STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

STEPHEN RICARTE, Complainant, vs. MANSFIELD SCHOOL DISTRICT, Respondent.	CASE 11268-U-94-2637 DECISION 5238-A - EDUC
CLARENE RICARTE, Complainant, vs. MANSFIELD SCHOOL DISTRICT, Respondent.	CASE 11269-U-94-2638 DECISION 5239-A - EDUC DECISION OF COMMISSION

Eric R. Hansen, Attorney at Law, appeared on behalf of the complainants.

Lukins & Annis, by Jerry J. Moberg, Attorney at Law, appeared on behalf of the employer.

This matter comes before the Commission on a petition for review filed by the Mansfield School District, seeking to overturn a decision issued by Examiner Pamela G. Bradburn.[1]

BACKGROUND

Mansfield School District (employer) operates schools in farming country, in the middle of the state, for students in kindergarten

[1] Mansfield School District, Decisions 5238 and 5239 (EDUC, 1995).

through high school. Bill Thornton became superintendent of schools at Mansfield in August of 1992, and was the employer's principal agent in dealing with its employees.

Teachers at Mansfield have long been organized for the purposes of collective bargaining. In the mid-1980's, the Mansfield Teachers Association merged with the Mansfield Education Association (union), affiliated with the Washington Education Association.

Stephen Ricarte was a teacher in Mansfield for 22 years, and was recently the only teacher in the vocational/agricultural program. He was involved in union activities for many years, serving as local union president and president-elect, and as uniserv council representative or co-representative. When this controversy arose in the spring of 1994, he was on the uniserv board and was to become the local union president for 1994-95.

Clarene Ricarte was an educator in Mansfield for 15 years, teaching kindergarten and elementary school classes. By the spring of 1994, she had completed two years of work toward her masters degree in elementary curriculum development. She was the local union president at Mansfield several times, including one period of three consecutive years. She was on the negotiating team nearly every year of her employment,[2] and several times served as the union's chief negotiator. She once declared an impasse and requested mediation from the Commission. In 1989, she wrote a letter to the employer regarding teachers not having been paid salary increments due them, and wrote another letter requesting a drug-free policy be negotiated. In 1991, she wrote to the school board regarding problems in setting meeting dates and times for negotiations. She also filed a grievance on her own behalf.

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[2] No other Mansfield teacher has served on the bargaining team for as many years.

When the parties opened negotiations for a collective bargaining agreement in March of 1993, Thornton served as chief spokesperson for the employer and Clarene Ricarte was a member of the union's bargaining team. After several bargaining sessions throughout the spring and summer, the union filed unfair labor practice charges on November 3, 1993, alleging the employer had refused to bargain.

A hearing concerning the unfair labor practice charges relating to the 1993 negotiations was held on January 20, 1994. Clarene Ricarte testified for the union at that hearing.

Following a levy failure in early 1994, the school board directed Thornton to develop a list of programs that could be eliminated. The board then examined the options presented by Thornton, and decided to close the vocational/agricultural program.

On May 13, 1994, Thornton advised Stephen Ricarte that there was probable cause that his employment contract would not be renewed. The reasons asserted in that letter were, however: (1) a decline in enrollment; and (2) a desire to change course offerings.

On June 3, 1994, Thornton informed Clarene Ricarte that her assignment during the next school year would be to teach high school math. This change was attributed to a restructuring after staff reductions.

On June 8, 1994, Examiner Walter M. Stuteville issued his decision on the unfair labor practice charges relating to the 1993 negotiations. The Examiner found the employer's conduct did not evidence a good faith effort to reach an agreement, or any willingness to compromise on mandatory subjects of bargaining. Mansfield School District, 4552-A (EDUC, 1994).[3]

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[3] The Commission affirmed Examiner Stuteville's decision that the employer committed an unfair labor practice. Mansfield School District, Decision 4552-B (EDUC, 1995).

On August 8, 1994, Clarene and Stephen Ricarte filed unfair labor practice charges with the Commission, alleging that the employer had discriminated against them on the basis of their union activities and for filing charges, in violation of RCW 41.59.140(1)(c) and (d), and that the employer interfered with the exercise of their collective bargaining rights in violation of RCW 41.59.140-(1)(a). Separate cases were docketed for the two individual complainants, but they were processed together. Examiner Pamela G. Bradburn held a hearing on February 2 and 3, and April 7, 1995.

Examiner Bradburn issued her findings of fact, conclusions of law and order on August 25, 1995. She found the employer committed unfair labor practices by nonrenewing Stephen Ricarte's employment and by changing Clarene Ricarte's teaching assignment. The employer filed a petition for review on September 15, 1995, thus bringing the matter before the Commission.

POSITIONS OF THE PARTIES

The employer argues that it had legitimate, non-discriminatory reasons for nonrenewing Stephen Ricarte and for the changes it effected in Clarene Ricarte's teaching assignment. Contending that the Examiner demonstrated bias towards the union, and that the Examiner made factual and legal errors, the employer asserts that paragraphs 3, 6, 7, 9, 10, 11, 12, 14, and 16 of the Examiner's findings of fact mischaracterize evidence, are misleading, are taken out of context, leave incorrect implications, and address issues not alleged or raised at the hearing. The employer argues that school boards have exclusive jurisdiction to terminate the contracts of teachers under Washington law. It argues that the record is devoid of any evidence of anti-union animus on the part of the employer, and that the challenged employment decisions would have occurred even in the absence of the complainants' union activities.

The union argues that the petition for review was untimely. It contends that, in any event, the Examiner's decision is supported by the facts and the law, and should be affirmed.

DISCUSSION

Timeliness of Petition for Review

Under WAC 391-45-350, a party has 20 days from the date of the issuance of an Examiner's decision to petition the Commission for review of that decision. In this case, the Examiner's decision was originally issued on August 25, 1995, which would have made September 14, 1995 the due date for any petition for review. A review of the case file discloses, however, that the decision was reissued on August 28, 1995, to effect service on the employer's counsel of record.[4] Thus, the deadline for the petition for review must be recomputed as September 18, 1995. Since the petition for review was filed on September 15, 1995, the requirements of the rule were met. The petition was timely.

The Applicable Legal Standards

The employer is subject to the Educational Employment Relations Act (EERA), Chapter 41.59 RCW, which includes:

> **RCW 41.59.060 EMPLOYEE RIGHTS ENUMERATED--FEES AND DUES, DEDUCTION FROM PAY.** (1) Employees shall have the right to self-organization, to form, join, or assist employee organizations, to bargain collectively through representatives of their own choosing, and shall also have the right to refrain from any or all of such activities except to the extent that employees may be required to pay a fee to any employee organiza-

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4 The Commission staff had noted the error, and re-issued the decision accordingly.

> tion under an agency shop agreement authorized in this chapter.
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> ...
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> **RCW 41.59.140** **UNFAIR LABOR PRACTICES FOR EMPLOYER, EMPLOYEE ORGANIZATION, ENUMERATED.** (1) It shall be an unfair labor practice for an employer:
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> (a) **To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in RCW 41.59.060.**
>
> (b) To dominate or interfere with the formation or administration of any employee organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made by the commission pursuant to RCW 41.59.110, an employer shall not be prohibited from permitting employees to confer with it or its representatives or agents during working hours without loss of time or pay;
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> (c) **To encourage or discourage membership in any employee organization by discrimination in regard to hire, tenure of employment or any term or condition of employment**, but nothing contained in this subsection shall prevent an employer from requiring, as a condition of continued employment, payment of periodic dues and fees uniformly required to an exclusive bargaining representative pursuant to RCW 41.59.100;
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> (d) **To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this chapter**;
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> (e) To refuse to bargain collectively with the representatives of its employees.

[Emphasis by **bold** supplied.]

In deciding unfair labor practice cases under Chapter 41.59 RCW, the Commission has been guided by precedent developed under the National Labor Relations Act (NLRA) and Chapter 41.56 RCW. RCW 41.59.110(2).

The definition of an "interference" violation in RCW 41.59.140(1)-(a) is similar to Section 8(a)1 of the NLRA and to RCW 41.56.140-(1). An interference violation will be found when an employee could reasonably perceive the employer's actions as a threat of reprisal or force or promise of benefit associated with the union

activity of that employee or of other employees. Seattle School District, Decision 2524 (EDUC, 1986).[5]

The definitions of "discrimination" violation in RCW 41.59.140(1)-(c) and (d) are similar to Sections 8(a)3 and 4 of the NLRA and to RCW 41.56.140(1) and (3). Discrimination violations involve intentional action by an employer based on protected union activity, and so require a higher standard of proof than an interference claim.[6]

Jurisdiction Over Stephen Ricarte's Complaint

Authority of School Board -
Citing Noe v. Edmonds School District, 83 Wn.2d 97 (1973), the employer argues that RCW 28A.405.210 gives school boards the exclusive authority to terminate a teacher's contract. The Court did state, "Under Title 28A the legislature has given school boards exclusive power to discharge, place on probation or otherwise adversely affect a teacher in his or her contract status",[7] but the issue in Noe was whether decisions adversely affecting a teacher's contract status could be made by the school district's superintendent, rather than by the school board. The sentence following the quotation relied upon by the employer includes, "[D]iscretionary duties specifically imposed upon the board by statute cannot lawfully be delegated to the superintendent ...".

The Noe decision did not discuss the type of jurisdictional matters we have before us in this case. The statement cited by the

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5 See, also, City of Seattle, Decision 3066-A (PECB, 1988); City of Seattle, Decision 3566-A (PECB, 1991); City of Pasco, Decision 3804-A (PECB, 1992); Port of Tacoma, Decisions 4626-A and 4627-A (PECB, 1995); and King County, Decision 4893-A (PECB, 1995).

6 See, Port of Tacoma, Decisions 4626-A and 4627-A (PECB, 1995).

7 Noe at page 103.

employer from Noe cannot be read to say that school boards have power to affect a teacher's contract in a manner that is prohibited by another statute, such as the state law against discrimination (Chapter 49.60 RCW), the discrimination prohibition within the worker's compensation law (Chapter 51.48 RCW), or the EERA. We particularly do not read the Court's statement made in 1973 as thwarting the Commission's jurisdiction under the EERA passed two years later, in 1975.

Priority of Action Rule -

Prior to the filing of his unfair labor practice complaint with this Commission, Stephen Ricarte initiated a challenge of his nonrenewal under Chapter 28A.405 RCW. The employer claims the non-renewal is subject to the exclusive appeal remedies provided by that statute, and that the Commission lacks jurisdiction to resolve Stephen Ricarte's claim for reinstatement.

Arguing that a hearing under Chapter 28A.405 RCW is quasi-judicial, the employer takes issue with the Examiner's finding that hearing officers under that chapter are neither an administrative agency nor a court. The employer contends the Commission must defer to the Chapter 28A.405 RCW procedure under the "priority of action" rule, as stated in Sherwin v. Arveson, 96 Wn.2d 77, 80 (1981):

> [T]he **court** which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved. The reason for the doctrine is that it tends to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process.

[Emphasis by **bold** supplied.]

The cited remarks do not, however, require the Commission to defer to the RCW 28A.405 procedure. The Supreme Court restated the criteria for application of the priority of action rule between an administrative agency and a court in City of Yakima v. International Association of Fire Fighters, Local 469, 117 Wn.2d 655 (1991),

holding that the rule only applies **when the cases "are identical as to (1) subject matter; (2) parties; and (3) relief".**[8] Even if a hearing officer empaneled under Chapter 28A.405 RCW were considered an administrative agency, the subject matter and relief available under that statute are not identical to the case before us.

The subject matter in the case before the Commission involves whether the employer committed unfair labor practices under the EERA. The subject matter of the Chapter 28A.405 RCW proceeding involves only the propriety of the nonrenewal. An order issued under Chapter 28A.405 RCW could not include a prospective order requiring the employer to cease and desist from discrimination and interference in the exercise of employees' collective bargaining rights, yet those would be conventional remedies issued by the Commission upon finding an unfair labor practice violation. In referring to the need for identity (of subject matter, parties and relief) in Sherwin v. Arveson, the Court also said:

> [T]his identity must be such that a final adjudication of the case by the court in which it first became pending would, as res judicata, be a bar to further proceedings in a court of concurrent jurisdiction.

Sherwin V. Arveson, at page 80.

Here, an adjudication under Chapter 28A.405 RCW could not serve as a bar to proceedings under the exclusive authority conferred upon the Public Employment Relations Commission by RCW 41.59.150.[9]

Because the cases are not identical as to subject matter and relief, the priority of action rule does not prohibit the Commission from ruling on Stephen Ricarte's unfair labor practice case.

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[8] Yakima, at page 675 [emphasis by **bold** supplied].

[9] The Commission's authority to rule on unfair labor practice complaints was noted in City of Yakima v. IAFF, Local 469, supra.

Supremacy of Collective Bargaining Statutes -
The state's collective bargaining laws govern relationships between public employers with their unionized employees. In Rose v. Erickson, 106 Wn.2d 420 (1986), the Supreme Court held that Chapter 41.56 RCW prevails in conflicts with other statutes. It did so on the basis of the wording of RCW 41.56.905, as follows:

> Except as provided in RCW 53.18.015, **if any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of this chapter shall control.**

[Emphasis by **bold** supplied.]

RCW 41.59.910 contains similar language:

> This chapter shall **supersede existing statutes not expressly repealed to the extent that there is a conflict between a provision of this chapter and those other statutes.**

[Emphasis by **bold** supplied.]

Since the Legislature intended that collective bargaining statutes control where there is conflict, we conclude that the Educational Employment Relations Act should prevail over Chapter 28A.405 RCW.

Discrimination Allegations

The Test for Discrimination -
In two cases decided under statutes which parallel the collective bargaining laws administered by this Commission, Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991), and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991), the Supreme Court of the State of Washington adopted a "substantial motivating factor" test for determining allegations of retaliatory discrimination. In Allison, the Court specifically rejected continued reliance on Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274

(1977). In Educational Service District 114, Decision 4361-A (PECB, 1994), the Commission explicitly rejected continued reliance on the burden-shifting analysis known as the Wright Line test.[10] Under the new test, the burden of proof does not shift.

A complainant claiming unlawful discrimination must first make out a prima facie case, showing:

1. That the employee exercised a right protected by the collective bargaining statute, or communicated to the employer an intent to do so;

2. That the employee was discriminatorily deprived of some ascertainable right, benefit or status; and

3. That there was a causal connection between the exercise of the legal right and the discriminatory action.

Where a complainant establishes a prima facie case of discrimination, the employer has the opportunity to articulate legitimate, nonretaliatory reasons for its actions. A violation will be found if the employer does not meet this burden of production.[11]

The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed employer action was in retaliation for the employee's exercise of statutory rights. That may be done by:

1. Showing the reasons given by the employer were pretextual;

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[10] Under Wright Line, 251 NLRB 1083 (1980), cited in City of Olympia, Decision 1208-A (PECB, 1982), the burden of proof shifted in a two-stage analysis: If a prima facie case of discrimination was made out, the employer had the burden of proof to establish valid reasons for its action. In formulating that approach, the NLRB had specifically relied on Mt. Healthy, supra.

[11] For example, in City of Winlock, Decision 4783 (PECB, 1994), an Examiner sustained a "discrimination" allegation on the first of two discharges of an employee, because the reasons asserted by the employer for that discharge were patently unlawful.

or

2. Showing that union animus was nevertheless a substantial motivating factor behind the employer's action.

The Prima Facie Case

Knowledge of Union Activity -
The record is clear the employer had knowledge of the extensive union activity of both Stephen and Clarene Ricarte.

Timothy Hicks was the only board member who testified, so the employer argues that the Examiner's finding that the board knew both Ricartes were active in union affairs is misleading. It is clear from the record, however, that Hicks was aware of the involvement of both Ricartes in union affairs. We accept Hicks' testimony as a representative of the board on other matters, and infer that the rest of the board members would have had similar knowledge of the Ricartes' union activities.

Even if we did not accept Hicks' testimony as indicative of the entire board's knowledge of the Ricartes' union activities, there is ample evidence from which we can infer that the entire board knew of their union involvement. There was no rebuttal of Stephen Ricarte's testimony that his union involvement was fairly open and obvious.[12] Clarene Ricarte had testified against the employer at the unfair labor practice hearing held in January of 1994;[13] she was one of three members of the union negotiating team during the controversial negotiations in 1993; she had been on the union's negotiating team several times previously, and more than any other employee; she had written to the school board on behalf of the union in 1991, regarding the failure of the negotiating committees

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[12] Transcript, p. 70

[13] Mansfield School District, Decision 4552-A (EDUC, 1994), affirmed, Decision 4552-B (EDUC, 1995).

to meet; and the board had received a letter regarding a proposed drug policy that she, as president of the local union, sent to the superintendent in 1989. The school board also had a direct reporting relationship with the superintendent, who clearly was knowledgeable of the union activity of both Ricartes. Considering the size of the school and community, and the extent to which both Ricartes were involved, we can easily infer the board had knowledge of their union activity.

The superintendent was acting within the apparent scope of his authority at all times relevant to this controversy. Even if a majority of the school board was somehow unaware of the Ricartes' union activities, unfair labor practices committed by a supervisor serving in an official capacity are considered to be the responsibility of the public employer as an entity. See, City of Brier, Decision 5089-A (PECB, 1995), and cases cited therein.

Discriminatory Deprivation -
Both complainants were deprived of a right, benefit, or status to their detriment. Stephen Ricarte's employment was terminated. Clarene Ricarte was involuntarily transferred from a familiar elementary school assignment for which she was well-qualified to a high school assignment where she had no teaching experience.

Causal Connection -
The timing of adverse actions in relation to protected union activity can serve as circumstantial evidence of a causal connection between the protected activity and the adverse action. City of Winlock, Decision 4784-A (PECB, 1995).

Thornton's attitudes and actions after he became superintendent in August of 1992 warrant scrutiny. The record contains credible evidence that Thornton exhibited anti-union sentiments from the beginning of his tenure. Although he denied doing so, the record shows he made anti-union statements to Clarene Ricarte, including

a statement in August of 1992 that he saw her as the union, and would break her in order to break the union. The Examiner discredited Thornton's testimony when he denied making the "break you, break the union" comment.

The Examiner credited Clarene Ricarte, who twice testified under oath about Thornton's comments. Her statements were consistent. She also testified that Thornton told her during the same conversation that he would deny making the "break you, break the union" comment if that conversation ever left the room.[14] Considering the credible and corroborated nature of her other testimony, there is a basis to infer her testimony was credible here as well. The fact of Thornton's "would deny" comment shows he was aware his conduct was improper. Further, as the Commission has previously noted:

> 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 Commission 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 of a "fact oriented" appeal ...

City of Pasco, Decision 3307-A (PECB, 1990), citing Asotin County Housing Authority, Decision 2471-A (PECB, 1987); Educational Service District 114, supra.

The fact of Thornton having made the "break you, break the union" comment to Clarene Ricarte was corroborated to a great extent by the person who was his own secretary at the time, and by the uniserv director.[15] Because the record supports the Examiner's

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[14] Transcript, p. 133-134.

[15] Clarene Ricarte confided in both of those individuals after the meeting in August of 1992.

interpretations, we defer to the Examiner's credibility findings in this case.[16]

Thornton's union animus is also evidenced by his remarks to his secretary, to the effect that: (1) He and his wife were not in favor of unions; and (2) that the 30-page collective bargaining agreement was ridiculous, and should be cut to two pages. His remarks to a bargaining unit member, to the effect that unions were unimportant and a barrier to direct dealing with individuals, also support a finding of union animus. Thornton's own admissions regarding his feelings toward the union corroborate the evidence provided by others. Although the employer contests the Examiner's paraphrase of Thornton's remarks, the Examiner's conclusions accurately reflect the evidence in the record.

<u>A pattern of anti-union animus dating from early 1993</u> is indicated by the record in the earlier unfair labor practice proceeding.[17] The employer and union began negotiating a collective bargaining agreement in March of that year, with Thornton as chief spokesperson for the employer opposite Clarene Ricarte as a member of the union team. After the employer made many proposals that would have removed or significantly restricted employees' existing rights and benefits, and then refused to compromise, the union filed its unfair labor practice complaint. Clarene Ricarte testified against the employer at the hearing on January 20, 1994, providing most of the testimony for the union. Her testimony included Thornton's "break you, break the union" comment of August, 1992.

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[16] The Commission may accord less deference to an Examiner's credibility findings when they are found to be inconsistent with the record. <u>Port of Tacoma</u>, Decisions 4626-A and 4627-A (PECB, 1995).

[17] <u>Mansfield School District</u>, Decision 4552-A (EDUC, 1994), affirmed, Decision 4552-B (EDUC, 1995).

The employer action occurred at the first opportunity for the employer to act against the Ricartes after the January 20, 1994 unfair labor practice hearing, when the annual cycle for non-renewal of teacher contracts occurred in the spring of 1994.

Conclusion on Prima Facie Case -
The superintendent's strong expressions of anti-union animus, together with the suspicious timing of the events, support an inference of a causal connection between the Ricartes' union activities and the personnel actions against them. The complainants have established a prima facie case of discrimination due to retaliation for protected activities.

Stephen Ricarte's Nonrenewal

The Employer's Burden of Production -
The employer asserts that the board directed Thornton to provide options to solve the situation resulting from the levy failure, and that the board decided to terminate the vocational agriculture and shop program after full discussion of the various options presented by Thornton. It argues that the board has the right to determine curriculum, and that it was time to shift emphasis to computer-related classes. It contends that the termination of the program had nothing to do with Stephen Ricarte being the teacher, and that the Commission should not substitute its judgment regarding program offerings and fiscal management for that of the board.

Employer's Reasons are Pretexts -
RCW 28A.405.210 requires a superintendent to notify a teacher of probable cause for nonrenewal, and the first flaw in the employer's levy failure defense is shown by the letter sent to Stephen Ricarte on May 13, 1994. In that official notice, Thornton wrote:

> The program is being eliminated because of a **decline in student enrollment** in the program and the Board's **desire to make some changes in the**

> **program offering's** [sic] for the next school year.

Exhibit 2 [emphasis by **bold** supplied].

The employer provided no evidence to show a decline in student interest or enrollment in Stephen Ricarte's classes, however. Thornton's testimony about declining enrollment was contradicted by Stephen Ricarte's grade books, which revealed no decrease in the classes he was teaching. The employer objected to the admissibility of the union's exhibits here, but the Examiner overruled that objection and invited the employer to present its own documents in support of its claim of declining enrollment. The employer did not do so. The record thus contains strong and essentially unrebutted evidence that the first reasons publicly provided by the employer for cutting Stephen Ricarte's classes were blatantly false.

The record also leaves us with the impression that Thornton may have tried to use a deceptive "decline in enrollment" or "low enrollment" theory to justify recommending that Stephen Ricarte's classes be cut. Prior to presenting options to the board, Thornton was in a position to cause a decrease in enrollment in Stephen Ricarte's classes by creating scheduling conflicts. Thornton's former secretary testified that Thornton did all the scheduling of classes, and that she noticed that required courses would be scheduled at the same time as vocational-agricultural courses. This would be a conflict for students, because they would not be able to take vocational classes.[18]

A board decision "to shift emphasis" does not necessarily require a particular staff cut, or result in a need to cut the vocational-agricultural program. To say the claimed shift of emphasis resulted in the layoff of Stephen Ricarte requires more solid evidence than we have in this case. Thornton presented the option

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[18] Transcript, Volume 1, pp. 37-38.

of cutting elective classes, but he submitted an incomplete list of those classes,[19] and the employer offered no explanation as to why it did not give more serious consideration to reducing other electives. Considering the record as a whole, a need to shift emphasis still does not fully explain cutting out courses which introduce students to actual trade skills they could potentially use for the rest of their lives.

We have considered the findings of fact that are disputed by the employer. The employer asserts that various findings are misleading standing alone, seem slanted, or are taken out of context. Our reaction to some of the asserted errors is addressed below. As to other claimed errors, we find the record supports the Examiner's findings of fact.

The employer contests paragraph 12 of the Examiner's findings of fact, which states that the employer never considered applying seniority to retain Stephen Ricarte. The employer claims it relates to no allegation, and that it was spurious to say the employer was required to reassign him to some other area. The employer's arguments have no merit. The board had a specific policy outlining the criteria to be used in the event of staff reduction, however. The major factors to be considered included: (1) Program staffing needs, (2) teacher performance, and (3) seniority.[20] There need not be (and the Examiner did not find) any requirement to reassign Stephen Ricarte. What is significant is the fact that there was an employer policy by which his employment could have been maintained. In searching for an employer's motives in a discrimination case, it is incumbent upon the Commission to

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[19] The list left out classes such as business math, basic math, algebra one, algebra two, geometry, senior math, chemistry, physics, advanced science, low-level English classes, Spanish, home economics, business classes. (Transcript, Volume 3, pp. 59-60)

[20] Exhibit 1, Board Policy 5256.

evaluate all of the relevant facts. The lack of evidence that this employer considered or applied its own policy in a systematic manner is one more indication that its motives were not consistent with its asserted reasons for nonrenewing Stephen Ricarte.

The Examiner found that Stephen Ricarte's certificate entitles him to teach any subject and any grade level between kindergarten and 12th grade.[21] The employer claims his teaching certificate limits him to teach vocational subjects, and cites WAC 180-77-020 to support that contention. The cited regulation clearly requires vocational instructors to hold vocational certificates, but does not prove that Stephen Ricarte's certificate contained any particular limitation. We note that Stephen Ricarte twice gave unrebutted testimony that he holds a certificate allowing him to teach any class K-12.[22] On the first of those occasions, he testified that he holds an "old standard certificate". Stephen Ricarte taught for 22 years, which would date his entry into the field as around 1972. The WAC rule cited by the employer went into effect in 1978. Without evidence in the record to show otherwise, we can infer that it is possible he has a certificate that was issued prior to the implementation of the standards for vocational certification, and that he could have been assigned outside the vocational area. The absence of evidence in the record of any employer investigation into the matter prior to the nonrenewal demonstrates a suspicious lack of concern for a long-term employee.

The employer's assertion that Stephen Ricarte's certificate limits him to teaching vocational subjects actually buttresses a finding that he was directly targeted for layoff. A scenario in which the employer attempted to reassign a teacher whose program was being eliminated (e.g., based on other skills or seniority) might support an inference that the employer was only attempting to eliminate the

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[21] Examiner's decision, finding of fact 3.

[22] Transcript, Vol. 1, pp. 65-66, and Vol. 3, p. 123.

program. In a case where reassignment seems to have been given no serious consideration, we conclude that it was the employee that was being directly targeted, rather than the program.

It is suspiciously inconsistent for the employer to argue that the real reason for the non-renewal was the levy failure, when the levy failure was not mentioned among the stated reasons for nonrenewal. Even if the Commission was to give credence to the "levy failure" theory, the board's decision to cut the vocational-shop program was based on a presentation of information which was of questionable credibility. The nature and circumstances in which Thornton presented the list of options to the board, as well as the information supplied by Thornton, appears to have had an underlying motive that was unlawful under RCW 41.59.140. We also find no evidence in the record that Stephen Ricarte was offered his job back when the levy passed, as would have been consistent with a financially-driven layoff.

Clarene Ricarte's Reassignment

The Employer's Burden of Production -
The employer claims that the decision to reassign Clarene Ricarte had nothing to do with her union activities. It argues that it had the right, under the management rights clause of the collective bargaining agreement, to "establish, change, combine, or eliminate jobs", and that the decision to reassign her rested in the sole and exclusive discretion of the school board.

Employer's Reasons are Pretexts -
The fact the employer may have the authority to reassign employees under the management rights clause is not conclusive. In this case, the change of assignment required Clarene Ricarte to gather new materials, prepare new lesson plans, and develop a new mindset to teach math at the high school level. An unwelcome and burden-

some assignment made in retaliation for union activity is an unfair labor practice.[23]

At the time she was advised of the change of assignment, Clarene Ricarte was told it was due to restructuring of jobs made necessary because of staff reductions. The correlation between those events is not at all clear, however. There was only one teacher laid off, and Stephen Ricarte taught in the vocational area, not math.

Thornton has since claimed that Clarene Ricarte had more college math than other teachers. However, he knew at the time of the assignment change that she had never taught in that subject area. The record also suggests that Thornton knew, or should have known, Clarene Ricarte was working on a masters degree in elementary school curriculum development that would not have been applicable to an assignment teaching math at the high school level.

The employer implies that Clarene Ricarte did not suffer any detriment as a result of her reassignment. The employer notes that she did not file any grievances or written objection to previous transfers, and that she sought a medical leave of absence after the disputed reassignment. It insinuates that her beginning work at another school district within days after being granted a leave of absence from Mansfield should somehow nullify the unfair labor practice claim. An unfair labor practice is not excused by the mitigating actions of a complainant which do not impeach her credibility for truthfulness as to the actions causing the unfair labor practice.[24] Clarene Ricarte's actions upon reassignment have no bearing on whether the employer committed an unfair labor practice in imposing the reassignment.

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[23] See, Spokane Transit Authority, Decision 2078 (PECB, 1984), affirmed, Decision 2078-A (PECB, 1985).

[24] In fact, an employee is expected to take steps to minimize adverse effects, where it is possible to do so. Town of Fircrest, Decision 248-A (PECB, 1977).

The employer takes issue with the last sentence of paragraph 16 of the Examiner's finding of facts, which reads as follows:

> At the hearing, Bill Thornton contended he changed Clarene Ricarte's assignment because civil rights complaints required the presence of a special education-qualified teacher; this contention is a pretext.

The employer's claim that this finding implied Clarene Ricarte's special education certification was the only reason for the transfer is unpersuasive. A review of the record shows that Thornton did emphasize the special education factor in relation to the change in Clarene Ricarte's assignment. After testifying in regard to changes made in the elementary grades, Thornton turned to problems experienced in the rest of the system. His concern that some teachers were not teaching in their best areas is belied by his disregard of Clarene Ricarte's ongoing work towards an advanced degree applicable at the elementary level. He testified that, in addition, they had three civil rights complaints, and one of the issues was the lack of a special education teacher at the high school. Thornton outlined other considerations for changing assignments, but they were essentially peripheral to the specific issue of Clarene Ricarte's assignment and related to a more comprehensive change.[25] The finding is accurate as written.

Conclusions on Discrimination Allegations

The employer contends that the employment decisions regarding the Ricartes would have occurred anyway, even absent their union activities. It cites Washington Public Employees' Association v. Community College District 9, 31 Wn.App. 203 (1982), in support of its contention. The cited case was, however, decided under the Wright Line test which is no longer applicable.

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[25] See, Transcript, Volume III, pp. 30-33.

The inconsistencies in the employer's stated reasons for Stephen Ricarte's nonrenewal and the puzzling lack of proof supporting its defenses, together with the lack of actual decline in student enrollment, the fact the nonrenewal letter made no mention of the levy failure as the reason for the nonrenewal, and the fact the employer did not follow its own personnel policies, all cause us to conclude that the employer's asserted reasons for the nonrenewal were pretexts designed to conceal a true motivation of union animus.

The inconsistencies and lack of proof supporting the employer's defenses in regard to Clarene Ricarte's assignment change, together with the burdensome nature of the change, the lack of evidence that staff reductions created a need for a high school math teacher, the fact the assignment was outside of her teaching experience and recent academic preparation, the employer's focus on special education staffing considerations which conflict with its other stated concerns, and the employer's attempts to turn her mitigating efforts against her, all cause us to conclude that the employer's asserted reasons for the reassignment were pretexts designed to conceal a true motivation of union animus.

Against the background of the extensive involvement by both Ricartes in the union, and the clear evidence of union animus on the part of the employer official who recommended or made the disputed changes, the inconsistencies in the record as to the employer's reasons for the personnel actions lead us to conclude that its motives had a great deal to do with the Ricartes' union activities. Our review of the record reveals sufficient evidence to support affirmation of the Examiner's decision.

<u>The Interference Violation</u>

The Examiner found ample evidence that employees could reasonably perceive the employer's actions in this case as a threat of

reprisal associated with the Ricartes' union activity. We agree. The Ricartes' union activity was open and obvious among the other teachers of this small employer. The detrimental actions taken in regard to the Ricartes were unparalleled in the employer's history.

Stephen Ricarte's nonrenewal and Clarene Ricarte's reassignment followed Thornton's blatant anti-union statements to his secretary, to Clarene Ricarte, and to another bargaining unit member. The actions also followed Clarene Ricarte's testimony against the employer in an unfair labor practice hearing before this agency. No evidence was put forward showing other, similar actions were taken against teachers who had not been active in the union. No evidence was put forward to show the employer went through a systematic, fair process and followed its own policy on staff reductions. The employees could reasonably perceive that the Ricartes were directly targeted, and that the detrimental actions were taken in reprisal for the Ricartes' union activities.

Attorney's Fees

In creating the Commission, the Legislature expressed its intention to achieve:

> [E]fficient and expert administration of public labor relations administration and to thereby ensure the public of quality public services.

RCW 41.58.005.

In Municipality of Metropolitan Seattle v. PERC, 118 Wn.2d 621 (1992), the Supreme Court of the State of Washington approved a liberal construction of the unfair labor practice remedies provision of the Public Employees' Collective Bargaining Act, RCW 41.56.160, in order to accomplish its purpose. The comparable provision of the EERA, RCW 41.59.150(2), states:

> If the commission determines that any person has engaged in or is engaging in any such unfair labor practices as defined in RCW 41.59.140, then the commission shall issue and cause to be served upon such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action as will effectuate the purposes and policy of this chapter, such as the payment of damages and/or the reinstatement of employees.

The authority granted to the Commission has been interpreted to be broad enough to authorize an award of attorney fees when such an award "is necessary to make the order effective and if the defense to the unfair labor practice is frivolous or meritless". METRO, supra. The term "meritless" has been defined as meaning groundless or without foundation. See, State ex. rel. Washington Federation of State Employees v. Board of Trustees, 93 Wn.2d 60 (1980). See, also, Lewis County v. PERC, 31 Wn.App. 853 (1982), review denied, 97 Wn.2d 1034 (1982); King County, Decision 3178-B (PECB, 1990) and Public Utility District 1 of Clark County, Decision 3815-A (PECB, 1992). Because of the close similarity between Chapter 41.56 RCW and the EERA, we use the same criteria here.

An attack on employees who file charges or give testimony in unfair labor practice proceedings before the Commission not only violates the express provisions of RCW 41.59.140(1)(d), but attacks the entire system of dispute resolution put in place by the Legislature for the regulation of the collective bargaining process. Considering the record as a whole, we make a strong inference of a causal connection between Clarene Ricarte's testimony in the previous unfair labor practice proceedings and the actions taken against both Ricartes the following spring.

Additionally, the defenses asserted by the employer here are so lacking in merit that the employer is unable to provide essential support for its defense:

* We find overwhelming evidence that the board based its decision to cut the vocational-agricultural program on information that was contaminated by the unlawful motives and questionable credibility of Thornton, who clearly maintained an anti-union posture throughout the time period leading up to the actions against the Ricartes.

* By nonrenewing Stephen Ricarte's contract, the employer left him without employment in an area of the state where locating similar employment may be difficult, and created an unbearable situation for both Ricartes. If her husband would have to leave the area to find work, Clarene would also have to leave her employment and move, in order to be with him. The absence of any showing that the employer attempted to help the Ricartes with their difficulties (e.g., by transferring Stephen to another teaching position in the school district, or by assisting him in finding other employment in the area) demonstrates a noteworthy lack of concern on the employer's part, and provides further support for a conclusion that the employer's actions were retaliatory.

* The employer then added "insult to injury" by creating another severe hardship on Clarene Ricarte, by reassigning her to a totally different subject and class level. Her request for a leave of absence thus occurred in response to employer actions which constituted a constructive discharge.

We find the actions of the employer in this case to be so blatantly willful and retaliatory, that an extraordinary remedy is required in addition to the conventional remedies already ordered by the Examiner. Attorney's fees are necessary to make the complainants whole, and to assure that this employer has received the message that discrimination in retaliation for union activity and testimony before the Commission will not be tolerated.

NOW, THEREFORE, it is

ORDERED

1. The findings of fact and conclusions of law issued in this matter by Examiner Pamela G. Bradburn are affirmed and adopted as findings of fact and conclusions of law of the Commission.

2. The Commission makes the following additional conclusion of law:

    3. Retaliation against employees for giving testimony before the Public Employment Relations Commission is so egregious, this employer's actions against Stephen Ricarte and Clarene Ricarte were so blatant, and the defenses asserted by the Mansfield School District in this matter are so lacking in merit, that an award of attorney's fees is warranted under the authority of RCW 41.59.150(2), to effectuate the purposes and policy of Chapter 41.59 RCW.

3. The Commission makes the following order:

a. MANSFIELD SCHOOL DISTRICT, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

(a) Nonrenewing, detrimentally changing teaching assignments, or otherwise discriminating against Clarene Ricarte and Stephen Ricarte or any other certificated teacher for the exercise of activities protected by Chapter 41.59 RCW.

(b) In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights secured by the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.59 RCW:

(a) Offer Stephen Ricarte immediate and full reinstatement as an employee in good standing of Mansfield School District, and make him whole by payment of back pay and benefits, for the period from the commencement of the 1994-1995 school year to the date of the unconditional offer of reinstatement made pursuant to this Order. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410.

(b) Offer Clarene Ricarte immediate and full reinstatement as an employee in good standing of Mansfield School District, and make her whole by payment of back pay and benefits, for the period from the commencement of the 1994-1995 school year to the date of the unconditional offer of reinstatement made pursuant to this Order. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410.

(c) Reimburse Clarene Ricarte and Stephen Ricarte for the attorney fees and other costs they incurred associated with the prosecution of this unfair labor practice case, upon presentation of a sworn and itemized statement of such costs and fees.

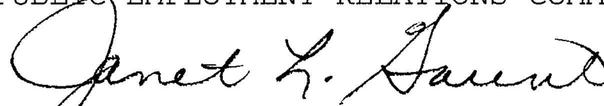
(d) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

(e) Notify the above-named complainant, in writing, within 30 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 above-named complainant with a signed copy of the notice required by the preceding paragraph.

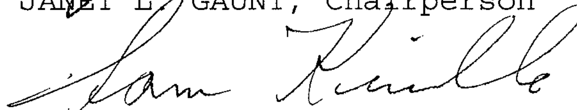
(f) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington, the 31st day of January, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



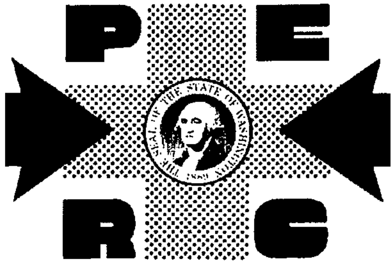
JANET L. GAUNT, Chairperson



SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

"APPENDIX"



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL offer Stephen Ricarte immediate and full reinstatement in his former, or a substantially similar, position, and will make him whole for any loss of pay and benefits he suffered, with interest, from the effective date of his nonrenewal to the effective date of the unconditional offer of reinstatement made pursuant to this order.

WE WILL offer Clarene Ricarte immediate and full reinstatement in her former, or a substantially similar, position, and will make her whole for any loss of pay and benefits he suffered, with interest, from the effective date of her constructive discharge to the effective date of the unconditional offer of reinstatement made pursuant to this order.

WE WILL reimburse Stephen Ricarte and Clarene Ricarte for their attorney fees and costs incurred in the prosecution of their unfair labor practice charges before the Commission.

WE WILL NOT, in any other manner, interfere with, restrain, coerce or discriminate against our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: ____________________

MANSFIELD SCHOOL DISTRICT

BY: ______________________________
Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.