STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 120, AFL-CIO, Complainant, vs. PORT OF EDMONDS, Respondent.	CASE NOS. 2142-U-79-301 and 2172-U-79-305 DECISION NO. 1191 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Michael McGrorey, Research Director, appeared on behalf of the complainant.

Richard Cole, Attorney-at-Law, appeared on behalf of the respondent.

The above-named complainant filed the complaint in Case No. 2142-U-79-301 on June 26, 1979 and filed the complaint in Case No. 2172-U-79-305 on July 16, 1979. It alleges that the above-named respondent has committed unfair labor practices within the meaning of RCW 41.56.140. The complaints were consolidated and Rex L. Lacy was designated as Examiner to make and issue Findings of Fact, Conclusions of Law, and Order.

Pursuant to notice issued by the Examiner, hearing on the matters was held on May 14, 15 and 16, 1980 at Edmonds, Washington. The parties submitted post-hearing briefs.

THE COMPLAINTS:

The complaint in Case No. 2142-U-79-301 alleges as follows:

> "Employer compensated petitioner's representative/employee Bill Thornton for attending and testifying on behalf of the employer at representation hearing 1872-E-78-338.
>
> Employer advised, assisted and counselled petitioner's representative throughout the hearing in direct conflict of interests. The roles and functions of these two parties became indistinguishable and are evidence of collusion.
>
> Employer failed to compensate employee Ron Dillon who attended and testified on behalf of the Union at hearing, pursuant to a subpoena issued by PERC at the request of the incumbent Union.

> By these related actions the employer has established its anti-union bias and shown favoritism for the decertification attempt; has thus sought to interfere with the incumbent bargaining representative's attempt to discharge its statutory responsibilities and has injected itself through its employment power into the representation process in a menner (sic) designed to interfere with, restrain, or coerce employees in the exercise of their legal rights."

* * *

The complaint in Case No. 2172-U-79-305 alleges as follows:

> "On May 17, 1979 petitioner representative/employee Bill Thornton advised bargaining unit member Riki Vesoja that a wage raise would be forthcoming if SEIU Local 120 would drop recently filed unfair labor practice charges.
>
> On that same day Port of Edmonds Assistant Manager Bob Yeager advised employee Vesoja that ten per cent (10%) wage raise would be forthcoming if the Union would drop unfair labor practice charges filed against the Port.
>
> On June 4, 1979 Bill Thornton advised Riki Vesoja that management could not discuss the matter with Vesoja but wanted him to drop membership in the Union, so that wage raises would be forthcoming; absent the recession of Vesoja's union membership, the Port would not be able to grant employees their wage raises.
>
> By these and related acts, the Employer has interferred with, restrained or coerced employees in the exercise of their rights; has attempted to control, dominate, or interfere with the employees' union in the exercise of its statutory obligation and has otherwise attempted to create an atmosphere in which no benefits may be provided while rights guaranteed under law are exercised."

THE FACTS:

Service Employees International Union, Local 120, AFL-CIO, was certified on May 27, 1977 as the exclusive bargaining representative for a bargaining unit of Port of Edmonds employees described as:

> "INCLUDED: All regular full time and regular part time employees
>
> EXCLUDED: Part time on call employees, secretary and all others."

The parties negotiated an initial tenative agreement in early 1978. Local 120's membership rejected the proposed collective bargaining agreement and a work stoppage began on July 7, 1978. Some Port employees worked during the strike, some did not. The striking employees returned to work on August 15, 1978, under terms negotiated by the parties. Negotiations resumed after the

strike ended and continued until early December, 1978 without the parties reaching final agreement. The employer's last offer to the union contained a wage proposal that would have granted a pay increase to employee William Thornton but gave no increase to employee Riki Vesoja.

Employees Ronald Wilander and William Thornton contacted Cabot Dow, Labor Relations Representative of the employer, for information about the procedure for filing a petition to decertify SEIU Local 120 as the employees' exclusive bargaining representative. Dow told Wilander and Thornton to contact the Public Employment Relations Commission. On December 6, 1978, a decertification petition, Case No. 1872-E-78-338, was filed by Wilander. The employer, citing the decertification petition, suspended bargaining on December 21, 1978. No further negotiations were held. Thereafter, Thornton continued to contact Dow regarding the procedure involved in processing the decertification petition, and Dow provided professional advice to Thornton.

A hearing was held on the decertification petition on April 25, 1979. William Thornton represented the decertification petitioner at the hearing. Ron Dillon was subpoenaed by the union to testify at the hearing. Both Dillon and Thornton reported to work for approximately 1½ hours and then left to attend the hearing. Thornton returned to work at the Port during the lunch period and after the close of the hearing. Dillon did not return to work after the hearing. Dillon received pay for 1½ hours. Thornton was compensated for 8 hours, including the time spent at the hearing.

On May 1, 1979, the Port sub-contracted its launching operations, gasoline docks, and parking spaces to Charles King for a period of five years. As a result of the agreement between King and the Port, all but two bargaining unit employees, Riki Vesoja and William Thornton, were terminated.[1/]

On May 4, 1979, the hearing on case No. 1872-E-78-338 was concluded.[2/]

On May 15, 1979, the employer, through its attorney, Richard Cole, informed the union that the Port had decided to increase Vesoja and Thorton's wages to $7.66 per hour. The increase represented a 10% increase in Vesoja's wages and would raise Thornton's wages to Vesoja's level, a 30.5% increase for Thornton.

On or before May 17, Thornton discussed the wage increase with Leo Torvinen, Port Manager. Thornton thereafter informed Vesoja that they would receive the wage increase if the unfair labor practice charges were withdrawn. Thornton also suggested that Vesoja should withdraw his membership in Local 120.

1/ Issues concerning the subcontracting of unit work were litigated in PERC Case No. 2072-U-78-295 and decided in Decision No. 844-B (PECB, 1980).

2/ No decision has been issued in the representation proceedings, as those proceedings have been treated as blocked by these cases and Case No. 2072-U-78-295, Decision 844-B (PECB, 1980).

Between May 22, 1979 and June 7, 1979, the parties exchanged several written communications that dealt with questions raised by Local 120 about the disparity in wage increases granted Vesoja and Thornton, and the effective date of the employer's unilateral wage increase.

On June 14, 1979, the employer implemented the previously announced wage increase, effective June 1, 1979. The employer excluded former employees from the general wage increase.

In a June 19, 1979 letter from Richardson to Cole, the union expressed the belief that the parties were negotiating an increase for bargaining unit employees and accused the employer of surface bargaining.

About September 1, 1979, Vesoja was notified by Leo Torvinen, Port Manager, that Vesoja would be transferred to the day shift, effective October 1, 1979. Vesoja had worked the late shift for several years, but he had requested to work days sometime in the past. Vesoja had difficulties adjusting to the new shift and was treated by a naturopath for a period of time. Vesoja did not inform the employer of his medical problems and never objected to the shift change.

DISCUSSION:

Jurisdiction

The Port contends that PERC has no unfair labor practice jurisdiction over port districts, while the union contends that such jurisdiction exists. The employer's arguments regarding the Public Employment Relations Commission's jurisdiction over port districts and their employees have previously been determined. See: Port of Seattle, Decision 599-A (PECB, 1979); Port of Edmonds, Decision 844-B (PECB, 1980).

Decertification Issue

The complainant contends that the employer improperly assisted and acted on behalf of the decertification petitioner during and prior to that hearing. The respondent contends that the Port did not act on behalf of, or assist, the decertification petitioner.

The record and testimony in this case clearly indicates that the employer furnished procedural advice with regard to the decertification petition filed on December 6, 1978. Thornton, the decertification petitioner's representative, testified that:

> Q. After the strike situation settled, the employees, Mr. Dillon and Mr. Vesoja and Mr. Gibson, returned to work, did you and Mr. Wilander have any discussions about an action to have the union decertified?

A. Yes, we did.

Q. Who initiated these discussions?

A. It was mutual between Mr. Wilander and myself.

Q. Did anyone from the Port ask you to do that?

A. No, sir, they did not, and it wasn't necessary. As I've said before, Mr. Cole, that's strictly my personal opinion and I still feel the same way.

Q. Did anyone from the Port assist you in any way in doing this?

A. No, they didn't.

Q. Did you talk to Mr. Dow?

A. Yes, I did.

Q. And what did he tell you to do?

A. Mr. Dow advised me of specific actions. Mainly -- if I can interject something personal -- mainly practice keeping my mouth shut. That he was a professional at this line of business. There was obviously a great deal that I didn't know about it, and advised me what course of actions would probably transpire.

Q. Who initiated the contract (sic) with Mr. Dow?

A. I did.

Q. Did he advise you to go to PERC?

A. Yes, he did.

Q. And, did you and Mr. Wilander go to PERC?

A. Yes, we did.

Q. And, did you find out about the procedures for decertification from PERC?

A. Yes, we did. Mr. Wilander found out more of the information. He had more time at his disposal. And when he initiated the procedure, which I eventually took up when Ron left the Port's employ, personnally hand carried his petition down to Olympia to get the show on the road.

TR. 151, 152

Thornton also testified regarding his conversations with Cabot Dow, the employer's Labor Relations Representative, as follows:

Q. (By Mr. McGrorey) Mr. Thornton, you also testified that relative to the filing of the decertification petition that you contacted Mr. Dow, the Port's labor relations representative. Do you recall approximately how many contacts you had with him relative to this issue?

A. Oh, Mr. McGrorey, overall I would say I had --I would say easily 10 or 12 contacts with Mr. Dow.

Q. All of which you initiated?

A. Yes, I did.

Q. And when you indicated in direct testimony that he advised you regarding your course of action, what was that advice?

A. Mr. McGrorey, his advice was, as I stated before to Mr. Cole, that at the time I was completely in the dark as to the PERC -- PERC's functions and what exactly was involved in labor negotiations. So I called Mr. Dow at his office and also at his home in Bellevue on evenings after work and asked him specifically what steps were involved in a decertification, and just basically what to expect as a matter of a procedure.

Q. When you -- again, let me be specific. When you testified on direct that he advised you on a course of action, my question to you is what was that advice?

A. Okay. I'll try not to make my answer too rambling. As I said, I talked with him on a number of occasions, and all of them boiled down to the simple fact of what I might expect in the Hearing the next day; whether or not PERC even had jurisdiction over the Port of Edmonds dispute. Simply, pretty much information that a person could read out of the newspaper that I was completely in the dark about; exactly what is going on.

Q. So your contact with Mr. Dow included the day preceding the decertification hearing on March 16; is that correct?

A. I can't say specifically, Mr. McGrorey. It could, but I would be lying if I said that I remembered exactly. As I said, I talked with him on a number of occasions.

Q. Didn't you just testify that he indicated what would happen on the next day in the Hearing?

A. I talked with -- as a matter of fact, I think I still have my old telephone bill with all the long distance calls to Bellevue. Yes, that would be safe to say that he advised me on what I might expect along the line of questioning; what the Commission's proceedings would be on the next day.

Q. This occurred the day preceding the March 16 Hearing; is that correct? Is that your recollection?

A. That would be correct, yes.

TR 169, 170, 171

Thornton's testimony about the contacts with Dow, the subject matter of the contacts, and the time frame in which they occurred, infer that the employer provided substantial professional advice to Thornton regarding the decertification petition. The large number of contacts evidence Dow's willingness to continue giving such advice, which undermines any suggestion that the employer's participation was de minimus.

Discrimination Against Dillon

The complainant contends that the employer favored the decertification attempt by providing compensation to the decertification petitioner's representative for attending the decertification hearing held March 16, 1979, while failing to compensate a long-time union activist subpoenaed to testify at the same hearing.

The respondent contends that the Port did not favor, or assist, the decertification petition; that Thornton was compensated as he was because he worked before the hearing, during the lunch break, and after the hearing.

Dillon was subpoenaed by the union to attend the hearing. Thornton was directed to attend the hearing by the employer, but also represented the decertification petitioner. The Commission has previously ruled that:

> "Ordinarily each party to litigation is responsible for producing its own witnesses and compensating them. Neither party has a right to produce witnesses at the expense of the other."

Shelton School District No. 309, Decision 579 (EDUC, 1979). Dillon was compensated for the time he worked for the employer and any additional compensation for attending the hearing is the responsibility of the party who subpoenaed him. Thornton, however, presents a different circumstance. The employer was aware that Thornton was going to represent the decertification petitioner, Ronald Wilander, at the PERC hearing. The employer chose not to use the same formula, as it had for Dillon, of compensating Thornton just for the hours he worked. Instead, Thornton was compensated for the time he worked plus the time he served as the representative for another party at the representation proceeding before a hearing officer of the Public Employment Relations Commission. The employer, therefore, has assisted the decertification petition in the form of additional compensation, along with the afore-mentioned procedural advice.

Unilateral Wage Increase

The complainant contends that the Port unilaterally altered wage rates without the benefit of good faith negotiations. The respondent contends that the employer was relieved of its duty to bargain by the decertification petition filed by Ronald Wilander, and thus the wage increase was proper.

The employer's defense, that it had no obligation to bargain, misses the point. It is an elementary principle of labor law that an employer is obligated to maintain the status quo until a question concerning representation is resolved. A unilateral wage change during the pendency of representation proceedings violates the "interference" unfair labor practice, RCW 41.56.140(1) rather than the "refusal to bargain" subsection, RCW 41.56.140(4), and has nothing to do with the union's previous bargaining

rights. An interference violation could be found whether the representation petition involved organization of unrepresented employees, a change of unions or a decertification. NLRB v. Newman-Green, Inc., 401 F2d 1 (CA7)(1968); NLRB v. Pandel-Bradford, Inc., 520 F2d 275 (CA1)(1975). The court of appeals has stated:

> "At first glance it might appear that the employer is caught between the proverbial 'devil and the deep blue sea.' It is an unfair labor practice to grant a wage increase during the campaign and bargaining periods, but at the same time it may be an unfair labor practice to refuse to grant an increase during this same period. ** We find little merit in such arguments. The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is that the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge."

NLRB v. Dothan Eagle, Inc., 434 F.2d 93, 97-98 (5th Cir., 1968). When the status quo with respect to wage increases is clearly apparent, and it can be said with assurance that the granting of a wage increase consititutes a change in the status quo, there need be no specific finding that the employer was prompted by anti-union motives. In such a case the employer inevitably conveys the message that it, not the union, controls the purse strings.

The timing of the employer's unilateral increase in this instance is critical because the employer had suspended bargaining five months earlier; had subcontracted out bargaining unit work on May 1, 1979; and had assisted the decertification petitioner prior to the hearing.

The Unfair Labor Practice and Union Membership Issues

The complainant contends that the employer attempted to influence withdrawal of unfair labor practice charges, Case No. 2072-U-79-305, and Vesoja's union membership by offering a wage increase. The respondent contends that the employer did not attempt to influence withdrawal of unfair labor practice charges or to induce withdrawal of Vesojas' membership in SEIU, Local 120.

The union relies upon Vesoja's conversations with employee William Thornton to substantiate its allegations regarding withdrawal of Vesoja's unfair labor practice charge. Thornton had discussed the announced wage increase with Leo Torvenin, Port Manager. Torvenin told Thornton that the Port had decided to grant a 10% wage increase "if the union agreed."

Thornton thereupon approached Vesoja and discussed the proposed increase with Vesoja. During the conversation, Thornton suggested Vesoja withdraw the ULP so that they could get an increase. Thornton, admittedly upset over the wage increase issue, also suggested that Vesoja withdraw his membership in Local 120 so they could get a raise. There is no evidence that Thornton thereby acted as the agent of the employer. Vesoja did not discuss the

issue with Torvinen and this record does not establish that the employer conditioned the general wage increase upon withdrawal of the unfair labor practice allegations.

The union's allegation that an attempt was made to induce withdrawal of Vesoja's membership is also based upon a separate conversation between Vesoja and Thornton. That conversation arose after Vesoja and Thornton approached Robert Yeager, Assistant Port Manager, with questions regarding Yeager's understanding of the wage issue. Yeager informed both employees, at the same time, that it was his understanding that the Port had decided to grant a wage increase and that "its up to the union now". The record does not indicate that Vesoja's unfair labor practice charge or union membership was discussed during the conversation with Yeager. Thornton's suggestions regarding withdrawal of Vesoja's membership reflected his personal feelings on that issue.

Vesoja's Shift Change

The complainant contends that the employer unilaterally altered Riki Vesoja's hours of employment without benefit of good faith negotiations, and thus retaliated against Vesoja for the unfair labor practice complaint he filed in Case No. 2072-U-79-305. The respondent contends that it adjusted Vesoja's hours to respond to Vesoja's previous request to work the day shift and because the work he performed could be accomplished during the day shift. Vesoja had previously requested the shift change and never objected to the employer changing his hours of employment. The union's contention that Vesoja's hours were changed as a retaliation for his union activities are without merit.

FINDINGS OF FACT

1. The Port of Edmonds is a port district within the meaning of RCW 53.18.010 and a public employer within the meaning of RCW 41.56.030(1).

2. Service Employees International Union, Local 120, AFL-CIO, an employee organization within the meaning of RCW 53.18.010 and a bargaining representative within the meaning of RCW 41.56.030(3) is the certified bargaining representative of certain employees of the Port of Edmonds.

3. On June 14, 1979, the employer unilaterally increased the wage rates of William Thornton and Riki Vesoja to $7.66 per hour, at a time when a question concerning representation was pending. The effect of the employer's action was to interfere with the freedom of choice of employees in selection of an exclusive representative or no representative, and to thereby destroy the laboratory conditions necessary for a secret ballot election.

4. The employer did not condition the June 1, 1979 unilateral wage increase upon withdrawal of unfair labor practice charges by Riki Vesoja or Service Employees International Union, Local 120, or upon withdrawal of Riki Vesoja's membership in Service Employees International Union, Local 120.

5. The employer has provided the decertification petitioner representative with professional advice and assistance in connection with the filing and processing of the decertification petition before the Commission in Case No. 1872-E-78-338.

6. The employer paid Ron Dillon only for work performed on the date of the hearing of the decertification petition.

7. The employer compensated William Thornton for work performed on the date of the hearing on the decertification petition but discriminated in favor of Thornton and the decertification petitioner and discriminated against Dillon by compensating Thornton for time spent representating the decertification petitioner at the hearing while denying compensation to Dillon for his time spent at the hearing.

8. The employer unilaterally changed Vesoja's shift for sound business reasons. Vesoja did not object to the change in hours to the employer. The change in hours was not in retaliation of Vesoja's union activities.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter under RCW 41.56 and RCW 53.18.

2. The employer interfered with the exercise of employee rights granted by RCW 41.56.040 and thereby violated RCW 41.56.140(1) by granting a wage increase while a question concerning representation exists.

3. The employer interfered with the exercise of employee rights granted by RCW 41.56.040 and thereby violated RCW 41.56.140(1) by providing the decertification petitioner procedural and professional advice with regard to a question concerning representation and by its discriminatory compensation of William Thornton for his time spent at a Commission hearing as the representative of the decertification petitioner.

4. The employer did not violate RCW 41.56.140 with regard to the matters described in paragraphs 4, 5 and 8 of the foregoing findings of fact.

On the basis of the foregoing Findings of Fact, and Conclusions of Law, the Examiner makes the following:

ORDER

The Port of Edmonds, its officers and agents shall immediately:

(1) Cease and desist from:

(a) Interfering with the exercise of employees' rights granted by RCW 41.56.040 by granting unilateral wage increases when a question concerning representation exists.

(b) Interfering with the employees' statutory right with regard to the selection of an exclusive bargaining representative or no bargaining representative by providing procedural and professional advice to employees involved in questions concerning representation.

(c) Interfering with the exercise of employees' rights granted by RCW 41.56.040 by granting financial support to employees who file and process decertification petitions.

(2) Take the following affirmative action designed to effectuate the policies of the Act:

(a) Compensate Ron Dillon for his time while he attended the hearing on the decertification petition before the Commission in Case No. 1872-E-78-338.

(b) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix A". Such notice shall, after being duly signed by an authorized representative of the Port of Edmonds, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the Port of Edmonds to ensure that said notices are not removed, altered, defaced or covered by other material.

(c) Notify the Executive Director of the Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice posted in accordance with this Order.

DATED at Olympia, Washington this 7th day of July, 1981.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

REX L. LACY, Examiner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE PURPOSES OF THE PUBLIC EMPLOYEES COLLECTIVE BARGAINING ACT, THE PORT OF EDMONDS HEREBY NOTIFIES ITS EMPLOYEES THAT:

WE WILL NOT interfere with the employees free choice in the selection of an exclusive bargaining representative or no bargaining representative.

WE WILL NOT provide professional advice or financial assistance to employees with regard to questions concerning representation.

WE WILL compensate Ron Dillon for his time while he attended the hearing on the decertification petition before the Commission in Case No. 1872-E-78-338.

DATED: _____

PORT OF EDMONDS

By: _____
Chairperson of the Port Commission

By: _____
Port Manager

By: _____
Labor Relations Representative