

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL LONGSHORE AND)	
WAREHOUSE UNION, LOCAL 9,)	
)	
Complainant,)	CASE 13740-U-98-3365
)	
vs.)	DECISION 7000-B - PECB
)	
PORT OF SEATTLE,)	COMPLIANCE ORDER
)	
Respondent.)	
)	
)	

Schwerin Campbell Barnard, LLP, by *Dmitri Iglitzin*, Attorney at Law, and *Anton Hutter*, Business Representative, appeared on behalf of the complainant.

Craig Watson, Attorney at Law, *Lou Pisano*, Labor Relations Manager, and *Mikel O'Brien*, Labor Negotiator, appeared on behalf of the respondent.

This case comes before the Commission on a request of International Longshore and Warehouse Union, Local 9, for enforcement of a remedial order previously issued by the Commission in this matter. The Commission sets forth the actions which must be taken to constitute full compliance with the remedial order.

BACKGROUND

On November 14, 2000, the Commission issued a decision finding the Port of Seattle guilty of an unfair labor practice in regard to premature implementation of an agreed personal leave benefit. The Commission ordered the employer to:

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapters 41.56 and 53.18 RCW:
 - a. Recompute the personal leave benefits for all employees in the bargaining unit(s) represented by International Longshore and Warehouse Union, Local 9, and eliminate the inconsistent enforcement of the personal leave benefit, by (i) crediting each employee for the maximum number of personal leave hours forgiven for any individual employees when the slate was "wiped clean," and (ii) deducting from the leave balance of each employee the number of hours of personal leave the employee actually used prior to January 26, 1998.

Port of Seattle, Decision 7000-A (PECB, 2000).

The Commission allowed employees from January 1 through December 31, 2001, to use the leave granted under the remedial order.

The employer tendered compliance in December 2000, reporting to the Commission that, among other things, it had "recomputed the personal leave benefits for employees in the bargaining unit represented by [Local 9] to eliminate any inconsistent enforcement of the personal leave benefit." Local 9 contested the sufficiency of that compliance, however, claiming that former employees who were employed during the time period of the unfair labor practice, but are no longer employed by the port, are also entitled to the remedy.

In January 2001, the Commission directed further proceedings on the compliance dispute. Compliance Officer Katrina I. Boedecker met with the parties on January 25, 2001,¹ and both parties submitted additional information for consideration after the meeting.

¹ This was not a formal hearing. Witnesses were not sworn or examined, and no transcript was made.

Certain facts were undisputed at the compliance meeting:

- Prior to the events giving rise to this controversy, employees had unlimited leave time for medical appointments, but were required to bring a note from the doctor verifying each appointment.
- The parties agreed in collective bargaining to replace the unlimited leave with a new personal leave concept. Each employee was to be granted 12 hours per year of paid leave that could be used for medical appointments, court appearances, etc. The requirement for a doctor's note was dropped, but employees were required to report to their work site at the beginning or end of the shift. Personal leave was not a vested benefit that could be carried over from year to year or cashed out.²
- The parties agreed to delay implementation of the new personal leave benefit until January 25, 1998.
- Three time periods were examined to determine usage of personal leave.
 - ▶ July 1, 1997, through January 21, 1998: After the new collective bargaining agreement was negotiated, 11 foremen appeared to have different requirements for doctor's notes or reporting to the work site, as well as different methods of recording time off for payroll purposes.

² Employees needing more than 12 hours in a year had to use sick leave or vacation time for the additional hours.

- ▶ January 22, 1998, through January 25, 1998: When the word spread that the slate would be wiped clean on January 26th, some employees began walking off the job.
- ▶ January 26, 1998, through June 30, 1998: The personal leave benefit was implemented per the contract for the balance of the period until a new contract year started.

The employer's premature implementation of the personal leave benefit for some employees was found to be an unfair labor practice.

- The maximum utilization of premature personal leave forgiven when the employer "wiped the slate clean" was 12 hours.
- The employer's tender of compliance includes giving up to 12 additional hours of personal leave to all of its current employees who were employed in the warehouse bargaining unit between November of 1997 and January 26, 1998. The union accepts that portion of the compliance.
- Thirty-seven of the people who were employed in the warehouse bargaining unit between November of 1997 and January 26, 1998, have since left their jobs. Data on legitimate utilization of the personal leave benefit among those 37 former employees is as follows:
 - ▶ Twenty of them used less than 12 hours of personal leave between January 26, 1998, and June 30, 1998.
 - ▶ Nine of them used less than 12 hours of personal leave in all three years of the contract: 1998, 1999, and 2000.
- Certain of the 37 former warehouse employees were granted personal leave prior to January 26, 1998. Among those:

- ▶ Two of them used the full 12 hours of personal leave, and the union acknowledges that those individuals are not owed any further remedy by the employer, since they were already beneficiaries.
- ▶ Five of them used between three and 12 hours of personal leave time.
- ▶ Thirty of them did not use any personal leave time.

The question before the Commission is how to treat the 35 former employees who received less than 12 hours of personal leave prior to January 26, 1998.

POSITIONS OF THE PARTIES

The union argues that the "credit each employee for the maximum number of personal leave hours forgiven for any individual employee when the slate was 'wiped clean'" language in the Commission's decision was not limited or qualified. It objects to the employer's attempt to assess whether individual employees would or could have taken advantage of additional leave time if they had it in 1998, and contends it is inappropriate for the Commission to attempt to condition the granting of this remedy to former employees on an intrinsically undeterminable after-the-fact assessment of whether this "special benefit" would in fact have had any "value" to the recipient. It insists that the "special benefit" should be given to all former employees who were originally deprived of that benefit, just as it was granted to similarly-situated current employees.

The employer argues that the Commission's order plainly required it to "recompute," "credit," and "deduct" from the personal leave

balances of *employees*, and it reasons that one has to be a current employee for that to happen. The employer points out that personal leave was granted on a "use it or lose it basis" and contends it is impossible to know whether any of the people who have left employment would actually have used additional personal leave between January 26 and June 30, 1998, if such additional leave had been provided. The employer contends that the Commission should not rewrite its order.

DISCUSSION

The purpose of an unfair labor practice remedy is to put the affected employees back in the situation they would have enjoyed if no unfair labor practice had been committed. In a case such as this, where the employer unlawfully created a differential among employees within the bargaining unit, the only way to put matters back in balance is to have the employer pay whatever it takes to eradicate the differential. The remedial order thus recognizes that the victims of the unfair labor practice (i.e., the employees who did not benefit from the premature implementation or who received less than the maximum benefit from the premature implementation) could have been paid for working fewer hours, and it entitles those victims to equivalent paid time off.

The remedy we ordered in this case is similar to the remedy awarded in *Wingert, et al. v Yellow Freight*, ___ F.2d ___ (No. 45794-2-I, December 4, 2000) where a unanimous Court of Appeals panel found an employer that deprived its employees of certain paid rest breaks was obligated to pay for the additional labor "it received when its employees are legally entitled to a rest break." Otherwise, the court reasoned, the employer would be unjustly enriched by the receipt of labor to which it was not legally entitled.

We reject the interpretation of our order which has been proposed by the employer here. Ceasing to be an employee does not forfeit all rights to remedies granted for the period the individual was employed. The National Labor Relations Board (NLRB) recognizes that the remedy for an unlawful differential grant of a benefit must be paid to "all employees who were employed" at the time of the unlawful act, without regard to their employment status at the time of the decision. In *Aero-Motive Manufacturing Co.* 195 NLRB 133 (1972), an employer who paid bonus cash payments to employees who crossed a picket line was ordered to pay the same bonus to strikers "who were employed at the conclusion of the strike or who were recalled to work within 30 days thereafter . . .".

The unfair labor practice violation involved the employer's premature implementation of the personal leave benefit for some employees, and its wiping the slate clean on January 26, 1998. The unlawful conduct ended at a specific point in time, and the Commission ordered the employer to rebalance the personal leave benefit for the many employees who had not benefitted (or only partially benefitted) from the unlawful conduct during that specific period.

Had the employer rebalanced the leave records of its employees on January 26, 1998 (i.e., instead of committing the "wiped clean" portion of its unfair labor practice), or similarly corrected the leave records of all affected employees on February 27, 1998 (i.e., the date the unfair labor practice complaint was filed), most of the employees in the bargaining unit would have had additional personal leave available through the end of that contract year (i.e., June 30, 1998).

The employer has been willing to pay the differential hours for its ongoing employees, but it urges an after-the-fact assessment as to

whether the differential benefit would have had any value to individual recipients. We reject such an approach. It was the employer's unlawful conduct that placed the parties in the situation where the likely use of personal leave in 1998 is intrinsically undeterminable. Our remedial order was not limited to the employees who would (or could) have taken advantage of additional leave time prior to June 30, 1998. Because the employer did not replicate the premature benefits within the contract year that ended June 30, 1998, the "use it or lose it" approach urged by the employer could not operate in that period.

The passage of time has compounded the problem. At a minimum, there would undoubtedly have been far fewer than 35 former employees to track down and compensate if the rebalancing had occurred earlier. By the time the Commission's decision was issued, on November 14, 2000, even the collective bargaining agreement which called for the delayed implementation of the personal leave benefit should have expired.³

It is appropriate to give the benefit of the doubt to each affected employee, and failure to do so would deprive the 35 former employees of the full compensation to which they were entitled while they were employed by the Port of Seattle. Suppressing the remedy for the former employees would also provide a substantial disincentive to quick resolution of disputes such as this one; the normal passage of time during administrative litigation should not automatically reduce the liability of a party which has committed an unlawful act. Making the remedial order applicable to all present and former employees who were victims of the differential treatment avoids speculation about individual circumstances and

³ RCW 41.56.070 imposes a three-year limit on the duration of collective bargaining agreements.

conforms to the fundamental precept that all of the employees who were in the warehouse bargaining unit in the 1997-1998 period should have been treated in the same manner.

NOW, THEREFORE, IT IS

ORDERED

1. To comply with the remedial order previously issued in this matter, and to avoid authorization of enforcement proceedings under RCW 41.56.160, the employer must:
 - A. Make a good faith effort to locate the 35 former warehouse bargaining unit employees who used less than 12 hours of personal leave prior to January 26, 1998.
 - B. Compute the differential implementation of personal leave benefits for each such employee, as 12 hours less any personal leave hours granted prior to January 26, 1998.
 - C. Pay each of the 35 former warehouse bargaining unit employees located under A. for his or her unused personal leave computed under B., at their rate in effect on January 26, 1998, to make them whole for the paid time off they lost in the differential implementation of the personal leave benefit. Such payments shall be subject to interest computed under WAC 391-45-410(3).
2. To avoid an authorization of enforcement proceedings under RCW 41.56.160, the Port of Seattle must:

- A. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order.

- B. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order.

Issued at Olympia, Washington, on the 30th day of May, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARILYN GLENN SAYAN, Chairperson


SAM KINVILLE, Commissioner


JOSEPH W. DUFFY, Commissioner