STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES COUNCIL 2 AFSCME, AFL-CIO, Complainant, vs. NORTHSHORE UTILITY DISTRICT, Respondent.	CASE 22092-U-08-5628 DECISION 10534 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Audrey B. Eide, General Counsel, for the union.

Davis Grimm Payne & Marra, by *Joseph G. Marra,* for the employer.

On November 6, 2008, the Washington State Council of County and City Employees Council 2 AFSCME, AFL-CIO (union) filed an unfair labor practice complaint with the Public Employment Relations Commission, naming the Northshore Utility District (employer) as respondent. The Commission issued a deficiency notice and the union amended its complaint on November 26, 2008. A preliminary ruling issued December 4, 2008, moved the union's alleged violations of RCW 41.56.140(1) interference and discrimination; violations of RCW 41.56.140(1) interference and (2) domination or assistance of a union; violations of RCW 41.56.140 (1) interference, and (4) refusal to bargain, to hearing. Examiner Starr Knutson held a hearing on April 14, 15, 16, and 17, 2009. The parties filed briefs to complete the record.

ISSUES

1. Did the employer interfere with employee rights and discriminate against Cherie L'Heureux, by terminating her employment, and Doug Wittinger, by laying him off, in reprisal for their union activities?

2. Did the employer interfere with employee rights and attempt to dominate or assist a union by its September 2008 e-mails to bargaining unit members requesting them to exclude union representatives and counsel from collective bargaining?

3. Did the employer interfere with employee rights and refuse to bargain by:
   a. breaching its good faith bargaining obligations concerning its union security proposal?
   b. circumventing the union by direct dealing with employees represented by the union by the general manager's letter dated October 17, 2008?

I find that the employer did not interfere or discriminate when it terminated Cherie L'Heureux for legitimate, non-retaliatory reasons. The employer did not interfere in Doug Wittinger's employee rights or discriminate against him when it laid him off for budgetary reasons.

I find the employer did not attempt to dominate or assist a union or interfere with employee rights in its September e-mails to bargaining unit members.

I find the employer did not breach its good faith obligation by its union security proposal; it did not circumvent the union by direct dealing with employees in the general manager's letter dated October 17, 2008.

APPLICABLE LEGAL STANDARDS

Unfair Labor Practices

This proceeding is conducted under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.[1] RCW 41.56.160 empowers the Commission to hear and determine unfair labor practice allegations and to issue appropriate remedies. WAC 391-45-270(1) (a) provides that the complainant in any unfair labor practice proceeding has the burden of proof.

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[1] This employer operates a water sewer district which is not included as a public utility under RCW 54.04.

All three issues allege interference in employee rights by certain employer actions. Chapter 41.56 RCW prohibits employer interference with, or discrimination against, employees for exercising their collective bargaining rights.

RCW 41.56.140(1) enforces those statutory rights by establishing that an employer that interferes with, restrains, or coerces public employees in the exercise of their collective bargaining rights commits an unfair labor practice.

An interference violation exists when an employee could reasonably perceive the employer's statements or actions as a threat of reprisal or force or promise of benefit associated with the union activity of that employee or of other employees. *Kennewick School District*, Decision 5632-A (PECB, 1996).

Statute of Limitations

RCW 41.56.160 limits the processing of any complaint to actions occurring during the previous six months.

> The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, that a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission.

The union filed its original complaint on May 6, 2008, and amended that complaint on May 26, 2008. To the extent the amended complaint added new causes of action, those are limited to events and/or actions occurring on or after November 26, 2007, and before May 26, 2008; the original allegations are timely if they occurred on or after November 6, 2007.

Additionally, the preliminary ruling identified certain allegations concerning the employer's comments about dealing with the union representative as "background statements [that] are not subject to remedial orders by the Commission." I will consider the events occurring outside of the six month limitation exclusively as background to establish a context for the allegations made in this case.

ISSUE 1

Did the employer interfere with employee rights and discriminate against Cherie L'Heureux and Doug Wittinger in reprisal for their union activities?

Legal Standard For Discrimination

A discrimination violation occurs when an employer takes action which is substantially motivated as a reprisal against the exercise of rights protected by Chapter 41.56 RCW. *See Educational Service District 114*, Decision 4361-A (PECB, 1994), where the Commission embraced the standard established by the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). A discrimination violation can be found when:

1. An employee exercises a right protected by the collective bargaining statute, or communicates to the employer an intent to do so;

2. The employee is discriminatorily deprived of some ascertainable right, benefit, or status; and

3. There is a causal connection between the exercise of the legal right and the discriminatory action.

Where a complainant establishes a prima facie case of discrimination, the employer need only articulate nondiscriminatory reasons for its actions. It does not have the burden of proof to establish those matters. The burden remains on the complainant to prove, by a preponderance of the evidence that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing that the reasons given by the employer were pretextual, or by showing that union animus was nevertheless a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A (PECB, 1995).

Cherie L'Heureux

Cherie L'Heureux began her employment at Northshore Utility District (NUD) in 2002. She served as the secretary for AFSCME Local 1024 between late 2005/early 2006 and September 2007. L'Heureux testified that she held the position of inventory and purchasing[2] from 2004 to 2008 when she was discharged. Her job specification included the following examples of work:

- Purchasing, receiving, and stocking of inventory.
- Enter and process time sheets, purchase orders, and material usage for Operations personnel.
- Prepare bid quotes or proposals to determine which vendor to use.
- Place orders by phone, in-person, or by fax.
- Control the issuance of all inventory, tools, equipment, and supplies to employees & subcontractors.
- Research and oversee service contracts.
- Assist and communicate with all departments.
- Prepare various reports.
- Courier trips for inventory pick-up as needed.
- Organize year-end inventory.
- Perform related duties as required.

Human Resources Director Alycien Cockbain became L'Heureux's supervisor shortly after she was elected to union office, in about March of 2006. From the beginning, L'Heureux was concerned about being across the table from her supervisor at the bargaining table;[3] she found it intimidating. After her election to union office the other union officers told her that she would be scrutinized closely by the employer. L'Heureux testified to the following examples[4] of how Cockbain scrutinized her work after she was elected to union office.

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2 The complete title of the position.

3 Although Cockbain was at the bargaining table, no evidence of any interactions between Cockbain and L'Heureux related to bargaining was presented.

4 L'Heureux did not testify as to what specific date Cockbain's actions outlined in this testimony occurred, only that it was sometime after Cockbain became her supervisor; therefore they are used as background only.

1. She said that before negotiating even started, Cockbain told her a certain pen was too expensive and not to buy it; when L'Heureux asked for a cut off point for prices, Cockbain just told her to be reasonable.

2. Cockbain questioned the clothing L'Heureux wore to work and suggested she wear "office" clothing instead of the clothing worn by the field crew. L'Heureux alleged the field crew was provided a uniform allowance. L'Heureux thought the previous inventory person, Carl Lunak,[5] had received the same uniform allowance that the field crew received and she was not provided that same "full allowance." No evidence was presented concerning the amount of the clothing allowance, which employee was qualified to receive it, or any proof that Lunak did in fact receive a clothing allowance and why.

3. L'Heureux was warned neither to leave the warehouse inventory door unlocked nor to leave her keys lying on the top of her desk.

4. She was asked not to communicate with Cockbain via e-mail.

5. Cockbain asked her to limit the time she spent talking with other employees about topics unrelated to her work duties.

6. L'Heureux testified that every time she was chastised verbally, Cockbain followed up with this "written thing." This intimidated her and she felt Cockbain was building a "paper trail" for further action later. No evidence was presented to directly support that L'Heureux received "written thing(s)."

L'Heureux attended a Northshore Utility District Commission (NUDC) meeting on September 10, 2007 along with union staff representative, Pat Thompson, and other union officers, Rich Karschney and Mick Holte. At the meeting L'Heureux and the others voiced their concerns with

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5 Lunak did not testify at the hearing, although the evidence shows he was a union officer at the time this case was filed.

the progress of negotiations for a successor collective bargaining agreement (CBA). The commissioners wrote a letter dated September 19, 2007, in response to what had been said at the meeting.

The letter was mailed to Thompson, hand delivered to the three union officers, and copied to all bargaining unit members. It included the district's perspective on the chronology of negotiations spanning from the middle of 2006 through August 30, 2007. It also included multiple comments attributed to L'Heureux and several comments attributed to Mick Holte. The letter noted that L'Heureux commented at the meeting on the high amount of money paid to the employer's lead negotiator, that "the management team's benefit package was larger than packages being offered by other municipalities," that she compared the employer's bargaining proposal to a "diminishing pie" due to the money paid to their lead negotiator, and stated she had computed a "higher average differential" in the wages of the comparable organizations, than the employer. The commissioners responded to each of those assertions with a rebuttal statement. Additionally, they asked the union for market data, defended their method for using the salary data, criticized the union's political activities and filing of ULP complaints, and urged the union to "devote more time and energy to face-to-face negotiations." L'Heureux testified that she provided market data to the employer's bargaining team in August 2007; however the union did not produce documentary evidence to support this statement.

L'Heureux resigned her position as union secretary shortly after the letter was received. No record was made that L'Heureux participated in any union activities after her resignation as an officer in September 2007. L'Heuruex continued to work in purchasing and inventory until her discharge from employment on June 13, 2008.

L'Heureux's protected activities as a union officer (and the commissioners' letter) occurred more than six months prior to the filing of the complaint in this case. While no remedy is available in this proceeding for any violations of the statute that occurred prior to November 6 or 26, 2007, the protected activity that took place may be considered in evaluating whether her discharge was unlawfully motivated. *City of Centralia*, Decision 2904 (PECB, 1988).

L'Heureux had engaged in union activities and was deprived of her employment. The union made its prima facie case and the burden has shifted to the employer to articulate non-discriminatory reasons for her discharge.

The Employer's Reasons

The employer articulated its reasons in the notice of discharge on June 13, 2008. As stated in that letter, those reasons included:

> We conducted an investigation based upon information that came to light during the annual audit. Our investigation led us to meet with you for follow-up questions, to which your responses showed a pattern of continuing insubordination and a lack of attention to detail that has not been rectified through the progressive disciplinary process. In a meeting with you, you were told the District is considering disciplinary action and to provide any mitigating circumstances we may have missed in our investigation, instead of providing any mitigating circumstances, you submitted a letter written by your Union Officer, in support of you, as your response. (sic)

L'Heureux testified that she had not received any discipline prior to a bargaining session on February 8, 2007, when she brought a box of unopened employer bargaining update memos and gave them to General Manager Fanny Yee. After that date, Cockbain verbally warned L'Heureux for several reasons: 1) concerning her clothing which Cockbain did not think was appropriate; 2) for deliberately ignoring an e-mail request to come to Cockbain's office for a meeting; and another time for having long personal conversations during work hours. L'Heureux also received two written warnings after the February meeting. One in July, concerning a message L'Heureux wrote on Operations Director Al Nelson's whiteboard outside his office that Nelson and Cockbain considered unprofessional. L'Heureux grieved the July 2007 warning and as a result Cockbain reduced the discipline to a verbal warning. L'Heuruex received a second written warning in August 2007 for performing union work during company time. L'Heureux testified she knew the union had an understanding with the employer that union work could be done on the employer's computers during off work hours; she also testified that she knew she had done the work for the union on work time and that it was a mistake. She did not grieve this warning because she thought "the employer was out to get her". No other

evidence was produced concerning the other warnings. This information is presented as background only.

During the six month period prior to the filing of this case, other issues with L'Heureux's job performance surfaced. During a period of L'Heureux's excused absence from February 11 to March 4, 2008,[6] Cockbain filled in for L'Heureux. During that period of time Cockbain discovered L'Heureux had several work performance issues.

One, Cockbain realized that L'Heureux had not set up an account with Grainger, one of NUD's suppliers, to receive discounted state pricing on supplies, despite being asked to set up the account two years previously. On March 4, 2008, Cockbain met with L'Heureux and put her on a performance plan to address the purchasing issue. Cockbain told L'Heureux not to purchase supplies from Grainger unless she called a certain representative directly as the account was not completely set up yet. In direct contradiction of that, L'Heureux placed two orders with Grainger for which the employer did not receive the discounted state prices. L'Heureux later called Grainger and NUD received a credit.

Two, on March 27, 2008, Cockbain discovered that L'Heureux had not set up a state discount with Office Depot. Cockbain had asked her to check the prices she had seen on the Office Depot web site to ensure those were the lowest prices available to NUD. L'Heureux assumed that the on-line pricing she saw was the lowest price that NUD could receive. She asserted to Cockbain that she was able to receive lower prices from an independent supplier. However, lower prices were available from Office Depot, if a state account was set up. From her demeanor at the hearing, I believe L'Heureux deliberately did not comply with Cockbain's directive to find out if lower prices were available from Office Depot.

Time Sheet Errors

During the preparation for the state auditor's annual audit in late March 2008, Cockbain found what she considered egregious payroll errors made by L'Heureux. Cockbain had asked L'Heureux to copy the time sheets that the state auditor had requested which supported two

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6 She took leave protected under the FMLA for alcohol treatment.

specific employees' overtime compensation for 2007. L'Heureux did not copy all of those time sheets. While making the requested copies L'Heureux noticed that she had made errors on those time sheets, one of which resulted in reducing the employees' compensatory time by 13.125 hours. She notified Cockbain of the errors.

Cockbain then informed L'Heureux on March 30, 2008, that all the 2007 time sheets would be reviewed. She found L'Heureux had made fifteen payroll errors in 2007. The errors involved the above instance, as well as mistakes in the entry of time, miscalculation of overtime, changing comp time to paid leave, changing a signed timesheet and entering an unsigned timesheet. L'Heureux responded to the employer's written report of her errors. She admitted she did not copy all the requested time sheets and admitted to ten of the errors. Regarding the other instances, in one case she claimed an employee had asked her to substitute paid leave time when he ran out of comp time because he did not track the amount of comp time he earned. She denied one error by stating she had returned the time sheet and that the employee made the error. Additionally, she defended her actions by saying that the department managers also signed the incorrect time sheets, and that Cockbain was her "second set of eyes" to check the accuracy of the time sheets. L'Heureux maintained that either the division manager or Cockbain should have caught the errors or therefore, she should not have been held responsible.

Analysis

I am not persuaded that the employer discharged L'Heureux for her union activities. The record establishes that the employer's concern with L'Heureux's performance were real and not pretextual. This records supports that the employer's reasons for terminating L'Heureux's employment were credible.

On brief, the union argues that as evidence of the employer's union animus L'Heureux was treated differently than other employees disciplined by the employer. The union cites union officer Karschney's testimony that in 2005 he represented an employee who was disciplined for providing another employee with a urine sample for a drug test. Karschney convinced the employee to confess he had not told the truth during an earlier interview about the incident, and to mention he knew he was wrong and would have to pay a price. This employee was suspended

for one month (without pay for two weeks and ordered to use vacation leave for two weeks) and put on probation for one year. Karschney stated he was surprised the employee was not discharged. Karschney testified he "knew" the employee was a union hater and insinuated that was the reason the employee was let off lightly. The union offered no evidence to substantiate that opinion. No other examples were presented.

One example does not establish a pattern of union animus. The union argued the employees should have been treated similarly as both were disciplined for dishonesty. However, there are differences in the two situations. The first employee went to his supervisor and admitted he was wrong and accepted responsibility for his actions. I did not hear L'Heureux admit to any wrong doing during the hearing. Even though L'Heureux acknowledged she had made *some* mistakes, her acknowledgment fell short of credibly accepting responsibility for the payroll errors. Further, the employer did not charge L'Heureux with dishonesty or falsifying the time sheets, she was charged with *correcting* time sheets. Although L'Heureux may have thought she was helping employees out by correcting their entries, whether it was a mathematical error or a substitution of one kind of leave for another, the evidence and testimony show she knew or should have known she was wrong. The time keeping manual she herself wrote, instructed the timekeeper to return any time sheet containing an error to the employee for correction. Further, it was undisputed that the NUD employee handbook instructed employees to fill out their own time sheets.

Insubordination

The employer charges L'Heureux with knowingly failing to comply with instructions given her by her supervisor. L'Heureux excuses her failure to establish the accounts at Grainger and Office Depot by claiming she did try to set up the accounts, however was misled by the representatives or assumed the pricing she saw on the company web site was the state discounted pricing. She testified she did not try to verify that misinformation nor did she make a second attempt to contact either Grainger or Office Depot. L'Heureux testified she was so upset by being put on an improvement plan the first day of her return from alcohol treatment that she just ordered on-line automatically, instead of heeding Cockbain's instruction to call the sales representative directly.

No Union Animus or Pretext

The union must prove union animus or that the employer's reasons were pretextual. It did not carry that burden of proof. Other union officers also spoke at the September meeting and were on the bargaining team during the same time period as L'Heureux and did not suffer any adverse employment action.

This record does not contain evidence that former or current union officers were harassed, singled out or received disciplinary action during their tenure at NUD. Although both Karschney and Holte testified they felt frustrated and bothered by the lack of progress in negotiations, their posture and behavior while testifying does not convince me their feelings were more than those any bargainer feels during tough negotiations. I do not find any evidence of union animus in this record.

Doug Wittinger

The employer hired Wittinger as a senior civil engineering specialist in March 2000. Wittinger testified that his primary work assignment at that time was to deal with the backlog of water and sewer development extensions (sometimes called applications). He thought the District received 50 to 100 applications a day. His supervisor, Engineering Director Dave Kaiser[7] disputed the number of developer applications Wittinger indicated NUD received. Kaiser testified the utility received about 200 applications per year. He also testified that developer extension projects continued to decrease from a high of 61 projects in early 2008, to 14 in April 2009.

Wittinger testified the backlog continued for seven years. He also testified that during his performance reviews over the years he and Kaiser, would work on a plan to get the backlog caught up. The backlog was not reduced and in late 2007 Kaiser contracted with a private engineering firm to help process the backlog of applications. Kaiser testified the engineering firm completed the work on the backlog in February 2008. Kaiser extended the contract in order for the engineering firm to finish four Capital Improvement Projects (CIP) also in the backlog. The engineering firm still has a contract with NUD; however they are not doing any backlog work.

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7 Kaiser was hired as engineering director sometime in early 2003.

Wittinger's secondary assignment was to replace the front counter engineering support specialist for breaks and lunch. Kaiser testified the number of customers wanting in-person service at the NUD office declined from a average of 3.8 on April 16-30, 2008, to an average of 2 between June 2-17, 2008.

Wittinger was the elected local union president from 2003 to 2006, and as such he signed four MOU's with the employer in 2003 and was part of the bargaining team for the 2004-06 contract. According to Wittinger, he attended the NUDC September 2007 meeting and spoke to the commission about the positive feedback in a 2007 customer survey and encouraged them to support the employees in negotiations. Wittinger is not mentioned in the September letter from the commissioners.

Wittinger testified he felt intense scrutiny from managers. He gave an example: he would be on the phone with his wife for "maybe two minutes" and a manager walking by would ask if he was on a personal phone call, while another employee in the next cubicle would be talking to someone they knew for 30 minutes and no manager commented. However, Wittinger also testified he was disciplined for performing work related to his elected position at Mountlake Terrace on NUD work time. Although he did not personally believe he had "cheated on his time" with NUD, as he made up the time by coming in early or staying after quitting time, he did not dispute the employer's evidence of the amount of that time in the disciplinary notice. This calls into question whether the scrutiny was about union activities or reflected the employer's concern that Wittinger was performing work unrelated to his employment. I do not find Wittinger's testimony credible; his demeanor was inconsistent with his words. He talked about *intense* scrutiny, however he was very matter of fact about the situations and the discipline he received, appearing to accept it without dispute.

Wittinger was laid off on June 27, 2008. The union has made its prima facie case; therefore, the burden shifts to the employer to articulate legitimate reasons for the lay off.

The Reasons

Kaiser attached a memo to the lay off notice explaining his reasons for recommending Wittinger for lay off. That memo stated in part:

> The downturn in the housing market, which started in 2007, began to impact the Engineering Department's workload with respect to developer extension projects and front counter assistance in early 2008. New development projects have dried up and existing projects have been mothballed. We delayed the consideration for staff reduction in the hope that the housing market would rebound. However, as the mortgage crisis has worsened, we have realized that there is no short-term resolution in sight. Beginning in April, we began to investigate the effects of the downturn in order to evaluate Engineering Department staffing requirements. The results of the analysis indicate that we are presently over-staffed. In addition, given that the projections for a rebound of the housing market do not appear to be on the horizon, that the majority of bulk, developable land in the District has been developed and that we have instigated a program to build out sewer systems in order to extend service to remaining developable lots, we have come to the conclusion that, in the best interest of the owners of the District – the rate-payers – we no longer need two staff members to handle the developer extension workload and that the position of Senior Engineering Specialist, held by Doug Wittinger, will be eliminated.
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> During the analysis, we also considered the possibility of eliminating the position of Senior Engineer, held by Tom Alexieff. This position is responsible for design review and construction support for the developer extension projects. Tom is a registered Professional Engineer (PE) with extensive experience in the design and construction administration of municipal facilities. During this downturn, Tom has been given capital improvement projects to manage – including the Singh property sewer main slip-lining, the Northshore Ridge development improvements, the Inglemoor Golf Course sanitary sewer main replacement and the Juanita Drive/153rd water main replacement. Tom's technical abilities and his professional registration enable him to manage the developer extension projects on his own from beginning to end, in addition to assisting us with the capital improvement project as needed. We will still need a PE for review work if any developer extension projects are submitted, in spite of the downturn. Conversely, Doug has neither the qualifications nor the credentials to both manage the projects and review the designs. For these reasons, we believe Tom's services are more valuable to the District at this time.
>
> We also considered the possibility of eliminating the position of Engineering Support Specialist, held by Pat Sutherland[8]. This position is responsible for handling front counter inquiries and processing permits. Given Pat's length of

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8 Sutherland had been a union officer.

> service, his knowledge of the District and our policies, his good customer service skills and his lower annual costs to the District as compared to Doug's, we have made the decision to retain Pat, rather than move Doug into the position and Pat out. Further, Pat's knowledge of AutoCAD and GIS make him a valuable potential contributor to the on-going GIS project. Given the decrease in the amount of front counter inquiries, we have four other members of the Engineering staff – myself, Tom, George, and Carol[9] – who are capable of assisting customers in Pat's absence. In other words, Doug's role as back-up to the front counter is no longer needed.

Analysis

Wittinger testified it was his personal belief that his lay off was due to his union activities because "there never has been a lay off at Northshore." Further, he does not believe the employer had a revenue shortfall, which he believed was the employer's reason for his lay off. I do not find any evidence that the layoff was for reasons other than those stated in the above letter.

The organizational chart admitted into evidence shows the engineering department reduced its number of employees between January 2008 and January 2009. One position was vacant in 2008; by January 2009 there were three additional vacancies, including Wittinger's. The 2009 organizational chart stated there was no intent to fill the three vacancies, and that Wittinger's position had been eliminated due to lack of work.[10] Kaiser credibly testified that the number of applications and customers had declined significantly due to the economic downturn that began in the spring of 2007 and still continued at the time of the hearing.

Lay Off Due to Lack of Business

The union states in its complaint that Wittinger was an active and outspoken supporter of the union. Limited evidence was presented to substantiate his union activities. Although Wittinger testified that he was present at the September meeting of the NUDC, he was not an addressee of the letter sent by the commissioners responding to the assertions of the union officers at that

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9 Tom Alexieff, George Matote, and Carol Cameron are bargaining unit members. Cameron was a past union officer.

10 One senior engineering specialist position remained; no evidence was presented to show that position could have or should have been eliminated.

meeting, nor is he mentioned in the letter. His comments regarding what he said at the September commission meeting did not mention the union; rather he presented information showing the rate payers had a high regard for employees. The only union activity attributed to Wittinger was his election to local president. Kaiser credibly testified that the economic down turn and lack of business were the reasons he decided to eliminate Wittinger's position. Although Wittinger disagrees with the reasons articulated by the employer for his lay off, other employees in the engineering department served as union officers without reprisal. I find the employer articulated legitimate reasons for the lay off; the union did not prove those reasons were pretextual or were motivated by union animus.

ISSUE 2

Did the employer interfere with employee rights and attempt to dominate or assist a union by its e-mails to bargaining unit members requesting them to exclude union representatives and counsel from collective bargaining?

Legal Standard For Domination

It is unlawful under RCW 41.56.140(2) for an employer to control, dominate or interfere with a bargaining representative. The union bears the burden of proof and must establish that the employer intended to control or interfere with the administration of the union and/or intended to dominate the internal affairs of the union. *King County*, Decision 2553-A (PECB, 1987)

The element of intent in the case of control, domination or interference in RCW 41.56.140(2) is in contrast to the standard for interference previously discussed regarding RCW 41.56.140(1), where intent is not required, but simply the belief of a reasonable person that interference took place.

In *Washington State Patrol*, Decision 2900 (PECB, 1988), the Executive Director extensively discussed the historical aspect and origin of unlawful employer domination and/or assistance found in the National Labor Relations Act (NLRA). The NLRA has long been interpreted to prohibit employer-dominated "company unions." *Pasco Housing Authority*, Decision 5927-A

(PECB, 1997). This precedent established in the federal act is reflected in RCW 41.56.140(2). The intent of the statute is to avoid "company unions" where the employer controls or is involved in the union's day-to-day operations and/or finances of the union. In many cases brought before the Commission, the charge of domination is related to assistance or interference with representation elections. *Renton School District*, Decision 1501-A (PECB, 1982), *State - Corrections*, Decision 7870-A (PSRA, 2003).

Analysis

The E-mails

The union charges the employer with attempting to dominate the union by its e-mails to employees in September 2008 requesting the union agree that its local officers could enter into binding memorandums of understanding with the employer without notice or review by union professional staff.

The union introduced into evidence four electronic messages from September 2008.

1. September 2, 2008; from Alycien Cockbain; to Pat Thompson, Mick Holte, Ken James[11]. . . . [The parties agreed that the first section of the message did not relate to this case.]
   On another matter, attached is the MOU that was discussed at our last labor/management meeting. Thanks, Aly.

   The relevant part of the attachment read:

   BACKGROUND

   The prior Bargaining Agreement expired 12/31/2006. During a Labor/Management meeting on August 8, 2008, District and Union agreed to implement what was labeled Article 20, "Signatory Authority" of the "last, best, and final offer" made by District to Union on May 1, 2008.

   ACTION

   By this MOU, the District and the Union agree to implement the following language for all future MOU's:

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[11] Ken James was another union officer.

> The District and Union may come to understandings, from time to time, for the clarification and execution of the various terms of this Agreement. These subsequent understandings will be documented in the form of memorandums of understanding (MOU's). At least two of the three Union Officers will execute these MOU's jointly on behalf of the Union and the District's General Manager shall do the same on behalf of the District. For all purposes herein, the local Union's president, vice president, and secretary shall be agents of the Union.

2. September 3, 2008; from Pat Thompson; to Alycien Cockbain; Mick Holte; Ken James.

   Aly,
   . . . .
   As far as the Districts proposal on article 20, Joe [Marra, employer attorney] and I discussed what I thought was a mutual concern that MOU's wouldn't be enforceable unless they were signed by a representative of the exclusive bargaining agent. Please let me know what you've heard on the subject, but it is my position that such agreements would not be binding. Thanks (sic)

3. September 10, 2008; from Alycien Cockbain; to Pat Thompson; Mick Holte, Ken James; cc Fanny Yee, Joe Marra.

   Hi Pat, re Article 20 MOU.
   At one of the first meetings that Joe attended, we were told that the Union Officers are agents of the Union. We are unclear how they can be agents but not be able to sign an mou (sic). Also, prior to this last contract, the only one to sign the MOU's was the Union President and the District's GM and it was never voiced that it was not binding.

   Are you now telling us that the officers are not agents of the union? Joe has informed us that if the officers are signing the MOUs as agents of the union, the MOU would be binding.

   This proposed MOU was agreed to in a Labor/Mgmt meeting and the section was TA'd to by the District and the Union during negotiations.
   Thanks ~Aly

4. September 11, 2008; from Pat Thompson; to Alycien Cockbain, Mick Holte, Ken James; cc Fanny Yee, Joe Marra, PSchwendiman[mediator].

> Ally (sic),
> My earlier email stands. My concern is that in what is apparently always a rush, the district pressures an officer to sign an agreement that they are not comfortable with or the employees involved will be terminated. There is no time given to have the union's staff representative or attorney review the documents, but obviously the district has spent hours of work time and resources to produce a document they're comfortable with. It is obvious that the goal is to cut the union staff representative out of the process and create an uneven playing field by calling district employees (who are currently at will) "agents of the union." I would ask that you consider the reverse, would you allow a supervisor to sign a MOU produced by the union without your approval? In the end, there's no accountability and the enforcement of the MOU is questionable. Given NUD's pattern of behavior, there is a change in my position.
>
> Given that we are in mediation, I would ask that you still correspond with Paul on contract issues and would ask for his guidance on this issue.
> Pat

The evidence does not include any other electronic messages from September 2008.

No Domination or Interference

The preliminary ruling specifically defines this issue as domination and interference by the employer's September e-mails *to bargaining unit members* requesting them to exclude union representatives and counsel from collective bargaining.[12] First, Cockbain addressed her e-mail messages to the local president and secretary in addition to Thompson; no bargaining unit members are included in the e-mail exchange. Second, the employer does not request the local officers take any action. Cockbain addresses her questions and concerns to Union Staff Representative Thompson. I credit Karschney and Holte's testimony that the employer never told either of them that they could not talk to Thompson before signing an MOU. I believe these e-mails were not an attempt to request from or influence employees as much as they were an employer representative asking questions of a union representative about a controversial issue. I believe Cockbain was trying to clarify a phrase "agent of the union" that had come up at the bargaining table which was being used differently by the union representative and the employer's attorney. It is clear to me in the September e-mail that the union representative and the employer's attorney disagreed on how this term applied to the local union officers. However,

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[12] However, even if the e-mails had gone to employees I would not find a violation.

this record does not contain evidence of interference or attempt to create or control a company union by the employer.

ISSUE 3

Did the employer interfere with employee rights and refuse to bargain by:

1. Breaching its good faith bargaining obligations concerning its union security proposal?
2. Circumventing the union by direct dealing with employees represented by the union by the general manager's letter dated October 17, 2008?

Legal Standard For Interference And Refusal To Bargain

As established in *City of Seattle*, Decision 2483 (PECB, 1986), the interference standard is not particularly high. The union is not required to show how an employer intended or was motivated to interfere with collective bargaining rights. Nor is it necessary to show that the employee involved was actually coerced or that the employer had a union animus for an interference charge to prevail. *City of Tacoma*, Decision 6793-A (PECB, 2000).

Legal Standard for Good Faith

Chapter 41.56 RCW states an employer has a duty to bargain with the *exclusive bargaining representative* of its employees. RCW 41.56.030(4) defines collective bargaining as:

> the performance of the mutual obligation of the representatives 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 obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and employees.

Differentiating between lawful "hard bargaining" and unlawful "surface bargaining" can be difficult in close cases. This fine line in differentiating the two reflects a natural tension between the obligation to bargain in good faith and the statutory mandate that there be no requirement that concessions be made or an agreement be reached. *Walla Walla County*, Decision 2932-A (PECB, 1988). An adamant insistence on a bargaining position is not, by itself, a refusal to bargain. *Mansfield School District*, Decision 4552-B (EDUC, 1995), citing *Atlanta Hilton and Tower*, 271 NLRB 1600 (1984). However, good faith is inconsistent with a predetermined resolve not to budge from an initial position. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

Union Security

Article 1 of the initial collective bargaining agreement (CBA) addressed union security effective September 25, 1998, through December 31, 2000. The original language was:

> 1.2 All employees in the bargaining unit who are members of the Union as of the signature date of this Agreement shall remain members in good standing for the term of the Agreement. Subject to Paragraph 1.3 below, all other employees electing not to become Union members shall be grandfathered out of the Union and shall have no obligations to pay moneys to the Union under the terms of this Agreement.
>
> 1.3 Any employee hired after the effective date of this Agreement shall, within thirty (30) days of employment become a member of the Union; provided that in the event any employee wishes to withdraw from the Union or does not wish to become a member of the Union, the employee shall pay a representation fee toward the cost of the negotiations and administration of this Agreement. Such representation fee shall not exceed the dues attributable to being a member of the Union.

The second CBA effective January 1, 2001, through December 31, 2003, had similar language:

> 1.2 All employees in the bargaining unit who are members of the Union as of the signature date of the Agreement shall remain members in good standing for the term of the Agreement. Subject to Article 1.3, any employee hired after the effective date of this Agreement shall, within (30) days of employment, become a member of the Union.
>
> 1.3 Rights of non-association, dues deduction and any representation fees shall be administered consistent with applicable state and federal laws.

A memorandum of understanding (MOU) was attached to that CBA concerning three subjects, including a union security clause exception. The union security clause exception stated:

> The following named employees may at their sole option elect to continue not to be members of nor pay any monies to or on behalf of the Union for the duration of their employment with the District. However, these individuals are required to make a contribution to a charity in an amount equal to the monthly Union representation fees: [four employees are listed].
>
> Under the terms of the previous collective bargaining agreement, then current employees of the bargaining unit were given the option of electing not to become Union members. Certain employees, including [the above names], exercised that option. At the time of the execution of the previous agreement, [name] occupied a supervisory position with the District and was therefore excluded from the bargaining unit. As such he was not required to make an election of union membership. During the term of the agreement, [his] position was reclassified and became a bargaining unit position. Because [name] was a District employee at the time of the execution of the previous agreement, the parties have agreed to extend the option to elect not to become a Union member to [name]. The District agrees, however, that on subsequent reclassifications of bargaining unit positions, this election would not apply.

The third CBA which expired on December 31, 2006, read:

> 1.2 All employees in the bargaining unit who are members of the Union as of the signature date of this Agreement shall remain members in good standing for the term of the Agreement. Subject to Article 1.3, any employee hired after the effective date of this Agreement shall, within thirty (30) days of employment, become a member of the Union.
>
> 1.3 Rights of non-association, dues deduction and any representation fees shall be administered consistent with applicable state and federal laws.

During the round of bargaining for the successor to the 2006 CBA the parties were engaged in hard bargaining. The record is replete with evidence that both parties had strong feelings about the issues and each other.

The union made its first proposal on August 25, 2006. It proposed changes to fifteen (15) sections of the existing CBA, with no change to the union security language. On November 6,

2006, the employer made its first proposal through a hand delivered letter addressed to union president Karscheny and mailed a copy to Holte and Thompson. The letter outlined two wage increase options and attached wage survey responses from its comparators, responded to the union's first offer, and proposed some additional language changes. No changes were proposed to the current union security language. The employer notified the union that it considered each of the options as a package. It wrote:

> It is important to point out that each of the two counter-offer options are to be accepted as a whole. The District reserves the right to withdraw either or both counter-offers, if either is not accepted in its respective entirety. To honor our pledge to work together cooperatively; we are providing you with the original printouts of the all the responses from the survey participants. . . . (sic)

Thompson testified he considered the above language meant the proposal was a "take it or leave it" offer to be taken to the membership for an "up or down vote," but no evidence was presented to indicate the membership had seen the package or had voted on it. General Manager Yee testified she meant the offer as a package and the employer "wanted to cut to the chase and provide the best offer it could make." She also testified she was disappointed that the union rejected both offers as she thought one of them would be a "place to start." Yee also expressed those same sentiments in a February 3, 2007, bargaining update to district employees from the management team. This update also said in its third bullet: "because both sides rejected each other's proposals, the parties have agreed that 'the slate has been wiped clean' and the status of bargaining is back to the initial status quo." Thompson testified he did not agree that the "slate had been wiped clean."

The employer made its next proposal on February 22, 2007, after it had chosen a new representative.[13] It labeled the union security language as "{OPEN}." On July 24, 2007, the employer proposed to modify Article 1.2 as follows:

> All employees in the bargaining unit who are members of the Union as of the signature date of this Agreement shall remain members in good standing for the

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[13] The union's new legislation prevented its original negotiator, one of the district commissioners, from continuing as a paid labor representative for the district while he was a commissioner.

> term of the Agreement. Subject to Article 1.3 and 1.5, any employee hired after the effective date of this Agreement shall, within six (6) months of employment, become a member of the Union unless they opt out (open shop). (Underlining in the original.)

The employer also proposed to add a new section numbered as Article 1.5:

> Annually, between January 1st and the Friday before the third Wednesday of January, bargaining unit employees have the option of "opting out" or "opting in" of membership in the Union by submitting a letter in writing to the Human Resources Director. Election will remain in effect until the employee makes a new election in a later January. (Underlining in the original.)

Holte testified that he thought the employer's change to union security would "go away and it would come back to the way it was as a closed shop." At that time he thought the language was similar to that in the first two contracts and would be resolved. He also stated the parties had several short discussions about the union security language during the summer of 2007 with both parties "adamant" about the issue. By April or May 2008, Holte realized the "open shop" was a "sticking point" for the employer. He and the other union officers met with the management bargaining team without each lead negotiator and "tentatively tentatively agreed to all the other articles except for . . . union security." Holte initialed this "tentative tentative" agreement on May 1, 2008. He testified he considered it "tentative tentative" because the officers all agreed they wanted Thompson to review the document before it became a formal TA. [14]

Yee sent a letter dated August 5, 2008, to all employees[15] on October 17, 2008, with several attachments. One of those was a letter from Trudy Rolla, president of the Board of Commissioners, to the PERC mediator. The mediator had requested to meet with the board to become clearer about the employer's reasons for proposing a change to union security. In her letter, she advised the mediator:

> that over the years employees have repeatedly expressed a desire for freedom of choice on the issue of union membership. With compulsory union membership

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14 The documents and events before May 6, 2008, are considered as background only.

15 Cockbain sent the letter to Thompson at his request on October 24, 2008.

> under threat of job loss, the District cannot retain or hire those who reject union membership. It is our goal to make freedom of choice available to current and future employees.
>
> By way of reference, this issue has long been a concern of the Board based on our duty to the employees to protect and defend their rights as citizens. Not everyone views union membership positively and others are concerned about their own lack of choice and personal freedom. A former employee who came from the Soviet Block (sic) typified these concerns. The lack of choice was a very real concern and represented more than simply the payment of dues. In his words, the freedom of choice was the reason he came to this country. The Board in respecting personal differences and freedom of association *cannot in all good conscience accede on this point.*
>
> (Emphasis added.)

October 17 was the first time the district employees had seen Rolla's letter. Thompson received a copy of the letter and its attachment from Cockbain on October 24, 2008.

Analysis

Both parties here have strong opinions on the subject of union security. The union security provisions in the 1998 CBA provided current employees the option of being grandfathered out of the union and not having to pay any moneys to the Union. However it required newly hired employees to become members or pay a representation fee not exceeding the amount of union dues. This was a unique provision that combined an open shop and a union shop. No evidence was provided as to how the specific language came into being except that it apparently worked for these parties. The second agreement required all employees who were members of the Union as of the date of the agreement to remain member, or in labor vernacular – maintenance of membership. The original employees who were grandfathered out of membership continued to retain their status through an MOU.

I believe these parties had pursued some distinctive language in their past contracts to accommodate their different positions on union security. I find no evidence in this record to prove the employer was not open to negotiating atypical language during this bargain.

Circumvention or Direct Dealing in the October Letter?

Legal Standard For Circumvention

The Commission prohibited circumvention of a union and direct dealing with employees when it stated:

> Where employees have exercised their right to organize for the purposes of collective bargaining, their employer is obligated to deal only with the designated exclusive bargaining representative on matters of wages, hours and working conditions. RCW 41.56.100; RCW 41.56.030(4). Under such circumstances, an employer may not seek to circumvent the exclusive bargaining representative of its employees through direct communications with bargaining unit employees.

City of Seattle, Decision 3566-A (PECB, 1991).

The legal standard on circumvention holds that an employer that bypasses the exclusive bargaining representative of its employees and deals directly with the employees themselves on mandatory subjects of bargaining, commits an unfair labor practice. *City of Pasco*, Decision 4197-A (PECB, 1994); *Whatcom County*, Decision 7244-A (PECB, 2003); *City of Seattle*, Decision 8916 (PECB, 2005).

With respect to employer communications to employees the Commission reaffirmed in *Grays Harbor College*, Decision 9946-A (PSRA, 2009), that employer statements could form the basis of an interference unfair labor practice under certain criteria. Those identified criteria include:

1. Is the tone of the communication coercive as a whole?
2. Are the employer's comments substantially factual or materially misleading?
3. Has the employer offered new "benefits" to employees outside of the bargaining process?
4. Are there direct dealings or attempts to bargain with the employees?
5. Does the communication disparage, discredit, ridicule, or undermine the union? Are the statements argumentative?
6. Did the union previously object to such communications during prior negotiations?
7. Does the communication appear to have placed the employer in a position from which it cannot retreat?

The Letter

The local union leadership sent memorandum dated October 8, 2008, to bargaining unit members. It reads in relevant part:

> As your local union officers, we wanted to update you as to what's been happening since our last general membership meeting.
> . . . .
> To date, the Commissioner's (sic) have not formally responded [to the mediator's recommendation to settle] although our General Manager has said they would not agree.
>
> Our media efforts have been successful in securing support from local and state elected officials as well as other labor organizations. The idea the Commissioner's (sic) refused to meet with the mediator and then rejected a recommendation that would give both parties a fair chance to present their case [to an arbitrator] shows anti-union bias of the District.
>
> We are aware that a petition is being circulated that criticizes the decision to go public with our issues. It was not taken lightly and was supported by everyone in attendance at the meeting and your three elected representatives. It has also been discussed at several previous meetings. We realized that not everyone will participate in Union activities where we discuss, debate, and vote. As your elected officers we only ask that if you disagree, get involved. Petitions calling our collective actions "ignorant" are unfair and unproductive. It should also be noted that *absolving our union would nullify our agreement for a 2009 COLA.* (sic)
> (Emphasis added.)

The employer responded by in a form letter dated October 17, 2008, addressed to an individual employee. It reads:

> Dear <<DisplayName>>:
>
> We have recently been made aware of a memorandum, dated October 8, 2008, distributed by the Union leadership group. This memo could use some clarification:
>
> - The statement in the memo that the 2009 COLA would be "nullified" is misleading. As you may or may not be aware, the District's Employee Handbook has an "Annual General Adjustment" section which grants COLAs, including for 2009, for all employees even in the absence of any union agreement.

- The District's negotiating team has met consistently with the state mediator (Paul Schwendiman), as recently as August 2008. The Board did decline Mr. Schwendiman's request to meet in executive session as it would be inappropriate under the Open Public Meetings Act. Instead, the Board asked the mediator to meet with its designated representative. Finally, the District did formally respond to the state mediator on September 11, 2008, regarding his proposals. Please see the attached correspondences for further details.

We will continue to negotiate in good faith with the Union in hopes of reaching a mutually agreeable contract. We look forward to the future, when representation of the employee group supports every member equally and keeps everyone well-informed. As always we have an open door policy if you have questions please contact any member of the Management Team.

Truly,
Fanny Yee
General Manager

Enclosures

Analysis

Tone

I read the employer's letter as being responsive to the union's memo and based on facts. Reasonable persons could differ on the tone of the last paragraph of the letter. Although I find some style concerns with that paragraph, taken as a whole I do not think the letter is coercive.

Factual or Misleading or New "Benefits"

The letter states that the District's Employee Handbook gives the employer authority to grant COLA's "even in the absence of any union agreement." The pertinent section of the handbook states:

Annual General Adjustment

The District considers all regular salaried, post probation/trial service period employees for an annual lateral adjustment. This adjustment takes place on the employee's effective anniversary date. It is conditioned upon (a) a satisfactory annual performance as determined by his/her Director and (b) having physically worked at least ten (10) months out of the immediately preceding twelve (12)

> months. ... All increases are limited by the wage ceiling for the position. In addition, *all regular salaried employees receive a cost of living adjustment as a percentage of the appropriate published CPI-W.*
>
> (Emphasis added.)

However, the CBA limits the applicability of the handbook. Article 14 of the CBA addresses the employee handbook as follows:

> The District publishes an Employee Handbook, which contains information, policies and procedures important for employees. The Employee Handbook is amended from time to time as deemed appropriate by the District. The contents of the Employee Handbook are not intended to alter or replace any provisions of this Agreement. In the event any portion of the Employee Handbook conflicts with any provision of this Agreement, the Agreement shall govern. The Union retains the right to negotiate any revision or amendment of the Employee Handbook, which is a *mandatory subject of bargaining.* This section pertains to any portion of this Agreement where reference is made to the Employee Handbook.
>
> (Emphasis added.)

The letter states the employer "will continue to negotiate in good faith." In fact the parties had negotiated and signed an agreement on May 8, 2008, to implement Article 18, Wages and Classifications, which included wage increases through 2010.

Direct Dealing

The letter refers to the bargaining update sent out by the local union officers. It responds to that update. It does not attempt to bargain directly with the employees nor make any promise of benefit.

Disparage, Discredit, Ridicule, Or Undermine The Union? Argumentative

The union argues that the employer's letter speaks for itself. I agree. The first part of the employer's letter simply states that the employer became aware of the October 8 memorandum

distributed by the Union leadership group. The employer then responds to some of the information contained in the memorandum and states it will continue to try and reach agreement.

The October 8 union memorandum contains what I believe to be a clerical error when it uses the phrase "absolving our union." I wonder if the writer meant to use the word "dissolve." The writer also uses the phrase "nullify our agreement for a 2009 COLA." Thompson and the union officers signed a MOU on May 8, 2008,[16] to implement Article 18 – *Wages and Classifications* of the employer's offer effective May 1, 2008. However, as the author of the memo did not testify and no one testified knew the meaning of the words used, nor was any other supporting or rebuttal evidence presented, I will not impute any specific meaning to the writer's use of the words absolve and/or nullify.

The October 17, 2008, letter did not disparage, discredit, or undermine the union, attempt directly negotiate with employees, or promise a benefit to employees without union involvement. Based upon the statutory language at issue, the employer's letter did not misstate any fact or make a promise to employees that it could not fulfill.

FINDINGS OF FACT

1. Northshore Utility District is a public employer within the meaning of RCW 41.56.030(1). The employer provides water and sewer service in the City of Kenmore and in portions of King County.

2. The Washington State Council of County and City Employees, Council 2 is a bargaining representative within the meaning of RCW 41.56.030(3). It is the exclusive bargaining representative of a bargaining unit of Northshore Utility District employees performing a variety of work assignments related to the construction, maintenance, repair, and operation of the water and sewer services provided by the employer.

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16 Yee signed the MOU on May 13, 2008.

3. The employer and the union were parties to a collective bargaining agreement effective from January 1, 2003, to December 31, 2006. The parties engaged in collective bargaining for a successor agreement beginning in the summer of 2006.

4. Cheri L'Heureux began employment at Northshore in 2007 as a purchasing and inventory specialist. She was elected to the position of local union secretary in late 2005 or early 2006. Alycien Cockbain, Human Resources Director, became L'Heureux's supervisor in approximately March 2006.

5. Between February 11 and March 4, 2008, Cockbain filled in for L'Heureux while L'Heureux was on an approved leave of absence. During that time Cockbain discovered certain purchasing errors and met with L'Heureux on March 4 to institute a performance plan to correct the errors. The employer determined L'Heureux was insubordinate in not complying with her supervisor's order not to purchase supplies from two suppliers before ascertaining the state discount would be applied to the order.

6. The state auditor conducted its annual audit of the employer's records, including overtime compensation in late March 2008. L'Heureux was asked to copy certain payroll records for the audit. In doing so, L'Heureux discovered she had erred entering in two of those time sheets resulting in reducing one employee's compensatory time by 13.25 hours. L'Heueurx told Cockbain, who started to check other payroll records.

7. On March 30, 2008, Cockbain informed L'Heureux that all the time sheets would be reviewed. Cockbain initiated an investigation of the time sheets and fifteen payroll errors were found. The errors included mistakes in data entry, miscalculation of overtime, changing compensatory time to paid leave, changing a signed timesheet, and entering an unsigned timesheet. The employer determined these errors were violations of its employee handbook.

8. On June 13, 2008, the employer terminated the employment of Cherie L'Heureux.

9. The employer articulated legitimate business reasons for terminating L'Heureux's employment.

10. Doug Wittinger was employed at Northshore as a senior civil engineering specialist and reported to Engineering Director Dave Kaiser. Wittinger's primary job duties were to process water and sewer development extensions and back up the support person at the customer counter. The development extensions were backed-up when Wittinger was hired and he was not able to catch up. The backlog continued until Kaiser hired an outside engineering firm that completed the backlog processing in February 2008.

11. Wittinger was elected local president of the union from 2003 to 2006.

12. The downturn in the housing market in 2007 began to impact the Engineering Department in early 2008. The numbers of development projects decreased and existing projects were discontinued by the developers. Kaiser reviewed the staffing requirements of the department and decided he no longer needed Wittinger as his primary workload, developer extensions, and in-person customers had declined and was not expected to rebound.

13. On June 27, 2008, the employer laid off Doug Wittinger.

14. In September 2008, the employer and the union exchanged four electronic messages related to the employer's proposed change to Article 20 of the collective bargaining agreement. Union Staff Representative Pat Thompson and HR Director Alycien Cockbain were the writers of the exchanged messages. Local union officers Mick Holte and Ken James were copied on all four messages. Fanny Yee, General Manager, and Joe Marra, the employer's attorney, were copied on two of the messages. No other bargaining unit members were included in the electronic messages.

15. The union sent its opening proposal to the employer on August 25, 2006. It did not propose changes to the union security language in the collective bargaining agreement.

16. On November 6, 2006, the employer responded to that proposal in the form of a package offer. This proposal offered two options for wage increases and responded to the union's offer. No proposal was made concerning union security. The union rejected the employer's offer.

17. The employer made its second proposal on February 22, 2007. This proposal was in the format of the entire contract with the employer's suggested changes highlighted and underlined. The employer proposed changing the union security language in a manner similar to that which existed in the 1998-2000 collective bargaining agreement.

18. Despite the involvement of a mediator, the parties were unable to resolve their differences. The parties did agree to interim wage increases for employees and all language issues except union security and Article 20.

19. On October 17, 2008, the employer wrote a letter and sent it to all employees individually. The letter responded to a bargaining update the union officers sent on October 8, 2008. The letter stated facts from the employer's point of view.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this case pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The employer did not violate RCW 41.56.140(1) when it terminated the employment of Cherie L'Heureux as identified in paragraphs 5, 6, and 7 of the preceding findings of fact.

3. The employer did not violate RCW 41.56.140(1) when it laid off Doug Wittinger for the reasons identified in paragraph 12 of the preceding findings of fact.

4. The employer did not violate RCW 41.56.140 (1) and (2) by its September e-mails identified in paragraph 14 of the preceding findings of fact.

5. The employer did not violate RCW 41.56.140(1) and (4) by its actions outlined in paragraphs 16, 17, 18, and 19of the preceding findings of fact.

ORDER

The complaints charging unfair labor practices filed in the above-captioned matters are DISMISSED.

ISSUED at Olympia, Washington, this 10th day of September, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

STARR H. KNUTSON, 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.