

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SUSAN ANDERSON,)	
)	
Complainant,)	CASE 12738-U-96-3058
)	
vs.)	DECISION 6326 - PECB
)	
CITY OF SEATTLE,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent.)	AND ORDER
)	
)	

Stephen A. Teller, Attorney at Law, appeared on behalf of the complainant.

Mark Sidran, City Attorney, by Janet K. May, Assistant City Attorney, appeared on behalf of the respondent.

On October 1, 1996, Susan Anderson (complainant) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC. The complaint alleged that the City of Seattle (respondent) had committed unfair labor practices within the meaning of RCW 41.56.140(1) and (3), by terminating the employment of Anderson because of her exercise of rights protected by Chapter 41.56 RCW. A hearing was conducted in Seattle, Washington, on April 30 and May 1, 1997, before Examiner Jack T. Cowan. The parties submitted post-hearing briefs.

BACKGROUND

Among various municipal services offered to its residents, the City of Seattle provides several home improvement and weatherization

programs. Of primary importance to this unfair labor practice case, the REACH program provided loans for low income homeowners to rehabilitate their primary residences. To qualify for a low interest loan under the REACH program, an applicant must be a homeowner at or below 80% of the Seattle area's median income, and must meet certain financial stability requirements.

At the time of hearing, the REACH program was under the direction of Priscilla Call. There were approximately 35 employees in the REACH program, with employees in the "property rehabilitation specialist" (PRS) classification carrying out the basic functions of the program. PRS personnel worked with individual loan applicants and a number of contractors, to insure that proposed improvements are done in a competent and cost-effective manner.

Susan Anderson was employed in the REACH program at the time she filed this unfair labor practice complaint. Her experiences in getting that position provide background for this case:

- Anderson had worked for the City of Seattle in several capacities, including work as an "energy conservation representative" (ECR) from 1986 through 1990.
- While employed as an ECR, Anderson was in a bargaining unit of city employees represented by International Federation of Professional and Technical Employees, Local 17. Anderson testified that she dealt with "morale issues" with other employees, and encouraged her fellow employees to take part in union-sponsored activities. In addition, Anderson took part in a "position description questionnaire" process where a number of employees were asked to review their existing job descriptions in light of their current work responsibilities.

- Priscilla Call had served as the weatherization program manager at the time that Anderson worked in the weatherization program. Anderson testified that Call did not appreciate criticism, and that Call perceived Anderson to be adverse to management. Call testified that she did not have any animosity toward Anderson, and was only concerned about Anderson's ability to perform her work in a professional manner.
- The record indicates that Anderson performed her work as an ECR in a satisfactory manner. However, a performance evaluation for the October 1988 through October 1989 period indicated her immediate supervisor was concerned that Anderson was "too outspokenly critical of the management and procedures" in the performance of her work. As program manager, Priscilla Call reviewed and signed Anderson's performance evaluation.
- Anderson left city employment for work in a private firm for several years.
- Anderson returned in the latter part of 1993, taking temporary employment as an ECR. While employed in that capacity, she applied for two permanent positions with the city. Anderson was turned down for both positions, and she believed that she was being singled out because of her earlier critical statements made against program managers.
- Anderson filed an unfair labor practice complaint against the employer, alleging that she was being discriminated against because of her exercise of protected rights. Before that case could be litigated, Anderson and the employer reached a settlement of the underlying issue on April 18, 1995. Under terms of that settlement, Anderson agreed to drop all pending

litigation, including the unfair labor practice complaint, and the employer agreed to hire her as a permanent employee in the REACH program.¹

- Pursuant to the settlement agreement, Anderson began her employment as a PRS with the REACH program on May 3, 1995. Anderson was subject to the same one-year probationary period that all new employees to the program were expected to complete. The record reflects that she was represented by Local 17 in her new position, for purposes of collective bargaining.

By the time that Anderson began her employment in the REACH program, Call had been appointed as program director. Anderson reported directly to Property Rehabilitation Supervisor Jan Henderson. Henderson, in turn, reported to Call.

Anderson's work as a PRS appears to have been non-controversial for the most part, but she did have several difficulties with one particular contractor, GMR Construction. In at least one instance, Anderson believed that GMR personnel tried to intimidate a client into accepting a substandard job, and Anderson was also concerned that the company attempted to collect for services that had not been rendered.

Events immediately leading to Anderson's dismissal began in the summer of 1995, when one of her neighbors, Ray Houle, was accepted as a REACH loan recipient. The record reflects that GMR Construction was given the contract for Houle's home improvement work at an unspecified time in autumn of 1995.

¹ Notice is taken of the Commission's docket records for Case 11202-U-94-2612, filed on June 23, 1994.

Houle became concerned that GMR Construction did not seem responsive to his requests to get started on his project. PRS Howard Bonar had been assigned to Houle's renovation project, and Houle contacted Bonar to discuss the matter. Bonar stated that he would follow up on the situation.

Houle's situation did not improve. The work was still not started by early 1996, when Houle approached Anderson to discuss the situation. Houle testified that Anderson referred him to the Better Business Bureau, but could not otherwise give much information because Houle's project was under Bonar's direction.

GMR Construction did not start any work on the project, so Houle eventually told Bonar to cancel the contract. During this conversation, Houle also informed Bonar about his conversation with Anderson. Bonar informed Houle that he would have to notify GMR personally, and Houle did so.

Bonar was very upset that Anderson had spoken with Houle about GMR's performance. Bonar noted that there was a long-established policy against agency personnel advocating for or against any particular contractor, and Bonar believed that Anderson had worked to eliminate GMR from Houle's project because of her past dealings with the company.

Bonar and Anderson discussed the Houle situation on February 9, 1996. Bonar testified that Anderson was very open about her discussions with Houle, and that she acknowledged doing much more than merely telling Houle to approach the Better Business Bureau about GMR Construction. Bonar left the discussion believing that Anderson had affirmatively told Houle to drop GMR Construction as a contractor. In addition, Bonar testified that Anderson informed

him that she had gotten permission from her immediate supervisor, Janet Henderson, before she met with Houle. Anderson testified that she never spoke to Henderson before she spoke with Houle. Henderson testified that she did not give Anderson permission to speak to Houle about GMR Construction.

Bonar also spoke to Henderson about the situation. Bonar told Henderson that Anderson actively interfered in his project, and that he believed that Anderson was biased against GMR Construction. Henderson looked into the matter, and found that GMR Construction was behind on a number of uncompleted contracts.

Henderson contacted GMR Construction, to inquire about the situation. In response to that inquiry, the owner of GMR, Gary Meissner, sent a letter to Priscilla Call on April 10, 1996. In the letter, Meissner stated that Anderson was making his work exceptionally difficult, and that he believed Anderson was actively working to interfere with his work.

At approximately the same time that Meissner's letter was received, Bonar discussed the situation with Call. Bonar testified that he told Call that Henderson must have known about Anderson's discussions with Houle before they took place, and told Call that his authority as a PRS had been compromised.

Call testified that an investigation into the matter was begun, and that Meissner was contacted as part of the inquiry. Call further testified that it appeared that Anderson had actively worked against GMR on the Houle project, and that the investigation also indicated that Henderson had prior knowledge of Anderson's actions. Dilts stated that she reviewed the situation in light of the employer's personnel policy and the progressive discipline

provisions of the collective bargaining agreement, and decided that Anderson's employment should be terminated.

A meeting held on May 2, 1996 was attended by Anderson, Local 17 representative Sarah Luthens, Director of the Department of Housing and Human Services Ven Knox, Division Director Martha Dilts, Human Resource Manager Beverly Yapp, and Energy Conservation Program Manager Pat Gibbon. At that meeting, Knox informed Anderson that her employment was being terminated effective that day. The termination took place one day before Anderson would have completed her one-year probationary period in the PRS classification. Luthens objected to the perfunctory manner in which the termination was imposed, and argued that the employer did not follow progressive discipline in its decision to terminate Anderson. While listening to Luthen's argument, the employer did not change its position, and Anderson's employment was terminated.

Anderson filed the instant unfair labor practice complaint on October 1, 1996.

POSITIONS OF THE PARTIES

Anderson argues that her employment was terminated because she had filed the earlier unfair labor practice complaint against the City of Seattle, and because she had been exercising protected rights as a public employee. The complainant maintains that she had a very difficult employment relationship with Priscilla Call, and that Call used the controversy concerning GMR Construction as a pretext to fire her from the REACH program. The complainant contends that the employer had a variety of disciplinary actions available, and could have even extended her probation period. However, the

employer chose to use the most drastic form of discipline, rather than use any of the other, less severe, alternatives. As a remedy, the complainant asks to be reinstated in her position with the REACH program, along with the payment of back pay for the period of her wrongful termination. In addition, complainant asks for the payment of her attorney fees and whatever other remedy the Commission may determine to be appropriate.

The employer argues that it made a legitimate business decision to terminate the employment of Susan Anderson. It contends that Anderson violated well-established procedures, by actively working against a contractor, and she had not performed her duties in a professional manner. The employer maintains that its decision to terminate Anderson's employment was necessary in the situation, and was not motivated by her prior unfair labor practice complaint or any other employee activities she may have been engaged in.

DISCUSSION

The Scope of Inquiry

During the course of hearing, the complainant presented a number of exhibits and produced a great deal of testimony concerning claimed violations of civil service rules and of the collective bargaining agreement. It is well settled, however, that the Commission does not have authority to deal with such violations. The Commission's sole concern in this case is whether the employer violated the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.

RCW 41.56.040 guarantees public employees the right to participate in collective bargaining activities in the following terms:

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 sets forth the various unfair labor practices that a public employer commits if it attempts to thwart the directives set forth in RCW 41.56.040:

It shall be an unfair labor practice for a public employer:

(1) **To interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by this chapter;**

(2) To control, dominate, or interfere with a bargaining representative;

(3) **To discriminate against a public employee who has filed an unfair labor practice charge;**

(4) To refuse to engage in collective bargaining.

[Emphasis by **bold** supplied.]

The allegations of the complaint in this case invoke both RCW 41.56.140(1) and (3).

The "Interference" Standard -

It has long been settled that motive is not a critical element in making a determination of employer interference with an employee's statutory rights in violation of RCW 41.56.140(1). See, City of Bremerton, Decision 2994 (PECB, 1988) and City of Mill Creek, Decision 5699 (PECB, 1006). Nor does finding a violation turn on the success or failure of the action. The test is whether the

employer's conduct may reasonably be said to interfere with the free exercise of employee rights.

The "Discrimination" Standard -

The Commission adopted a new "substantial motivating factor" standard, in 1994, for determining whether an employee has been discriminated against for the exercise of rights guaranteed by Chapter 41.56 RCW. Educational service District 114, Decision 4631-A (PECB, 1994); City of Federal Way, Decisions 4088-B and 4495-A (PECB, 1994). That standard is based upon decisions by the Supreme Court of the State of Washington in Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991), and applies whether the matter is a "mixed motive" or a "pretext" case. In setting forth its new analysis, the Commission explained:

Under the Wilmot/Allison test, the first step in the processing of a "discrimination" claim is for the injured party to make out a prima facie case showing retaliation. To do this, a complainant must show:

1. The exercise of a statutorily protected right, or communicating to the employer an intent to do so;
2. That he or she was discriminated against;
3. That there was a causal connection between the exercise of the legal right and the discriminatory action.

If a plaintiff provides evidence of a causal connection, a rebuttable presumption is created in favor of the employee.... While the complainant carries the burden of proof throughout the entire matter, there is a shifting of the burden of production. Once the employee establishes his/her prima facie case, the employer has the opportunity to articulate legitimate, non-retaliatory reasons

for its actions ... the employee may respond to an employer's defense in one of two ways:

1. By showing that the employer's reason is pretextual; or

2. By showing that, although some or all of the employer's stated reason is legitimate, nevertheless a substantial factor motivating the employer to act in a discriminatory manner.

Educational Service District 114, supra.

The Commission has noted that a discrimination violation requires a showing that an employee was deprived of "some ascertainable right, benefit, or status". See, Port of Tacoma, Decision 4626-A and 4627-A (PECB, 1995).

Application of Standards

Turning to the instant unfair labor practice complaint, it is clear that the employer's decision to discharge Anderson deprived her of a clearly ascertainable status. The underlying question is whether Anderson has presented a prima facie case that the employer's action was discriminatory.

The record in this case makes scant reference to any union-related activities participated in by Anderson. It appears she never held union office, never served in any official capacity such as shop steward, and never participated in any collective bargaining on behalf of the union. Given these factors, it is difficult to find that Anderson was engaging in protected collective bargaining activities during her recent period of employment.

On the other hand, it is undisputed that Anderson filed an unfair labor practice complaint against the employer prior to the course

of events leading to her termination. If Anderson is to be successful in her claim against the employer, she would need to establish a prima facie showing that her discharge resulted, in substantial part, from her earlier unfair labor practice filing. The record does not support Anderson's position, however. While Anderson presented a great deal of testimony about her personal issues with Priscilla Call, none of her evidence supports a contention that the recent discharge was motivated by retaliation against the earlier unfair labor practice charge.

Even though the Examiner does not find the evidence sufficient to support a prima facie case of discrimination, some comment is appropriate on evidence which would have satisfied the employer's burden to produce non-discriminatory reasons for its actions. The record strongly suggests that Anderson made inappropriate comments about GMR Construction, and that the employer had legitimate business reasons to discharge Anderson for violation of its policy prohibiting employees from advocating for or against any contractor. Anderson's contentious employment history with the employer, and personal difficulties with the manager of the REACH program, cannot excuse her misconduct on the job.

FINDINGS OF FACT

1. The City of Seattle is a municipal corporation of the state of Washington, and is a "public employer within the meaning of RCW 41.56.030(1). The employer offers low interest loans to qualified residents for home remodeling and rehabilitation, through its REACH program. Priscilla Call was a manager in the REACH program during the period relevant to this proceeding.

2. Susan Anderson is a "public employee" within the meaning of RCW 41.56.030(2).
3. Anderson began employment with the City of Seattle in approximately 1986. She initially worked as an energy conservation representative in a weatherization program where Priscilla Call was then the program manager. Anderson was included in a bargaining unit represented by International Federation of Professional and Technical Employees, Local 17, and she was openly critical of certain management decisions and practices. Anderson had a difficult working relationship with Call, who disliked Anderson's criticisms of her management style.
4. Anderson voluntarily left City of Seattle employment in 1990.
5. Anderson returned to City of Seattle employment in the latter part of 1993, in a temporary position as an energy conservation representative. While working in that temporary job, Anderson applied, without success, for several permanent positions with the City of Seattle. As a result of her unsuccessful attempts to obtain a permanent position, Anderson filed an unfair labor practice complaint on June 23, 1994, alleging that the employer was discriminating against her because of her exercise of protected rights.
6. The employer and Anderson settled the unfair labor practice case filed in 1994, prior to the matter being litigated. As part of that settlement, Anderson was given a position as a property rehabilitation specialist in the REACH program. As a REACH program employee, Anderson was again included in a bargaining unit represented by Local 17. Her employment was subject to satisfactory completion of a one-year probation.

7. As an employee in the REACH program, Anderson reported directly to Property Rehabilitation Supervisor Jan Henderson. In turn, Henderson reported to Call, who by that time had become a manager in that program.
8. Anderson's employment in the REACH program was generally non-controversial, except for her dealings with one contractor: GMR Construction. Anderson believed that GMR Construction had, in at least one instance, attempted to intimidate a client, and she was also concerned that the company had tried to collect for services that had not been completed. There is no evidence that Anderson held any union office or engaged in any union activity during her employment in the REACH program.
9. In the summer of 1995, one of Anderson's neighbors approached her about problems he had encountered with GMR Construction. Houle was a REACH client, and GMR had been selected to perform certain repairs and upgrades on his residence. Anderson discussed the situation with Houle. While the extent of the conversation is disputed, there is clear evidence that Houle made decisions about terminating his arrangements with GMR because of his conversation with Anderson.
10. The property rehabilitation specialist responsible for Houle's REACH project, Howard Bonar, learned of Houle's discussion with Anderson about GMR. He discussed the situation with Anderson, and then approached Henderson with concerns about a violation of a long-established agency policy prohibiting personnel from trying to get clients to change contractors.
11. Henderson contacted GMR Construction about the situation. In response, the company's owner stated that he believed that

Anderson was trying to undermine his efforts to fulfill his contracts.

12. Bonar also discussed his concerns with Call, and an investigation of the incident took place shortly thereafter. Based on the results of that investigation, the employer determined that Anderson's employment should be terminated.
13. A meeting was conducted on May 2, 1996, one day before Anderson would have completed her probationary period. A union representative was in attendance at that meeting. The decision to terminate Anderson's employment, effective that day, was announced.
14. Anderson filed a timely unfair labor practice complaint alleging that she had been dismissed because she had exercised statutory collective bargaining rights and because she had filed an earlier unfair labor practice complaint.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.
2. By events described in the foregoing Findings of Fact, the complainant has failed to sustain her burden of proof to establish a prima facie case that her discharge was in reprisal for the filing of her earlier unfair labor practice complaint, or was substantially motivated by her exercise of any protected collective bargaining rights during her recent employment with the City of Seattle, so that no violation of RCW 41.56.140 could be found.

ORDER

Based on the foregoing and the record as a whole, the complaint charging unfair labor practices is hereby DISMISSED.

DATED at Olympia, Washington, this 9th day of June, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


JACK T. COWAN, Examiner

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