Northshore Utility District, Decision 11267 (PECB, 2011)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

MICHAEL HOLTE, Complainant, vs. NORTHSHORE UTILITY DISTRICT, Respondent.	CASE 23788-U-11-6070 DECISION 11267 - PECB FINDINGS OF FACT, CONCLSIONS OF LAW, AND ORDER

The Rosen Law Firm by *Jon Howard Rosen,* Attorney at Law, for the union.

Davis Grimm Payne & Marra by *Selena C. Smith,* Attorney at Law, for the employer.

On February 4, 2011, Michael Holte (Holte/complainant) filed an unfair labor practice complaint against Northshore Utility District (employer) alleging employer discrimination. On February 11, 2011, the Unfair Labor Practice Manager issued a deficiency notice. On February 15, 2011, Holte filed an amended complaint. On February 17, 2011, the Unfair Labor Practice Manager issued a preliminary ruling finding a cause of action for employer discrimination by termination of Holte in reprisal for union activities and employer discrimination in reprisal for testifying in an unfair labor practice case. The Commission assigned Charity Atchison as Examiner. The Examiner held a hearing on August 10-12, September 7, 14, and 15, 2011. The parties filed post-hearing briefs which were considered.

ISSUES

1. Should the Examiner strike all, or a portion of, the employer's post-hearing brief for violating WAC 391-45-290(2) by filing a brief within the 25 page limit, but containing an excessive number and length of footnotes?

2. Did the employer discriminate against Holte in reprisal for testifying in an unfair labor practice hearing when it laid Holte off?

3. Did the employer discriminate against Holte in reprisal for union activities when it laid Holte off?

While the employer's brief contains excessive footnotes containing a recitation of facts contained in the record, the Examiner will not strike the employer's brief. The employer's brief complies with WAC 391-45-290(2) because it is within the 25 page limit.

The employer did not discriminate against Holte in reprisal for testifying at an unfair labor practice hearing. Holte did not establish a causal connection between his testimony and the employer laying him off.

The employer did not discriminate against Holte in reprisal for protected union activities. Holte did not establish that the employer knew that Holte was vigorously opposing the union's decertification. Holte failed to establish a causal connection between being the union president at the time the union was decertified on July 2, 2010, and being laid off on November 22, 2010.

ISSUE 1: Should the Examiner strike all, or a portion of, the employer's post-hearing brief for violating WAC 391-45-290(2) by filing a brief within the 25 page limit, but containing an excessive number and length of footnotes?

APPLICABLE LEGAL PRINCIPLES

Parties to unfair labor practice proceedings may file briefs at the close of a hearing. WAC 391-45-290(1). Those briefs must comply with WAC 391-45-290. WAC 391-45-290(2) sets the following limitations:

> (2) A party filing a brief under this section must limit its total length to twenty-five pages (double-spaced, twelve-point type), unless:
>
> (a) it files and serves a motion for permission to file a longer brief in order to address novel or complex legal and/or factual issues raised by the objections;

(b) The examiner grants such a motion for good cause shown; and

(c) A motion for permission to file a longer brief may be made orally to the hearing examiner at the end of the administrative hearing, and the hearing officer has the authority to orally grant such motion at such time.

ANALYSIS

On November 18, 2011 the parties filed post-hearing briefs. On November 23, 2011, the complainant filed a motion to strike the respondent's brief for "violating the letter and spirit" of WAC 391-45-290(2) by filing a brief that "while technically within the 25 page limitation, contains over 176 lines of text in "footnotes" that is both single spaced and less than 12 point type, as required by the rule and specific direction of the hearing examiner." On November 28, 2011, the Examiner sent an e-mail to the parties allowing the employer until December 5, 2011 to respond to the motion to strike. The employer responded on December 2, 2011. On December 7, 2011, the Examiner denied the complainant's motion.

WAC 391-45-290 establishes a 25 page limit for briefs. The rule makes no mention of footnotes. As such, there is no basis in the rule to strike all or a portion of the employer's brief. The employer's brief is, technically, 24 pages.

The conduct of both parties in the briefing and motion on this matter bears comment.

On November 18, 2011, the employer filed a brief that although technically within the 25 page limit appears to be an effort to thwart the 25 page limitation. The employer's brief is 24 pages. However, the employer's brief contains 36 footnotes on 20 of the 24 pages. On page 20, almost equal space is devoted to the footnotes as the actual text of the brief. Further, the footnotes add nothing in the form of legal analysis. The footnotes contain excessive recitation of the facts of the case. The employer does not commence its analysis of the case until page 16. Parties need not waste precious space in their briefs detailing the facts contained in the record that the Examiner reviews prior to issuing her decision. Briefs should focus on legal analysis.

On November 23, 2011, the complainant filed its motion to strike the employer's brief. The complainant relied on unpublished court of appeals decisions in an attempt to make its case that the employer's brief should be stricken. While not specifically applicable to this agency,

General Court Rule 14.1 prohibits citation to unpublished court of appeals decisions. The complainant's attorney made no attempt to identify that he was citing to unpublished opinions.[1] Parties are expected to conduct themselves in a manner consistent with behavior that would be expected in other adjudicatory proceedings. A party would not cite unpublished opinions in court proceedings, nor should they cite unpublished opinions as authority in matters before this Agency.

ISSUES 2 & 3 APPLICABLE LEGAL PRINCIPLES

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. *Educational Service District 114,* Decision 4361-A (PECB, 1994). The employee maintains the burden of proof in such discrimination cases. To prove discrimination, the employee must first set forth a prima facie case by establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute, or communicated to the employer an intent to do so;

2. The employer deprived the employee of some ascertainable right, benefit, or status; and

3. A causal connection exists between the employee's exercise of a protected activity and the employer's action.

An employee engages in protected activity when he or she testifies at an unfair labor practice proceeding before the Commission. *Mansfield School District,* Decision 5238-A (EDUC, 1996); *Kennewick School District,* Decision 5632-A (PECB, 1996).

Ordinarily, an employee may use circumstantial evidence to establish a prima facie case of discrimination because parties do not typically announce a discriminatory motive for their actions. *Clark County,* Decision 9127-A (PECB, 2007).

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[1] When the Examiner read the cases cited in the complainant's motion to strike, she discovered many the cited cases were unpublished.

In response to an employee's prima facie case of discrimination, the employer need only articulate its non-discriminatory reasons for acting in such a manner. The employer does not bear the burden of proof to establish those reasons. *Port of Tacoma,* Decision 4626-A (PECB, 1995). Instead, the burden remains on the employee to prove by a preponderance of the evidence that the disputed action was in retaliation for the employee's exercise of statutory rights. *Clark County,* Decision 9127-A. The employee meets this burden by proving either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma,* Decision 4626-A.

To prove discriminatory motivation, the employee must establish that the employer had knowledge of the employee's union activity. An examiner may base such a finding on an inference drawn from circumstantial evidence although such an inference cannot be entirely speculative or improbable. Circumstantial evidence consists of proof of facts or circumstances which, according to the common experience, gives rise to a reasonable inference of the truth of the fact sought to be proved. *City of Yakima,* Decision10270-A (PECB, 2011).

RELEVANT FACTS

Holte worked for the employer from July 1985 until November 22, 2010. The Washington State Council of County and City Employees (union) represented employees of the employer from 1997 until decertification on July 2, 2010. In 1997, Holte became a member of the union. Holte was the union vice president and president multiple times and served on the union bargaining team. Between 2006 and the union's decertification on July 2, 2010, Holte served as union vice president and president. At the time of the union's decertification, Holte was the only union officer.

In 2006, the union and the employer began a protracted negotiation. Holte served on the union negotiation team. Carl Lunak also served on the union's negotiating team in 2008 and stepped down toward the end of 2009. Fanny Yee, the employer's General Manager, attended most of the bargaining session, Alycien Cockbain, the employer's Human Resources Director, attended almost all of the meetings, and Al Nelson, the employer's Operations Director, attended one negotiation meeting. There is no evidence in the record about when the negotiations ended.

In 2009, the union filed unfair labor practice complaints with this Agency. In April 2009, Holte testified at the unfair labor practice hearing.

In his roles as union president and vice president, Holte kept the membership abreast of developments in negotiations. Holte posted information on the union bulletin board and provided bargaining updates at union meetings. Holte testified that in the time before the decertification vote, he advocated for the union in union meetings. Union meetings were held in the employer's building. No members of management attended union meetings.

Lunak was aware Holte advocated for the union, but did not observe Holte advocating on the union's behalf. Lunak recalled Holte posting information on the union bulletin board, trying to schedule union meetings, and being involved in a disciplinary proceeding.

Every three years the employer conducts a compensation study. In 2010, the employer attempted to undertake a compensation study with other jurisdictions. On July 9, 2010, Yee sent the staff a memorandum. Yee informed the staff that the salary survey was under way, but if it could not be completed, the employer would update pay ranges based on a wage survey commissioned by Alderwood Wastewater District (Alderwood). The employer decided it would not be feasible to complete the study by the end of 2010.

In an August 15, 2010 memorandum, Yee recommended to the Board of Commissioners (Board) that the employer adopt the Alderwood pay scale. The Board expressed some concern about the increased labor costs and instructed Yee to look at efficiencies. At the November 1, 2010 Board meeting, the Board directed Yee to present a staff reduction plan.

On October 25, 2010, Yee sent an e-mail to Lunak and Cockbain. Yee explained that she had been asked to look for ways to mitigate the impact of implementing the Alderwood pay ranges. Yee requested to meet with Lunak to discuss working as a consultant. When Yee, Cockbain, and Lunak met, Yee inquired about whether Lunak could be hired as a contract employee instead of a full-time employee. Lunak was unable to accept that offer.

Yee met with the management team to discuss ideas for reducing staff. At that time, the management team suggested consolidating the Water Quality position with the Safety and Conservation Coordinator position, consolidating two utility supervisor positions upon the incumbents' retirement, and eliminating the assistant utility supervisor position, continuing to leave a utility worker position vacant, leaving a meter reading utility worker position vacant, delaying refilling the engineering counter position, and reassigning cash receipting and account set up to the finance department.

In a November 10, 2010 memorandum to the Board Yee updated the Board about the management team's discussion. On page 3 of the memorandum, Yee wrote:

> Following discussions, the Management Team agreed on a consolidation plan. As all conservation education programs for local schools have been contracted out to a service provider, Aly could easily share the remaining conservation duties with Kelly Boswell. The next step is to select a candidate to fill the consolidated functions of water quality, safety and emergency planning. The District will be evaluating two incumbent employees with related experience to determine who could best fill this new position. The District will consider experience in an array of functions, including: safety, training, emergency planning, water quality as well as attributes such as creativity, versatility, productivity and the public speaking skills required to perform the essential duties of the new position. The employee not selected for the consolidated position will be lay-off [sic] for labor cost savings. (emphasis added).

On page 4 of the memorandum, Yee wrote:

> The following are labor costs saving measures that we plan to implement for the coming years:
>
> . . . .
>
> (3). Re-assign the conservation functions to Alycien Cockbain and Kelly Boswell. Combine the water quality, safety and emergency planning functions into a single position for re-assignment to Carl Lunak. Both Aly and Carl would have to be trained for the water quality duties. Mick Holte will be lay-off [sic] with a two-month severance package.

On Friday, November 19, 2010, Yee informed Holte and Lunak individually that if they were interested in applying for the consolidated positions, they were to submit an application on Monday, November 22, 2010.

On November 22, 2010, Yee, Cockbain, and Nelson interviewed Lunak and Holte. The employer interviewed Lunak first. Lunak was given an hour to draft a writing sample. The employer interviewed Holte second. Holte was given an hour to draft a writing sample. The employer met to discuss the interviews. All employer witnesses testified that the decision was unanimous. That afternoon, Yee, with Nelson present, informed Holte he was not selected and would be laid off.

Yee then drafted a memorandum from Nelson and Cockbain to Yee. Yee wrote the first draft of the memorandum. Nelson and Cockbain edited the draft memorandum. The memorandum stated that Nelson and Cockbain advocated for their respective subordinate. The panel being split, the decision was left to Yee.

ISSUE 2: Did the employer discriminate against Holte in reprisal for testifying in an unfair labor practice hearing when it laid Holte off?

ANALYSIS

Holte engaged in protected activity when he testified at the unfair labor practice hearing in April 2009. The employer deprived Holte of his job when it laid him off on November 22, 2010. Holte failed to establish a causal connection exists between his testimony in April 2009, and the employer laying him off on November 22, 2010, because the time that between when Holte testified in the unfair labor practice proceeding and the employer laying Holte off is too attenuated to infer a causal connection.

CONCLUSION

While Holte established the first two prongs of the *prima facie* case, he engaged in protected activity and was not selected for the consolidated position, Holte failed to establish a causal connection and has not made out the *prima facie* case. More than 19 months passed between Holte's April 2009 testimony and the employer laying Holte off on November 22, 2010. No causal connection exists between Holte's testimony in April 2009 and the employer laying him off in November 2010. The employer did not discriminate against Holte for providing testimony in an unfair labor practice hearing by laying him off.

ISSUE 3: Did the employer discriminate against Holte in reprisal for union activities when it laid Holte off?

ANALYSIS

The first step in establishing a *prima facie* case is to prove that the employee engaged in protected activity. Holte engaged in protected activity when he served as the union president, union vice president, and a member of the negotiation team. Employer officials Yee, Cockbain, and Nelson knew Holte was a union officer.

In his amended complaint, Holte alleges he engaged in protected activity by "openly and vigorously opposed the decertification petition in 2010 . . . ." Holte testified that he spoke against decertification at union meetings that management did not attend. After one meeting, Yee asked Holte about the decertification proceeding. Holte told Yee the union members had a good conversation. Holte did not testify that he told Yee he spoke against decertification. Holte was the union president and only union officer at the time of decertification. Holte did not talk with Yee or Nelson about the decertification. There is no evidence, other than Holte's claims, that he openly and vigorously opposed decertification. While Holte may have spoken openly and vigorously against decertification in union meetings, there is no evidence that the employer had knowledge of Holte's advocacy; therefore, it is not possible to conclude that Holte's opposition to the decertification creates a causal connection between his protected activity and his layoff.

The second step in establishing a *prima facie* case is to prove that the employer deprived the employee of a right benefit or status. The employer deprived Holte of a right, benefit, or status when it laid Holte off on November 22, 2010.

The third step in establishing a *prima facie* case is to show that a causal connection exists between the employee's protected activity and the employer's action. Proximity between union activity and an adverse action do not, alone, establish a *prima facie* case. *Port of Seattle,* Decision 10097-A (PECB, 2009). Holte was the last remaining union officer when the employees decertified the union. As mentioned above, Holte did not establish that the employer knew he openly and vigorously opposed decertification.

When asked if he said anything to Yee or Nelson between November 19th and 22nd, Holte testified that on November 19, 2010, he went into Nelsons office and said,

> [M]an, I really wish there was a union here that I would have some recourse for this because I do feel like, on Friday night, I said I know I'm going to be the odd guy out on Monday, no matter what.
>
> I said why don't – you now, I had suggested to Fanny, is this your best recommend – our best alternative? Why can't we have Rick and Bill retire, who are eligible to retire? They're well over their 30 years. They're just still working because this is what they want to do, but they could retire with full benefits. I still have four more years and eight months to get my 30 years in. And I just asked them, I said, could you just keep me on staff at least until they both retired, and I could be looking for a job? And Fanny told me no.
>
> And when I conveyed that to Al, he just sat and stared. He never really - - really said anything, you know. And I told Al the same thing, I said I just wished there was some sort of recourse I had . . . .

Holte's testimony on this point is not credible. Holte sat through four days of hearing before he testified and heard the testimony of all of the employer officials. Neither Yee nor Nelson were asked about these conversations. When Holte testified about Yee telling him about the consolidated position, he made no mention of asking her about options. Holte's testimony that he went to Nelson and said he wished he had a union present is not credible. Holte testified that he felt like he had a bullseye on his back because he had been a union officer. Such insecurity is inconsistent with going into a supervisor and saying "I wish there was a union" on the eve of interviewing for a consolidated position. It is not plausible that Holte would tell his supervisor, and an interview panel member that he wished there was a union.

In his brief, the complainant asserts that "Holte was terminated less than five months after the decertification vote. The decision to terminate him had been made a considerable time before that." There is no evidence in the record to support this assertion. No evidence was offered, nor is it reasonable to infer that the employer decided to lay Holte off "a considerable time" before the layoff. The earliest date the evidence supports is October 2010. There is no causal connection between Holte serving as the union president at the time the union was decertified and the employer laying Holte off.

When asked if prior to the interviews if she believed Lunak was the better candidate, Yee credibly testified that she "would be lying if I say no. Yes, I did." Yee later testified that prior to the interviews she had a "very strong leaning." Yee explained that this was due to Lunak's skill set. Yee's testimony is credible because she explains why she thought Lunak was the better candidate and she testified in an honest straightforward manner, even when her testimony was inconsistent with that of other witnesses.

Holte failed to establish a causal connection between his protected activity and the employer laying him off. While only four and one-half months passed between the time the employees decertified the union and the time the employer did not select Holte for the consolidated position and laid him off, there is no evidence connecting events. There is no evidence to support an inference that Holte was not selected for the consolidated position based on his protected activity. It is not necessary to determine whether the employer articulated a nondiscriminatory reason for not selecting Holte or whether that reason was substantially motivated by union animus or pretextual because Holte did not establish a *prima facie* case.

CONCLUSION

Holte established that he engaged in protected activity and the employer deprived him of a right, benefit, or status by laying him off, but Holte failed to establish a causal connection between his protected activity and the employer's action.

FINDINGS OF FACT

1. Northshore Utility District (employer) is a public employer within the meaning of RCW 41.56.030(13).

2. Michael Holte was a public employee within the meaning of RCW 41.56.030(12) during the time he was employed by the employer until he was laid off on November 22, 2010.

3. The Washington State Council of County and City Employees represented the employer's employees from 1997 until the employees decertified the union on July 2, 2010.

4. In April 2009, Holte testified at an unfair labor practice proceeding before this agency.

5. Holte was the union vice president and president from 2006 until the decertification on July 2, 2010. Holte served on the negotiations committee for the negotiations beginning in 2006. There is no evidence about when negotiations ended.

6. Fanny Yee, the employer's General Manager, recommended to the Board of Commissioners (Board) that the employer adopt a new pay scale. The Board directed Yee to look for efficiencies.

7. The management team developed a staff reduction plan which included consolidating the water quality, safety, and emergency planning duties into one position.

8. On November 19, 2010, Yee informed Holte and Lunak that their positions were being consolidated and they would need to interview for the consolidated position.

9. On November 22, 2010, Yee, Nelson, and Cockbain interviewed Holte and Lunak.

10. On November 22, 2010, Yee informed Holte that the employer did not select him to fill the position and he would be laid off.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

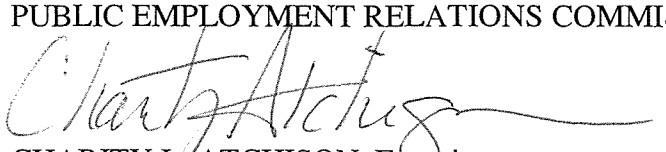
2. By failing to select Michael Holte for the consolidated water quality, safety, and emergency planning position and laying Holte off, as described in Findings of Fact 4 through 10, the employer did not discriminate against Holte because of his protected activity.

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 29th day of December, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CHARITY L. ATCHISON, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ ROBBIE DUFFIELD

CASE NUMBER:	23788-U-11-06070	FILED:	02/04/2011	FILED BY:	PARTY 2
DISPUTE:	ER MULTIPLE ULP				
BAR UNIT:	ALL EMPLOYEES				
DETAILS:	see 23875-S-11-0209				
COMMENTS:					

EMPLOYER: NORTHSHORE UTILITY DIST
ATTN: FANNY YEE
6830 NE 185TH ST
PO BOX 82489
KENMORE, WA 98028-0489
Ph1: 425-398-4410 Ph2: 425-398-4400

REP BY: SELENA SMITH
DAVIS GRIMM PAYNE MARRA
701 5TH AVE STE 4040
SEATTLE, WA 98104
Ph1: 206-447-0182

PARTY 2: MICHAEL HOLTE
ATTN: C/O JON HOWARD ROSEN
THE ROSEN LAW FIRM
705 2ND AVE STE 1200
SEATTLE, WA 98104-1798
Ph1: 206-652-1464

REP BY: JON ROSEN
THE ROSEN LAW FIRM
705 2ND AVE STE 1200
SEATTLE, WA 98104-1798
Ph1: 206-652-1464 Ph2: 206-682-6711