STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC, PROFESSIONAL AND OFFICE-CLERICAL EMPLOYEES AND DRIVERS, LOCAL 763,	)	CASE NO. 6344-U-86-1233
Complainant,	)	DECISION 2692 - PECB
vs.	)	
TOWN OF GRANITE FALLS,	)	FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Davies, Roberts, Reid & Wacker, by Bruce E. Heller, attorney at law, appeared on behalf of the complainant.

Fisher, Patterson, Metcalf & Simpson by David G. Metcalf, attorney at law, appeared on behalf the respondent.

On April 9, 1986, Public, Professional and Office-Clerical Employees and Drivers, Local 763, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (union) filed a complaint with the Public Employment Relations Commission wherein it alleged that the Town of Granite Falls (employer) had committed unfair labor practices within the meaning of RCW 41.56.140(1). After identifying the parties, the complaint charging unfair labor practices alleged:

* * *

> 3. On February 5, 1986, Complainant filed a Petition For Investigation of a Question Concerning Representation for a bargaining unit including all full-time and regular part-time employees of the Respondent, excluding elected and appointed officials.

4. On February 6, 1986, Complainant hand delivered a letter dated February 5, 1986 to Respondent informing Respondent that a majority of its employees had authorized Complainant to be their exclusive collective bargaining agent and requesting a meeting between Complainant and Respondent.

5. On February 10, 1986, Mayor Vivian Affleck was observed taking pictures of two (2) maintenance employees, as they performed their normal duties.

6. On February 11, 1986, Mayor Vivian Affleck imposed numerous "work rules" on two (2) of Respondents maintenance employees, who were known supporters of Complainant.

7. On or about February 13, 1986, representatives of Respondent were quoted by the news media as stating that Town employees represented by Complainant could "go on strike if they want to" and that Respondent would not be required to sign a contract with Complainant.

8. By letter dated March 13, 1986, Mayor Vivian Affleck terminated the services of Jim Mirabella, a known supporter of Complainant, effective March 21, 1986. The reason given for such termination was that effective March 21, 1986, Respondent's sewage treatment plant would be operated by a new employee, who had a Class II Waste Water Treatment Plant certificate. Mirabella possesses a Class I Operator in Training certificate. Mirabella was apparently terminated from his position as Maintenance Worker so that the incumbent sewage treatment plant operator, Bruce Caley, could be reassigned to Mirabella's Maintenance Worker position. Caley possesses a Class I Waste Water Treatment Plant certificate. To Complainant's knowledge, Respondent's sewage treatment plant remains a Class I facility, although the State of Washington Department of Ecology officials are reviewing the appropriateness of such classification.

9. On March 14, 1986, Mayor Vivian Affleck, accompanied by her husband, delivered the afore-mentioned letter of March 13, 1986 to Jim Mirabella, at the Town's Sewage Treatment plant facility. While leaving such facility the Mayor was overheard by two (2) employees to make an extremely profane and derogatory remark to Jim Mirabella, leading Complainant to question the true nature of Respondent's reasons for terminating Mirabella.

10. On March 25, 1986, Mayor Vivian Affleck imposed additional "work rules" on the Town's maintenance employees. Such "work rules" listed new duties for

employees to perform as well as threatening termination for violation of such rules.

11. Respondent has engaged in a pattern of coercive and intimidating conduct attempting to thwart the rights of its employees to organize and designate Complainant as their representative for the purpose of collective bargaining. In addition, Respondent has imposed new "Work Rules" on employees. Such rules constitutes a unilateral change in working conditions.

Rex L. Lacy was designated as Examiner to make Findings of Fact, Conclusions of Law, and Order. A hearing was held on October 9, 1986, at Granite Falls, Washington. The parties filed post-hearing briefs.[1]

BACKGROUND

The Town of Granite Falls, located in Snohomish County, is a fourth class municipality within the meaning of Chapter 35.27 RCW and a public employer within the meaning of RCW 41.56.030(1). The town is governed by an elected mayor, Vivian Affleck, and a five person elected town council. The town has six employees. One of the employees works exclusively at the waste water treatment plant; one divides his work time between the waste water treatment plant and the maintenance department; one is employed full-time in the maintenance department; two are police officers; and one is the town clerk.

Public, Professional and Office-Clerical Employees and Drivers, Local 763, is a bargaining representative within the meaning of RCW 41.56.030(3). Jon Rabine is secretary-treasurer of Local 763.

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1 After the close of the hearing, the complainant made a motion to re-open the hearing to take additional testimony from witness Mike Dawda. Dawda was the first witness to testify at the hearing held on October 9, 1986, and he was excused with the consent of both parties after the conclusion of his testimony. The complainant's motion seeks to have the hearing re-opened for the purpose of presenting additional rebuttal evidence. It does not allege discovery of new evidence that could not have been available at the time of the hearing. The motion is denied.

Jim Mirabella was hired by the Town of Granite Falls in July, 1985.[2] He normally worked a forty-hour work week which was divided into two days at the waste water treatment plant and three days as a maintenance worker. Mirabella was scheduled to work overtime on the weekends at the sewage plant. In October, 1985, Mirabella applied for and was granted a "Waste Water Treatment Plant Operator in Training" certificate by the Washington State Department of Ecology (DOE).

In early January, 1986, the Town of Granite Falls was visited by Gerald Caulkins, a DOE employee acting on allegations of falsifications and discrepancies in the reporting of required waste water tests on raw sewage. Caulkins' visit was followed by a full investigation of the waste water treatment operation by Mike Dawda, an engineer employed by the DOE.

On January 30, 1986, Affleck met with Mirabella and Joe Poplin, water distribution manager and street superintendent, regarding the amounts of overtime pay they had requested for January, 1986. Thereafter, Affleck denied substantial amounts of the overtime hours submitted by the employees.

Also on January 30, 1986, Affleck took pictures of the conditions of the streets in the township. Mirabella and Poplin were in the immediate vicinity of the locations where the pictures were taken but were unaware that Affleck was taking the pictures. The pictures were not shared with the employees.

On or about February 4, 1986, a representative of Local 763 met with employees of the Town of Granite Falls at Mirabella's residence for the purpose of organizing the employees. It is inferred that at least some of the employees gave representation authorization to the union. During the course of that meeting Affleck was observed driving past Mirabella's residence.

On February 6, 1986, Local 763 notified the Town of Granite Falls that the employees had selected the union to represent them for the purposes of

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2 During the period from July, 1985 to December, 1985, Mirabella's wife was a member of the five-person town council.

collective bargaining. The employer did not voluntarily recognize Local 763 as the exclusive bargaining representative of its employees.

Also on February 6, 1986, the Washington State Department of Ecology issued a report on the status of the waste water treatment operations and facilities at the Town of Granite Falls. The report, authored by Dawda, was critical of falsification of reports, inadequate reporting of test results that were performed on the raw sewage, and indications that all the required tests were not actually being performed. Additionally, Dawda notified the town that the waste water operation was required to have a Class II operator in charge of the facility.

On February 7, 1986, Local 763 filed its representation petition with the Public Employment Relations Commission, seeking certification as the exclusive bargaining representative of a bargaining unit of "all full-time and regular part-time employees of the respondent excluding elected and appointed officials".[3]

On February 10, 1986, Affleck took additional pictures of the disrepair of some of the town's streets. Mirabella and Poplin were again working in the vicinity where the pictures were taken. On this occasion, both employees were aware that Affleck was taking pictures. Affleck did not show the pictures to the employees.

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[3] The petition was docketed as Case No. 6225-E-86-1108. The Examiner takes administrative notice of the record in that proceeding, which shows that the representation petition was processed by the Public Employment Relations Commission beyond the administrative determination of the sufficiency of the showing of interest. Thus, the petition submitted to PERC was supported by at least thirty per cent of the affected employees. A dispute arose concerning the composition of the bargaining unit. The Executive Director issued a decision which excluded the town clerk from the petitioned-for bargaining unit. See: Town of Granite Falls, Decision 2617 (PECB, 1987). The union prevailed in an election conducted by the Commission and the union was certified as exclusive bargaining representative in Town of Granite Falls, Decision 2617-A (PECB, March 30, 1987).

On February 11, 1986, Affleck imposed new "work rules" on employees engaged in maintenance work, including street maintenance. Mirabella and Poplin were the only maintenance employees when the new work rules were issued.

On February 13, 1986, following a town council meeting, one or more of the town's councilpersons made statements to a reporter from the Everett Herald newspaper who covered the council meeting, to the effect that the "union could come in if they wanted to but we didn't have to recognize them", that "employees could go on strike", and that the "employer would not be required to sign a contract with the union".

On March 13, 1986, Affleck, accompanied by her husband, hand-delivered a written notification of termination to Mirabella at the sewage treatment. The termination letter stated, in pertinent part:

> Effective March 21, 1986, the Granite Falls sewage treatment plant will be primarily operated by a newly-employed Waste Water Treatment Plant Operator, Classification II. Because of budget constraints, the Town is not able to increase the total number of its employees. Accordingly, Bruce Caley will be reassigned to the position of street and water maintenance which you presently hold.
>
> Because of this reassignment, it is necessary that the Town terminate your services, effective March 21, 1986.
>
> On behalf of the Town, I wish to thank you for your efforts during the time of your employment.

At the same time, Affleck notified Caley that he was being demoted to Mirabella's position, as follows:

> Effective March 24, 1986, the Granite Falls sewage treatment plant will be primarily operated by a newly-employed Waste Water Treatment Plant Operator, Classification II. Because of budget constraints, the Town is not able to increase the total number if its employees, and accordingly you will be reassigned to the position of street and water maintenance which you previously held along with assistance of two (2) days per week at the sewer plant.

As Affleck was leaving the sewage treatment plant, she uttered a profane remark which Mirabella and Caley believed to have been directed towards Mirabella.

On March 24 or 25, 1986, Affleck hired Mike Friese, who possesses a Class II Waste Water Treatment Certificate, to operate the waste water facility. Friese supervised Caley on the days he worked at the sewage plant.

On March 25, 1986, Affleck imposed additional work rules on maintenance employees Poplin and Caley. There is no indication that the first set of rules issued by Affleck were actually enforced. This second set of rules was drafted by Councilman Howard Hughes, but were signed and presented to the employees by Affleck. Poplin testified the second set of rules also was not enforced.

In June, 1986, Affleck terminated Caley because his work habits and record keeping at the waste water plant had not improved. Thereafter, Affleck refused to re-employ Mirabella for the position vacated by Caley. The work performed by Caley (and by Mirabella prior to the termination of his employment) was split between two employees, Craig Wallace and Glenn Davis. Wallace held a DOE Operator in Training Certificate. Davis performed only clean up work at the waste water plant.

DISCUSSION

Statutory Rights

The statutory right of employees to select a bargaining representative is set forth in RCW 41.56.040, as follows:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE 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 the chapter.

Chapter 41.56 RCW sets forth unfair labor practices for employers as follows:

> RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. 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;

Standard for Determination of Dual Motivation Discharges

The National Labor Relations Board (NLRB) adopted its current test for dual motive discharges in August, 1980, in Wright Lines, Inc., 251 NLRB 150 (1980). The test, which replaced an "in part" test previously applied to dual motive cases, was modeled after the test established by the United States Supreme Court in Mount Healthy School District, Bd. of Directors v. Doyle, 429 U. S. 274 (1977), and effectively balances the interests of the employer and the employee. Thus, in all cases alleging violations of Section 8(a)(3) of the Labor-Management Relations Act of 1947 (the Taft-Hartley Act) or violations of Section 8(a)(1) of the LMRA turning on employer motivation, the NLRB will require a prima facie showing sufficient to support an inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected conduct. The NLRB's "in part" test had found a discharge to be unlawful if there was any relationship between protected employee conduct and an employer action. In discussing the test in Wright Lines, supra, the NLRB stated:

> Under the Mt. Healthy test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role

> in the employer's decision. Also, the employer is provided with a formal framework within which to establish its asserted legitimate justification. In this context, it is the employer which has "to make the proof". Under this analysis, should the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because its action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes.

The Public Employment Relations Commission endorsed the Wright Lines test in its decision in West Valley School District, Decision 1179-A (PECB, 1981). See also: City of Olympia, Decision 1208, 1208-A (PECB, 1982).

The test has also been approved by the Washington courts. In 1982, the Washington State Court of Appeals cited Wright Lines, supra, with approval in a case involving a community college employee, when it established the legal standard to be applied in unfair labor practices cases alleging discriminatory discharges. The Court stated:

> Complaints alleging that an employer's discharge of an employee constitutes an unfair labor practice fall into three categories: (1) cases in which the employer asserts no legitimate grounds for discharge; (2) cases in which the employer's asserted justification for discharge is a sham and no legitimate business justification in fact exists (pretextual firings); and (3) cases is which there is both a legitimate and impermissible reason for the discharge (dual motive discharges). The first two types of discharge constitute unfair labor practices. The third type may or may not constitute an unfair labor practice.

Public Employees v. Community College, 31 Wn.App 203 (Div. II, 1982).

The same Court re-affirmed the same standard in Clallam County v. PERC, 43 Wn.App 589 (Div. II, 1986)

The Surveillance Issue

Since the early days of the National Labor Relations Act, employer surveillance of employees engaged in protected activities has been held to violate Section 8(a)(1) of the LMRA. Consolidated Edison Co. v. NLRB, 305 US 197 (1938). This is true regardless of whether the surveillance is conducted by the actual employer, by supervisors, by rank-and-file employees at the direction of the employer, or by outsiders acting on behalf of the employer. Further, the National Labor Relations Board has successfully maintained that surveillance is illegal regardless of whether the employees have knowledge of the surveillance. NLRB v. Grower-Shipper Vegetable Ass'n, 122 F.2d 641 (DC Circuit, 1941).

The law is equally clear that an employer violates Section 8(a)(1) of the LMRA if it creates the impression among employees that the employer, or its agents, is engaged in surveillance. NLRB v. Rybold Heater Co., 408 F.2d 888 (6th Circuit, 1969). The NLRB has held that, by highlighting employee anxiety concerning union activities, the employer inhibits the future union activities of the employees. CBS Records Div., 223 NLRB 709 (1976).

Three seemingly innocent incidents nevertheless created the impression that the employer was engaging in surveillance of employees involved in protected activities. Affleck's two picture-taking escapades took place during times when the employees were engaging in protected union activities. The first incident occurred contemporaneous with the overtime pay issue. Testimony adduced from involved employees clearly establishes that the denial of the overtime pay triggered the organizational effort among the employees. On the day the employees met with the union representative at Mirabella's residence, Affleck was observed driving past the location where the union meeting was being held. It matters not that the pictures were later explained to have been taken to show the disrepair of the town's streets, or that the photographs were not shown to the employees prior to the hearing in this matter. Poplin and Mirabella believed that they were the subjects of the photographs. The employer's conduct was thus violative of RCW 41.56.140(1).

The Interference Issue

The NLRB has held that an employer violates the Act by making threats which create an atmosphere of futility for employees to select a bargaining representative to represent them for the purposes of collective bargaining. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). The employer is permitted to engage in free speech during the processing of a question concerning representation, but the employer is not at liberty to make threats of reprisal or force or promises of benefit. The Supreme Court stated in Gissel that:

> Any balancing of the employer's rights of free speech and the rights of employees to be free from coercion, restraint, and interference "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might more readily be dismissed by a more disinterested ear".

A few days after the representation petition was filed, elected officials of the employer made remarks to the press that indicated their displeasure with the employees seeking union representation.

At the hearing in this proceeding, the council members explained that their statements were made at a time when they were unaware of the statutory rights of the employees. Ignorance is not bliss in this situation. Nor is ignorance of the law a defense or excuse. The employer is, as one of its elected officials pointed out, a small municipality. Employment is a treasured asset. Disparaging remarks, especially of the type made to the press, are strong indications of the employer's true feelings regarding the union activity among the town's employees. Even if those remarks did not reflect the true feelings of the elected officials, they could have been understood by the employees to indicate that it would be futile to select Local 763 as their bargaining representative. The remarks were violative of RCW 41.56 .140(1).

The New Work Rules Issue

A controversy arose in late January, when Poplin and Mirabella turned in overtime pay requests that Affleck considered to be excessive. She refused to pay some of the amounts. That event precipitated the organizing activity among the employees.

Shortly thereafter, Affleck presented Poplin and Mirabella with the first of two sets of "new" work rules. Those new rules read as follows:

STARTING TIME TO WORK:

1. 8:00 A.M. to 5:00 P.M. - Monday to Friday
2. One 15 minute coffee break in A.M. morning.
   One 15 minute coffee break in P.M. afternoon.
3. One hour for lunch.

DAILY:

1. Check wells every day.
2. Work on all streets in Town, fill holes with gravel or (when possible and moneywise) blacktop.
3. Clean all catch basins in Town. All culverts on city property.
4. Clean all drains under the streets and sidewalks in Town - once a month.

ONCE A MONTH:

1. Clean all sidewalks (sweep) and gutters at Paradise Park and Alpine Street includes litter on sidewalks.
2. Do the above from East Stanley to West Stanley.
3. Do the above from South Granite stoplite to city limits South Granite.
4. Pick up litter on North Granite, both sides of street.
5. Clean gutters, sweep sidewalks pick up litter from East Stanley (stop lite) on North Alder to end of sidewalk at High School.

Only one man to take water samples to Everett.

Only one man to go out Town after repairs.

> There will not be two men riding together all day unless necessary that work requires two men.
>
> One man can be working on one project while the other man can be working on the other project.
>
> There will not be any overtime unless you clear with the Mayor.
>
> "Jim Mirabella"
>
> You work with Joe Poplin on Monday, Tuesday and Thursday.
>
> You work at the sewer plant on Wednesday and Friday.
>
> Jim, you will take your orders at the sewer plant from Bruce Caley.
>
> Projects are to be upgraded regularly.

Poplin and Mirabella testified that, with the exception of the reference to two men riding together, the "new" work rules were generally a reiteration of existing, unwritten rules. The employees were not informed of any consequences if the work rules were not followed. The rules were not enforced.

On March 25, 1986, four days after Mirabella was terminated, Affleck presented Poplin and Caley with the second set of "new" work rules, as follows:

> WORK RULES FOR MAINTENANCE CREW
>
> All members of maintenance crews shall punch time clock promptly at 8:00 A.M. or at such time as designated by supervisors. After punching time clock, employees shall immediately leave for place of work.
>
> There will be two (2) coffee breaks daily of fifteen minute duration from job site to job site. There will be no coffee drinking on job other than at regular breaks.
>
> Lunch break will be one hour, job site to job site.
>
> Maintenance (sic) of Vehicles & Equipment (sic)
>
> All vehicles and equipment shall be maintained in top shape. Any loose bolts or nuts shall be tightened,

brakes adjusted and dents repaired, etc. Oil and filters shall be changed at regular intervals, to be determined by condition of oil on dipstick.

Equipment shall be washed once a month or whenever dirty. It is suggested that motors and running gear be cleaned with high pressure system at sewer plant, after first being sprayed with gunk and let set for a few minutes.

When checking and adding motor oil, keep dipstick cover and oil filler pipe cover and surrounding area clean (should be wiped carefully every checking and or adding oil).

Filler plugs on all gear boxes shall be cleaned thoroughly with a wire brush and cloth, as well as surrounding areas before being removed. The purpose of this is to insure that contaminants will not be introduced into the system.

Once a year, drain plugs on all gear boxes shall be removed and a small amount of the lube allowed to run into a small container and examined to determine the condition of said lube. If lube is very dirty and has contaminants, the box should be drained and new oil added.

Vehicles shall be lubed at regular intervals, 3000 miles for pickups and whenever required on other equipment.

Batteries should be checked for fluid, as part of lube job service.

Anti freeze shall be kept in all water cooled equipment, and checked on a regular basis in fall, winter and early spring.

All vehicles shall be checked for oil and water upon starting in the morning.

On dual tire vehicles, duals should be checked with a hammer in the A.M.

Any maintenance problem that can not be handled by crews, shall immediately be brought to the attention of the Mayor or the Council person designated as equipment supervisor.

Tools and equipment that are constantly carried in the back of the pickups shall be kept clean and in place, hand tools kept in boxes and out of sight. Shovels, rakes, etc., stacked neatly.

> Dirt, debris, scrap iron or wood shall be removed from pickup box at regular intervals.
>
> When it is raining and there is no outside work to be done, the shop area should be cleaned out, scrap iron and various items that no longer have any use should be thrown out and other items sorted out and places found to put them where they are readily available. At this point, the place really needs a good cleaning up.
>
> Tools should be placed in a position where they are easily identified. The same treatment should be given the outside area when there is time available. The whole area should be a place to be proud of, instead of being strewed with rubble.
>
> All lube jobs, oil changes, repairs, tire changes, and mechanical work will be noted, along with the mileage in the book supplied for that purpose, immediately after being done. This book shall be kept in a readily accessible place, where it can be checked by the Mayor or Council members at any time.
>
> Violations of the above directives will result in a letter of reprimand from the Mayor. Three such letters in a year will result in a week lay-off without pay. A fourth letter will be one of complete termination.

This second set of "new" work rules contains some significant differences from the February 11, 1986 rules and from practice prior to the onset of union activity. Most importantly, the last paragraph of the March 25th rules sets forth a program of progressive discipline that could result in termination for failure to follow the rules. These rules can reasonably be construed to be both a threat made to employees and a unilateral change of working conditions during the existence of a question concerning representation. The new work rules are violative of RCW 41.56.040.

The Discharge Issue - Application of the Dual Motivation Standard

The first inquiry is whether the union has met its obligations of establishing a *prima facie* case that protected activities were a motivating factor in the employer's decision to terminate Mirabella. The employer's actions of engaging in surveillance of employees, the remarks made by town council

members to the news media regarding the employee's union activity and the employer's resistance to recognizing the union or signing a contract, and the unilateral implementation of new work rules, as discussed above, are all factors to be taken into consideration.

The next point to be established is whether the employer had knowledge that its employees, including Mirabella, were engaged in union activities. Mirabella was involved in the overtime situation which gave rise to the employees' seeking union representation. It is clear that the organizational meeting was held at Mirabella's residence. Although Mirabella testified that he was not the employee that contacted the union, it is clear that he signed an authorization card for Local 763.[4] The employer cites a case wherein the Court held that merely signing an union authorization card does not constitute "union activity" sufficient to protect an employee from being disciplined for insubordination. Florida Steel Corp v. NLRB, 529 F.2d 1225-1234, (5th Cir. 1976). The case is inapposite. There is no evidence in this record that Mirabella was insubordinate or that he was disciplined for any other type of misconduct. In fact, Mirabella was characterized by his supervisor and fellow employees as being a competent worker. The entire issue of union organization was discussed in the newspaper with quotations from both parties. Mirabella was identified in the newspaper as a union supporter, and the story published on February 13, 1986 contained a statement by Mirabella that the denial of overtime pay was the reason for the employees' seeking representation by Local 763. It is evident from the record that the employer knew that Mirabella was involved in the union activities.

The burden of proof now shifts to the employer who must prove that its justification for Mirabella's discharge was not a sham, that legitimate business reasons existed for the discharge, and that the reasons given were not pretextual to cover up the employer's true motive for discharging the employee.

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4 Mirabella's self-serving characterization of being only an authorization card signer is not substantiated by the record.

The employer asserts that Mirabella's termination arose from a legitimate business decision made in response to the Department of Ecology report issued by Dawda. It argues that the employer understood that it was required to have a Class II waste water operator to supervise the waste water operation and that, because Caley did not hold the required license, it was necessary to hire a qualified operator. Because the small size of its work force, and its inability to hire the Class II operator while at the same time retaining all current employees, the employer claims a need to layoff one employee. The employer argues that, even though Caley possessed a work record that indicated poor performance at the waste water treatment plant, he had been employed for approximately 12 years, whereas Mirabella had been employed only eight months. Accordingly, it is claimed that Affleck chose to retain Caley and layoff Mirabella because of Caley's seniority, and because of Caley having worked on the maintenance projects that Mirabella was currently assigned to perform. Further, the employer contends that although the town did not have any written seniority rules, unrefuted testimony by Affleck and other elected officials of the employer clearly establishes that seniority has been followed when layoff of town employees was necessary.

On the other side of the debate, the union urges the Examiner to ignore the seniority defense of the employer based upon the postulation that Caley was an inferior employee to Mirabella due to his poor work performance and his poor record keeping, which triggered the layoff. Additionally, the union cites Caley's subsequent discharge as the "proof of the pudding" support for its argument that Mirabella should not have been terminated. The argument is based on fact, but it cannot be the controlling factor in deciding this issue. The employer need not affirmatively prove "just cause" here to sustain the discharge, but presents the seniority issue only as a defense. See: Whatcom County, Decision 1886 (PECB, 1984). If the shoe were on the other foot, the union could credibly urge that Caley's greater length of service would be an important consideration in evaluating a "just cause" defense to a discharge of Caley. Seniority is a legitimate factor in deciding which employee will be laid off and which employee will be retained. Thus, the NLRB has held that the employer did not violate Section 8(a)(3) of

the IMRA when it laid off a union supporter where (1) credible testimony establishes that the employer had less work available; (2) other employees were laid off or quit at about the same time; (3) the employer followed last-hired, first-fired procedure in making layoffs, with each employee's seniority date being the date on which the latest period of employment began; and (4) there is no evidence that the method used to determine seniority was unreasonable or discriminatory. C.M. Carpenter, d/b/a Carpenter Trucking, 274 NLRB 300-307 (1983). Mirabella's discharge meets items 1, 3, and 4 of the criteria set down in C.M. Carpenter. Regardless of the respective qualifications of the employees, the employer chose to use seniority as the basis for retaining Caley instead of Mirabella. There was nothing unreasonable or discriminatory in the method used in that situation.

The Examiner is convinced that Mirabella would have been laid off, regardless of his protected union activities, because he was the least senior employee. Although the employer initially engaged in some conduct that violated the statute, it is clear that it subsequently obtained legal advice on the rights of its employees, and adjusted its conduct accordingly. The employer acted to comply with the DOE requirement that it have a Class II waste water operator in charge of its sewage operation. It actually hired an employee with qualifications that neither Caley nor Mirabella possessed. It applied principles of seniority in effecting the layoff. The Examiner concludes that the termination of Mirabella was not in violation of the statute.

If seniority for layoff were the only issue, this saga could end here. It is not, and the last (and most difficult) issue in the case is whether the employer refused to recall Mirabella because of his involvement in protected union activities. If the recall decision was affected by discrimination for Mirabella's having engaged in protected union activities, it is violative of the statute. It is an unfair labor practice for an employer to refuse to hire an employee because of discrimination against that applicant's union activity or that of others with whom the applicant is aligned. Auburn School District, Decision 2291 (PECB, 1985). It is axiomatic that the same "legitimate business decision" analysis applies to such situations.

The record establishes that Affleck considered Mirabella to be a trouble-maker. Several incidents are involved.

Affleck blamed Mirabella for informing the DOE that Caley was not keeping proper records. Affleck testified that Mirabella had notified her of the falsification-of-reports situation on more than one occasion, and that she believed Mirabella was attempting to "get Caley's job". That assertion makes little sense in view of the fact that Mirabella had received his "operator in training" certification shortly prior to the incident and was unable to test for a Class I license for a year after obtaining the OIT permit. Mirabella denied having contacted DOE. The DOE report caused the town to hire an operator with a higher certification, who presumably commanded a higher salary and put pressure on the employer's budget. Mirabella was the victim, rather than the instigator.

Affleck and Mirabella were involved in the confrontation concerning overtime pay, and it was clear long before Caley's discharge that the overtime dispute had led to the union organizing activity.

Affleck singled out Mirabella for special treatment in the work rules that she presented to Poplin and Mirabella in February.

Affleck drove past Mirabella's residence and photographed him at work. Even if those actions were directed at Mirabella individually, rather than at the collective activity of the whole group of employees, that does not help the employer here.

Finally, Affleck made an obscene remark after delivering the termination letter to Mirabella at the treatment plant. The remark was overheard by Caley, who received his demotion letter at the same time. Contrary to the Afflecks' version of the incident, the record and demeanor of Affleck and her husband lead the Examiner to believe that the remark was directed towards Mirabella.

All of the foregoing preceded a discharge which has been found to be lawful, however, and is only background to the question of the employer's motivation at the time it had to make a decision on the recall of Mirabella. During the interim period, Mirabella and his wife had initiated a recall effort against Affleck. Although the recall effort ultimately was unsuccessful, that political controversy must be taken into consideration in evaluating Affleck's subsequent actions and statements in connection with the refusal to rehire Mirabella.

Caley's discharge is not at issue. In response to questions raised by members of the town council about rehiring Mirabella to replace Caley, Affleck convinced the town council that Mirabella was "a little hard to work with", and that a Class I operator was required to support the Class II operator. The first part of her statement is not supported by the record and fails to meet the test of a legitimate business reason for refusing to rehire Mirabella. In fact, because he believed Mirabella was capable of performing the required work, Mike Friese, the employee hired to replace Caley as the lead operator at the sewage treatment plant, attempted to have Mirabella rehired so that he could have some time off. Affleck refused, stating "that Mirabella would not work for the town as long as she was mayor". Affleck did not offer any objective reasons for her statement, or proof that Mirabella was incapable of again performing the duties at the sewage plant. Affleck's interpretation of the DOE rules is patently incorrect. The DOE rules regarding waste water operations allow employees holding operator-in-training certifications to work under the supervision of a lead operator who holds the requisite license. Additionally, Affleck eventually hired an individual who possessed the same certification that Mirabella held when he was terminated. There is, however, no evidence of any anti-union animus or unlawful actions by the employer between early March, 1986 and July, 1986.

The fact remains that Affleck was very upset by the recall attempt against her. Mirabella did not deny that the recall attempt occurred. The Examiner inevitably comes to the conclusion that Affleck's refusal to rehire Mirabella was primarily in response to his political activity, and particularly the

involvement of Mirabella and his wife in the unsuccessful recall attempt. Whether such action was lawful under constitutional principles, common law or statutes outside of the field of collective bargaining, it is not the type of activity protected by the Public Employees Collective Bargaining Act, Chapter 41.56 RCW. The NLRB has held that:

> It is important to note that in controversies involving employee discharges or suspensions, the motive of the employer is the controlling factor. NLRB v. Brown, supra, 380 U.S. 278 (1965); Mueller Brasco v. NLRB, supra, 544 F.2d 815, 819 (1977). Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws.

Clothing Workers of America v. NLRB, 524 F.2d 434 (1977).

The political activities of firefighters to protest changes in the fire department did not constitute collective bargaining activity under City of Yakima, Decision 1124-A (PECB, 1981). Similarly, Mirabella's political activities do not fall within the realm of union activities protected by the statute administered by the Public Employment Relations Commission.

FINDINGS OF FACT

1. The Town of Granite Falls, Washington is a fourth-class municipality within the meaning of Chapter 35.27 RCW and is a public employer within the meaning of RCW 41.56.030(1). The town is governed by an elected mayor and five member town council. Vivian Affleck is the mayor.

2. Public, Professional and Office-Clerical Employees and Drivers, Local 763, International Brotherhood of Teamsters is a bargaining representative within the meaning of RCW 41.56.030(2).

3. Jim Mirabella was hired in July, 1985. Throughout his employment, Mirabella worked in both the maintenance and waste water treatment

departments. He worked two days at the sewage plant and three days on maintenance. Additionally, Mirabella was regularly scheduled to work two hours overtime on Saturdays and/or Sundays at the waste water treatment plant. In October, 1985, Mirabella obtained an Operator-in-Training certificate from the Washington State Department of Ecology for the waste water plant operation portion of his employment. From the time of his employment until his discharge, Mirabella was supervised by Bruce Caley when he worked at the sewage operation and by Joe Poplin when he worked in the maintenance department.

4. In January, 1986, Mirabella and Poplin became involved in a dispute with Affleck concerning overtime pay claims filed by the employees. That dispute led to employees of the town seeking to organize for the purposes of collective bargaining.

5. On or about January 30, 1986, Affleck took photographs in the vicinity where Mirabella and Poplin were working.

6. Prior to February, 1986, the Town of Granite Falls waste water treatment operation was required to have a Class I Waste Water Treatment Operator in charge of the facility. As a result of the audit issued on February 6, 1986 by the Washington State Department of Ecology, the town was required to have a Class II operator in charge of the plant. The employer took steps to hire Mike Friese as a Class II operator.

7. About February 3, 1986, a representative of Public, Professional and Office-Clerical Employees and Drivers, Local 763, IBT, met with employees of the Town of Granite Falls at Mirabella's residence. The purpose of the meeting was to organize the employees. During the time the meeting was taking place, Affleck was observed driving past Mirabella's house.

8. On February 6, 1986, Public, Professional and Office-Clerical Employees and Driver's, Local 763, IBT, requested that the town voluntarily

recognize Local 763 as the exclusive bargaining representative for its employees. The employer declined to voluntarily recognize the union as the exclusive bargaining representative of its employees.

9. On February 7, 1986, Public, Professional and Office-Clerical Employees and Drivers, Local 763, IBT, filed a petition with the Public Employment Relations Commission raising a question concerning representation among certain employees of the Town of Granite Falls. The case was docketed as Case Number 6225-E-86-1108. The authorization cards filed with the petition were administratively determined to be sufficient to meet the thirty per cent showing of interest required by WAC 391-25-110.

10. On or about February 10, 1986, Affleck took pictures of road conditions within the township. Mirabella and Poplin were performing maintenance work in the immediate vicinity when the pictures were taken. Affleck's picture taking created the impression that Mirabella and Poplin were under surveillance.

11. On or about February, 11, 1986 and March 25, 1986, Affleck unilaterally imposed new work rules on employees within the petitioned-for bargaining unit, making specific mention of Mirabella. The March 25, 1986 work rules contained a progressive discipline clause that threatens affected employees with punishment up to, and including, termination for failure to observe and follow the rules.

12. On or about February 13, 1986, elected officials of the Town of Granite Falls made public statements regarding the union activities of the town's employees which were threatening to the employees or indicated a futility in their seeking union representation.

13. On March 13, 1986, Affleck notified Mirabella that the Town of Granite Falls had demoted Bruce Caley, a Class I operator, to the position previously held by Mirabella and that Mirabella's employment was to be terminated, effective March 21, 1986. Affleck cited the Washington

State Department of Ecology report requiring the Town of Granite Falls to have a Waste Water Treatment Plant Operator, Classification II in charge of the sewage operation, budgetary constraints, and the demotion of a more senior employee as the reasons for discharging Mirabella. On the record made here, Mirabella was terminated for legitimate business reasons.

14. Between March 21, 1986, and late June, 1986, Mirabella engaged in political activity in an unsuccessful effort to recall Vivian Affleck from office as Mayor of the Town of Granite Falls.

15. In late June, 1986, Affleck discharged Bruce Caley for continuing poor work performance. Thereafter, the Town of Granite Falls twice advertised for the vacancy in the sewer and street maintenance position previously held by Mirabella and Caley. Mirabella applied both times. Affleck refused to rehire Mirabella based upon his political activity in connection with the recall attempt.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter pursuant to Chapter 41.56 RCW.

2. The Town of Granite Falls, Washington has violated RCW 41.56.040 and RCW 41.56.140(1) by engaging in surveillance of employees involved in protected union activities, which interferes with the right of public employees to organize and select a bargaining representative of their own choosing.

3. The Town of Granite Falls, Washington has violated RCW 41.56.040 and RCW 41.56.140(1) by unilaterally implementing changes in working conditions during the pendency of a question concerning representation, which

interfered with employees' statutory rights to organize and select a bargaining representative of their own choosing.

4. The Town of Granite Falls, Washington has violated RCW 41.56.040 and RCW 41.56.140(1) by the public statements of its elected officials that threaten reprisals or force and indicate the futility of its employees engaging in activity protected by the Public Employees Collective Bargaining Act, so as to interfere with the employees statutory right to organize and select a bargaining representative of their own choosing.

5. The Town of Granite Falls did not violate Chapter 41.56 RCW when it terminated Jim Mirabella for legitimate business reasons on March 21, 1986.

6. The Town of Granite Falls did not violate Chapter 41.56 RCW when it refused to rehire Jim Mirabella in June, 1986, because such refusal to rehire was based on political activity of Mirabella outside of the collective bargaining process rather than on activity protected by the Public Employees Collective Bargaining Act.

ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, and pursuant to RCW 41.56.160 of the Public Employees Collective Bargaining Act, it is ordered that the Town of Granite Falls, Washington, its officers, elected officials, and agents, shall immediately:

1. Cease and desist from:

   A. Interfering with employees in the exercise of their statutory right to organize and select a bargaining representative of their won choosing pursuant to Chapter 41.56 RCW.

B. Engaging in surveillance of employees, making unilateral changes of work rules or other conditions of employment of employees engaged in activity protected by Chapter 41.56 RCW.

C. Making threats or other statements to the public which indicate futility of employees engaging in activity protected by Chapter 41.56 RCW.

2. Take the following affirmative actions to remedy the unfair labor practices and effectuate the purposes and policies of Chapter 41.56 RCW:

A. Post, in conspicuous places on the employers premises where notices to all employees are customarily posted, copies of the notice attached hereto and marked "Appendix A". Such notice shall, after being duly signed by an authorized representative of the Town of Granite Falls, Washington, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the Town of Granite Falls to ensure that said notices are not removed, altered, defaced, or covered by other material.

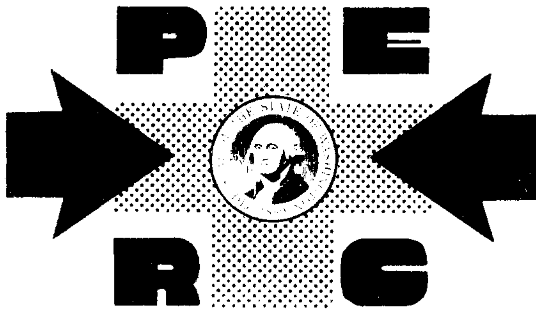
B. Notify the Executive Director of the Public Employment Relations Commission, in writing, within thirty (30) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding .

DATED at Olympia, Washington, this 27th day of May, 1987.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

REX L. LACY, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX A

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF RCW 41.56, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT engage in surveillance of employees who are involved in organizing and selecting a bargaining representative of their own choosing pursuant to RCW 41.56.040.

WE WILL NOT unilaterally implement new work rules or other conditions of employment.

WE WILL NOT issue public statements that interfere with statutory rights of employees engaged in protected union activities pursuant to RCW 41.56.040.

TOWN OF GRANITE FALLS

By:______________________________
Authorized Representative

Dated __________________

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

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. any Questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone (206) 754-3444.