STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES,	)	CASE NO. 6117-U-85-1151
Complainant,	)	DECISION 2471-A - PECB
vs.	)	
ASOTIN COUNTY HOUSING AUTHORITY,	)	
Respondent.	)	DECISION OF COMMISSION

Pamela G. Bradburn, attorney at law, appeared on behalf of the complainant.

Charles T. Sharp, attorney at law, appeared on behalf of the respondent.

Examiner J. Martin Smith issued findings of fact, conclusions of law and order in the above-entitled matter on October 30, 1986, finding unfair labor practice violations and ordering reinstatement and back pay for discharged employees. The employer, Asotin County Housing Authority, filed a timely petition for review. Both parties filed briefs for consideration by the Commission.

BACKGROUND

The Asotin County Housing Authority, a public employer, operates approximately 140 house and apartment units in the Town of Asotin and the City of Clarkston. It is funded by the

federal Department of Housing and Urban Development (HUD) and by Asotin County. Most of the tenants qualify for low income or rent supplement benefits. The authority is governed by a five-member board of directors who appointed Alice White as executive director on February 1, 1985.

Prior to the events giving rise to these proceedings, the housing authority employed three persons for maintenance and operation of the housing units. The employees had attempted to organize for collective bargaining in 1978, but no exclusive bargaining representative was certified.

Roy Kennedy was hired by the housing authority in July, 1974. He started as a part-time laborer, but later became a full-time "maintenance laborer". In 1979, he was promoted to "maintenance mechanic" and "head" of the maintenance department. In February, 1985, he was told he was a "maintenance laborer" and not a "maintenance mechanic". Kennedy was terminated in April, 1985, but a post-termination hearing was held, and he was reinstated for a 60-day trial period beginning July 1, 1985.

Mike Bonaparte was hired on August 10, 1979. He started as, and remained, a "maintenance laborer". The record does not show any discipline of Bonaparte.

Mel Ketchersid was hired in 1984. He was assigned grounds-keeping duties, but was classified as a "maintenance helper".

Kennedy and Bonaparte decided to seek union representation, and contacted the Washington State Council of County and City Employees (union). Business Representative Bill Keenan mailed authorization cards to them, and then met with Kennedy and Bonaparte on Friday, July 26, 1985. They met first at the employer's shop and later at Bonaparte's home, where Keenan

received signed authorization cards from the two employees. Ketchersid knew of both meetings, but neither participated nor signed an authorization card.

Before the authorization cards were used by the union in any way, Kennedy and Bonaparte were discharged from employment within a few days. In a memorandum dated July 31, 1985, the employer's executive director announced that the housing authority's maintenance department was being "closed down". The action was effective August 15, 1985. Only the grounds-keeper/laborer position occupied by Ketchersid was retained, and Ketchersid was not laid off or discharged.

The union filed an unfair labor practice complaint against Asotin County Housing Authority on November 18, 1985. The complaint alleged that the respondent violated RCW 41.56.140(1) in discharging Roy Kennedy and Michael Bonaparte. A hearing was held on January 15, 1986. There was no direct testimony showing that the employer's executive director was aware of the unionization effort, but the Examiner entered findings of fact, conclusions of law and order finding a "discrimination" violation.

Some additional salient facts are set forth below in our discussion of the issues.

POSITION OF THE PARTIES

In its petition for review and supporting brief, the employer essentially challenges all of the Examiner's findings of fact and conclusions of law, arguing that they are unsupported by the record. But the employer also claims the timing of the decision, in relation to receipt of a letter from the union

attorney inquiring into the status of the case, suggests a hurried review of the record which, the employer alleges, was arbitrary and capricious. finally, the employer contends that the union waived its rights by waiting two-and-one-half months before filing the charges.

The union responds that the petition for review is deficient for lack of specific challenge to enumerated findings and/or conclusions. The union contradicts the claim that issuance of the Examiner's decision was influenced by the union's letter. Finally, the union requests that the Commission "correct" the remedial part of the Examiner's decision by reinstating Mr. Kennedy to his most recent position, that of laborer, rather than his prior position of maintenance mechanic.[1]

DISCUSSION

We attach considerable weight to the factual findings and inferences therefrom made by our Examiners. They have had the opportunity to personally observe the demeanor of the witnesses. The inflection of the voice, the coloring of the face, and perhaps the sweating of the palms, are circumstances that we, as Commissioner members, are prevented from perceiving through the opaque screen of a cold record. This deference, while not slavishly observed on every appeal, is even more appropriate on a "fact-oriented" appeal like this one. As noted by the union, the employer's petition for review does not challenge specific findings, but all of them. We find no error.

---

1 We hasten to note that Examiner Smith was in the process of correcting that oversight when he was deprived of jurisdiction to do so by the filing of the petition for review.

We attach no significance to the coincidence between the receipt of a letter from the union's attorney to our Executive Director and the issuance of the Examiner's decision. The timing of decisions issued by members of the Commission staff is affected by the workload of the agency as a whole, by the workload of the Examiner, by the complexity of the legal and factual issues in a given case, and by various other factors not including letters from the parties' representatives urging their priorities.[2] In any event, the union letter at issue could not have influenced the processing of this case. The letter was received in the Olympia office of the Commission on October 27, 1986 and was not mailed to the Examiner's office in Spokane until October 29, 1986. The Examiner was virtually finished with an exhaustive consideration of the evidence and preparation of a 22 page decision by the time the letter was received in the Olympia office and had signed the decision in Spokane on October 28th, forwarding it to the Olympia office for issuance. We reject this contention.

We also reject the employer's "waiver" argument, based on the fact that the unfair labor practice charge was filed approximately two-and-one-half months after the events. The statute sets forth a six-month statute of limitations on the filing of unfair labor practice charges. RCW 41.56.160.

The gravamen of the instant unfair labor practice charges is that the employer discriminated against the employees by

---

[2] With a backlog of 317 cases pending before the agency on October 31, 1986 (one day after the issuance of the Examiner's decision in this case), it should be clear that any priority extended to one case would be at the expense of other cases. Priorities are administered according to the nature and age of cases, and orderly processing of the entire caseload precludes giving effect to individual urgings of the parties to particular cases.

discharging them for attempting to exercise their right to organize. The standard governing such cases before this Commission was set forth in City of Olympia, Decision 1208, 1208-A (PECB, 1982), citing the National Labor Relations Board's decision in Wright Lines, Inc., 251 NLRB 150 (1980). A complainant must first make out a prima facie case sufficient to support an inference that protected conduct was a motivating factor in the employer's decision. The burden then shifts to the employer to show the same action would have taken place even if the employee had not been engaged in protected activity. This standard has been approved by the Washington Courts. WPEA v. Community College District 9 (Highline), 31 Wn.App. ___ (Division I, 1982); Clallam County v. PERC, ___ Wn.App. ___ (Division II, 1986), cert. den., ___ Wn.2d ___ (1986). The Wright Lines standard recognizes that the complaining party often might not possess actual knowledge of the motives of the other party. That is why the complainant need only make a showing "sufficient to support an inference" that protected activity is a motivating factor.

We agree with the Examiner's conclusion that the record reveals a "dual motive discharge". The union need not have a "smoking gun" admission of anti-union animus; a coincidence of otherwise inexplicable facts will suffice to support a clear inference. Material to us are the following facts:

1. The timing of the discharges;

2. Retention of Mr. Ketchersid (who did not favor unionization.

3. The very small workforce;

4. Comments by Ketchersid regarding his fear of the effect of unionizing;

5. The opportunity for communications between Ketchersid and White;

6. The employer's inconsistent statements regarding the discharges (or layoffs);

7. The apparent deviation from the employer's own personnel policy on order of layoff in the event of reductions-in-force.

The Ninth Circuit Court of Appeals stated, in such a case:

> In determining motive, the Board may consider circumstantial and direct evidence and its inferences will prevail if reasonable and supported by substantial evidence on the record as a whole ... Fort Vancouver Plywood Co., 604 F.2d 546, 102 LRRM 2232 (9th Circuit, 1979).

We agree with that analysis. The Examiner correctly ruled that the complainant made our a prima facie case. The next question is whether the employer sustained its burden of proof in its attempt to show that the employees would have been terminated irrespective of the protected activity.

The record does not support any employer contention that the two employees were discharged for cause. Their personnel files contained no written reprimands, suspensions or other discipline, except that the employer had attempted to fire Kennedy once before. After Kennedy hired an attorney, the employer reinstated him, but placed him on "probation" for two months. While the employer's executive director testified she had "heated discussions" with both men, "heated discussions" were, at most, equivalent to oral reprimands. Moreover, they were apparently not even documented in the employer's files. Finally, the employer itself did not clearly state that these were discharges for cause. It eventually decided to label them as layoffs relating to the elimination of the department.

The record also fails to support the purported abolition of the maintenance department, i.e., a bona fide reorganization, as the reason for the termination of the employment of Kennedy and Bonaparte. There was no evidence in the record, such as minutes of board action, a resolution, or documentation of any kind, that the housing authority board took official action to close the department before terminating Kennedy and Bonaparte. The minutes of a board meeting held after the discharges state that the employer's executive director had conferred individually with board members on the layoffs. There is no evidence that HUD required or recommended such a reorganization. We cannot find fault with the Examiner's inference that the discharge decision was truly made by the employer's executive director.

The evidence taken as a whole reeks of pretext. The only sensible conclusion is that the primary motivating factor for the discharge of Kennedy and Bonaparte, and not Ketchersid, must have been the employer's awareness of and displeasure with the attempt to organize the workforce. We affirm the Examiner's conclusion that the employer violated RCW 41.56-.140(1) and (4).

With regard to the remedy, we agree that the Examiner's order should be corrected to reinstate Kennedy to his most recent position. Bonaparte, too, should be reinstated as a laborer.

NOW, THEREFORE, it is

ORDERED

1. The findings of fact, conclusions of law and order issued by the Examiner are affirmed and adopted as the findings of fact, conclusions of law and order of the Commission,

except for paragraph 2.A. of the order, which is amended to state:

> A. Offer employee Roy Kennedy immediate and full reinstatement to his former position of maintenance laborer, with full back pay plus interest to August 15, 1985, computed in accordance with WAC 391-45-410.

2. The Asotin County Housing Authority, its officers and agents, shall notify the Executive Director of the Public Employment Relations Commission, in writing, within thirty (30) days following the date of this order, as to what steps have been taken to comply herewith and shall at the same time provide the Executive Director with a signed copy of the notice required by the Examiner's decision.

ISSUED at Olympia, Washington, this 20th day of April, 1987.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R. Wilkinson
JANE R. WILKINSON, Chairman

Mark C. Endresen
MARK C. ENDRESEN, Commissioner

Joseph F. Quinn
JOSEPH F. QUINN, Commissioner

Appendix "A"

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE PURPOSES OF THE PUBLIC EMPLOYEES COLLECTIVE BARGAINING ACT, THE ASOTIN COUNTY HOUSING AUTHORITY NOTIFIES ITS EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of their right to organize and designate representatives of their own choosing for the purposes of collective bargaining.

WE WILL NOT interfere with the exercise of the rights of employees to engage in activities protected by RCW 41.56.040.

WE WILL NOT interfere with, restrain or coerce employees Roy Kennedy and Michael Bonaparte in the exercise of their right to organize and designate representatives of their own choosing, as detailed in RCW 41.56.040.

WE WILL offer employee Roy Kennedy immediate and full reinstatement to his former position of Maintenance Laborer with full backpay plus interest, in accord with WAC 391-45-410.

WE WILL offer employee Michael Bonaparte immediate and full reinstatement to his former position of Maintenance Laborer with full backpay plus interest, in accord with WAC 391-45-410.

DATED: _____

ASOTIN COUNTY HOUSING AUTHORITY

BY: _____
AUTHORIZED REPRESENTATIVE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced or covered by other material. Any questions concerning this notice or compliance with its provisions maybe directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98503, (206) 753-3444.