STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF EMTS AND PARAMEDICS,	)	
Complainant,	)	CASE 15921-U-01-4054
vs.	)	DECISION 8085 - PECB
GRANT COUNTY PUBLIC HOSPITAL DISTRICT 1,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
Respondent.	)	

Harry F. Berman, Attorney at Law, for the union.

Garvey, Schubert & Barer by, *Bruce E. Heller*, Attorney at Law, for the employer.

On July 23, 2001, International Association of EMTs and Paramedics, (union) filed a complaint charging unfair labor practices with the Commission under Chapter 391-45 WAC, naming the Grant County Public Hospital District 1 d/b/a Samaritan Hospital (employer) as respondent. The preliminary ruling issued under WAC 391-45-110 found a cause of action to exist on allegations summarized as:

> Employer interference with employee rights and discrimination in violation of RCW 41.56.140(1), and employer discrimination for filing unfair labor practice charges in violation of RCW 41.56.140(3), by closing the E.M.S./Ambulance Division in reprisal for union activities protected by Chapter 41.56 RCW.

A hearing was held on January 17, 2002, before Examiner Paul T. Schwendiman. The parties submitted briefs.

On the basis of the evidence introduced at the hearing, the Examiner dismisses the complaint.

BACKGROUND

The employer operates an acute care hospital licensed for 50 beds, located in Moses Lake, Washington. From 1996 until August 20, 2001, the employer operated a paramedic-level ambulance service, with ambulances based at two separate stations leased from the City of Moses Lake. Two levels of service were: (1) Basic life support (BLS), which can be provided by emergency medical technicians (EMTs); and (2) advanced life support (ALS), which must be provided by more highly trained paramedics. The area served encompassed all of Grant County Public Hospital District 1, plus other areas as directed by the local Emergency Medical Services Council.

The union had represented employees in the Ambulance Department for collective bargaining since 1997. Approximately 35 full-time and part-time EMTs and paramedics were employed in that unit.

The union perceived difficulties in bargaining with this employer throughout the parties' four year relationship. National union representative Bill Davis testified:

> [W]e have filed grievances and unfair labor practices against the employer for such things as terminations and improper promotions and hiring. During negotiations, the employer had consistently used tactics in delaying such as canceling meetings, not coming prepared, that type of thing. During negotiations, the union had to submit for interest arbitration on both agreements for union security, but in order to settle the agreements, the union withdrew those requests for arbitration. Throughout the negotiations, the employer refused to deduct union dues from part-time employees, stating it was

> impossible to make such deduction, whereas people through the accounting department have come forward and said that there is no such problem, that those deductions could be made without any problem through their payroll program.

Transcript 10-11.

Leonard Johnson served as vice-president of the local union from 1997 until he became its president in May 2000. Johnson testified regarding his perception of the overall bargaining relationship:

> Dealing with grievances was difficult. We had hard times getting them processed through and getting responses out of the hospital on issues, difficulties in getting them to review the grievances. In the last part of the time prior to the department being disbanded, we had problems getting good-faith negotiations on the severance package. We were instructed by the hospital it wasn't an issue that we could address, that it didn't apply to our work conditions. And so they had a pretty negative attitude in general in dealing with employee problems and grievances.

Transcript 40.

Other evidence indicates, however, that only one grievance was arbitrated and only one other unfair labor practice complaint was filed during the four-year bargaining relationship. The employer prevailed in both of those cases. Transcript 17-18.

In August 2000, the director of the Ambulance Department, Corbin Moberg, gave notice of his intent to take a job elsewhere. The employer's vice-president of administration and professional development, Lynn Bales, thereupon placed the shift captains in charge of daily operations and personally assumed overall responsibility for the department. Bales began to look more closely at the Ambulance Department and its costs. Transcript 88-89.

Medicare reimburses for ALS services at a higher rate than for BLS service. Historically, assignment of a paramedic to an ambulance was sufficient to designate the service as ALS for Medicare reimbursement purposes. Under a change announced in the Autumn of 2000, Medicare was to pay the higher ALS reimbursement rate only if advanced life support was actually provided. Transcript 90-92; Exhibits 7, 8.

In the Autumn of 2000, the employer's administrator, Keith Baldwin, began to actively explore other options for the ambulance service, including "partnering" with the City of Moses Lake or Grant County Fire District 5. Transcript 93-94. Baldwin and officials from Fire District 5 held a meeting, which union president Johnson attended in his capacity as a battalion chief and secretary to the board of fire commissioners for Fire District 5. Transcript 41-42. At that meeting, Baldwin stated that the hospital was looking for "out-source options" for the ambulance service. Transcript 43. The employer's belief that the impending change in Medicare reimbursement rates would reduce Ambulance Department revenues was discussed at the meeting. Baldwin expressed his concern about whether the hospital could continue to run the ambulance service without sustaining a loss. Transcript 45-46.

In December 2000 and January 2001, the employer planned for the new Medicare fee schedule, which was originally to be effective January 1, 2001. Medicare delayed implementation of the change, however, because of its negative impact on the rural emergency medical system. Transcript 90-92; Exhibits 7, 8.

On February 13, 2001, the employer and the City of Moses Lake reached an agreement concerning the ambulance service. They signed the following "Memorandum of Understanding" on March 5, 2001:

This MEMORANDUM is made and entered into this 13th day of February 2001, between Grant Count Hospital District No. 1 ("District") and the City of Moses Lake ("City") in the State of Washington.

The District has determined that an evaluation of the Samaritan Ambulance service is appropriate and necessary to the continued delivery of a quality service at the current Paramedic-level of community response. The initial impetus for the evaluation was the departure of the Department director. A number of alternatives have been proposed to accomplish the following objectives:

- Reduce costs to maintain financial viability because of projected reductions in reimbursements, primarily from Medicare, and because of increasing costs based on the advanced level of service being offered to the community and EMS service area as compared to similar operations.
- Increase the efficiency of the operation by utilizing less costly resources which already exist in the community or by creating economies of scale through relationships with other entities.
- Maintain or improve existing levels of service to the community while at the same time improving the quality by collaborating more fully with other EMS agencies or entities.

Because the District and the City, through prior agreements, jointly operated the Samaritan Ambulance, continue to have relationships for the provision of ambulance services, and believe that each other have resources which could be maximized through collaboration, they jointly agree to discuss the merits of a new relationship for the ambulance service which would accomplish the objectives as set forth above.

They will develop and analyze alternatives to the current delivery structure and operational aspects of the service. They will also determine if a new structure or delivery model meets the needs of the community using criteria as agreed by both parties. Should there be consensus between the parties, an Interlocal Agreement will be developed to guide the transition to the new arrangement.

Exhibit 9.

At a meeting of the employer's board held on March 19, 2001, Bales presented a memorandum regarding the Ambulance Department. That document included:

> Greetings. I am enclosing a packet of background information that I believe will be helpful in future discussions regarding the Ambulance service.
>
> . . . .
>
> 4. The breakdown of payors by primary insurance group reveals that Medicare is 43.7% of our charges, Medicaid is 24%, and all others are 32.3% of our charges. . . .
>
> 5. From the above charge and reimbursement information, our collected revenue is approximately 53% of charges.

Exhibit 10. Information attached to that memo indicated Medicare had only reimbursed the employer for 49.28% of charges billed to it, that Medicaid had only reimbursed the employer for 19.43% of charges billed to it, and that all other accounts reimbursed at a rate of 83.2% of the amounts billed to them. Exhibit 10.

The reimbursements from Medicare in 2000 were labeled as "interim" (rather than "final") figures, because the 2000 reimbursement from Medicare was made under a cost formula that was subject to a later calculation of a mileage-based "cap" on total Medicare reimbursement. If the calculated "cap" amount turned out to be less than the actual "interim" reimbursement already received, the difference was to be subtracted from future Medicare reimbursements to the employer. In fact, the employer owed Medicare $107,369 when the 2000 reimbursements were re-calculated with a "cap" of $407,518.[1]

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[1] The employer had billed Medicare for $1,044,396 of charges in 2000, and had actually received interim reimbursements of $514,877 from Medicare up to that point. Exhibit 10.

The difference was to be deducted from reimbursements due the employer in 2001. Transcript 134-137; Exhibits 17, 18.

The union sent a letter to the employer on May 21, 2001, requesting financial and other information. The union request included a total of 20 documents relating to the Ambulance Department.

The employer's board discussed its overall financial condition at a meeting held on May 22, 2001. Bales and the employer's chief financial officer, Terry Litke, provided a preliminary report projecting a loss of $171,304 for the Ambulance Department for calendar year 2001.[2] Exhibit 11. The Medicare rule change reducing ambulance reimbursements was not factored into that projection. An additional $106,000 revenue reduction would have been shown,[3] if the Medicare rate change had been effective for the full year, thus increasing the projected 2001 loss to $277,000. Transcript 91-92; Exhibits 7, 8, 10. At that meeting on May 22,

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[2] The preliminary cost report initially projected 2001 billed revenues of $2,388,944. The projected billed revenues were adjusted by historic percentages of revenue billings between Medicare (44%), Medicaid (24%), and "Other" (32%). The resulting revenue was then adjusted by historic collection reimbursement rates by type of 49%, 19% and 83% respectively. The report projected the employer's adjusted "net" revenue for 2001 at $1,268,592. The projected "net" revenue was then decreased by $107,369 to account for the projected reduction of reimbursements from Medicare. The actual "net" revenue from providing ambulance service was thus projected as $1,168,195, including $6,972 from "other" sources. Direct expenses were projected at $1,030,033, plus a $89,479 charge for depreciation, $212,687 for employee benefits, and $7,300 for laundry/linen expenses allocated to the ambulance operation, for a total of $1,339,499. The projected loss for 2001 thus totaled $171,304.

[3] Under the new Medicare formula, reimbursement for ALS trips would drop from 152 to 108 per month, at a loss of approximately $200.00 per trip. Exhibit 10.

2001, the employer's board voted to sell the assets of the Ambulance Department to the City of Moses Lake. Transcript 107-108.

An "ASSET PURCHASE AND SALES AGREEMENT" was entered into by the employer and the City of Moses Lake on May 25, 2001. That agreement included:

> 7. *COVENANTS OF THE [EMPLOYER].* District covenants as follows:
>
> . . . .
> 7.4 *Space.* District currently leases space from City . . . for use in connection with the Service. City and District are terminating the Leases effective as of May 1, 2001 . . .
>
> . . . .
> 8. *COVENANTS OF THE CITY.* City covenants as follows:
>
> 8.1 *Leases.* City will terminate leases effective of the date of May 1, 2001, and shall permit district its use of such space through the Closing.
>
> 8.2 *Licenses.* Within 15 days of the date of this agreement, City shall submit an application for a license with the Secretary of the Department of Health to operate an ambulance service covering the same geographical area and at the same level of service as District's license. City shall use its best efforts to obtain such license as quickly as possible and before the Closing.
>
> . . . .
> 11. *INDEMNIFICATION.*
>
> 11.1 *District Indemnification.* District shall defend, indemnify and hold harmless City . . . from, against, claims, fines, penalties, damages, and expenses . . . arising in connection with:
>
> . . . .
> (B) any liability or obligation of District whether known or unknown, absolute or contingent, except as specifically assumed by City under this Agreement; or
>
> (C) any action, suit, proceeding, compromise, settlement, assessment, or judgment arising from or incident to any of the matters indemnified against in this Section 11.

> 11.2 *City Indemnification.* City shall defend, indemnify, and hold harmless District . . . from, against, claims, fines, penalties, damages, and expenses . . . arising in connection with:
>
> . . . .
> (B) any liability assumed or obligated relating to City's ownership or use of the Assets purchased here under after the Closing; or
>
> (C) any action, suit, proceeding, compromise, settlement, assessment, or judgment arising from or incident to any of the matters indemnified against in this Section 11.
>
> . . . .
> 13. *GENERAL.*
>
> . . . .
> 13.3 *Assignment;* Binding Effect. Neither party may assign its rights under this Agreement without the prior written consent of the other party. This Agreement inures to the benefit of the parties and is binding upon the parties and their respective permitted heirs, personal representatives, successors, and assigns.

Exhibit 12.

The employer responded to the union's request for information on June 7, 2001, providing all of the documents requested including:

1. Audit from LeMaster and Daniels
2. Audit from LeMaster and Daniels Hospital Balance sheet (April 2001 and December 2000)
3. Audit from LeMaster and Daniels Hospital Balance sheet (April 2001 and December 2000)
4. Billing/AR Daily Operations summary (1/1/00 - 12/31/00 and 1/1/01 - 4/30/01)
5. Department Income and Expense Analysis (December 2000 and April 2001) . . .

Exhibit 13. The union did not seek additional information or clarification of the documents provided by the employer. Transcript 18.

Union Analysis of Departmental Income and Expenses -

The union employed Gary Edwards, an independent Certified Public Accountant,[4] to analyze the "Department Income and Expense Analysis (December 2000 and April 2001)" that was provided by the employer in response to the union's information request.[5] Transcript 13, 60-61. Union representative Davis testified of his concern about the documents: "When I talked to Gary, I asked him, 'Am I missing something here?' after I reviewed the documents because I felt that it was showing that the ambulance . . . was making a profit." Transcript 14. Edwards' analysis was confined to the two packets of computer-printed outputs titled "Departmental Income and Expense Analysis" for calendar year 2000 and the first four months of 2001.

Edwards' analysis of the accounting significance of the employer's documents was:

> [T]hey're showing the contribution margin of each of the departments. A contribution margin is the difference between your variable income and your variable expenses.
>
> Now, in this case, income -- all of your income is variable because you have to go out and earn it. So now we look at your expenses, and your expenses -- the only expenses that should be listed in that section would be your variable expenses.
>
> Now, the expenses -- the question is, what variable expenses were incurred to generate that income? And

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[4] Edwards has practiced his profession for 25 years. The union is only one of his clients. His work for the union includes preparation of tax returns, auditing various local unions, and auditing employers. His experience "auditing" hospitals is limited and he had not performed a "certified audit" of a hospital, but he had analyzed hospital financial records and reviewed them for the union, including profit and loss statements, and revenue figures. Transcript 60-62.

[5] The two documents were offered by the union and admitted in evidence by stipulation as Exhibits 3 and 4.

> they're listed: salaries, professional fees, supplies, rental, and other direct expenses, so -- but what we're not including on this report are the fixed expenses. Fixed expenses are not part of this. So we get the difference between the income and the variable expenses is your contribution margin. . . .
>
> What the significance of that figure is that that is the excess amount that has been generated over the income has been -- is in excess of the expenses you expended to generate that income. So we have that contribution margin, and that is now available to be applied against fixed expenses. And if the contribution margin is large enough to be greater than all of the fixed expenses, then the hospital operates at a profit. If it is not large enough, it will not operate at a profit.

Transcript 64-65. Edwards read the employer's document to show a "positive contribution margin" or "variable profit" for the Ambulance Department, while the same employer document showed a negative contribution margin (loss) for other departments that were to remain open. Concerning the employer-supplied computer printouts for calendar year 2000, Edwards testified:

> [F]or the Ambulance [Department], we have net revenue for the year of $2,395,917. And then we have the variable expenses, and they total $1,030,033. So we have a contribution margin or a variable profit of $1,365,884. So they're operating at a positive contribution margin, which means they're generating money which is going to be available to offset the fixed expenses of the hospital.

Transcript 65-66. Edwards interpreted the employer's document for the first four months of 2001 (Exhibit 4) to show that the Ambulance Department had "a positive contribution margin of $460,953." Transcript 67. Edwards continued:

> [W]e have many departments that have a negative contribution margin. . . . [T]hey're not helping offset fixed expenses. They're hurting. They're working at a negative. So those are items that you really want to look at quickly and find out what -- why they have a

> negative number, because they're not helping the hospital one bit, at least looking strictly at the numbers. . . .
>
> And first I mentioned this physician management. If you'll look on my worksheet about six lines below the ambulance, we have physician management, and that's operating at a negative $336,000 for the year 2000. Now, I don't know what physician services does -- physician management does, but it's certainly operating at a substantial negative number, which would be an item if -- as the accountant, I'd look at that first rather than looking at a number like the ambulance, which is operating at a profit of a million-three. . . .

Transcript 68-70. Edwards also expressed concern about similar "loss[es] for the year 2000" in social services ($277,592), community relations ($288,817), in-service education ($98,000), and Pioneer Medical Center ($241,000) departments. Transcript 70-71. He noted that health information management and nursing administration departments each lost over a half million dollars in 2000. He pointed out his concerns in a letter to union official Paul Jennings. Transcript 70-71.

In July 2001, the union and employer met to negotiate a severance package. Transcript 16. The parties failed to reach an agreement, but the union persuaded the employer to increase the period during which payments were made to separated employees under COBRA.

Originally, the transfer of the ambulance operation to the City of Moses Lake was to be effective September 19, 2001. The employer experienced continuing financial losses and difficulties in staffing ambulances up to about August 13, 2001, when the closing date was moved up to August 20, 2001. A document in evidence as Exhibit 20 is titled, "INTERLOCAL AGREEMENT BETWEEN THE CITY OF MOSES LAKE, WASHINGTON, AND GRANT COUNTY PUBLIC HOSPITAL DISTRICT NO. 1 FOR AMBULANCE SERVICES." It contained the following:

2.4 RCW Chapter 39.34 permits one municipal corporation to contract with another municipal corporation to have performed within its jurisdiction any service or function which both authorities have power to perform. Both the district and the City have the authority to operate an ambulance service. By this agreement, the City will provide ambulance service within the boundaries of the District.

. . . .

3. *Agreement*. In consideration of the mutual benefits and covenants described herein, the parties agree as follows:

3.1 *Purpose*. The purpose of this Agreement is to insure the City continues to provide ambulance service within the District at the same level of service as when the District operated an ambulance service. This agreement provides the assurance of continued service to the residents of the District as contemplated in the Asset Purchase and Sale Agreement previously entered into by the parties.

3.2 *Designation of Service Provider*. The District hereby designates the City as a provider of ambulance service within the District.

3.3 *Professional Service*. The City agrees to provide ambulance service within the boundaries of the District, as now exist or may exist in the future, at the ALS level. The City will use its reasonable efforts to insure District residents are provided licensed ambulance service at the ALS level.

3.4 *Service Area*. The area to be served by the City's ambulance service will include all areas within the District as those boundaries now exist or as they may exist in the future.

3.5 *Term of Agreement*. This agreement shall be for an initial term of three years beginning on September 1, 2001, and ending on August 31, 2004 and then shall automatically renew on an annual basis unless a written notice of termination has been served prior to June 1st of any year beginning 2004.

3.6 *Notices*. Any notice required to be given either party will be deposited in the United States mail, postage prepaid, . . .

3.7 *Relationship of the parties*. No agent, official, employee, servant or representative of the City shall be deemed an officer, employee, agent ser-

> vant, or representative of the District for any purpose. No agent, official, employee, servant or representative of the District shall be deemed an officer, employee, agent servant, or representative of the City for any purpose. The City will be solely and entirely responsible for the acts of its agents, employees, servants or representatives. The District will be solely and entirely responsible for the acts of its agents, employees, servants or representatives.

Thus, the employer laid off about 35 EMT-qualified and ALS-qualified employees on August 20, 2001.

The City of Moses Lake became the provider of ambulance service within the boundaries of the hospital district as of August 20, 2001. Transcript 108-109. It had not employed any EMT-qualified employees solely to provide ambulance services up to that time, and its EMT-qualified employees were also qualified fire fighters. Thus, it did not hire any of the EMT-qualified employees laid off by the hospital district. Five of the ALS-qualified paramedics laid off by the hospital district applied for work with the City of Moses Lake, and three of those individuals were hired through the civil service testing and hiring process. Transcript 126-127.

POSITIONS OF THE PARTIES

The union contends that the employer's Ambulance Department was closed to eliminate an active and vigorous union presence, so that both interference and discrimination violations should be found under RCW 41.56.140(1) and (3).

The employer first argues that its closure of the Ambulance Department was an absolute management prerogative, so that the

employer's motive is irrelevant. Even if the employer's motives are material, the employer contends the union has not produced any evidence establishing a prima facie case that the decision was motivated by union animus. Alternatively, the employer contends it has produced evidence of lawful, non-discriminatory reasons for its decision that are sufficient to rebut any prima facie case made out by the union.

DISCUSSION

The Discrimination Prohibition

The Examiner is not persuaded by the employer's claim of an absolute right to close the Ambulance Department, so that discriminatory motive is irrelevant. A discrimination violation occurs under RCW 41.56.140(1) or (3), if actions are substantially motivated by union animus in retaliation for activity protected by Chapter 41.56 RCW. The Examiner finds, however, that the union has not proved that employees' pursuit of protected rights was a substantial factor motivating the closure of the Ambulance Department.

Relevance of Retaliatory Motive -

The employer argues that the closure of its Ambulance Department could never be subject to scrutiny under RCW 41.56.140(1) or (3), even if the closing was entirely motivated by union animus. Its argument is based on footnote 12 in *City of Kelso*, Decision 2633-A (PECB, 1988) (*Kelso II*), *aff'd in relevant part*, *Fire Fighters v. Kelso*, 57 Wn. App. 721 (1990), *review denied*, 115 Wn.2d 1010 (1990), where the Commission wrote:

> 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. . . . We analogize the annexation to a closure of an entire operation, which is entirely a management prerogative under the NLRA, regardless of motivation. . . .

The Examiner finds, however, that the employer places more weight on that footnote than it will bear.

In *Darlington,* the Supreme Court held, at 380 U.S. 268, "so far as the Labor Relations Act is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases," but then distinguished *partial closures* in saying, "but [we] disagree . . . that such right includes the ability to close part of a business no matter what the reason. . ."[6] On appeal in *Kelso*

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[6] Understanding the Commission's analogy requires a more thorough reading of *Darlington* than the three sentence footnote in *Kelso II*. *Darlington* involved a partial closure that put more than 500 employees out of work in 1956. Reinstatement with back pay was not offered until 1969, upon enforcement of *Darlington Mfg. Co.*, 165 NLRB 1074 (1967), *enforced*, *Darlington v. NLRB*, 397 F.2d 760 (4th Cir., 1968), *cert. denied*, 393 US 1093 (1969). The complexity of that 13-year battle was noted in a supplemental order at 139 NLRB 241 (1962) at 282:

> > This is a report after three rounds of what, if not for any championship, may yet be regarded as a historic fight. As referee with the additional duty to explain my decision, mine is not to reason the why of all this. But one can wonder whether more progress toward a determination of the problems here would not have been made, once the complaint was issued in the form determined by the General Counsel in 1956, had the issues presented in the original hearing and covered in the first Intermediate Report herein, that of April 30, 1957, been passed upon as urged exactly 2 years ago.

II, the Washington Court of Appeals appeared to concur with the Commission:

> [W]hether the City's decision to seek annexation was motivated by anti-union animus is irrelevant. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 . . . (bona fide termination of business cannot yield benefit as might result from lockout, e.g., such termination, even if motivated by spite against the union, is therefore not actionable under National Labor Relations Act provision similar to RCW 41.56.140).

Firefighters v. Kelso, note 4 at 724. The explanation for the treatment of this subject matter in footnotes lies, however, in the actual facts that were before the Commission and the Court of Appeals in *Kelso II*: The Commission found that employer's decision to pursue annexation to Cowlitz County Fire Protection District 2 was motivated by union animus on the part of the City of Kelso, but that the actual annexation decision was not for the Kelso City Council to make. RCW 52.04.180 (since recodified as RCW 52.04.071) then required an affirmative vote of the electorates of both the City of Kelso and the fire district to effect the annexation, and the City of Kelso could not then revisit the issue for three years. Further, restoration of the fire suppression function to the City of Kelso would also have required a vote of city residents. To be precise based on those facts, the Commission could only have been drawing an analogy between an *annexation by vote of the public* and a *complete closure of an entire business* in the private sector under *Darlington*, 380 U.S. 263. No public vote occurred in this case.

The employer's reliance upon the footnote in *Kelso II* is also misplaced, because the facts of this case are analogous to the *partial closure* actually found unlawful in *Darlington*. The Commission's suggestion of some analogy between the closing of the

fire department and the reference to a *complete closure* in *Darlington* does not overcome that the Supreme Court of the United States *reversed* a court of appeals decision that the *partial* closure of the *Darlington* business was not a discrimination violation under Section 8(a)(3) of the National Labor Relations Act, *irrespective* of the employer's anti-union motive.[7] The major distinction in *Darlington* between partial and complete closure was whether the employer actually remained in business as an employer of *any* employees:

> The closing of an entire business, even though discriminatory, ends the employer-employee relationship; the force of such a closing is entirely spent as to that business when termination of the enterprise takes place. On the other hand, *a discriminatory partial closing may have repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of* [statutory collective bargaining] *rights among remaining employees* of much the same kind as that found to exist in the "runaway shop" and "temporary closing" cases. . . . Moreover, a possible remedy open to the Board in such a case, like the remedies available in the "runaway shop" and "temporary closing" cases, is to order reinstatement of the discharged employees in the other parts of the business. No such remedy is available when an entire business has been terminated. *By analogy to those cases involving a continuing enterprise we are constrained to hold, in disagreement with the Court of Appeals, that a partial closing is an unfair labor practice under 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer* and if the employer may reasonably have foreseen that such closing would likely have that effect.

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[7] The most that can be said is that the Supreme Court was concurring, hypothetically, with the lower court's reasoning that *if* there had been a complete closure then "When an employer closes *his entire* business, even if the *liquidation* is motivated by vindictiveness toward the union, such action is not an unfair labor practice." 380 U.S. at 273-274.

Darlington, at 275 (emphasis added). Thus, *Darlington* makes it clear that complete immunity from discrimination scrutiny requires a closure of business and liquidation far more complete than occurred in the case now before the Examiner, where the employer merely sold one of its departments to another entity.

Even if the facts of this case were not so problematic for this employer, the *Darlington* language relied upon by the employer here has also been given limited interpretation. *NLRB v. Ft. Vancouver Plywood Co.*, 604 F.2d 596 (9th Cir. 1979) includes:

> It is clear that the Supreme Court meant its exception [to section 8(a)(3)] in *Darlington* to apply only to the complete liquidation of a business. *See Great Chinese American Sewing Co. v. NLRB*, 578 F.2d 251 (9th Cir. 1978). Antiunion firings that fall short of terminating business operations completely . . . violate section 8(a)(3).

When given the opportunity to disagree with the 9th Circuit, the Supreme Court denied certiorari. 445 U.S. 915 (1980). Locating NLRB decisions finding *complete* closure is difficult, but that is to be expected under a test requiring a closure to be so complete as to result in having *no* employer that could employ *any* employees, even in the future.[8]

In *Kelso II*, the City of Kelso remained an employer of employees after its fire department closed as the result of annexation. If

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[8] Without an employer of any employees, including even a potential for future employees, there would be no "labor dispute . . . affecting commerce" to which the NLRB could apply the NLRA. Even if a business is closed and *all* employees terminated, it is arguably only a *temporary* closing until the formerly productive physical assets are liquidated.

the City of Kelso had been a private employer under the NLRA, the *partial* closure standard of discrimination would have applied, *not* the *absolute* immunity granted in a *complete* closure case. Hence, the Examiner interprets the Commission's analogy in Footnote 12 of *Kelso II* to refer to the annexation statute (including that Kelso would not be the employer of *any* fire suppression employees, then or in the future), rather than to the partial closure versus complete closure distinction.

The employer's argument here is also based on the doubtful premise that a *public employer* has the same inherent rights as those accorded to private corporations and individual businesspersons in *Darlington*.[9] Our state Supreme Court has offered a caution which applies to the Commission's reference to *Darlington* in *Kelso II*:

> As noted in *Green River [Community] College v. Higher [Education] Personnel Bd.*, 95 Wn.2d 108, 120 . . ., modified, 95 Wn.2d 962 . . . (1981), the NLRA regulates

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[9] The Supreme Court was concerned in *Darlington* about:

> A proposition that *a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation . . . that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent . . .*

Darlington, at 270. The Court found neither clear manifestation of legislative intent nor unequivocal judicial precedent to entertain that the NLRA allowed such an innovation. The Court noted, "The *personal* satisfaction . . . an employer may derive from standing on *his* [anti-union] *beliefs* . . ." by ceasing to be an employer "are surely too remote to be considered dangers at which the labor statutes were aimed." *Darlington*, at 272 (emphasis added). That points to concern for the *personal right* of *a single individual* with sufficient ownership control to completely close and liquidate a business solely because of his or her anti-union beliefs.

> labor relations *only* in the private sector. *Private sector bargaining and public sector bargaining are radically different*. . . .

Nucleonics Alliance v. WPPSS, 101 Wn.2d 24, 34 (1981) (emphasis added). Public employers are creatures of statutes, and have only the rights and authority conferred upon them by statutes. The employer has not cited any statutory authority suggesting that the employer's board could shut down the entire hospital (as if it owned the place) without a vote of the people. There is no parallel here to the rights of Roger Millikin or any other single individual.[10] Indeed, this is an area suggested by *Nucleonics*, where the rights of elected officials cannot be equated with private ownership rights.[11] Returning to the importance of the vote

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[10] Directly or through his family, Roger Milliken personally controlled the Darlington Manufacturing Company through Deering Milliken, a textile marketing firm. Milliken controlled 17 companies operating 27 textile mills, and closed only the Darlington plant (days after a union was certified to represent the employees) because of his personal anti-union beliefs. To effect a *complete closure*, Milliken would have needed to cease employing *any* employees at *any* of the businesses he controlled, but the remaining the other 26 mills remained in operation. The closure of just the Darlington mill was a *partial closure* and Section 8(a)(3) of the NLRA was violated upon proof of his union animus: "A majority of the stock of Darlington . . . was in turn controlled by Roger Milliken, Darlington's president . . . . [T]he closing was due to Roger Milliken's antiunion animus, a violation of 8(a)(3) of the National Labor Relations Act." *Darlington*, 380 U.S. at 263.

[11] This is particularly apt for the paramedic service involved here. In imposing interest arbitration on bargaining units of "uniformed personnel" under RCW 41.56.030(7), the Legislature "recognize[d] there exists a public policy . . . that the uninterrupted and dedicated service of these classes of employees is vital to the welfare and public safety [of residents] of the state of Washington. RCW 41.56.430.

of the people in *Kelso II*, all public election contests are governed by several general principles. Chief among those is that judicial (and, impliedly, quasi-judicial) processes should exercise restraint to avoid interfering with election rights reserved to the people in the state Constitution. *In re Contested Election of Schoessler*, 140 Wn.2d 368, 383 (2000) (citing *Dumas v. Gagner*, 137 Wa.2d 268, 283-284, (1999)). The annexation process reserved to a public vote was not subject to being reversed by an unfair labor practice remedy under RCW 41.56.160 for an *employer* discrimination in violation of RCW 41.56.140(1) or (3). The city council resolution in *Kelso II* was part and parcel of that election process, and was similarly protected.[12]

Interlocal agreements lack immunity from scrutiny under Chapter 41.56 RCW, even though they are authorized by Chapter 39.34 RCW. Such agreements are entered into by elected or appointed officials as agents of public employers regulated by Chapter 41.56 RCW, without need for ratification by vote of the public. The purpose of the "Interlocal Cooperation Act," Chapter 39.34 RCW, is merely:

> [T]o permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities

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[12] For the *absolute right* of the public to vote on certain questions to operate requires that the process for initiating the vote for or against annexation was also protected. RCW 52.04.061 provided: "The legislative authority of the city or town may initiate annexation by the adoption of an ordinance stating an intent to join the fire protection district and finding that the public interest will be served thereby. . . ." Thus, the initiation of the election process by the Kelso City Council also warranted immunity, even if it was motivated by anti-union animus in retaliation for employee activity protected by Chapter 41.56 RCW.

> in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population and other factors influencing the needs and development of local communities.

RCW 36.34.010. "Any two or more public agencies may enter into agreements with one another for joint or cooperative action. . . ." RCW 39.34.030(2). By such interlocal agreement, "Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having the [same] power or powers, privilege or authority . . . ." RCW 39.34.030(1). In *Western Washington University v. Washington Federation of State Employees*, 58 Wn. App. 433, 440 (1990) the Court noted:

> [T]he plain language of RCW 39.34.030(5) . . . provides, in pertinent part, that:
>
> > No [interlocal] agreement made pursuant to this chapter shall relieve any public agency of any obligation or responsibility imposed upon it by law. . . .
>
> In light of the above provision it seems clear that the University's power to enter into interlocal cooperation agreements is expressly subject to the University's obligations and responsibilities under the State Higher Education Personnel Law.

The (since-repealed) State Higher Education Personnel Law, Chapter 28B.16 RCW, then provided that "Each and every provision of RCW 41.56.140 through 41.56.190 shall be applicable to the state higher education personnel law . . ." Former RCW 28B.16.230. The section of the interlocal agreement statute cited by the court, RCW 39.34.030(5), has never been amended to exempt interlocal agreements from the unfair labor practice provisions of Chapter 41.56 RCW, and remedies for violations of RCW 41.56.140(1) and (3) thus remain available in this case. RCW 41.56.040 is sufficiently broad

to regulate "other persons" and public employers acting either "directly or indirectly" through an interlocal agreement.

Finally, another clear distinction between this case and *Kelso II* lies in the difference of the legal theories raised by the respective cases. Unlike the situation in *Kelso II*, and in an earlier case involving those parties,[13] the union here has neither alleged a refusal to bargain in violation under RCW 41.56.140(4), nor has it attempted to utilize the interest arbitration procedure for "uniformed personnel" contained in RCW 41.56.430 -.492.

The Washington Standard for Discrimination -

The employer's *complete closure* theory based upon *Darlington* ignores the absence of varying tests for "discrimination" allegations under Washington law.[14] This is another instance where Washington law distinctly differs from federal law.

In *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991), the Supreme Court of the State of Washington rejected the shifting of burden of proof used by the NLRB and federal courts under *Mt. Healthy City Bd. of*

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[13] In the earlier case, *City of Kelso*, Decision 2120-A (PECB 1985) (*Kelso I*) that employer's earlier attempt to transfer the same fire suppression work to the fire district by interlocal agreement was found to be in violation of RCW 41.56.140(4).

[14] Under federal precedent, the test applied in "partial closing" cases is more onerous than the "but for" test used by the NLRB under *Wright Line*, 251 NLRB 1083 (1980), applying *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977). In regard to interference violations, the Supreme Court also wrote: "[I]t is only when the interference with Section 7 rights outweighs the business justification for the employer's action that Section 8(a)(1) is violated." *Darlington*, 380 U.S. at 269.

Ed. v. Doyle, 429 U.S. 274 (1977), and embraced a "substantial motivating factor" test for deciding all discrimination allegations under Washington law.[15] Chapter 41.56 RCW protects the right of public employees to organize and designate representatives of their own choosing for the purposes of collective bargaining, including the right to be free from anti-union discrimination. RCW 41.56.040. Those employee freedoms are protected by RCW 41.56.140(1) generally, and by RCW 41.56.140(3) specifically as to the filing unfair of labor practices. The Commission embraced the *Wilmot / Allison* test for discrimination in *Educational Service District 114*, Decision 4361-A (PECB, 1994). The burden of proof remains on the complainant at all times, and no authority is cited or found for the existence of multiple tests paralleling the situational variance of standards that the employer points out from the federal precedents.

A discrimination violation will be found under RCW 41.56.140(1) or (3), if an employer action regarding an employee is found to have been substantially motivated in reprisal for the exercise of rights protected by Chapter 41.56 RCW. *Educational Service District 114*. The complainant must first make a prima facie case of retaliatory discharge by showing that:

1. The employee(s) involved exercised a statutorily protected right, or communicated an intent to do so; and

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[15] While NLRB and federal court decisions construing the NLRA can be persuasive (but never controlling) in interpreting state laws based upon the NLRA, any deviation from the NLRA in Chapter 41.56 RCW must be carefully considered in determining the value of federal precedents. Federal precedent is least persuasive when contrary Washington state precedent already exists.

2. The employee(s) involved were deprived of some ascertainable right, status or benefit; and

3. There was a causal connection between the exercise of the legal right and the discriminatory action.

The evidence supporting the existence of a prima facie case is often circumstantial in nature:

> [I]n establishing the prima facie case, the employee need not attempt to prove the employer's sole motivation was retaliation or discrimination based on the worker's exercise of [protected rights]. Instead, the employee must produce evidence that pursuit of a [protected right] was a cause of the firing [or other deprivation of a right, benefit or status], and may do so by circumstantial evidence . . . .

Wilmot, at 70, *cited in Educational Service District 114*. The types of circumstantial evidence considered in making a prima facie case have been described as follows:

> Circumstantial evidence may consist of the timing of the discharge, disparate treatment of other employees, whether established procedures (including contract procedures) were followed, the reasons given for the discharge, whether those reasons were given to the employee, any shift in those reasons on the part of the employer, and evidence from prior unfair labor practice proceedings. See generally, 1 Morris, The Developing Labor Law, 192 (2nd ed. 1983).

Seattle Public Health Hospital, Decision 1911-C (PECB, 1984). The focus on circumstantial evidence recognizes that employers are not in the habit of announcing retaliatory motives.

If the complainant makes out a prima facie case, a burden of production shifts to the respondent to: "[A]rticulate a legitimate

nonpretextual nonretaliatory reason for the [allegedly discriminatory action]." *Wilmot*, at 70.[16]

If the respondent produces evidence of a legitimate basis for the discharge, the burden shifts back to the complainant. The complainant retains the burden of proof to show:

1. That the reason articulated for the action is pretextual; or

2. That the pursuit of protected rights was nevertheless a substantial factor motivating the employer to act in a discriminatory manner.

The Examiner applies that formula to the facts concerning the closure of this employer's ambulance service.

Application of the Discrimination Standard

The Prima Facie Case -

The union easily proved the first two elements of the prima facie case under the *Wilmot / Allison* test:

1. Employees in the ambulance department exercised rights protected by Chapter 41.56 RCW when they formed a union, bargained collectively with the employer for four years, filed a number of grievances under the parties' collective bargaining agreement, and filed a previous unfair labor practice complaint with the Commission.

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[16] While this burden is certainly less than a burden of proof, it is not automatic or a foregone conclusion. In *City of Winlock*, Decision 4783 (PECB, 1994), the analysis ended when the employer's articulated reasons evidenced an anti-union motivation.

2. Employees were deprived of ascertainable rights, status, and benefits when the employment of every employee in the bargaining unit was terminated upon the employer's closure of its ambulance operation.

The third element of the prima facie case — the causal connection — is less apparent. At the close of the union's case-in-chief, the evidence presented by the union appeared to be sufficient to provide basis for an inference that there was a causal connection between the exercise of protected rights and the closure of the ambulance department. There was, however, no direct evidence of union animus. The circumstantial evidence regarding the overall relationship between the employer and union was limited to:

- Evidence that the bargaining relationship was not completely harmonious. Union witnesses testified that:
  - The union had filed a previous unfair labor practice charge against the employer. Transcript 10-11.
  - The union had processed grievances under the parties' collective bargaining agreement. Transcript 11. The testimony of Leonard Johnson also indicated that:
    - Dealing with grievances was "difficult" (Transcript 40);
    - The union had a hard time "Getting [grievances] processed through and getting responses out of the hospital on issues" (Transcript 40); and
    - The union encountered "Difficulties in getting [the employer] to review the grievances" (Transcript 40).
  - The union had negotiated contract terms with the employer, but:

- The employer delayed negotiations by canceling meetings and not coming prepared in negotiations (Transcript 11);
- The union withdrew requests for interest arbitration in order to reach settlement during negotiations (Transcript 11); and
- The employer refused to deduct union dues from the pay of part-time employees (Transcript 11).

Even with fully crediting the testimony provided by the union as to the less-than-harmonious bargaining relationship, the Examiner does not infer a causal connection with the disputed action.

First, the mere filing of an unfair labor practice complaint does not, by itself, establish the existence of union animus. An employer can act in complete good faith but still disagree with the union representing its employees. The fact that the union failed to prove its claims in the previous unfair labor practice case lends support to the Examiner's reluctance to infer a causal connection here.

Second, unspecified delay of negotiation by cancelling unspecified meetings or not coming prepared for negotiations does not rise to an inference of union animus. Without intending to condone them, the Examiner notes that being lazy, being distracted, or being disorganized and other possible explanations apart from union animus could explain the same delays.

Third, unspecified difficulties in dealing with grievances is also too vague to support an inference of union animus.

Fourth, the fact of no agreement being reached on a severance package does not compel a finding of union animus, particularly where the union has not alleged a "refusal to bargain" violation in

this case and the evidence shows that the employer responded to union demands by increasing severance benefits.

Fifth, rather than establishing union animus on the part of the employer, the Examiner infers that the union's withdrawal of the parties' dispute from interest arbitration under RCW 41.56.450 suggests that the union was motivated by economic considerations and the successful conclusion of the collective bargaining process. If the union was dissatisfied with the employer's offer on any mandatory subject, it had a statutory right to seek interest arbitration for at least the paramedics in the bargaining unit.

The Examiner thus concludes that the general testimony of union witnesses concerning the parties' collective bargaining relationship is insufficient to establish a casual connection between protected activity and the termination of the ambulance operation.

Other circumstantial evidence in the record at the close of the union's case-in-chief provided basis to infer a causal connection:

A variance between announced reasons and employer documents seemed evident at that point. The record contained the "Departmental Income and Expense Analysis" documents (Exhibits 3-5) and the testimony of the union's accountant. Based on his review of the data the union had received,[17] Edwards testified that the ambulance

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[17] The documents contain "TOTAL REVENUE," "NET REVENUE," "TOTAL OPERATING EXPENSES" AND "CONTRIBUTION MARGIN" terms. Edwards explained his understanding of those terms, including: "net revenue" as the amount billed less any uncollected amounts, "variable expenses" as the expenditures to generate operating revenue, "fixed expenses" as expenditures not attributable to generation of revenue (and incurred irrespective of whether the department generates revenue), "total operating expenses" as the sum of the variable and fixed expenses, and "contribution margin" as the fiscal effect of a department on the profitability of the overall business.

operation had, "[N]et revenue for the year of $2,395,917. And then we have the variable expenses, and they total $1,030,033. So we have a contribution margin or a variable profit of $1,365,884." Edwards contrasted what he saw as a positive "CONTRIBUTION MARGIN" for the ambulance department with negative results for some other departments that were not closed. The evidence that the ambulance operation was making a profit (or at least not the severe loss claimed by the employer) thus provided basis for the required inference of a causal connection.

The timing of the decision to terminate the ambulance operation provides the barest of support for an inference concerning a causal connection. The employer did act after there was protected activity, but that protected activity had occurred over a period of more than four years and there was no recent incident precipitating any action or reaction.

Based on inconsistency between the evidence provided by the union and the explanation given by the employer to the union, and based on the timing of events, the Examiner finds support for an inference that the closure of the ambulance operation was or could have been connected to the previous union activity. As noted in *City of Winlock*, Decision 4783 (PECB, 1994), *aff'd*, *City of Winlock*, Decision 4784-A (PECB 1995), "A prima facie case is easily made where an alleged discriminatee is clearly identified as a union supporter." The Examiner notes here that a prima facie case is also easily made out where discrimination is alleged against an entire bargaining unit that has previously confronted the management through the collective bargaining process.

The Employer's Articulation of Reasons -

The employer produced evidence that it had lawful reasons for closing its ambulance operation. Moreover, the financial evidence supporting the union's prima facie case was discredited by the

employer's detailed evidence and explanation as to why the Departmental Income and Expense Analysis documents relied upon by the union were in error as to the "NET INCOME" and "CONTRIBUTION MARGIN" for the ambulance operation. Indeed, the employer produced evidence showing that the ambulance operation incurred a loss (rather than the profit claimed by the union's accountant) during calendar year 2000. Moreover, the employer produced evidence showing that announced changes in Medicare reimbursements would produce even greater losses from the ambulance operation in the future:

The employer explained away Edwards' interpretation of the "NET REVENUE" stated in the employer-supplied documents.[18] The employer produced evidence that the data used by Edwards did not accurately portray either the "net revenue" or "contribution margin" for the ambulance operation, and did not represent an accurate accounting of the employer's departmental income and expenses as is generally accepted by accounting professionals.[19]

The true picture was set forth in other documents, including the memorandum presented to the employer's board on March 5, 2001 (Exhibit 10), the testimony of the employer's chief financial officer, Terry Litke (Transcript 128-148), and the testimony of the employer's vice-president for administration, Lynn Bales (Tran-

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[18] Edwards acknowledged that his contribution margin analysis and concern was based exclusively on the data in the employer's Departmental Income and Expense Analysis documents provided to the union. Transcript 81. He held open the possibility that additional data could change his analysis. Transcript 75-79.

[19] The "NET REVENUE" and "TOTAL REVENUE" lines on both Exhibit 3 and Exhibit 4 are equal as to every department analyzed. For example, Exhibit 3 shows $2,388,945 on both lines for calendar year 2000. Under Edwards' explanation, that could only occur if the employer had no uncollectable billings or accounts.

script 84-127). They consistently explained the error in the Departmental Income and Expense Documents which formed the basis for the union's prima facie case: While the "TOTAL REVENUE" figures on each of the documents was correct; some "NET REVENUE" figures were incorrect by reason of omitting any reference to or consideration of uncollectable accounts amounting to approximately half of the "TOTAL REVENUE" for the ambulance operation.

The correct figures actually show a loss, when the uncollectable billings, Medicare over-reimbursement exceeding the mileage cap, and "fixed" expenses[20] are considered, totalling $132,907 for the year ending December 31, 2000, instead of the "variable profit" of $1,365,884 inferred by Edwards as a positive "CONTRIBUTION MARGIN" for the operation.

There was a projected loss for 2001, although less than estimated by the employer initially at $204,511. When adjusted for the actual performance during the first six months of 2001, the projected 2001 loss was reduced to $168,164. Exhibit 11.

The projected did not include the Medicare reduction for 2001, so that the employer could reasonably have projected an *additional* loss of about $106,000 per year when the new regulations would be implemented.[21]

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[20] In considering closure, no expenses are truly "fixed." All "fixed" expenses of an ongoing operation become "variable" expenses as they decline to zero at closure.

[21] Where all trips staffed with ALS-qualified paramedics were paid at the higher ALS rate in the past, irrespective of whether ALS service was actually provided, the ALS rate was to be paid under the new Medicare formula only if ALS service was actually provided. Based on past data, reimbursement for ALS trips would drop from 152 to 108 per month, at a loss of approximately $200 per trip. *See* Exhibits 7, 8, 10, 17 and Transcript 88-94, 147-148.

While it is regrettable that the employer provided the union with incorrect or misleading information, and doubly regrettable that the documents caused the union to question the employer's stated (financial) reasons for closing the ambulance operation, no violation of the duty to bargain has been alleged in this case.

The fact is, and remains, that the ambulance operation was incurring substantial financial losses. The employer's evidence proves that the ambulance operation incurred an accounting *loss* in 2000, that *increasing losses were projected for 2001* even before the change of Medicare regulations, and that *further losses were anticipated* because of the anticipated reduction of revenue from Medicare. The Examiner finds the employer has stated lawful reasons for closing the ambulance operation.

Pretext -

The Examiner is unable to conclude that the reasons stated by the employer were pretexts to conceal some other reason, or even that the documents provided by the employer to the union conceal some other reason for the decision to close the ambulance operation. Union witness Edwards admitted that he did not know either what the various departments did, or the details of the accounting system used by the employer. Transcript 66, 69-71, 76-79. In fact, the record is clear that the negative contribution margin listed for some departments in exhibits 3 and 4 resulted from a practice of accumulating the "OPERATING EXPENSES" of some departments that do not create revenue as "fixed" expenses charged to revenue-producing departments. Thus, the Examiner infers that the employer's accounting system does not produce figures that conform to the "contribution margin" term generally accepted in accounting circles, at least in the income and expense documents provided to the union. Substantial negative figures for some departments mis-labeled as "contribution margin" were instead "fixed costs"

ultimately billed to revenue generating departments. Exhibits 3 and 4 are, therefore, meaningless as any measure of actual profit or loss, and useless in assessing the relative fiscal viability of the ambulance operation as compared to other departments.[23]

At a minimum, the list of financial results compiled by Edwards for various departments (Exhibit 5) would need to be corrected along the following lines:

	YE 12/31/2000	YTD APR 2001
AMBULANCE	~~1,365,884~~	~~460,953~~
	(132,907)	(57,000)

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[23] For example, Edwards expressed concern that:

> [W]e have physician management, and that's operating at a negative $336,000 for the year 2000. Now, I don't know what . . . physician management does, but it's certainly operating at a substantial negative number, which would be an item if -- as the accountant, I'd look at that first rather than looking at a number like the ambulance, which is operating at a profit of a million-three. I'd look at the ones that are negatives.

In regard to physician management, Bales testified:

> Q. [By Mr. Heller] Okay. Does [physician management] generate a positive cash flow?
>
> A. [By Ms. Bales] No. But physician management is a fixed cost. . . . It provides the oversight for our physician groups, . . . and it also includes, I believe, the billing staff for that entity.

Transcript 114. Other departments shown with no or negligible budgeted or actual revenues include printing, laundry & linen, social services, purchasing, plant maintenance, security, data processing, accounting, business services, admitting, administration, personnel, health information management center, nursing administration, inservice education, and quality improvement.

Once the figures for 2000 are corrected to reflect the actual collection rates, the over-reimbursement by Medicare, and "fixed" expenses allocated, along with correcting the figures for 2001 to reflect the projected collection rate, the results for the ambulance operation no longer stand out from a crowd of money-losing departments.

Edwards' uncertainty about the employer documents was evident from his testimony that his approach as an accounting professional was:

> [J]ust looking at the negative contribution margin items because those are the items that are hurting us. In addition to our fixed costs, they're hurting us. And I pointed out the ones that I thought were fairly large and fairly -- something that I didn't quite understand, so I detailed them. But I do understand that ambulance was one of the positive numbers and a fairly substantial positive number. So that number -- I couldn't understand why the hospital would go after a positive number and try to eliminate it when we have many negative numbers that maybe should be eliminated.

Transcript 72. There is no evidence that Edwards followed up with the employer on his own uncertainty. The fact that the union's accountant reached a faulty conclusion is not a basis to find the employer guilty of an unfair labor practice.

Substantial Factor Analysis -

The Examiner is unable to conclude that union animus was nevertheless a substantial factor in the employer's decision to close its ambulance operation.

The employer's reason to close its ambulance operation was the recent and projected fiscal results, including a projected decline in revenue from Medicare reimbursement, and the ambulance department's negative impact on the employer's overall profit. Tran-

script 11, 43-49. Consistent with that, the union's case-in-chief included evidence that the employer described "having a financial loss" to John Aslakson, a union official representing the employer's nurses, during negotiations for a collective bargaining agreement covering the nurses bargaining unit. Transcript 23.

The Examiner has applied the *Wilmot / Allison* test in a formulaic manner, which resulted in finding a causal connection on the basis of the evidence contained in the record as of the close of the union's case-in-chief. If that analysis were to be made on the basis of the entire record (including the employer's evidence that discredits the interpretations of union accountant Edwards), the discrepancy that seemed evident at the close of the union's case-in-chief would disappear.

Along the same line of reasoning, the union could not have sustained a prima facie case on the basis of timing alone. It is to be expected that there will be some level of controversy between an employer and a union representing its employees. It is noteworthy that the employer prevailed in the previous unfair labor practice case filed by this union, and that the employer prevailed in the only arbitration processed to arbitration under the parties' collective bargaining agreements.

In proving its own income and expense documents were wrong or misinterpreted, the employer has rebutted the union's prima facie case. The union has not proved that the employer decision to close its ambulance operation was substantially motivated by union animus in retaliation for protected union activity. The employer did not violate RCW 41.56.140(1) or (3) by closing its ambulance operation. The "discrimination" allegations advanced by the union in this case under RCW 41.56.140(1) and (3) must be dismissed.

The "Interference" Allegation

The preliminary ruling issued in this case framed a cause of action for alleged "interference" without limitation to a violation deriving only from the companion "discrimination" allegation. The Examiner has considered whether an "interference" violation was established in this case, but concludes that theory must also be dismissed.

The Applicable Legal Standard -
Chapter 41.56 RCW prohibits interference with the exercise of collective bargaining rights:

> 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.

RCW 41.56.040. Enforcement of the statutory right to freedom from interference, restraint or coercion by a public employer is through RCW 41.56.140(1): "It shall be an unfair labor practice for a public employer . . . [t]o interfere with, restrain, or coerce public employees in the exercise of their rights under this chapter."

An interference violation will be found, "When employees could reasonably perceive the employer's actions as a threat of reprisal or force or promise of benefit associated with the union activity of that employee or of other employees." *Pasco Housing Authority*, Decision 5927-A (PECB, 1997); *King County*, Decision 4893-A (PECB, 1995). Unlike a discrimination violation, it is not necessary to show that the employer acted with intent or motivation to inter-

fere, nor is it necessary to show that the employee(s) involved actually felt threatened or coerced. See *Kennewick School District*, Decision 5632-A (PECB, 1996), and cases cited therein. The determination is based on whether a typical employee in the same circumstances could reasonably see the employer's actions as discouraging his or her union activities. An employer's innocent intentions when taking disputed actions interfering with employee rights are legally irrelevant. *City of Seattle*, Decision 3066-A (PECB, 1989); *City of Pasco,* Decision 4860-A (PECB, 1995).

Application of the "Interference" Standard -
The Examiner finds that a typical employee would not reasonably perceive the employer's action to sell (practically give away) its money-losing ambulance operation as a threat of reprisal or force or promise of benefit associated with union activity protected by Chapter 41.56 RCW.

The record is devoid of direct evidence of union animus, or even of employer actions that would reasonably lead typical employees to believe that union animus caused the closure of the ambulance department. To the contrary, there is evidence that employees believed that fiscal concerns about the ambulance department could possibly lead to its closure. Transcript 27.

The only circumstantial evidence supporting an inference of union animus is the error in the "NET REVENUE" and "CONTRIBUTION MARGIN" figures reported in employer's Departmental Income and Expense analysis documents, and the record does not establish that those documents were ever distributed by the employer directly to any bargaining unit employees. The employer provided the documents to the union, in response to the union's request for information. The act of supplying documents to a union does not support an inference that the information (or errors) contained in those documents were ever communicated to employees. Moreover, this

record supports an inference that the errors that appear to have remained undiscovered until the employer presented its case at the hearing in this matter were unknown to the employees. It is thus impossible to conclude that the error provided any basis for any employees to reasonably conclude the employer's documents were threatening or coercive.[24]

The timing of the closure did not provide basis for bargaining unit employees to reasonably believe the closure of the ambulance department was coercive or retaliatory. The employer had maintained a collective bargaining relationship with the union for more than four years, and it maintains bargaining relationships with three other unions representing other bargaining units. The timing of the closure did not correspond to any discrete protected activity or precipitating incident from which employees might reasonably infer a threat for having engaged in protected activity. By reason of his parallel role with a local fire district, at least one of the bargaining unit employees was fully aware of the recent change of Medicare regulations that was expected to adversely affect the profitability of the ambulance operation.

Even if a typical employee might have perceived a threat to his or her own livelihood because of the job loss caused by the employer closing its ambulance operation, the evidence in this record concerning the financial losses of the operation calls into question the reasonability of any perception of a causal connection with union activity. If the accounting professional hired by the union failed to sort out the employer's erroneous "NET INCOME" and

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[24] Apart from the fact that there is no "refusal to bargain" allegation directly challenging the erroneous documents supplied by the employer in this case, the fact that the employer made a response to the request for information provided less basis for employee concern than if the employer had refused to provide information.

"CONTRIBUTION MARGIN" figures, there is no reason to infer that employees who are not accounting professionals could reasonably have perceived the employer's documents as threats of reprisal or force associated with their union activity. Accepting that the employer's erroneous documents misled the union's accountant, the Examiner finds it difficult to hold the employer responsible for any perpetuation of its error by the union's redistribution of the misleading documents or by the union's publication of the erroneous analysis by the union's accountant.

Absent a finding that typical employees would reasonably perceive the employer's actions as coercive or retaliatory, the Examiner concludes that the union has not proved an independent interference violation of RCW 41.56.140(1).

The Employer's Request for Attorney Fees

The employer has requested that the Union be ordered to reimburse the employer for its attorneys' fees. That request is DENIED.

The statutory authority of the Commission in unfair labor practice cases includes RCW 41.56.160(2), which provides:

> *If the commission determines that any person has engaged in or is engaging in an unfair labor practice*, the commission shall issue and cause to be served upon the person an order requiring the person to cease and desist from such unfair labor practice, and to take such affirmative action as will effectuate the purposes and policy of this chapter, such as the payment of damages and the reinstatement of employees.

(emphasis added). The remedial authority granted to the Commission by RCW 41.56.160 has been interpreted as broad enough to authorize an award of attorney fees. *See Municipality of Metropolitan*

Seattle v. PERC, 118 Wn.2d 621 (1992). However, RCW 41.56.160(2) authorizes remedy only where an unfair labor practice violation is found. *Anacortes School District*, Decision 2464-A (EDUC, 1986). As no determination has been made in this case that any person has engaged in or is engaging in an unfair labor practice, no remedial order (with or without attorney fees) is possible in this case.

FINDINGS OF FACT

1. Grant County Public Hospital District 1 d/b/a Samaritan Hospital (employer) is a public employer within the meaning of RCW 41.56.030(1).

2. The International Association of EMTs and Paramedics (union), a bargaining representative within the meaning of RCW 41.56.030(3), was the exclusive bargaining representative of certain emergency medical technician and paramedic employees of Grant County Public Hospital District 1 from 1996 until August 20, 2001.

3. The employer operates an acute care hospital located in Moses Lake, Washington. Until August 20, 2001, the employer operated a basic life support (BLS) and advanced life support (ALS) ambulance service. The ambulances were based at two separate stations leased from the City of Moses Lake, and provided service throughout the geographical area constituting "Hospital District 1" and in other areas as directed by the local Emergency Medical Services Council.

4. During the four-year bargaining relationship between the parties to this proceeding, the union perceived difficulties in dealing with the employer. The union did not, however,

file or pursue any unfair labor practice charges concerning alleged delaying or canceling of negotiating meetings by the employer, or concerning the employer allegedly coming unprepared to negotiations. The union took only one grievance to arbitration, and that grievance was denied. The union filed and pursued only one previous unfair labor practice complaint against the employer, and that complaint was dismissed.

5. In the Autumn of 2000, an announced change of the way in which Medicare reimburses for ambulance services provided basis for the employer to estimate that the revenues from its ambulance operation would decline by approximately $106,000 per year.

6. In the Autumn of 2000, the employer began active exploration of other options for providing ambulance service, including partnering with the City of Moses Lake and/or Grant County Fire District 5.

7. In the Autumn of 2000, Leonard Johnson was the local president of the union identified in paragraph 2 of these findings of fact, but attended a meeting concerning the ambulance service in his capacity as a representative of Grant County Fire District 5. Johnson thereby learned that the employer believed the new medicare regulations would reduce its ambulance revenues in the future, that the employer was looking into options for "outsourcing" the ambulance service, and that the employer expressed concern about whether it could operate the ambulance service without sustaining a loss.

8. Notwithstanding the information acquired by its official as described in paragraph 7 of these findings of fact, there is no evidence that the union requested bargaining concerning the future of the ambulance service, and the union has not

advanced any "refusal to bargain" allegation in this unfair labor practice proceeding.

9. On February 13, 2001, the employer and the City of Moses Lake entered into a memorandum of understanding providing for an evaluation of the ambulance service, along with the development and analysis of the delivery structure and operational aspects of the ambulance service then provided by the employer, to determine if a new structure or delivery model would meet the needs of the community using criteria agreed upon by both parties. The employer and the City of Moses Lake further agreed that, should there be consensus between them, an interlocal agreement would be developed to guide the transition to a new arrangement to provide ambulance service.

10. On May 21, 2001, the union sent a letter to the employer, requesting certain information concerning the financial status of the employer and of the ambulance operation.

11. At its meeting on May 22, 2001, the employer's board of commissioners discussed its overall financial condition. At the meeting, the employer's chief executive officer and chief financial officer provided a preliminary cost report which showed a projected loss for the ambulance operation of approximately $170,000 for calendar year 2001. At that meeting, the employer's board voted to sell the assets of the ambulance operation to the City of Moses Lake.

12. On May 25, 2001, the employer and the City of Moses Lake entered into an "ASSET PURCHASE AND SALES AGREEMENT" concerning the ambulance operation. That document provided for the employer to cease operation of the ambulances, and for the City of Moses Lake to take over their operation.

13. On June 7, 2001, the employer complied with the union's request for information as described in paragraph 10 of these findings of fact, by supplying all of the various audit reports and financial reports that had been requested by the union. The union did not seek any additional information or any clarification of the information supplied by the employer.

14. It is now known that some, but not all, of the documents provided by the employer as described in paragraph 13 of these findings of fact contained substantial errors. One specific effect of those errors was to overstate the employer's actual revenues for 2000 and 2001 from the ambulance operation; another specific effect of those errors was to overstate the employer's future revenues from the ambulance operation by failing to take account of the change of the Medicare reimbursement rate; another specific effect involved charging of fixed costs for departments that do not generate revenue. The overall effect of those errors was to make it appear that the ambulance operation was producing a profit while several other operations were incurring a loss. In fact, correct figures would have disclosed that the ambulance operation had incurred a substantial loss and that those losses were expected to increase in the future.

15. The union employed Gary Edwards, an independent certified public accountant, to analyze the documents provided by the employer, and he reported his conclusions to the union. Edwards interpreted the employer documents to indicate that the ambulance operation was producing a profit while several other operations were incurring a loss, but did not make any inquiry directly to the employer for clarification of the documents which had been provided to him by the union or for verification of his conclusions.

16. When the employer's estimates concerning the ambulance operation were adjusted for actual performance during the first six months of 2001, the loss for 2001 originally estimated as $204,511 was reduced to $168,164 (excluding the effect of the anticipated change of Medicare regulations). The change of Medicare reimbursements was expected to increase that loss by approximately $106,000 per year, to a total of approximately $274,164 in 2001.

17. In August 2001, the employer and the City of Moses Lake entered into an interlocal agreement which provided for the transfer of the ambulance operation. That interlocal agreement was to be effective on September 1, 2001.

18. The employer continued to experience financial losses from the ambulance operation after it entered into the interlocal agreement described in paragraph 17 of these findings of fact. The employer also encountered difficulties with regard to staffing the ambulance operation.

19. On an unspecified date prior to August 20, 2001, the employer and the City of Moses Lake agreed to effect the transfer of the ambulance operation earlier than the effective date set forth in the interlocal agreement described in paragraph 17 of these findings of fact.

20. On August 20, 2001, the City of Moses Lake assumed responsibility for providing ambulance service under the interlocal agreement described in paragraph 17 of these findings of fact. The employer thereupon closed its ambulance operation and laid off approximately 35 emergency medical technicians and paramedics constituting the entire membership of the bargaining unit.

21. Notwithstanding the partial closure of operations described in paragraph 20 of these findings of fact, the employer continues to operate its other departments and continues to employ employees in those departments, including employees in three other bargaining units represented by unions other than the union identified in paragraph 2 of these findings of fact.

22. The employer's decision to close its ambulance operation was motivated by the fiscal losses historically incurred and projected for that operation. The employer's stated reason for closing the ambulance operation was neither pretextual nor substantially motivated by animus in retaliation for union activities among the employees in the ambulance operation.

23. Typical employees of this employer would not reasonably perceive the employer's closure of the ambulance operation as a threat of reprisal or force or promise of benefit associated with the exercise of rights protected by Chapter 41.56 RCW.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The union has failed to sustain its burden of proof that the employer either interfered with the exercise of employee rights under Chapter 41.56 RCW or discriminated against employees in reprisal for the exercise of rights protected by Chapter 41.56 RCW by closing its ambulance department as described in paragraph 20 of the foregoing findings of fact, so that no unfair labor practice has been established under RCW 41.56.140(1) in this case.

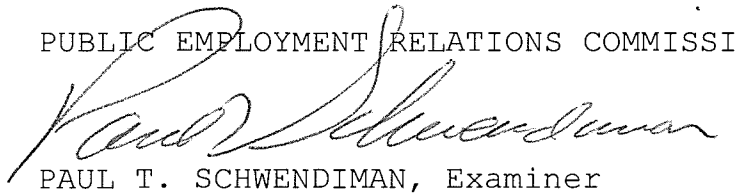
3. The union has failed to sustain its burden of proof that the employer discriminated against any public employee who had previously filed an unfair labor practice complaint by closing its ambulance operation department as described in paragraph 20 of the foregoing findings of fact, so that no unfair labor practice has been established under RCW 41.56.140(3) in this case.

ORDER

The complaint charging unfair labor practices filed by International Association of EMTs and Paramedics is DISMISSED on its merits.

Issued at Olympia, Washington, on this 4th day of June, 2003.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



PAUL T. SCHWENDIMAN, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.