STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WELLPINIT CLASSIFIED PUBLIC EMPLOYEES ASSOCIATION / WEA,	)	CASE 7988-U-89-1731
Complainant,	)	DECISION 3625-A - PECB
vs.	)	
WELLPINIT SCHOOL DISTRICT 49,	)	DECISION OF COMMISSION
Respondent.	)	

Harriet Strasberg, Attorney at Law, appeared on behalf of the complainant.

Winston and Cashatt, by C. Matthew Anderson, Attorney at Law, appeared on behalf of the respondent.

Examiner Walter M. Stuteville issued his findings of fact, conclusions of law and order in the above-entitled matter on November 19, 1990, finding unfair labor practice violations and ordering reinstatement and back pay for discharged employees Alvina Andrews and Terri Samuels. Wellpinit School District 49 filed a timely petition for review, bringing the matter before the Commission. Both parties filed briefs for consideration by the Commission.

BACKGROUND

Wellpinit School District 49 (employer) is located within the boundaries of the Spokane Indian Nation Reservation, northwest of Spokane, Washington. At the time of the events relevant to this case, Jess Cruzen was superintendent of schools.

The Wellpinit Classified Public Employees Association / WEA (union) has represented a bargaining unit of classified employees of the

employer since September, 1987. At the time of the events relevant to this case, Leona Dater was the Uniserv representative assigned to the bargaining unit.

Contract negotiations between the parties have been lengthy, and were ongoing at the time of the events relevant to this case.[1]

Alvina Andrews and Terri Samuels were both employed as instructional aides within the bargaining unit represented by the union. Andrews and Samuels both had received satisfactory performance evaluations in the past, during each of their years of employment. In their annual performance evaluations made at the end of the 1987-88 school year, the employer recommended that their contracts of employment be renewed.

Andrews and Samuels were both active in the union. During contract negotiations in 1988-89, they were members of the union's negotiating team and were union officers, Andrews as vice-president and Samuels as secretary. Their union activities were known to the employer through their appearances before the school board as members of the negotiating team. In addition, they appeared before the board on behalf of the union in July of 1988, to protest a proposed smoking policy. The board chairman acknowledged that they both attempted to speak out against the policy.

On February 15, 1989, Samuels appeared before the school board on a personal matter, and to speak out against the employer's reduction of a fellow employee's hours. The chairperson later reprimanded Superintendent Cruzen for his failure to handle personnel matters and, on February 28, the superintendent issued a

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[1] The record reflects that the negotiations were still going on when the hearing in this matter closed on May 1, 1990. The docket records of the Commission for Case 8490-M-90-3293 reflect that a mediation case for this bargaining unit filed on March 15, 1990 remained pending at least through May 31, 1991.

memo instructing the classified staff to follow the "chain of command" and first approach their immediate supervisor "on any or all matters". The same memo stated that employees who went directly to the school board would be disciplined, fired or their contracts would not be renewed.

Andrews and Samuels attended a negotiation meeting on March 7, 1989, at which union representative Leona Dater took issue with the "chain of command" memo. Superintendent Cruzen agreed to rescind the memo, but, according to several witnesses, he added that the individuals "that brought it down would be dealt with".[2] The negotiators for the employer and union agreed upon a modified version of the superintendent's memo, but it was rejected by the superintendent. In a letter to the employer's negotiator, the superintendent complained about the negotiator's failure to prevent discussion of the "chain of command" memo. The employer's negotiator was subsequently replaced.

On March 10, 1989, the employer's business manager personally distributed a memo to the classified employees, rescinding the "chain of command" memo. In the presence of Samuels, that employer official told another employee that "this was being brought down by the troublemakers around here". Samuels related the statement to Andrews over lunch. When Andrews was later approached by the business manager, Andrews stated that she didn't appreciate being called a troublemaker. Later in the day, the business manager approached Samuels in her classroom, struck her arm, and stated that she did not appreciate Samuels telling people that she called

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[2] The school board chairperson, who was also present at this meeting, conceded that when objections to the memo were raised, Superintendent Cruzen "snapped back" at Dater and appeared upset. The board chairperson quoted the superintendent as saying: "We'll just deal with everybody on an individual basis, case by case basis"; a remark the chairperson did not view as a threat. The employer's chief negotiator also denied hearing a threat being made. Cruzen did not testify.

them troublemakers. Samuels replied that she didn't appreciate being called a troublemaker. During this exchange, according to Samuels, the business manager said, "You two go around and stir up trouble here and there."[3]

The employees customarily turned in their monthly time sheets and received their paychecks near the start of the school day on the last Friday of each month. On Friday, April 28, 1989, Andrews and Samuels each turned in a time sheet which indicated seven hours worked that day. Later the same day, both employees left work early; Samuels at 11:00 a.m., and Andrews later. The procedure for early departure was that, in the absence of the principal, the employees were to notify the school secretary, a bargaining unit employee. According to both employees, as well as Pauline Ford, the school secretary, Andrews and Samuels independently contacted Ford and advised her they were leaving. In addition, Andrews testified at the hearing that, on the morning in question, she notified the principal that she would be leaving early. The time sheets turned in earlier that day were not corrected, and neither Andrews nor Samuels gave explanations for their early departures.

Early in May of 1989, the employer notified the union that it was ending the deduction of union dues from the pay of bargaining unit employees. On May 5, 1989, the union notified the employer that such conduct was inappropriate, after which the employer continued to make payroll deductions.

On May 9, 1989, the principal confronted both Andrews and Samuels about their inaccurate time sheets for April. They each acknowledged that they had left school early on April 28, but asserted that they had properly checked out with the school secretary.

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[3] The business manager did not testify in this proceeding.

On May 11, 1989, Andrews and Samuels were notified that the superintendent would be recommending that the school board not renew their employment contracts. On May 15, 1989, they were each given a written reprimand for not having corrected their April time sheet. Samuels again explained the circumstances of her incorrect time sheet to the principal, and requested that the reprimand not be placed in her personnel file. This request was denied.[4]

After Andrews and Samuels received notice of the recommendation of non-renewal, they both sought permission from the principal to speak to the school board at its meeting scheduled for May 17, 1989. They were referred to the superintendent, who in turn, instructed them to make their request to the board chairperson. Andrews and Samuels presented a written request to the chairperson on about May 15, 1989. He refused to read it, instructing them to write another letter stating why the superintendent would not place them on the agenda. The chairperson understood, however, that the two employees wanted to address the board. Andrews and Samuels mailed such a letter, and it arrived at the post office on May 17, but was not received by the chairperson until after the meeting.

At the May 17, 1989 school board meeting, the superintendent recommended that Andrews' and Samuels' contracts not be renewed.[5] When Andrews and Samuels attempted to address the school board, the chairperson ruled them out of order. The board voted not to renew the two contracts. Those were the only classified employee contracts not renewed in 1989.

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[4] Samuels renewed this request in a letter dated May 17, but there is no record of a response.

[5] According to the chairperson's testimony, the principal told the board that both employees admitted leaving without permission. This conflicts with the testimony of Andrews and Samuels that when the principal questioned them on May 9, they told him that they advised the school secretary they were leaving early.

The principal prepared evaluations dated May 24 on both Andrews and Samuels, for the 1988-89 school year. All categories on both employees' evaluation forms were marked "meets expectations", including responses to: "Consider promptness to required reports" and "Consider attendance and punctuality". At the direction of the superintendent, the principal did not complete the portion of the evaluation which asked whether: "I would", "I would hesitate to", or "I would not" recommend that either employee be re-employed.

POSITION OF THE PARTIES

The employer's petition for review and supporting brief challenge only paragraph 6 of the Examiner's findings of fact, where the Examiner stated there that the bargaining relationship between the parties has been acrimonious. The employer challenges only paragraphs 3 and 4 of the Examiner's conclusions of law, which it claims are unsupported by the record and factually and legally incorrect. No other findings or conclusions are challenged in the petition for review. The thrust of the employer's legal argument is that RCW 28A.58.099 authorized it to refuse to rehire Andrews and Samuels, so that those individuals did not enjoy "employee" status after the end of the 1988-89 school year; that the Examiner improperly applied the legal standard of the Commission's "dual motivation" cases, and utilized erroneous legal and factual bases in finding the employer's acts were motivated by union animus; and that the Examiner incorrectly determined that the employer's reliance on "falsification of time records" as the cause for non-renewal of the two contracts was pretextual. Finally, the employer argues that the Examiner improperly considered actions which occurred after the employment of Andrews and Samuels was terminated.

The union supports the Examiner's decision, and asks that it be affirmed by the Commission.

DISCUSSION

Conflict of Statutes

We disagree with the employer's argument that RCW 28A.58.099 freed it of any employment obligation towards Andrews and Samuels. That statute does require "sufficient cause" for discharge only during a school year. Relying on Butler v. Republic School District, 34 Wn.App. 421 (1983), the employer argues that once the school year has ended, a school district needs no cause in order to refuse to renew the contract of a classified employee. Over the years, however, Congress and various state legislatures have placed restrictions on terminations and other employment actions adverse to employees or job applicants when made on the basis of race, sex, age, or union activity. Chapter 41.56 RCW is one such law. RCW 41.56.040 and .140 forbid a public employer from discriminating against any public employee for their exercise of collective bargaining rights guaranteed by Chapter 41.56 RCW. We note that the Stevens County Superior Court decision relied upon by the employer did not involve an alleged violation of Chapter 41.56 RCW, and we concur with the Examiner's analysis that RCW 28A.58.099 must be read in harmony with the provisions of Chapter 41.56 RCW.

The alternative approach suggested by the employer's argument is to consider Andrews and Samuels as applicants for employment with the Wellpinit School District for the 1989-90 school year,[6] but the same result is reached by analysis from that starting point. The protections of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, are not limited to the employees currently on the payroll of an employer, but also extend to job applicants who are not hired. Auburn School District, Decision 2291 (PECB, 1985). See, also, Phelps Dodge Corporation v. NLRB, 313 U.S. 177 (1941).

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[6] It is clear that neither Andrews nor Samuels resigned or otherwise indicated a lack of interest in working for the employer.

Andrews and Samuels clearly enjoyed the status of "public employee" under RCW 41.56.030. If the decision to deny them contracts for 1989-90 were for any of the reasons proscribed by RCW 41.56.140, their employer committed unfair labor practices within the meaning of RCW 41.56.140(1).

The "Dual Motivation" Test

The employer next argues that the Examiner erred in applying the standard adopted in City of Olympia Decision 1208-A (PECB, 1982), citing with approval Wright Line, 251 NLRB 1083 (1980). We find, however, that the Examiner properly applied the standard adopted by the Commission for deciding "dual motive" cases. Under that standard:

> A complainant must first make out a prima facie case sufficient to support an inference that protected conduct was a motivating factor in the employer's decision. The burden then shifts to the employer to show that the same action would have taken place even if the employee had not been engaged in protected activity.

Asotin County Housing Authority, Decision 2741-A (PECB, 1987).

This standard has been endorsed by the Washington courts for use in cases of this type. Clallam County v. PERC, ___ Wn.App. ___ (Division II, 1986), citing Mt. Healthy City School District Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) and Washington Public Employees Association v. Community College District 9, 31 Wn.App. 203, 211 (Division II, 1982).

Application of the Standard

The complainants made out a prima facie case. The record is clear that the employer exhibited acrimony in regard to the exercise of protected rights by Andrews and Samuels in their capacities both as

employees and as officers of the union. It is undisputed that after Samuels appeared before the school board to speak on behalf of a fellow employee, Superintendent Cruzen immediately responded by announcing that employees who skipped the "chain of command" would be "disciplined, fired, or [have their] contracts not renewed". When his "chain of command" letter was challenged during a negotiation session attended by Andrews and Samuels, Cruzen stated, in the presence of several witnesses, that the individuals who brought it down would be dealt with. The testimony about that statement is buttressed by the uncontradicted evidence that the business manager told employees that the "chain of command" letter was "brought down by the troublemakers".

Additional evidence of the superintendent's anger at being challenged about his "chain of command" memo was his rejection of a perfectly reasonable revision of that memo agreed upon by the union's and the employer's negotiators, and his replacement of the employer negotiator after complaining about the failure of that individual to prevent discussion of the memo.

It is undisputed that the employer and union had an additional dispute during the period between the April 28 "early departure" incidents and the employer's actions against Andrews and Samuels. On May 1, 1989, the employer notified the union that it would no longer deduct union dues from the pay of bargaining unit employees. The union protested on or about May 5, and the employer rescinded its action.[7] While the record suggests that the business manager

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[7] RCW 41.56.110 makes "checkoff" a statutory right of an exclusive bargaining representative, without regard to whether there is a contract in effect. An employer's withdrawal of "checkoff" could be justified only by a decertification of the union or a lawful withdrawal of recognition by the employer, neither of which is claimed to have occurred here. See, Snohomish County, Decision 2944 (PECB). As noted by the Examiner, no complaint was filed alleging that the discontinuance of the "checkoff" was an unfair practice, and no such violation was found.

may have initiated the action without the superintendent or principal being aware that a discontinuance of the "checkoff" was contemplated, the dispute which ensued could support a finding of the existence of union animus.[8]

We concur with the Examiner's inference that the frequent and highly visible union activities of Andrews and Samuels could easily have been a motivating factor in the employer's decision not to renew their contracts. Since the union sustained its burden by making out a prima facie case, it was up to the employer to establish that it would have taken adverse action against Andrews and Samuels even in the absence of their protected activities.

We find the Examiner's conclusion that the reason for non-renewal was pretextual is fully supported by the record. Both Andrews and Samuels apparently filled out their time sheets for the month of April in accordance with an employer practice calling for the sheets to be filled out prior to the end of the period being reported. There is nothing in the record to suggest that their actions on the morning of April 28 were designed to conceal a planned absence later in the day. Credible evidence indicates that both employees followed established procedure in reporting their absences to the school secretary prior to their departures. When confronted later by the principal, neither employee denied the absence nor claimed entitlement to pay for unworked hours. Finally, the circumstances surrounding the timing of the employer's decision and the employer's responses to the attempts of Andrews and Samuels to defend themselves before the school board support the Examiner's comment about the lack of appearance of fairness.

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[8] The record discloses that the employer again took steps to cancel the "checkoff" in October of 1989. We need not consider the latter incident, and we reject the employer's contention that the Examiner's reference to it is a basis for overturning the entire decision.

Although Andrews and Samuels were initially confronted by the principal on May 9, 1989, and notified of the superintendent's decision not to recommend that their contracts be renewed on May 11, they did not receive written reprimands until May 15. In addition, their written evaluations, which stated that they met expectations in all categories and omitted any mention of the April 28 incident or any shortcomings in regard to "promptness to required reports" or "attendance and punctuality", were dated May 24, 1989.

The actions of the superintendent and school board chairperson, when Andrews and Samuels attempted to be placed on the agenda for the school board meeting, are inexplicable. This is especially true when it is recalled that the principal misrepresented the substance of his May 9 conversations with Andrews and Samuels, by neglecting to tell the board members that the two employees told him that they had obtained permission to leave early through proper channels. The foregoing behavior reinforces our conclusion that the non-renewals were unlawful. We can only wonder if the refusal to permit them to address the school board was designed to prevent the full board from learning that they were, in fact, denying any impropriety. This might also explain why the principal referred Andrews and Samuels to the superintendent when they first requested permission to speak at the May 17 board meeting.

The East Wenatchee decision cited by the employer is not on point.[9] The serious misconduct of the discharged employee in that case was manifest. The employee received repeated warnings over a 10-month period about poor work performance and misconduct, as well as his abuse of sick leave. His employment was finally terminated after

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[9] East Wenatchee Water District, Decision 1392 (PECB, 1982), was the decision of another Examiner, and was not appealed to or considered by the Commission. City of Olympia, supra, was a decision of the full Commission, affirming a decision by the Executive Director sitting as Examiner in the case.

it was learned he had asked his foreman to indicate in advance on the time sheets that he was "sick" when, in fact, he was not. In contrast, Andrews and Samuels had repeatedly received satisfactory ratings on their written evaluations, including those filled out and dated after the incidents which allegedly led to the decision not to renew their contracts. The April 28 incidents did not involve falsification of time slips.

Based on the entire record, the Commission concludes the Examiner's findings of fact, conclusions of law and order were correct in all respects.

NOW THEREFORE IT IS

ORDERED

1. The findings of fact, conclusions of law and order issued in the above-entitled matter by Examiner Walter M. Stuteville are affirmed and adopted as the findings of fact, conclusions of law and order of the Public Employment Relations Commission.

2. Wellpinit School District 49, its officers and agents, shall immediately:

   a. 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 the Examiner's order, and at the same time provide the above-named complainant with a signed copy of the notice required by that order.

   b. 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 the Examiner's order, and at the

same time provide the Executive Director with a signed copy of the notice required by that order.

Issued at Olympia, Washington, the 11th day of June, 1991.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

MARK C. ENDRESEN, Commissioner

DUSTIN C. McCREARY, Commissioner