City of Seattle, Decision 6852 (PECB, 1999)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ROBERT DOWD,	)	
	)	
Complainant,	)	CASE 13052-U-97-3155
	)	
vs.	)	DECISION 6852 - PECB
	)	
CITY OF SEATTLE,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER
	)	

Thomas A. Leahy, Attorney at Law, appeared on behalf of the complainant.

Mark H. Sidran, Seattle City Attorney, by C. Christine Maloney, Assistant City Attorney, appeared on behalf of the respondent.

On March 27, 1997, Robert Dowd filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the City of Seattle (employer) as the respondent. A hearing on the "discrimination" allegations was held on March 20, 1998, April 20, 1998, and May 15, 1998, before Examiner Jack T. Cowan. The parties filed post-hearing briefs.

Based upon the evidence, the Examiner rules that the complainant did not sustain his burden of proof. The complaint is dismissed.

PROCEDURAL BACKGROUND

Dowd signed the complaint form, using the title of "union steward", and he listed Service Employees International Union, Local 6

(union) in the space provided for his attorney or representative. Boxes on the complaint form were marked to indicate claims under RCW 41.56.140(1) [employer discrimination] and 41.56.140(3) [employer discrimination for filing charges]. The statement of facts accompanying the complaint form made reference to an unfair labor practice complaint Dowd filed with the Commission (as an individual) on September 16, 1996, and alleged he was discharged on September 26, 1996,in reprisal for that filing. Also attached to the complaint form were copies of a collective bargaining agreement, and copies of various correspondence and related documents dating back to January of 1996.

On May 5, 1997, Thomas A. Leahy filed a letter with the Commission, noting his appearance. That letter characterized the case as "SEIU Local 6 (Robert Dowd) vs. City of Seattle", but the union did not formally move for intervention or substitution as complainant.

The complaint was reviewed for purposes of making a preliminary ruling under WAC 391-45-110.[1] A deficiency notice issued on May 12, 1997, addressed to Leahy and the attorney who had noted an appearance on behalf of the employer, pointed out several problems with the complaint, as filed. Allegations of "discrimination" were found to state a cause of action for eventual processing under Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991), but other allegations were found to be untimely or to be contractual claims over which the Commission does not assert jurisdiction. The complainant

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[1] At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

was given a period of 14 days in which to file and serve an amended complaint which stated a cause of action, or face dismissal of the insufficient allegations.

A response to the deficiency notice filed on May 27, 1997 was signed by Dowd, without reference to acting on behalf of the union. Dowd reiterated his filing of the original complaint in this case, and even appeared to take issue with the union's settlement of a related grievance. Dowd acknowledged that the question of whether the employer had "just cause" for his discharge would not be directly before the Commission in this proceeding, but he reiterated his claim that he had been discriminated against by the employer.

Although the union's attorney represented Dowd at the hearing, the union still did not formally move for substitution as complainant.

FACTUAL BACKGROUND

The Seattle Center is a 74-acre facility owned by the City of Seattle, which includes a number of venues such as the Opera House and the Key Arena.[2] The Seattle Center Admissions Department manages the employees who work on event control at the various venues, including ushers, guards, and ticket-takers who are represented by SEIU, Local 6.

The employer and union have been parties to a series of collective bargaining agreements. Dispatch procedures and a minimum hours requirement for employees at the Seattle Center were the subject of a Memorandum of Agreement signed by those parties in March of 1993,

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[2] The Key Arena was formerly known as the "Coliseum".

with reference to a collective bargaining agreement that was in effect between the same parties through December 31, 1994. Under the standards then in effect, the 15 most-senior employees were required to work 370 hours per year; the next 10 employees on the seniority list were required to work 200 hours per year; new hires were required to work 500 to 700 hours per year.

The minimum hours requirements have been enforced in the past. The employer's accounting department tabulates the hours worked by employees during each six-month period, and sends the information to the admissions department. The admissions department issues a letter to each employee whose hours are deficient, and advises those employees to discuss the matter with management. The first time an employee fails to meet the minimum hours requirement, the letter contains a warning, advising that the minimum must be met in the next six-month period. If an employee fails to meet the requirement in two consecutive six-month periods, the employee is subject to discharge. Discharge is not automatic, but depends on factors such as: Whether work was available;[3] the employee's seniority and ability to get to work; leaves of absence or otherwise excusals from work; and the employee's commitment to increasing their work hours in the future. The employment of numerous Seattle Center employees has been terminated under the minimum hour requirement. This record includes letters sent to employees other than Dowd in April of 1994, and again in August of 1994, concerning failure to meet the minimum hours requirements.

Robert Dowd has been employed as an usher at the Seattle Center since 1988, has worked as an usher at the Opera House for the past

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[3] In the case of one employee, an employer official excused an accumulation of too few hours on the basis of "the scarce amount of work available".

six years, and is the union steward at the Opera House. He has been a part-time employee of the City of Seattle throughout that period.[4] The union and employer negotiated the dispatch procedure late in 1994, and Dowd's name was specifically mentioned in December 8, 1994 correspondence between the employer and union, relating to the hours issue. Dowd was credited for 194.5 hours (174.5 "net" hours) for 1995, against a 200-hour requirement for that year. The negotiations continued following expiration of the collective bargaining agreement on December 31, 1994.

In December of 1995, the union voted on a managed competition proposal, and agreed to increase the minimum hours and season commitments for the ushers.

In January of 1996, the employer published an "Admissions Bulletin" in which it announced:

> *Employee Commitment & Responsibility*
> In addition to the dispatching provisions, employees are required to work a minimum level of 400 hours annually for seniority numbers 1 thru 25 and 300 hours for seniority numbers 26 plus. If the group as a whole is not meeting the overall goal of staffing at events, then this minimum hour threshold may increase to 500 or 600 hours annually after discussion with the Union in a labor-management forum.

Dowd received a copy of that bulletin. The union responded with a newsletter which stated that the minimum hour requirement was only on a trial basis, but there is no indication in this record that the union ever filed an unfair labor practice complaint or initiated any other proceeding to challenge that announcement.

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[4] Separate from his employment at issue in this case, Dowd is a full-time employee of King County (METRO).

On January 19, 1996, the employer notified Dowd that he had not met the minimum work requirement for 1995. Dowd responded by letter dated January 23, 1996.

The employer accepted Dowd's explanation in a February 14, 1996 letter, which included:

> My intention was to confirm with you that you understand what your requirement is, and warn you that in the future you would need to be aware of meeting those requirements.
>
> Given the fact that you were only 5.5 hours short of meeting your requirement, I am not overly concerned about the past year and feel the shortage of hours can be excused. However, I must warn you that you are expected to meet your hours requirement in 1996. We will be calculating minimum hours again in the middle of this year and we can review your situation at that time.

While the record does not contain any direct response to that letter by Dowd, his awareness of the hours requirement is further evidenced by a February 24, 1996 letter in which he expressed concerns about dispatching errors that caused employees to lose work opportunities.

Based upon his status as 17th on the Opera House seniority list, Dowd's minimum hour requirement for 1996 was 400 hours per year (200 hours each six months). After Dowd's wife suffered a heart attack and required bypass surgery in April of 1996, Dowd spent approximately four days at the hospital, and then spent additional time helping his wife during her rehabilitation period from April through June. He informed Head Usher Jim Sepulvada about his wife's condition, and expressed concern about his work hours. Sepulvada undertook to take care of any notification in regard to

Dowd's family emergency, and he contacted Dispatcher Linda Wilson. Dowd did not submit a leave slip to request time off. Dowd worked only 132 hours in the period from January through June of 1996.

Events Leading to Discharge

By letter dated September 5, 1996, the employer notified Dowd that his work hours for the first half of 1996 (incorrectly stated in the letter as 102 hours) were insufficient. Letters pointing out similar deficiencies were sent to at least three other employees on the same date. The letter to Dowd indicated the employer was aware of some special circumstances, and Dowd was asked to schedule a meeting with an employer official, to discuss the matter before a decision on his employment status was made.

Dowd's First Unfair Labor Practice Complaint

Dowd filed a complaint charging unfair labor practices with the Commission on September 16, 1996.[5] In doing so, he acted as an individual, without even mentioning his office as a union steward. Dowd alleged a refusal to bargain on the part of the employer, in regard to the change of the minimum hours requirement.

That complaint was dismissed in November of 1996, for failure to state a cause of action.[6] The Order of Dismissal noted that, as an individual employee, Dowd did not have legal standing to pursue a refusal to bargain claim, and that the union had not come forward to substitute itself as the complainant.

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[5] Case 12706-U-96-3044.

[6] City of Seattle, Decision 5744 (PECB, 1996).

Discharge, Grievance, and Reinstatement

On September 17, 1996, Dowd and Facility Support Coordinator Juanita Woelfle had a discussion regarding Dowd's failure to meet his minimum hours requirement for the first six months of 1996. Dowd disputed applicability of the 400-hour minimum to him, and stated his belief that his annual requirement should have been lower (or perhaps should not have been changed from the 200 hours previously in effect). He acknowledged, however, that he had received the bulletin issued in January of 1996, and that information about the increased minimum hours requirement was included in that bulletin, but he asserted the information provided was incorrect. Woelfle asked Dowd what was going to happen for him for the next six months, and what he was going to do to demonstrate that he was going to meet the second half of the year minimum hour requirement. While Woelfle talked about opportunities Dowd could utilize, such as signing up on the "block", signing-up for the events at the Key Arena, using weekly call-in, using short-notice dispatch, and using standby (all of which are methods for employees to aggressively increase their minimum hours), Dowd continued to emphasize that the 400-hour minimum should not apply. Woelfle testified that Dowd offered reasons for not taking advantage of any of the methods which were discussed, and that he failed to commit

> ... to following through on things – offers that are available. No mapping out of a plan, no willingness to do that. He had failed to meet the minimum hour requirements in the first half, and although that would normally be a reasonable factor, the fact that he chose not to commit and chose not to map or a plan told me he wasn't interested in doing so ...

When asked what Dowd could have said to have obtained a different outcome, Woelfle responded,

> ... he could have mapped out a plan. He could have said he would take advantage of the various dispatching means and method, that he would commit to trying to meet these levels of work that were required, and frankly acknowledge that this was his requirement to do so.

As a result of that meeting, Woelfle recommended termination of Dowd's employment in a letter drafted September 19, 1996. Woelfle testified of being unaware of Dowd's filing of an unfair labor practice complaint until some time after September 25, 1996.

On September 24, 1996, letters were sent to Dowd and six other Seattle Center employees, discharging them for failure to meet the minimum hours requirement. In Dowd's case, the discharge was for failing to meet his minimum hour requirement for two consecutive periods: The second half of 1995, and the first half of 1996.

Dowd filed a grievance regarding his discharge. President Mark Earls of the union discussed Dowd's discharge with Carol Laurich, a labor negotiator for the employer, and with the director of the Seattle Center. Dowd was offered reinstatement by means of a letter dated October 21, 1996. He accepted that offer shortly thereafter.

POSITIONS OF THE PARTIES

Dowd asserts that his discharge was motivated by his filing of the unfair labor practice complaint earlier the same month. It is contended that Dowd was discharged in retaliation for engaging in statutorily protected conduct; specifically, for his having filed an unfair labor charge. The alleged failure of Dowd to maintain minimum hours was fallacious and merely a pretext.

The employer maintains that the reason for Dowd's termination was his inability to maintain the required minimum hours. The employer further argues that the official who took the action was unaware of Dowd's having filed a complaint at the time of the discharge.

DISCUSSION

Scope of the Proceedings

This case originated as, and continues to be, a "discrimination" complaint. The limitation of the case to discrimination claims is in the context that Dowd's earlier effort to initiate a "refusal to bargain" charge was dismissed for lack of standing. While the union has provided Dowd with legal representation here, the union has not formally moved for intervention as a party and certainly has not moved to amend the complaint to allege any "refusal to bargain" claim in this proceeding.

Standards for Discrimination Claims

RCW 41.56.140(3)provides: it is an unfair labor practice for an employer "to discriminate against a public employee who has filed an unfair labor practice charge". The Commission applies a "substantial motivating factor" test under Wilmot, supra, and Allison, supra. The complainant has the burden of proof at all times. A "discrimination" violation requires a finding of intent.

Knowledge of the Unfair Labor Practice Complaint

While it is clear that Dowd engaged in protected activity, both by serving as a union steward and by filing his earlier unfair labor

practice complaint, he has failed to establish a causal connection between his protected activity and the employer's discharge action. The operative time period for employer officials to have acted in reprisal for the earlier unfair labor practice complaint is from September 16, 1996 (when the complaint was filed with the Commission) and September 24, 1996 (when the discharge letters were sent to Dowd and others). Dowd has failed to sustain his burden of proof that the employer officials involved were aware of his unfair labor practice complaint during that time period.

None of the persons involved in the decision to discharge Dowd admitted to having any knowledge of his unfair labor practice filing prior to his discharge. Dowd testified that he did not tell Woelfle about his unfair labor practice complaint during their conversation on September 17, 1996, or at any other time.

The Examiner is confronted with conflicting testimony about Dowd's service of his earlier complaint. Dowd testified that he served the papers on the employer on September 16 or 17, 1996, by leaving copies with both the secretary to the director of labor relations and the secretary to Virginia Anderson. The employer denies that either of those offices has any record of receiving service from Dowd. The failure to provide any documentation of Dowd's actions weighs against him. WAC 391-08-120, titled "Filing and Service of Papers", provides in relevant part:

> (3) A party which files or submits any papers to the agency shall serve a copy of the papers upon all counsel and representatives of record and upon all parties not represented by counsel or upon their agents designated by them or by law. Service shall be completed no later than the day of filing of submission [to the Commission].

> (4) On the same day that service of the papers is completed under subsection (3) of this section, the person who completed the service shall:
>
> (a) Obtain an acknowledgment of service from the person who accepted personal service; or
>
> (b) Make a certificate stating that the person signing the certificate personally served the papers by delivering a copy at a date, time and place specified in the certificate to a person named in the certificate.

While the failure to provide documentation of service is not fatal in this case, as it would be if the document at issue was the complaint in this case,[7] it certainly provides basis for an inference that Dowd did not comply with the rule.

At the same time, there is a factual basis for the employer's claim that its first notice of Dowd's earlier unfair labor practice complaint was received by the director of labor relations from the Commission on September 23, 1996, and was forwarded to Anderson on September 24, 1996. Copies of a "Notice of Case Filing" routinely generated by the Commission's computerized case docketing system whenever a new case is docketed is mailed to each party and representative then listed on the Commission's docket records for the case.[8]

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[7] See, City of Seattle, (Apostolis) Decision 5852-A, where the Commission affirmed dismissal of a case in which a law office employee was unable to provide a contemporaneous record of service of an amended complaint.

[8] The Examiner takes official notice of the Commission's docket records for Case 12706-U-96-3044, which includes a "Notice of Case Filing" issued from the Commission's Olympia office on September 20, 1996. That effectively reduces the "operative time period" described above to just one or two days.

Absence of Causal Connection

The employer action at issue in this case appears to have been deliberate and voluntary based on a long series of developments, not a spontaneous reaction to a single event.

The employer offered evidence to show that there had been earlier warnings to Dowd about the shortage in his work hours, and that there had even been a discussion to encourage remedial action by Dowd. Additionally, it is clear that Dowd was not the only employee to be discharged in September of 1996 for failure to conform with the work hours requirement. The evidence does not support a finding that the employer was targeting Dowd for his union advocacy and efforts, or that it exhibited any union animus. Indeed, the evidence suggests that the employer's discharge of Dowd and others similarly situated for their failure to adhere to what it believed to be agreed-upon work hour standards was routine.

FINDINGS OF FACT

1. The City of Seattle is a municipal corporation and political subdivision of the state of Washington, and is a public employer within the meaning of RCW 41.56.030(1). It operates the Seattle Center.

2. Robert Dowd is an employee of the City of Seattle, working at the Seattle Center, and is a public employee within the meaning of RCW 41.56.020(2).

3. Service Employees International Union, Local 6, a bargaining representative within the meaning of RCW 41.56.030(3), is the

exclusive bargaining representative of certain City of Seattle employees working at the Seattle Center, including Robert Dowd, and Dowd served as a steward for the union.

4. A collective bargaining agreement between the employer and the union, for the period through December 31, 1994, established a minimum numbers of hours to be worked by employees in a one year period. Failure to meet the required hours was a basis for a warning, and could be a basis for discharge. Under the terms of that contract, Dowd was required to work at least 200 hours per year. The employer and union continued to negotiate following the expiration of that agreement.

5. In December of 1995, the union voted on a managed competition proposal and agreed to increase the minimum hours and season commitments for bargaining unit employees, including Dowd. The employer announced that agreement by means of a bulletin which was received by Dowd. The union announced that agreement by means of a union newsletter.

6. In January of 1996, the employer notified Dowd, by letter, that he had not met his minimum hours requirement for the last six months of 1995.

7. On September 5, 1996, the employer notified Dowd, by letter, that he had failed to meet his minimum hours requirement for the first six months of 1996.

8. On September 16, 1996, Dowd filed a complaint charging unfair labor practices with the Commission, alleging that the City of Seattle had committed a "refusal to bargain" in connection with the implementation of increased minimum hours require-

ments. Dowd has not provided proof of service conforming with WAC 391-08-120, to show that (or when) he served the City of Seattle with a copy of that complaint.

9. Dowd met with an employer official on September 17, 1997, for a discussion of his work hours. Although Dowd objected to the increased minimum hours requirement being imposed upon him, he did not inform the employer official of his filing of an unfair labor practice complaint on that subject.

10. On September 19, 1996, the employer official who met with Dowd on September 17, 1996, recommended the termination of Dowd's employment. Dowd has failed to establish that the employer official had knowledge of Dowd's filing of an unfair labor practice complaint on September 16, 1996.

11. The employer provided credible evidence that its first notice of the unfair labor practice complaint filed on September 16, 1996, was by means of the Notice of Case Filing issued by the Commission on September 20, 1996.

12. On September 24, 1996, the employer sent letters to Dowd and other employees who had failed to meet the minimum hours requirement, terminating their employment. Dowd has failed to establish that the employer official who sent those letters had knowledge of Dowd's filing of an unfair labor practice complaint on September 16, 1996.

13. Dowd filed a grievance protesting his discharge. Following a discussion between a union official and an employer official, an agreement was reached to resolve the grievance. Dowd was offered reinstatement by a letter dated October 21, 1996.

14. Dowd has failed to provide either direct or circumstantial evidence showing that the employer harbored or was motivated by union animus in regard to its actions taken to warn him concerning his failure to work the minimum hours for his classification and/or to terminate his employment in September of 1996.

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. The scope of the proceedings is and continues to be limited to a complaint of "discrimination" in violation of RCW 41.56.040 and RCW 41.56.140(1) and/or (3), and Dowd has no legal standing to pursue a "refusal to bargain" claim under RCW 41.56.140(4).

3. Robert Dowd engaged in activities protected by RCW 41.56.040, both by serving as a union steward for SEIU, Local 6, and by filing of a complaint charging unfair labor practices on September 16, 1996.

4. Dowd has failed to sustain his burden of proof to establish that any employer official was motivated by animus toward the exercise of rights protected by Chapter 41.56 RCW.

5. Dowd has failed to sustain his burden of proof to establish a causal connection between his protected activity and the employer's action to discharge him on September 24, 1996, so

that no unfair labor practice has been established under RCW 41.56.140(1) or (3).

ORDER

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

Issued at Olympia, Washington, this 21st day of October, 1999.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JACK T. COWAN, 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.