STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 4440,	
Complainant,	CASE 24184-U-11-6194
vs.	DECISION 11411 - PSRA
STATE - SOCIAL AND HEALTH SERVICES,	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
Respondent.	

Fenrich & Gallagher, P.C., by *Rhonda J. Fenrich,* Attorney at Law, for the union.

Attorney General Robert M. McKenna, by *Laura L. Wulf,* Assistant Attorney General, and *Marlo S. Oesch,* Assistant Attorney General, for the employer.

On August 15, 2011, International Association of Fire Fighters, Local 4440 (union) filed an unfair labor practice complaint with the Public Employment Relations Commission. The union alleged that the Washington State Department of Social and Health Services (employer/DSHS): (1) refused to bargain by breaching its good faith bargaining obligations in negotiations over assistant fire chief positions; (2) dominated or assisted the union by unlawful interference in internal union affairs; and (3) discriminated by its refusal to hire or recall Ronald Lauer in reprisal for union activities protected by Chapter 41.80 RCW. Unfair Labor Practice Manager David L. Gedrose reviewed the complaint under WAC 391-45-110 and issued a deficiency notice for the second and third allegations of the complaint on August 23, 2011. The union filed an amended complaint on September 12, 2011, that omitted the domination allegation and corrected the deficiencies in the discrimination allegation. A preliminary ruling was issued on September 15, 2011, finding a cause of action for both the refusal to bargain and discrimination allegations in the amended complaint. On September 21, 2011, the Commission assigned the

matter to Examiner Stephen W. Irvin, who presided over a hearing on January 11, 2012. The parties submitted post-hearing briefs to complete the record.

ISSUES

1. Did the employer breach its good faith bargaining obligations in negotiations over assistant fire chief positions?

2. Did the employer discriminate in reprisal for union activities by refusing to hire or recall Ronald Lauer?

Based on the totality of the circumstances, I find that the employer did not breach its good faith bargaining obligations in negotiations over the assistant fire chief positions. I also find that the employer did not discriminate by refusing to hire or recall Lauer in reprisal for his union activities.

BACKGROUND

The union is the exclusive bargaining representative of the full-time and regular part-time firefighters of the Washington State Department of Social and Health Services Fire Department working at McNeil Island. Before the union filed a representation petition for these employees on April 20, 2011, the union represented them in a bargaining unit of all full-time and regular part-time officers at McNeil Island within the Washington State Department of Corrections (DOC).

Prior to April 1, 2011, DOC oversaw operations at the McNeil Island Corrections Center (MICC) and was responsible for firefighting and marine services on the island. On November 19, 2010, DOC notified the union that it was closing the corrections center by the end of March 2011. As part of the closure, DOC's responsibilities – including firefighting services – were transferred to DSHS in support of DSHS' Special Commitment Center (SCC) for sexually violent predators on the island. The union and the International Organization of Masters, Mates & Pilots (MM&P) demanded to bargain the impacts of the corrections center closure four days later, and

negotiations began on January 18, 2011, with representatives from the union, MM&P, DOC, DSHS, and the State Labor Relations Office (LRO) in attendance.

Although many of the specifics discussed at the January meeting are in dispute, the general topics covered concerned the transition from DOC to DSHS, and how employees would be affected by the switch. DSHS representatives present at the meeting expressed the agency's interest in having former DOC employees remain at the island in order to take advantage of their experience working there. DSHS representatives also discussed the probability that the agency would have a smaller budget than DOC had. No written agreements arose out of the meeting.

Subsequent to the January meeting, DSHS was informed that it did not have the ability to transfer DOC firefighting and marine positions directly to DSHS. As a result, DSHS was required to fill positions through an open interview process. DSHS representatives met with DOC employees in February 2011 to explain the interview process and offer assistance in applying for positions through DSHS' online application, NEOGOV.

On March 15, 2011, five full-time and two "on-call" DOC firefighting employees received layoff notices from DOC, and became "project" employees for the agency until DSHS took over DOC's responsibilities at McNeil Island. The interviews for five open DSHS positions – one assistant fire chief who would be the lead and four assistant fire chiefs with working titles of captain – were completed shortly afterward, and employment offers were sent by March 22, 2011. Of the seven firefighting employees who worked for DOC, three full-time employees and two on-call employees were offered positions with DSHS beginning April 1, 2011.

In a telephone conversation with union counsel Rhonda Fenrich before the employment offers were sent, DSHS representatives indicated that union President Dennis Buss and Secretary/Treasurer Ronald Lauer would not be offered positions with the agency. After Fenrich expressed concern that the only DOC employees not offered DSHS positions were union representatives, DSHS made an employment offer to Buss, but not to Lauer. On March 23, 2011, Fenrich sent an e-mail to DSHS officials that questioned why on-call employees were hired instead of Lauer, a senior full-time employee.

On April 20, 2011, the union filed a petition seeking to represent the DSHS firefighting employees on McNeil Island. On June 9, 2011, the Commission issued a final certification indicating that the employees had selected the union as their exclusive bargaining representative. *State – Social and Health Services*, Decision 11088 (PSRA, 2011).

Two days after the union filed its representation petition, one of the five firefighters hired by DSHS resigned. Instead of re-starting the recruitment process, the agency was given permission to utilize the classified list and the interviews from the March recruitment in order to find a replacement. DSHS did not hire Lauer for that position, either, choosing instead to hire an applicant who had not previously worked for DOC.

APPLICABLE LEGAL STANDARDS

Duty to Bargain

Under Chapter 41.80 RCW, "collective bargaining means the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times and to bargain in good faith in an effort to reach agreement with respect to the subjects of bargaining specified under RCW 41.80.020." *University of Washington*, Decision 11075-A (PSRA, 2012). The scope of bargaining includes "wages, hours, and other terms and conditions of employment, and the negotiation of any question arising under a collective bargaining agreement." RCW 41.80.020(1).

Reaching an agreement in bargaining requires a meeting of the minds on the subject matter being discussed. *City of Yakima,* Decision 3564-A (PECB, 1991). In making this determination, the Commission has adopted an "objective manifestation" theory which is used to impute to a person an intention corresponding to the reasonable meaning of their words and acts. *City of Mukilteo,* Decision 9452-A (PECB, 2008), citing *City of Wenatchee,* Decision 8802-A (PECB, 2006). As a general rule, whether parties in labor bargaining have reached a meeting of minds is an issue of fact when there is no contract to show it. *Skagit County,* Decision 9133-B (PECB, 2006), citing *Ben Franklin National Bank,* 278 NLRB 986 (1986).

In determining whether an unfair labor practice has occurred, the Commission examines the totality of the circumstances when analyzing conduct during negotiations. *University of Washington*, Decision 11075-A, citing *Shelton School District,* Decision 579-B (EDUC, 1984). A party may violate its duty to bargain in good faith either by one *per se* violation, such as refusing to meet at reasonable times and places, by refusing to make counter proposals, or through a series of questionable acts which, when examined as a whole, demonstrate a lack of good faith bargaining, but by themselves would not be a *per se* violation. *Snohomish County,* Decision 9834-B (PECB, 2008).

Discrimination

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by the Personnel System Reform Act of 2002, Chapter 41.80 RCW. *State - Corrections*, Decision 10998-A (PSRA, 2011); *Central Washington University*, Decision 10118-A (PSRA, 2010); *see also Educational Service District 114*, Decision 4361-A (PECB, 1994). The employee maintains the burden of proof in employer discrimination cases. To prove discrimination, the employee must first set forth a *prima facie* case by establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute, or communicated to the employer an intent to do so;
2. The employer deprived the employee of some ascertainable right, benefit, or status; and
3. A causal connection exists between the employee's exercise of a protected activity and the employer's action.

Ordinarily, an employee may use circumstantial evidence to establish the *prima facie* case because parties do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007).

In response to an employee's *prima facie* case of discrimination, the employer need only articulate its non-discriminatory reasons for acting in such a manner. The employer does not bear the burden of proof to establish those reasons. *Port of Tacoma*, Decision 4626-A (PECB, 1995). Instead, the burden remains on the employee to prove by a preponderance of the evidence

that the disputed action was in retaliation for the employee's exercise of statutory rights. *Clark County*, Decision 9127-A. The employee meets this burden by proving either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

ANALYSIS

The bedrock question that must be answered in order to assess the union's refusal to bargain complaint involves the commitments that were made by DSHS representatives during and after the meetings with the union in January and February of 2011. The union contends that the employer's representatives committed to hire as many of the union's members as possible within the constraints of the agency's budget. The union further contends that it construed that commitment to pertain to its full-time members, including Lauer, who was not initially hired by DSHS and was bypassed again after one of the employees hired on April 1, 2011, resigned.

To support its contentions, the union points to two e-mail exchanges – one on February 24, 2011, that included Fenrich and DSHS Senior Director of Human Resources Glen Christopherson and was copied to SCC Superintendent Kelly Cunningham, the hiring authority for DSHS; and another on March 1 and 2, 2011, involving Fenrich, Christopherson and LRO Deputy Director Karl Nagel, who represented DSHS during negotiations.

On February 24, Fenrich sent an e-mail to Christopherson regarding a rumor circulating that employees at the recently closed Maple Lane School would be given preference for DSHS firefighting positions. At the end of the e-mail, Fenrich wrote, "This seems to contradict the assurances that were given to the folks on McNeil that they would be retained in their positions. Can you let me know if this is fact or fiction?" Christopherson answered:

> This is fiction. I'm not sure how this rumor has started. We are only interviewing and hiring those individuals who have the background and experience for the job. No one person is getting "first dib's" over another. As we have stated our preference is to have those firefighters who are currently on the job at McNeil Island stay with us as we take over these responsibilities.

> But we must be ready to fill the positions if the current firefighter(s) are not interested in taking the positions we need to fill. So we are not closing the door on anyone who has the skills and abilities to do the job(s).

On March 1, Fenrich sent Christopherson and Nagel an e-mail inquiring about entering into an agreement that DOC firefighters would not experience a break in service after they were laid off on March 15 and not employed by DSHS until April 1. On March 2, Nagel responded:

> I spoke with Glen and he stated that it is DSHS' intent the change would be as seamless as possible. They leave work at DOC one day, start work the next day at DSHS. It should be leaving one state job for a job at another state agency without a break in service. He did say he is checking with their people to confirm the dates of hire will work that way.

It requires an extremely liberal reading between the lines of the employer representatives' correspondence to find a commitment to hiring all of the full-time DOC firefighters. At the very least, the union and the employer have considerably different interpretations of the communications, which indicates that there was no meeting of the minds regarding how DSHS positions would be filled.

The record shows a far clearer understanding that DOC firefighters had to apply for the assistant fire chief positions at DSHS, and that DSHS committed to assisting DOC employees with the open application process. Because of budgetary considerations, it was apparent that DSHS would not automatically provide a position for everyone from DOC, and that each individual must apply and be interviewed in order to obtain a position. DSHS also assured the union that its members' experience working for DOC, although not determinative of being offered a DSHS position, would be seen as favorable in the application process. There was, however, no commitment in writing or otherwise that a preference would be provided for full-time DOC firefighters over on-call DOC firefighters or other applicants who possessed the skills and experience necessary for the positions.

The union argues that Lauer not being hired by DSHS – in addition to being evidence of the employer not following through with its commitments to hire full-time DOC firefighters over on-call employees – was a discriminatory act on the part of the employer in reprisal for Lauer's union activities.

Lauer was an assistant fire chief and McNeil Island's chief medical officer during the approximately seven years he worked for DOC, in addition to serving as the union's secretary/treasurer during that time. After DOC announced that it was closing the McNeil Island Corrections Center (MICC) and firefighting responsibilities on the island would be transferred to DSHS in support of its Special Commitment Center (SCC), Lauer was one of eight applicants for five assistant fire chief positions with DSHS. The employer conducted an open recruitment that required prospective employees to fill out an online application and be interviewed by a three-member panel consisting of Fire Chief Mike Sanders, SCC Chief Operations Officer Don Gauntz, and SCC Administrative Services Chief Mark Davis. The panel's hiring recommendations then went to SCC Superintendent Kelly Cunningham, who made the final hiring decision.

The record indicates that the union established its *prima facie* case for discrimination. Lauer engaged in protected collective bargaining activities by serving as the union's lead negotiator during contract negotiations and filing grievances on behalf of bargaining unit members. Lauer was deprived of a benefit when the employer did not hire him for one of the open positions following DOC's closure of the MICC. Gauntz and Davis testified they were unaware of Lauer's union involvement, but Sanders had previously worked with Lauer at DOC and had knowledge of his union activities, which is circumstantial evidence that a causal connection existed between Lauer's exercise of a protected activity and the employer's decision not to hire him.

The employer's non-discriminatory reasons for not hiring Lauer are directly tied to his performance during the interview and the panel's determination of what qualities were important for future DSHS employees. Based on the record, the interview panel's recommendations to Cunningham were influenced by two distinct factors: the first being the type and amount of experience of each candidate; the second being the level of professionalism displayed during the interview. Due to the reduction in budget for firefighting activities under DSHS, it was important that the new assistant fire chiefs have the experience and training necessary to be able to do a variety of tasks. Also, unlike DOC positions, the new DSHS employees would be

working with private citizens and other state employees instead of inmates. Because of this change, DSHS placed a strong emphasis on professionalism and interpersonal relationship skills.

Although the interview panel believed Lauer met the level of training and experience needed for the new position, his behavior during the interview gave the panel concern regarding his professionalism and ability to work with the rest of the DSHS workforce. Lauer was described as argumentative during the interview, even challenging one of the panelists on his reasons for asking a follow-up question. It was Lauer's behavior during the interview and its perceived indication of the level of Lauer's professionalism that caused the panel to not recommend Lauer for a position.

The union argues that the employer's reasons for not hiring Lauer were pretextual and displayed anti-union animus. The union asserts that Lauer was a skilled emergency medical technician with negligible disciplinary history and positive evaluations. The union contends that Lauer's behavior in the interview was evidence of a prospective employee who believed that the interviews were merely a formality and that he had already been assured of a job with the employer. Finally, the union claims that the employer's initial decision to not offer positions to Buss and Lauer – both union officials – was evidence of anti-union sentiment, and that the employer needed to show how it made the hiring decisions in order to prove a lack of discrimination.

None of these contentions fulfill the union's burden to prove that the employer's hiring decision was discriminatory. While Lauer's job skills are not in question, his occasional difficulties in working cohesively with others were documented by his supervisors, and his behavior in the interview was troubling to his prospective employer, which was filling positions based on a competitive process that included the interview. The fact that Buss wasn't on the employer's preliminary list of candidates who would receive job offers sheds little more than circumstantial light on the employer's decision not to hire Lauer, lending itself only to the conclusion that the employer determined that Buss was a preferable candidate to Lauer when the final decision was made.

CONCLUSION

Based on the record as a whole, I find that the employer's hiring decisions for its assistant fire chief positions were not a breach of its good faith bargaining obligation. The employer made no commitments to the union during impact bargaining that it did not keep when it took over firefighting responsibilities on McNeil Island on April 1, 2011. In addition, I find that the union did not meet its burden of proof for its allegation that the employer discriminated against Lauer in reprisal for his union activities when it did not hire or recall him for an assistant fire chief position. Therefore, the complaint is dismissed.

FINDINGS OF FACT

1. The Washington State Department of Social and Health Services (employer/DSHS) is an employer within the meaning of RCW 41.80.005(8).

2. The International Association of Fire Fighters, Local 4440 (union) is an exclusive bargaining representative within the meaning of RCW 41.80.005(9).

3. The union is the exclusive bargaining representative of the full-time and regular part-time firefighters of the Washington State Department of Social and Health Services Fire Department working at McNeil Island.

4. Before the union filed a representation petition for these employees on April 20, 2011, the union represented them in a bargaining unit of all full-time and regular part-time officers at McNeil Island within the Washington State Department of Corrections (DOC).

5. Prior to April 1, 2011, DOC oversaw operations at the McNeil Island Corrections Center (MICC) and was responsible for firefighting and marine services on the island.

6. On November 19, 2010, DOC notified the union that it was closing the corrections center by the end of March 2011. As part of the closure, DOC's responsibilities – including

firefighting services – were transferred to DSHS in support of DSHS' Special Commitment Center (SCC) for sexually violent predators on the island.

7. The union and the International Organization of Masters, Mates & Pilots union (MM&P) demanded to bargain the impacts of the corrections center closure four days later, and negotiations began on January 18, 2011, with representatives from the union, MM&P, DOC, DSHS, and the State Labor Relations Office (LRO) in attendance.

8. The general topics covered at the January meeting concerned the transition from DOC to DSHS, and how employees would be affected by the switch. The DSHS representatives present at the meeting expressed the agency's interest in having former DOC employees remain at the island in order to take advantage of their experience working there. The DSHS representatives also discussed the probability that the agency would have a smaller budget than DOC had. No written agreements arose out of the meeting.

9. Subsequent to the January meeting, DSHS was informed that it did not have the ability to transfer DOC firefighting and marine positions directly to DSHS. As a result, DSHS was required to fill positions through an open interview process.

10. DSHS representatives met with DOC employees in February 2011 to explain the interview process and offer assistance in applying for positions through DSHS' online application, NEOGOV.

11. The employer conducted an open recruitment that required prospective employees to fill out an online application and be interviewed by a three-member panel consisting of Fire Chief Mike Sanders, SCC Chief Operations Officer Don Gauntz, and SCC Administrative Services Chief Mark Davis. The panel's hiring recommendations then went to SCC Superintendent Kelly Cunningham, who made the final hiring decision.

12. On March 15, 2011, five full-time and two "on-call" DOC firefighting employees received layoff notices from DOC, and became "project" employees for the agency until DSHS took over DOC's responsibilities at McNeil Island.

13. The interviews for five open DSHS positions – one assistant fire chief who would be the lead and four assistant fire chiefs with working titles of captain – were completed shortly afterward, and employment offers were sent by March 22, 2011. Of the seven firefighting employees who worked for DOC, three full-time employees and two on-call employees were offered positions with DSHS beginning April 1, 2011.

14. In a telephone conversation with union counsel Rhonda Fenrich before the employment offers were sent, DSHS representatives indicated that union President Dennis Buss and Secretary/Treasurer Ronald Lauer would not be offered positions with the agency.

15. After Fenrich expressed concern that the only DOC employees not offered DSHS positions were union representatives, DSHS made an employment offer to Buss, but not to Lauer.

16. Lauer was an assistant fire chief and McNeil Island's chief medical officer during the approximately seven years he worked for DOC, in addition to serving as the union's secretary/treasurer during that time.

17. Lauer engaged in protected collective bargaining activities by serving as the union's lead negotiator during contract negotiations and filing grievances on behalf of bargaining unit members.

18. On March 23, 2011, Fenrich sent an e-mail to DSHS officials that questioned why on-call employees were hired instead of Lauer, a senior full-time employee.

19. On April 20, 2011, the union filed a petition seeking to represent the DSHS firefighting employees on McNeil Island.

20. On June 9, 2011, the Commission issued a final certification indicating that the employees had selected the union as their exclusive bargaining representative. *State – Social and Health Services*, Decision 11088 (PSRA, 2011).

21. Two days after the union filed its representation petition, one of the five firefighters hired by DSHS resigned. Instead of re-starting the recruitment process, the agency was given permission to utilize the classified list and the interviews from the March recruitment in order to find a replacement.

22. DSHS did not hire Lauer for that position, either, choosing instead to hire an applicant who had not previously worked for DOC.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.80 RCW and Chapter 391-45 WAC.

2. By its actions described in Findings of Fact 6 through 15, the employer did not refuse to bargain and did not breach its good faith bargaining obligations in negotiations over assistant fire chief positions or violate RCW 41.80.110(1)(e).

3. By its actions described in Findings of Fact 14 through 18, 21, and 22, the employer did not discriminate by refusing to hire or recall Ronald Lauer in reprisal for union activities protected by Chapter 41.80 RCW or violate RCW 41.80.110(1)(c).

ORDER

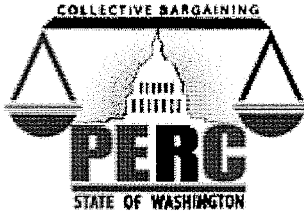
The complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 28th day of June, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

STEPHEN W. IRVIN, Examiner

This order will be the final order of the
agency unless a notice of appeal is filed
with the Commission under WAC 391-45-350.



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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ ROBBIE DUFFIELD

CASE NUMBER: 24184-U-11-06194 FILED: 08/15/2011 FILED BY: PARTY 2
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