STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CHAUFFEURS, TEAMSTERS AND HELPERS UNION, LOCAL 252, Complainant,	)	CASE NO. 5675-U-85-1042
vs.	)	DECISION 2424-A - PECB
LEWIS COUNTY, Respondent.	)	DECISION OF COMMISSION

Griffin and Enslow, by James F. Imperiale, Attorney at Law, appeared on behalf of the complainant.

Harold Cooper, Prosecuting Attorney, by Eugene Butler, Deputy Prosecuting Attorney, appeared on behalf of the respondent.

Chauffeurs, Teamsters, and Helpers Union, Local 252, appeals from a decision of the Executive Director concluding that the employer, Lewis County, did not discriminatorily discharge two employees whom the union was seeking to represent.

This case has had an unusual procedural history. The examiner who presided over four days of testimony resigned from Commission employment before issuing a decision. She filed, however, a "Report of Examiner on Observations of Demeanor and Credibility" concerning the witnesses who testified at the hearing. The Executive Director substituted as examiner and, after reviewing the relatively lengthy record as well as the briefs and arguments of counsel, issued a decision which included a recitation of the circumstances leading to the substitution of

examiners. Thereafter, it was discovered that the credibility report issued by the original examiner apparently was not served on the parties.

Two of the union's assignments of error pertain to the substitution of examiners and the credibility report issued by the original examiner. The remaining assignments of error pertain to various findings and conclusions made by the Executive Director. We will discuss the procedural issues first.

WAC 391-45-130 states, inter alia, that:

> Upon notice to all parties, an examiner may be substituted for the examiner previously presiding.

The union complains that it was not properly notified, and further asserts that the intent of this regulation is not to allow an examiner who did not attend the hearing to issue the initial decision.

The union does not claim that it has been prejudiced by the absence of advance notice of the substitution of examiners, and we therefore conclude that any error which has occurred was harmless. Further, we disagree with the union's interpretation of the cited rule. The Administrative Procedures Act, at RCW 34.04.110, contemplates situations where the agency official(s) who is(are) to render a decision may have "read", but not "heard", the testimony of the witnesses at hearing. The Commission makes routine use of that procedure in its processing of representation cases under Chapter 391-25 WAC (both as to decisions issued by the Commission itself on election objections and as to decisions issued by the Executive Director from records made by other agency staff members), as well as in its processing of unit clarification cases under Chapter 391-35 WAC (where authority has been delegated to the Executive Director

to render initial decisions on cases heard by other members of the agency staff). It has also occasionally been necessary in the past for the Commission, having familiarized itself with the record, to issue a decision on an unfair labor practice case where the examiner who held the hearing had become unavailable to do so. E.g., City of Tacoma, Decision 322 (PECB, 1978). Thus, we do not believe that parties in general, or the parties in this case, are inherently prejudiced in any respect by the use of the statutorily permitted "read the evidence" procedure.[1]

There is no Commission rule pertaining to reports of examiners on the demeanor and credibility of witnesses. In the alternative to the "read the evidence" option discussed above, RCW 34.04.110 contemplates issuance of an "initial" decision by the person who conducts the hearing. The normal procedure under Chapter 391-45 WAC calls for the examiner to issue the initial decision in a case. In this case, however, the resignation of the original examiner occurred between the close of the hearing and the due date for the briefs of the parties. In the absence of sufficient time to render a full initial decision, an effort was made to preserve the one element that can be lost from the record by exclusive use of the "read the evidence" alternative of RCW 34.04.110. The procedure which was followed (i.e., issuance of credibility findings) makes sense to preserve the best possible record when the examiner is about to leave the agency without rendering a full decision. We are not persuaded that the procedure was inherently prejudicial.

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1 If the RCW 34.04.110 "read the evidence" procedure could not be utilized, there would be either no mechanism for the substitution of examiners, or a need to send a "back-up" examiner to each hearing. The first option would be intolerable; the second would squander the Commission's resources.

The Commission's usual practices, as well as WAC 391-08-110, call for service of a copy of any document filed with the agency. The omission of service of the original examiner's "Report of Examiner on Observations of Demeanor and Credibility" was an error, although inadvertent. The Commission and the Executive Director were unaware that the report had not been sent to the parties until the union pointed this out in connection with its petition for review. Although Local 252 was not immediately notified of the report, it was eventually notified and was provided a copy. It has had an opportunity to raise objections thereto during these review proceedings, and it has done so. Any error committed was harmless.

Local 252 challenges the report as being too vague and unspecific to be meaningful. We disagree. Examiner Schreurs was quite specific regarding aspects of the credibility and demeanor of certain of the witnesses. As to the remaining witnesses, she concluded that they were credible. Local 252 has not indicated how it would disagree, in any respect, with the reported observations as to credibility and demeanor. Also, the report should be kept in perspective. It is but one aspect of the entire record before us, and the report states at the outset that much of the testimony may be reconciled without relying on findings pertaining to the credibility of witnesses.

We turn now to the merits of the case. We note that neither of the parties disputes that the test articulated by the National Labor Relations Board in Wright Lines, Inc., 251 NLRB 150 (1980) is the proper test in discriminatory discharge cases. City of Olympia, Decision 1208-A (PECB, 1981). Accord, Public Employees v. Community College, 31 Wn App. 203, 642 P.2d 1248 (1982). Thus, the union must make a prima facie case raising an inference that protected union activity was a motivating factor with respect to an employee's discharge. Once a prima facie case has been made, the burden shifts to the employer to

demonstrate that the discipline or discharge would have taken place even in the absence of protected union activity.

The Executive Director found that Local 252 made a prima facie showing of improper motivation on the part of Lewis County. That finding is not challenged by the parties. Therefore, we will not consider that issue further.[2]

The Executive Director concluded, however, that the employer met its burden of proving that the discharges at issue here would have occurred in the absence of protected conduct. This conclusion, and its supporting findings, are vigorously challenged by Local 252.

The Executive Director's challenged findings relate to the job performance of the two dischargees, Mark Pickrell and Duane Beaver. The performance history of these individuals, as well as the context in which events occurred, are set out in considerable detail in the Executive Director's decision. In spite of the union's assignments of error on these points, we find the Executive Director's decision to be factually accurate on all points significant to the decision. Therefore, we will only briefly summarize the relevant facts pertaining to Mark Pickrell's and Duane Beaver's job performance.

Mark Pickrell was hired by Lewis County in July, 1984, as a dispatcher in the county-wide dispatch center. He was placed on one year's probation. Early in his employment, he received instructions to improve his typing and spelling skills, and a few warnings were given to him, but no disciplinary action.

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2 Local 252 assigns error to the Executive Director's finding that he could not infer anti-union animus from past labor disputes on the part of two of Lewis County's management employees. Since the Executive Director found anti-union animus on other grounds, we will not consider this assignment of error.

Duane Beaver was hired in April, 1983, also for work in the dispatch center. At some point in 1983, he received a letter from his supervisors outlining certain problems with his work as a dispatcher. The record shows that Beaver experienced difficulty due to lack of sleep because of a second job he had taken on, that of a reserve police officer in Napavine, Washington. Beaver was placed on six month's probationary status in September, 1984.

Certain of the agencies using the dispatch center's services, and particularly the Sheriff's department, voiced increasing concern and dissatisfaction with the quality of service received from the dispatch center. The complaints focused particularly on Pickrell and Beaver. In fact, it appears the sheriff's deputies were considering filing grievances through their union concerning the department's inability to guarantee effective dispatching, which the deputies believed was a violation of the safety provisions of their collective bargaining agreement. It appears that their concerns were legitimate. These complaints provoked an inter-agency meeting on January 25, 1985, which resulted in the termination of Pickrell and Beaver. Their termination notices were received in early February, 1985.

As detailed in the Executive Director's decision, except as set forth above, no corrective action and follow-up occurred on performance incidents involving Pickrell and Beaver, although at least two other previously discharged employees were given the benefit of the same. This fact weighs heavily in the union's favor. Also, there was testimony from colleagues of Pickrell and Beaver that any deficiencies in their performance did not warrant the extreme step of discharge.

On the other hand, there was persuasive evidence that the discharges of Pickrell and Beaver occurred because of strong

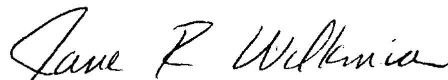
complaints voiced by the sheriff's department and other users, who pressured the department head at the dispatching center to remove Pickrell and Beaver. There is no evidence that the sheriff's deputies were improperly motivated. In fact, the complaining deputies were members of Local 252, the same union to which Pickrell and Beaver belonged.

Although the employer's handling of events leading to the discharges of Pickrell and Beaver may not have been ideal personnel practices, we agree with the Executive Director. Facts showing that the discharges would have occurred, even absent any anti-union sentiment on the part of management, are predominant in this case. While the issue is not an easy one, we find that the weight of the evidence supports this conclusion.

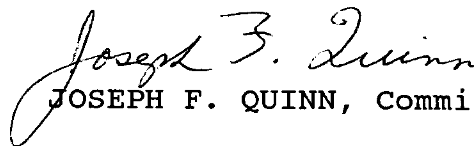
Accordingly, the findings of fact, conclusions of law and order of the Executive Director are affirmed.

ISSUED at Olympia, Washington, this 30th day of September, 1986.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JANE R. WILKINSON, Chairman



JOSEPH F. QUINN, Commissioner

Commissioner Mark C. Endresen did not take part in the consideration or decision of this case.