

STATE OF WASHINGTON  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PENINSULA EDUCATION ASSOCIATION,	)	
	)	
Complainant,	)	CASE NO. 3931-U-82-609
	)	
vs.	)	DECISION NO. 1477 - EDUC
	)	
PENINSULA SCHOOL DISTRICT NO. 401,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER
	)	

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Symone Scales, Attorney at Law, appeared on behalf of the complainant.

William A. Coats, Attorney at Law, appeared on behalf of the respondent.

On January 20, 1982, Peninsula Education Association (complainant) filed a complaint charging unfair labor practices against Peninsula School District No. 401 (respondent). The complaint alleged that respondent violated RCW 41.59.140(1)(a) and (c) by retaliating against a bargaining unit employee for filing a grievance. A hearing was conducted on April 14, 1982, before Kenneth J. Latsch, Examiner. The parties submitted post-hearing briefs.

BACKGROUND:

Peninsula School District No. 401 serves approximately 5,600 students in the western Pierce County area. The district's 300 certificated employees work in various facilities throughout the school district, including Peninsula High School. Dele Gunnerson is the principal at Peninsula High School and, at times relevant to these proceedings, Peter McIntyre served as assistant principal and athletic director.

Peninsula Education Association represents certain certificated employees in a bargaining unit described in the 1981-1983 collective bargaining agreement as:

"...all regularly employed full-time or part-time employees whether under contract or on leave, employed by the Employer. Substitute teachers shall not be considered to be regularly employed. Such representation shall exclude the superintendent, assistant superintendents, district directors, coordinators, principals, and assistant principals."

This unfair labor practice case involves claims made by Steve Bruner, a bargaining unit employee.

Bruner signed an individual employment contract for the 1979-1980 school year as a social studies teacher at Peninsula High School. In addition, Bruner served as assistant football coach, assistant basketball coach and department head for the school's four-member social studies department. For these activities, Bruner received additional compensation under the terms of supplemental contracts. Such contracts, issued pursuant to RCW 28A.67.074, terminate each year, and may be renewed at the discretion of the school district. As part of Bruner's regular assignment, he conducted an ASB (Associated Student Body) class used by student leaders to plan school events and programs.

Principal Gunnerson named Bruner head football coach in the 1980-1981 school year. Bruner continued to serve as assistant basketball coach and social studies department head under the terms of supplemental contracts, and he signed an additional supplemental contract for the head football coach position. Bruner was relieved of his duties as department head prior to events alleged as retaliation, and complainant does not contend that Bruner's removal resulted from retaliatory intent. Football season ended on November 7, 1980. Bruner's team suffered a losing season, and concerns about the football program led Gunnerson and McIntyre to conduct a meeting with Bruner on January 21, 1981. Gunnerson attributed the delay in calling the meeting to Bruner's unavailability and other scheduling problems.

The parties disagree over what transpired at the meeting. Bruner testified that the meeting was extremely hostile, and that Gunnerson asked for Bruner's resignation as football coach. Bruner further testified that he warned Gunnerson that he would not resign and would "pursue legal remedies" if he was terminated from the coaching position. By contrast, Gunnerson testified that the meeting was a fact finding exercise intended to inform Bruner of deficiencies in the football program. Gunnerson also testified that he did not threaten Bruner with the loss of the coaching position, and he did not remember Bruner's threat of legal action. McIntyre's testimony supported Gunnerson's recollection of the meeting.

A second meeting was conducted on January 27, 1981 between Bruner, Gunnerson and McIntyre. Gunnerson testified that he presented Bruner a list of objectives to be fulfilled if Bruner wanted to retain the coaching position. Among the goals were better communication with assistant coaches and more contact with concerned parents. Gunnerson gave Bruner until April 1, 1981 to fulfill the objectives. There is no indication that either legal action or pursuit of grievance procedures was mentioned at that meeting. Bruner testified that he received the list of objectives, but he did not have any other specific recollection of the meeting.

In February, 1981, respondent prepared transfer lists in anticipation of the

opening of a new middle school. Peninsula High School was affected because it would no longer have an eighth grade student body when the new school opened. Bruner's inclusion on the transfer list is at issue. Complainant offered testimony that respondent had prepared a list of specific employees to be transferred, giving these individuals certain rights to request transfers to particular schools. Bruner testified that he was scheduled for transfer to Goodman Middle School as early as February, but his name was not included on transfer lists. Bruner believed that respondent excluded his name because he had threatened to file a grievance over the coaching situation. Gunnerson testified that respondent had prepared a list of teaching positions to be transferred, but individual employees were not designated for transfer in February. Gunnerson stated that the selection process for Peninsula High School teachers continued through June, 1981. Although Bruner was considered for transfer in February, no final decision was made at that time. Bruner was the junior social studies teacher at Peninsula High School, and he was qualified to teach at a middle school because of his educational background. He had been teaching eighth grade classes for two of his five instructional periods at Peninsula High School.

In March, 1981, events involving Bruner's ASB class led him to believe that respondent was taking retaliatory measures against him. The school's spring term began on March 9, 1981. Upon checking his teaching schedule, Bruner found that he was relieved of the ASB class. Bruner testified that he did not have prior notification that he would be relieved of the class. Disputing Bruner's version of events, Gunnerson testified that Bruner had been notified of the class change several weeks before the quarter began. In addition, Gunnerson testified that Bruner was relieved of the ASB class so that he could teach a history class scheduled for the same period. Bruner's qualifications as a history teacher led Gunnerson to believe he was the best teacher for the class.

On April 1, 1981, Gunnerson again met with Bruner to discuss the football situation, and informed him that he would not be retained as head football coach. Gunnerson explained that Bruner had not fulfilled the list of objectives given to him on January 27, 1981. Of particular concern was Bruner's failure to meet with concerned parents to discuss their complaints about the football program. Bruner testified that Gunnerson offered him an assistant coaching position at the meeting. To the contrary, Gunnerson testified that the assistant coaching position may have been discussed, but he did not make any employment offer. Gunnerson further testified that Bruner's first indication of legal action came at the April 1, 1981 meeting. A grievance was filed on April 30, 1982, and was subsequently denied without resort to arbitration.

During May, 1981, Gunnerson held meetings with certificated employees to discuss their evaluations. While the date is not certain, Bruner was called to go over his evaluation during that month. Bruner testified that he received a poor evaluation, and he requested Gunnerson to change it.

Although his testimony was unclear, Bruner indicated that he left the evaluation form with Gunnerson. Gunnerson testified that he gave Bruner a good evaluation, but Bruner took the evaluation form to make comments and did not return it. Apart from evaluations, certificated employees also receive individual employment contracts for the upcoming school year during May. Bruner did not receive his contract until July 28, 1981. Gunnerson testified that Bruner's contract was not issued because of an oversight, and not because respondent desired to retaliate against Bruner for filing a grievance.

In June, 1981, Bruner was notified that he was to be transferred to Goodman Middle School. By this time, it was evident that Bruner would not be considered for an assistant football coach position at Peninsula High School. Gunnerson testified that the new head football coach recommended against retaining Bruner as assistant coach, and Gunnerson approved the recommendation.

Bruner began duties as a social studies teacher at Goodman Middle School in September, 1981. In addition, Bruner continued to serve as assistant basketball coach at Peninsula High School. Budget problems arose in the basketball program causing head coach William Montgomery to reallocate funds available for assistant coaches. Believing that he needed an assistant coach for the junior varsity team and another assistant for a new ninth grade team, Montgomery discovered that he only had funds for one assistant coach. Accordingly, he decided to divide the funds for two coaching positions. Montgomery approached Bruner and Kevin Anderson, the other assistant coach, with the idea, but Bruner rejected the offer. Respondent later determined that Montgomery's actions were improper because he could not divide coaching funds as proposed.

In October, 1981, Bruner noticed that his assistant basketball coach position was listed as vacant in the district newsletter. Bruner testified that he questioned several district administrators about the situation, and came away with the impression that the position was taken from him in retaliation for filing the grievance. Montgomery, testifying on behalf of respondent, stated that he believed Bruner quit as assistant basketball coach, and therefore declared the position vacant. Kevin Anderson was later named to be assistant basketball coach.

At the time of hearing, Bruner was a teacher at Goodman Middle School, and did not hold any coaching position in the district. However, Bruner was serving as assistant football coach in Bethel School District. He has requested a transfer back to Peninsula High School for the 1982-1983 school year, and that request has been granted by respondent.

#### POSITIONS OF THE PARTIES:

Complainant argues that respondent was on notice that Steve Bruner was going

to file a grievance as early as January 21, 1981. Complainant maintains that after January 21, respondent relieved Bruner of class assignments, involuntarily transferred him to a middle school, refused to timely issue him an individual employment contract for the 1982-1983 school year, and took away several coaching positions in retaliation because Bruner filed a grievance.

Respondent contends that filing and processing a grievance is not a right protected under RCW 41.59.060. Even if it is determined that a protected right is involved, respondent maintains that an unfair labor practice was not committed. Respondent argues that it did not have notice of Bruner's intention to file a grievance until April 1, 1981, and evidence about earlier events cannot be considered by the Examiner. Respondent further contends that it did not take any retaliatory action against Bruner because he filed the grievance.

#### DISCUSSION:

In its closing brief, respondent contends that filing a grievance is not a right guaranteed under the provisions of RCW 41.59.060. That statute provides:

"(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 organization under an agency shop agreement authorized in this chapter."

Respondent relies on City of Seattle, Decision 489 (PECB, 1978) in making its argument about grievance processing. In Seattle, an individual employee alleged that the city discriminated against him because of his union membership. The employee filed numerous complaints on behalf of fellow employees through a procedure unilaterally adopted by the employer. Given the facts presented, the Examiner concluded that an unfair labor practice had not been committed. Noting that RCW 41.56, the Public Employees Collective Bargaining Act, does not contain a "concerted activities" clause like that found in the National Labor Relations Act (NLRA), the Examiner determined that the affected employee's isolated complaints were remote from the "right to organize and designate representatives" guaranteed under RCW 41.56.040. However, a contrary result was reached where a contractual grievance procedure was invoked by a public employee. In Valley General Hospital, Decision No. 1195-A (PECB, 1981), it was determined that pursuit of a grievance under terms of a collective bargaining agreement is an activity protected under RCW 41.56.040. While it is true that RCW 41.59 also lacks a "concerted activities" clause, the Public Employment Relations Commission has held that grievance processing is a protected right. See: Warden School

District No. 146-161, Decision 1062 (EDUC, 1981). In this case, Steve Bruner's complaint was submitted through a grievance procedure established by a collective bargaining agreement. Following earlier Commission decisions, it must be concluded that such activity is protected under RCW 41.59. Analysis must now shift to whether complainant has shown that respondent has, in fact, retaliated against Bruner because of the grievance.

Complainant maintains that respondent had notice that Bruner intended to file a grievance as early as January, 1981. However, Bruner's testimony concerning events in January was contradicted by Gunnerson and McIntyre. In fact, Bruner was uncertain whether a meeting was even conducted on January 27, 1981. Gunnerson offered detailed testimony as to events occurring at that time. As to the meeting of January 21, 1981, the parties offered conflicting testimony. In light of such a conflict, complainant did not adequately prove that respondent had notice of Bruner's intent to file a grievance about the loss of the head football coach position. The Examiner credits respondent's explanation of events in January and finds that the district was not on notice of a possible grievance until April 1, 1981. Examination of events after that date indicates that respondent was not acting in retaliation to Bruner's grievance.

Despite complainant's assertion that Bruner received a poor evaluation because of difficulties with the ASB class, the record indicates that Bruner received a satisfactory evaluation. The disappearance of the evaluation form weakens complainant's argument in light of testimony offered by respondent to the effect that Bruner was requested to return the form but failed to do so.

Bruner's loss of the ASB class does not reflect a retaliatory intent by respondent. The record reflects that Bruner was qualified to teach history classes, and that respondent needed a qualified teacher to take over a history class scheduled for the same period as the ASB class. Complainant did not prove that respondent acted improperly, and respondent showed a legitimate need to reschedule Bruner.

Claims concerning Bruner's transfer to a middle school similarly are not convincing. It appears that respondent had legitimate concerns about its instructional program and sought to correct them without concern about Bruner's grievance. Respondent presented uncontroverted testimony that Bruner was qualified to teach an eighth grade history class, and transferred him only because an opening existed in a middle school. Given the number of transfers being made at the time, it is impossible to conclude that respondent singled out Bruner for discriminatory treatment. Rather, it is concluded that Bruner's was merely one of many transfers, and respondent had legitimate business reasons in making his transfer.

Bruner's claims concerning the loss of the assistant basketball coach position do not support an allegation of retaliation. Through testimony

offered by head coach William Montgomery, respondent established that it believed Bruner had resigned from the position. Given the circumstances surrounding the assistant basketball coach position, the Examiner must find that respondent acted reasonably.

Complainant alleges that respondent further retaliated against Bruner by not issuing his individual employment contract for the 1982-1983 school year until July 28, 1981. However, respondent produced convincing testimony that its failure to issue the contract resulted from an oversight and not from a retaliatory intent. As in the case of the missing evaluation, complainant's argument has been weakened through Bruner's lack of action concerning the missing contract. It is curious that he did not raise the issue for several months, in effect magnifying the hardship he claims to have suffered.

It must be remembered that complainant, as the charging party, has the burden of proof. This requirement is set forth in WAC 391-45-270, and failure to sustain the burden of proof results in the dismissal of the unfair labor practice complaint. See: Douglas County, Decision 1220 (PECB, 1981). In this case, respondent effectively rebutted complainant's allegations. The Examiner credits respondent's explanation of events leading to this unfair labor practice complaint, and, accordingly, finds that it did not retaliate against Steve Bruner for filing a grievance.

#### FINDINGS OF FACT

1. Peninsula School District No. 401 is a school district created under title 28A RCW, and is an "employer" within the meaning of RCW 41.59.020(5). Among its facilities, the district operates Peninsula High School. Dele Gunnerson is principal at the high school.
2. Peninsula Education Association represents certain certificated employees employed by the district. Steve Bruner, a bargaining unit employee, was hired in 1979 as a social studies teacher at Peninsula High School. In addition, Bruner worked as assistant football coach, assistant basketball coach, and social studies department head.
3. In 1980, Bruner was named head football coach. His team suffered a losing season, and Bruner was called to a meeting with Gunnerson and assistant principal Peter McIntyre on January 21, 1981, to discuss the football program. Bruner testified that he threatened to file a grievance if Gunnerson insisted that he resign as football coach. Gunnerson testified that no such threat was made.
4. A second meeting was held on January 27, 1981, at which time Gunnerson gave Bruner a list of goals to be accomplished if he was to remain head coach.

5. On April 1, 1981, Bruner again met with Gunnerson. At this meeting, Gunnerson informed Bruner that he would not be retained as football coach. The district received its first notice that Bruner intended to file a grievance at the April 1 meeting. The grievance was filed on April 30, 1981, and was subsequently dismissed before submission to grievance arbitration.

6. In May, 1981, Gunnerson reviewed Bruner's evaluation with him. Gunnerson gave Bruner a favorable evaluation. Bruner took the evaluation form with him and never returned it.

7. Bruner's individual employment contract for the 1982-1983 school year was to have been issued during May, 1981, but it was not issued until July 28, 1981. Bruner did not question district officials about the contract problem until his attorney made a demand that the contract be issued.

8. Bruner was transferred to Goodman Middle School for the 1982-1983 school year. The transfer process began in February, 1981, but was not completed until June of that year. Bruner was one of twenty (20) certificated employees who was transferred from Peninsula High School as the result of a new middle school being opened.

9. Bruner continued to serve as assistant basketball coach after he was terminated from the head football coach position. Budget difficulties caused head basketball coach William Montgomery to ask Bruner to work at a reduced rate of compensation for his coaching duties. Bruner refused to continue as assistant coach under the conditions outlined by Montgomery. Although it was discovered that Montgomery's plan to divide money from one supplemental contract into two positions was improper, the district assumed that Bruner had quit as assistant basketball coach. The district later hired another certificated employee as assistant basketball coach. The district's conduct was not in reprisal for pursuit by Bruner of his grievance concerning the football assignment.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.59 RCW.

2. By events described in Findings of Fact 3 through 8, above, Peninsula School District No. 401 did not commit an unfair labor practice violative of RCW 41.59.140(1)(a) and (c).

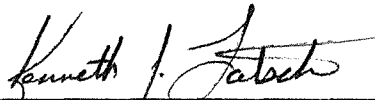


ORDER

It is ordered that the complaint charging unfair labor practices against Peninsula School District No. 401 is hereby dismissed.

DATED at Olympia, Washington this 19th day of July, 1982.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
KENNETH J. LATSCH, Examiner