

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

GARY R. NEARING,)	
)	CASE NO. 5713-U-85-1054
Complainant,)	
)	
vs)	DECISION NO. 2291 - PECB
)	
AUBURN SCHOOL DISTRICT,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
Respondent.)	AND ORDER
)	
)	

Robbins, Brown, Boelter, and Amos, by Lilah M. Amos,
Attorney at Law, appeared on behalf of the complainant.

Michael J. Reynolds, Attorney at Law, appeared on behalf
of the respondent.

On March 4, 1985, Gary R. Nearing (complainant) filed a complaint charging unfair labor practices against Auburn School District (respondent), alleging that respondent violated RCW 41.56.140(1), (2), and (3) as well as RCW 41.59.140(1)(a), (1)(c), and (1)(d) by discriminatorily refusing to hire complainant as a school bus driver. A hearing was conducted on April 16, 1985, in Auburn, Washington. At the outset of the hearing, respondent moved to dismiss the complaint, arguing that complainant had applied for a position outside the scope of the existing bargaining unit, and thus, alleged facts upon which a remedy could not be fashioned. In addition, respondent maintained that the complaint failed to state a cause of action because complainant did not make any reference to his union activities or affiliation. Complainant opposed the motion, contending that the alleged violations deal with unlawful interrogation of an applicant for employment, and respondent's action was designed to discourage union membership. Respondent's motion was denied; however, the complaint was limited to alleged violations of Chapter 41.56 RCW. The parties submitted post-hearing briefs.

BACKGROUND

Auburn School District operates a number of educational facilities in the southeast portion of King County, Washington. Under the general policy direction of an elected school board, daily operations are managed by superintendent of schools, with the assistance of the district's administrative staff. Two of these administrators are important to the instant unfair labor practice complaint: Dr. Charles Booth, deputy superintendent, deals with collective bargaining and personnel policy for the district; Stewart Fitzpatrick, transportation supervisor, directs school bus operations and supervises the employer's transportation personnel.

The district provides school bus services in an area of ten square miles around Auburn, Washington. Operating over 60 vehicles, the district employs 65 drivers and six mechanics.

Auburn School District has collective bargaining relationships with several employee organizations. Public School Employees of Washington represents a bargaining unit described in a September 1, 1983 - August 31, 1986 collective bargaining agreement as:

Section 1.4 ... all transportation drivers driving at least on a regular part-time basis.

Section 1.4.1 Personnel serving in a substitute capacity who are not eligible for representation rights serve at the discretion of the District. Employees serving in a substitute capacity who are eligible for representation shall only be governed by this section and any other provision which so expressly states that the provision's coverage applies to such employees. This Agreement is not to be construed so as to require that coverage or application of a section or provision which involves employees serving on a substitute basis with the District.

On November 14, 1984, the employer advertised the availability of a position in the district's transportation operation. Titled "School Bus Driver-Substitute", the notice directed applicants to submit an employment

application, a letter of application, and an optional resume by November 28, 1984. Gary Nearing saw the notice and applied on November 14th. Nearing had returned to the Auburn, Washington, area in October, 1984, after residing in Alaska. He had previously worked for one-and-a-half years as a school bus driver with a private company providing school bus service to the Anchorage School District. In his driving capacity, Nearing had received several awards and commendations. At some unspecified time after Nearing had submitted his application form, he was informed that he had to submit a "letter of application". Nearing testified that he was not told that the letter would be used in the applicant evaluation process. The letter was submitted on November 29, 1984.

After the application process was completed, Transportation Supervisor Fitzpatrick and Assistant Transportation Supervisor Eleanor Zahnow conducted separate interviews of each candidate and independently completed evaluation forms prepared by the district. The results were then tabulated, and successful applicants were to then go through a number of driving tests. If the driving tests were passed, the applicant would be hired.

Nearing's interview took place on December 4, 1984. Immediately prior to Nearing's interview, Fitzpatrick and Zahnow had a brief conversation. During the conversation, Zahnow informed Fitzpatrick that Nearing was Anna Jean Jeffreys' brother. Jeffreys, a shop steward in the transportation department, was a well-known union activist who had several encounters with school district management. Jeffreys regularly brought drivers' complaints to Fitzpatrick's attention, and she was involved in at least one disciplinary dispute herself when, as a result of using a school bus to drive to a polling place for a general election, she was suspended for three days. At the time of the interview, Jeffreys was involved in another controversy with the district involving the reassignment of her regular school bus. Jeffreys testified that she felt "singled out" for disparate treatment because of her union activities. Fitzpatrick testified that he did not know of the relationship between Nearing and Jeffreys until Zahnow informed him of it on December 4, 1984. Immediately after the conversation took place, Fitzpatrick

interviewed Nearing. Events surrounding the interview are disputed. Fitzpatrick testified that he only asked Nearing questions from a list prepared by the district's personnel department. Fitzpatrick further testified that he "never deviated" from the list of questions when conducting an interview. The questions dealt with an applicant's past driving experience, as well as hypothetical situations involving the operation of a school bus or communication with students and parents. Nearing testified that Fitzpatrick's first question was, "What would your reaction be if anybody discussed management?" In response, Nearing said he would "mind his own business" in such matters. Fitzpatrick denies ever asking such a question in the interview. Nearing did not recall any questions asked by Fitzpatrick or Zahnow about his sister.

Following the interview process, another applicant was given the available driver position. Fitzpatrick and Booth testified that Nearing was not successful in his attempt to become a district employee because his past driving experience was not necessarily adequate. In addition, Fitzpatrick testified that he was concerned by Nearing's forceful demeanor and felt that Nearing would have difficulty with students and parents.

On December 5, 1984, Nearing received a letter from the district informing him that he did not get the position. Shortly after he received the letter, Nearing attempted to discuss his situation with Booth. After several attempts, Nearing and Booth met. Nearing told Booth that he felt his sister's difficulties with the school district caused the district to refuse Nearing's application. Nearing testified that Booth acknowledged that there were problems between Jeffreys and Fitzpatrick. Booth denied that such statements were made, and testified that he was not aware of the relationship between Nearing and Jeffreys until after Nearing was notified that he did not get the substitute bus driver position. In any event, Booth promised Nearing that he would review the application again.

Approximately five days later, Nearing spoke with Booth again. Nearing testified that Booth had reviewed the matter, and, given Nearing's

qualifications, "could not understand" why he would not be an acceptable driver for the Auburn School District. Nearing also testified that Booth indicated that he would receive the next available position. Booth testified that he discussed the situation with Nearing, but never made any promise to give Nearing any preferential consideration for upcoming employment.

Subsequently, the school district hired yet another bus driver. Apparently, the position was not advertised, and the employer used applicants from the earlier driver recruitment. Nearing did not receive the driver position. At a later time, Nearing applied for a custodial-maintenance position. His application was rejected because of a lack of experience performing such work. At the time of hearing, Nearing was unemployed.

POSITIONS OF THE PARTIES

Complainant maintains that he was not hired as a school bus driver because his sister, a well-recognized union activist, had filed several grievances against the school district. As a result of his sister's exercise of rights guaranteed by Chapter 41.56 RCW, complainant was not given a fair evaluation of his driving skills and capabilities, thus depriving him of an opportunity to be hired, to join the bargaining unit, and to exercise the bargaining rights guaranteed to public employees.

Respondent denies that any unfair labor practice was committed. Respondent notes that complainant applied for a substitute position not within the coverage of the bargaining unit, and therefore, could not receive benefits under the collective bargaining agreement. Respondent further contends that complainant has failed to state a cause of action. Complainant was not a "union member" when he applied for the driver's position, and the district argues it is inappropriate to claim that actions taken by his sister can somehow provide a basis for the instant complaint. Respondent maintains that complainant was not hired because of a lack of qualification for the particular job.

DISCUSSION

Respondent's argument that complainant does not have standing to bring this complaint lacks merit. The position at issue, while advertised as "substitute" is not necessarily excluded from the bargaining unit. The collective bargaining agreement in effect at the time makes provision for coverage of certain substitutes. It is logical to assume that complainant could have attained bargaining unit status after successful completion of his initial work assignment. Respondent's action effectively cut off that possibility.

Denial of employment because of personal union activities or sympathies has long been held to violate Section 8(a)(3) and (1) of the National Labor Relations Act (NLRA). See: Phelps Dodge Corporation v. NLRB, 313 US 177 (1941). Respondent would limit the scope of inquiry in this matter, insisting that an unfair labor practice charge could only be brought by a union member or supporter. However, this is not a complete statement of the law. An employer's refusal to hire an applicant because of the union activity of a relative has also been found to be violative of the NLRA. See: Copes-Vulcan, Inc., 237 NLRB 1253 (1978), enfd. in pertinent part, 611 F.2d 440 (3d Cir. 1979). See also Delta Hosiery, Inc., 259 NLRB 1005 (1982). In Copes-Vulcan, the prospective employee was married to the chief shop steward at the company's major facility. The applicant was denied employment because of her relationship with a known union activist. In fact, the company acknowledged the relationship and defended its action by contending that the steward threatened to create difficulties if the applicant was not hired. The National Labor Relations Board (NLRB) ruled that an employer can refuse to hire an individual if the incumbent union makes threats concerning the hiring process. Such unlawful threats or pressure would not be an activity protected under Section 8(a)(1) of the NLRA. However, the NLRB found that such threats were not made in the factual setting presented and found that unfair labor practices had been committed. In Delta Hosiery,

supra, the sister of an active union member was denied employment after a position was tentatively promised to her.

Turning to the instant complaint, respondent admits that it was aware of Nearing's relationship to an active shop steward at the time complainant was interviewed. In fact, complainant's sister was, at that time, involved in a grievance with the district concerning her school bus assignment. The relationship was discussed by management official just prior to the interview. As complainant properly notes in closing brief, the existence of such intent can be proven through circumstantial evidence. See: Stephensen v. NLRB, 614 F.2d 1210 (1980). Given these circumstances, complainant has presented a prima facie case that a discriminatory motive could have existed. Analysis now shifts to respondent's defenses to the alleged discrimination.

This unfair labor practice dispute is susceptible to analysis under the criteria set forth in Wright Lines, Inc., 251 NLRB 1083 (1980):

... The aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. Also, the employer is provided with a formal framework within which to establish its asserted legitimate justification. In this context, it is the employer which has "to make the proof." Under this analysis, should the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because its action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes.

See: City of Olympia, Decision 1208-A (PECB, 1982), where the Public Employment Relations Commission embraced the Wright Lines test.

If respondent can rebut the discrimination allegations on the basis of practical business necessity, an unfair labor practice cannot be found.

Respondent relies on its judgment that Nearing was improperly trained to become a driver with the Auburn School District. However, the record shows that a lack of training has not, in the past, been necessarily determinative in hiring selections. The district representatives both had difficulties with the skill levels required by private companies such as the one Nearing had worked for, and prior experience with such matters led them to the conclusion that drivers with private company experience were not well trained. However, the record indicates that the district has hired several drivers with only private company driving experience. In addition, respondent's contention that complainant would not be able to deal with students is not persuasive in light of complainant's experience in Alaska. Nearing presented uncontroverted testimony that he dealt with "problem" school bus routes and got along well with his student passengers. Given the factors brought forth in this matter, it is decided that respondent has failed to refute the prima facie case showing that denying Nearing employment arose from a discriminatory attempt to somehow impute his sister's union attitudes to Nearing's application.

FINDINGS OF FACT

1. Auburn School District provides a number of educational services and is a "public employer" within the meaning of RCW 41.56.030(1).
2. Public School Employees of Washington is a "bargaining representative" within the meaning of RCW 41.56.030(3). The union represents a bargaining unit of Auburn School District employees working as school bus drivers.
3. Gary R. Nearing moved into the Auburn area in October, 1984. He had recently returned from Anchorage, Alaska, where he had worked as a school bus driver for one-and-one-half years.

4. Nearing's sister, Anna Jean Jeffreys, was employed by the Auburn School District as a bus driver. Jeffreys was active as a union shop steward and often had confrontations with management concerning the interpretation of the collective bargaining agreement.
5. Nearing applied for an open substitute driver's position on November 14, 1984. He had an interview with Transportation Supervisor Stewart Fitzparick and Deputy Transportation Supervisor Eleanor Zahrow. Immediately before Nearing's interview with Fitzpatrick, Fitzpatrick was informed of Nearing's relationship to Jeffreys. At the time of the interview, Jeffreys was involved in a grievance concerning the assignment of her school bus.
6. Nearing did not receive the available position. Shortly after he was notified, Nearing met with Dr. Charles Booth, the district's deputy superintendent. Booth promised Nearing that his application would be reviewed again.
7. Booth and Nearing spoke again several days later. Nearing credibly testified that Booth mentioned that difficulties with Nearing's sister were a major cause of his problem getting a driver's position. Subsequently, another position was available, and Nearing did not receive the driving job. The school district does not have any policies about hiring drivers who had worked for private carriers in the past.
8. The Auburn School District discriminatorily refused to properly consider Gary R. Nearing's application for employment because of his relationship with Anna Jean Jeffreys, a known union activist and sympathizer.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.
2. By events described in Findings of Fact 5 through 8, above, Auburn School District violated RCW 41.56.140(1) by discriminatorily refusing to hire Gary R. Nearing as a substitute school bus driver.

ORDER

Upon the basis of the above Findings of Fact and Conclusions of Law, and pursuant to RCW 41.56.160 of the Public Employees Collective Bargaining Act, it is ordered that Auburn School District, its officers and agents shall immediately:

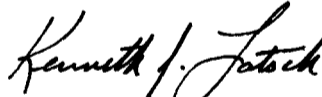
1. Cease and desist from:
 - A. Refusing to hire Gary R. Nearing as a substitute school bus driver when an available position becomes open.
 - B. In any other manner interfering with or discriminating against public employees in the exercise of rights protected by Chapter 41.56 RCW.
2. Take the following affirmative action to remedy the unfair labor practice and effectuate the policies of the Act.
 - A. Offer Gary R. Nearing a position as substitute school bus driver with the Auburn School District.
 - B. Make Gary R. Nearing whole by payment of back pay from the date the original substitute bus driver position was filled, as measured by

the work opportunities and pay provided to the successful applicant. Deducted from the amount due shall be the amount equal to any earnings such employee may have received during the period of the violation, calculated on a quarterly basis. Also deducted shall be an amount equal to any unemployment compensation benefits such employee may have received during the period of violation, and respondent shall provide evidence to the Commission that such amount has been repaid to the Washington State Department of Employment Security as a credit to the benefit record of the employee.

- C. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked Appendix A". Such notice shall, after being duly signed by an authorized representative of Auburn School District be and remain posted for sixty (60) days. Reasonable steps shall be taken by Auburn School District to insure that said notices are not removed, altered, defaced, or covered by other material.
- D. Notify the Executive Director of the Public Employment Relations Commission, in writing, within thirty (30) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by the proceeding.

DATED at Olympia, Washington, this 45th day of September, 1985.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



KENNETH J. LATSCH, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

Appendix A

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF RCW 41.56, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to hire individuals because of their relationship with known union activists.

WE WILL NOT interfere with, restrain or coerce employees in the exercise of rights guaranteed by Chapter 41.56 RCW.

WE WILL offer Gary R. Nearing employment as a substitute school bus driver when such a position becomes available.

AUBURN SCHOOL DISTRICT

By _____
AUTHORIZED SIGNATURE

DATED: _____

THIS IS AN OFFICIAL NOTICE AND MUST
NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone (206) 753-3444.