STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

FRANK FIELDS, Complainant vs. MUNICIPALITY OF METROPOLITAN SEATTLE, (METRO), Respondent	)	CASE NO. 5565-U-84-1012 DECISION NO. 2442 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Jean Schiedler-Brown, Attorney at Law, appeared on behalf of the complainant.

Julie L. Kebler, Attorney at Law, appeared on behalf of the respondent.

On November 27, 1984, Frank Fields (complainant) filed a complaint with the Public Employment Relations Commission (PERC) alleging that the Municipality of Metropolitan Seattle (respondent or METRO) violated RCW 41.56.140(1) and (3), by its personnel practices during his service as a probationary employee, and by its eventual termination of him from full-time employment as a bus driver. The complainant filed a supplemental statement of facts on December 28, 1984. The Executive Director issued a preliminary ruling on January 8, 1985, pursuant to WAC 391-45-110, referring allegations of "reprisal for exercising rights to file a grievance"[1] to Examiner Martha M. Nicoloff for hearing.

Pursuant to notice issued by the examiner, the employer filed an answer on February 19, 1985. At the same time, it filed a motion for a more definite and certain statement of facts and a motion for dismissal of allegations based on RCW 41.56.140(3). The

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1 The term "protest" was actually used in the original complaint.

complainant filed an amended statement of facts, a response to the motion for dismissal and a motion for discovery. The motion for discovery was denied by the examiner in a letter dated March 21, 1985. With respect to the citation of RCW 41.56.140(3), the parties were notified that the complainant would be permitted to pursue his allegations of discrimination on the basis of union activity under RCW 41.56.140(1), but that the complaint failed to state a cause of action under RCW 41.56.140(3) in the absence of any allegation that the complainant had previously filed charges or given testimony in an unfair labor practice proceeding.

A hearing was held in the matter on April 10, 1985. At the close of complainant's case-in-chief, the respondent moved for dismissal, claiming that the complainant had failed to sustain his burden of proof. The examiner took the motion under advisement and recessed the hearing. Prior to reconvening the hearing, the examiner granted the motion for dismissal.

FACTS

The Municipality of Metropolitan Seattle (METRO) is engaged in the operation of transportation and waste disposal systems serving the Seattle metropolitan area. METRO has a collective bargaining relationship with the Amalgamated Transit Union, Division No. 587 (ATU), for a bargaining unit which includes transit operators and equipment maintenance, facilities maintenance, and clerical and office personnel.

At the time the events germane to this proceeding took place, METRO and the ATU were parties to a collective bargaining agreement covering the above-described unit for a term from November 1, 1981 through October 31, 1984. That agreement contained an entire article concerning discipline, which detailed

matters which would be subject to discipline and the types of discipline which could be meted out for specific infractions. The language of that article included notation that METRO provided an "essential public service", and that employees had the "obligation" to report for duty unless previously excused. A section in that article dealing solely with probationary employees provided that the discipline of such employees was the sole responsibility of METRO. That section also provided that terminations during the probationary period would not be subject to the grievance or arbitration provisions of the collective bargaining agreement.

The collective bargaining agreement also included a separate article dealing solely with sick leave. It was noted therein that the ability to work regularly was a requirement of continued employment with METRO, and that employees who were repeatedly absent might be subject to disciplinary action.

METRO maintains written "Standards for Evaluating Probationary Employees", which detail the types of discipline which might result for particular infractions occurring during the probationary period. That document provides for a point system for discipline, and provides for termination of the employee if the total on the record of any full-time operator equals or exceeds 15 points at any time during the probationary period. The probationary standards detail the number of points which an operator will accrue for specific infractions. Five points per day accrue beginning with the fourth full or partial day of sick time used by a full-time operator. The collective bargaining agreement details a procedure by which points for certain types of infractions may be "worked off" an employee's record. Each probationary employee is provided with a copy of the collective bargaining agreement and a copy of the probationary standards at a meeting at which those standards are explained to new hires.

Frank Fields was originally employed by METRO as a full-time transit operator in August, 1973. He voluntarily quit his employment in October, 1974, apparently to move out of the area. Fields was re-hired by METRO as a part-time transit operator on December 1, 1980. He worked as a part-time operator for approximately three years, during which time he received several letters from his operations chief, congratulating him on his perfect attendance record.

On November 16, 1983, Fields was notified that he had been selected as a full-time transit operator. METRO procedures require that employees moving from part-time to full-time transit operator positions resign from their part-time positions and incur a break in service before becoming full-time employees. On December 2, 1983, Fields submitted his resignation as a part-time driver. He then had a two-day break in service before he became a full-time transit operator on December 5, 1983.

The METRO/ATU collective bargaining agreement provided, at Article III, that full-time employees would serve a six-month probationary period, commencing either with the date of employment or the date of qualification. Transit operators are required to "qualify" for their positions. Fields was determined by METRO to be qualified as a full-time operator and able to begin his probation on December 9, 1983. His probation was scheduled to end six months later, on June 8, 1984.

The collective bargaining agreement required that all employees become members of or pay fees to the union within thirty days of their employment. Fields became a union member as a full-time operator,[2] having been advised by the employer that he was

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[2] The record does not reflect whether Fields had joined the union as a part-time operator, although it must be assumed that he did so.

required to do so. It does not appear from this record that Fields took an active role in union affairs (such as service as a shop steward or as a member of the union executive board, or otherwise), or that he ever attended any policy meetings between the union and the employer. During his employment as a transit operator, either full or part-time, Fields engaged in no work stoppages.[3]

In the early part of 1984, the employer changed its enforcement of the sick leave standards for probationary employees. Dan Linville, business agent for the ATU, testified that METRO began at that time to apply points for use of sick leave as described in the probationary standards. Previously, METRO had not enforced the sick leave standards in that manner. That change resulted, according to Linville, in several immediate terminations. The union protested those terminations collectively and in the probation termination hearing of each affected individual.

Fields had some instances of illness early on during his probationary period.[4] Those incidents were on his record as background to the additional incidents described below.

On April 8, 1984, Fields was charged with a seven point infraction for an unexcused absence. Fields testified that his alarm clock failed to go off that morning, and that he was told when he called in that this would be treated as an unexcused absence. Although the contract provides that unexcused absences may be reduced to "absences" under certain circumstances, Fields testified that such was not the practice for part-time drivers,

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3 Nor were there apparently any such actions involving the ATU and METRO during that period.

4 He may also have accrued and subsequently worked off some points on his record for a minor infraction, although that is not entirely clear from the record.

and he had just assumed that the practice was the same for full-time employees. He did not recall being informed of the possibility of reducing points for infractions, either at his orientation when he was assigned to full-time driving or when he called in on April 8th. He testified that he did not find out that he could have reduced his points until a month or two later, at which time it was too late to do anything about the seven points.

On April 10, 1984, Fields failed to appear on time to relieve another driver. For that infraction, three points were added to his probation point total. Although he did not initially recall being counselled regarding his point accumulation, Fields did remember under cross-examination that he was counselled by his "chief" after the April 10th incident.

On April 30, 1984, Fields misread the assignment board. He reported for work at what he believed to be the appropriate time, but found when he reported that he was, in fact, several hours late for his assigned route. On that occasion, a supervisory employee advised Fields to write out what had occurred, so that the matter could be reviewed by the employer, and perhaps the points for that infraction reduced. It was at that time that Fields realized, apparently for the first time, that it was possible to reduce points for unexcused absences. Because the April 30th matter was reviewed by the employer, Fields avoided accruing another seven points, and instead only had three additional points added to his probation total on that occasion. Had the points not been reduced for that occurrence, Fields would have exceeded the allowable number of points for his entire probation period as of April 30th.

On May 2, 1984, five points were added to Fields' probation record for an instance of use of sick leave, recorded as his fourth use of sick leave during his probationary period.

Fields was absent again on May 7, 8, and 9, 1984. At that time, a particle apparently lodged under his contact lens, scratching his cornea, so that he was unable to wear his contact lens for several days. A total of fifteen additional points were added to his record for that occurrence, denoted as his fifth, sixth, and seventh instances of sick leave. Therefore, by May 9, 1984, Fields had accrued a total of 33 probation points, well in excess of the allowable number.

Fields was called in on May 14, 1984, along with his shop steward, to speak with his base supervisor. At that time, he was informed that, in accordance with METRO policy, he was being suspended "for ten days" in anticipation of being discharged. He was apparently also advised by the employer at that time that he should seek union assistance with regard to his suspension and the hearing which would follow.

On May 17, 1984, a probationary review hearing was held. Fields was represented at that hearing by the union. As part of its representation efforts, the union stated its position that the probationary standards should not include sick leave points. The employer took the position that it needed to find out during the probation period whether an employee was able to work regularly. The employer also was concerned that Fields had not sought help from his supervisors until after he had exceeded his allowable point total.

As a result of that hearing, the base supervisor determined that Fields should be reinstated. Because the employer took the position that the probation period is the time during which an

employee must prove that he has the ability to work regularly, and that Fields had failed to meet that standard during his initial probationary period, the employer extended Fields' probation by six months. The terms of the reinstatement included removal of all of the sick leave points which Fields had accrued in May, leaving a total of 13 points on his record. Fields was advised that he would be terminated in the event he exceeded the allowable number of points during that second six-month period. Fields' reinstatement was effective May 26, 1984.

On June 11, 1984, Fields' car had a flat tire while Fields was on his way to work. Fields therefore reported late, which resulted in three additional points being placed on his record. He was suspended on June 14, 1984.

On June 22, 1984, another probationary review hearing was held, during which Fields received union representation. The union again took the position that sick leave points should not be a part of the probationary standards, and that Fields should have never have been "terminated" in May because of sick leave points. METRO's position at that time was that Fields had been warned that any additional points would result in termination, and that his record on probation had been far from exemplary. Fields was discharged on June 24, 1984.

The union continued to protest METRO's policy concerning the enforcement of the probationary standards for use of sick leave. At some point in the Autumn of 1984, as a result of the union's request, the union and the employer held a policy meeting to discuss the application of the sick leave standards. The matter was not resolved at that meeting. Shortly thereafter, negotiations opened between the parties for a successor collective bargaining agreement. A proposal to change the sick leave standards or their application was not made a part of the union's

bargaining position, nor was any change in that policy recorded in the parties' successor collective bargaining agreement. At the time of the hearing in this matter, the union had requested another meeting on the subject, but no such meeting had been held.

POSITIONS OF THE PARTIES

Complainant claims that he has been prevented from exercising his statutory rights in two major ways. First, he alleges that the employer has deprived him of his right to bargain, to be represented and to file grievances in accordance with the terms of the collective bargaining agreement, by extending his probation without having the authority under that agreement to do so. A corollary to this argument is that complainant was deprived of his rights by the particular collective bargaining agreement under which he worked, because the employer and the union agreed in that contract that probationary employees had no right to grieve terminations.[5] Secondly, the complainant claims that his rights were violated in that he was an innocent third party caught up in a dispute between the employer and the union over the application of the sick leave/discipline policy. Complainant claims that the dispute between the union and management over the change in the employer's application of the sick leave policy was coming to a head at the time of his probation, and that exceptional penalties, such as extension of the probationary period, were imposed upon those probationary employees who used sick leave at that time. Countering the employer's argument, complainant claims that it was of no benefit to him to have his probation extended, because he then continued to be deprived of his right to all the benefits of the collective bargaining

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5 The complainant did not name the union as a respondent or allege any violation of RCW 41.56.150.

agreement, including the right to file a grievance concerning his termination. Complainant claims he was reinstated under prejudicial terms because he had no opportunity to drop discipline points from his record and thereby to gain a more beneficial position. He claims that employer animus deriving from the sick leave issue resulted in his initial termination and was carried over to the second termination, and therefore the second termination was a direct result of that animus. He also claims that statements made by management personnel regarding the first termination show that the employer resented his protests. As further evidence in support of his claim, complainant asserts that he was never properly instructed by the employer as to the possibility of reducing points accrued for infractions.

Respondent asserts that complainant failed to make a prima facie showing of the occurrence of any sort of interference or discrimination. Respondent claims the complainant made no showing of involvement in any type of protected activity. It claims, further, that even if complainant was somehow involved in a protected activity, there has been no showing that the employer or any of its agents had knowledge of complainant's involvement. With regard to the complainant's assertion that he was a victim of a dispute between the union and the employer over sick leave points, respondent claims there is no evidence that the disagreement rose to the level complainant claims, nor is there any evidence that the employer and its agents did anything other than encourage the complainant to exercise his right to hearings and requests for review. Respondent claims that complainant's reinstatement and probationary period extension were favorable rather than unfavorable, actions towards the complainant; and that, having been given another chance, the complainant could have reduced his point accumulation over time. Citing Seattle Public Health Hospital, Decision 1911 (PECB, 1984), the respondent claims that nothing in complainant's case would meet the

standards enunciated by the Commission in that matter as supporting even an inference of animus. Respondent also asserts that the matter of the fairness of complainant's discharge is not at issue, citing City of Bellevue, Decision 2096, (PECB, 1984) in support of that position.

DISCUSSION

RCW 41.56.030(4) defines collective bargaining as:

> . . . the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours, and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

The object of the collective bargaining process is execution of a written contract setting forth the agreements of the parties. RCW 41.56.122(2) provides that collective bargaining agreements may provide for final and binding arbitration of grievance disputes.

The unfair labor practice provisions of the statute ensure the right of employees to organize and be represented or to refrain from such representation without fear of interference or reprisal, as well as ensuring the good faith of employers and unions in bargaining. PERC does not assert jurisdiction through the unfair labor practice provisions of the statute to remedy violations of collective bargaining agreements. City of Walla

Walla, Decision 104 (PECB, 1976). It is clear from preliminary rulings made in numerous past cases and from the preliminary ruling made in this case that the Executive Director did not identify a cause of action here relating to any claim arising solely from the collective bargaining agreement. If, as the complainant argues, the employer had no authority under the contract to extend his probationary period, any remedy would lie within that contract rather than in an unfair labor practice proceeding.

Complainant appears to argue that the collective bargaining agreement between the parties was inherently violative of his statutory rights, because the employer and the union agreed in that contract that probationary employees could not grieve or arbitrate terminations. Notions of seniority and probation are themselves matters of contractual creation, and are not called for by the statute. Nowhere in the statute is an employee guaranteed the right to final and binding grievance arbitration. Parties to a collective bargaining agreement are not required to bargain provisions of equal benefit to all bargaining unit employees. Rather, they are empowered to make agreements as they see fit, as long as those agreements are not the result of collusion, or made in bad faith, or arbitrary, or capricious, or discriminatorily motivated. The record herein does not sustain a finding that any of those factors were involved. The Commission is not empowered through an unfair labor practice proceeding to rule upon the wisdom of agreements reached in collective bargaining.

The preliminary ruling of the Executive Director in this case, and the ruling of the examiner on the motion concerning reliance on RCW 41.56.140(3), both focus attention on the limited allegations within this complaint that the complainant was interfered with or discriminated against in reprisal for his protests of the

discipline assessed against him by the employer. It is well settled in PERC case law, as well as under case law developed by the National Labor Relations Board, that the discharge of an employee because of his participation in protected activity is unlawful. The National Labor Relations Board has set the standard for proving claims of discriminatory discharge in its decision in Wright Line, Inc., 251 NLRB 1083 (1980), as follows:

> First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The Wright Line standard has been adopted by the Public Employment Relations Commission. See: City of Olympia, Decision 1208-A (PECB, 1981); Clallam County, Decision 1405-A (PECB, 1982); Seattle Public Health Hospital, supra; and citations therein. The protections of the statute apply to probationary as well as permanent employees. Valley General Hospital, Decision 1195, 1195-A (PECB, 1981).

It is true, as respondent alleges, that in most cases of this type, complainant must show that he was engaged in protected activity, that the employer had knowledge of that activity, and that the employer had animus. City of Olympia, supra; Clallam County, supra; Seattle Public Health Hospital, supra. However, it is possible for a discriminatory discharge to be proved where an individual complainant, although not a union activist, is discharged or otherwise discriminated against in an effort by the employer to disguise its unlawful discrimination against others. For example, firing of employees who were not sympathetic to a union along with those who were was illegal as to both groups in

Howard Johnson Co., 209 NLRB 1122 (1974). However, where a probationary employee failed to prove animus, her discharge, even though suspicious under "just cause" precedent, did not violate the statute. Whatcom County, Decision 1886 (PECB, 1984).

The complaint in this matter was filed more than six months subsequent to the suspension and proposed termination of Fields which occurred in May, 1984. Thus, the only matter before the examiner is the complainant's June, 1984, termination. The examiner has considered the events leading up to the June, 1984, termination, however, in determining the employer's motivation in this matter, particularly in view of complainant's claim that the second termination flowed inexorably from those events. Nevertheless, it is concluded that the complainant has failed to sustain his burden of proof.

The examiner is unable to concur with complainant's reading of the employer's comments that, "It was only on the two occasions that he exceded (sic) his points, that he sought out a Chief for help" as supportive of an animus finding. Those remarks appear to the examiner to reflect a desire by the employer that complainant seek out help before he accrued so many points, rather than resentment by the employer that he had sought out the union for assistance. Further, complainant's own testimony in this regard was that his chief informed him that he was required to seek out union assistance, and it was only after he had been so informed that he went to the union. The fact that complainant may not have been properly instructed regarding the provisions of the collective bargaining agreement does not lead to a conclusion that the employer was showing animus.

The complainant does not claim that the employer exhibited union animus in general, nor does he claim that he was engaged in protected activity in the usual sense, so as to raise some sort

of animus specific to his actions. His claim that he was the victim of animus particular to the dispute over the application of sick leave points to probationers does not withstand scrutiny. Clearly there was a disagreement between the union and the employer over that issue. Employers and unions frequently disagree concerning a variety of matters. However, the existence of a dispute which gave rise to differences of opinion in probationary review hearings, and to one labor-management meeting on the subject, (which took place after complainant's discharge) does not rise to the magnitude suggested by complainant. There is insufficient evidence in the record for the examiner to conclude that animus existed concerning that issue.

For reasons noted above, the examiner is unable, in the context of this unfair labor practice proceeding, to deal with the allegation that the employer was without contractual authority to extend complainant's probationary period. Complainant's claim that the extension of probation was an exceptional penalty, resulting from employer animus, is not sustainable on this record. Absent a finding of animus by the employer concerning the sick leave issue, it is difficult to discern animus solely because of an extension of the probationary period. Even in a case in which an employer has been found guilty of animus involving a number of discharges and interference actions, the same employer has been found not to have committed a violation when it has extended the probation of an employee involved in a number of incidents of sick leave and other absences. Presbyterian/St. Luke's Medical Center, 258 NLRB 93 (1981).

Complainant argues that extension of his probation was of no benefit to him because such an extension continued to deprive him of his rights under the collective bargaining agreement, particularly the right to grieve his termination. That argument appears to be predicated on the assumption that the only alternatives

open to the employer were to make complainant's employment permanent as of the date his probation was to have ended, or to extend his probation. But the employer also had, as a third alternative, the choice of terminating him at that time. The examiner is unable to conclude that extension of his probation was of no benefit to the complainant in comparison to that third alternative. Further, complainant did have the opportunity to drop discipline points from his record during his extended probation, and could have thereby gained a somewhat more viable employment record. The employer removed all of the points which he had accrued for sick leave use. Had he been able to work until June 30th without further incident, the April 30th "miss" points would have been stricken from his record, in accordance with the provisions of the collective bargaining agreement. An additional 20 days beyond that time without incident would have resulted in the removal of the points accrued for the April 10th incident.

There is no evidence in the record that the complainant was deprived of the right to bargain, be represented, or file grievances in general because of the employer's extension of his probation. Probationary employees were covered by the provisions of the collective bargaining agreement, and had the right to bargain and be represented as did other employees. Linville testified that probationary employees had the right to file grievances under the contractual grievance machinery and have arbitrated a grievance concerning any matter other than a termination which occurred during the probationary period. Complainant was, in fact, represented by his union in both of his probationary review hearings, and there is no evidence in the record that the employer did anything other than encourage him to seek out that representation. The fact that he was on probation does not appear to have entered into either the employer's

actions in recommending to him that he seek union assistance or the union's actions in providing it.

FINDINGS OF FACT

1. The Municipality of Metropolitan Seattle (METRO) is a public employer within the meaning of RCW 41.56.030(1).

2. The Amalgamated Transit Union, Division No. 587, is a bargaining representative within the meaning of RCW 41.56.030(3), and is the certified bargaining representative for an appropriate bargaining unit which includes part-time and full-time transit operators employed by METRO.

3. METRO and the ATU have been parties to a series of collective bargaining agreements covering the above-referenced bargaining unit. At the time the events germane to this proceeding occurred, they were parties to an agreement with a term of November 1, 1981 through October 31, 1984. That agreement provided that full-time transit operators would serve a probation period of six months from date of hire or qualification. It also delineated a variety of discipline and sick leave standards. With regard to probationary employees, the contract provided that METRO had the sole responsibility for discipline of such employees, and that those probationary employees who were not satisfactory would be terminated. The contract provided that probationary employees could not grieve or arbitrate terminations. There is no evidence in the record that the language of the section concerning discipline of probationers came about as a result of collusion, or an intent to discriminate.

4. METRO maintains a document entitled "Standards for Evaluating Probationary Employees", which sets forth a system of points which accrue to the record of a probationer for commission of certain infractions. That document provides that an individual will accumulate five points on his record for each incident of sick leave use commencing with the fourth such incident. A probationary employee who accrues 15 points will be terminated.

5. In early 1984, METRO began enforcing those sick leave standards closely, which had not theretofore been their practice. The enforcement of those standards resulted in several terminations, and ongoing protests from the union that the probationary standards should not include the application of sick leave points.

6. Frank Fields, the complainant, was employed by METRO as a full-time transit operator with a probation period beginning December 9, 1983, and scheduled to end June 8, 1984. Fields became a member of the union. There is no evidence in the record that Fields was a union activist.

7. By May 9, 1984, Fields had accrued 33 points on his record for a variety of infractions during his initial probationary period, including 20 points accrued in May for sick leave use. Fields was suspended on May 14, 1984, with notification that termination would follow on May 24, 1984.

8. On May 17, 1984, Fields was afforded a probationary review hearing, at which he was represented by the union. The union protested the application of sick leave points to the probationary standards at that hearing. As a result of that hearing, the employer reinstated Fields, and removed all of

the sick leave points which had accrued on his record. However, the employer extended Fields' probation for an additional six months, and warned that any incidents in that time period resulting in point accrual over the allowable maximum would result in his termination.

9. On June 11, 1984, Fields accrued an additional 3 points on his record for an absence unrelated to use of sick leave. On June 14, 1984, he was suspended. On June 22, 1984, he had another probationary review hearing. As a result of that hearing, Fields was terminated on June 24, 1984.

10. There is no evidence that the discharge of Fields was motivated by an anti-union animus or was reasonably perceived by Fields or other employees as a threat of reprisal or force or promise of benefit to interfere with the exercise of rights under Chapter 41.56 RCW.

CONCLUSIONS OF LAW

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

2. The complainant has failed to sustain his burden of proof that his termination from employment on June 24, 1984, or the employer's actions leading to that termination were violative of RCW 41.56.140(1).

ORDER

The complaint in the above-entitled matter is dismissed.

DATED at Olympia, Washington, this 7th day of May, 1986.

PUBLIC EMPLOYMENT
RELATIONS COMMISSION

MARTHA M. NICOLOFF
Examiner

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