STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TACOMA POLICE UNION, LOCAL 6, Complainant,	)	CASE 9620-U-92-2165
vs.	)	DECISION 4539-A - PECB
CITY OF TACOMA, Respondent.	)	DECISION OF COMMISSION

Hoag, Vick, Tarantino and Garrettson, by James M. Cline, Attorney at Law, appeared on behalf of the union.

Cheryl Carlson, Attorney at Law, City of Tacoma, appeared on behalf of the employer.

This case comes before the Commission on a petition for review filed by the Tacoma Police Union, Local 6, seeking to overturn an order of dismissal issued by Examiner J. Martin Smith.[1]

BACKGROUND

The employer negotiates with a "Joint Labor Committee" composed of several unions representing its employees. The resulting collective bargaining agreement covers such issues as a grievance procedure, payroll deduction of union dues, a labor-management committee, health care insurance, vacations, sick leave, on-the-job injury, longevity pay, and holidays. The Tacoma Police Union, the exclusive bargaining representative of uniformed police officers up to an including the rank of captain, is one of the members of the Tacoma Joint Labor Committee. Police Officers James Mattheis, Stan Nyland, and Ed Lowry have represented the union on the Joint Labor

[1] City of Tacoma, Decision 4539 (PECB, 1993).

Committee in negotiations. For at least six years, the parties had attempted to negotiate a drug-testing policy.

During the summer of 1991, Police Chief Raymond A. Fjetland became concerned about reports from an informant that Officer Amy Boardman was using drugs, namely marijuana and cocaine. The police department conducted surveillance activities, and officers reported observing Boardman at locations where it was known that drugs were used. Officers also reported difficulty in following Boardman, due to Boardman's driving erratically and at excessive speeds. One officer indicated to the chief that he felt her driving rose to the level of reckless driving and would have cited her had it not been for the surveillance. Other reports included her strange behavior, bizarre comments, and immaturish giggling. Rumors circulated that Boardman was using illegal drugs.

Chief Fjetland had a number of concerns: the public safety; the trust of the public in police officers; the heightened standard of conduct to which police officers are held; and the potential for liability if something should happen and the officer was found to be under the influence of drugs. Fjetland reviewed the matter with Jan Gilbertson, director of human resources for the City of Tacoma, and Mary Brown, assistant director of human resources, as well as the city attorney's office.

The City of Tacoma Personnel Code allowed for medical examinations to assure new hires and probationary employees were fit for duty, and to monitor physical and mental fitness of employees. Section 1.24 800 reads, in pertinent part, as follows:

> All employees of the City during their period of employment may be required by the appointing authority with the approval of the Personnel Director, to undergo periodic medical examinations to determine their physical and mental fitness to perform the work of the position in which they are employed. Such

> periodic medical examination shall be at no expense to the employee.
>
> Determination of physical or mental fitness will be by a physician designated by the Personnel Director. The physician will be provided a description of the work to be performed and its physical parameters.

In the past, the public works street maintenance department had ordered an alcohol test when a fitness for duty question arose due to suspicion of alcohol use/abuse. Chief Fjetland had also used the Personnel Code to compel psychological/psychiatric fitness for duty evaluations. The fire department had required employees to submit to urinalysis for substance abuse as a part of discipline and a return to work agreement. The employer took the position that the Personnel Code authorized a drug test and that the labor contract did not prohibit the police department from requesting a substance abuse exam to see whether Boardman was "fit for duty".

On September 4, 1991, an assistant chief of police ordered Boardman to submit to a urinalysis-type drug test. The employer had received comments from the informant that Boardman may have been using drugs the prior weekend, so the employer felt some sense of urgency about testing the officer. The letter to Boardman stated in pertinent part:

> You have become the focus of a drug investigation based upon information provided by a confidential informant whose reliability has been established; this information has been partially corroborated by officer observation. The information creates reasonable suspicion that you may have or may now be illegally using drugs. This calls into question your physical and mental fitness to perform the work of the position in which you are employed.
>
> Therefore, pursuant to Personnel Code Section 1.24.800, you are being asked to undergo medical examination procedures at Tacoma Industrial Medicine, under the authority of Dr.

> Yasayko, under the medical and security procedures established by the medical facility.
>
> If you refuse to voluntarily consent to this examination, be advised that you will be ordered to submit to the medical examination as part of an internal investigation being conducted by the Tacoma Police Department. You are hereby ordered to submit and cooperate with the medical testing procedures which relate to your investigation ....

The union objected, both orally and in writing, to the order requiring Officer Boardman to take the drug test. It asserted that the police department had no legal authority to order such a test. The union did not agree with the employer that "reasonable suspicion" should be the standard for determining whether a test should be administered.

Officer Boardman took the urinalysis test through Tacoma Industrial Medicine.[2] Detective Nyland, Officer Mattheis, and Attorney Cline accompanied Boardman to the testing facility where she submitted to the drug test. The results of the drug test were negative, and did not confirm that Boardman had used drugs the preceding weekend. However, Boardman was discharged from employment for reasons that she subsequently alleged were related to the drug test. The police department did not consider reassignment.

The employer and the Joint Labor Committee agreed to a Substance Abuse Policy on November 20, 1991. The policy allows the employer to request an employee to undergo a drug screen test if the employer has a "reasonable suspicion" that an employee has used or is using a drug.

---

[2] This is the same medical services provider which conducted pre-employment drug screening tests for the city.

On February 6, 1992, the Tacoma Police Union, Local 6 (union), filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Tacoma (employer) had violated RCW 41.56.140(4).

Examiner J. Martin Smith conducted a hearing on April 27, 1993, and issued Findings of Fact, Conclusions of Law and Order on November 19, 1993. Examiner Smith concluded that the city responded to an emergency in requiring Boardman to submit to a drug test, and was therefore excused from the duty to bargain. The union subsequently filed its petition for review of the Examiner's decision, thus bringing the matter before the Commission.

POSITIONS OF THE PARTIES

The union argues that drug testing is a mandatory subject of bargaining under RCW 41.56.140(4), and that the employer committed an unfair labor practice by unilaterally adopting a policy without bargaining with the union. The union agrees with the Examiner that the employer failed to demonstrate a past practice permitting a drug test under the circumstances, which would relieve the employer of the duty to bargain. It takes issue with the Examiner's legal and factual assertions supporting the use of an "emergency doctrine", and disagrees with the Examiner's finding that an emergency justified the employer's actions in requiring a drug test.

The employer does not dispute that drug testing is a mandatory subject of bargaining, but it contends that it was addressing a disciplinary situation within the confines of an existing procedure. It notes that it continued to bargain with labor for a formal substance abuse policy. The employer agrees with the Examiner's finding that an emergency existed, and asks that the

Examiner's Findings of Fact, Conclusions of Law and Order dismissing the union's unfair labor practice claims be affirmed.

DISCUSSION

Mandatory Subject of Bargaining

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, imposes certain bargaining obligations on labor and management. RCW 41.56.030(4) reads as follows:

> "Collective bargaining" means ... to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on **personnel matters, including wages, hours and working conditions**, ...
>
> [Emphasis by **bold** supplied.]

The potential subjects for discussion between an employer and union are commonly divided among three categories: "Mandatory", "Permissive" and "Illegal". Federal Way School District, Decision 232-A (EDUC, 1977), citing NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958). Mandatory subjects of bargaining are those matters about which an employer is obligated by law to bargain in good faith, upon request, with the exclusive bargaining representative. Permissive subjects are matters of management or union prerogative which do not affect wages, hours, or conditions of employment. The parties may bargain regarding permissive subjects, but are not required by law to do so. Whether a particular personnel action is a mandatory subject of bargaining is a question of law and fact for the Commission to decide. See, also, WAC 391-45-550; and Kitsap County Fire District 7, Decision 2872-A (PECB,

1988)[3]; and Pierce County Fire District 3, Decision 4146 (PECB, 1992).

The Examiner in this case found drug testing to be a mandatory subject of collective bargaining, stating:

> The discipline and discharge of employees clearly involves their working conditions and tenure of employment, so as to come within the "wages, hours and working conditions" scope of mandatory collective bargaining under RCW 41.56.030(4).

Examiner's decision at page 8.

The union argues that a drug testing policy constitutes a mandatory subject of bargaining, and the employer does not take issue with this contention. We concur that the subject of drug testing is a mandatory topic for bargaining.

Pre-Existing Policy

The Applicable Legal Standard -

If a subject is a mandatory subject of bargaining, an employer commits an unfair labor practice if it changes an existing term or condition of employment of its union-represented employees without having exhausted its obligations under a collective bargaining statute. See, NLRB v. Katz, 369 U.S. 736 (1962); Federal Way School District, supra; and Green River Community College, Decision 4008-A (CCOL, 1993).

In order for there to be a "unilateral change" giving rise to a duty to bargain, there must have been some change in the status quo. See, Kitsap County Fire District 7, supra, and Pierce County

---

[3] This case held that decisions by the employer to impose restrictions on tobacco use and residency of employees, and the effects of such decisions, such as discipline, were proper subjects of bargaining.

Fire District 3, supra, which distinguish between new policies and restatements or reiterations of old policies. No duty to bargain arises from a reiteration of established policy, or from a change which has no material effect on employee wages, hours or working conditions. Clark County Fire District 6, Decision 3428 (PECB, 1990); City of Yakima, Decision 3564-A (PECB, 1991); Evergreen School District, Decision 3954 (PECB, 1991); and Green River Community College, supra.

The Commission determines whether an alleged unilateral change actually constitutes a part of the status quo. To be part of the status quo, a rule or policy must be a precedent which the employer has used during the relevant past, not merely a written policy which is pulled off the shelf just in time to fend off an unfair labor practice charge. Examiner's decision at page 9, referring to Pierce County Fire District 3, supra.

Application of the Legal Standard -
The Examiner in this case found that the requirement for Boardman to submit to the urinalysis drug test was not a "periodic" examination, but one based on "probable cause". He found that the employer had no past practice of conducting random drug tests or "probable cause" drug tests. The Examiner acknowledged that the employer had an established personnel policy which addressed fitness for duty examinations, but concluded that policy does not encompass "probable cause" drug testing. He therefore concluded that the employer made a unilateral change when it decided to give Boardman a drug test without opportunity to bargain.

We disagree with the Examiner's conclusion that the employer's requirement of the drug test, under the circumstances presented, was a unilateral change. Section 1.24.800 of the City of Tacoma Personnel Policy addresses the subject of medical examinations. It is clearly intended to encompass situations where the employer has some reason to question the physical or mental fitness of an

existing employee. In the case before us, the employer appears to have had cause to question Boardman's fitness for duty.

The police department received information from a reliable and confidential informant that Boardman was using drugs. Bizarre behavior was observed and reported by her supervisor, and surveillance officers observed her driving in a dangerous and erratic manner. Rampant rumors that Boardman was using and/or was suspected of current illegal drug use were circulating in the police department, and supervisors felt the rumors were compromising both Boardman and the rest of the department.

The use of illegal drugs by a police officer calls into question whether the officer can be allowed to continue working since officers are entrusted with deadly weapons and empowered by special mandate to use them. Because it had probable cause to suspect an officer was using drugs, we find the employer reasonably questioned Boardman's ability to perform her job.[4]

Section 1.24.800 refers to a generic "medical examination". The city's policy does not specifically mention drug testing, but neither does it specifically mention psychiatric exams, blood alcohol tests or urinalysis tests, all of which the record indicates have been required of employees while the "fitness for duty" personnel policy has been in effect. We find the term "medical examination" has been used by the employer as inclusive of drug testing when there is reasonable cause to believe the use of drugs is affecting an officer's fitness for duty.

We agree with the Examiner that the city did not have a policy of conducting random drug tests. Absent an existing past policy, we would have found a violation of RCW 41.56.140(4) in this case, if

---

[4] In arriving at this conclusion, we do not credit the employer's implicit suggestion that it was doing Boardman a favor by demanding a drug test.

the employer had utilized such a test before reaching agreement with the union. We disagree, however, with the Examiner's conclusion that Section 1.24.800 was not applicable to situationally responsive testing. This conclusion is contradicted by evidence regarding the city's prior actions while Section 1.24.800 has been in effect.

Chief Fjetland testified that in the past he used Personnel Code Section 1.24.800 to require several officers to undergo a fitness review evaluation in the form of a psychiatric evaluation to determine the officers' competence, when their behavior became such that he had reason to be concerned for their emotional stability. Human Resources Director Jan Gilbertson testified that a blood alcohol test had been required of a department of public works employee. Gilbertson also testified that the fire department had required drug tests in other "for cause" situations to establish whether the person was under the influence as part of discipline and as part of a return to work agreement. These tests were done during the Joint Labor Committee's negotiations with the employer over the substance abuse testing policy. None of the preceding exams were "periodic" in the sense of regularly scheduled preventative examinations. They were situationally responsive examinations generated by probable cause to suspect a fitness problem.

Under its established fitness for duty examination policy, the employer reserved the right to require appropriate "medical examinations" when an existing employee's physical or mental condition was in question. When the city required Boardman to submit to a drug test, it was applying a preexisting policy and practice that had been used several times in several city departments. We find that the requirement of Officer Boardman to undergo a drug test was not a departure from the status quo, but was instead the exercise of a right that the city has preserved and exercised in the past. Since the city was maintaining the status

quo in applying its preexisting policy, requiring Boardman to submit to a drug test was not a unilateral change that gave rise to a duty to bargain. The city's obligation to bargain over the terms of a policy specific to substance abuse testing did not preclude it from applying a preexisting policy that was already in place.

The Examiner found that even though the employer made a unilateral change, the drug test of Boardman was a circumstance where the duty to bargain gives way to the legitimate need for an employer to take reasonable action in response to an emergency. We need not address the "emergency doctrine" used by the Examiner, and express no opinion as to whether or not there is a basis in the record to apply such a doctrine. We are affirming the order dismissing the unfair labor practice charges, but we find the employer was excused from its bargaining obligation on different grounds.

NOW, THEREFORE, it is

ORDERED

1. The Commission affirms and adopts the Findings of Fact issued in this matter by Examiner J. Martin Smith, except paragraph 9, which is amended to read as follows:

> 9. Prior to the drug test administered to Officer Boardman, the employer had used Personnel Code Section 1.24.800 to require police officers to undergo fitness for review evaluations in the form of psychiatric evaluations to determine officer competence. Drug tests had been given to fire department employees, and at least one blood alcohol test had been required of a public works employee.

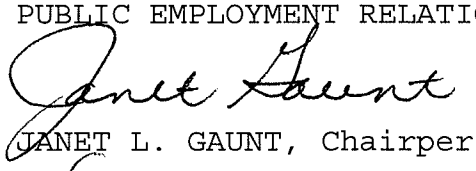
2. The Commission affirms and adopts the Conclusions of Law issued by Examiner J. Martin Smith, except paragraphs 3 and 4, which are amended to read as follows:

> 3. In requiring bargaining unit employee Amy Boardman to submit to a drug test by urinalysis, the City of Tacoma was maintaining the status quo by applying a preexisting practice. No unilateral change was made, and therefore the employer was excused from the duty to bargain as set forth in RCW 41.56.030(4).
>
> 4. In requiring bargaining unit employee Amy Boardman to submit to a drug test by urinalysis, the City of Tacoma did not violate RCW 41.56.140(4).

3. The Commission affirms and adopts the order of dismissal issued by Examiner J. Martin Smith in the above-captioned matter.

Issued at Olympia, Washington, the 16th day of August, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JANET L. GAUNT, Chairperson

DUSTIN C. McCREARY, Commissioner

DISSENTING OPINION

The issue is whether the employer committed an unfair labor practice when it required one of its employees to submit to a urinalysis test. I agree with the parties and my colleagues that such tests are subject to mandatory bargaining. Like the majority, I also do not reach a finding of an emergency. However, unlike the majority, I do not find an exception to the duty to bargain the issue.

I agree with the Examiner's conclusion that the employer made a unilateral change when it decided to conduct a urinalysis test of a bargaining unit employee for drugs or substance abuse. Because the unilateral change was made, without providing an opportunity for bargaining on its format or effects, I would find that the employer committed an unfair labor practice.

In City of Chehalis, Decision 2803 (PECB, 1987), the Examiner decided that an employer faced with a "compelling need", did not violate RCW 41.56.140(4) and (1), when it unilaterally adopted a policy to ban smoke in the air of its worksites. The Examiner did conclude in that case that the employer violated the law by refusing to bargain the **impact and effect** of its decision to ban smoke in the air of its worksites. The Examiner in Chehalis decided an employer's decision to ban smoking in its facilities affected the working conditions of employees who smoke, and that the exclusive bargaining representative should have been allowed the opportunity to bargain, saying at page 10:

> Through mutual agreement, the parties could decide when the ban was to be effective; if or where there would be a designated smoking area; whether, and at whose expense, employees who smoked would be offered the opportunity to join a smoke-ending program and so forth.

The Examiner in Chehalis cited the Connecticut Board of Labor Relations as saying:

> We do not base our decision on principles either of morality or of health; rather, we are bound to consider the issue, as we have done, in terms of what must be done when the exercise of management prerogatives has a substantial impact on the conditions of employment in the workplace.

Town of Rocky Hill, BLR No. 2501 (Conn. BLR, 1987), quoted in City of Chehalis, supra, at page 12.

Like the imposition of a ban on smoking, imposing drug tests on employees without bargaining is the exercise of a management prerogative that has a substantial impact on the conditions of employment in the workplace. In the case now before the Commission, the parties could have decided, through bargaining and arriving at a mutual agreement, when drug tests are to be required and the rights of employees.

In City of Sumner, Decision 1839 (PECB, 1984), the employer unilaterally adjusted employees' pay dates, delaying those dates by five days. The issue was being bargained in negotiation sessions, but the parties never reached agreement, nor impasse. The Commission agreed with the Examiner's rejection of the employer's "business necessity" argument in that case, saying:

> We do not believe that the relative neglect of a low priority issue should justify unilateral action by a party, so long as the supporters of the status quo take steps, as occurred here, to negotiate the issue and keep it alive. ... In circumstances such as these, where the existence of an impasse on an issue is far from clear, it behooves the party desiring immediate action to take the issue off the shelf and pursue it vigorously in negotiations.

City of Sumner, Decision 1839-A (PECB, 1984), citing Pierce County, Decision 1710 (PECB, 1983), and Seattle School District, Decision 1803 (PECB, 1984).

In the case now before the Commission, discussions concerning this issue had been initiated, and had gone on for several years. The issue had not been resolved through the bargaining process, however, and was kept alive by both parties. As in City of Sumner, supra, the employer, who desired immediate action, could have taken the issue off the shelf and pursued it vigorously in negotiations prior to requiring Boardman's drug test. The fact the issue was in negotiations indicates an obligation.

I disagree with the majority in their finding that the employer did not make a unilateral change, but was implementing an existing policy when it required Boardman's drug test. Just because some tests were done previously does not mean the actions were justified. Some of the previous tests mentioned by the majority were not necessarily done under the umbrella of the city's written personnel policy. Also, that policy only refers to "periodic medical examination". To find the term inclusive of "probable cause" drug testing, as the majority does in this case, is an unwarranted stretch of the term "periodic medical examination". The fact that the issue of drug testing had been a subject of negotiations for such a long period of time, and the fact that an agreement on the issue was reached a short time after Boardman's drug test indicate that there was acknowledgement that the employer's written personnel policy was not enough to justify the exams.

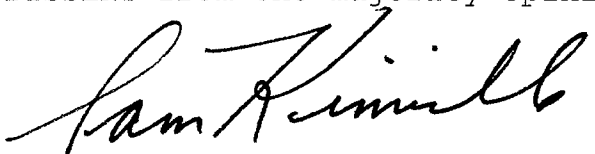
The police department alleges it received information from an informant regarding Boardman's drug activity, that it observed bizarre behavior on her part, observed her erratic driving, and that rumors were rampant about Boardman's drug use. It appears that the employer's position is that, because of these instances, it was doing the employee a favor by having her take a drug test. I find this to be illogical, and must disagree if the majority is, in effect, accepting the employer's theory on this point. Beyond reference to bizarre behavior and immaturish giggling, no mention

was made in the record as to actual performance deficiencies that would call into question Boardman's fitness for duty and her ability to perform her work.

The employer cannot require its employees covered by the collective bargaining agreement to submit to such a test, no matter what the circumstances, whether the reason be justified by describing it as an emergency, as the Examiner did, or whether it be justified by finding an unchanged status quo in the form of an existing practice, as the majority does in this case. There were obviously other remedies available, in the form of disciplinary procedures, to the employer to deal with such an alleged work performance problem.

If the employer is not dealing with an alleged work performance problem but believes the employee, or any citizen, is violating the law, this Commission should not have to advise the employer, a law enforcement agency, the correct course of action.

For the reasons indicated, I DISSENT from the majority opinion in this case.



SAM KINVILLE, Commissioner