Seattle School District, Decision 5946 (PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ELIZABETH B. FREER, Complainant,	)	CASE 11038-U-94-2567
vs.	)	DECISION 5946 - PECB
SEATTLE SCHOOL DISTRICT, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Elizabeth B. Freer, appeared pro se.

Karr Tuttle Campbell, by Tracy M. Miller, Attorney at Law, appeared on behalf of the respondent.

On March 25, 1994, the Seattle Education Association filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the Seattle School District had interfered with and discriminated against Elizabeth Freer, by refusing to provide information requested by the union, and by refusing to hire Freer for a summer school position in 1993. The union subsequently withdrew from the case, and Freer was substituted as the complainant. A hearing was held on November 6, 1996, before Examiner Mark S. Downing. The parties filed post-hearing briefs to complete the file.

BACKGROUND

Elizabeth Freer has been an employee of the Seattle School District for approximately 20 years. During her tenure with the employer,

she has worked as a special education assistant, a mainstreaming assistant, and a teaching assistant.

The Seattle School District (employer) operates the largest school system in the state of Washington. In the 1996-1997 school year, the employer had approximately 46,000 students enrolled at 10 high schools, 11 middle schools, 61 elementary schools, and 16 alternative schools.[1] John Stanford is the superintendent of schools.

The Seattle Education Association (union) is the exclusive bargaining representative of paraprofessional employees of the Seattle School District, including the positions held by Freer.

Freer's Previous Employment History

In 1991, Freer worked at Gatewood Elementary School in West Seattle. Acting during that year in a self-described role as a "whistle blower", Freer reported that the school administration was not correctly handling money derived from school-sponsored fundraising events, such as the sale of candy bars and other items to assist in funding school programs. As the result of investigations conducted by the State Auditor and the employer, the principal at Gatewood was subjected to public criticism and cited for violating the employer's guidelines in setting up student bank accounts for fundraising.

Freer filed an unfair labor practice complaint with the Commission on July 18, 1991, alleging that the employer had retaliated against her for reporting these alleged financial improprieties.[2] Freer

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[1] Washington Education Directory, 1996-97.

[2] Notice is taken of the Commission's docket records for Case 9281-U-91-2060.

filed another unfair labor practice complaint on July 14, 1993, based upon the same general allegation.[3] Both of those complaints were eventually withdrawn.

The Current Dispute

For several years, the employer has offered a "Compensatory Education/Youth Investment Combined Summer School Program" for children with specific learning disadvantages or students that have been identified as "at risk". That program utilizes certificated teachers and classified teaching assistants, as well as a coordinator, secretaries, computer specialists, and family support workers. The curriculum includes instruction in the areas of language, writing, mathematics, and reading. Freer worked in that program in 1992, when the practice was for the summer program staff to be chosen by on-site program coordinators.

By the time Freer applied for the summer program in 1993, the union and employer had agreed to change the selection process. Instead of selecting program participants based only upon applications, individuals were interviewed by two-person teams composed of past and present teachers in the summer program or teachers from the compensatory education program who had not previously worked in the summer program. There were 297 applicants for the summer program in 1993. Freer was among the 104 applicants who were interviewed, but she was not among the 55 who were hired to work in the program that year.

On October 19, 1993, the union filed a grievance on Freer's behalf, protesting her rejection by the summer program. The grievance was

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[3] Notice is taken of the Commission's docket records for Case 10586-U-93-2457.

processed through the first two steps of the contractual grievance procedure, but the union eventually declined to submit it to arbitration. The union filed the complaint charging unfair labor practices to initiate this proceeding in March of 1994.

Freer applied for the summer program again in 1994. She was not accepted in the original round of hiring, but she was hired in a secondary selection process held after the program was expanded in response to the large number of students applying for the program. Freer thus worked in the summer program in 1994.

The processing of this complaint has been delayed by several matters:

- On November 1, 1994, Freer notified the Commission that she had been informed that the union would no longer represent her in this proceeding. Freer requested that she be substituted as the complainant. In a directive issued by the Commission on November 30, 1994, the parties were ordered to show cause as to why the requested substitution should not be granted. After receiving no objection from the union, Freer was substituted as the complainant in this case on December 15, 1994.
- Freer invoked a lengthy appeal process, in an attempt to have the union fund her legal representation before the Commission.
- Apart from union assistance, Freer was represented by an attorney in some phases of this proceeding. Freer represented herself as a pro se complainant at the hearing, however.

Because of these developments, the hearing in this matter was delayed until November of 1996.

POSITIONS OF THE PARTIES

Freer argues that the employer discriminated against her when it did not hire her for a position as a teaching assistant in the 1993 summer program. Freer asserts that, although she had previously worked in the program, the employer did not hire her because of her activities while serving as a union representative at Gatewood Elementary School in 1991. Freer maintains that her union activities consisted of calling the school's fiscal administration into account and filing unfair labor practice complaints in 1991 and 1993.

The employer argues that Freer has "totally and completely" failed to carry her burden of proving that retaliatory discrimination was a substantial motivating factor in the employer's decision not to hire her for the summer school in 1993. While acknowledging that it changed its hiring procedure in 1993, the employer denies any discriminatory or retaliative motive and asserts that Freer was not hired based upon fair and competitive interviews and evaluations.

DISCUSSION

Refusal to Provide Information

As indicated in the Order to Show Cause issued by the Examiner in this proceeding on November 30, 1996, a duty to provide information is operative between an employer and the exclusive bargaining representative of its employees. As was stated in City of Tacoma, Decision 5439 (PECB, 1996):

> [A]n employer has a statutory duty to turn over, upon request, information that is needed by the exclusive bargaining representative for

> the proper performance of its duties, as the exclusive bargaining representative to administrate and police the collective bargaining agreement. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); Pullman School District, Decision 2632 (PECB, 1987); City of Seattle, Decision 3329-B (PECB, 1990).

This same duty does not operate, however, between an employer and an individual employee. In applying the latter principle, the Commission wrote as follows:

> **This duty is derived from the duty to bargain in good faith**, and it extends beyond the period of contract negotiations. The obligation applies, for example, to interest arbitration proceedings, and to requests for information necessary for the representation of bargaining unit members in processing grievances to enforce the terms of negotiated contracts.

City of Bellevue, Decision 4324-A (PECB, 1994) [citations and footnotes omitted, emphasis by **bold** supplied.]

As a result of the substitution of Freer as the complainant in this case, the allegation concerning the employer's refusal to provide information no longer states a cause of action. That allegation must be dismissed.

Standards for Determining "Discrimination" Charges

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, protects the right of public employees to organize and designate representatives of their own choosing for the purposes of collective bargaining. Employees also enjoy protection from interference with their statutory collective bargaining rights under RCW

41.56.140(1), and protection from discrimination for filing unfair labor practice complaints under RCW 41.56.140(3).

The standard for enforcing the "interference" and "discrimination" protections has been established by the Supreme Court of the State of Washington. In Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991), the Court adopted a "substantial factor" test for determining discrimination cases. While a charging party retains the burden of proof at all times, it only needs to establish that the statutorily protected activity was a "substantial" motivating factor in the employer's decision to take adverse action against the employee. As the Court indicated in Wilmot, at page 70:

> If the plaintiff presents a prima facie case, the burden shifts to the employer. To satisfy the burden of production, the employer must articulate a legitimate nonpretextual nonretaliatory reason for the discharge. ... [I]f the employer produces evidence of a legitimate basis for the discharge, the burden shifts back to the plaintiff ... [to] establish [that] the employer's articulated reason is pretextual.

The Commission has embraced a "substantial factor" test. Educational Service District 114, Decision 4361-A (PECB, 1994); City of Federal Way, Decision 4088-B (PECB, 1994). That standard was discussed recently in North Valley Hospital, Decision 5809 (PECB, 1997) and Mukilteo School District, Decision 5899 (PECB, 1997).

The Prima Facie Case

As described in Seattle School District, Decision 5237-B (EDUC, 1996) and North Valley Hospital, supra, the requirements necessary

for a complainant to establish a prima facie case of unlawful discrimination are threefold:

1. The exercise of a statutorily protected right, or communication to the employer of an intent to do so;

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

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

Proof of one or two of those elements is not sufficient to shift the burden of production to the employer.

Protected Activity -

In 1991, Freer instigated charges of financial improprieties against the administrator of the school where she was assigned to work. While "whistleblowing" is not directly protected by Chapter 41.56 RCW, the record indicates that Freer was also engaged in union activity at that time. The charges resulted in a public notice and criticism of an employer official. Since that time, Freer has been concerned about retaliatory actions by the employer. In 1991 and 1993, Freer filed unfair labor practice complaints against the employer. In the present case, Freer alleges that the employer retaliated against her for filing those complaints.

Freer was clearly engaging in protected activity when she filed her unfair labor practice complaints in 1991 and 1993. The Commission has evidenced an intent to protect those who file charges. Mansfield School District, Decision 5238-A (EDUC, 1996). She has established the first element of her prima facie case.

Deprivation of Right, Status, or Benefit -

Freer was not hired as a teaching assistant for the 1993 summer school program. Absent specific controlling language in a collective bargaining agreement, an employer has an unfettered right to choose who they wish to hire. However, a public employer must abide by the provisions of Chapter 41.56 RCW. It cannot make hiring decisions based upon a discriminatory motive. Since she worked in the program in 1992, and was again hired for that program in 1994, an inference is available that Freer was deprived of the benefit of a summer school position by the employer's decision not to hire her in 1993. Freer has thus established the second element of her prima facie case.

Causal Connection -

Freer's case falters when confronted with the need to show a causal connection between her filing of her previous unfair labor practice complaints and the employer's failure to hire her for summer school employment in 1993. The standard of proof for this element was enunciated in Seattle School District, supra, at page 19:

> An employee may establish the requisite causal connection by showing that adverse action followed the employee's known exercise of a right protected by the collective bargaining statute, under circumstances from which one can reasonably infer a connection. Employers are not in the habit of announcing retaliatory motives, so circumstantial evidence of a causal connection can be relied upon. Wilmot, supra, at page 70. See, also, Port of Tacoma, Decisions 4626-A and 4627-A (PECB, 1995). At the same time, it is recognized that there are many varieties and degrees of protected activity, and that **the burden to establish a causal connection increases for activities that are remote from organizing and bargaining.** In other words, the evidentiary and proof problems for a union leader and visible organizer

> are easier than for one who merely claims benefits under an existing contract.
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> [Emphasis by **bold** supplied.]

Freer has presented no evidence that her "whistleblowing" activity was done as a **collective bargaining** activity protected by Chapter 41.56 RCW. While she was a union grievance representative when she reported the fiscal irregularities, this record does not establish that she was making her report as a representative of the union, or even as a representative of the employees at the Gatewood site. The stated purpose of Chapter 41.56 RCW is to promote the continued improvement of the collective bargaining relationship between public employers and their employees. An employee who acts as a grievance representative may also engage in activities that are outside the purview or protection of the collective bargaining statutes. Freer has not established a causal connection between her activities at Gatewood and the protections of Chapter 41.56 RCW.

More importantly, Freer has not established a causal connection between her unfair labor practice complaints and the employer's refusal to hire her for the summer school program in 1993.[4] A complainant can establish a casual connection between the exercise of a protected right and an employer's deprivation of a benefit through direct or inferred evidence. While the fact of having filed the unfair labor practice complaints is established, Freer presented no direct evidence that the people who made the 1993 summer school hiring decisions had knowledge of her unfair labor practice complaints. Employer knowledge of union activities has

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[4] Such a causal connection must be established by a complainant for a charge of discrimination to prevail. City of Centralia, Decision 2904 (PECB, 1988).

been inferred in cases involving very small workforces, as in City of Winlock, Decision 4784-A (PECB, 1995) [a unit of eight employees]; Kitsap County Fire District 7, Decision 3610 (PECB, 1990) [a unit of 15 employees]; Asotin County Housing Authority, Decision 2471 (PECB, 1986) [a unit of three employees], but application of the "small plant doctrine" was recently rejected in City of Seattle, Decision 5852 (PECB, 1997) where hundreds of employees were included in the unit involved.

The exact size of the bargaining unit to which Freer belongs was not put into evidence, but an inference is available that it is of substantial size. The employer operates 98 schools; a mediation case for that bargaining unit in 1993 listed 650 employees;[5] nearly 300 employees applied for the summer school program in 1993. Such a bargaining unit does not qualify for application of the "small plant doctrine" as a substitute for actual knowledge of union activities on the part of employer officials who made the challenged decision. Without a factual basis to suggest employer knowledge, discrimination on the basis of union activities or for the filing of unfair labor practices cannot be found.

The employer called Carol Bruhn to testify as to the procedure used to hire staff for the summer program. Bruhn is currently a program consultant with the employer's Department of Curriculum Services, but she was a program consultant in the Compensatory Education Program and, as such, oversaw the hiring for that program from 1991 through 1996. She testified that a site-based hiring process used in 1991 and 1992 was replaced by a different process in 1993. Job announcements sent out in April of 1993 delineated the requirements for teaching assistants in the program. Applica-

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[5] Notice is taken of the Commission's docket records for Case 10516-M-93-3961.

tions for the positions were to be sent to the employer's personnel office with a postmark no later than May 17, 1993. Once received by the department office, they went through an initial screening process to ensure that the basic qualifications were met. Bruhn testified that approximately 297 applications were received that year, and 104 interviews were scheduled. The applicants selected for interview were then subjected to a new, centrally organized interview process.[6] All of the candidates were interviewed by two-person teams in a 4-hour block of time during one evening. The interviewers had been trained beforehand, as to the confidentiality of the process and what information the employer was trying to elicit from the interviews. At the end of the interview period, the interviewers made their ratings independently. Any ratings which differed between the two interviewers were averaged into one score for the individual. Candidates were then ranked, and 55 of the 104 candidates interviewed were hired from this process.

The employer's interview and hiring procedure was based on objective criteria. There is no evidence that Freer's protected activities were a "substantial" motivating factor in the employer's decision not to hire her for the 1993 summer school program. Freer has not established sufficient evidence to conclude that a prima facie case of discrimination exists under the standard used by the Commission and the Supreme Court for discrimination charges. The complaint must be dismissed.

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[6] Bruhn testified that the interview process was changed, based upon input from the union, to include interviews of all teaching assistant candidates by teams made up of teachers from the summer program or teachers with current compensatory education experience.

FINDINGS OF FACT

1. Seattle School District is a public employer within the meaning of RCW 41.56.030(1). The employer operates 98 schools in the district.

2. Seattle Education Association, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative for a unit of paraprofessional employees of the Seattle School District, including the position of teaching assistant.

3. Elizabeth Freer has been employed by the Seattle School District as a teaching assistant for approximately 20 years. During 1991, Freer was employed as a teaching assistant at Gatewood Elementary School. While at Gatewood, she reported to the employer and to the public that internally-raised student activity funds had allegedly been mishandled.

4. In 1991 and 1993, Freer filed unfair labor practice complaints with the Commission, alleging retaliation by the employer against her for reporting the alleged Gatewood financial improprieties. Both complaints were eventually withdrawn.

5. The employer offers a Compensatory Education/Youth Investment Combined Summer School Program for children with specific learning disadvantages or students identified as "at risk". Freer worked in that program in 1992 as a teaching assistant.

6. In 1993, Freer applied for a teaching assistant position in the summer school program. She received an interview but was not hired to work in the program.

7. In 1992, the employer utilized on-site program coordinators to hire from a list of summer school applicants. Based upon input from the union, the employer changed its selection process in 1993 to include interviews by two-person teams consisting of teachers from the summer program or teachers with current compensatory education experience. Interview scores were immediately tallied and those receiving the highest scores were hired.

8. In October of 1993, the union filed a grievance concerning the employer's failure to hire Freer for the 1993 summer school program. The union eventually declined to submit it to arbitration.

9. Freer applied for a summer school position in 1994. While not accepted in the original round of hiring, she was hired in a secondary selection process necessitated by high student enrollment in the program.

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. Based upon the withdrawal of Seattle Teachers Association as the complainant and the substitution of Elizabeth Freer in its place, the allegation concerning the employer's refusal to provide information does not state a cause of action.

3. Freer failed to make a prima facie showing that there was a causal connection between her two previously-filed unfair labor practice complaints, and the employer's decision not to

hire her for the 1993 summer school program. Freer did not sustain her burden of proof showing any violation of RCW 41.56.140(1) or (3) by the employer.

NOW THEREFORE, IT IS

ORDERED

The complaint charging unfair labor practices filed in this matter is hereby dismissed.

ISSUED AT Olympia, Washington, this 6th day of June, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARK S. DOWNING, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.