STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 17,	)	CASE 7762-U-89-1642
Complainant,	)	DECISION 3566-A - PECB
vs.	)	
CITY OF SEATTLE,	)	DECISION OF COMMISSION
Respondent.	)	

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

Mark Sidran, City Attorney, by Marilyn Sherron, Assistant City Attorney, appeared on behalf of the respondent.

This case comes before the Commission on a timely petition for review filed by the International Federation of Professional and Technical Engineers, Local 17. The union seeks to overturn a decision issued on September 6, 1990 by Examiner J. Martin Smith.

BACKGROUND

This dispute is the latest incident in an ongoing labor dispute between the parties, dating back to at least 1983, regarding the adoption of workplace restrictions on employee smoking.

In 1986 and 1987, Local 17 and three other unions representing bargaining units of City of Seattle employees filed unfair labor practice charges against the employer, challenging the unilateral adoption of a city-wide "no smoking" policy. In December of 1988, Examiner Kenneth J. Latsch ruled that the employer had violated RCW 41.56.140(4), by failing to bargain in good faith with Local 17 and

the other complainant unions before adopting the challenged "no smoking" policy.[1]

On December 22, 1988, the City of Seattle petitioned for Commission review of the Examiner's decision on the "smoking" cases, pursuant to WAC 391-45-350.[2] On the same day, the employer transmitted a letter to all City of Seattle employees, as follows:

> TO: All City Employees
>
> FROM: Everett S. Rosmith /s/
> Personnel Director
>
> Douglas N. Jewett /s/
> City Attorney
>
> SUBJECT: Citywide Smoking Policy
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> As you may know, the City recently received its long awaited ruling from the Washington State Public Employment Relations Commission (PERC) on the unfair labor practice charges filed by four of the City's twenty-five unions with regard to the implementation of the Citywide smoking policy. The Commission's decision states that the City must cease and desist from "implementing the city-wide no smoking policy" as it pertains to members of Local 17, I.F.P.T.E., the Seattle Police Officers' Guild (SPOG), the Seattle Police Dispatchers Guild (SPDG) and the Seattle Police Management Association (SPMA). Furthermore, if the City wishes to implement such a smoking policy for members of the aforementioned unions, it must give notice of its intent to do so and, upon request, negotiate

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1 City of Seattle, Decisions 3051, 3052, 3053, and 3054 (PECB, 1988).

2 We note, in passing, that the Examiner's decision was subsequently affirmed by the Commission in City of Seattle, Decisions 3051-A, 3052-A, 3053-A, and 3054-A (PECB, 1989). The Supreme Court recently dismissed the employer's petition for judicial review as procedurally defective. ___ Wn.2d ___ (1991).

the imposition and effects of such a policy with these unions.

While the PERC decision concludes that the issue of a smoking policy is a mandatory subject of bargaining and that the City did not collectively bargain - as that term is defined under state law - with the aforementioned unions, it should be remembered that the City did spend approximately two years working with employees, all interested union representatives, departmental management and a consultant to develop a Citywide smoking policy. A great deal of energy and effort was invested in this endeavor and it is still our belief that the current smoking policy is one which is appreciated and supported by a substantial majority of employees. Therefore, the Citywide Smoking Policy will remain in effect, as is, for all employees other than those currently represented by Local 17, the SPOG, the SPDG and the SPMA. Smoking policies which were implemented by individual departments prior to the Citywide smoking policy taking effect on January 26, 1987 and which were previously uncontested may still be applicable to members of Local 17, the SPOG, the SPDG and the SPMA.

The Law Department will be appealing the PERC Hearing Examiner's decision to the three-member PERC Commission, and possibly on to Superior Court if necessary. In the meantime, the City will notify the four unions who filed the unfair labor practice charges that the City wants to implement the Smoking Policy as it relates to their members and that we are prepared to enter into negotiations immediately in order to attempt to mutually resolve this matter. Said notification will be made with the clear understanding that the City is reserving its right to appeal the PERC decision and its right to modify any agreement reached as a result of PERC's recent order regarding the Citywide smoking policy, should the City be successful in its appeal.

Members of Local 17, the SPOG, the SPDG and the SPMA who choose to now smoke in the workplace - assuming a pre-existing department policy does not restrict them from doing so - should realize that they may be legally liable

> for the effects of sidestream smoke. It is possible that litigation will be instituted by nonsmoking employees against those who smoke in the workplace or against their employer. The City and other employers are currently faced with such litigation. Since smoking is not considered an activity that must be performed in the "course and scope of their employment," the Law Department will not defend employees who smoke [or] [sic] who are named in such a suit. Similarly, if the City is sued by nonsmoking employees because of sidestream smoke, the City will attempt to include the employees responsible for the smoke in the workplace and their respective unions in the litigation.
>
> While awaiting resolution of this matter, we ask that all employees be mindful and courteous of one another. We encourage smokers within the four complainant unions who wish to smoke while at work to do so outdoors or in the designated City smoking rooms.

[emphasis in original]

On January 11, 1989, Local 17 filed this unfair labor practice case with the Commission, alleging that the employer had violated RCW 41.56.140(1), (2) and (3), by communicating directly with bargaining unit members through the above letter.

Following a hearing and the submission of briefs, Examiner Smith found no violation and dismissed the complaint. The union has appealed.

POSITIONS OF THE PARTIES

Local 17 argues that the employer's December 22, 1988 letter was argumentative and contained misrepresentations which tended to demean and undermine the union. The major thrust of the letter is said to coerce, threaten and intimidate bargaining unit employees, by suggesting that they might be joined in lawsuits concerning

"sidestream" smoke while also threatening withdrawal of the city's protection in the event of such lawsuits. The union asserts that the letter unlawfully communicated an offer to negotiate to the employees, and that it sought to pit employees against the union for its pursuit of remedies available under the collective bargaining statute. The union also contends there is no basis in the record for certain of the Examiner's findings.

The employer did not file a brief on review.

DISCUSSION

Circumvention of the Union

Where employees have exercised their right to organize for the purposes of collective bargaining, their employer is obligated to deal only with the designated exclusive bargaining representative on matters of wages, hours and working conditions. RCW 41.56.100; RCW 41.56.030(4). Under such circumstances, an employer may not seek to circumvent the exclusive bargaining representative of its employees through direct communications with bargaining unit employees. See, Seattle-King County Health Department, Decision 1458 (PECB, 1982), where an employer was found to have committed an unfair labor practice by negotiating directly with bargaining unit employees concerning possible layoffs, and City of Raymond, Decision 2475 (PECB, 1986), where an employer unlawfully dealt with bargaining unit employees concerning proposed changes in wages and working conditions.[3]

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[3] A public employer does not commit a unfair labor practice by truthfully explaining to bargaining unit members the proposals it had previously communicated to the union. Spokane County, Decision 2793 (PECB, 1987).

We do not read the employer's December 22, 1988 letter to its employees as an offer to negotiate directly with them. To the contrary, it advises those employees that the employer will instead negotiate with their exclusive bargaining representatives.

Alleged Interference/Discrimination

Despite the existence of a bargaining relationship, employers retain the right to communicate directly with their employees who are represented for the purposes of collective bargaining, subject to certain conditions. The "interference" prohibitions of RCW 41.56.140(1) and (2) circumscribe an employer's right to address its employees, by forbidding communications that those employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity. METRO, Decision 3218-A (PECB, 1990); City of Seattle, Decision 3066-A (PECB, 1989). Even if noncoercive in tone, a direct communication may amount to unlawful conduct if it has the effect of undermining a bargaining representative.

There is no contention in this case of a promised benefit. The issue before the Commission is whether the December 22 letter is reasonably characterized as coercive or threatening. The burden of proof rests with the union. City of Seattle, Decision 3066-A (PECB, 1989).

In analyzing the December 22 letter, the Examiner applied criteria utilized by the National Labor Relations Board (NLRB) to determine whether an employer statement is "free speech" or "interference".[4] We concur with the Examiner's conclusion that the main thrust of the December 22 letter was informational, that it was substantially factual, and as a whole would not reasonably be perceived by

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[4] See, Endo Industries, 239 NLRB 1074 (1978).

bargaining unit employees as threatening them for their exercise of lawful union activity.

The first paragraph of the December 22 letter is factually correct in its description of the Examiner's ruling in City of Seattle, Decisions 3051 et al., supra.

The employer began the second paragraph by describing the Examiner's finding that the employer failed to collectively bargain. It then went on to describe the efforts it had made to obtain input from a variety of sources when developing the city-wide smoking policy. We find unpersuasive the union's contention that the wording of this paragraph up to this point was misleading, or that it tended to demean and undermine the union. Rather than undermining the complainant unions or showing defiance of the Examiner's ruling, the underlined portion at the end of the second paragraph announces the employer's compliance with that decision.

The third paragraph of the December 22 letter is a factual statement that the employer will exercise its right to appeal the Examiner's ruling in City of Seattle, Decisions 3051 et al., supra, together with a factual statement that the employer will exercise its right to request bargaining on the subject.[5]

In the fourth paragraph, bargaining unit members that chose to smoke were advised that risked becoming involved in litigation and potential liability for sidestream smoke. Employees were further advised that, because smoking is not considered an activity in the course and scope of employment, they would not be defended by the city Law Department in the event of a lawsuit. The union takes issue with this paragraph as containing a threat to union members.

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[5] Bear in mind that the Examiner did not find that the disputed "smoking" policy was itself unlawful, but only that the employer had unilaterally implemented that policy without fulfilling its bargaining obligations.

The fifth paragraph encourages peace and harmony, and suggests that smoking be done outside, without any suggestion of enforcement.

As this Commission has noted previously, distinguishing between illegal threats and legitimate prophecies can be difficult. PUD of Clark County, Decision 2045-B (PECB, 1989). In making that distinction, the Commission takes into account the natural tendency of employees, because of their economic dependence upon the employer, to perceive implications that might be more readily dismissed by a more disinterested ear. Id. quoting with approval NLRB v. Gissel Packing Co., 391 U.S. 575 (1969).

The fourth paragraph of the letter is certainly the most troubling. The employer's warning of legal liability might reasonably be perceived as threatening by some employees. The critical consideration, however, is whether any implied threat was reasonably perceived as directed at the exercise of a protected activity. Here, we are persuaded it was not.

The protected activity in this case was the challenge to unilateral implementation of the city-wide smoking policy. The warning in the employer's letter is not directed just at employees who supported such a challenge. It is not even directed at all bargaining unit employees who choose to continue smoking. When paragraph four is read in conjunction with paragraph five it seems apparent that the employer's warning is directed only at members of the union who choose to continue smoking in locations where other employees are subjected to their sidestream smoke. Further, the warning is limited to the period while the employer pursues its available appeals of the adverse ruling.

The union did not establish that its bargaining unit members were necessarily entitled in the past to legal defense by the city

against liability for side stream smoke.[6] Thus, the employer does not appear to be withdrawing any benefit previously provided because of the charge filed against the city-wide smoking policy.

We agree with the employer that the act of smoking anywhere one chooses is not an activity protected by the collective bargaining statute. Statements made to deter employees from engaging in unprotected activities are not prohibited. Concrete School District 11, Decision 1059 (PECB, 1980). Any perceived threat in this case was not directed against the exercise of a lawful union activity.

As a whole, the evident purpose of the letter appears informational rather than persuasive or coercive. The letter was "substantially factual". Judged by its overall purpose and tone, we find the letter was a permissible communication between the employer and its employees.

Unsupported Factual Findings

We have considered the union's objections to certain of the Examiner's factual statements, and we agree that certain statements are not supported by the record.[7]

At page 10 of the Examiner's decision, he stated: "It appears to be accepted practice for both sides to 'fire for effect' when the urge to communicate arises." The foregoing comment is a generalization about the parties' relationship for which we can find no

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[6] The union admits that whether actions occurred "in the course of employment" is the test for determining the circumstances under which employees are "routinely" defended for their actions on the job.

[7] The record in this case is very limited; consisting only of stipulated exhibits.

basis in the stipulated record. Accordingly, we have attached no weight to that observation.

At page 12 of the Examiner's decision, he commented on whether legal defense was a mandatory subject of bargaining, and whether the unions had waived or failed to timely pursue unfair labor practice rights concerning such bargaining. We have likewise disregarded those comments. The unfair labor practice complaint at issue in this case was focused on the text of the employer's letter of December 22, 1988. The Examiner's comments amount to dicta that exceeds the scope of the record.[8]

In paragraph 6 of his findings of fact, the Examiner stated: "Local 17 had not previously objected to direct communications by the City of Seattle with its employees, and there was a past practice of the employer issuing such communications." This finding can only have been based on an inference drawn from the record's silence as to any prior objection. Given the limited record and issue being litigated by the parties, we find such an inference inappropriate and thus delete it from the Commission's findings.

None of the foregoing changes alter the outcome of the case.

NOW, THEREFORE, it is

ORDERED

1. The findings of fact issued by Examiner J. Martin Smith in this matter are affirmed and adopted as the findings of fact of the Public Employment Relations Commission, except paragraph 6 is deleted.

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[8] The Examiner's statement may well be true as to whether a refusal to bargain could now be alleged by the union, but we need not decide that issue based on the limited record before us.

2. The conclusions of law and order of dismissal issued by Examiner Smith in this matter are affirmed and adopted as the conclusions of law and order of the Commission.

Issued at Olympia, Washington, the 16th day of July, 1991.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Janet L. Gaunt

JANET L. GAUNT, Chairperson

Mark C. Endresen

MARK C. ENDRESEN, Commissioner

Dustin C. McCreary

DUSTIN C. McCREARY, Commissioner