STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, Complainant, vs. ASOTIN COUNTY HOUSING AUTHORITY, Respondent.	CASE 7423-U-88-1540 DECISION 3241 - PECB FINDING OF FACT, CONCLUSIONS OF LAW, AND ORDER

Pamela G. Bradburn, Attorney at Law, appeared on behalf of the union.

Lofland and Associates, by Ryan M. Edgley, Attorney at Law, appeared on behalf of the employer.

On May 31, 1988, the Washington State Council of County and City Employees (WSCCCE) filed a complaint with the Public Employment Relations Commission, alleging that the Asotin County Housing Authority had committed unfair labor practices. Specifically, the union charged that the employer violated RCW 41.56.140(1), (3) and (4), by laying off employees Roy Kennedy and Mike Bonaparte. A hearing on the matter was conducted on September 28, September 29, November 15, and November 16, 1989, in Clarkston, Washington, before Examiner Walter M. Stuteville. The parties filed post-hearing briefs.

BACKGROUND

The Asotin County Housing Authority operates approximately 140 house and apartment units for low-income persons in the cities of

Asotin and Clarkston, in southeastern Washington. The employer is funded with both local monies, through Asotin County, and with federal monies, through the Department of Housing and Urban Development (HUD). The employer's governing body is a five-member Board of Commissioners. For the last three to four years James Garred has been the chairman of that board.

On February 1, 1985, the employer appointed Alice White as its executive director. At that time, the employer also employed an executive secretary and three maintenance laborers, including Roy Kennedy and Mike Bonaparte. Prior to White's arrival, Kennedy was regarded as the "lead" maintenance worker, and had supervised the maintenance crew. White took on the supervision task directly after her arrival.

The history of the relationship between the employer and union, as recounted in Asotin County Housing Authority, Decision 2471 (PECB, 1987), provides background to the union's present complaint. In 1985, Kennedy and Bonaparte were terminated from employment with the Asotin County Housing Authority. Both had been long-term employees,[1] and unfair labor practice charges were filed by the WSCCCE. The Examiner in that case held that the employer had known of union organizing activity by the two dischargees,[2] and that it had unlawfully terminated their employment in reprisal for their protected activity. The employer's personnel records on the terminated employees did not suggest that the work performance of either of them had been poor, and the employer had retained a less-senior employee who had not signed an authorization card. The Examiner also concluded that the employer's economic justification for the terminations was irrational. Altogether, these findings

---

[1] Kennedy's year of hire was 1974; Bonaparte's was 1979.

[2] Kennedy and Bonaparte were discharged within five days after their having met with a WSCCCE organizer and signed union authorization cards.

led the Examiner to order that Kennedy and Bonaparte be offered full reinstatement with back pay. The Examiner's decision was affirmed by the Commission. Asotin County Housing Authority, Decision 2471-A (PECB, April 20, 1987). The employer did not immediately comply with the Commission's order, however.

During July or August of 1987, the third maintenance laborer, Mel Ketchesid, was laid off and Executive Secretary Cindy Youngberg resigned her position with the employer. A new position was created by the employer under the title of "general superintendent" or "administrative assistant". The new position was designed by White to be responsible for some of the tasks previously done by Youngberg, as well as to assist White with some of her administrative responsibilities and to supervise the maintenance laborers. At the time the position was created, there was some discussion by the employer's board of there being a need to create the new position as a "buffer" between White and the returning maintenance laborers. Gary Gunkel was hired for that new position on or about July 10, 1987. The present unfair labor practice charges arise out of the events and changes that resulted after Gunkel was hired.

Kennedy and Bonaparte were reinstated to employment with the employer, in response to the Commission's order, on August 10, 1987. The "leadworker" responsibility was not restored to Kennedy upon his reinstatement to employment, but was maintained by Gunkel. By the time of the hearing in the instant case, however, Kennedy and Bonaparte were working a reduced work schedule.

Budget Negotiations

The hours reductions that are the subject of the present unfair labor practice complaint occurred against a background of correspondence and negotiations between the employer and the Public Housing Division of HUD. The employer receives approximately 40%

of its budget from HUD subsidies. The remaining 60% comes from rents and other income.

In November of 1987, HUD informed the employer that a problem was anticipated with the employer's budget, and that HUD would be scrutinizing the employer's year-end statements very carefully. The specific problem indicated was a failure of the employer to maintain a cash and inventory reserve of 40%. HUD informed the employer that it would allow a minimum reserve of 20% to 30%. Based upon that notice, the employer began some cost saving measures, such as eliminating outside watering and cutting back on purchasing.

In December of 1987, the employer submitted a proposed 1988 budget with a reserve of 10%. HUD rejected that budget. The employer then instituted additional cost saving measures, such as cutting security services, deferring repair of decaying sewer lines, and deferring purchase of four refrigerators needed for housing units.

In February of 1988, White and two members of the employer's board met with HUD representatives to discuss the resubmission of the employer's budget. On February 29, 1988, the employer received a letter from HUD, as follows:

> This is to advise you in accordance with 24 CFR 990.112(c) your operating budget and any revisions for Contract SF-45 will be scheduled for a detailed review by this office.
>
> This action is being taken due to your low operating reserve balance of 11 percent for the fiscal year ending December 31, 1987, and non receipt of a board approved FY 1988 operating budget as of this date.[3]

---

[3] Examiner's note: White explained that the employer had not submitted the 1988 budget, because it had not received information from HUD required to complete the budget format required by HUD.

> In accordance with 24 CFR 990.111(a), HUD will not approve an operating budget that will cause the reserve balance to fall below 40 percent, unless the Housing Authority fully documents a lesser amount is sufficient to meet working capital needs. As this office indicated in a previous meeting, various levels of reductions in your payroll costs for FY 1988 is mandatory to achieve a modest 20 percent reserve balance. Since it appears no action has been taken to date to reduce payroll costs, it is our opinion that the Housing Authority must now consider more drastic personnel reductions.
>
> You are reminded that no further operating subsidy will be provided until an operating budget which evidences a reserve balance of close to 20 percent is approved.
>
> You are also reminded the Annual Contributions Contract (ACC) requires the submission of an operating budget no later than 90 days before the beginning of your fiscal year. . . .

After considering its options for reducing its operating budget in compliance with the HUD directive, the employer's board sent a letter to the union on March 9, 1988, as follows:

> It has become necessary for the Housing Authority to make a cutback in personnel expense in order to achieve a budget that will be approved by HUD. Enclosed you will find a letter from Director Roberta L. Ando, which is dated February 29, 1988. Personnel reductions do, indeed, appear to be our only viable alternative.
>
> Our intent is to lay off one employee, Mike Bonaparte, for a period of at least nine (9) months. This should produce the reduction in personnel costs to achieve the requirements of HUD for approval of our budget.
>
> If you with to suggest alternatives to our proposal, please contact the Executive Director of the Housing Authority, Alice White. We would certainly consider your input on behalf of employees in reaching a final decision on

> how to achieve the required personnel reductions.
>
> Please note that time is of the essence in reaching a final decision on the reduction issue so that we can then submit a budget. Accordingly, I request that you respond to this letter, if you intend to do so, on or before Monday, March 14, 1988.

The union responded with a March 10, 1988 letter, written by Staff Representative Jerry Gillming, in which the union questioned the employer's hiring of Gary Gunkel while simultaneously considering the lay-off a long-term employee.

The employer responded in a letter written by White on March 14, 1988, stating the employer's belief that, based upon legal advice, the subject of the administrative assistant position was not a mandatory subject of bargaining. She further stated that the retention of Gunkel's position was a management prerogative. White then explained her view as to why an administrative assistant was necessary:

> Quite frankly, the Housing Authority could not operate in an adequate fashion without an administrative assistant. If you are suggesting by your letter that we layoff the administrative assistant, that does not appear to be a viable alternative at this time.
>
> Further, the fact that Mr. Gunkel has not been with the Housing Authority as long as Mr. Bonaparte cannot be considered in making this decision. Our personnel policies require us to consider relative efficiency and the need for the particular type of job, before seniority, in making a decision such as this. For reasons stated above, we have a far greater need for the services Mr. Gunkel can provide and, based on relative absenteeism and the amount of work performed by each, Mr. Gunkel is the more efficient employee to retain.
>
> Finally, the identity of the individual filling the Administrative Assistant cannot be of

> any relevance to legitimate concerns of the union. That person provides supervision to employees in the bargaining unit. It would be inappropriate to bargain with the union over the retention of that person in his job.
>
> In his letter of March 9, 1988, Mr. Garred invited you to suggest alternatives to our proposal. As noted, laying off the administrative assistant is not a viable alternative at this time, in the opinion of the Housing Authority. If you have any other suggested alternatives, please respond, and explain any reasons supporting your proposals, on or before Friday, March 18, 1988.
>
> The Board of Commissioners will need to make a final decision on this issue shortly after that dae (sic), in order to prepare a budget for submission to HUD.

On March 15, 1988, the parties met to discuss the proposed personnel reduction. The union again proposed that the employer lay off Gunkel. In the alternative, the union proposed that the employer make equal reductions in the work hours of the two maintenance laborers and Gunkel. The union's proposal was referred to the employer's board.

The employer's board spent two meetings discussing the various options available that would enable the employer to comply with the HUD directive. On March 31, 1988, the employer's board reaffirmed its previous decision to lay off one maintenance laborer for a period of nine months. The selection of Bonaparte for layoff was based upon seniority. The union was sent notice of that decision on April 1, 1988:

> At the Board's direction I have issued a ten day notice of lay-off to Mr. Bonaparte as of this date. His last day of employment for this budget year will be April 10, 1988.
>
> At the meeting the Board had with you to hear any alternatives to the lay-off, you asked to be given an opportunity to address who might

> be laid off and for how long. The Commissioners have agreed to hear any discussion you might have at this point in time. As it stands now, Mr. Bonaparte is the employee who has been given the notice of lay-off. . . .

On April 15, 1988, the employer's board held a special meeting where it accepted a union proposal, as follows:

> 1) In lieu of the proposed layoff, each employee shall work ten (10) working days and be considered laid off the next ten (10) working days. This rotation shall continue through fiscal year 1988;
>
> a) medical insurance shall remain in full force and effect during the term of the layoff;
>
> b) vacation and seniority shall continue to accumulate, prorated, according to the number of hours worked.
>
> 2) Unemployment Compensation
>
> a) each employee will be eligible to receive unemployment compensation during the ten (10) day layoff period, in accordance with the State Unemployment regulations;
>
> b) each employee will be considered as being on call or stand by during the ten (10) day layoff period but will not be required to remain by the phone or in quarters;
>
> c) the Housing Authority will immediately notify the State Unemployment Commissions local office of the conditions of the layoff and item (b).

The employer immediately implemented that plan. Thereafter, the union filed these unfair labor practice charges.

POSITIONS OF THE PARTIES

The union argues that the employer's budgetary problems were actually the result of its unlawful discharge of Kennedy and Bonaparte in 1985, and that the budget shortfall was then further exacerbated by the employer's hiring of Gary Gunkel. The union alleges, further, that the organizational activity among the maintenance workers and the union's pursuit of the previous unfair labor practice charges were the motivating factors behind the employer's decision to resolve its budgetary problems by laying off the maintenance laborers. The complainant argues that the only personnel seriously considered for layoff by White were the maintenance labors. Finally, the union argues that the Examiner should reverse an evidentiary ruling by which the Examiner excluded an account of a March 1, 1988 meeting of the employer's board which was published in the Lewiston Tribune newspaper.

The employer argues that the union is erroneous in its claim that the employer has blamed the union for its financial problems. The employer alleges that the union failed to make a prima facie showing that the employer based its decision on the layoffs on a discriminatory motive or unlawful intent. The employer asserts that the employee reductions were the result of budget necessity, and that the same decisions would have been made in the absence of protected conduct. Finally, the employer defends that it has not refused to engage in collective bargaining on the issue of personnel reductions.

DISCUSSION

Admissibility of the Newspaper Article

During the presentation of its case, the union moved for the admission into evidence of a newspaper article from the Lewiston

Tribune. The article reported on a meeting of the employer's Board of Commissioners. The document was marked as Exhibit 29. The employer objected that the article was the work product of a reporter not available to testify at the hearing. The employer alleged that the article contained some paraphrased statements and descriptions of events which occurred outside of the board meeting. Further, the employer raised the issue of attorney-client privilege being violated by a newspaper account which might contain discussion of the board in executive session with the board's attorney present.

The union responded that the newspaper reported only on what was said during an open session, and that the article was no different than written notes which may be admitted long after they are written. Citing Town of Granite Falls, Decision 2692 (PECB, 1987) and City of Kelso, Decision 2633 (PECB, 1988), the union contends in its brief that newspaper accounts have been admitted in other cases before the Commission. Since the Commission is not bound by technical rules of evidence, the union urges that newspaper articles should be admitted. The union thus urges the Examiner to reverse his ruling on Exhibit 29, and to admit the article into evidence as an account of what occurred at the subject meeting.

The complainant correctly cites RCW 41.56.170:

> COMMISSION TO PREVENT UNFAIR LABOR PRACTICES AND ISSUE REMEDIAL ORDERS--PROCEDURE--COMPLAINT--NOTICE OF HEARING--ANSWER--INTERVENING PARTIES--COMMISSION NOT BOUND BY TECHNICAL RULES OF EVIDENCE.
>
> . . .
>
> In any such proceeding the commission shall not be bound by technical rules of evidence prevailing in the courts of law or equity.

The Commission is also governed by the Administrative Procedures Act, Chapter 34.04 RCW, which includes at RCW 34.04.100:

> (1) Agencies, or their authorized agents, may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.
>
> . . .
>
> (3) Every party shall have the right of cross-examination of witnesses who testify, ...

The probative value of an exhibit depends somewhat on the purpose for which it is offered in evidence. In City of Kelso, supra, cited by the complainant, the newspaper article was used as evidence of a "bitter crusade, with many battles along the way". Granite Falls, supra, was a similar situation in that the fact of publicity was evidence in the presentation of a case. The union did not make clear as to why Exhibit 29 was being offered into evidence in the instant case. This left (and leaves) the Examiner in doubt as to its probative value, and in doubt as to whether it was merely cumulative and repetitious.

The exhibit at issue here would have had probative value to establish that there was publicity about the meeting. The union did not argue that the article was necessary to establish that there was publicity surrounding the issue, however. Rather, it appeared to focus on the content of the article as proof of the truth of the matters stated. The probative value of the exhibit was thus lessened. Neither the reporter who wrote the article nor the newspaper's editor were present at the hearing to respond to cross-examination as to what in the article was factual and what was interpretation. A member of the employer's board who was present at the meeting in question was used to identify the exhibit, and could have been examined about what transpired at the meeting. Further, the subject matter of the article was recorded in official minutes of the employer, which were available to the

union and were, in fact, later admitted into evidence as Exhibit 30. It is thus clear that Exhibit 29 was merely cumulative to other evidence that was subject to the full right of cross-examination. The ruling on Exhibit 29 will stand as made at the hearing.

The Legal Standard and Burden of Proof

This unfair labor practice case arises under RCW 41.56.140. The union made specific reference to the portions of that statute making it an unfair labor practice for an employer:

> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
>
> . . .
>
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
>
> (4) To refuse to engage in collective bargaining.

The union's complaint that the employer was once again attempting to interfere with the protected rights of employees Kennedy and Bonaparte (i.e., that the employees who "brought the union in" were being systematically harassed and then ultimately laid off) calls forth the same legal principles applied in Asotin County Housing Authority, Decision 2471, 2471-A (PECB, 1987).

In City of Olympia, Decision 1208-A (PECB, 1982), the Commission had adopted the "causation" test used by the National Labor Relations Board in Wright Line, Inc., 251 NLRB 150 (1980).[4] Under that test, the complaining party must make a prima facie showing based upon employees' protected conduct:

---

[4] The Wright Line test was developed on the basis of the decision of the United States Supreme Court in Mt. Healthy v Doyle, 429 U.S. 274 (1977).

> 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.
>
> . . .
>
> First, we shall require that the General Counsel make a prima facie case showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Wright Line, 251 NLRB 150.

Thus, the moving party must make a showing from the surrounding circumstances that conduct protected by state law was being penalized. City of Bellevue, Decision 2096 (PECB, 1984). Only if such a showing has been made does the burden of proof shift to the employer to prove that the decision or action would have been the same, regardless of any protected activity.

Application of the Causation Test

In the instant case, the complainant uses multiple lines of argument to support assertion that the employer's conduct was actionable interference and discrimination.

Previous Litigation -

The union first argues that the history of these parties, culminating in the Commission's earlier decision and order reinstating Bonaparte and Kennedy, clearly shows a past intent by this employer to remove those employees from its workforce by unlawful means.

The factors leading to the inference of unlawful motivation in the earlier case were clear and unmistakable: A small workforce; a union organizing campaign; the dismissal of the two employees who

were obvious union supporters; and the retention of the one employee who had not supported the organizing effort. Additionally, the Examiner in that case found that the employer was inconsistent in its decisions regarding the two employees, and that the employer did not follow its own reduction-in-force policies. It was a textbook case of interference and discrimination for union activity.

Here, however, the employer did comply with the Commission's order to reinstate Kennedy and Bonaparte, and the departures of Ketchersid and the executive secretary from the employer's workforce are not alleged to have been discriminatory. The complainant thus cannot rely solely on past unfair labor practices to prove employer motivation in its more recent actions, absent some indication of an ongoing union animus.

Budget Deficit and New Employee Hiring -

The union particularly points to the employer's continuing concern about the budget deficit and its causes, and the seemingly contradictory hiring of a new employee, Gunkel, as evidence of an ongoing effort by the employer to interfere with and discriminate against bargaining unit employees. The complainant contends that the employer's budget shortfall in 1988 ultimately resulted from the unlawful discharge of Kennedy and Bonaparte in 1985. While this argument may have some factual basis from a purely accounting point of view, it is neither persuasive nor conclusive in establishing that the employer had a current intent in 1988 to discriminate based upon union activity. Carried to its extreme, every expenditure made by the employer prior to 1988 contributed to the budget deficit. The complainant provided no evidence that the backpay and litigation expenses incurred by the employer as a result of the earlier unfair labor practice proceedings were the sole cause, or even a major cause, of the shortfall in the employer's reserves in 1988. More importantly, the complainant provided no evidence that the shortfall was created deliberately, as a

subterfuge to justify layoffs or the hours reductions at issue here.

Although perhaps a closer question, the record also fails to sustain an inference that Gary Gunkel was hired as part of a long-range scheme by the employer to further discriminate against Kennedy and/or Bonaparte. As with other expenditures, the cost of adding Gunkel to the employer's staff would undoubtedly have had some impact on the size of the budget shortfall that was to be called to the employer's attention in 1988. On the other hand, the costs of hiring Gunkel were at least partly offset by the savings resulting from the departures of the executive secretary and third maintenance laborer. Had the employer made different financial decisions at any of a number of points in time, the shortfall in reserves might have been averted, and layoffs might not have been necessary. By themselves, however, imprudent budgetary decisions are not indicative of illegal intent.

The union also put forward the argument that Gunkel was hired illegally, during an executive session held in violation of the Open Public Meetings Act, and that he was hired as a temporary employee with benefits (medical insurance), contrary to the employer's normal personnel policies. While this argument is also advanced to prove an intent to interfere with or discriminate against Kennedy and/or Bonaparte for their union activities, the real question is whether the hiring of Gunkel was indicative of an unlawful motive. Unlike the inconsistent decisions regarding employee terminations that were at issue in the earlier unfair labor practice case, the hiring of Gunkel is only tangentially related to the issue of the layoffs and/or hours reductions imposed on Kennedy and Bonaparte. Viewed several months after the fact, and with the vision of hindsight, the employer's board may have acted unwisely in hiring Gunkel, but an imprudent decision is not subject to reversal by the Commission in the absence of a connection to the protected activities of the employees. Looking even

further back in time, had the employer voluntarily recognized and bargained with the union in 1985 without any unfair labor practices, there would presumably have been one full-time position excluded from the bargaining unit in addition to White. The union has not provided evidence sufficient to support a prima facie case that Gunkel was hired as part of a larger plan of discrimination.

Intent of the Executive Director -
The union argues that Executive Director White had an ongoing intention, dating from 1985, to remove Kennedy and Bonaparte from the employer's staff. She is alleged to have seriously considered only the layoff of maintenance workers as the solution to the HUD budget directive. The union describes a series of board meetings in which it was apparent that White was a continuing advocate for laying off one maintenance worker, and for the retention of Gunkel. The complainant argues that the employer's board is bound by the decisions and actions of its supervisory personnel.

Whatever White's motives may have been in proposing to have one maintenance laborer laid off, they are not relevant because that position was not ultimately reflected in the final decision made by the board. In fact, the hours reductions were the result of a compromise position taken by the union itself in collective bargaining. In essence, the employer's board overruled White, agreeing in the end to splitting the layoff between Kennedy and Bonaparte while retaining both of them as employees with rights of recall to full-time employment. The union has not provided evidence sufficient to prove a prima facie case that the reduction of hours was the result of union animus on the part of White.

Absence of Alternative Motive -
In arguing that the employer intentionally interfered with and discriminated against the maintenance laborers, the union reasons that there must have been an illegal motive, because no other motive existed for the employer's decisions. The "continuing animosity"

allegedly harbored by White for the successful challenge of the 1985 terminations, it argues, supports this allegation.

Again the union failed to offer supporting evidence linking the 1988 layoffs to previous events. Although a "smoking gun" is not necessary to prove intent, the establishment of a plausible causal relationship between intent and action on the part of the employer must be established. City of Bellevue, supra.

Post-Reinstatement Harassment -
The union argues that, through a pattern of systematic harassment and generally bad working conditions, the employer exhibited a continuing motivation to interfere with the protected rights of the organized employees and to discriminate against them for their union activities. The union described a series of complaints and problems that had arisen between the maintenance laborers and the employer's management, including: Doling out tools on a one-at-a-time basis; ordering that outside yard maintenance work be attempted during inclement winter weather; close and direct supervision by Gunkel, which was seen as interference by the employees; the use of independent contractors to perform plumbing and electrical repairs; and refusing to allow the use of employee-owned tools at worksites. The employer offered defenses to the charges of harassment of the maintenance workers, but they did not entirely defeat the inference of an unlawful motivation.

The employer asserted that there were only limited numbers of specific tools available, at least when Gunkel, Bonaparte and Kennedy were initially working together, so that the "doling-out" of tools was necessary to accomplish the work in an efficient manner with a limited numbers of tools.

Yard maintenance was admittedly ordered during inclement weather. However, the employer argues that this was done at a time when there was only limited indoor maintenance to be completed. Not

employing a laborer to do the outside work would have left the employer with a temporary layoff as the next alternative because of lack of work.

The employer acknowledged that Gunkel did provide close and direct supervision of the maintenance laborers, but defended that this was a primary responsibility of his position. Further, it noted that the supervision provided by Gunkel would "obviously" be different from what the employees had been accustomed to when Kennedy was the lead maintenance worker, or when White supervised the maintenance workers from the administrative office.

The employer admitted that it had contracted out some work, but countered the allegation that it was using independent contractors to do usual maintenance work or that it was building a justification for reducing maintenance hours. It identified the work contracted out as being either plumbing or electrical work that could not be done by the maintenance workers, because they lacked the tools or the specific skills required.

The employer countered the union's allegations with its own list of items: Excessive use of sick leave by Bonaparte; meetings held by Kennedy with visitors on the employer's time and property; and letters from tenants setting forth their complaints about the quality of some of the maintenance work that was being done.

It is clear that patterns of behavior existed between the parties that were indicative of continuing animosity and resentment on the part of both management and labor. Such animosity on the part of management cannot be legally, intentionally acted upon. The analysis on the part of some employer's board members that there needed to be a "buffer" between White and the maintenance laborers was probably correct. Unfortunately, the diplomacy needed for that difficult task was not available, and the divisions between management and the laborers continued to grow until the announcement of

the layoffs. Given the inability or unwillingness of management to deal with the continuing problems of supervision and direction presented by the returning maintenance laborers, and the list of continuing "incidents" involving the supervision of the maintenance laborers, an inference can be made that the employer had no intention of correcting such problems and that continually raising obstacles to the successful completion of the laborer's work was intentional and discriminatory. Further, the facts would support an inference that such discrimination reached its apex in the announcement of the proposed layoff of Bonaparte, so that the "compromise" to reduce the hours of work for both Bonaparte and Kennedy was arranged under a cloud of unlawful motivation.

The Examiner concludes that the burden of proof must be shifted to the employer under the Wright Line analysis.

The Rebuttal of the Inference

Budget Necessity -

The employer argues that it had to make budget reductions sufficient to cut $20,000 from its 1988 budget, and that HUD had advised personnel reductions, because the employer's earlier budget reductions had not created the reserves required by HUD. The employer further contends that, once its board decided to make a personnel reduction, there was then a need to decide which positions were the most essential to the employer's continued operations. The employer contends that its decision to "get by" with one maintenance laborer and the part-time maintenance work performed by Gunkel was based upon the frequency of tenant turn-over and the work needed to be done in vacancy preparation. It argues that there was no connection between the choice of the employee to be laid off and the poor employee-employer relations involving the maintenance laborers.

So far as it appears, this employer had no independent source of funding with which to replace the 40% of its budget received from HUD. Whatever the reasons for the decline of its reserves, with the correspondence from HUD that is in evidence, there can be little doubt that the employer faced a genuine fiscal crisis in 1988.

The Decision to Reduce the Maintenance Crew -

Given the evident struggle that the employer's board had in making the layoff decision, the Examiner concludes that the employer has demonstrated that some reduction of the maintenance workforce would have been necessary without regard to whether the maintenance employees were organized for the purposes of collective bargaining or were engaged in any protected activity. Unlike the situation in the earlier Asotin County Housing Authority case, the employer followed its own personnel rules in making the decision to lay off Bonaparte. It notified the union, and it discussed the situation with the union as required by law. It was not within the capacity of the employer and union to negotiate away the existence of the fiscal crisis, but they did negotiate the "effects" of the fiscal crisis. Deference is to be given to an employer in the exercise of control over its own budget, so long as that control does not violate its duty to bargain and refrains from interfering in protected employee rights. City of Kelso, Decision 2633-A (PECB, 1988). The employer's hiring of Gunkel in 1987 was at least in part to replace the non-bargaining unit executive secretary who had resigned, and the employer has justified its decision to retain that position based upon the work that needed to be accomplished.

The Negotiated Solution -

The reduction of hours for both Kennedy and Bonaparte, together with their retention on the payroll with full medical benefits, vacation and seniority rights, has been shown to be the result of negotiations between the parties in response to the HUD directive, rather than the culmination of a pattern of unlawful interference

with the right of the employees to organize and bargain. While it is true that the employer did not agree with the initial proposals put forward by the union (i.e., that Gunkel should be laid off, or that Gunkel's hours should be reduced along with those of the maintenance laborers), the correspondence between the parties clearly indicates that the employer kept the union apprised of the situation and continually offered to negotiate with the union.

The final destruction of the union's "discrimination" claim occurs in this case with the conclusion that the employer met its bargaining obligations on the matter. It is clear that the parties met, negotiated the layoff issue, and resolved the matter with a solution that was significantly different from that originally advocated by White or originally put forward by the employer's board.

Conclusion

The complainant has failed to connect the fiscal crisis leading to the reduction in hours of the maintenance laborers in 1988 with the union organizing effort in 1985, or the union's successful prosecution of the earlier unfair labor practice charges against the employer. The employer has presented evidence concerning the events and decisions in 1988 which rebut the inference of union animus. Although there was evidence of some ongoing employee relations problems, there was also an apparently genuine concern on the part of the employer about negotiation of the proposed layoffs to a satisfactory conclusion. The complaint must be dismissed.

FINDINGS OF FACT

1. Asotin County Housing Authority is a public employer within the meaning of RCW 41.56.030(1). Alice White is the employer's executive director.

2. The Washington State Council of County and City Employees (WSCCCE), is a labor organization within the meaning of RCW 41.56.030(3).

3. The WSCCCE is the exclusive bargaining representative for the maintenance laborers employed by the Asotin County Housing Authority.

4. In Asotin County Housing Authority, Decision 2471 (PECB, 1986) the employer was found to have committed unfair labor practices, by discriminating against maintenance laborers Roy Kennedy and Mike Bonaparte for their protected conduct in seeking to organize for the purposes of collective bargaining.

5. In July of 1987, the employer hired Gary Gunkel as "administrative assistant". Gunkel was initially hired as a "temporary" employee. Following the resignation of a "secretary" who had not been included in the bargaining unit represented by the union, Gunkel was assigned to perform some of the duties of that position, in addition to assisting White and supervising the employer's maintenance laborers.

6. Kennedy and Bonaparte were reinstated to employment with the employer on or about August 10, 1987, and were placed under the supervision of Gunkel. The maintenance laborers were thereafter under closer and more direct supervision than they had previous to their discharge, and many disputes arose between Gunkel and the maintenance laborers concerning how the maintenance work was to be completed.

7. On February 29, 1988, the employer was informed by the U.S. Department of Housing and Urban Development that the employer's reserve balance was unacceptably low, and that federal subsidies amounting to approximately 40% of the employer's overall budget were in jeopardy. The employer was

advised to effect reductions in personnel to correct the situation and retain its federal subsidy.

8. On March 10, 1988, the employer notified the union, in writing, that it was considering laying off the least senior maintenance laborer, Mike Bonaparte, for nine months to effect the personnel reductions recommended by federal authorities. That letter invited the union to suggest alternatives to the proposed layoff.

9. The union requested negotiations and the parties met, but were unable to reach an agreement at that time. On April 1, 1988, after having met with the union, the respondent informed Bonaparte that he was to be laid off effective April 10, 1988.

10. On April 15, 1988, the employer modified the layoff pursuant to an agreement reached with the union, whereby a personnel reduction was effected by a reduction in hours for both of the maintenance laborers, by rotating them on a cycle of ten days on duty followed by ten days off, while preserving the medical, vacation and seniority benefits of both employees.

CONCLUSIONS OF LAW

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

2. The conduct complained-of in this proceeding is the reduction in hours of the maintenance laborers employed by the respondent, so that the complaint charging unfair labor practices was filed in a timely manner pursuant to RCW 41.56.160, within the six months following the act or event giving rise to the complaint.

3. The complainant made a prima facie showing sufficient to support an inference that conduct of the maintenance laborers protected by RCW 41.56.040 could have been a motivating factor in the employer's decision to lay off or reduce the hours of the maintenance laborers.

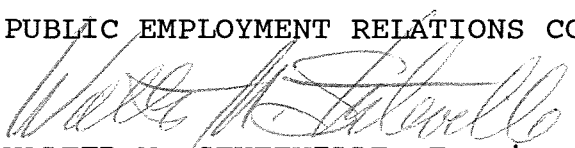
4. The respondent has established that a reduction of its maintenance laborer workforce would have occurred in 1988 due to the shortfall of fiscal reserves and the directive of the federal agency, notwithstanding any protected activity among the maintenance laborers, that it met its duty to give notice to the union, and that it bargained collectively in response to the request of the union, so that it has not committed and is not committing unfair labor practices under RCW 41.56.140-(1), (3) and (4).

ORDERED

The complaint charging unfair labor practices filed against the Asotin County Housing Authority in this matter is hereby dismissed.

Issued at Olympia, Washington, the 30th day of June, 1989.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



WALTER M. STUTEVILLE, Examiner

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