STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1445,	)	
Complainant,	)	CASE NO. 5647-U-87-1034
vs.	)	DECISION 2633 - PECB
CITY OF KELSO,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Webster, Mrak & Blumberg, by Mark E. Brennan, Attorney at Law, appeared for the complainant.

Davis, Wright & Jones, by Larry E. Halvorson, Attorney at Law, appeared for the respondent.

On January 23, 1985, International Association of Fire Fighters, Local 1445, filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the City of Kelso, Washington, had violated RCW 41.56.140(1), (3), and (4). Pursuant to a preliminary ruling issued by the Executive Director on February 22, 1985, Rex L. Lacy of the Commission staff was designated as Examiner to make Findings of Fact, Conclusions of Law, and Order.

Hearing on the matter was originally scheduled for June 12, 1985. The respondent filed a timely answer to the unfair labor practice allegations. The hearing was continued indefinitely while certain contract defenses were before an arbitrator, and while the Examiner was ruling on motions filed by the respondent.

On August 27, 1985, the complainant filed a "proposed amendment" to the original complainant. On September 10, 1985, the respondent filed an

"objection to an unauthorized document." Prior to any action by the Examiner, the complainant filed a second amended complaint on October 11, 1985. The respondent then volunteered an answer to the amended charges, without being directed to do so.

On November 21, 1985, the complainant filed a third amended complaint which named Cowlitz County Fire Protection District No. 2 as a co-respondent.[1]

Hearing on the matter was held on May 13, 14, and 27, 1986 and July 2, 1986, at Kelso, Washington.[2] The hearing on Case No. 5647-U-85-1034 was concluded on July 2, 1986. The parties filed post-hearing briefs, the last of which was received on December 10, 1986.

THE UNFAIR LABOR PRACTICE ALLEGATIONS

The unfair labor practices alleged in the complaint filed on January 23, 1985 are as follows:

> 1. On January 18, 1985, Respondent announced that effective February 1, 1985, it will implement a lay-off of at least two (2) firefighters. Said layoff decision was presented as a fait accompli without any prior notification to the Union or the opportunity to bargain.
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> 2. The announcement was made only three (3) weeks after the Union had won a favorable decision from PERC Examiner Kenneth Latsch in Case No. 5435-U-84-989 requiring the Respondent to bargain concerning the decision to contract out it's fire services and had been successful in seeking an injunction from the Cowlitz

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1 The allegations against the fire district were docketed separately as Case No. 6221-U-86-1185. Thereafter, Case No. 6221-U-86-1185 was set for a consolidated hearing with this matter.

2 During the course of the hearing on May 13, 1986, the parties stipulated that the complaint against Cowlitz County Fire Protection District No. 2 should be separated from the instant matter and scheduled for separate hearing. The Examiner allowed the separation of the complaint involving the fire district.

County Superior Court enjoining Respondent from transferring such services and from discharging the bargaining unit personnel pending the outcome of the PERC proceedings.

3. On January 18, 1985, the Union requested bargaining concerning the layoff decision and effects. The City has neither responded nor bargained.

4. Complainant alleges that the acts of the City set forth above are in retaliation against its firefighters for having pursued their rights under RCW 41.56.140, .470 and .480.

5. Complainant alleges that Respondent's unilateral conduct and its failure and refusal to bargain concerning the decision and effects constitute unfair labor practices.

6. Complainant alleges that such conduct is willful and flagrantly abusive of the act and the rights of the employees and justifies an award of attorney's fees to complainant.

7. Complainant also requests that PERC seek appropriate relief in the Superior Court pursuant to RCW 41.56.480 to enjoin Respondent from further abusive, retaliatory and unilateral conduct.

The August 27, 1985 amended complaint is the same as the original complaint, except for renumbering of sections after a new section 4, as follows:

4. On or about August 6, 1985, the Respondent announced that it had decided to seek annexation with Cowlitz County Fire District No. 2. Said decision was presented as a fait accompli without any prior notification to the Union or opportunity to bargain.

The third amended complaint filed on October 11, 1985 read essentially the same as the August amendment, except for two new sections, as follows:

5. On August 14, 1985, the Union requested bargaining concerning the decision and effects. Since that time, the City has refused to bargain concerning its decision to seek annexation, contending that the matter was not a mandatory subject of bargaining. With

respect to the effects of its decision to seek annexation, the City met with the Union on September 20, 1985, but refused to acknowledge that it had a duty to utilize the procedures set forth in RCW 41.56.440, et seq., concerning the effects. Subsequently, it agreed to discuss the effects, but it has refused to agree to maintain the status quo pending exhaustion of the dispute resolution procedure set forth in RCW 41.56-.440, et seq.

6. On or about October 7, 1985, at a public meeting, the City announced that it intended to implement the annexation as soon as possible after the election of November 5, 1985, if the annexation is approved by the electorates of the City and Fire District without regard to whether it had reached an agreement with the Union or had fulfilled the bargaining procedures set forth in RCW 41.56.440, et seq. The City also acknowledged at the meeting that it would pay substantial sums to the Fire District in excess of the amount raised by levy tax in order to maintain current levels of fire protection services in the City in addition to transferring its fire protection equipment to the Fire District.

Other allegations made in the original complaint or in earlier amendments were merely renumbered to accommodate the new allegations.

BACKGROUND

The City of Kelso, a municipal corporation within the meaning of RCW 41.56.020, is located in Cowlitz County, Washington. It has approximately 11,000 residents. The city is governed by a council-manager form of municipal government. A seven-member city council elected by the voters of the city chooses the mayor from among its members. Richard Woods was the mayor at the time of the hearing. A city manager appointed by the city council is the chief administrative officer of the city. Jay Haggard was hired as city manager in 1983.

Among other municipal services, the city maintains and operates a Public Safety Department providing police and fire suppression services. Tony

Stoutt has been Director of Public Safety since 1983, when the previous Fire Chief retired and formerly separate fire and police departments were consolidated into a single department.

Like other municipalities of its type, the City of Kelso is funded by a combination of property taxes, municipal taxes, and fees. The city's budgetary process is controlled by the Municipal Budgeting Act, Chapter 35.33 RCW. Departments submit budget requests, public hearings are held, a preliminary budget is developed, and the city council adopts the final budget by the end of December of each year for the ensuing year.

International Association of Fire Fighters, Local 1445, has, for many years, represented "uniformed" firefighter employees of the city, excluding only the department head. Larry Hendricksen was President of Local 1445 at the time of the hearing in this matter.

The City of Kelso and Local 1445 have been parties to a series of collective bargaining agreements. The latest contract prior to the filing of this complaint expired on December 31, 1983.

Historically, the fire suppression function has been headquartered in part of the same downtown Kelso building that also houses the city hall and law enforcement function. The building, situated on a busy thoroughfare, is in a state of disrepair that would require extensive renovation to function at its optimum level. The city had three firefighting vehicles, and used four platoons of firefighters working 24-hour rotating shifts to provide fire suppression services. The city did not have an ambulance or "aid" vehicle, and did not have "emergency medical service" capabilities. The city did not have a fire marshal to perform fire inspections.

Cowlitz County Fire Protection District No. 2 (hereinafter referred to as the fire district) is a municipal corporation organized and operated in accordance with Chapter 52.04 RCW. The fire district is governed by a board of commissioners. The fire district provides fire suppression and emergency

medical services for residents of unincorporated areas of Cowlitz County adjacent to the City of Kelso.[3] A small part of the fire district's original boundaries were within the Kelso city limits. Historically, the fire district and the city were parties to an intergovernmental agreement to provide "mutual aid" assistance at large fires and to have the city provide "first response" fire suppression services for the portion of the fire district within the city limits.

After he became Director of Public Safety in 1983, Stoutt hired consultants to evaluate the condition of the city's fire suppression operation. The consultants suggested four alternatives for the city to consider:

1. To retain the fire department and utilize volunteers to improve the operation;

2. To merge the Kelso Fire Department with Cowlitz County Fire Protection District No. 2;[4]

3. To merge the Kelso Fire Department with the fire department operated by the City of Longview; and

4. To cease providing fire protection services and contract with a private firefighting organization to provide fire protection.

The consultant recommended that the city select the second option, although state law in effect at that time precluded an actual merger or annexation between the two governmental units, since the population of the City of Kelso exceeded the 10,000 maximum population specified in the state statute governing annexation of a city to a fire district.

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3 As of 1984, the fire district had 3 full time uniformed employees, including a fire chief, an assistant chief, and a fire marshal. Volunteers were used extensively in its operations. The fire marshall performed inspection functions.

4 Pursuit of this option would have caused a substantial reduction of the city's tax revenues. Fire districts are funded by property tax assessments of $1.00 per $1,000 of assessed valuation on real property within the district's geographical boundaries. A city or town within a fire district is authorized to collect up to $3.60 per $1,000 of assessed valuation on real property, less any regular fire district levy.

Stoutt recommended the that city select the first option, and the city council agreed with Stoutt. Thereafter, "volunteer" firefighters were recruited and trained to provide assistance to the employees in the bargaining unit represented by Local 1445. During one of many subsequent disputes between the city and Local 1445, all of the volunteers resigned.

The city encountered substantial budgetary difficulties in 1983, resulting in reduction of the fire suppression workforce. This led to reduced manning of firefighter platoons and other difficulties, eventually including cancellations by Cowlitz County Fire Protection District No. 2 and the City of Longview of their mutual aid agreements with the City of Kelso.[5]

In October, 1984, the city entered into an intergovernmental agreement with Cowlitz County Fire Protection District No. 2, under which the fire district was to provide fire suppression, fire inspection, and emergency medical services for the city and it's residents. Local 1445 filed unfair labor practice charges with the Public Employment Relations Commission, alleging that the city had unilaterally made a decision to subcontract out bargaining unit work without bargaining the issue. The Examiner's decision found an unfair labor practice violation. The union then obtained an injunction from the Superior Court for Cowlitz County, preventing the city from implementing the intergovernmental agreement. On a petition for review filed by the city, the commission ruled in favor of the union on the subcontracting issue. Cowlitz County, Decision 2120-A (PECB, 1985).[6]

Citing a $40,000 budget overexpenditure during 1984 which was to be carried forward to the following year as a budget reduction for the fire suppression operation, Stoutt notified Local 1445 on January 18, 1985, that the two least senior firefighters, Dean Bolden and Robert Stephenson, would be laid off effective February 1, 1985.

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5 Those difficulties are detailed in the decisions in City of Kelso, Decision 2120, 2120-A (PECB, 1985), and need not be repeated here.

6 The city has appealed the Commission's decision to the Superior Court for Cowlitz County.

Local 1445 immediately requested budget information regarding the layoffs of Bolden and Stephenson. Although theoretically on "layoff" status, Bolden and Stephenson were actually working at least part of the time during the early months of 1985, as replacements for other employees on leave or disability. On May 8, 1985, the union and the city manager held a meeting concerning the layoff dispute.[7] There was no resolution of the dispute at that time.

Chapter 52.04 RCW was amended by the Legislature during its 1985 session, raising the population maximum for annexation to 100,000. This enabled the city to pursue annexation to Cowlitz County Fire Protection District No. 2.

The parties signed a new collective bargaining agreement on July 30, 1985, which was to be effective from January 1, 1984 to December 31, 1986. That contract dealt with the subject of "layoffs" as follows:

> Article 8
> Personnel Reduction
>
> 8.1 In case the Employer decides to reduce Fire Department personnel, the employee with the least seniority shall be laid off first. No new employee shall be hired until all laid off employees have been given an opportunity to return to work.

The contract contained a memorandum of agreement which allowed the parties to pursue litigation then ongoing in a number of separate forums.

On August 6, 1985, one week after the city and the union signed their new collective bargaining agreement, the city announced it's intent to seek annexation to Cowlitz County Fire Protection District No. 2. On the same

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[7] The union and the city had a similar dispute in 1984, regarding an earlier layoff of Bolden and Stephenson. At that time, the union filed a grievance under the terms of the collective bargaining agreement and filed unfair labor practice charges with the Commission. The grievance was resolved by placing Bolden on medical leave. The unfair labor practice case was withdrawn.

date, the Kelso city council passed the necessary ordinance to accomplish an annexation. On August 8, 1985, the fire district's board of commissioners passed the necessary resolution to initiate annexation proceedings between the fire district and the city.

On August 14, 1985, Local 1445 requested that the city bargain the annexation issue with the union. The union sought to negotiate both the decision to annex the city to the fire district and the effects of such a decision. Haggard responded on August 23, 1985, indicating that the city considered the decision to be a non-mandatory subject for collective bargaining, but was willing to meet and negotiate both the decision and the effects of the decision to seek annexation.

On September 2, 1985, the city submitted a proposal to the union, setting forth the city's position regarding severance pay and benefits if the voters approved the annexation. The proposal included provisions pertaining to pay, notice in lieu of pay, payment of accrued vacation pay, consideration of firefighters for employment to other positions within the city for a period of one year, medical benefits, and job training services for terminated employees. The union proposed that the city require the fire district to hire the displaced city employees. After failing to reach agreement, the city offered to engage in mediation and/or interest arbitration to resolve the effects of an annexation prior to submission of the annexation question to the voters, but no mediation request was filed at that time.

Pursuant to Chapter 36.93 RCW, the annexation issue was presented to the Cowlitz County Boundary Review Board for approval. On September 18, 1985, the boundary review board approved the annexation request and the issue was placed on the ballot for the general election held on November 5, 1985. The decision of the boundary review board was not challenged by the union.

The union campaigned vigorously against the annexation issue. The voters approved the annexation of the city with the fire district, however, by a

margin of slightly more than 100 votes. As a result of the annexation, the fire district will receive $1.00 per $1,000 of assessed valuation for property within the City of Kelso starting in 1987, and the city's revenue will be reduced by the same amount beginning in 1987.

On November 6, 1985, Local 1445 requested that the Commission provide a mediator to assist the parties with their dispute.

Stating publicly that the effective date of the transfer of responsibility was discretionary, officials of the city entered into negotiations with Cowlitz County Fire Protection District No. 2 concerning implementing the annexation. Under a contractual arrangement between the city and the fire district, the fire district was to assume responsibility for all fire suppression services within the City of Kelso effective December 1, 1985. The city was to pay the fire district $439,000 for fire-related services during 1986,[8] and was to pay a pro-rata share of that amount for services provided by the fire district in December, 1985. The city was also to contribute 24% of the cost of the fire district's new fire station,[9] and was to permit the fire district use of fire equipment owned by the City of Kelso.

On November 14, 1985, the city notified the union that the city's fire-fighters would be laid off effective December 1, 1985.

The results of the November 5, 1985 election, including the success of the annexation proposition, were certified on November 18, 1985.

On December 1, 1985, all of the members of the bargaining unit represented by Local 1445 were laid off by the City of Kelso and Cowlitz County Fire Protection District No. 2 commenced providing services within the City of

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8 This amount is greater than the city's fire department budget for 1985.

9 That facility is located within the city limits of Kelso, approximately three city blocks from the city hall.

Kelso. The fire district did not hire any of the former city employees displaced by the annexation.[10]

A mediator from the Commission's staff met with the parties beginning on December 6, 1985. During the mediation sessions, the union offered to make major concessions on contract provisions where the city had sought changes while the parties were negotiating their 1984-1986 agreement. The city did not accept the union's concession proposals. Thereafter, the mediator declared the parties to be at an impasse.

On February 7, 1986, the Executive Director of the Commission certified two issues for interest arbitration pursuant to RCW 41.56.430, et seq.[11] On February 13, 1986, the union designated its partisan arbitrator for the interest arbitration panel. The city has refused to participate in the interest arbitration process, which has been held in abeyance pending this decision.

POSITIONS OF THE PARTIES

The union contends that the City of Kelso has violated RCW 41.56.140(1), (3), and (4), by laying off two firefighters effective February 1, 1985 without notice to the union or affording the union the opportunity to bargain the issue, and by unilaterally acting, without bargaining, concern-

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10 Chapter 52.04 RCW was amended again in 1986 to require an employer taking over fire-related services by merger or annexation to hire, within legislatively established guidelines, the firefighters of the predecessor entity. The two separate legislative actions created a "notch year" wherein the fire district was not legally obligated to employ the annexed municipality's employees.

11 The issues certified for interest arbitration in Case No. 6218-I-86-140 were "effects" issues limited to:
(1) Interim employment and/or severance pay for fire fighters displaced by annexation.
(2) Recall rights for fire fighters displaced by the annexation should the City of Kelso reinstate its fire department in the future.

ing the decision and the effects of the decision to seek annexation and contract with Cowlitz County Fire Protection District No. 2 for fire suppression services previously performed by members of the bargaining unit represented by the union. Further, the union contends that the city's actions with regard to the layoffs and annexation were in retaliation against the union's members for engaging in protected union activities pursuant to RCW 41.56.140, .470, and .480.

The city contends that the layoff of two firefighters early in 1985 was for legitimate budgetary reasons, that the layoffs were made in accordance with provisions of the collective bargaining agreement between the parties and well established past practice, that the union has waived any right to bargain the layoff issue, and that the dispute regarding the layoffs should have been deferred to grievance arbitration under the terms of the collective bargaining agreement. The city argues that the decision to annex is not a mandatory subject of collective bargaining, and that the city was not obligated to maintain the status quo pending interest arbitration. Based on its claim that annexation is not a proper subject for bargaining, the city contends that even the effects of its decision are outside the scope of mandatory collective bargaining. Finally, the city contends, in the alternative, that the union has waived its right to bargain the annexation issue and/or that the city has met its statutory obligation to bargain both the decision and/or effects of the annexation.

DISCUSSION

The Public Employees Collective Bargaining Act, Chapter 41.56 RCW, sets forth the rights and obligations of these parties:

> **RCW 41.56.030(4) DEFINITIONS.**
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> . . .
>
> (4) "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and

> to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.
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> * * *
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> **RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED.** It shall be an unfair labor practice for a public employer:
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> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter.
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> . . .
>
> (3) To discriminate against a public employee who has filed an unfair labor practice.
>
> (4) To refuse to engage in collective bargaining.

The National Labor Relations Act, as amended, contains similar provisions establishing the collective bargaining obligations of employers and the exclusive bargaining representatives of employees in the private sector:

> Section 8
>
> (a) It shall be an unfair labor practice for an employer -
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> . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
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> * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

The Public Employment Relations Commission and the National Labor Relations Board have interpreted their respective statutes in a generally similar manner. The precedents controlling the decision in this case are well established under both state and federal law.

Collective bargaining imposes an obligation upon an employer to refrain from making any changes in any wages, hours or working conditions of its organized employees, without first giving notice to the exclusive bargaining representative of the employees and providing that organization with the opportunity to bargain the subject. See, City of Bremerton, Decision 2733-A (PECB, 1987), where the Commission recently affirmed an Examiner's finding of an unfair labor practice violation (and an extraordinary remedy) in a case of this type. An example of precedent under the National Labor Relations Act is May Department Stores Co. v. NLRB, 326 U.S. 376 (1945).

The collective bargaining statutes not only protect employees from the direct economic effects of unilateral employer actions, but also forbid by-passing of the employees' exclusive bargaining representative. Leeds and Northrup Co. v. NLRB, 391 F.2d 874, 877 (1968). Because unilateral actions undermine the stability of industrial relations, the collective bargaining statutes prohibit them regardless of the subjective intent of the employer. NLRB v. Katz, 369 U.S. 736 (1964); Florida Steel Corp. v. NLRB, 601 F.2d 125 (4th Circuit, 1979). The Supreme Court stated in Katz, supra, that:

> The duty "to bargain collectively" enjoined by Section 8(a)(5) is defined by Section 8(d) as the duty to "meet ... and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact -- "to meet ... and confer" -- about any of the mandatory subjects. A refusal to negotiate in fact as to any subject which is within Section 8(d), and about which the union seeks to negotiate, violates Section 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargaining to that end.

> We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of Section 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal.

The essence of the violation is the change in the status quo without notice to or bargaining with the union. Rochester Institute of Technology, 264 NLRB 1020 (1982). Notice must be given sufficiently in advance as to afford the union an opportunity to present counter-arguments or proposals. NLRB v. Katz, supra, at 743; Gresham Transfer, 272 NLRB 484 (1984); NLRB v. Citizen Hotel Company, 326 F.2d 501 (5th Circuit, 1964); NLRB v. W. R. Grace and Co. Construction Products Div., 571 F.2d 279, 282 (5th Circuit, 1978); Sun-Maid Growers of California v. NLRB, 104 LRRM 2543 (9th Circuit, 1980). See City of Vancouver, Decision 808 (PECB, 1980), where similar conclusions were reached under Chapter 41.56 RCW.

Presenting the union with a fait accompli is not sufficient, for notice is of value only if given before the action is taken by the employer. City of Centralia, Decision 1534-A (PECB, 1983). See, also, Rose Arbor Manor, 242 NLRB 795 (1979); Winn Dixie Stores, Inc., 243 NLRB 972 (1979). Thus, in assessing whether an employer's unilateral action is violative of the duty to bargain, a predominant factor is "whether in the light of all the circumstances there existed reasonable opportunity for the union to have bargained on the question before unilateral action was taken by the employer." NLRB v. Cone Mills., 373 F.2d 595, 599 (4th Circuit, 1967).

The prohibition against unilateral changes applies only to mandatory subjects of bargaining, and unilateral changes are not violative of the Act if the changes involve permissive, non-mandatory subjects of bargaining. Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass, 404 U.S. 157 (1971). The Commission, the NLRB and the courts have found matters to be mandatory subjects of bargaining if they set a term or condition of employment or regulate the relationship between employer and employee. International Union of Operating Engineers, Local

12, 187 NLRB 430, 432 (1970); Federal Way School District, Decision 232 (EDUC, 1977). If the actions concern a managerial decision of the sort that is at the core of entrepreneurial control, or decisions involving fundamental changes in the scope, nature or direction of the enterprise, rather than labor cost, then there is no duty to bargain. First National Maintenance Corp., 452 U.S. 666 (1981); Otis Elevator Company, 269 NLRB 162 (1984). City of Yakima, Decision 2380 (PECB, 1986).

"Layoffs" and situations where bargaining unit work is to be transferred to employees outside of the bargaining unit are among the types of issues where there is a duty to give notice and bargain. Federal Way School District, supra; South Kitsap School District, Decision 472 (PECB, 1978); City of Kennewick, Decision 487-A (PECB, 1979); City of Mercer Island, Decision 1026-A (PECB, 1981); City of Centralia, Decision 1534-A (PECB, 1982); and City of Kelso, Decision 2120 (PECB, 1985).[12]

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12 The question of whether the decision to contract out bargaining unit work is a mandatory subject of bargaining under the NLRA has undergone nearly as many changes as the weather. Prior to 1945, the NLRB arguably took the position that an employer had no duty to bargain before deciding to subcontract operations. In Mahoning Mining Co., 61 NLRB 792 (1945), the NLRB stated that it had never held that an employer could sell or contract out a part of its total operation without bargaining. Thereafter, the NLRB required employers to bargain the "effects" of subcontracting decisions, but as late as 1961 considered the decision to contract out bargaining unit work to be a non-mandatory subject of bargaining. Fibreboard Paper Products Corp., 130 NLRB 1558 (1961). In Town and Country Mfg. Co., 136 NLRB 1022 (1962), the NLRB held that an employer violated Section 8(a)(5) if it refused to bargain the decision to subcontract bargaining unit work. Relying on Town and Country and the decision in Telegraphers v. Chicago & Northwestern R.R., 362 U.S. 330 (1960), the NLRB reconsidered and reversed its original decision in Fibreboard, concluding that an employer's failure to bargain its decision to subcontract work previously performed by bargaining unit employees violated Section 8(a)(5). 138 NLRB 550 (1962), enf. 322 F.2d 411 (D.C. Circuit, 1963), aff. 379 U.S. 203 (1964). The NLRB provided a comprehensive interpretation of Fibreboard in Westinghouse Electric Corp., 153 NLRB 143 (1965). Contracting out is a mandatory subject of bargaining if employees lose overtime, are laid off, or are transferred to lower paying jobs. Weston & Brooks Co., 154 NLRB 747 (1965), enf. 373 F.2d 741 (4th Circuit, 1967).

When bargaining is requested, it must be conducted in good faith, which presupposes negotiations between the parties with attendant give and take and an intention of reaching agreement through compromise. This requires more than merely going through the motions of bargaining, or taking a pro forma approach to bargaining. Winn Dixie Stores, Inc., supra.

The January, 1985 Layoffs

There was no collective bargaining agreement in effect between the city and the union in January, 1985, when the city announced that two bargaining unit employees were to be laid off. The employer's arguments concerning "waiver by contract" and "deferral to arbitration" are thus entirely without merit. City of Bremerton, supra.

The presentation of the matter as a fait accompli is demonstrated by a letter directed by counsel for the employer to counsel for the union under date of January 24, 1985, as follows:

> ... As you know from our discussion on January 23, the City has decided to no longer schedule two fire fighters .... Due to cost overruns in 1984 and 1985 budgetary limitations, it is necessary for the City to further reduce its fire department operating costs. As a result, two-man crews will be scheduled effective February 1, 1985, instead of the three-man crews that had previously been scheduled part of the time.
>
> Although it is our opinion that our client has no duty to bargain with the union regarding this matter ... the City is willing to discuss this matter with the Union. [emphasis supplied]

Thus, a change driven primarily, if not exclusively, by considerations of labor cost was a foregone conclusion before the union ever had a chance to present its views on the matter. At a later point in time, this union was quite willing to offer substantial concessions to save the jobs of its members. We cannot know what concessions the union might have offered in January, 1985 to save the jobs of two of its members, since the employer did

not give it the opportunity required by law. Under RCW 41.56.470 and City of Seattle, Decision 1667-A (PECB, 1984), the city was obligated to maintain the status quo or proceed to interest arbitration in the absence of agreement on a mandatory subject of bargaining, and so was not in a position to unilaterally implement a change. The Examiner concludes that the City of Kelso violated RCW 41.56.140(4) and (1) by unilaterally laying off employees Bolden and Stephenson effective February 1, 1985.

The Annexation Decision

Viewed at its beginning and at its end, the events at issue in this case appear to be a instant replay of the events which gave rise to the previous unfair labor practice litigation between these parties. The City of Kelso has ceased to provide fire suppression services, and Cowlitz County Fire Protection District No. 2 has ended up providing fire suppression and related services in the area formerly served by employees represented by Local 1445. The union contends, now as then, that the employer has violated RCW 41.56.140, by refusing to bargain the decision to transfer the bargaining unit work. The employer contends, now as then, that it has "gone out of the business." Two significant ingredients of this cauldron of discontent have changed, however. The revisions of Chapter 52.04 RCW made by the Legislature in 1985 have enabled the city to approach the situation in a different manner than was available to it in 1984, and the voters have approved an annexation of the City of Kelso to Cowlitz County Fire Protection District No. 2.

The City of Kelso asserted that it had "gone out of the business" of providing fire suppression services in 1984, but the Commission concluded that the city had an ongoing role in the collection of taxes and maintenance of a contractual relationship with the fire district for the provision of services within the city. The subcontracting decision was a mandatory subject of bargaining, the city therefore had an obligation to bargain, and the Commission, citing several statutory violations, ordered the city to bargain the decision to contract out the unit work. The city's effort to

contract with the fire district fell afoul of its duties under Chapter 41.56 RCW because the city had not taken the time to give notice to the union and bargain in good faith upon request of the union, as required by the statute. The Commission thus ruled against the city on the manner in which the city attempted to accomplish its goal of improvement and economy in fire-related services, rather than on the desirability of its doing so.

The field of battle then shifted to the halls of the Legislature, where the population maximum for annexation was increased in 1985. The union sought an amendment requiring the surviving employer to absorb the workforce of the annexed employer, but that amendment was not adopted at that time.

Just as a school district is entitled to determine its curriculum, Federal Way School District, supra, a municipality is entitled to make "entrepreneurial" decisions about the types and amounts of facilities or services provided to its citizens. After the 1985 amendment to Chapter 52.04 RCW, the city was no longer precluded from pursuing annexation with the fire district, and it could truly cease to be a provider of fire suppression services. The annexation certainly changed the city's bargaining obligations. Even if, as alleged by the union, the city may have intentionally caused some or all of the deterioration of the fire department, the city's annexation decision was outside of mandatory collective bargaining.

The fire district agreed to the proposed annexation. The Cowlitz County Boundary Review Board held public hearings on the matter and approved it. The union did not petition for judicial review or otherwise challenge the decision of the Boundary Review Board, apparently preferring to take the issue to the public in the November 5, 1985 election.

Approval of the annexation by the statutorily specified democratic process was not without its costs to the voters of Kelso. Their control over the determination of the services to be provided, the size and deployment of the fire service work force and the manner in which fire services were to be provided would be diluted by the transfer of control to the much larger

electorate of the fire district. Nevertheless, the voters of Kelso ignored the pleas of Local 1445. When asked if they wanted their city to be a provider of fire suppression services, the voters of Kelso said "NO." The city truly "went out of the business" effective with the statutory effective date of the annexation. No unfair labor practice violation can be found regarding the decision to annex.

Bargaining of Annexation Effects

In City of Kelso, Decision 2120-A, supra, the Commission ordered the employer to reinstate the status quo ante, and to give notice and bargain concerning any future subcontracting decision, thereby making it unnecessary for the Commission to belabor the "effects" of the subcontracting. The decision on annexation was an accomplished fact after November 5, 1985, and could not be reversed under the terms of the statute for a period of three years.[13] The approval of the annexation decision does not, however, obliterate the city's obligation to bargain the effects of that decision on its employees.

The Effective Date of the Transfer

The first issue to be decided was the effective date of the transfer of function. The city's officials understood the statute to be ambiguous on the subject. RCW 52.04.071 says only:

> ... If a majority of the persons voting on the proposition in the city or town and a majority of the persons voting on the proposition in the fire protection district vote in favor thereof, the city or town shall

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13 **RCW 52.04.101 Withdrawal by annexed town or city—Election.** The legislative body of such a city or town which has annexed to such a fire protection district, may, by resolution, present the voters of such city or town a proposition to withdraw from said fire protection district at any general election held at least three years following the annexation to the fire district. If the voters approve such a proposition to withdraw from said fire protection district, the city or town shall have a vested right in the capital assets of the district proportionate to the taxes levied within the corporate boundaries of the city or town and utilized by the fire district to acquire such assets.

> be annexed and shall be a part of the fire protection district.

The results of the election were certified on November 18, 1985 but, due to a lag between levy and collection, the fire district could not collect taxes directly from property owners in Kelso until 1987. Both the mayor and the city manager publicly acknowledged that the city could have waited until as late as December 31, 1986 to effectuate the transfer of fire suppression services to the fire district. Anxious to be rid of its fire department, however, the city unilaterally chose to implement the transfer on December 1, 1985.

The city entered into a contractual relationship with the fire district, calling for a payment of funds by the city to the fire district in exchange for fire suppression services for one month of 1985 and all of 1986. The provisions of that contractual relationship relating to payment towards the fire district's new building and relating to the fire district having use of city-owned fire equipment present little difficulty, since decisions on construction projects and capital purchases are among those normally reserved to employers outside of the scope of mandatory collective bargaining. The decision to accelerate the transfer of the fire service function to the fire district presents quite different problems.

The collective bargaining agreement signed by the city and union in July, 1985 remained in effect until December 31, 1986. That agreement reserved to the city the right to determine a need for layoffs, and the city would clearly have been entitled to exercise that contractual right on the date when it was obligated to implement the annexation. The contract did not secure the city a right to contract out bargaining unit work during the terms of the contract. The city's arguments based on the annexation decision gloss over the contractual relationship which existed between the city and the fire district for a 13-month period prior to the date on which the statutes permitted the fire district to begin collecting taxes in Kelso. The total amount of money involved was substantial, exceeding the budget for the Kelso fire service operation for 1985. Some part of the approximately

$475,000 sum[14] was for providing fire inspection and emergency medical services which were not among the bargaining unit work for which the union had bargaining rights, but even with those "improved" services excluded from consideration, a substantial sum was transferred by the city to the fire district. The city's payment for operating expenses during 1985 and 1986 is thus found to be a variant of the contractual relationship overturned in City of Kelso, Decision 2120-A, supra.

The city had a duty to bargain with respect to its discretionary decision affecting the jobs of its employees for more than a year. Simply stated, the city did not learn from its previous mistakes. Even before the results of the election were certified, it unilaterally contracted out bargaining unit work for the remaining 13 months before the fire district was to take over by annexation, without notification to the union or affording the union an opportunity to bargain the issue. It then unilaterally notified the union that all of its firefighters would be laid off effective December 1, 1985. For all of the same reasons detailed in City of Kelso, Decision 2120, 2120-A, supra, the city has committed unfair labor practices in violation of RCW 41.56.140(4) and (1) with respect to its discretionary contracting out of unit work in anticipation of the annexation.

The Proposal to Require Transfer of Employees

On August 13, 1985, the union demanded that the city bargain the annexation issue. The city, although it took a legal posture that it had no duty to bargain the annexation decision, agreed on August 23, 1985, to bargain the effects of the decision to annex with the fire district. The parties held several meetings but were unable to reach agreement. One of the sticking points in those negotiations was the union's request that the city insist that the fire district employ all the city fire fighters who were to be

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14 Both Haggard and Baxter testified that they orally agreed upon the amount to be paid by the city to the fire district for fire services for the December 1, 1985 to December 31, 1986 period. The Examiner notes that the annual amount agreed upon is similar to the sum negotiated for services in the written intergovernmental agreement signed in 1984.

displaced by the annexation. The city refused to deal with the issue beyond a seemingly gratuitous "recommendation" to the fire district that it should consider the displaced city employees for employment. Having failed to reach agreement, the city suggested that the parties proceed to mediation. The record clearly establishes that the union did not request the services of a mediator until November 6, 1985, the day following the approval of the annexation by the electorate. Commencing on December 6, 1985, the parties met on several occasions with the assistance of a mediator. The parties still did not reach agreement on the issues arising out of the annexation decision, even though the union offered to significantly increase the work week of bargaining unit employees and to make other major concessions to halt the annexation process.

Confining this inquiry to the city's duty to bargain concerning "effects" of the annexation,[15] it is now clear from the record made in this proceeding, and specifically from the admissions of top management officials of the city, that there was a discretionary decision to be made (and thus room for bargaining) about the job security issue. Under City of Seattle, Decision 1667-A, supra, the city was not in a position to unilaterally subcontract the unit work to the fire district during the transition year, and so had a practical need to deal with the union's demand for job security protection for existing employees. The city has not satisfied its bargaining obligations towards the union by asserting its lack of control over the fire district. Contrary to its position at the bargaining table, the transfer of existing employees could have been made a part of the same negotiations between the city and the fire district which yielded the reimbursement rate

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15 The course towards annexation was set and the fire district, as a separate employer, had whatever discretion is normally reserved to employers when it came time to hire new employees to take on substantially expanded fire suppression responsibilities. At one time, the union sought to make the fire district a co-respondent in this proceeding. Later, the union stipulated to the separation of the proceedings. Yet later, the union and the fire district settled their differences and the unfair labor practice charges in Case No. 6221-U-86-1185 were withdrawn. The fire district is not before the Examiner in this proceeding.

and the commitments concerning the fire station and equipment. If the fire district refused to accede to transfer rights satisfactory to the union, the city could have presented the dispute to an interest arbitrator under RCW 41.56.450, or could have waited out the remaining time until the annexation became non-discretionary. The city was too anxious to be rid of its fire suppression function and has failed to bargain in good faith on the matter, thereby unlawfully contributing to the impasse in bargaining.

Waiver

Under City of Kennewick, Decision 482-B (PECB, 1979), waiver is the intentional relinquishment of a known right. A finding of waiver thus depends upon analysis of the facts and circumstances surrounding the conduct of the parties, or of the making and administration of a collective bargaining agreement, to determine whether there has been a clear relinquishment of the bargaining rights conferred by the statute. American Oil Co. v. NLRB, 602 F.2d 184 (8th Circuit, 1979).

Waivers must normally be "express," City of Kennewick, supra, Communications Workers of America, Local 1051 v. NLRB, 644 F.2d 923, 928 (1st Circuit, 1981), and must be clear and unmistakable, General Electric Co. v. NLRB, 414 F.2d 918, 923-924 (4th Circuit, 1969), cert. den. 396 U.S. 1005 (1970). In other words, it must be shown that the right to bargain was consciously waived. Tocco Division of Park-Ohco Industries, Inc. v. NLRB, 702 F.2d 624-628 (6th Circuit, 1983).

Waivers may be found due to union inaction after receiving notice of an occasion for bargaining. A union cannot be content with merely protesting the action or filing an unfair labor practice complaint. City of Yakima, Decision 1124-A (PECB, 1981); Citizens National Bank of Willmar, 245 NLRB 389 (1979). To establish a waiver by inaction, however, it must be shown that the union had clear notice of the employer's intent to institute the change sufficiently in advance of implementation as to afford a reasonable opportunity to bargain regarding the proposed change, and that the union

failed to timely request bargaining. American Distributing Co v. NLRB, 715 F.2d 446 (9th Circuit, 1983).

As noted above by reference to City of Bremerton, supra, the arguments made in relation to the January, 1985 layoff of firefighters Bolden and Stephenson are completely unfounded. There were no contract waivers in effect. The union requested bargaining immediately after learning of the proposed layoffs. Thereafter, Local 1445 filed this unfair labor practice case, and at the same time, filed a grievance under the expired collective bargaining agreement. Nothing in the record indicates that the union knowingly or willingly waived any of its rights to pursue the layoff issue.

With respect to the bargaining of annexation effects, it is clear that the union responded in a timely manner to the city's announcement. There was some bargaining before the annexation was approved by the voters. The breakdown of bargaining which is of concern here relates to the "effects" of the non-mandatory annexation decision. Under Federal Way School District, supra, the city is not entitled to benefit from an impasse traceable to its own unlawful conduct.

The Discrimination Allegations

A public employer reserves discretion over its budget. Federal Way School District, supra. Similarly, the several decisions of the Commission finding "minimum manning" to be outside the scope of mandatory collective bargaining are based on the discretion reserved to public employers to set the level of services to be provided to their citizens. City of Wenatchee, Decision 780 (PECB, 1980); City of Yakima, Decision 1130 (PECB, 1981); Pierce County, Decision 1710 (PECB,1983); City of Richland, Decision 2448-B (PECB, 1987). Organization for the purposes of collective bargaining does not make a union or employees immune from the practical economic realities of their environment, and a city's effort to obtain improved services (here, fire inspection and emergency medical services) and to reduce the cost of providing existing services (here, fire suppression services) cannot be

categorically faulted as "discrimination" against existing employees. On the other hand, a management decision made by an employer to avoid a union or union activity among its employees (e.g., a "runaway shop") is unlawful. NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2nd Circuit, 1961). The question here is whether any or all of the city's actions were motivated by an anti-union animus. If the union makes a prima facie showing of anti-union animus, the burden shifts to the employer to prove that the actions were taken for non-discriminatory business reasons. Clallam County, Decisions 1405, 1405-A (PECB, 1982), aff. 43 Wn.App 589 (Division II, 1986), pet. rev. denied 106 Wn.2d 1013 (1986).

The union contends that, in every instance where the union has successfully challenged the city, the results of victory under the contract and the statutes were severe cuts in the fire department budget. Specifically, the union argues here that the layoffs of Bolden and Stephenson, as well as the decisions concerning annexation, were made by the city in retaliation for the union having litigated unfair labor practice charges before the Commission on the 1984 attempt to contract-out bargaining unit work, and for the union having obtained an injunction from the Superior Court for Cowlitz County to prevent the city from implementing its contract with the fire district. The union points out that the $40,000 budget shortfall blamed for the layoffs approximates the city's cost of litigating the unfair labor practice and court actions. Further, the union points out that the amounts paid by the city to the fire district for services during the transition period were in excess of the city's own budget for fire suppression. Local 1445 concludes it's assertions by alleging that the city has retaliated against the union any time the union pursued its rights.

The employer denies that it has retaliated against the union for litigating any issues, and argues that the annexation and resulting layoffs were due to declining revenues.

This record, like that of the previous unfair labor practice litigation between these parties, is replete with evidence establishing that these

parties have recently had a difficult bargaining relationship. Their relationship since the early 1980's resembles a bitter crusade, with many small battles along the way. A number of the exhibits in this matter are newspaper accounts of public statements and counter-statements made by representatives or the parties on a variety of disputes. The uncontroverted testimony of a news reporter provides evidence of anti-union statements by city officials. Against that background, it is not difficult to infer that the city may have acted out of anti-union animus, and so have discriminated against the employees represented by the union for pursuing their statutory rights. The burden must be shifted to the employer.

To be remedied here, any discrimination must have occurred within the six months immediately preceding the filing of this case.[16] Most of the published accounts which are in evidence concern events which occurred in the time frame of the 1984 unfair labor practice litigation before the Commission, and the previous decisions have remedied those violations. This decision will deal only with the layoffs of Bolden and Stephenson early in 1985, and with the city's acceleration of the annexation late in 1985.

Over the years, Kelso's firefighters had been successful in winning an extremely short work week (42 hours per week) as compared to other fire fighters (some of which, according to the Examiner's experience, work as many as 56 hours per week). They had made themselves expensive. The city sought alternatives and improved services, neither of which was in any way unlawful.

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16 **RCW 41.56.160 Commission to prevent unfair labor practices and issue remedial orders.** The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: Provided, That a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established. [Emphasis added]

The city incurred astronomical legal expenses in a losing battle to defend its 1984 intergovernmental agreement with the fire district. It was not obligated to absorb its losses "across-the-board" or by any other set formula, and had discretion to charge the costs to the fire service budget. The Public Employment Relations Commission does not have the authority to determine how a public employer prioritizes its budgetary expenditures. Those matters are at the heart of managerial determinations covered by the Municipal Budgeting Act. Therefore, taking into consideration the entire record in this matter, the Examiner concludes that the employer's move to lay off Bolden and Stephenson was motivated by the 1985 budget reductions enacted by the employer, and was not a "discrimination" unfair labor practice. Nor was the identification of Bolden and Stephenson for layoff pretextual. Once the decision to reduce the size of the fire service budget had been made, selection of the two least senior employees was consistent with past practice and the expired collective bargaining agreement. This record does not establish that the union activities of the employees were a deciding factor in the decision to reduce the fire department budget or in the selection of the employees for layoff.[17]

The opposite conclusion is reached concerning the acceleration of the annexation. Rather than saving money, the evidence establishes that the city undertook to pay the fire district an amount greater than the city's fire service budget for the services to be provided during the 13-month transition period. The Examiner concludes that a "discrimination" violation must be found, adding an independent violation of RCW 41.56.140(1) to the "refusal to bargain" unfair labor practices committed by the city when it moved quickly to be rid of its firefighter employees.

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17 This conclusion is not inconsistent with the conclusion, reached above, that the employer committed a "refusal to bargain" violation with respect to the same layoffs. Assuming a non-discriminatory management decision to cut the fire service budget, the employer still had a duty to give notice to the union and provide an opportunity for bargaining in the absence of a contract giving the employer the right to lay off. The union could have proposed alternatives or concessions which might have accommodated the budget cut without a layoff of employees.

REMEDY

Remedial orders in unfair labor practice cases are designed to enforce the public policy of the collective bargaining statute, and generally to restore those injured to the situation they would have enjoyed had no unfair labor practice been committed. RCW 41.56.160 states, in pertinent part:

> The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders. . .

It has long been held under the provisions of the National Labor Relations Act that the remedial power conferred by the collective bargaining law does not go so far as to confer punitive jurisdiction, even though the agency may be of the opinion that the policies of the Act might be effectuated by such an order. Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

In this type of case, the "normal" remedies drawn from precedent would include:

1) An order for the employer to reinstate the employees terminated as a result of the refusal to bargain concerning layoffs, the refusal to bargain concerning the acceleration of the annexation, and the discrimination against bargaining unit employees;

2) An order to make affected employees whole for any loss of wages and benefits resulting form the employer's actions;

3) An order for the employer to restore the status quo to that which existed at the time of the employer's misconduct;

4) An order requiring the employer to cease and desist from its violations of the statute and post notice to the affected employees; and

5) An order for the employer to bargain in good faith concerning the disputed issues.

This situation calls for some modification of the norm, for the reasons previously discussed.

The transition period has now passed; the annexation has taken effect; and the City of Kelso is no longer in the fire service business. Accordingly, the city will not be ordered to re-create its fire department or to reinstate employees to their former positions.

In response to the refusal to bargain violation found concerning their layoffs, the City of Kelso will be ordered to make Dean Bolden and Robert Stephenson whole for all wages and benefits lost during the period from the effective date of the layoff announced on January 18, 1985 through December 31, 1986, with the usual offsets and interest computed as specified in WAC 391-45-410.

In response to the refusal to bargain violation concerning the decision to accelerate the effective date of the annexation and the discrimination violation, the City of Kelso will be ordered to make all of its firefighter employees whole for all wages and benefits lost during the period commencing on December 1, 1985 and ending on December 31, 1986, with the usual offsets and interest as specified in WAC 391-45-410.[18] Remedies are not ordered for the period after January 1, 1987 on a "runaway shop" theory,[19] since the discrimination found relates only to the acceleration of the transfer of functions to the fire district and the city's fire service operations would have lawfully terminated on December 31, 1986.

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18 The Examiner is aware that the make-whole remedies ordered herein will have the effect of extending the employment of these individuals beyond the effective date of the 1986 amendment to Chapter 52.04 RCW, and that rights may be asserted under that statute. Nothing herein is intended to diminish any rights of former City of Kelso employees to employment with the fire district. At the same time, the Examiner notes, again, that the fire district is not a party to this proceeding. The Examiner will not attempt to rule upon the issue, leaving it for an appropriate forum with all parties participating.

19 See, Darlington Mfg. Co. v. NLRB, 380 U.S. 263 (1965) and (on remand) 165 NLRB 1074 (1967).

The traditional "cease and desist" and "bargaining" orders are similarly limited. It would serve no purpose to require the parties to bargain about disputed issues for the future, because Local 1445 does not represent the employees of Cowlitz County Fire Protection District No. 2 and the collective bargaining relationship between the City of Kelso and Local 1445 was terminated, except as to "effects" and termination conditions, when the employer went out of business on December 31, 1986. The list of issues certified for interest arbitration may well be incomplete in light of this decision, and the union will not be limited to pursuit of those issues.

Extraordinary remedies have been issued under collective bargaining laws when deemed necessary to prevent recurrences of unlawful conduct. For example, the National Labor Relations Board (NLRB) has ordered the "disestablishment" of would-be unions which have been shown to be management-dominated, as in Carpenter Steel Co., 76 NLRB 670 (1947); and both the NLRB and the Public Employment Relations Commission have awarded attorney's fees to the prevailing party in the face of frivolous defenses, as in Lewis County, Decision 644 (PECB, 1979), aff. 31 Wn.App 853 (Division II, 1982). This decision marks the culmination of a long and bitter saga which suggests a need for extraordinary remedies. The "unilateral change" violations found here are essentially the same as those found in City of Kelso, Decision 2120, 2120-A (PECB, 1985). The employer should have known that it was obligated to bargain with the union on mandatory subjects such as layoffs of employees in the absence of a contract. The employer certainly should have known later in 1985 that it was obligated to bargain with the union concerning the discretionary transfer of all bargaining unit work to another employer. Because of the repetitiveness of these violations, the defenses asserted herein are found to be frivolous and the City of Kelso will be ordered to pay reasonable attorney's fees to the union's counsel.[20]

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[20] Apart from unfair labor practice remedies, the Commission has authority to regulate practice before it. WAC 391-08-010; 391-08-020. No person or organization is above the law, whether they be Richard Nixon, Oliver North or the City of Kelso. Having already been found guilty of bad faith by the Commission on similar facts, there is little which this Examiner can or need add to the

FINDINGS OF FACT

1. The City of Kelso is a municipality of the state of Washington, located in Cowlitz County, and is a "public employer" within the meaning of RCW 41.56.030(1) and RCW 41.56.020. The city is governed by a council-manager form of city government. The general management of the city is under the control of a city manager appointed by the city council.

2. International Association of Firefighters, Local 1445, is a "bargaining representative" within the meaning of RCW 41.56.030(3). The union was recognized as the exclusive bargaining representative of an appropriate bargaining unit of fire suppression personnel of the City of Kelso described in the collective bargaining agreement between the parties as follows:

> The Employer recognizes the Union as the exclusive collective bargaining representative for the purpose of establishing wages, hours and other conditions of employment for all employees of the Fire Department excluding the Chief of the Fire Department.

3. Cowlitz County Fire Protection District No. 2 is a municipality of the state of Washington organized under the terms of Title 52 RCW to provide fire protection services for certain portions of Cowlitz County.

4. The City of Kelso and International Association of Firefighters, Local 1445, have been parties to a series of collective bargaining agree-

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condemnation of the City of Kelso and its officials. A recitation of the facts of this case speaks for itself. Disbarment of an individual from practice before the Commission is beyond the authority of this Examiner to order, but it would not be beyond the authority of the Commission to call upon officials and counsel of an organization found guilty of repetitive unfair labor practices to individually give account of their past actions and their fitness to participate in the collective bargaining process in the future.

ments, the latest of which was signed on July 30, 1985 and was effective from January 1, 1984 to December 31, 1986.

5. During the latter part of 1983, and continuing at all times pertinent in 1984 and up to July 30, 1985, the parties were engaged in collective bargaining negotiations to replace a collective bargaining agreement which expired on December 31, 1983.

6. Between 1982 and 1984, the city and the union had several disputes, as a result of which the City of Kelso undertook to contract out its fire suppression operation to Cowlitz County Fire District No. 2. Local 1445 filed unfair labor practice charges, culminating in City of Kelso, Decision 2120-A (PECB, 1985). Local 1445 also filed a civil action, culminating in an injunction issued by the Superior Court for Cowlitz County which prevented the city from contracting out its fire suppression function.

7. The city reduced its fire suppression budget by $40,000 for 1985. On January 18, 1985, the city announced, as a fait accompli, that two firefighters, Bolden and Stephenson, were laid off effective January 1, 1985 as a result of the budget reduction. Local 1445 responded to the layoffs by demanding bargaining, by timely filing this unfair labor practice case, and by filing a grievance under the terms of the expired collective bargaining agreement. The City of Kelso implemented the layoffs of Bolden and Stephenson without bargaining in good faith to agreement or processing a dispute to arbitration pursuant to RCW 41.56.430, et seq.

8. When they entered into a new collective bargaining agreement on July 30, 1985, covering the period through December 31, 1986, Local 1445 and the City of Kelso attached a "Memorandum of Understanding" preserving the rights of both parties with respect to several items of litigation being pursued by the parties.

9. On August 6, 1985, the Kelso city council announced its intent to seek annexation with Cowlitz County Fire Protection District No. 2 for fire suppression and related services. Thereafter, the city passed an ordinance, and the fire district passed a resolution to annex the two entities. The annexation request was presented to and approved by the Cowlitz County Boundary Review Board, and was placed on the ballot for the general election held on November 5, 1985.

10. The union made a timely demand for bargaining on the decision and effects of the proposed annexation. The parties met and the union specifically proposed, consistent with proposals advanced in connection with the 1984 attempt to contract out services, that the city make provision for the fire district to hire city employees displaced by the annexation. The parties failed to reach agreement and the city proceeded with the annexation process without bargaining in good faith to agreement or processing the dispute concerning job security for displaced employees to arbitration pursuant to RCW 41.56.430, et seq.

11. On November 5, 1985, the voters of the city and the voters of the fire district approved the annexation of the city to the fire district.

12. The City of Kelso unilaterally made a discretionary decision to implement the annexation prior to the January 1, 1987 date on which the fire district could collect taxes on property within the city limits of the City of Kelso. In pursuit of that unilateral decision, the city negotiated a contract with Cowlitz County Fire Protection District No. 2 to provide services during the period from December 1, 1985 to December 31, 1986 in exchange for payments from the city. The amount agreed to by the city and the fire district for 1986 exceeded the city's fire suppression budget for 1985.

13. On November 14, 1985, without waiting for the certification of the election which occurred on November 18, 1985, the city notified the union that the firefighters were laid off effective December 1, 1985.

14. On December 1, 1985, Cowlitz County Fire Protection District No. 2 assumed responsibility for fire protection for residents of the City of Kelso. The fire district did not hire any of the firefighters laid off by the city.

15. Commencing in 1987, the fire district will receive $1.00 per $1,000 of assessed valuation of the city's tax levies. The annexation is not subject to reversal for a period of three years.

CONCLUSIONS OF LAW

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

2. By failing and refusing to give notice and bargain concerning the decision to lay off Dean Bolden and Robert Stephenson in January, 1985, at a time when there was no collective bargaining agreement in effect between the parties, the City of Kelso has committed unfair labor practices in violation of RCW 41.56.140(4) and (1).

3. The decision to annex the City of Kelso to Cowlitz County Fire Protection District No. 2 under the annexation procedures set forth and authorized under Chapter 52 RCW is not a mandatory subject of collective bargaining under Chapter 41.56 RCW, so that the City of Kelso has not violated RCW 41.56.140(4) by its unilateral decision to annex.

4. The effects of an annexation decision upon displaced employees, including the discretionary effective date of layoff, employment rights with the successor employer in the event of a discretionary transfer of services, re-employment rights with the city, severance pay, and interim employment, are mandatory subjects of collective bargaining under Chapter 41.56 RCW, so that the City of Kelso has committed unfair labor practices in violation of RCW 41.56.140(4) and (1) by unilater-

ally making and implementing a discretionary decision to implement the annexation prior to the date on which the fire district could collect taxes on property within the city limits of the City of Kelso.

5. By accelerating the implementation of the annexation in order to be rid of its fire suppression function and employees and its collective bargaining relationship with Local 1445, the City of Kelso discriminated against public employees in reprisal for their exercise of rights protected by RCW 41.56.040, and has committed unfair labor practices in violation of RCW 41.56.140(1).

ORDER

Upon the basis of the above 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 City of Kelso, its officers and agents shall immediately:

1. Cease and desist from interfering with its former fire suppression employees in the exercise of their rights under Chapter 41.56 RCW.

2. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Public Employees Collective Bargaining Act:

   a. Make its former fire suppression employees Dean Bolden and Robert Stephenson whole for wages and benefits they lost as a result of their unlawful layoff for the period January 1, 1985 through December 31, 1986,, by payment at their normal rates of pay and contractual benefits such as clothing allowances, holiday pay, vacation pay, and longevity, less any earnings they may have received during said period which they would not otherwise have received and less any unemployment compensation they may have

received during said period. The City of Kelso shall make retirement contributions to the appropriate retirement systems on all back pay. Additionally, the City of Kelso shall arrange for reinstatement of medical and dental insurance for such individuals for such period or in the absence of obtaining such coverage shall reimburse each such individual for all medical, dental and similar expenses they incurred during said period which would have been paid by insurance provided to them as employees of the City of Kelso.

b. Make all of its former fire suppression personnel, including Dean Bolden and Robert Stephenson to the extent not covered by paragraph 1 of this Order, whole for wages and benefits they lost as a result of their unlawful layoff between December 1, 1985 and December 31, 1986, by payment at their normal rates of pay and contractual benefits such as clothing allowances, holiday pay, vacation pay, and longevity, less any earnings they may have received during said period which they would not otherwise have received and less any unemployment compensation they may have received during said period. The City of Kelso shall make retirement contributions to the appropriate retirement systems on all back pay. Additionally, the City of Kelso shall arrange for reinstatement of medical and dental insurance for such individuals for such period or in the absence of obtaining such coverage shall reimburse each such individual for all medical, dental and similar expenses they incurred during said period which would have been paid by insurance provided to them as employees of the City of Kelso.

c. Bargain, in good faith, with International Association of Firefighters, Local 1445, concerning the effects of the annexation of the City of Kelso to Cowlitz County Fire Protection District No. 2 and, if no agreement is reached, proceed to interest arbitration as provided in RCW 41.56.430 on any unresolved issues.

d. Reimburse International Association of Firefighters, Local 1445 for its costs and reasonable attorney's fees incurred in the prosecution of this case, upon presentation of a sworn and itemized statement thereof.

e. Notify the complainant, in writing, within thirty (30) days following the date of this order, as to what steps have been taken to comply with the Order issued by the Examiner, and at the same time provide the complainant with a signed copy of the notice required by that Order.

f. Notify the Executive Director of the Public Employment Relations Commission, in writing, within twenty (20) days following the date of this order, as to what steps have been taken to comply herewith.

DATED at Olympia, Washington, this 15th day of January, 1988.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Rex L. Lacy

REX L. LACY, Examiner

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