STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, LOCAL 1504, Complainant, vs. MASON COUNTY, Respondent.	CASE NO. 6903-U-87-1399 DECISION 3108 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pamela Bradburn, General Counsel, appeared on behalf of the union.

Gary P. Burleson, Prosecuting Attorney, by Michael Clift, Deputy Prosecuting Attorney, appeared on behalf of the employer.

On June 10, 1987, the Washington State Council of County and City Employees, Local 1504, (complainant) filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that Mason County (respondent) had committed unfair labor practices in violation of RCW 41.56.140. The matter was assigned to Walter M. Stuteville, Examiner. The case was heard on November 11, 1987, in Shelton, Washington. Both parties submitted post-hearing briefs.

FACTS

The complainant represents certain Mason County employees working in the Treasurer's office, the Assessor's office, the

Auditor's office, the County Clerk's office, the District Court and Emergency Services. The employees work in two buildings in Shelton, the county seat: the county courthouse and a building across the street from the courthouse called Annex II.[1]

Prior to April of 1987, county employees were not allowed to smoke in any areas of the courthouse or Annex II where there was public access. Employees could smoke at their work stations, however, if smoking was specifically permitted by the elected official or department head for whom they worked. The employees could also smoke in lounges provided by the employer in the courthouse.

On March and April of 1987, the union's staff representative, Mary Brown, learned that the county was considering an ordinance on smoking and wrote two letters to the Commissioners. In her March 31, 1987, letter, Brown protested the proposed change in the smoking policy. She suggested that a provision be added to the ordinance which would allow for a smoking room in both the courthouse and in Annex II. In an April 13, 1987, letter to the Commissioners, Brown repeated her protest of the proposed ordinance and argued that the proposed ordinance would be in violation of the county's duty to negotiate a change in working conditions with the exclusive bargaining representative. She also added that the ordinance would be in violation of the non-discrimination clause of the collective bargaining agreement between the parties. She requested that the parties set "a mutually agreeable time to meet and negotiate this issue".

The county responded through Chris Freed, Administrative Assistant and Budget Director for the county, who served as

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1 County employees represented by the complainant have occupied the Annex II facility since June of 1987.

the chief negotiating representative for the respondent. Freed returned Brown's phone call and suggested several dates for the parties to meet. When it was apparent that it would not be possible to meet with the union before the scheduled date for passage of the proposed ordinance, Freed recommended to the Commissioners that they postpone the hearing on the smoking ordinance until after she had an opportunity to meet with the union. The Commissioners declined, and held the hearing as previously scheduled.

On April 28, 1987, the Mason County Commissioners gave final approval to Ordinance 30-87, which prohibited smoking in all public areas within buildings owned or leased by the county. Under the ordinance, all of Annex II was to be a no-smoking area, while elected officials and department heads officed in other county buildings could establish their own policy on smoking. The ordinance was to be enforced by a fine of up to $100.00.

On May 6, 1987, the complainant and respondent held the requested meeting concerning the smoking ordinance. Brown challenged the ordinance based upon the arguments previously stated in her March and April correspondence. Freed defended the Commissioner's actions based upon the management rights language in the collective bargaining agreement between the parties.

On June 25, 1987, the union filed a request for grievance arbitration on the smoking ordinance. In the grievance, the union alleged that the county had violated specific sections of the collective bargaining agreement by passing the smoking ordinance. In response to a routine inquiry made by the Executive Director concerning the propriety of "deferral" of the unfair labor practice charges to arbitration pursuant to

Commission policy, the county asserted that the grievance was not arbitrable. The unfair labor practice charges were then assigned to the Examiner for further proceedings.[2]

POSITIONS OF THE PARTIES

The complainant argues that the Public Employment Relations Commission has jurisdiction as a matter of law, even though a grievance was filed on the same fact pattern. It asserts that deferral to the grievance arbitration process is voluntary on the part of the Commission, and should apply only where it would be useful to obtain an arbitrator's ruling on contractual defenses. Further, it argues that filing for arbitration is not a general waiver of statutory defenses. The complainant urges that a policy on smoking is a mandatory subject of bargaining where previously established working conditions are changed. Finally, the complainant argues that there cannot be a contractual waiver of bargaining rights of a mandatory subject of bargaining in a general management rights clause. The complainant requests that the status quo ante be reinstated so that good faith collective bargaining can occur.

The respondent admits the unilateral adoption of a no-smoking policy without prior negotiations with the union. The respondent defends its unilateral action in a "scatter-gun" series of arguments. It argues that the Commission lacks

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2 The parties proceeded to arbitration on the grievance. On March 21, 1988, following the receipt of the briefs from the parties in the instant unfair labor practice case, the respondent forwarded a copy of an Arbitrator's Opinion and Award dealing with the Mason County "no-smoking" ordinance which is the subject of this decision. The arbitrator's decision was filed in the PERC case file, but has not been referred to in the development of this decision.

jurisdiction over the subject matter, due to the contract language and the union's filing for arbitration. It argues that the complaint fails to state a cause of action. It asserts that a no-smoking policy is not a mandatory subject of bargaining. It argues that the disputed policy is permitted by the "management rights" and "subordination of agreement" clauses of the collective bargaining agreement. Finally, the respondent alleges that the policy on smoking was mandated by state law -- the Clean Air Act -- and that the ordinance had been passed based upon a good faith reliance on advice of counsel concerning mandatory subjects of bargaining.

DISCUSSION

Jurisdiction of the Commission

The ultimate subject matter of this unfair labor practice case is a "refusal to bargain" charge which is not within the jurisdiction of an arbitrator. An arbitrator draws authority from a contract between parties, and has no authority to rule on whether the actions of one or both of those parties are in violation of state law.

A "waiver by contract" defense to a "refusal to bargain" charge is often available where there is a contract in existence between the parties. The existence of a grievance moving toward arbitration does not dispose of the issues raised under Chapter 41.56 RCW, but merely provides an alternative mechanism which may be used to determine whether the employer's conduct was either protected or prohibited by the contract. Stevens County, Decision 2602 (PECB, 1987).

Deferral to arbitration is not ordered where, as here, the employer indicates that it will question the arbitrability of the grievance or assert procedural defenses to arbitration. In the absence of deferral, the Commission and its Examiner have the authority and responsibility to make an interpretation of the collective bargaining agreement.

In its brief, the respondent states that the principal issue in this case is whether the Public Employment Relations Commission has jurisdiction, based upon whether the actions of the employer violated the collective bargaining agreement. That somewhat mis-states Commission precedent. Actually, an unfair labor practice charge is not the appropriate forum to remedy a violation of contract. City of Walla Walla, Decision 104 (PECB, 1976). The Commission is looking for contractual silence in "refusal to bargain" cases, rather than contractual coverage. If there has been no bargaining on a mandatory subject of bargaining, then a duty to bargain exists under state law notwithstanding the existence of a contract covering other mandatory subjects. In its complaint in this case, the union alleges a refusal to bargain on the issue of smoking regulations. Such a charge can state a cause of action and does appropriately invoke the jurisdiction of the Commission under state law. The filing of a grievance on the matter is neither inconsistent with the claim of rights under state law, nor a waiver of rights under state law. City of Chehalis, Decision 2803 (PECB, 1987).

The respondent argues that the complaint should be dismissed as failing to state a cause of action, citing C-Tran, Decision 1576 (PECB, 1983); METRO, Decision 1695 (PECB, 1983); Renton School District, Decision 1694 (PECB, 1983); and Pierce County, Decision 1671 (PECB, 1983). Those cases dealt, however, with subjects that were clearly only matters of contract enforce-

ment. Just cause was at issue in C-Tran; the duty of fair representation was at issue in METRO and Renton School District; while union security was at issue in Pierce County. Those cases were, indeed, dismissed as failing to state a cause of action, but they do not constitute precedent for a dismissal here. The complaint in the instant case is not an attempt to enforce contractual rights, but rather to enforce underlying statutory rights in the absence of contractual rights.

Mandatory Subject of Bargaining

The scope of the duty to bargain, and the determination as to whether a particular subject is a mandatory subject for bargaining, are determined by the Public Employment Relations Commission under the statute. RCW 41.56.030(4) provides:

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

WAC 391-45-550 sets forth the policy of the Commission to encourage discussion of issues arising between labor and management:

> The commission deems the determination as to whether a particular subject is mandatory or non-mandatory to be a question of law and fact to be determined by the commission, and which is not subject to waiver by the parties by their action or inaction.

When deciding whether a particular subject is a mandatory subject of collective bargaining, the Commission begins by investigating whether the matter directly impacts wages, hours of work or conditions of work. Lower Snoqualmie Valley School District, Decision 1602 (PECB, 1983). If the subject matter in

question does not directly involve wages or hours, a balance must be achieved between the employer's need for management judgement and the interests of bargaining unit employees in their terms and conditions of employment. Edmonds School District, Decision 207 (EDUC, 1977).

Smoking restrictions imposed upon employees without bargaining have been the subject of a number of recent cases before the Commission. In Kitsap County Fire District No. 7, Decision 2872-A (PECB, 1988), the Commission affirmed the decision of its Examiner holding that such smoking restrictions are a mandatory subject of collective bargaining.[3] Those decisions deal extensively with the issue of tobacco use, and the cases cited there need not be repeated here.

Affirmative Defenses

Most of the remainder of the county's defenses are parallel to defenses raised in Chehalis, supra.

Compelling Need -

An exception to the direct impact / balancing analysis has been made in some cases where the employer has shown a compelling need to bypass the collective bargaining process. In Chehalis the management issued a memorandum declaring the office of the police department to be a non-smoking workplace. Particular air flow problems existed in that building. As in the instant case, the union involved there objected to the unilateral

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[3] In an earlier case, City of Chehalis, Decision 2803 (PECB, 1988), an Examiner had held that there was no duty to bargain the smoking prohibition imposed by the employer in that case. More recently, an Examiner ruled in City of Seattle, Decisions 3051, 3052, 3053, 3054 (PECB, 1988) that the employer committed an unfair labor practice by its unilateral adoption of a smoking policy.

change in working conditions and the employer defended with basically the same arguments as are used by the respondent here. Although the Examiner found that the employer was entitled to move, without negotiations, to protect the health and welfare of its employees in Chehalis, the impacts of that decision which impinged directly upon employment conditions were still found to be a mandatory subject of bargaining.

The respondent in this case cites the potential for lawsuits for civil damages involving a smoke-filled work environment as the compelling need for its ordinance. Such a potential liability does justify dealing with the smoking issue, but does not explain the rush to adopt the ordinance over the advice of its own representative without negotiating the issue with the exclusive bargaining representative. Neither does it relieve the employer of the duty to bargain the impact of such policies with the exclusive bargaining representative.

The employer made no showing of any other immediate or compelling need to impose smoking restrictions without first complying to the duty to bargain. The Examiner concludes, consistent with Kitsap, that both the decision to impose restrictions on the use of tobacco and the effects of that decision were mandatory subjects of bargaining in this case.

Waiver by contract -
General contract language, such as the "zipper" clause relied on by the employer in Chehalis, supra, and the general "management rights" and "subordination of agreement" clauses relied on by the employer in this case are not sufficient to avoid the duty to bargain over a mid-term change in working conditions. NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (2d Circuit, 1952); City of Kennewick, Decision 482-B (PECB, 1980); Kitsap, supra. The contract between the parties to the instant case has no

provisions which deal specifically with smoking or the use of tobacco. No waiver by contract defense is available to the employer in this case.

Need to comply with other state law -
The respondent cites RCW 36.12.120, which requires the Board of County Commissioners to preserve, benefit, or manage corporate property, and RCW 70.160, the Clean Indoor Air Act, as justifications for the unilateral imposition of restrictions on smoking. The two cited statutes authorize the employer to pass ordinances concerning tobacco use, but they must, if possible, be read to operate in a manner not in conflict with the duty to bargain mandated by Chapter 41.56 RCW. The county must comply with all state laws, not just those which it prefers to cite. It has not demonstrated how compliance with its statutory obligation to bargain issues relating to working conditions with the exclusive bargaining representative prior to adoption of the ordinance would be in conflict with either of the cited statutes.

Rejection of "Impact" Negotiations

Brown actually sought to open negotiations on the "impact" of the ordinance in her March 31, 1987, letter to the county. In that letter, the union proposed that a room to be set aside in Annex II for the use of smokers. This kind of proposal could have mitigated the impact of the smoking ban, by allowing employees a place to smoke, particularly in inclement weather. The union also proposed to work with the county in providing smoke-reducing equipment. Had the respondent met with the union and discussed this proposal in a good faith attempt to reach accommodation on the issue, it is entirely possible that these unfair labor practice charges would not have been filed or pursued. Chris Freed had even proposed that the ordinance

be delayed until she had an opportunity to meet with the complainant. The commissioners refused her request, and therefore must take full responsibility for flaunting the state collective bargaining statute.

FINDINGS OF FACT

1. Mason County is a political subdivision of the state of Washington, and is a "public employer" within the meaning of RCW 41.56.030(1). At the time in question, Chris Freed was the Administrative Assistant and Budget Director for the county.

2. The Washington State Council of County and City Employees, Local 1504 is a "bargaining representative" within the meaning of RCW 41.56.030(3), and is the certified exclusive bargaining representative of a bargaining unit of Mason County employees working the Auditor's office, the County Assessor's office, the Treasurer's office, the County Clerk's office, the District Court and Emergency Services. At the time in question the staff representative for the union was Mary Brown.

3. The parties had a collective bargaining agreement effective from January 1, 1986, through December 31, 1988. That agreement made no specific provision concerning the use of tobacco or smoking.

4. County employees represented by the union work in the county courthouse and in a nearby building called Annex II. Prior to April 28, 1987, employees were permitted, under certain circumstances, to smoke at their work stations. Smoking lounges were also provided.

5. Upon hearing of an impending restriction on smoking in the workplace, the union wrote to the county commissioners on March 31, 1987, and on April 13, 1987, requesting an opportunity to meet and discuss the issue.

6. On April 28, 1987, the county commissioners unilaterally adopted Ordinance 30-87, prohibiting smoking in all public areas within buildings owned or leased by Mason County, including the courthouse and Annex II.

CONCLUSIONS OF LAW

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

2. Restrictions on smoking in the workplace are a mandatory subject of collective bargaining under RCW 41.56.030(4).

3. By unilaterally adopting an ordinance banning smoking at work sites where smoking was previously permitted, without having given notice to Washington State Council of County and City Employees, Local 1504, and provided opportunity for bargaining concerning the decision and impacts of such a ban, Mason County has refused to bargain collectively in good faith and has committed unfair labor practices in violation of RCW 41.56.140(4) and (1).

ORDERED

Pursuant to RCW 41.56.160 of the Public Employees' Collective Bargaining Act, it is ordered that Mason County, its officers, elected officials, and agents, shall immediately:

1. Cease and desist from:

   A. Refusing to bargain collectively with the Washington State Council of County and City Employees, Local 1504 regarding the decision and effects of the decision to ban smoking in its facilities;

   B. Interfering with, restraining or coercing its employees in any other manner in the free exercise of their rights guaranteed them by the Act.

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

   A. Rescind or cease giving effect to ordinance 30-87, "An Ordinance relating to smoking in any building owned or leased by Mason County", with respect to employees in the bargaining unit represented by Washington State Council of County and City Employees, Local 1504, until such time as Mason County has affirmatively met its obligation to bargain collectively, in good faith, with the exclusive bargaining representative concerning the decision and effects of adoption of a prohibition of smoking by its employees at or about their workplace.

   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 Mason County, be and remain posted for sixty (60) days. Reasonable steps shall be taken by Mason

County 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.

Issued at Olympia, Washington, the 26th day of January, 1989.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALTER M. STUTEVILLE, Examiner

This order may be 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 HAS HELD A HEARING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE. THE COMMISSION HAS FOUND THAT WE VIOLATED THE PUBLIC EMPLOYEES' COLLECTIVE BARGAINING ACT (CHAPTER 41.56 RCW) AND HAS ORDERED US TO POST THIS NOTICE.

WE WILL NOT refuse to bargain in good faith with the Washington State Council of County and City Employees, Local 1504, regarding the impact and effects of the decision to ban smoking in county facilities.

WE WILL rescind ordinance 30-87, "An Ordinance relating to smoking in any building owned or leased by Mason County" until such time as the County has affirmatively met its obligation to meet and negotiate in good faith the impact and effects of that ordinance with the exclusive bargaining representative.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of rights guaranteed them by the Public Employees' collective Bargaining Act.

MASON COUNTY

By:_____
Authorized Representative

DATED_____

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

This notice must remain posted for sixty (60) consecutive 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.