STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

YAKIMA POLICE PATROLMEN'S ASSOCIATION,	)	
Complainant,	)	CASE 19741-U-05-4998
vs.	)	DECISION 9451-B - PECB
CITY OF YAKIMA,	)	
Respondent.	)	DECISION OF COMMISSION

Cline & Associates, by *James M. Cline*, Attorney at Law, for the union.

Summit Law Group, by *Bruce L. Schroeder*, Attorney at Law, for the employer.

This case comes before the Commission on a timely appeal filed by the City of Yakima (employer) seeking to overturn certain Findings of Fact, Conclusions of Law, and Order issued by Examiner Carlos Carrion-Crespo determining that the employer committed certain unfair labor practices.[1] The Yakima Police Patrolmen's Association (union) supports the Examiner's decision.

ISSUE PRESENTED

Did the employer commit an unfair labor practice by discriminating against employees in violation of RCW 41.56.140(3) when it implemented a "Last-chance" agreement that resulted in the termination of Officer Michael Rummel in retaliation for the

[1] *City of Yakima*, Decision 9451-A (PECB, 2006).

union's refusal to withdraw a separate pending unfair labor practice complaint?

We reverse the Examiner's decision that the employer violated RCW 41.56.140(3) when it implemented the "Last-chance" agreement that resulted in Officer Rummel's termination. Although the Examiner correctly found that the union made its prima facie case of discrimination, the employer provided compelling non-discriminatory reasons for implementing Rummel's "Last-chance" agreement, and substantial evidence does not support a finding that the union sustained its ultimate burden of proof. We dismiss the complaint in its entirety.[2]

THE UNION'S DISCRIMINATION CLAIM

Applicable Legal Standard

A discrimination violation occurs when an employer takes action which is substantially motivated as a reprisal against the exercise of rights protected by Chapter 41.56 RCW. *See Educational Service District 114*, Decision 4361-A (PECB, 1994), where the Commission embraced the standard established by the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991); *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). A discrimination violation can be found when:

1. An employee exercises a right protected by the collective bargaining statute, or communicates to the employer an intent to do so;

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[2] Where an allegation of discrimination has been dismissed, an independent interference allegation cannot be found for the same facts. *See Reardan-Edwall School District*, Decision 6205-A (PECB, 1998). Therefore, we need not address whether any of the facts alleged constitute employer interference.

2. The employee is discriminatorily deprived of some ascertainable right, benefit, or status; and

3. There is a causal connection between the exercise of the legal right and the discriminatory action.

Where a complainant establishes a prima facie case of discrimination, the employer need only articulate non-discriminatory reasons for its actions. It does not have the burden of proof to establish those matters. *Port of Tacoma*, Decision 4626-A (PECB, 1995). The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing that the reasons given by the employer were pretextual, or by showing that union animus was nevertheless a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

Application of Standard

The facts surrounding Officer Rummel's termination and the subsequent discrimination claim are intricate and complex as a whole, but can be broken down into the following sequence:

- In August of 2002, Rummel was stopped by Yakima Police Officers and charged with driving under the influence of alcohol. At the time of his arrest, Rummel acted in a non-compliant manner towards the officers who stopped him. The arresting officers escorted Rummel home, and warned him not to operate a vehicle under his current state of intoxication. Shortly thereafter, Yakima Police officers again observed

Rummel operating a motor vehicle.[3] Based upon these events, Rummel was charged with driving under the influence of alcohol in violation of RCW 46.61.502.

Following an internal investigation which determined that Rummel violated several employer policies, Rummel signed a "Last-chance" agreement requiring him to abide by several conditions, including evaluation and treatment for substance abuse and an agreement to "comply with any and all Yakima Police Department Policy and Procedures and Yakima Police Civil Service Rules."

- In September of 2003, Samuel Granato was hired as Chief for the City of Yakima Police Department.

- In late 2004, the supervisor to Stacey Unglesby, a co-worker of Rummel's who worked in the dispatch center, filed a complaint against Rummel alleging that Rummel made several "harassing" phone calls to Unglesby. Rummel and Unglesby were involved in a relationship. Recordings of the phone calls indicated to the employer that Rummel was potentially suicidal. Captain Greg Copeland, Rummel's immediate supervisor, took steps to have Rummel undergo a mental health evaluation at that time.

- On October 31, 2004, Yakima Police officers responded to reports of a domestic dispute at Rummel's apartment involving Rummel and Unglesby. Apparently, the two got into a disagreement while attending a Halloween party, and upon return to Rummel's apartment, Rummel was refusing to allow Unglesby entry to retrieve her keys. Upon entering the apartment, Yakima Police Sergeant Wentz and Unglesby observed Rummel

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[3] It appears from the record that both arrests for driving under the influence occurred on the same day.

loading a shotgun. They quickly retreated, and soon thereafter Copeland arrived at the scene. Copeland testified that he could tell that Rummel was intoxicated. Tr. 303:3.

- Copeland and Rummel met on November 1, 2004, and Copeland ordered Rummel not to have any contact with Unglesby.

- On December 7, 2004, Copeland, while interviewing Unglesby about a possible violation of the no-contact order, learned from Unglesby that, on December 6, Rummel contacted her at work. Copeland obtained a tape of that call, and concluded that Rummel violated the no-contact order, an insubordinate act under the Yakima Police Code of Conduct.[4]

- Prior to a full investigation regarding the December 6 incident, Rummel's physician advised Copeland that Rummel was having difficulties eating and sleeping. The employer then placed Rummel on administrative leave and ordered him to undergo a psychiatric evaluation. The psychiatrist recommended that Rummel was able to return to work February 15, 2005, but also recommended 90 days of random alcohol testing for Rummel.

- On February 16, 2005, the union filed a separate unfair labor practice complaint[5] against the employer alleging that it had attempted to directly negotiate with an employee and breached its good faith bargaining obligation by failing to meet regarding a random drug-testing policy.

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[4] Copeland was interviewing Unglesby regarding a different potential violation of the no-contact order. However, evidence regarding this different incident was withdrawn by the employer.

[5] Case 19206-U-05-4882.

- This record demonstrates that the union and employer disagreed about the process and procedure regarding Rummel's random alcohol testing, with the union adamantly insisting that Rummel's testing would in no way create a past practice for future random drug testing.[6] Disagreement about the process for Rummel's alcohol testing, as well as a hand injury to Rummel, delayed his return to work. This record also demonstrates that in April of 2004 the union agreed that Rummel's reinstatement would be subject to 90 days of random alcohol testing, but the union reiterated that Rummel's testing did not create a department-wide policy or establish a past practice.

- On April 1, 2005, Rummel was accused of using his police badge to enter a bar without paying the cover charge, a violation of the Yakima Police Code of conduct which prohibits police officers from using their badge for monetary gain. The parties disagree about the circumstances surrounding the incident, with Rummel asserting that he simply entered the bar to pick up an intoxicated friend. However, the employer's internal investigation concluded that Rummel violated an employer policy.

- In May of 2005, the employer and union conducted a labor/management meeting. During this meeting, several matters were discussed, including department-wide drug testing, the union's February 16, 2005, unfair labor practice complaint, and Officer Rummel's possible reinstatement.

- In June of 2005, the employer held a pre-termination hearing, and ultimately terminated Rummel based upon his violation of

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[6] Bargaining unit employees were subject to drug testing upon reasonable suspicion. The parties were in the process of negotiating a random drug testing procedure.

the "Last-chance" agreement stemming from the April 1 badge incident.

The question now before this Commission is whether or not the employer discriminated against Rummel when it implemented the provisions of Rummel's "Last-chance" agreement based upon other bargaining unit employees exercising their statutorily protected right to file an unfair labor practice complaint.

The Union's Prima Facie Case

The Examiner found, and we agree, that the union produced enough evidence to establish a prima facie case of discrimination. It is clear from this record that, according to the union, it exercised its right to file an unfair labor practice complaint under Chapter 41.56 RCW, and in retaliation for pursuit of those protected rights, Granato informed the union at the May 2005 labor/management meeting that he was going to discharge Rummel under the "Last-chance" agreement. According to the union, Granato wanted the union to drop its unfair labor practice complaint.

The Employer's Rebuttal

This record also demonstrates that the employer articulated several non-discriminatory reasons for implementing Rummel's "Last-chance" agreement. According to the employer, Rummel violated the "Last-chance" agreement on at least two occasions. The first was the December 2004 incident involving Unglesby and Rummel's violation of the no-contact order. The second incident was the April 2005 event at a night club where Rummel was accused of using his police badge for personal gain. The employer argues that the numerous violations of the employer's code of conduct and policies warranted his termination.

Union's Ultimate Burden of Proof

The Examiner found that the union satisfied its ultimate burden of proof that a substantial motivating factor for implementing Rummel's "Last-chance" agreement was union animus. We disagree, and find that substantial evidence does not support several of the Examiner's conclusions.

The Examiner found that the employer offered to reinstate Rummel in March 2005, and based upon that offer the Examiner inferred that the employer did not consider the April 2005 badge incident to be a serious matter, particularly in light of the October 2004 phone harassment and December 2004 insubordination incidents. However, the badge incident occurred *after* the employer made its March 2005 offer to reinstate Rummel, and the investigation into Rummel's actions had not yet concluded. Thus, the Examiner's inference that the employer did not consider the badge incident a violation of the "Last-chance" agreement was not supported by substantial evidence.

Additionally, the Examiner failed to consider the testimony of Captain Copeland. Following the badge incident, Lieutenant Nolan Wentz was assigned to investigate the incident. Wentz completed his investigation of the April 1, 2005, badge incident and turned his report over to Copeland. Following review of the report, Copeland independently recommended to Granato that Rummel be terminated. Copeland testified that he considered the incident a breach of the "Last-chance" agreement, and testified that union activities did not factor into his decision.

Finally, although the Examiner found that Granato expressed frustration regarding the union's failure to withdraw its unfair labor practice complaint regarding a policy for random drug testing for bargaining unit employees, that frustration does not by itself constitute evidence of the employer's intent to discriminate

against Rummel. The frustration expressed was more closely associated with the bargaining process, and not an intent to discriminate against protected employee rights.

Simply put, substantial evidence does not support a conclusion that the union met its ultimate burden of proof. The union's claim that Rummel's discharge was in retaliation for protected union activity does not outweigh the non-discriminatory reasons set forth by the employer for implementation of Rummel's "Last-chance" agreement. The complaint is dismissed.

NOW, THEREFORE, the Commission makes the following:

AMENDED FINDINGS OF FACT

The Findings of Fact issued by Examiner Carlos Carrion-Crespo are adopted as the Commission's Findings of Fact except paragraphs 9 and 11, which are stricken from the record.

AMENDED CONCLUSIONS OF LAW

The Conclusions of Law issued by Examiner Carlos Carrion-Crespo are adopted as the Commission's Conclusions of Law except paragraph 2, which is amended to read:

2. The City of Yakima did not retaliate for the union's filing of an unfair labor practice complaint with the Public Employment Relations Commission when it implemented Officer Michael Rummel's "Last-chance" agreement.

AMENDED ORDER

The complaint filed by the Yakima Police Patrolmen's Guild against the City of Yakima alleging unfair labor practices is DISMISSED.

Issued at Olympia, Washington, the 9th day of May, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS ~~G.~~ MOONEY, Commissioner