STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1810, Complainant, vs. KING COUNTY FIRE DISTRICT 11, Respondent.	)	CASE 9946-U-92-2273 DECISION 4538-A - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Schwerin, Burns, Campbell & French, by Spencer N. Thal, Attorney at Law, appeared on behalf of the complainant.

Perkins Coie, by Jeffery A. Hollingsworth, Attorney at Law, appeared on behalf of the respondent.

On August 4, 1992, International Association of Fire Fighters, Local 1810 (union), filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that King County Fire District 11 (employer) had refused to bargain concerning a policy manual adopted by the employer's board of fire commissioners. A preliminary ruling letter issued by the Commission's Executive Director on April 26, 1993, included:[1]

> The complaint details a series of meetings and correspondence between the parties on the subject of the policy manual, but suffers from a lack of specificity as to the provisions which are claimed to infringe on mandatory subjects of bargaining. The complaint acknowledges that a provision relating to a drug policy was removed from the manual based on objections raised by the union. ...

[1] In making a preliminary ruling pursuant to WAC 391-45-110, the Executive Director must assume that all of the facts alleged in the complaint are true and provable.

> The union's complaint would not state a cause of action for changes that are inapplicable to employees that it represents, or for rules that merely codify past practice. In the case of the drug testing policy, it appears that the employer responded to objections made by the union, so that the "give notice and bargain" requirements of the collective bargaining process were fulfilled. Reflecting on the very general allegations of the complaint in light of the responses to the deferral inquiry, it is necessary for the union to clarify what it believes to have been objectionable about the personnel rules adopted by the employer.

The union responded with an amended complaint on May 13, 1993, providing details on some of the disputed policies.

On November 5, 1993, the Executive Director dismissed several union allegations as vague, as not related to "wages, hours or working conditions", or as not involving any change (i.e., the drug testing proposal). Further proceedings were ordered on 12 allegations.[2]

A hearing was held on April 20, 1994, before Examiner Walter M. Stuteville. At the outset of the hearing, five of the allegations forwarded to the Examiner in the preliminary ruling were withdrawn by the parties. Evidence was presented on the remaining seven charges. The parties filed briefs by June 17, 1994.

BACKGROUND

In 1966, the employer's board of commissioners adopted Resolution 128, which incorporated job descriptions, duties of personnel, general rules of administration, and civil service rules. Since that time, modifications to that resolution have been issued in memos, in standard operating procedures (SOPs), and in district

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[2] King County Fire District 11, Decision 4538 (PECB, 1993).

directives which were maintained at the headquarters fire station and were made available to employees, upon request. In 1990, the employer dropped its civil service procedure, and deleted the relevant sections from Resolution 128.

The employer decided to consolidate the remainder of Resolution 128 and its various amendments and modifications into a comprehensive document. Assistant Fire Chief Juel Hammond was given responsibility for coordinating that project. An outside consultant was hired to develop a new, consolidated, policy manual.

The consultant prepared a preliminary draft of a new manual, and a copy of the draft was delivered to the union. A meeting of the board of fire commissioners was scheduled for April 7, 1992, to obtain input on the consultant's proposed manual. The union notified the fire chief that it objected to several provisions of the new manual. The union was specifically concerned about changes or additions to existing working conditions.

On March 23, 1992, President Ken DeMan of the union sent the following letter to Hammond:

> We are writing you in regard to the notice that was posted on March 4, 1992 concerning the review and adoption of the Policies and Procedures Manual at the Board of Fire Commissioners to be held on April 7, 1992.
>
> Pursuant to the agreement between International Association of Fire Fighters Local 1810 and King County Fire District Eleven dated January 1, 1992 through December 31, 1994, Article 19.1.89, we demand that you bargain with us concerning the changes in working conditions before the Policies and Procedures Manual may be adopted. Article 18.1.89 states that management is limited by applicable law as to the authority to direct operations. The Revised Code of Washington, Articles 41.56.030, 41.56.100, and 41.56-.140 state that a public employer must engage in collective bargaining concerning changes in wages, hours, or working conditions.

> Due to the size of the document in question, we must insist that a copy of the Policies and Procedures Manual be forwarded to International Association of Firefighters local 1810 for review and that collective bargaining take place with regard to changes in working conditions before the document is adopted.

At the meeting held on April 7, 1992, Hammond and the fire chief informed the board of commissioners of the union's opposition to the new manual. The commissioners postponed its adoption.

On May 12, 1992, representatives of the parties met to discuss the manual. Hammond asked that the union specifically identify its concerns about the new manual. From that discussion, and from subsequent discussions with the fire chief and the commissioners, Hammond concluded that the new manual did not constitute a change from the employer's existing policies and procedures. He informed DeMan of that conclusion on May 27, 1992.

On June 1, 1992, Treasurer Larry Briggs provided the employer with another written statement of the union's position, as follows:

> As we have previously stated, we feel that there are numerous items which affect the wages, hours and working conditions of the Bargaining Unit contained in the draft of this manual. We have met with Assistant Chief Hammond and made him aware of the items. I question and insist that these items must be negotiated before adoption of the manual may take place. If the manual is adopted without resolving these concerns we feel that this would be an unfair labor practice and would be forced to take appropriate action.
>
> The District and the Union both have important issues to address with the new city of Burien and the possibility of a merger with neighboring district. We feel that our actions and resources would more wisely be focused towards these issues rather than toward items which may be resolved at the bargaining table. We will be looking forward to meeting with you to resolve these concerns.

As a result of that letter, the board of commissioners again postponed adoption of the new manual until their next meeting.

At a meeting of the board of commissioners held on June 16, 1992, Hammond recommended the adoption of the new manual. Based upon input at that meeting from DeMan, the commissioners removed sections concerning drug policies from the draft. With that modification, the board officially adopted the new manual. The union's initial complaint in this case followed, on August 1, 1992.

The provisions remaining in dispute at the hearing (and their impacts on wages, hours and working conditions as claimed by the union) are limited to:

Section 2000 -
This provision designates the "staff of the district" as within the scope of coverage of the new manual. The union's charge was that the language gives the appearance of covering bargaining unit members, thereby superseding the collective bargaining agreement.

Section 2416 / 2416P -
These provisions concern annual physical examinations to be conducted by employer-chosen physicians. The union's charge was that present practice allowed employees to use the physician of their own choice for their physical examinations.

Section 2440 -
This provision concerns a designation of employees as "representative of the department" by the wearing of department insignia outside the station or during off-duty time. The union asserts an interest in ascertaining potential disciplinary liability of unit members.

Section 2440P -
This provision permits employer searches of employee lockers and contains a definition of "horseplay" on duty time. The union's charge was that this expands the area of potential discipline of bargaining unit members.

Section 2447 -
This provision concerns the use by employees of "free time" during working hours. The union's charge was that this has an impact on hours of work, and is a change from past practice.

Section 2604 / 2604P -
These provisions concern the employer's ability to discipline or discharge employees for off-the-job conduct or offenses. The union's charge was that this expanded the number of offenses for which an employee can be disciplined.

Section 2605P -
This provision concerns an Employee Assistance Program (EAP) and related disciplinary provisions. The union's charge was that this constituted a change of disciplinary / enforcement practices.

POSITIONS OF THE PARTIES

The union contends that the employer's new manual changes working conditions for the members of its bargaining unit. It argues that it has never waived its right to demand bargaining on such changes, and that the management rights clause in its current collective bargaining agreement is only a general statement that does not constitute a waiver of its right to bargain regarding mandatory subjects of bargaining. Finally, it asserts that some written departmental policies previously in effect had been changed by actual practice, and that the new manual is the employer's attempt

to return to previously-abandoned policies without bargaining with the exclusive bargaining representative.

The employer defends its decision to adopt a new policy manual by asserting that its intent was to consolidate existing policies and procedures into a single, comprehensive document. It argues that it made no material changes in mandatory subjects of bargaining, and denies that it has attempted to resurrect previously-abandoned policies. The employer also argued that the union waived its objections to the new manual by agreeing to the management rights clause in the parties' collective bargaining agreement.

DISCUSSION

Waiver by Contract Defense

The employer's answer asserted that the union's charges should be barred by the language of the management rights clause in the parties' collective bargaining agreement. That provision states:

> Article 18 MANAGEMENT RIGHTS
>
> 18.1.89 It is recognized that, except as limited by terms of this agreement or applicable law, the employer shall retain the right and authority to operate and direct the affairs of the employer in all of their various aspects, including but not limited to, the right to direct the working forces; to plan, direct and control all the operations and services of the Employer; to determine the methods, means, organization and number of personnel by which such operations and services are to be conducted; to assign and transfer employees; to determine whether goods or services should be made or purchased, to make and enforce reasonable rules and regulations; and to change or eliminate existing methods, equipment, facilities, or levels of service.

The employer did not, however, reiterate this line of argument in its post-hearing brief.

As correctly noted by the union, the Commission has not given effect to **general** contractual statements as waivers of statutory bargaining rights:

> [T]o be effective, a waiver of statutory bargaining rights must be specific to the subject matter and knowingly made.
>
> City of Kennewick, Decision 482-B (PECB, 1980).

See, also, City of Seattle, Decision 1667-A (PECB, 1984); Kitsap County Fire District 7, Decision 2872 (PECB, 1988); City of Yakima, Decision 3564 (PECB, 1990); and Pierce County Fire District 3, Decision 4146 (PECB, 1992).

In the instant case, the language concerning personnel rules in Article 18.1.89 is no more than a conditioned, general statement: "... to make and enforce **reasonable rules and regulations** ..." [emphasis by **bold** supplied]. It falls within a pattern that has repeatedly been analyzed by this agency as too general to be considered a waiver of bargaining rights.

Mandatory Subjects of Bargaining

The mandatory / permissive / illegal categorization of potential bargaining subjects has been utilized in past cases. Federal Way School District, Decision 232-A (EDUC, 1977), citing NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958); King County Fire District 39, Decision 2160-A (PECB, 1985). The standards for determining scope of bargaining questions were described in Pierce County Fire District 3, Decision 4146 (PECB, 1992), as follows:

> Whether a particular personnel action is a mandatory subject of bargaining is a question of

> law and fact for the Commission to decide. WAC 391-45-550; Kitsap County Fire District 7, Decision 2872-A (PECB, 1989). In Spokane County Fire District 9, Decision 3661-A (PECB, 1992), the Commission set forth two principal considerations in determining whether a duty to bargain exists: (1) the Commission will consider the impact of management's contemplated actions upon the wages, hours or working conditions of the affected employees; and (2) The Commission will consider the extent to which the action is deemed to be an essential management prerogative.
>
> Where an employer's personnel actions concern a managerial decision of the sort that is the core of entrepreneurial control or decision involving fundamental changes in the scope, nature or direction of the enterprise, rather than labor cost, then there is no duty to bargain. Spokane County Fire District 9, Decision 2860 (PECB, 1988).
>
> Even if a personnel decision does not require discussion with or concurrence by the union, there is a mandatory duty to bargain any effects of such a decision which have a substantive impact on the wages, hours or conditions of employment of bargaining unit employees. Spokane County Fire District 9, supra.

Permissive subjects (i.e., those outside of "wages, hours and working conditions") may be negotiated, but may not be insisted upon to impasse. Illegal subjects (i.e., those which it would be unlawful to include in a contract even if the parties agreed on them) may not be proposed or bargained at any time.

The duty to bargain exists where a **change** is to be made in or affecting a mandatory subject of bargaining. Again from Pierce County Fire District 3, supra:

> The status quo ante must be maintained regarding all wages, hours and conditions of employment, except where such changes are made in conformity with a collective bargaining agreement.

Mere restatements or reiterations of the status quo do not require notice or bargaining.

The union has the burden of proof in this case. As to each of the policy manual provisions disputed by the union, determinations must be made as to whether: (1) the section involves a mandatory subject of bargaining; and (2) there have been changes in past practice which would give rise to a duty to bargain.

Application of Precedent

Section 2000 - Scope of the Personnel Policies -
The union charges that the scope of the employer's new manual is unclear. The union is concerned that it is "impossible" to determine if a policy is intended to apply to the members of its bargaining unit.

The terms "staff" and "employees" are used interchangeably in the new manual. The term "staff" is not defined, and it is not particularly clear as to how broadly the term is to be applied vis-a-vis paid staff or volunteers. In examining the new manual, however, the following statement is found early in the document:

> Applicability of Personnel Rules
> Except where expressly provided to the contrary, personnel policies apply to the staff of the district. However, where there is a conflict between the terms of a collective bargaining agreement and the district's policy, the law provides that the terms of the collective bargaining agreement shall prevail in regard to the staff covered by that agreement.
>
> When a matter is not specifically provided for in the appropriate negotiated contract, the district's policies shall govern.

The quoted paragraph makes it very clear that the policies do not, and cannot, supersede the collective bargaining agreement. Thus,

the union's concerns are overstated with respect to any sections which address subjects also covered in the collective bargaining agreement. Although the manual might have been written more clearly in this respect,[3] the union has not established that the employer committed an unfair labor practice by developing and approving section 2000 of the policy manual.

Section 2416 / 2416P - Physical Examination -
The union alleges that these sections of the manual constitute a change in the past practice concerning annual medical examinations required of bargaining unit members. The provisions read:

> PERSONNEL
> Physical Examinations
>
> ...
> The routine examination will be provided by a physician selected by the district. A copy of the results of the examination shall be furnished to ... the district ....

Although acknowledging that the employer's earlier written policy had called for employees to have their annual physical examinations by a physician designated by the employer, the union argued that actual practice among employees had effectively changed that policy. It presented testimony from several employees that, at least in the recent past, they had had their annual physical examinations from physicians of their own choosing.

While there was testimony that the employer had raised no objections to the employees' deviation from the written procedure, the union did not present evidence that the employer had any knowledge that the employees were using other physicians for their annual

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[3] To the extent that the manual is confusing as to its references to non-bargaining unit personnel or volunteers or supervisors, that problem is beyond the scope of this decision. Only those aspects of the personnel policies which affect the bargaining unit are of concern here.

examinations. There is no basis in the record from which to infer that the employer knew or should have known that its employees were not following its written policy.[4]

This case is distinguished on its facts from Pierce County Fire District 3, supra, where the employer acknowledged that its written policy was not being enforced and it was concluded that the policy had been abandoned.[5] If the union had wanted to change the policy at issue in the instant case, it could have brought the issue to the employer's attention and negotiated for such a change. It did not do so, and the new policy manual is not a change of policy concerning employee physicals. Having sat on the information concerning the lack of appropriate enforcement of the stated rule, the union cannot now cry foul when the original policy is enforced. The complaint must be dismissed as to this issue.

Sections 2240 / 2440P - Scope of the Code of Conduct -
The union charges that several provisions in Section 2440P of the new manual, which proscribe specific employee behaviors, constitute substantial changes in working conditions. The provisions include:

> Code of Conduct
> (2440)
> A code of conduct shall be developed and adopted which, in principle, places the priority of

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[4] Testimony from fire fighter Briggs was that he told a district secretary he was seeing his own physician for his physical, and knew the employer was not automatically sent any information concerning that examination. A stronger case could be made for the union if this had been stated to one of the chief officers, and/or if information concerning the examination had been sent to the employer.

[5] The policy in question in Pierce County Fire District 3 required fire fighters to live within 10 minutes of their assigned station. That union presented evidence that employees had specifically notified the employer they had moved outside of the 10 minute zone, and the employer had drafted a job announcement requiring fire fighters to live "within a 10 to 15 minute response time to the station".

> concern for providing the highest level of services to the residents of the district and to the staff of the department. Violation of the code of conduct may result in disciplinary action or termination.
>
> The code of conduct shall also be applicable while attending outside functions as a representative of the department.
>
> (2440P)
> In order to provide the highest level of service possible to the fire district, the staff shall adhere to the following code:
>
> ...
> 8. All boisterous conduct, "horseplay", or similar activities which may result in injury or illness to anyone is forbidden while on duty or in station.
>
> ...
> 10. A staff member has the right to use equipment, storage areas, lockers in the conduct of official duties. Such properties belong to the district and are subject to search or inspection at all times.
>
> ...
> 14. When attending outside functions, representatives of the department shall adhere to the code of conduct.

The union argues that these sections impact the working conditions of bargaining unit employees, because they expand their liability for disciplinary action by the employer. Its focus is on specific activities engaged in by employees in the past, such as horseplay that actually resulted in an injury, employee use of their own locks on fire station lockers, and drinking alcohol on non-working time while wearing clothing with a fire district logo. None of those incidents had been the basis for disciplinary responses by the management in the past, but the union indicates concern about potential discipline under subsections 8 and 14 of the new policy.

The employer's former policy on "horseplay" read as follows:

> [F]irefighters should exercise due caution to avoid unnecessary damage to or loss of property or injury to himself or other personnel in the performance of his duties.

The employer cited that it had cautioned employees on numerous occasions in the past, when complaints were received from the public about employees that had been identified by their jacket or T-shirt displaying the department's insignia. The employer acknowl-edged that no fire fighter had ever been disciplined for merely drinking in public while wearing a department logo on their clothing, for locking an on-site locker with their own lock, or for engaging in "horseplay", but it asserted that its lack of response in specific incidents was not intended to constitute a waiver of its policy.

The employer may not have intended sections 8 and 14 to be a change of policy, but the union's questions as to the scope of the new manual were very appropriate. In section 8, the language was substantially changed from "... **exercise due caution** to avoid unnecessary damage" to ..."horseplay", or similar activities ... **is forbidden** while on duty or in station" [emphasis by **bold** supplied]. Section 10 is entirely new language. Section 14 was substantially changed from language that originally referred to "ordinary and reasonable rules of behavior" to more specific language addressing the code of conduct. In all three of these sections, the employer is moving toward more specific language which gives the impression of "tightening up" behavior standards. The union reasonably perceived these changes as increasing the probability of disciplinary responses from the employer in the event of a violation.

If there was no intent on the part of the employer to change its behavior standards, then the employer had an obligation to explain why the language was changed. It offered no such explanation. By not bargaining these disciplinary standards with the union prior to their adoption, the employer committed an unfair labor practice.

Section 2447 - Activities On Free Time -

The disputed provision in the new policy manual reads as follows:

> Use of Department Name
> The King County Fire Protection District No. 11 has adopted the following policy regarding the distribution to residents receiving services from the fire district of post cards or other literature distributed on behalf of private persons or organizations. This policy is prompted in part by the district's concern that distribution of such literature may be inappropriate depending on the nature of the call and the district's response. The district is also concerned with possible misuse or misinterpretation of the district's name. Accordingly, all personnel will be expected to comply with this policy unless authorized by the district in writing.
>
> ...
> 3. Personnel may not prepare, work on or distribute literature for a private party on the district's work time.
>
> ...
> These policies are necessary to prevent the unauthorized use of the district's name and reputation for private purposes and for the district's best interests. All personnel will be expected to comply with the policy.

Although the union acknowledges that this section of the policy was originally adopted in 1988, it argues that the employer had abandoned the policy. It illustrates this by way of examples where the employer encouraged participation in general union business or "political" matters.

The union did not carry its burden of proof on this issue. Neither of the examples brought forth in testimony involved preparing or distributing literature for a private party. The examples presented included the literature concerning the City of Burien and the union itself. The abandonment of policy found in Pierce County, supra, was very specific by comparison. The facts concerning this section are not parallel with Pierce County and do

not prove any abandonment whatsoever of the employer's policy. The charge of unfair labor practices on this section of the personnel policies must be dismissed.

Section 2604 / 2604P - Off-the-Job Behavior -
The employer's new policies include the following statement on conduct away from the employer's workplace:

> Disciplinary Action and Discharge
>
> Staff who fail to follow the reasonable directions of the chief or who conduct themselves **on or off the job** in ways that significantly affect their effectiveness on the job shall be subject to discipline. ...
>
> [Emphasis by **bold** supplied.]

The union acknowledged that this was a modification of existing policy,[6] but it argued that the new policy:

> [M]ay have been modified or eliminate [sic] by subsequent rules or regulations. More importantly though, the employer cannot avoid its duty to bargain about changes in working conditions by relying on an unenforced, or inconsistently enforced policy form [sic] 1966.

The last quoted statement, which is a restatement of a holding in Pierce County Fire District 3, supra, is true enough, given a similar factual pattern. It does **not** apply in this case, however, because the facts are not the same.

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[6] The existing policy was set forth in the following terms:

> CONSTITUTION AND ADMINISTRATIVE PROCEDURES
> Resolution No. 128
>
> ...
> 27. Members shall be held responsible for their conduct **while absent from the fire department as well as when on duty.**
>
> [Emphasis by **bold** supplied.]

The union did not prove that the policy promulgated in 1966 had been abandoned, modified or inconsistently enforced. In fact, from the perspective and memory of the union's local president, the employer's policy had never been enforced, either consistently or inconsistently. Such testimony does not prove either abandonment or modification as alleged by the union, but only that there may never have been incidents wherein the policy would have applied. The unfair labor practice charge on this section of the personnel policies must also be dismissed.

Section 2605P Employee Assistance Programs -

There is indication that some sort of an EAP program was in place prior to the adoption of the following provision in the new manual:

> Staff Assistance Program
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> In order to achieve the objective of enhancing the personal and on-the-job life of a staff member through the staff assistance program, the department will strive to:
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> 1. Provide confidential, professional, and appropriate assistance ....
> 2. Promote education and awareness that alcoholism and chemical dependency are diseases for which there is effective treatment and rehabilitation.
> 3. Promote adequate treatment coverage for chemical dependency by department-approved group insurance ....
> 4. Provide training in order to increase the supervisor's awareness in identifying changes in staff member's behavior and performance.
> 5. Provide training regarding the supervisor's role in relation to troubled staff members and the utilization of the staff assistance program.
>
> Procedures are as follows:
>
> ...
>
> 4. The staff member may choose to accept or reject the offer to meet with the district's staff assistance coordinator for confidential help and referral. **If the staff member rejects the offer and the job performance problems do not recur after the conference, the issue is resolved.** If the staff member chooses to par-

> ticipate in the staff assistance program, then the district's staff assistance coordinator will arrange a referral for the staff member to a district-related professional agency for assessment and treatment.
>
> 5. **If the staff member rejects the offer, and the supervisor and the staff member organization representative, if applicable, recognize that the job performance problem is continuing and the staff member's performance is not satisfactory, the next step will be to offer the staff member a firm choice between accepting the assistance offered by the program or be confronted with whatever action is appropriate within the framework of the existing collective bargaining agreements or board policies.**
>
> [Emphasis by **bold** supplied.]

The union alleges that the EAP program was voluntary under the previous policy, and an employee was never faced with the "firm choice" of attending the EAP or facing disciplinary consequences. It asserts that the new policy affects conditions of work and is a mandatory subject of bargaining, because it might lead to disciplinary response. It further argues that the new policy:

> [I]gnores the fact that the threat of unjustified discipline will induce many employees to attend the EAP rather than grieve the discipline. Under the prior EAP, an employee facing unjustified discipline would have no alternative: he or she would simply grieve the discipline after it was imposed. However, under the new EAP, the Employer has given the employee an alternative: to attend the EAP. Now a risk-adverse employee who faces unjustified discipline will take the easy way out and attend the EAP even though there is no justification for the threatened discipline.

By the union's own argument, however, **the risk of unjustified disciplinary action is not changed.** It is only in the instance of a justifiable disciplinary action that an alternative has been added (i.e., using the employee assistance program). Given that analysis, the discussion must turn to whether the Employee

Assistance Program, as defined by the employer as an alternative to employer-imposed discipline, is a mandatory subject of bargaining.

The method of analysis and the precedents concerning physical conditions of employees were detailed in City of Olympia, Decision 3194 (PECB, 1989), as follows:

> In determining whether a particular matter is a mandatory subject of bargaining, the Commission initially determines whether such matter directly impacts the wages, hours or working conditions of bargaining unit employees. Lower Snoqualmie Valley School District, Decision 1602 (EDUC, 1983).
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> Even when a subject does not directly affect wages, hours or working conditions, the Commission utilizes a balancing test, analyzing the employer's need for entrepreneurial judgment against the employees' interest in their terms and conditions of employment. Federal Way School District, Decision 232-A (EDUC, 1977). This balancing test can be traced to Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964), wherein the Supreme Court held that an employer is required to bargain on the issue of subcontracting. ...
>
> > ... those managerial decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area.
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> ...
> Work rules have generally been held to be mandatory subjects of bargaining. City of Bellevue, Decision 839 (PECB, 1980). Rules on safety and health are mandatory subjects of bargaining. Gulf Power Company, 156 NLRB 622 (1966), enforced 384 F.2d 822 (5th Cir., 1967); Boland Marine & Mfg. Co., 225 NLRB 824 (1976), enforced 562 F.2d 1259 (5th Cir., 1977); Hanes Corporation, 260 NLRB 557 (1982); Oil, Chemical & Atomic Workers v. NLRB, 711 F.2d. 348 (D.C. Cir., 1983); NLRB v. Holyoke Water Power Co., 778 F.2d 49 (1st Cir., 1985); City of Richland, Decision 244-A, 244-B (PECB, 1987). Likewise, rules of employee conduct, listing various

> offenses and the nature of discipline contemplated for each, are mandatory subjects of bargaining. Miller Brewing Company, 166 NLRB 831 (1967), enforced 408 F.2d 12 (9th Cir., 1969); Murphy Diesel Company, 184 NLRB 757 (1970), enforced 454 F.2d 303 (7th Cir., 1971); General Electric Company, 192 NLRB 68 (1971), enforced 466 F.2d 1177 (6th Cir., 1972); Boland Marine & Mfg. Co., supra; Moody Chip Corp., 243 NLRB 265 1979); Holiday Inn, 284 NLRB No.101 ... (1987).
>
> Among working conditions analogous to the "physical fitness standards" at issue in the instant case, our Commission has held that restrictions on tobacco use implemented by an employer out of concern of the health and well-being of its employees are a mandatory subject of collective bargaining. Kitsap County Fire District No. 7, Decision 2872-A (PECB, November 16, 1988). An employer's implementation of drug and alcohol testing programs (which often include disciplinary sanctions for employees who refuse to submit to such tests) is a subject that must be bargained. Advice Memorandum of NLRB General Counsel, 325 LRRM 1368 (1987).*/ See, also, Teamsters v. Southwest Airlines, 842 F.2d 794 (5th Cir., 1988), holding that a drug and alcohol testing program was directly related to the working conditions of bargaining unit employees, and so a mandatory subject of bargaining.

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*/ This memorandum concludes that the duty to bargain includes the content, extent, application and employment implications of a drug test.

Accepting that the EAP policy is a mandatory subject of bargaining does not end the inquiry, however. A question remains as to whether it has been substantively changed to a degree sufficient to warrant bargaining.

The union argues that an employee faced with an unjustified discipline under the prior EAP would have to grieve the discipline through the grievance procedure, while the employee may avoid grieving an unjustified disciplinary action by submitting to what may be an equally unjustified alternative of attending the EAP under the new policy. A close reading of the new policy reveals

that the disciplinary response is only appropriate if the "**performance problem is continuing and the staff member's performance is not satisfactory**". The employer has thus subtly changed its policy. In doing so, it has clearly added an option for an employee under suspicion of chemical abuse. In the judgment of the Examiner, however, this change in the employee assistance program has minimal impact on employee working conditions.

Contrary to the union's claim that it forces employees into the EAP program, the new manual takes nothing away from employee rights in terms of recourse in the face of employer disciplinary action.[7] The modified policy merely adds an option for employees faced with a suspected drug or alcohol problem. Balanced against this minimal impact on working conditions is the entrepreneurial responsibility of the employer to maintain a drug-free workplace and to provide options to employees who may have a chemical dependency problem. That responsibility has been reinforced by the enactment of the federal Americans with Disabilities Act (ADA), which mandates alternative employer responses to disabilities related to drug or alcohol abuse. The employer's need to maintain a safe working environment outweighs the union's interests in challenging this change in employment policy. City of Olympia, supra. The charge of refusing to bargain has not been sustained on this change in the employer's personnel policies.

FINDINGS OF FACT

1. King County Fire District 11 is a public employer within the meaning of Chapter 41.56.030(1) RCW.

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[7] It would be an unlawful interference with employee rights under RCW 41.56.140(1) for an employer to "steer" employees away from using the grievance procedure. City of Seattle, Decision 2773 (PECB, 1987). The union has not advanced such a claim here, however.

2. International Association of Fire Fighters, Local 1810, a bargaining representative within the meaning of RCW 41.56-.030(3), is the exclusive bargaining representative of non-supervisory, uniformed fire suppression personnel employed by King County Fire District 11.

3. In 1966, the employer's board of commissioners adopted Resolution 128, which incorporated employee job descriptions and administrative and civil service rules. Since that date, additional rules, memoranda of understanding, directives and "standard operating procedures" regarding personnel matters have been added to the original resolution.

4. In 1990, the employer discontinued its use of civil service procedures, and simultaneously determined that it needed to update and consolidate its personnel rules and regulations into a new personnel manual. It hired an outside consulting firm to perform this consolidation. Assistant Fire Chief Juel Hammond was assigned as the administrative liaison responsible for coordinating the development of the new manual.

5. The employer's consultant presented a preliminary draft of a new policies and procedures manual in 1992, and a copy was provided to the union. The union notified the employer that it had concerns about the new manual, and it demanded bargaining concerning changes from existing working conditions.

6. The parties met on May 12, 1992, for the purpose of collective bargaining concerning the new personnel manual. During that meeting, the union identified specific concerns about the new manual.

7. After several discussions, Hammond determined that the policies and procedures manual did not change existing policies and procedures. He informed the union of this

conclusion on May 23, 1992. The union responded by letter dated June 1, 1992, indicating that it disagreed with Hammond's evaluation of the situation.

8. On June 16, 1992, based upon recommendations from Hammond and from the union, the employer's board of commissioners adopted a modified personnel and procedures manual. The policy and procedures manual so adopted indicates that the collective bargaining agreement between the employer and union supersedes the manual where there is a conflict affecting bargaining unit employees.

9. The employer's policy concerning employee physical examinations has consistently required that the employee utilize an employer-designated physician. To the extent that individual employees may have deviated from that practice, the evidence in this record does not substantiate that the employer knew of or condoned such inconsistencies.

10. The new policy and procedures manual did not change the employer's policy on the use of free time during duty hours.

11. The Employee Assistance Program delineated in the new manual reflects the employer's responsibility to deal with potential employee drug or alcohol problems, and does not change the potential for employee discipline.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. The new policy and procedures manual developed by the employer neither conflicts with nor gives the appearance of conflicting

with the collective bargaining agreement between the employer and union, so that the fact of its adoption does not constitute an interference with employee rights under RCW 41.56-.140(1) or a refusal to bargain under RCW 41.56.140(4).

3. The provisions in the employer's new policy and procedures manual concerning employee physical examinations did not constitute a change in the employer's long-standing policy or an attempt by the employer to revive an abandoned policy, so that there was no occasion for collective bargaining the matter under RCW 41.56.030(4) and RCW 41.56.140.

4. The provisions in the employer's new policy and procedures manual concerning the wearing of the employer's insignia on off-duty time, concerning the use of employee lockers; and concerning the possible disciplinary consequences of employee "horseplay" constituted changes affecting mandatory subjects of collective bargaining under RCW 41.56.030(4), so that the employer's unilateral adoption of the new policies without bargaining was a refusal to bargain and an unfair labor practice under RCW 41.56.140(4) and (1).

5. The provisions in the employer's new policy and procedures manual concerning the use of free time during duty hours did not constitute a change in the employer's long-standing policy or an attempt by the employer to revive an abandoned policy, so that there was no occasion for collective bargaining the matter under RCW 41.56.030(4) and RCW 41.56.140.

6. The changes in the employer's policy manual concerning enforcement of drug and alcohol regulations implement employer responsibilities under law, and do not significantly impact disciplinary standards affecting employees, so that no duty to bargain arose as to such matters under RCW 41.56.030(4) and the employer did not violate RCW 41.56.140(4).

ORDER

Based on the foregoing and the record as a whole, it is ordered that King County Fire District 11, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   (a) Unilaterally adopting, implementing or giving effect to the provisions in its new policy and procedures manual on the wearing of the employer's insignia by bargaining unit employees on off-duty time, concerning the use of employee lockers by bargaining unit employees, or concerning the possible disciplinary consequences of employee "horseplay" by bargaining unit employees, unless such matters are bargained with the exclusive bargaining representative of those employees in conformity with Chapter 41.56 RCW.

   (b) In any other manner, interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   (a) Give notice to and, upon request, bargain collectively with the exclusive bargaining representative of its employees prior to implementing any change of policies affecting employees wages, hours or working conditions.

   (b) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such

notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

(c) Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

(d) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington on the 14th day of December, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALTER M. STUTEVILLE, Examiner

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

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL, upon request, bargain collectively in good faith with the International Association of Fire Fighters, Local 1810, prior to implementing any change of policies affecting employees' wages, hours or working conditions.

WE WILL NOT unilaterally adopt, implement, or give effect to the provision in the new policy and procedures manual on the wearing of the employer's insignia by bargaining unit employees on off-duty time, concerning the use of employee lockers by bargaining unit employees or concerning the possible disciplinary consequences of employee "horseplay" by bargaining unit employees, unless such matters are bargained with the exclusive bargaining representative of those employees in conformity with Chapter 41.56 RCW.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____

KING COUNTY FIRE DISTRICT 11

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (206) 753-3444.