Pasco Housing Authority, Decision 6248-A (PECB, 1998)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS UNION, LOCAL 839, Complainant,	CASE 12581-U-96-2992
vs.	DECISION 6248-A - PECB
PASCO HOUSING AUTHORITY, Respondent,	DECISION OF COMMISSION

Davies, Roberts & Reid, by David W. Ballew, Attorney at Law, appeared for the complainant.

Menke, Jackson, Beyer & Elofson, by G. Scott Beyer, Attorney at Law, appeared for the respondent.

This case comes before the Commission on a petition for review filed by Teamsters Local 839, and a cross-petition for review filed by the Pasco Housing Authority, each seeking to overturn a decision issued by Examiner Rex L. Lacy.[1] We affirm.

BACKGROUND

The Pasco Housing Authority (employer) and Teamsters Local 839 (union) have a collective bargaining relationship for a bargaining unit that includes office employees. The parties began negotiations for an initial collective bargaining agreement in September of 1995, but still had not reached an agreement at the time of the hearing in this case, about 15 months later.

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[1] Pasco Housing Authority, Decision 6248 (PECB, 1998).

Lydia Rocha began working for this employer in 1981. She initially held a "rental clerk" position, and served as the receptionist in the employer's office. She performed routine office-clerical duties until she received on-the-job training for, and was formally promoted to, a "case manager" position in 1983. Rocha's duties and responsibilities as a case manager included overseeing the rental and maintenance of approximately 300 housing units owned by the employer. The record does not contain indication of any problems with Rocha's work for several years thereafter, but does indicate there was some criticism of Rocha's performance later, beginning with an audit report received by the employer in August of 1993.

On September 3, 1993, the Washington State Council of County and City Employees (WSCCCE) filed a representation petition with the Commission, seeking certification for essentially the same unit as is now represented by Teamsters Local 839. After the WSCCCE was certified as exclusive bargaining representative,[2] Rocha served as president of the local organization for that union. She also served as a member of that union's bargaining team.

In early 1994, Rocha began having problems with her eyesight. She was provided with adaptive equipment, her caseload was reduced, and Clerk/Receptionist Adella Salinas was promoted to a newly-created case manager position to take over some of Rocha's caseload. Salinas was assigned to oversee rental units for elderly and handicapped tenants, while Rocha continued to handle multi-family units. Rocha and Salinas thereafter shared clerk/receptionist duties in the office, such as answering the telephone, greeting visitors, and providing clerical support. The record indicates ongoing concerns about Rocha's performance since that time.

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[2] Pasco Housing Authority, Decision 4592 (PECB, 1994).

Joe Garza was hired in 1994, as case manager for the "Section 8" program. Rental units owned by private citizens are maintained and administered by the public employer under that program.

The employer and WSCCCE did not reach a collective bargaining agreement, and the WSCCCE disclaimed its bargaining rights in March of 1995. Bobbie Littrell was promoted to the employer's executive director position in June of 1995, and continued in that position throughout the balance of the period relevant to this proceeding.

On June 26, 1995, Teamsters Local 839 filed a representation petition with the Commission for the disclaimed bargaining unit. On August 25, 1995, Local 839 was certified to represent employees in a bargaining unit described as:

> All full-time and regular part-time clerical, maintenance, inspectors, janitors, and laborers of the Pasco Housing Authority, excluding supervisors, confidential, and all other employees.

Pasco Housing Authority, Decision 5234 (PECB, 1995).

Rocha served as shop steward for Local 839, and she also served on the negotiating team for Local 839. Negotiations for a collective bargaining agreement began in September of 1995.

In January of 1996, the employer began formulating options in reaction to an expected budget deficit. One of the possibilities being considered was the elimination of one case manager position. In a memo issued to staff on April 12, 1996, Littrell stated that it was necessary to eliminate four low-income public housing program staff positions. By memo dated June 17, 1996, from Littrell, Rocha was notified that she had been chosen for layoff effective June 28, 1996. Littrell stated as follows:

> In accordance with our union notification letter of April 12, 1996, and our staff notice posted April 17, 1996, because of the reduced 1996/1997 operating subsidies, it is necessary to eliminate four low-income housing staff positions: The Maintenance Assistant position, Clerk/Receptionist position, Maintenance Repairer position, and one (1) low-income public housing Casemanager [sic] position. Solicitations were requested for part-time work schedules, job sharing, and pay reduction options but none were received.
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> Two positions were advertised and you did not apply for either.
>
> The Housing Authority of the City of Pasco and Franklin County Reduction in Force Policy 18.3.3 states that "job performance, qualifications, and length of service of regular employees will be considered in making layoff decisions."
>
> After consideration of the factors above, it is my decision to lay you off from employment effective June 28, 1996. This decision is based upon not only the most recent unsatisfactory evaluation, but also your past documented decline in job performance in spite of reduction in duties.

On July 1, 1996, the union filed the complaint charging unfair labor practices in this proceeding, alleging that Rocha was laid off in reprisal for her union activities while less-senior employees were retained. The union asked that Rocha be returned to full-time work and made whole.

The employer sent a memo to employees on September 11, 1996, and the union responded to that memo by filing another unfair labor practice complaint. An Examiner and the Commission ruled in that case that the employer interfered with the exercise of employee rights secured by RCW 41.56.040, and so committed unfair labor

practices under RCW 41.56.140(1). Pasco Housing Authority, Decision 5927 (PECB, 1997), affirmed Decision 5927-A (PECB, 1997).[3]

By letter of October 25, 1996, Littrell offered Rocha a position as "Section 8 Self-Sufficiency Coordinator". She stated, in part:

> As I am sure you appreciate, this position is sensitive to continued funding. In the event these grant funds are not received in the future, or upon the funds being exhausted, this position may be subject to elimination. It is only fair to advise you this position may not be permanent and may not exist in the future if funding is not available.

The letter requested Rocha to advise the employer within five days if she wished to accept the offer.

By letter of November 4, 1996, Rocha declined the employer's offer of re-employment, stating in part:

> As you are aware, the Board turned down the claim I filed and I will be filing a lawsuit shortly regarding what I strongly believe was discrimination on the part of the Housing Authority and retaliation against me for a number of reasons.
>
> I do not believe there is any way I could work for the Housing Authority with a pending lawsuit in Superior Court, a complaint before PERC, and an internal investigation by H.U.D. Additionally, I do not meet the minimum qualifications listed on the job description.
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> If any positions are open where I would not have to be in the office on a daily basis but could operate from a different facility, I

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[3] The case is now on appeal to the Franklin County Superior Court.

> would certainly be interested in that employment.

Rocha did not explain why she felt she did not meet the minimum qualifications for the job.

In a letter to Rocha dated November 18, 1996, Littrell responded that the state Employment Security Department had referred to Rocha's refusal of the offered job in a document which showed that she had refused the job because she did not meet the minimum qualifications concerning possessing a valid driver's license. Littrell noted that the employer had previously accommodated Rocha's lack of a valid driver's license by providing taxi service, and Littrell offered to provide that service again. In addition, Littrell offered to provide Rocha taxi service, as needed, in the performance of her offered duties. Littrell stated she was not aware of any lawsuit pending in Superior Court, and she assured Rocha that the complaint before the state Public Employment Relations Commission and the investigation by federal Housing and Urban Development (HUD) authorities would not adversely affect the terms or conditions of Rocha's employment.

By letter of November 25, 1996, Rocha informed Littrell that she had obtained other employment. She added:

> Even if I had not obtained other employment I could not return to work with the Housing Authority due to the given discrimination on the part of the Housing Authority and retaliation against me for a number of reasons.
>
> Additionally, the job description enclosed in the November 18, 1996 letter was that of the Section 8 Program Self Sufficiency Clerk and not Section 8 Family Self Sufficiency Coordinator as stated in that letter and the

> October 25, 1996 letter, so it's somewhat confusing as to which position is being offered.

Rocha neither explained what type of employment she had obtained, nor detailed specific reasons why working for the employer would be unsatisfactory.

The Examiner held a hearing in this matter, and issued his decision on April 6, 1998. The Examiner held that the union sustained its burden of proof to establish that the reasons given by the employer for Rocha's layoff were pretexts designed to conceal anti-union animus, and that Rocha's union activities were a substantial motivating factor in the employer's layoff decision. The Examiner thus concluded that the employer discriminated against Rocha for her union activities, and so committed unfair labor practices in violation of RCW 41.56.140(1). The Examiner ordered the employer to make Rocha whole for lost wages and benefits for the period from June 28, 1996 to November 4, 1996, but ended the back pay as of the date Rocha declined the employer's offer of reinstatement.

On April 27, 1998, Teamsters Local 839 filed a timely petition for review, thus bringing the case before the Commission. The employer filed a timely cross-petition for review on May 4, 1998.

POSITIONS OF THE PARTIES

Local 839 argues that the Examiner erred in limiting Rocha's back pay award, and that the employer did not prove that Rocha failed to mitigate her damages. It urges that: (1) the job offered by the employer was only temporary, and thus not "substantially equivalent" to the position from which Rocha was laid off; (2) the

position offered paid substantially less than Rocha's previous job; (3) Rocha had good reason to decline the employer's offer, because an employee need not accept a position where excessive hostility exists or where there is a reasonable fear of being subjected to further discrimination; and (4) there is no evidence that Rocha did not seek other work. Local 839 claims the Examiner erred in not ordering the employer to reinstate Rocha to her former position of case worker or to a substantially similar position, and that Rocha is entitled to reinstatement regardless of the outcome of the issue concerning mitigation of damages.

Responding to the union's petition for review, the employer argues that Rocha failed to mitigate damages, in that the job offered to her was a regular full-time position substantially equivalent in responsibilities and pay and benefits to her former position, and that Rocha did not have good reason to decline the offer. In addition, the employer contends Rocha is not entitled to reinstatement, since she voluntarily resigned.

In its cross-petition for review, the employer disputes certain of the Examiner's findings of fact, and urges the Commission to consider: Problems with Rocha's performance under the prior executive director; the fact that the job of case manager was split between two persons, so that Rocha only managed 171 units after 1994; discrimination claims that Rocha filed concerning the reduced duties were not factually supported; a conversation regarding "team players" occurred a month prior to Rocha's latest evaluation; it was necessary to lay off either Rocha or Salinas; and Salinas was the more qualified of the two. The employer asserts that the Examiner erred in the facts and the use of the facts to arrive at a conclusion of discrimination. The employer thus requests that the Examiner's order be vacated.

Responding to the employer's cross-petition for review, Local 839 argues that there is ample evidence to support the finding that the employer's work performance justification was pretextual. It points to anomalies in performance evaluations and the process by which Rocha received performance evaluations, and claims they show that Rocha was singled out. Local 839 contends the employer made the decision to lay off Rocha first, and then subsequently justified the decision. Local 839 argues the employer demonstrated anti-union animus, and that the employer's reasons for singling out Rocha for layoff were pretexts to hide a desire to rid itself of an active union supporter.

DISCUSSION

Legal Standard for Discrimination Claims

Chapter 41.56 RCW prohibits interference with or discrimination against the exercise of collective bargaining rights:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE. **No public employer**, or other person, **shall directly or indirectly**, interfere with, restrain, coerce, or **discriminate against any public employee** or group of public employees **in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining**, or in the free exercise of any other right under this chapter.

[Emphasis by **bold** supplied.]

Enforcement of those statutory rights is through the unfair labor practice provisions of Chapter 41.56 RCW:

> RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be an unfair labor practice for a public employer:
> (1) **To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;**
> (2) To control, dominate or interfere with a bargaining representative;
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
> (4) To refuse to engage in collective bargaining.

[Emphasis by **bold** supplied.]

Authority to hear, determine and remedy unfair labor practices is vested in the Commission by RCW 41.56.160.

A discrimination violation occurs under Chapter 41.56 RCW when an employer takes action which is substantially motivated as a reprisal against the exercise of rights protected by Chapter 41.56 RCW. See, Educational Service District 114, Decision 4361-A (PECB, 1994) and Mansfield School District, Decision 5238-A (EDUC, 1996). The Supreme Court of the State of Washington has established the standard of proof for "discrimination" cases. Under Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991), a complainant has the burden to establish a prima facie case of discrimination, including that: (1) the employee has participated in protected activity or communicated to the employer an intent to do so; (2) the employee has been deprived of some ascertainable right, benefit or status; and (3) there is a causal connection between those events. If that burden is met, the employer has the opportunity to articulate legitimate, nonretaliatory reasons for its actions. The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of

statutory rights. That may be done by showing that: (1) the reasons given by the employer were pretextual; or (2) union animus was nevertheless a substantial motivating factor behind the employer's action.

Application of Standard

The Prima Facie Case - Exercise of Protected Right - Rocha engaged in activities protected by RCW 41.56.040. Between mid-1993 and mid-1994, Rocha served as local president for the Washington State Council of County and City Employees, and served as a member of that union's bargaining team. After Teamsters Local 839, was certified as exclusive bargaining representative in 1995, Rocha served as shop steward for that union beginning in January of 1996. She also attended all collective bargaining negotiations sessions during 1995 and 1996.

The Prima Facie Case - Discriminatory Deprivation - Rocha was laid off effective June 28, 1996. Depriving her of employment satisfies this element of the prima facie case.

The Prima Facie Case - Causal Connection - The Examiner found a causal connection chiefly for two reasons: (1) Union animus demonstrated by the September 11, 1996 memorandum, which resulted in the unfair labor practice violations found by an Examiner and the Commission in Pasco Housing Authority, Decision 5927-A (PECB, 1997); and (2) a supervisor's comment to Rocha that the employer was only interested in keeping "team players".

The employer argues that Pasco Housing Authority, Decision 5927-A (PECB, 1997), should not have been considered by the Examiner as evidence of anti-union animus, because the judicial review process

is not complete. We note that no stay has been granted by any court of the Commission's decision in that case. Even if we did not consider the decisions in that case, however, sufficient evidence exists for a determination of anti-union animus. The employer's September 11, 1996 memo to employees was also an exhibit in this proceeding, and so can be evaluated here on its own merits. The memo was titled "Representation Facts", and stated:

> It has been over a year since negotiations began between the Teamsters and the Authority. At the last negotiations meeting, the Teamster Representative reported to the Authority that he did not believe the Teamsters represents the majority of the employees at this time.
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> ...
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> The Authority's history has proven to provide wage increases yearly for their employees, wage increases authorized by the Board without the involvement of union representation amount to 4.0% in 1992 and 5.5% in 1993. Up until the budget deficits, employee's medical benefit was paid 100% without the need for union representation. The Authority wages are at or above what is required by HUD and comparable to wages within the industry and surrounding public agencies.
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> In proposals to date:
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> - The Teamsters have not addressed any wage increase in their proposed contract.
> - The Teamsters have proposed a closed shop, which means every employee must pay Union dues. Employees who do not wish to join the Union or pay Union dues cannot retain their employment with the Authority.
> - Union dues amount to approximately $20 per month or $240 per year per employee.
> - For the negotiations alone, the Authority has paid $13,000 for representation costs. This amount would be equivalent to:

- a 3.0% raise for every employee which amounts to $10,000/year; <u>plus</u>
- Authority paying 100% of medical insurance coverage. Current employee out-of-pocket deductions represent $3,000/year.

- The Board recognizes the employee's [sic] desire to be involved in decisions affecting their employment and suggest [sic] the employees consider an employee committee who can meet with Management and Board to provide employee input on issues.
- Authority employees are now eligible to vote for decertification of union representation. The Board urges you to consider the benefits of union representation and exercise your right to vote for continued representation or decertification.

Taken in the context of the protracted negotiations, and also standing alone, the employer's memo is coercive in tone. On its face, it clearly demonstrates a desire of the employer to deal directly with employees; it impliedly offers benefits outside of the collective bargaining process; and it discredits and undermines the union. By its nature, it demonstrates the employer harbored an anti-union animus dating back "over a year since negotiations began between the Teamsters and the Authority". While the employer's memorandum was issued after Rocha was laid-off, we agree with the Examiner that it is germane to this case as evidence that the employer harbored an anti-union animus in the period when the layoff decision was made.

The employer does not contest that Rocha's supervisor, Sonia Cichocki, told Rocha that the employer was only interested in

keeping "team players". In arguing that the comment was made prior to Rocha's last evaluation, the employer implies that the comment could not have been reasonably interpreted as having referred to union activity. The evaluation form was signed in June of 1996, but our review of the record shows that the evaluation was in process during May, and that the comment was made on or about May 14, 1996. An employee active in the union could reasonably perceive that the comment was related to her union activity. See, Port of Tacoma, Decision 4626-A (PECB, 1995), where the Commission said, in reference to an employer's emphasis on "team building":[4]

> While the employer had been emphasizing the "team" among its employees for some time, the employer's desire to put together a dream team must be scrutinized for whether the employer was using its team building emphasis as a guise for weeding out union activists. Where an outspoken union activist does not share management's view, it could be too easy for an employer to claim its reason for adverse action was the employee's inability to share the view of the team.

While the record in this case does not include as much "team building" emphasis as existed in Port of Tacoma, the comment still lends support to finding a causal connection, in the context of an emerging collective bargaining relationship and Rocha's layoff.[5]

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[4] In Port of Tacoma, the Commission made an inference that employer interviewers considered promotional applicants who might have grievances or question management actions within an existing contractual relationship to not exhibit qualities necessary to be part of the "team".

[5] The employer takes issue with some of the cases cited by the Examiner in support of the ruling on the "team" issue, but Port of Tacoma suffices as authoritative precedent on this subject.

We find the foregoing reasons sufficient to infer a causal connection. The complainant has made a prima facie case of discrimination.

The Employer's Articulation of Defenses -

The employer defends on the basis that a layoff was necessary due to funding shortfalls; that the layoff was going to affect either Rocha or Salinas; that Garza handled a type of housing unit that Rocha was not qualified to handle; and that the union did not request to bargain the layoff until after it had already occurred. The employer asserts that Rocha was laid off because of her performance and the feeling of her supervisors that she could not handle the increase in workload that would occur as a result of the layoff, and that Rocha admitted she did not believe she could handle a caseload which included the units previously handled by Salinas. The employer also argues that the offers of re-employment following termination should have been considered as rebutting any inferences of discrimination or animus against Rocha.

The employer has articulated legitimate, nonretaliatory reasons for its actions, so the burden remains on Local 839 to show that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the layoff of Rocha.

Substantial Motivating Factor / Pretext Analysis -

The record provides a basis to infer that the employer's layoff planning was due to a budget deficit. The issue of the selection of employees for layoff is, however, another matter. A thorough review of the record shows the employer's defenses do not hold up.

Deviations in personnel policies and changes in personnel practices have been a basis for finding unfair labor practices in the past,

where an employer provides unclear or inconsistent explanations for its actions. See, e.g., Port of Tacoma, supra, and Mansfield School District, supra.

The employer relies upon a layoff policy in effect as of April 1996, which reads: "Job performance, qualification, and length of service of regular employees will be considered in making layoff decisions."[6] Thus, length of service was to be one of three considerations in any layoff decision under a policy that did not assign weights among the three factors. Since the most senior employee in the case manager classification was being laid off, we would expect some proof that all three factors were considered by the employer in implementing its own policy. The employer's director of finance and administration testified, however, that the weight given to seniority in Rocha's case was less than the weight given to performance.[7] Thus, the evidence suggests that the employer did not exercise a systematic method of considering the three factors required by its own policy.

The record shows that the employer made a change in its personnel policy on layoffs some time between May of 1995 and April of 1996. The personnel policies in effect as of May 5, 1995, read: "When job performance and qualification of regular employees are equal, the regular employee with the greatest seniority will be retained."[8] The timing of the deletion of the strong preference for seniority as a determining factor in layoff is suspect, particularly where the employer had a collective bargaining obligation with Local 839 after August of 1995. Since it appears

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[6] Exhibit 1, and employer's post-hearing brief.

[7] This individual supervised Rocha beginning in May 1996.

[8] Employer's answer, filed August 5, 1996.

the May 5, 1995 personnel policies remained in effect when the union was certified, we are reluctant to place great weight on a policy that may not have been agreed upon by both parties.[9] Moreover, it is clear that the employer was contemplating a layoff as early as January of 1996, so the record supports an inference that the policy was amended to lessen the import of the seniority factor, and thus make it easier to get rid of Rocha.

In addition, the record shows that the employer's "qualification" defenses hold little merit. The employer claims that Salinas was better qualified than Rocha, but the employer has not demonstrated that it considered any systematic measurement of each employee's educational or experience background, or even that it made a comparison between the employees. The employer's contention that Salinas would be able to handle the increased workload goes to their estimated productivity or "performance", rather than to their "qualifications" term used in the employer's own policy.

The employer has defended mainly on the basis of long-term problems with Rocha's "performance", but a close review of the record indicates inconsistencies in the employer's arguments:

- The employer argues that Rocha exhibited performance problems under the employer's previous executive director, and that the Examiner would not have found the layoff pretextual if due consideration had been given to those problems. The record shows, however, that Rocha's performance evaluations made by the previous executive director were higher than the ones made by Littrell.

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[9] The union has not alleged a "unilateral change" or a "refusal to bargain" violation under RCW 41.56.140(4) in this case, so we are not making a specific finding of fact or conclusion of law on this subject.

- The employer's overt assessments of Rocha's performance shifted toward the negative under Littrell.

- The employer retained Garza, who was the least-senior employee in the case manager classification, even though it was necessary to send him to training classes to obtain certification before he took over a portion of Rocha's caseload.[10]

The evaluation process relied upon by the employer also creates many doubts:

- As the Examiner stated, Littrell initially testified that all of the case managers were evaluated before the layoff. She admitted under cross-examination, however, that Salinas was not scheduled for an additional (six-month) evaluation even though her point total was similar to Rocha's, and that Garza was not evaluated.

- The last evaluation of Rocha was performed by an official who had only recently been assigned to evaluate the case managers, and only Rocha was evaluated. Cichocki assigned a lower point total to Rocha than either Littrell or Sandoval had received in their previous evaluations.

- Cichocki recommended Rocha for layoff even though the other employees in the classification were not evaluated just prior to the layoff decision. While a systematic performance evaluation done for everyone in the classification just prior

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[10] By comparison, the record indicates Rocha was not sent to training to accomplish a re-certification required for her job.

> to the layoff decision might have helped demonstrate an appropriate application of the employer's policy, there is no proof that this employer made a serious examination of all affected employees' performance evaluations for a specific and consistent period of time.

The employer's "performance" defense fails because, as the Examiner stated, the variances discredit the employer's defenses and support a conclusion that Cichocki carried out a pre-determined decision to lay off Rocha. This compounds the effect of the earlier inference that a systematic effort took place, including a change in personnel policy to dilute the seniority factor, to get rid of a union activist.

The Employer's "Unfounded Charges" Defense -
The employer asserts that its rejection of earlier discrimination charges somehow shows that the employer was not acting in a pretextual manner in making the decision to lay off Rocha. It contends that Rocha charged the employer with "discrimination" and/or "harassment" as a result of the 1994 reorganization,[11] in which Rocha's duties were split between two persons. The fact that the employer's board of commissioners made no finding of illegal activity may or may not support a conclusion that her claims were not factually supported, but the employer has not provided a basis to tie-in that controversy with the unfair labor practice claim now before us. The employer's board would not have had authority to rule on any discrimination charges under Chapter 41.56 RCW, so that any ruling by that body would provide no support for a decision by this Commission.

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[11] Apparently, none of these charges were related to union activity. A search of the Commission's docket records fails to disclose any unfair labor practice case in 1994.

The record clearly suggests that the determination to lay off Rocha was made prior to Rocha's last evaluation, that the reasons given for Rocha's layoff were pretextual, and that Rocha was discriminated against for her union activities. Thus, we affirm the Examiner's conclusion that the employer's anti-union animus was a substantial motivating factor in Rocha's discriminatory lay-off.[12]

Remedies

The Examiner did not order the employer to offer Rocha reinstatement to her former position, and he only awarded back pay to Rocha for the period from June 28, 1996 to November 4, 1996. The Examiner found that she did not mitigate her damages by accepting the employer's offer of re-employment, and that she voluntarily resigned her employment. The union argues that Rocha should be reinstated to her former position or a substantially similar position, and that she should be made whole for lost wages and benefits. The employer, on the other hand, argues that Rocha failed to mitigate damages, and that she is not entitled to reinstatement.

The Examiner cited Town of Fircrest, Decision 248-A (PECB, 1977), where a failure to mitigate damages was clear from the record. The Washington courts use mitigation principles adopted from federal case law, and place the burden on the defendant to show that there were suitable positions available and that the plaintiff failed to use reasonable care and diligence in seeking them. To show a willful loss of earnings which would support a failure to mitigate a claim, an employee must refuse a job "substantially equivalent"

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[12] The finding of a "discrimination" violation under RCW 41.56.040 and RCW 41.56.140(1) carries with it a derivative "interference" violation under RCW 41.56.140(1).

to the one denied. Burnside v. Simpson Paper Company, 66 Wn.App. 510 (1992). Generally, the doctrine prevents recovery for "damages the injured party could have avoided by reasonable efforts taken after the wrong was committed." See, Kloss v. Honeywell, 77 Wn.App. 294 (PECB, 1995). The injured party's duty is to "use such means as are reasonable under the circumstances to avoid or minimize the damages." Cobb v. Snohomish County, 86 Wn.App. 223 (1997). Under National Labor Relations Board (NLRB) precedent, as well, the duty to mitigate damages includes the obligation to accept a job substantially equivalent to the one denied.[13]

Mitigation of Damages -
The record shows that the employer offered Rocha a job four months after she was laid off, and that she declined the offer.

Lack of Substantial Equivalence could be a basis for excusing Rocha's refusal, but we find that the position offered was sufficiently similar to the position she left to warrant a conclusion that Rocha did not mitigate her damages:

- Prior to 1994, Rocha handled about 300 tenants, and served as a "multi-family housing manager". When her caseload was split, Rocha essentially went from a full-time case manager to a part-time case manager and part-time receptionist/clerk. The split of tasks required counter duties and telephone duties to be shared equally with Salinas. Thus, when Rocha was laid off, she had fewer tasks and less responsibility than

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[13] See, e.g., Alamo Cement Company, 298 NLRB 638 (1990). The NLRB has also held that an employee who does not make a reasonably diligent search for interim employment incurs a willful loss of earnings during the period of idleness, and is not entitled to back pay. American Bottling Company, 116 NLRB 1303 (1956).

before 1994, and the position she left was more closely aligned with the offered position than would have been the case before the division of her original caseload.

- Rocha's latest work assignment involved management of 171 housing units. She answered questions at the front desk; took applications and placed applicants on the waiting list; pulled applications from the waiting list; conducted reference, credit, and other checks; selected or rejected applicants for housing; collected rent; and took work orders. She handled re-examinations or adjustment of rents, and inspections with the inspector. The offered position as "Section 8 Self-Sufficiency Coordinator" was explained by Littrell in the October 25, 1996 letter, as follows:

> This position will be responsible for maintaining complete lease-up of up to 40 Section 8 Self-Sufficiency vouchers; monitoring the five year contracts with the tenants; conducting tenant needs assessments; and ensuring they fulfill their education and job training commitments in compliance with our Self-Sufficiency Action Plan. The position also requires the ability to work with staff, applicant tenants, and tenants in a positive and productive manner.

While there are differences of specific tasks, the level of work involved in the offered position, in terms of independence of thought and creativity, appears to be close to that of Rocha's previous position. Both jobs involved communicating with and monitoring tenants at a level above the menial, and have independent assignments of a technical nature. Both appear to require experience with housing programs. Rocha even testified that there are a lot of similarities between the Section 8 program and the public housing program.

- The Section 8 position was offered at a $10.50 per hour rate of pay. Rocha was formerly paid $12.00 per hour, but some or all of the difference was due to her tenure in the position she had filled. Littrell's testimony supports an inference that Rocha would have started at a lower pay rate in the new position because of her lack of experience with the Section 8 position,[14] and that the starting rates of the two positions may have been the same. The union cites Yellowstone Plumbing, 286 NLRB 993 (1987), for the proposition that an employer's offer of reinstatement to a laid off employee is not valid to terminate back pay liability where the job offered was at a wage rate lower than the wages paid at termination.[15] Other factors were considered in that case, however, to arrive at the decision. We must also compare the positions using other characteristics, and, on balance, we find that the pay rates of the offered and former positions are not so disparate as to render the two positions not substantially equivalent.

- While it is clear that the position offered to Rocha was contingent on funding, that fact does not negate application of the "substantially equivalent" test. The union cites Alamo Cement Company, 298 NLRB 638 (1990), where the NLRB held that an employer's offers of reinstatement to temporary positions were not the same or substantially equivalent to regular, permanent positions.[16] In the case at hand, the position was

[14] Transcript, p. 139.

[15] In Yellowstone, an offer of employment was considered inadequate, in part because the job was at lower wage rate than two previous wage rates of the discriminatee. The offered rate was $10.00 per hour, while the earlier rates had been $11.31 and $18.85 per hour.

[16] The positions in Alamo were simply to end "when the need for their services no longer existed".

a "regular full-time" position, not specifically dependent on the continued need for services. The position offered was not specifically designated a temporary position, but only contingent on continued funding.[17] So far as it appears from the record, the position would have been included in the bargaining unit and been subject to insurance benefits and leave accrual like other full-time positions.

We agree with the Examiner, that the position offered to Rocha was sufficiently similar to require that she mitigate her damages.

A Hostile Environment could be a basis for excusing Rocha's refusal, and the union aptly cites Woodline Motor Freight, 278 NLRB 1141 (1986), for the propositions that: (1) valid offers of reinstatement are not made when the discriminatees have a reasonable fear that they would be subject to further discrimination,[18] and (2) that it would be unreasonable to expect the discriminatees to abandon their interim employment for the uncertainty of the employer's offers. The November 4 and 25, 1996 letters to Littrell suggest that Rocha would have been uncomfortable working with those she blamed for having treated her unfairly. While we empathize with Rocha's feelings, the record does not show the employer exhibited a hostile attitude so severe as to warrant Rocha's refusal of the job offer. To the contrary:

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[17] We recognize a contextual difference between the private sector and the public sector. Many programs at the local government level are funded by appropriations or grants from higher levels of government. Employees holding such "soft money" positions are employees within the meaning and coverage of Chapter 41.56 RCW, however, and the source of funds is not a factor in bargaining unit determinations under RCW 41.56.060.

[18] In that case, the validity of the employment offers was undermined by continuing discrimination.

- The employer reiterated its offer, and affirmatively encouraged Rocha to accept the offered position.

- The employer offered taxi service to accommodate Rocha's eyesight problem.

- The employer assured Rocha that the legal actions she had taken would not be held against her.

Under these circumstances, Rocha did not do what she could to mitigate her losses. We are not inclined to order a full back pay award where the employee could have accepted an offer of employment in this situation.

The union argues that there is nothing in the record to suggest that Rocha failed to undertake a reasonably diligent search for other employment,[19] and notes that the discriminatee in Town of Fircrest, supra, did not seek other work between the date of his discharge and at least the date of the hearing, but that misses the point. She thus incurred a willful loss of earnings during the period of time she was not working.

Applying the standards used by the Commission, the NLRB and the Washington courts, we conclude that Rocha's November 4, 1996 rejection of the job offered by the employer constituted a failure to mitigate her damages. She was thus entitled to back pay only for the period from June 28, 1996 to November 4, 1996, as ordered by the Examiner in this case.

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[19] In fact, Rocha's November 25, 1996 letter to Littrell stated that she had obtained another job, so an inference is available that she had been seeking other work.

Reinstatement -
The union argues that Town of Fircrest does not preclude reinstatement, and that the Examiner erred in failing to order the employer to offer Rocha reinstatement. The union cites Muney Design, Inc., 285 NLRB 289 (1987), which stands for the proposition that a valid offer of reinstatement tolls an employer's backpay liability as of the date of the attempt, but does not relieve the employer of its ultimate obligation to reinstate that employee.

In the case at hand, an inference is available that Rocha only wanted to perform the job from which she had been laid off, and that she wanted to work under her conditions, not the employer's.[20] Apart from the question of whether Rocha's stance was unreasonable, it is clear that Rocha herself terminated the employment relationship by her November 25, 1996 letter to Littrell. That voluntary act on Rocha's part distinguishes this case from North Valley Hospital, Decision 5809-A (PECB, 1997), where we ordered an employer to offer reinstatement to a discriminatee who had not requested that remedy. Because Rocha both declined the offered job and indicated that further job offers from this employer would also be rejected, she ended her entitlement to a reinstatement order.

The Employer's Claimed Factual Errors

The employer takes issue with certain of the Examiner's findings of fact and portions of the discussion in the Examiner's opinion. The employer would have us rewrite the facts to support its preferred

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[20] Rocha had not applied for either of the positions that had been advertised after the employees were warned that layoff would occur, but prior to her layoff. In her letter of November 4, 1996, she essentially advised the employer that she would only be interested in working from a different facility.

conclusion, but did not provide detail proving that the facts were substantially incorrect. Moreover, a thorough review of the record reveals that the Examiner's decision represents an accurate portrayal of the facts. We are changing one paragraph of the findings of fact that the record shows to be incorrect,[21] but sufficient evidence exists in the record to support the Examiner's general factual interpretations.[22]

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact and Conclusions of Law issued by Examiner Rex L. Lacy in the above-captioned matter on April 6, 1998 are AFFIRMED and adopted as the findings of fact and conclusions

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[21] We are correcting paragraph 9 of the findings of fact to reflect that Cichocki's "team players" statement to Rocha occurred at a meeting on May 14, 1996, and to reflect how that statement could have been perceived, but both of those changes involve harmless error that are not critical to the conclusions in this case.

[22] The employer takes issue with a statement on page 16 of the Examiner's decision, "Rocha was denied training to accomplish a re-certification required for her job." Rocha gave unrefuted testimony, however, that she was not notified about a training class for a Farmers Home Administration program for which she had a certification that expires year to year. Tr. Pp. 35-47. We find no basis to infer from the record that, as the employer says, Rocha would just need recertification to continue to handle the 22 FMHA units. The employer takes issue with the Examiner's statement, on page 16, that Cichocki recommended Rocha for layoff without having evaluated the other employees in the classification, but we find the statement is true as written. Cichocki did not evaluate anyone else in the classification besides Rocha, and she recommended Rocha for layoff.

of law of the Commission, with the exception of Paragraph 9 of the findings of fact, which is amended to read as follows:

9. The next evaluation of Rocha was made by Cichocki, who was new to her job and had not evaluated the other employees in the same classification. ~~During the course of that evaluation,~~ On May 14, 1996, during the same month that Cichocki worked on Rocha's evaluation, Cichocki informed Rocha that the employer was only interested in retaining "team players", ~~which Rocha reasonably understood as related to her union activity~~, a comment which could be reasonably understood by an employee to relate to union activity. Cichocki then recommended that Rocha be the employee laid off from the case manager classification, notwithstanding that the two other employees in that classification each had less seniority than Rocha and one of those employees would require training to take over Rocha's caseload.

2. The Pasco Housing Authority, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

a. CEASE AND DESIST from:

1. Using pretextual reasons for selecting known union supporters for layoff; and

2. In any manner interfering with, restraining, coercing or discriminating against its employees in the exercise of

their collective bargaining rights under the laws of the State of Washington.

b. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effect the purposes and policies of Chapter 41.56 RCW:

1. Make Lydia Rocha whole for lost wages and benefits for the period from June 28, 1996 to November 4, 1996, by payment to her of back pay at the rate of pay in effect for her as a "case manager" immediately prior to June 28, 1996, computed in accordance with WAC 391-45-410.

2. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

3. Read the notice attached hereto at the regular public meeting of the Board of Commissioners of the Pasco Housing Authority which next follows the receipt of this decision, and permanently append a copy of the attached notice to the official minutes of the meeting where the notice is read as required by this paragraph.

4. Notify the above-named complainant, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order, and at the

same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

5. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding paragraph.

Issued at Olympia, Washington, on the 18th day of September, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

APPENDIX

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

WE WILL compensate Lydia Rocha for the period of time from June 28, 1996 to November 4, 1996, less any other compensation she received from other employment and any unemployment compensation from the State of Washington.

DATED: ______________

PASCO HOUSING AUTHORITY

BY: ____________________________
Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P.O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.