STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2819, Complainant, vs. KITSAP COUNTY FIRE DISTRICT NO. 7, Respondent.	)	CASE NO. 6776-U-87-1362 DECISION 2872 - PECB FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

Gary Faucett, President, appeared on behalf of the complainant.

Richard Gross, Attorney at Law, appeared on behalf of the respondent.

On February 23, 1987, International Association of Fire Fighters, Local 2876 (IAFF) filed a complaint with the Public Employment Relations Commission, alleging that the Kitsap County Fire District No. 7 had committed unfair labor practices in violation of RCW 41.56.140(4), by unilaterally altering the working conditions of employees represented by the union. Specifically, the employer is accused of establishing policies on residency and use of tobacco, without giving notice to or bargaining with the union. The employer submitted a hearing brief. A hearing was held in the above-entitled matter at Port Orchard, Washington, on June 15, 1987, before William A. Lang, Examiner. The parties waived filing of post-hearing briefs.

FACTS

International Association of Fire Fighters, Local 2819 (Union) is the exclusive bargaining representative of all regular non-supervisory uniformed personnel employed by Kitsap County Fire District 7 (employer). The union and employer were parties to a collective bargaining agreement signed on December 19, 1985 for the period January 1, 1986 through December 31, 1986. On October 13, 1986, the parties began negotiations on a successor collective bargaining agreement.

While the negotiations for a successor agreement were ongoing, the employer's Fire Chief, Bill Meigs, issued a memorandum dated December 5, 1986, inviting interested parties to give input on several proposed resolutions to be considered at a meeting of the employer's Board of Fire Commissioners to be held on January 15, 1987. The two resolutions provided:

1. That new employees hired after April 1, 1987 not be allowed to use tobacco products either on or off duty. Violations of this policy would be cause for dismissal.

2. That new hires and current employees who move after April 1, 1987 be required to maintain their residences within thirty (30) minutes driving time from employer's headquarters. Violations of this policy would be cause for dismissal.

On December 10, 1986, Gary Faucett, President of Local 2819, wrote to Commissioner Robert W. Yingling, a member of the fire district board, demanding to bargain on the two resolutions. There was no response from the employer.

The parties reached agreement in negotiations for a successor agreement on issues other than the tobacco use and residency subjects covered by the December 10, 1986 bargaining demand. On January 8, 1987, Faucett again wrote to Yingling, this time

declaring that the union would withhold signing of the recently negotiated collective bargaining agreement, unless the fire district bargained on the tobacco use and residency policies.

On January 20, 1987, Roger Wiley, Chairman of the Board of Fire Commissioners, informed Faucett that the resolutions on tobacco use and residency were matters of district policies and "not items in the contract." Wiley welcomed input from the union at meetings of the employer's board.

The resolutions on tobacco use and residency were adopted, in modified form, by the employer's board at its meeting on February 19, 1987. The final resolutions deleted references to disciplinary actions for violations of the policies and limited their application to new hires. The tobacco use resolution was further modified to re-state a pre-existing prohibition on smoking in fire equipment, and to expand a pre-existing prohibition on smoking in dormitories to apply to all of the employer's buildings. As adopted, the resolution on tobacco use was prefaced by statements concerning added costs and healthy environment, and stated, in relevant part:

> 1. All employees of South Kitsap Fire Protection District #7 hired after the 1st day of March, 1987, shall not use tobacco products;
>
> 2. All buildings and apparatus under the control of the District shall be non-smoking areas and be clearly posted as "non-smoking";

The resolution on residency was prefaced with concerns about timely responses to emergencies, and stated, in relevant part:

> ... all employees of South Kitsap Fire District #7 hired after the 1st day of March, 1987, shall maintain their permanent

> and regular living residence(s) at a relatively close distance from the main headquarters of the Fire District so that they may safely reach the Fire District Headquarters by motor vehicle within 30 minutes from the time they are summoned.

The collective bargaining agreement subsequently ratified by the parties, on March 19, 1987, does not deal with either the tobacco use or residency issues.

DISCUSSION

The complainant declares, without citation of authority, that policies on tobacco use and residency are mandatory subjects for bargaining under RCW 41.56.030(4), because they deal with working conditions. The employer asserts, also without citation of labor law authority, that since the disciplinary features of the resolutions have been removed, and since they now deal mainly with new hires for which the union lacks standing to represent their interests, that the employer had no duty to bargain. The employer also contends that the union has waived its right to bargain, if it had any, by its conduct and by the terms of the subsequently signed collective bargaining agreement (citing: Article XII, Grievances; Article XVI, Rights of Management, and Article XXII, Entire Agreement).

Standing to Represent Applicants for Employment

The employer raises the question of whether the union can litigate concerns involving applicants for employment. By implication, the employer asks whether applicants are public employees within the meaning and coverage of the Public Employees Collective Bargaining Act. RCW 41.56.030(2) provides:

> "Public employee" means any employee of a public employer except any person (a) elected by popular vote, or (b) appointed to office pursuant to statute, ordinance or resolution for a specific term of office by the executive head or body of the public employer, or (c) whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit.

In Allied Chemical and Alkali Workers Local 1 v. Pittsburg Glass Co., 404 U.S. 157 (1971), the Supreme Court dealt with the question of whether an employer had an obligation to bargain on policies affecting retired employees. Finding that policies and benefits affecting retired employees did not "vitally affect" the wages, hours and conditions of employment of current employees, the court ruled that retirees were not "employees" under the National Labor Relations Act, and that there was no duty to bargain. Public Employment Relations Commission precedent on the subject appears to be limited to a series of cases involving King County Fire District No. 39, Decisions 2160-A, 2160-B, and 2160-C (PECB, 1985), where RCW 41.56.030(2) was interpreted to include non-employees if the union could demonstrate a nexus with current employees. The question in that case (which involved pre-hire minimum qualifications) was whether the new standards "vitally affected" existing employees.

Unlike the situations in Pittsburg Plate Glass and King County Fire District 39, the facts in the instant case suggest a strong nexus between the hiring condition and ongoing working conditions. The employer admitted as much:

> It is important to note that disciplinary procedures for violations of these resolutions are not set forth in the resolutions. It is admitted that setting forth discipli-

> nary procedures would effect (sic) an employee's "working conditions" and would, therefore, be subject to mandatory bargaining with the union.

Pre-hearing brief, page 7, lines 5-9.

The employer's assessment of its obligation to bargain is inaccurate on multiple grounds:

First, the test announced in the cited precedents relies on whether the policy substantially or vitally impacts working conditions working conditions of employees, not merely on whether discipline attaches. See State v. Hernandez, 89 N.M. 698, 556 P.2d 1174 (1976), which reversed a lower court ruling that limited personnel matters to those relating to discipline.

Second, the employer may, in fact, be in a position to enforce the policies on residency and tobacco use by disciplinary action, even without specific reference within the policies themselves. Disciplinary authority is reserved to the employer under both the fire district's rules and standard operating procedures. The employer's standard operating procedures (referred to as the "S.O.P.") states, under provision 1-1, that deviations from the S.O.P. will be just cause for disciplinary action. The S.O.P. already contains, under provision 2-1, a prohibition against smoking on equipment or around patients. The employer's rules and regulations also provide, under section X-26, that violations of the rules shall be subject to disciplinary action. Rule XIV-14 prohibits smoking in dormitories. Other rules require compliance with lawful orders, and relate to keeping the district informed of changes in addresses. Furthermore, the employer claims the right to adopt rules in order to effectuate policy for the efficient operation of the district. It appears, therefore, likely that the resolutions at issue would eventually be codified, or at least enforced, as procedures under the S.O.P. or as rules. Further, the employer has the right, under

Article 26 of the collective bargaining agreement, to impose discipline as provided by the laws of State of Washington and the its own rules and regulations.

Third, there are compelling public policy reasons that support a finding that the union has standing to pursue this matter. The collective bargaining rights conferred by Chapter 41.56 RCW would be severely undermined and disrupted if the employer was able to circumvent the exclusive bargaining representative by altering the ongoing working conditions for various groups of "new hires". The resolutions at issue here applied not only to the employer's selection of new employees, but also purport to continue to operate throughout the career of the individual as an employee of this employer. The two levels must be distinguished from one another. The "new hires" become "existing employees" as soon as they commence employment. Under this view, the complaint is not filed on behalf of "new hires", but rather on behalf of all "existing employees", who have a right to be free of unilateral setting of ongoing working conditions which are different for one class of employees, namely those employed after March 1, 1987.

The examiner concludes that, <u>if the resolutions on tobacco use and residency involved mandatory subjects of bargaining</u>, the ongoing imposition of the pre-hiring standard on employees hired after March 1, 1987 would substantially affect their terms of employment as employees, so as to confer "standing" on the exclusive bargaining representative to allege and litigate a claim that the employer was obligated to bargain those working conditions under RCW 41.56.030(4) and 41.56.140(4).

<u>Mandatory subjects of bargaining</u>

The scope of the duty to bargain is defined by RCW 41.56.030-(4), which provides:

> "Collective bargaining" means ... negotiations on personnel matters, including wages, hours and working conditions ...

The determination as to whether a particular subject is a mandatory subject for collective bargaining is a question of law and fact for the Commission to decide. WAC 391-45-550. In deciding such questions, the Commission initially investigates whether the matter directly impacts wages, hours or working conditions of bargaining unit employees. Lower Snoqualmie Valley School District, Decision 1602 (PECB, 1983). When the subject does not directly involve wages or hours, the commission will balance the employer's need for entrepreneurial judgement against the employees' interest in their terms and conditions of employment. Edmonds School District, Decision 207 (EDUC, 1977).

Use of tobacco -

Whether restrictions on the use of tobacco products both on and off the job is a mandatory subject for bargaining is a question of first impression before the Commission. The only Commission precedent close to the subject is City of Chehalis, Decision 2803 (PECB, 1987) where the Examiner ruled that the employer's decision to ban smoking in its facility was not a mandatory subject of bargaining, but that the employer had a duty to bargain the effects of that decision.

In private industry, the Supreme Court of the United States has specifically mentioned "safety practices" as a condition of employment when defining the duty of employers to bargain. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1965). Plant rules are generally considered working conditions, regardless of the employer's legitimate reasons for their promulgation. Medicenter, Mid-South Hospital, 221 NLRB 670 (1975). The National Labor Relations Board (NLRB) has held in

several cases that a ban on smoking in warehouses must be bargained with the union, and cannot be unilaterally implemented. Chemtronics, Inc., 236 NLRB 178 (1978); Albert's, Inc., 213 NLRB 686 (1974). The prohibition against off-duty use of tobacco would also appear to be a mandatory subject for bargaining. See, BMWE v. Chicago North Western Transport, ___ F.2d ___, No. 86-5403 (8th Circuit, August 25, 1987), which held that an employer rule prohibiting off-duty use of illegal drugs is subject to negotiations with the union.

There have been several decisions in other public sector jurisdictions on the question of restricting the use of tobacco in the school employment settings. The New Jersey Public Employment Relations Commission reaffirmed prior holdings that teachers' smoking privileges were mandatorily negotiable. Warren Hills Regional High School, 7 NJPER 12198 (N.J.PERC, 1981). Accord: Steuben-Allegany BOCES, 2 NPER 33-14552 (N.Y.PERB H.O., 1980), aff. 2 NPER 33-13096 (N.Y.PERB, 1980), which rejected an employer's claim of a management prerogative to regulate the use of its premises when balancing employee interests. In Oxford Hills Teachers Association v. MASD No. 17, PELRB Case No. 73-06 (Me.LRB, 1973), it was held that evidence establishing harmful effects of smoking did not override the bargain ability of smoking privileges. Rhode Island State Labor Relations Board and the Pawtucket School Committee, No. ULP-413 (RI.SLRB, June 11, 1987) also rejected a school district's claim that the state's workplace pollution law removed such policies from the scope of mandatory collective bargaining. The Rhode Island board ordered bargaining, even though the policy was adopted after open hearings required by the pollution statute. School districts appear to have the right to unilaterally ban smoking in areas where students are present, Portland Board of Education, 3 NPER 07-12024 (Ct.SBLR, 1981), but those are not the facts here.

In public sector cases outside of school districts, there have been a variety of decisions emanating from collective bargaining laws.[1]

Pennsylvania Public Relations Board held that the disharmony among employees caused by smoking was not a sufficient basis to support an employer's unilateral smoking ban. Venango County Board of Assistance, 1 NPER 40-10013 (Pa.LRB, 1978). See, also, Commonwealth v. PLRB, No. 2167 C.D. 1980 (Pa. Commonwealth Court, April 28, 1983), ruling that the subject of smoking is entirely unrelated to entrepreneurial judgments fundamental to the basic direction of the enterprise.[2]

The Connecticut State Board of Labor Relations ruled, however, in Town of Rocky Hill, No. 2501 (Ct.SBLR, June 10, 1986), that an employer could unilaterally ban smoking in its computer dispatch center as a management prerogative, in order to protect its investment in a computer which required a smoke-free environment. Even then, the employer was obligated to

---

1 In the public sector, an employer's rule seeking to regulate off-duty conduct may also be subject to constitutional challenge as an invasion of a public employees protected rights. Where an employee asserts a violation of the fourteenth amendment by an employer's rule, the constitutional issue to be decided is whether there is a rational connection between the rule and the protection of the public welfare and property. Everett v. Napper, 632 F.Supp. 1481 (N.D.Ga., 1986). The U.S. Court of Appeals for the 10th Circuit, on the other hand, found a rational connection between a regulation banning smoking by trainees in a fire department and health and safety. Grusendorf v. City of Oklahoma, ___ F.2d ___, 25 GERR 1213, No.85-1807 (10th Circuit, April 17, 1987).

2 The same court also rejected the state's contention that the "zipper clause" of the collective bargaining agreement permitted unilateral action.

bargain the impact of its managerial decision with the union, because the smoking was considered to be an important condition of employment.

The Connecticut board recently upheld a policy of a city to hire only non-smokers for fire fighter positions, noting that the duty to bargain has not been held to cover job qualifications characteristics or qualities. The board ruled, however, that the employer was obligated to bargain the ongoing enforcement of such a ban, because conditioning continued employment on not smoking, especially in high stress jobs such as firefighting, "is a matter which strikes clearly and deeply on employee conditions of employment." City of Middletown v. IAFF local 1073, No. 2581 (Ct.SBLR, September 9, 1987).

The New Hampshire Public Employee Labor Relations Board reviewed pre-hire restrictions in individual contracts for six new employees in Dover Professional Fire Fighters Ass'n v. City of Dover, 23 GERR 1224 (BNA, 1985). After balancing management prerogatives with the employee interests, the board struck down clauses requiring the new employees to refrain from smoking, because the limitation was not sufficiently related to the job of fire fighter.

A Minnesota district court judge decided that the City of Duluth can continue to implement its new policy of hiring non-smokers for firefighting jobs in IAFF Local 101 v. City of Duluth, No. 8720508 (Minn.D.C.6, June 19, 1987)[3]. In that case, the city council had approved a resolution prohibiting newly hired firefighters from using tobacco on or off the job.

---

[3] It should be noted that the Minnesota law does not provide for determination of "unfair labor practices" by an administrative agency with specialized expertise in labor relations.

The union was denied a temporary injunction. The union interpreted the decision as allowing the right to negotiate the ban. The city disagreed. The full text of the court decision was not available to the Examiner herein.

The Federal Labor Relations Authority approved bargaining on proposals to modify stringent anti-smoking regulations, declaring that the proven negative effects of ambient tobacco smoke on non-smokers is not sufficient to show a compelling management need to act without bargaining. Fort Leonard Wood, Mo., 26 FLRA No.73, April 20, 1987.[4]

According to a Bureau of National Affairs bulletin of September 7, 1987 (126 LRR 14), the State of New York is negotiating with five unions representing state employees concerning policies to restrict smoking in work areas.

It should be clear from a review of the above-cited decisions that, in the absence of a compelling business need, an employer must bargain the establishment of any policy to restrict the use of tobacco among its existing employees. It is also well settled that, even if the employer has a clear management right to restrict the use of tobacco, it must negotiate the impact of that decision on the working conditions of its employees. Town of Rocky Hill, supra. See also City of Kelso, Decision 2120-A (PECB, 1985), distinguishing between an employer's obligation to bargain a mandatory subject decision and its obligation to bargain the impact of a non-mandatory subject decision on working conditions.

---

[4] An update on how major federal agencies are complying with GSA regulations is published at 25 GERR 1446 (BNA, October 19, 1987).

In the instant case, the employer contends that a study published by the American Cancer Society showed that smokers cause employers economic losses from higher insurance premiums, absenteeism and lost productivity. The employer also argues that a recent Washington court decision, McCarthy v. Department of Social and Health Services, 46 Wn.App. 125 (December 8, 1986), has subjected the fire district to potential lawsuits from employees and third parties. McCarthy permitted an employee lawsuit against her employer for failing to maintain a healthy work environment.

The resolution at issue is not simply a policy to hire non-users of tobacco. It seeks to restrict the use of tobacco products after the applicant becomes an employee, together with extending the ban to all buildings and equipment. In short, the employer seeks to prohibit employees from smoking either in the work place or off the job. The record does not support the employer's conclusion that the fire district has the management right to unilaterally set hiring standards which ban tobacco use. The general statistical analysis does not support a finding of compelling need. Fort Leonard Wood, Mo., supra. The potential for a law suit, standing alone, is also not sufficient to create a compelling need, inasmuch as a total ban is not the only approach an employer can take. It is clear from precedent that, through negotiations, other measures may be worked out to protect the employer and balance the interest of the union and employees in an important working condition.

Residency requirement -

It should be noted at the outset that there is a statutory prohibition against a fire district imposing a residency requirement on its employees. **RCW 52.30.050 Residency not grounds for discharge of civil service employees** declares:

> Residence of an employee outside the limits of a fire protection district is not grounds for discharge of any regularly-appointed civil service employee otherwise qualified.

In addition, **RCW 41.08.075 Residency as a condition of employment-Discrimination because of lack of residency-Prohibited** states, in relevant part:

> No city, town or municipality shall require any person applying for or holding an office, place, position or employment under the provisions of this chapter or under any local charter or other regulations described in RCW 41.08.010 to reside within the limits of such municipal corporation as a condition of employment, or to discriminate in any manner against because of his residency ...

While it is beyond the authority of the Commission to enforce those statutes, it is noted that those statutes clearly describe a public policy of this state against the imposition of residency restrictions as a condition of employment.

Whether the employer may unilaterally establish such a residency policy without bargaining with the union representing its employees under Chapter 41.56 RCW is a matter of first impression.

While the resolution at issue makes reference to new employees hired after a certain date, it does not apply to the new hires as a pre-employment hiring standard. Rather, the resolution in question requires employees who are hired after March 1, 1987 to maintain their residency within thirty (30) minutes driving time from district headquarters. The resolution thus establishes a condition of employment to operate <u>after</u> the employee is hired.

Employer-imposed residency restrictions on public employees have been examined by various courts on a number of constitutional bases. The Supreme Court of the United States ruled in McCarthy v. Philadelphia C.S.C., 424 U.S. 645 (1976), that a municipal residency requirement imposed on a firefighter does not violate the constitutional right to travel freely, where the limitation is uniformly applied and appropriately defined. The same court in Supreme Court of New Hampshire v. Piper, ___ U.S. ___, 195 S.Ct. 1272 (1985), found that a residency requirement for admission to the bar violated the privileges and immunities clause of the U.S. Constitution. A federal appeals court in Soto-Lopez v. New York City C.S.C., 755 F.2d 266 (2nd Cir., 1985), prob. juris. noted, ___ U.S. ___, 105 S.Ct. 3523 (1985), found that a residency requirement violated the equal protection clause of the constitution and the right to travel.[5] In Carofano v. City of Bridgeport, 196 Conn. 623, 495 A.2d 1011 (1985), the court upheld the right of the city to require police officers to reside in the city as a condition of continued employment, noting that the requirement was not a prerequisite to employment or a durational residency problem of the type voided in Dunn v. Blumstein, 405 U.S. 330 (1972). In Carofano, the court applied an "intermediate standard" in deciding that the individual interest was outweighed by municipal interests. The city's interests included availability of manpower in an emergency, ethnic balance, reducing local unemployment and increased personal knowledge of the community. A one year pre-employment residency requirement for police and firefighters was found unconstitutional in Musto v. Redford Township, 137 Mich. App. 30, 357 N.W.2d 791 (1984) using the "intermediate standard" but finding that many of the municipal

---

5 This case dealt with the conferral of veteran's preference points based on residency for hire and not directly with residency as a condition of employment eligibility.

interests relied upon in the Carofano case were, in reality, insufficient to form the basis for discrimination.

Turning to labor law, there is general agreement that, in public employment, residency requirements are a mandatory subject of bargaining when applied to current employees. See, Detroit Police Ass'n v. Detroit, 391 Mich. 44 (1974); City of Auburn, 9 PERB Para 3085 (NY.PERB, 1976) and City of Clintonville v. Wisconsin Employment Relations Commission, Case No. 12723 (Waupaca County Circuit Court, June 16, 1975).[6]

Other jurisdictions have considered rules that mandate new hires to obtain residencies within a specified period of time to be a mandatory subject of bargaining. See, New Haven Board of Education, 1 NPER 07-10031 (Ct.SBLR, 1979) and Detroit, supra. In the latter case, the Supreme Court of Michigan rejected the city's "continuing recruitment requirement" label, determining that the requirement attempted to regulate the conduct of employees throughout their years on the police force.

The residency requirement, in the case at issue, was imposed because the employer wanted to assure adequate response time to emergencies where a call-out of off-duty personnel was needed. The employer's objective may be worthwhile, but resolution would affect the employees throughout their employment and was a mandatory subject for collective bargaining.

---

6 There have been some rulings that employers did not have to bargain the imposition of a residency requirement on applicants for employment, reasoning that the union has no right to protect persons who were not yet public employees. See, City of Peekskill,1 NPER 33-1449 (N.Y. PERB H.O.1979) and Auburn, supra.

The Employer's "Waiver" Defenses

The employer argues that the union has waived its rights, if there were any, under several provisions of the collective bargaining agreement between the parties and by its conduct. It is well settled that waivers, to be effective, must be specific to the subject matter and knowingly made. City of Kennewick, Decision 482-B (PECB, 1980).

Waiver by inaction -
To establish a waiver by inaction, the union must have failed to pursue the issue following notification of an opportunity for bargaining. City of Yakima, Decision 1124-A (PECB, 1981); City of Pasco, Decision 2603 (PECB, 1987). Such is not the case here. When notified of the pending resolutions, the union promptly made two separate demands for bargaining on the proposed policies. It was the employer which refused to bargain.

The employer also claims that the union has waived its right to bargain by failing to attend the open, public meeting of the employer's board at which the resolutions were adopted. That is not the law. An employer has the obligation to meet with union representatives at reasonable times and negotiate in good faith on mandatory subjects of bargaining. The collective bargaining process involves give and take, but does not require concessions by either. For a bargaining unit of firefighters who are "uniformed personnel" within the meaning of RCW 41.56.030, a failure to reach agreement invokes the "interest arbitration" impasse procedures of RCW 41.56.430 et seq.[7] The

---

[7] For such a bargaining unit, there is no place in the statutory scheme for a "unilateral implementation" upon a failure to agree. City of Seattle, Decision 1667-A (PECB, 1984).

statutory duty to bargain collectively is not satisfied by an expectation that the union should appear at an open, public meeting before the employer's "legislative" body to express views with the hope of persuading a change minds. Even if one were to accept that there was some defect in the union's claim by reason of its failure to attend the open meeting, such a conclusion procedure would not conform to the requirements of the statutory interest arbitration procedure. It is the Examiner's conclusion that the union's failure to attend the open meeting scheduled by the employer did not constitute a waiver of the union's rights to bargain on mandatory subjects.

Past waivers of bargaining rights -

The employer urges the theory that, having adopted policies in the past to banning smoking without objection from the union, it was free to adopt the smoking policy at issue here. In other words, the employer would have a waiver of bargaining rights on the subject at some past time held to constitute an ongoing or permanent waiver of the union's bargaining rights on the entire subject matter. The employer cites no authority for the proposition, however, and the record does not entirely support the argument.

The record does establish that part of the disputed tobacco use resolution was merely a restatement of existing employer policies which prohibited smoking in dormitories and in or on district-owned fire equipment. To that extent, the disputed resolution does not constitute any change of wages, hours or working conditions giving rise to an occasion for bargaining, and the union's past waivers of bargaining rights continue to operate here. Therefore, the employer was under no obligation to bargain those aspects of the tobacco use resolution which, in effect, merely restated the prior policy.

The fact that the union did not desire to bargain (or at least did not take steps to do so) when related policies were adopted in the past does not act to abrogate the union's rights when confronted with a new and different proposal for changes of the existing wages, hours or working conditions of the employees it represents. City of Wenatchee, Decision 2194 (PECB, 1985) rejected a similar argument where a union had let some changes of hours pass without requesting bargaining, but made a timely assertion of rights over a change of overtime distribution procedures.

Waiver by Contract -

The duty to bargain collectively may be waived by the terms of a collective bargaining agreement between an employer and the exclusive bargaining representative of its employees. If an employer's unilateral conduct is "arguably protected or prohibited" by a collective bargaining agreement which contains provision for final and binding arbitration of grievances, the Commission will normally defer processing of the unfair labor practice case while the parties obtain an interpretation of the contract through their contractual machinery. Stevens County, Decision 2602 (PECB, 1987). In this case, the employer cites "Article XII, Grievances", "Article XVI, Rights of Management" and "Article XXII, Entire Agreement" as the source of the contract waivers, but there are several defects with that position.

First, there was no collective bargaining agreement in effect in February, 1987, when the disputed resolutions were adopted. See, City of Bremerton, Decision 2733-A (PECB, 1987), where the Commission affirmed the finding of a violation on a unilateral change made while there was no contract in effect. In order to be deferrable to grievance arbitration under the policies of the Commission, the issues raised in an unfair labor practice case must be susceptible to resolution under a

contract that was in effect between the parties at the time the cause of action arose. Stevens County, supra. The issue before the Examiner in the instant case is a refusal to bargain during a hiatus between contracts, so that deferral was not appropriate.

Second, even if there had been a contract in effect, general management rights clauses and scope of agreement clauses which, as here, are also known as "entire agreement" clauses, do not constitute a waiver of rights to negotiate on mandatory subjects. City of Pasco, supra; City of Kennewick, supra. The right to grieve is limited by the agreement between the parties to interpretations of the contract. There are no contract provisions which specifically deal with the tobacco use and residency issues encompassed by this dispute. The union could not allege the violation of the collective bargaining agreement so as to place these issues before an arbitrator.

CONCLUSION

Policies banning employee use of tobacco and requiring employees to maintain their residences within a specific area are found generally to be mandatory subjects of bargaining. The employer has not shown any compelling need which would override employee interests and bargaining rights, and was obligated to bargain the establishment of these policies with the exclusive bargaining representative of its employees. The policies at issue in this case are not simply recruiting standards, under which the employer is attempting to give a preference to job applicants who don't use tobacco and who will initially reside within the designated area. Under the terms of the resolutions, the employer would purport to impose an ongoing condition of employment on the affected employees

prohibiting their use of tobacco products and restricting their choice of residence to a prescribed area. In effect, the employer seeks to set separate terms of employment for part of the workforce after they are hired. Therefore, the Examiner concludes that the employer has committed unfair labor practices in violation of RCW 41.56.140(4) and (1).

FINDINGS OF FACT

1. Kitsap County Fire Protection District No.7 is a "public employer" within the meaning of RCW 41.56.030(1). At all times pertinent hereto, Bill Meigs was Fire Chief and Roger Wiley was Chairman of the Board of Commissioners.

2. International Association of Fire Fighters, Local 2819, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the certified exclusive bargaining representative of non-supervisory firefighter employees of Kitsap County Fire Protection District No. 7. At all times pertinent hereto, Gary Faucett was the President of the union.

3. On October 13, 1986, the union and district began negotiations on a successor contract to an agreement which was to expire on December 31,1986.

4. While collective bargaining negotiations were ongoing but prior to the expiration of the 1986 contract, the employer notified the union, by memorandum, of an opportunity to give input on proposed resolutions dealing with tobacco use and residency which were to be considered at a meeting of the employer's Board of Commissioners on January 15, 1987.

5. On December 10, 1986, Faucett made a timely, written request for bargaining on the issues of tobacco use and residency encompassed in the proposed resolutions. The union did not receive a reply to that letter.

6. On January 8, 1987, Faucett made an additional written demand for bargaining on the issues of tobacco use and residency encompassed in the proposed resolutions.

7. On January 20, 1987, Wiley replied, on behalf of the employer in a letter to Faucett, asserting that the proposed resolutions were not "items in the contract" and declining to bargain the matters. The employer therein reiterated its invitation to the union to provide input at the open, public meetings of the employer's board.

8. On February 19, 1987, while there was no collective bargaining agreement in effect between the parties, the employer's Board of Commissioners finalized the resolutions concerning tobacco use and residency. The union did not participate at that session.

9. The resolutions adopted by the employer impose, as ongoing conditions of employment, on employees hired after March 1, 1987 requirements that they shall:

a. Make no use of any tobacco products, while on duty or off duty; and

b. Maintain their residence within 30 minutes driving time from the employer's headquarters.

10. In addition, to the changes specified in paragraph 8 of these findings of fact, the resolutions adopted by the employer enlarge a pre-existing ban on smoking in dormitory areas and fire apparatus to impose on all

employees a prohibition on smoking in any buildings under the control of the employer.

11. The employer has not demonstrated any compelling need for the adoption of the changes referred to in paragraphs 8 and 9 of these findings of fact.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By unilaterally adopting policies affecting tobacco use and residency as described in paragraphs 8 and 9 of the foregoing findings of fact, without demonstrating a compelling need to do so, and by refusing to bargain with the exclusive bargaining representative of its employees on timely demand, Kitsap County Fire Protection District No. 7 has committed unfair labor practices in violation of RCW 41.56.140(1) and (4).

3. To the extent that the resolution adopted by the employer on tobacco use merely restated previously existing policies prohibiting smoking in dormitories and in equipment, there was no change giving rise to a duty to bargain and no unfair labor practice.

ORDER

Pursuant to RCW 41.56.160 of the Public Employees Collective Bargaining Act, it is ordered that the Kitsap County Fire

District No. 7, its officers, elected officials, and agents, shall immediately:

1. Cease and desist from:

   a. Giving effect to the resolutions adopted on or about February 19, 1987, except to the extent that the resolution on tobacco use merely restates previous prohibitions on smoking in dormitories and fire equipment.

   b. Refusing to bargain collectively with International Association of Fire Fighters, Local 2819, regarding the adoption of changes of policy on the use of tobacco products and residency for employees represented by Local 2819.

2. Take the following affirmative actions to remedy the unfair labor practices and effectuate the purposes of Chapter 41.56 RCW:

   a. Give notice to and, upon request, bargain collectively in good faith with International Association of Fire Fighters, Local 2819, concerning any policies on tobacco use or residency to be imposed upon employees as a condition of employment.

   b. Post, in conspicuous places on the employer's premises where notices to all employees are customarily posted, copies of the notice attached hereto and marked "Appendix". Such notice shall, after being duly signed by an authorized representative of the Kitsap County Fire District 7, be and remain posted for sixty (60) days. Reasonable steps shall

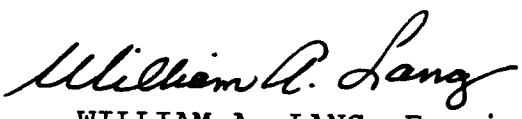
be taken by the employer to ensure that said notices are not removed, altered, defaced, or covered by other material.

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

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

DATED at Olympia, Washington, this 17th day of February, 1988.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



WILLIAM A. LANG, Examiner

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

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE PUBLIC EMPLOYEES COLLECTIVE BARGAINING ACT, CHAPTER 41.56 RCW, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain collectively with International Association of Fire Fighters, Local 2819 regarding the adoption of changes in policy on the use of tobacco products and residency for employees represented by Local 2819.

WE WILL NOT give effect to the resolutions adopted on or about February 19, 1987, except to the extent that the resolution on tobacco use merely restates previous prohibitions on smoking in dormitories and fire equipment.

WE WILL NOT interfere with, restrain or coerce our employees in any manner in the free exercise of their rights guaranteed them by the Public Employees Collective Bargaining Act.

DATED_____

KITSAP COUNTY FIRE DISTRICT NO. 7

BY:_____
Authorized Representative

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

This notice must remain posted for sixty (60) days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone: (206) 753-3444.