

STATE OF KANSAS
BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD

IN THE MATTER OF: *
*
Public Service Employees' Local Union *
No. 1422 Laborers' International Union *
of North American AFL-CIO *
complainant, * CASE NO: CAE 3-1979
vs. *
*
University of Kansas at Lawrence, *
Kansas *
respondent. *

ORDER

Comes now on this 22nd day of October, 1979 the above captioned case for consideration by the Public Employee Relations Board.

Mr. Francis Jacobs, International Union Representative, appears on behalf of complainant, Laborers' International Union Local 1422. Respondent, University of Kansas, appears by and through its counsel Michael J. Davis, General Counsel for the University. Complainant alleges a violation of K.S.A. 75-4333 (b) (3) and (4) in that the respondent denied a transfer for Kenneth Brouhard due to his union activities.

STATEMENT OF PROCEDURES BEFORE THE BOARD

1. Complaint filed November 29, 1978 by Mr. Francis Jacobs, International Union Representative, on behalf of Public Service Employees' Local No. 1422 Laborers' International Union of North American AFL-CIO.
2. Answer to complaint received December 11th filed by Mr. Michael J. Davis on behalf to the University of Kansas.
3. Motion to dismiss filed by Mr. Davis on behalf of respondent, University of Kansas.
4. Meeting of the parties March 2, 1979 in an attempt to resolve the complaint.
5. Hearing conducted April 24, 1978 before Jerry Powell duly appointed hearing examiner for the Public Employee Relations Board.
6. Parties agreed in the hearing for the examiner to request an explanation of civil service "testing" requirements for the classified positions of plumber and steamfitters and the latitude given a state agency in transferring employees. This request was made of Norman Hanson, Acting Director of Personnel on May 2, 1979.
7. Answer from Mr. Hanson received July 9, 1979.
8. Brief received from complainant and respondent in this matter.

CAE-3-1979

FINDINGS OF FACTS

1. That respondent, University of Kansas, is a public employer within the meaning of K.S.A. 75-4321 et seq.
2. That Labors International Union Local 1422 was certified as the representative of certain employees of University of Kansas on October 17, 1973.
3. That the complainant is timely and properly before the Public Employee Relations Board.
4. That Kenneth Brouhard serves as business agent for Local 1422. (T-26)
5. That Mr. Brouhard has been employed by the University of Kansas for approximately 18 years. (T-19)
6. That Mr. Brouhard is employed in the civil service classification of steamfitter. (T-19)
7. That Mr. Brouhard was transferred from the steamfitters shop to the construction shop during the month of March, 1979. (T-19)
8. That the transfer from the steamfitters shop to construction was not at the request of Mr. Brouhard. (T-20)
9. That Mr. Brouhard has on at least three occasions requested a transfer from the steamfitters shop to the plumbing shop. (T-34)
10. Since Mr. Brouhard's transfer to the construction department he spends about 50% of his working day in the tunnel. (T-24)
11. That Mr. Brouhard does not consider working in the tunnels "good" work and believes his transfer to be a demotion. (T-25)
12. That Kenneth Brouhard has been rated as very good by his supervisor in four out of the past five years. (Complainant Ex. 4)
13. That Mr. Brouhard and Mr. Tony Bermudez, supervisor of the steamfitters shop, were not on friendly terms. (T-30 and T-64)
14. That Mr. Brouhard handled grievances for others in the appropriate unit. (T-64)
15. That people are not generally transferred out of the steamfitters shop into plumbing shop. (T-42)
16. That others had requested transfers from the steamfitters shop to the plumbing shop and have been denied. (T-42)
17. That the University of Kansas Classified Employee Handbook, Section 2 under transfer, states: "When an opening arises in a department and qualified and interested University employees are not available for promotion within the department, other University employees will be considered for transfer before applicants from outside are considered. Factors used to determine qualifications for promotion will be used to determine qualifications for transfer." (T-48)

18. That an individual transferring from one trade to another usually drops down to the level of maintenance repairman. (T-59)

19. That Mr. Brouhard was given a letter under the signature of Mr. Roger Oroke which stated in part: "I feel that you should be aware also that most certainly the Steamfitting Shop and Construction Service areas will be observed. If there is any indication that either yourself or other members are involved in continuing disruptive activity or below average work performance, that further steps will be taken." This letter is dated approximately two months after the complainant was filed. (T-28-29)

20. That Mr. Brouhard was involved in a work stoppage some seven years ago. (T-31)

21. That Mr. Brouhard spent about 50% of his work day in the tunnels when he was working in the steamfitters shop. (T-37)

22. That approximately three years ago Mr. Brouhard was removed as leadman and was informed by Mr. Feldstein that the position interfered with his union activities. (T-26 and T-38)

23. That Mr. Miley, Assistant Director for Utilities and Mechanical Services, was instrumental in the decision to deny transfer to Mr. Brouhard. (T-74-75)

24. That the university has allowed employees to transfer for "better working conditions." (T-71)

25. That at least two of the plumber positions for which Mr. Brouhard applied were filled by individuals with plumbing experience. (T-69 and T-72)

26. That one plumber's position for which Mr. Brouhard applied was filled by an individual who had passed the state examination as a plumber. (T-72)

27. That the state examination consists of a rating of the applicants training and experience. The candidates for the open position are then given a numerical score and are certified to the state agency having the open position. (Letter from state personnel)

28. That all transfers require the approval of the appointing authority. The Division of Personnel Services has no authority to tell an agency that it must fill a vacancy by transfer, and if an agency decides to fill a vacancy by transfer, the Division has no authority to tell the agency whom to transfer. The Division's role is to see that persons seeking transfers get consideration when openings occur, and, when a transfer is recommended by an agency, to see that the matter is handled in accord with the regulations. (Letter from state personnel)

29. That some individuals have transferred to the plumbing shop without prior plumbing experience. (T-81)

30. That the position of maintenance repairman is a lower pay grade than that of plumber or steamfitter. (T-84)

31. That Mr. James Feldstein, Director of Personnel, recommended transferring Mr. Brouhard because of severe supervisory problems. (Compt. Ex. #5)

32. That Mr. Oroke, Facility's Operations Officer, believed Mr. Brouhard to be capable of learning the plumbers trade. (T-106)

33. That Mr. Brouhard did not inform Mr. Bermudez or Mr. Miley of his experience as a plumber. (T-36)

CONCLUSIONS - DISCUSSION

The complainant, Mr. Kenneth Brouhard, alleges he was three times denied a lateral transfer because of his choice to form, join and participate in union activities. Mr. Jacobs, the union representative, has painted a picture of discrimination against Mr. Brouhard commencing some seven years ago when Mr. Brouhard participated in a work stoppage. Subsequent to the work stoppage Mr. Brouhard was allegedly removed as a "leadman" because of his involvement with the union. This action took place approximately three years prior to the filing of the complaint. Mr. Brouhard, in his position with the union, has represented a number of employees in grievances involving the steamfitter shop foreman, Mr. Tony Bermudez. There is no question that problems existed between Mr. Brouhard and his foreman, Mr. Bermudez. As a foreman, Mr. Bermudez participated in the decision to deny Mr. Brouhard's transfer. Mr. Brouhard has received very good ratings in the past five years and is considered a good steamfitter. While the University has a policy of encouraging employees to seek promotion or transfer for "better working conditions" they (the university) must consider other factors before granting such promotion or transfers. Both the plumbing shop and the steamfitter shop have and are operating short handed. Other employees have requested transfer which have been denied while some transfers have been granted. Subsequent to filing the complaint Mr. Brouhard was transferred from Mr. Bermudez' area of supervision but was retained in a steamfitter's position. This transfer did not involve any change of classification or pay rate. Mr. Brouhard is now required to work approximately 50% of the time in the "tunnels". Mr. Brouhard does not consider this "tunnel" work to be desirable work. However, Mr. Brouhard testified that prior to his transfer he was also required to spend approximately 50% of his time in the tunnels. Subsequent to Mr. Brouhard's transfer he was given a letter under the signature of Mr. Oroke which stated that he and others in the Steamfitters Shop and Construction Services would be observed for any indication of disruptive activity of below average work.

K.S.A. 75-4333 (b) (3) and (4) states:

"(b) It shall be prohibited practice for a public employer of its designated representative willfully to:

(3) Encourage or discourage membership in any employee organization, committee,

association or representation plan by discrimination in hiring, tenure or other conditions of employment, or by blacklisting;

(4) Discharge or discriminate against an employee because he has filed any affidavit, petition or complaint or given any information or testimony under this act, or because he has formed, joined or chosen to be represented by any employee organization;

The examiner is aware that there are many subtle actions an employer or his designated representative may take in order to punish an employee. Such actions when taken against a union member can serve as notice for other employees who might consider joining a union, thus, discouraging union membership. Logic dictates that such an unscrupulous employer will cite an abundance of "proper cause" for his actions. Therefore, it is necessary to look not only to the incident alleged to be prohibited by law, but also to the history of the employers actions toward the employee. As a result, any action which occurred six months prior, or subsequent to the filing of the charge cannot in and of itself, serve as a basis for a finding of a prohibited practice. The actions, however, must be considered and weighed against management's "proper cause" for the action which prompted the complaint.

The employee's action in participating in the work stoppage some years back would have been construed by the examiner as a prohibited practice if charges had been filed in a timely fashion by the employer. The action by the employee should not, however, be used as a basis for management's treatment of the employee today. The employee's alleged "demotion" from leadman because of his union activities may have been a prohibited practice. The time for filing on that action has passed, thus, the examiner can only consider the incident in determining management's attitude toward the employee or unions in general. It was common knowledge that Mr. Brouhard and Tony Bermudez were not on friendly terms. Mr. Bermudez' testimony indicated that Mr. Brouhard sometimes created special difficulties, yet for the past five years he (Mr. Bermudez) gave Mr. Brouhard very good or good service ratings. The examiner is hard pressed to understand why a supervisor would continually rate an employee very good if, in fact, the employee did not or could not adequately perform his job. It appears to the examiner then that these special difficulties were a result of Mr. Brouhard's active role in processing grievances against the steamfitter supervisor.

Websters Seventh New Collegiate Dictionary defines discriminate as:

"to make a difference in treatment or favor on a basis other than individual merit."

The examiner finds it difficult to determine the difference in treatment Mr. Brouhard received based upon his union activities. Testimony shows that some employees are

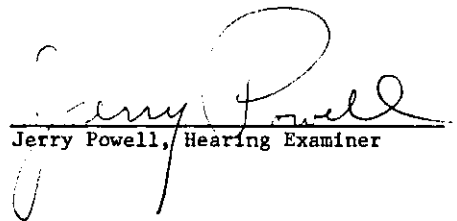
transferred while others are not. Management seems to have sound reasons for their denial of Mr. Brouhard's request. He (Mr. Brouhard) made a valuable contribution to the steam shop. He is considered a good steamfitter. The steam shop has been and is operating short handed. Other individuals with plumbing experience filled two of the openings in the plumbing shop. Mr. Brouhard failed to inform Mr. Miley of his plumbing experience. Mr. Brouhard had not, as of the filing of the complaint, received lower service ratings, nor has he alleged discrimination in work assignments in the steam shop. Mr. Brouhard desires to transfer to the plumbing shop because he believes the plumbing shop affords better working conditions. Management has granted transfers to employees seeking better working conditions. Nevertheless, it remains management responsibility to determine the necessary qualifications for promotion and transfer. In the absence of convincing evidence that the respondent has failed to consider an applicant because of his union activity it is not for the examiner to judge the qualifications of applicants. Complainant has the right to apply for and take the open competitive examination for maintenance plumbers given by the state division of personnel. Complainant has failed to show that the denial of his requests for transfer to the plumbing shop constitute an act of different treatment for any reason other than individual merit. Mr. Brouhard perceives his reassignment to the construction shop as further evidence of discrimination by the university. However, Mr. Brouhard retained his classification of steamfitter, suffered no monetary loss, and spends approximately the same amount of time working in the tunnels. Respondent contends that this move was merely to separate Mr. Brouhard and Tony Bermudez.

In weighing all evidence and testimony before the examiner the following conclusions are reached:

1. All occurrences 6 months prior to the filing of the prohibitive practice charge cannot, at this time, be construed to be prohibitive practices.
2. The steamfitter supervisor was not shown to have engaged in different treatment of Mr. Brouhard.
3. Kansas University management personnel had valid and sound reasons for denying Mr. Brouhard transfer requests.
4. Complainant has failed to show that his reassignment to the construction crew was based on any motivation other than management's desire to separate Mr. Brouhard and Mr. Bermudez.

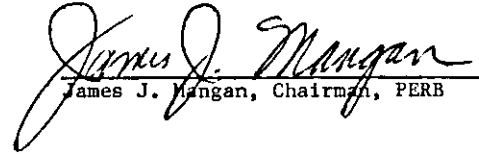
The examiner makes the following three recommendations:

1. That Mr. Kenneth Brouhard apply to take the open competitive examination for maintenance plumber administered by the Kansas State Division of Personnel.
2. That the University officials review their priorities for determining promotions and transfers. In at least this case it appears that an employee performing his job in a "very good" manner is penalized in his quest for better working conditions, i.e. promotion or transfer, because of his value to the department. In this vein it seems that the university is telling their employees that the best way to secure promotion or transfer is to avoid excellence in their work product.
3. That the Public Employee Relations Board enter a finding that insufficient evidence was presented to substantiate the allegations set out in the complaint and therefore dismiss case CAE 3-1979.

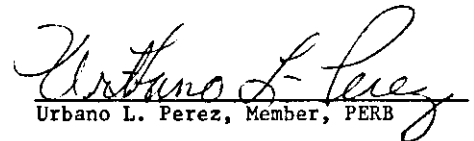

Jerry Powell, Hearing Examiner

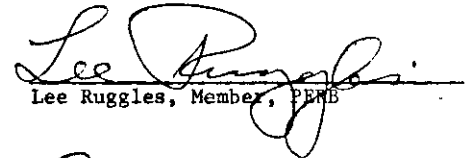
The hearing examiner's report and recommended findings are hereby approved and adopted as a final order of the Board.

IT IS SO ORDERED THIS 19th DAY OF December 1979, BY THE PUBLIC EMPLOYEE RELATIONS BOARD.


James J. Mangan, Chairman, PERB

Louisa A. Fletcher, Member, PERB


Urbano L. Perez, Member, PERB


Lee Ruggles, Member, PERB


Art Veach, Member, PERB