

STATE OF WASHINGTON  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

Mr. Barry Keesee	)	
229 - 22nd N.W.	)	
East Wenatchee, WA 98801	)	
	)	CASE NO. 3086-U-80-436
Complainant	)	DECISION NO. 1392-PECB
	)	
vs	)	
	)	FINDINGS OF FACT,
East Wenatchee Water District	)	CONCLUSIONS OF LAW,
890 Eastmont	)	AND ORDER
East Wenatchee, WA 98801	)	
	)	
Respondent	)	
	)	
	)	

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JOHN HOTCHKISS, Attorney at Law, appeared on behalf of the complainant.

DALE M. FOREMAN, Attorney at Law, appeared on behalf of the respondent.

On October 8, 1980, Barry Keesee filed a complaint with the Public Employment Relations Commission alleging that East Wenatchee Water District had committed unfair labor practices within the meaning of RCW 41.56.140(1). The matter was heard on December 18, 1980 in East Wenatchee, Washington before Examiner George G. Miller. Post-hearing briefs were filed by the complainant on March 2, 1981, answered by the attorney for the respondent on March 15, 1981, which was answered by a response brief by the attorney for the complainant on March 23, 1981.

THE COMPLAINT

The complaint alleges

Mr. Barry Keesee has been an employee of the Respondent employer and a member in good standing of the American Federation of State, County, and Municipal Employees, AFL-CIO, Local 846 E.W. (Union) since August of 1975. Mr. Keesee was elected president of the union in September of 1976.

Charlie Johnson became manager of Respondent employer in 1977. Since that date, Mr. Johnson has been overheard to say that he would do anything to get rid of the union and he has also offered the employees higher salary if they would withdraw from the union.

Since Mr. Johnson became manager of the Respondent employer, the following has occurred. In December of 1978, the Respondent employer initiated a new personal hygiene policy. Said policy required all employees to trim their hair and beards. On or about December 5, 1978, Mr. Keesee was sent home to trim his beard and hair. Mr. Keesee was the only employee sent home for that purpose. Mr. Keesee's hair and beard have always been neatly trimmed. On or about June 5, 1979, Mr. Keesee received a letter from Charlie Johnson advising him that he had taken a considerable amount of sick leave time and that the sick leave policy should not be abused. Mr. Keesee has taken sick leave when necessary, not when convenient. At this time, there was at least one employee of the Respondent employer who had taken more sick leave time than Mr. Keesee. That employee did not receive a letter of the same nature. On or about June 18, 1979, Mr. Keesee received two letters of reprimand; one concerning his maintenance on his backhoe, and the other concerning his job performance for one two and a half day period. Mr. Keesee's backhoe is checked for maintenance more consistently than any other of the Respondent employer's operators. The letter of reprimand concerning Mr. Keesee and another employee's job performance was protested and taken through the first three steps of the grievance procedure outlined in the collective bargaining agreement between the union and the Respondent employer. Respondent employer has refused to complete the final step of arbitration concerning that protested letter. On or about October 19, 1979, Mrs. Keesee gave birth to Mr. and Mrs. Keesee's newest child. Some time before October, 1979, Mr. Keesee, being aware that the child would be born in October, had requested that he be allowed to take a week of accumulated vacation time in October after the child was born. Mr. Keesee was given permission to take the week of vacation in October. On or about October 19, 1979, Mr. Keesee and his foreman, Ben Hill, discussed the possibility of the East Wenatchee Water District allowing Mr. Keesee to take three days sick leave during this occasion. Mr. Keesee thought that since he had already been given the time off that if the East Wenatchee Water District would not allow him to take the time as sick leave, they would change his time cards to vacation time. Adhering to this thought, Mr. Keesee requested, and his foreman agreed, to fill out his time cards for sick leave on October 22nd, 23rd, and 24th and vacation time for the 25th and 26th of October. Article 12, Paragraph 12.3 does allow an employee to use three days sick leave for death in the employee's immediate family and by special arrangements at the discretion of the manager, more time on sick leave may be granted in special circumstances. Mr. Keesee thought that his situation may qualify for special circumstances and if not, he had already been given permission to take time as vacation. On or about October 25, 1979, Mr. Keesee went into the shop of Respondent at noon when all the other employees were eating lunch and picked up his rubber boots so that he might have them to pour concrete at his home. Using the Respondent's tools and shop for personal use is common practice for the Respondent's employees. On or about October 30, 1979, Mr. Keesee was terminated for abusing sick leave on October 22, 23, and 24 of 1979 and for taking company tools for personal use. Subsequent to Mr. Keesee's termination, Mr. Ben Hill, an employee of the Respondent employer, personally asked Mr. Charlie Johnson if he could use three days sick leave while his wife gave birth to their child. Mr. Johnson gave Mr. Hill permission to use the sick leave as requested.

Mr. Keesee was also the head of the Employees Safety Committee and has turned the East Wenatchee Water District in to the Department of Labor and Industries for their refusal to provide safe

working conditions. The Department of Labor and Industries has issued citations to the East Wenatchee Water District.

There has been friction between Mr. Keesee and Mr. Johnson since soon after Mr. Johnson became the manager of the Respondent. Mr. Keesee's termination was a result of exercising his rights under RCW 41.56.040 and his insistence that the respondent provide their employees with safe working conditions, not for his abuse of sick leave or use of company tools. Mr. Johnson's expressed anti-union attitude and his termination of the union's president for other than good cause has had a chilling effect on the remaining employees as far as exercising their rights under RCW 41.56.040 are concerned.

Relief Sought:

The complainant requests that the respondent be ordered to reinstate him and to pay him all of the accumulated back pay from his date of discharge on October 30, 1979 until the present.

Three (3) cases have been filed with the Public Employment Relations Commission in this matter. On October 14, 1980 the Executive Director, Public Employment Relations Commission advised the parties as follows:

Re: East Wenatchee Water District, Case No. 2184-A-79-185,  
Case No. 2808-A-80-243, Case No. 3086-U-80-436

The first of the captioned cases was opened on the basis of an arbitration request filed by the union on July 23, 1979. That grievance arbitration concerned a reprimand placed in the file of Barry Keesee. The matter lay dormant for quite some time due to lack of prosecution and more recently due to a lack of concurrence by the employer in having PERC appoint the arbitrator pursuant to RCW 41.56.125.

The second of the captioned cases is another grievance arbitration case. It was opened on the basis of a union request filed June 5, 1980 making reference to the termination of "the local union president". As with the earlier case, the employer declined to concur in proceeding to arbitration, and the matter was held in abeyance.

The third of the captioned cases is an unfair labor practice filed by Barry Keesee on October 8, 1980. The employer has filed its answer to that complaint, attaching copies of the findings, conclusions and order of the Chelan County Superior Court dismissing as untimely the union's effort to force arbitration. The complaint charging unfair labor practices alleges (and the employer's answer denies) that Keesee has been discriminated against for his exercise of rights under RCW 41.56. The complaint is now before the undersigned for the preliminary ruling required by WAC 391-21-510, and I conclude that there are sufficient allegations to warrant a hearing. Given the multiplicity of issues, I want to make clear at the outset that the Examiner in the unfair labor practice case will not be considering contractual "just cause" questions as an arbitrator would have done, but rather will be considering only the anti-union animus/discrimination allegations which would constitute statutory violations under RCW 41.56.140. Examiner George G. Miller is hereby assigned to conduct the further proceedings in this case. The Examiner is located in our Spokane office:

PUBLIC EMPLOYMENT RELATIONS COMMISSION  
East 3102 Trent Avenue TAF-C33  
Spokane, Washington 99220

The Examiner will contact the parties with respect to a hearing date.

Please be advised that Case No. 2184-A-79-185 and Case No. 2808-A-80-243 are being closed. We kept these arbitration cases pending for some time on the chance that the concurrence of the employer might be obtained. It appears clear from the results of the Court proceedings that the employer's concurrence will not be forthcoming and that no further useful purpose will be served by our carrying those cases as open cases on our docket.

BACKGROUND

Barry Keesee was hired by the East Wenatchee Water District in August 1975. He was discharged on October 30, 1979 for misuse of sick leave privileges and for poor work performance.

On June 5, 1979, Keesee received a letter from the District showing a number of sick leave hours he had taken during the past year and the first five months of 1979. While no accusations of misconduct were made, he was reminded that "While sick leave is a benefit afforded you by your employer, it is a privilege not to be taken advantage of." Subsequent to receipt of this letter, Keesee filed a written request for October vacation time, stating that the reason for the request was so that he could be with his wife during the birth of their child. On or about October 19, 1979, he did not report for work. His daily time cards for October 23, 24 and 25, 1979 had been recorded, in advance, that he was sick. The District, after reviewing Keesee's work record, opted to discharge him.

Keesee served as President of Local 846EW, American Federation of State, County and Municipal Employees from 1976 until his discharge. Local 846EW is the exclusive bargaining representative for certain classes of personnel employed by the East Wenatchee Water District.

POSITIONS OF THE PARTIES

The complainant maintains that his termination came about because of his activities as President of the local union and his confrontations with management in that capacity.

The respondent holds that the complainant "cloaked" himself in the flag of a union man in an attempt to obscure the true facts behind his discharge. He was terminated because he was a bad employee.

#### DISCUSSION

The ambit of the hearing was limited to consideration only of the anti-union animus/discrimination allegations which would constitute statutory violations under RCW 41.56.140.

The record shows that Keesee came to the District's attention in early December 1978 over a matter of personal appearance. As a result of his failure to comply with the District's policy that beards be trimmed, Keesee was relieved of duty and sent home on December 5, 1978. That same morning Keesee had damaged the door of the shop building by backing his backhoe through the not completely opened door.

On June 5, 1979, Charlie Johnston wrote the following to Keesee:

Dear Barry:

I wish to call to your attention the number of sick leave hours you have taken for the year of 1978 and through May 31, 1979.

During 1978, your records indicate that a total of 127½ hours were taken and through May 31, 1979 you have taken 118 hours. The latter represents approximately three weeks taken so far for 1979.

I am not indicating that you are abusing this privilege, I am merely saying that it far exceeds time taken by other employees of the District.

While sick-leave is a benefit afforded you by your employer, it is a privilege I would hope that would not be taken advantage of.

Sincerely,

Charlie

On June 13, 1979, Manager Johnston, placed the following letter in files of Barry Keesee and Terry Barnes (a fellow employee).

SUBJECT: Letter to file of B. Keesee and T. Barnes.

The meter installation crew consisting of Ben Hill, Foreman, T. Barnes and B. Keesee were installing a pressure reducing valve at the Corner of 15th & 19th Streets. This involved

digging down to the main and tapping a 10" main and putting a 2" corporation on top of the 10" main. These corporations cost approximately \$82.00 and good judgment should be used when tightning the top of the corporation in fear of breaking it. Ben Hill, the foreman, came into my office and requested to talk with John Everhart and myself regarding the two employees under him. He advised both of us that B. Keese had broken the corporation on the 10" main as apparently he did not use good judgment in tightning it. It consists of copper and two pipe wrenches should be used so one can apply proper leverage without running the risk of breaking it. In this case it was not used. Mr. Hill informed J. Everhart and myself he wished to resign from his foremans position as he apparently was dis-satisfied with the two employees under him. I informed him that the matter would be taken care of and looked into immediately.

J. Everhart and I went to the above location and examined the broken corp. T. Barnes was not in the dug hole helping as he advised he had injured his back the previous weekend playing softball and had taken two days of sick leave. Mr. Everhart got in the hole and put a 2" tap over the top of the broken corp in hopes of being able to rethread the broken one. He was able to accomplish this. Both Barnes and Keese were working in the hole on top of the 10" pipe trying to install the proper plumbing after the corporation had been re-threaded. Water from tapping the main was at the bottom of the hole. It is my understanding Keese had got wet earlier and had gone home to change his clothes. Considerable time was spent trying to plumb the pipes because neither employee had taken boots or "waders" with them to the job site. All employees have access to these. Mr. Keese fell into the hole during the time I was there and got wet again. Had they had the proper gear on the job a great amount of time could have been reduced. J. Everhart explained the way the plumbing should be placed. In fact, he plumbed the entire set-up on the road and it was then placed into the hole and tightned. During the tightning, is when Keese fell in the water. Everything was in order and we left the site at around 10:30 A.M. It was imparative that we expedite the job and work with caution as all the homes on the North side of 15th Street was out of water.

A hole about 6' deep by approximately 10' wide needed to be back-filled. The back-hoe was at the job site to do this. A call came over the radio from T. Barnes to Everhart about 3:30 P.M. asking a question. John ask him if they were still working of this project and Barnes said yes. John said it looks as though we better have a meeting about getting more work done. Barnes' reply was "any time you are ready". I then came over the radio and say the meeting will be held at the shop at 8:00 A.M. sharp on 6-14-79.

In summary, after discussing with J. Everhart, lack of judgment was used at the job site, lack of planning was used before going to the job, and a lot of time was wasted in backfilling. I think their attitude was such during the backfilling that they didn't care when they finished.

/s/ Charlie Johnston

On June 18, 1979, John Everhart, Water District Superintendent, wrote to Keesee:

Dear Barry:

This is to serve notice to you that it is your responsibility to maintain and service the backhoe that you operate.

In my thinking it was neglect on your part by not properly greasing the hoe and keeping water in the battery. As an operator, your responsibilities are to maintain this piece of equipment at all times.

Sincerely,

John Everhart  
Superintendent

On October 19, 1979 and on November 26, 1979, (after Keesee's discharge) Everhart sent a memorandum to Johnston regarding lack of maintenance and corrective action on the backhoe assigned to Keesee. Everhart testified that he did not always "get around to writing memoranda on the date of occurrence", thus the time lag on the second communication. He identified the first memo as reporting the incident and the second memo as a report of corrective action taken.

On or about October 19, 1979, Keesee asked his foreman, Ben Hill, to turn in Daily Time Tickets for him the following week as he would be taking time off to be with his wife who had just given birth to their child. Daily Time Cards were filled out by Hill for October 22, 23, 24, 25 and 26. The cards for the 22nd, 23rd and 24th carry the notation "sick", the cards for the 25th and 26th were marked "vacation". It should be noted that Keesee appeared at the shop on or about October 25, 1979 at about noon and picked up the District-owned rubber boots assigned to him and removed them from the premises without permission of anyone in authority. Hill passed the cards to Everhart, the Superintendent, who, in turn, passed them on to Johnston, the Manager. Everhart testified that when Hill handed him the five (5) Daily Time Tickets he had made out for Keesee, Hill stated "I want you to know that I filled these out under orders. I know it looks hokey and there's going to be something come of it but here they are". At the Board of Commissioner's meeting on October 29, 1979, Johnston reported that Keesee had improperly claimed sick leave time the preceeding week when he was in fact not sick. The Commissioners unanimously agreed that termination of Keesee

was warranted. Keesee was discharged on October 30, 1979.

The complainant has the burden of proof in any unfair labor practice case. See WAC 391-45-270. The record fails to substantiate any anti-union animus or discrimination by the employer in the discharge of Keesee. An inference that the discharge of an employee was motivated by his union activity must be based on evidence, direct or circumstantial, and not on mere suspicion.

NLRB v. Federal Pacific Electric Co., 441 F. 2d 765 (5th Cir. 1971);

Lozano Enterprise v. NLRB, 357 F. 2d 500 (9th Cir. 1966); Traveleze Trailer

Co., Inc., 163 NLRB 43 (1967). The Court in NLRB v. McGahey, 233 F. 2d 406

(5th Cir. 1956), stated:

The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like, then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, naught remains but anti-union purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or for no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8 (a)(3) forbids. NLRB v. Nabors (5 Cir., 196 F.2d 272), supra; NLRB v. National Paper Co. (5th Cir., 216 F.2d 859), supra; NLRB v. Blue Bell, Inc. (5th Cir., 219 F.2d 796), supra; NLRB v. C & J Camp, Inc. (5th Cir., 216 F.2d 113), supra.

This holding was quoted with approval in Florida Steel Corporation v. NLRB, 587 F.2d 735 (5th Cir. 1979).

The Examiner is not convinced that Keesee's union membership or activity was a motivating factor in the decision by the District to discharge him. The Examiner is convinced that his discharge was the result of his own performance. Having considered the evidence, testimony, arguments and post-hearing briefs, the Examiner now makes the following:

#### FINDINGS OF FACT

1. East Wenatchee Water District, East Wenatchee, Washington, is a "public employer" within the meaning of RCW 41.56.020 and RCW 41.56.030(1).



2. The complainant, Barry Keesee, is an "employee" within the meaning of RCW 41.56.030(2).
3. The respondent, by letter, advised the complainant that he had used 245½ hours of sick leave between January 1, 1978 and May 31, 1979 (30+ workdays) and while he was not accused of abusing sick leave, he was subtly placed on notice that the respondent was monitoring his sick leave useage.
4. The respondent placed a letter in the complainant's personnel file on June 13, 1979 which commented derogatorily on his job performance that day.
5. The complainant was admonished, in writing, by the District Superintendent on June 18, 1979 for failure to properly service his assigned backhoe.
6. The respondent was advised by the District Superintendent on October 19, 1979, by memorandum, that the complainant's assigned backhoe had not been properly maintained.
7. On or about October 19, 1979, the complainant asked his foreman to turn in daily time cards for the following week indicating on the first three days "sick" and on the last two days "vacation" as the reasons for his absence. The attempt to claim sick leave time triggered the discharge action taken by the respondent on October 30, 1979.
8. On or about October 25, 1979, the complainant removed from the respondent's premises, without permission, a pair of rubber boots, property of the respondent.
9. The complainant did not produce any circumstantial or other evidence demonstrating any anti-union animus or discriminatory course of conduct by the respondent.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. The respondent, East Wenatchee Water District, did not violate RCW 41.56.140 by discharging the complainant, Barry Keesee, on October 30, 1979.

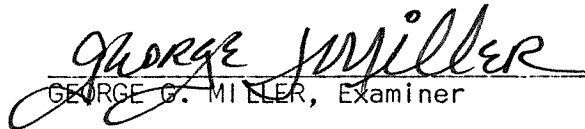
On the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

The complaint charging unfair labor practices filed in the above entitled matter is dismissed.

DATED at Spokane, Washington this 4<sup>th</sup> day of March, 1982.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
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GEORGE G. MILLER, Examiner