Snohomish County, Decision 12723-B (PECB, 2018)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SNOHOMISH COUNTY CORRECTIONS GUILD, Complainant, vs. SNOHOMISH COUNTY, Respondent.	CASE 128885-U-17 DECISION 12723-B - PECB DECISION OF COMMISSION

James M. Cline and *Eamon McCleery*, Attorneys at Law, Cline & Associates, for the Snohomish County Corrections Guild.

Charlotte F. Comer and *Steven J. Bladek*, Deputy Prosecuting Attorneys, Snohomish County Prosecuting Attorney Mark K. Roe, for Snohomish County.

The Snohomish County Corrections Guild (union) filed an unfair labor practice complaint against Snohomish County (employer). The union alleged that the employer interfered with employee rights, unilaterally implemented a new shift turnover policy, unilaterally changed the policy on cell phone use, and discriminated against union president Charles Carrell.

Examiner Daniel Comeau conducted a hearing and issued a decision. The Examiner found that the employer interfered with employee rights and dismissed the other allegations. The union filed a timely appeal.

The appeal presents three issues. Did the employer refuse to bargain by implementing a new shift turnover policy? Did the employer refuse to bargain when it implemented a new cell phone policy? Did the employer discriminate against union president Charles Carrell when the employer disciplined him for using his cell phone inside the secured area of the jail?

Standard of Review

The Commission applies its experience and specialized knowledge in labor relations to decide cases. RCW 34.05.461(5). The Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. The Commission also reviews findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Examiner's conclusions of law. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002).

The Commission reviews factual findings for substantial evidence in light of the entire record. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *City of Vancouver v. Public Employment Relations Commission*, 107 Wn. App. 694, 703 (2001); *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7007-A (PECB, 2000). This deference, while not slavishly observed on every appeal, is highly appropriate in fact-oriented appeals. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B.

We have reviewed the transcript, exhibits, and the parties' briefs. The Examiner correctly stated the legal standard for the unilateral change allegations. Substantial evidence supports the Examiner's findings of fact, which in turn support the Examiner's conclusions of law that the employer did not refuse to bargain when it implemented the shift turnover policy and the cell phone policy. We affirm the Examiner.

We reverse the Examiner's decision that the employer did not discriminate against Carrell. The employer's reason for disciplining Carrell was a pretext.

BACKGROUND

Charles Carrell was the union president. In October 2016 Carrell testified on behalf of the union in an interest arbitration hearing.

On October 11, 2016, Corrections Bureau Chief Anthony Aston issued a directive prohibiting personal electronic devices, including cell phones, in the secured area of the jail.

The employer investigated Carrell in late 2016 in a matter unrelated to cell phone use. As part of that investigation, Carrell attended a personnel complaint investigatory interview on December 7, 2016. The employer scheduled and conducted the interview in the secured area of the jail. Carrell asked Lieutenant Clint Moll, who was conducting the interview, to change the location. Moll declined.

In compliance with the cell phone directive, Carrell had stored his cell phone outside the secured area of the jail. Before the December 7 interview, Carrell retrieved his cell phone and took it into the conference room where the interview was scheduled.

Moll and Lieutenant Randy Harrison conducted the interview. Geoff Kiernan, the union's attorney, accompanied Carrell to the interview. At the beginning of the interview, Carrell showed his cell phone to Moll and asked permission to record the interview. Moll agreed that Carrell could record the interview. Kiernan asked Moll a question about Carrell's *Garrity* rights. Moll excused himself from the room to obtain the answer.

Moll consulted with Major Jamie Kane. While asking about Carrell's *Garrity* rights, Moll told Kane that Carrell was recording the interview on a cell phone. Kane asked Moll if the phone belonged to Carrell. Moll did not know and asked Kane if Moll should address ownership of the cell phone. Kane instructed Moll to conduct the interview first and then ask Carrell about the cell phone.

At the conclusion of the interview Moll asked Carrell if the cell phone used to record the interview belonged to him. Carrell confirmed that the cell phone was his. Moll told Carrell that he was in violation of the directive prohibiting cell phones in the secured area of the jail.

On December 8, 2016, Moll filed a personnel complaint against Carrell for violating the October 11, 2016, directive limiting the use of personal electronic devices. The employer assigned

Lieutenant Mark Simonson to conduct the investigation. At the conclusion of the investigation Simonson recommended finding that Carrell failed to adhere to a directive prohibiting personal electronic devices inside the secured area of the jail. Simonson also recommended finding that the insubordination violation was unfounded. Simonson recommended Carrell receive a two-year written reprimand.

Captain Kevin Young reviewed Simonson's recommendation. Young did not agree. Young "[knew] that Deputy Carrell was aware of the directive. . ." and "intentionally disregarded" the directive. Therefore, Young recommended Carrell receive a five-year written reprimand and a five-day suspension. Kane agreed with Young.

On January 27, 2017, the employer gave Carrell a notice of pre-disciplinary hearing. The employer sustained both charges: failing to adhere to a directive, and insubordination. On February 17, 2017, the employer disciplined Carrell by suspending him for five days and issuing a five-year written reprimand.

ANALYSIS

Applicable Legal Standards

Discrimination

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of statutorily protected rights. RCW 41.56.140(1); *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in a discrimination case. To prove discrimination, the complainant must first establish a prima facie case by showing that

1. the employee participated in protected activity or communicated to the employer an intent to do so;

2. the employer deprived the employee of some ascertainable right, benefit, or status; and

3. a causal connection exists between the employee's exercise of protected activity and the employer's action.

City of Vancouver v. Public Employment Relations Commission, 180 Wn. App. 333, 348–349 (2014); *Educational Service District 114*, Decision 4361-A. Ordinarily, an employee may use circumstantial evidence to establish a prima facie case of discrimination because parties do not typically announce a discriminatory motive for their actions. *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 69 (1991); *Clark County*, Decision 9127-A (PECB, 2007).

If the complaining party establishes a prima facie case, the burden of production shifts to the respondent. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349; *Port of Tacoma*, Decision 4626-A (PECB, 1995). The respondent may articulate a legitimate nondiscriminatory reason for the adverse employment decision. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349. If the respondent meets its burden of production, then the complainant bears the burden of persuasion to show that the employer's stated reason was either a pretext or substantially motivated by union animus. *Id.*

Application of Standards

Prima Facie Case

The Examiner found that the union proved a prima facie case of discrimination. We agree. The Examiner limited Carrell's exercise of protected activity to Carrell's testimony at the interest arbitration. We broaden this finding to include Carrell's service as union president to be protected activity.

The employer disciplined Carrell. Thus, Carrell suffered an adverse action.

An employee may establish a causal connection by showing that adverse action followed the employee's known exercise of a protected right. *City of Winlock*, Decision 4784-A (PECB, 1995). An Examiner may rely upon circumstantial evidence because employers are not in the habit of announcing retaliatory motives. *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 69.

The employer knew Carrell was the union president and had testified at the interest arbitration hearing. The temporal proximity of Carrell's testimony at the hearing and serving as union president to the employer's decision to investigate and discipline Carrell for violating a directive is sufficient to establish a causal connection.

Legitimate Nondiscriminatory Reason

The employer met its burden of production and articulated a legitimate nondiscriminatory reason by stating that the employer disciplined Carrell because he violated the October 11, 2016, directive prohibiting personal electronic devices in the secured area of the jail.

The employer's legitimate nondiscriminatory reason was a pretext.

The union met its burden of persuasion to establish that the employer's stated reason for disciplining Carrell was a pretext. An articulated reason is a pretext when it is not the real reason for the adverse action and there is no legitimate business justification for the action. *Educational Service District 114*, Decision 4361-A.

The manner in which the employer handled its knowledge of Carell having his cell phone in the secured area of the jail is evidence that the articulated nondiscriminatory reason was a pretext. At the beginning of the interview, Carrell showed his cell phone to Moll and asked permission to record the interview. Moll agreed that Carrell could record the interview. Moll then left the interview to ask Kane about Carrell's *Garrity* rights and how to handle Carrell possessing the cell phone. Kane asked if the cell phone was Carrell's personal cell phone or the attorney's. Moll did not know. Kane directed Moll not to address the cell phone until after Moll completed the interview. Rather than address the issue by giving Carrell the opportunity to remove his cell phone or by changing the interview location, the employer allowed Carrell to use the cell phone thereby creating an opportunity for discipline.

Management overturning the recommendation of the investigator is further evidence that the discipline was retaliatory. Simonson, who investigated the complaint, recommended that only one allegation be sustained and recommended a two-year written reprimand. Simonson made this

recommendation on the evidence, the category of violation in the employer's disciplinary matrix, and Carrell's disciplinary history.

The employer did not call Young or elicit testimony from Kane as to why it overturned Simonson's recommendation. Young's memo in the investigatory file was brief and based on his conclusions regarding Carrell's knowledge. Somehow Young determined that Carrell "intentionally disregarded" the directive and showed "blatant disregard" for the employer's rules. A more reasonable conclusion would have been that Carrell disregarded the directive because he believed Moll had given him permission to do so.

Young's recommended discipline was more severe than Simonson's proposed punishment.

The employer increased the severity of the discipline from a two-year written reprimand to a five-day suspension and five-year written reprimand. A five-day suspension is a much more severe punishment than a written reprimand. The increased severity of the discipline, based on the same evidence reviewed by Simonson, leads us to infer that the employer's stated reason was a pretext.

Following Carrell's discipline, the employer also disciplined Corrections Deputy Christopher Lundi for violations of the cell phone policy. The employer gave Lundi a three-day suspension and a two-year written reprimand. There was no comparator for a violation at the time that the employer disciplined Carrell.

Taken together, these facts persuade us that the employer discriminated against Carell for engaging in protected activity. To remedy this unfair labor practice, we order the employer to rescind the five-day suspension and the five-year written reprimand. The employer shall make Carrell whole by paying him any pay and benefits lost as a result of the five-day suspension.

CONCLUSION

We reverse the Examiner's decision and find that the employer discriminated against Carrell when it issued him a five-day suspension and five-year written reprimand. The union met its burden to prove that the employer's reason for the discipline was a pretext.

Substantial evidence supports the Examiner's findings of fact and conclusion that the employer did not refuse to bargain when it implemented the cell phone policy. Substantial evidence supports the examiner's findings of fact and conclusion that the employer did not refuse to bargain the shift turnover policy. We affirm the Examiner on those issues.

ORDER

The Findings of Fact issued by Examiner Daniel J. Comeau are AFFIRMED and adopted as the Findings of Fact of the Commission. Conclusions of law 1, 2, and 3 are AFFIRMED and adopted as the Conclusions of Law of the Commission. Conclusion of law 5 is VACATED. We substitute the following conclusion of law:

5. By disciplining Deputy Charles Carrell and by its actions described in findings of fact 26 and 55 through 63, the employer discriminated against Carrell in violation of RCW 41.56.140(1).

We modify the Examiner's order as follows:

Snohomish County, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Interfering with protected employee rights through statements made by an employer official;

b. Discriminating and interfering with employee rights by suspending Charles Carrell for five days and issuing him a five-year written reprimand because he engaged in activity protected by Chapter 41.56 RCW; and

c. In any other manner interfering with, restraining, or coercing its employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Make Charles Carrell whole by rescinding the five-day suspension and five-year written reprimand and by paying Carrell any wages and benefits lost as a result of the suspension. Back pay shall be computed in conformity with WAC 391-45-410.

b. Contact a compliance officer at the Public Employment Relations Commission to receive official copies of the required notice for posting. Post copies of the notice provided by the compliance officer in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

c. Read the notice provided by the compliance officer into the record at a regular public meeting of the County Council of Snohomish County, and permanently append a copy of the notice to the official minutes of the meeting where the notice is read as required by this paragraph.

d. Notify the complainant, in writing, within 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 provided by the compliance officer.

e. Notify the compliance officer, in writing, within 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 compliance officer with a signed copy of the notice the compliance officer provides.

ISSUED at Olympia, Washington, this 3rd day of December, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

MARK BUSTO, Commissioner

Commissioner Spencer Nathan Thal
did not participate in the consideration
or decision of this case.

PERC
PUBLIC EMPLOYMENT RELATIONS COMMISSION

RECORD OF SERVICE

ISSUED ON 12/03/2018

DECISION 12723-B - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

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CASE 128885-U-17

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