

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JOHN ROWLAND,)	
)	CASE NO. 4658-E-83-772
Complainant,)	
)	DECISION NO. 2096 - PECB
vs.)	
)	
CITY OF BELLEVUE,)	
)	FINDINGS OF FACT,
Respondent.)	CONCLUSIONS OF LAW
)	AND ORDER

John Howard Rosen, Attorney at Law, appeared on behalf of the complainant.

Linda M. Youngs, City Attorney, appeared on behalf of the respondent.

On June 9, 1983, the above-named complainant filed a complaint with the Public Employment Relations Commission wherein he alleged that the above-named respondent had committed unfair labor practices within the meaning of RCW 41.56.140. Rex L. Lacy was designated as examiner to make and issue Findings of Fact, Conclusions of Law and Order. Hearing on the matter was conducted on December 12 and 13, 1983, at Bellevue, Washington. The parties filed post-hearing briefs.

The material allegations of the complaint are as follows:

1. Complainant began working in respondent's finance department on or about February 1, 1979.
2. His supervisor was Richard Hughes.
3. In the spring, summer and fall of 1980, complainant and other employees attempted to form a labor organization comprised of City of Bellevue workers but were unsuccessful.
4. Commencing in September, 1980, by which time complainant's union activities were known and open, Hughes began a campaign of harrassing (sic) and criticizing complainant in response to complainant's criticisms of the City of Bellevue and the finance department, which criticisms were protected concerted activity.
5. On June 11, 1981, Hughes prepared and signed and delivered a City of Bellevue performance evaluation for complainant stating, among other things, that complainant's quality of work was unsatisfactory because his efforts in the area of leadership were

"definitely unsatisfactory." Hughes stated that "these efforts, aimed at enlisting the support of other staff members in his outspoken anti-management criticisms, thereby negatively impacted the entire accounting division." Hughes rated other aspects of quality of work as satisfactory for complainant.

6. Complainant's "outspoken anti-management criticisms" were protected concerted activities.
7. Complainant should not have been evaluated on a leadership criterion since he had no leadership responsibilities as part of his job classification.
8. Because of the unsatisfactory overall evaluation on quality of work, complainant did not receive a merit pay increase.
9. On or about July 2, 1981, complainant was moved by the City of Bellevue to its Municipal Services Center location in order to put him in closer proximity to the branch of Bellevue government with which he worked most closely. The facilities that complainant were (sic) placed in, however, consisted of intolerable working conditions such as unmaintained and broken laboratories, walls with holes in them, and other unsuitable physical conditions. In addition, complainant was isolated from the rest of the City employee staff in that he was the only person placed in the particular facility. Placement of complainant in such an environment was harrassing (sic) and coercive and in response to complainant's protected activities.
10. In the winter and spring of 1982, complainant was again openly involved in an unsuccessful union organization campaign.
11. In November, 1982, complainant applied for a promotional opportunity for which he was considered a prime candidate by personnel representatives of respondent, but such promotional opportunity was withdrawn by the City shortly after he applied and was not re-opened until after the City wrongfully terminated complainant on March 17, 1983.
12. On January 1, 1983, complainant's hours of service and pay were each reduced by 40% allegedly because some of his job functions were being reduced. The reduction of hours and pay was contrary to personnel policy of respondent in that he was as qualified as other less senior City of Bellevue employees who were retained. Reducing complainant's hours and pay were in retaliation for his protected concerted activities.
13. On March 17, 1983, (sic) complainant was terminated on the basis of false charges by respondent that he failed to comply with a warning notice, unrelated to union activities, dated March 11, 1983, and presented to complainant on March 15, 1983. The termination was pretextual, actually being in retaliation of his protected activities.

BACKGROUND

The City of Bellevue is a municipality of the State of Washington. Andrea Beatty is city manager, Richard Saunders is director of finance and Richard Hughes and Richard Scott are finance department supervisors.

As alleged in the complaint, John Rowland was hired February 1, 1979. He was assigned accounting responsibilities for the Mechanical Equipment Rental Fund (MERF) and Electrical Equipment Rental Fund (EERF). Rowland performed those duties from the date he was hired until he was discharged on March 18, 1983. Rowland was supervised initially by Richard Hughes.

Also as alleged in the complaint, Rowland and some of his co-workers were involved during the spring, summer and fall of 1980 in an unsuccessful attempt to obtain union representation. Rowland served on the employees' organizing committee, helped arrange meetings and openly participated in discussions about the union(s) with the employees. The employees' fundamental reason for seeking union representation was their dissatisfaction with the employer's handling of employee grievances. In August, 1980, Rowland and several co-workers met with Beatty to discuss their concerns about employee complaints. The meeting with Beatty resulted in the adoption of a grievance procedure for handling employee complaints. The grievance procedure was incorporated into the city's personnel rules.

In February, 1981, Rowland received his annual performance evaluation as alleged in the complaint. Hughes was critical of Rowland's work performance, attendance and leadership. Additionally, Rowland was criticized for refusing to observe and conform to management policies. Based on Hughes' unsatisfactory evaluation, Rowland was denied a merit increase. In June, 1981, Hughes re-evaluated Rowland's performance. He again rated Rowland's performance as being unsatisfactory. Again, Rowland was denied a merit increase for 1981. The two unsatisfactory evaluations triggered a plethora of communications between Hughes, Rowland and Saunders but there is no evidence of a grievance processed under the city's personnel rules.

Hughes and Rowland communicated primarily through written memos from February, 1981 to July, 1981. In July, 1981, Rowland requested to be supervised by Richard Scott. The employer complied with Rowland's request. At the same time, Rowland's work site was moved to the second floor of the Municipal Service Center, about two blocks from city hall. The Municipal Service Center, which housed the physical activities of the rental funds, was being remodeled at the time Rowland was transferred, and the second floor amenities were in a state of disrepair. There is no indication that Rowland pursued the problem under the grievance procedure in the city's personnel rules.

During the winter of 1981 and spring of 1982, Rowland and co-workers again unsuccessfully sought union representation. Rowland arranged for a meeting room at the city library.

In November, 1982, Rowland applied for a promotion to the position of Management Assistant II. Rowland was considered for promotion but the city did not fill the position while Rowland was employed.

Going beyond the allegations of the complaint, the record discloses that, in December, 1982, Rowland was involved in an incident involving another city employee that resulted in Rowland receiving a written warning for his actions. Rowland was also given a traffic citation in connection with his harassment of a female employee of the city by following her around in his personal automobile. Rowland did not contest the warning issued by the employer.

The reduction of Rowland's work hours by 40% on January 1, 1983 resulted from a "negative service recommendation" due to reduced revenues. Rowland's position had been included in previous negative service recommendations in 1980 and 1981. In January, 1983, Rowland's work performance was evaluated for the first time by Scott. He received a satisfactory evaluation.

On March 17, 1983, Rowland contacted a female city employee who, he had learned, had made a statement to the employer in connection with the city's investigation of the December, 1982 incident. She became upset with the employer for a perceived breach of confidentiality, and so informed the city. The employer, citing the December, 1982 incident, and Rowland's overall work performance, then discharged Rowland. The discharge was effectuated on March 18, 1983.

Thereafter, Rowland filed and processed a grievance under the grievance procedure in the city's personnel rules contesting his discharge, hours reduction and denial of promotion. The grievance was appealed to an impartial hearing examiner, Robert Sutermeister, who ruled that Rowland's discharge was not for just cause and recommended that he be reinstated to his position. Sutermeister ruled in favor of the employer on the hours and promotion issues. On November 21, 1983, Beatty accepted the hearing examiner's decision with regards to the hours and promotion rulings. She reversed the decision of the hearing examiner on the discharge issue, and refused to reinstate the grievant.

POSITION OF THE PARTIES

The complainant contends that he was discharged in retaliation for his engaging in protected union activities; that the two-year statute of

limitations rule allows the Public Employment Relations Commission to remedy any unfair labor practice which occurred on or after June 10, 1981; that events which occurred before June 10, 1981 may be considered as evidence; that City of Bellevue management was aware of Rowland's participation in union activities from August, 1980 to March, 1983; and that Rowland was denied promotional opportunities and suffered a 40% pay reduction for engaging in protected union activities.

The respondent contends that the complainant has not met his burden of proof in a dual motivation discharge cases under current law; that Rowland was discharged for reasons unrelated to his union activities; that the two-year statute of limitations does not apply to this case; that the Commission should strictly adhere to the six-month statute of limitations set forth in RCW 41.56.160; and that the employer did not retaliate against Rowland for engaging in protected union activities.

DISCUSSION

RCW 41.56.160 was amended in 1983 to read as follows:

RCW 41.56.160 COMMISSION TO PREVENT UNFAIR LABOR PRACTICES AND ISSUE REMEDIAL ORDERS. 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. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.

This limits the filing of unfair labor practice allegations. After six months time has elapsed, the complaint will be dismissed as being untimely filed. Neither RCW 41.56.160 nor RCW 4.16.130 prevents the Commission from taking into consideration protected activity that occurred more than six months prior to the filing of the complaint. Both statutes merely limit the time the actions can be accepted for processing, not the parties ability to prove or disprove the violation.

The NLRB has adopted the following causation test for determining allegations of discriminatory discharge:

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 employ 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.

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

In discussing the test in Wright Lines, supra, the NLRB stated:

...the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. Also, the employer is provided with a formal framework within which to establish its asserted legitimate justification. In this context, it is the employer which has "to make the proof." Under this analysis, should the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because its action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes.

The test has been affirmed by the U. S. Supreme Court in NLRB vs. Transportation Management Corporation, 456 U.S. 998, 113 LRRM 2857 (1983) and has been adopted by the Public Employment Relations Commission in City of Olympia, Decision 1208-A (PECB, 1981), and in Valley General Hospital, Decision 1195-A (PECB, 1981). The Washington State Court of Appeals cited Wright Lines, supra, with approval, in a case involving a community college employee, when it established the following legal standard to be applied in unfair labor practice cases alleging discriminatory discharges. The Court stated:

Complaints alleging that an employer's discharge of an employee constitutes an unfair labor practice fall into three categories: (1) cases in which the employer asserts no legitimate ground for discharge; (2) cases in which the employer's asserted justification for discharge is a sham and no legitimate business justification for discharge in fact exists (pretextual firings); and (3) cases in which there is both a legitimate and impermissible reason for the discharge (dual motive discharges). The first two types of discharge constitute unfair labor practices. The third type may or may not constitute an unfair labor practice.

Public Employees vs. Community College, 31 Wn App 203 (Division II, 1982).

The case at hand may be made more difficult for the employer by the circumstance that a well-known and respected impartial arbitrator of labor disputes has already ruled that the employer lacked just cause to discharge Rowland. Nevertheless, absent a showing of anti-union motivation, an

employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the collective bargaining statute. Clothing Workers vs. NLRB, 564 F2d 434,440 (CA, DC, 1977); Whatcom County, Decision 1886 (PECB, 1984).

It is uncontested that the employer was aware of Rowland's participation in the union organizing campaign in 1980. Rowland was involved in the process from the beginning until the end. He was one of several city employees who met with the city manager to develop a settlement mechanism for employee grievances. Further, the employer assumed that Rowland was involved in the 1982 organizing attempt.

Rowland's and Hughes' mutual dissatisfaction with each other had manifested itself prior to the 1980 union organizing effort. Hughes' unsatisfactory rating of Rowland's work performance gave rise to their communications problem evidenced by the multitude of correspondence between February, 1981 and July, 1981. The examiner is convinced, however, that Rowland's protected activities played little or no part in that situation.

Rowland requested, and was granted, a transfer to Richard Scott's supervision. Rowland was transferred to the Municipal Service Center because the two rental funds he provided accounting services for are housed there. The disrepair of the second floor, the condition of the restrooms, and the air-conditioning were simply a matter of timing. Rowland's personal work station was adequate and the other problems were corrected in due course. The examiner cannot conclude that the transfer constituted harassment of Rowland for his participation in protected union activities.

Rowland's performance evaluation for 1983 was performed by Scott. The record does not reflect any criticism of Scott's evaluations by Rowland or anyone else. Rowland himself testified that Scott would not include union activities in evaluating any employee.

The city's budget jargon identifies as "negative service package" those activities considered for reduction or elimination. Rowland, knowing his position had been under scrutiny for elimination in 1982, as it had been in 1980 and 1981, applied for an announced job opening. The new position, Management Assistant II, would have been a promotional opportunity for Rowland. Rowland remained under consideration for the position until his discharge. The record in this matter does not support a conclusion that the promotional process was delayed on account of Rowland's application, let alone his previous union activity, and so does not warrant finding an unfair labor practice.

On January 1, 1983, Rowland's work hours were reduced by 40% as part of a

city-wide service reduction because of decreasing revenues. This was the result of budget scrutiny which had been going on for some time. The record does not establish any connection between Rowland's hours reduction and his union activities.

The employer, during the course of the hearing, moved for dismissal of these unfair labor practice allegations. The city based its motion upon the evidence and testimony in this record and the voluminous record made before a hearing examiner on Rowland's grievance under the city's personnel rules. The examiner withheld ruling on the motion until such as that the entire record in both cases could be reviewed. The examiner, after reading the two records, determined that the parties should file post-hearing briefs and arguments on the issues in this matter.

Based upon the entire record, and for all the reasons previously stated, the motion for dismissal is granted. Although Rowland established employer knowledge of his union activity, Rowland has not met his burden of proving that a discriminatory motive, or unlawful intent existed. Rowland's communication gap with Hughes existed before, and continued after, his involvement in the 1980 attempt to obtain union representation. Rowland sought to be supervised by Scott, and the employer complied with Rowland's request for a change in supervisors. Scott and Rowland worked together satisfactorily. Scott would have recommended Rowland for a merit increase but for the December, 1982 incident involving another employee. In the end, it was events unrelated to Rowland's 1980 and 1982 union organizing activities that actually precipitated his discharge. Those incidents both involving harassment of female employees of the city, are not within the jurisdiction of the Commission to evaluate or determine. It is sufficient to note that the incidents do not have any connection whatever with Rowland's protected union activities. The examiner concludes that Rowland's discharge was not in reprisal for his union activities protected under Chapter 41.56 RCW. The examiner concludes that the employer's action in this matter would have taken place regardless of Rowland's union activities.

FINDINGS OF FACT

1. The City of Bellevue is a municipality of the State of Washington and a "public employer" within the meaning of RCW 41.56.030(1).
2. John Rowland, a "public employee" within the meaning of RCW 41.56.030(2), was employed as an accounting clerk in the City of Bellevue finance department from February 1, 1979 to March 18, 1983.
3. John Rowland was supervised by Richard Hughes from February 1, 1979 to July 26, 1981.

4. During 1980, employees of the City of Bellevue, including finance department personnel, engaged in union organizing activities. John Rowland served on the union organizing committee. The committee met with Andrea Beatty, city manager, to discuss the reasons for their dissatisfaction with the employer. The meeting resolved the employees complaints, and also resulted in the adoption of a grievance procedure for unrepresented employees. The organizing campaign was abandoned. No organization within the meaning of RCW 41.56.030(3) was selected to represent the affected employees.
5. On February 1, 1981, Rowland received an adverse performance evaluation from his supervisor, Richard Hughes. Between February, 1981 and July, 1981, Rowland and Hughes communicated by memorandums that evidence their mutual dissatisfactions with each other. During that period, Rowland, because of Hughes' unsatisfactory performance evaluations, did not receive annual merit increases.
6. On July 26, 1981, Rowland was transferred, at his own request, to the Municipal Service Center and placed under Richard Scott's supervision. The MSC was undergoing remodeling and renovation. At the time of Rowland's transfer, the restrooms and the physical area of the second floor were in a state of disrepair.
7. In November, 1982, Rowland applied for the position of Management Assistant II. The new position represented a promotional opportunity for Rowland. The position was not filled prior to Rowland's discharge. He remained under consideration for the position until he was discharged from employment by the city.
8. During 1982, Rowland again supported a union seeking to represent city employees. The attempt at organizing the employees was unsuccessful.
9. In December, 1982, Rowland was involved in an incident unrelated to any protected activities, resulting in issuance of a written warning for his misconduct.
10. In January, 1983, Rowland's hours of work were reduced by 40% due to a budget reductions adopted by the city council. Rowland's position had been included in negative service packages in 1980 and 1981. The reduction in hours were unrelated to protected activities.
11. In March, 1983, Rowland was engaged in another incident unrelated to protected union activities. The December, 1982 and March, 1983 incidents were the motivating factors in Rowland's discharge.

12. The record does not establish that Rowland was engaged in protected union activities at the time of his discharge, or that the discharge was motivated by anti-union animus.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter pursuant to Chapter 41.56 RCW.
2. The City of Bellevue, Washington did not violated RCW 41.56.140 when it terminated John Rowland on March 18, 1983.

ORDER

The complaint charging unfair labor practices against the City of Bellevue is DISMISSED.

DATED at Olympia, Washington, this 15th day of November, 1984.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


REX L. LACY, Examiner

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