Tacoma-Pierce County Employment and Training Consortium, Decision 10280 (PECB, 2009)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 117,	)	
	)	
Complainant,	)	CASE 21845-U-08-5567
	)	
vs.	)	DECISION 10280 - PECB
	)	
TACOMA-PIERCE COUNTY EMPLOYMENT AND TRAINING CONSORTIUM,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
Respondent.	)	

Spencer Nathan Thal, General Counsel, Anna A. Jancewicz, Staff Attorney, and Schwerin Campbell Barnard Iglitzin & Lavitt LLP, by *Robert H. Lavitt*, Attorney at Law, for the union.

City Attorney Elizabeth A. Pauli, by *Cheryl A. Comer*, Assistant City Attorney, for the employer.

On July 7, 2008, Teamsters Local 117 (union) filed an unfair labor practice complaint against the Tacoma-Pierce County Employment and Training Consortium (employer). In the complaint, the union alleges that the employer failed and refused to bargain concerning layoffs and recall of employees. The union further alleges that the employer discriminatorily laid off employees in retaliation for their union activity. The Public Employment Relations Commission (Commission) appointed Jessica Bradley as the Examiner. The complaint was identified by the Executive Director as a priority case. I conducted the first day of hearing on September 17 and conducted two additional days of hearing on October 20 and 21, 2008. The parties filed post-hearing briefs on November 14, 2008.

ISSUES

1) Did the employer fail or refuse to bargain about layoffs in violation of RCW 41.56.140(4) and (1)?

Because the employer's layoff decision had a significant impact on employees' wages, hours and working conditions, the decision is a mandatory subject of bargaining. The manner in which the employer selected employees for layoff was not consistent with the status quo and therefore triggered a bargaining obligation. Upon learning of the potential layoffs, the union made a timely request to bargain. The employer did not fulfill its bargaining obligations before announcing its layoff plan as a *fait accompli*. I find the employer committed refusal to bargain and derivative interference violations.

2) Did the employer fail or refuse to bargain about recalling employees from layoff in violation of RCW 41.56.140(4) and (1)?

I find the employer fulfilled its bargaining obligation concerning the recall. The employer and union bargained the recall procedure and reached an agreement. The employer adhered to the agreement in its implementation of the recall.

3) Did the employer discriminatorily target union supporters for layoff in violation of RCW 41.56.140(1)?

The union established a prima facie case of discrimination. The employer's layoff plan was a pretext to retaliate against union supporters. The protected union activities of Karinya Castonguay,

Shirley Chatters, Marybeth McCarthy, and Megan Shea were a substantial motivating factor in the employer's layoff decision. I find the employer discriminated against Castonguay, Chatters, McCarthy, and Shea in reprisal for union activities protected by Chapter 41.56 RCW.

ISSUE 1 - REFUSAL TO BARGAIN LAYOFFS

APPLICABLE LEGAL STANDARDS

The duty to bargain is defined in RCW 41.56.030(4), as follows:

> '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. . . .

An employer's duty to bargain is enforced through RCW 41.56.140(4). The Commission has authority to conduct unfair labor practice proceedings and issue remedial orders under RCW 41.56.160 and Chapter 391-45 WAC. Where an unfair labor practice is alleged, the complainant has the burden of proof. WAC 391-45-270(1)(a). The burden to establish affirmative defenses lies with the respondent. WAC 391-45-270(1)(b).

The Commission has held that once employees have exercised their statutory right to select an exclusive bargaining representative, an employer is prohibited from taking unilateral action in regard to the wages, hours and working conditions (mandatory subjects of bargaining) of those employees, and has the obligation to maintain

the status quo. *Snohomish County Fire District 3*, Decision 4336-A (PECB, 1994).

Determining whether or not a subject is a mandatory subject of bargaining is the starting point for analyzing any refusal to bargain allegation.

> As defined in RCW 41.56.030(4), the duty to bargain extends to 'personnel matters, including wages, hours and working conditions . . .' The scope of mandatory bargaining thus is limited to matters of direct concern to employees. Managerial decisions that only remotely affect 'personnel matters', and decisions that are predominantly 'managerial prerogatives', are classified as nonmandatory subjects.

International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland), 113 Wn.2d 197 (1989).

The Commission has repeatedly held that the decision to lay off employees is a mandatory bargaining subject. *City of Kelso*, Decision 2633-A (PECB, 1988), *aff'd in part and rev'd in part*, 57 Wn. App. 721 (1990), *review denied*, 115 Wn.2d 1010 (1990); *Stevens County*, Decision 2602 (PECB, 1987); *City of Centralia*, Decision 1534-A (PECB, 1983); *South Kitsap School District*, Decision 472 (PECB, 1978).

Before changing a mandatory subject of bargaining, "employers must give unions advance notice of the potential change, so as to provide unions time to request bargaining, and upon such requests, bargain in good faith to resolution or lawful impasse prior to implementing the change." *City of Anacortes*, Decision 9004-A (PECB, 2007). Also see *North Franklin School District*, Decision 5945 (PECB, 1997), *aff'd*, Decision 5945-A (PECB, 1998).

ANALYSIS

The employer provides job training and placement services to job seekers, works with businesses to recruit qualified employees, and is the fiscal administrator of workforce development dollars.

On August 7, 2007, the union filed a representation petition with the Commission seeking to represent all of the employer's non-supervisory employees. The Commission conducted an election in which the majority of employees voted in favor of union representation. On October 11, 2007, the Commission certified the union as the exclusive bargaining representative of a bargaining unit described as:

> All full-time and regular part-time employees of the Tacoma-Pierce County Employment and Training Consortium, excluding supervisors and confidential employees.

The parties began contract negotiations on January 24, 2008, and held additional negotiation meetings on February 28 and April 23. As of the conclusion of the hearing, the parties had yet to reach agreement on an initial contract. The employer had an obligation to maintain the status quo concerning mandatory subjects of bargaining while the parties were in contract negotiations. *Snohomish County Fire District 3*, Decision 4336-A.

Employer Notifies Union of Layoffs and Union Demands to Bargain

On or about May 7, 2008, Linda Nguyen, Executive Director for the employer, informed Alice Massara, a labor negotiator for the City of Tacoma and lead contract negotiator for the employer, that the

employer may have a budget shortfall resulting in a potential need for layoffs. Later that same day Massara called Mary Ann Brennan, Business Representative for the union. Brennan was on vacation. Massara left a message indicating there was a possibility of layoffs. This was the first time the union was notified that the employer was considering layoffs.

On or about May 12, Brennan called Massara. Massara told Brennan that there was a potential need for layoffs because some of the employer's funding had been cut. Massara asked to meet with Brennan to discuss layoffs. Brennan expressed that the union wanted to bargain with the employer about the layoffs. When the two of them compared schedules they found that the next contract negotiation meeting, scheduled for May 20, would be the soonest time that they were both available to meet.

The testimony of Brennan and Massara is inconsistent concerning the scheduling of a time to discuss the layoffs. According to Brennan, the parties agreed to discuss the layoffs at the next negotiation meeting on May 20. According to Massara, the parties set a separate time to discuss the layoffs and scheduled a meeting for May 21 with the understanding that the employer would have a layoff proposal. On this issue I credit Massara's testimony. Brennan acknowledged that she had a lot of things going on at the time and was not confident of the date. Massara appeared to have a clearer recollection of this issue. The subsequent email correspondence sent by the employer also supports Massara's recollection.

The employer notified the union of possible layoffs and the union requested to bargain the layoffs. The union's request to bargain triggered a bargaining obligation on behalf of the employer.

Are Layoffs a Mandatory Subject of Bargaining?

In order to determine whether an employer has a bargaining obligation, it is first necessary to determine if the topic at issue is a mandatory subject of bargaining. The employer argues that the reduction in force (a term the employer uses interchangeably with layoff) was not a mandatory subject of bargaining. The union argues that the layoffs are a mandatory subject.

In determining whether a topic is a mandatory subject of bargaining, the Commission balances: (1) the relationship of the subject to wages, hours and working conditions; and (2) the extent to which the subject lies at the core of entrepreneurial control or is a management prerogative. *City of Richland*, Decision 2448-B (PECB, 1987), *remanded*, 113 Wn.2d 197 (1989). *Richland* requires application of the balancing test to the particular facts of the case at hand. The critical consideration in determining whether an employer has a duty to bargain is the nature of the impact of the subject on the bargaining unit. *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991).

A layoff is typically found to be a mandatory subject of bargaining because it impacts the employment relationship at its core. "In the case of imminent layoffs, however, the effect of the layoff decision on the wages, hours, and working conditions of the bargaining employees to be laid off are clear. Hence, the decision to lay off is a mandatory bargaining subject." *City of Kelso, Decision* 2633-A.

The employer argues that its reduction in force decision was not a mandatory subject because it required the exercise of entrepreneurial experience and judgement. This argument must be

balanced against the impact of the employer's decision on employees, the loss of all wages, hours and working conditions.

As an examiner explained in *North Franklin School District*, Decision 5945:

> There is a notable distinction between a 'decision' that has personnel implications and its 'effects': Even where a managerial decision is a permissive subject of bargaining, the personnel effects of implementing that decision (e.g., layoffs) are a mandatory subject of bargaining. *City of Richland*, Decision 2448-B (PECB, 1987).

In this case I find that the employer had the right to make a managerial decision concerning the need to reduce staffing (lay off employees) in order to balance its budget. This is the type of business decision that lies at the core of entrepreneurial control. However, the implementation of the layoff had a significant impact or effect on employees' wages, hours and working conditions and is a mandatory subject of bargaining. Implementation includes, but is not limited to, the manner in which the employees are selected for layoff and the notice given to affected employees.

Initial Correspondence and Bargaining of Layoffs

On May 20, 2008, the parties met for their scheduled contract negotiation meeting. During this meeting neither party raised the issue of possible layoffs.

At 6:10 p.m. on May 20, after the negotiation meeting, Nguyen sent an e-mail to the union concerning a reduction in force (RIF). The e-mail stated:

> In the spirit of transparency and open communication, I want to share the attached information with you so that

> you have a chance to review, formulate questions and suggestions before we meet tomorrow, May 21st. This is a difficult issue to be faced with and I appreciate us working together to implement a reduction in force as smoothly and humanely as possible.

A document attached to the e-mail, titled "Tacoma-Pierce County Employment and Training Consortium Program Year 2008 (July 1, 2008-June 30, 2009) Reduction in Force Plan" started by discussing the employer's budget cuts, program costs, and revenue sources. The document explained:

> Additional Reduction in Force Needed to meet Operating Budget = 6.4 FTEs. In a concerted effort to alleviate the impacts of the forced layoffs, and help defray the costs associated with the mandated reduction, we have considered a number of alternatives to lay offs as the only solution, such as employee premium sharing, wage freezes and/or salary reductions, and early retirement. These alternatives, however, do not solve the budgetary shortfall in its entirety, but will only lessen the impact on the organization and provide for fewer FTE's that need to be eliminated.

The next section of the document appeared as follows:

> Reduction In Force Plan of Action:
>
> *Reductions-in-Force selection shall be based on business need and impact to services looking at the departments most significantly impacted by the loss of adequate revenue streams.*
>
> *Rationale: RIF proportionate to impact on service area. Since the largest funding reduction is in the Career Development Center adult and dislocated worker operation, the greatest impact will be felt and take place from here as service delivery will be substantially decreased resulting in a decreased need for case management services. The Business Connection area will also see significant reduction by laying off staff in a probationary status and one working in a part time status. The Planning and Program Development Department will also be negatively affected by the reduction since*

it receives funding from the three affected revenue streams as well. To this end, we propose the following employee lay offs:

1. Patrick Williams - Business Connection Project Specialist on probation, hired in April - per our policy
2. Craig Larson - Office Assistant I Business Connection, Part time - per our policy
3. Kari Castonguay Adult ETS II has lowest seniority (hire date 4-22-02) of four ETS II currently charged to the adult funding stream
   a. Debra Gibson hired 8-28-00
   b. Jeff Bruce hired 9-5-95
   c. Veronica Batiste hired 6-27-89
4. Marybeth McCarthy Dislocated Worker ETS II has lowest seniority (hire date 7-15-02) of seven ETS II charged to the dislocated worker funding stream
5. Megan Shea Dislocated Worker ETS II has second lowest seniority (hired 9-10-01) of seven ETS II charged to the dislocated worker funding stream
6. Shirley Chatters Dislocated Worker ETS II has the third lowest seniority (hired 1-8-01) of the dislocated worker funding stream.
   a. The remaining four Dislocated Worker ETS II
7. Paul Clark Information Specialist from Planning and Program Development

The employer's May 20 RIF Plan identified seven employees for layoff: Williams, Larson, Castonguay, McCarthy, Shea, Chatters, and Clark.

Obligation to Bargain Changes to the Status Quo

A complainant alleging a "unilateral change" must establish the relevant status quo. *METRO (Amalgamated Transit Union, Local 587),*

Decision 2746-B (PECB, 1990). In cases involving a newly-certified bargaining unit, the status quo refers to the terms and conditions of employment that existed at the time the union was certified. To determine what constitutes the status quo, the Commission looks to the employer's past practice.

According to the employer's former operations manager, who retired in 2005, in the late 1990's the employer faced the possibility of layoffs as a result of a funding decrease. The employer never actually had to lay off any employees because it was able to obtain more funding at the last minute. However, because the employer began the process of identifying and notifying employees who would be laid off, we can look to this instance as an example of past practice.

In the late 1990's the employer's policy was to first lay off any temporary employees, then any probationary employees, and then part-time employees. If the employer still needed to lay off additional employees, the policy was to lay off according to job classification, such as employment training specialist or clerical. In explaining what constituted a job classification, the former operations manager explained that the employer saw the Employment Training Specialist II (ETS II) and ETS III job positions as two distinct job classifications. Once the employer identified a job classification for layoffs, the employer used seniority to determine which employees would be laid off. The least senior employees were laid off first.

The former operations manager acknowledged that the policy also listed job performance, productivity, and attendance as criteria for layoffs, but explained that in the 1990's the employer did not apply these criteria because managers had not diligently conducted employee evaluations on an ongoing basis.

In the late 1990's the employer looked to its Personnel Rules and Regulations to determine layoffs. Although the Personnel Rules and Regulations in effect in the 1990's were revised in 2004, the layoff policy remained substantially the same. According to the former operations manager, who was involved with the 2004 rules revisions, the revisions were done to eliminate duplication of verbiage and not to change the nature of what the layoff policy was trying to say.

The Personnel Rules and Regulations have not been revised since 2004. The layoff section of the Personnel Rules and Regulations appears as follows:

ARTICLE XIV
REDUCTION IN FORCE

The Consortium is very interested in continuing its service levels and productivity. Accordingly, it will attempt to avoid cutbacks and reductions in force whenever feasible. However, if the Consortium determines that a reduction in the work force is warranted because of a lack of work, a reorganization, or other considerations, the following procedures will apply.

14.1 NOTIFICATION OF REDUCTION-IN-FORCE (LAYOFF)

The Executive Director shall notify an employee of a pending Reduction in Force (R.I.F.) in writing, at least ten (10) working days prior to the effective date of the R.I.F.

14.2 LAYOFF

a) Factors Used to Determine Order of Layoffs

Employees shall be selected for layoff carefully so as to be fair and consistent. All personnel policies, including the Consortium's policy against unlawful discrimination, shall be followed. Layoffs shall be implemented on a Consortium wide basis by job classifications. Once it is determined what the scope of the layoff will be, employees will be laid off in the following order:

1) temporary and on-call employees;

2) probationary employees (in their first six months of employment with the Consortium);

3) part-time employees;

4) full-time employees.

b) Within each of the classifications noted above, employees shall be selected for layoff based on a combination of factors, including, but not necessarily limited to, past performance and productivity, qualifications, and attendance. In cases where the Consortium determines that general performance and other factors are essentially equal between two or more employees, length of service will be the deciding factor in determining which employee or employees shall be retained.

c) An evaluation of performance may be conducted by the immediate supervisor of an employee who is subject to R.I.F. providing:

1. A substantial change of duties, assignment, classification, or performance has occurred since the last performance appraisal; OR

2. The majority of the employee's length of service has not been evaluated since the last scheduled appraisal.

If it is found that two or more persons are considered equal in terms of performance, and equal in terms of seniority of service (continuous service date), then the Executive Director shall determine order of separation. The length of service within the assigned classification may be one of the criteria used by the Executive Director in making this determination.

d) Length of Service

Length of service for purposes of this policy is defined as the total number of full and partial months that the employee has worked for the Consortium, disregarding any periods during which the employee was on leave of absence and any periods in which the employee was not employed by the Consortium due to one or more breaks in service.

> An employee who changes job classifications shall retain length of service credits accrued in all previous job classifications for purposes of determining his length of service in the event of a reduction in force.
>
> e) Transfers or Reassignment
>
> Employees who are selected for layoff may be reassigned or apply for transfer to any open position in the Consortium for which they are qualified. (Refer to Article IV, Section 4.5.)

Based on the record, the employer's status quo regarding layoffs is limited to the practices it used to issue layoff notifications in the late 1990's and its written Personnel Rules and Regulations.

If the employer wished to conduct layoffs according to its Personnel Rules and Regulations as applied by past practice, it would be maintaining the status quo and would not have a bargaining obligation. If however, the employer wished to deviate from the status quo and change the manner in which it implemented layoffs, the employer had to fulfill its bargaining obligations with the union.

The employer's May 20 RIF plan for determining which employees would be laid off clearly deviated from the employer's past practice. The employer's past practice, which is reflected in its written policy states: "Layoffs shall be implemented on a Consortium wide basis by job classifications." The Personnel Rules and Regulations define classification in "Article II Definitions" as follows:

> e) Class or Classification
>
> A group of positions in the Consortium's service sufficiently alike in duties, authority, responsibilities, and

> qualifications required. The same schedule of pay can be equitably applied to all positions in the group.

This definition is consistent with the interpretation provided by the former operations manager, who indicated that the Employment Training Specialist II (ETS II) is a distinct job classification. The employer's May 20 RIF plan did not propose laying off employees on a consortium wide basis by job classification. Rather the employer proposed that positions be selected "based on business need and impact to services looking at departments most significantly impacted by the loss of adequate revenue streams." The inconsistency is particularly clear when looking at the ETS II positions the employer identified for layoff. The employer used funding streams to identify the positions rather then selecting a job classification, in this case ETS II, and laying off employees on a Consortium wide basis.

It should also be noted that at the hearing the employer stipulated that "the layoff decisions in this case were not based on past performance, productivity, qualifications, or attendance." In looking at article 14.2 b) of the Personnel Rules and Regulations and the employer's past practice in the 1990's, this stipulation means that in determining which employees in a job classification will be laid off, the employees' "length of service will be the deciding factor. . . ." The employer did not conduct any additional employee evaluations under article 14.2 c) of its rules and did not raise any concerns under 14.2 d) about breaks in service impacting the calculation of employees' length of service.[1]

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[1] The employer produced a document showing the start dates of each employee.

The employer had the right to make a layoff proposal that deviated from the status quo. However, because its May 20 RIF plan constituted a change to the status quo, the employer could not lawfully implement the proposal without first fulfilling its statutory bargaining obligations.

Bargaining the Layoffs

On the morning of May 21, 2008, Brennan called Massara on behalf of the union. Brennan explained that she was concerned that the union had not received the employer's layoff proposal until the night before the scheduled meeting. Brennan said the union needed more time to digest all of the information and formulate questions. Brennan asked to cancel that afternoon's meeting. Massara indicated that the layoff "was going to happen July 1st. Let's start the meetings as soon as we can, because we want to . . . provide you as much information, answer your questions."

In the same conversation on May 21, Massara explained that Nguyen wanted to notify employees personally that there would be a reduction in force. Massara stated that Nguyen thought her personally telling employees would be the most compassionate way to inform them, and she wanted to make the announcement because of her position as executive director. Brennan objected and explained that the union wanted to notify the bargaining unit members first because it represented the employees.

Massara and Brennan's accounts of the rest of their May 21 conversation differ. According to Brennan, Massara insisted that the employer needed to notify employees and said the employer would be making an announcement to all staff the next day (May 22). Brennan objected to the employer presenting the layoff plan to the

employees without first bargaining with the union. Massara explained that although the employer's layoff policy only required it to give employees two weeks (10 working days) notice, the employer wanted to give employees at least 30 calendar days notice to provide employees with an opportunity to figure out what they were going to do.

As Massara describes the conversation, the union was forcing the employer to notify employees. Massara explained that the employer would have preferred to wait and have the initial meeting with the union before having to notify employees.

In evaluating the totality of the testimony on this issue, the context of the events, and the witnesses' demeanor when giving the testimony, I credit Brennan's testimony. The explanation provided by Brennan is most consistent with the overall fact pattern.

At the end of their May 21 conversation, Brennan and Massara agreed to meet the next morning to discuss the employer's May 20 RIF plan. The meeting was to be between Brennan and business representative Greg Slaughter, on behalf of the union, and Massara and Nguyen, on behalf of the employer. Massara insisted that the employer was going to notify the employees of the layoff the next day at 12:30 p.m. Brennan made it known that she did not think the employer should be notifying employees of the layoff before bargaining with the union. Massara indicated that the employer would hold a May 22 meeting with the employees, despite the union's objections. Brennan said that if the meeting occurred she and Slaughter wanted to be present. Brennan also asked Massara to provide the union with an opportunity to meet with the employees on its bargaining team before the employer announced the layoff. Massara would not agree to wait on notifying the employees but agreed to let the

union meet with its bargaining team the next day, after the employer and union met in the morning, but before the employer's 12:30 p.m. meeting with all staff.

At 1:22 p.m. on May 21, Nguyen sent an e-mail to all staff titled: "IMPORTANT: Critical Meeting for all Staff." The e-mail stated: "Mary Ann Brennan and Greg Slaughter from Teamsters Local 117 and I are calling a joint meeting with all TPCETC staff. The meeting is scheduled for May 22nd at 12:30 . . . . This is very important and I ask that you attend. . . ."

Upon receiving the e-mail Brennan called Massara during the afternoon of May 21. Brennan explained that she was upset that the employer used her name and Slaughter's name in the e-mail and felt that the e-mail was very misleading about the union's position on holding the meeting. Brennan reiterated that the union wanted the employer to wait until bargaining occurred to notify employees of the layoff. Massara apologized and explained that she wanted to let staff know that it was a joint meeting. Brennan told Massara that if the employer intended to send a joint e-mail the employer should have shown the e-mail to the union before sending it to all staff.

During this May 21 phone conversation, Massara indicated that the employer intended to share its May 20 RIF plan, which it had e-mailed the union the prior evening, with employees. Brennan objected and argued that the employer should not distribute the document without first bargaining with the union. Brennan explained that the union believed the employer was not following its layoff policy and wanted to bargain about which employees would be targeted for layoff before the employer informed individuals they were going

to be laid off. Brennan asked that the employer at least remove employee names from the document.

In response to the union's concerns, on May 21 the employer e-mailed the union a revised version of its May 20 RIF plan. In the revised version the employer replaced employee names with the following position descriptions:

1.5 FTE Business Connection
1 FTE Adult ETS II case manager
3 FTE Dislocated Worker ETS II case managers
1 FTE Planning and Program Development

In the morning on May 22, Brennan and Slaughter met with Nguyen and Massara for approximately two to three hours. The union asked questions about the employer's funding situation and RIF plan. The union made it clear that it wanted to bargain about the implementation of the layoff. As Brennan described "we were demanding to bargain the procedure . . . to bargain the way they executed the layoffs, the manner in which they choose who was going to be laid off." The union asked the employer to satisfy its bargaining obligation before presenting the layoff plan to employees. Despite the union's objections, the employer indicated it would present its layoff plan, with position descriptions rather than employee names, to the staff that afternoon. During this meeting the parties did not reach agreement or impasse.

On May 22, at 11:00 a.m., Brennan and Slaughter met with the union's bargaining team to tell them about the information they had gained from the employer that morning.

On May 22, at 12:30 p.m., the employer held an all-staff meeting. Brennan and Slaughter were also present. Executive Director Nguyen was the first person to speak at the meeting. She explained that there was going to be a reduction in force and that the budget shortfall translated to 6.5 FTEs. Nguyen referenced the methodology used by the employer to determine which job positions to lay off. Nguyen stated that the employer would negotiate the layoff with the union.

There is some discrepancy in testimony as to whether the employer presented anything in writing at the May 22 staff meeting. I credit the testimony of employee Castonguay and find that the employer displayed at least part of the revised version of its RIF plan that it e-mailed to the union on May 21. Specifically, the employer showed employees the position descriptions that it proposed to lay off.

After Nguyen finished speaking, she handed the meeting over to the union to talk about what their role was going to be. Employees began asking questions to Brennan and Slaughter. A short time later, the employer's managers and supervisors excused themselves and allowed the union to talk with the employees privately.

In describing her observations at the May 22 staff meeting, Mascara explained:

> [T]here was quite a bit of dissension. And that's the word that I would use because there was so many questions and it was obvious to me that some bargaining unit members were not happy with -- with the representation that they were receiving to date. And I don't know if it's because they were confused or they didn't know what process was. And that's possible, that they hadn't been communicated what the process was. And there was a lot

> of fear, fear specifically about losing your job and about the reduction.

Nguyen described the meeting as:

> It was emotional for everyone involved. . . . It was emotional for the employees there, those who didn't understand why they hadn't been consulted during the bargaining session to get their thoughts and ideas. Emotional for those who sort of made the assumption or guess based on how we, the management, talked about our methodology that they may be the one. So highly charged, very emotional from 'Oh, my goodness, it might be me. What's going to happen? Who's representing us? And why aren't we getting communication?'

The employer and union met to bargain the reduction in force on May 27 and 30, and June 13 and 20. Each meeting lasted approximately two to three hours.

On May 27, there was a lot of discussion about how the employer had determined its layoff plan. The union told the employer that it agreed that the part-time and probationary employees on the employer's proposed layoff list should be included in the RIF. The union expressed concerns about the four ETS II employees identified in the layoff plan. Specifically, the union explained that it thought the employees identified by the employer had too much seniority to be laid off in accordance with the employer's policy. The union made several verbal proposals of who to lay off. The employer told the union that its proposal to lay off an accounting technician would decimate their fiscal department. In response the union proposed laying off the least-senior ETS I and the three least-senior ETS IIs. The employer said the union's proposal was not operationally feasible.

On May 30, the parties continued to bargaining the layoffs. They compared the cost savings generated by their respective proposals. The employer pointed out that its proposal saved more money than the union's layoff proposal. The employer continued to tell the union that its layoff plan followed its policies and personnel rules. The union raised the idea of internal transfers and bumping as a way to cover the work load that would be generated by the union's layoff proposal. The employer indicated it was not interested in transferring employees to different ETS II job positions and explained why it thought job transfers with the ETS I and II job positions would be disruptive to the administration of various programs. The union continued to revise its verbal proposals in response to information provided by the employer. However, the employer maintained that none of the union's proposals were as good as its proposal.

During the bargaining sessions on May 27 and 30, the parties did not reach agreement or impasse.

On June 4, the employer sent layoff notices to all of the employees it had identified in its original May 20 RIF plan. The same day, the union sent a letter to the employer objecting to the implementation of the layoff. The letter stated that the parties "are no where near impasse." The union made it clear that the employer should not be notifying employees before the employer finished bargaining with the union. The employer did not take any action to retract the June 4 layoff notices to employees.

On June 13, the union and employer met to continue bargaining the layoffs. The union reiterated its concerns regarding the layoff notices that the employer issued to employees on June 4. The union explained that it did not think the layoff notices should have been

issued to employees at a time when the parties had barely begun bargaining. The employer indicated that it had met its bargaining requirements. The parties continued to discuss the employer's funding streams and the employer's interpretation of its personnel rules.

On June 15, in response to questions raised by the employer, the union provided a spreadsheet comparing the cost savings of the employer's layoff proposal with the union's layoff proposal. On June 19, the employer e-mailed the union additional economic data concerning the costs of specific job positions.

On June 20, the employer and union met to continue bargaining the layoffs. Using the data provided by the employer, the union showed that cost savings generated by its proposal were only $28,852 less than the employer's. The union explained that its figures showed a good solution for the numbers involved as well as consideration of seniority under the employer's policies and procedures. The union pointed out that it had revised its proposals several times in response to the employer's concerns, but noted that the employer had not made one move off of its original May 20 RIF plan.

The employer did not provide any notes or detailed accounts of the bargaining meetings. Some of the employer's witnesses described the bargaining generally. Massara indicated: "[A]s the lead negotiator . . . my role, was to -- to partner with Linda [Nguyen] and bargain the impacts." When asked if she had specifically asked the union representatives if they wanted to bargain the impacts of the reduction in force, Massara said yes and explained:

> The [union's] response was to focus entirely on our methodology. And -- and we basically went round and

> round and round talking about the methodology and how we arrived at our proposal. And theirs was based on seniority. Ours was based on legitimate business need and on the policy. We believe we followed the policy. So that, to me, is not bargaining the impacts of a reduction in force. In my opinion, that is not beneficial use of time. I think that what was important was to talk about caseload, for instance, or talk about what's going to happen to the employees who are laid off, what is going to happen to the remaining employees at the organization, are there any other alternatives to our plan, and, if so, let's take a look at them and consider them. That is my opinion on how these negotiations should have gone.

Massara's testimony makes it clear that the employer did not believe it had an obligation to bargain with the union about its layoff decision. The employer was only interested in bargaining about the effects of its May 20 RIF plan, not the plan itself.

Nguyen's testimony focused largely on explaining why the employer's RIF plan was the best proposal from an operational standpoint.

On June 24, Brennan called Massara and explained that the union still objected to the employer moving forward with the layoffs when the parties were merely scratching the surface of bargaining on the issue.

From June 25 to June 30, the employer's managers met with the employees identified in the employer's initial May 20 RIF plan. The employees were asked to sign documentation acknowledging they were being laid off effective June 30, 2008.

Did the employer present its RIF plan as a fait accompli?

The union argues that the employer presented its RIF plan as a *fait accompli*, as something that had already been decided, with very little time to engage in bargaining prior to implementation. As the Commission explained in *Clover Park Technical College*, Decision 8534-A (PECB, 2004), "In determining whether a *fait accompli* has occurred, the Commission focuses on the circumstances as a whole, and whether the opportunity for meaningful bargaining existed."

In *Lake Washington Technical College*, Decision 4721-A (PECB, 1995), the Commission stated:

> If the union is adequately notified of a contemplated change at a time when there is still an opportunity for bargaining which could influence the employer's planned course of action, and the employer's behavior does not seem inconsistent with a willingness to bargain if requested, then a *fait accompli* should not be found.

When an employer presents a change in a mandatory subject of bargaining as a *fait accompli,* the employer commits a refusal to bargain violation. *Clover Park Technical College*, Decision 8534-A. Once a *fait accompli* bargaining violation is found, the union is relieved of its obligation to request bargaining and further analysis addressing whether the employer refused to bargain with the union becomes unnecessary. *Clover Park Technical College*, Decision 8534-A.

The employer notified the union of its RIF plan on the night of May 20. On May 21, the employer told the union it would be sharing its RIF plan with employees the next day. On May 22, the employer and union bargained about the RIF plan for a few hours. During this time no agreement or impasse was reached. The union asked the

employer to complete bargaining before presenting its RIF plan to the employees. Despite the union's objections, the employer went forward with its May 22 afternoon meeting and informed the employees of its RIF plan. At the meeting the employer shared details of its methodology for determining who would be laid off and identified specific job positions for layoff.

When the employer sent employees layoff notices on June 4, the employer made its RIF plan out to be a done deal. At this point, if not at the May 22 meeting with employees, the employer's RIF plan became a *fait accompli*. Although the employer continued to meet with the union to discuss the layoffs, the employer's actions were not consistent with good faith bargaining. By presenting the RIF plan to employees and issuing layoff notices to employees before completing negotiations with the union, the employer's actions illustrated that it had already determined its course of action. This conclusion is further supported by Massara's testimony in which she indicated that she did not believe the employer had an obligation to bargain the methodology for determining which employees would be laid off and described such discussions as "not beneficial use of time."

The employer failed to engage in bargaining with the union concerning its decision to implement a layoff. That decision included the manner or methodology used to select employees for layoff and how notice was given to affected employees. The employer was only willing to engage in bargaining concerning the impacts of its decision, such as the effects of its decision on laid off employees or on employees that remained with the organization. I find that the employer's actions left the union with no meaningful opportunity to bargain about which employees would be laid off. The

employer violated RCW 41.56.140(4) by presenting its RIF plan as a *fait accompli*.

ISSUE 2 - REFUSAL TO BARGAIN THE RECALL

APPLICABLE LEGAL STANDARDS

The legal standards for evaluating a refusal to bargain violation are already outlined above.

ANALYSIS

The union also alleges that the employer refused to bargain the recall of some employees from layoff. Specifically, the union argues that by recalling the probationary employee, before recalling the four full-time ETS IIs who were laid off, the employer did not conduct the recall in accordance with its Personnel Rules and Regulations.

As the decision in this case to lay off employees was a mandatory subject of bargaining, so was the employer's decision to recall employees from layoff. Recall procedures directly affect employees' wages, hours and working conditions.

On June 20, 2008, at the conclusion of the RIF bargaining meeting, Nguyen informed the union that there would be an increase in funding to the business connection program that would have a major impact on the RIF and could result in the removal of 1.5 FTEs from the layoff notice. Nguyen also told the union the "Heros at Home" program could receive more funding, which could result in the creation of a new ETS 1 position. Nguyen asked the union to

schedule a meeting during the next week to discuss the new funding before the layoff went into effect. The union said it wanted to bargain about the layoff but explained that its negotiating team was not available to meet until July 1. Although the employer had previously mentioned there was a potential of receiving more funding, this was the first time the employer notified the union of the funding increase and related recall.

On July 1, 15, and 22, the union and employer met to bargain the recall of 1.5 FTEs in the business connection program and the process for filling a newly-created ETS I position.

On July 7, the employer sent the union a letter containing a written proposal. The letter made it clear that the "proposal is entirely open to discussion and input from you and we do not intend to take action until we meet next on July 15th and have an opportunity to discuss this further."

On July 22, 2008, the union and employer reached an agreement on the hiring and recall process for the 1.5 FTEs in the business connection program and the newly-created ETS I position. The employer would open the full-time project specialist position, previously held by the laid off probationary employee, to all current represented employees and all laid off employees. The application process would be competitive and involve a skills test. Applicants with a qualifying test score would be interviewed. The employer agreed to waive the 500 word essay requirement.

Under the parties' agreement, the employer would first fill the full-time project specialist position, because it was promotional in nature and filling it could cause another position to become vacant. Once the project specialist position was filled, the

remaining vacant positions would be offered to employees on the layoff list in order of seniority, so long as the employee was qualified for the position.

I find that the employer fulfilled its bargaining obligation with respect to the recall. The employer notified the union of the recall before making a decision on how it would be implemented. When the union requested bargaining, the employer and union met and bargained until they reached an agreement. The union's disagreement with the employer's ultimate recall decision is not relevant. The employer conducted the recall according to the parties' agreement and hired the only applicant who received a passing score on the test, the probationary employee who was originally laid off from the position.

ISSUE 3 - DISCRIMINATORY LAYOFFS

APPLICABLE LEGAL STANDARDS

RCW 41.56.040 gives employees the right to organize and designate exclusive bargaining representatives without interference:

> No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

Under RCW 41.56.140(1), it is an unfair labor practice for a public employer to interfere with, restrain, or coerce public employees in the exercise of the rights described above.

The legal standard for determining whether an employer has unlawfully discriminated against an employee in retaliation for union activity is explained by the Commission in *Kennewick School District*, Decision 5632-A (PECB, 1996):

> The Commission and Supreme Court require a higher standard of proof to establish a 'discrimination' violation. A discrimination violation occurs when: (1) The employee exercised a right protected by the collective bargaining statute, or communicated to the employer an intent to do so; (2) The employee was discriminatorily deprived of some ascertainable right, benefit or status; and (3) There was a causal connection between the exercise of the legal right and the discriminatory action. See, *Educational Service District 114*, Decision 4361-A (PECB, 1994) and *Mansfield School District*, Decision 5238-A and 5239-A (EDUC, 1996).
>
> In a discrimination case, a complainant has the burden to establish a prima facie case of discrimination, after which the employer has the opportunity to articulate legitimate, nonretaliatory reasons for its actions. The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed employer action was in retaliation for the employee's exercise of statutory rights, which may be done by: (1) showing the reasons given by the employer were pretextual; or (2) showing that union animus was nevertheless a substantial motivating factor behind the employer's action. *Educational Service District 114, supra.*

ANALYSIS

1) Employees engaged in protected union organizing activity

In 2006 some employees of the employer attempted to organize representation with another union. This effort was led by Megan Shea. The other union did not prevail in obtaining majority support and the employees remained unrepresented. According to Shea and her co-workers, it was widely known throughout the employer's

organization that Shea initiated the first union organizing campaign.

The Teamsters union was first contacted by employee Marybeth McCarthy in April of 2007. The union conducted its first organizational meeting with two employees in late April. The union held organizing meetings for employees during the spring and summer of 2007. There were approximately eight employees who were visibly supportive of the union's organizing efforts, and assisted with getting the union's message out to other employees. These individuals were referred to as the union organizing committee. Of those eight employees one has since retired[2] and four of them (Karinya Castonguay, Shirley Chatters, Marybeth McCarthy, and Megan Shea) were laid off and are at issue in this case.

In mid or late June 2007, some employees, including McCarthy, began to wear union buttons and distribute union leaflets and flyers to co-workers. McCarthy testified that she talked with employees about the union at the workplace during breaks. Shea indicated that the majority of the employees who were laid off "were all known for being union supporters." She explained that "everyone who was laid off did have stickers on, buttons and pins and things like that."

During the summer of 2007, at a staff appreciation picnic sponsored by the employer, McCarthy wore a union button. McCarthy explained that "many staff were very afraid to wear their Teamsters button to

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[2] The union initially filed an unfair labor practice complaint concerning the employee's termination. The union withdrew the complaint before any ruling was made by the Commission. The employer noted that the end result of the settlement was that the employee retired.

this picnic . . . but I came in and wore my button. And then other people pulled out their buttons and put them on. And so at that point I think . . . you could surmise . . . I was one of the main people." Managers and supervisors of the employer, and the Mayor of Tacoma, attended the picnic. McCarthy approached the mayor and asked him, "Will you support our effort to organize?" The mayor responded, "I have no problem with you organizing."

The union organizing activities of Castonguay, Chatters, McCarthy, and Shea during the spring and summer of 2007, were protected union activities under RCW 41.56.040.

2) Employees deprived of some ascertainable right, benefit or status

The four alleged discriminatees (Castonguay, Chatters, McCarthy and Shea) were all laid off, effective June 30, 2008. This resulted in deprivation of their employment.

3) Causal connection between union activity and layoffs

A causal connection can be established "by showing that adverse action followed the employee's known exercise of a protected right under circumstances from which one can reasonably infer a connection." *City of Winlock*, Decision 4784-A (PECB, 1995). Also see *Mansfield School District*, Decision 5238-A (EDUC, 1996). Here, the timing of the layoffs, announced by the employer seven months after certification of the union and during the parties' initial contract bargaining, is suspect. The employer's layoff included four full-time employees. All of the employees were on the union organizing committee. This fact also supports a causal connection.

The employer argues that its managers did not know which employees were union supporters and therefore could not have knowingly

structured the layoff to target union supporters. The employer points out that when asked, "Prior to implementation of the reduction of force, did you personally know who were active union supporters?" Nguyen answered "No."

The union argues that the employees engaged in visible union support including wearing union stickers, pins, and buttons, and distributing union literature. The union also argues that the "small plant doctrine" should apply because the employer has a small work force. The small plant doctrine is based on the idea that in a small workplace, management will inevitably learn of organizing activity conducted in the workplace. As an Administrative Law Judge (ALJ), who was affirmed by the National Labor Relations Board (NLRB/ Board), explained in *Frye Electric Inc.,* 352 NLRB No. 53 (2008):

> In its so-called 'small plant doctrine,' the Board has long recognized that it is reasonable to infer that management of a small firm is likely to gain knowledge of the identity of employees who are involved in union activities. See *Wiese Plow Welding Co.*, 123 NLRB 616 (1959); *D & D Distribution Co. v. NLRB*, 801 F.2d 636 at fn. 1 (3d Cir. 1986)('The essence of the small plant doctrine rests on the view that an employer at a small facility is likely to notice activities at the plant because of the closer working environment between management and labor.'); and *LaGloria Oil & Gas Co.*, 337 NLRB 1120, 1123 (2002), affd. 71 Fed. Appx. 441 (5th Cir. 2003).

In *Frye Electric,* the ALJ found a causal connection based primarily on the small plant doctrine and timing of the discharge.

The Commission has also embraced the small plant doctrine. As the Commission explained in *City of Winlock*, Decision 4784-A [footnote 12]:

> The 'small plant doctrine' may be used to establish the requisite employer knowledge in certain circumstances. Employer knowledge is inferred where union activities in a small workforce and [*sic*] are carried on in such a manner or at such times that it may be presumed that the employer must have noticed them.

According to its organizational chart, prior to the layoff the employer employed approximately 49 individuals, including managers and supervisors. This is a small enough work force to apply the small plant doctrine.[3]

Although the employer denies knowing which employees were union supporters, some of the employer's managers and supervisors acknowledged that they were generally aware of the union's organizing campaign. Michael Higgins, a supervisory ETS III for the employer, was asked: "Prior to the reduction in force, did you have an awareness of who among the employees were active union supporters?" Higgens replied, "Yes." When asked to identify the active union supporters, Higgins responded: "I don't know the activity level, but some of them wore buttons. . . ." Higgins confirmed that he had personally seen employees wearing union buttons.

When Nguyen was asked, "Did you ever see employees wearing any union buttons or logo wear?" she testified, "Not in the office that I can recall. We did have a staff appreciation event at the Point Defiance Park, and I know there were stickers on the table for those who wanted to take one and wear it, but not--nothing is honing my

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[3] In *United L-N Glass, Inc.*, 297 NLRB 329 (1989), the small plant doctrine was applied to an employer with a workforce of 30 to 50 employees. In *Frye Electric*, the small plant doctrine was applied to a work force of 35 individuals.

memory on certain staff wearing it." Although Nguyen did not identify specific employees who wore stickers at the staff appreciation picnic, the employer's work force is small enough to infer that some of the employer's managers would have observed McCarthy and other employees wearing union stickers, or overhead McCarthy's conversation with the mayor. The record contains enough evidence to support the conclusion that under the small plant doctrine, the employer would have known that Castonguay, Chatters, McCarthy, and Shea were active in union organizing activities.

I find the union established a prima facie case of discrimination. It is therefore necessary to evaluate the employer's reasons for its layoff action.

Employer's Reasoning for Layoff Selections

The employer explained that it selected the four ETS IIs (Castonguay, Chatters, McCarthy, and Shea) for layoff based on its layoff policy and service areas affected by funding cuts. Specifically, the employer argues that it had to cut one ETS II position providing adult services, and three ETS II positions providing dislocated worker services based on the areas where its funding was reduced. The employer refers to this as "funding streams." The employer contends that there are at least four different types of ETS II positions or "service areas": business connection, dislocated worker, low-income adult, and youth. This distinction is not reflected in the employer's personnel rules. The employer asserts that the different types of ETS II positions require different skill sets and are not interchangeable.

The union does not dispute the fact that the employer experienced a reduction in funding and as a result needed to reduce positions.

The union argues, pursuant to its policy, the employer should have laid off the four least-senior ETS IIs within the organization and reassigned the remaining ETS II employees to service areas as the funding streams necessitated. The union believes that the employer acted discriminatorily when it refused to lay off the least-senior ETS IIs and reassign the more-senior ETS IIs. Ultimately, the union is arguing that the employer's justification for the layoffs was a pretext for targeting union supporters.

Employer's Personnel Policy Justification

Considering the facts contained under Issue 1 of this decision, it is clear that Castonguay, Chatters, McCarthy, and Shea were not selected for layoff based solely on the employer's written personnel rules as applied by past practice. If the employer had followed its layoff policy, it would have laid off the four least-senior ETS II employees. This would have resulted in laying off the following employees: the ETS II hired on February 25, 2003, the ETS II hired on October 7, 2002, and two of the four ETS IIs hired on July 15, 2002. Of the four employees who were laid off, only McCarthy, who was one of the four employees hired on July 15, 2002, fit into the group of least-senior ETS IIs. The employer's failure to follow its own personnel rules supports a finding that the employer's stated reasoning is pretextual.

Job Classifications and Assignment of Work

During the layoff negotiations the union asked the employer to consider laying off the four least-senior ETS I and ETS II employees, and reassigning the remaining ETS II employees pursuant to the employer's funding formulas. The employer expressed the

opinion that this option was not practical and would not be in the best interest of the organization.

When Executive Director Nguyen was asked if the employer could have laid off ETS II positions based solely on seniority within the ETS II job classification, she explained:

> No. That would not be a practical business decision to make. Again, it would destabilize the operations that are at hand. It would put at risk the partnership and the work that's in place. . . . [G]rantors do not want to see and get a bit- well red flags raise for them when there's instability in staffing, because it was stable staff who built those relationships, that's built those relationships, that's produced those outcomes to date.

The employer also argues that ETS II positions are not interchangeable because the different positions require different skill sets. The employer explained it could not lay off the least-senior ETS II, hired on February 25, 2003, because that individual works in the business connection program, an area that did not need cuts beyond laying off the probationary employee. The employer contended it could not lay off the second least-senior ETS II, hired October 7, 2002, because that individual works with the youth internship program, which was not experiencing a funding reduction.

Work Experience of Discriminatees

Castonguay was hired on April 22, 2002, as an EST II for youth and adults. As part of her job she ran a youth program. A couple of years later, the employer offered Castonguay an opportunity to work exclusively with low-income adults. She accepted the opportunity and worked as an ETS II with low-income adults up until she was laid off on June 30, 2008.

Chatters was hired by the employer on January 8, 2001, as a temporary Job Club Coordinator. In June 2001, she was promoted to a permanent ETS II position with the business connection program. In this position Chatters worked with employers and job seekers. She was responsible for helping dislocated workers and adults obtain employment. She was also part of the business team and helped plan large job fairs and employer orientation/hiring events.

In approximately 2005 or 2006, when the employer moved its business unit to a location in Clover Park, Chatters began working at the employer's downtown location. She was responsible for leading the Job Club, a forum for dislocated workers and adults to talk about career planning. Chatters was never specifically assigned to youth programs, but worked with youth who were referred to Job Club. For the six months prior to her layoff, Chatters was also working with the Brownsfield grant, a program to train and place hazardous materials clean-up workers. After she was laid off, another ETS II was assigned to work with the Brownsfield grant.

McCarthy was hired on July 15, 2002, as an ETS II working with low-income youth and low-income adults. A couple of years later, she stopped working with youth and worked as an ETS II with dislocated workers and low-income adults. For the last few years until she was laid off (approximately 2006-2008), McCarthy worked exclusively with dislocated workers.

Shea was hired on September 10, 2001, as a ETS II working with a youth program. During the course of her employment, she also worked with low-income adults and dislocated workers. Before the employer created a separate business connection program, Shea worked with the business community placing people in jobs. Shea explained that

before the creation of a separate business part of the agency, ETS IIs worked with businesses as part of their regular job duties.

Is Employer's Justification Pretextual?

The employer's unwillingness to consider transferring ETS II employees between the various types of ETS II positions is not consistent with its past staffing practices. The employer argues that different ETS II positions require unique skills and are not interchangeable. However, the employment history within the agency shows a great deal of interchange between ETS II positions. During the course of their employment, all of the discriminatees worked in at least two of the four ETS II position types identified by the employer. Testimony of other witnesses also shows significant interchange in positions. For example, Danny Grisham is currently employed as an ETS II in the employer's business connection program but was initially hired as an ETS II working with dislocated workers.

If the employer had only been concerned with cutting ETS II positions to save money, one would expect to see more of a willingness to consider retaining more experienced employees. The employer's unwillingness to make any change in its position on which employees would be laid off, despite numerous bargaining meetings with the union, supports an inference that the employer was determined to lay off specific individuals.

For example, if the employer had laid off the least-senior ETS II, hired on February 25, 2003, from the business connection program it could have transferred Chatters to fill the void. Chatters already had experience working in the business connection program and had the necessary skills. Shea also had some experience in this area. If the employer had laid off the second least-senior ETS II, hired

October 7, 2002, from the youth internship program it could have transferred Shea, Castonguay, or McCarthy to fill the void. All of them had previous experience with youth programs.

The fact that the employer gave layoff notices to employees before fulfilling its bargaining obligations, and with more notice than its own policies required,[4] infers that the employer was committed to laying off specific individuals. The employer's failure to follow its own policy and layoff ETS IIs on a consortium-wide basis, also supports the conclusion that the employer wanted to target specific individuals, not just reduce the number of FTEs on its payroll. The fact that all four of the full-time employees the employer laid off were active in the union's organizing campaign seems to be more then a mere coincidence.

In *Asotin County Housing Authority,* Decision 2471-A (PECB, 1987), the Commission found a discrimination violation and noted, "The union need not have a 'smoking gun' admission of anti-union animus; a coincidence of otherwise inexplicable facts will suffice to support a clear inference." In this case the series of poorly supported justifications and positions taken by the employer, indicates that its layoff plan was a pretext to retaliate against union supporters.

Although specific evidence regarding employer knowledge of Chatter's and Castonguay's union activities is limited, there is clear evidence that the employer had knowledge of McCarthy and Shea's union activities. At the point I find that the employer selected

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[4] Article 14.1 of the employer's personnel rules requires notice to affected employees at least ten working days prior to the effective date of a layoff. Here the employer notified the employees 18 working days prior to the effective date.

McCarthy and Shea for layoff because they supported the union. I also conclude that Chatters and Castonguay were discriminatorily targeted in the layoff. As the Board has noted, a "discriminatory discharge of one worker [is] a factor to consider in weighing whether the contemporaneous discharge of a second coworker, who engaged at the same time in the same prounion activity, was discriminatory." *Yellow Enterprise Systems*, 342 NLRB 804 (2004), citing *Howard's Sheet Metal, Inc.*, 333 NLRB 361 (2001). See also *Extreme Building Services Corp.*, 349 NLRB No. 86, slip op. at 3 (2007) (earlier discharge of employee for union activity "strongly supports" a finding of unlawful motivation in discharge of second employee who engaged in the same protected activity).

The protected union activities of Castonguay, Chatters, McCarthy and Shea were a substantial motivating factor in the employer's layoff decision. The employer violated RCW 41.56.140(1) by discriminatory laying off Castonguay, Chatters, McCarthy, and Shea.

REMEDY

In addition to the standard remedies for refusal to bargain and discrimination violations, I am ordering an extension of the union's certification year, also referred to as the certification bar year. The initial certification year provides a union with an opportunity to bargain a first contract. Under WAC 391-25-030(2):

> A "certification bar" exists where a certification has been issued by the agency, so that a petition involving the same bargaining unit or any subdivision of that bargaining unit will only be timely if it is filed:
>
> > (a) More than twelve months following the date of the certification of an exclusive bargaining representative;

The certification bar provides a new exclusive bargaining representative with at least one full year of recognition and good faith bargaining before its majority status can be challenged. *Snohomish County*, Decision 9834-B (PECB, 2008). In situations where an employer's unfair labor practices interfere with the union's ability to engage in good faith bargaining during the initial certification year, the Commission will extend the certification year. As the Commission explained in *Snohomish County*, Decision 9834-B:

> In Lewis County, Decision 645 (PECB, 1979), the Commission extended the one-year certification bar in instances where the exclusive bargaining representative had not enjoyed the benefit of at least one full [year] of recognition and good faith bargaining that it is entitled to. The Commission found that because the employer's conduct tended to undermine a union's status as exclusive bargaining representative, the appropriate remedy was to re-compute the 'certification bar year' from the date on which good faith bargaining commenced pursuant to the Commission's order.

In *Snohomish County*, Decision 9834-B, the Commission found that the employer had failed to bargain in good faith with a newly-certified union. As a remedy the Commission extended "the certification bar applicable to the union for one-year from the date that the employer commences to bargain in good faith."

The principle of extending the certification year is also well established in NLRB case law and is often referred to as a Mar-Jac remedy, named for *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

The magnitude of the unfair labor practices committed by the employer and the fact that they occurred in the context of first contract bargaining, make this an appropriate situation for an

extension of the certification bar year. The employer's actions undercut the union's credibility with bargaining unit employees, ultimately impacting the union's support. Shea testified that as a result of the layoff, "I do think the power of the Teamster's has been-- definitely been reduced. I think other staff members are lacking faith in their-- in their abilities to-- to support us." The employer even acknowledged the impact that its conduct had on employees. As Massara explained in describing the May 22 all-staff meeting where the employer announced the layoffs:

> [I]t was obvious to me that some bargaining unit members were not happy with -- with the representation that they were receiving to date. And I don't know if it's because they were confused or they didn't know what process was. And that's possible, that they hadn't been communicated what the process was.

The employer's action of notifying employees of the layoff before fulfilling its bargaining obligations with the union caused employee dissatisfaction towards the union. The employer should not be permitted to benefit from its unfair labor practices. I find that an extension of the certification bar year is necessary to fully remedy the employer's unlawful acts and allow the union a period of good faith bargaining.

In order to determine what constitutes a reasonable period of time for a certification bar extension, I look to the facts in this case.[5] The employer presented its layoff plan as a *fait accompli* on

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[5] "In determining the length of such extensions, the Board considers the nature of the violations; the number, extent, and dates of the collective-bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations. *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004); *Metta Electric*, 338 NLRB 1059, 1065 (2003),

June 4, 2008. After this date, the union's position as exclusive bargaining representative was significantly compromised. No additional contract bargaining occurred between the *fait accompli* and the hearing dates. The union's certification year expired on October 11, 2008, while the hearing on this complaint was ongoing.

The union must be afforded a reasonable period of time for good faith bargaining after the employer remedies its unfair labor practices. I am ordering that the certification bar be extended for four months and one week from the date the employer fully complies with the attached order.

FINDINGS OF FACT

1. The Tacoma-Pierce County Employment and Training Consortium (employer) is a public employer within the meaning of RCW 41.56.030(1).

2. Teamsters Local 117 (union) is a bargaining representative within the meaning of RCW 41.56.030(3).

3. On October 11, 2007, the Commission certified the union as the exclusive bargaining representative of a bargaining unit described as: all full-time and regular part-time employees of the Tacoma-Pierce County Employment and Training Consortium, excluding supervisors and confidential employees.

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enfd. in relevant part, 360 F.3d 904, 912-913 (8th Cir. 2004)." *Mercy, Inc. d/b/a American Medical Response,* 346 NLRB 1004 (2006).

4. The employer and union began contract negotiations on January 24, 2008. As of October 21, 2008, the parties had not reached agreement on an initial collective bargaining agreement.

5. Alice Massara is employed as a labor negotiator for the City of Tacoma. She served as lead contract negotiator for the employer.

6. Linda Nguyen is employed as the Executive Director for the employer.

7. Mary Ann Brennan and Greg Slaughter are employed by the union as business representatives.

8. On May 7, 2008, the employer notified the union that it was considering layoffs.

9. On or about May 12, 2008, Brennan informed Massara that the union wanted to bargain with the employer about the layoffs.

10. The implementation of the layoff had a significant impact or effect on employees' wages, hours and working conditions and is therefore a mandatory subject of bargaining.

11. On May 20, 2008, the employer e-mailed its Reduction in Force Plan (RIF plan/layoff plan) to the union.

12. Up until their layoff, Karinya Castonguay, Shirley Chatters, Marybeth McCarthy, and Megan Shea were bargaining unit employees represented by the union.

13. The employer's status quo regarding layoffs is limited to the practices it used to issue layoff notifications in the late 1990's and its written Personnel Rules and Regulations.

14. The employer's May 20 RIF plan described in Finding of Fact 11 constitutes a change from the status quo described in Finding of Fact 13.

15. In the morning on May 22, 2008, the union and employer met to bargain about the employer's May 20 RIF plan.

16. On May 22, 2008, at 12:30 p.m., the employer conducted an all-staff meeting to inform employees it would be conducting layoffs and to explain the methodology used to determine which job positions would be laid off.

17. The employer and union met to bargain the reduction in force on May 27 and May 30, 2008. During these meetings, the parties did not reach agreement or impasse.

18. On June 4, 2008, the employer sent layoff notices to all of the employees it had identified in its original May 20 RIF plan described in Finding of Fact 11. The same day, the union sent a letter to the employer objecting to the implementation of the layoff.

19. On July 1, 15, and 22, 2008, the union and employer met to bargain the recall of 1.5 FTEs in the business connection program and the process for filling a newly-created ETS I position.

20. On July 22, 2008, the union and employer reached an agreement on the hiring and recall process for the 1.5 FTEs in the business connection program and the newly-created ETS I position.

21. The employer laid off Karinya Castonguay, Shirley Chatters, Marybeth McCarthy, and Megan Shea effective June 30, 2008.

22. During the spring and summer of 2007, Karinya Castonguay, Shirley Chatters, Marybeth McCarthy, and Megan Shea were visibly supportive of the union's organizing efforts.

23. Michael Higgins, a supervisory ETS III for the employer, had an awareness of which employees were active union supporters and saw employees wearing union buttons.

24. Prior to the layoff the employer employed approximately 49 individuals, including managers and supervisors. This is a small enough work force to apply the small plant doctrine.

25. Under the small plant doctrine, the employer would have known that Castonguay, Chatters, McCarthy, and Shea were active in union organizing activities.

26. The employer failed to follow its own personnel rules with respect to the layoffs of Castonguay, Chatters, McCarthy and Shea.

27. Despite numerous alternative proposals by the union and bargaining sessions with the union, the employer was unwilling to make any change in its position on which employees would be

laid off. The employer's May 20 RIF plan was presented to the union as a *fait accompli*.

28. A causal connection exists between the exercise of legal rights, as described in Finding of Fact 22 through 25, and the employer's discriminatory layoff action, as described in Finding of Fact 21, 26, and 27.

29. The employer's stated reasoning for laying off Castonguay, Chatters, McCarthy, and Shea was pretext for anti-union discrimination.

30. The protected union activities of Castonguay, Chatters, McCarthy, and Shea were a substantial motivating factor in the employer's layoff decision.

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. By failing or refusing to bargain with the union about layoffs, as described in Findings of Fact 8 through 18, 21, and 27, the employer refused to bargain and violated RCW 41.56.140(4) and (1).

3. By bargaining with the union concerning the recall of employees from layoff until an agreement was reached, as described in Findings of Fact 19 and 20, the employer did not refuse to bargain or violate RCW 41.56.140(4).

4. By laying off Karinya Castonguay, Shirley Chatters, Marybeth McCarthy, and Megan Shea in reprisal for union activities protected by Chapter 41.56 RCW, as described in Findings of Fact 21 through 30, the employer discriminated against Castonguay, Chatters, McCarthy, and Shea and violated RCW 41.56.040 and RCW 41.56.140(1).

ORDER

TACOMA-PIERCE COUNTY EMPLOYMENT AND TRAINING CONSORTIUM, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Failing or refusing to bargain about layoffs.

   b. Laying off employees in retaliation for their union organizing activities.

   c. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under the laws of the state of Washington.

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

   a. Offer Karinya Castonguay, Shirley Chatters, Marybeth McCarthy, and Megan Shea immediate and full reinstatement to their former positions or substantially equivalent positions, and make them whole by payment of back pay and

benefits in the amounts they would have earned or received from June 30, 2008, to the effective date of the unconditional offer of reinstatement made pursuant to this order. Back pay shall be computed in conformity with WAC 391-45-410.

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 in layoff procedures found unlawful in this order.

c. Give notice to and, upon request, negotiate in good faith with Teamsters Local 117, before changing the status quo concerning layoffs.

d. Commence good faith bargaining negotiations with Teamsters Local 117 over the terms and conditions of an initial collective bargaining agreement.

e. Extend the certification of Teamsters Local 117 for four months and one week from the date of full compliance with this order.

f. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of

initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

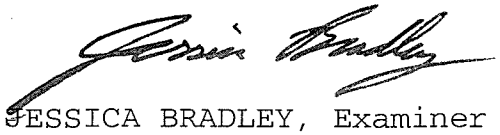
g. Read the notice provided by the Compliance Officer into the record at a regular public meeting of the Board of the Tacoma-Pierce County Employment and Training Consortium, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

h. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice provided by the Compliance Officer.

i. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Compliance Officer with a signed copy of the notice.

ISSUED at Olympia, Washington, this 23rd day of January, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JESSICA BRADLEY, 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.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

TO EMPLOYEES

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT THE *TACOMA-PIERCE COUNTY EMPLOYMENT AND TRAINING CONSORTIUM* COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS:

WE UNLAWFULLY changed our layoff procedures contained in our Personnel Rules and Regulations as applied by past practice, without fulfilling our bargaining obligations with your union, Teamsters Local 117.

WE UNLAWFULLY laid off Karinya Castonguay, Shirley Chatters, Marybeth McCarthy, and Megan Shea in retaliation for their union organizing activities.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL offer to reinstate Karinya Castonguay, Shirley Chatters, Marybeth McCarthy, and Megan Shea to Employment Training Specialist (ETS) II positions or substantially equivalent positions.

WE WILL pay Karinya Castonguay, Shirley Chatters, Marybeth McCarthy, and Megan Shea the wages and benefits they lost as a result of the unlawful layoff. We will also restore their seniority.

WE WILL reinstate the wages, hours and working conditions which existed for employees in the Teamsters bargaining unit prior to our unlawful change in layoff policy.

WE WILL notify Teamsters Local 117 before making any changes to our layoff procedures and, upon request, bargain in good faith with your union before making any such changes.

WE WILL commence good faith bargaining negotiations with Teamsters Local 117 over the terms and conditions of an initial collective bargaining agreement. In addition the Public Employment Relations Commission extended the certification of Teamsters Local 117 for four months and one week from the date we comply with this order.

WE WILL NOT fail or refuse to bargain with Teamsters Local 117 about layoffs.

WE WILL NOT layoff employees in a manner that discriminatorily targets union supporters.

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

DO NOT POST OR PUBLICLY READ THIS NOTICE.

AN OFFICIAL NOTICE FOR POSTING AND READING WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.