BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

DAVID GRIMES, TERRY ST. MARY, STUART BENNETT, Appellants, v. WASHINGTON STATE UNIVERSITY, Respondent.	Case No. RIF-05-0008 Case No. RIF-05-0009 Case No. RIF-05-0010 ORDER GRANTING APPEALS ON SUMMARY JUDGMENT

I. INTRODUCTION

1.1 **Hearing on the Issue.** This matter came before the Personnel Appeals Board, BUSSE NUTLEY, Vice Chair, and GERALD L. MORGEN, Member, on February 27, 2006, for consideration of Respondent's Motion for Summary Judgment. These three appeals were previously consolidated on Appellants' motion. None of the parties requested oral argument on the Motion for Summary Judgment.

1.2 **Appearances.** Appellants appeared *pro se*. Donna J. Stambaugh, Assistant Attorney General, represented Respondent Washington State University (WSU).

1.3 **Documents Considered.** The Board considered the files and documents in this matter, including:

(a) Respondent's Motion to Dismiss (sic), Memorandum in Support of Motion for Summary Judgment, and Affidavits of Richard A. Heath, Steven Hansen, and Lisa Gehring, with attachments, filed February 6, 2006;

(b) Appellants' Response in Opposition to Respondent's Motion for Summary Judgment and Motion to Dismiss, and Affidavits of David Grimes, Terry St. Mary, and Stuart Bennett, with attachments, filed February 15, 2006; and

(c) Respondent's Reply Memorandum in Support of Motion for Summary Judgment, filed February 24, 2006.

II. FINDINGS OF FACT

2.1 Appellants David Grimes, Terry St. Mary and Stuart Bennett were laid off from their Fire Officer II positions at WSU, effective May 16, 2005, after their positions were abolished following closure of the WSU Fire Department. Appellants were originally notified of their layoffs on December 13, 2004, by letter from their appointing authority, Steven Hansen, Police Chief and Director of Public Safety. Appellants filed timely appeals of their layoffs to the Personnel Appeals Board (PAB) on June 13, 2005, within 30 days after the effective date of the layoffs. Appellants and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated as Titles 251 and 358 WAC.

2.2 Appellants were originally notified of their layoffs on December 13, 2004, by letter from their appointing authority, Steven Hansen, Police Chief and Director of Public Safety. Appellants were notified that their respective positions were being abolished due to lack of work and that their last day of employment would be not less than 20 calendar days from receipt of the notice or before January 3, 2005.

2.3 Also on December 13, 2004, Lisa Gehring, Human Resources Manager, met separately with Appellants to discuss potential layoff options. Ms. Gehring provided each Appellant with their layoff notice letter from Chief Hansen and their layoff option form. Each Appellant held permanent status in the Fire Officer I and II classes only. No available options existed for Appellants within their layoff unit. Appellants were each offered over 50 informal university-wide options for positions outside of their unit, for which a qualifying exam was required.

2.4 Mr. Grimes returned his option form and indicated that he did not wish to be considered for any of the potentially available options for continued employment. Mr. St. Mary did not complete or return his option form. Mr. Bennett reviewed the options, ranked his first six most-desirable options and took copies of the exams for those options to complete and return. Mr. Bennett did not return the exams and later indicated that he did not want to claim a position. Accordingly, none of the Appellants were considered for possible continued employment by WSU in any of the potentially available options and were subsequently laid off effective May 16, 2005.

2.5 The WSU Department of Public Safety is a division of the Office of Business Affairs. The Fire Department was one part of the Department of Public Safety. Even though the WSU-Pullman campus is located within the jurisdictional boundaries of the City of Pullman Fire Department, WSU operated its own fire department for the Pullman campus for a number of years. Fire services for other WSU campuses and research stations have been provided by the city or fire district in which they are located.

2.6 WSU and the City of Pullman entered into a Joint Fire Services Agreement in May 2001 to share some resources and personnel. Under that agreement, the Fire Chief for the City of Pullman acted as the Chief of the Pullman Fire Department and the WSU Fire Department and the Training Officer of the WSU Fire Department acted as the Training Officer for both departments. In the years following this agreement, the City and WSU discussed the possibility of WSU discontinuing its Fire Department, which would result in the City of Pullman becoming responsible for fire suppression and related duties for all of Pullman, including the WSU campus. The City determined it could absorb the provision of fire services to the campus by its fire department provided it received an equitable share of the City's costs to provide fire services and emergency medical services, as required by statute.

2.7 On March 17, 2005, WSU entered into an agreement with the City of Pullman wherein WSU agreed to pay the City of Pullman an equitable share of the City's costs to provide fire protection and emergency medical protection services upon cessation of fire services by WSU. On May 15, 2005, WSU ceased to operate a fire department. The City of Pullman assumed its statutory responsibility to furnish fire and emergency medical protection services to the WSU-Pullman campus, effective May 16, 2005. On June 16, 2005, the parties amended the agreement to include basic life support services that, under the March 17, 2005 agreement, were to be provided by a student basic life support unit.

2.8 The Interlocal Agreements made between WSU and the City of Pullman contain recitals that "under authority of Ch. 39.34 RCW, RCW 28B.30.150 and RCW 35.21.775 the University may agree to pay the City an equitable share of the City's costs of providing fire and emergency medical protection services."

III. ARGUMENTS OF THE PARTIES

3.1 Respondent moves for summary judgment denying the appellants' appeals on the grounds that the reductions-in-force was conducted based on lack of work after WSU closed its fire department and that the appellants were provided adequate and timely notice of their reductions-in-force, proper options and the chance to select a potential option. Respondent argues that the evidence shows that there is no genuine issue of material fact and that summary judgment as a matter of law is appropriate. Respondent asserts that these reductions-in-force were properly conducted under WAC 251-10-030 and were based on a valid lack of work because WSU closed its fire department and is no longer in the business of providing fire suppression and emergency services to its Pullman campus. As a result of that closure Respondent argues, these fire officers

did not have any work to perform. Respondent states as an undisputed fact there is no longer a WSU Fire Department and that Appellants were employees of that department. Respondent also asserts that since there is no fire department, there is no work to perform in that department. Respondent further argues that the evidence clearly shows that the appointing authority laid off the fire officers due to lack of work after the department closure, that all proper notice periods and time frames were met and that appropriate options for continued employment were provided to each of the Appellants.

3.2 Appellants argue that two genuine issues of material fact exist that preclude deciding their appeals on summary judgment: (1) that WSU laid off Appellants without a legitimate "lack of work" as that term is used in WAC 251-10-030; and (2) that WSU violated the legal limitations of purchasing services by contract in RCW 41.06.382 at the time of layoff. Appellants provided affidavits and attachments providing additional detail to the sequence of events outlined in the Findings of Fact, including copies of the city staff memoranda and the Interlocal Agreements between WSU and the City of Pullman. Appellants assert four disputed facts in addition to their statement of the above issues. Appellants state that the Interlocal Agreements rely upon the authority of RCW 35.21.775 which does not require payment to the city, but which authorizes contracts for an equitable share of fire protection services. Appellants also assert that the effective date of their layoffs was May 17, 2005, not May 16, 2005 as stated in Respondent's memorandum and supporting affidavits. Appellants contend that WSU has properties and facilities that are outside the Pullman city limits. Appellants also disagree with Respondent's claim that the need for fire services on the Pullman campus has decreased in recent years due to advances in fire suppression systems designed to lessen risk of major on-campus fires. Appellants assert their workload actually increased due to these systems' diversity, complexity and limitations requiring additional training.

3.3 Respondent argues in its reply memorandum that the two disputed issues of material fact raised by Appellants are questions of law to be decided by the Board.

IV. DISCUSSION AND CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board may decide an appeal when the documents on file, depositions and affidavits show there is no genuine issue as to any material fact and the appeal should be decided or dismissed as a matter of law. WAC 358-30-060(1). All facts and reasonable inferences drawn from those facts are to be determined in favor of the nonmoving party. Hall v. University of Washington, PAB No. 3863-V2 (1995).

4.2 The question presented in this appeal is whether Washington State University violated WAC 251-10-030 when Appellants were laid off from their Fire Officer positions due to a lack of work after WSU decided to abolish its fire department and enter into an Interlocal Agreement with the City of Pullman for payment of an equitable share of the city's cost for providing fire protection services on the WSU campus.

4.3 There are no genuine issues of material fact in dispute that must be resolved in order for the Board to decide this appeal as a matter of law.

4.4 In an appeal of a reduction-in-force, Respondent has the burden of proof. WAC 358-30-170. Respondent has the burden of proving by a preponderance of the credible evidence that it laid the employee off for the reason stated in the RIF letter. O'Gorman v. Central Washington University, PAB No. L93-018 (1995).

4.5 WAC 251-10-030(1) provides in relevant part: "An appointing authority may layoff or reduce the number of working hours or the work year of an employee without prejudice because of lack of funds or lack of work…."

4.6 RCW 41.06.382 [formerly RCW 28B.16.240, effective until July 1, 2005] prohibited contracting for services unless such services were regularly purchased by valid contract prior to April 23, 1979 and also provided that "no such contract may be executed or renewed if it would have the effect of terminating classified employees or classified employee positions at the time of execution or renewal of the contract."

4.7 The prohibition of "contracting out" has been addressed in several court decisions cited by the parties in their memoranda. Appellants rely on Cunningham v. Community College District No. 3, 79 Wn. 2d 793, 489 P.2d 891 (1971), in which the state supreme court ordered reinstatement of food service employees who were laid off when the college decided to purchase food services from a contractor. The former statute, RCW 28B16.240, was apparently enacted in response to Cunningham to provide limited exceptions to the holding in that case.

4.8 In a case more similar in its facts to the present appeals, Western Washington University entered into an interlocal cooperation agreement with the City of Bellingham to provide police services on the WWU campus. Western Washington University v. Washington Federation of State Employees, 58 Wn. App. 433, 793 P.2d 989 (1990). WWU likewise planned to abolish its existing campus police department and its campus police officer positions. The court found that the holding in Cunningham was dispositive on the issue of whether employees subject to the state Higher Education Personnel Law could, in effect, be made exempt without recourse by the university's exercise of statutory authority to establish a police force. WWU at 439. The court upheld the

Higher Education Personnel Board's conclusion that there was not a "lack of work" which justified the layoff of the employees pursuant to WAC 251-10-030. The HEP Board had found that that the work was merely being transferred to the City of Bellingham. Based on the finding, the HEP Board concluded that the WWU's decision to abolish the campus police force did not result from a "lack of work" because such work was not being discontinued. WWU at 441.

4.9 We similarly conclude that there was not a lack of fire protection and suppression work at the Pullman campus of WSU to support a layoff under WAC 251-10-030(1). This work is undisputedly being done by the City of Pullman. As the court stated in the WWU decision, "a 'lack of work' for purposes of layoffs under WAC 251-10-030, cannot be justified on the basis that the claimed work shortage is occasioned by the contracting out of such work to others." WWU at 442.

4.10 Respondent relies on Keeton v. Department of Social and Health Services (DSHS), 34 Wn. App. 353, 661 P.2d 982 (1983), in which DSHS decided to close a bakery it operated at Lakeland Village. The Keeton court made a distinction between contracting out and getting out of a particular line of business, relying on a line of cases under the National Labor Relations Act discussing "contracting out" as a term of art in labor relations law. The court determined that DSHS could get out of the bakery business and purchase bread from a vendor. The court also distinguished purchasing of goods from contracting for services in construing a similar prohibition of contracting in RCW 41.06.380, then applicable to general government agencies.

4.11 Respondent also cites the results of decisions by the Public Employment Relations Commission and later court review of the City of Kelso's decision to contract with the Cowlitz District for fire suppression services. While the discussion is informative of how questions arising in the context of labor relations may be addressed, our jurisdiction is limited to deciding these

appeals under the state civil service law (Chapter 41.06 RCW) and the higher education personnel rules (Title 251 WAC).

4.12 RCW 41.06.382 is clear and unambiguous. The statute only permits purchasing services by contract if regularly purchased by valid contract prior to April 27, 1979 (which the 2005 agreement between WSU and the City of Pullman was not) and prohibits executing or renewing such contracts if it would have the effect of terminating classified employees or classified employee positions (which was the clear effect of the agreement). The court in WWU also addressed the university's argument that the statute does not prohibit contracting out work performed by civil service positions to other governmental agencies. The court held that RCW 28B16.240 [41.06.382] does not embody "a legislative intent to exclude governmental recipients of such contracts for the general prohibition against the contracting out of civil service positions." WWU at 442.

4.13 The effective date of the repeal of RCW 41.06.382 was after the date of the layoffs. According to the note following RCW 41.06.170 governing employee appeal rights,

> The transfer of the powers, duties, and functions of the personnel appeals board to the personnel resources board under RCW 41.06.111 and the transfer of jurisdiction for appeals filed under section 213, chapter 354, Laws of 2002 after June 30, 2005, shall not affect the right of an appellant to have an appeal filed on or before June 30, 2005, resolved by the personnel appeals board in accordance with the authorities, rules, and procedures that were established under chapter 41.64 RCW as it existed before July 1, 2004." [2002 c 354 § 214.]

4.14 This Board does not disregard Respondent WSU's broad authority under Chapter 28B.30 RCW as an institution of higher education to govern and manage its affairs. Further, we have no jurisdiction to decide the validity of the Interlocal Agreements entered between WSU and the City of Pullman to provide for fire protection and emergency medical services on the WSU campus under Chapter 39.34 RCW and providing for payment of an equitable share of the City's costs of providing those services. However, we are empowered to ensure that all actions involving

classified employees comply with the state's civil service law and the rules and authorities that implement the law. We must conclude, for the reasons discussed above, that the layoff of these Appellants was not justified due to a lack of work under WAC 251-10-030(1).

4.15 Summary Judgment should be granted in favor of Appellants and the appeals of David Grimes, Terry St. Mary, and Stuart Bennett should be granted.

Having reviewed the files and records in this matter and being fully advised in the premises, the Board enters the following:

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that Summary Judgment is granted in favor of Appellants and the appeals of David Grimes, Terry St. Mary, and Stuart Bennett are each granted.

IT IS FURTHER ORDERED Washington State University shall remedy the improper layoff action consistent with the findings and conclusions above.

DATED this _____ day of _____, 2006.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Busse Nutley, Vice Chair

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Gerald L. Morgen, Member