Port of Bellingham, Decision 5640 (PECB, 1996)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	
INLANDBOATMEN'S UNION OF THE PACIFIC	CASE 11632-U-95-2730
	DECISION 5640 - PORT
Involving certain employees of:	
PORT OF BELLINGHAM	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Scott Braymer, Regional Director, appeared on behalf of the union.

Larry E. Halvorson, Attorney at Law, appeared on behalf of the employer.

On March 6, 1995, the Inlandboatmen's Union of the Pacific (IBU) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the Port of Bellingham (employer) had violated RCW 41.56.140-(1), (3), and (4). A hearing was held on February 21, 1996, before Examiner Rex L. Lacy. The parties filed post-hearing briefs.

BACKGROUND

The Port of Bellingham operates in Whatcom County, in the northern portion of western Washington. A three-member elected board of commissioners is responsible for overall port operations. The employer's facilities are used by the Alaska Marine Highway System as the southern terminal for the Alaska State Ferries.

Following an election conducted by the Public Employment Relations Commission, the Inlandboatmen's Union of the Pacific was certified on April 13, 1994, as the exclusive bargaining representative for a bargaining unit described as follows:

> All employees of the Port of Bellingham at the Bellingham Cruise Terminal.

Port of Bellingham, Decision 4624-A (PORT, 1994)

The employer had previously signed a joint contract with the individual Bellingham Cruise Terminal employees.

The IBU and the employer engaged in protracted negotiations for their initial collective bargaining agreement. The recognition clause in the contract they signed on February 6, 1996, reads:

> All non-exempt office clerical employees of the Employer, excluding supervisors, managerial, professional, confidential employees, guards, ticketing agents at the Bellingham Cruise Terminal, and employees represented by other labor organizations.

Employees working at that facility make reservations, take tickets, assist in loading and unloading the ferries, provide administrative support, and perform janitorial functions.

The Previous Unfair Labor Practice Cases

On May 6, 1993, while its representation petition was pending before the Commission, the IBU filed an unfair labor practice complaint alleging that the employer had unilaterally changed the working conditions of bargaining unit employees, by implementing a new employee handbook. That complaint was docketed as Case 10454-U-93-2418. That complaint was withdrawn prior to a hearing, and the case was closed on May 18, 1994.

On May 17, 1993, the IBU filed a second unfair labor practice complaint alleging the employer had violated the statute by unilaterally requiring employees at the Bellingham Cruise Terminal to wear uniforms. That complaint was docketed as Case 10454-U-93-2418. It was also withdrawn prior to a hearing, and was also closed on May 18, 1994.

The Status Quo Ante

During the course of the hearing in the instant case, the employer produced a document titled "Agreement between the Port of Bellingham and the Bellingham Cruise Terminal Employees - January 1, 1992". Included in that document was the following:

> ARTICLE IV
>
> HOURS OF WORK, OVERTIME AND HOLIDAYS
>
> 4.1 Pursuant to Article III, the Employer reserves the right to schedule the hours of work and the shifts.
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> 4.2 Hours of work. **It is understood that hours of work, including breaks and meal periods, will vary depending upon the operational requirements of the Bellingham Cruise Terminal.** The immediate supervisor shall post a monthly schedule, at least seven (7) calendar days prior to the beginning of the scheduled month. In the event an employees schedule is changed from the monthly posted schedule, the employer shall give the employee seventy-two (72) hours notice.
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> [Emphasis by **bold** supplied].

That was offered to show the wages, hours, and working conditions of employees at the Bellingham Cruise Terminal prior to the certification of the IBU as exclusive bargaining representative.

The employer has historically reduced the hours of work for Bellingham Cruise Terminal employees when the Alaska State Ferries

reduces weekly ferry sailings from two to one during the winter months. In the past, all of the bargaining unit employees had their work hours reduced by 8 to 16 hours per week until the ferry sailings were increased in the spring. Hours were reduced equally for employees on a departmental basis, by classification.

In March of 1995, while the parties were still negotiating their first contract, the employer implemented a cutback of personnel. In a notable exception to the past practice, one employee was altogether laid off. Maria Boyd was the least-senior employee in the ticketing/reservation agent classification when she was laid off on March 1, 1995. This complaint followed, on March 6, 1995.

The first collective bargaining agreement between the employer and the IBU, which was signed and effectuated on February 6, 1996, contains the following provision:

> ARTICLE III
>
> HOURS OF WORK AND OVERTIME
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> 3.01 Hours of work, including breaks and meal periods. Individual and weekly normal schedule will vary depending upon Employer needs. The Employer shall post a work schedule on the employee bulletin board for all bargaining unit employees setting forth with respect to each employee the job classification, the starting and ending time for his/her shift, and days off. **Because of the fluctuation of ferry arrivals and departures, it may be necessary to adjust an employees scheduled hours to meet Employer needs.** ...

[Emphasis by **bold** supplied].

The dispute concerning the layoff of Maria Boyd was not resolved by the parties as part of their contract negotiations.

POSITIONS OF THE PARTIES

The union contends that the employer committed an unfair labor practice by breaching an oral agreement to not change the hours of bargaining unit employees. That agreement was allegedly made during the course of negotiations which led to the withdrawal of the previous unfair labor practice cases. The union also alleges that the employer unlawfully discriminated against Boyd, by selecting her for layoff because of her protected union activities. The union alleges that the employer laid off Boyd and reduced the work hours of other bargaining unit employees without meeting its statutory obligation to bargain in good faith concerning the reduction in hours. Finally, the union alleges that the employer insisted to impasse that the union waive its right to file and process this unfair labor practice complaint, as a condition to settlement of the contract negotiations.

The employer contends that it did not breach any unwritten settlement agreement when it laid off Boyd, that the layoff was due to business necessity, that Boyd's union activities played no role in the decision concerning who was to be laid off, that Boyd was the least senior employee in her job classification, and that the employer did not insist upon withdrawal of this unfair labor practice complaint as a condition of settlement in the contract negotiations.

DISCUSSION

Collective bargaining relations between port districts and their employees are regulated by two statutes. Chapter 41.56 RCW applies "except as provided otherwise" in Chapter 53.18 RCW.[1] RCW 41.56-

[1] RCW 53.18.015.

.140(1) through (4) define unfair labor practices for employers, as follows:

> 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;
> (2) To control, dominate or interfere with a bargaining representative;
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
> (4) To refuse to engage in collective bargaining.

Chapter 53.18 RCW does not contain provisions for processing unfair labor practice complaints, so Chapter 41.56 RCW governs this arena.

Chapter 41.56 RCW authorizes public employers to engage in collective bargaining with bargaining representatives, as follows:

> 41.56.100 Authority and duty of employer to engage in collective bargaining--Limitations--Mediation, grievance procedures upon failure to agree. A public employer shall have the authority to engage in collective bargaining with the exclusive bargaining representative and no public employer shall refuse to engage in collective bargaining with the exclusive bargaining representative: PROVIDED, That nothing contained herein shall require any public employer to bargain collectively with any bargaining representative concerning any matter which by ordinance, resolution or charter of said public employer has been delegated to any civil service commission or personnel board similar in scope, structure and authority to the board created by chapter 41.06 RCW. Upon the failure of the public employer and the exclusive bargaining representative to conclude a collective bargaining agreement, any matter in dispute may be submitted by either party to the commission. If a public employer implements its last and best offer where there is no contract

> settlement, allegations that either party is violating the terms of the implemented offer shall be subject to grievance arbitration procedures if and as such procedures are set forth in the implemented offer, or, if not in the implemented offer, if and as such procedures are set forth in the parties' last contract.

RCW 53.18.020 similarly authorizes port districts to enter into labor agreements, as follows:

> RCW 53.18.020 Agreements authorized. Port districts may enter into labor agreements or contracts with employee organizations on matters of employment relations: PROVIDED, That nothing in this chapter shall be construed to authorize any employee, or employee organization to cause or engage in a strike or stoppage of work or slowdown or similar activity against any port district.

RCW 41.56.030(4) defines collective bargaining, as follows:

> (4) "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and **to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer**, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter. ...
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> [Emphasis by **bold** supplied]

Chapter 53.18 RCW does not contain any provision which provides otherwise.

The Alleged Oral Agreement

The union asserts that the employer entered into an oral agreement to not change the hours and working conditions of bargaining unit employees during the course of negotiations, in exchange for the union's withdrawal of the unfair labor practice complaints it filed on May 6 and 17, 1993. The employer disagreed with the union's interpretation of the conversation, and characterized the withdrawal of the previous unfair labor practice complaints as a good faith clearing of the decks for negotiations on an initial collective bargaining agreement.

The critical issue here is the "oral" nature of the agreement relied upon by the union. In State ex rel. Bain v. Clallam County, 77 Wn.2d 542 (1970), the Supreme Court of the State of Washington held that the language of RCW 41.56.030(4) and preservation of a clear record of public business both required that all agreements reached in collective bargaining be reduced to writing. An oral commitment would not be enforceable, regardless of its terms.[2] The union cites Island County, Decision 857 (PECB, 1980), Columbia Basin Irrigation District, Decision 1404 (PECB, 1982), and Kiona-Benton School District, Decision 4312 (PECB, 1993), but all of those cases dealt with refusals to ratify or sign written contracts reflecting terms agreed upon in collective bargaining. They are of no help to the union with enforcement of an oral agreement that it has never previously sought to have written down.

The Parties' Written Collective Bargaining Agreement

By definition, collective bargaining is an exercise in which an employer and the exclusive bargaining representative of its

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[2] Accordingly, cases cited by the union that arose under the National Labor Relations Act, including Hydrologics, Inc., 293 NLRB 1060 (1989) and Odell & Sons, 277 NLRB 1353 (1985), are inapposite here.

employees seek to negotiate and sign a written contract setting forth the wages, hours and working conditions of the employees in an appropriate bargaining unit. In this case, the parties commenced bargaining in May or June of 1994. Their efforts came to a conclusion on February 6, 1996, when they signed and effectuated their initial contract. During the course of those negotiations, they agreed upon a contractual provision that permits the employer to reduce hours of work when lack of business requires it to do so. The evidence does not sustain the union's allegation that the employer failed to meet its statutory obligations to bargain in good faith over that contractual provision.

Reduction of Hours at the Bellingham Cruise Terminal

When Alaska State Ferries reduces the number of ferry sailings to Bellingham, the employer's revenues are reduced proportionally.[3] Employees' duties are similarly reduced, and it requires less personnel to provide services. Prudent management requires that adjustments in expenditures be made at such times, and the employer has historically cut back its personnel costs. The evidence clearly establishes that the hours of bargaining unit employees have been significantly reduced during winter seasons in the past, when the Alaska Marine Highway System reduced the number of sailings from two to one.

The financial situation in 1995 was much the same as it had been in previous years. Although the evidence suggests that reductions had been made in the past by spreading the burden among all bargaining unit employees (e.g., reducing the hours of all employees by 8 to 16 hours per week, or seeking voluntary reductions by employees who were willing to take leave without pay), the employer elected to entirely eliminate one ticketing/reservation agent. Layoff of

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[3] Revenues are cut by half or more, because of reduced travel by ferry system customers.

personnel is an accepted method of reducing personnel costs, and the aggregate effect on the bargaining unit was the same.

The union argues that the employer refused to bargain in good faith over the reduction of hours and the layoff of Boyd. The record refutes the union's assertion, however. The employer notified the union of the forthcoming hours reduction well in advance of the actual event. The evidence indicates that a substantial exchange of telephone calls, meetings and telefacsimile transmissions occurred between employer and union representatives during January and February of 1995, related to the hours reduction in the spring of 1995. Various permutations of hours reductions and layoffs were discussed in a debate which appears to have centered largely on which employee should be laid off, rather than on whether there should be a cutback of personnel. The parties reached a tentative agreement, which was rejected by the union membership. Thereafter, the parties continued negotiating until they reached another agreement which was ratified by the parties and effectuated as required by statute. Based on the record, the Examiner concludes that the employer has met its duty to bargain in good faith on this issue.

The Layoff of Maria Boyd

Maria Boyd was hired by the employer in 1990. Her first assignment was as a clerk at the Bellingham airport for about five months. She then accepted a "marketing coordinator" position at the employer's administration building, where she worked for approximately one and one-half years. In about 1992, she transferred to a "ticketing/reservation agent" position at the cruise terminal.

For an unspecified period, Boyd was temporarily assigned to provide clerical support as "administrative assistant" to the manager of

the cruise terminal.[4] While working in that capacity, Boyd was paid at her ticket agent rate, which is higher than the rate of pay for the administrative assistant position.

Boyd was the least-senior employee in the ticketing/reservation agents classification as of early 1995. When Boyd was laid off on March 1, 1995, she was being paid at a rate of $16.66 per hour. She applied for an office-clerical position at the employer's airport which had been discussed by the employer and the IBU in January and February of 1995, even though it is covered by a collective bargaining agreement between the employer and another union. Boyd was given the position at the airport, and started work there on March 13, 1995, at a $12.42 per hour rate of pay.

Alleged Deviation from Seniority -
The union does not dispute that McHenry held a different classification at the time of layoff, but it contends that he should have been laid off, because he had less seniority with the employer than Boyd. The employer argues that it has historically laid off by classification, rather than by employer-wide seniority.

While the decision in Port of Bellingham, Decision 4624 (PECB, 1993) found a contract signed by the employer and the individual employees was not a "collective bargaining agreement" for purposes of administering the contract bar provisions of RCW 41.56.070, that document does establish the wages, hours and working conditions which were in effect when the IBU filed its representation petition. Since no collective bargaining agreement had been signed by the employer and IBU as of March 1, 1995, it can also be taken as evidence of the status quo which existed when the present

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[4] In can be inferred from surrounding circumstances that this occurred in late-1992. Boyd served in this capacity from the time Loni Caulkins resigned until a replacement was hired. The record indicates that Greg McHenry was hired into the administrative assistant position in December of 1992, to permanently replace Caulkins.

dispute arose. That document did not contain any provisions which restricted the ability of the employer to lay off employees.

The seniority provisions eventually negotiated by the employer and IBU are consistent with the employer's view of the past practice:

> Article II
>
> SENIORITY
>
> 2.01 The parties agree that the job skills and classifications of the employees covered by this agreement are sufficiently diverse that **a seniority system uniformly applied to all employees covered by this Agreement may not be appropriate**. The parties therefore agree that the seniority provisions which follow below **shall apply only in cases were two or more employees are employed in positions with the same job similarities**. The Employer will provide the employee with a 30 day notice of layoff.
>
> ...
>
> 2.04 Seniority shall prevail in case of layoffs and recall, providing the employee is capable of performing the work. The Employer shall be the sole judge of capability. Regular part-time employees will have the same seniority rights as regular full-time employees.

[Emphasis by **bold** supplied.]

Under either of those provisions, the employer has the right to select employees for layoff by seniority within classifications. Thus, the evidence does not sustain a finding that the employer laid off Boyd in contravention of past practice.

Discrimination for Protected Activities -

The union's complaint alleged that Boyd was laid off in retaliation for engaging in protected union activities, but the union did not develop this theory at the hearing. The record before the Examiner fails to establish that Boyd was involved in organizing on behalf

of the union, that she held any union office, that she was involved in the negotiations for the initial contract, or that she was engaged in any other protected activities that would support a prima facie case for discrimination.

Insistence on Withdrawal of Charges

It is an unfair labor practice for a party to insist to impasse on the withdrawal of unfair labor practice charges as a condition of agreement on mandatory subjects of collective bargaining. Public Utility District 1 of Clark County, Decision 2045-B (PECB, 1989). The union accuses the employer of taking such a position, while the employer defends that it did not insist to impasse.

At one or more points during the course of the parties' contract negotiations, the employer sought the union's agreement to withdraw this unfair labor practice complaint as part of an overall settlement of their differences. The union declined to withdraw this complaint. The evidence indicates, however, that the employer backed off on its demand without taking the issue to an impasse. At a minimum, the parties had signed a collective bargaining agreement prior to the hearing in this matter, and the hearing went forward under the procedures set forth in Chapter 391-45 WAC.

FINDINGS OF FACT

1. The Port of Bellingham, a "public employer" within the meaning of RCW 53.18.010 and RCW 41.56.030(1), operates the Bellingham Cruise Terminal.

2. Inlandboatmen's Union of the Pacific, an "employee organization" within the meaning of RCW 53.18.010 and a "bargaining representative" within the meaning of RCW 41.56.030(3), has been the exclusive bargaining representative since April 13,

1994, of a bargaining unit of employees who work at the Bellingham Cruise Terminal.

3. In May of 1994, the IBU withdrew two unfair labor practice complaints which it had filed in May of 1993, concerning alleged unilateral actions by the employer during the time the representation petition was being processed. Neither of those complaints involved matters in dispute in this case. Any oral agreements reached by the parties in connection with the withdrawal of those complaints were not reduced to writing or signed by the parties.

4. After the certification of the union as exclusive bargaining representative, the parties engaged in protracted negotiations for their initial collective bargaining agreement. The contract negotiations continued through and beyond March of 1995.

5. Maria Boyd was hired as an "airport clerk" in January of 1990. She later served as a "marketing coordinator" before taking a "ticketing/reservation agent" position. The basic duties of the employees in the ticketing/reservation agent classification are to make reservations and sell tickets for Alaska Marine Highway System ferry vessels which arrive and depart from the employer's facility. As of March 1, 1995, Boyd was the least-senior ticketing/reservation agent.

6. Before March 1, 1995, the employer notified the union of an impending reduction of hours for cruise terminal employees, and of the employer's proposal to lay off Maria Boyd. The union demanded to bargain the issue, and the employer agreed to discuss the issue with the union. The parties reached a tentative agreement concerning the depth of the hours reduction and Boyd's layoff, but that agreement was rejected by the bargaining unit membership in January or February of 1995. The proposed reduction of work hours was consistent with past

practice when the Alaska State Ferries curtail operations in the spring, and was not opposed by the union. The parties disagreed about which bargaining unit employee should be laid off, with the union insisting upon application of seniority on an employer-wide basis while the employer proposed to continue a past practice of applying seniority within classifications.

7. The evidence does not support a finding that Maria Boyd was engaged in protected union activities which would mark her for retaliation, or that the employer selected Boyd for layoff based upon protected union activities.

8. The parties signed a collective bargaining agreement on February 6, 1996, with an expiration date of December 31, 1996. While the employer requested withdrawal of this unfair labor practice complaint as part of an overall agreement, the evidence does not support a finding that the employer insisted to impasse on that proposal. The parties' contract contains provisions which apply seniority by classifications within the bargaining unit.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapters 53.18 and 41.56 RCW and Chapter 391-45 WAC.

2. The employer did not fail or refuse to bargain in good faith with regard to the reduction of hours for bargaining unit employees in the spring of 1995, or with respect to the layoff of Maria Boyd, and it acted in a manner consistent with past practice, so that it has not committed any violation of RCW 41.56.140(4) in that regard.

3. The union has not presented a prima facie case showing that the employer has violated RCW 41.56.140(1) by discrimination against Maria Boyd in retaliation for protected union activities.

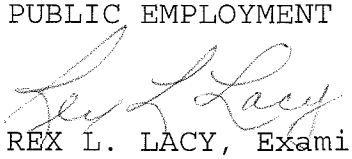
4. The union has not sustained its burden of proof to show that the employer violated RCW 41.56.140(4) by insisting to impasse upon withdrawal of this unfair labor practice complaint as a condition of agreement on a contract covering the wages, hours and working conditions of bargaining unit employees.

ORDER

Based on the entire record in this matter, the complaint charging unfair labor practice filed in this matter is **DISMISSED.**

Issued at Olympia, Washington, the 23rd day of August, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



REX L. LACY, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.