STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 17, AFL-CIO,	)	CASE 6663-U-86-1336
Complainant,	)	DECISION 3066-A - PECB
vs.	)	
CITY OF SEATTLE,	)	DECISION OF COMMISSION
Respondent.	)	

Richard D. Eadie, Attorney at Law, appeared on behalf of the complainant.

Douglas N. Jewett, City Attorney, by Rodney S. Eng, Assistant City Attorney, appeared on behalf of the employer.

On December 20, 1988, Examiner Mark S. Downing issued a decision generally favorable to the employer, the City of Seattle, on an unfair labor practices complaint brought by the union, International Federation of Professional and Technical Engineers, Local 17. The union appeals two of the findings made by the Examiner.

INTRODUCTION

The genesis of events complained of by the union was the filing of a grievance and a lawsuit by two Seattle Human Rights Department employees, Debra Hillary and Debbie Gillespie. Both Hillary and Gillespie were investigators in the enforcement division of the Human Rights Department, and both are caucasian. Their concern in

both the grievance and the lawsuit was that the employer had engaged in reverse discrimination when it appointed Robert Matz, a person of Native American ancestry, to a supervisory position in the enforcement division.

The union alleges that, subsequent to the exercise of protected rights (i.e., the filing of the grievance) by Hillary and Gillespie, the employer committed a number of acts which unlawfully interfered with those rights and which discriminated on account of union activity.

In a lengthy and thoughtful decision, the Examiner found that:

1. Insufficient evidence supported the union's allegation that the employer improperly monitored the work phones of Hillary and Gillespie.

2. Acting Enforcement Division Supervisor Alene Anderson searched the desks of Hillary and Gillespie on a number of occasions. Employees could reasonably have believed that Anderson acted with the employer's knowledge and approval. Anderson, however, had a legitimate need to obtain case file data from the desks of Hillary and Gillespie and bargaining unit employees observed her actions and did not question it; therefore her conduct was neither unusual or unreasonable.

3. The union presented insufficient evidence to establish the employer retaliated against Hillary and Gillespie by imposing obstacles to the assignment of cases, answering of questions and approval of work.

4. The union did not prove that the "no-talking" rule imposed by the employer interfered with the employees' protected activities. The employer limited the rule to its legitimate sphere of interest, being work concerns. The employees were free to talk about whatever they chose on their own time.

5. The union met its burden of establishing a prima facie case that the employer's discharge of probationary employee Laura Rasset was motivated by anti-union animus. However, the employer

met its burden of proving that Rasset would have been discharged even in the absence of protected conduct.

6. The employer did not circumvent the union by telling the department employees, at a staff meeting, that a 4/40 work week would not be implemented. The parties' collective bargaining agreement does not permit a 4/40 work week for the bargaining unit.

7. For the same reason, the employer did not engage in unlawful discrimination by refusing to implement a 4/40 schedule.

8. The employer did not violate the duty to disclose information about a new performance evaluation system. It disclosed the information sought by the union when the employer itself had the information.

9. The employer did not unlawfully discriminate against bargaining unit employees by adopting case production performance standards for the enforcement division, but not for the contract compliance division. Case performance standards are relevant to the enforcement division, but not to the contract compliance division.

10. The employer did violate RCW 41.56.140(1) when, in a notification to employees of their rights to appeal performance evaluations, it failed to appraise the employees of their right, set forth in the collective bargaining agreement, to challenge the standards used to measure their performance.

POSITIONS OF THE PARTIES

On appeal, the union challenges the second and the fifth among the Examiner's determinations set forth above, which pertain to the desk searches by Alene Anderson and the discharge of Laura Rasset. Although the union generally does not take issue with the Examiner's legal analysis, it argues that his application of the facts to the law was improper.

The employer argues that the issues raised on appeal are factual, and that the Commission should defer to the Examiner's determinations on those matters.

DISCUSSION

The Desk Searches

Acting Enforcement Division Supervisor Alene Anderson conducted a number searches of Gillespie's and Hillary's desks during the autumn of 1986. Several union witnesses testified that on multiple occasions they observed Ms. Anderson reviewing papers and files, both on the top of and inside of Hillary's and Gillespie's desks. Union witnesses testified that Anderson's conduct was very unusual, and some of them believed it was retaliatory. They testified that a person would occasionally need a case file from someone else's desk and that, if materials were taken while the desk occupant was away, it was customary that a note to the desk occupant be left or a remark made.

Alene Anderson agreed that she had been at both Hillary's and Gillespie's desks on several occasions. While she could not recall most of the specific instances, she stated that she would have been there to retrieve files. She testified that she also occasionally retrieved files from other employees' desks. She testified that she had spent a great deal of time at Gillespie's and Hillary's desks, because she needed information from each case file they had in order to complete a report. She also testified that she was a member of the bargaining unit and "pro-union," and was very disturbed about the charges against her. She testified that she never looked at Gillespie's and Hillary's personal effects.

The union disputes Anderson's claim that she did not search parts of Gillespie's and Hillary's offices where personal effects might

be found. Testimony was presented from witnesses who observed Anderson looking at files on top of and inside the desks. Hillary testified that one search of Gillespie's office lasted almost 30 minutes, and that she kept a written log of Anderson's action while the search took place. She alerted the union steward, and telephoned Gillespie at her home. Gillespie telephoned her office, and Hillary testified that Anderson left Gillespie's office immediately when the telephone rang, and returned only when the telephone stopped ringing.

There was testimony from union witnesses that Anderson's searches were only of the offices of Hillary and Gillespie, and that they ceased after the grievance was settled. Anderson denies this, stating that she often goes into other employees' offices to retrieve case files and obtain information.

Although Anderson's searches were observed by Hillary, by a shop steward and by other bargaining unit members, none of them asked Anderson what she was doing. Nor did any of the employees bring their concerns to the attention of employer officials higher in the management structure. The Examiner found this fact significant, indicating that if their suspicions were aroused, they would have or should have said something. The union, in response, points to testimony that nothing was said because the employees viewed the searches as retaliatory, and feared that any challenge would cause further retaliation.

We agree with the Examiner's analysis that an employer is guilty of an interference violation if the search is retaliatory in intent, or if it reasonably creates the impression with employees that it is conducted in retaliation for their exercise of statutory rights. Thus, if there is no direct showing of improper motive, the question is not what they actually perceived, but: "What did the employees reasonably perceive?" The Examiner found insufficient evidence of a retaliatory intent. There was, however, direct

evidence that the employees actually believed the surveillance was retaliatory. The Examiner evidently found this perception was not reasonable under the circumstances, considering that Anderson had legitimate reasons to look at case files and obtain information from the offices of others, Anderson's own intense desire not to be involved in the dispute, and the failure of the employees to speak up.

Were the facts as clear as the union alleges in its appeal brief, we would reverse. This case, however, presents a very close question. Bearing in mind that the burden of proof remains with the union, it is ultimately a question of credibility, and particularly of the credibility of Alene Anderson. On the one hand, there was testimony from union witnesses upon which one could conclude that Anderson engaged in a retaliatory search. On the other hand, there was testimony from Anderson that she had a legitimate business reason to enter those work areas, and to view or retrieve case files. She testified that she did not single Gillespie and Hillary out. She testified that she was disturbed about being accused of retaliating when she had not. She did not like the divisiveness the department was experiencing, did not want to be involved in any dispute, and was forced to testify. From this conflicting testimony, the Examiner could reasonably conclude that Anderson visited Gillespie's and Hillary's offices for legitimate business reasons, had no retaliatory intent, and had a desire to avoid office politics. In resolving this question of credibility, the Examiner apparently found in her favor. While the distrust of management extant in the department at the time might have led some employees to impute more sinister motives to Anderson, their belief was not reasonable, considering the evidence as a whole.

This is an excellent example of the type of case in which deferral to the Examiner's determination of contested facts and credibility

issues is appropriate. As we stated in Asotin County, Decision 2471-A (PECB, 1987):

> We attach considerable weight to the factual findings and inferences therefrom made by our staff Examiner. They have had the opportunity to personally observe the demeanor of the witnesses. The inflection of the voice, the coloring of the face, and perhaps the sweating of the palms are circumstances that we, as Commission members are barred from perceiving through the opaque screen of a cold record.

The hearing in the case at hand was lengthy; there were many witnesses; there was disputed testimony; a number of issues were presented to the Examiner which required the consideration of circumstantial evidence. There is no substitute for hearing such information first-hand in a case such as this. Our review of the record shows that the Examiner's findings were based on substantial evidence. Accordingly, we affirm the Examiner on this issue.

Discharge of Laura Rasset

Laura Rasset was hired on September 25, 1985, as an investigator in the Human Rights Department. In January, 1986, she filed a grievance concerning paid release time. Her relationship with her supervisors began deteriorating, and the situation worsened after Gillespie and Hillary filed their grievance and lawsuit. Department Director Bill Hilliard terminated Rasset's employment on September 23, 1986, just prior to the end of her probationary period.

The union presented evidence of the management's anti-union animus. Enforcement Division Manager Marilyn Endriss had made statements to Rasset that could be taken as hostility to the contract grievance procedure. Endriss also told Rasset that Rasset's friendship with Gillespie and Hillary made her uncomfortable. There was

evidence concerning anti-union hostility by Hilliard: Statements attributed to him expressing his dislike for "petty" grievances; of his belief that there were grounds to "get rid of Local 17"; and of his negative feelings about unions, because he felt they perpetuated past discriminatory practices. Hilliard testified as to what he believed to be the union's unfavorable impact on the functioning of the department, and as to his not particularly good relationship with the union. The Examiner properly imputed knowledge of Rasset's grievance filing and of her friendship with Hillary and Gillespie to Hilliard, and he properly found that the union had made the requisite _prima facie_ showing to shift the burden of proof to the employer. _Wright Line_, 251 NLRB 150 (1980); _Clallam County_, Decision 1405-A (PECB, 1982), aff. 43 Wn.App. 589 (1986).

The reasons set forth by the employer for its discharge of Rasset were:

1. Rasset's hostility towards Matz. After Matz was hired, Rasset told him he had no right to the job, and that she, Gillespie and Hillary were better qualified. Rasset avoided Matz for advice and information and instead sought out Gillespie and Hillary. The Examiner found that Rasset was generally insubordinate to Matz.

2. Soliciting a friend's involvement in a housing test, which the employer believed could be perceived by the public as a misuse of authority. The employer earlier gave Rasset a warning for this misconduct.

3. Excessive talking and laughing by Rasset in the hallways, about which she had been warned several times. The Examiner stated that Rasset's overall productivity was not challenged.

4. Failing to seek direction from a supervisor before conducting a conciliation conference. The Examiner observed, however, that the supervisor was aware the conference was to take place and she expressed no concerns to Rasset.

The Examiner wrote:

> The critical question is whether or not the anti-union statements made by Endriss carried over and affected the judgment of Director Hilliard concerning Rasset. Hilliard's primary concerns regarding Rasset focused on the housing test incident and her deteriorating relationship with Matz. Hilliard obtained first hand information from Matz regarding those matters, and there is no evidence that Matz engaged in any anti-union conduct.... [T]he employer would have rejected Rasset as a permanent employee, even in the absence of any protected conduct.

The union argues that the Examiner erred in this determination. While acknowledging that the housing test incident was a mistake of judgment for which the reprimand given was justified, the union urges that principles of progressive discipline preclude use of the incident as the linchpin of a discharge. The union also maintains that the Examiner's reasoning was faulty with respect to the role of Matz. It points out that Matz was effectively Rasset's supervisor for only a few weeks. While the Examiner found it significant that Hilliard was acting on the opinion or recommendation of Matz (i.e., the supervisor to whom Rasset was insubordinate), and that Matz harbored no anti-union animus, the union contends that Matz, in fact, had no position one way or the other on Rasset, and did not seek her discharge.

The employee was in "probationary" status, and not entitled by contract to the protections of a "just cause" standard. Further, "just cause" is not the issue before the Commission on this "discrimination" unfair labor practice allegation. <u>Whatcom County</u>, Decision 1886 (PECB, 1984). While the union's view of the facts is plausible, again, the record is susceptible of more than one interpretation. Our reading is that Matz was not nearly as ambivalent in his feelings towards Rasset as the union would have us believe. He testified that he found Rasset's attitude towards him very disturbing, and he told Endriss that it would be impossible for the two of them to work together. While he did not

propose Rasset's discharge, he testified that Rasset had been engaged in the kind of conduct - excessive social chatting and tardiness - which he labelled a "major concern",[1] as well as insubordination that would cause a persons's discharge in other places he had worked. Matz expressed these concerns, telling the management that "they needed to consider whether or not [Rasset] should continue as a permanent employee."[2] We do not believe Matz conveyed a neutral attitude on the subject to his superiors.

Hilliard had observed Rasset's work habits first-hand, and he did not find them to be good. He commented on her social chatting and tardiness, and stated that he "had concerns about her productivity".[3] Rasset had been warned several times, yet he saw no improvement. Although Hilliard testified that it was Endriss who specifically recommended that Rasset not be retained, he testified that he also based the decision on information obtained from Matz and from Rasset herself.

As with the "surveillance" issue, this issue requires findings based on conflicting testimony. Once again, reasonable minds could differ. The Examiner was the closest to the testimony, and he found that the discharge would have occurred in any case. Substantial evidence supports that determination. We affirm.

COMPLIANCE

The employer previously indicated its intention to comply with the Examiner's remedial order, but requested that compliance be stayed pending the Commission's determination on the union's petition for

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[1] Transcript at page 1308.

[2] Transcript at page 1306.

[3] Transcript at page 1756.

review. The stay was granted. Accordingly, the employer must now proceed with compliance under the terms ordered by the Examiner.

NOW, THEREFORE, it is

ORDERED

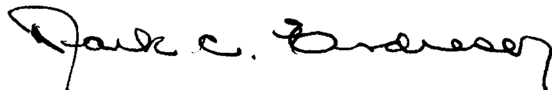
1. The findings of fact, conclusions of law and order issued by Examiner Mark Downing are affirmed and adopted as the findings of fact, conclusions of law and order of the Commission.

2. The City of Seattle shall notify International Federation of Professional and Technical Employees, Local 17, in writing, within 20 days following the date of this order, as to what steps have been taken to comply herewith, and at the same time shall provide the union with a signed copy of the notice required in this proceeding.

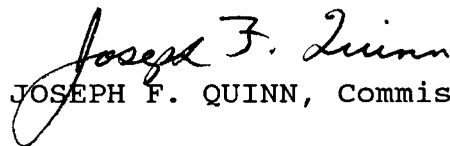
3. The City of Seattle shall notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply herewith, and at the same time shall provide the Executive Director with a signed copy of the notice required in this proceeding.

Issued at Olympia, Washington, this 29th day of September, 1989.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARK C. ENDRESEN, Commissioner



JOSEPH F. QUINN, Commissioner