STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 2819,	)	CASE NO. 6776-U-87-1362
Complainant,	)	DECISION 2872-A - PECB
vs.	)	
KITSAP COUNTY FIRE DISTRICT NO. 7,	)	DECISION OF COMMISSION
Respondent.	)	

Gary Faucett, President, appeared on behalf of the complainant at hearing; James F. Imperiale, Attorney at Law, filed the response to the Petition For Review.

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

Examiner William A. Lang issued Findings of Fact, Conclusions of Law and an Order in the above-captioned matter on February 17, 1988, concluding that the employer committed unfair labor practices by unilaterally adopting certain employment policies without first bargaining with the union that represents its employees. The employer filed a timely petition for review, thereby bringing the matter before the Commission.

BACKGROUND

On February 19, 1987, the Board of Commissioners of Kitsap County Fire Protection District No. 7, a public employer, adopted policies which provided, in pertinent part, as follows:

> 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":
>
> * * *
>
> ... 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 complainant, which is the exclusive bargaining representative of all regular non-supervisory uniformed personnel employed by the fire district, filed this unfair labor practice complaint, alleging that the resolutions were adopted unilaterally, without bargaining between the employer and the union. The union claimed a violation of RCW 41.56.140(4).

The union and the employer had a collective bargaining agreement in effect during calendar year 1986. In October, 1986, the parties began negotiations for a new agreement.

On December 5, 1986, while negotiations were ongoing, the fire chief issued a memorandum inviting comment at an upcoming fire commissioners meeting on proposed resolutions prohibiting use of tobacco (while on or off duty) and imposing residency requirements. Both proposals explicitly provided that non-compliance would be cause for dismissal. Both proposals made reference to new employees, but both would have applied, by their terms, to existing employees after April 1, 1987. Before

the meeting, the local union president wrote to one of the fire district commissioners, demanding bargaining. No response was received by the union, and no bargaining occurred.

The parties reached agreement on a new collective bargaining agreement, but it did not include any terms on tobacco use or residency. Before the union signed the new agreement, its president again demanded bargaining on those issues. The chairman of the respondent's Board of Commissioners replied that they were questions of district policy and "not items in the contract".

As adopted in February 1987, the policies on tobacco use and residency were modified to delete references to discipline for non-compliance. To some extent, the new policy on tobacco use was merely an expansion (to all of the employer's facilities) of previously adopted employer policies prohibiting tobacco use in the employer's fire equipment or in its dormitories. The previous policy had apparently been adopted with no complaint from the union.

The Examiner drew a distinction between applicants for employment and persons who were already "employees", noting that the union's bargaining rights extend only to the latter class. The Examiner thus found that the employer violated the law only by extending its pre-hire qualifications or hiring preferences to individuals who had become employees, and thus came within the bargaining rights of the union.

POSITIONS OF PARTIES

The employer raises five points in its petition for review. First, it seeks to use the Examiner's conclusion on the lack of

union bargaining rights concerning hiring preferences for non-smokers and those with nearby residences as support for the proposition that those subjects relate more to the efficiency and economy of the fire department than to the wages, hours or working conditions of employees. The employer next contends that the 1986 contract remained in effect between the parties by reason of an agreement for indefinite extension, and so takes issue with the Examiner's conclusion that there was no waiver by contract. The terms of the adopted resolutions notwithstanding, the employer's third contention is that the resolutions did not impose ongoing conditions of employment, and that it was prepared to negotiate any penalties with the union. Finally, the employer disputes both the Examiner's finding of fact and conclusion of law that there was no "compelling need" for adoption of the new policies.

The union supports the decision of the Examiner on each of the points challenged by the employer.

DISCUSSION

The Commission has carefully reviewed the Examiner's findings of fact, conclusions of law and order in light of the entire record, and we find no error.

The Examiner properly concluded that the employer had no obligation to bargain with the union concerning its decision to hire non-smokers and its decision to hire applicants having residences in close proximity to the employer's place of business. Such individuals were not "employees" of this employer at that point in time, and so were not represented by the union. That holding is inapposite, however, to the rights of persons who, now or in the future, become its employees.

The Examiner also properly concluded that the resolutions adopted by the employer, in both their spirit and terms, imposed ongoing conditions of employment upon "employees". In other words, the resolutions adopted by the employer impose, in each case, restrictions upon employees' private lives which are particularly traceable to their status as employees of this employer. Whether tobacco use leads to illnesses, medical expenses and health insurance claims is not the issue before the Commission; whether it is desirable for the employer to have its employees living in close proximity, and thus to have a possibility of prompt response to emergency call-outs, is not the issue before the Commission. Both the decisions to impose restrictions on tobacco use and residency, and the effects of such decisions (e.g., discipline) were proper subjects of bargaining as to current and future employees. Chemtronics, Inc., 236 NLRB 178 (1978); Albert's Inc., 213 NLRB 686 (1974). As with any legitimate issue in collective bargaining, the outcome of the process is to be determined through the reasoned communications called forth by the obligation to negotiate in good faith. RCW 41.56.030(2). Since this is a bargaining unit of "uniformed personnel" covered by the interest arbitration provisions of RCW 41.56.430, et seq., an absence of agreement at the bargaining table would not prevent the employer from pursuit of its "efficiency and economy" arguments to a final and binding conclusion in interest arbitration.

The employer's third argument, concerning the existence of a contract extension, is also without merit. RCW 41.56.070 prohibits the operation of contract clauses calling for "automatic renewal or extension" of a collective bargaining agreement. When the employer unilaterally adopted the challenged policies, the parties' 1986 agreement had expired according to its valid terms. At most, the parties were operating on an agreement to extend the contract for an

indefinite period. But even if there were a valid extension agreement, the employer's argument concerning the existence of a contract misses the point. The employer's own official said these issues were "not items in the contract", and the employer did not take issue with the Examiner's conclusion that the general "management rights" clause of the expired contract was not sufficient to constitute a waiver of the union's bargaining rights on the tobacco use and residency issues.

The fourth and fifth points raised by the employer relate to the Examiner's references to a "compelling need" test used in some of the cases cited in the Examiner's decision. Such a standard appears to be, at most, an exception to a general rule that smoking bans are mandatory subjects of bargaining. Ft. Leonard Wood, Mo., 26 FLRA No. 73 (1987); Commonwealth v. PLRB, 459 A.2d 452 (1983). We need not adopt a similar standard here, however, as the facts of this case do not support a conclusion that there was a compelling need. The employer's earlier limited ban on tobacco use (based on a need to protect sensitive radio equipment) had not been challenged by the union, and remains in effect under the Examiner's decision. It appears that the employer's motivation for extending its ban to all tobacco use grew out of current literature on the adverse effects of smoking on both smokers and those living or working in close proximity to them. Such a general concern is hardly "compelling".

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact, Conclusions of Law and Order issued in this matter by Examiner William A. Lang are AFFIRMED

and adopted as the Findings of Fact, Conclusions of Law and Order of the Commission.

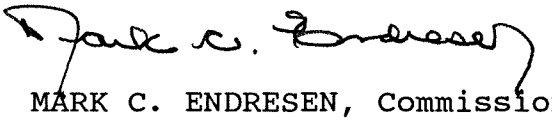
2. Notify International Association of Firefighters, Local 2819, in writing, within thirty (30) days following the date of this order, as to what steps have been taken to comply herewith, and at the same time provide Local 2819, with a signed copy of the notice required by the order.

3. Notify the Executive Director of the Public Employment Relations Commission, in writing, within thirty (30) 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 the order.

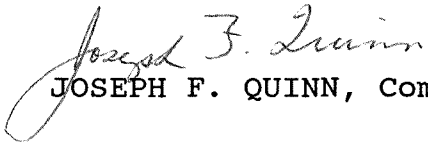
DATED at Olympia, Washington, this 16th day of November, 1988.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANE R. WILKINSON, Chairman



MARK C. ENDRESEN, Commissioner



JOSEPH F. QUINN, Commissioner