

STATE OF WASHINGTON  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PATRICIA HIGGINS,	)	
	)	
Complainant,	)	CASE 7331-U-88-1511
	)	
vs.	)	DECISION 3178 - PECB
	)	
KING COUNTY,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND ORDER
	)	
	)	

---

Hafer, Price, Rinehart and Schwerin by M. Lee Price, Attorney at Law, appeared for the complainant.

Norm Maleng, King County Prosecutor, by Mary E. Cummings, Deputy Prosecuting Attorney, appeared for the respondent.

On March 29, 1988, Patricia Higgins filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that she was improperly denied reinstatement to a position with King County, in violation of RCW 41.56.140(1) and (3). On May 31, 1988, King County made a motion to dismiss the complaint, on the grounds that Patricia Higgins was not an employee of King County at the time the alleged unfair labor practices took place.<sup>1</sup> J. Martin Smith of the Commission's staff was assigned as Examiner. A hearing was held at Seattle, Washington, on August 24, 1988. Memoranda of legal authority were filed by the parties to complete the record in this case.

---

<sup>1</sup> This motion was withdrawn at hearing.

BACKGROUND

Patricia Higgins was hired by King County in 1976, to fill a part-time position with the King County Animal Shelter at Bellevue.

In July of 1977, Higgins transferred to a full-time animal control officer position, working out of the employer's Seattle facility. The job duties of animal control officers involve elements of danger, physical discomfort and substantial work out-of-doors. Higgins described her duties as taking care of all types of animals, from "kitties to livestock".

After Higgins had been employed for 8 months, King County chose to issue her a probationary work performance report. Supervisors indicated that her work was "poor", and cited an incident where she allegedly had not cooperated with a veterinarian. Higgins filed a grievance under the collective bargaining agreement then applicable to her employment.<sup>2</sup> The grievance was resolved in her favor and to her satisfaction.

In 1979, Higgins was told that she was being laid off. Other employees working in the department at that time were junior to her in County service, and she filed a grievance. That grievance resulted in an arbitrator's award in her favor.

On another occasion, supervisors decided to change the assignments of trucks and motor vehicles for animal control officers, resulting in Higgins ending up without any truck assigned to her. She again filed a successful grievance.

---

<sup>2</sup> The Animal Control employees were represented for the purposes of collective bargaining in 1977-79 by Teamsters Union, Local 174.

In all, Higgins estimated that she filed five to seven grievances in the past few years, and that she "won them all".

Higgins has a history of injuries and physical disability which runs concurrently with her history of filing grievances. She suffered an "industrial" back injury in September of 1983, after which she received workers' compensation benefits for about ten months. During this time, she retained attorney David Condon to represent her on the back injury claim.<sup>3</sup> Higgins returned to work in Animal Control in June of 1984, as an "office assistant III" with a reduction in pay of approximately \$2.00 per hour. At that time, her physicians restricted her work to avoid "heavy lifting", which was not likely to occur in a clerical position.<sup>4</sup> In March of 1986, some 21 months after she began the clerical assignment, Higgins re-injured her back and again received time-loss benefits while off work through the balance of 1986 and all of 1987.<sup>5</sup>

In November of 1987, another Animal Control employee quit her job, but Higgins did not have a release from her physicians to return to such a position, and so was not contacted about filling that position.

In an effort to return Higgins to employment with King County, employer officials decided to create a new position, which was to have foreman-supervisory responsibilities, in the Parks

---

<sup>3</sup> Condon also represented Higgins on a dog bite injury claim which occurred later.

<sup>4</sup> By virtue of the "self-Insurer Referral Plan for RTW", King County and the State of Washington allowed Higgins until June of 1986 to apply for reinstatement as an animal control officer "on training status".

<sup>5</sup> Presumably, her re-injury in March of 1986 suspended the deadline previously established for June of 1986.

Department. On November 30, 1987, Condon wrote to the employer, indicating that Higgins would consider a dispatcher's position in the Animal Control operation.

On December 1, 1987, Employee/Labor Relations Manager Wes Moore sent a letter to Higgins stating, in part:

I explained to you the County's rationale for attempting to locate a position for you out of Animal Control. As I indicated, the decision was mine and was based upon my assessment of your best interests and those of Animal Control. I continue to be convinced that neither [party] would be served by your returning to work in an organization which, given a choice, would prefer that you work elsewhere. . . .

The essence of the letter was that Moore preferred that Higgins return to County employment, but not to a position in Animal Control.

A meeting was arranged for December 7, 1987. The meeting was held at "Professional Services for the Injured", a medical service facility in south King County, where Higgins was receiving treatment for her back injury. Those present were Higgins, Condon, Moore, and Don Lehman of the County's workers' compensation office. At that meeting, Moore outlined the Parks Department job that had been designed with Higgins in mind, and provided a job description for that position. The job involved supervision of a seven-person crew of developmentally disabled people doing grounds and maintenance work at County parks.

On December 29, 1987, both Moore and Higgins sent letters regarding the Parks Department position. For his part, Moore explained to Les Ellis, a workers' compensation claims officer for the employer, that the December 7 meeting had been held to

explain the Parks Department crew chief position to Higgins, that Higgins had been told that the position would be probationary, at a negotiable salary, and that acceptance would involve starting her seniority from the beginning. Moore told Ellis that Higgins had refused the job at that time, and that he was attempting to find an "office assistant III" position for her in a department other than Animal Control. Higgins' handwritten letter sent to Moore on the same day notified the employer that she had turned down the Parks Department position because she was continuing her request to be placed back in Animal Control.

Higgins received releases for work from her physicians on January 6 and 7, 1988, and she reported for work at Animal Control on January 8. She was told that there was no work for her at that time.

Higgins subsequently registered with the employer's "hot line" system for referrals for employment with the County. Several openings developed and, by April of 1988, Higgins had applied for a clerk position in the Public Works Department, for an animal control officer position, and for an animal control dispatcher position. Higgins also applied for a position which became the "animal control adoption specialist". Higgins was given an oral "examination" by Animal Control employees. The results of her ranking as a candidate for Animal Control positions are not known.

#### POSITIONS OF THE PARTIES

Higgins contends that King County has committed unfair labor practices under RCW 41.56.140(1), by not reinstating her to a position in Animal Control after her physicians released her to

work. She claims that her past history of filing grievances as a member of Teamsters Local 174 created an adversarial response from supervisors in that department so that, even if there were other reasons to deny her work in Animal Control, her "reputation" remained a paramount--and illegal--reason to pass her over for reinstatement.

King County takes the position that it had legitimate reasons for not considering Higgins for work in Animal Control when she returned from an industrial injury in December of 1987. Among those reasons were the fact that no openings existed in Animal Control at that time, and that a new position in the King County Parks Department was being considered for her instead. The employer denies that it had a motive to discriminate against Higgins for filing either grievances or unfair labor practices, and contends that no unfair labor practice occurred.

## DISCUSSION

### The Applicable Statutes

Whether an unfair labor practice claim is made out is determined by an analysis of the facts against the language of RCW 41.56.040. That section makes clear:

No public employer, or other person, shall directly or indirectly interfere with, restrain, coerce or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing or in the free exercise of any rights under this chapter.

It is further the command of the statute, in RCW 41.56.140, that it is an unfair labor practice for a public employer:

- (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;  
...
- (3) to discriminate against a public employee who has filed an unfair labor practice charge . . .

It has consistently been held that sanctions will be imposed against an employer under Chapter 41.56 RCW, if it discriminates against an employee for filing grievances. Though this protection is parallel to the analogous language of RCW 41.56.140(3), referring to employees who file unfair labor practice charges, it takes cognizance of RCW 41.56.080, which provides that:

Any public employee at any time may present his [her] grievance to the public employer and have such grievance adjusted without the intervention of the exclusive bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect . . .

See, Valley General Hospital, Decision 1195-A (PECB, 1982); Clallam County, Decision 1405, 1405-A (PECB, 1984); Pullman School District, Decision 2632 (PECB, 1987); Washougal School District, Decision 2055-A (PECB, 1985).

#### The Shifting Burden of Proof

The Public Employment Relations Commission has applied the principles enunciated in Wright Line, Inc., 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir., 1981); cert. den., 455

U.S. 989, in determining "dual motivation" unfair labor practice cases:

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.

Asotin County Housing Authority, Decision 2471-A (PECB 1987)

See, also, City of Olympia, Decision 1208, 1208-A (PECB 1982). The use of this standard has also been approved by the Washington courts. Clallam County v. PERC, \_\_\_ Wn.App. \_\_\_ (Division II, 1986); WPEA v Highline Community College, 31 Wn.App. \_\_\_ (Division I, 1982).

#### The Complainant's Prima Facie Case

The facts support an inference--even a probability--that Higgins' protected conduct in filing grievances under the collective bargaining agreement was a motivating factor in the employer's decision to "find another job" for her, and for its resistance to calling her back to work in Animal Control.

#### The Telephone Conversation and Confirming Letter -

Higgins testified of her November 30, 1987, telephone conversation with Wes Moore, wherein she asked to have her Animal Control job back:

- Q. And what generally, was the nature of the conversation that you had?
- A. [by Higgins] Wes [Moore] told me that they did not want me back. They did not want me back because of the



grievances that I had filed against them with King County.

- Q. Did he indicate who "they" were?
- A. No. I pressed it. I wanted to know who were "they" and he said "Jim Buck and Dan Graves" . . . Graves is the shelter supervisor at the King County Animal Control and I'm not sure what Jim Buck does . . ."

When asked about that conversation, Moore testified that he "memorialized" his November 30, 1987 remarks on the phone into the letter of December 1, 1987. Moore did not rebut Higgins' version of the conversation, and the letter states that:

I continue to be convinced that neither would be served by your returning to work in an organization which, given a choice, would prefer that you work elsewhere.

Further, Moore never denied mentioning Jim Buck and Dan Graves, by name.

The December 7 Meeting -

An event that was perhaps more critical was the meeting of December 7, 1987. Of the participants in that meeting, all but Don Lehman testified in this proceeding as to what was said on that occasion.

Higgins remembers the conversation as beginning with her assertion that she was ready to go back to work in Animal Control, and her claim that there was a vacancy. Higgins then told Moore that Sgt. Graves had to represent the County in several of the grievances, and he had "ill feelings" towards her, personally. Moore outlined a substitute job in the Parks

Department. Higgins expressed her doubts about being able to perform adequately in a new job with unknown expectations.

David Condon testified that the December 7 meeting was set to consider the Parks Department job, and that Higgins was not cleared to work in any County position as of that time. Condon testified that Higgins inquired of Moore regarding the possibility of returning to Animal Control:

Q. Was there a response?

A. [by Condon] Well, he had expressed the fact that the personnel within King County Animal Control . . . he was talking about basically the people that ran the department, or at least ran the portion of the department where Patty would fit, did not want her to come back. . . . Patty asked him specifically at that point if why and if her grievance activity had something to do with it and his answer was in affirmative. That yes it did.  
. . .

Moore's testimony generally fails to rebut the testimony of Higgins and Condon. The inference is unmistakable that the Animal Control management did not want Higgins to return to that department, and that the motivating factor behind that view was the fact that she had filed several grievances during her previous employment in that department. These inferences go beyond "suspicion" or "supposition", and point to a causal connection between the complainant's protected grievance activity and the position taken by King County regarding her return to work at Animal Control.<sup>6</sup>

---

<sup>6</sup> This case is distinguishable from Lyle School District, Decision 2736-A (PECB, 1988), where a prima facie showing was NOT made out. The Commission ruled that a vague "showing of some hostility" on the part

The Employer's Affirmative Defenses

The burden of proof now shifts to the employer to show that the same action, i.e., the denial of Higgins' return to Animal Control, would have occurred even if she were NOT involved in the protected activity of filing grievances.

The Claimed Absence of an Opening -

The County builds its case around a claim that there "was no opening" for Higgins in December of 1987, when she asked to come back to work in Animal Control. Detailed examination of the evidence does not support that claim. Moore passed along the opinion of Jim Buck that he "didn't know whether there were any positions" available on December 1, 1987. This is somewhat surprising, since Buck was assistant manager of general services, which administers the Animal Control function. Dan Graves told him there was only a temporary clerical position, which was under review. Higgins had performed dispatcher and clerk duties at the animal shelter. For her part, Higgins told Moore and her attorney that she could perform dispatcher or clerk duties at the animal shelter.

Had there been no position available, King County merely had to say something like: "we will consider you for the next opening in an Animal Control position for which you qualify," had it wanted to honor its obligations to the grievant without risk of violation of RCW 41.56.140(1). By taking advantage of the opportunity to attempt to transfer Higgins to another depart-

---

of the management official towards a bargaining unit member involved in negotiations was not sufficient, in and of itself, to infer a motive to "retaliate" on his part. Here, by contrast, a causal relationship exists between admitted "ill feeling" and a detrimental action against an individual employee.

ment<sup>7</sup> for purposes related to her filing of grievances, the County is exposed as to its true motive.

Concern about Potential Re-injury -

Moore's claim that he was concerned that Higgins might "injure herself" again if she returned to Animal Control is self-serving, given the fact that Higgins was not yet cleared by her physicians to be an animal control field officer. She was cleared for work on the Parks Department job on January 6, 1988, and for work in the Animal Control clerk position on January 7, 1988.

Higgins' Work Record -

Equally damaging to the employer's case was Moore's citation of "the totality of Patty's record with Animal Control" as being a reason not to reinstate her, since--as he admitted under cross-examination--there was no record of disciplinary warnings or suspensions resulting from Higgins' ten years in the department. Indeed, only the first of her grievances seemed to involve any form of discipline taken against her by exercise of management rights or prerogatives.

The attempt by Moore to persuade Higgins to accept a new position in the Parks Department could have been made in good faith, and might well have been made even without Higgins' record of grievances.<sup>8</sup> Certainly, such a transfer might have resolved issues with respect to Higgins' worker's compensation

---

<sup>7</sup> Through Moore's testimony, Assistant Manager of General Services Jim Buck is quoted as having said "[isn't] there any place else we could put her in the County?"

<sup>8</sup> In Moore's defense, it can be stated that Moore dealt with Higgins on an appropriate basis, and in apparent good faith. He does not run the Department of General Services or the Animal Control function. Rationale which came to him from those departments does not come with a stamp of legal approval.

claim. However, the attempts to persuade her to accept such a transfer, no matter how well-intended, cannot exonerate or "cover" the County's primary reason for excluding her from Animal Control. See, Seattle School District, Decision 2524 (EDUC, 1986), where a well-meaning employer official's pressure on a bargaining unit employee to accept a transfer was found to be an unfair labor practice.

Conclusions -

Taken together, the employer's defenses fail to persuade that it would have denied Higgins' reinstatement to the Animal Control staff when her physical impairments ended in 1988. Nor is Higgins' refusal to accept the position in the Parks Department a sufficient basis to conclude that she made a waiver of her rights to other positions with King County or her rights under Chapter 41.56 RCW. It is apparent, however, that Higgins was treated as not being an employee of King County when she applied for the Animal Control positions which became available in April and May of 1988. That treatment at those times is indicative of the employer's desire to keep her out of the Animal Control operation, and it is thus concluded that it was an unfair labor practice for the employer to refuse to rehire her at those times.

The Remedy

Retribution against employees for their filing of grievances is not to be tolerated under Chapter 41.56 RCW. The normal remedy for such a violation of RCW 41.56.140(1) would include reinstatement with full back pay, plus interest. Such an order must be limited in this case, however, because of circumstances affecting Higgins' availability for work.

Higgins' rejection of offers of employment outside of the Animal Control staff precludes any remedy affecting the periods when such positions were made available. See, Town of Fircrest, Decision 248-A (PECB, 1977), where the Commission vacated remedies for periods when the employee eligible for remedies declined to mitigate losses.

The onset of the "back pay" period must then be further postponed because of Higgins' unavailability for positions in Animal Control until January 7, 1988, when she was cleared for clerical work with King County.

It appears that an animal control officer position was available in March, 1988. Return to that position is not possible, however, because the Department of Labor and Industries had not cleared Higgins to work in such a field position.

An animal control dispatcher position became available in April of 1988. The Examiner believes Higgins was entitled to an opportunity to prove herself in that position, and she is entitled to back pay from the date that Animal Control Dispatcher position became available.

#### FINDINGS OF FACT

1. King County is a political subdivision of the state of Washington and is a "public employer" within the meaning of RCW 41.56.030(1).
2. Patricia Higgins was employed by King County in its Animal Control operations beginning in 1976. Higgins received workers' compensation time loss benefits for a back injury between September of 1983 and June of 1984, when she was

returned to work in an office-clerical position under a physician's release limiting her work duties with respect to heavy lifting. In March of 1986, Higgins was again placed on leave status as an employee, while receiving workers' compensation time loss benefits for a re-injury to her back.

3. At all times while employed by King County, Higgins was represented for the purposes of collective bargaining by Teamsters Union, Local 174. Higgins filed and successfully prosecuted several grievances under the collective bargaining agreements between the employer and Local 174. Her grievances were resolved substantially in her favor.
4. Higgins was given a two-year period following March of 1986, during which she might be able to rehabilitate enough to work as an animal control officer. Although such an opening occurred in November of 1987, Higgins had not been released by her physicians by that time for return to work in that capacity.
5. In discussions and correspondence, King County officials informed Higgins that she was not welcome back in the Animal Control operation, because managers in that operation were unhappy with her record of filing and pursuit of grievances. The employer advised Higgins that the best interests of the employer and of herself would be served if she would accept an alternative position developed for her in the Parks Department. Said position was offered to Higgins under terms that involved serving a probationary period and loss of seniority. After considering the offer, Higgins turned down the position.

7. Higgins continued to claim status as an employee, and took no action to cash out her accumulated sick leave, vacation leave, or retirement. Although Higgins has not received a final warrant from King County, the employer took the position after she turned down the offered position in the Parks Department that she was no longer an employee and/or was no longer eligible for reinstatement to employment with King County.
8. Higgins was released by the Department of Labor and Industries and by her own physicians for return to work in the employer's Animal Control operations by April of 1988, when a dispatcher position became available. Higgins applied for that position. The employer did not hire Higgins for that position, due to her past history of filing grievances as an employee of King County.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.
2. Patricia Higgins is a public employee within the meaning of RCW 41.56.030(2), in relation to her employment with King County.
3. Patricia Higgins was engaged in activities protected by RCW 41.56.040 to the extent that, as an employee of King County, she filed and processed grievances under a collective bargaining agreement covering her employment.
4. By refusing to consider Patricia Higgins for reinstatement in its Animal Control operation upon her release for



return to work from an industrial injury, and by insisting on her acceptance of employment in another operation at prejudice to her seniority rights, because of her record of filing and pursuit of grievances, King County has interfered with, restrained, coerced and discriminated against Patricia Higgins for her exercise of rights guaranteed by Chapter 41.56 RCW, and has engaged in unfair labor practices under RCW 41.56.140(1).

Upon the basis of the above Findings of Fact and Conclusions of Law, and pursuant to RCW 41.56.160 of the Public Employees' Collective Bargaining Act, the Examiner enters the following:

ORDER

King County, its officers and agents shall immediately:

1. Cease and desist from interfering with, restraining, coercing and discriminating against employees in the exercise of their rights under Chapter 41.56 RCW, and specifically with respect to the filing of grievances under a collective bargaining agreement covering their employment.
2. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Public Employees' Collective Bargaining Act:
  - a. Reinstate Patricia Higgins to employment with King County in the position of "animal control dispatcher" as that position became available in April of 1988, or in a substantially equivalent position.

- b. Make Patricia Higgins whole for the wages and benefits lost as a result of the discrimination against her, by payment of back pay at the rate of pay of the "animal control dispatcher" position that became available in April of 1988, from the date that such position became available until the date of the unconditional offer of reinstatement made pursuant to this order, computed in accordance with WAC 391-45-410.
- c. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto. Such notice shall, after being duly signed by an authorized representative of the respondent, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the respondent to insure that said notices are not removed, altered, defaced, or covered by other material.
- d. Notify the complainant, in writing, within twenty (20) days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice required by this order.
- e. Notify the Executive Director of the Public Employment Relations Commission, in writing, within twenty (20) days following the date of this order, as to what steps have been taken to comply herewith, and at

at the same time provide the complainant with a signed copy of the notice required by this order.

Dated at Spokane, Washington, this 10 day of April, 1989.

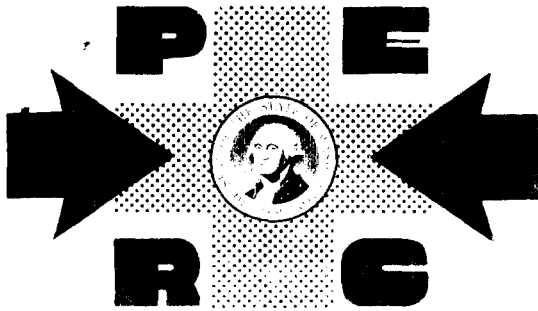
Issued at Olympia, Washington, this 14th day of April, 1989.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



J. MARTIN SMITH, Examiner

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



PUBLIC EMPLOYMENT RELATIONS COMMISSION

# NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION HAS HELD A HEARING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE. THE COMMISSION HAS FOUND THAT WE VIOLATED THE PUBLIC EMPLOYEES' COLLECTIVE BARGAINING ACT (CHAPTER 41.56 RCW) AND HAS ORDERED US TO POST THIS NOTICE.

WE WILL NOT DISCRIMINATE against Patricia Higgins for protected rights under RCW 41.56, e.g., file grievances under the collective bargaining agreement;

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of rights guaranteed them by the Public Employees' Collective Bargaining Act.

WE WILL offer re-instatement to Patricia Higgins of a position as Animal Control Dispatcher in the Animal Control Division of King County, and will otherwise make her whole in wages for the period April, 1989 to the present date, with interest.

KING COUNTY

By: \_\_\_\_\_  
Authorized Representative

Dated \_\_\_\_\_

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 any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone (206) 753-3444.