STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 17, | ) | CASE 10185-U-92-2332 |
| Complainant, | ) | DECISION 4851-A - PECB |
| vs. | ) | |
| CITY OF SEATTLE, | ) | FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER |
| Respondent. | ) | |

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

Mark H. Sidran, Seattle City Attorney, by Sandra L. Cohen and Leigh Ann Tift, Assistant City Attorneys, appeared on behalf of the respondent.

On December 23, 1992, International Federation of Professional and Technical Engineers, Local 17 (IFPTE) filed a complainant charging unfair labor practices against the City of Seattle. The matter came before the Executive Director for a preliminary ruling pursuant to WAC 391-45-110. At that time, several problems with the complaint were noted and the complainant was allowed 14 days to file an amended complaint or have the case dismissed for failure to state a cause of action. The union filed an amended complaint.

The processing of this case was held in abeyance for a time, while the Commission had occasion to review an Examiner's decision on another case which bore certain similarities to the instant complaint. The processing of this complaint was then resumed with the benefit of the Commission's deliberations.[1]

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

The amended complaint was found to state a cause of action, and was referred to Examiner Katrina I. Boedecker for further proceedings. The matter was scheduled to be heard in August of 1994, but the employer filed a motion for dismissal in July of 1994. The hearing was rescheduled, and the union was granted an opportunity to respond to the motion. The employer also filed a reply memorandum in support of its motion for dismissal. The motion to dismiss was denied in City of Seattle, Decision 4851 (PECB, 1994). The matter was heard before the Examiner on October 4, 1994. The parties filed post-hearing briefs.[2]

## BACKGROUND

The City of Seattle and International Federation of Professional and Technical Engineers, Local 17 have had a collective bargaining relationship since at least 1976.[3] Local 17 represents a bargaining unit of administrative support employees which includes the customer service representative classification in the Engineering Department. Employee "X" is a customer service representative.[4]

Over the years, the collective bargaining agreements between the parties have always included grievance procedures culminating in binding arbitration, as well as articles outlining progressive

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[2] After the close of the hearing, a lively correspondence transpired concerning whether the Examiner should consider "more complete and clear" exhibits than certain partial depositions that had been received into evidence at the hearing. The Examiner has found the exhibits in the record are clear. Thus, this decision is based solely upon the record developed at the hearing.

[3] The Commission commenced operations on January 1, 1976. Its docketing system records cases back to that time.

[4] Because of the nature of the allegations discussed in this published decision, the employees involved will be referred to by letter codes unrelated to their initials.

discipline and subordination of the agreement. The collective bargaining agreement in effect in 1992 echoed language from agreements since at least 1980:

> Article 6 - Grievance Procedure
>
> ...
> Section 6
>
> ...
> Step Four
>
> ...
> In connection with any arbitration proceeding held pursuant to this Agreement, it is understood as follows:
>
> ...
> (b) The decision of the arbitrator shall be final, conclusive and binding upon the City, the Union, and the employee involved.
>
> ***
>
> Article 23 - Disciplinary Actions
>
> 23.1 The City may suspend, demote or discharge an employee for just cause.
>
> 23.2 The parties agree that in their respective roles primary emphasis shall be placed on preventing situations requiring disciplinary actions through effective employee-management relations. The primary objective of discipline shall be to correct and rehabilitate, not to punish or penalize. To this end, in order of increasing severity, the disciplinary actions which the City may take against an employee include:
>
> (a) verbal warning
> (b) written reprimand
> (c) suspension
> (d) demotion
> (e) termination
>
> Which disciplinary action is taken depends upon the seriousness of the affected employee's conduct.
>
> ...
> 23.4 An employee covered by the Agreement must upon initiating objections relating to disciplinary action use either the grievance procedure contained herein or pertinent proce-

> dures regarding disciplinary appeals to the Civil Service Commission. Under no circumstances may an employee use both the contract grievance procedure and the Civil Service Commission procedures relative to the same disciplinary action.
>
> ***
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> Article 25 - Subordination of Agreement
>
> 25.1 It is understood that the parties hereto and the employees of the City are governed by the provisions of applicable Federal Law and State Law. When any provisions thereof are in conflict with or are different than the provisions of this Agreement, the provisions of said Federal Law or State law are paramount and shall prevail.
>
> 25.2 It is also understood that the parties hereto and the employees of the City are governed by applicable City Ordinances and the City Charter and said Ordinances and City Charter are paramount **except where they conflict with the express provisions of this Agreement**. [Emphasis by **bold** supplied.]
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> ***
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> Article 26 - Savings Clause
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> ...
> 26.2 If the City charter is modified during the term of this agreement and any modifications thereof conflict with an express provision of this Agreement, the City and/or the Union may reopen, at any time, for negotiating the provisions so affected.

Since at least 1977, Seattle's city charter has defined a single personnel system with uniform procedures for employee discipline, labor negotiations and "other personnel actions". Article XVI, Section 9 of the charter specifies "The City Council shall not ratify any contract which is inconsistent with this Charter."

The Seattle personnel ordinance, in effect since 1978, states that actions can be taken against an employee for inappropriate behavior or performance. An employee's supervisor may issue a verbal warning or written reprimand; the employee's department head must

approve any suspension, demotion or termination. The grounds for discipline or termination listed in the ordinance include:

> 14. Intentional breach of the City Ethics Ordinance;
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> ...
> 16. Theft from the city ....

In 1980, the City of Seattle established a code of ethics for its officers and employees. The code was enforced by a board of ethics which had the same membership and tenure of office as the city's fair campaign practices commission.

By ordinance adopted in 1991, the city replaced the board of ethics with a "Seattle Ethics and Elections Commission" (SEEC) authorized to: Administer the code of ethics, administer an election campaign code and its campaign matching fund program; publish the city's election pamphlets; administer the political sign ordinance; and investigate certain complaints of improper governmental action under the "whistleblower protection" ordinance. A pamphlet that was distributed to all employees of the city included a section titled "Penalties and Remedies for Violations", which states:

> If, after hearing, the [SEEC] determines that a violation of the Code of Ethics has occurred, it may recommend disciplinary action, i.e., reprimand, suspension or discharge, and/or a monetary fine not to exceed $500 per violation.

The ordinance that created the SEEC also created an executive director position. Carolyn Van Noy now holds that position.[5]

On October 1, 1991, an anonymous memo was sent to the mayor and (among others) a city councilmember, the "Board of Ethics" [sic]

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[5] Van Noy became the executive director of the SEEC on December 18, 1991.

and Director Gary Zarker of the Engineering Department. The memo concerned "Perceived Fraudulent Payroll Reporting/Authorized/On-going". It implied that, after being denied an out-of-class pay request, employee X had 20 hours of overtime per pay period authorized by her supervisor. That same day, X's supervisor Bev Hundley, wrote a memo to Zarker, apparently in response to his request to investigate the allegations of the anonymous memo. Hundley detailed X's job duties, detailed X's on-call obligations, and recounted the overtime history of the overtime of employees who had previously performed X's assignments. Hundley reported having reviewed X's timesheet, and found the overtime consistent with past records for these assignments. Hundley stated that X's timesheets accurately reflected the number of hours she worked.

The following week, Zarker informed the mayor and the councilmember of his investigation of the allegations made in the anonymous memo. Zarker reported he personally inspected every one of the timesheets in question, and interviewed all of the people involved. He stated he found no evidence of wrongdoing. Zarker reported that X had assumed significant new responsibilities that required considerable overtime work. He allowed that someone with limited information about the situation may have had grounds to ask questions. Zarker stated he had reiterated the department's policies on timesheets to the employees, and had encouraged anyone to report questionable activity while insuring that there would be no retribution resulting from reporting of conduct of that nature. He concluded that the matter was "now closed". Zarker did not discipline any employee as a result of the anonymous memo or its allegations.

Van Noy questioned, in her own mind, whether Zarker had done a thorough investigation of the allegations in the anonymous memo, and she launched an independent investigation. Van Noy interviewed X two or three times, beginning on March 19, 1992. Each time, a union business representative was present, and was allowed to participate. Van Noy did not interview Zarker until October 1992.

On October 13, 1992, a little more than one year after Zarker had closed his investigation, Van Noy issued a "Notice of Charges and Notice of Hearing", calling upon X to appear before the SEEC for the purpose of determining whether she had violated the code of ethics by reporting and receiving payment for work never done.

During the hearing before the SEEC, Van Noy called X as a witness against herself. The hearing was reported in The Seattle Times and the Seattle Post-Intelligencer newspapers. After the hearing, the SEEC dismissed the charges against X, on the grounds that Van Noy had failed to establish a prima facie case.

In December of 1992, the SEEC ordered another employee to pay $300 in sanctions to the city, and required that a copy of its order be placed in that employee's personnel file. That employee's union, Washington State Council of County and City Employees, Local 21, urged the SEEC to refer the complaint to the employee's department management so that the employee would be accorded his rights under the collective bargaining agreement. The SEEC refused.

## POSITIONS OF THE PARTIES

Local 17 recognizes that the ethics ordinance applies to its members along with all other city employees, but contends the ordinance may not duplicate, supplant or displace the disciplinary and grievance articles that were arrived at by agreement of the parties through collective bargaining. The focus of the union's complaint is on the duplication of proceedings (double jeopardy) to which the employee is exposed, the usurpation of the authority of the department head, and the right of the employee to the contractual grievance procedure. Local 17 argues that a separate forum was not the intent of either party in the adoption of the several collective bargaining agreements that have been in existence over the life of this ordinance. The union contends the city made a

unilateral change in a mandatory subject of bargaining (i.e., discipline), when it brought charges against X under the ethics ordinance on a matter which had been subject to disciplinary action by the department head. The union contends that, by bringing the charges, the city unilaterally established a parallel procedure of imposing discipline on employees regarding matters which had previously been within the exclusive jurisdiction of the department head and subject to the grievance procedure of the collective bargaining agreement. It urges that, as applied in this case, the ethics ordinance is in direct conflict with the collective bargaining agreement, and that the contract controls in the event of a direct conflict. The union contends that the ethics ordinance was misapplied when it was used to duplicate a discipline previously addressed and resolved by the employee's department.

The employer contends this unfair labor practice complaint was not filed in a timely manner. It asserts that the application of the investigative and/or charging procedures of the ethics code was not a new practice with respect to Local 17 members. It claims that the union is erroneously attempting to have subjective contractual intent impede the application of the ethics code procedures. The city also contends the union established a waiver by conduct, since it knew about the ethics processes but never sought to bargain them. As to the union's citation of RCW 41.56.140(2), the city contends the union either mistakenly claimed a violation or, alternatively, that no violation of that subsection was proven.

## DISCUSSION

### Timeliness of the Complaint

In order to obtain a remedy before the Commission under Chapter 391-45 WAC, a complainant must demonstrate that the acts complained of occurred no more than six months prior to the date the complaint

was filed.[6] As a statute of limitations, the six month period begins to run on the date that the adversely affected party has actual or constructive notice of the complained of conduct. Emergency Dispatch Center, Decision 3255-B (PECB, 1990).

The employer contends the union had both actual and constructive knowledge that all provisions of the ethics code applied to members of Local 17, including both rules of conduct and enforcement mechanisms, for years before the complaint was filed. The question is properly divided into two parts for analysis.

The "Interference" Claim -

The complaint form filed by the union in this matter cited a violation of RCW 41.56.140(1), which provides:

> 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; ...

The union's "interference" theory relates to the special status of "grievance procedures" in RCW 41.56.030(4) and the statutory right of a union to file and process grievances concerning employees in a bargaining unit that it represents under RCW 41.56.080. In City of Bellevue, Decision 3129 (PECB, 1989), it was held that an employer cannot lawfully insist that all grievances be signed by employees, because of the union's direct rights under the statute.

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[6] RCW 41.56.160 specifies:

> The Commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, that **a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the Commission**. ...

[Emphasis by **bold** supplied.]

In that case, the employer's refusal to allow the exclusive bargaining representative to file grievances on behalf of represented employees was found to interfere with the statutory duty of representation owed to the represented employee.

> When employees organize for the purposes of collective bargaining and choose an exclusive bargaining representative under Chapter 41.56 RCW, they establish a three-cornered relationship in which the employer and union become the parties to a contract and the employer is no longer at liberty to deal directly with the employees. The employer's proposal in this case that one party to the contract (the union) may only use the enforcement procedures provided for in the contract through a third party (the employees) when dealing with the other party to the contract (the employer), substantially limits the ability of the union to function as the representative for the entire bargaining unit, particularly where the issue at hand may not be unanimously supported, or even a popular one, among the employees.

City of Bellevue, Decision 3129, at page 10.

It is an interference with an employee's right to be represented by the union if the employer sets up its own hearing processes outside of the collective bargaining relationship. Thus, an independent "interference" violation could occur for each bargaining unit employee that is called up before the SEEC.

The employer's claim that this unfair labor practice complaint is untimely is without merit as to the "interference" claim, because the complaint was filed within six months following the issuance of the charges and hearing notice concerning employee X. The Examiner is not persuaded by the employer's contention that the statute of limitations period began to run when X and her union representative attended the investigatory interview conducted by Van Noy in March of 1992, and that the union knew then that the SEEC intended to assert jurisdiction to hear allegations concerning possible viola-

tions of the ethics code by a Local 17 member. The contacts in March of 1992 were of a preliminary nature, and did not foreclose the filing of an unfair labor practice complaint based on the official charges and notice of hearing.

The "Unilateral Change" Claim -

The union's arguments at the hearing and in its brief protested the establishment, without bargaining, of an extra-contractual discipline process on its members. The employer raised "waiver" and other defenses suitable to a "unilateral change" claim, without relying on the absence of any citation of RCW 41.56.140(4) in the union's complaint.[7] Responding to the arguments actually made by the parties, the Examiner finds that the record does not support a conclusion that the union had received clear notice, prior to June 23, 1992,[8] that city was intending to assess discipline on a bargaining unit member outside of the processes set forth in the collective bargaining agreement.

In 1988, a "pre-hearing resolution agreement" was executed between the administrator for the city's office of election administration and Engineering Department employee "Y", who was represented by Local 17. Charges had been brought, claiming that Y had violated the city's code of ethics by using city telephones and work time to solicit support for the candidacy of former Local 17 Business

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[7] RCW 41.56.140(4) makes it an unfair labor practice for an employer "To refuse to engage in collective bargaining." The duty to bargain imposed by RCW 41.56.030(4) includes an obligation on employers to make no changes of employee wages, hours or working conditions unless they give advance notice to the exclusive bargaining representative of the affected employees and, upon request, bargain in good faith with the union concerning both the decision and its effects. A "unilateral change" is a derivative violation of RCW 41.56.140(1), but it is fundamentally an affront to a union's collective bargaining rights that are protected by RCW 41.56.140(4).

[8] This date is six months prior to the filing of the complaint.

Manager Michael Waske for the elected office of "civil service commissioner". A technical violation was found there, and the employer points to the incident as support for its contention that the union always knew that the city asserted authority over union members through the ethics code. The cited settlement agreement states, however:

> Employee supervisors have the responsibility to determine whether or not such use interferes with the conduct of City business and, pursuant to SMC 4.04.230, take disciplinary action if necessary.

The citation of the Seattle Municipal Code (SMC),[9] together with the referral of disciplinary matters back to the employee's department contradicts a conclusion that the union was put on notice of the possibility of direct action in another forum.

It was just in 1991 that the board of ethics was replaced with the SEEC, and the position of elections administrator was replaced with

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[9] Seattle Municipal Code (SMC) 4.04.230, provides:

> Discipline and discharge.
> A. In order of increasing severity, the disciplinary actions which his/her supervisor may take against an employee for inappropriate behavior or performance include:
> 1. A verbal warning, which shall be accompanied by a notation in the employee's personnel file;
> 2. A written reprimand, a copy of which must be placed in the employee's file;
> 3. Suspension up to thirty (30) days;
> 4. Demotion;
> 5. Discharge.
> B. Which disciplinary action is taken depends upon the seriousness of the affected employee's conduct.
> C. **Suspension, demotion or discharge shall be approved by the employee's department head in writing.** An hourly employee may be suspended up to one (1) day without the department head's approval for emergency situations, in accordance with rules promulgated by the Director. [Emphasis by **bold** supplied.]

that of an executive director. No examples or patterns had been established as to what powers the SEEC and the new executive director would assert. Further, the subordination clause of the parties' collective bargaining agreement would have the contract prevail in the event of a conflict with the SMC. While the labor agreement expressly allows employees to initiate appeals of imposed discipline through either the contract's grievance procedure or the civil service commission's procedures, there is no evidence that discipline imposed by the SEEC could be appealed through either the contractual grievance procedure or the civil service commission.

The circumstances surrounding this particular case were also very ambiguous. Van Noy was hired after X's department head had completed his investigation, and had found no evidence of wrongdoing. At the same time Van Noy was interviewing X, she was also interviewing X's supervisor, Hundley, who was not a member of the bargaining unit. The union could reasonably have inferred that the interview of X related to an investigation of Hundley, or even of Zarker as the department head who cleared X of misconduct.

Noting that the right of X to union representation at the investigatory interviews with Van Noy stemmed from Section 4.3 of the collective bargaining agreement, the city reasons that the union should have known in March of 1992 that the SEEC was asserting a right to discipline X. The argument is not persuasive, however. The cited section guarantees employees the right to be accompanied by a union representative "when an employee covered by this agreement attends a meeting for purposes of discussing an incident which may lead to suspension, demotion or termination of that employee because of that particular incident". It is not clear that Van Noy ever specified to X that her union representative was present because of Section 4.3. Even if such a comment had been made, it would have been reasonable for the union to believe that, since its presence was invited because of the language of the collective bargaining agreement, any "suspension, demotion or

termination" resulting from the meetings would be meted out through the process established in the collective bargaining agreement. As such, the discipline would be subject to the grievance procedure, where the union would have been able to argue to an arbitrator that there was no just cause for discipline when the department head had previously cleared the employee of wrongdoing.

The parties' bargaining history and other language in the collective bargaining agreement provided a reasonable basis for the union to believe that its bargaining unit members were subject to only one disciplinary process. Bill Hauskins, who was the city's negotiator for Local 17 contracts since 1980, confirmed that an issue of the ethics commission's jurisdiction over employee discipline was never raised by either party in bargaining during his tenure in that role. Michael Waske testified that the contract discipline procedures were intended to be the exclusive way discipline could be brought against a bargaining unit member.

Based on the foregoing, the Examiner concludes that the union was not put on notice, prior to June 23, 1992, of a unilateral change of discipline procedures affecting the employees it represents. Van Noy's filing of the charges against X on October 13, 1992, was the first notice to the union that the SEEC, through its executive director, intended to take action contrary to the union's reasonable belief that the discipline process was controlled by the collective bargaining agreement. The unfair labor practice complaint filed in December of 1992 was timely vis-a-vis the city's assertion, in October of 1992, that the ethics ordinance established a parallel disciplinary procedure.

## Waiver

When given notice of an opportunity for bargaining, a union must make a timely request for negotiations, if it desires to pursue its rights under Chapter 41.56 RCW. Lake Washington Technical College,

Decision 4721-A (CCOL, 1995). Citing the "savings clause" of the parties' contract, Article 26,[10] the employer contends that it was incumbent upon the union to propose to bargain an exemption for its members from the enforcement provisions of the ethics code, if it felt the city charter was modified in a way which caused a conflict with express provisions of the agreement. Since the union did not request bargaining, the city argues that it waived any objection to the parallel disciplinary and ethics processes. A more reasonable interpretation of the facts is available, however.

Both parties to a collective bargaining agreement are protected by the stability and predictability that the contract establishes for wages, hours and working conditions. The record establishes that it was logical and reasonable for Local 17 to believe that Article 23, "Disciplinary Actions", of the labor contract established the only process for disciplining the members of its bargaining unit. If the city wanted to change that stable and predictable practice, it had a duty to inform the union that it believed the change in the city charter created a conflict which provided an occasion for a re-opening of bargaining through the savings clause. There was no such request by the city. It is well-established that the presentation of a unilateral change as a fait accompli relieves the opposite party of the duty to request bargaining. There was no waiver of bargaining rights by the union's conduct.

## Mandatory Subject of Bargaining

As noted above, the processing of this complaint was delayed pending the outcome of the Commission's deliberations in City of Pasco, Decision 4197-A, 4198-A (PECB, 1994). The Pasco Police

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[10] In Article 25 - Subordination of Agreement, the parties agreed that the employees of the city are governed by applicable city ordinances and the city charter except where they conflict with the express provisions of the collective bargaining agreement. Article 26 permitted either the city or the union to reopen negotiations.

Department had an established procedure of a "board of review" and a "point system" to classify police vehicle accidents and discharges of firearms. That board recommended disciplinary outcomes. When the police chief unilaterally abolished the board of review and instituted a new "management review" system to deal with the same matters, the Commission found that employer had failed and refused to bargain about the system that impacted the disciplinary response. The Commission noted, "Discipline can affect tenure of employment, which is the ultimate 'working condition' within the traditional scope of 'wages, hours and working conditions'". The Commission rejected an argument there that the recommendations did not affect discipline.

In City of Spokane, Decision 5054 and 5055 (PECB, 1995), that employer's city council implemented a "citizens review" process whereby citizens could appeal the police chief's finding of **proper** conduct by police officers. That employer asserted the actions of the citizens review panel did not constitute a working condition, since the panel could only recommend discipline, but it was found that the panel could publicly disclose information regarding unsustained allegations about bargaining unit members. Such allegations had previously been considered confidential material. The establishment of the citizens review panel was held to be a change of working conditions that should have been bargained prior to its implementation, since "the procedures subject bargaining unit members to institutionalized double jeopardy". The publicity aspect was found to so invade an employee's reasonable expectation of privacy that the panel was more of a working condition (and hence a mandatory subject of bargaining) than an exercise of the employer's entrepreneurial control.

In the present case, the actions of Van Noy in filing charges against a member of a bargaining unit led to a public hearing and could have led to discipline by the SEEC. Van Noy's actions thus impacted a mandatory subject of bargaining.

The Interference Charge

The City of Seattle would distinguish Pasco on the basis that the Seattle ethics code is 14 years old, and that no new regulation came as a surprise to the union. However, that is an incorrect view of the facts. The "subordination of agreement" clause in the parties' collective bargaining agreement was in effect even prior to the ethics code being adopted. Under that clause, federal and state laws prevail over any conflicting provisions of the collective bargaining agreement. The city charter and city ordinances are only paramount "**except where they conflict with the express provisions of this Agreement**." (Emphasis by **bold** supplied.) The city and the organization designated under state law as the exclusive bargaining representative of its employees had bargained under state law for one single method of imposing discipline on bargaining unit employees. There is no evidence that the union's previous interaction with the ethics code in the Y matter involved a public hearing. All that is in the record from the Y incident is a settlement agreement that specifies that employee supervisors have the responsibility to take any necessary disciplinary action. If Y had received discipline from his supervisor, it would presumably have been through the process established in the collective bargaining agreement and subject to the grievance procedure.

The city contends there are no express contract provisions that proscribe the investigatory or charging powers of the SEEC as against Local 17 members. It is true that there has been concurrent existence of disciplinary procedures in the collective bargaining agreement and the ethics code, but the analysis cannot end there. There are conflicts between the SEEC procedures and the discipline and grievance procedures set forth in the collective bargaining agreement:

* Under City of Spokane, supra, the public nature of the SEEC procedure is of major significance. In considering suits for damages in defamation cases, the Washington state courts have

recognized that the truth can never catch up with charges of wrongdoing, which makes public notice of the charges all the more damaging. In this case, charges involving allegations of moral turpitude could be brought, heard and dismissed in public view.

* The union participates in the selection of the decision-maker (arbitrator) under the collective bargaining agreement. In contrast, the SEEC panel is appointed solely by the employer.

* The SEEC claims authority to order an employee found guilty of an ethics violation to pay a monetary fine to the employer, while fines are not designated as a form of discipline available to the employer under the collective bargaining agreement between Local 17 and the city.[11]

By bringing charges against a bargaining unit member in a public hearing which could have resulted in discipline determined by the SEEC outside of the disciplinary and grievance procedures found in its collective bargaining agreement with Local 17, the employer has interfered with, restrained and coerced employee X and other members of the bargaining unit in the exercise of their right to be represented by an organization of their own choosing for the purposes of collective bargaining under Chapter 41.56 RCW. The employer has violated RCW 41.56.140(1) in this case.

Domination of Bargaining Representative

The complaints cited RCW 41.56.140(2), which provides that it shall be an unfair labor practice for a public employer:

> To control, dominate or interfere with a bargaining representative;

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[11] Although the fine imposed by the SEEC in December of 1992 involved an employee represented by a different union and covered by a different collective bargaining agreement, the informational pamphlet distributed to members of Local 17 indicates the SEEC can impose monetary sanctions on employees.

The union asserted that the SEEC did not recognize Local 17 as a party in interest in its charges against bargaining unit member X. Local 17 charges that the employer has, in that manner, circumvented the exclusive bargaining representative and the collective bargaining process. It further asserts that if the employer agreed to an exclusive discipline and grievance process in the contract, while at the same time failing to disclose that it intended that another forum have concurrent jurisdiction, then the employer bargained in bad faith.

The "circumvention" and "bad faith" theories advanced by the union would be suitable to a claim under RCW 41.56.140(4) which, as noted above, was not cited by the union in its complaint in this case. In City of Pasco, supra, the Commission wrote:

> The union's reliance on RCW 41.56.140(2) is misplaced in the case, because there is no assertion of interference in the union's internal affairs. There is no allegation, for example, that the employer has contributed financial support or other assistance to the union, or that it has interfered in any way with the internal workings of the employees' organization.

Local 17 has made no record that establishes that the city interfered in the internal workings of the union. This charge must be dismissed.

## Remedy

The standard remedies for an unfair labor practice violation are to restore the affected employee(s) back in the same position they would have enjoyed had there been no violation of the statute, and to require the violator to post notice to reassure the employee(s) that there will be no recurrence of the misconduct. Inasmuch as the charges against employee X were dismissed by the SEEC, the remedies in this case will necessarily be mostly prospective in

nature. The City of Seattle will be ordered to cease and desist from bringing bargaining unit employees before the SEEC for public hearings, and will be ordered to administer all discipline of bargaining unit employees through the discipline and grievance procedures set forth in the collective bargaining agreement between the employer and Local 17.[12]

The union has asked for an extraordinary remedy of attorneys fees, and such a remedy is available to repetitive violations of the law. The City of Seattle has previously been found guilty of unfair labor practices for attempting to maintain litigation processes outside of the collective bargaining process, so the union's request for attorney fees here presents a tempting option. In City of Seattle, Decision 809 (PECB, 1980), the city committed an unfair labor practice when it refused to allow a non-attorney union representative to appear before its civil service commission during a hearing on a reclassification grievance involving bargaining unit members. In City of Seattle, Decision 2773 (PECB, 1987), the city was found to have interfered with an employee in the exercise of collective bargaining rights when it advised the employee of rights under a civil service appeals procedure without making reference to parallel rights under the collectively bargained grievance procedure. Two years later, in City of Seattle, Decision 3066-A (PECB, 1989), the city was found to have violated RCW 41.56.140(1) when it notified employees of their right to appeal performance evaluations without advising them of their parallel right, under the collective bargaining agreement, to challenge the standards used to measure their performance. However, these violations span

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[12] This is not to say that the SEEC would be precluded from asking the supervisors of a bargaining unit employee to take disciplinary action that would be grievable under the collective bargaining agreement. Since the SEEC is an arm of the employer, however, it could only act within the employer side of the collective bargaining relationship. If an arbitrator ruled in favor of the employee, the SEEC would be estopped from any further proceedings.

a period of 15 years, the record does not establish a conscientious strategy to interfere with employees' rights, and the union itself acknowledged that its members are subject to the ethics code the SEEC was attempting to enforce. An order which does not include extraordinary remedies will hopefully suffice to alert this employer to keep its behavior legal in the future.

## 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 an appropriate bargaining unit of administrative support employees of the City of Seattle which includes customer service representatives in the employer's Engineering Department.

3. The parties to these proceedings have been parties to a series of collective bargaining agreements covering from at least 1977 through 1992. The subordination of agreement language in each contract called for city ordinances and the city charter to be paramount except where they conflict with express provisions of the labor agreement. The savings clause of each agreement stated that if the city charter was modified during the contract term in such a way as to conflict with an express provision of the agreement, either the city or the union could reopen to negotiate the affected provision. Since at least 1979, the collective bargaining agreements have included an article specifying disciplinary actions which the city may take against bargaining unit employees, as well as provisions for final and binding arbitration of grievances.

4. In 1980, the City of Seattle established a code of ethics for its officials and employees. Initially, that code of ethics was enforced by a board of ethics.

5. By an ordinance adopted in 1991, the board of ethics was replaced by a Seattle Ethics and Elections Commission (SEEC) having the authority to recommend discipline of a reprimand, suspension or discharge and/or a monetary fine up to $500. The same ordinance established the position of executive director for the SEEC.

6. During collective bargaining negotiations over the years, neither party raised the issue of the jurisdiction of the ethics board or the SEEC to discipline bargaining unit employees. The union did not waive its bargaining rights, where it reasonably believed that the "disciplinary actions" provisions contained in Article 23 of the parties' labor contract established the only process for disciplining the members of its bargaining unit.

7. As the party seeking a change from the status quo, the City of Seattle had a duty to inform the union if it believed a change in the city charter created a conflict warranting the reopening of negotiations through the savings clause of the parties' contract, with respect to the disciplinary actions article of the parties' contract. The employer made no such request.

8. An anonymous memo received by various City of Seattle officials on or about October 1, 1991, alleged that an employee in the bargaining unit represented by Local 17 had improperly obtained overtime assignments and/or improperly claimed pay for overtime work. Director Gary Zarker of the Engineering Department investigated the allegations and found no evidence of wrongdoing.

9. On October 13, 1992, the employee who had been accused of misconduct in the anonymous memo described in paragraph seven of these findings of fact, received a notice of charges filed by the executive director of the SEEC and notice of a public hearing before the SEEC. The employee was called as a witness by the executive director of the SEEC, and was subjected to adverse examination by that employer official at that hearing. The hearing was reported in two Seattle area newspapers. The SEEC dismissed the charges on the basis that the executive director of the SEEC failed to establish a prima facie case.

## CONCLUSIONS OF LAW

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

2. The compliant charging unfair labor practices filed in this matter in December of 1992 was timely under RCW 41.56.160, with respect to the claimed interference with employee rights in connection with the actions of the executive director of the SEEC to bring charges against a bargaining unit employee in October of 1992, and with respect to the public hearing held before the SEEC under claim of authority to discipline bargaining unit employees outside of the disciplinary and grievance procedures bargained in the parties' collective bargaining agreement.

3. The action of the executive director of the SEEC in filing charges against a member of the bargaining unit represented by Local 17, and the action of the SEEC in holding a public hearing under claim of authority to discipline the bargaining unit member, both affected the working conditions and tenure of employees in the bargaining unit represented by Local 17, and were within the mandatory scope of collective bargaining

under RCW 41.56.030(4) for which bargaining unit employees have a right to union representation under RCW 41.56.140(1).

4. The history of bargaining and collective bargaining agreements between the City of Seattle and Local 17 do not contain or constitute a clear and unmistakable waiver of the union's statutory bargaining rights under RCW 41.56.030(4) and 41.56.140(4) concerning discipline and hearing procedures to be conducted by the SEEC outside of the disciplinary provisions and grievance procedures contained in the parties' collective bargaining agreement.

5. By unilaterally establishing and implementing a process through the Seattle Ethics and Elections Commission that imposes, or has the potential to impose, discipline on bargaining unit members outside of the disciplinary and grievance procedures negotiated by the parties, the City of Seattle has interfered with, restrained, and coerced public employees in the exercise of their rights guaranteed by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, and has committed, and is committing, unfair labor practices under RCW 41.56.140(1).

6. The union has failed to sustain its burden of proof to establish that the City of Seattle interfered with the internal affairs of the union, so that no violation of RCW 41.56.140(2) has been established in this matter.

## ORDER

I. The City of Seattle, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

a. Failing and refusing to bargain collectively, in good faith, with International Federation of Professional and Technical Engineers, Local 17, regarding disciplinary procedures that affect bargaining unit members.

b. Filing charges or holding public hearings before the SEEC for the purpose of disciplining bargaining unit employees outside of the discipline and grievance procedures set forth in the collective bargaining agreement between the City of Seattle and Local 17.

c. 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. Reinstate the disciplinary procedure in the collective bargaining agreement as the only manner in which bargaining unit members can receive discipline.

b. Upon request of Local 17 or an affected employee, withdraw any notice of hearing or discipline imposed upon bargaining unit employees by the SEEC on or after October 13, 1992, and re-impose discipline upon such employees only in conformity with the collective bargaining agreement which was in effect at the time of the alleged wrongdoing by the employee.

c. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto marked "Appendix". Such notices shall be duly signed by an authorized representa-

tive of the respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

d. 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 complainant with a signed copy of the notice required by the preceding paragraph.

e. 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.

II. The allegation that the City of Seattle violated RCW 41.56-.140(2) is DISMISSED.

Entered at Olympia, Washington, on the 20th day of November, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Katrina I. Boedecker

KATRINA I. BOEDECKER, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

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 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 reinstate the disciplinary procedure in the collective bargaining agreement as the only manner in which bargaining unit members can receive discipline.

WE WILL, upon request of the International Federation of Professional and Technical Engineers, Local 17, or an affected employee, withdraw any discipline imposed upon bargaining unit employees under the SEEC procedure on and after October 13, 1992, and re-impose discipline upon such employees only in conformity with the collective bargaining agreement which was in effect at the time.

WE WILL give notice to the International Federation of Professional and Technical Engineers, Local 17, and, upon request, bargain collectively with that organization concerning any proposed alteration of the discipline system.

WE WILL NOT, in any 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: _____

CITY OF SEATTLE

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: (360) 753-3444.