

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 286,	)	CASE NO. 5336-U-84-965
	)	
Complainant,	)	
	)	DECISION NO. 2272 - PECB
vs.	)	
	)	
METROPOLITAN PARK DISTRICT OF TACOMA,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
	)	
Respondent.	)	
	)	
	)	

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Hafer, Price, Rinehart and Schwerin, by John Burns, Attorney at Law, appeared on behalf of the complainant.

Patricia Parfitt, Assistant City Attorney, appeared on behalf of the respondent.

On July 2, 1984, International Union of Operating Engineers, Local 286, filed a complaint with the Public Employment Relations Commission, wherein it alleged that the Metropolitan Park District of Tacoma 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. Hearings on the matter were held on November 20, 1984, December 18, 1984, January 18, 1985 and January 21, 1985 at Tacoma, Washington. The parties filed post-hearing briefs.

BACKGROUND

The Metropolitan Park District of Tacoma maintains and operates seven departments, including the Point Defiance Zoo and Aquarium.

The park district is governed by a five-member board of park commissioners. Neil Ofsthum is executive director; Byron Olson is administrative coordinator; Andy Grobins is director of planning and research; and Ursula Doolittle is park board secretary and administrative aide to the executive director.

Point Defiance Zoo and Aquarium (hereinafter zoo) has five separate divisions. Gene Leo was zoo and aquarium director at the time of the events giving rise to this case. Each division has a supervisor who reports directly to the zoo director. Among the five divisions is the education department. Charles Seaborn was supervisor of the education department until February, 1984. Upon Seaborn's resignation, Tom Otten, assistant zoo and aquarium director, assumed Seaborn's duties.

International Union of Operating Engineers, Local 286, AFL-CIO is the exclusive bargaining representative of a bargaining unit of park district employees, including employees of the zoo. The bargaining unit is defined as follows:

#### ARTICLE II - UNION RECOGNITION

The Metropolitan Park District of Tacoma hereby recognizes the International Union of Operating Engineers Local 286 as the exclusive bargaining representative for wages, hours, and working conditions as stated in Chapter 41.56 RCW for all employees employed in the classifications listed in the Appendix to this agreement.

The parties have entered into a series of collective bargaining agreements, the latest of which is effective from January 1, 1984 to December 31, 1985. Appendix "A" of the agreement contains approximately 38 different job classifications. The job classification "instructor/graphics coordinator" is not listed on Appendix "A".

Judith Pearce did some work for the zoo as a freelance graphics artist during or about 1980 to 1982, while the zoo was being renovated. In May, 1982, the zoo advertised a newly created position entitled "instructor/graphics coordinator", and Pearce applied for the position. The qualifications for the instructor/graphics coordinator are as follows:

This position involves the implimentation (sic) and design of educational programs for the zoo and aquarium as well as graphics and art work responsibilities. The duties of this position include:

1. Act as staff instructor for school programs and tours offered by the department. Actual in-class instruction is required with the ability to provide such for all programs offered at all grade levels.
2. Coordinate and schedule school and adult education groups. Daily scheduling of tours by telephone and correspondence.
3. Supervise, coordinate and schedule volunteers with work schedule. Work closely with volunteers in providing training and factual instruction or the teaching of educational programs.
4. Assist in the development and implementation of new programs and revisions of current programs. Research, outline and write such programs.
5. Compilation and tabulation of department statistics on attendance, age breakdowns, budgetary figures, etc. on a regular basis.
6. Operation and maintenance of audio-visual equipment such as slide (35mm) and movie (16mm) projectors.
7. Design and produce graphics and artwork such as signs, brochures, in-house publications, classroom aids, interpretive displays and exhibits, etc.

8. Supervise and maintain general library and photo library within department.
9. Maintenance of small aquaria and small terrestrial birds and mammals used in education programs. Knowledge of proper handling of such animals.
10. Lead field trips and other outdoor zoo and aquarium educational programs.
11. Assist in training programs for area teachers in the utilization of the zoo and aquarium as an educational resource.
12. Assist in the preparation of interpretive exhibits and similar programs.

#### EXPERIENCE AND TRAINING QUALIFICATIONS

1. 2 - 3 years teaching experience in an exhibition facility, school system or university with experience in teaching special programs especially desirable.
2. Possess a four year bachelor's degree from an accredited university in biology or zoology or a related field. An equivalent combination of experience and academic training will be considered.
3. Practical experience in graphic art and design including such fundamental tasks as paste-up, lay-out, production of camera-ready art, etc.

Pearce was accepted, and began full-time employment in November, 1982.

In November, 1983, Pearce contacted Andy Grobins, who was at that time park district personnel director, to inquire whether Pearce and co-worker Sharon Cole were entitled to an automatic salary step increase. Grobins investigated Pearce's inquiry and, after he determined that Pearce and Cole were entitled to

the step increase, had their hourly pay rates adjusted to the proper pay rate.

Between February and May, 1984, Pearce raised a question as to whether her job classification was covered by the collective bargaining agreement and whether she should join the union. Pearce queried Seaborn, Otten, Doolittle, and other zoo and park district staff, as well as the shop steward for Local 286, about her status. Otten told her that her membership in the union would be illegal because her classification was not covered by the collective bargaining agreement. Later Pearce was told by other management personnel to make her own decision about joining the union.

In April, 1984, Otten instructed Pearce to develop a list of desirable graphic projects together with the estimated cost of each project. Pearce prepared and presented Otten with an extensive list of proposed projects.

Separately, the park district was notified in April, 1984, that a state audit of the district had determined that a revenue shortfall of 8.1% had occurred. The district's department directors were instructed to prepare and submit plans to reduce 1984 budget allocations to reflect the 8.1% reduction in revenue. The zoo's portion of the budget reduction amounted to \$141,000. Leo submitted several alternative plans to meet the new budget level. None of the original alternatives contained staff reduction to balance the zoo budget. Those proposals were rejected by senior management. A revised proposal made by Leo in early May, 1984, contained a recommendation to eliminate the instructor/graphics coordinator position.

About May 7, 1984, Pearce enrolled in Local 286. Pearce did not choose to have membership fees deducted from her paycheck. The

employer had knowledge of the event, however, and Otten contacted Pearce to discuss her reasons for joining the union.

About May 16, 1984, the park district commissioners adopted a revised budget for 1984. Included in the budget revisions was the elimination of the job classification of instructor/graphics coordinator.

On May 17, 1985, Otten informed Pearce, in writing, that she was being terminated effective May 31, 1984. Otten cited the commissioners' elimination of her position as part of the zoo's overall budget reductions. Pearce requested her termination date be extended until June 15, 1984 to allow her to complete several unfinished projects. Otten refused to grant Pearce's request. On May 31, 1984, Pearce was terminated.

Between May 17, 1984 and May 31, 1984, Pearce requested that Leo draft a letter of recommendation to be used in seeking employment. Leo refused to issue a "to whom it may concern" letter of recommendation. Leo indicated he preferred to answer each request from prospective employees more intimately than could be done in such a correspondence.

After May 31, 1984, the zoo hired several seasonal employees to work in the gift shop and concession stand. Additionally, at least two animal care technicians were hired for full-time employment. Pearce was not notified of any employment opportunities at the zoo, or within the park district. The graphic artist position was not included in the 1985 budget adopted later in 1984.

#### POSITIONS OF THE PARTIES

The complainant contends that Judith Pearce was terminated in

retaliation for engaging in protected union activities, that the employer's budgetary arguments were a pretext designed to disguise employer's anti-union animus, and that the employer's post-termination activities are further proof of the employer's retaliation against Pearce for engaging in protected union activities.

The respondent contends that the employer had no knowledge of Pearce's engaging in protected union activities, that the employer did not know Pearce had joined the union, that the employer did not retaliate against Pearce for joining the union, and that Pearce's position was eliminated solely for budgetary reasons.

#### DISCUSSION

RCW 41.56.040 sets forth the right of employees to organize and designate representatives of their choosing without interference as follows:

No public employer, or other person shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under the chapter.

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 US 998 (1983) and has been adopted by the Public Employment Relations Commission. City of Olympia, Decision 1208-A (PECB, 1981); Valley General Hospital, Decision 1195-A (PECB, 1981); Clallam County, Decision 1405-A (PECB, 1982); West Valley School District, Decision 1179-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 practices cases alleging discriminatory discharges:

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 v. Community College, 31 Wn.App 203 (Division II, 1982).

#### The Protected Union Activities Issue

In order to prove that a discharge was discriminatorily motivated, it must be established that the employer had knowledge of the discharged employee's union activities. Tri-State Truck Serv. vs. NLRB, 616 F.2d 65 (3rd Cir, 1980); Benton Franklin Transit, Decision 1906 (PECB, 1984). A finding of knowledge can be based on an inference drawn from circumstantial evidence; however, such inference must not be entirely speculative or improbable. NLRB vs. Fort Vancouver Plywood Co., 604 F.2d 596 (9th Cir, 1979). Knowledge is often inferred when the employee has engaged in overt union activities, Lizdale Knitting Mills, Inc., 211 NLRB 966 (1974), and when the employee's plant or operation is small in size. Permanent Label Corp., 248 NLRB 118 (1980).

The record, as a whole, clearly establishes that the employer had knowledge of Pearce's protected activities. Pearce had overtly discussed the 1983 wage issue with zoo management and park district management personnel. In April and May, 1984, she contacted the same individuals regarding her eligibility for union membership.

#### Interference Violation

Between May 7, 1984, when Pearce joined the union, and May 17, 1984, when Otten delivered the notice of termination to Pearce, they had a conversation during which Otten interrogated Pearce regarding her reasons for joining the union. Otten's reasons for engaging in that sort of interrogation are irrelevant. Any such interrogation violates the law. It has long been recognized that the test for an "interference" violation does not turn on a respondent's motive (or, for that matter, on courtesy, gentleness, or success or failure). The test is whether the employer conduct reasonably tended to interfere with the free exercise by employees of their rights under the collective bargaining statute. Hanes Hosiery, Inc., 219 NLRB 338 (1975); King County, Decision 1698 (PECB, 1983). Regardless of the outcome of the analysis under Wright Lines, supra, the employer will be ordered to cease and desist from interrogation of employees concerning their union activities.

#### The "Budget" Defense

The complainant has satisfied its burden of proof in making a prima facie case that the employer had knowledge of Pearce's protected union activities. Thus the burden shifts to the

respondent to prove that Pearce would have been terminated without regard to her union activities.

Every witness, including Pearce, testified that real budget problems existed for the park district. The situation was not unexpected, or a new subject matter. It is clearly established that Pearce, Cole, and Rich Gaida (the shop steward for the union), were all aware that layoffs were possible. Several positions, including Pearce's, were rumored to be considered for layoffs.

Testimony from nearly every witness indicated that Pearce's position was the most vulnerable for layoff. Park District Executive Director Ofsthum had openly opposed the creation of a full-time graphics position. The record amply establishes that Ofsthum was not convinced that the zoo had sufficient work for a full-time position. Witnesses, including Pearce's co-workers, supported Ofsthum's view regarding the amount of graphics work. Additionally, testimony indicates that budget allocations for graphics projects were of lower priority than animal care.

#### The Employer's Post-Termination Conduct

Prior to the incident at issue in this case, there had never been a layoff of personnel at the zoo. The expired collective bargaining agreement between the employer and Local 286 had made no provision for layoffs. The employer had personnel rules in effect, which provided for layoff and recall, as follows:

ARTICLE 20LAY-OFF

- 20.1 LAY-OFF DEFINED. Lay-off is the termination of employment of a system employee when, for any valid reason, it may be necessary to abolish one or more positions or reduce the number of employees in the District service.
- 20.2 DETERMINATION OF EMPLOYEES TO BE LAID OFF. Work records, employee evaluation ratings and length of service shall be used in determining which employees shall be laid off. The chief basis of the decision shall be the relative competence of the employees for the job that remains. In choosing (sic) between two employees, the employee more competent for the job that remains shall be retained.
- 20.3 LAY-OFF DECISION OR DEPARTMENT/OFFICE HEAD. Whenever one or more positions must be discontinued temporarily or abolished because of lack of work or lack of funds, a Department/Office Head after reviewing the work records of all employees under his/her supervision in the occupational class subject to lay-off shall determine which employees are to be laid off on the basis of relative competence. Longevity shall be the determining factor among employees of the same relative competence.
- 20.4 NOTIFICATION. The employees to be laid off shall be notified in writing by the Department/Office Head of the lay-off and reasons therefor. Each employee to be laid off shall be given a notice of at least two weeks whenever there is salary money available to pay him/her. When possible, a longer lay-off notice period will be given.
- 20.5 ELIGIBILITY FOR RE-EMPLOYMENT. Any employee who has been laid off shall have the opportunity to have his/her

name placed on all eligible lists for District positions for which he/she may be qualified. It is the responsibility of the employee to keep the District informed of the employee's current address.

The provisions dealing with the relative competence and longevity of employees would seem to be inapplicable in this situation, as Pearce was the one and only incumbent of her classification.

The employer did not notify Pearce of certain positions which became available subsequent to her layoff. None of those positions was in "graphic arts" or related field, however. Employer witnesses testified that the employer did not consider Pearce to be qualified for the positions which came open after her layoff. In the case of animal care technician jobs, the current minimum qualifications called for educational and work background in zoology, which Pearce did not have. It strains credibility, even in the presence of the interference violation committed by Otten, to suggest that the employer's upgrade of minimum qualifications for personnel working in its main business was part of some grand design to discriminate against Pearce by precluding her transfer from her "overhead" job. In the case of temporary concession stand sales personnel, which would have represented a substantial decrease in compensation for Pearce, the employer may well have considered Pearce to be over-qualified and ignored her on that basis.

As with the apparent violation of its own personnel rules, the refusal of the employer to provide a blanket letter of recommendation is a curious circumstantial fact. On the other hand, there is evidence that Pearce was placed on the list of persons eligible to bid for free-lance graphic arts work. There was credible testimony that the refusal of a blanket letter of recommendation was consistent with Leo's management

philosophy and previous practice. Further, Leo invited specific contacts for recommendations.

It is not the function of the examiner to enforce the employer's personnel rules in this proceeding, although they may technically have been violated by the failure to offer Pearce a chance at the vendor jobs. Zoo management did investigate the possibility of other positions in the park district for which Pearce might qualify. These incidents are not sufficient to base a finding that there was a pattern of discrimination being practiced here by the employer.

#### Conclusions

This case is made difficult by the independent development of two separate sets of events. Within those two series, testimony of witnesses (often arising from one-on-one conversations is often diametrically opposed to that of other witnesses. When all of the facts and circumstances are considered, however, the examiner concludes that the non-essential graphic arts position held by Pearce would have been eliminated due to the employer's financial crisis, resulting in the layoff of Pearce. Thus, the employer has satisfied its burdens under the second half of the Wright Lines test.

#### FINDINGS OF FACT

1. Metropolitan Park District of Tacoma is a public employer within the meaning of RCW 41.56.030(1). Neil Ofsthum is executive director of the park district. The park district operates and maintains a facility known as the Point Defiance Zoo and Aquarium. Tom Otten is presently director of the zoo

and aquarium. At the time of the events giving rise to this case, Gene Leo was director of the zoo and aquarium. Otten was then subordinate to Leo.

- 2 International Union of Operating Engineers, Local 286, AFL-CIO, is a bargaining representative within the meaning of RCW 41.56.030(3), and is the exclusive bargaining representative of an appropriate bargaining unit of park district employees that includes zoo and aquarium employees.
3. The parties have had a series of collective bargaining contracts, the latest of which was signed after May 17, 1984, effective from January 1, 1984 to December 31, 1985.
4. Judith Pearce was initially hired as a freelance graphic artist to develop two graphics projects for the zoo between 1980 and 1982. She was employed as a full-time instructor/graphics coordinator in November 1982. Pearce was assigned to work in the education department located in the administration building. Pearce was supervised by Charles Seaborn, education curator, from November 1982 to April 1984. Thereafter, Pearce was supervised by Otten.
5. In November, 1983, Pearce and co-worker Sharon Cole filed a request for review of their pay status. The inquiry was investigated by the employer and it was determined that Pearce and Cole had not received an automatic step increase to which they were entitled. Their pay was adjusted to the proper rate of pay.

6. During April and May, 1984, Pearce openly engaged in inquiries regarding the inclusion of her job classification under the collective bargaining agreement. Initially, response to her questions were answered variously. Otten advised Pearce it would be illegal for Pearce to join the union, because her job classification was not specifically listed in Appendix A of the 1984-1985 contract. The employer, through Ursual Doolittle, informed Pearce in late April, 1984, that the decision to enroll in Local 286 was up to Pearce. Pearce enrolled as a member of Local 286 on May 7, 1984.
7. Between May 7, 1985 and May 17, 1985, Otten interrogated Pearce regarding the reasons which caused Pearce to enroll in Local 286.
8. During April and May, 1984, the park district commissioners directed department directors to reduce department budgets 8.1%. The reduction was caused by a revenue shortfall. The zoo's portion of the budget reduction amounted to \$141,000. Leo submitted several alternatives to accomplish the necessary budgetary adjustment. One of the alternatives presented to the commissioners proposed the elimination of the instructor/graphics coordinator job held by Pearce.
9. About May 16, 1984, the park commissioners adopted a revised budget for fiscal year 1984. As a part of the revised budget, the job classification instructor/graphics coordinator was eliminated.
10. On May 17, 1984, Otten informed Pearce her position had been eliminated by the park commissioners due to budget reductions. The termination letter established May 31, 1984 as the last date of Pearce's employment.



11. Between May 17, 1984 and May 31, 1984, Pearce requested that Leo prepare a letter of recommendation to be used in her search for employment. Leo refused to do so because he preferred to answer specific inquiries concerning Pearce's work rather than endorse a broad "to whom it may concern" recommendation.
12. After May 31, 1984, the zoo employed several seasonal employees to work in the gift shop and concession stands. Additionally, at least two animal care technicians were employed. Pearce was not notified of the job openings, and she was not offered re-employment in any available positions within the park district or the zoo.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.
2. The activities of Judith Pearce described in paragraphs 5 and 6 of the foregoing Findings of Fact are protected by Chapter 41.56 RCW.
3. By the interrogation described in paragraph 7 of the foregoing Findings of Fact, Metropolitan Park District of Tacoma has interfered with, restrained and coerced a public employee in the exercise of rights protected by Chapter 41.56 RCW and has committed an unfair labor practice within the meaning of RCW 41.56.140(1).
4. The layoff of Judith Pearce on May 17, 1984, was the result of valid business reasons of the employer, and would have

occurred without regard to her activities protected by Chapter 41.56 RCW.

ORDER

Metropolitan Park District of Tacoma, Washington, its board of commissioners, elected officials, and agents shall immediately:

1. CEASE AND DESIST from:

Interfering or otherwise discriminating against any employee because of the exercise of protected activities under Chapter 41.56 RCW.

3. TAKE THE FOLLOWING AFFIRMATIVE ACTION which the examiner finds will effectuate the policies of the Public Employees Collective Bargaining Act, Chapter 41.56 RCW.

A. Immediately cease interrogating employees regarding the reasons they choose to exercise their statutory rights set forth in RCW 41.56.010.

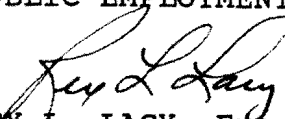
B. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall, after being duly signed by an authorized agent of Metropolitan Park District of Tacoma, be and remain posted for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

C. Notify the Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide a signed copy of the notice required by the preceding paragraph.

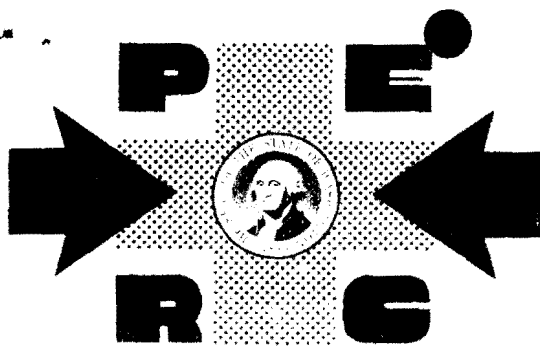
3. In all other respects, the complaint is dismissed.

DATED at Olympia, Washington, this 9th day of January, 1986.

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.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX A

# NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF RCW 41.56, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with or otherwise discriminate against any employee because of their exercise of protected activities under Chapter 41.56 RCW.

METROPOLITAN PARK DISTRICT OF TACOMA

By: \_\_\_\_\_  
CHAIRMAN, BOARD OF COMMISSIONERS

By: \_\_\_\_\_  
EXECUTIVE DIRECTOR

By: \_\_\_\_\_  
EXECUTIVE DIRECTOR OF POINT DEFIANCE  
ZOO AND AQUARIUM

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone (206) 753-3444.