STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 120,	)	CASE NO. 5850-U-85-1089
Complainant,	)	DECISION NO. 2335 - PECB
vs.	)	
BELLINGHAM HOUSING AUTHORITY,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Terry Costello, Field Representative, appeared on behalf of the complainant.

Langabeer, Tull and Cuillier, by Gary Cuillier, Attorney at Law, appeared on behalf of the respondent.

On June 10, 1985, the Service Employees International Union, Local 120 filed a complaint charging unfair labor practices against the Bellingham Housing Authority, alleging that respondent violated RCW 41.56.140(1) by interfering with the employees' right to organize a union when it terminated an employee for union activity and when it denied the employee union representation during the termination meeting. A hearing was conducted in Bellingham on August 6, 1985, by William A. Lang, examiner. Post-hearing briefs were filed on October 4, 1985.

BACKGROUND

The Bellingham Housing Authority is a public employer funded, in part, from federal grants. The employer serves the housing needs of low income residents in the City of Bellingham. The operation is under the direction of an executive director, Ralph Rogers, who is appointed by a board of directors representing community and governmental agencies within the area served.

Bonnie Bailey was hired by the Bellingham Housing Authority as a temporary employee in January, 1984. The decision to hire Bailey was based on the recommendation of Ed Knight, who was to be her immediate supervisor and who had a prior acquaintance with her in a previous employment with a social service agency in the city. After several three-month tours of duty as a temporary employee, Bailey was placed in a permanent position on a six-month probationary status in accordance with personnel policy. Her probation was to end on January 15, 1985, after which she would be entitled to permanent status. Terminations of permanent employees may be appealed to a hearing before the executive director and the board of directors, if necessary. Probationary employees may be terminated without appeal, but must be given the reasons therefor, in writing.

Service Employees International Union, Local 120 informed the employer on October 24, 1984, that it had organized the employees of the employer, and requested recognition or a consent election. The union filed a petition with the Public Employment Relations Commission on October 31, 1984, seeking a representation election. (Case No. 5533-E-84-996). A pre-hearing conference was held in the representation case on December 19, 1984, at which time the employer and union entered into an election agreement and a supplemental agreement reserving an eligibility issue concerning inclusion of Knight in the bargaining unit. An election was scheduled for January 11, 1985.

The union held three organizational meetings prior to the election. Ms. Bailey attended several of these. The employer conducted several meetings with the staff to give its position regarding union representation. The election held on January 11, 1985 resulted in the interim certification of the union as the exclusive bargaining representative of the employees.

Ms. Bailey's employment was terminated on January 15, 1985, the last day of her probationary period. She was informed of the termination by Rogers at a private meeting.

POSITIONS OF THE PARTIES

Complainant argues that reasons given for Bailey's termination were pretexual, and that she was fired immediately after the election in order to discourage union activity.

The employer contends Bailey was terminated for a bad work attitude, errors in judgment and in anticipation of a reduction in force.

DISCUSSION

The Discriminatory Discharge Allegation

The complainant has the burden of proof in any unfair labor practice case. To establish a discriminatory discharge of an employee for engaging in union organizational activity or other protected activity, it must be shown that the employer's action was motivated by union animus. The evidence must be more than mere suspicion. See: City of Olympia, Decision 1208-A (PECB, 1982). In support of this burden, the union offers several incidents as evidence.

On October 25, 1984, the day on which the employer received notice of the union's organizational effort, Susan Player, a senior bookkeeper who was a supervisor, questioned several employees, including Bailey, about their knowledge of the union activity. The employer acknowledges that such interrogation was, or could easily be found to be, improper under the "interference" unfair labor practice, RCW 41.56.140(1). The evidence falls short, however, of demonstrating a union animus. The supervisor's inquiry was designed only to obtain information about the union for the employees under her supervision, because they had been left out of the organizational activities.

Several pre-election meetings were held at which the union claims that Rogers expressed displeasure at the employee's seeking representation. The evidence does not indicate that Rogers did anything more than express his views about the need for a union. There is no evidence of threats of reprisal or force or promises of benefit. His conduct did not constitute intimidation. The strongest statement attributed to or about Rogers was in hearsay testimony expressing an assessment as to Rogers' attitude following the election. Rogers denied making any anti-union comment to the declarant, who was never called as a witness.

The chairman of the employer's board of directors, Phyllis Graham, met with the employees in a closed meeting and asked them to express their feelings. Supervisors were excluded from the meeting, but there is indication that Rogers' secretary was present in the room, and that the employees were reluctant to talk openly with her present. The conversations would seem to have bordered on, if not crossed the line, into improper offers of benefit, but it is difficult to credit these incidents as evidence of union animus. The chairman of the board is herself a member of and representative for another local union in the Bellingham area, and can hardly be characterized as hostile to an organizational effort. Graham indicated concern that the employees were unhappy. The record shows that these meetings were not intimidation.

Bailey testified to attending two or three organizational meetings with union representatives away from the employer's premises. She was an outspoken critic of the management, but the record does not indicate that Bailey was a leader of the organizational drive. The record does not disclose that the employer was aware of those meetings, that it had identified Bailey as a "union organizer" or even whether she was a member of the union.

The Examiner's first conclusion is that this case must be dismissed due to insufficient evidence to sustain the complainant's initial burden of proof. There is simply no evidence of union animus on the record of this case.

Realizing that the employer's agents may have committed some technical interference violations, the Examiner has considered how the case would come out if the burden where shifted to the employer under the Wright Lines[1] test for examination of mixed-motive discharges. When that is done, the examiner is convinced that the true reason for Bailey's termination was her disrespectful attitude toward management. The record shows her to be a sarcastic antagonist to the director's management of the employer.

Bailey's immediate supervisor, Knight, gave a positive evaluation of her performance as a probationary employee.[2] This evaluation differed, however, from the evaluation made by Knight's supervisor, Housing Program Manager Charles Anderson, who observed that Bailey had problems working with others outside her area and questioned her judgment. Anderson's recommendation was to terminate Bailey for poor attitude and judgment, and in anticipation of budgetary cutbacks. Anderson testified he had been member of various unions and had worked in a supervisory capacity with unions without problems. His testimony was creditable.

The record shows Bailey was well liked by other employees but had a disrespectful attitude towards Rogers, who she sarcastically challenged at a staff meeting as being three weeks late in soliciting employee concerns over changes in operational procedures.

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1 251 NLRB No. 1084 (1980), cited with approval in City of Olympia, Decision 1208-A (PECB, 1982)

2 Knight has been determined by the Public Employment Relations Commission to be a public employee under RCW 41.56.030(2) and, not a supervisor. See: Bellingham Housing Authority, Decision 2140 (PECB, 1985). Since Knight was a bargaining unit employee, his evaluation, while prepared at the request of management cannot be viewed as an employer evaluation. Rather, it was one that was subject to review and modification by supervisors, which was the case here.

As to the timing of the discharge, the employer claims coincidence. Bailey's probationary period did end on January 15, 1985. The employer was forced to make its decision before the end of the probationary period, otherwise she would have been automatically granted permanent status. The record supports the employer's contention that the timing was unfortunate but unavoidable.

Employer criticism of Bailey for lack of documentation in one case (in which the client sought congressional assistance), and of her work in the preparation of statistics for federal review, is not entirely justified. Those instances of inadequate work performance involved the collaboration of others, including supervisors, and were a small number of the total number of cases that Bailey handled. This is not, however, a "just cause" proceeding. Whatcom County, Decision 1886 (PECB, 1984).

Denial of Union Representation

The union argues that Bailey was denied union representation in the termination hearing. The employer disagreed with Bailey's claim that she was refused union representation.

Rogers testified that Bailey understood that if she wanted a representative present, then he also wanted a supervisor there; and that she refused to take any papers regarding the termination. Bailey confirmed her refusal to take papers, but disagreed with Rogers' version of the transaction. She said that he refused to permit either a union or employee representative, but would allow a supervisor.

It is clear from the record that the purpose of the meeting was to inform Ms. Bailey that she had failed her probationary trial and would not be retained as a permanent employee. The meeting was not an investigatory meeting within the rule of J. Weingarten v. NLRB, 420 U.S. 251 (1975) and Okanogan County, Decision 2252 (PECB, 1985), where the employer was seeking damaging facts to support its decision or to hear the employee's side of the

story with a view of withholding discipline. An employee has no right to the presence of a union or other representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision. Baton Rouge Water Works Co., 246 NLRB 995 (1979). The Baton Rouge case also involved a probationary employee who was being informed of a decision not to give her permanent status. As in this case, the decision to terminate her was made prior to the meeting.

FINDINGS OF FACT

1. The Bellingham Housing Authority is a "public employer" within the meaning of RCW 41.56.

2. Bonnie Bailey was a probationary employee of the Bellingham Housing Authority from July, 1984 to January 15, 1985.

3. During her probation, Bailey's performance as an employee was unsatisfactory.

4. Bailey's discharge on January 15, 1985, was not based on anti-union animus. She failed the test of probation because she was unsatisfactory.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. The respondent, Bellingham Housing Authority, did not violate RCW 41.56.010 and RCW 41.56.140 in discharging Bonnie Bailey.

On the basis of the foregoing Findings of Fact and Conclusions of Law, the examiner makes the following:

ORDER

The complaint charging unfair labor practices filed in the above-entitled matter is dismissed.

DATED at Olympia, Washington, this 7th day of February, 1986.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

William A. Lang

WILLIAM A. LANG, Examiner

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