

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PATRICIA HIGGINS,	)	
	)	
Complainant,	)	CASE 7331-U-88-1511
	)	
vs.	)	DECISION 3178-B - PECB
	)	
KING COUNTY,	)	
	)	
Respondent.	)	ORDER DETERMINING
	)	COMPLIANCE DISPUTE
	)	
	)	

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Hafer, Price, Rinehart and Schwerin, by M. Lee Price, Attorney at Law, appeared for the complainant.

Norm Maleng, Prosecuting Attorney, by Mary E. Roberts, Deputy Prosecuting Attorney, appeared for the respondent.

This case comes before the Commission for determination of a dispute concerning compliance with a remedial order previously issued by this Commission.<sup>1</sup> A hearing on the compliance dispute was conducted by Hearing Officer Walter M. Stuteville on June 18, 1990.

BACKGROUND

Examiner J. Martin Smith issued a decision on April 10, 1989,<sup>2</sup> finding that King County violated RCW 41.56.140(1) when it denied Patricia Higgins reinstatement to employment because of her history of engaging in the protected activity of filing grievances against the employer. As a remedy, the Examiner ordered the employer to hire Higgins in the position of "animal control dispatcher" or a

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<sup>1</sup> King County, Decision 3178-A (PECB, 1989).

<sup>2</sup> King County, Decision 3178 (PECB, 1989).

substantially equivalent position, and to provide her backpay and benefits, at the "animal control dispatcher" rate of pay from April of 1988 to the date of her reinstatement to employment. The Examiner provided for posting of notice and computation of interest, in accordance with Commission practice.

Both parties petitioned for review. The employer contended that the Examiner's findings and conclusion went beyond the scope of the complaint and evidence, and it objected to that portion of the remedial order which awarded Higgins both a position and backpay for a position which, it contended, she had never held. Higgins contended that she should have been reinstated to her previous position of "animal control officer" retroactive to March of 1988, and that the Examiner erred in concluding that she would not have been medically eligible for the position at that time.

The Commission's decision issued on July 21, 1989 affirmed most of the Examiner's decision.<sup>3</sup> In light of both parties' objections to the Examiner having fashioned his remedial order on the "animal control dispatcher" position, the Commission amended the remedial order to focus on an "animal control officer" position. Specifically, we ordered the employer to reinstate Higgins to the position of "animal control officer" or a substantially equivalent position, and to make Higgins whole for the wages and benefits by payment of backpay at the rate of pay of the "animal control officer" position from the date that the position was filled until the date of the unconditional offer of reinstatement. Neither party petitioned for judicial review of the Commission decision.

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We rejected the employer's claim the Examiner had considered matters beyond the scope of the complaint, and we affirmed the Examiner's finding of unlawful retaliation by the employer. Those issues are not before us in this compliance proceeding.

On July 6, 1989, King County filed notice with the Commission of its intention to comply with the order issued by the Commission. Higgins subsequently disputed the sufficiency of the tendered compliance, and a pre-hearing conference was held on April 30, 1990, to establish the issues remaining in dispute. The parties had no disagreement as to the rates from which the wages and benefits should be calculated. The issues identified were:

1. The date when the position of "animal control officer" or a substantially equivalent position became available;
2. The resulting appropriate seniority date; and
3. The computation of "wages and benefits lost".

The hearing held on June 18, 1990 was limited to those issues.

#### FACTS

Shelby Russell-Diaz began performing some of the duties of an "animal control officer" on January 20, 1988, while on "temporary" employment status with King County. Russell-Diaz testified that she did not receive health insurance, paid time off or other benefits while working as a "temporary" employee, and that she did not handle animals. In February, 1988, Russell-Diaz took euthanasia training. She began handling animals as of March, 1988.

On March 2, 1988, the employer requested a list of eligible applicants for an "animal control officer" position. Simultaneously, it began advertising for applications for the position through the circulation of a position description. By April 27, 1988, a list of applicants had been prepared. Patricia Higgins was among those applicants.

On June 30, 1988, a decision had been made concerning which applicant to select. Russell-Diaz was "permanently" assigned to the position on July 6, 1988.

#### POSITIONS OF THE PARTIES

The employer's tender of compliance related to its July 6, 1988 action to "permanently" fill the "animal control officer" position. The employer argued that the position had been only "temporarily" filled prior to that date by Shelby Russell-Diaz, and that her work prior to achieving "permanent" status should be disregarded. Because the temporary position had not been assigned all of the responsibilities of a permanent position, and because temporary employees do not receive benefits, the employer contends the temporary position was not a "substantially equivalent" position. Thus, the employer contends that July 6, 1988 is the date that should be considered as the starting date for computing Higgins' seniority, back wages, and benefits.

Higgins asserted that she applied for the "animal control officer" position, and that hers was one of the 10 names on the employer's "Requisition for Personnel", so that she would have been eligible for the temporary position in March as well as for the permanent position in July. Thus, she asserts that the "substantially equivalent" position should include the time spent by Shelby Russell-Diaz in the temporary position.

#### DISCUSSION

This Commission modified the Examiner's remedial order to the extent that Higgins was to be offered an "animal control officer" position. It was noted that Higgins was available for the "animal

control officer" position in March of 1988, and that such a position was also available in March of 1988.

In contending that there was a substantial difference between the temporary position available in March and the permanent position filled in July, the employer put its focus on the differences between "temporary" and "permanent" status under the county's personnel system. In the employer's view, the fact that the employer utilized the full application procedure to fill the permanent position, the fact that temporary employees are paid at a flat wage rate, and the fact that temporary employees do not receive the same benefits as permanent employees are major distinctions. Those claimed distinctions are not persuasive, however, in assessing when the disputed position was "filled" for the purposes of determining a remedy in a discrimination case. The fact is that the employer had an employee providing "animal control officer" services as early as March. Absent its unlawful discrimination against her when she applied to return from a medical leave, the position could as easily have been filled by Higgins on March 2, 1988. There would then have been no occasion for the employer to go through an extensive recruitment and hiring process that appears to have taken up at least some of the time between March and July.

The same reasoning carries through for determining Higgins' seniority date and backpay entitlements. The employer will not be relieved of the burdens of its discriminatory practices because it took several months to finalize the hiring of Shelby Russell-Diaz for the position that could (and should) have been given to Higgins on March 2, 1988.

#### Attorney Fees for "Compliance" Proceedings

The employer indicated that it was going to comply with the Commission's order. If it had done so in a timely manner, without

raising other issues or disputes, then the backpay and benefits ordered by the Commission would have put Higgins back in the situation she would have enjoyed absent a violation. The employer's resistance to paying Higgins backpay and benefits caused Higgins to incur additional attorney's fees to recoup the backpay and benefits that the Commission found to be rightfully hers. Thus, Higgins is in a worse position than when she started on the "compliance" aspect of this case.

Many of the employer's positions and actions have been frivolous attempts to avoid liability for its discriminatory refusal to hire Higgins. The employer's denial of liability for Higgins' medical bills at an early stage of this compliance proceeding was a purposeful misreading of Commission practice and precedent.<sup>4</sup> Similarly, the employer's denial of backpay to Higgins for the March-July period ignored Commission practice and precedent, as well as of the terms of order specifically giving Higgins backpay to March for the disputed position or a substantially equivalent position. The employer then continued to focus at the compliance hearing on the "vacancy" in the animal control officer position under its personnel rules, disregarding the Commission's unchallenged ruling that the vacancy had been improperly denied to Higgins.

As we noted in Municipality of Metropolitan Seattle (METRO), Decision 2845, (PECB, 1988), the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW confers broad remedial powers on the Commission to rectify and prevent unfair labor practices.<sup>5</sup> The Commission wrote in METRO:

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<sup>4</sup> The employer subsequently admitted at the pre-hearing conference that it was liable for the medical benefits.

<sup>5</sup> RCW 41.56.160 provides inter alia: "The Commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders...."

After careful consideration, we have arrived at the conclusion that our jurisdiction to impose remedies is not constrained by statute or otherwise to only those time-honored and traditional remedies we have used in the past. If an extraordinary situation presents itself, as in this case, calling for extraordinary remedies, we believe that they may be imposed, subject to any express constitutional or statutory limitations on our power.

We have awarded attorney's fees previously where the defense to the unfair labor practice was characterized as frivolous or meritless. Lewis County, Decision 644 (PECB, 1979) aff. 31 Wn.App. 853 (1982), pet. rev. den., 97 Wn.2d 1034 (1982). In this case, we find it appropriate to order the employer to pay Higgins' attorney fees for the compliance portion of these proceedings. Such an order is necessary to effectuate our order that she be made whole for the full amount that she would have received if the employer had promptly complied with the Commission's order.

NOW, THEREFORE, it is

ORDERED

The affirmative actions ordered by the Commission in Decision 3178-A are clarified in the following manner:

1. Patricia Higgins is entitled to reinstatement to employment with King County in the position of "animal control officer" as of March 2, 1988.
2. Patricia Higgins is entitled to seniority credit for the "animal control officer" position retroactive to March 2, 1988.
3. Patricia Higgins is to be made whole for the wages and benefits lost as a result of the discrimination against her,

by payment of backpay at the rate of pay of the "animal control officer" for the period from March 2, 1988 until the date of the unconditional offer of reinstatement made pursuant to the order of the Commission, computed in accordance with WAC 391-45-410.

4. King County shall reimburse Patricia Higgins for the attorney fees and costs she incurred in the compliance portion of these proceedings.

Issued at Olympia, Washington, the 27th day of September, 1990.

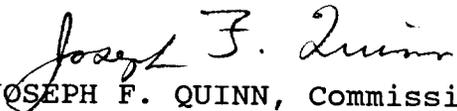
PUBLIC EMPLOYMENT RELATIONS COMMISSION



JANET L. GAUNT, Chairperson



MARK C. ENDRESEN, Commissioner



JOSEPH F. QUINN, Commissioner