STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1760, Complainant,	)	CASE 7520-U-88-1573
vs.	)	DECISION 3366 - PECB
KING COUNTY FIRE DISTRICT NO. 4, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Cogdill, Deno, Millikan, and Carter, by W. Mitchell Cogdill, Attorney at Law, appeared on behalf of the union.

Foster, Pepper and Shefelman, by P. Stephen DiJulio, Attorney at Law, appeared on behalf of the employer.

On August 11, 1988, International Association of Fire Fighters, Local 1760, filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that King County Fire District No. 4 had violated RCW 41.56.140, by personnel action taken concerning Peter Thornley. A hearing was held on July 24, 1989, before Examiner Frederick J. Rosenberry. The parties did not file post-hearing briefs.

BACKGROUND

International Association of Fire Fighters, Local 1760, is the exclusive bargaining representative of certain employees of King County Fire District No. 4. The employer and the union have had a collective bargaining relationship that pre-dates the events involved in this case, and they had a collective bargaining

agreement for the period from January 1, 1986 through December 31, 1988. The bargaining unit covered by that contract included approximately 47 employees in the ranks of firefighter, lieutenant, captain, and battalion chief who are "uniformed personnel" within the meaning of RCW 41.56.030(7), as well as "mechanic" and "facilities and grounds maintenance" employees who are not "uniformed personnel".

In addition to the workforce represented by the union, the employer maintains a cadre of approximately 23 "volunteer" or "reserve" firefighters.

Peter Thornley was hired on May 1, 1986, to fill the then-new "facilities and grounds maintenance" position. The employer's position summary for that title states:

> This position performs work of a semi-skilled nature, in the maintenance and repair of buildings, grounds, facilities and equipment.
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> This position performs a variety of semi-skilled maintenance duties requiring a knowledge of various trade skills such as carpentry, electrical, painting, plumbing and related building maintenance trades, etc. This employee may work either independently on routine maintenance assignments or under the technical direction of a supervisor or superior, who will review work in progress and upon completion to insure that desired results are obtained.

Although the question was initially disputed between the parties, the employer ultimately acquiesced to the union's insistence that the "facilities and grounds maintenance" position be placed in the same bargaining unit with the "uniformed personnel". The parties then negotiated a salary rate and benefits for the new position. Thornley did not take part in the employer's "reserve" program.

In about May, 1988, Thornley learned that the employer was accepting applications for the purpose of hiring a regular, full-time firefighter. Thornley attempted to apply for the position, but was advised by the management that the employer was only accepting applications from members of its "reserve" group, so that he was ineligible to apply.

Thornley brought the situation to the attention of the union, and the union submitted a grievance on Thornley's behalf. In its June 16, 1988 grievance letter, the union claimed that the employer's refusal to allow Thornley to apply for the firefighter position was discriminatorily motivated. The employer denied Thornley's grievance and, on July 13, 1988, administered an employment test to applicants from the "reserve" group. The union then filed the instant unfair labor practice charge.

The record reflects that during or about September of 1988, subsequent to the filing of this unfair labor practice case, Thornley enrolled in the volunteer firefighter program of King County Fire District No. 16.[1] Subsequently, the union requested the employer to reconsider its policy limiting recruitment to its own "reserve" force, but the employer declined to do so.

The record also reflects that, subsequent to the filing of this unfair labor practice case, the employer insisted in bargaining on a separation of the bargaining unit, and that the parties agreed to create separate bargaining units for the "uniformed personnel" and those who are not "uniformed personnel".[2]

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[1] King County Fire District No. 16 borders King County Fire District No. 4 to the east.

[2] The record reflects that separate collective bargaining agreements were negotiated for two units, effective January 1, 1989.

POSITIONS OF THE PARTIES

The union asserts that there has been a trend on the part of the employer to make "civilian" positions out of positions formerly filled by "uniformed personnel", and that the employer has then insisted upon removal of such positions from the "uniformed personnel" bargaining unit. The union maintains that its resistance to such measures has created an atmosphere of hostility on the part of the employer, and has led to retaliation by the employer. It is the union's belief that the employer's refusal to consider Peter Thornley for a regular firefighter position was based on such hostility. The union denies that the employer has a policy of restricting applicants for firefighter positions to those individuals who serve in its "reserve" program, and it claims that the employer has hired a number of firefighters who were not members of the reserve group.

The employer denies that it discriminated against Thornley. It maintains it has had a long-standing practice of giving preference to those already within its "reserve" program when hiring regular firefighters. It explains that this is beneficial to the employer, by providing an incentive which aids in recruiting qualified "reserve" personnel, and by preserving the training and experience they acquire in their "reserve" roles. The employer acknowledges that there have been instances where it has hired individuals who were not among its "reserve" group, but it asserts that those situations were due to there being no "reserve" personnel who were interested in becoming regular firefighters or were due to special qualifications that were unique to the positions that were open. The employer thus maintains that Thornley was ineligible to apply for the firefighter position, because he was not a "reserve" for the employer, and that his inclusion in the bargaining unit had nothing to do with his ineligibility to apply for the firefighter position.

DISCUSSION

The Applicable Legal Standards

It is unlawful for a public employer to engage in any form of reprisal or discrimination against its employees because they exercise their right, under Chapter 41.56 RCW, to organize themselves for the purpose of collective bargaining and to designate an exclusive bargaining representative. The statute provides, in relevant part:

> **RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE BARGAINING REPRESENTATIVE.** No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under 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;[3]

A discrimination violation occurs where it is demonstrated that an employer deprives an employee of some ascertainable right, with-

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[3] The complaint form filed on August 11, 1988, does not contain any marks in the boxes provided to indicate which specific subsection(s) of RCW 41.56.140 are alleged to have been violated. Arguments concerning "discrimination for union activity" were raised throughout the hearing, however, and the employer never raised any question or doubt as to the nature of the allegations against it. "Discrimination" is prohibited in RCW 41.56.040, and so is incorporated, by reference, into RCW 41.56.140(1).

holds benefits to which an employee would otherwise be entitled, or takes adverse action against an employee, in reprisal for the exercise of protected activity. Essential to such a finding is a showing that the employer intended to discriminate against the employee. City of Seattle, Decision 3066 (PECB, 1989), AFFIRMED Decision 3066-A (PECB, 1989).

The complainant has the burden of proof in an unfair labor practice case. Bellingham Housing Authority, Decision 2335 (PECB, 1985). Of particular interest in this case, the Commission and the courts have embraced the principles set forth by the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083 (1980), which prescribed a test for balancing the rights of employees with those of the employer in cases where a discriminatory motivation is a possibility.[4] City of Olympia, Decision 1208-A (PECB, 1982). 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.

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[4] 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. Highline Community College, 31 Wn.App. 203 (Division II, 1982); Clallam County, Decision 1405-A (PECB, 1982), aff. 43 Wn.App. 589 (Division I, 1986).

Although Wright Line and its progeny generally address dual-motive cases, where there may be both legitimate and prohibited reasons behind a discharge, the principles applied there are also applicable in evaluating the merits of this case. Mixed motivation may be a factor that causes an employer to decide to deny an individual an opportunity to apply for a job or position, in much the same manner as it may be the basis for a decision to discharge an employee.

Application of the Wright Line Analysis

This dispute evolved from an attempt by bargaining unit employee Peter Thornley to apply for a firefighter position. The first inquiry is whether there is evidence to support an inference that the employer's rejection of Thornley's application was discriminatory, in reprisal for union activity.

The employment setting is a commingled workforce which includes both "uniformed personnel" and employees who are not "uniformed personnel". The employer's workforce has grown considerably during the past several years, expanding from approximately 27 firefighters in 1980 to approximately 47 firefighters at the time of the hearing in this case. The record fairly reflects that the union has sought to include all of the employees it represents in a single bargaining unit, while the employer has desired to separate those employees into two units. The union refers to three such disputes between the parties.

The first dispute cited by the union erupted several years ago, when the union filed unfair labor practice charges[5] alleging that the employer had unilaterally increased the work time of the

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[5] Examination of the docket records of the Commission discloses that an unfair labor practice complaint filed February 8, 1984 was docketed as Case 5094-U-84-893.

"reserve" group, to the detriment of the regular firefighters. The record reflects that the parties were able to resolve that dispute on their own. The union withdrew its complaint, and no hearing was held before the Commission.[6]

The union describes a second dispute that occurred in 1985, when the incumbent in a "firefighter-mechanic" position then included in the bargaining unit announced his intention to resign. The union alleges that the employer expressed a desire to change the composition of the bargaining unit, by unilaterally eliminating the "firefighter-mechanic" classification and hiring a "mechanic" who would not be a "uniformed" employee or a member of the bargaining unit. The union filed another unfair labor practice complaint with the Commission,[7] this time alleging that the employer had unlawfully disregarded its bargaining obligation, and simultaneously filed a unit clarification petition with the Commission,[8] seeking to include the new "mechanic" position in the existing bargaining unit. The parties were also able to resolve that dispute, and the union withdrew both cases.[9]

The third dispute cited by the union erupted in 1986, when the employer created the "facilities and ground maintenance" position. Contrary to the union's desire, the employer did not intend to place that position in the same bargaining unit with the employer's

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6 The Commission's docket records also indicate that Case 5094-U-84-893 was closed as "withdrawn" on December 27, 1984.

7 This unfair labor practice complaint was docketed as Case 5869-U-85-1094.

8 The unit clarification petition was docketed as Case 5870-C-85-293.

9 The unfair labor practice case was closed as "withdrawn" on October 17, 1985. The unit clarification case remained pending until March 28, 1986, when it was closed on the basis of an agreement between the parties.

"uniformed personnel". As was the case in resolving the dispute over the "mechanic", however, the employer acquiesced to the union's demands, and agreed to place the "facilities and grounds maintenance" position in the existing bargaining unit.

Although the record reflects that the scope of the bargaining unit has been a major source of friction between the parties in the past, the Examiner does not find that fact to provide compelling support for the inference that is necessary in the instant case. In each of the instances which preceded the denial of Thornley's application for a firefighter position, the employer acquiesced to the union's position on the unit determination issue. Additionally, while none of those disputes actually came before the Commission for determination, it can be observed that the employer retreated in two more recent cases from positions that it could likely have sustained in proceedings before the Commission.[10] Acquiescence and compromise are indicia of an atmosphere of collaboration and harmony, not of hostility.

The union has expressed its belief that the employer's anti-union animus was not directed at Thornley as an individual, but rather at the union as an institution. Aside from innuendo, however, the union offered no evidence that supports its claim that the employer unlawfully discriminated against Thornley because of "union animus" stemming from the cited history of conflict. The Examiner concludes that the complaint must be dismissed due to the failure of the union to sustain its initial burden of proof under the Wright Line test. City of Bonney Lake, Decision 1962-A (PECB, 1985; Douglas County, Decision 1220 (PECB, 1981).

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[10] The matter of commingling of "uniformed personnel" and other employees in a single bargaining unit has come before the Commission on several occasions, and it has routinely been held that commingled bargaining units are inappropriate under RCW 41.56.060. See, King County Fire District No. 39, Decision 2638 (PECB, 1987); Benton County, Decision 2221 (PECB, 1985).

Application of the Wright Line Test - An Alternative View

Accepting that reasonable minds could differ, and that there may be some who would shift the burden of proof to the employer in this case, the Examiner nevertheless concludes that the complaint would have to be dismissed.

The Employer's Right to Hire -

There is a substantial question here as to whether Thornley was deprived of anything to which he was otherwise entitled. An employer has no obligation to bargain with the exclusive bargaining representative of its employees concerning hiring decisions and pre-hire employment qualifications. Kitsap County Fire District 7, Decision 2872-A (PECB, 1989). An employer is generally free to solicit applicants for employment in any manner it deems fit, so long as there are no discriminatory ramifications. King County Fire District No. 39, Decision 2160-C (PECB, 1986).

Allegations of "disparate" treatment -

The union claims that the employer has no identifiable policy that requires that an individual be a member of the employer's reserve force in order to be eligible to apply for a regular firefighter position. While there is apparently no written policy on the matter, the employer produced credible evidence in support of its claim of having a hiring policy which favors members of its "reserve" force. Fred Baker, a former deputy chief with the employer, testified regarding his personal career path[11] and explained that it has been long-standing policy of this employer

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[11] Baker started as a volunteer firefighter with the employer in 1961, and was subsequently promoted to the rank of lieutenant. He became a regular firefighter with the employer in 1970, and was subsequently promoted to the ranks of lieutenant, fire inspector, captain, battalion chief, and deputy chief. Baker resigned from the employer in 1987, and is presently a Deputy Chief at King County Fire District No. 16.

to hire from the ranks of the reserve force to fill regular openings. The union acknowledges that, for the most part, the employer has hired regular firefighters from the ranks of its reserves.

Notwithstanding the existence of a general policy, the union points to eight specific incidents which, it claims, involved hirings in contravention of such a policy. Specifically, the union maintains that the employer has filled three paramedic positions, a mechanic position, a facilities maintenance position, and three firefighter positions with individuals who had no fire fighting experience and were not members of the employer's reserve complement. Baker also testified concerning the circumstances under which the employer has deviated from its general policy of giving a hiring preference to its reserves.

The hiring of paramedics was related to circumstances over which the employer had no control. Baker explained that none of the employer's regular or reserve personnel were qualified as paramedics when the paramedic program was introduced in King County.[12] Baker explained, further, that it was not realistic for the employer to train current firefighters to become paramedics, because such a move would have depleted the employer of its trained manpower. Consequently, the initial complement of paramedics was hired from outside of the employer's regular workforce or reserve

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[12] Notice is taken of the proceedings and decision in King County, Decision 560 (PECB, 1979). The record in that case indicates that the paramedic program was initiated by King County ordinance in May of 1975. King County then contracted with three provider groups for service. One such provider group was made up of King County Fire District No. 4, King County Fire District No. 16, and the City of Lake Forest Park, and it was responsible for the administration and operation of the emergency medical services paramedic program in an area of the county to the north of Seattle. King County provided one-half to two-thirds of the funding and set certain standards for the operation of the program. The case was a representation case commenced on December 9, 1977.

group, and those hired were subsequently cross-trained to be firefighters.

The hiring of the mechanic was related to a desire for somebody with experience. Baker testified that he was instrumental in hiring the firefighter-mechanic, that the individual who was hired was a trained mechanic employed by the City of Mountlake Terrace Fire Department, and that the individual had also served in Mountlake Terrace as a volunteer firefighter. Baker was not aware of the employer having any trained mechanics at that time in its reserve force.

Responding to a union allegation concerning a "facilities" position which pre-dates the position held by Thornley, Fire Chief Michael Brown testified, without contradiction, that the former facilities employee was a reserve who was hired to perform a remodeling project and was then assigned to work as a regular full-time firefighter.

With regard to the hiring of three firefighters during or about 1971, Baker explained that the individuals referred to were recruited from outside the department and placed directly into fire fighter positions, because none of the people in the employer's reserve force at that time showed interest in becoming regular firefighters.

Baker testified that he did not recall any other exceptions to the employer's policy when hiring firefighters. His credible recollection of the employer's policy and past events was not disputed by the union, and was corroborated by Richard C. Warbrouck, who is the chairman of the employer's board of fire commissioners.[13] Thus,

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[13] Warbrouck is himself a retired firefighter, and is currently an officer of International Association of Fire Fighters, Local 27, which represents firefighters employed by the City of Seattle.

even if the burden were to be shifted to the employer under the Wright Line standard, it is clear that the allegation must be dismissed. The management decision to limit applicants for the position of firefighter to the ranks of its reserve firefighters was a proper exercise of managerial authority based on legitimate operational concerns. The employer has credibly explained the circumstances of past exceptions to its hiring policy, so as to demonstrate that its personnel actions with regard to Thornley were not discriminatorily motivated.

FINDINGS OF FACT

1. King County Fire Protection District No. 4 is a municipality of the State of Washington, and is a public employer within the meaning of RCW 41.56.030(1).

2. International Association of Fire Fighters, Local 1760, a "bargaining representative" within the meaning of RCW 41.56-.030(3), is the exclusive bargaining representative of employees of King County Fire Protection District No. 4. The bargaining relationship is currently conducted through two separate bargaining units, one of which is limited to employees who are "uniformed personnel" under RCW 41.56.020(7).

3. During the period between 1980 and 1989, the employer's workforce of regular full-time "uniformed personnel" increased from approximately 27 to approximately 47 employees.

4. The employer maintains a force of "reserve" or "volunteer" firefighters who are not within the bargaining unit represented by Local 1760.

5. As an incentive to recruitment of "reserve" personnel, and to preserve its training investment in them, the employer has historically given members of its reserve force a preference

in hiring of regular full-time firefighters. For the period from 1971 to the date of the hearing in this matter, the union identified eight individuals who were not members of the employer's reserve force immediately prior to being hired by the employer as regular full-time firefighters. In each case, the employer offered a credible explanation for sound business reasons behind the deviation from its general policy.

6. The union filed an unfair labor practice charge against the employer in 1984, in a dispute concerning assignment of bargaining unit work to members of the reserve force. The union filed an unfair labor practice charge and a unit clarification petition in 1985, in a dispute concerning removal of mechanic work from the bargaining unit. The parties had a dispute in 1986 concerning removal of a facilities maintenance position from the bargaining unit. All such disputes were resolved by the parties on terms acceptable to the union, and no hearings were held regarding the merits of the union's claims. As a result of those settlements, the bargaining relationship was conducted for a time by means of a commingled bargaining unit which included both "uniformed personnel" and employees who are not "uniformed personnel".

7. Peter Thornley was hired on May 1, 1986, to fill the then-new "facilities and ground maintenance" position. Thornley did not participate as a member of the employer's reserve program.

8. During or about June, 1988, Thornley sought to apply for the position of full-time firefighter in the district. The employer refused to consider Thornley for a firefighter position, because he was not a member of the employer's reserve force.

9. In July of 1988, the employer administered an employment test for the position of regular full-time firefighter to those

members of its reserve force who had made application for such position. It is inferred that the employer eventually hired a person who had been a member of its reserve force.

CONCLUSIONS OF LAW

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

2. International Association of Fire Fighters, Local 1760, has failed to sustain its burden to establish an inference that the refusal of King County Fire District No. 4 to consider the application of Peter Thornley for a regular full-time firefighter position was motivated by anti-union animus violative of Thornley's employment rights under RCW 41.56.040.

3. King County Fire District No. 4 has established in any event that its refusal to consider Peter Thornley for the position of regular full-time firefighter was an appropriate exercise of managerial prerogative, consistent with its past practices, so that there was no violation of RCW 41.56.140(1).

ORDER

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

Dated at Olympia, Washington, this 7th day of December, 1989.

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.