

STATE OF WASHINGTON  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KENNETH G. SULLIVAN,	)	
	)	
Complainant,	)	CASE NO. 4386-U-82-701
	)	
vs.	)	DECISION NO. 1911-C PECB
	)	
PUBLIC HEALTH HOSPITAL PRESERVATION	)	
AND DEVELOPMENTAL AUTHORITY,	)	
d/b/a SEATTLE PUBLIC HEALTH	)	DECISION OF COMMISSION
HOSPITAL,	)	
	)	
Respondent.	)	
	)	

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Kenneth G. Sullivan, Complainant, appeared Pro Se.

Wickwire, Lewis, Goldmark, and Schorr, by Wendy F. Leibow, Attorney at Law, appeared for the respondent.

Kenneth G. Sullivan has petitioned for review of an examiner decision rendered on May 11, 1984, finding that Sullivan's employer, the Seattle Public Health Hospital, committed no unfair labor practices against him.

Sullivan's brief in support of his petition for review in large part consists of invective directed towards the examiner, his findings and conclusions. Setting aside the vituperative aspects of this brief, Sullivan's main thesis is that the employer discriminated against him on account of his activities which sought to strengthen employee representation. Sullivan maintains that the employer had a sweetheart relationship with the incumbent union, which he sought to expose and rectify. He maintains that evidence showing the employer's lack of anti-union hostility against the incumbent union simply reinforces his point, since union and management had a very cozy relationship.

The employer maintains that Sullivan was disciplined and ultimately discharged solely on account of his absences and violations of his supervisor's orders. The examiner agreed.

Although some of the facts are disputed, the following are not: Sullivan was hired by the employer on June 8, 1981. Until mid-July, 1982, he worked under two supervisors with whom he got along well, and had no disciplinary problems. On July 16, 1982, a new supervisor, Patricia Hayes, was appointed. In mid-August, Hayes announced new work rules, including a rule that two weeks' notice would be required for annual leave. Shortly thereafter, on

less than two weeks' notice, Sullivan requested annual leave for the period August 23 - 25, 1982. This request was denied. Sullivan was absent from work due to illness on August 23 - 25, 1982. Sullivan went to procure a medical certificate for his absence from the Veteran's Administration Hospital on August 27, 1982, and was away from his job for two-and-a-half hours, for which he was marked AWOL. In early 1983, supervisor Hayes had four positions in Sullivan's work area upgraded. She required persons interested in those positions to apply for them, and Sullivan did apply. The promotions were announced on March 11, 1983. Sullivan was not given one of the upgraded positions. On March 11, 1983, Sullivan felt ill and went to the hospital clinic. He was sent home with flu symptoms, and ran some errands on the way home. The following two days were weekend days which Sullivan was not scheduled to work. Sullivan was absent from work on March 14th through 18th, 1983. The following week Sullivan requested annual leave to attend a court hearing on March 25, 1983. Hayes initially denied the request, but later granted it. Sullivan did not report for work at any time on March 25, 1983. He was terminated on March 28, 1983.

It also is not disputed that Sullivan was at odds with the incumbent union, and that he initiated a number of administrative and judicial complaints against the employer in furtherance of his cause.

There appears to be dispute as to the following: Supervisor Hayes was concerned about the excessive use of the telephone for personal calls in the area in which Sullivan worked. Sullivan was reprimanded by Hayes for his allegedly excessive use. The examiner found that Hayes gave Sullivan an oral warning on his allegedly excessive telephone use in January of 1983, and gave him a written reprimand on February 25, 1983. Sullivan maintains (Brief at page 29) that Hayes never verbally reprimanded him for excessive telephone use in January of 1983.

Sullivan maintains that his absences between March 14th and 18th were due initially to the flu, and then to complications, including an adverse reaction to medication, from a staple cut on his finger. Sullivan maintains that Hayes orally approved his absence of March 14th. On March 18th, Hayes apparently asked Sullivan to report for light duty status. Sullivan refused, claiming that reaction to medication for his finger prevented him from working in any capacity. Although it is undisputed that Sullivan was marked AWOL for March 14th, 15th, and 18th the justification for that discipline is hotly debated. Sullivan produced a statement from the VA hospital covering his finger injury, but not the prior flu symptoms. The VA certificate additionally stated that Sullivan could not perform activities involving his left hand. Sullivan argues that the certificate is sufficient to cover his entire absence, or at least complies with Hayes' request for a medical excuse.

Also disputed are Hayes' instructions to Sullivan regarding the terms of his leave on March 25, 1983 to attend court. Hayes maintains she told Sullivan to return at the end of the morning court hearing. Sullivan argues he was not given any orders in this regard, that Hayes stated "I'll expect you back after the hearing." (Brief at page 14, quoting from unemployment hearing testimony). Sullivan maintains also that he was required in court in the afternoon because he had filed a petition for rehearing, and that he had gone home ill after that.

A collective bargaining agreement between the American Federal Federation of Government Employees, Local 1170 and the employer was dated November 16, 1978. Article XV, Section 2.g. states:

Sick leave absences in excess of three workdays, or for a lesser period when considered necessary by the supervisor, will be supported by a medical certificate. The medical certificate will be signed by the attending physician, attesting to the incapacitation from duty for the period of absence and be presented to the supervisor within 48 hours of the employee's return to duty.

Article XX, Section 1, states that: "All written disciplinary actions shall be taken for just cause ...".

Section 8 sets out a "Sample Table of Offenses and Penalties." Suggested for "unauthorized absence on any scheduled day of work" are: First Offense -oral admonishment to 3 days suspension; Second Offense - written reprimand to 5 days suspension; Third offense - 5 days suspension to removal. The same penalties are suggested for unauthorized absence from work station during working hours. Suggested penalties for insubordination are slightly stiffer. Section 8.d. states:

"For determining the action to be taken in a particular case, consideration will be given to the record of the employee, and when offenses are repeated, to the time interval between offenses. An offense may be mitigated by a good past record and it may be aggravated (sic) by a poor one."

Section 8.e. states: "When an employee commits a combination of, or series of different offenses, a greater penalty than listed for a single offense should be considered".

On March 25, 1983 a new contract was signed by the Local 1170, AFGE, and the employer. The sick leave provisions, Article XVII, SICK LEAVE, Section 3, are substantially similar to those in the old contract. Article XIX, however, is new. It states that the

"Hospital will follow the policy of progressive discipline to correct conduct deficiencies... All formal disciplinary actions must be supported by substantial evidence, and may be subject to the negotiated grievance procedure."

The "Sample Table of Offenses and Penalties," which appears in the 1978 contract, does not appear in the new contract.

DISCUSSION:

The Examiner set forth four issues in this case:<sup>1/</sup>

1. Whether the employer has discriminatorily enforced its medical certification for absence requirements on complainant Sullivan in reprisal for his exercise of union activity rights protected by Chapter 41.56 RCW?
2. Whether the employer has discriminatorily enforced, or has changed, implemented or more strictly enforced, rules to interfere with complainant Sullivan's exercise of rights protected by Chapter 41.56 RCW or in reprisal for his filing of charges with the Public Employment Relations Commission under Chapter 41.56 RCW?
3. Whether the employer has denied complainant Sullivan an upgrade in classification and pay in reprisal for his exercise of rights protected by Chapter 41.56 RCW?
4. Whether the employer discharged complainant Sullivan in reprisal for his exercise of rights protected by Chapter 41.56 RCW?

It is important to bear in mind that all four issues concern discrimination or reprisal against Sullivan on account of his union activity or exercise of his union activity or exercise of his rights under RCW 41.56.

The parties dispute the examiner's use of the Wright Line, Inc., 251 NLRB 150 (1980) as the test for determinations of this type. It is true that aspects of the burden of proof in federal discriminatory discharge cases have been subject to uncertainty. The Supreme Court of the United States laid this controversy to rest, however, in National Labor Relations Board v. Transportation Management Corp., 456 U.S. 998 (1983). In that case, the Court approved the NLRB's rule that the General Counsel has the burden of proof, by a preponderance of the evidence, that an anti-union animus contributed to the employer's decision to terminate the employee. In this case the complainant, Sullivan, had the burden of proving that animus against him because his controversy with the union contributed to the decision to terminate him. Once having made the prima facie case, the burden shifts to the employer to show, by a preponderance of the evidence, that the employee would have been discharged for legitimate reasons even if he or she were not involved in protected conduct. This test is essentially that used by the

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<sup>1/</sup> Sullivan objects to the examiner's reference concerning Sullivan's refusal to go along with the union's last-ditch offer of arbitration. The examiner entered no finding against Sullivan in this respect, and we agree with Sullivan that a grievance arbitration, under the circumstances relating to the conduct of the union, could be tainted, and deferral to arbitration inappropriate.

examiner in the instant case, and has been applied in Commission cases previously. City of Olympia, Decision No. 1208-A (PECB, 1981); Valley General Hospital, Decision No. 1195-A (PECB, 1981); Accord, Washington Public Employees Assoc. v. Community College District No. 91, 31 Wn.App. 203, 642 P.2d 1248 (1982). The prima facie case favoring the employee can be made by direct as well as circumstantial evidence. Circumstantial evidence may consist of the timing of the discharge, disparate treatment of other employees, whether established procedures (including contract procedures) were followed, the reasons given for the discharge, whether those reasons were given to the employee, any shift in those reasons on the part of the employer, and evidence from prior unfair labor practice proceedings. See generally, 1 Morris, The Developing Labor Law, 192 (2nd ed. 1983).

In the instant case, there is virtually no direct or circumstantial evidence showing an improper motive on the part of the employer. There is no evidence that the disciplinary rules or work rules were applied to Sullivan in a discriminatory or disparate way. Several of Sullivan's co-workers testified that Hayes was even-handed about discipline and rule-enforcement and did not single out Sullivan unfairly. With respect to the use of the telephone, Sullivan's own witnesses testified that Sullivan used the telephone for non-job related business substantially more than other employees. There was nothing suspicious about the timing of the discharge in this matter, and it appears that the applicable collective bargaining agreements were adhered to with respect to the discharge.<sup>2/</sup> The reason for the discharge was given to Sullivan orally at the time of the discharge, which was followed by a written termination letter dated March 30, 1983. Sullivan contends that those reasons changed, but we could find no evidence to that effect. There was no evidence of prior unfair labor practice proceedings involving this employer. Finally, there was no evidence to corroborate Sullivan's own opinion that the employer had a "sweetheart" relationship with the incumbent union. Accordingly, we are unable to conclude that the complainant has made out the prima facie case needed under the controlling precedent.

The decision of the examiner is affirmed, with certain amendments to the findings of fact which appear, from our review of the record, to be appropriate.

#### AMENDED FINDINGS OF FACT

1. The Public Health Hospital Preservation and Developmental Authority, d/b/a Seattle Public Health Hospital, is a public authority chartered by

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<sup>2/</sup> Bear in mind that our determination herein is not binding on the issue of contractual compliance. The determination of that issue is a job for an arbitrator.

the City of Seattle, Washington, pursuant to Seattle Municipal Code 3.110 and RCW 35.21.725 through 35.21.755, and is a public employer within the meaning of RCW 41.56.030(1).

2. American Federation of Government Employees, Local 1170, is a bargaining representative within the meaning of RCW 41.56.030(3). The union represents employees of the employer in an appropriate bargaining unit defined as:

INCLUDED: All professional and non-professional employees employed by the employer.

EXCLUDED: Management officials, supervisory employees, employees engaged in personnel work in other than a purely clerical capacity, and all employees of any independent group practice that may contract with the employer.

3. American Federation of Government Employees, Local 1170, and the United State Public Health Service Hospital were parties to a series of collective bargaining agreements from 1968 through 1982.
4. The Public Health Hospital Preservation and Developmental Authority, d/b/a Seattle Public Health Hospital, is the successor to the United States Public Health Service Hospital. Seattle Public Health Hospital and American Federation of Government Employees, Local 1170, are parties to a collective bargaining agreement effective from March 25, 1983 to March 25, 1986. The bargaining unit covered by the agreement is defined as follows:

## ARTICLE II

### RECOGNITION AND UNIT DETERMINATION

Section 1. The employer hereby recognizes that the Union is the exclusive representative of all employees in the Unit as defined in Section 2 below. The Union recognizes its responsibility of representing the interests of all such employees without discrimination and without regard to Union Membership with respect to hours, wages and working conditions, subject to the express limitations set forth elsewhere in this Agreement.

Section 2. The recognized Bargaining Unit includes, and this Agreement is applicable to, all current and future eligible professional and non-professional employees of the Hospital, employed at 1131 14th Avenue South, Seattle, Washington, except for the following:

- (1) any Management official;
- (2) any employee engaged in Personnel work in other than a purely clerical capacity;
- (3) supervisors;

(4) confidential employees.

The Bargaining Unit was certified by the Public Employee Relations Commission on April 16, 1982, Case No. 3992-E-82-750, Decision No. 1435-PECB.

5. On June 8, 1981, Kenneth G. Sullivan commenced employment with the Seattle Public Health Hospital as a file clerk.
6. On July 16, 1982, Patricia Hayes was hired to supervise the file room unit. During the last few days of July, 1982, and early August, 1982, Hayes implemented a stricter enforcement of rules than her predecessors had engaged in.
7. On August 15, 1982, Sullivan requested five days annual leave commencing August 23, 1982. Hayes denied Sullivan's leave request.
8. On August 23, 1982, Sullivan notified Hayes that he was ill. Sullivan was absent the following two days for the same reason.
9. On August 27, 1982, Sullivan visited the Veterans Administration Hospital during his lunch hour to obtain a medical certificate for his absences August 23, 24, and 25, 1982. Sullivan was 2½ hours late reporting back to work. Hayes marked Sullivan "absent without leave" for his late return to work.
10. On November 18, 1982, Hayes conducted a file room department meeting to notify the employees of their responsibilities to the employer, and to delineate hospital and departmental rules. Either Sullivan or Local 1170 objected to a new rest break policy, and Hayes later rescinded the rest break policy.
11. During January, 1983, Hayes requested that all file room employees receive an upgrade in pay and classification. The employer audited the employees work responsibilities and concluded that four positions would be reclassified. Sullivan, along with eight other file room employees, applied for three of the newly created positions. All employees were interviewed for the positions for which they had applied. Sullivan was not selected for promotion.
12. During January, 1983, Hayes orally reprimanded Sullivan for excessive use of the telephone for personal business. Other employees were similarly reprimanded.
13. On February 25, 1983, Hayes reprimanded Sullivan, in writing, for conducting internal union business during working hours, and for excessive personal use of the telephone.

14. On March 11, 1983, Sullivan reported to the hospital walk-in clinic for medical treatment. Sullivan, diagnosed to have flu symptoms, was sent home. On his way home, Sullivan delivered some documents relating to litigation before the King County Superior Court to the attorney for the hospital.
15. On March 14 and 15, 1983, Sullivan was unable to return to work due to the same health problem for which he was sent home on March 11, 1983.
16. On March 16, 17 and 18, 1983, Sullivan did not report to work due to complications from a finger injury. He refused Hayes' request to return on light duty status.
17. On March 21, 1983, Sullivan returned to work, but did not procure a medical certificate previously requested by Hayes. Sullivan presented a copy of the progress report furnished by the V.A. hospital concerning his finger injury March 16 - 18, 1983. The report stated he could not use his left hand. She reported Sullivan AWOL for March 15th, 16th, and 18th, 1983. Sullivan's pay was withheld for the three days.
18. On March 24, 1983, Sullivan requested annual leave to attend King County Superior Court to process his litigation against the employer. After consulting with her superiors, Hayes gave him the time to attend the court session provided he return to work afterwards.
19. On March 25, 1983, Sullivan attended the court proceedings. He did not return to work after the hearing was concluded.
20. On March 28, 1983, Sullivan telephoned Hayes to inform her he was ill. During their conversation, Hayes informed Sullivan he was terminated.
21. No substantial evidence was presented at the hearing that Sullivan was unfairly singled out with respect to work rules or discipline.
22. No substantial evidence indicates that established procedures and the collective bargaining agreement were nor followed with respect to Sullivan's discipline and discharge.
23. No substantial evidence was presented at hearing showing that the employer held any particular hostility towards Sullivan because of his exercise of his protected rights under Chapter 41.56 RCW, or that any such hostility motivated his discipline and discharge.

#### CONCLUSIONS OF LAW

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



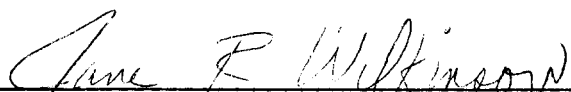
2. The complainant has not met its burden of proof that the employer has discriminatorily enforced its medical certification for absence requirements on complainant, Kenneth G. Sullivan, in reprisal for his exercise of union activity rights protected by Chapter 41.56 RCW.
3. The complainant has not met its burden of proof that the employer has discriminatorily enforced, or has changed, implemented or more strictly enforced, rules to interfere with complainant, Kenneth G. Sullivan, in his exercise of rights protected by Chapter 41.56 RCW or in reprisal for his filing of charges with the Public Employment Relations Commission under Chapter 41.56 RCW.
4. The complainant has not met its burden of proof that the employer denied complainant Kenneth G. Sullivan an upgrade in classification and pay in reprisal for his exercise of rights protected by Chapter 41.56 RCW.
5. The complainant has not met its burden of proof that the employer discharged complainant, Kenneth G. Sullivan, in reprisal for his exercise of rights protected by Chapter 41.56 RCW.

ORDERED

The complaint charging unfair labor practices against Public Health Hospital Preservation and Developmental Authority, d/b/a Seattle Public Health Hospital, is dismissed.

DATED at Olympia, Washington, this 9th day of November, 1984.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
\_\_\_\_\_  
JANE R. WILKINSON, Chairman

  
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MARK C. ENDRESEN, Commissioner

  
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MARY ELLEN KRUG, Commissioner