Port of Walla Walla, Decision 9061 (PECB, 2005)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 4203, Complainant, vs. PORT OF WALLA WALLA, Respondent.	CASE 18779-U-04-4768 DECISION 9061 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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

The Wesley Group, by *Kevin Wesley*, Labor Relations Consultant, for the respondent.

On August 16, 2004, the International Association of Fire Fighters, Local 4203 (union) filed an unfair labor practice complaint against the Port of Walla Walla (employer) charging the employer with interference with employee rights, employer discrimination, and refusal to bargain in violation of RCW 41.56.140. A preliminary ruling was issued on September 7, 2004, and an answer was received on September 23, 2004. A hearing was held before Examiner Claire Collins on December 10, 2004. Both parties filed timely post-hearing briefs.

The employer has operated the Walla Walla Regional Airport since January 1, 1989, and provides the Federal Aviation Administration (FAA) mandated rescue/fire fighter services for Horizon Airlines' commercial flights at the airport. The aircraft rescue fire fighter/security employees have been considered to be "uniformed personnel" within the meaning of the RCW 41.26.030(4) definition of

a fire fighter. The union is the exclusive bargaining representative of the employer's aircraft rescue and fire fighter (ARFF)/security employees.

On the basis of the record, statutes, rules, and case law, the Examiner finds the employer violated RCW 41.56.140(1), (2), and (4) by interfering with employees represented by the union, discriminating against a bargaining unit employee for union activity, and for refusing to bargain with the union regarding mandatory subjects of bargaining.

ISSUES PRESENTED

Issue 1: Did the employer interfere with employees' rights by displaying union animus toward members of the union?

Issue 2: Was the layoff of Jake Riggs unlawful discrimination?

Issue 3: Did the employer refuse to bargain over mandatory subjects of bargaining?

ANALYSIS

Issue 1: Did the employer interfere with employees' rights by displaying union animus toward members of the union?

The union began organizing the employees working in the Walla Walla airport's aircraft rescue fire fighter/security positions for the purpose of collective bargaining in early 2003. The union filed a representation petition with the Public Employment Relations Commission on March 3, 2003.

Upon the filing of the petition, Brent Partlow, union vice-president and aircraft rescue fire fighter/security employee for eleven years, contacted Jim Kuntz, Executive Director of the Port of Walla Walla, to inform him of the petition that had been filed. Partlow testified that during that discussion Kuntz made the following comments: "The die has been cast - the die is cast and we'll let the chips fall where they may. And that the employees had done a great disservice to the flying public of Walla Walla, and . . . we had no class for doing what we did."

Kuntz claims that his comments were:

> Did you file your paperwork? Based on that then we can't meet. I could have met with you earlier, and your group, but since you filed the paperwork, I have been told . . . that I can't meet. I thought that we could have met ahead of time, if you hadn't filed the paperwork. I thought the Port had been very supportive of the airport and commercial air service, but we cannot meet.

As background, Partlow further testified regarding a personal conversation with Kuntz in early 2001 where he made the following comment about unions in general: "I'm not sure about unions. They are not necessarily a good thing." Kuntz testified that he did not recall making this statement.

Obviously, the employer and union's testimony differ regarding comments made by Kuntz. Partlow recalled in detail the statements made by Kuntz while Kuntz didn't remember making the comments or his recollection was vague. When issues of credibility are raised an examiner will look to overall demeanor of the witnesses and consistency of the testimony presented versus the actions taken by the parties. In attempting to establish the facts, I found the management's testimony was often inconsistent and therefore less credible than the union's witnesses. In this case the denial of union animus by the employer was contrary to the behavior and

decisions made regarding its relationship with the union as described below.

The Public Employment Relations Commission certified the aircraft rescue fire fighter/security bargaining unit on August 12, 2003.[1] Between the date of filing the representation petition, March 3, 2003, and the filing of the unfair labor practice on August 16, 2004, the employer took a number of actions that the union has interpreted to further create an anti-union environment. The actions include:

1. Cross training of employees outside of the bargaining unit to perform aircraft rescue fire fighter duties;

2. Laying off the union president;

3. Eliminating Kelly days[2] from the work schedule; and

4. Filing of an inquiry to the Department of Retirement Systems (DRS) regarding the bargaining unit's retirement status as uniformed personnel.[3] The inquiry was followed by the subsequent appeal to the initial DRS decision.[4]

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[1] *Port of Walla Walla,* Decision 8165 (PECB, 2003).

[2] "In the vernacular of the fire service, a "kelly day" is a day off duty built into the schedule of an individual employee when the rest of the crew to which he or she is normally assigned will work their regular shift". *City of Yakima,* Decision 3564 (PECB, 1990).

[3] The union recognizes the employer's right to file the DRS inquiry, but questions the employer's motive in filing the appeal. This action by itself is not union animus.

[4] The parties are in the process of negotiating a first contract. They have been in mediation and have been certified to interest arbitration by the Public Employment Relations Commission. The appeal to DRS has caused the interest arbitration to be placed on hold, thus delaying the completion of a first contract.

Interference Violation

The statute that establishes interference violations is RCW 41.56.140, which states:

> It shall be an unfair labor practice for a public employer:
>
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter...

The Commission test for interference is:

> To establish an interference violation under RCW 41.56.140(1), a complainant need only establish that a party engaged in conduct which employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity. A showing that the employer acted with intent or motivation to interfere is not required. Nor is it necessary to show that the employees concerned were actually interfered with or coerced.

City of Omak, Decision 5579-B (PECB, 1998). *See, also, King County,* Decision 6994-B (PECB, 2002).

The employer took unilateral actions regarding mandatory subjects of bargaining without communicating with the union in several situations:

- cross training of maintenance employees to perform rescue fire fighter duties;
- using tentative language proposed during mediation for the layoff process without prior agreement;
- eliminating Kelly days.

These actions, together with the employer's comments and the employees' perceptions of the DRS appeal, support the employees' belief that the employer has an anti-union bias and that the aforementioned actions constitute retaliation. Therefore, the Examiner finds that based on the totality of all the actions, an interference charge is appropriate.

Issue 2: Was the layoff of Jake Riggs unlawful discrimination?

Jake Riggs worked for the airport at the Port of Walla Walla in an aircraft rescue fire fighter/security position from December 26, 1999, until October 24, 2004. He initiated the effort to organize the work group through affiliation with the International Association of Fire Fighters and is also the president of Local 4203. Riggs made the initial contact with the Fire Fighters to begin the organizing effort. He participated in the negotiation sessions for the first contract, including mediation.

Riggs received a letter from Kuntz dated July 8, 2004, indicating that he would be laid off on September 30, 2004. With extensions of the original layoff date, his employment ended on October 24, 2004. Riggs testified that he observed a general change of attitude from the employer after the representation petition was filed. Combined with the actions discussed previously the union asserts that the layoff was a discrimination violation for his protected activities.

Test for Discrimination

The test for discrimination is much more complex than an interference charge. The Commission has established precedents for discrimination in *Education Service District 114,* Decision 4361-A (PECB, 1994); *City of Omak,* Decision 5579-B; and *King County,*

Decision 6994-B, which are based on the three-prong approach endorsed by the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum,* 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority,* 118 Wn.2d 79 (1991). That precedent is described below:

1. A discrimination violation is found when action is taken against an employee as a result of the employee's exercise of a right protected by statute or when the employee communicates to the employer an intent to do so and is then deprived of an ascertainable right, benefit or status and a causal connection exists between the exercise of the right and the employer response.

2. The complainant must meet a burden of proof based on a preponderance of the evidence showing that the disputed employer action was in retaliation for the employee's exercise of statutory rights. It must be established that the employer's stated reasons for its actions were pretextual, and/or that union animus was a substantial motivating factor behind the employer's action.

3. If a prima facie case is established, a complainant will prevail if the employer fails to produce any evidence of other motivation for the adverse actions. The respondent will prevail if they can articulate lawful, nonretaliatory reasons that substantiate the basis for it's actions.

Discrimination Violation

In this case, Kuntz stated two reasons for the layoff of Riggs: a reduction of commercial flights and projected deficits. Additionally, in defense of the cross training of maintenance employees,

the employer points to a post 9/11 environment in the air transportation industry. These issues are discussed below in detail.

Commercial Flight Reductions

The employer presented some inconsistent arguments concerning the employee layoff. It argues that the layoff of Riggs was necessary in part as a result of a reduction by Horizon Airlines of daily commercial flights into the airport. However, according to Kuntz' own testimony, flight reductions have occurred in the past and the employer has only made staff reductions through employee attrition. Kuntz testified that flights have been reduced as recently as 2003 and no employee was ever laid off as a result.

The union claims that regardless of the number of commercial flights coming into the airport, historically, the 24/7 work schedule has been maintained. Obviously, with the layoff of Riggs, the same work hours are being covered with fewer employees.

The union further states that in the past, with four employees, there were always off-duty employees that could be called in if an ARFF employee was absent. Since Riggs was laid off, with the three remaining ARFF employees, shifts have to be extended by 12 hours for each shift, the employee could work 48 hours (two shifts) or the employer could bring in a maintenance employee at a higher rate of pay to cover the vacancy. Each of these options result in additional cost to the employer.

Kuntz testified that Riggs' layoff was delayed so he could cover for an absence of another ARFF employee. Thus the employer was avoiding incurring overtime for the remaining two ARFF employees, which would have resulted in additional cost. Since Rigg's layoff, that coverage is no longer available.

Furthermore, as a result of Riggs' layoff, Johnson testified that he eliminated Kelly days from the schedule. The use of Kelly days was designed to reduce overtime expense by giving employees time off to prevent reaching an overtime threshold and to compensate the employee for the long hours worked. The elimination of Kelly days results in increased overtime expense to cover absences by the remaining three aircraft rescue fire fighter/security employees. The employees are negatively impacted by the reduced time off while working a 24/7 schedule with increased overtime potential.

Projected Deficits

Kuntz stated that the 2004 budget deficit of $371,311 was a reason for Riggs' layoff. However, he inconsistently testified that during the period of 2001-2003 there were significant budget shortfalls and no action was taken to reduce staff. Kuntz stated that the projected loss for 2001 was $891,736, the 2002 deficit was $244,798 and the 2003 deficit was $500,000. During these periods the employer did not reduce staff even though the losses were often greater and the number of Horizon flights fluctuated. Given this inconsistent testimony the employer's statements do not support it's defenses.

Cross Training

Other inconsistent statements in testimony do not support the employer's defenses of its layoff decision. Testimony given at the hearing by Kuntz indicates that the maintenance employees that have been cross-trained in aircraft rescue fire fighter/security duties would be used in the event of an emergency. The employer would offer bargaining unit work to maintenance employees if the bargaining unit could not fill the hours, as long as aircraft fire fighter/security employees had been given the first opportunity.

This is contrary to statements made later in the hearing by Kuntz when he stated that the maintenance employees were only trained to back up the aircraft fire fighter/security employees in case of an airport emergency. Testimony made by Ricky Walsh, the union representative, indicated that during a mediation session, he was told by the employer representative that if they did not agree to a schedule involving only three people, versus the four that were scheduled at the time, the employer would use maintenance employees to fill the empty shifts. These comments raise the issue of whether it was the employer's intent to cross train the maintenance employees, while laying off Riggs and therefore undermining the bargaining unit's work.

The result of reducing the ARFF staffing levels is increased overtime expense which does not support the concept of cross training to reduce expenses. Cross training employees outside of the bargaining unit in the functions of the bargaining unit's work to fill shift vacancies, is also counter to the employer's rational given for the layoff.

Post 9/11 Environment

Finally, the employer references the post 9/11 environment as a defense for the need of cross training for emergencies. However, the timing of this decision, announced in a memo from Kuntz, circulated to all employees on June 11, 2004, does not support that defense. This was 2¾ years after 9/11 and coincidentally after the aircraft rescue fire fighter/security employees' August 12, 2003, unit certification. Additionally, the parties were in the midst of a highly contested mediation that resulted in certification to interest arbitration.

Thus, the record indicates that the employer was well aware of the employees' protected activities and the position Riggs held with the union. The employer's actions taken against Riggs and the other ARFF employees have denied them benefits and status. The employer's reasons for its actions are not consistent with the evidence presented and leads to the conclusion that union animus was a substantial motivating factor behind the employer's actions and that these actions support a violation of discrimination against the laid off employee, Riggs.

Issue 3: Did the employer refuse to bargain over mandatory subjects of bargaining?

The duty to bargain is expressed in RCW 41.56.140 and under longstanding Commission precedent. It includes the responsibility of the party that seeks changes of existing wages, hours and working conditions to: 1) give notice to the opposite party; 2) provide an opportunity for bargaining prior to making a final decision; 3) upon request, bargain in good faith; and 4) bargain to agreement or impasse concerning any mandatory subjects of bargaining. *City of Seattle,* Decision 8313-A (PECB, 2003).

Additionally, when a new bargaining unit is certified, the employer is required to maintain the status quo ante until successful completion of a bargaining agreement between the parties.

> The Commission has consistently 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 of those employees, and has the obligation to maintain the status quo.

Snohomish County Fire District 3, Decision 4336-A (PECB, 1994).

After the employer was notified that the aircraft rescue fire fighter/security employees had chosen to be represented by the union, the employer ignored the union's existence and the requirement to maintain the status quo by taking action on several issues:

- It instituted cross training of maintenance employees to perform aircraft rescue fire fighter duties without consulting or notifying the union. The union found out about this action from a memo distributed by Kuntz to all employees.
- It used layoff procedure language that was only tentatively agreed to during negotiations for the layoff of Riggs before the parties had come to a final agreement on any contractual language. The use of the proposed language had not been discussed until after the layoff letter was received by Riggs.
- It eliminated Kelly days from the employees' work schedule. Johnson stated that he eliminated the Kelly days because they didn't fit in the schedule of the reduced workforce and that he had not discussed this decision with the union.

All of these issues are mandatory subjects of bargaining since they are clearly hours of work and working conditions as stated in RCW 41.58.040:

> In order to prevent or minimize disruptions to the public welfare growing out of labor disputes, employers and employees and the representatives shall:
>
> (1) Exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

In the absence of any notice to the union, without affording the opportunity to negotiate the effects of these unilateral actions, and failure to maintain the status quo, the employer has committed a violation of RCW 41.56.140(4).

FINDINGS OF FACT

1. The Port of Walla Walla is a public employer within the meaning of RCW 41.56.030(1).

2. The International Association of Fire Fighters, Local 4203 (IAFF, Local 4203), a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of the Aircraft Rescue Fire Fighter/Security department employees employed by the Port of Walla Walla.

3. Jim Kuntz is the Executive Director of the Port of Walla Walla and has ultimate authority regarding personnel issues at the airport where the ARFF/Security positions are housed.

4. Ronald Johnson is the Assistant Airport Manager and direct supervisor of the ARFF/Security employees.

5. Jake Riggs began working for the Port Walla Walla in an ARFF/Security position on December 26, 1999. At all times relevant to this proceeding, Riggs served as President of IAFF, Local 4203 and representative of the ARFF bargaining unit in negotiation meetings with the employer.

6. The ARFF/Security employees have been considered to be "uniformed personnel" within the meaning of "fire fighter" in RCW 41.26.030(4).

7. On March 3, 2003, IAFF, Local 4203 filed a representation petition seeking representation of the ARFF/Security employees at the Port of Walla Walla.

8. The bargaining unit was certified by the Public Employment Relations Commission on August 12, 2003. The parties have been in negotiations for a first contract since late August 2003, and have participated in mediation. They have been certified for interest arbitration by the Public Employment Relations Commission. This process is "on hold" pending the outcome of the appeal to the Department of Retirement Systems review.

9. In September of 2004, Horizon Airlines reduced the number of flights into the Walla Walla Airport from four to three. In the past, flights have fluctuated similarly without a layoff.

10. On June 11, 2004, the employer gave notice, via a letter to all employees, that it was going to cross-train maintenance employees to perform ARFF duties. Notification was not given to the union.

11. The Port did not have a layoff policy or procedure, at all times relevant to this proceeding. The employer used the tentative agreement regarding a layoff procedure pending in negotiations when it laid off Riggs on October 24, 2004.

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

fighter/security employees; and the layoff of the union president.

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 unilaterally taking actions as referenced in Finding of Fact 12, the employer has committed unfair labor practices in violation of RCW 41.56.140(1),(2),and (4).

3. Bargaining unit employees testified to statements made by Kuntz that, along with actions listed in Finding of Fact 12 above, created an environment of union animus and supports an interference violation of RCW 41.56.140(1).

4. The employer presented the union with a fait accompli regarding mandatory subjects of bargaining listed in Finding of Fact 12 above, thereby denying the union the opportunity to negotiate the changes made in violation of RCW 41.56.140(4).

5. By presenting only contradictory or pretextual evidence concerning the layoff of Riggs, the employer has violated RCW 41.56.140(2).

ORDER

The Port of Walla Walla, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from: interfering with, restraining or coercing its employees in the exercise of their collective

bargaining rights secured by 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 Jake Riggs immediate and full reinstatement to his former position or a substantially equivalent position. Make Riggs whole by payment of back pay and benefits in the amounts he would have earned or received from the date of the unlawful layoff to the effective date of the unconditional offer of reinstatement made pursuant to this order. Such back pay shall be computed, with interest, in accordance 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 found unlawful in this order; specifically cease cross training non-bargaining unit employees to do bargaining unit work and reinstate Kelly days for bargaining unit employees.

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

D. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto. Such notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 days.

Reasonable steps shall be taken by the respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

E. Read the notice attached to this order into the record at a regular public meeting of the Board of Commissioners for the Port of Walla Walla 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.

F. 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 attached to this order.

G. Notify the Executive Director 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 Executive Director with a signed copy of the notice attached to this order.

Issued at Olympia, Washington, on the 22nd day of August, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

CLAIRE COLLINS, 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

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

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

WE UNLAWFULLY failed to bargain in good faith in connection with: the cross training of maintenance employees to perform aircraft rescue fire fighters duties, use of tentatively agreed-to language for the layoff of Jake Riggs, and elimination of Kelly days from the employees work schedule.

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

TO REMEDY OUR UNFAIR LABOR PRACTICES:

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

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

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

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

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

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

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

PORT OF WALLA WALLA

DATED: _____ BY: _____

Authorized Representative

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

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