STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE PATROL TROOPERS ASSOCIATION,	)	CASE 9777-U-92-2225
Complainant,	)	DECISION 4757 - PECB
vs.	)	
WASHINGTON STATE PATROL,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW
Respondent.	)	AND ORDER

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

Christine O. Gregoire, Attorney General, by Chip Holcomb, Senior Assistant Attorney General, appeared on behalf of the employer.

On April 27, 1992, Washington State Patrol Troopers Association (union) filed an unfair labor practice complaint with the Public Employment Relations Commission (Commission) against the Washington State Patrol (employer). The complaint alleges a refusal to bargain by the employer in violation of RCW 41.56.140(4). On August 4, 1993, the Commission, through Examiner Kenneth J. Latsch, issued a notice of hearing upon the complaint filed by the union which also notified the employer of its right to file an answer on or before August 24, 1993. No answer was filed by the employer. Accordingly, the employer is deemed to admit all facts alleged in the complaint are true and to waive a hearing as to those facts alleged. WAC 391-45-210. The union on September 8, 1993, filed a motion and affidavit in support of motion requesting a default judgment upon its complaint.

Thereafter, the parties verbally agreed to submit briefs upon the merits of the facts alleged in the complaint and for the Commission

to thereafter render a decision upon the complaint. The union, with its complaint, filed a copy of the parties' collective bargaining agreement, draft agreements, a letter from union counsel to employer counsel, agreements signed by Nold and an employer representative, and a statement of facts and remedy requested. All of these documents, as well as the briefs filed by the parties, have been considered by the Examiner.

BACKGROUND

At all relevant times the employer has had a collective bargaining agreement with the union covering uniformed commissioned personnel below the rank of lieutenant. The labor agreement contains articles dealing with discipline and discharge and provides for a grievance and arbitration procedure.

In December 1991, the employer began an investigation of Trooper Bob Nold, an employee covered by the terms of the parties' collective bargaining agreement, in connection with an incident involving the use of alcohol. Although there is no evidence of a grievance having been filed, counsel for the union began discussions with the employer regarding discipline for Nold.

On March 25, 1992, Chip Holcomb, counsel for the employer, submitted documents to counsel for the union entitled "Contractual Agreement in Lieu of Termination from Employment between Trooper Robert L. Nold #485 and the Washington State Patrol" and "Waiver of Administrative Charges and Hearing in Discipline Cases and Order Imposing Penalty". On March 26, 1992, Christopher Vick, counsel for the union, directed correspondence to employer counsel relative to those documents. Union counsel raised specific objections, indicating that certain specified portions of the proposed agreement and waiver violated cited provisions of federal and state statutes. Union counsel further stated the employer must bargain

with the union, rather than Nold, relative to the proposed agreement and that any direct dealings by the employer with Nold would cause the union to file an unfair labor practice complaint with the Commission.

Several days after the written response by Vick was mailed, Holcomb advised Vick that his correspondence had not been received. Another copy of Vick's correspondence was sent to Holcomb via facsimile.

On April 3, 1992, the employer required Nold to meet with his supervisor to sign the documents referred to above, as modified by the employer, after review of the union's objections to the original documents. Nold previously had been instructed by the union to object to the agreement but to sign it, if required, to avoid an insubordination charge. Nold signed the documents on April 3, 1992, and the union, thereafter, filed the complaint herein. The documents signed by Nold varied from the original drafts by elimination of a requirement for Nold to retire on or before May 31, 1993. This deletion was one of several demanded by Vick in his letter of March 26, 1992. None of the other conditions which were objected to in the draft documents were deleted from the material signed by Nold.

POSITIONS OF THE PARTIES

The union contends that the employer has breached its bargaining obligations by entering into an unlawful agreement with Nold in derogation of its duty to bargain with the union and that this constitutes a per se violation of the statute. The union further maintains that, by requiring Nold to sign the documents over the union's objections, the employer interfered with the union's right to file a grievance for a breach of the just cause provisions of the parties' collective bargaining agreement.

The union relies upon Spokane County, Decision 2167-A (PECB, 1988); City of Yakima, Decisions 3503, 3504, 3503-A and 3504-A (PECB, 1990); J. I. Case Co. v. NLRB, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762 (1944); and North Coast Cleaning Service, 272 NLRB 1343 (1984). The remedies requested by the union are rescission of the agreements signed by Nold, reimbursement of Nold's costs and time including payment for AA classes and counseling, and overtime at the applicable contractual rate for time spent in attendance at these activities outside of his normal working hours as well as attorney's fees for the union because the only defenses to the union's complaint are frivolous citing City of Tukwila, Decisions 2434 and 2434-A (PECB, 1984).

The employer contends that it presented Nold with an alternative to a termination proceeding, pursuant to RCW 43.43.060.110, which it is free to do, without the agreement of Nold's union. The employer maintains that Nold can consult with the union in the course of deciding his course of action but there is no obligation on the part of the employer to negotiate with the union on the subject matter of the alternative to discipline it proposes to an employee. Although not required, the employer did, in fact, afford the union an opportunity to provide input to it concerning the matter. Further, the employer contends that, while not required to do so, it did modify part of the document in response to objections posed by the union.

DISCUSSION

The Applicable Statute

The following statutory provisions are relevant to the determination of the issue presented in the complaint in this case:

> **RCW 41.56.030 DEFINITIONS** As used in this chapter:

. . .

(4) "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative 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, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter. In the case of the Washington state patrol, "collective bargaining" shall not include wages and wage-related matters.

. . .

RCW 41.56.080 CERTIFICATION OF BARGAINING REPRESENTATIVE--SCOPE OF REPRESENTATION. The bargaining representative which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and shall be required to represent, all the public employees within the unit without regard to membership in said bargaining representative: PROVIDED, That any public employee at any time may present his grievance to the public employer and have such grievance adjusted without the intervention of the exclusive bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect, and if the exclusive bargaining representative has been given reasonable opportunity to be present at any initial meeting called for the resolution of such grievance.

. . .

RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be 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;
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> . . .
>
> (4) To refuse to engage in collective bargaining.

This case involves a situation where the employer contemplated taking disciplinary action, pursuant to an administrative proceeding, for what it believed to be serious infractions of its regulations, including those dealing with unbecoming conduct, use of alcohol, and reporting for duty. No grievance was ever filed with respect to this matter.

The employer presented the employee with a proposed written agreement and waiver providing for various employment conditions including transfer, counseling, enrollment in AA at his cost, loss of 23 days annual leave, retirement by May 31, 1993, and waiver of his right to administrative due process in the event of his termination for further violations of employer regulations as an alternative to processing of charges through an administrative hearing and termination. The union furnished the employer with its objections to certain portions of these documents and demanded that matters relative to Nold's employment status be negotiated with the union. The employer modified the documents to the extent of deleting the requirement for Nold's retirement by May 31, 1993. The employer, admittedly, did not enter into negotiations with the union but proceeded to present the revised documents to Nold. After consultation with the union, Nold signed the documents.

The parties' collective bargaining agreement provided for a grievance procedure and contained provisions on discipline and discharge. In addition to the foregoing, at the end of the labor agreement, there were 9 pages devoted to describing the employee's rights in the disciplinary process.

The cases cited by the union, involving both Commission and NLRB precedent, are not persuasive. These cases, generally stand for the propositions an employer may not: negotiate individual employment contracts to avoid its bargaining obligations with a newly certified bargaining representative; assert the existence of individual employment contracts as justification for failing to bargain with a newly certified bargaining representative; or implement its offer on mandatory subjects of bargaining prior to impasse. While these cases are authority for those principles, they are not applicable to the fact situation in this case and are not dispositive of the issue presented for decision.

The statute clearly conveys the right of a bargaining representative to be present at the time of adjustment of an employee's grievance or to participate in an investigatory interview at the request of an employee[1]. The statute requires that terms and conditions of employment be negotiated with the designated bargaining representative rather than directly with employees[2]. However, there is no requirement that an employer negotiate with the union concerning what, if any, disciplinary action it will take with respect to an employee. There is no precedent to support the proposition that an employer, in such circumstances, is not free to deal directly with the employee.

Indeed, in this case, the employer went beyond its statutory obligations to the union by entertaining the union's objections to its contemplated course of action and, in significant degree, modifying its original position concerning the disposition of Nold's situation. This case is analogous to, and governed by, established Commission precedent regarding the right of an employer to advise an employee of discipline to be imposed without a union

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[1] City of Pasco, Decisions 4197-A, 4198-A (PECB, 1994).

[2] King County, Decision 4299-A (PECB, 1993); City of Bellevue, Decision 4324-A (PECB, 1994).

representative being present.[3] Accordingly, the complaint must be dismissed.

FINDINGS OF FACT

1. Washington State Patrol, an agency of the State of Washington, is a "public employer" within the meaning of Chapter 41.56 RCW.

2. Washington State Patrol Troopers Association is a labor organization and a bargaining representative within the meaning of RCW 41.56.030(3) for a bargaining unit of troopers and sergeants employed by the employer.

3. During the period relevant to these proceedings a collective bargaining agreement was in effect between the employer and the union.

4. The collective bargaining agreement provided for grievance and arbitration and discipline and discharge procedures.

5. Robert Nold was employed by the employer as a trooper at all times relevant to this proceeding and is a "public employee" within the meaning of RCW 41.56.030(2).

6. Nold, at all times relevant to this proceeding, was a member of the collective bargaining unit represented by the union.

7. On April 3, 1992, Nold executed an agreement in lieu of termination and a waiver of administrative charges and hearing in disposition of the incident involving Nold.

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[3] Kitsap County Fire District, Decision 3610 (PECB, 1990); City of Seattle, Decision 3198 (PECB, 1989).

8. These documents signed by Nold had been modified by the employer subsequent to their review by counsel for the union and receipt of union counsel's written objections to the content of the original documents.

9. The sole purpose of Nold's meeting with the employer on April 3, 1992, was to execute the documents referred to herein.

10. The union, prior to April 3, 1992, had unequivocally stated its objections to the employer, both verbal and written, to certain parts of the documents proposed by the employer.

11. Prior to the date of April 3, 1992, the union had advised the employer that any negotiations concerning the resolution of the incident involving Nold were to be conducted with the union.

12. Prior to attending the meeting with the employer on April 3, 1992, Nold contacted the union and was advised to sign the documents if he believed his failure to do so would result in an insubordination charge.

13. No negotiations or investigation were conducted during the meeting between Nold and the employer on April 3, 1992.

CONCLUSIONS OF LAW

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

2. The evidence, as described in paragraphs 1 through 13 of the foregoing findings of fact, does not establish that the employer violated RCW 41.56.140(1)(4).

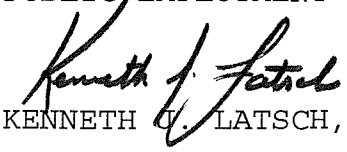
NOW THEREFORE, it is

ORDERED

The motion for default judgement filed by the union is denied and the complaint charging unfair labor practices filed in this matter is hereby dismissed.

Issued at Olympia, Washington, this 29th day of June, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



KENNETH J. LATSCH, Examiner

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