STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 3173, Complainant, vs. PORT OF PASCO, Respondent.	CASE 7676-U-88-1615 DECISION 3307-A - PECB
RODERICK D. LINGLE, Complainant, vs. PORT OF PASCO, Respondent.	CASE 7713-U-88-1629 DECISION OF COMMISSION

Critchlow and Williams, by Alex J. Skalbania and Robert D. Merriman, Attorneys at Law, appeared on behalf of the complainants.

McKinlay, Hultgrenn and Vanderschoor, by Edward H. McKinlay, Attorney at Law, appeared on behalf of the respondent.

These cases come before the Public Employment Relations Commission on a timely petition filed by the Port of Pasco, seeking review of a decision issued by Examiner Kenneth J. Latsch.

BACKGROUND

To comply with Federal Aviation Administration (FAA) requirements, the Port of Pasco assigns certain of its employees at the Tri-Cities Airport to "aircraft crash and rescue" duties. Those

employees sought representation by International Association of Fire Fighters (IAFF), Local 3173, for the purposes of collective bargaining. The employer resisted the representation petition.[1] Roderick Lingle was one of the employees assigned to "aircraft crash and rescue" duties, and was a supporter of the union organizational effort. In the same week that the representation petition was filed with the Commission, the Port of Pasco notified Lingle that he was being "laid off".

On November 16, 1988, Local 3173 filed a complaint charging unfair labor practices, alleging that the employer violated RCW 41.56-.140(1), by discharging Lingle for his exercise of collective bargaining rights guaranteed by Chapter 41.56 RCW.[2]

On December 8, 1988, Roderick D. Lingle filed a similar complaint charging unfair labor practices, asserting the same factual allegations contained in the union's complaint.[3]

Subsequent to the filing of these unfair labor practice cases, the employer "recalled" Lingle from "layoff".[4]

The two complaints were consolidated for further processing before Examiner Latsch. A hearing was conducted at Pasco, Washington on March 22 and 23, 1989, and at Richland, Washington, on May 1, 1989. The Examiner issued his decision on October 5, 1989, finding a number of unfair labor practice violations and ordering remedies.

---

[1] The Commission recently certified the union as exclusive bargaining representative, overruling most of the employer's objections to a Direction of Cross-Check issued by the Executive Director. Port of Pasco, Decision 3398-A (PECB, 1990).

[2] Case 7676-U-88-1615.

[3] Case 7713-U-88-1629.

[4] So far as can be determined from the record before us, Lingle is currently working for the employer.

The employer filed a timely petition for review, bringing the matters before the Commission.

POSITIONS OF THE PARTIES

The employer indicates that its responses to the organizational effort grew out of its concern that employees hired at varying wage rates and under different job descriptions were "unilaterally" attempting to change their job descriptions and be recognized as full-time fire fighters, with all that legally implies. The arguments advanced in the employer's petition for review fall into three groupings: (1) There is no basis to find that the layoff of Lingle was an unfair labor practice; (2) The employer at no time interfered with the employees' right to decide on a representative; and (3) Lingle's lay-off was dictated by economic necessity, properly followed seniority order and was independent of the union organizing efforts. The employer requests that the Examiner's decision be reversed.

The union and Roderick Lingle agree with the Examiner's decision, and request that it be affirmed.

DISCUSSION

This case is not, as the employer contends, an examination of the job classification(s) of the employees involved. Both parties have devoted substantial energy to the question of whether the employees involved here are "uniformed personnel" within the meaning of RCW 41.56.030(7). That statute provides:

> RCW 41.56.030 DEFINITIONS. As used in this chapter:
> ...

> (7) "Uniformed personnel" means ... (b) fire fighters as that term is defined in RCW 41.26.030, as now or hereafter amended.

This Commission declined to determine whether these employees were "uniformed personnel" in the related representation case. Such a determination was not necessary to resolve the question concerning representation, and we expressed a preference that the issue of coverage under Chapter 41.26 RCW be presented first to the Department of Retirement Systems for determination. Similarly, we do not find it to be either necessary or appropriate to rule on the "uniformed personnel" issue in this unfair labor practice case.

The employees involved here are "public employees" within the meaning of Chapters 41.56 and 53.18 RCW. Unless excluded from the coverage of the Public Employees Collective Bargaining Act as elected officials,[5] officials appointed for a fixed term of office,[6] confidential employees,[7] or as the "executive head of the bargaining unit",[8] any group of persons who qualify as "public employees" under RCW 41.56.030(2) are entitled to create or choose any organization that meets the requirements of RCW 41.56.030(3). Neither the Commission nor the employer is empowered to limit or deny public employees their choice of representative. International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland), 45 Wn.App 686 (Division III, 1986), review denied 107 Wn.2d 1030 (1987), reversing City of Richland, Decision 1519-A (PECB, 1983). Public employees who are not "uniformed personnel" within the meaning of RCW 41.56.030(7) have exactly the same rights under RCW 41.56.040 and 41.56.140(1)

---

[5] See, RCW 41.56.030(2)(a).

[6] See, RCW 41.56.030(2)(b).

[7] See, RCW 41.56.030(2)(c).

[8] See, RCW 41.56.030(2), generally, and City of Yakima, Decision 2387-B (PECB, 1986).

as public employees who come within the definition of "uniformed personnel".[9]

The Standards for Determination

The Examiner correctly stated that the determination of this case rests on application of the "dual motive discharge" standard set forth in City of Olympia, Decision 1208-A (PECB, 1982), citing with approval Wright Line, 251 NLRB 1083 (1980). Under that test,

> A complainant must first make out a prima facie case sufficient to support an inference that protected conduct was a motivating factor in the employer's decision. The burden then shifts to the employer to show the same action would have taken place even if the employee had not been engaged in protected activity.

Asotin County Housing Authority, Decision 2471-A (PECB, 1987)

The use of that analytical framework in determining "discrimination" cases has been endorsed by the Washington courts. See, Clallam County v. PERC, 43 Wn.App 589 (Division II, 1986), affirming Clallam County, Decision 1405-A (PECB, 1984), and Washington Public Employees Association v. Community College District 9, 31 Wn.App 203 (Division II, 1982), citing Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

---

[9] The only distinction between the two groups arising from Chapter 41.56 RCW is that "uniformed personnel" are eligible for the "interest arbitration" impasse resolution procedures of RCW 41.56.430 et seq. An additional distinction growing out of other statutes is that full-time fire fighters are eligible for coverage under the Law Enforcement Officers and Fire Fighters (LEOFF) retirement system created by Chapter 41.26 RCW, whereas other public employees are covered by the Public Employees Retirement System (PERS) under Chapter 41.40 RCW.

The Complainant's Prima Facie Case

The record supports the Examiner's finding that the employees of the Port of Pasco, and Lingle in particular, were engaged in organizational activity expressly protected by RCW 41.56.040.

The employer contends that it could not have knowingly interfered with union organizing activity, because it did not receive the IAFF's request for recognition until after Lingle was laid off. The Examiner considered the claimed ignorance of employer officials, and did not find their testimony persuasive. The Examiner was in the best position to judge the motivation and knowledge of those witnesses.

We find ample evidence in the record to support the Examiner's inference that the employer knew that Lingle sympathized with and was interested in the IAFF organizational effort. A supervisor, Ostergaard, observed that members of the proposed unit signed a questionnaire regarding interest in being represented by a union in June. In late July, the employer attempted to set up a meeting between the employees and the employer's labor relations representative, to discuss the pros and cons of union representation. The employer subsequently attempted to set up another meeting for the employees to speak with a representative of a different union. Apart from the potential for the employer to "interfere", in violation of RCW 41.56.140(1), if it engaged in surveillance of its employees' organizational activity or attempted to express any preference between labor organizations, all of these actions clearly indicate that this employer knew of the union activity among its employees well in advance of Lingle's "layoff".

The timing of the disputed action also supports an inference of discrimination. Lingle was laid-off on October 25, the same day that the employer received the IAFF's request for recognition. Although the announcement of the layoff was made prior to the

employer's actual receipt of the union's request, the preponderance of the evidence suggests that the employer knew or surmised that the union activity among its employees was about to move to a new level. The Examiner properly concluded that the burden should be shifted to the employer under the Wright Line analysis.

The Employer's Defenses

While many other developments and actions may be of concern to the parties, the primary question here is whether the employer has met its burden of proof. We agree with the Examiner's conclusion that the employer has not made a sufficient showing that Lingle would have been laid off absent the organizing effort. Our reasoning follows.

Credibility Judgments of the Examiner -
The employer takes issue with the Examiner's refusal to credit the testimony of certain of its witnesses (Port Manager Vick and Airport Manager Morasch). As the Commission previously noted:

> We attach considerable weight to the factual findings and inferences therefrom made by our Examiners. They have had the opportunity to personally observe the demeanor of the witnesses. The inflection of the voice, the coloring of the face, and perhaps the sweating of the palms, are circumstances that we, as Commission members are prevented from perceiving through the opaque screen of a cold record. This deference, while not slavishly observed on every appeal, is even more appropriate of a "fact oriented" appeal ...

Asotin County Housing Authority, supra.

We have reviewed the record and believe that the Examiner's judgments are worthy of deference in this case.

The Need for a Layoff -

The burden was on the employer to establish the "layoff" defense which it has asserted. The record leaves serious doubt as to the need for a lay-off at the airport, at a time when the financial condition of the airport operation had been improving. The employer subsequently gave all of its non-organized employees a 5% pay increase, and gave selected employees additional merit increases, which we find to be inconsistent with a claim of financial difficulties.

The Selection of Lingle for Layoff -

Lingle was not the least-senior employee of the Port of Pasco at the time he was laid off. The burden was on the employer to explain why the method of seniority that it used at the airport (i.e., separating job classifications for seniority) differed from the method of seniority that it used at its industrial park (i.e., a combining of job classifications). This was not done.

The employer has asserted, without convincing this Commission, that it had a right to retain Bickle because he was more qualified as a custodian. The record indicates Lingle had not performed some of Bickle's duties, but the employer did not establish that he could not do so or that the duties could not be readily learned. Either way, the individual retained would have needed further training. Bickle presumably would have had to perform rescue and fire fighting duties in order for the employer to satisfy FAA requirements for an undiminished schedule of commercial flights. There is nothing to suggest that Bickle was already trained in that regard.

Conclusions -

Based on a combining of many parts of the evidentiary record, we find the employer did not establish that Lingle would have been laid-off in the absence of the organizing drive. The "layoff" came after the employer's apparent attempts to influence their selection of a bargaining representative were rebuffed by the employees. We

find the reasons given by the employer to be pretexts designed to conceal a true motivation of union animus. The unfair labor practice violation was outright and obvious. Such actions were in violation of RCW 41.56.140(1).

NOW, THEREFORE, it is

ORDERED

1. The findings of fact, conclusions of law and order issued by Examiner Kenneth J. Latsch are AFFIRMED.

2. The Port of Pasco shall notify the complainants, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with the remedial order issued by the Examiner, and shall at the same time provide each of the complainants with a signed copy of the notice required by the Examiner's order.

3. The Port of Pasco shall notify the Executive Director of the Commission, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with the remedial order issued by the Examiner, and shall at the same time provide the Executive Director with a signed copy of the notice required by the Examiner's order.

Issued at Olympia, Washington, the 31st day of December, 1990.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Janet L. Gaunt

JANET L. GAUNT, Chairperson

Mark C. Endresen

MARK C. ENDRESEN, Commissioner

Joseph F. Quinn

JOSEPH F. QUINN, Commissioner