

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

RAY REAMER,

and

PUBLIC SCHOOL EMPLOYEES OF
WASHOUGAL, AN AFFILIATE OF PUBLIC
SCHOOL EMPLOYEES OF WASHINGTON,
Complainant,

vs.

WASHOUGAL SCHOOL DISTRICT,
Respondent.

CASE NO. 5135-U-84-903

DECISION NO. 2055 - PECB

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

Gail S. Fujita, Attorney at Law, appeared on behalf of the complainant.

Gallup, Duggan, Tubbs and Heurlin by Dennis R. Duggan, Attorney at
Law, appeared on behalf of the respondent.

By a complaint charging an unfair labor practice filed with the Public Employment Relations Commission on February 29, 1984, the above-named complainant alleged that he was transferred by the Washougal School District in violation of RCW 41.56.140(1) and (3), in reprisal for successful prosecution of a grievance against the district. A hearing was held on June 14, 1984; William A. Lang, Examiner. Post-hearing briefs were filed August 10, 1984.

FACTS

Ray Reamer was employed as a custodian by the Washougal School District (district) commencing February 10, 1980. He was terminated on February 16, 1983 for an alleged assault on his supervisor, Mrs. Hosman, the principal of the Cape Horn-Skye School. A grievance was filed under the collective bargaining agreement and processed to the school board, which upheld

the termination. Since the contract did not provide arbitration as the final grievance step, Reamer appealed the adverse decision of the board to the Superior Court. The Superior Court heard the matter de novo on September 14, 1983. The Court reinstated Reamer to his former position, with back pay, effective October 3, 1983. Negotiations were then initiated on the issue of back pay.

There was a change in school administration with the 1983-84 school year. Dr. Jack McKay was appointed as superintendent and Roger Sitko, was appointed as the new principal of the Cape Horn-Skye School. Prior to Reamer's reinstatement, Sitko spoke to a newspaper reporter regarding his new role as principal. The resulting article which appeared in the Camas Post-Record on October 4, 1983 contained references to the Reamer lawsuit. Sitko is quoted as saying that some staff were "torn and confused", and that morale had dipped. Sitko thought morale had improved and that he had helped to alleviate some of the stress and tension. Sitko is reported to have foreseen no major problems from the litigation.

McKay testified he disagreed with the judge's decision to return Reamer to his former position but would make the best of it. He also admitted friendship with the former principal, whose husband was superintendent of a neighboring school district.

Either on the first day following his return or shortly thereafter, Reamer was given a copy of an evaluation form and told he would be evaluated under a new policy initiated by the recently appointed superintendent. This policy limited evaluations to custodial employees for "their protection". Other classified employees in the school district were not evaluated, so Reamer, being the only custodian in the Cape Horn-Skye School was the only classified employee in the school to be evaluated.

On October 12, 1984, Reamer requested assistance because two additional classrooms were open and evening activities were increased from one evening to five. Sitko discussed the request with McKay, who turned it down. Since the school was the smallest in the district the superintendent thought one custodian should be able to handle it. Also around this time, McKay expressed concerns to the union's business agent about Reamer's "flaunting his victory at court" and on keeping him at the Cape Horne-Skye School.

On October 28, 1983, Reamer received authorization for several hours of extra clean-up work on a Sunday following a Booster club fund raising Halloween party. After Reamer had completed three and one-half hours of work, he was informed by Sitko that he would only be paid for two hours and he could bill the Boosters directly or be paid by the district who would then be reimbursed by the Boosters. Because the Boosters did not raise much money, Reamer decided to donate his services. This dispute over the amount of time involved and the source of payment caused further bad feelings between Reamer and Sitko.

In early November, 1983, Reamer was cautioned about wet-mopping when children were in the area because of safety considerations, and about sweeping up their articles, e.g., scissors and crayons. Reamer thought the criticism unwarranted, because he had always mopped in that manner and was conscious of its hazards. He also resented the implications he was throwing out the children's belongings.

On November 15, 1983, Reamer was notified, by letter, that his shift was being changed to 12:30 PM to 9:00 PM. There is a disagreement over whether Reamer agreed to this change. He maintains he did not. Also on this date, Sitko told Reamer not to confront teachers or talk to parents in the hallway. Reamer understood he was being told not to talk to teachers or parents.

Two days later, on November 17, 1983, Reamer was evaluated by Sitko and the head custodian, Steve Thompson. Reamer was rated as excellent. The only deficiencies noted were anxiety between Reamer and the staff and wet-mopping the hall floors while classes were in session. Reamer acknowledged the staff anxieties. He stated he had no ill feelings, and thought that Principal Sitko "should try to eliminate any problems the staff and administration may have". He denied having adjustment problems or that he wet-mopped when students were in class. The record does not show whether the principal responded to these comments or made any attempts to lessen the admitted tensions.

Also around the middle of November, McKay was invited to a staff meeting at the school. McKay was surprised that the teachers made sure Reamer was not within hearing distance while they talked. McKay testified, "They were fearful, they were scared, they did not want it to get back to Ray what they were saying to me because of the reprisals that could possibly happen or

harm them." The record does not disclose whether the superintendent followed up on this information with any corrective actions.

On December 13, 1983, Reamer was admonished by Sitko that he was disturbing the teachers with his loud, annoying humming, noisy vacuuming and bumping furniture and leaving smelly custodial items in the hallways. The next day he was again orally reprimanded for his loud humming and bad attitude. Reamer admits to the humming but denies it was loud or annoying. Sitko thought he should get some help, which Reamer took as a suggestion to get medical attention. These admonishments were repeated on December 19, 1983 at a meeting with the union's business agent.

Prior to his reinstatement, Reamer had been advised by his attorney to keep a "low profile" when he returned to work. Reamer interpreted this to mean, "not to be friendly." During the three months Reamer worked at the Cape Horn-Skye school, several teachers and other staff reported that he spoke to them initially but got progressively distant and non-communicative. They confirm the loud humming, noisy vacuuming and sullen glares which they felt not only deliberate but calculated to be intimidating. Contributing to the already distrustful atmosphere was the administration request that the staff document all that transpired between them and Reamer. This resulted in reports of many silly and nonsensical incidents e.g., making faces at the teachers, and various remarks which are not worthy of further mention except as a measure of their self-induced suspicion.

Reamer's attorney concluded back pay negotiations with the district's attorney in mid-December, 1983. On January 3, 1984, Reamer received payment and signed a release.

On January 6, 1984, the superintendent, McKay, hand delivered a letter which gave Reamer notice that he was being transferred to the 11:00 PM to 7:30 AM shift at Washougal High School and Jemtegaard Middle School. McKay initially declined to give any reasons for the transfer. Several weeks later, McKay met with Reamer and told him he was being transferred to reduce tension and fear, because no other custodian would work with him, and that there was insufficient reason to terminate him.

Even though Reamer received the same pay, worked the same number of hours and had the same job responsibilities, he felt that the new assignment was less desirable because he went from a day shift assignment to a graveyard shift split between two schools. As a result of this transfer, this complaint was filed.

POSITIONS OF THE PARTIES

The complainant argues that Reamer was subjected to a hostile environment and harassed in retaliation for his successful prosecution of a grievance, a protected right.

The school district contends it has the right to transfer without giving reasons, that Reamer's conduct is not protected activity and, if it is protected, the district had cause to initiate the transfer.

DISCUSSION

Employees have a protected right under Chapter 41.56 RCW, the Public Employees Collective Bargaining Act, to pursue grievances. Valley General Hospital, Decision No. 1194-A (PECB, 1981). Even though the employer had under its collective bargaining agreement the unqualified right of transfer, it may not utilize this right to punish an employee for pursuing a grievance. Adverse action because of an employee's exercise of protected activities is a violation of RCW 41.56.140(1) and as such, is within the scope of the Public Employment Relations Commission's jurisdiction. Port of Seattle, Decision No. 1624 (PECB, 1983).

The standard for determining whether the employer's conduct was an unfair labor practice was set forth by the Commission in City of Olympia, Decision No. 1208-A (PECB, 1982). In that case the Commission adopted the Wright Line Inc., 251 NLRB 150 (1980) "causation test" which requires the complainant to make a prima facie showing sufficient to support an inference that the protected conduct was a motivating factor in the employer's decision. Once this is shown the employer must come forward with credible evidence to demonstrate that the same action would have taken place even in absence of protected conduct.

Wright Line Inc. modified a series of decisions which seem to immunize a union activist against legitimate discipline for genuine offenses. The burden of proof now placed on the employer is

one of production of reasonable justification for his actions, not one of proving by a preponderance of evidence that an unfair labor practice has not occurred.

Union's Prima Facie Case

In the instant case, the union must show that the motivation to transfer Reamer was his involvement in the protected activity. The union argues that the evidence shows that both the newly appointed superintendent and principal were unhappy and apprehensive that Reamer was being returned by the Court decision to his former position in the school where the alleged assault had occurred. That assessment is correct. McKay admitted he did not believe the Court should have returned him to his former position. He was also a personal friend of the former principal and her spouse. The newspaper article which coincided with Reamer's return establishes Sitko's apprehensions as well.

The union maintains that the new evaluation policy was designed specifically for Reamer's situation. The Examiner is inclined to agree. The district initiated evaluations of only one classification out of many. The reason given is that the custodians needed "protection" provided by the documentation. If that is true, it would be equally true for the other classified employees such as secretaries, aides and drivers. The fact that it applied selectively to custodians supports an inference of an improper motive. This inference is enhanced by the fact that Reamer received an excellent rating. It would not seem appropriate to transfer one to a less desirable shift if he is doing excellent work in his current assignment.

The timing of the transfer also lends credence to the union's position that actions were retaliatory. Reamer's attorney completed back pay negotiations with the district in the middle of December. The release was signed on January 3, 1984. Three days later he was notified by letter, hand delivered by McKay, that he was being transferred. Among the reasons later disclosed were to reduce staff tension and fear, a situation the superintendent personally became acquainted with a month earlier and which he apparently did nothing to correct. Two other reasons given for the transfer strengthen the inference of improper motive because they appear contrived. The stated reason that no other custodian would work with Reamer makes little sense, since he was currently working alone unless it is to justify not placing him in a day shift at another school.

The other reason offered, that Reamer was being transferred because he could not be fired, seems inadequate as well, since it implies a disciplinary motivation without identifying any misconduct.

Finally, the union characterizes the refusal to provide additional assistance to cope with the increased workload, the change in shift hours and the dispute over pay for the Halloween party as evidence of their hostility toward Reamer. The complainant contends that the district seized on otherwise trivial offenses such as excessively loud humming, noisy vacuuming, wet-mopping halls while classes were in session and sweeping up children's crayons and scissors to effectuate its true purpose of placing him in another school.

The reluctance to return Reamer to his former position as the Court ordered, together with the timing of the transfer, the reasons given, the selective evaluation and the other evidence of minor offenses and possible harassment, lead to the conclusion that the union has established a prima facie case demonstrating that the transfer was based on an improper motive.

Employer's Motivation

Having established the inference that the protected conduct was a motivating factor in the employer's decision, the school district has the burden to produce evidence of good reasons for their action. The district argues that it had sufficient cause to transfer Reamer in order to reduce staff tension and fear. It offered corroborative testimony from a number of teachers and classified staff, to the effect that Reamer deliberately embarked on a course of conduct calculated to intimidate the teachers, the principal and the other staff. According to the district's account of what transpired, the staff, while initially apprehensive, attempted to give Reamer the benefit of the doubt regarding the incident from the previous school year. Over the first few weeks of Reamer's re-employment, staff members made attempts at civility in an atmosphere of slight tension. But the relationship began to deteriorate. The teachers and other staff observed a growing sullenness and hostility on the part of Reamer. They complained that Reamer disturbed them by excessive noisy humming and vacuuming. The staff felt Reamer deliberately swept-up children's articles, left smelly articles in the halls, banged furniture and did other acts to intimidate them.

Although Reamer's testimony confirms the initial attempts at polite conversation and the slight tension, he had a somewhat different view of the subsequent events. Reamer felt the new administration was hostile. He thought the district was making his situation difficult by refusing extra help, singling him out for evaluation, changing his shift hours and disputing the pay for the Halloween clean-up. Reamer admits humming, vacuuming, wet-mopping, sweeping children's articles up (to be retrieved later), but denies the interpretation that these acts were deliberately taken to intimidate others.

While the examiner cannot pass judgment on management's practices, there is evidence which support the inference that the district had a significant role in creating the situation from which it now seeks relief. Instead of dealing with each incident swiftly and with certainty, the teachers were advised to document it, thereby encouraging their suspicion. The examiner is disturbed by the absence in the record of evidence that the district dealt with the basic issue of Reamer's alleged hostility. It was not until mid-December that Sitko thought Reamer should get some help. In the meanwhile, the staff watched their relationship with Reamer diminish into sullen stares. Instead of reaching out, the teachers retreated to the extent of having "an unwritten rule" of not being left alone in the building with Reamer. The examiner is troubled further that McKay met with the teaching staff in mid-November to learn first hand of their fear and intimidation, yet in the following six weeks till Reamer's transfer McKay held no meetings to clear the air. No positive counseling was given. The examiner is discomforted by the possibility that the district was pre-disposed with the hope that by doing nothing Reamer may be provoked into a stronger action or, failing that, by waiting could document a litany of triviality into sufficient justification.

The issue before the examiner boils down to the question of credibility. Even discounting their testimony, as the union urges, because of the past association of the witnesses with the former principal and their interest in continued employment, the examiner is persuaded that Reamer's actions were deliberate. Chapter 41.56 protected Reamer in his right to file and process his grievance, but it does not protect his antagonistic behavior following his reinstatement. If he was attempting to follow the advice of his counsel, he would seem to have overshot the mark. What might appear at first to be random, trivial actions on his part, and, perhaps even unintended, take on an even more unfavorable light when viewed in the context of what transpired after the transfer.

The district offered, over vigorous objection, testimony that in February and March, 1984, several months after his transfer, Reamer followed several of the teachers home in his pick-up truck and on other occasions made obscene and hostile gestures at the principal and others for which he received a written reprimand. The examiner permitted this testimony subject to a deferred ruling. Ordinarily testimony on events which take place after the controversy at issue are not admissible because it would not be relevant and would risk undue prejudice and confusion. In this instance, however, the evidence is admissible for purposes of impeachment and to establish a pattern of conduct. Reamer continued to be an employee of the district following the disputed transfer. The examiner has considered the possibility that the more overt actions of intimidations which took place in February and March, 1984 could stand in isolation from the earlier events used by the district to justify Reamer's transfer, i.e. that the subsequent actions relate only to measure Reamer's anger at and retaliation for the part the teachers played in his transfer. Even if this rationale is considered to its fullest implication that the district overreacted and its fears were self-induced, the examiner is still left with the inference that Reamer has a predisposition to intimidate. It is this realization which is fatal to the complainant's case.

The reported actions of Reamer involving suggestive remarks, loud humming, noisy disruptions and sullen stares, when viewed in combination with the harassment of staff by truck and gesture after the transfer, fully support the conclusion that Reamer intended his actions, however childish they may appear, as intimidation.

While the proximity of the transfer to the finalization of the Court action together with other actions established a prima facie case of impermissible motivation, the examiner concludes that the reasons given by the district for the transfer were not pretextual. Sufficient evidence exists to support the conclusion that Reamer was transferred for legitimate non-discriminatory reasons.

FINDINGS OF FACT

1. Washougal School District is a public employer within the meaning of RCW 41.56.030(1).
2. The Public School Employees of Washington is a bargaining representative within the meaning of RCW 41.56.030(5).

3. Raymond Reamer is a public employee within the meaning of RCW 41.56.030(2). He was hired by the school district as a full-time custodian on February 10, 1980, terminated on February 16, 1983, and reinstated in his former position at Cape Horn-Skye school on October 3, 1983 by Court action. He was transferred from the day shift to a less desirable night shift at two other schools on January 6, 1984.
4. The transfer of Reamer was implemented three days following the final resolution of procedures commenced by Reamer under the grievance procedure of the collective bargaining agreement between the district and union to challenge the district's discharge of Reamer on or about February 16, 1983; and was implemented following implementation of a selective evaluation system by the district.
5. The decision to transfer Reamer to another school was motivated in part by protected conduct. The school district's actions, however, was justified by Reamer's course of conduct designed to harass and intimidate the teaching and classified staff.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter under RCW 41.56.
2. The complainants have met their burden to establish a prima facie case that the transfer of Ray Reamer was motivated in reprisal for his exercise of rights protected by Chapter 41.56 RCW.
3. Washougal School District has established that its transfer of Ray Reamer was actually based on legitimate business reasons of the employer, including Reamer's misconduct following his reinstatement, and, by such transfer, has not committed unfair labor practices within the meaning of RCW 41.56.140(1).

Based on sworn testimony during the hearing, the exhibits received into evidence, the post-hearing briefs of the parties and the record as a whole, it is:

ORDERED

The complaint charging an unfair labor practice against Washougal School District is dismissed.

DATED at Olympia, Washington, this 4th day of October, 1984.

PUBLIC EMPLOYMENT RELATIONS
COMMISSION

[SIGNED]

WILLIAM A. LANG, Examiner

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