STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DUANE WOOD, Complainant, vs. CITY OF CENTRALIA, Respondent.	)	CASE NO. 6599-U-86-1314 DECISION 2904 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Hafer, Price, Rinehart and Schwerin, by Richard H. Robblee, Attorney at Law, appeared on behalf of the complainant.

Skellenger and Bender, by Michael J. Fox, Attorney at Law, appeared on behalf of the respondent.

On October 10, 1986, Duane Wood (complainant) filed a complaint charging unfair labor practices with the Public Employment Relations Commission (PERC), alleging that the City of Centralia had violated RCW 41.56.140(1) in June, 1986, by not considering and selecting the complainant for hire to a permanent position as "laborer". The city's actions are alleged to have been in retaliation for Wood's previous filing and processing of an unfair labor practice complaint with PERC. A hearing regarding the instant complaint was held on April 7, 1987, before Frederick J. Rosenberry, Examiner. The parties submitted post-hearing briefs.

BACKGROUND

The City of Centralia Light Department is a city-owned electric utility that generates and distributes electric power to consumers. Department offices and the "distribution" function are located in Centralia. The utility operates a hydro-electric generating facility located near Yelm, Washington, some 20 miles from Centralia. Operations and maintenance employees of the utility are represented for the purposes of collective bargaining by International Brotherhood of Electrical Workers, Local 77.

Duane Wood was employed by the utility from November, 1980 to September, 1984. Prior to his employment with Centralia City Light, Wood had worked as a meat cutter, as an auto mechanic, as a carpenter, and as a heavy equipment operator. He had worked for various logging firms in forests, setting up and operating power equipment. Wood's formal education ended prior to completion of the eleventh grade, and he has not subsequently undertaken any academic or technical instruction in an educational institution, so that his occupational skills have been the result of on-the-job experience. While employed at the utility, Wood worked at the hydro-electric power plant as an apprentice relief dam operator. Wood's activities while learning operator skills at the plant included assisting in generator repair, assisting with governor and turbine overhauls, wiring and installation of transformers, monitoring watt hour meters for malfunctions, welding fabrication and repairs, vehicle and generating equipment maintenance, taking test samples from transformers, installing electrical wiring for high voltage circuitry in the power house, general clean up, painting, groundskeeping, and miscellaneous facility repair such as window replacement. Wood also compiled various statistical reports such as logs of power plant readings,

periodic gasoline use, and mileage traveled. In recognition of his good performance, Wood was advanced to the "journeyman" level hydro operator prior to the completion of the number of hours of work prescribed for that upgrade. In January, 1983, Wood's performance was rated above average and it was noted that, "Duane is a very capable person at any job he is given and truly an asset to Centralia City Light". The record does not reflect that he was ever given a poor evaluation.

The operation of the hydro-electric power plant was reorganized in 1984. Wood declined to continue in his position as a dam tender under the utility's reorganization plan, because it would have required that he take up residence on-site at the power house located near Yelm. Wood later changed his mind and requested the dam tender assignment, but by then the deadline for making such decisions had expired and the utility had already employed a new employee to fill the position. Wood's request was therefore denied, and his employment was terminated on September 25, 1984. At the time of his separation from employment, Wood was advised that he would be given a good recommendation. The circumstances of Wood's separation from employment in 1984 led to the filing of his previous complaint charging unfair labor practices[1].

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[1] For additional background information, see: City of Centralia, Decisions 2481 and 2481-A (PECB, 1986). Wood filed unfair labor practices charges with PERC on March 25, 1985, alleging that the city violated RCW 41.56.140(1), (3), and (4) by terminating his employment at the hydro-electric power generation facility in reprisal for his union activity. The Examiner dismissed the complaint on the merits on June 30, 1986. City of Centralia, Decision 2481 (PECB, 1986). Wood timely filed a petition for review. The Commission affirmed the dismissal of the complaint on November 10, 1986. City of Centralia, Decision 2481-A (PECB, 1986).

In March, 1985, the utility announced several job openings. The record does not reflect the reason for the openings. As regards this case, two advertised "laborer" positions are of interest.[2] The position description for "laborer" described the duties and qualification requirements as:

> Clean and stock warehouse material as necessary. Perform upkeep of Light Department buildings and grounds. Drive, operate and service equipment as required. Assist other crews as needed. Be responsible for time reporting and other reports. Perform similar and incidental duties as required.
>
> Applicant must be proficient in using tools and equipment. Must have ability to communicate effectively with others. Must have a working knowledge of safety regulations and must possess or obtain within thirty (30) working days after selection, a valid First Aid Certificate. Must possess a valid driver's license with the necessary endorsements. Must be dependable.

The utility expected its new laborers to perform general warehouse duties, including inventorying materials and supplies, painting, repairing broken or damaged buildings and fixtures, landscape maintenance, vehicle maintenance and repairs, delivering equipment to work sites, performing road repair, assisting in meter reading, working as a groundsman for line crews (i.e., preparing equipment and assembling transmission line materials on the ground for hoisting), and assisting substation operators in maintaining equipment (such as circuit breakers and transformers).

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[2] Documents submitted in evidence at the hearing disclose that the utility had openings at the same time for other positions titled "line crew foreman" and "substitute dam tender". There is no indication that the complainant sought either of those positions, and the record does not reflect how those openings were filled.

The laborer positions are part of the utility's distribution department, which is responsible for the construction and maintenance of the electric power distribution network. The utility anticipated that it might have to train new laborers how to operate some of the mechanical equipment, to train them on performing groundsman duties, and to provide them with information regarding electrical safety standards. The utility was desirous of hiring employees who already had the driver's license endorsement required by the State of Washington for operation of multi-wheeled heavy equipment, as it was possible that the laborer would be expected, at some time in the future, to operate such equipment.[3]

One of the advertised "laborer" positions was filled without opening it to non-employee applicants. The utility's incumbent "substitute dam tender" requested transfer to the "laborer" position. The laborer position offered that individual full-time work, whereas the substitute dam tender position provided only part-time work. The request was granted pursuant to the job bidding procedure contained in the collective bargaining agreement between the city and Local 77.[4]

Wood first learned of the remaining "laborer" position in March, 1985, having heard the news from a former co-worker who was also a union shop steward. On March 15, 1985, Wood submitted a bid for the position. The utility acknowledged receipt of Wood's bid by letter dated March 26, 1985, stating:

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[3] At the time of the hearing, all of the utility's vehicles could be lawfully operated with a standard drivers license.

[4] The collective bargaining agreement was arrived at in February, 1985, and was effective for the period from April 1, 1984 to March 31, 1987.

> Centralia City Light Department has now completed its bidding process for both the line crew foreman position and the two laborers positions.
>
> City Light will now solicit public applications for the one remaining laborers (sic) position until Friday March 29, 1985.
>
> Although you improperly submitted a "bid" for one of the laborer positions on March 15, 1985, City Light will now view that "bid" as a regular employment application and give equal consideration to it, as all other applications received by the above mentioned deadline.

Wood did not hear anything further from the city, and the record does not reflect that he made any inquiry regarding the status of his application.

The city received approximately 343 applications for the laborer position. The applicant screening process was conducted by William Cummings, the utility superintendent, and Orville Henneke, the assistant superintendent in charge of the power distribution department. Cummings and Henneke initially selected between 25 and 30 applications that they believed warranted additional consideration. They do not recall if Wood's application was among that group. They then further reduced the number of applications to 9 candidates whom they were desirous of interviewing. It is clear that Wood was not included among the group to be interviewed.

Eight of the finalists had either graduated from high school or had passed the General Educational Development (GED) test. Seven of the finalists had some additional technical training in an educational institution. The record is not clear as to the educational status of the ninth finalist.

It is clear from the record that one consideration of management during the selection process was a new provision in its labor agreement with the IBEW concerning future job bidding rights of any employee hired into the "laborer" classification. The utility anticipated that whoever it selected for the position of laborer would have the opportunity in the future to advance by bidding into more technical areas of the utility's operation, and the employer was thus seeking individuals who not only possessed the skills necessary to be a laborer but also had advanced knowledge of mathematics and electrical theory which would prepare them for job advancement.[5]

Compounding the complexity of the selection process, the utility faced uncertainty over the disposition of the unfair labor practice complaint filed by Wood a few days earlier, on March 25, 1985. The employer was concerned that an adverse decision from the Commission could order that Wood be reinstated to employment at the utility, and so was concerned about the wisdom of offering a long-term employment commitment to whoever it selected to fill the remaining laborer position.[6] Accordingly, the respondent advised each applicant interviewed that an unfair labor practice complaint was pending, the

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5 The utility thus maintains that it desired to hire an employee who had the technical and mathematical background to understand the principles of electricity and how it would be applied in the department, and that the successful applicant possess sufficient educational background to enable the employee to be promoted to more responsible positions in the department.

6 The employer anticipated a "ripple" effect in the event Wood was reinstated, such that Wood would be reinstated to his previous position as a dam tender, the newly hired dam tender would be transferred to the laborer position then being filled, and the laborer to be hired would be displaced and/or terminated.

outcome of which could not be predicted, and that an offer of long-term employment would be contingent on the utility prevailing in the unfair labor practice litigation.

The final selection process occurred between April 5, and April 8, 1985. Wilsey Lytle was selected to fill the remaining laborer position. The record does not reflect if any other candidates were a close second choice. Lytle had provided an employment resume and a list of references with his initial employment application. The record reflects that Lytle attended Clover Park Vocational-Technical Institute and Centralia Community College for about 12 months, taking carpentry and industrial machinist courses. Lytle had been employed in the past as a millwright, as a machinist, and as a power equipment operator for logging operations. As a part of his past work experience, he had performed power equipment maintenance and overhaul, parts fabrication, electrical wiring, plumbing and welding. The record does not reflect the extent of his experience or degree of proficiency in performing these duties. Lytle was interviewed twice. At his initial interview, he was told what the job entailed, was questioned regarding his education beyond high school, and was instructed to provide copies of grade reports. He was also advised by the superintendent that, while employment would more than likely be permanent, any continued employment was contingent on the utility prevailing in unfair labor practice proceedings in which a former employee sought reinstatement.[7] Lytle subsequently provided an itemized list of his post-secondary studies and was hired for the job at a second interview. The respondent did not request additional background data from Lytle subsequent to offering employment to him. The record does not reflect the date that Lytle was notified that he was selected

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[7] The employer did not disclose the identity of the complainant.

for employment, but he signed an "employment agreement" on April 16, 1985, acknowledging that his appointment was temporary, that his employment was for a term not to exceed six-months duration, and that his employment was subject to earlier termination.[8]

By letter dated April 17, 1985, the utility superintendent notified Local 77 that Lytle had been selected, stating:

> ... this letter is to inform you that the final laborer position, here at Centralia City Light, has now been filled. Mr. Wilsey Lytle, Jr., of Centralia, will assume the duties of laborer beginning April 22, 1985. Also hired was Mr. Warren Simons, of Yelm. He will assume the duties of Substitute Dam Tender immediately.
>
> You may want to have the respective shop stewards contact these individuals to solicit their membership into the I.B.E.W.

The record does not indicate any immediate response by the union.

The decision on Wood's unfair labor practice complaint had not been issued at the expiration of Lytle's initial term of employment, and the utility still did not want to make a long-term employment commitment to Lytle. Therefore, it extended the temporary employment agreement with Lytle for a second six-month period. This time, the union interposed itself regarding the temporary appointment, addressing the subject in a letter to the utility dated January 31, 1986, stating:

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[8] The one-page memorandum prepared by the utility stated that it modified the terms of the collective bargaining agreement between the utility and IBEW Local 77. Neither the document nor the record reflects that the union agreed to it.

> This letter is in response to a (sic) Employment Agreement that I happened to fall across. After some investigation I discovered this was the second of such letters that Wilsey Lytle, Jr. had been approached with to sign. (sic)
>
> According to the Collective Bargaining Agreement Under (sic) Section 7, Article 7.17 (B), after the first six months have been completed the employee shall appear on the seniority list.
>
> I would appreciate your cooperation in this matter. If you have any questions please contact me for any further discussion.[9]

The employer responded with a letter dated February 3, 1986, in which it maintained that Lytle was, and would continue to be, a "temporary" employee under the individual employment agreement.

On June 1, 1986, Lytle's employment status was changed to that of "permanent", without going through a new hiring process. This was prior to the issuance of a decision on Wood's unfair

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[9] Review of the collective bargaining agreement reveals that it does not contain an "Article 7.17 (B)". A provision numbered "7.17" refers to vacation and sick leave, and has no apparent relevance to the subject matter addressed in the union letter. Although the record is silent regarding this apparent inaccuracy, further review of the collective bargaining agreement leads the Examiner to infer that the union intended to cite a provision numbered "7.19", which states:

> 7.19 Seniority. The following seniority rules shall apply separately to each group of employees covered by this Agreement:
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> ...
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> (b) The first six months of employment shall constitute a probationary period, and seniority shall not apply during this period. After the first six months of employment, an employee's name shall appear on the seniority list.

labor practice case, and the record does not reflect why the utility changed its position. Although a reading of the decisions in City of Centralia, Decisions 2481, 2481-A, supra, would fairly indicate that Wood had applied for several positions with the utility during 1985 and 1986, only the June 1, 1986 conversion of Lytle's status is at issue here.

POSITION OF THE PARTIES

Duane Wood charges that Centralia City Light has interfered with, restrained, coerced and discriminated against him by failing to consider his application and select him for hire to the position of laborer or a higher rated position, in violation of his rights under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Wood believes that the utility retaliated against him as a result of his previous filing and processing of unfair labor practice charges against the employer. Wood maintains that, because of his age and experience, he is more qualified for the laborer position than Lytle, that he was an excellent employee and a skilled craftsman, and that he should have been selected to fill the temporary position of laborer when it was granted to Lytle in April, 1985. Wood contends that the reasons advanced by the employer for the selection of Lytle are pretextual, and that he has the demonstrated ability to meet the requirements of the laborer position. Wood acknowledges, however, that the allegations of his complaint regarding the events of March and April, 1985, are barred by the statute of limitations, and that the Commission has no authority to process them. He would place the focus of attention on the conversion of Lytle to "permanent" status in June, 1986, contending that the utility did not announce that the position filled by Lytle was being made permanent, that he was deprived of an opportunity to apply for

the permanent position, and that he should have been appointed to the permanent position granted to Lytle. It follows, according to Wood, that the complaint filed on October 10, 1986, is within the six-month statute of limitations, and is timely filed.

The employer denies that it engaged in any form of reprisal against Wood. The utility contends that the laborer position in dispute was permanent from the outset, and that the finalist applicants were advised that their continued employment was contingent on the outcome of a pending unfair labor practice case because there were a limited number of positions available. The utility maintains that it was entitled to fill the laborer position with the most qualified applicant, that it desired to hire an individual with enough education to provide sufficient mathematical and electrical background to understand electrical theory as it might be presented and applied in the department, that Wilsey Lytle was the most qualified applicant in the opinion of management, and that Lytle was selected in good faith, pursuant to objective standards. The employer notes that Wood's previous record of satisfactory performance was in a different position, and contends that it therefore was not relevant. It is the employer's position that Wood has failed to meet the burden of proof necessary to demonstrate a violation of the law, that his complaint is not timely with respect to the allegation that he was discriminated against in 1985, and that the complaint should be dismissed.

DISCUSSION

The Public Employees' Collective Bargaining Act states:

> **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;
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> . . .
>
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;[10]

Duane Wood claims that his former employer violated the law when it failed to hire him.

The Statute of Limitations

RCW 41.56.160 precludes the processing of a complaint with respect to unfair labor practices that occurred more than six months prior to the filing of the complaint. Much of Wood's claim of reprisal by the utility is based on events that occurred more than six months prior to the filing of the complaint in the instant case. The statute of limitations does not prohibit consideration of the complainant's past participation in protected activity as background facts and circumstances in evaluating his complaint of unfair labor practices. In Toutle Lake School District, Decision 2659 (PECB, 1987), it was noted:

> The statute of limitations contained in RCW 41.56.160 applies to the filing of charges in relation to the conduct complained of, rather than to the timing of protected activities on which discriminatory conduct is based. City of Bellevue, Decision 2096

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10 The complaint form filed on October 10, 1986 contains a mark in the box appropriate to RCW 41.56.140(1) only, although "discrimination for filing charges" arguments were made throughout the proceedings. It matters little. A prohibition on "discrimination" is found in RCW 41.56.040, and so is incorporated by reference into RCW 41.56.140(1).

> (PECB, 1984). The complaint cannot be discredited solely on the basis of the passage of time since the complainant's clearly proven participation in protected union activities.

While Wood's protected activity occurred more than six months prior to the filing of the instant complaint, that passage of time does not automatically preclude its consideration or diminish its relevance.

Application of the Six-Month Standard

The Duration of the Available Position -

The complainant has sought to characterize the laborer position filled by Lytle commencing on or about April 22, 1985, as being "temporary", and he has sought to characterize the conversion of that position to "permanent", as a separate action giving rise to a fresh opportunity to have his employment application considered by the employer. It must be remembered that the Examiner and the Public Employment Relations Commission are not sitting in judgment of violations of the employer's own personnel procedures. While a separate transaction in June, 1986, would meet the time threshold for application of the statute of limitations, the record does not support the contention that such an opportunity existed.

The general announcement of the "laborer" opening did not state that it was temporary. Nothing in the record indicates that the employer desired either of the "laborer" positions that it announced in March, 1985, to be "temporary". Indeed, the utility initiated a full scale candidate search, advertised the positions to the public and screened over three hundred applications. The management spent considerable time in interviewing finalists. The utility did not go through the extensive recruiting exercise, in March and April, 1985, only

to hire someone with the expectation of going through such an extensive recruiting and screening process all over again, one year later. One of the positions was filled by transferring an existing part-time employee who sought full-time work, and there is no indication that transaction was ever characterized as "temporary".

The superintendent's April 17, 1985 letter to the IBEW announcing Lytle's selection did not characterize the appointment as being temporary. It is clear that the utility advised the finalists for the position that continued employment would be contingent on the utility prevailing in the unfair labor practice proceedings then pending before the Commission, but there would seem to be a significant difference between "contingent" and "temporary". At the time he was hired, Lytle was told by the superintendent that his employment would more-than-likely be permanent. The record does not reflect that the employer's initial classification of Lytle as a "temporary" employee was a pretext, or that it caused Wood to forfeit any rights that he may have derived from Chapter 41.56 RCW. The status of the laborer position, be it temporary or permanent has no relevance in evaluating an allegation of discriminatory motivation in rejecting Wood's application for employment. Nothing prevented Wood from promptly filing an unfair labor practice complaint when he was passed over by the utility and Lytle was hired.

There does not appear to be a provision for "temporary" employees in the collective bargaining agreement.[11] There is

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[11] Wood thus relies on a "temporary" status of questionable validity. An individual employment agreement made at variance with the collective bargaining agreement would fail as an unlawful "circumvention" of the union on refusal to bargain charges filed by the exclusive bargaining representative.

an inference that IBEW Local 77 viewed the position as being permanent from the outset of Lytle's employment. The union challenged the extension of the "temporary" appointment beyond the six-month "probationary" period provided in the collective bargaining agreement, and it requested that Lytle be granted seniority. When confronted by the union, the superintendent's response was consistent with a "contingent", rather than "temporary" status. His explanation was that he wanted to preserve the right to terminate Lytle in the event that Wood was reinstated, not that he wanted to keep Lytle for some limited period of time.

The Examiner thus concludes that there is no reason to doubt that (barring a finding that he was himself unsatisfactory as an employee) Lytle's hiring was contingent only on the outcome of Wood's complaint.

The June 1, 1986, Change of Status -
Discrimination is the unlawful deprivation of an ascertainable right. Wood argues that the award of "permanent" status to Lytle on June 1, 1986 constitutes a separate cause of action for violation of rights under the Public Employees' Collective Bargaining Act. Requisite to such a finding is a determination that an employment related incident occurred on June 1, 1988, that directly or indirectly interfered with or discriminated against Wood. Examination of the circumstances of Lytle's hire does not support Wood's allegation.

The June 1, 1986, conversion from temporary to permanent was an administrative change which did not constitute the creation of a new position, a change of the structure or make up of the existing "laborer" position, or even an opportunity for the employer to consider other potential applicants.

Wood's argument that there was a temporary appointment and then a second permanent appointment is flawed. The statute of limitation commenced to run in this matter in April, 1985, when the position was initially filled. The June, 1986, change of Lytle's formal status to permanent did not create a new threshold date for the filing of an unfair labor practice case.

Would The Complainant Have Been Hired, Were It Not For His Protected Activity?

The Examiner recognizes that the conclusion reached on the statute of limitations is arguable, and therefore chooses to examine the merits of the discrimination allegations.

The Commission and the state's courts give consideration to federal precedent where it is consistent with Chapter 41.56 RCW. Nucleonics Alliance, Local 1-369 v. WPPSS, 101 Wn.2d 24 (1984), Public Employees v. Community College, 31 Wn App 203 (Division II, 1982), Clallam County, Decision 1405-A (PECB, 1982), aff. ___ Wn.App. (Division I, 198). The Commission and the courts have embraced the principles set forth in Wright Line, Inc., 251 NLRB 1083 (1980), which prescribes tests for balancing the rights of the employee with those of the employer in cases in which discriminatory motivation is a possibility. In turn, Wright Line drew much of its reasoning from Mt. Healthy City School District Board of Education v. Doyle, 429 US 274 ( ). Wright Line states in part:

> 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.

In Port of Seattle, Decision 1624 (PECB, 1983), the principles set forth in Wright Line were applied in evaluating claims of adverse action against an employee based on discriminatory motivation:

> Where an employer responds to discrimination allegations with claim of business reasons for its actions, a shifting of burdens occurs during the course of litigation. . . . The complainant is required initially to make a prima facie showing sufficient to support an inference that protected activity was "a motivating factor" in the employer's decision. Once that is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Although Wright Line and much of its progeny address dual motive cases in which there may be legitimate and prohibited reasons for discharge, it provides guidance in evaluating the merits of Wood's complaint. Mixed motivation may be a factor that causes an employer to decline to hire an individual in much the same manner as it may be the basis of a decision to discharge an employee. Master Mining, Inc., 274 NLRB No. 183 (1985). In this case, there is the possibility of motivation on the part of the utility to reject Wood's request for employment for both lawful and unlawful reasons.

Factors Weighing in Favor of Wood

There is no doubt that the complainant has engaged in protected activity in the past, thus there is the potential motivation on the part of the employer to view Wood as a "troublemaker" and

to pass him over for employment for an unlawful reason in reprisal for his earlier protected activities.

There are also factors that weigh in favor of Wood's selection, notwithstanding his lack of formal education. The utility previously employed him for four years. While in the utility's employ he was prematurely advanced to a higher wage classification in recognition of his good performance, his performance was favorably evaluated, and he gained considerable hands-on experience regarding the utility's operations. Although the utility argued that Wood's dam tender experience would not be of value to him working as a "laborer", the fact is that another dam tender was transferred to a "laborer" position pursuant to the bid procedure in the collective bargaining agreement, from which it can be inferred that dam tender experience does have value.

The Examiner does not find the utility's concerns about employee bidding rights to be persuasive. The terms of the collective bargaining agreement provide the employer with the ability to deny employee bids on the basis of incompetency or inability to perform the work, stating in relevant part:

> 7.20 Bidding
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> ...
>
> (d) The city need not consider the bid of an employee who in the City's opinion does not possess the knowledge, skill, efficiency, adaptability and physical ability required for the job on which the bid is made.
>
> (e) In making appointments to vacancies in jobs involving personal contact by the employee with the public or requiring specific technical skills or jobs in which the employee must lead and direct other employees, the City shall consider the bids of employees submitted as herein provided, but the City may nevertheless make appoint-

> ments to such vacancies on the basis of ability and personal qualifications.

A laborer does not have absolute claim to a more technical position, and such a defense to hiring Wood, by itself, is inadequate.

Factors Weighing Against Wood

Wood's earlier employment relationship with the utility had been entirely severed so that he had no seniority-based claim to employment at the utility or to a preference over any other candidate who may have sought employment with it.

Aside from the inference to be made from the fact of his having previously filed unfair labor practice charges, Wood has not been able to present any evidence of animus on the part of the employer directed at the union as an institution or at him personally.

The preferred new employee has more extensive education than the complainant, including having completed several technical courses which may be of value to him and the utility. Wood's record shows several years of hands-on experience, but with only ten years of completed formal education. It is incumbent on the management of the utility to hire those employees that it deems to be the best qualified for the position. The employer's judgement as to the most qualified candidate for employment cannot be taken lightly or casually substituted.

The dual motivation standards in discrimination complaints cannot be applied so as to create an automatic inference that a former employee automatically establishes a prima facie case of discrimination in the event that he or she is not rehired simply because of past union membership, participation on

negotiation committees or because at some time in the past the individual filed a complaint of unfair labor practice against the employer. Background events of this nature by themselves do not establish a prima facie case of unlawful retaliation by an employer.

Conclusions

The burden of proof is initially on the complainant to establish a prima facie case demonstrating that the utility discriminated against him when it passed him over for selection to the new laborer position. The complainant has failed to meet that burden, so as to shift the burden of proof to the employer. City of Bonney Lake, Decision 1962-A (PECB, 1985); Douglas County, Decision 1220 (PECB, 1981). Absent acceptance of an inference that Wood was passed over in retaliation for his past protected activity, the evidence is not sufficient to support a finding that there was discriminatory motivation on the part of the utility in rejecting his application for re-employment.

Finally, the employer has demonstrated that it preferred Lytle over Wood for bona fide business reasons. There is a practical consideration of an employer determination as to what constitutes legitimate desirable attributes when screening new applicants.

FINDINGS OF FACT

1. The City of Centralia is a public employer within the meaning of RCW 41.56.030(1). Among other municipal services, the city operates a light department.

2. Duane Wood was employed by the City of Centralia Light Department from November, 1980 to September, 1984, at the utility's hydro-electric power generation plant, located at Yelm, Washington. Wood was initially employed as an apprentice relief dam operator and was later advanced in rank.

3. In 1984 the employer reorganized its power generation operation, thus requiring that employees working at the power generation facility to take up residence at the facility. Wood declined to relocate, and thereby voluntarily terminated his employment with the utility. Wood thereafter filed and processed unfair labor practice charges against the city, which were dismissed on their merits.

4. In March, 1985, the employer advertised for applicants for the position of laborer. Duane Wood was among more than three hundred applicants for the laborer position.

5. Wood's application for employment was not accepted by the employer. On or about April 16, 1986, Wilsey Lytle was selected for employment in the position of "laborer". Initially, Lytle was told that his employment was subject to termination based on the outcome of Wood's unfair labor practice complaint.

6. The employer purported to extend a limitation on Lytle's employment status beyond the end of the six-month probationary period specified in the collective bargaining agreement between the employer and IBEW Local 77. Such a limitation appears to be in conflict with the collective bargaining agreement, and was challenged as such by the IBEW. Thereafter, on or about June 1, 1986, the employer

changed Lytle's status to "permanent" and ceased to assert that Lytle's employment was contingent upon the outcome of the unfair labor practices filed by Wood. The utility did not undergo a new employee recruiting process in conjunction with the change of Lytle's status.

7. On October 10, 1986, Duane Wood file an additional complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that he had been passed over for selection for employment because of his past union activity.

CONCLUSIONS OF LAW

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

2. The complaint charging unfair labor practices filed by Wood on October 10, 1986, is barred by the statute of limitations set forth in RCW 41.56.060 with respect to the allegation that the employer retaliated against Wood by not hiring Wood for the position of "laborer" in 1985.

3. The change of employment status made for Wilsey Lytle on June 1, 1986 was not an independent, separate, occurrence giving rise to any rights on the part of Duane Wood, so that by making such change without considering an employment application from Duane Wood the respondent has not directly or indirectly interfered with or discriminated against the complainant in violation of RCW 41.56. 140.

4. The complainant has failed to sustain the necessary burden of proof demonstrating that he was entitled to be con-

sidered or was discriminatorily passed over for appointment to the position of "laborer" in June, 1986, so that no cause of action exists under RCW 41.56.140 as to that time period.

ORDER

The complaint charging unfair labor practices filed in the above-entitled matter is hereby DISMISSED.

DATED at Olympia, Washington, this 7th day of April, 1988.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Frederick J. Rosenberry

FREDERICK J. ROSENBERRY, Examiner

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