STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 4203, Complainant,	)	CASE 18779-U-04-4768
vs.	)	DECISION 9061-A - PECB
PORT OF WALLA WALLA, Respondent.	)	DECISION OF COMMISSION

Emmal Skalbania & Vinnedge, by *Alex Skalbania*, Attorney at Law, for the union.

Summit Law Group, PLLC, by *Otto G. Klein III*, Attorney at Law, for the employer.

This case comes before the Commission on a timely appeal filed by the Port of Walla Walla (employer), seeking to overturn the Findings of Fact, Conclusions of Law, and Order issued by Examiner Claire Collins.[1] The International Association of Fire Fighters, Local 4203 (union), supports the Examiner's decision.

ISSUES PRESENTED

The union represents employees in the aircraft rescue fire fighter/security classification, and the parties were negotiating their first contract. On August 16, 2004, the union filed an unfair labor practice complaint alleging the employer interfered

[1] *Port of Walla Walla*, Decision 9061 (PECB, 2005).

with and discriminated against bargaining unit employees, and refused to bargain in violation of Chapter 41.56 RCW.

1. Did the employer interfere with protected employee rights by: a. its comments to bargaining unit employees about unionization; b. seeking review of the employees' retirement plan status?

2. Did the employer unlawfully discriminate against bargaining unit employee Jake Riggs by terminating his employment?

3. Did the employer bargain in bad faith when it: a. implemented a new lay-off procedure consistent with the parties' tentative agreement; b. changed employee "Kelly" days following the termination of Jake Riggs' employment; and c. threatened to transfer bargaining unit work to cross-trained non-bargaining unit employees if the union did not agree to a work schedule involving three employees instead of four?

We affirm the Examiner's decision, including that the employer unlawfully interfered with protected employee rights through: 1.a. comments made to bargaining unit employees demonstrating anti-union bias; 1.b. comments made about using non-bargaining unit employees to perform bargaining unit work if employees did not work a 40 hour week; and 1.c. the timing of its petition seeking review of the bargaining unit employees' retirement plan; that the employer discriminated against Riggs when it terminated his employment; and that the employer bargained in bad faith when it: 3.a. unilaterally implemented the lay-off procedure; 3.b. unlawfully refused to bargain the effects of the decision to terminate Riggs' employment; and 3.c. threatened to transfer bargaining unit work if the union did not agree to a 3 employee work shift.

STANDARD OF REVIEW

This Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Executive Director or Examiner's conclusions of law. *C-Tran*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002). The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

ISSUE 1 - Interference with Employee Rights

Applicable Legal Standard

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW provides that no public employer shall interfere with, restrain, coerce, or discriminate against public employees in the free exercise of their collective bargaining rights. RCW 41.56.060. Those rights apply to port districts and their employees through RCW 53.18.015. RCW 41.56.140(1) enforces protected employee rights and provides that an employer who interferes with the collective bargaining right of its employees is guilty of an unfair labor practice. *King County*, Decision 8630-A (PECB, 2005).

The test for interference is whether a typical employee could, in the same circumstances, reasonably perceive the employer's action as discouraging his or her union activities. *Grant County Public Hospital District 1*, Decision 8378-A (PECB, 2004). A complainant

is not required to show intent or motive for interference, that the employee involved was actually coerced, or that the respondent had a union animus. *King County*, Decision 8630-A (PECB, 2005). The complainant bears the burden of demonstrating that the employer's conduct resulted in harm to protected employee rights.

Application of Interference Standard

The Examiner found that the totality of the comments and actions of the employer tended to display anti-union bias that interfered with protected employee rights. We agree. Not only do the employer's actions and comments in total constitute interference, but the complained-of actions could by themselves constitute employer interference with protected rights.

Issue 1.a. - Employer Statements to Bargaining Unit Employees

This Commission asks seven questions when determining whether an employer's statements could constitute interference with protected employee rights:

1. Is the communication, in tone, coercive as a whole?
2. Are the employer's comments substantially factual or materially misleading?
3. Has the employer offered new "benefits" to employees outside of the bargaining process?
4. Are there direct dealings or attempts to bargain with the employees?
5. Does the communication disparage, discredit, ridicule, or undermine the union? Are the statements argumentative?
6. Did the union object to such communication during prior negotiations?

7. Does the communication appear to have placed the employer in a position from which it cannot retreat?

Grant County Public Hospital District 1, Decision 8378-A. Here, the Examiner found that the employer made comments to bargaining unit employees that demonstrated anti-union bias. Specifically, the Examiner credited the testimony of bargaining unit member Bret Partlow, who stated that the employer's Executive Director, Jim Kuntz, told Partlow in a phone conversation that by filing a representation petition, "the employees had done a great disservice to the flying public of Walla Walla, and . . . [the employees] had no class for doing what [they] did." The Examiner also discounted Kuntz's testimony, which provided a different recollection of the conversation. This statement clearly demonstrates an intent to disparage, discredit, ridicule and undermine the union. We affirm the conclusion regarding the union's interference allegations.

Issue 1.b. - Employer's Challenge to the Employees' Pension Status

Prior to the union's certification as the exclusive bargaining representative of the employees in question, all of them were enrolled in the Law Enforcement Officer/Fire Fighter (LEOFF) retirement system plan. When the union initiated its representation petition, the employer challenged the propriety of the employees being covered by the LEOFF plan. Commission staff informed the employer that this Commission was not empowered to resolve retirement plan eligibility questions, rather the Commission only asked if the employees were in the LEOFF plan, and if so, then the unit was certified as a "uniformed" bargaining unit.

Within 25 days after the representation petition was filed, the employer sought a Department of Retirement Systems (DRS) review of the employees' eligibility in the LEOFF plan, Chapter 41.26 RCW, arguing that they actually belonged in the Public Employees'

Retirement System (PERS). The PERS retirement plan not only provides employees with benefits of a substantially lower value than the LEOFF plan, but employees in the PERS plan are not eligible for Chapter 41.56 RCW interest arbitration rights granted to LEOFF-eligible employees.

Although we recognize that employers may challenge the propriety of their employees being placed in a particular retirement plan, the timing of those types of challenges may still be subject to scrutiny by this Commission. If the timing of those challenges demonstrate the challenge was brought in retaliation for the exercise of protected employee rights, then the employer will have committed an unfair labor practice.

Here, the timing of the employer's challenge demonstrates that it was brought in retaliation against the employees' collective bargaining activities. The employer tolerated the employees being in the LEOFF retirement plan since at least 1989. The employer also should have been aware of Division II of the Court of Appeals of Washington's decision in *IAFF, Local 3266 v. Department of Retirement Systems*, 97 Wn. App. 715 (1999), where airport maintenance employees who performed work similar to that of the employees in question here were deemed not eligible for the LEOFF retirement plan. The employer did not act until the employees sought collective bargaining rights; the timing of the action interfered with protected employee rights.[2] The employer's claim that it sought review of the employee's LEOFF status is undercut by the fact that Kuntz unilaterally and without prior notice to the union

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[2] The employer argues that its petition to DRS was necessary to ensure that it was appropriately using taxpayers' money. Considering the employer should have been aware of the *Fire Fighter v. Retirement System* decision for at least six years, this excuse rings hollow.

revised the job description of the aircraft rescue fire fighter/security classification just prior to the DRS review. This record supports a finding the employer committed an unfair labor practice.

ISSUE 2 - Employer Discrimination

Applicable Legal Standard

A discrimination violation occurs 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), where the Commission embraced the standard established by the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991); *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). A discrimination violation can be found when:

1. An employee exercises a right protected by the collective bargaining statute, or communicates to the employer an intent to do so;
2. The employee is deprived of some ascertainable right, benefit or status; and
3. There is a causal connection between the deprivation and the exercise of the legal right.[3]

Where the complainant establishes a prima facie case of discrimination, the employer need only articulate non-discriminatory reasons for its actions. It does not have the burden of proof to establish those matters. *Port of Tacoma*, Decision 4626-A (PECB, 1995).

[3] *See, e.g., Community College District 13*, Decision 8117-B (PSRA, 2005).

The burden remains on the complainant to prove that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing that the reasons given by the employer were pretextual, or by showing that the union animus was nevertheless a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.[4]

Application of Discrimination Standard

Riggs initiated contact with the union prior to the union's petition, and was instrumental in the organizing campaign. Following certification of the union, Riggs served as the bargaining unit chapter president and participated in negotiating and mediation sessions. The Examiner found that Riggs credibly testified that the employer's attitude towards him changed, culminating with a termination letter dated July 8, 2004, and effective September 30, 2004. Based upon the evidence, the union made a prima facie case demonstrating a causal connection between Riggs' protected activity and his termination.

The employer attempted to articulate several non-discriminatory reasons for Riggs' termination, and argued that the Examiner erred by not crediting those reasons.

- The employer argued that the reduced number of commercial flights necessitated a reduction in bargaining unit staff; the union argued prior flight reductions had never caused the termination of an employee.
- The employer argued that a budget shortfall existed necessitating the lay-off; the union argued that the employer

[4] We recognize that the Examiner's explanation of the discrimination test differs from that adopted by this Commission, but it does correctly state the standard.

suffered substantially greater budget short-falls in previous years and did not terminate any employee.

The Examiner examined each of the employer's reasons, along with the counter-arguments of the union, and concluded that the union sustained its burden in proving the employer discriminated against Riggs. Specifically the Examiner found, and we agree, that the employer's claim of a budget shortfall was pretextual in light of additional overtime paid because Riggs' employment ended, and expenditures caused by the cross-training. The record also demonstrates that other employees were junior in service time to Riggs, and that no other employee had been terminated in previous years. The employer's claim that it was required to raise rental rates to off-set the budget shortfall is undercut by the fact that it reversed or modified increases for tenants who objected at regular meetings of the port commission. Substantial evidence exists on the record to support the Examiner's conclusion, and therefore we affirm her findings.

ISSUE 3 - Refusal to Bargain Allegations

Applicable Legal Standard

A public employer has a duty to bargain with the exclusive bargaining representative of its employees under Chapter 41.56 RCW, as follows:

> RCW 41.56.030 DEFINITIONS. . . .
> (4) "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation

> neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter. . . .

The "personnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as the mandatory subjects of bargaining under *City of Richland*, Decision 2448-B (PECB, 1987), *remanded*, 113 Wn.2d 197 (1989), and *Federal Way School District*, Decision 232-A (EDUC, 1977), citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). An employer or union that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice, as follows:

> RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be an unfair labor practice for a public employer:
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> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
>
> . . .
>
> (4) To refuse to engage in collective bargaining.

In determining whether an unfair labor practice has occurred, the totality of circumstances must be analyzed. *City of Mercer Island*, Decision 1457 (PECB, 1982); *Walla Walla County*, Decision 2932-A (PECB, 1988). The evidence must support the conclusion that the respondent's total bargaining conduct demonstrates a failure or refusal to bargain in good faith or an intention to frustrate or avoid an agreement. *City of Clarkston*, Decision 3246 (PECB, 1989). Inherent to the good faith obligation is the obligation of employers and unions to provide each other, upon request, with information needed by the requesting party for collective bargaining negotiations or contract administration. *City of Bellevue*, Decision 3085-A (PECB, 1989), *aff'd,* 119 Wn.2d 373 (1992).

Application of Refusal to Bargain Standards

The Examiner found that the employer committed several "refusal to bargain" violations. We find that the employer refused to bargain implementation of the termination policy, a change to "Kelly" days, and impermissibly threatened the union with transfer of bargaining unit work if the employer's work schedule was not adopted. A potential for an actual skimming violation at some time in the future exists, but no such violation actually occurred.

Issue 3.a. - Termination Policy

The union's complaint alleges that the employer "refused to bargain with [the union] regarding either the decision to terminate Jake Riggs . . . or the impacts and effects of that decision upon the members of [] the bargaining unit." This allegation clearly placed the employer on notice that the union claimed the employer failed to bargain Riggs' termination and the impacts of that termination.

The employer argues that it terminated Riggs in accordance with the lay-off procedure tentatively agreed upon by the parties in collective bargaining. We disagree. Bargaining unit employees covered under the LEOFF retirement plan are "uniformed personnel" under RCW 41.56.030(7), and the interest arbitration provisions of RCW 41.56.430 through .490 are applicable to those employees.[5] In *City of Seattle*, Decision 1667-A (PECB, 1983), this Commission ruled that the "unilateral change" precedents normally applicable

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[5] Although the employer challenged the employees' placement in the LEOFF retirement plan, this Commission certified the bargaining unit employees as uniformed personnel eligible for interest arbitration, and any unilateral change must be analyzed under the employment conditions that existed at the time of the complaint. Until credible evidence demonstrating a change in circumstances, the bargaining unit description set forth in *Port of Walla Walla*, Decision 8165 (PECB, 2003) applies to these employees.

under Chapter 41.56 RCW are inapposite to bargaining units covered by the interest arbitration process. Changes can only be imposed by an interest arbitration panel, or under true emergency circumstances provided the employer reverts to the status quo following the end of the true emergency.[6] Nothing, however, prevents parties from making bilateral agreements to implement an agreed upon term prior to execution of a final collective bargaining agreement. Here, no such agreement existed.

Issue 3.b. - Kelly Days

In *City of Yakima*, Decision 3564 (PECB, 1990) *aff'd*, *City of Yakima*, Decision 3564-A (PECB, 1991), the Commission found that the practice of scheduling "Kelly days" is a mandatory subject of bargaining. Here, when the employer terminated Riggs, the effect of that decision caused the employer to change its practice regarding Kelly days because it had one fewer employee to cover shifts. It deleted Kelly days without bargaining with the union. The record supports a finding that the employer failed to bargain the decision and the effects of its decision to terminate Riggs.

Issue 3.c. - Employer's Coercive Statements During Bargaining

The core of the employer-employee relationship centers around the availability of the job or work that the employee has been hired to perform. The decision to reassign or change employees' duties affects wages, hours, and working conditions, and thus is a

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[6] For example, in *Evergreen School District*, Decision 3954 (PECB, 1991), an employer "skimmed" the bargaining unit work of distributing textbooks to students when it had a non-bargaining unit employee perform that very same function. The examiner in that case found that under the particular circumstances, delaying distribution of the book would have impacted the students' ability to learn, and since the alleged "skimming" occurred only once and was associated with an actual emergency, no refusal to bargain violation occurred.

mandatory subject requiring bargaining before any change can be made. *Skagit County*, Decision 8746-A (PECB, 2006).

Generally, training other employees to perform bargaining unit work is a managerial prerogative, and not a mandatory subject of bargaining over which the employer must bargain to impasse. Decisions to train other employees in work traditionally performed by the bargaining unit do not by themselves affect the wages, hours, and working conditions of bargaining unit employees. While it certainly heightens the chance that the employer would utilize the newly trained employees to perform bargaining unit work, thus exposing the employer to a "skimming of bargaining unit work" violation, an actual skimming violation has yet to occur. Before the employer utilizes non-bargaining unit employees to perform bargaining unit work in non-emergency situations, it must first bargain in good faith with the exclusive bargaining representative of the employees who normally perform the work.

In order to determine whether a party bargained in bad faith, the totality of conduct is examined. If the conduct reflects a rejection of the principle of collective bargaining, the party will be considered to have acted in bad faith. *City of Snohomish*, Decision 1661-A (PECB, 1984). We recognize, however, that in limited situations a unilateral change may be implemented if an emergency situation necessitates such change; however, the facts of ths case do not present an emergency situation.[7]

Here, the employer's statements that if the union did not agree to a shift schedule of three employees instead of four, the employer would utilize non-bargaining unit employees to perform bargaining unit work failed to meet its collective bargaining. This proposal

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[7] See Footnote 6.

would require the union to give up its statutory right to not agree with the employer's proposal under threat of losing bargaining unit work. By insisting on a proposal that undermines the union's status as the exclusive bargaining unit, the employer committed an unfair labor practice. *See City of Snohomish*, Decision 1661-A.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact issued by Examiner Claire Collins are affirmed and adopted as the Findings of Fact of the Commission except paragraph 12, which is amended as follows:

12. Since the certification of IAFF, Local 4203, the employer has taken unilateral actions that have adversely affected the aircraft rescue fire fighter/security employees including: use of a layoff procedure that was only a tentative agreement; elimination of Kelly days; and the layoff of the union president.

The Conclusions of Law issued by Examiner Claire Collins are affirmed and adopted as the Conclusions of Law of the Commission. The Commission makes additional Conclusions of Law as follows:

6. The employer violated RCW 41.56.140(4) and (1) when it threatened to utilize cross-trained employees described in Finding of Fact 10 if the union did not agree to an employee work schedule utilizing three employees instead of four.

7. The employer did not violate RCW 41.56.140 (4) and (1) when it cross-trained maintenance employees to perform duties of the aircraft rescue fire fighter/security employees.

The Order issued by Examiner Claire Collins is affirmed and adopted as the Order of the Commission except paragraphs B. and C., which are amended as follows:

B. Restore the status quo ante by reinstating the wages, hours and working conditions which existed for the employees in the affected bargaining unit prior to the unilateral change found unlawful in this order.

C. Give notice to and, upon request, negotiate in good faith with IAFF, Local 4203, before making changes regarding mandatory subjects of bargaining.

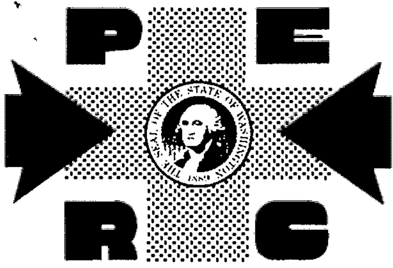
Issued at Olympia, Washington, the 15th day of August, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON STATE PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY interfered with our employees, members of International Association of Fire Fighters, Local 4203 (IAFF, Local 4203), in the exercise of their collective bargaining rights under state law.

WE UNLAWFULLY laid off Jake Riggs and discriminated against him for the exercise of his statutory right.

WE UNLAWFULLY failed to bargain in good faith in connection with: the use of tentatively agreed-to language for the layoff of Jake Riggs; the elimination of Kelly days from the employees' work schedule; threatening to utilize non-bargaining unit employees to perform bargaining unit work if the union did not agree to the employer's shift-scheduling proposal.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL offer Jake Riggs immediate and full reinstatement to his former position or a substantially equivalent position, and make him whole by payment of back pay and benefits in the amounts he would have earned or received from the date of the unlawful layoff to the effective date of the unconditional offer of reinstatement made pursuant to this order.

WE WILL restore the status quo ante by reinstating the wages, hours, and working conditions which existed for the employees in the affected bargaining unit prior to the unilateral change found unlawful in this order.

WE WILL bargain collectively and in good faith with the IAFF, Local 4203, concerning the wages, hours, and working conditions of the employees in the bargaining unit represented by that union.

WE WILL notify the union, in advance, of any anticipated changes affecting the wages, hours, or working conditions of the bargaining unit personnel.

WE WILL post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of this notice.

WE WILL read this notice into the record of the next public meeting of the Port of Walla Walla Board of Commissioners.

WE WILL NOT, in any manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under state law.

PORT OF WALLA WALLA

DATED: ____________________ BY: ________________________________

Authorized Representative

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

This notice must remain posted for 60 consecutive days, and must not be altered or covered by any other material. Questions about this notice or compliance with the Commission's order may be directed to the Public Employment Relations Commission (PERC) at 112 Henry Street NE, Suite 300, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's website, www.perc.wa.gov.