STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 77, Complainant,	)	CASE 20776-U-06-5289
	)	DECISION 9938-A - PECB
	)	CASE 20894-U-07-5328
vs.	)	DECISION 9939-A - PECB
CITY OF SEATTLE, Respondent.	)	DECISION OF COMMISSION

Robblee Brennan & Detwiler, by *Kristina Detwiler*, Attorney at Law, for the union.

City Attorney Thomas A. Carr, by *Paul A. Olsen*, Assistant City Attorney, for the employer.

This case comes before the Commission on a timely appeal filed by the City of Seattle (employer) and a timely cross-appeal filed by the International Brotherhood of Electrical Workers, Local 77 (union), each seeking review and reversal of certain Conclusions of Law and Order issued by Examiner Karyl Elinski.[1]

ISSUES PRESENTED

1. Did the employer fail to maintain the dynamic status quo in violation of RCW 41.56.140(1) or (4) when it did not grant the bargaining unit employees an ordinance-based wage increase applicable to unrepresented employees?

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[1] *City of Seattle*, Decision 9938 (PECB, 2007). The parties do not appeal the Examiner's conclusion that the employer committed an unfair labor practice when it unilaterally created a new position with a different work schedule without providing the union notice and an opportunity to bargain.

2. Did the employer discriminate against or interfere with bargaining unit employees in violation of RCW 41.56.140(1) or (3) when it did not grant the employees an ordinance-based wage increase applicable to unrepresented employees?

3. Did the employer refuse to bargain in violation of RCW 41.56.140(4) when it declined the union's request to bargain the decision and the effects of the decision to discharge Doug Knorr, a bargaining unit employee.

For the reasons set forth below, we affirm the Examiner's conclusions that the employer did not commit any unfair labor practices when it did not grant bargaining unit employees the ordinance-based wage increase applicable to unrepresented employees. We reverse the Examiner's conclusion that the employer refused to bargain in violation of RCW 41.56.140(4) by declining the union's request to bargain the decision and the effects of the decision to discharge Doug Knorr.

STANDARD OF REVIEW

This Commission reviews conclusions of law, applications of law, and interpretations of statutes de novo. We review findings of fact to determine whether they support the Examiner's conclusions of law.[2] *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002).

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[2] The union filed two separate unfair labor practice complaints which were consolidated for hearing. The parties determined there were no material disputed facts and filed stipulated facts in lieu of holding a hearing. The Examiner incorporated the stipulated facts into her decision as the Findings of Fact.

ANALYSIS

Applicable Legal Standards

Once a union has filed a representation petition, the employer must maintain the status quo and must not take unilateral action regarding wages, hours, or working conditions. *Snohomish County Fire District 3*, Decision 4336-A (PECB, 1994); WAC 391-25-140(2). If the Commission certifies the union as the exclusive bargaining representative, the obligation to maintain the status quo regarding all mandatory subjects of bargaining continues until the parties bargain a change to the status quo. We determine the status quo as of the date the union filed the representation petition.

In addition to the above "general status quo" obligation, Commission precedent also requires employers to maintain the "dynamic status quo." This "dynamic status quo" concept recognizes that occasionally the status quo is not static and the employer needs to take action to follow through with changes that were set in motion prior to the union filing a representation petition. *King County*, Decision 6063-A (PECB, 1998). The Commission in *King County* explained:

> If expected by the employees, changes which are part of a "dynamic status quo" do not disrupt a bargaining relationship or undermine support for a union. *NLRB v. Katz*, 369 U.S. 736 (1962). *See also Spokane County*, Decision 2377 (PECB, 1986). Thus, where wage or benefit increases are previously scheduled, it would be unlawful to withhold them just because a representation petition is filed. *See Emergency Dispatch Center*, Decision 3255-B (PECB, 1990). Conversely, if changes the employees may view as negative merely carry out a "dynamic status quo" (*i.e.*, actions consistent with previously-existing policies and practices), no violation will be found.

Operation of the dynamic status quo ensures that petitions do not block routine, non-discretionary changes to employee working conditions.

This Commission enforces the duty of employers and unions to bargain about mandatory subjects through RCW 41.56.140(4) and 41.56.150(4), and processes unfair labor practices under RCW 41.56.160 and Chapter 391-45 WAC. Parties asserting unfair labor practices bear the burden of proof. WAC 391-45-270. Where a complainant alleges a party committed a unilateral change of a mandatory subject of bargaining, the complainant must establish the existence of a status quo and a change in the wages, hours, or working conditions. *METRO (Amalgamated Transit Union, Local 587)*, Decision 2746-B (PECB, 1990).

ISSUES ONE AND TWO: ORDINANCE-BASED WAGE INCREASE

The International Union of Operating Engineers (IUOE) formerly represented the employer's Construction and Maintenance Equipment Operators (CMEO). The CMEOs decertified the IUOE in April 2005. On March 29 and April 28, 2006, the union filed petitions for representation with the Commission to represent the CMEOs. On July 5, 2006, the Commission certified the union as the exclusive bargaining representative.

In August of 2005, almost one year before the Commission certified the union as the exclusive bargaining representative, Seattle Mayor Greg Nickels signed Ordinance No. 121887 establishing cost-of-living wage increases for unrepresented employees retroactively to December of 2004 and prospectively for December of 2005 and December of 2006. In December of 2004, IUOE had represented CMEOs and the employees did not receive the ordinance-based retroactive wage increase. In December of 2005, the CMEOs were unrepresented and received the ordinance-based wage increase.

In December of 2006, the union represented the CMEOs and the parties had not completed negotiations for a bargaining agreement. The employer did not grant the employees the ordinance-based wage

increase. Prior to December of 2006 and before commencing bargaining, the employer offered to enter into an agreement to allow for negotiations of retroactive wages.[3]

Application of Legal Standards

The union argues that the employer cannot withhold the ordinance-based wage increase from the bargaining unit employees because it is part of the dynamic status quo. The union also asserts that restricting the increase to non-represented employees is discriminatory and coercive, alleging that "Employees are essentially informed by the mere maintenance of the ordinance that if they choose to be represented by a labor organization, they will lose certain benefits." In support of its position, the union cites National Labor Relations Board (NLRB) cases.[4] The union's arguments find no support in the facts of this case, Commission precedent, or NLRB precedent. The ordinance is neither part of a dynamic status quo nor is it discriminatory or coercive.

Status Quo

With respect to scheduled pay increases, when an employer creates an expectation that employees will receive future increases, the increases may become part of a dynamic status quo that the employer must maintain until it and the union negotiate a change. In this case, the employer did not create an expectation that represented employees would receive the ordinance-based increase. On its face, the ordinance applies only to employees who are not represented by unions. Over the course of the life of the ordinance, the

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[3] The employer's offer was consistent with *Christie v. Port of Olympia*, 27 Wn.2d 534 (1947).

[4] This Commission may rely upon National Labor Relations Act precedence where the state collective bargaining laws that this Commission administers are similar. *In re WAC 391-95-010*, Decision 9079 (2005) *citing Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24 (1984).

employees only received the ordinance-based wage increase in December of 2005, when they were not represented.

The employer maintains discretion to set wages for unrepresented employees and, in this situation, chose to exercise its discretion by adopting a cost-of-living increase effective for three years. The ordinance effectively distinguishes between represented and unrepresented employees and preserves the union's right to negotiate pay increases through the collective bargaining process. Although the ordinance addressing unrepresented employees does not specifically state that represented employees negotiate their increases, the ordinance did not need to be so explicit. This ordinance is restrictive in its application and, as such, cannot become part of a dynamic quo for represented employees.

In *Snohomish County Fire District 3*, Decision 4336-A, the union argued that a cost-of-living increase was a key element in the employees' ongoing compensation package. The Commission disagreed, ruling that the employer would have committed an unfair labor practice had it granted the cost-of-living pay increase outside of the bargaining process. As the Examiner in *King County Library System*, Decision 9039 (PECB, 2005), stated:

> Insofar as general wage increases are concerned, once the status quo obligation commences, employees must look to negotiations between their union and employer for such wage increases, not to any further unilateral action by the employer.

In this case, the employer maintained the status quo by only applying the terms of the ordinance to unrepresented employees and by allowing represented employees to negotiate pay increases through the collective bargaining process.

Conclusion

The Examiner correctly concluded that the employer did not refuse to bargain or otherwise violate RCW 41.56.140(1) or (4) when it did not grant the ordinance-based wage increase to represented employees.

Discrimination, Interference, Coercion

The Examiner's decision accurately details Commission precedent on discrimination and interference and we will not repeat the overview of the law here. The findings of fact present no support for the union's assertion that the employer's ordinance is discriminatory, coercive, or interferes with the protected rights of employees or the union.

With respect to the claim of discrimination, the union cannot establish that the employer discriminatorily deprived bargaining unit employees of a right or benefit. The employees lost nothing as a result of the employer's application of the ordinance, an ordinance which the employer passed almost one year prior to the union's certification. The union maintained the right to negotiate wage increases for employees comparable to, or higher than, the wage increase set by ordinance for unrepresented employees.

With respect to the interference claim, the record contains no evidence that employees could reasonably perceive the employer's actions as a threat of reprisal or force associated with union activity. In *Lynden School District*, Decision 6391 (PECB, 1998), the employer gave unrepresented employees holiday and vacation benefits at a time when a bargaining representative was organizing a unit of unrepresented part-time employees who were advocating for such benefits. The union alleged that the extension of vacation and holiday benefits to unrepresented employees constituted unlawful interference with the union's organizing campaign. The

Examiner found no basis for the union's allegations and dismissed the complaint, noting that there was no legal impediment to the employer taking unilateral personnel actions regarding its unrepresented employees.

In this case, the employer did not violate RCW 41.56.140(1) or (3) by giving unrepresented employees the ordinance-based wage increase and allowing represented employees to negotiate their wage increases through the collective bargaining process. Had the employer done otherwise, it would have committed an unfair labor practice.

Conclusion

The Examiner correctly concluded that the employer did not discriminate against or interfere with employee rights by not granting the ordinance-based wage increase to represented employees.

ISSUE THREE: DISCHARGE OF DOUG KNORR

The employer terminated Doug Knorr's employment effective October 22, 2006. The employer took the action pursuant to the Seattle Municipal Code and City Personnel Rules. At the time of the employer's actions, the union had been certified as the exclusive bargaining representative but the parties had not negotiated a bargaining agreement. The employer did not provide the union notice or an opportunity to bargain the discharge decision or the effects of the decision. The union requested to bargain the decision and the effects and the employer refused. The Examiner concluded that the employer's actions constituted a refusal to bargain in violation of RCW 41.56.140(1) and (4). We disagree.

Application of Legal Standards

The union alleges that the employer failed to provide the union with notice and an opportunity to bargain before it changed the

status quo by discharging Knorr. The union argues that Knorr's employment was part of the status quo and that the employer was not allowed to change an individual's employment status without providing advance notice to the union and an opportunity to bargain. Furthermore, the union asserts that the employer committed an unfair labor practice by refusing the union's requests to bargain the discharge decision and the effects of the decision.

Maintenance of Status Quo

Employee discipline is a mandatory subject of bargaining. As a result, an employer cannot revise existing, or adopt new, disciplinary standards without providing the union notice of the proposed changes and an opportunity to bargain. *City of Yakima,* Decision 3503-A (PECB, 1990), *aff'd* 117 Wn.2d 655 (1991).

Under Commission precedent, however, individual disciplinary determinations are not mandatory subjects of bargaining. *City of Auburn,* Decision 4896 (PECB, 1994). An individual's employment status is not part of the status quo that employers must maintain from the time the union files a representation petition until the parties complete contract negotiations. In *City of Auburn,* Decision 4896, the union alleged the employer committed an unfair labor practice when it refused to bargain before unilaterally suspending an officer for two days without pay during a "hiatus" between bargaining agreements. In his dismissal of the complaint, the Executive Director stated that the fact that the general topic of discipline is a mandatory subject of bargaining:

> does not transform the contemplated discipline of a single bargaining unit member into a mandatory subject of bargaining. No authority has been cited or found for the proposition that a public employer subject to Chapter 41.56 RCW is required to negotiate with the exclusive bargaining representative of its employee before imposing discipline on him or her.

While individual disciplinary actions are not mandatory subjects of bargaining, we continue to hold that an employer must maintain the discipline standards and appeal processes existing at the time a union files a petition for representation until the parties negotiate standards and processes through collective bargaining. The existing standards and processes represent the status quo and the parties must negotiate any changes to the status quo.

The union points to NLRB cases in support of its position that the employer must negotiate individual disciplinary action. As previously noted, this Commission may apply NLRB case precedent in some situations when we construe Washington's collective bargaining laws, there are cases where we draw policy distinctions and elect not to apply NLRB precedent. This is such a case.

NLRB cases address private sector employment relationships where employers often provide limited, if any, standards for disciplinary actions or appeal procedures, absent negotiated bargaining agreements. Often, private sector employers exercise wide discretion in disciplinary matters and offer employees no procedural protections from arbitrary employer actions. For example, in *Monterey Newspaper Inc.*, 2003 WL 259023 (N.L.R.B. Div. of Judges, 2003), an employer unilaterally disciplined employees. The union objected to the discipline, demanded bargaining over the decision to discipline the employees, and filed an unfair labor practice complaint with the NLRB. An administrative law judge held that NLRA case precedent does not suggest that the NLRB intended to encumber an employer's day-to-day operations by subjecting the managerial minutiae or individual discipline to pre-imposition union scrutiny, and employers are generally afforded considerable discretion in imposing discipline. However, the ALJ noted that there may be an obligation for an employer to confer with the union after discipline is implemented regarding discipline of the employees.

In contrast, most of Washington's public sector employers generally provide non-represented employees some safeguards from arbitrary employer actions, including procedural and substantive due process rights. Although the safeguards and employee protections may not be as extensive as those the parties eventually negotiate in their collective bargaining agreements, the safeguards and protections do represent a different "status quo" for Washington's public sector employees that we find warrants the Commission taking a path different from the NLRB.[5]

In this case, at the time the union filed its petition, section 4.04.260 of the Seattle Municipal Code applied to all regular employees, including the CMEOs, who had been aggrieved.[6] The employer maintained the status quo by applying the just cause standard and appeal process from the Seattle Municipal Code when it discharged Knorr. The parties stipulated that Knorr was terminated pursuant to the Seattle Municipal Code and the City Personnel rules and the union presented no evidence that the employer changed the standards for discipline or otherwise unilaterally changed any step of the discipline or appeal process. The Examiner stated:

> It is undisputed that the disciplinary action taken against Knorr was consistent with the employer's discipline practices as they existed prior to the certification of this bargaining unit. There is no allegation that the employer made unilateral changes in its disciplinary practices or that its exercise of discretion was motivated by anti-union animus.

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[5] We are unable to locate any case precedent from the other state labor relations agencies ruling upon this issue.

[6] Under 4.04.260(c), the only time an employee cannot pursue an appeal to the civil service commission is when that employee agrees to submit the same grievance to binding arbitration under the terms of a collective bargaining agreement. Exhibit A.

Despite this, the Examiner articulated a variety of concerns with the existing discipline process. For example, the Examiner erroneously concluded that "notably absent from the civil service rules is the right to have union representation at any stage of the disciplinary proceedings."[7] The Examiner expressed another concern that the union had no input into the just cause standard. It is not clear how these concerns relate to the Examiner's ultimate conclusion that the employer unlawfully refused to bargain the discharge decision and its effects. Regardless, these concerns lack relevance to the issue before the Commission.

The union's briefing cites to our decision in *Asotin County*, Decision 9549-A (PECB, 2007), as support for its position that the employer unilaterally changed the status quo without bargaining. In *Asotin County*, the union alleged the employer unilaterally changed the just cause standard applicable to employee discipline when it discharged an employee. In that case, we stated:

> During contract negotiations, substantial changes to the terms and working conditions of employees without first bargaining to a lawful impasse has a detrimental effect on the terms and conditions of employment. This is true even where isolated instances of change occur because alterations of the status quo tend to create confusion and uncertainty regarding the floor for bargaining. Furthermore, a unilateral change in the status quo that results in an employee's termination has a substantial impact on employees, and isolated instances will be closely scrutinized.

The case before us does not involve a change in applicable standards resulting in an employee's termination as was alleged in *Asotin County*. Again, in this case, the employer applied the

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[7] The Seattle Municipal Code provides the opportunity for employees to be represented at hearings by a person of their choosing.

existing disciplinary standards and appeal process; the employer made no change to the status quo.

Refusal to Bargain

Upon learning of Knorr's discharge, the union submitted a letter to the employer requesting to bargain "both the employer's decision and the impact of said decision to terminate the employment of Doug Knorr...." The employer responded in writing, refusing to bargain. The employer noted that because a bargaining agreement had not yet been negotiated, "the remedy available to Mr. Knorr regarding his termination is the same remedy that was available to him prior to the certification of Local 77. The Personnel Rules of the City are available to Mr. Knorr to appeal his termination."

The union responded by letter arguing that discharge decisions fall within the bargaining obligation and reiterating its request to bargain both the decision and the impacts. In response, the employer reiterated its prior positions, referenced the commencement of the parties' bargaining, and stated: "I would expect that at the conclusion of contract negotiations there will be an agreed-upon grievance procedure in place that will be available for use by Local 77 and its members to address future disciplinary matters."

The Examiner ruled that the employer had an obligation to bargain both the employer's decision to discharge Knorr and the effects of the decision. We disagree. As detailed above, we hold that individual disciplinary decisions are not mandatory subjects of bargaining. The employer's refusal to bargain its decision to discharge Knorr was not an unfair labor practice. Additionally, we hold that under these circumstances, the employer was not required to bargain the effects of the discharge decision. Knorr maintained the right to appeal the discharge decision through the existing Seattle Municipal Code. Through that appeal process, the Seattle

Civil Service Commission may affirm, reverse or modify any personnel decision, including Knorr's discharge, and any appeal issued by the Seattle Civil Service Commission may be appealed to superior court. Exhibit B. That system represented the status quo. Although it would not have constituted an unfair labor practice for the employer to bargain with the union in response to the union's request, it was not required to do so.

The Examiner stated that "termination of Knorr without bargaining effectively rendered the union impotent in its relationship with the employer in disciplinary matters." This is inaccurate. The employer must negotiate with the union, per the union's request, concerning discipline standards and an appeal or grievance process for the collective bargaining agreement. Depending upon the language the parties negotiate, the union may play a significant role on behalf of employees in future disciplinary actions. During the period of time before the parties develop their bargaining agreement, the status quo prevails. The role the union may play in such situations depends upon the circumstances in each case. Based upon the record in this case, the Seattle Municipal Code allows employees to be represented at hearings by a person of their choosing.

Conclusion

The employer had no duty to bargain its decision to discharge Knorr or the effects of its decision. As a result, the employer did not refuse to bargain in violation of RCW 41.56.140(4).

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact issued by the Examiner are AFFIRMED and adopted as the Findings of Fact of the Commission.

2. The Conclusions of Law issued by the Examiner are AFFIRMED except for Conclusion of Law 5[8] which is amended to read as follows:

> 5. The City of Seattle had no duty to bargain its decision to discharge Knorr or the effects of its decision. As a result, it did not commit a refusal to bargain violation when it took action as described in Findings of Fact 10, and 12 through 16.

3. The remedial order issued by the Examiner is AFFIRMED and adopted by the Commission, except parts 1(b) and 2(c) of the order which are eliminated.[9]

Issued at Olympia, Washington, the 19th day of February, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

THOMAS W. McLANE, Commissioner

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[8] The Examiner's decision inadvertently included two "Conclusions of Law 4"; the existing paragraph four remains unamended, and we have renumbered the second paragraph number four as paragraph number five.

[9] Pursuant to a recently adopted procedure, the Commission's compliance officer will provide the employer with the proper Notice as part of the compliance process.

BRADBURN, COMMISSIONER (Concurring in Part, Dissenting in Part): I concur with the majority's analysis and conclusions on Issues 1 and 2. For reasons of public policy and my view of the law, I must respectfully dissent from the majority's analysis and conclusion on issue 3. I think our precedent, the policies served by our statutes, and relevant National Labor Relations Act precedent required the employer in this case, upon the union's demand, to negotiate the effects of bargaining unit member Doug Knorr's termination.

The majority opinion fully sets out the facts of this case. In considering Issue 3 I wish to focus on the following:

1. The union was certified on July 5, 2006 by this agency as representative of the bargaining unit.

2. Knorr's employment was terminated October 20, 2006.

3. The employer rejected the union's November 8, 2006 demand to bargain the decision and effects of Knorr's termination.

4. The first bargaining session was held November 17, 2006.

Commission Precedent and Public Policy

This case presents an issue of first impression for this agency. I find some guidance in the Commission's existing precedent directing public employers and unions representing public employees to communicate openly and fully with each other, as required by statute and public policy. *See, e.g., Snohomish County*, Decision 9834-B (PECB, 2008); *City of Redmond*, Decision 8879-A (PECB, 2006).

The Legislature enacted Chapter 41.56 RCW in order to "promote the continued improvement of the relationship between public employers and their employees," RCW 41.56.010, by establishing the possibil-

ity of relationships that require joint discussion and agreement on wages, hours, and working conditions. The fundamental assumption underlying the statute is that issues are better and more completely resolved if all interests are represented in the discussions and decisions.

Therefore, once public employees choose to be represented by a union, their employer is obliged to deal with that union on mandatory subjects of bargaining. The fact that a party can legitimately refuse to agree to a proposal does not entitle that party to flatly refuse to discuss the proposal and the issue the proposal addresses. A party must explain the reasons for its reluctance so that the proposing party can modify its proposal to accommodate those concerns. We have explained this obligation numerous times. *See, e.g., Snohomish County*, Decision 9834-B. Many of the cases that come before us would likely never have been filed if the parties had chosen to talk to each other about the issues bothering one or the other.

I am concerned that the majority's decision on Issue 3 creates an incentive for public employers to delay bargaining on an initial contract for as long as possible so they can postpone having to deal with the union, and maintain unfettered discretion, as long as possible.[10] Representation in a disciplinary situation is one of the primary reasons employees seek a union. The majority's decision places termination, the harshest level of discipline, out of bounds for union representation until an initial contract is negotiated. A public employer resistant to having to deal with a union will be able to discipline as many individuals as desired so long as negotiations are continuing. And Chapter 41.56 RCW imposes

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[10] My focus is on employers in this case since they have the authority to terminate bargaining unit members.

no deadlines for parties to reach agreement on a contract.[11] How many employees can be disciplined in such a situation before the majority is willing to find an employer has violated the law?

I am also uncomfortable that the majority is allowing the employer to undermine the union by refusing to deal with it on an issue where most employees would expect to be represented. Members of a newly certified bargaining unit are naturally focused on the progress of negotiations and expect to see their new union vigorously representing them. In this case the employees saw a fellow employee terminated more than three months after certification and the union's attempt to represent him flatly rebuffed by the employer.

I accept, for the purposes of this case only, the majority decision that disciplining a single bargaining unit member is not a mandatory subject of bargaining.[12] However, we have frequently held that, if the effects of a decision on a non-mandatory subject have sufficient impact on bargaining unit members, those effects must be bargained upon request by the union. *King County*, Decision 9495-A (PECB, 2008), *citing Grays Harbor County*, Decision 8043-A (PECB, 2004). I conclude the effects of being terminated are sufficiently important to the employee that the employer must negotiate them with a union so demanding.[13]

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[11] An unfair labor practice complaint arguing the employer is bargaining in bad faith takes time to be processed, can be appealed by right to the Court of Appeals, and the remedy usually is an order to return to the table.

[12] I note the majority relies on an Executive Director decision here, not a Commission decision.

[13] Matters which could be negotiated include lesser discipline, the wording of references, handling of available leave, inclusion of the employee's response in the personnel file, apologies, and so forth.

In reaching its decision, the majority has relied on the fact that Knorr did not use the civil service appeal process.[14] I think the terminated employee's decision not to use the civil service appeal process is irrelevant to the third issue. This case is not about the rights of a bargaining unit member in the hiatus between certification and agreement on a new contract.[15] This case is about the rights and obligations of certified unions and public employers. Knorr's failure to use the existing civil service appeal process cannot limit the rights of the union that represents him.

Sister Agency Precedent

Agency staff asked sister agencies in the United States and Canada whether they had decided the issue in this case, and received no positive responses.

National Labor Relations Board Precedent

When the statute we are construing is similar to the National Labor Relations Act, we are directed to consider the approach of the National Labor Relations Board. *International Association of Fire Fighters, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978).

Both Chapter 41.56 RCW and the NLRA are established to protect and enforce employee free choice about whether or not to be represented

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[14] The parties to this case stipulated that "[t]he City of Seattle maintains a civil service system that applies to its unrepresented employees." Stipulated Fact V. We have been provided with part of the Seattle Municipal Code and part of the Civil Service Rules; nothing in either of these exhibits casts doubts on the parties' stipulation. Civil service review is by operation of law available to bargaining unit members as part of the status quo when the petition was filed.

[15] I note my concern that the majority decision may encourage parties to delay agreement on a new contract in order to exercise discretion in ways that might not be permitted once a contract is signed.

by a union. Once employees in an appropriate bargaining unit choose a union, both this Commission and the Board require their employer to negotiate with the representative over wages, hours, and working conditions. RCW 41.56.100; see also Federal Way School District, Decision 232-A (EDUC, 1977). Both this Commission and the NLRB require an employer to maintain the status quo existing at the time of the election until different provisions are negotiated by the employer and certified union. WAC 391-25-140; *Whatcom County*, Decision 8245-A (PECB, 2004).

The issue in this case has been discussed in a 2003 decision by NLRB Administrative Law Judge Lana Parke which was not appealed. In *Monterey Newspapers. Inc.*, 2003 WL 259023 (N.L.R.B. Div. of Judges, 2003), a successor employer recognized the incumbent union and lawfully established initial terms and conditions of employment. These did not include a just cause requirement for discipline or an independent review of the employer's disciplinary decisions. The union demanded an opportunity to bargain over the fact, and type, of discipline before it was imposed. The employer rejected the union's contention and continued to exercise total discretion in imposing discipline on bargaining unit employees.

The NLRB General Counsel and the union argued to ALJ Lana Parke that the broad discretion exercised by the employer obligated it to negotiate on demand before disciplining a bargaining unit member. The employer contended it was only exercising its disciplinary rules.

Ms. Parke found no "conclusive direction" in Board precedent on the General Counsel's contention. *Monterey Newspapers, citing Oneita Knitting Mills, 205 NLRB 500* (1973). Ms. Parke differentiated continuation of an existing program from implementation of an existing program in a manner determined by employer discretion. In

that case, the employer had a merit increase program before the employees chose to be represented. After certification, the employer gave merit increases and exercised total discretion in their amount and timing. The Board held the employer violated section 8(a)(5) because the union was entitled to negotiate over such merit increases.

Ms. Parke concluded in *Monterey Newspapers* that the employer was not obligated to inform the union and negotiate the fact and amount of proposed discipline before it was imposed. She noted that the employer had regularly accepted "its post-implementation obligation to confer with the Union, upon request, concerning the discharges, discipline, or reinstatement of its employees." This is the same request made in this case by the union and rejected by the employer.

Adoption and Application of Legal Standard

I find it appropriate in this case of first impression to follow what little NLRB precedent exists. Under both statutes, certification of a union triggers a set of rights and obligations for both parties. The union has the right and obligation to represent the bargaining unit. The employer has the obligation to negotiate with the union issues which are mandatory subjects of bargaining. An employer risks being found to have acted unlawfully when it flatly rejects a union's demand for bargaining because it denies the union exercise of its statutory rights and it unlawfully creates and emphasizes the perception of union ineffectiveness and weakness, and the perception of the employer as all powerful and without limits on its actions.

The extent of employer discretion is an important element in the NLRB's consideration of whether an employer violates the law by acting unilaterally before an initial contract is negotiated. In

the present case, the employer's exercise of disciplinary discretion is limited by the review available from the Civil Service Commission, an independent body that possesses the authority to reverse the termination. This limitation is another reason I conclude only the effects of the employer's termination of Knorr must be negotiated with the union.

In addition, I find in the present case that the employer has refused to negotiate with the union after the termination, contrary to the behavior of the newspaper owner in the private sector case discussed above. Here, the employer denied the union its statutory rights, and resisted the union's exercise of its obligations toward its bargaining unit members, by flatly rejecting the union's demand to bargain the effects of Knorr's termination. I respectfully dissent from the majority's analysis and conclusion on this issue.

Pamela G. Bradburn

PAMELA G. BRADBURN, Commissioner