

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERMITTENT WORKERS FEDERATION AND THOMAS BANNISTER	)	
	)	
Complainants,	)	CASE NO. 1878-U-78-247
vs.	)	DECISION NO. 1038-PECB
CITY OF SEATTLE	)	
	)	
Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

John W. Scannell, Field Secretary, Intermittent Workers Federation, appeared on behalf of the complainants.

P. Stephen DiJulio, Assistant City Attorney, appeared on behalf of the respondent.

On December 11, 1978, the Intermittent Workers Federation (IWF) and Thomas Bannister filed a complaint with the Public Employment Relations Commission charging an unfair labor practice against the City of Seattle, alleging a discriminatory discharge due to union activity. The matter was heard November 1 and 2, 1979, in Seattle, Washington, before Examiner Katrina I. Boedecker. The final post-hearing briefs were filed with the Examiner on December 24 and 26, 1979.

BACKGROUND:

Thomas Bannister began working for the City of Seattle as an "intermittent" janitor at the Seattle Center early in 1978. At that time, and at all times material to this case, Bannister's job assignments were made through the Temporary Employment Service (TES), an arm of the city Personnel Department. TES maintains lists of persons interested in intermittent clerical, labor, and janitorial positions with the city. Employees on the TES eligible lists are considered to be on-call, intermittent employees who are not subject to the same regulations and do not receive the same benefits as permanent employees.<sup>1/</sup>

<sup>1/</sup> The incidents alleged and claims filed in this case occurred prior to January 10, 1979, when a new personnel ordinance took effect in the City of Seattle. Intermittent Workers Federation v. City of Seattle, Decision No. 781(PECB, 1979) indicates that in the "civil service" system in effect prior to January 10, 1979, non-permanent on-call employees did not acquire civil service status or rights.

Departments needing TES employees call the service and specify the type of worker needed and the anticipated duration of employment. They may also request that certain persons not be referred to them, and those requests are honored by TES. Melaine Smith, TES program coordinator, testified that:

"...we try to rotate so that everyone has an opportunity to work. Primarily though, as we're calling people to see if they are available, it's who we're able to get in touch with. These types of positions, people--there is heavy turnover in laborer and janitor employment."

TES receives work requests from city departments, makes calls to schedule workers, and issues checks and follow-up memoranda for intermittents. TES pays the salaries of those employees whom it refers, and is subsequently reimbursed by the user department. City policy is that only with specific budget approval and appropriate notification to TES, may assignments of employees from the TES labor pool continue for over 60 days.<sup>2/</sup> Smith testified that TES requires departments to review an assignment of an intermittent employee which has extended near to sixty days "so that the person does not work more than they should and the service is not abused." However, actual practice may deviate from the stated policy. Some TES employees have stayed in the same assignment for four months before the unauthorized extension is caught by TES.

Prior to beginning work as an intermittent employee, Bannister became acquainted with John Scannell and interested in Scannell's efforts to organize a union, the Intermittent Workers Federation, for the city's intermittent workers. Early in his employment, Bannister solicited union authorization cards from intermittent employees at the Seattle Center and recruited support for a lawsuit being filed by the IWF.

The Seattle Center runs three work shifts--day, swing and graveyard. Each shift is made up of work crews headed by leadmen. The leadmen all are supervised by their shift's crew chief; Robert Henninger, Al Gardner or Dale Dahms. Mel Weisgerber is an Assistant Supervisor at the Center and the crew chiefs' superior.

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<sup>2/</sup> Certain departments also employ "on-call" personnel on their own payrolls. The mechanics of employment of such individuals differs from the system employed by TES.

Scannell testified that sometime in May, 1978, he and Bannister were sitting at a table in the employees' locker room talking about the IWF. When Scannell turned around he saw Weisgerber standing there. Weisgerber said Bannister would be transferred to the night shift because there was more work there and that shift needed help. On May 24, 1978, Bannister was assigned to the graveyard shift at the Seattle Center's "Center House." The leadman on his work crew was Sulo Jussila. Bannister regularly worked several nights weekly after his assignment to Jussila's crew. While on that shift, during the summer of 1978, Bannister continued to recruit members for the IWF and became Secretary-Treasurer of the organization.

On or about August 7, 1978, Bannister and Jussila were walking together toward the employee locker room at the close of the shift. Upon seeing Scannell, Bannister testified Jussila stated, "There's that son of a bitch; don't join his union." After Jussila allegedly made that remark, Bannister walked over to Scannell and spent a few moments in discussion with him, while Jussila looked on. Jussila denies that such an incident took place.

Sometime between August 7 and August 27, 1978, Bannister and Jussila talked about reducing Bannister's 5 days per week work schedule to 3 days per week. Although unclear, Scannell's testimony which comprises the entire record on this matter, indicates that the reduction in hours was requested by Bannister. Scannell and Bannister went together to Henninger who said there was enough work to have Bannister on a five day schedule, but he would accept Jussila's three days per week schedule for Bannister. On August 21, 1978, TES issued a memorandum to the Seattle Center reminding them of the budget authorization necessary to continue the assignment of five employees listed: Levita Tupou, Jerry Henneke, Roger Bembry, James Sauter and Vaitohu Latu. All five had exceeded the 60 day limit. Bannister's name was not included on the typewritten list; rather, an undated handwritten notation indicates his name was inadvertently omitted. The length of Bannister's assignment had the least days over 60 of the group; Bannister, was also the first of the group to be returned to the TES labor pool, on August 28, 1978.

On or about August 27, 1978, Bannister's assignment at the Seattle Center ended. He was not again assigned by TES anywhere until September 21, 1978. Subsequent assignments have not been of the regularity or duration of the summer 1978 assignment to the Seattle Center.

Position of the Parties:

The complainants argue that the city has unlawfully discriminated against Bannister because of his union activities, and has interfered with the rights of others currently employed. They allege that Bannister was "laid off", "suspended", or "terminated" from his employment at the Seattle Center shortly after his association with the IWF became known to management of the Center; that the Center's use of a routine memo to return Bannister to the TES labor pool was pretextual; and that such action is another in a series showing the employer's anti-union animus. They seek a remedy of "reinstatement" of Bannister, reinstatement of his normal scheduling, and payment for lost earnings, as well as an order that the employer cease and desist its interference with employee rights.

The respondent denies any commission of unfair labor practices, and urges the dismissal of all charges. The city disputes the statement attributed to Sulo Jussila, and claims that even were such an expression made, it does not rise to the level of a threat. The city further argues that Jussila is not an agent of the employer. It claims that the evidence does not support a conclusion that Jussila, any supervisory or management personnel knew of Bannister's union activity. It believes the evidence shows that Bannister's return to the temporary employment pool was done according to standard practice, and points to his subsequent assignments to the Center as proof that no "lay off", "suspension", or "discharge" occurred. The city claims, in conclusion, that the IWF did not meet the burden of proof required to sustain its allegations.

Pertinent Statutes

RCW 41.56 provides, in pertinent part,

41.56.040 Right of employees to organize and designate representatives without interference. 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 their rights under this chapter.

41.56.140 Unfair labor practice for employer enumerated. It shall be unfair labor practice for a public employer:

(1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;...

Discussion:

1. Employer Knowledge of Bannister's Union Activity.

The city claims that knowledge of Bannister's union activity by TES and/or Nancy Jacobson, Seattle Center Personnel Director, was not proven and is critical to a finding of discriminatory action. These contentions are not correct.

The Examiner takes note of the fact Jussila testified during the morning hearing after having worked his regular grave-yard shift, when he was undoubtedly fatigued and perhaps not as clear in memory as he might otherwise have been. However, the Examiner credits the testimony of Bannister and Scannell with regard to the August 7th incident and believes that Jussila made the remarks, or comments similar to those to which Bannister testified. However, Jussila's statement implies that he was unaware at that time that Bannister was a member of, or was interested in, the IWF. The recitation of this incident that has been credited, though, shows that Jussila became aware that Bannister was developing some association with Scannell since Jussila watched Bannister and Scannell talking together.

Additionally the record holds uncontroverted testimony from Scannell that crew chief Henninger, and the assistant supervisor, Weisgerber, were aware of some association between Bannister and Scannell regarding the IWF. Scannell's association with the IWF was clearly known to the city's representatives.

When a representative of the employer is in a position to adversely affect the employment conditions of an employee because of his/her union activities, there exists a sufficient agency connection to carry a finding of discrimination by the employer.<sup>3/</sup> In the Mercer Island Police

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<sup>3/</sup> RCW 41.56.030 (1) "Public employer" means any officer, board, commission, council or other person or body acting on behalf of any public body governed by this chapter... (emphasis added)

Association vs City of Mercer Island, Decision No. 1026, (PECB, 1980), the employer's authority was found in the Director of the Department of Public Safety when an employee in the bargaining unit would reasonably interpret his actions to be the voice of the employer.<sup>4/</sup> In the instant case, the city's own witnesses testified to the authority of leadworkers to recommend return of an intermittent employee to the TES labor pool and of a crew chief or assistant supervisor to take action directly affecting an intermittent's employment. The record also reflects that crew chief Henninger authorized a reduction in Bannister's hours and assistant supervisor Weisgerber directed a change in Bannister's work shift. Thus, although, Jacobson coordinates assignments of intermittent personnel for the Seattle Center, the record does not support respondent's implication that she had sole authority to determine whether or not an individual would be returned to the labor pool or requested for future assignments. The examiner does not dispute the city's contention that Jacobson may not have known of Bannister's involvement with the IWF at the time his summer 1978 assignment with the Seattle Center ended. However, the Examiner finds that agents of the City, in a position to adversely affect Bannister's employment, did have knowledge of his union activities.

## 2. The Alleged Discriminatory Act

Since the complainant is alleging his "lay-off" was pretextual, the Examiner can take into account direct, circumstantial and credible testimony, to draw inferences and to make findings as to whether violations of RCW 41.56.140(1) exist. This Examiner finds that even though Bannister proved that his supervisors did know of his union activity, he did not meet his burden of proof to show that the city's conduct was motivated by union animus and had inherently destructive effects on his rights under the Public Employees Collective Bargaining Act 41.56 RCW. The city rebutted the complainant's prima facie case of discriminatory intent by proving that Bannister's "lay off" was motivated by legitimate, nondiscriminatory business considerations.

By its very nature, intermittent employment is subject to irregular scheduling. Uncontroverted testimony in the record shows that TES was never requested not to assign Bannister to the Seattle Center. In fact, Bannister has been referred to, and worked at the Seattle Center since the time of the incidents giving rise to this complaint.

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4/ See also: Mechanics Laundry and Supply, Inc 240 NLRB No. 040 and Pepsi Cola Bottling Co. 242 NLRB No. 048.

Bannister's return to the labor pool occurred approximately three weeks after the incident with Jussila and even less time after Henninger's discussion with him and Scannell. Although this return to the labor pool --or "lay-off", "discharge" or "suspension" as the complainant characterizes it--occurred shortly after Bannister's lead worker and a crew chief became aware of his association with the IWF, Bannister was subsequently called-up and worked at the Center. Evidence in this case indicates that intermittents generally work more hours in the summer than at other times of the year. Statistics entered show that Bannister was assigned as many hours for September, 1978 as other TES janitors who worked at the Seattle Center. The memorandum from TES to the Seattle Center which generated Bannister's return to the labor pool, did not include Bannister's name on the typewritten list. Smith testified that Jacobson had contacted her to inform her of the oversight, and had been advised by Smith to add Bannister to the list and proceed as with the others. The Examiner can credit the possibility that an understaffed office in a busy season can fall as far behind in issuing memos as TES apparently did in this case. No evidence was presented to impugn the authenticity of the memo or the return process.

PERC does have case law holding a reduction of hours may be a discriminatory act. In Intermittent Workers Federation vs City of Seattle, Decision No. 489, (PECB, 1978), the Examiner dismissed the complaint but noted:

"Discrimination may take forms other than discharge. Retaliatory action, such as failure to schedule, would be violative of the Act if done for proscribed reasons."

The City of Seattle, in the instant case, continued to follow its usual scheduling pattern in assigning Bannister to work after his supervisors knew of his IWF affiliation. In Retail Clerks Union Local 1612 vs Benton City, Decision No. 436, (PECB, 1978), the Examiner found a violation of RCW 41.56.140(1) where the employer reduced the hours of a regularly scheduled full-time employee. Benton City does not square with the present case. By definition, an intermittent worker does not have a continued expectation of regularly scheduled employment. When Bannister was sent back to the labor pool on August 27, 1978, his recall was for legitimate business purposes, and the city followed its usual procedures in doing so.

The complainant has not met its burden of proof to persuade the Examiner that Thomas Bannister was discriminated against because of his union activities and that the City of Seattle thereby interfered with, restrained, or coerced public employees in the exercise of their rights guaranteed by the Public Employees Collective Bargaining Act RCW 41.56.

FINDINGS OF FACT

1. The Intermittent Workers Federation is a bargaining representative within the meaning of 41.56.030(3).
2. Thomas Bannister is a public employee within the meaning of 41.56.030(2).
3. The City of Seattle, through its Temporary Employment Service, assigns interested people to intermittent employment in clerical, labor and janitorial positions with the city. It is the policy of the city to assign intermittent employees for only 60 days in a department. This policy has not always been strictly followed.
4. Thomas Bannister is an intermittent employee for the City of Seattle and was assigned from the Temporary Employment Service to work as a janitor at the Seattle Center from May 24 to August 27, 1978. During that time, he recruited members for and became an officer of the Intermittent Workers Federation. On August 28, 1978, he was returned to the Temporary Employment Service labor pool.
5. Sulo Jussila, Robert Henninger and Mel Weisgerber knew, or reasonably could have known, of Thomas Bannister's affiliation with the Intermittent Worker's Federation.
6. Bannister has been periodically assigned to the Seattle Center since August 28, 1978. He has been assigned as many hours as other Temporary Employment Service janitors employed at Seattle Center.
7. The City of Seattle did not deviate from its normal, legitimate business practices in assigning Thomas Bannister as an intermittent worker from the Temporary Employment Service.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter pursuant to Chapter 41.56 RCW.
2. The City of Seattle is a public employer within the meaning of RCW 41.56.030(1). At material times herein, Nancy Jacobson, Melaine Smith, Bob Henninger, Mel Weisgerber and Sulo Jussila were representatives of the employer.



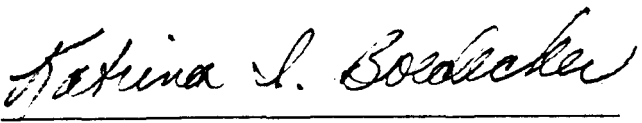
3. The City of Seattle has not committed unfair labor practices violative of RCW 41.56.140(1).

ORDER

The complaint charging unfair labor practices is hereby dismissed.

DATED at Olympia, Washington this 26th day of November, 1980.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
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KATRINA I. BOEDECKER, Examiner