STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION 252, Complainant, vs. CITY OF WESTPORT, Respondent.	CASE NO. 2778-U-80-406 DECISION NO. 1194 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Fred G. Enslow, Attorney at Law, appeared on behalf of the complaint.

William E. Morgan, Attorney at Law, appeared on behalf of the respondent.

The above-named complainant filed a complaint with the Public Employment Relations Commission on May 20, 1980, wherein it alleged that the above-named respondent had committed unfair labor practices within the meaning of RCW 41.56.140. Rex L. Lacy, a member of the Commission staff, was designated as Examiner to make and issue Findings of Fact, Conclusions of Law and Order. Pursuant to notice issued by the Examiner, hearing on the complaint was held on December 4, 1980, at Olympia, Washington. The parties filed post-hearing briefs.

THE FACTS:

International Brotherhood of Teamsters, Local 252, was certified on June 30, 1978, as the exclusive bargaining representative for a bargaining unit described as follows:

INCLUDED: All city employees.

EXCLUDED: Police Dept., Mayor, City Attorney, Court Clerk, City Clerk-Treasurer, and Director of Public Works.

The parties bargained an initial collective bargaining agreement which expired December 31, 1979. They commenced negotiations for a successor agreement in October, 1979. The agreement was finalized in July, 1980 and expires December 31, 1981.

POSITION OF THE PARTIES:

The complainant contends that the employer bargained in bad faith by certain acts of reprisal against bargaining unit employees; that the employer unfairly discharged one of the union's negotiators and two other bargaining unit employees; that the employer engaged in surveillance of bargaining unit employees; and that the employer has harassed, intimidated, and interferred with employees for engaging in their statutorialy protected union activities.

The respondent contends that the City of Westport did not bargain in bad faith; that employees Jacobson, Gill, and Rupp were discharged for cause; that the employer did not authorize or engage in surveillance of employees; and that the employer has not harassed or intimidated employees engaged in protected activities.

DISCUSSION:

Bad Faith Bargaining Issue

The City of Westport and IBT 252 commenced negotiations in October, 1979 for the current collective bargaining agreement. During the course of negotiations regarding wages, the employer offered to allow the union to inspect the employer's financial records to determine if monies were available for a wage increase. Robert Jacobson, negotiations team member for the union, and two clerks inspected the records and reported their findings at negotiations. A heated discussion ensued and the employer requested, and the union agreed to a 30 day cooling-off period. During the cooling-off period, and thereafter, the employer's financial records were audited twice. Based upon the audits, the parties agreed to a wage increase of 5%, effective September 1, 1980 and finalized the current agreement.

The duty to bargain in good faith is set forth in RCW 41.56.030(4) as follows:

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

The totality of conduct, of the employer during negotiations does not indicate that the employer bargained in bad faith. The employer sought

solutions to the wage issue, opened its financial records to the union, twice submitted to audits, and eventually agreed to a wage increase.

Harassment and Intimidation

The union contends that the placement of the no strike provision of the collective bargaining agreement in the employees' personnel files, after the sick-out in March, was an act of harassment and intimidation. That contractual provision reads as follows:

ARTICLE XII

NO STRIKE

> "(a) The Employer and the Union agree that the ppublic interest requires efficient uninterrupted performance of the City's funcitions and as such they pledge their best efforts to avoid or eliminate any conduct contrary to this objective. Specifically, the Union and its members, as individuals or as a group, will not initiate, cause, permit, or participate or join in any strike, work stoppage, slowdown, picketing, sickout, sitdown, or any curtailment of or interference with the activities and operation of the City for any reason, including an alleged unfair labor practice. The Union will not cause or permit the employees to refuse, and no employee shall refuse, to cross any picket line established by the Union or by any other labor organization. Disciplinary action, including discharge, may be taken by the Employer against any employee or employees engaged in the violation of this article. Such disciplinary action may be taken at the option of the Employer, and shall not preclude or restrict recourse to any other remedies, including an action for damages, which may be available to the Employer.
>
> (b) In the event of a strike, work sotppage, slowdown, picketing, sickout, sitdown, or any curtailment of or interference with the activities and operation of the Employer, either on the basis of individual choice or collective employee conduct, the Union will immediately upon notification attempt to secure an immediate and orderly return to work. This obligation and the obligation set forth in (a) above shall not be affected or limited by the subject matter involved in the dispute giving rise to the stoppage or by whether such subject is or is not subject to the grievance provisions of this agreement.
>
> (c) Disciplinary action taken by the Employer against any employee for any violation of the obligation set forth in (a) above shall not be subject to the grievance procedure of this agreement, except to determine whether the employee in fact violated any provision of this article."

RCW 41.56 does not protect any right of public employees to strike. See: RCW 41.56.120. The Examiner concludes, from the record, that the aforementioned employer conduct has not interferred with the exercise of any right of bargaining unit employees.

Discharged Employees

An employer has the right to take disciplinary action, including discharge, for good cause, poor cause, or no cause, to maintain order and efficiency in its operations, unless the employer's purpose is to encourage or discourage union membership. Associated Press v. NLRB, 301 US 103, 132 (1937); NLRB v. McGahey, 233 F2d 406 (CA5, 1966).

John Gill and Jeff Rupp were discharged for poor work performance. The union challenged the discharges in accordance with the grievance procedure of the collective bargaining agreement, but did not process the grievances beyond step 2 of the grievance procedure. There is no evidence before the examiner that the discharges involved protected union activities.

Robert Jacobson was discharged on May 9, 1980 for alleged insubordination, participation in a "sick-out", and damage to city property. During the time Jacobson was discharged, he continued to serve on the union's negotiations team, with the employers concurrence that he do so. Jacobson met with Engle and agreed to a settlement of his discharge grievance. The settlement returned Jacobson to work with the employer.

The NLRB has adopted the following causation test for dual motive discharges:

> "In all cases alleging violations of Section 8(a)(3) of LMRA or violations of Section 8(a)(1) turning on employer motivation, NLRB will employee the following "causation test". (1) General Counsel must make prima facie showing sufficient to support inference that protected conduct was a "motivating factor" in employer's decision; (2) once this is established, employer has burden of demonstrating that same action would have taken place even in absence of protected conduct. NLRB is abandoning use of term "in part," which it previously used in determining relationship, if any, between employer action and protected employee conduct."

Wright Lines Inc., 251 NLRB 150 (1980).

The union implies, but does not substantiate, that the employer used Jacobson's protected activities as a motivating factor in his discharge. The Examiner observes that at least the "participation in a sick-out" portion of the stated causes would not appear to be within the type of activity protected by RCW 41.56. The employer continued to recognize Jacobson in his shop steward capacity, raised no objections to Jacobson continuing to serve on the union's bargaining committee, and resolved Jacobson's discharge. Since the complainant has not met its obligation to make a prima facie showing sufficient to support its inference that Jacobson's protected activities were a motive in the employer's decision to terminate Jacobson, there is no reason to shift to the second part of the dual motivation test under Wright Lines Inc., supra.

Surveillance Issue

Since the early days of the National Labor Relations Act, surveillance of employees by an employer, whether with rank and file employees, supervisors, or outsiders, has been held to be violative of the Act. Consolidated Edison Co. V NLRB, 305 US 197 (1938). The law is equally clear that the employer violates the Act if he creates the impression that he is engaged in surveillance. NLRB V Grower-Shipper Vegetable Ass'n, 122 F2d 368 (CA9, 1941); Bethlehem Steel Co. V NLRB, 120 F2d 641 (CA, DC, 1941). Moreover, the NLRB has found an interferrence violation even where supervisors were motivated solely by their own curiosity and were subsequently forbidden by the employer to continue such surveillance. Intertype Co. V NLRB, 371 F2d 787 (CA4, 1967).

George McCleary was hired as a consultant, was given the title of Administrative Assistant, and shares Engle's office. He works in the same area that the clerks work. At about the same time that the city and the union were participating in the cooling-off period in negotiations, McCleary, acting on his own, visited the City of Centralia and inquired into the employment performance and union activity of Vesta Rocky. Rocky was one of the employees who inspected the financial records of the city on behalf of the union.

The employer has created the impression that the City of Westport was engaged in the surveillance of employees engaged in their statutory rights guaranteed by Chapter 41.56 RCW. It matters not that McCleary's information was never used. Intertype Co., supra.

FINDINGS OF FACT

1. The City of Westport is a municipality of the State of Washington and an employer within the meaning of RCW 41.56.030(2).

2. International Brotherhood fof Teamsters, Local Union 252, is a bargaining representative within the meaning of RCW 41.56.030(2). IBT Local 252 is the certified bargaining representative of a bargaining unit of employees of the City of Westport.

3. The City of Westport and International Brotherhood of Teamsters, Local Union 252, commenced negotiations for a successor agreement to the initial contract between the parties in October, 1979. The negotiations reached a heated level and beginning April 14, 1980, the parties engaged in a 30 day colling-off period. During the cooling-off period, and thereafter until July or August the employer caused its financial records to be audited. Upon completion of the audit, by using the data made available, the parties reached agreement for a contract which expires December 31, 1981.

4. On February 6, 1980, Mayor Orville Engle terminated John Gill and Jeff Rupp for poor work performances. The union contested the discharges in accordance with the collective bargaining agreement grievance procedures. The union has not made a prima facie showing that Gill and Rupp were discharged because of their union activities.

5. On March 11, 1980, some employees of the City of Westport participated in a one day work stoppage. Thereafter, the employer, on some unspecified date, caused a one page document reflecting Article XII - NO STRIKE provision of the collective bargaining agreement to be placed in bargaining unit employees' personnel files.

6. Vesta Rocky is employed by the City of Westport as a clerk at City Hall. In April, 1980, George McCleary, Administrative Assistant to Mayor Engle, made inquiries of the Chief of Police of Centralia, Washington regarding the union activities of Vesta Rocky while an employee of the City of Centralia Police Department.

7. On May 9, 1980, Mayor Engle terminated Robert Jacobson for alleged work performance incidents. Jacobson, a shop steward of IBT, Local 252, served on the union's negotiations committee before, during, and after his discharge. On July 1, 1980, Jacobson and Engle entered into a settlement agreement for Jacobson's disputed discharge. The union has not made a prima facie showing that Jacobson's union activities were a motivating factor in the employer's decision to discharge Jacobson.

CONCLUSIONS OF LAW

1. The Public Employment Relations commission has jurisdiction over this matter under RCW 41.56.

2. The City of Westport did not violate RCW 41.56 with regard to its actions in Findings of Facts 4, 5, and 7.

3. The City of Westport violated RCW 41.56.040(1) by the actions of its employee George McCleary who engaged in surveillance of bargaining unit employees exercising their statutory rights.

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

JOHN SPELLMAN
Governor

STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

603 Evergreen Plaza • Olympia, Washington 98504 • (206) 753-3444

July 1, 1981

Mr. Orville Engle, Mayor
City of Westport
City Hall
Westport, Washington 98595

Mr. William E. Morgan, Atty.
Bitar, Morgan & Deck
623 Simpson Avenue
Hoquiam, Washington 98550

Mr. Jack Fargo
IBT 252
417 N. Pearl
Centralia, Washington 98531

Mr. Fred G. Enslow, Atty.
Griffin & Enslow
3049 South 36th Street
Tacoma, Washington 98409

RE: City of Westport
Case No. 2778-U-80-406

Dear Sirs:

Enclosed is a corrected Page 8 and NOTICE (APPENDIX "A") for the above-mentioned case.

Very truly yours,

REX L. LACY, Examiner

RLL/smp
Enclosure

ORDER

The City of Westport, its officers and agents shall immediately:

(1) Cease and desist from:

(a) Interferring with bargaining unit employees' statutory rights by engaging in surveillance of their protected activities.

(2) Take the following affirmative action which the Examiner finds will effectuate the policies of RCW 41.56:

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

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

DATED at Olympia, Washington this 26th day of June, 1981.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

REX L. LACY, Examiner

APPENDIX "A"

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE PUBLIC EMPLOYEES COLLECTIVE BARGAINING ACT, WE, HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT engage in or allow, surveillance of employees who are exercising their statutory rights guaranteed by RCW 41.56.

CITY OF WESTPORT

By: _____
Chairperson of the City Council

_____
Mayor

_____
City Legal Counsel

Dated this ____ day of June, 1981.

THIS NOTICE SHALL REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

APPENDIX "A"

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE PUBLIC EMPLOYEES COLLECTIVE BARGAINING ACT, WE, THE YAKIMA POLICE PATROLMAN'S ASSOCIATION, HEREBY NOTIFY OUR MEMBERS THAT:

WE WILL NOT engage in or allow, surveillance of employees who are exercising their statutory rights guaranteed by RCW 41.56.

CITY OF WESTPORT

By: _____
Chairperson of the City Council

_____
Mayor

_____
City Legal Counsel

Dated this ____ day of June, 1981.

THIS NOTICE SHALL REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

ORDER

The City of Westport, its officers and agents shall immediately:

(1) Cease and desist from:

(a) Interferring with bargaining unit employees' statutory rights by engaging in surveillance of their protected activities.

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

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

DATED at Olympia, Washington this 26th day of June, 1981.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Rex L Lacy

REX L. LACY, Examiner