

STATE OF WASHINGTON  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KENNETH G. SULLIVAN,	)	CASE NO. 4386-U-82-701
Complainant,	)	
vs.	)	DECISION NO. 1911 - PECB
PUBLIC HEALTH HOSPITAL	)	FINDINGS OF FACT,
PRESERVATION AND DEVELOPMENTAL	)	CONCLUSIONS OF LAW
AUTHORITY, d/b/a SEATTLE PUBLIC	)	AND ORDER
HEALTH HOSPITAL,	)	
Respondent.	)	

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Kenneth G. Sullivan, complainant, appeared Pro Se.

Wickwire, Lewis, Goldmark, and Schorr, by Wendy F. Liebow, Attorney at Law, appeared for the respondent.

On December 14, 1982, Kenneth G. Sullivan filed a complaint charging unfair labor practices against Seattle Public Health Hospital, alleging that the hospital had violated RCW 41.56.140(1) and (2) by a series of actions set forth in a statement of facts attached to the complaint. The matter was docketed as Case Number 4386-U-82-701. On December 16, 1982, the same complainant filed a complaint alleging that American Federation of Government Employees, Local 1170, had violated RCW 41.56.150(1) by interfering with complainant's right to be properly represented in the processing of a grievance through a contractual grievance procedure. The matter was docketed as Case Number 4389-U-82-703. The complaints were assigned to Rex L. Lacy, Examiner, and the cases were consolidated for further action. A notice of hearing was issued on May 25, 1983, setting hearing dates for July 19 and 20, 1983, and establishing June 2, 1983, as the date for filing answers to the unfair labor practice complaints.

The union failed to answer in a timely fashion. Complainant filed a motion for summary judgment on June 9, 1983. An exchange of correspondence ensued. The cases were both rescheduled for hearing for August 15, 16, and 17, 1983. A pre-hearing conference was scheduled for August 8, 1983. The union appeared at the pre-hearing conference, but again failed to answer the allegations in the unfair labor practice complaint filed against it. At the outset of the hearing on August 15, 1983, the two unfair labor practices were separated for further proceedings.

Hearing in Case Number 4386-U-82-701 was conducted on August 15, 16, and 17, 1983, and October 24, 1983. The parties were instructed to file simultaneous post-hearing briefs on December 21, 1983. No arrangements were established for reply or rebuttal briefs. Both parties filed post-hearing briefs as scheduled by the examiner. The complainant filed several unsolicited rebuttal statements after the established briefing date. The unsolicited statements have not been considered in this decision.

#### BACKGROUND

Public Health Hospital Preservation and Developmental Authority, d/b/a Seattle Public Health Hospital, Seattle, Washington, hereinafter "the authority" is a public entity chartered by the City of Seattle. Seattle Public Health Hospital has a governing council composed of citizens of the community. It provides medical care to patients in the greater Seattle area. The hospital was formerly operated as the United States Public Health Service Hospital, Seattle, Washington. The federal government ceased to operate the hospital on November 24, 1981. The authority commenced operating the hospital simultaneously with the end of federal government involvement with the facility. Dr. Richard Tompkins is director of the hospital.

American Federation of Government Employees, Local 1170 (AFGE), represented employees of the U.S. Public Health Service Hospital, Seattle, Washington, from 1968 until its demise as a federal facility. Upon the commencement of operation of the hospital by the authority, AFGE, Local 1170 filed a petition with the Public Employment Relations Commission (PERC) raising a question concerning representation for certain employees of Seattle Public Health Hospital. The union's petition sought representation rights for the same bargaining unit it represented while the hospital was a federal facility. On April 8, 1982, PERC conducted a secret ballot representation election in an appropriate bargaining unit described as:

INCLUDED: All professional and non-professional employees employed by the employer.

EXCLUDED: Management officials, supervisory employees, employees engaged in personnel work in other than a purely clerical capacity, and all employees of any independent group practice that may contract with the employer.

AFGE was certified as the exclusive bargaining representative for the bargaining unit on April 16, 1982, Public Health Hospital Preservation and Developmental Authority, Decision 1435 (PECB, 1982). Beth Koster was president of AFGE, Local 1170 at the commencement of this proceeding. Koster resigned during the course of the proceedings. She was replaced by Hadley Butcher.

AFGE, Local 1170 and the U. S. Public Health Service Hospital had entered into a series of collective bargaining agreements between 1968 and 1981. The agreement in effect at the time of the transition from federal ownership was observed until a new agreement could be reached between the new employer and the union. AFGE and the authority ratified and implemented their first collective bargaining agreement on March 25, 1983. The contract was effective from March 25, 1983 until March 25, 1986.

On June 8, 1981, Kenneth G. Sullivan was hired as a file clerk. The file unit is responsible for maintaining medical records used in treating the hospital's clientele. The file unit has about 13 employees and operates 24 hours daily, seven days per week. Sullivan worked in that capacity until March 28, 1983. Sullivan was initially supervised by Darcy Dolecal.

Between January, 1982 and April, 1982, Sullivan actively campaigned for the office of president of Local 1170. Sullivan was handily defeated by Koster in the election in April, 1982.

On July 26, 1982, Patricia Hayes was hired as file unit supervisor. In mid-August of 1982, Hayes implemented new work rules for sick leave, emergency leave and annual leave. Specifically, she implemented a two-week notification requirement for annual leave and scheduled medical and dental appointments. Any vacation or appointments previously scheduled were allowed to stand. Shortly thereafter, Sullivan requested five days annual leave commencing August 23, 1982. Hayes denied Sullivan's leave request because another employee already had leave scheduled that week, and because Sullivan had not given Hayes two weeks notification of his desire to use annual leave.

On August 23, 1982, Sullivan notified Hayes, by telephone, that he was ill. Sullivan also missed the following two days due to the same condition. On the third day of Sullivan's absence, Hayes asked Sullivan if he intended to provide a medical certificate for his absences on April 23, 24, and 25, 1982. Sullivan responded that he believed his medical services provider, the Veterans Administration Hospital, would provide a medical certificate. Sullivan did not provide Hayes with a medical certificate when he returned to work on August 26, 1982. On August 26, 1982, Hayes directed Sullivan to provide a medical certificate for his absences on the preceding three days. Hayes believed Sullivan was using sick leave because she had denied his annual leave request for the same time period. Sullivan was allowed 48 hours to obtain the medical certificate.

On Friday, August 27, 1982, Sullivan visited the V.A. Hospital on his lunch hour. Sullivan returned to work 2½ hours late. Hayes, reconsidering her

instructions to Sullivan earlier in the week, decided she had improperly handled the medical certificate episode. She informed Sullivan she would not require a medical certificate for August 23, 24, and 25, 1982, but that he would be marked absent without leave (AWOL) for the 2½ hours he was late returning to work from his lunch hour. Sullivan's pay was docked 2½ hours for the AWOL incident.

Sullivan filed a grievance seeking to overturn the pay reduction for the 2½ hours he was marked AWOL. Sullivan represented himself during the processing of the grievance. The grievance was denied at the highest step of the grievance procedure. Thereafter, Sullivan initiated a lawsuit on the matter in Superior Court.

On November 18, 1982, Hayes conducted a departmental meeting for file room personnel. The purpose of the meeting was to inform employees of the file unit of the department's responsibilities, policy changes affecting employees, supervisors' responsibilities, and proposed enforcement of hospital policies and departmental rules. One of the departmental rule changes proposed by Hayes at that time involved a new practice of scheduling all rest breaks during each shift. Shortly after the meeting, Reid Eaton, shop steward, voiced objections to the change in rest break practice. On December 1, 1982, Hayes met with Martin Ritter, labor relations specialist, and Eaton to discuss the union's objections to the change in the rest break practice, and to clarify employees' questions arising from the November 18, 1982 meeting. As a result of that meeting, Hayes rescinded the rule change for rest periods.

Early in January, 1983, Hayes commenced a program to obtain an upgrade in pay and classification for file unit employees. Hayes' efforts resulted in four positions being approved for upgrade in pay and classification. In accordance with established hospital procedure, the new job openings were advertised. Hayes informed employees to apply for the positions they desired. Initially, Sullivan objected to applying for the new positions. Eventually, Sullivan applied for three of the four openings. Hayes interviewed all the employees for the positions for which they applied.

In January, 1983, Hayes warned Sullivan against excessive use of the department's telephone for personal business. The file room has only one telephone line. All employees had been restricted to one personal call daily. Emergency calls were also allowed. Hayes gave similar warnings to other employees.

On February 25, 1983, Hayes reprimanded Sullivan, in writing, for conducting union business during work hours and making excessive use of the telephone for personal business. The reprimand reads:

As I indicated to you during our conversation on February 17, 1983, I have decided to reprimand you for your violations of the policy restricting the conduct of personal and/or internal union business during work-time. Specifically, you engaged in five (5) personal telephone conversations during work-time in my presence on February 16, 1983.

On November 18, 1982, I discussed the file room policy with you and your fellow employees. I then followed-up with a written policy statement which was distributed to file room workers in the first week of December, 1982. Among other issues, the policy clearly restricts work-time personal telephone calls to one per day of short duration, and prohibits the conduct of internal union matters during work-time. The policy does not restrict any such activity during non-work time such as breaks and meals.

I orally admonished you on January 7, 1983, for violating the policy. This did not correct your behavior; in fact, I have noted eleven (11) separate instances of your violation of this policy. This behavior will not be tolerated further.

I am issuing this Letter of Reprimand to you in the hope you will correct your behavior and adhere to the policy of confining your non-work activities to non-work time. Further violations may result in more severe discipline.

A copy of this letter will be placed in your personnel folder for a period of one (1) year from the date of receipt. You have one week from the date of receipt to request reconsideration of this action. Such request, if any, should be made to Susan Helbig, Chief, Health Data Services. If the action is upheld, you have the right to initiate a formal grievance in accordance with Article XIX of the Collective Bargaining Agreement. If you have any questions, please call Rus Ritter, Employee/Labor Relations Officer, at extension 4111.

On Friday, March 11, 1983, Hayes delivered letters to each employee who had applied for a position upgrade, notifying them of their selection, or non-selection, for a position. Sullivan did not receive a promotion. After receiving that notice, Sullivan reported to the hospital's walk-in clinic. Sullivan was sent home with possible flu symptoms. On his way home from work, Sullivan delivered some communications to the hospital's attorney, at her office in downtown Seattle, some distance from the hospital.

On March 14, 1983, Sullivan did not report for work. He testified that he was ill from the same malady he had when he was sent home on the preceding Friday.

On March 15, 1983, Sullivan was still unable to return to work. Hayes informed Sullivan by telephone that she required a medical certificate for his absences of March 13 and 14, 1983.

On March 16, 1983, Sullivan reported that he was unable to return to work due to a new medical affliction, a paper cut on his finger. Hayes informed Sullivan, by telephone, that she required a medical certificate for the new medical problem. Additionally, Hayes directed Sullivan to report to work on light-duty status.

Sullivan did not report to work March 17, 1983. On March 18, 1983, Sullivan notified Hayes he was unable to report to work due to his finger injury, and reactions to medicine prescribed by the V.A. Hayes reiterated that Sullivan was required to have a medical certificate attesting to his incapacitation to work on the dates Sullivan was absent.

On March 21, 1983, Sullivan presented Hayes with a progress report on his finger injury. The progress report was all he was able to obtain from the V.A. hospital. He did not present any medical certificate for March 14 or 15, 1983. Additionally, Sullivan did not have a medical certificate for March 18, 1983 regarding the finger injury. Hayes marked Sullivan AWOL on March 14, 15, and 18, 1983, and had his pay withheld for those three days.

On March 21, 1983, Hayes, Sullivan, and Reid Eaton, shop steward, met with Martin Ritter regarding the March, 1983 AWOL incident. During the meeting, Hayes informed Sullivan she was taking disciplinary action for the three AWOL days, and that she was going to follow up that action with even more severe disciplinary action. Hayes mentioned that she was considering suspension as the form of more severe discipline.

Sullivan had filed several legal actions in the courts, and one of the actions was scheduled for the morning of March 25, 1983. On March 24, 1983, Sullivan requested that he be allowed to attend court. Hayes initially denied Sullivan's request. After consulting Ritter and her supervisors, Hayes permitted Sullivan to use annual leave for the time he needed to attend court. Hayes instructed Sullivan to return to work after he was finished at superior court, or by noon, whichever applied. On March 25, 1983, Sullivan attended the court hearing. Sullivan's legal action was rejected by the court. Sullivan did not return to work after the conclusion of the court proceedings.

On March 28, 1983, Sullivan called Hayes to report that he was ill. During the conversation, Hayes informed Sullivan that he was terminated because he did not report to work on March 25, 1983 upon the conclusion of the court hearing.

At the pre-hearing conference held on August 8, 1983, AFGE, Local 1170 offered to arbitrate Sullivan's discharge. The employer also agreed to arbitrate the discharge, and, additionally to waive the time limits of the grievance procedure in order to facilitate the processing of the grievance. Sullivan refused the union's offer to arbitrate his discharge.

POSITIONS OF THE PARTIES

The complainant contends that the respondent has discriminately enforced its medical certification requirements in reprisal for the complainant's exercise of union activity rights protected under RCW 41.56; has discriminately and deliberately enforced, changed, and implemented its rules of the workplace to interfere with the complainant's exercise of protected rights under RCW 41.56 and in reprisal for filing charges with the Commission; has denied the complainant an up-grade in classification and pay in reprisal for the complainant's exercise of protected rights under RCW 41.56; has discriminatorily discharged the complainant in reprisal for exercising protected rights under RCW 41.56; and has acted in recognition of union hostility and misconduct toward the complainant by colluding with the union in taking discriminatory disciplinary action against the complainant and refusing to process his grievances, in violation of RCW 41.56.

The respondent contends that it has not enforced its sick leave policy more strictly or discriminatorily against the complainant; has not discriminatorily enforced, changed, implemented or more strictly enforced its rules against the complainant; has not denied the complainant an upgrade in pay and classification in reprisal for his union activities; and has not discriminatorily discharged the complainant in reprisal for his union activities; and has not taken any actions in regard to the complainant which would deprive the complainant of his rights protected by RCW 41.56.

DISCUSSION

The complainant filed a plethora of unfair labor practice allegations against the employer and Local 1170. The complaints were reviewed by the Executive Director pursuant to WAC 391-45-110. The numerous statements, allegations, and comments in the original complaint were reduced by the Executive Director to four issues for hearing and determination by the examiner. Those issues are:

1. Whether the employer has discriminatorily enforced its medical certification for absence requirements on complainant Sullivan in reprisal for his exercise of union activity rights protected by Chapter 41.56 RCW?
2. Whether the employer has discriminatorily enforced, or has changed, implemented or more strictly enforced, rules to interfere with complainant Sullivan's exercise of rights protected by Chapter 41.56 RCW or in reprisal for his filing of charges with the Public Employment Relations Commission under Chapter 41.56 RCW?
3. Whether the employer has denied complainant Sullivan an upgrade in classification and pay in reprisal for his exercise of rights protected by Chapter 41.56 RCW?

4. Whether the employer discharged complainant Sullivan in reprisal for his exercise of rights protected by Chapter 41.56 RCW?

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, \_\_\_ US \_\_\_, 113 LRRM 2857 (1983) and has been adopted by the Public Employment Relations Commission in City of Olympia, Decision No. 1208-A (PECB, 1981), and in Valley General Hospital, Decision No. 1195-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. The Court stated:

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).

#### Issue 1.

Whether the employer has discriminatorily enforced its medical certification for absence requirements on complainant Sullivan in reprisal for his exercise of union activity rights protected by Chapter 41.56 RCW?

The sick leave policy in effect while the hospital was operated as a federal government facility read as follows:

#### Section 2. Sick Leave

- a. Employees shall earn Sick Leave in accordance with applicable statutes and regulations. Sick Leave shall be charged in increments of 30 minutes.
- b. When appointments are made in advance for medical, dental, or optical examination, requests for Sick Leave shall be made no less than two weeks in advance or at the time the appointment is made.
- c. Advance Sick Leave. An employee may request that Sick Leave be advanced to him when he has insufficient Sick Leave to his credit to cover a period of illness or injury by submitting SF-71 through his supervisor to the Director. Employees must meet the following provisions before the Director will consider his request:
  1. Medical Certificate - the request from the employee must be supported by a medical certificate on Standard Form 71 or a medical statement from the attending physician which should include the nature of the disability or illness and specifically state that the employee is physically incapacitated for the performance of his duty, and the recommended period of absence.
  2. Recommendation - the supervisor who usually approves Annual or Sick Leave should have recommended approval of the advance.
  3. Time Requirement - the request must relate to absence of five (5) or more consecutive workdays because of sickness unless a shorter period is recommended by the supervisor. Total indebtedness for advance of Sick Leave may not exceed thirty (30) days at any time.
  4. Prospect for Continued Employment - the employee must express his intention to return to duty.
- d. The employer shall not post individual Sick Leave records.
- e. The Employer may assign employees to useful light duty work when such light duty work exists for periods of less than ninety (90) days to help reduce the loss of accumulated Sick Leave.

- f. The employer will make the employee aware of his/her rights to have Sick Leave reinstated if a claim for work-related injury or illness is approved for that period.
- g. Sick Leave absences in excess of three workdays, or for a lesser period when considered necessary by the supervisor, will be supported by a medical certificate. The medical certificate will be signed by the attending physician, attesting to the incapacitation from duty for the period of absence and be presented to the supervisor within 48 hours of the employee's return to duty. When the supervisor requires that an employee furnish a medical certificate for each absence for which Sick Leave is used, such a requirement must be made in advance and in writing.
- h. No employee may be required to use medical services of the hospital.
- i. An employee requesting emergency Sick Leave will personally, if possible, request the leave from his/her supervisor or designee within the first hour of their scheduled reporting time for duty. An employee who is assigned to a tour of duty which requires rotation or is in an organization with coverage in excess of eight (8) hours per day or is in a direct patient care area will request, whenever possible, the leave at least one (1) hour prior to their scheduled reporting time for duty.

After the transition from the federal government to the current employer, Local 1170 and the Seattle Public Health Hospital negotiated and adopted a new sick leave policy which reads:

#### SICK LEAVE

Section 1. Employees shall earn sick leave credits at the rate of 8 hours per month (pro rated for part-time employees), exclusive of overtime premium and standby pay, with no limit as to maximum accumulation.

Section 2. Employees in departments with twenty-four (24) hour coverage shall be required to notify the Employer at least three (3) hours in advance of the commencement of the employee's scheduled shift if unable to report to work. In areas of eight (8) hour (day) coverage the employee will be required to notify the Employer as soon as possible (normally the first hour). Failure to do so may result in loss of paid sick leave for that day.

Section 3. Sick leave absences in excess of three working days, or for a lesser period when the supervisor has reason to suspect abuse, must be supported by a medical certificate. This requirement may be waived on a case-by-case basis by the supervisor when the employee's illness is known to the supervisor. The medical certificate will be signed by the attending physician attesting to the incapacitation from duty for the period of absence and be presented to the supervisor upon the employee's return to work. When the supervisor requires that an employee furnish a medical certificate for each absence for which sick leave is used, such a requirement must be made in advance and in writing. Continued abuse of sick leave shall be grounds for discharge.

Section 4. Sick leave is not payable under the following conditions: when receiving Worker's Compensation, during vacation, on a normally scheduled day off or holiday.

Section 5. Employees will not be allowed to accumulate sick leave while on leave of absence. However, they will retain all sick leave accumulated up to the time they go on leave.

Section 3 of the new sick leave policy contains the language important to this issue. It sets forth the notification and medical certificate requirements for absence in excess of three days, or when a supervisor suspects abuse of sick leave. The policy authorizes any supervisor to require a medical certificate if they deem one necessary.

Sullivan insists that, because of his union activities, Hayes more strictly enforced the medical certificate requirement in his situations than she did for other departmental employees. The record in this matter does not bear out Sullivan's contentions, imagined or real. All the witnesses in this case, including those employees and supervisors called to testify by the complainant, and Sullivan's own testimony, presented unrefuted testimony that Hayes required any employee absent from work on sick leave status for three days or more to obtain a medical certificate attesting to the employee's inability to work. Hayes routinely marked employees who were unable to present a medical certificate AWOL. When Hayes was absent due to illness, she left the medical certificate matter up to Dennis Waldow, a lead worker who was in charge during her illness. The record clearly establishes that Hayes was convinced that the complainant was abusing his sick leave privileges. Sullivan's illnesses were often in response to negative decisions regarding departmental events (i.e. the promotion issue) or adverse court decisions.

Based upon the record, the examiner concludes the employer has not discriminated against the complainant in retaliation for his union activities by its enforcement of its medical certificate requirement.

#### Issue 2.

Whether the employer has discriminatorily enforced, or has changed, implemented or more strictly enforced, rules to interfere with complainant Sullivan's exercise of rights for his filing of charges with the Public Employment Relations Commission under Chapter 41.56 RCW?

The file room unit was supervised by Darcy Dolecal when the complainant was hired in 1981. Dolecal, who was characterized by all the witnesses to be

lenient regarding hospital rules, was replaced by Hayes. Hayes, a much stricter supervisor, met with file room employees to explain how she intended to apply and enforce departmental and hospital rules for sick leave, vacations, emergencies, telephone use, and personal discussions on working time. Hayes specifically identified discussing internal union business, and making personal telephone calls on the department's telephones as examples of topics she would not allow during working hours. Hayes told employees they could conduct internal union business, personal business, or make any telephone calls on the public phone during breaks, lunch periods, or before or after work. Unrefuted testimony clearly establishes that Hayes was consistent in enforcing the set of rules and practices presented to, and discussed by, employees at the November, 1982 meeting. She reprimanded several employees for excessive telephone usage, discussing internal union business, and excessive shop talk. Sullivan resented the strict enforcement of departmental rules. Witnesses at the hearing presented unrefuted testimony that Sullivan, more than any other employee, violated departmental rules and regulations. In February, 1983, Sullivan received a written reprimand for discussing union business on work time.

During the approximately 21 months Sullivan was employed, he filed numerous grievances, court cases, and these unfair labor practice allegations. The record contains no evidence that the employer refused to process Sullivan's grievances. There is no evidence that the employer did anything to discourage the litigation of the unfair labor practice cases before PERC. In fact, Sullivan was permitted to pursue his grievances during working hours, and was given time off to attend court appearances. The employer's management witnesses testified that they did not feel threatened by Sullivan's processing grievances (he won one grievance), his court cases, or unfair labor practice allegations. Hayes told employees to challenge rules, practices, or decisions if they believed their rights had been violated. The record, as a whole, fails to substantiate Sullivan's claim that the employer retaliated against him for his union activities.

### Issue 3.

Whether the employer has denied complainant Sullivan an upgrade in classification and pay in reprisal for his exercise of rights protected by Chapter 41.56 RCW?

Upgrades in classification and pay for four of the nine employees in the file unit were a direct result of Hayes' efforts to secure better pay for file room employees. Shortly after she was hired, Hayes succeeded where other supervisors had failed in obtaining pay increases for her employees. She followed established hospital procedures in obtaining job audits, and authorization to hire for four new classifications. Sullivan's initial reaction was negative. He did not believe employees should have to apply for

the newly created positions. Eventually, he was interviewed for three of the four newly created positions. Hayes interviewed all nine employees who applied for the new positions, and selected the three individuals she considered best qualified for CRT operator, clinic clerk, and midnight clerk. She did not select Sullivan.

The record contains unrefuted testimony from departmental employees and supervisors that confirms Hayes selection of the most qualified employee for each position. Hayes credible and unchallenged testimony was that she did not consider any union activities in evaluating employee work performance. Her testimony is supported by her selection of Reid Eaton, shop steward, for the clinic clerk position.

#### Issue 4.

Whether the employer discharged complainant Sullivan in reprisal for his exercise of rights protected by Chapter 41.56 RCW?

Hayes discharged Sullivan for not returning to work upon the conclusion of the court hearing on March 25, 1983. Sullivan had sought approval to attend the proceedings from Hayes, and she specifically instructed Sullivan to return to work upon the completion of the hearing. Sullivan agreed to return to work. After the court's decision was rendered, Sullivan broke his agreement to return to work. On March 28, 1983, Sullivan attempted to use sick leave. Hayes discharged Sullivan at that time for failing to return to work on the preceding Friday.

RCW 41.56 is similar to the National Labor Relations Act. Discharge of an employee because of an employee's membership in, or activities on behalf of, a labor organization violates either act. Since only discriminatory conduct which is motivated by union animus violates Section 8(a)(3) of the NLRB rulings indicate that establishing the employer's unlawful motivation is a precondition to finding a violation of the applicable statute. Retail Clerks Local 770, 208 NLRB 256 (1974). The keystone of proving a violation is determination of an unlawful motive. Hambre Hombre Enterprises, Inc. v. NLRB, 581 F2d 204 (CA 9, 1978). The essential element of finding that a discharge violates the Act are "a knowledge on the part of the employer that the employee is engaged in union activity and the actual discharge of the employee for this activity". Wheeling-Pittsburg Steel Corp. v. NLRB, 618 F2d 1009 (CA 3, 1980). In proving unlawful motive it must be shown that the employer possessed union animus. Thus, absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws. Clothing Workers v. NLRB, 564 F2d 434, 440, (CA, DC, 1977). Whatcom County, Decision 1886 (PECB, 1984). In determining whether conduct is

unlawfully motivated, the NLRB and PERC will rely on circumstantial as well as direct evidence to infer discriminatory motivation on the part of the employer. Circumstantial evidence, such as the following, will be considered: (1) a delay in the discharge after knowledge of the offense, Merchants Truck Line, Inc. v. NLRB, 577 F2d 1011 (1978) enforcing 232 NLRB 676 (1977); (2) a departure from established procedures for discharge, Richmond Refining Co., 212 NLRB 16 (1974); (3) failure to tell the employee the reason for the discharge at the time of discharge, Forest Park Ambulance Serv., 206 NLRB 550 (1973); (4) change in position in explaining the reason for discharge, Coca-cola Bottling Co., 232 NLRB 794 (1977); and (5) the timing of the discharge, in relation to when the employer gains knowledge of the union activity, Marx-Haas Clothing Co., 211 NLRB 350 (1974).

Section 8(a)(4) of the NLRA and RCW 41.56.140(3) make it unlawful to discharge or otherwise discriminate against an employee because he/she has filed charges or given testimony under the Act. B/M Excavating, Inc., 155 NLRB 1152 (1965).<sup>1/</sup> The courts, including the Supreme Court, and the NLRB will hold that an employer violates the Act for discharging an employee who makes sworn written statements to examiners investigating unfair labor practice charges, NLRB v. Scrivener, 409 US 117 (1972) and First Nat'l Bank and Trust Co., 209 NLRB 95 (1974) where the employee is only suspected of filing unfair labor practice charges, actually filing charges, or for testifying before the applicable agency. A-1 Janitorial Serv. Co., 222 NLRB 664 (1976). Logically, the same protections would devolve to employees for their efforts in the courts to enforce rights secured by the collective bargaining statute or a collective bargaining agreement.

Sullivan's appearance before the Superior Court to seek an injunction to prevent the loss of pay in March, 1983, was known to the employer. Hayes permitted Sullivan time off to be present at the hearing. Up to that point, Sullivan was engaged in protected activities. Sullivan exceeded his protected activities rights when he failed to return to work following an unfavorable ruling by the Superior Court. He consciously absented himself without permission by his supervisor. The examiner, based upon the entire record in this matter, cannot determine that Sullivan's discharge was motivated by anti-union animus. The employer processed the complainant's grievances, law suits, and unfair labor practice allegations without resorting to retaliation against Sullivan, even if the employer believed the allegations in any forum to be frivolous and without merit. Sullivan's internal union business and union activities were not instrumental in his discharge. Sullivan's discharge resulted from his failure to return to work

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<sup>1/</sup> The proscription does not apply to filing of charges or testifying under legislation other than the NLRA. B/M Excavating, Inc., id.

after the conclusion of a superior court appearance, not because he filed the action against the employer. Sullivan's absence without leave is a contractual matter, and, as such, is not within the jurisdiction of the Commission. City of Walla Walla, Decision No. 104 (PECB, 1976).

#### FINDINGS OF FACT

1. The Public Health Hospital Preservation and Developmental Authority, d/b/a Seattle Public Health Hospital, is a public authority chartered by the City of Seattle, Washington, pursuant to Seattle Municipal Code 3.110 and RCW 35.21.725 through 35.21.755, and is a public employer within the meaning of RCW 41.56.030(1).
2. American Federation of Government Employees, Local 1170, is a bargaining representative within the meaning of RCW 41.56.030(3). The union represents employees of the employer in an appropriate bargaining unit defined as:

INCLUDED: All professional and non-professional employees employed by the employer.

EXCLUDED: Management officials, supervisory employees, employees engaged in personnel work in other than a purely clerical capacity, and all employees of any independent group practice that may contract with the employer.

3. American Federation of Government Employees, Local 1170, and the United State Public Health Service Hospital were parties to a series of collective bargaining agreements from 1968 through 1982.
4. The Public Health Hospital Preservation and Developmental Authority, d/b/a Seattle Public Health Hospital, is the successor to the United States Public Health Service Hospital. Seattle Public Health Hospital and American Federation of government Employees, Local 1170, are parties to a collective bargaining agreement effective from March 25, 1983 to March 25, 1986. The bargaining unit covered by the agreement is defined as follows:

#### ARTICLE II

##### RECOGNITION AND UNIT DETERMINATION

Section 1. The employer hereby recognizes that the Union is the exclusive representative of all employees in the Unit as defined in Section 2 below. The Union recognizes its responsibility of representing the interests of all such employees without discrimination and without regard to Union Membership with respect to hours, wages and working conditions, subject to the express limitations set forth elsewhere in this Agreement.

Section 2. The recognized Bargaining Unit includes, and this Agreement is applicable to, all current and future eligible professional and non-professional employees of the Hospital, employed at 1131 14th Avenue South, Seattle, Washington, except for the following:

- (1) any Management official;
- (2) any employee engaged in Personnel work in other than a purely clerical capacity;
- (3) supervisors;
- (4) confidential employees.

The Bargaining Unit was certified by the Public Employee Relations Commission on April 16, 1982, Case No. 3992-E-82-750, Decision No. 1435-PECB.

5. On June 8, 1981, Kenneth G. Sullivan was hired as a file clerk. Sullivan was supervised by Darcy Dolecal until she left her employment in the Summer of 1982.
6. Between January, 1982, and April, 1982, Sullivan sought to be elected president of AFGE, Local 1170. Sullivan was not elected to any office in the union.
7. On June 26, 1982, Patricia Hayes was hired to supervise the file room unit. During the last few days of July, 1982, and early August, 1982, Hayes implemented a stricter enforcement of rules than her predecessor had engaged in.
8. On August 15, 1982, Sullivan requested five days annual leave commencing August 23, 1982. Hayes denied Sullivan's leave request.
9. On August 23, 1982, Sullivan notified Hayes that he was ill. Sullivan was absent the following two days for the same reason. Hayes improperly requested that Sullivan present a medical certificate attesting to his being unable to work. Sullivan was not marked AWOL.
10. On August 27, 1982, Sullivan visited the Veterans Administration Hospital during his lunch hour to obtain a medical certificate for his absences August 23, 24, and 25, 1982. Sullivan was 2½ hours late reporting back to work. Hayes marked Sullivan AWOL for his late return to work. Sullivan grieved the AWOL issue. The grievance was denied at all steps of the grievance procedure. AFGE, Local 1170, did not arbitrate the AWOL grievance. Sullivan appealed the matter to court.
11. On November 18, 1982, Hayes conducted a file room department meeting to notify the employees of their responsibilities to the employer, and to



delineate hospital and departmental rules. Local 1170 objected to a new rest break policy, and Hayes later rescinded the rest break policy.

12. During January, 1983, Hayes requested that all file room employees receive an upgrade in pay and classification. The employer audited the employees work responsibilities and concluded that four positions would be reclassified. Sullivan, along with eight other file room employees, applied for three of the newly created positions. All employees were interviewed for the positions for which they had applied. Sullivan was not selected for promotion. Those promoted were selected for their superior skills.
13. During January, 1983, Hayes verbally reprimanded Sullivan for excessive use of the telephone for personal business. Other employees were similarly reprimanded.
14. On February 25, 1983, Hayes reprimanded Sullivan, in writing, for conducting internal union business during working hours, and for excessive personal use of the telephone.
15. On March 11, 1983, Sullivan, after receiving his notice of non-selection for a promotional position, reported to the hospital walk-in clinic for medical treatment. Sullivan, diagnosed to have flu symptoms, was sent home. On his way home, Sullivan delivered some documents relating to litigation before the King County Superior Court to the attorney for the hospital.
16. On March 14, 1983, Sullivan was unable to return to work due to the same health problem he was sent home for on March 11, 1983.
17. On March 15, 1983, Sullivan did not return to work due to the same illness. Hayes informed Sullivan she required a medical certificate for his absences on March 13 and 14, 1983.
18. On March 16, 1983, Sullivan did not report to work because he had a new health problem. Hayes directed Sullivan to report to work on a light duty status. He did not return to work.
19. On March 18, 1983, Sullivan did not report for work, claiming illness. Hayes reiterated that Sullivan was to provide a medical certificate for the second absence on March 16, 17 and 18, 1983.
20. On March 21, 1983, Sullivan returned to work without the medical certificates requested by Hayes. Sullivan presented a copy of the progress report furnished by the V.A. hospital. Hayes accepted the progress report for March 16 and 17, 1983. She reported Sullivan AWOL for March 14, 15, and 18, 1983. Sullivan's pay was withheld for the three days.

21. On March 24, 1983, Sullivan requested annual leave to attend King County Superior Court to process his litigation against the employer. After consulting with her superiors, Hayes gave him the time to attend the court session provided he return to work afterwards.
22. On March 25, 1983, Sullivan attended the court proceedings. He did not return to work after the hearing was concluded.
23. On March 28, 1983, Sullivan telephone Hayes to inform her he was ill. During their conversation, Hayes informed Sullivan he was terminated for failing to return to work after the court proceedings on March 25, 1983.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter pursuant to Chapter 41.56 RCW.
2. The complainant has not met its burden of proof that the employer has discriminatorily enforced its medical certification for absence requirements on complainant, Kenneth G. Sullivan, in reprisal for his exercise of union activity rights protected by Chapter 41.56 RCW.
3. The complainant has not met its burden of proof that the employer has discriminatorily enforced, or has changed, implemented or more strictly enforced, rules to interfere with complainant, Kenneth G. Sullivan, in his exercise of rights protected by Chapter 41.56 RCW or in reprisal for his filing of charges with the Public Employment Relations Commission under Chapter 41.56 RCW.
4. The complainant has not met its burden of proof that the employer denied complainant Kenneth G. Sullivan an upgrade in classification and pay in reprisal for his exercise of rights protected by Chapter 41.56 RCW.
5. The complainant has not met its burden of proof that the employer discharged complainant, Kenneth G. Sullivan, in reprisal for his exercise of rights protected by Chapter 41.56 RCW.

ORDERED

The complaint charging unfair labor practices against Public Health Hospital Preservation and Developmental Authority, d/b/a Seattle Public Health Hospital, is dismissed.

DATED at Olympia, Washington, this 11th day of May, 1984.

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.