STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL 117,	)	
	)	
Complainant,	)	CASE 21845-U-08-5567
	)	
vs.	)	DECISION 10280-A - PECB
	)	
TACOMA-PIERCE COUNTY EMPLOYMENT AND TRAINING CONSORTIUM,	)	DECISION OF COMMISSION
	)	
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.

This case comes before the Commission on a timely appeal filed by the Tacoma-Pierce County Employment and Training Consortium (employer) seeking review and reversal of certain Findings of Fact, Conclusions of Law, and Order issued by Examiner Jessica Bradley.[1] Teamsters Local 117 (union) supports the Examiner's decision.

ISSUES PRESENTED

1. Did the employer commit an unfair labor practice when it unilaterally changed the existing reduction-in-force policy without first bargaining to impasse with the union?

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[1] *Tacoma-Pierce County Employment and Training Consortium*, Decision 10280 (PECB, 2009).

2. Did the employer commit an unfair labor practice when it discriminatorily targeted union supporters for layoffs?

For the reasons set forth below, we affirm the Examiner's ultimate conclusion that the employer committed an unfair labor practice when it unilaterally adopted a new layoff plan. When this employer chose to make its personnel reduction in a manner different from existing policy, it needed to satisfy its good faith bargaining obligation. The employer failed to do so.

We also affirm the Examiner's findings and conclusions that the employer discriminatorily targeted bargaining unit employees Marybeth McCarthy and Megan Shea for layoff based upon their union activity, but reverse the Examiner's findings and conclusions that the employer discriminatorily targeted bargaining unit employees Karinya Castonguay and Shirley Chatters for layoffs. Substantial evidence supports the findings and conclusions that the employer targeted McCarthy and Shea for layoffs based upon their union activity, but not Castonguay and Chatters.

Finally, we affirm the Examiner's remedial order in its entirety and reinstate McCarthy, Shea, Castonguay, and Chatters. The issued remedial order is appropriately tailored to redress the employer's unfair labor practices.

ANALYSIS

Standard of Review

This Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-TRAN*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002). Unchallenged findings of fact are accepted as true on appeal. *C-TRAN*, Decision 7088-B. The Commission attaches considerable weight to the

factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

ISSUE 1 - DUTY TO BARGAIN CHANGE IN LAYOFF POLICY

Applicable Legal Standards

Washington State law requires public employers to engage in collective bargaining with the exclusive bargaining representative of their employees concerning wages, hours, and other terms and conditions of employment. RCW 41.56.030(4); 41.56.100. Absent a clear and unmistakable waiver of a union's right to bargain, an employer is prohibited from making unilateral changes to mandatory subjects. An employer commits an unfair labor practice if it fails to give sufficient notice of a change affecting a term or condition of employment or, if upon request by the union, it fails to bargain in good faith upon request. *State - Social and Health Services*, Decision 9551-A (PSRA, 2008); *Federal Way School District*, Decision 232-A (EDUC, 1977). Even when employers do not have a duty to bargain a particular decision, they may still be required to bargain the effects of a decision that impacts the wages, hours, or working conditions of represented employees. *Seattle School District*, Decision 5755-A (PECB, 1998).

In determining whether an issue is a mandatory subject of bargaining, the Commission weighs the extent to which the issue affects working conditions. Where a subject relates to conditions of employment and is a managerial prerogative, the focus of the inquiry is to determine which of these characteristics predominates. *IAFF, Local 1051 v. Public Employment Relations Commission*, 113 Wn.2d 197 (1989). The critical consideration in determining whether an employer has a duty to bargain a matter is the nature of the impact on the bargaining unit. *Spokane County Fire District 9*, Decision 3661-A (PECB, 1991).

Presenting a Decision as a *Fait Accompli* is an Unfair Labor Practice

In instances where an employer contemplates a change and takes action toward the goal of implementing that change without allowing the union an opportunity for bargaining which could influence the employer's planned course of action, an unfair labor practice may be found. *See Skagit*

County, Decision 6348-A (PECB, 1998). An employer who presents a union with a change of a mandatory subject as a *fait accompli* commits an unfair labor practice. *City of Seattle*, Decision 3654 (PECB, 1990).

Obligation to Maintain Status Quo

Once a union has filed a representation petition, the employer must maintain the status quo and must not take unilateral action regarding wages, hours, or working conditions. *Snohomish County Fire District 3*, Decision 4336-A (PECB, 1994); WAC 391-25-140(2). When this Commission certifies the union as the exclusive bargaining representative, the obligation to maintain the status quo regarding all mandatory subjects of bargaining continues until the parties bargain a change to the status quo, or until the parties reach a bona fide impasse.[2] This Commission determines the status quo as of the date the union filed the representation petition. During the period between certification of the exclusive bargaining representative and the final ratification and implementation of the parties' first collective bargaining agreement, certain actions may be governed by existing employer policies. However, if there is no existing policy governing a mandatory subject of bargaining, or if the policy is not sufficiently specific in providing a clear and identifiable course of action for the employer to take, the employer may not make a change that impacts mandatory subjects of bargaining in that subject area without first satisfying its bargaining obligation.

Application of Standards

Neither party disputes the dire economic situation that this employer faces. Additionally, the union has not appealed the Examiner's ultimate conclusion that the employer needed to lay employees off to balance its budget, and the evidence demonstrates that the union was willing to accept employee layoffs provided they were completed in a manner consistent with the employer's existing policy.[3]

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[2] For employees eligible for interest arbitration, an employer may not unilaterally implement its desired change after bargaining to a lawful impasse, but rather must seek interest arbitration.

[3] Because the union has not appealed the Examiner's conclusion that the employer was not obligated to bargain the decision to lay off employees during the period between the certification of the bargaining unit and the parties' first collective bargaining agreement, we are not answering that question in this decision.

Therefore, the only question that we need to determine is what was the employer's bargaining obligation given the fact that the parties were still negotiating a first collective bargaining agreement.

The Relevant Status Quo

In the event that layoffs occur, Section 14.2 of Article XIV of the employer's policies governed the method which employees would be selected for layoffs. That article states, in part:

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

The question that we must answer is whether the employer in fact followed this policy.

The employer stipulated that the decision to lay off employees was not based on past performance, productivity, qualifications, or attendance. The Examiner concluded that once the employer laid off temporary, probationary, and part-time employees, the existing policy required the employer to lay off employees within specific job classifications on an employer-wide basis by hire-date seniority. We agree with that interpretation of the policy.

Employer Unilaterally Changed its Policy

This record supports the Examiner's findings and conclusions that the employer did not follow its policy when it laid off McCarthy, Shea, Castonguay, and Chatters. In fact, the employer's testimony throughout the hearing supports a finding that this employer desired to lay off employees in a manner other than that stated in Article XIV. For example, Linda Nguyen, Executive Director for the employer, testified that it "would not be a practical business decision" to lay off employees according to seniority.[4] Based upon this belief, the employer crafted what it believed was an acceptable reduction-in-force plan to achieve budgetary savings, without input from the union.

The employer's new reduction-in-force plan, states in part:

> 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.*

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[4] Transcript, pg. 315, line 14-15.

The employer's new layoff plan examines funding and revenue streams, and then selects employees from the service areas most impacted. This is significantly different from the criteria stated in Article XIV. The employer's new plan does not rely upon any of the Article XIV criteria, including past performance, productivity, qualifications, attendance, or seniority to determine which employees are to be selected for layoffs. Accordingly, the Examiner correctly concluded that the employer was obligated to satisfy its good faith bargaining obligation before implementing this new plan.

Vague Policy Language Does Not Allow Variance From Specific Policy Language

The employer argues that the "including, but not necessarily limited to" language of Article 14.2(b) actually gives it broad discretion to select employees to lay off. The employer essentially claims that the only restriction that the policy places upon it when selecting employees for layoffs is to ensure that it selects employees in a non-discriminatory manner, and in that regard, the employer was free to lay off employees utilizing criteria other than those explicitly stated in Article XIV. We disagree.

As previously noted, an employer may not rely upon vague rules or policies such as the one cited by the employer to circumvent a specific rule or policy. The language cited by the employer is so open ended that it would create complete uncertainty. The "including, but not necessarily limited to" language does not grant this employer freedom to deviate from the specific terms of its existing lay-off policy.

Because the existing language of Article XIV does not grant the employer the freedom to lay off employees in a manner different from those specifically stated in that policy, the final question that we must answer is whether this employer implemented its new layoff plan without first informing the union of its intent, and satisfying its bargaining obligation.

Employer Presented Decision to Lay Off Employees as a *Fait Accompli*

The Examiner found that the employer committed an unfair labor practice when it presented its lay-off plan to the union as a *fait accompli* and failed to provide the union with a meaningful opportunity to bargain. Specifically, the Examiner found that during bargaining, 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 who remained with the organization. Accordingly, the Examiner concluded that the employer entered negotiations with its mind set on implementing its new lay-off plan. We agree.

On May 7, 2008, Nguyen informed Massara that the employer might have a budget shortfall that could result in the need for lay offs. On May 12, Massara communicated this possibility to Mary Ann Brennan, Business Agent for the union. Brennan informed the employer that the union wanted to bargain the issue. On May 20, 2008, Nguyen sent an e-mail to the union outlining the employer's new reduction-in-force plan. Additionally, Nguyen's e-mail stated that she would appreciate the union and employer "working together to implement a reduction in force as smoothly and humanely as possible."

However, the evidence clearly demonstrates that when the employer entered discussions with the union, the employer intended to lay off employees in a manner consistent with its newly created plan. Specifically, the employer's new plan listed the specific employees that were going to be laid off. The plan implemented by the employer remained exactly the same as its initial plan, including which employees were going to be terminated. Although the employer eventually removed the names of employees prior to presentation of the plan to bargaining unit employees, the lack of movement on the part of the employer, particularly in light of the fact that the employer entered negotiations with the intent to lay off specific employees, constitutes demonstrative evidence that the employer entered negotiations with a fixed position.

Parties Not At a Good Faith Impasse

On appeal, the employer argues that because its budget crisis constituted an emergency, this Commission should relieve it of its bargaining obligation. The employer cited a decision of our sister agency in California standing for the proposition that an employer may implement a unilateral

change to a mandatory subject of bargaining prior to impasse, provided a true emergency exists.[5] This Commission recognizes that in certain situations, parties may reach an impasse in negotiations in a more compressed time frame because of certain outside forces. The duty to bargain does not impose a duty to agree, and there are times when a party may lawfully conclude that further collective bargaining negotiations will not produce an agreement. *See Skagit County*, Decision 8746-A (PECB, 2006). However, in order for a lawful impasse to be declared, a party must first enter negotiations in good faith, and continue to bargain in good faith until impasse.[6]

Here, the employer entered negotiations by presenting its new, unilaterally determined, layoff plan as a *fait accompli*, and did not provide an opportunity for meaningful bargaining with the union. Therefore, no lawful impasse could ever have existed that would have allowed this employer to unilaterally implement its plan.[7]

Conclusion and Remedy

These facts support the Examiner's conclusion that the employer committed an unfair labor practice when it imposed a layoff plan different from its existing policy without giving the union a meaningful opportunity to bargain over the new plan. The standard remedial order in most cases where an employer is found to have committed a unilateral change is to restore the *status quo ante* and make bargaining unit employees whole for any losses they suffered. Accordingly, the employer

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5 Compton Community College, California Public Employment Relations Board, Decision No. 720 (1989). Although the California case was issued by a labor relations board performing tasks similar to this agency, the employer fails to demonstrate how the California case is persuasive authority. Where parties wish to suggest cases from other jurisdictions should be considered persuasive authority for this Commission to follow, they should demonstrate that the statutory framework in the other jurisdiction is similar to the statutes that this agency administers.

6 Even then, a lawful impasse only creates a temporary hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force." *Skagit County*, Decision 8746-A citing *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982).

7 Furthermore, even where an employer establishes a lawful business necessity defense, that employer is still required to bargain the effects of its unilateral decision. *See Skagit County*, Decision 8886-A (PECB, 2007).

shall immediately reinstate McCarthy, Shea, Castonguay, and Chatters to their original positions and make them whole for any losses they suffered due to this employer's unlawful actions.

ISSUE 2 - EMPLOYER DISCRIMINATION

Applicable Legal Standards

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by Chapter 41.56 RCW. *Educational Service District 114*, Decision 4361-A (PECB, 1994). The employee maintains the burden of proof in employer discrimination cases. To prove discrimination, the employee must first set forth a *prima facie* case by establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute, or communicated to the employer an intent to do so;

2. The employer deprived the employee of some ascertainable right, benefit, or status; and

3. A causal connection exists between the employee's exercise of a protected activity and the employer's action.

Ordinarily, an employee may use circumstantial evidence to establish the *prima facie* case because parties do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007).

In response to an employee's *prima facie* case of discrimination, the employer need only articulate its non-discriminatory reasons for acting in such a manner. The employer does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the employee to prove by a preponderance of the evidence that the disputed action was in retaliation for the employee's exercise of statutory rights. *Clark County*, Decision 9127-A. The employee meets this burden by proving either that the employer's reasons were pretextual, or

that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

To prove discriminatory motivation, the employee must establish that the employer had knowledge of the employee's union activity. An examiner may base such a finding on an inference drawn from circumstantial evidence although such an inference cannot be entirely speculative or improbable. An examiner may infer knowledge when the employee has engaged in overt union activities and when the employer's operation is small in size. *Metropolitan Park District of Tacoma*, Decision 2272, *aff'd*, Decision 2272-A (PECB, 1986).

Application of Standards

This record does not support the Examiner's conclusion that the union established its prima facie case for Castonguay and Chatters. However, we agree with the Examiner that the union established its *prima facie* case with respect to McCarthy and Shea.

Prima Facie Case - Castonguay and Chatters

With respect to Castonguay and Chatters, there is scant evidence in this record demonstrating how each of these individuals exercised their collective bargaining rights. In fact, most of the testimony by each of these individuals centers around either their specific job functions, or how the layoff affected them. Thus, without some evidence from these employees demonstrating how they were involved with the organizing activity, we cannot agree that they exercised a protected activity. Accordingly, we must reverse the Examiner's findings and conclusions that the employer discriminated against these two employees in violation of Chapter 41.56 RCW.

Prima Facie Case - McCarthy and Shea

This record supports a finding that both McCarthy and Shea engaged in protected activity. McCarthy served as the initial contact with Teamsters Local 117, and worked on the organizing campaign that resulted in the union being certified as the exclusive bargaining representative of these employees. McCarthy testified that she was known to be a union supporter, and distributed pro-union leaflets.

At an employer-sponsored staff appreciation picnic, McCarthy wore a union button and also discussed her union organizing campaign with the Mayor of Tacoma.

Shea worked on a previous unsuccessful union organizing campaign, and was a supporter of the campaign that resulted in the union being certified as the exclusive bargaining representative of these employees. She testified that she was hesitant to be the visible leader of the campaign to certify the current union as the exclusive bargaining representative because of her experiences with organizing during the previous campaign, but she also stated that she was a known union supporter. This record supports a finding that both McCarthy and Shea were deprived of a benefit, right or status, namely their jobs.

The Examiner found that a causal connection existed between McCarthy and Shea's union activity and their termination. Specifically, the Examiner utilized the small plant doctrine outlined in *City of Winlock*, Decision 4784-A (PECB, 1995), which may be used to establish the requisite employer knowledge in certain circumstances where union activities are carried out in such a manner or at such times that it may be presumed that the employer must have noticed them. The Examiner then noted that because this particular workforce was of such small size, 49 employees including managers and supervisors, it is reasonable to infer that the employer had knowledge of the employees' activity.

We agree that the small plant doctrine is applicable in this case, and we also agree with the Examiner that a causal connection may be established by making a reasonable inference between the timing of the layoffs and the inclusion of these two union supporters in those layoffs. Although Nguyen testified that she knew a campaign was going on but did not know which employees were involved, the Examiner essentially discredited this statement because the evidence demonstrated otherwise. For example, Michael Higgins, a supervisory employee, testified that he had personally seen employees wearing buttons. Given the relatively small size of the employer's workforce and the accompanying testimony regarding the knowledge of the organizing activity, we find the Examiner correctly concluded that the union established a causal connection of discrimination between McCarthy and Shea's union activity and their termination.

Employer's Reasoning for Layoff Selections

As previously noted, the employer's reliance upon its own policy as a non-pretextual reason is misplaced given the fact that it failed to bargain in good faith any change to that policy. Additionally, there is ample evidence demonstrating that McCarthy and Shea had the ability to work in multiple areas of the employer's workforce. However, the employer ignored these facts and would not consider laying off less senior employees. In the employer's opinion, retaining and transferring McCarthy and Shea would have "unnecessarily disrupted" the workforce.

We also agree with the Examiner that the employer's insistence that certain employees be targeted for termination supports a discriminatory motive on the part of the employer. As previously noted, even prior to bargaining with the union, the employer had already devised a policy that laid off McCarthy and Shea. Thus, we agree with the Examiner that the employer has failed to set forth a non-discriminatory reason for selecting McCarthy and Shea for layoffs.[8]

Examiner's Extraordinary Remedy

In addition to the standard remedy of returning McCarthy, Shea, Castonguay, and Chatters to work because of the employer's unilateral change and refusal to bargain violations, the Examiner also found that the magnitude of the employer's unfair labor practices warranted extension of the union's certification bar for a period of four months and one week from the time when the employer begins bargaining in good faith with the union. We agree with the Examiner that this case warrants such an extraordinary remedy.

This Commission may extend the certification bar in instances where the exclusive bargaining representative has not enjoyed the benefit of at least one full year of recognition and good faith bargaining. *Snohomish County*, Decision 9834-B (PECB, 2008) *citing Lewis County*, Decision 645 (PECB, 1979). In *Lewis County*, the Commission found that because the employer's conduct tended to undermine the union's status as exclusive bargaining representative, the appropriate remedy was

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[8] Although we are reversing the Examiner's decision that the employer unlawfully discriminated against Castonguay and Chatters, both employees are still reinstated based upon the employer's unilateral change to the layoff policy.

to re-compute the "certification bar year" from the date on which good faith bargaining commenced pursuant to the Commission's order. *Lewis County*, Decision 645.

On appeal, the employer argues that this remedy is not appropriate because there is no allegation that the employer has failed to bargain the parties' first collective bargaining agreement in good faith. The employer notes that in the *Lewis County* decision, the conduct at issue concerned an employer's bargaining tactics and behavior for a complete collective bargaining agreement, thus that case is factually distinguished from the case before us.

Neither *Lewis County* nor *Snohomish County* stands for the proposition that the only factual situations that will warrant extension of the certification year are where the parties are negotiating a complete agreement. Rather, the focus of the inquiry in granting this particular remedy is whether the employer's conduct tended to undermine the union's status as exclusive bargaining representative.

Here, we agree with the Examiner that the employer's actions tended to undermine the union's status. The employer's presentation of the reduction-in-force plan as a *fait accompli* as well as the employer's discriminatory actions against two union supporters significantly impacted this union's status as the employees' exclusive bargaining representative. Thus, we agree with the Examiner that the union must be afforded a reasonable time period for bargaining, and agree that the additional four months and one week to the date when the employer begins bargaining in good faith with the union is specifically tailored to address the employer's violation.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact issued by Examiner Jessica Bradley are AFFIRMED and adopted as the Findings of Fact of the Commission, except Finding of Fact 25, which is amended to read as follows:

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

The Conclusions of Law issued by Examiner Jessica Bradley are AFFIRMED and adopted as the Conclusions of Law of the Commission, except Conclusion of Law 4, which is amended to read as follows:

4. By laying off 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 McCarthy and Shea and violated RCW 41.56.040 and RCW 41.56.140(1).

The Order issued by Examiner Jessica Bradley is AFFIRMED and adopted as the Order of the Commission.

Issued at Olympia, Washington, the 12th day of August, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner