Pasco Housing Authority, Decision 5927 (PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS UNION, LOCAL 839,	)	
	)	
Complainant,	)	CASE 12735-U-96-3055
	)	
vs.	)	DECISION 5927 - PECB
	)	
PASCO HOUSING AUTHORITY,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND ORDER
	)	
	)	

Davies, Roberts and Reid, by David W. Ballew, Attorney at Law, represented the union.

Menke, Jackson & Beyer, by G. Scott Beyer, Attorney at Law, represented the employer.

On September 30, 1996, Teamsters Union, Local 839 filed a complaint charging unfair labor practices with Public Employment Relations Commission under Chapter 391-45 WAC, alleging that Pasco Housing Authority violated RCW 41.56.140(1) and (2), by interfering with employee rights when it solicited decertification of the exclusive representative and encouraged employees to form an "employee committee" to meet with employer. A hearing was held in Pasco, Washington, on February 26, 1997, before Examiner William A. Lang. Post-hearing briefs were filed on April 4, 1997.

BACKGROUND

The Pasco Housing Authority (employer) was created to provide low-income housing and related services in the city of Pasco and Franklin County, Washington. The employer's operations are under

the direction of a board of commissioners, of which three members are appointed by the City of Pasco and two are appointed by Franklin County. The employer is funded, in part, by grants from the United States Department of Housing and Urban Development (HUD). Ms. Bobbie Littrell is the employer's executive director. Rocky L. Jackson, of the Menke, Jackson & Beyer law firm, represents the employer in labor negotiations.

Teamsters Union, Local 839 was certified as exclusive bargaining representative of Pasco Housing Authority employees on August 25, 1995.[1] As a prelude to meeting with the employees to formulate proposals for an initial collective bargaining agreement, union Business Representative Ted Duffy wrote to Jackson on September 21, 1995, requesting all employer documents containing current information on the wages, hours and working conditions of bargaining unit employees. Jackson forwarded the employer's personnel policies and code of ethics to Duffy on September 21, 1995, and suggested Duffy call his office for a date to begin negotiations.

In a November 20, 1995 letter to Duffy, Jackson confirmed the first negotiation session was set for Wednesday, December 6, at 4:30 p.m. At Duffy's request, that session was delayed to December 19, 1995. In a November 29, 1995 letter to Jackson, Duffy wrote that the starting time should be 8:30 a.m. The scheduling debate continued when Jackson replied on December 1, 1995. Jackson suggested a two-hour limit on negotiation sessions, and stated that he was not authorized to change a "practice" of a 4:30 p.m. starting time for sessions. Jackson later wrote that the employer would agree to meet at 1:30 p.m., if employees were not on duty time and Duffy

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[1] Notice is taken of the Commission's docket records for Case 11861-E-95-1943, filed by Local 839 on June 26, 1995. The certification was issued August 25, 1995. Pasco Housing Authority, Decision 5234 (PECB, 1995).

agreed not to contact employees on duty time. The employer reserved the right to bargain after the work day.

In a January 5, 1996 letter, Duffy advised Jackson that he had reviewed the employer's proposed collective bargaining agreement, and could agree to some portions "as is". Duffy indicated that other portions seemed more appropriately in policy than in a labor agreement. Duffy agreed to discuss changes by telephone, and indicated optimism about the progress made.

On January 16, 1996, Duffy suggested that the negotiators work from a computer diskette containing the proposals. On January 18, 1996, Jackson forwarded a disk containing the employer's proposals.

On January 25, 1996, Duffy informed Jackson that the union was willing to resume having negotiations sessions begin at 4:30 p.m.[2] Duffy listed 10 possible dates in February and 10 possible dates in March, and asked Jackson to meet twice a week until agreement was reached. Jackson only agreed to negotiation sessions on February 8, 1996 at 6:30 p.m. and March 7, 1996 at 4:30 p.m.

Duffy suggested March 28, and April 8, 9 and 10, as dates for negotiations, and he reiterated his desire for weekly negotiations during the last two weeks of April and throughout May. On March 6, 1996, Jackson informed Duffy that "[T]he Housing Authority is not

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[2] There was also communication between the parties at this time about settlement of an unfair labor practice complaint the union had filed against the employer. Notice is taken of the Commission's docket records for Case 12280-U-96-2899, which was filed by Local 839 on January 19, 1996. The union alleged that the employer unlawfully refused to provide information concerning a pending grievance. That complaint was subsequently withdrawn by the union, and the case was closed by an order issued February 27, 1996.

obligated to schedule weekly negotiation dates nor will it schedule weekly negotiation sessions".

On April 5, 1996, Jackson asked for a counterproposal from the union. A negotiation date of April 10, 1996 was confirmed.

Secretary/Treasurer Robert Hawks of Local 839 replaced Duffy as the union representative in May of 1996. In July, the union filed additional unfair labor practice charges against the employer.[3]

On August 19, 1996, the union and employer continued their negotiations. Among the topics discussed was the union's proposal for a union shop provision, which included:

> ARTICLE II - UNION SECURITY
>
> 2.1 All employees in the bargaining unit except as described in paragraph 2.6 below must, as a condition of employment, be a member of the union and pay Union dues or pay an agency fee to such Union but not both. ...
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> ...

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[3] Notice is taken of the Commission's docket records for Case 12581-U-96-2992, which was filed by Local 839 on July 1, 1996. The union alleged that the employer had laid off Elidia Rocha, a member of the union's bargaining team, in reprisal for her union activity. A preliminary ruling issued in that case under WAC 391-45-110 found a cause of action to exist, and an Examiner was appointed. A hearing was held, and it remains pending for a decision by that Examiner. At the hearing in this case, the employer offered excerpts from the transcript of the hearing in the Rocha case as evidence, and they were admitted as an exhibit. After the parties to this case filed simultaneous post-hearing briefs, the employer moved (without citation of any authority) to strike portions of the union's brief which refer to the Rocha case. The motion is without merit, and is denied.

2.6 [language on religious exceptions]

While the union security proposal was discussed at the bargaining session, the amount of union dues was never mentioned.

The employer's cancellation, on September 10, 1996, of a bargaining session which had been scheduled for September 25, 1996, was attributed to the employer's board of commissioners.

On September 11, 1996, the employer distributed the following memo to each employee in the bargaining unit:

> TO: All Staff
>
> FROM: Board of Commissioners
>
> SUBJECT: Representation Facts
>
> It has been over a year since negotiations began between the Teamsters and the Authority. At the last negotiation meeting, the Teamster Representative reported to the Authority that he did not believe the Teamsters represents the majority of the employees at this time.
>
> The fiscal year end financial report for 1995/1996 HUD Low Income showed a deficit of $117,000. The Board adopted the new budget for 1996/1997 representing a proposed deficit of $58,000. ...
>
> The Authority's history has proven to provide wage increases yearly for their employees, wage increases authorized by the Board without involvement of union representation amounted to 4.0% in 1992 and 5.5% in 1993. Up until the budget deficits, employee medical benefit was paid 100% without the need for union representation. The Authority's wages are at or above what is required by HUD and comparable to wages within this industry and surrounding public agencies.
>
> In proposals to date:

- The Teamsters have not addressed any wage increase in their proposed contract.
- **The Teamsters have proposed a closed shop**, which means every employee must pay union dues. Employees who do not wish to join the Union or pay Union dues cannot retain their employment with the Authority.
- Union dues will amount to approximately $20 per month or $240 per year per employee.
- For the negotiation sessions alone, the Authority has paid $13,000 for representation costs. This amount would be equivalent to:
  - A 3.0% raise for each employee which amounts to $10,000 per year, plus
  - Authority paying 100% of medical insurance coverage. Current employee out-of-pocket deductions represent $3,000/year.
- **The Board recognizes the employee's desire to be involved** in decisions affecting their employment **and suggest** the employees consider **an employee committee who can meet with the management and Board and to provide employee input on issues.**
- Authority employees are now eligible to vote for decertification of union representation. **The Board urges you to consider the benefits of union representation and exercise your right to vote for continued representation or decertification.**

(Emphasis by **bold** supplied.)

In a September 25, 1996 letter to Jackson, the union asserted that the employer still had to bargain with the union. The union then filed this unfair labor practice complaint on September 30, 1996.

The employer offered to continue negotiations on October 4, 1996, and the union asked to meet with the employer's board. On October

9, 1996, Jackson acknowledged the union's request and stated that he was forwarding it to the board.

On October 10, 1996, Jackson's office sent a letter to the union confirming that another negotiation session was scheduled for October 29, 1996.

On December 11, 1996, Hawks asked Jackson for negotiation dates in January, February and March of 1997. In a letter dated December 13, 1996, Jackson questioned "the appropriateness" of further negotiations. Jackson's letter said, in pertinent part, that:

> In reference to the appropriateness of a negotiation, my review of the notes from prior negotiation sessions would indicate that **it appears the parties are at impasse** on the issue of binding arbitration, union security, contracting out, probation period, layoff by classification versus seniority. The union has not made any proposal regarding wages or health care benefits. We also appear to be significantly apart on a seniority clause, management rights clause, and any attempt for a zipper clause. These negotiations commenced in September of 1995, with proposals exchanged in December. Our first meeting appears to be December 19, 1995, followed by a telephone conference on January 16, 1996; and negotiation sessions on February 7, 1996, March 7, 1996, and June 13, 1996, August 19, 1996, October 29, 1996, with many of the same issues that the parties appear to be impassed on remaining open.
>
> Given this history of bargaining, it may be prudent at this point in time to request mediation. ...

[Emphasis by **bold** supplied.]

While the employer could have requested mediation under WAC 391-55-010, the Commission's docket records indicate that no mediation request was submitted for the negotiations between these parties.

POSITIONS OF THE PARTIES

The union argues that the employer's direct communication to bargaining unit employees goes beyond the National Labor Relations Board (NLRB) precedent in Proctor and Gamble Company, 160 NLRB 334 (1996), cited in Lake Washington School District, Decision 2483 (EDUC, 1986). The union contends the "representation facts" communication misstated facts, and had a purpose of encouraging employees to decertify the union in favor of an employee committee.

The employer argues that the statements in its September 11, 1996 memorandum to its employees were substantially factual, and not misleading in any material way. The employer relies on City of Seattle, Decision 3566 (PECB, 1990) and Lake Washington School District, supra, as authority that its memo constituted free speech. The employer contests an inference that the cancellation of the scheduled negotiation on September 10, 1996 had anything to do with the memorandum issued on the following day.

DISCUSSION

The "Union Lacked Majority Status" Defense

Bargaining obligations exist under RCW 41.56.030(4), and are only enforced under RCW 41.56.140(4), only between an employer and an organization designated as the "exclusive bargaining representative" of its employees under RCW 41.56.080. To hold status as an exclusive bargaining representative, an organization must have the support of a majority of the employees in the bargaining unit. In this case, the employer argues that its September 11, 1996 memorandum to bargaining unit employees was triggered by a union acknowledgment that it did not represent a majority of the

employees. Resolution of that issue is therefore of primary importance in this case.

As described by union witnesses, the context of the union's alleged admission was a conversation initiated by union official Hawks about the layoff of union negotiator Elidia Rocha. Describing this as a heavy moment, Hawks testified that he was attempting to lighten up the conversation when he said that if the employer continued to lay off union people there would not be anyone to represent. Rocha confirmed Hawks' version of the conversation.

Some employer witnesses also recalled the conversation in that context. Maintenance Supervisor Brett Sanders testified:

> To the best of my recollection Bob Hawks had made a statement to us that **we were terminating, laying off employees, who were involved with the union**, and that they knew it, and that they were going to put a stop to it. And there was -- Rocky Jackson at that point or Bob stated that you are -- that is what you are doing. **You guys are going to eventually get all of the Union people out of here so there will be no more union**. And Rocky Jackson had stated, Well, are you admitting you do not have a majority? And he said, Yes, or I don't believe we do at this point. And then he made some sort of about I'm surprised we had been -- this hasn't been brought up to this point ...

Transcript page 45, lines 11-23 [emphasis by **bold** supplied].

On direct examination, the employer's executive director testified as follows:

> Q. [By Mr. Beyer] What do you recall was said concerning whether or not the union represented a majority of the employees?

> A. [By Ms. Littrell] I recall that around this same time period [when union security was being discussed] just before we broke, and I believe Rocky made the first initial comment to Mr. Hawks, which I don't remember what we were quite discussing; and Mr. Hawks made the illusion that he did not -- that he did not represent the majority of the board and kind of look at me nastily and said something to the effect that **because you fired, laid off, or whatever the union members. And Rocky kind of jokingly said**, well, if you are admitting there's a majority [sic] maybe we should petition to decertify **and kind of joked to make it upbeat. And so Mr. Hawks laughed** and said, Frankly, I am surprised that I haven't got something in the mail already.

Transcript page 59, line 19 through page 60, line 8 [emphasis by **bold** supplied].

> ...
>
> Q. Did [Hawks] bring it up first in talking about laying off, firing union people?
>
> A. He said that he didn't represent it because -- and then looked at me and said, **You have fired or terminated or laid off all the Union people.**
>
> Q. Okay. And **was there joking**? Were people laughing about that?
>
> A. **I didn't think that was too funny**. I looked down, but that is when Rocky lightheartedly said, "If you are admitting there's no majority maybe we should petition to decertify"; so then Mr. Hawks laughed and said, I am surprised that I haven't gotten something in the mail already.

Transcript page 68, lines 13 - 25 [emphasis by **bold** supplied].

Testifying on direct examination, Jackson provided the following version of the conversation:

> Q. [By Mr. Beyer] Were there any statements by anybody regarding whether or not the union represented a majority of the employees?
>
> A. [By Mr. Jackson] Yes. Bob Hawks indicated to me that the union probably does not represent a majority of the employees. And then he stated that he was surprised that the employer had not petitioned to decertify.

Transcript at page 79, line 11-17.

Under cross-examination, however, Jackson gave a different account of the context in which the comments were exchanged:

> Q. [By Mr. Ballew] Okay. The discussion regarding whether Local 839 represented a majority of the Union, or Union or bargaining unit members; **do you recall prior to that statement being made** a discussion between the employer and the Union regarding **the Union saying, keep firing or laying off Union people, we won't have anybody left to represent**?
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> A. [By Mr. Jackson] **No**.
>
> Q. Do you [recall] discussing Elidia Rocha's case at that point?
>
> A. Elidia Rocha's case?
>
> Q. Yes.
>
> A. **No**.
>
> Q. No mention was made of Elidia Rocha at that August 19, 1996 bargaining session, as far as you can recall?
>
> A. **I don't recall that Elidia Rocha was discussed**.
>
> ...
>
> Q. Do you recall having discussions with Mr. Hawks about the unfair labor practice charge regarding Ms. Rocha?
>
> A. **No**.

> Transcript pages 86, lines 10 through page 87, line 7 [emphasis by **bold** supplied].

Thus, all of the witnesses except Jackson remembered the discussion as related to discussion about the layoff of Rocha. Littrell recalled looking down at the table when she was accused of laying off union adherents; Hawks remembered the layoff discussion as creating a "foul mood"; both Littrell and Sanders recalled that the conversation on whether the union had a majority was initiated in order to lighten the moment. Crediting the employer's witnesses other than Jackson with some accuracy, a conclusion follows that Hawks complained about the layoff of Rocha and made a statement that predicated a potential loss of majority status on further layoffs of union adherents. The Examiner concludes that Jackson responded jokingly, with words to the effect, "Are you saying you don't have a majority?", to which Hawks responded, in jest, with words to the effect, "I'm surprised I haven't received a decertification letter". The Examiner concludes that the employer has not sustained its burden of proof in support of an affirmative defense that the union had admitted a lack of majority status.

Further support for the foregoing conclusion is found in the fact that the employer did not follow up in a manner that would have been consistent with the collective bargaining statute:

- First, the employer did not file a representation petition under Chapter 391-25 WAC. RCW 41.56.050 provides that the Commission "shall be invited to intervene" whenever there is a disagreement between a public employer and public employees about a question concerning representation. WAC 391-25-090 makes specific provision for employer-filed representation petitions, as follows:

> Where an employer has a good faith belief that a majority of its employees in an existing bargaining unit no longer desire to be represented by their incumbent exclusive bargaining representative, it may file a petition to obtain a determination of the question concerning representation.

Affidavits from Jackson and/or the other employer officials who were witnesses to Hawks' alleged admission of loss of majority status would seemingly have sufficed to satisfy the requirement of WAC 391-25-090(2)(a). The employer put forth no such effort, however.

- Second, the employer continued to meet and negotiate with the union after Hawks allegedly admitted the union lacked majority status, and then only ceased bargaining on an "impasse" claim. Employers risk being found guilty of "interference" unfair labor practices under RCW 41.56.140(1) and "unlawful assistance to a union" unfair labor practices under RCW 41.56.140(2), if they negotiate with an organization that is known to lack majority status. Such a complaint can be filed by an individual employee or another organization, and so is not dependent on the reluctance of the incumbent union to put its own status in question.

The "Free Speech" Defense

The employer's defense in this case asserts a "free speech" right to take its "lack of majority status" allegation and other claims directly to the employees. It did so at its peril. Employer communications with employees who are represented for the purposes of collective bargaining have been the subject of numerous decisions. The Lake Washington School District decision cited by both parties listed factors to be considered when determining

whether a communication goes beyond the pale of free speech, including:

1. Were the statements misleading or factual?
2. Has the employer made new benefits available in its \communication?
3. Does the communication have a tendency or purpose to undermine the union?
4. Is the communication, in tone, coercive as a whole?

Employers do retain a right to communicate directly with their union-represented employee, but that right is subject to the aforementioned conditions. The employer in Lake Washington was found guilty of an unfair labor practice, because its communications contained a new proposal which had not been given to the union previously at the bargaining table. Proctor and Gamble, supra, on which Lake Washington was based, also dealt with the accuracy of the employer's description of the status of collective bargaining negotiations.[4] City of Seattle, supra, held that a contested employer communication was substantially factual, noncoercive and not intended to undermine the exclusive bargaining representative. In this case, the employer's actions far exceed the actions at issue in the cases upon which it relies.

Misrepresentations -
On the evidence presented in this record, as discussed above, the employer's memo misrepresented the "lack of majority status" conversation.

The employer's memo clearly misrepresented the union's proposal on union security, by invoking obsolete and controversial "closed

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[4] In Proctor and Gamble, the NLRB found the employer's motivation was to give its version of a breakdown in negotiations, not to subvert the union.

shop" terminology.[5] It thus inherently suggested the union was proposing a form of union security outlawed by RCW 41.56.122. The "closed shop" has never been a permitted form of union security under Chapter 41.56 RCW, and was not proposed by this union.

In the context of uncontroverted testimony that the parties never discussed the amount of union dues during their negotiations, the specification of a dues amount in the employer's memo is clearly not a report on the status of negotiations. Moreover, the amount reported by the employer was, in fact, inaccurate.

The Examiner finds the employer's misrepresentations on these issues, like the rest of the memo, were likely to drive the employees away from the union. As such, the memo interfered with employee rights secured by RCW 41.56.040, and was a violation of RCW 41.56.140(1).

Promise of Benefit -

The employer's memo detailed how saving of its cost of representation for collective bargaining ($13,000 up to that point) could be made available for employee wages and/or employer-paid medical

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[5] The "closed shop" was a form of union security negotiated by private sector unions and employers under the National Labor Relations Act of 1935. It required union membership in good standing as a pre-condition to commencing employment. Roberts' Dictionary of Industrial Relations, (BNA Books, 1966). The closed shop was outlawed in the private sector by the Labor-Management Relations Act of 1947 (the Taft-Hartley Act), under which the maximum form of union security is a "union shop". As so amended, Section 8(a)(3) of the federal law provides that employees cannot be obligated under a union security clause until "following the beginning of such employment or the effective date of such agreement, whichever is later", and the maximum obligation on an employee is to "tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership" in the union.

insurance at 100% of the premium cost. Those statements could reasonably be perceived by employees as a promise of benefit if they abandoned the union. As such, the memo constituted an interference with employee rights secured by RCW 41.56.040, and was a violation of RCW 41.56.140(1).

Purpose of Undermining the Union -
Considering the context in which it was issued, the Examiner has no difficulty in concluding that the employer's memo tended to undermine Teamsters Local 839. The memo was written in a style used in representation election campaigns, but this was not a pre-election campaign where employees were about to make a ballot choice. Local 839 was the one and only target:

- The employer opened with "over a year since negotiations began", without mentioning the limitations which it had imposed on the time and frequency of bargaining sessions. The employer thus appeared to make the union entirely responsible for the delay.

- In the third paragraph, the employer trumpeted wage increases it had given in the past "without involvement of union representation" and medical benefits paid 100% "without need for union representation". In the context of what followed in the memo, that was clearly a swipe at Local 839.

- At the first bullet under "proposals to date", the employer criticized the absence of a union proposal on wages, without mentioning either the tentative agreements which had been reached or the limitations which the employer itself had imposed on the time and frequency of bargaining sessions.

- At the fourth bullet, the employer clearly blamed the union for its $13,000 in representation costs. That figure takes on

added meaning as constituting nearly 25% of the $58,000 deficit described in the same memo as having been built into the employer's 1996/1997 budget.

- At the fifth bullet, the employer patronized employees with recognition of their "desire to be involved in decisions affecting their employment",[6] and then made a specific suggestion of an "employee committee ... to provide input on issues".

The employer's solicitation of an employee committee is particularly troublesome in light of RCW 41.56.140(2), which provides:

> It shall be an unfair labor practice for a public employer:
>
> ...
>
> (2) To control, dominate or interfere with a bargaining representative.

That section parallels Section 8(a)(2) of the National Labor Relations Act (NLRA). As detailed in Washington State Patrol, Decision 2900 (PECB, 1988), the prohibition of "company unions" was a central focus in the debate leading to the adoption of the NLRA in 1935, and the disestablishment of an employer-dominated organization was ordered in the very first decision issued by the NLRB. Pennsylvania Greyhound Lines, 1 NLRB 1 (1935). That

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[6] This was not the employer's only recent experience with collective bargaining. The Examiner takes notice of the Commission's docket records for Case 10664-E-93-1759, which indicate that the Washington State Council of City and County Employees (WSCCCE) was certified on February 3, 1994 as exclusive bargaining representative of this workforce. The Commission's docket records also contain an indication that the WSCCCE disclaimed the unit on March 13, 1995, little more than three months before Local 839 filed its representation petition on June 26, 1995 (see footnote 1, above).

principle remained intact in the Taft-Hartley amendments, and remains in effect down to the present time. Electromation, Inc., 309 NLRB 990 (1992), enforced 35 F.3rd 1148 (7th Cir, 1994). By any standard, the employer's suggestion of an employee committee was out of line.

Tone of Coercion, as a Whole -

The employer's memo generally denigrated the collective bargaining process. Although the employer has consistently denied that the purpose of its September 11, 1996 memorandum was unlawful, its intent is irrelevant. The disputed memo must be evaluated on the "reasonably perceived by employees" standard applicable to interference allegations under RCW 41.56.140(1):

- The employer's recitation that it had given 4% and 5.5% wage increases in the past without union involvement, and had provided fully-paid medical benefits in the past without union representation, were transparent promises of benefit if the employees would forego exercise of their rights under the Public Employees' Collective Bargaining Act.

- The employer decried its costs for collective bargaining representation in terms of what could have been given as pay increases and medical insurance benefits for employees. This would reasonably have been perceived by employees as indicating gains they could receive if they ceased exercising their rights under the collective bargaining statute. An alternative view of this passage, in comparison to the 4% and 5.5% wage increases mentioned just a few paragraphs earlier in the memo, is that employees were being warned that they paid a price for exercising their collective bargaining rights, and would now receive reduced largess from the employer.

- The employer pointed out the expiration of the certification bar period set forth in Chapter 41.56 RCW, without giving the employees a full explanation of their statutory rights.[7] The employer then specifically encouraged the employees to decertify the union.

- The suggestion that employees should form an employee committee furthered the implication that the employees would be better off if they ceased exercising their collective bargaining rights.

On the whole, the memo was inherently coercive, and could reasonably have been perceived by employees as threats of reprisal or promises of benefit, so as to constitute a violation of RCW 41.56.140(1). The September 11, 1996 memo does not even come close to qualifying as "free speech" under the precedents on which the employer relies.

Cancellation of September 25 Bargaining Session

The employer argues that the September 10 action of its board to cancel the negotiation session scheduled for September 25, 1996 was not taken to allow an opportunity for the employees to decertify the union. On the record made here, this argument is not creditable. It is clear from the testimony of the employer's executive

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[7] An employer which takes it upon itself to advise employees of their legal rights needs to be careful not to steer employees away from the collective bargaining statute. The partial explanation in this case has a parallel in City of Seattle, Decision 2773 (PECB, 1987), where a violation was found based on a full recitation of civil service rights without mention of the employees' concurrent collective bargaining rights.

director that a decertification strategy was discussed in the employer's caucus:

> Q. [By Mr. Beyer] During the break was there further discussion between you and Mr. Jackson and Mr. Sanders regarding this issue of union majority?
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> A. [By Ms. Littrell] Yes. As soon as we broke we went into my office, which we normally do, and discuss different issues. Almost the first word out of mouth, out of Rocky's mouth, we went into the room was, I cannot believe he admitted he did not represent a majority. Never in all my years of negotiating has anyone done this. And so I wondered, I said, Well, you know, what we can do with that?
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> ...
>
> A. [By Ms. Littrell] And he said, Well, potentially that we could petition to decertify, and then he went on to say that, that would be viewed pretty disfavorably that, you know, that could cause some concerns. And, of course, I said that would be something that would have to be board decision, but we discussed the different options.

Transcript at page 60, line 22 through page 61, line 17.

Under cross-examination, regarding the preparation of the September 11, 1996 memo to the employees, the same witness testified:

> Q. [By Mr. Ballew] You testified at the last hearing you prepared it for the board?
>
> A. [By Ms. Littrell] I was going to say the ideas were presented from the board and it was made, prepared in conjunction with the legal advice of Menke, Jackson and [Beyer]; but it was typed here.

Transcript at page 65, lines 17-22.

A reasonable inference can be drawn that the employer's representatives discussed the strategy with its board of commissioners, and obtained approval to encourage the employees to decertify the union. In that context, it is concluded that the employer canceled the scheduled negotiation session in order to give the employees sufficient time to fashion a decertification effort.

Further support for the foregoing conclusion is found in the fact that invoking the employer's board of commissioners as a player in the negotiations was, itself, a new development. The board had never previously been involved with the scheduling of negotiation sessions.[8] In view of the discussion in the employer's caucus and both the content and distribution of the September 11 memo, the cancellation of the September 25 bargaining session was part of the employer's campaign to provoke decertification of the union. On the record made here, in fact, no other explanation is plausible.

The employer scheduled the October 29, 1996 negotiation session reluctantly, and only after no decertification petition was forthcoming and the union filed the complaint to initiate this proceeding. In response to the subsequent request for additional negotiations, the employer declared impasse on December 13, 1996 but never followed through with its own suggestion of requesting mediation. Thus, the employer's subsequent actions do not belie an inference of an unlawful motivation when it canceled the meeting on September 10, 1996.

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[8] No member of the board of commissioners ever sat in on the negotiations with the employer's bargaining team.

REMEDY

The employer's conduct in this case, and particularly its September 11, 1996 memo, raises a serious public policy question as to the proper remedy where an employer embarks on a blatant anti-union campaign during negotiations for an initial collective bargaining agreement. The imposition of extraordinary remedies has been affirmed in Lewis County, Decision 644-A (PECB, 1979), affirmed 31 Wn.App. 853 (Division II, 1982), review denied 97 Wn.2d 1034 (1982), and Municipality of Metropolitan Seattle, Decision 2845-A (PECB, 1988), affirmed 118 Wn.2d 621 (1992), where unfair labor practice violations are flagrant or repetitive, and/or where the defenses asserted are frivolous. The Examiner finds that the imposition of extraordinary remedies is indicated in this case.

Violations are Flagrant and Repetitive -
The Commission's docket records and the transcript in this proceeding do not provide circumstantial evidence that this employer has a history of good faith and fair dealings:

- In Pasco Housing Authority, Decision 702 (PECB, 1979), this employer was found guilty of discriminatorily discharging an employee in reprisal for that employee's union activity.

- This employer, with Jackson as its representative in bargaining, failed to reach agreement on an initial collective bargaining agreement with another union after a year of fruitless negotiations that ended just months before Teamsters Local 839 arrived on the scene. Littrell's testimony that the Washington State Council of County and City Employees was

"decertified" was not only in error,[9] but provides a telling insight into the mindset of the employer's senior official.

Additionally, Jackson's testimony evidences a fundamental and flagrant misuse of labor law terminology with respect to the "closed shop". Under oath, albeit by telephone while he was at an arbitration involving another client, Jackson testified on cross-examination:

> Q. [By Mr. Ballew] ... You practice labor or union employment law?
>
> A. [By Mr. Jackson] That is correct.
>
> Q. **Are you aware of any provision in RCW 41.56 that authorize a closed shop?**
>
> A. **No.**
>
> Q. Is there anything [sic] legal closed shop allowed under statute?
>
> A. I am sorry. I didn't hear all of the questions.
>
> Q. Is there anything - the word legal - is there a legal closed shop; not an illegal? I realize this may be difficult by phone.
>
> A. I don't have a statute in front of me. I recall agency shop. I don't have that. I recall 41.56 specifically deals that issue.
>
> Q. **Specifically states a closed shop is not allowed?**
>
> **A. That is my recollection. I would have to review the statute. I don't memorize that particular one.**
>
> Q. You're aware of the memo that was issued on September 11th; that was to the complaint?

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[9] The WSCCCE disclaimed the unit. See footnote 6, above.

A. Yes, I don't have that in front of me, but I believe you are talking about the unfair labor practice complaint.

Q. Yes.

A. And a memo issued by the Pasco Housing Authority.

Q. Correct.

A. Correct.

Q. **Did you approve the language in that memo that indicated Teamsters had proposed a closed shop?**

A. Well, if I did I think that is probably privilege.

Q. You can't be asserting the privilege when you are testifying everything you have been doing and your partner is the attorney on the case. It is already been testified to by your client, by the way, that it was sent to you for review.

A. Then if the client waives it, **the answer is, yes.**

Q. **So you approved saying the Teamsters have proposed a closed shop?**

A. **Yes.**

Q. Were you referring to the Teamsters written proposal sent to you or received on August 13, '96?

A. No.

[Questions and answers on notes omitted.]

Q. Would that be referring to the last proposal, written proposal, submitted by the union?

A. That -- no. That would be in regard to the union's position as reflected in my notes of August 19, 1996.

Q. Then, now the Union's written proposal has a provision that the obligations to pay either Union dues or agency fees kicks in after 30 days of employment. Did the Union stay with that proposal under your understanding?

A. Which Union proposal are you referring to?

Q. Well, you are saying that six days after they sent you a written proposal they came to the table and suddenly changed it. I am wondering how much that you think they changed. Do you think that the obligation to pay union dues did not kick in until after 30 days of employment?

A. There was no discussion on that issue.

Transcript, pages 82 - 86 [emphasis by **bold** supplied].

...

Q. [By Mr. Ballew] Let me ask you, you are an experienced labor lawyer, **how often do you use the term closed shop in describing union security provisions?**

A. [By Mr. Jackson] **Closed shop term is typically not used. Many employers use the term closed shop. Many union representatives use the term closed shop. It is probably misused from a technical standpoint. It is often used to describe union membership where the employee can join the union or pay an agency fee, and it is often used - often misused.**

Transcript, page 89 [emphasis by **bold** supplied].

Coming from an individual who is listed as employer representative on at least 10 cases currently pending before the Commission (constituting more than 2.5% of all pending cases), Jackson's unfamiliarity with the statute and his admitted approval of language he knows was misused is appalling. The applicable statutory language is as follows:

> RCW 41.56.122 Collective bargaining agreements - Authorized provisions. A collective bargaining agreement may:
>
> (1) Contain union security provisions: PROVIDED, That nothing in this section shall authorize a closed shop provision: ...

Additionally, no reference to "agency shop" is found in that section of the statute, or elsewhere in Chapter 41.56 RCW.[10]

Compounding Jackson's approval of the September 11, 1996 memo containing the "closed shop" terminology, the employer's brief sought to put an innocuous spin on the "closed shop" reference, as follows:

> Regarding the Union's proposals, the memo noted that ... the Union had proposed a "closed shop". According to the memo, this meant that all employees would have to pay union dues.

The document speaks for itself, however, and the interpretation now suggested by the employer is nowhere to be found in it.
Finally, the employer's brief contained a lame attempt to rehabilitate Jackson's unfounded claims about the use of terminology:

> Mr. Jackson also testified it is common in labor negotiations for both the Union representatives and employer representatives to use the term "closed shop". Although not an accurate usage of the term, "closed shop" is commonly used to mean that employees must pay union dues or an agency fee or be terminated. It would have been more accurate if the memo had stated that employees would either have to pay union dues or an agency fee or not be retained. From the standpoint of the employees' wallets, however, the statement was entirely accurate. From the perspective of the employees, therefore, they were not materially misled by this statement.

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[10] The Educational Employment Relations Act, Chapter 41.59 RCW, includes the following at RCW 41.59.100:

> A collective bargaining agreement may include union security provisions including an agency shop, but not a union or closed shop.

The Legislature does not adopt nullities. The Examiner and Commission must give meaning to the terms used by the Legislature in RCW 41.56.122. The closed shop has been outlawed in that section since it was first adopted in 1973, just as it has been outlawed in the private sector since 1947. Half a century seems a sufficient time for the employer's representatives to learn the correct terminology when they are about to issue a controversial communication to bargaining unit employees.[11]

Frivolous Defenses -
The employer has not offered any serious defense to its soliciation of creation of a company union that would have clearly been in violation of RCW 41.56.140(2).

Having cited precedent concerning the "free speech" exception to interference violations under RCW 41.56.140(1) and its federal counterpart in Section 8(a)(1) of the NLRA, the employer proceeded to belabor this record with evidence and argument concerning the intent of its September 11, 1996 memo. It knew or should have known from numerous Commission and NLRB precedents that a finding of intent is not necessary to the analysis of an "interference" claim, and that the focus in such matters is on the reasonable perception of employees. The employer's assertion of "intent" defenses to this "interference" charge was additionally outrageous, where its memo contained blatant misrepresentations, could have had no other purpose but to undermine the union, and was clearly outside of the precedents relied upon by the employer.

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[11] The authority of the Examiner does not extend to imposing discipline on persons who practice before the agency, but the Commission retains such authority under WAC 391-08-020. The Examiner thus can only recommend that the Commission consider whether Jackson and/or Beyer should be sanctioned for their actions in this case.

The employer's defenses disregarded the testimony of its own witnesses, who established that employer negotiators specifically discussed a decertification strategy in caucus while they were supposedly negotiating an initial collective bargaining agreement with the union. The employer then embarked upon a campaign to coerce the employees into decertifying the union.

This is not a "refusal to bargain" case, but the employer has belabored the record with materials and defenses that would only be relevant to a "refusal to bargain" claim:

- This record includes a large volume of bargaining proposals and correspondence which the employer insisted upon having admitted into evidence over objection from the union. Review of that material illuminates a sorry commentary of the employer's minimal effort to fulfill its statutory obligation to bargain in good faith. Over a period of a year, the employer managed to attend only five bargaining sessions. Jackson both insisted that the duration of bargaining sessions be limited, and refused more frequent meetings requested by the union. The session held on October 29, 1996 appears to have been forced upon the employer by the filing of this complaint. The employer's declaration of impasse and subsequent refusal to meet, without even attempting mediation, strongly suggest an intent to frustrate or avoid agreement.

- During the limited negotiations which were held, the parties were unable to reach agreement on basic contract provisions which are common in collective bargaining agreements, such as union security, management rights, contracting out, probationary period, layoff, seniority, zipper clause, and grievance procedure. The latter is particularly troublesome, as RCW 41.56.030(4) specifically makes grievance procedures a mandatory subject of collective bargaining, RCW 41.56.122(2)

> specifically authorizes binding arbitration of grievance disputes, RCW 41.58.020(4) specifically sets forth a legislative policy favoring arbitration of grievances, and RCW 41.56.125 even makes the Commission's staff available to arbitrate grievances at no cost to the parties.

The Examiner understands the difference between "hard bargaining" and "bad faith". RCW 41.56.030(4) generally does not force any party to make concessions but that does not excuse failure to meet at reasonable times and places, breaches of the good faith obligation, or flagrant excesses of free speech rights such as those contained in the employer's September 11, 1996 memo. Under these facts, the Examiner concludes there is no reasonable expectation that this employer would ever negotiate an initial collective bargaining agreement with this union.

Attorney Fees -

The employer's conduct in this case is without precedent. The remedy fashioned in this case must be sufficient to compensate the union for its costs of prosecution, both to remedy an outrage against public policy and to encourage collective bargaining relationships that are free from interference. Payment of a successful complainant's attorney fees and costs by the respondent is warranted in this case, where the employer's anti-union sentiments and actions were blatant, and its defenses meritless. Mansfield School District, Decision 5238-A and 5239-A (EDUC, 1996). The employer is therefore being ordered to pay reasonable attorney's fees and costs to the union for this case.

Interest Arbitration -

The impact of the employer's September 11, 1996 memo and its subsequent shutdown of negotiations are immeasurable. In Municipality of Metropolitan Seattle, supra, the Supreme Court affirmed the availability and use of an "interest arbitration" remedy in a

case where an employer flagrantly and repeatedly avoided negotiating a first contract with a union representing its employees. While the Commission and the Supreme Court each indicated that such a remedy should be used only infrequently, the case now before the Examiner presents an appropriate case for its application. In order to assure that these parties will attain an initial collective bargaining agreement, the Examiner orders the employer and union to submit unresolved issues to mediation, and to then submit any unresolved issues to interest arbitration.

FINDINGS OF FACT

1. The City of Pasco Housing Authority is a public employer within the meaning of RCW 41.56.030(1). At all times pertinent Bobbie Littrell was the employer's executive director and Rocky L. Jackson was its representative in labor relations matters.

2. Teamsters Union, Local 839, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of an appropriate bargaining unit consisting of employees of the City of Pasco Housing Authority, pursuant to a certification issued by the Commission on August 25, 1995. At all times pertinent, Business Representative Ted Duffy and Secretary/Treasurer Robert Hawks represented the union.

3. Teamsters Local 839 filed its petition to obtain certification as exclusive bargaining representative less than four months after the Washington State Council of City and County Employees (WSCCCE) disclaimed the bargaining unit after more than a year of negotiations failed to produce an initial collective bargaining agreement.

4. Despite numerous requests by union officials for more frequent negotiations, the employer imposed severe limits on the number and length of bargaining sessions. As a result, the parties met only five times during the first year of negotiations.

5. At a bargaining session on August 19, 1995, Hawks accused the employer of laying off union adherents in order to destroy the union. In an exchange which followed, Jackson jokingly asked if the union was saying it did not represent a majority of employees, and Hawks jokingly responded that he was surprised he had not received a notice of a decertification effort. The record does not support a conclusion that Hawks actually admitted that the union lacked majority status.

6. Jackson called for a caucus during the August 19, 1996 bargaining session, at which time employer officials discussed a decertification strategy and Littrell stated that the employer's board of commissioners needed to be involved in any decertification strategy.

7. Acting on September 10, 1995, at the request of the employer's board of commissioners, Jackson canceled a bargaining session which had been scheduled for September 25, 1995. This was the first occasion on which the employer's board of commissioners took or was attributed as having taken a direct role in the negotiations.

8. On September 11, 1995, the employer sent a memo to bargaining unit employees which had been prepared in the employer's office and approved by Jackson, but was attributed to the employer's board of commissioners.

9. The employer's September 11, 1996 memo contained material misrepresentations, including stating that the union had

acknowledged it no longer represented a majority of the employees in the bargaining unit, reporting that the union had proposed a closed shop in negotiations, and purporting to report a particular amount as union dues when the matter had not been discussed in bargaining.

10. The employer's September 11, 1996 memo contained an implied promise of benefit if the employees would forego their union activity, in the form of reference to the wage increases and medical benefits which could be provided with an amount equal to that which the employer had spent on its representation for collective bargaining.

11. The employer's September 11, 1996 memo evidenced a purpose of undermining the union, by appearing to blame the union for the entire delay of negotiations, by reminding employees of wages and benefits provided by the employer in the past without union representation, by criticizing the absence of a union proposal on wages without reference to the tentative agreements in negotiations up to that time, by blaming the union for its own costs of representation, and by making a specific suggestion that employees decertify the union and form an employee committee to provide input to the employer.

12. Taken as a whole, the employer's September 11, 1996 memo evidenced a tone of coercion to penalize employees for their assertion of collective bargaining rights and to encourage them to abandon their union representation.

13. The employer consented to hold another bargaining session only after the union had filed the complaint charging unfair labor practices to initiate this proceeding. The parties then met on October 29, 1995, but did not resolve their differences.

14. In a written reply, on December 13, 1996, to a union request for additional negotiations, Jackson refused to schedule any further meetings. Jackson therein acknowledged that the parties had only met for five negotiation sessions (on December 19, 1995 and February 7, March 7, June 13, and August 19, 1996), and had discussed the negotiations once by telephone (on January 16, 1996), but asserted that the parties were at impasse on proposals concerning union security, binding arbitration, contracting out, probation, layoff, seniority, management rights and a zipper clause. Jackson suggested mediation, but did not follow through with making a request for mediation.

15. After a year of negotiations, the parties had made little progress to an initial collective bargaining agreement.

CONCLUSIONS OF LAW

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

2. The employer has failed to sustain its burden of proof as to its affirmative defense that the union acknowledged a lack of majority support during negotiations on August 19, 1996, or that it otherwise had a good faith doubt as to the union's majority status, so that the employer remained obligated at all times to bargain in good faith under RCW 41.56.030(4).

3. By its action on September 10, 1996 to cancel a bargaining session previously scheduled for September 25, 1996, the employer acted in pursuit of a decertification strategy which was discussed by employer officials beginning with a caucus during a bargaining session held on August 19, 1996, and interfered with employee rights secured by RCW 41.56.040, and

committed unfair labor practices in violation of RCW 41.56.140(1).

4. By issuing the memorandum dated September 11, 1996, as described in paragraphs 8 through 12 of the foregoing findings of fact, the employer interfered with employee rights secured by RCW 41.56.040, and committed unfair labor practices in violation of RCW 41.56.140(1).

5. By its actions described in paragraphs 7 through 15 of the foregoing finding of facts, the employer has committed flagrant and repetitive violations of RCW 41.56.140 and has demonstrated little likelihood of reaching an agreement with Teamsters Local 839, warranting imposition of an extraordinary remedy under RCW 41.56.160.

6. The defenses asserted by the employer in this proceeding are so frivolous as to warrant the imposition of an extraordinary remedy under RCW 41.56.160.

ORDER

The Pasco Housing Authority, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Interfering and discriminating against, restraining or coercing employees in the exercise of their collective bargaining rights under the laws of the State of Washington, by soliciting decertification of Teamsters Local 839, by limiting or canceling bargaining sessions, by misrepresentations, by promises of benefits, by denigrating the union, by an overall tone of coercion of employ-

ees, and/or by suggesting substitution of an employee committee in place of collective bargaining.

b. In any other manner interfering with, discriminating against, restraining or coercing the employees in the exercise of their collective bargaining rights secured by the laws of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Reimburse Teamsters Union, Local 839, AFL-CIO, for its costs and reasonable attorney's fees associated with this matter, upon presentation of a sworn statement of such costs and fees.

b. Upon request, bargain collectively in good faith with Teamsters Union, Local 839, with respect to all subjects of bargaining as described in Chapter 41.56 RCW for the employees in the bargaining unit established by the Commission.

c. If no agreement is reached through bilateral negotiations within sixty (60) days after Local 839 has requested to bargain under this order, either party may request the Public Employment Relations Commission to provide the services of a mediator to assist the parties.

d. If no agreement is reached through the mediation process, and the Executive Director of the Commission, on the request of either of the parties and the recommendation of the assigned mediator, concludes that the parties are at impasse following a reasonable period of negotiations, the remaining issues shall be submitted to interest arbitration using the procedures of RCW 41.56.450, et seq., and the standards for employees other than fire fighters. The decision of the neutral chairman of the

arbitration panel shall be final and binding upon both the parties.

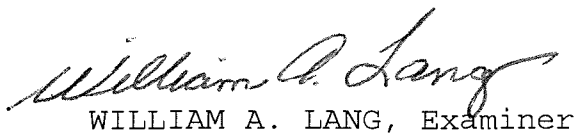
e. Post, in conspicuous places on the employer's premises where notices to employees are usually posted, copies of the notice attached hereto and marked "Appendix." Such notices shall, after being duly signed by an authorized representative of the Pasco Housing Authority, be and remain posted for sixty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

f. Notify the complainant, in writing, within thirty (30) days following the date of this order, as to what steps have been taken to comply herewith, and at the same time provide the complainant with a signed copy of the notice required by the preceding paragraph (2)(f).

g. Notify the Executive Director of the Public Employment Relations Commission, in writing, within thirty (30) days of 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 required by the preceding paragraph (2)(f).

DATED at Olympia, Washington, this 28th day of May, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



WILLIAM A. LANG, Examiner

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL NOT solicit decertification of Teamsters Union, Local 839, AFL-CIO, by limiting or canceling bargaining sessions, by misrepresentations, by promise of benefits, by denigrating the union, and by an overall tone of coercion of employees.

WE WILL NOT solicit the creation of an employee committee in place of collective bargaining.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

WE WILL, upon request, bargain collectively in good faith with Teamsters Union, Local 839, AFL-CIO, with respect to all subjects of bargaining as described in Chapter 41.56 RCW for the employees in the bargaining unit established by the Public Employment Relations Commission.

WE WILL, if no collective bargaining agreement is reached within sixty (60) working days through bilateral negotiations, participate in mediation with the assistance of a mediator appointed by the Public Employment Relations Commission. If no agreement is reached in mediation, we will join with the Union in presenting the remaining issues to final and binding interest arbitration pursuant to RCW 41.56.450, et seq. and the standards for employees other than fire fighters.

WE WILL pay Teamsters Union, Local 839, AFL-CIO, reasonable costs and attorney's fees in this matter.

DATED: _____

PASCO HOUSING AUTHORITY

BY: _____

Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.