STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 17,	)	CASE 7762-U-89-1642
Complainant,	)	DECISION 3566 - PECB
vs.	)	
CITY OF SEATTLE,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Richard Eadie, Attorney at Law, appeared on behalf of the complainant.

Mark Sidran, City Attorney, by Marilyn Sherron, Assistant City Attorney, appeared on behalf of the respondent.

On January 11, 1989, International Federation of Professional and Technical Engineers, Local 17, filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Seattle had violated RCW 41.56.140(1), (2) and (3), by communicating directly with bargaining unit members with respect to the employer's position on disputed "no smoking" policies affecting employees working in City of Seattle facilities. Hearings scheduled for December of 1989 and January 12, 1990 were postponed. A hearing was convened at Seattle, Washington, on January 29, 1990, before Examiner J. Martin Smith. The parties did not call any witnesses at that time, but certain documents were stipulated in evidence and arrangements were made for the parties to submit briefs and additional evidence to complete the record in this case.

BACKGROUND

The City of Seattle is the largest municipality in the State of Washington, and is the county seat of King County. Norman Rice was formerly a member of the Seattle City Council, and is now the elected mayor. At the time of the events relevant to this proceeding, Everett S. Rosmith was the employer's personnel director. William Hauskins was, and remains, the employer's director of labor relations. Douglas N. Jewett was the employer's elected city attorney until January 2, 1990, when Mark Sidran took office in that position.

The City of Seattle has some 8000 full-time employees engaged in providing the police, fire, utility, social and general governmental services associated with a large metropolitan area. A total of 24 bargaining units exist among employees of the City of Seattle. Local 17 is the exclusive bargaining representative of seven separate bargaining units involving approximately 2200 City of Seattle employees.[1] The employer and Local 17 are parties to two separate collective bargaining agreements.

These parties have debated a "smoking" issue since at least 1983, when the union apparently tried to introduce the issue of employee smoking in contract negotiations. According to the union, it offered language at that time which would have imposed restrictions on employee smoking anywhere in the workplace. No new contract language was agreed upon in 1983, however, and the employer's policy continued to allow employees to smoke in designated work areas.

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[1] Those seven bargaining units include a "clerical" unit, a unit of human rights field representatives, a "professional" unit; a "recreation specialist" unit, a "senior business" unit, a "technical" unit, and a "senior representative" unit.

In 1985, discussions were begun at the administrative and city council levels with regard to the impacts of smoking by employees in the workplace.

As a result of the discussions commenced in 1985, the Seattle City Council took action early in 1987 to approve an administration recommendation on a new "smoking" policy.[2] From that date forward, with few exceptions, City of Seattle employees were no longer permitted to smoke at their work areas. The Seattle City Council allocated $50,000 for the implementation of a policy governing smoking in the working environment. The policy was later amended, after "discussions" with several of the unions representing City of Seattle employees, including Local 17.

Local 17 remained dissatisfied with the employer's "smoking" policy, and it filed an unfair labor practice complaint with the Commission.[3] Three other labor organizations representing City of Seattle employees filed similar unfair labor practice charges.[4] After a consolidated hearing, Examiner Kenneth J. Latsch ruled that the employer had violated RCW 41.56.140(4) in all four cases, by failing to bargain in good faith with respect to the smoking policy issue.[5] The Examiner's conclusions of law included:

> 2. The demands made by the complainant unions herein for collective bargaining concerning the imposition and effects of a smoking policy on employees in the various bargaining units they represent

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[2] Ordinance 113148 (January 26, 1987).

[3] Case 6674-U-86-1337.

[4] The Seattle Police Guild filed Case 6743-U-87-1351, the Seattle Police Management Association filed Case 6772-U-87-1359, and the Seattle Police Dispatchers Guild filed Case 6796-U-87-1368.

[5] City of Seattle, Decision 3051, 3052, 3053, 3054 (PECB, December 2, 1988).

> are mandatory subjects of collective bargaining under RCW 41.56.030(4).
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> 3. By events described in the foregoing findings of facts, the City of Seattle has failed and refused to bargain in good faith concerning the imposition and effects of a city-wide smoking policy upon employees within the bargaining units represented by the complainant unions and has, as to each such union, committed unfair labor practices in violation of RCW 41.56.140(4).

Examiner Latsch rejected a "waiver" argument advanced by the employer, specifically concluding that the unions involved had not waived their right to bargain either the imposition or effects of a "smoking" policy.[6] As a remedy, the Examiner directed that the employer cease and desist from implementing the adopted "smoking" policy with respect to employees in bargaining units represented by the complainant unions.

On December 22, 1988, the City of Seattle petitioned for Commission review of the Examiner's decision on the "smoking" cases, pursuant to WAC 391-45-350. On the same day, the employer transmitted a letter to all City of Seattle employees, as follows:

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[6] The employer has not changed its belief that the unions were accorded a full, meaningful opportunity to meet, confer, negotiate and bargain about the restrictive smoking policy. Its position in Case 6674-U-86-1337, and its position here, is that it spent:

> [A]pproximately two years working with employees, all interested union representatives, departmental management and a consultant to develop a Citywide smoking policy. A great deal of energy and effort was invested in this endeavor and it is still our belief that the current smoking policy is one which is appreciated and supported by a substantial majority of employees. ...

TO: All City Employees

FROM: Everett S. Rosmith, Personnel Director /s/
Douglas N. Jewett, City Attorney /s/

SUBJECT: Citywide Smoking Policy

As you may know, the City recently received its long awaited ruling from the Washington State Public Employment Relations Commission (PERC) on the unfair labor practice charges filed by four of the City's twenty-five unions with regard to the implementation of the Citywide smoking policy. The Commission's decision states that the City must cease and desist from 'implementing the city-wide no smoking policy' as it pertains to members of Local 17, I.F.P.T.E., the Seattle Police Officers' Guild (SPOG), the Seattle Police Dispatchers Guild (SPDG) and the Seattle Police Management Association (SPMA). Furthermore, if the City wishes to implement such a smoking policy for members of the aforementioned unions, it must give notice of its intent to do so and, upon request, negotiate the imposition and effects of such a policy with these unions.

While the PERC decision concludes that the issue of a smoking policy is a mandatory subject of bargaining and that the City did not collectively bargain - as that term is defined under state law - with the aforementioned unions, it should be remembered that the City did spend approximately two years working with employees, all interested union representatives, departmental management and a consultant to develop a Citywide smoking policy. A great deal of energy and effort was invested in this endeavor and it is still our belief that the current smoking policy is one which is appreciated and supported by a substantial majority of employees. Therefore, the Citywide Smoking Policy will remain in effect, as is, for all employees other than those currently represented by Local 17, the SPOG, the SPDG and the SPMA. Smoking policies which were implemented by individual departments prior to the Citywide smoking policy taking effect on January 26, 1987 and which were previously uncontested may still be

applicable to members of Local 17, the SPOG, the SPDG and the SPMA.

The Law Department will be appealing the PERC Hearing Examiner's decision to the three-member PERC Commission, and possibly on to Superior Court if necessary. In the meantime, the City will notify the four unions who filed the unfair labor practice charges that the City wants to implement the Smoking Policy as it relates to their members and that we are prepared to enter into negotiations immediately in order to attempt to mutually resolve this matter. Said notification will be made with the clear understanding that the City is reserving its right to appeal the PERC decision and its right to modify any agreement reached as a result of PERC's recent order regarding the Citywide smoking policy, should the City be successful in its appeal.

Members of Local 17, the SPOG, the SPDG and the SPMA who choose to now smoke in the workplace - assuming a pre-existing department policy does not restrict them from doing so - should realize that they may be legally liable for the effects of sidestream smoke. It is possible that litigation will be instituted by nonsmoking employees against those who smoke in the workplace or against their employer. The City and other employers are currently faced with such litigation. Since smoking is not considered an activity that must be performed in the "course and scope of their employment," the Law Department will not defend employees who smoke [or][sic] who are named in such a suit. Similarly, if the City is sued by nonsmoking employees because of sidestream smoke, the City will attempt to include the employees responsible for the smoke in the workplace and their respective unions in the litigation.

While awaiting resolution of this matter, we ask that all employees be mindful and courteous of one another. We encourage smokers within the four complainant unions who wish to smoke while at work to do so outdoors or in the designated City smoking rooms. ...

These unfair labor practice charges followed.

POSITIONS OF THE PARTIES

Local 17 alleges that the employer's December 22, 1988 letter to all city employees improperly disparaged the union for its pursuit of remedies available to it under the collective bargaining statute. The union argues that the letter coerces, threatens and intimidates employees as well, specifically by its suggestion that employees and their unions might be joined in lawsuits against the employer because of "sidestream" smoke.

The City of Seattle denies that its December 22, 1988 letter was threatening or coercive, or that it interfered with employee rights. The employer asserts that the letter transmitted factual information, so that there no domination of or interference with the bargaining process. The employer justifies its dissemination of the information to all of its employees on the basis that the "smoking" policy had affected all City of Seattle employees, and because the "smoking" policy was to remain in effect for employees other than those in bargaining units directly affected by the unfair labor practice proceedings.

DISCUSSION

The Statutory Setting

The parties in this case are not newcomers to collective bargaining or to the obligations imposed by Chapter 41.56 RCW. That statute imposes upon both management and labor the obligation to "meet at reasonable times, to confer and negotiate in good faith". It is an unfair labor practice for a public employer:

> (1) To interfere with, restrain or coerce public employees in the exercise of their rights guaranteed by this chapter;
> ...

(4) To refuse to engage in collective bargaining.

RCW 41.56.080 designates the union selected by the majority of the employees in an appropriate bargaining unit as the "exclusive bargaining representative" of all of the employees in the unit.

Case law prohibits "circumvention" of the exclusive bargaining representative by means of an employer's direct communication with bargaining unit employees on bargaining matters. See, Proctor and Gamble, 160 NLRB 334 (1966); Endo Industries, 239 NLRB 1074 (1978). On the other hand, the Commission has held that employers may, within reasonable limits, communicate information to bargaining unit members, as well as to the general public. Seattle-King County Health District, Decision 1458 (PECB 1982); Entiat School District, Decision 1361 (PECB 1982).[7] The criteria for evaluating such communications were set forth in Lake Washington School District, Decision 2483 (PECB, 1986). An employer's communication to employees could be an unfair labor practice under any one, combination or all of the following criteria:

1. Is the communication, in tone, coercive as a whole?

2. Are the employer's comments substantially factual or materially misleading?

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[7] A companion Washington statute, the Educational Employment Relations Act, Chapter 41.59 RCW, is more specific, repeating the "free speech" proviso contained in the National Labor Relations Act:

> The expressing of any views, arguments or opinion, or the dissemination thereof to the public, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this chapter, if such expression contains no threat of reprisal or force or promise of benefit.

RCW 41.59.140(3).

3. Has the employer offered new "benefits" to employees outside of the bargaining process?

4. Are there direct dealings or attempts to bargain with the employees?

5. Does the communication disparage, discredit, ridicule, or undermine the union? Are the statements argumentative?

6. Did the union object to such communications during prior negotiations?

7. Does the communication appear to have placed the employer in a position from which it cannot retreat?

The simple fact of direct communication is not per se unlawful. Thus, in a recent case involving Local 17 and another employer, a meeting held by the employer was found not to be a per se violation of RCW 41.56.140, where the employer limited the subject matter to a newspaper article concerning litigation between employer and the union. Municipality of Metropolitan Seattle (METRO), Decision 3218-A (PECB 1990).

Application of the Circumvention Criteria

Material Misrepresentation -

The December 22 letter fairly outlined the holding of the Examiner in City of Seattle, Decision 3051 (PECB 1988), as well as the remedy ordered by the Examiner in that decision. The city also sets out the effect of the appeal filed with PERC's Commissioners under WAC 391-45-350.

Offer of Reward or Benefit -

Clearly, the employer's December 22 letter did not offer any new "benefits" to employees.

Attempts to Bargain Directly -

No "offer" or alternative proposal on the smoking issue put before the employees in evasion of the bargaining table. The employer

indicated its offer to negotiate again concerning the "implemented" smoking policy, and it offered to "enter into negotiations immediately in order to attempt to mutually resolve this matter." That offer to negotiate was made towards the unions, not to individual employees. The letter does not announce a change in the employer's proposal - it still preferred the smoking policy already implemented for other employee groups - but that is not an unfair labor practice by itself. There appears to be no attempt by the city to stake out a position on the smoking issue that was irreversible.

Disparaging the Union -

The four labor organizations who filed the unfair labor practice complaints decided by the Examiner represent city employees, including both smokers and non-smokers. The employer's December 22, 1988 letter did not ridicule any of those organizations, or seek to pit employees against the union. Rather, the employer indicated a readiness to deal with those organizations in the bargaining process. The Examiner does not find it reasonable to conclude that the communication involved here was of the type which would intimidate the union into being meek, mild or ineffective.

Previous Objection to Such Communications -

Since 1983, there has been no objection from Local 17 with respect to issuance of "all employee letters" by the employer during the course of contract negotiations or at other times.[8] It appears to be accepted practice for both sides to "fire for effect" when the urge to communicate arises.

Coercive as a Whole -

Taking the first-stated criteria last, and considering the union's "interference" allegation, the Examiner is nevertheless unable to conclude that the December 22, 1988 letter, taken as a whole, was

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[8] Nor, for that matter, is there any indication of such objections from the SPOG, the SPMA or the SPDG.

coercive. The union's reliance on Gissel Packing v. NLRB, 395 U.S. 575 (1969) is not on point here, because the employer activity at issue here stopped far short of the "egregious" and outrageous anti-union conduct of the employer in the Gissel case.[9]

It was obvious that the employer was concerned about the potential for lawsuits by non-smokers, as well as about labor relations problems with its represented employees. Those employees who were freed by the Examiner's decision to continue smoking under the prior smoking policy were warned about the possibility of lawsuits concerning the effects of "sidestream" smoke upon non-smoking employees. It seems far-fetched to think that the employer would "invite" lawsuits by either non-union employees or non-smoking union members against smokers among the members of the four bargaining units that had filed unfair labor practice complaints. Plaintiffs in lawsuits involving sidestream would likely seek to show damages to their health which began far before the disputed "smoking" policy went into effect, and so would involve liability for the employer without regard to its recently-adopted "smoking" policy and its bargaining relationships with various unions. A record of favorable contract terms with the unions would only marginally protect the employer from liability, and then only prospectively.[10] The Examiner is thus unable to conclude that the employer's statements would reasonably be taken by employees as threats of substantial personal liability to dissuade them from pursuit of their rights through their union.

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[9] The gravamen of Gissel was its holding that the NLRB's issuance of a "bargaining order" because it was believed that it might not be possible to obtain an "uncoerced" majority of employees in an election or card-check. In the context of bargaining, "laboratory conditions" are neither the norm or the rule. See, 71 LRRM 2481 at 2494.

[10] See, generally, McCarthy v Department of Social and Health Services, 46 Wn.App. 125 (1986), which permitted an employee lawsuit against her government employer for failing to maintain a healthy working environment.

The employer made it clear that employee smoking was not required by the city, and hence was not considered to be "in the course and scope of their employment", so that the employer would not defend any employees who were sued individually for smoking at the workplace. The union contends that this theory rests on "questionable legal grounds", but admits that "in the course of their employment" is the test for determining the circumstances under which employees are "routinely" defended for their actions on the job. More important, the withdrawal of legal support for employees who are sued in a civil action, or the existence of "hold harmless" or other employee-liability language, is an entirely separate topic for bargaining as part of a collective bargaining agreement. Since the exposure of an employee to liability may well vitally affect the working conditions of an employee, the topic of employee liability is probably a mandatory subject for bargaining under RCW 41.56.030, et seq. No request was made by any of the four unions, however, to bargain the issue of employee liability within six months of the December 22, 1988 letter, and hence are deemed waived. Spokane County, Decision 2167 (PECB 1987).

FINDINGS OF FACT

1. The City of Seattle is a public employer within the meaning of RCW 41.56.020 and 41.56.030(1).

2. International Federation of Professional and Technical Engineers, Local 17, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of certain employees of the City of Seattle.

3. On December 2, 1988, an Examiner issued a decision in an unfair labor practice case filed with the Public Employment Relations Commission by Local 17 against the City of Seattle, holding that the employer violated RCW 41.56.140 by refusing

to bargain concerning the imposition and effects of a policy restricting "smoking" by bargaining unit employees in City of Seattle facilities.

4. On December 22, 1988, the City of Seattle filed a petition with the Commission, pursuant to Chapter 391-45 WAC, seeking Commission review of the Examiner's decision on the "smoking" policy.

5. On December 22 1988, the City of Seattle issued a memorandum to all of its employees concerning the "smoking" policy. The contents of that letter were factual and nonargumentative in nature. The contents of that letter did not promise reward or benefit to employees, and did not solicit direct dealing with employees. The contents of that letter did not disparage, discredit, ridicule, or undermine the union.

6. Local 17 had not previously objected to direct communications by the City of Seattle with its employees, and there was a past practice of the employer issuing such communications.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in these matters pursuant to Chapter 41.56 and Chapter 391-45 WAC.

2. By its letter of December 22, 1988, the City of Seattle has not interfered with, restrained or coerced its employees, and has not circumvented the exclusive bargaining representative of its employees, and so has not committed an unfair labor practice under RCW 41.56.140.

ORDER

The complaint charging unfair labor practices filed in the above-entitled matter shall be, and hereby is, DISMISSED.

DATED at Spokane, Washington, this 5th day of September, 1990.

ISSUED at Olympia, Washington, this 6th day of September, 1990.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

J. MARTIN SMITH, Examiner

This order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.