STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

MICHAEL L. CLOSSON, Complainant,	)	CASE No. 4557-U-83-742
vs.	)	DECISION NO. 2078-A PECB
SPOKANE TRANSIT AUTHORITY, Respondent.	)	DECISION OF COMMISSION

William J. Powell, Attorney at Law, appeared on behalf of the complainant.

Thomas F. Kingen, Attorney at Law, appeared on behalf of the employer.

On March 23, 1983, Michael L. Closson (complainant) filed a complaint charging unfair labor practices against the Spokane Transit Authority (employer) alleging violations of RCW 41.56.140(1), by interfering with, restraining and coercing complainant in the exercise of his rights to attempt to collectively bargain under the provisions of the statute. A hearing was held December 7, 1983 before Examiner Jack T. Cowan. The parties submitted post-hearing briefs. On December 17, 1984, Examiner Cowan found for the complainant and ordered remedial action. Respondent filed a Petition for Review on January 4, 1985 and brief in support of the petition for review on February 6, 1985. The complainant filed a brief on February 22, 1985 supporting the Examiner's decision.

The respondent's petition for review is based essentially on a statement made on page 15, lines 15 through 17 in its brief:

> An employer can discharge or demote an employee for a good reason, a bad reason, or no reason at all, so long as the reason is other than anti-union discrimination.

Specifically, the employer argues that 1) the findings of fact are not supported by substantial evidence; 2) RCW 41.56.140(1) does not protect the employee's conduct in this case; and 3) in applying the "Mt. Healthy" test, the Examiner erred as a matter of law.

The facts are as set forth in the Examiner's decision and are adopted by reference.

RCW 41.56.040 states:

> No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

RCW 41.56.140 states:

> It shall be an unfair labor practice for a public employer: 1) To interfere with, restrain, or coerce of their rights guaranteed by this chapter; . . .

As pointed out by the Examiner, Chapter 41.56 RCW contains no "concerted activity" clause such as is found in Section 7 of the the National Labor Relations Act. The omission must be judged as intentional. But the absence of a general concerted activity protection does not exclude findings of unfair labor practices based on the specific types of activity protected in RCW 41.56.040. In particular, the members of a proposed bargaining unit are protected from employer interference and reprisal during an organizing drive. This protection extends to all potential bargaining unit members, without regard to leadership or spokesman roles. Because this protection has been established in recognition of the problems historically experienced by employees attempting to engage in collective bargaining with their employers, this agency, the NLRB and the courts have evaluated very critically the behavior of employers that would appear to interfere with the process. The timing of Closson's demotion, which occurred during an organizing effort, itself suggests careful scrutiny for an improper motive on the part of the employer.

The decision in this case must flow from evaluating Closson's behavior and the Transit Authority's response in the context of what was on-going at the time. Closson was a supervisor. Supervisors have bargaining rights under Chapter 41.56 RCW, METRO v. DEPARTMENT OF LABOR AND INDUSTRIES, 88 Wn.2d 925 (1977), and it was an appropriate separate unit of supervisors that was organizing. The Transit Authority was aware of the organizing drive. The Commission faults the Transit Authority for calling a meeting with the employees involved in the organizing drive on a bargainable subject (sick leave) while the representation case was pending, and then dictating the terms of the matter without recognizing the potential for those terms to be set by collective bargaining. The respondent compounded this fault by requesting members of the petitioned-for bargaining unit to sign a document that detailed the respondent's position. Closson spoke up in protest. The Commission finds that Closson's behavior at the July 23, 1982 meeting would be acceptable in a negotiating setting, and that the respondent established

such a setting by calling the meeting on a bargainable issue. That the Transit Authority wished to impose a policy rather than to bargain, and that the bargaining representative had not yet been certified are not offsetting. To then demote a potential bargaining unit member (Complainant Closson) for voicing opposition in ways commonly seen in negotiating settings is inexcusable.

We find that the record amply supports the Examiner's finding that Closson was engaged in protected activity, and that the employer was aware of this fact. Although leadership in the union is not a necessary precondition to the protections of the statute, this record clearly establishes that Closson had been a union leader at the time the supervisors were removed from the bargaining unit composed of non-supervisory employees of this employer. There is evidence showing that the confrontation at issue occurred as a result of certain promises made by the employer, including one pertaining to sick leave policy. There is evidence that the successor employer was aware of Closson's union leadership role, which was extended as Closson pursued the employer's alleged commitment with respect to the sick leave policy. Closson understandably believed his credibility was at stake with respect to the sick leave policy issue, and that it was his responsibility to pursue that issue.

We agree with the Examiner that the employer failed to overcome Closson's prima facie case, i.e., it failed to show that Closson would have been demoted even absent the protected conduct. It is noteworthy that Closson had no prior reprimands or discipline during his eight and a half years as supervisor. Following the demotion, the Transit Authority engaged two supervisory personnel to write up self-serving evaluations of the complainant that, in many parts, contradict both prior evaluations and claimant's own work record. After-the-fact psychological tests are not convincing, nor are other infractions as to which Closson was not given prior warnings, as was customary. The sick leave policy implementation, demotion, subsequent sham hearings and transparent evaluations during a period of organizing establish instead a setting of employer interference and reprisal that the Commission will not countenance.

ORDER

1. The findings of fact, conclusions of law and order of the Examiner are affirmed.

2. The employer shall notify the Executive Director of the Public Employment Relations Commission, within thirty days following the date of this Order, as to what steps it has taken to comply with the Order issued by Examiner Jack T. Cowan in the above-entitled matter, and shall

at the same time provide the Executive Director with a signed copy of the notice posted in accordance therewith.

ISSUED at Olympia, Washington, this 23rd day of August, 1985.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANE R. WILKINSON, Chairman

MARK C. ENDRESEN, Commissioner