STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1445, Complainant,	)	CASE NO. 5647-U-85-1034
vs.	)	DECISION 2633-A - PECB
CITY OF KELSO, Respondent.	)	DECISION OF COMMISSION

Webster, Mrak & Blumberg, by Mark E. Brennan, Attorney at Law, appeared for the complainant.

Davis, Wright & Jones, by Larry E. Halvorson, Attorney at Law, appeared for the respondent.

The International Association of Firefighters, Local 1445 (the "union"), in a complaint initially filed January 23, 1985, and later amended, charged the City of Kelso (the "city") with committing unfair labor practices in violation of RCW 41.56.140(1), (3) and (4). Examiner Rex L. Lacy conducted hearings on the charges and issued his decision on January 15, 1988. Both the city and the union petitioned the Commission for review of the Examiner's decision.

BACKGROUND

The Examiner, in his decision, has ably set forth the facts pertinent to this case. We will reiterate those facts only to the extent necessary, incorporating by reference the Examiner's recitation of facts to the extent not set forth here.

The City of Kelso, with approximately 11,000 people, is a non-charter code city with a council-manager form of government. The city council elected by the people chooses a mayor from among its members. The council is a policy-making body for the city, and the chief administrative officer is the city manager. Since late 1983, Jay Haggard has served as city manager.

For many years, the International Association of Firefighters, Local 1445, has represented uniformed firefighters employed by the city. The city and the union have been parties to a series of collective bargaining agreements. The last such agreement was effective from January 1, 1984 through December 31, 1986, although the parties did not sign that agreement until July 30, 1985. The previous labor agreement spanned the period January 1, 1981 through December 31, 1983.

The city's fire department was headquartered on a busy thoroughfare in downtown Kelso. The building needed repair. The city at one time employed a fire chief and 18 full-time firefighters. By February, 1985, it did not have a fire chief and employed only nine full-time firefighters. The fire department did not have an ambulance, aid vehicle or similar emergency medical service capabilities. The fire department also lacked a fire marshall. At one time the city and the nearby Cowlitz County Fire Protection District #2 ("Cowlitz District") and the City of Longview were parties to an intergovernmental agreement to provide automatic response to larger fires. That agreement was cancelled in 1984 by the Cowlitz District and in early 1985 by the City of Longview, because of inadequacies in the Kelso Fire Department.

In early 1983, facing a serious budget deficit, the city asked the union to forego the eight percent wage increase provided in the collective bargaining agreement in effect between the parties at that time. The union offered to postpone the increase on the condition there would be no layoffs. The city would not agree to that condition, and told the union it would accept nothing short of a waiver of the entire eight percent. The union refused, and the entire increase went into effect. The relationship between the city and the

union, which had not been particularly good, then began to deteriorate further.

In March, 1983, the city council reorganized the police and fire functions by consolidating them into a department of public safety and establishing a volunteer program to supplement the paid firefighters. The fire chief retired and the city did not fill this position. The Chief of Police, Tony Stoutt, was designated public safety director and placed in charge of the combined functions, although he had no fire department experience.

In the political campaign during the latter part of 1983, Mayor Dick Woods sought re-election to the city council. During negotiating sessions for the most recent labor agreement, Mayor Woods had made a statement that the fire department was going to sustain a $175,000 budget cut for calendar year 1984.[1] As a result, the union gave support to the mayor's opponent and conducted informational picketing of city hall. The volunteer firefighters quit when the union told them the city planned to replace the paid firefighters with volunteers to save the $175,000 demanded by the mayor. The mayor was re-elected and, subsequent thereto, the fire department budget was cut by $130,000.

On February 1, 1984, in response to the budget cuts, the city laid of several firefighters. Others resigned or retired. The union grieved the layoffs and filed an unfair labor practice complaint with the Commission. Both the grievance and the unfair labor practice charges were settled by the parties without hearing.

Negotiations for a new contract did not produce results. In April, 1984, the unresolved contract issues were certified for interest arbitration under RCW 41.56.450.

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1 We need not decide a dispute framed by the testimony as to whether Mayor Woods stated that the cuts were in retaliation for political support he believed certain union members were giving his opponent.

Also in April, 1984, Assistant Chief Buley was demoted for giving an interview to the local newspaper. The interview followed media statements attributed to Public Safety Director Stoutt that firefighters gambled on the job, were poorly trained, came and went without accountability, and engaged in lucrative side occupations. The union grieved Buley's demotion, and processed that grievance to arbitration under the parties' collective bargaining agreement, but that dispute remains unresolved.[2]

In late June, 1984, while the interest arbitration proceedings were pending under RCW 41.56.450, the city announced that it was considering an intergovernmental agreement with the Cowlitz District. Pursuant to that agreement, the city was to transfer its fire equipment to the Cowlitz District, discontinue its own fire protection services, and purchase that service from the Cowlitz District.

The union requested bargaining on both the decision to contract services to the Cowlitz District and the effects of such an arrangement on the employees. The city took the position that the decision was not a mandatory subject of bargaining. However, several meetings were held in which the decision was discussed, without any agreement being reached. On October 9, 1984, the union delivered to the city a written offer making major concessions. The offer was rejected by the city. On the same day the city signed the intergovernmental agreement with the Cowlitz District.

The union filed unfair labor practice charges with the Commission which were first heard and decided by an Examiner, and then were reviewed by the

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[2] In a decision dated April 8, 1985, an arbitrator ruled that the city had violated the labor agreement by demoting Buley without just cause and discriminated against him on account of his union membership. The arbitrator was a member of the Commission's staff, serving pursuant to RCW 41.56.125, but the Commission does not decide appeals of or otherwise review such decisions under Chapter 391-65 WAC. The city has not complied with the arbitrator's ruling. The city petitioned the Superior Court for Cowlitz County (Cause No. 85-2-003690-2, filed May 8, 1985), seeking to have the arbitration award vacated, but that court action is dormant.

Commission itself.[3] On March 15, 1985, the Commission affirmed the Examiner's ruling that the decision to contract out its fire suppression services was a mandatory subject of bargaining, and that the city had not fulfilled its statutory bargaining obligations in its discussions with the union. City of Kelso, Decision 2120-A (PECB, 1985) ("Kelso I"). The Commission ordered the city to bargain its decision with the union, to refrain from implementing the intergovernmental agreement with the Cowlitz Fire District, and in the event that resolution of the issue was not achieved through negotiation, submit the dispute to mediation, and if necessary, to interest arbitration for determination. The city timely appealed the Commission's decision to the Superior Court for Cowlitz County, where that matter also remains dormant.

Meanwhile, on January 18, 1985, Public Safety Director Stoutt ordered the layoff of the two least senior firefighters, Dean Bolden and Robert Stephenson, effective February 1, 1985. The reason given by Stoutt for the layoff was a $40,000 over-expenditure of the fire department budget in 1984, which was required to be carried forward and offset the following year as a budget reduction. The union asserts that the amount of that deficit coincided substantially with the unbudgeted amount that the city spent in legal fees defending the unfair labor practice and court proceedings regarding the intergovernmental agreement. The record indicates that the city's police, corrections and communication departments also overspent their 1984 budgets, but apparently were not required to carry those deficits forward to 1985. The city's general fund, of which the fire department is a part, underspent its 1984 budget by nearly $102,000. At hearing in this matter, City Manager Jay Haggard testified that departmental budget overages or underages are not carried forward from one budget year to the next. Instead, according to Haggard, the planners look to the status of the general fund itself. He also testified that the layoffs of Bolden and Stephenson resulted from a

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[3] On December 28, 1984, the date of the Examiner's decision finding an unfair labor practice violation, the Superior Court for Cowlitz County issued a preliminary injunction, preventing the city from discontinuing its fire department or giving effect to the agreement with the Cowlitz District.

projected 1985 deficit, thus contradicting the explanation given at the time by Stoutt.

On January 18, 1985, the union requested bargaining over the announced layoffs. The city responded, stating that the layoffs were not a mandatory bargaining subject, but that it would meet with the union. Further correspondence ensued. The union and the city scheduled a meeting for March 8, 1985, with several issues on the agenda. At the meeting, the union brought up the layoffs. The city manager again responded that the layoffs were a management right and were not negotiable.

During the 1985 legislative session, Chapter 52.04 RCW was amended to raise the population maximum for fire district annexations from 10,000 to 100,000. This enabled the city to seek out-right annexation to the Cowlitz District.

The parties executed their 1984-1986 collective bargaining agreement on July 30, 1985.[4] On the same date, the city announced its intent to pursue annexation to the Cowlitz District. The union learned of the annexation on the next day, from a news reporter. Shortly thereafter, the city council and the Board of Commissioners of the Cowlitz District passed the necessary resolutions to initiate the annexation proceedings.

On August 14, 1985, the union requested that the city bargain the annexation decision, and it made a proposal. Haggard responded with a statement that the city did not consider the decision a mandatory subject of bargaining.

On September 18, 1985, the boundary review board approved the annexation pursuant to Chapter 36.93 RCW, and the issue was placed on the ballot.

The parties met on September 20, 1985, when Haggard reiterated the city's position that the annexation decision was not negotiable. He was more equivocal about the "effects" of the annexation decision.

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[4] The new contract contained a memorandum of agreement which allowed the parties to continue pursuing the litigation then ongoing.

Voters approved the annexation on November 5, 1985, and the vote approving annexation was certified on November 18, 1985.

On December 6, 1985, a mediator assigned from the Commission staff attempted to mediate the dispute. No agreement was reached, and no further negotiating sessions were held. On February 7, 1986, the Executive Director certified two "effects" issues for interest arbitration. The union designated its partisan arbitrator for the interest arbitration panel, but the city has refused to participate. The interest arbitration process has been held in abeyance pending the decision in the instant matter.

Because of a lag between levy and collection which is built into the statutes, the Cowlitz District could not collect taxes directly from Kelso property owners for fire suppression services until 1987. Thus, it presumably would have had difficulty providing fire protection services in Kelso prior to January 1, 1987, without compensation from the city.

At the hearing in this matter, Cowlitz District Chief Baxter testified that, without funds in addition to $208,000 annually that the Cowlitz District would receive from the transferred Kelso tax levies under the annexation statute, the Cowlitz District would have provided fire protection primarily with volunteers, with the support of some full-time firefighters. He testified that it was the city's decision to determine the level of service it wanted to buy from the Cowlitz District. The Cowlitz District stated that it would require additional funds to pay for such additional services.

The city negotiated with the Cowlitz District concerning implementation of the annexation. Those parties agreed that the Cowlitz District would assume responsibility for fire suppression services effective December 1, 1985. The city agreed to pay the Cowlitz District $439,000 for fire-related services during 1986, and a pro-rata share of that amount for December, 1985. The city also agreed to contribute 24% of the cost of the Cowlitz District's new fire station, and permitted the Cowlitz District to use fire equipment owned by the city.

On December 1, 1985, all of the Kelso firefighters were laid off and the Cowlitz District commenced providing fire services for the city. The Cowlitz District did not hire any of the firefighters displaced by the annexation.[5]

After considering the evidence presented at hearing, Examiner Lacy found that the city violated RCW 41.56.140 by: 1) refusing to give notice and bargain concerning the decision and effects of the layoff of Dean Bolden and Robert Stephenson in January, 1985; 2) refusing to bargain the effects of the annexation decision upon displaced employees; and 3) refusing to bargain the decision to contract out its fire protection services to the Cowlitz District between December 1, 1985 and January 1, 1987. The Examiner ruled that the annexation decision itself was not a mandatory subject of bargaining. With respect to the discrimination charges, the Examiner ruled that the layoffs of Bolden and Stephenson were not retaliatory, but that the contracting out to the Cowlitz District which occurred between December, 1985 and January, 1987 was motivated by anti-union animus and was in retaliation for the exercise of employee rights protected by Chapter 41.56 RCW. By way of remedy, the Examiner ordered the city to bargain the "effects" issues with the union, with the matter to be taken to interest arbitration, if necessary. He ordered make-whole remedies in favor of Bolden and Stephenson for their entire periods of layoff and for the other Kelso firefighters displaced by the decision to contract out to the Cowlitz District effective December 1, 1985. Because the contracting out was found to be a retaliatory act, as well as a flagrant disregard of the Commission's decision in Kelso I, the Examiner ordered the extraordinary remedy of costs and attorney's fees in favor of the union.

ISSUES

The petitions for review and the extensive briefs of the parties frame a large number of issues for determination by the Commission:

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[5] Chapter 52.04 RCW was again amended in 1986, and now requires an employer taking over fire-related services by merger or annexation to hire the firefighters of the predecessor entity.

1. Did the city commit an unfair labor practice by not fulfilling its statutory bargaining obligations with respect to its 1985 decision to lay off firefighters Bolden and Stephenson?

2. Were the economic reasons given for the 1985 layoffs of firefighters Bolden and Stephenson pretextual, and were those layoffs, in fact, in retaliation for protected union activity?

3. Did the city have an obligation to bargain its decision to seek annexation to the Cowlitz Fire District?

4. Did the city have the obligation to bargain the "effects" of the decision to annex to the Cowlitz Fire District?

5. Did the city, in fact, satisfy its statutory bargaining obligation of bargaining with respect to the "effects" of its annexation decision?

6. Did the city have the duty to bargain its decision to pay the Cowlitz District for assuming fire protection services between December 1, 1985 and January 1, 1987?

7. Did the city have the duty to bargain concerning its decision to purchase additional services from the Cowlitz District?

8. Did the city arrange for the takeover of services by Cowlitz District on December 1, 1985, instead of a later date, in retaliation for protected union activity?

9. If the city committed unfair labor practices, is the union entitled to recover attorney's fees?

Those issues are discussed under separate sub-headings, below.

DISCUSSION

Issue 1 - The January 1985 Layoffs

The Examiner held that the city violated RCW 41.56.140(1) and (4) by failing to bargain the layoffs of firefighters Bolden and Stephenson.

The city challenges the Examiner's decision, arguing that: 1) A reduction in crew size is not a mandatory subject of bargaining; 2) the applicable collective bargaining agreement specifically allows layoffs; 3) the dispute regarding the layoffs should have been deferred to arbitration under the parties' collective bargaining agreement; 4) the union waived its bargaining rights by inaction; and 5) if the city did have a bargaining obligation, it met that obligation in its negotiations with the union.

Layoffs as a mandatory subject of bargaining -
This Commission has repeatedly held that the decision to lay off employees is a mandatory bargaining subject. E.g., Stevens County, Decision 2602 (PECB, 1987); City of Centralia, Decision 1534-A (PECB, 1982); City of Mercer Island, Decision 1026-A (PECB, 1981); South Kitsap School District, Decision 472 (PECB, 1978).[6]

The city's reliance on our minimum staffing decisions, e.g., Pierce County, Decision 1710 (1973); City of Yakima, Decision 1130 (1981); City of Richland, Decision 2448-B (1987),[7] is so misplaced as to be frivolous. We have held that future staffing levels are not a mandatory subject of bargaining unless the union shows a clear nexus between staffing levels and the wages, hours and conditions of employment of the bargaining unit. See, City of Richland,

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6 Indeed, 1 Morris, The Developing Labor Law, 800 (2nd ed. 1983) lists "layoffs" under the heading of "obvious and settled examples" of mandatory bargaining subjects under the National Labor Relations Act (NLRA).

7 An appeal of the Richland decision is pending, sub nom. International Association of Firefighters vs. PERC, in Benton County Superior Court, Cause No. 87-2-00-7429.

supra. In the case of imminent layoffs, however, the effect of the layoff decision on the wages, hours, and working conditions of the bargaining employees to be laid off are clear. Hence, the decision to lay off is a mandatory bargaining subject. The city's "not a mandatory subject" response to the bargaining demand was made at its peril.

Waiver by Contract -

We find, for two distinct reasons, that the contract which expired on December 31, 1984, does not apply to this dispute. First, the waivers of bargaining rights contained in that contract expired with the contract. City of Bremerton, Decision 2733-A (PECB, 1987). Second, the parties later signed a new contract which, by its terms, applies to the period in which the layoff decision was made and implemented.

The collective bargaining agreement signed by the parties on July 30, 1985, was retroactive to January 1, 1984. Hence, by its terms that contract would apply to the layoffs of Bolden and Stephenson. Article 8 of that contract states:

> 8.1 In case the Employer decides to reduce Fire Department personnel, the employee with the least seniority shall be laid off first. No new employees should be hired until all laid off employees have been given an opportunity to return to work.

Article 31 of the agreement, a "management's rights" clause, states:

> The Employer retains the exclusive right to manage the fire department. Therefore, all powers, authorities, functions and rights not specifically and expressly restricted by this Agreement are subject to exclusive management control.

The parties signed a memorandum of understanding (MOU) which excepted certain litigation from the contract signed on July 30, 1985. Even if, as the city urges, that MOU does not except the layoff dispute, we do not believe the contract itself waives the union's right to bargain the layoff decision. The

layoff clause quoted above concerns only the procedure regarding layoffs, (i.e., the "effects") and not the decision. The management rights clause is too general to give rise to a specific waiver. City of Kennewick, Decision 482-B (PECB, 1980).[8]

The parties' past practices are not sufficient to show that the waiver language was intended to mean anything except that which we stated above. In fact, the last time a layoff occurred, in 1984, the union grieved and the parties negotiated a settlement. Thus, the past practice demonstrates, if anything, that the union did not waive its right to negotiate the decision to lay off.

Deferral to Arbitration -

At the time these layoffs occurred, there was no contractual language in effect susceptible to interpretation (a necessary precondition to deferral). The prior labor agreement did not apply, as previously stated. The contract which ultimately applied to this time period was not agreed upon until more than a year later. Finally, we do not defer "discrimination" charges made under RCW 41.56.140(1),[9] and such a charge has been made with respect to these layoffs. For these reasons, deferral is not appropriate.

Waiver by Inaction -

The city's brief, at pages 9-10, relates that the union's attorney contacted the city's attorney in a letter dated January 18, 1988, and requested

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8 See, also, 1 Morris, The Developing Labor Law, supra, at 643-44, noting that a "catchall" management rights clause which does not address specific bargaining rights does not by itself satisfy the prerequisites for a waiver.

9 As reviewed in Stevens County, Decision 2602 (PECB, 1987), our deferral policies relate to "unilateral change - refusal to bargain" unfair labor practice allegations, where an arbitrator's interpretation of the parties' collective bargaining agreement may well put the entire dispute to rest. The same cannot be said for "discrimination" allegations, where an arbitrator drawing his or her authority from the collective bargaining agreement has no authority or jurisdiction parallel to that conferred upon the Commission by RCW 41.56.140(1) and 41.56.160.

bargaining. The city's attorney responded stating that the city had no duty to bargain, but was willing to meet with the union to discuss the matter. The letter instructed the union to contact the city attorney to schedule a meeting. The city's brief, at 10, thereupon states:

> Despite adequate notice and an opportunity to bargain, the Union did not meet with the City Manager until May 8, 1985. Exhibits 14-16. The Union's attorney requested additional information on May 30, to which the City Manager responded on June 11, 1984. Exhibits 17 and 18. No further communications were received from the Union regarding the February layoffs.

Further, in its brief, at 16, the city states:

> The Union did not request a delay in implementation of the decision until after the layoffs were effected. Nor did it follow up on the City's offer to bargain until some three months after the two employees were laid off.

Based on its own account of the evidence, the city contends that the union sat on its hands for three months, and thus waived its bargaining rights with respect to the layoffs of Bolden and Stephenson. It further contends that the union was apprised of the impending layoffs before they occurred so that, contrary to the Examiner's holding, the layoffs were not a fait accompli.

The city mis-states the facts. The record shows the following transpired during the period of January to May, 1985:

Date	Event
January 18	Memorandum to fire department Captain advising him of layoffs.
January 18	Union attorney's letter requesting bargaining and certain information also requests city to reconsider and refrain from implementing the layoffs.
January 24	City attorney's letter advising union layoffs were non-negotiable but city would discuss. Union advised to contact city to contact meeting.

January 30	Union attorney's letter to city's attorney asking if attorney for union could contact city attorney's client directly. Also requested a delay in implementation of layoff decision.
February 1	Layoffs implemented.
February 6	City attorney's response approving direct contact by union with city.
February 15	Letter from Local 1488's president to city manager regarding scheduling a meeting.
February 25	City manager's response suggesting week of March 4, 1985. Notes initialed by Local 1488's president at bottom of letter states: "called Jay 3/4/85 confirmed meeting for 3/8".
March 8	Parties met with more than one issue on agenda. Testimony was that union brought up question of layoffs and city manager stated that they were not negotiable because they were a management right.
May 1	Letter from union's attorney to city manager requesting delivery of information originally requested on January 18, 1985.
May 2	Letter from city's attorney to union's attorney stating that the information is available for inspection in Kelso.
May 6	Letter from union's attorney to city's attorney thanking him for his response and stating that the parties will meet at the union's offices on May 8.

We have set forth these events in more detail than we would ordinarily, because the city has failed to mention the important events which transpired between January 30 and March 8, 1985. We find the evidence establishes that the union requested bargaining as soon as it learned of the layoffs. Contrary to what the city asserts in its brief, we also find that the union requested the city to refrain from or delay the implementation of the decision. Some correspondence concerning the proper contacts ensued, and a meeting was scheduled at the city's earliest convenience, but the city refused at that meeting to bargain the layoff decision. In the context of the repeated claim that the matter was not a mandatory subject for bargain-

ing, we conclude that any further bargaining efforts by the union would have been an exercise in futility. The inference of a "waiver" sought by the city is directly contrary to the evidence.

Satisfaction of the Bargaining Obligation -
The city argues, incredibly, that its May 8, 1985 meeting with the union concerning the budgetary information the union had sought satisfied the city's bargaining obligation, because the city had given the union the information requested and did not hear from the union again on the subject. This argument again ignores the March 8, 1988 meeting and the prior contacts between the parties, and we reject it in its entirety.

Issue 2 - The Layoffs as Retaliatory

The union contends that the Examiner erred by not finding that the layoffs were in retaliation for the union's utilization of the procedures of the Commission and the courts to block the intergovernmental agreement in 1984.

We agree with the union that the layoffs were retaliatory, and that the economic explanation was pretextual. We therefore reverse the Examiner in that respect.

We agree that with the Examiner that the employer has the right to exercise control over its own budget, and that the fact of the budget shortfall being coincidentally equivalent to the legal fees spent opposing a prior union action does not, by itself, prove retaliation. The Examiner applied the Wright Lines[10] analysis in making his ultimate determination on the issue:

> This record, like that of the previous unfair labor practice litigation between these parties, is replete with evidence established that these parties have recently had a difficult bargaining relationship ... A

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10 251 NLRB 1083 (1980). See, Clallam County, Dec. 1405-A (PECB, 1982), aff'd 43 Wn. App. 589 (1986), rev. den. 106 Wn.2d 1013 (1986).

> number of the exhibits in this matter are newspaper accounts of public statements and counter-statements made by the representatives or the parties on a variety of disputes. The uncontroverted testimony of a news reporter provides evidence of anti-Union statements made by city officials. Against this background it is not difficult to infer the city may have acted out of anti-Union animus, and so have discriminated against the employees represented by the union for pursuing their statutory rights. The burden must shift to the employer.

The Examiner went on to find that the city met its burden of proving that legitimate business reasons existed for the layoffs. He noted that much of the evidence of anti-union motivation occurred prior to the events at issue, and further, over the years, the Kelso firefighters had "made themselves expensive." The Examiner thus concluded that the city's move to layoff Bolden and Stephenson was motivated by the 1985 budget reductions enacted by the employer, and was not retaliatory. While we respect and give great credence to the Examiner's perception of events, we are not convinced that the employer carried its burden of proof. In reaching that conclusion, we consider that Public Safety Director Stoutt and City Manager Haggard gave inconsistent reasons for the layoffs, that other departments which overspent their budgets in 1984 did not incur similar cuts in 1985, that the city's general fund had an overall surplus at the end of 1984, and the evidence that the city's planners look to the status of the general fund to determine whether a true deficit exists. We also consider the evidence we found in Kelso I, suggesting a deliberate attempt by the city to let the fire department "run down", as well as later allegations that Stoutt stated that the city council intended to allow further deterioration in retaliation for the union's successful opposition to the intergovernmental agreement. Those many elements lead us to the conclusion that the reasons stated by the city for the layoffs were pretextual. When the evidence linking the budget reduction to the legal expenses incurred by the city opposing the union, we find that the city has not met its burden of overcoming the prima facie case made by the union.

Issue 3 - The Duty to Bargain the Decision to Seek Annexation

The union seeks reversal of the Examiner's determination that the decision of the city to seek annexation was not a mandatory bargaining subject. The union cites RCW 41.56.905 in support of the proposition that, by its terms, Chapter 41.56 RCW takes precedence over any conflicting provisions of Chapter 52.04 RCW. Further, the union maintains there is nothing inherent in the annexation process that precludes collective bargaining. Finally, it disagrees with the Examiner's conclusion that the annexation is a "core entrepreneurial" decision exempt from bargaining. It urges us to take into account the special legislative interest in uniformed personnel which sets up a statutory scheme of bargaining, mediation and interest arbitration as a strike alternative.

While we agree with the union's analysis of the relationship between Chapter 41.56 RCW and Chapter 52.04 RCW, we agree with the Examiner's characterization of the annexation as a "core entrepreneurial" decision exempt from bargaining.

In Kelso I, we decided that the city's contracting out of fire suppression services was a mandatory subject of bargaining. When an employer merely contracts out the work, it retains both rights and liabilities with respect to the contracted work. Some rights and liabilities are specified under the contract, others are implied by law. Under the intergovernmental agreement for fire suppression services at issue in Kelso I, the city was to retain both legal rights and legal responsibilities concerning the fire suppression function. For example, if the city had found itself dissatisfied with its contractor's performance, it could have considered rescinding the contract on the grounds of material breach. Conversely, had the city failed to pay its contractor, it could have been liable for damages. In some circumstances the city could have been liable to third parties for the negligent performance of services by its contractor. Thus, when services are contracted out, the employer has not truly "gone out of the business" of providing those services.

We commented extensively in Kelso I on the city's attempted contracting out of its fire suppression services in the context of the city's argument that it was merely going out of the fire suppression business, and we distinguished the city's 1984 contracting out effort from the "partially going out of business" situations discussed by the Supreme Court of the United States in First National Maintenance Corp. vs. NLRB, 452 U.S. 666 (1981). We particularly examined the Supreme Court's focus on the need of private sector management, in cases of closures, for speed, flexibility, and secrecy, as well as significant tax and securities consequences that hinge on confidentiality. We noted also the Supreme Court's observation that good faith bargaining in such situations could very well be futile. We thereupon observed, at 9, that:

> Most public sector institutions do not exist to compete with private enterprise and therefore the above considerations favoring management are not relevant.

We also found important the need to preserve the mandate of RCW 41.56.430, which requires interest arbitration after an impasse in negotiations is reached.

There are situations, however, that are not mandatory bargaining subjects, because they fundamentally affect the scope and direction of the enterprise. Federal Way School District, Decision 232-A (PECB, 1978). We find this occurs when management seeks to relieve itself from any legal involvement whatsoever in a product or service it formerly provided. In other words, it truly "goes out of the business".

In the case at hand, the city annexed its fire suppression function to another entity. Having done so, the city lost all of its rights, interest and control in the basic fire suppression services provided by the annexing entity under the transferred tax levies. If the city were to conclude later that it was not satisfied with the services rendered by the Cowlitz District, its hands, relatively speaking, would be tied. It is clear that the city's management lacks the legal standing to contest the quality of services, to

withhold payment of the transferred tax levies or to otherwise terminate the arrangement.[11] In all likelihood, the city would not be liable to third parties for negligence on the part of the Cowlitz District, which would be the provider of fire services.

We distinguish "subcontracting" from an "annexation", and hold that the decision concerning the former is a mandatory subject of bargaining in most circumstances, while the latter is not. Thus, we hold that the Examiner was correct in ruling that decision to seek annexation was not a mandatory bargaining subject, and hence the city did not commit an unfair labor practice when it failed to bargain that decision.[12]

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11 Chapter 52.04 RCW provides that both a passage of three years' time and affirmative approval of the electorate is required to reverse an annexation.

12 The union points out that the Examiner found that the city's decision to transfer and fund fire suppression services between December 1, 1985 and December 31, 1986 was retaliatory. The union questions how a retaliatory decision (i.e., one without legitimate business justification) arising from the same set of facts as the decision to seek annexation can be exempt from bargaining. We find the situations are distinguishable.

In Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965), the Supreme Court stated the closure of an entire operation (i.e., going out of business) would be exempt from bargaining and immune from discrimination charges, even if the closure was wholly motivated by anti-union animus. On the other hand, "runaway shops" (i.e., a transfer of work to another plant, to other employees in the same plant, to a subcontractor or to an alter-ego corporation based upon anti-union animus) constitute a discriminatory practice violative of the National Labor Relations Act. Local 57, Garment Workers (Garwin Corp.) v. NLRB, 153 NLRB 664, modified 374 F.2d 295 (D.C. Circuit, 1967), cert. den. 387 U.S. 942 (1967). We analogize the annexation to a closure of an entire operation, which is entirely a management prerogative under the NLRA, regardless of motivation. In contrast, the 1984 intergovernmental agreement at issue in Kelso I and the contracting for the transitional period which are at issue in this case are more analogous to the "runaway shop" that is not condoned.

Issues 4 and 5 - Bargaining the Effects of Annexation

The effects of a fundamentally managerial decision, including the effects of the decision in this case to seek annexation, are unquestionably a mandatory bargaining subject, the city's arguments to the contrary notwithstanding. First National Building Maintenance, supra.

The city contends that it did bargain in good faith to impasse (citing as proof the Executive Director's declaration of impasse which precedes a certification for interest arbitration). It refused, however, to submit the certified "effects" to interest arbitration as would be fitting with respect to mandatory subjects of bargaining. Thus, even if the city did bargain in good faith to impasse, its refusal to complete its statutory obligations is unquestionably evidence of bad faith and the basis for finding a violation of RCW 41.56.140(4).

The fact of the matter is that the Examiner ruled that the city did not bargain in good faith on the effects of the annexation decision. We affirm that portion of the Examiner's decision.

Issues 6 and 7 - The Duty to Bargain the Decision to Fund Services

Apart from the "effects" of the annexation itself (e.g., interim employment, severance pay and recall rights), the question remains as to whether the decision and the effects of the decision to have the City of Kelso directly fund certain services provided by the Cowlitz District after the annexation vote were mandatory bargaining subjects. There are two parts to this issue: The first concerns the decision of the city to fund the Cowlitz District for providing services prior to the date that the Cowlitz District would collect the tax revenues on property within the city limits. The second concerns the city's decision to fund services over and above those that would have been provided by the Cowlitz District out of property tax revenues received from the annexation. The Examiner held that the first decision was bargainable, and the second was not. We affirm.

The December 1, 1985 - December 31, 1986 Funding Period -

Chapter 52.04 RCW, which governs the annexation of a city to a fire district, does not specify an effective date of the annexation (i.e., the date the annexing fire district must commence providing services, or the date, if any, the annexed city must cease providing services).

The city argues that the annexation took effect on November 6, 1985, when the voters approved the annexation) or on November 18, 1985, when the election results were certified.[13] It further maintains that after the annexation took effect, the city lost the ability to provide its citizens with fire protection services. Without that ability, it contends, there was nothing to bargain with the union; hence, the funding decision at issue was not a mandatory subject of bargaining.

We believe that the city's focus on the effective date of the annexation is misplaced. The real threshold question is when, if ever, the city lost the practical ability to fund its own fire suppression service, and hence the practical ability to bargain.

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13 In its brief to the Commission, the city points to four analogous circumstances (a new city charter, a constitutional amendment, a state-wide initiative or referendum, and a local initiative) in support of its argument that the annexation's effective date was in November, 1985. Each circumstance has to do with a political or legal measure approved by the electorate, and each of those is effective at or near the time of the election.

On July 21, 1988, after briefs were filed with the Commission in this matter, the Superior Court for Cowlitz County, in City of Kelso et al. v. International Association of Fire Fighters, Local 1445, No. 88-2-00201-1, issued an order on summary judgment which assumed, without deciding, that the effective date of the annexation was November 18, 1988. The Court thereupon declined the city's motion for a declaratory judgment, on the grounds that no justiciable controversy existed.

We also take notice of the affidavit filed in that action by Ray Ryan, Cowlitz County Assessor, stating that to place a levy on the tax rolls during 1987, the annexation must be effective on or before March 1, 1986.

The union points out that the city, as a non-charter code city, has broad powers. RCW 35A.11.020 states, in part, that unless specifically denied by law (emphasis added):

> [T]he legislative body of each code city shall have any authority ever given to any class of municipality or to all municipalities of this state before or after the enactment of this title.

RCW 35.22.280(23) confers on first class cities the power to "provide for the prevention and extinguishment of fires ...." We have found no laws specifically denying code cities the power to provide fire protection services, notwithstanding an annexation to a fire district.[14] Thus, we agree with the Examiner that the city had the power and the discretion to continue to provide fire protection services after the election was held and certified, and at least until January 1, 1987.

Our conclusion herein also reflects what actually occurred. The city, in fact, provided its own fire protection services for a brief transition period after election certification (November 18 to December 1, 1985). Presumably, this was a lawful undertaking. The city then contracted with Cowlitz District for services for an additional 13-month transition period. Presumably, this was also a lawful undertaking.

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[14] In addition to omitting any specification of an effective date, the statute under which the annexation at issue here took place, Chapter 52.04 RCW, contains no provision for a transition period. By comparison, the Legislature has specifically provided for a transition period for certain other political actions affecting the tax base. See, e.g., RCW 52.08.025, which provides for a transition when all of the area within a fire district is incorporated, by allowing the fire district to continue to provide services until the new city or town acquires the tax base. In the absence of transition provisions within Chapter 52.04 RCW, we are left with the reality that none may be necessary: The annexing fire district has the authority to provide services by contract, and the annexed city retains the authority to provide its own services. Thus, both have the power to negotiate whatever arrangement they see fit.

Having the discretion to contract for services, and still having the tax revenues with which to fund such a contract, the circumstances up to December 31, 1986 were no different from those which existed in 1984, when the city attempted its intergovernmental agreement with the Cowlitz District - an attempt which we found in violation of chapter 41.56 RCW in Kelso I.[15]

The Decision To Purchase Services After January 1, 1987 -
The city entered into a contractual relationship with the Cowlitz District for the ongoing provision, starting January 1, 1987, of fire-related services over and above those that would have been provided by the Cowlitz District. The union alleges that contracting decision gave rise to a duty on the part of the city to bargain with the union.

As we previously held, an employer's decision to purchase services to replace its own curtailed operations could be a mandatory bargaining subject. The union would not prevail, however, if those services were not previously performed by the bargaining unit. The Examiner held that decision to contract for services in this case did not give rise to a duty to bargain, because the services to be provided by the Cowlitz District were of a type that had never been provided by the city itself, and hence were not bargaining unit work. Those services included a fire marshal's office and emergency medical aid. We agree with the Examiner's reasoning to the extent supported by the facts.

We observe that some of the money provided to the Cowlitz District on and after January 1, 1987, was possibly used to buy fire suppression services which were within the unit work claims of the union. The record is not clear, however, as to the quantity or the level of service purchased. We bear in mind that the burden of proof is on the union. Although the union contends that Kelso would only have volunteer fire protection without the added money, Cowlitz District Chief Baxter testified that the transferred tax

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15 Indeed, the similarity is pervasive: The city's 1986 funding arrangement with the Cowlitz District was virtually identical to that which was agreed upon by the same entities in 1984.

levies would buy some paid firefighter services. Baxter did not specify how much paid firefighter services would have been provided, except to say it would have been less than provided with the additional funds. We also must bear in mind that the purchased services are inextricably bound to the additional fire marshal and emergency medical services provided by annexation. Given the uncertainty in the record, we find that we lack sufficient evidence to conclude that there has been a violation or to fashion a meaningful remedial order as to this issue. We thus affirm the Examiner's conclusion that the purchase of these excess services was not a mandatory bargaining subject.

Issue 8 - Retaliation in December 1, 1985 - December 31, 1986 Period

The Examiner ruled that the acceleration of the transfer of services to the Cowlitz District was an act of discrimination by the city against the union members, in retaliation for the exercise of their collective bargaining rights. The Examiner was particularly persuaded by the evidence showing that rather than saving money, the city undertook to pay the Cowlitz District an amount substantially greater than the city's fire service budget for the same period.

We agree with the Examiner's conclusion. While no single piece of evidence is determinative, taken together, the evidence makes a prima facie case for the union. The animosity that city officials have displayed in the past several years towards the union is probative of the anti-union animus on this issue. While such statements of animosity, by themselves, are not violative of 41.56.140(1), such displays are evidentiary as to the question of whether certain action was taken in retaliation for the exercise of bargaining rights. We wrote in Kelso I:

> In August, 1983 an arrangement with Fire District #2 was considered and rejected by the city. The city itself had decided against having a fire chief in 1983. The inadequate condition of the fire department was largely a result of its deliberate slashing of the budget for the fire department, perhaps as a political reprisal. In

> effect, the city precipitated a crisis which is ostensibly solved by a business decision which incidentally will wipe out the bargaining unit. Council for Local 1445 put it up as setting up a strong man and knocking him down.

After the union backed Mayor Woods' opponent in the city election in 1984, Mayor Woods responded by cutting the fire department's budget by a substantial amount, as he had promised to do. The record contains evidence that in 1985, after our Kelso I decision, Public Safety Director Stoutt told a firefighter that the city council intended to allow the fire department to further deteriorate because of its anti-union hostility. The fire department did, in fact, deteriorate. By February, 1985, the department had nine full-time paid firefighters and no chief, compared to the 18 full-time paid positions, along with a chief, that it had in the early 1980's. Its 1985 budget contained no money for training, and very little provision for maintenance and repair.[16]

The city's actions in regard to Assistant Chief Buley add to the inference of union animus. An arbitrator found that the demotion was done in retaliation for Buley's protected activity. The city has neither complied with the arbitrator's award nor pursued its effort to have that award vacated.

The next question is whether the city can rebut this prima facie case by presenting legitimate business reasons for its decision to accelerate the assumption of firefighting services by the Cowlitz District. The city argued that it had insufficient personnel relating to fires, inadequate equipment, an inadequate station, a lack of emergency medical services, a lack of a fire marshal or training officer, and a lack of authority to provide the services.

We reject the city's argument that it lacked authority to provide fire-related services. Under the broad terms of RCW 35A.11.020, the city had -

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16 The city budgeted $1000 for maintenance and repair in 1985. By comparison, the Cowlitz District proposed, under the intergovernmental agreement, a budget of $65,000 for maintenance and repair in 1984, and $20,000 for the same purposes in 1985.

and arguably still has - the legal authority to provide fire protection services to its citizens over and above those provided by the Cowlitz District. Importantly, the city's own actions in contracting with the Cowlitz District after the annexation contravene its own argument.

We found in Kelso I that the city brought much of the poor condition of its fire department upon itself. Since that decision was issued, it has continued to take affirmative steps to ensure the deterioration. The city indeed found itself in a financial crisis in the 1983 time period, but it refused to accept any solution other than that which it proposed. As was observed in Kelso I, the union was willing to make significant concessions in 1984, yet it appears the city did not take advantage of that offer in a timely fashion.[17] The city manager admitted, and the record affirms, that the department's first line equipment was adequate. The backup equipment needed repair, but it does not appear that repair would have been costly. The fire station was old, but serviceable. The traffic situation in front did not appear to be serious, considering the ample testimony concerning the traffic signals available to control the problem. Moreover, the city could have proceeded with its purchase of its share of the new Cowlitz District station without the annexation or the early transfer of services. Although the citizens of Kelso gained a fire marshal via the annexation, it would appear that the city could have contracted with the Cowlitz District for fire marshal services while still maintaining its own fire suppression force during the transition period. Similarly, while the city's desire for emergency medical services was one of the more persuasive reasons for annexation, it would also appear that the city could have contracted with the

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17 In 1984 the union offered to increase the work week of bargaining union members with no commensurate pay increase, and to support a volunteer program. The city rejected this proposal. Had it accepted that proposal, the number of personnel responding to fires would have been approximately equivalent, in terms of paid firefighter hours, to the coverage the city receives from the Cowlitz District. At the time of the hearing, the Cowlitz District employed 14 paid firefighters to cover a population of 26,000 (nearly 11,000 in the city of Kelso) and an area of 148 square miles (of which approximately six or eight square miles are within the city of Kelso).

Cowlitz District for such services during the transition year.[18] The evidence we have examined leads us to conclude that the city's business reasons for contracting with the Cowlitz District for fire protection services between December 1, 1985 and January 1, 1987 were pretextual.

Even if there were some valid business reasons for the decision to accelerate the transfer of bargaining unit work to the Cowlitz District, we question whether such reasons should immunize a transaction that appears identical to the one enjoined in Kelso I. We believe there is a sound basis for concluding that a deliberate violation of our order in Kelso I is so inherently destructive of the Kelso firefighters' collective bargaining rights that a per se violation of RCW 41.56.140(1) has occurred.

Thus, we conclude that the city committed an independent violation of RCW 41.56.140(1) by transferring its fire suppression services to the Cowlitz District for the period ending December 31, 1986, in retaliation for the protected activities of the union and the employees it represents.

Issue 9 - Remedies

We agree with the remedies ordered by the Examiner, which are set forth in detail in his decision and will not be repeated here. Essentially, they consist of: (1) A cease-and-desist order, (2) back pay and benefits for Bolden and Stephenson for the entire period of their layoffs, (3) back pay and benefits for all affected employees for the period between December 1, 1985 and December 31, 1986, (4) an order requiring the city to bargain the effects of the annexation issue, (5) an order requiring the city to submit the same to interest arbitration if no agreement is reached, and (6) an award of attorney's fees to the union. The Examiner properly dispensed with the

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[18] There was also evidence (albeit disputed) that the Kelso firefighters had been willing and able to provide emergency medical services, and that, unlike some governmentally operated emergency medical services, the service provided by the Cowlitz District is not a substitute for ambulance service.

traditional posting of notice to employees, since there are (and will be) no members of the former firefighter bargaining unit on the city's premises to read such a notice.

Our conclusion that the layoff of Bolden and Stephenson was discriminatory adds a basis for imposing the back pay remedy favoring them, but does not enlarge the period or amount of that remedy.

Because we affirm the Examiner's rulings on the absence of a duty to bargain regarding the annexation decision itself, and those regarding the excess services purchased by the city after December 31, 1986, we decline the union's requests for an order re-establishing the Kelso Fire Department, for an order reinstating all of the employees with back pay for the period on and after January 1, 1987, and for a bargaining order regarding the annexation decision.

The extraordinary remedy of attorney's fees is strongly challenged by the city. We agree with the Examiner that this remedy is appropriate. In Lewis County, 31 Wn. App. 853, 866 (1982), the court held that an attorney's fees award is appropriate when: 1) such an award is necessary to make the Commission's order effective; and 2) the defense to the unfair labor practice charge is frivolous; or 3) there is pattern of conduct evidencing a patent disregard for the duty to bargain in good faith.

We agree with the Examiner that the decision to purchase services from the Cowlitz District between December 1, 1985 and December 31, 1986 was a deliberate, repeat violation of the state's collective bargaining statute. In fact, we find that the city has engaged in an entire course of conduct, spanning several years, designed to undermine the bargaining unit by utilizing methods not allowed under Chapter 41.56 RCW. As the Examiner observed, in Kelso I we disagreed not with the city's desire to turn over the firefighting business to the Cowlitz District, but to the manner in which it occurred. That also holds true here.

We further find that some of the arguments which the city advances in this case are frivolous. The issues it raises regarding the duty to bargain layoffs and the duty to bargain the effects of the annexation have been clearly resolved by past precedent. The arguments it makes regarding the union's waiver of its bargaining rights with respect to the layoffs was based on serious mis-characterizations of fact. The city's argument on compliance with its duty to bargain the layoffs was simply disingenuous.

An award of attorney's fees is clearly necessary to give effect to the Commission's ruling in this case, and is more than justified.

NOW, THEREFORE, it is

ORDERED

1. Paragraph 7 of the Findings of Fact issued by Examiner Rex L. Lacy in this matter is amended to read as follows:

> The city reduced its fire suppression budget by $40,000 for 1985 and, on January 18, 1985, announced that firefighters Dean Bolden and Robert Stephenson were to be laid off effective February 1, 1985, all in reprisal for the exercise of collective bargaining rights by its firefighter employees and in reprisal for their pursuit of remedies through the unfair labor practice proceedings before the Public Employment Relations Commission and the Superior Court for Cowlitz County. Local 1445 responded to the layoffs by demanding bargaining, by timely filing this unfair labor practice case, and by filing a grievance under the terms of the expired collective bargaining agreement. The City of Kelso implemented the layoffs of Bolden and Stephenson without bargaining in good faith to agreement or processing the dispute to interest arbitration pursuant to RCW 41.56.430, et seq.

2. Paragraph 2 of the Conclusions of Law issued by Examiner Rex L. Lacy in this matter is amended to read:

> By laying off its employees Dean Bolden and Robert Stephenson in January, 1985, based on a pretextual claim of a budget shortfall in the fire department when any such shortfall had been created by the City of Kelso in reprisal for the exercise by its employees of rights protected by Chapter 41.56 RCW, and by failing and refusing to give notice and bargain concerning the decision to lay off Dean Bolden and Robert Stephenson at a time when there was no collective bargaining agreement in effect between the parties, the City of Kelso has interfered with, restrained, coerced, discriminated against its employees, in violation of RCW 41.56.140(1), and has refused to bargain with the exclusive bargaining representative of its employees, in violation of RCW 41.56.140(4) and (1).

3. Except as specified in paragraphs 1 and 2 of this Order, the findings of fact, conclusions of law and order issued by Examiner Rex L. Lacy on January 15, 1988, in Decision No. 2633 - PECB are AFFIRMED and adopted as the findings of fact, conclusions of law and order of the Public Employment Relations Commission.

4. The City of Kelso, its officers and agents, shall immediately:

   A. Notify the complainant, in writing, within thirty (30) days following the date of this Order, as to what steps have been taken by the City of Kelso to comply with the Order issued by the Examiner and affirmed by the Public Employment Relations Commission.

   B. 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 by the City of

Kelso to comply with the Order issued by the Examiner and affirmed by the Public Employment Relations Commission.

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R. Wilkinson

JANE R. WILKINSON, Chairman

Mark C. Endresen

MARK C. ENDRESEN, Commissioner

Joseph F. Quinn

JOSEPH F. QUINN, Commissioner