STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ROBERT B. BENNATTS, Complainant,	)	CASE 10865-U-93-2528
vs.	)	DECISION 4968 - PECB
CITY OF TUKWILA, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Stephen M. Hansen, Attorney at Law, appeared for the complainant.

Williams, Kastner and Gibbs, by Ronald J. Knox, Attorney at Law, appeared for the respondent.

On December 29, 1993, Robert B. Bennatts filed a complaint charging unfair labor practices with the Public Employment Relations Commission, naming the City of Tukwila as respondent. The complaint alleged that the employer had violated RCW 41.56.140, by changing the complainant's shift/station assignment in retaliation for the complainant's filing of grievances with respect to disciplinary action taken against him. A hearing was held at Tukwila, Washington, on November 29, 1994, before Examiner Vincent M. Helm. The employer filed a post-hearing brief.

BACKGROUND

At the time of the hearing, the complainant had been employed by the City of Tukwila for approximately six years. At all times material herein, the complainant has been a fire fighter represented for purposes of collective bargaining by International Association of Fire Fighters, Local 2088 (union). The employer and union had a collective bargaining agreement in effect during the relevant

time period, and it contained a grievance and arbitration procedure.

During his employment, Bennatts has been assigned to all four of the employer's fire stations. Until November 24, 1993, Bennatts was certified on the lieutenant eligibility list.[1]

On or about November 24, 1993, Bennatts was required to attend a meeting with Chiefs Olivas and Keefe. Lieutenant McFarland was present as the complainant's station officer. During this meeting, which was not investigative in nature, the complainant received two disciplinary notices.

Lieutenant Kohler was chairman of the union's grievance committee, and he acted as the complainant's union representative at the November 24, 1993 meeting. Although Bennatts was dissatisfied with the union representative assigned to participate in this meeting, he raised no objection to Kohler acting in that capacity during the course of the meeting.

At the conclusion of the November 24 meeting, Bennatts discussed the matter with Kohler and perhaps McFarland. Bennatts' grievances concerning the discipline were dated December 1, 1993, and were given to Kohler at a union meeting on December 6, 1993.

When Kohler became aware of the complainant's dissatisfaction and withdrew as the complainant's representative in connection with the processing of the grievances, Bennatts attempted to persuade Kohler to continue to function as his union representative because of his familiarity with the situation. Bennatts gave Kohler a letter to that effect on December 7, 1993.

---

[1] Prior to the hearing, Bennatts was again placed on the eligibility list.

The complainant contends that Kohler met with the chiefs later in the day on December 7, 1993, and he believes the chiefs may have been informed at that time of the grievances which had been filed with the union.

By memo dated December 8, 1993, Chief Olivas advised Bennatts of his transfer from Station B-54 to Station B-51, effective January 1, 1994.[2] The complainant received the memo on December 14, 1993. Bennatts believes that Olivas was aware of the grievances at the time he directed the change in station assignments, either through the rumor mill or Kohler.

The complainant testified that Station B-51 is the employer's headquarters, where management officials spend the majority of their time and are in a position to observe his activities. The complainant further testified that the staffing at Station B-51 has mandated his being supervised by acting lieutenants who, in order to advance their careers, can be coerced by their supervisors to make unjustified complaints concerning the complainant. Bennatts testified that the employer has a history of retaliating against those who file grievances citing, by way of example, one fire fighter who has filed many grievances and has received many transfers. Moreover, the complainant testified that union activity is conducted during work hours, at stations other than B-51, because of the absence of management officials. In addition to the timing of the transfer, the complainant contended that the change in his assignment, after the posting of the shift/station list in September 1993, was virtually without precedent and, therefore, provides additional evidence of discriminatory intent.

---

[2] While Bennatts filed a grievance with the union concerning the station transfer, no evidence was submitted with respect to the disposition either of this grievance or his earlier grievances.

With respect to the complainant's experiences since being transferred to Station B-51, his testimony was contradictory. He initially stated that he had been unfairly written up on more than one occasion for reporting to work late, as the result of Olivas or another chief pressuring an acting lieutenant to write him up. On cross-examination, however, Bennatts testified that he has neither been disciplined nor given an adverse evaluation of his work performance since his transfer to Station B-51. Moreover, no warning letters were introduced into the record.

Olivas testified, at length, concerning the operation of the fire department and the history of transfers between stations. The fire department's ladder truck is housed at Station B-54, along with related rescue equipment. The fire department has fire fighters who are specially trained for rescue and hazardous materials work, and who may request assignment to rescue or hazardous materials teams. When the ladder truck was purchased, the management of the fire department committed to the mayor that the truck would be staffed with fire fighters who have multiple skills, particularly with regard to rescue and hazardous materials operations.

In assigning fire fighters to stations, consideration is given to a number of factors including skills requirements, required staffing levels and the familiarization of fire fighters with the various stations. Input concerning station assignments is obtained from the lieutenants assigned to each station. Changes are not common after the station assignments are posted in September, but they are not without precedent.[3]

In the station assignments in September, 1993, fire fighter Beckman was transferred to Station B-51 from Station B-54, while fire

---

[3] In 1994 four such transfers, including the two involved in Bennatt's transfer, had been made as of the date of the hearing.

fighter Flores moved from Station B-51 to Station B-54. Beckman had been a member of the rescue team from 1986 until February of 1993, when he left the team for personal reasons. Flores had previous service on the rescue team and, prior to the posting of the September notice, had requested a transfer to Station B-54.

After the September assignment list was published, Beckman asked Olivas if he could rejoin the rescue team and remain at Station B-54. Beckman reiterated his station request on November 23, 1994, while advising Flores that he, in any event, would return to the rescue team.

Flores contacted McFarland regarding Beckman's request. Some time between December 2 and December 7, 1993, McFarland recommended to Olivas that Beckman remain at Station B-54, and that Bennatts be transferred to Station B-51. At the time of the complainant's transfer to Station B 51, he was the only fire fighter assigned to Station B-54 who was not a member of the rescue team. McFarland, who the complainant characterized as being fair, stated he had no knowledge of the complainant's grievances at the time he recommended the transfer of the complainant to Station B-51.

The complainant testified that McFarland said that he had been pressured by Olivas to "write up" the complainant, and to recommend his transfer to Station B-51. Although McFarland was called as a witness by the complainant, he was not questioned regarding the allegations with respect to being pressured by Olivas.

POSITIONS OF THE PARTIES

The complainant contends that the timing of his transfer from Station B-54 to Station B-51 is sufficient to establish that his transfer was in reprisal for the filing of the grievances, in view of other circumstances surrounding the transfer. The complainant

contends that, because of the pervasiveness of discussion among fire fighters relative to his grievances, the employer must have been aware of the existence of those grievances at the time the transfer was decided upon. The complainant also contends his transfer is suspect because transfers between stations subsequent to the September posting of station assignments are rare. Further, the complainant argues that, by transferring him, the employer was better able to keep him under surveillance and to coerce acting lieutenants to contrive discipline against the complainant, leading ultimately to his discharge.

The employer maintains it had no knowledge that the complainant had filed grievances at the time of his transfer. The employer urges that the complainant's transfer was motivated by circumstances unrelated to his filing of grievances and was not accomplished for discriminatory reasons. While admitting that transfers between stations after the posting of the September assignments are relatively rare, the employer argues that they have occurred often enough that the complainant's transfer must not be viewed as particularly unique. Moreover, the employer notes that the complainant has not been the subject of disciplinary action since his transfer. In the employer's view, the transfer of Bennatts was a management response to a circumstance creating an opportunity to more effectively staff its various work locations.

DISCUSSION

Necessary Elements to Establish a Violation of the Statute

The pursuit of a grievance pursuant to the provisions of a collective bargaining agreement is a right protected by the statute, and if an employer takes action in reprisal for engaging in such activity, a violation of the statute is established. City of Seattle, Decision 3066 (PECB, 1989), affirmed Decision 3066-A

(PECB, 1989); Valley General Hospital, Decision 1195-A (PECB, 1981). The complainant has the burden of proof, under WAC 391-45-270, to establish a violation of the statute. Snohomish County, Decision 3289-B (PECB, 1990). A complainant must establish a case based on evidence, and not on uncorroborated hearsay or suspicion, East Wenatchee Water District, Decision 1392 (PECB, 1982); Snohomish County, Decision 3289-B (PECB, 1990).

In order to prevail with respect to a claim that the employer interfered with his rights in violation of RCW 41.56.140(1), the complainant need only show that the employer engaged in conduct which can be reasonably perceived by an employee as reprisal or a threat of reprisal, because of being involved in activity protected by the statute. City of Winlock, Decision 4783 and 4784 (PECB, 1994); City of Seattle, supra. The actual motivation of the employer or awareness of the protected activity, therefore, is immaterial.

A more stringent test is imposed to establish that an employer discriminated against a complainant by taking action affecting the employee's terms and conditions of employment in retaliation for the employee having exercised a statutory right. In that instance actual employer knowledge of protected activity must be shown, City of Seattle, supra. The Commission applies a "substantial factor" test to determine whether a violation of the statute has occurred. Under that procedure, the complainant must show through direct or circumstantial evidence the exercise of a statutory right, and a causal connection between discriminatory action by the employer and the pursuit of the statutory right. Having done so, a rebuttable presumption is created in favor of the complainant. While the burden of proof never shifts from the complainant, the burden of production of evidence shifts once a prima facie case is presented, and the employer must advance legitimate non-discriminatory reasons for its actions or the complainant will prevail. The employer's obligation in this regard, however, falls short of a preponderance

of evidence standard. Should the employer advance the necessary evidence to overcome the presumption established in the complainant's prima facie case, the complainant then has the ultimate burden of proof. To meet this obligation, a complainant must show that the protected activity engaged in was a substantial motivating factor for the action of the employer by demonstrating that the employer's reasons for the action are either pretextual or, if not, the pursuit of the protected right was nonetheless a substantial factor in providing motivation for the employer's action, Lewis County, Decision 4691-A (PECB, 1994); Educational Service District, Decision 4361-A (PECB, 1994).

Where employer knowledge is required it may be inferred from the circumstances of the case. The "small plant doctrine" has been adopted by the Commission, so that employer knowledge may be inferred where protected activity occurs in a relatively small work environment and is carried out in such a manner or at such times that it can be presumed that the employer was aware of it. Kitsap County Fire District 7, Decision 3610 (PECB, 1990); Housing Authority of the City of Bremerton, Decision 3168 (PECB, 1989). While employer knowledge can be inferred from circumstantial evidence, there must be a rational connection between facts proved and facts to be inferred therefrom. Asotin County Housing Authority, Decision 2471 (PECB, 1986).

Evidence Does Not Establish a Statutory Violation

The complainant's grievances protesting the discipline imposed upon him were clearly protected activity under Chapter 41.56 RCW. The complainant has shown that he was transferred from one fire station to another within a day or two after he filed the grievances.

The "Discrimination" Claim -

Olivas denied having any knowledge of the complainant's grievances prior to his December 8, 1993 directive. Kohler stated that he did

not inform Olivas (or any other employer representative) of the existence of the grievances before the change in station assignments was announced.[4] No direct evidence was introduced to show that the employer was aware of the existence of the complainant's grievances prior to his change in station assignment.

Abundant testimony was introduced to the effect that the "rumor mill" within the department had the potential to generate an awareness on the part of the employer's representatives that the complainant was processing some sort of grievance against the employer. The assertions by Olivas and McFarland (i.e., that they were unaware of the complainant's grievances at the time the transfer decision was made) are credible, however. The complainant's evidence with respect to the chief's knowledge of the grievances consisted solely of uncorroborated hearsay testimony as to the matter being widely discussed by other fire fighters. Actual knowledge of the existence of the filing of grievances, therefore, cannot be imputed to the employer.

The hearsay testimony introduced by the complainant relative to the claim of pressure being applied by Olivas on McFarland was totally uncorroborated. Although McFarland was called as a witness by the complainant, the complainant's theory was not substantiated through examination of the witness that was closest to the situation. Additional support for a finding of no discriminatory motivation is the fact that the sinister purposes contemplated by the complainant have never materialized.

The "Interference" Claim -

Even if the employer was unaware of the complainant's protected activity at the time it made the decision to transfer Bennatts, a

---

[4] Kohler further testified that informing management of the existence of a grievance prior to its internal union processing would violate union policy.

question remains as to whether Bennatts could reasonably have believed that his transfer was triggered by the grievance filings. Given the testimony of the chairman of the union grievance committee, however, the Examiner is unable to conclude that there has been an "interference" violation. The union official detailed the confidentiality with which grievances are maintained by the union prior to their presentation to the employer. The same official testified that the grievances filed by Bennatts had not been presented to the employer prior to the transfer decision. The Examiner does not believe it was reasonable for the complainant to entertain a belief that the employer was aware of the existence of his grievances at the time his transfer was decided upon.

The complainant's testimony indicated that the relative freedom from employer observation at Station B-54 encouraged engaging in union activities there. The relative security he maintained in connection with discussing his grievance, either away from the workplace or in a private area at the workplace, also weighs against any inference of employer knowledge. In the circumstances of this case, even the "small plant" doctrine does not provide a reasonable basis for the complainant to have believed that the employer was aware of his grievance filings when it decided to transfer him. Further contradicting the reasonability of such an inference is the fact that Bennatts would have been the only employee at Station B-54 who was not a member of the rescue team. Based on the evidence, the complainant's theory places an undue strain on the credulity of the Examiner.

FINDINGS OF FACT

1. The City of Tukwila is a "public employer" within the meaning of RCW 41.56.030(1).

2. International Association of Fire Fighters, Local 2088, a bargaining representative within the meaning of RCW 41.56-.030(3), is the exclusive bargaining representative of a unit of fire fighters employed by the City of Tukwila.

3. At all times relevant herein the City of Tukwila and Local 2088 were parties to a collective bargaining agreement which includes a grievance and arbitration procedure.

4. Robert B. Bennatts was a public employee of the City of Tukwila in the bargaining unit represented by Local 2088. In November of 1993, Bennatts received discipline from the employer with respect to his work performance. On December 6, 1993, Bennatts submitted grievances to the union relative to that discipline.

5. The practice of Local 2088 is to maintain the confidentiality of grievances until they have been processed internally by the union. The evidence fails to disclose any deviation from that practice in the case of the grievances filed by Bennatts in December of 1993.

6. On or about December 7, 1993, employer officials decided to transfer Robert B. Bennatts from Station B-54 to Station B-51.

7. The City of Tukwila initiated the transfer of Robert B. Bennatts for legitimate reasons, without knowledge of the existence of grievances and under circumstances wherein Robert B. Bennatts should not reasonably have perceived that the transfer was the result of his filing grievances.

CONCLUSIONS OF LAW

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

2. By the acts and conduct set forth in the foregoing findings of fact, the City of Tukwila did not violate any provisions of RCW 41.56.140.

ORDER

The complaint charging unfair labor practices filed in this matter is hereby DISMISSED.

Issued at Olympia, Washington, this 27th day of February, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Vincent M. Helm

VINCENT M. HELM, Examiner

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