Bethel School District, Decision 6731 (EDUC, 1999)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ELIZABETH A. RIGOULOT, Complainant,	)	CASE 14170-U-98-3514
vs.	)	DECISION 6731 - EDUC
BETHEL SCHOOL DISTRICT, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Eric R. Hansen, Attorney at Law, appeared for the complainant.

Clifford D. Foster, Jr., Attorney at Law, appeared for the respondent.

On October 6, 1998, Elizabeth A. Rigoulot (complainant) filed a complaint with the Public Employment Relations Commission under Chapter 391-45 WAC, charging that Bethel School District (employer) had committed unfair labor practices in violation of RCW 41.59.140(1)(a) and (c). A hearing was held on February 12, 1999, before Examiner Vincent M. Helm. The parties filed briefs.

The preliminary ruling issued under WAC 391-45-110 found a cause of action to exist on allegations of:

> Employer discrimination against complainant, by its failure to offer her a counselor position because she sought assistance from her exclusive bargaining representative in a controversy concerning her tenure of employment.

On the basis of the evidence presented at the hearing, the Examiner holds that the employer violated RCW 41.59.140(1)(a) and (c), and orders that complainant be offered the disputed position and be made whole for her losses as the result of the employer's unfair labor practice.

BACKGROUND FACTS

Complainant's Employment History and Education

The complainant was initially hired by the respondent for the last half of the 1996-97 school year, as a teacher for severely behavior disordered (SBD) students at Cedarcrest Junior High School (Cedarcrest). This was a newly-created position, and required her to develop a program of instruction. At the time of her hire, she executed an employment contract which indicated on its face that it was not subject to the continuing contract law, RCW 28A.405.210, and would terminate automatically at the expiration of its term.

The complainant has a master's degree in school counseling. For four years immediately prior to her hire by the respondent, she had worked as an elementary school counselor in Wyoming. Her bachelor's degree is in special education, and she had six years of experience in that field.

Acceptance of Counselor Position and Related Discussions

In the spring of 1997, complainant became aware of an opening for a counselor at Cedarcrest for the 1997-98 school year. That opening arose by virtue of the incumbent counselor applying for a one year leave of absence. In August 1997, complainant executed an employment contract for the counselor position for the 1997-98 school term which, as in the case of her first employment contract,

stated that it was not subject to the continuing contract law and would terminate automatically at the expiration of its term.

When she applied for and accepted the counselor position, the complainant believed the employee she was replacing would not elect to return to work following the expiration of her leave and that she would then have the job on a permanent basis. Complainant based this belief upon alleged conversations with Deborah Davis, the principal of Cedarcrest, and with Jay Hirst, a bargaining unit employee who was working as an intern and functioning as an administrative assistant / dean of students with responsibility for the special education program at Cedarcrest. Complainant insists she was repeatedly told by those two that she would have the counselor job on a permanent basis, because she had a good background for the job. Davis recalled telling complainant she did not believe the employee on leave would return. Davis did not deny the complainant's contentions, nor did she contradict the testimony of Frank Gilletti, the other counselor at Cedarcrest, who stated that on at least two occasions he heard Davis tell complainant that the counselor on leave would not return to work and that complainant should not worry about getting the counselor position on a permanent basis because she was doing a fine job. Hirst remembered telling complainant that, although there were no guarantees, complainant should have a good opportunity to get the counselor position on a permanent basis if the employee did not return from leave and if complainant did a good job.

As further evidence of the fact that complainant was assured of getting the counselor position on a permanent basis, complainant testified that Hirst and Davis told her not to apply for two continuing contract counselor positions which were open at another school at the same time the position at Cedarcrest came open, and that Hirst and Davis told her she would not like working at the other school because of the administration at that school. Hirst

admitted that he made such statements to complainant, but contended Davis was not present when he commented on the desirability of working at the other school. Davis denied recall of any conversation with complainant relative to openings for a counselor position at another school, and indicated she was unaware of any openings.

The Levy Failures and Reactions Thereto

During the 1997-98 school year, two levies for funds to support the employer's operations failed, in February and April of 1998. The complainant became concerned about her future status after the second levy failure. She heard that, because of cutbacks necessitated by the levy failure, an assistant principal at another school intended to take the counselor position at Cedarcrest for the 1998-99 school year.

Complainant contends she initiated a conversation with Davis, based on her concerns after the levy failures. In complainant's view, Davis was unsympathetic and advised complainant to get her resume in order, with the implication being that complainant would be out of a job. Davis denied recall of this conversation.

After the second levy failure and her conversation with Davis, complainant contacted Jon Holdaway, a fellow teacher at Cedarcrest and a representative of WEA Spanaway (union), which represents respondent's certificated employees. Complainant told Holdaway of the assurances of job security she had been given by Davis and Hirst when she took the counselor position, her confusion and anxiety resulting from her conversation with Davis after the levy failure, and her belief that she had been misled by the school administration as to her future employment as a counselor. Complainant's contact with Holdaway resulted in a series of e-mails and conversations between union officials and upper-level officials of the respondent.

The first e-mail, dated May 21, 1998, went from Holdaway to Steve Brown, the president of the Bethel Education Association, and purports to convey the essence of Holdaway's conversation with complainant relative to her employment at Cedarcrest. Essentially, Holdaway informed Brown that complainant had been initially employed on a continuing contract as an SBD teacher and had been persuaded to give up that permanent position to accept a non-continuing contract as a counselor upon the representations of Hirst and Davis that the employee on leave would not return to work and the complainant would then obtain the position on a permanent basis.[1] The e-mail further noted that, as a result of the levy failure, a displaced assistant principal was moving into the counselor position and the SBD position formerly held by complainant had been filled by another employee, leaving complainant without a job. Holdaway's e-mail accuses Hirst and Davis of misleading complainant about her future job security, to induce her to give up a job under a continuing contract and accept the counselor position on a non-continuing basis to satisfy their short term needs. Holdaway finished by urging Brown to contact Davis' supervisors, in order to meet a perceived moral obligation on the part of the employer to fulfill Davis' promises to complainant.

Further e-mails transmitted between Holdaway and Brown in the May 21 to June 15, 1998 period indicate that, at least as of May 23, 1998, the respondent's executive director of human resources, Greg Rawlings, was aware of the union's concerns about complainant's employment status, was sympathetic, and was to review the situation with the respondent's assistant superintendent. In one of the e-mails, dated May 23, Holdaway noted that Rawlings had indicated in an e-mail that Holdaway's presentation relative to Rigoulot's

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[1] This fundamental tenet of the union's position, based upon information supplied by Rigoulot, was in error. As earlier noted Rigoulot, when she accepted the counselor position, was not working under a continuing contract.

status was "compelling". Based upon the e-mails, it appears that no decision by the respondent was communicated to union representatives as of June 15, 1998.

At some point in the May - June period, the Executive Director of the Summit Uniserv Council, Ron Scarvie, talked to complainant to confirm that Holdaway's account of her situation was correct. Scarvie then met with Brown and Rawlings concerning the matter. A period of time elapsed after this meeting with no action being taken. Scarvie then contacted Rawlings again, prompting Rawlings to meet with Brown. Rawlings also recalls some lapse of time from the initial union contact before he met with Brown.

Evidence of Union Animus

According to complainant, Davis entered her office some time in the spring of 1998, and stated she had just talked to Rawlings and did not like what complainant had told the union. Complainant contends the message was that Davis was in trouble with her superiors, and did not appreciate complainant's lies about what Davis had said concerning the counselor position. Complainant further testified that Davis said complainant knew the counselor job was not a continuing contract when she took the position, and that complainant should stop being a baby and deal with the situation. According to complainant, Davis went on to say that administrators talk to each other and did not like troublemakers in their schools and that complainant was a troublemaker. Complainant testified that Davis was extremely angry when indicating her unhappiness with the chain of events initiated by complainant's contact with the union. Gilletti testified, without objection, that the complainant informed him of Davis' comments in April or May 1998. Davis testified that, as a result of a conversation with Rawlings, she merely advised complainant to talk to Hirst, because he had been a big supporter of complainant, and to inform him of what complainant

had told the union about him before Rawlings talked to him. Davis also put that conversation in a hallway, rather than in an office.

In her complaint, and at one point in her testimony, complainant placed the date of this meeting with Davis as May 15, 1998. When cross-examined as to why the conversation was not mentioned in a June 3, 1998 document prepared at the request of the union to summarize her employment situation, complainant indicated the conversation with Davis had not yet occurred at that time. At another point in her testimony, complainant said the conversation occurred after she contacted Holdaway, but before she met with Rawlings on June 17.

Through undisputed testimony, Scarvie provided insight into Davis' reaction as described by complainant. Scarvie stated that some 30 teachers met with the union during the spring of 1997, to express their dissatisfaction with Davis' style of administration. At that meeting, a number of employees stated they feared repercussions if Davis became aware of their identities. As a result, the union and the respondent engaged the services of a mediator for two days of meetings held between Cedarcrest administrators and staff in August of 1997, to improve relations.

In one of the e-mails exchanged between union representatives in the spring of 1998 concerning complainant's situation, Holdaway voiced his personal concern about having raised the matter noting, "Life can be difficult for people in our school who end on the administration shit list."

An Apparent Resolution to the Situation

When Rawlings and Brown met, Rawlings said that, under the circumstances, the employer should initiate a pro-active hire of complainant. Before reaching a conclusion as to the proper

disposition of the matter, however, Rawlings met with his superiors, an assistant superintendent and the superintendent. Because of the harmonious relationship of the parties and the significance attached to the matter by the union, the employer thought some accommodation should be made even though the union's basic premise as to complainant's initial employment status was incorrect. An additional factor was that special education teachers were in limited supply.

Rawlings contacted Davis to get her input as to complainant's abilities, and received a "great" recommendation. Rawlings and Davis state that Rawlings did not express any negative reaction to Davis concerning her dealings with complainant, but did suggest that Davis should counsel Hirst with respect to not making promises of employment which were beyond his authority.

Shortly after the 1997-98 school year ended, in June of 1998, Rawlings met with complainant and furnished her a letter of intent dated June 17, 1998, indicating her appointment to a continuing position as a special education teacher. This fulfilled the respondent's commitment to the union, and Scarvie testified it was a fair disposition of the matter. Complainant signed the document, and returned it to the employer on June 26, 1998.

Counselor Position Again Vacant

In early July of 1998, Davis became aware that the assistant principal who had been designated to transfer to the counselor position had elected to take another position. According to complainant, Davis told complainant that the counselor position was open on a continuing contract basis, and that she would be interviewed for the job, but not to count on getting the job. A paraphrase of Davis' version of the conversation is that she told complainant to conduct herself in the interview as though she were

not already well known to the interviewers, and to thereby avoid giving responses which assume the interviewers are familiar with her. Under either version the comments appear to be equivocal.

Davis designated a six-person interview committee consisting of herself, the assistant principal at Cedarcrest (Jeff Hunt), a parent who also served as a coach, two teachers at Cedarcrest, and the other counselor at Cedarcrest (Gilletti). When Davis contacted teacher Harriet Maines to be on the interview panel, Maines said her response was that was great because Davis could hire complainant for the counselor position. According to Maines, Davis responded she really did not want to hire complainant. When Maines asked why, Davis stated that complainant did not participate in extra-curricular activities; was always running to her husband; and had lied about what Davis had told her concerning complainant's contract status. Maines said she told Davis she thought complainant had done an excellent job as a counselor, and asked for further detail about complainant's alleged lies. Davis responded that she had told complainant that she would have a non-continuing contract when she took the counselor's position. Maine states that Davis did not expressly refer to complainant's contact with the union, but she was aware that complainant's contact had precipitated the union's contact with respondent. Maines reiterated that she and the other teachers were extremely satisfied with complainant's performance as a counselor. Davis denied recall of this conversation.

The Interview Process and Results Thereof

In addition to complainant, Davis had another applicant she wished to consider for the counselor position. Kevin Shanley was moving to the area, with five years prior experience as a junior high school counselor. There was some indication in the testimony that a third applicant was interviewed, but no evidence was presented as

to the results of that interview. When the panel convened on July 20, 1998, to interview the applicants, Davis had prepared 12 questions to be asked and prescribed that each response was to be scored from a low of 1 to a high of 5. Davis told the panel members to score each applicant's response to each question, and emphasized that the individual with the highest score would not necessarily be selected for the job. The questions were of a nature where there was no objective right or wrong response.
At the end of the interviews, the panel members discussed the applicants. According to the participants who testified, a consensus appeared to develop at the outset in favor of complainant. Factors cited favoring complainant included her work as a counselor, which they thought was excellent, their perceived need for a female counselor to deal with female students who might not be comfortable talking with a male, and her incumbency in the position. Davis was the notable exception to that consensus. At that point, Hunt stated he felt too much attention was being given to complainant when he felt Shanley was far superior, and he asked that the scores be tallied for each candidate. The parent member did not give numeric ratings; the other results were as follows:

Maines (a teacher) scored each 57
Gilletti (a counselor) scored complainant 58 and Shanley 57
Moreford (a teacher) scored complainant 56 and Shanley 57
Hunt (an administrator) scored complainant 39 and Shanley 47
Davis (the principal) scored complainant 44 and Shanley 52

The comments and scorecards of each of the interviewers were introduced into evidence. Maine's scorecard indicates she failed to give a numerical designation to one of complainant's answers, and contained an apparent mathematical error.[2] Hunt also made a

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[2] Although she announced scores of 57 points for both candidates, a count of the points she assigned showed only 49 for complainant, and the most that she could have

mathematical error.[3] Hunt thought that the tide turned in favor of Shanley at the point when the scores were announced, and that the the only remaining consideration was whether a better female candidate could be found to address the concern of the faculty members about having a female counselor available to work with female students. According to Maines, she was in favor of hiring complainant even though she scored the two evenly, because of: Her observations of complainant's performance as a counselor, her belief that one of the counselors should be female, and her feeling that the incumbent should get the job if all else were equal. Gilletti would also have selected complainant for the same reasons expressed by Maines, and had even given complainant a slightly higher score. Moreover, he sharply disagreed with Hunt's statement to the panel that complainant lacked initiative, and cited a specific program complainant had initiated. Gilletti and Maines both believed Moreford also favored complainant by a slight margin, her point count notwithstanding. Both Gilletti and Hunt thought the parent representative was "on the fence".

While numerical scores were ostensibly not to be controlling, the following is a synopsis of what they indicate:

- Hunt consistently awarded lower scores than did the faculty members of the panel and Davis;

- Davis awarded Shanley a point count identical to the average score awarded to him by the faculty members of the panel;

- A chasm developed between the ratings awarded to complainant by the faculty members and administrators, with the faculty

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given complainant would have been 54 had she assigned a numerical designation to each of complainant's responses.

[3] Although he announced a score of 47 points for Shanley, review of his sheet shows the point total to be 51.

> members awarding her an average of 56 points on the items scored, while Davis tallied 44 points and Hunt awarded the lowest total at 40 points.

Thus, while the average score awarded by faculty members for Shanley was approximately 2 points (less than 5%) higher than the average score awarded by the two administrators, the differential with respect to complainant was nearly 29%. The disparity is most striking with respect to questions 3, 7, and 12, which dealt with the applicant's view of the role of a counselor, counseling strategies, and ideas as to the expanded role a counselor could assume to assist the employer in fulfilling its mission where a levy had failed. In evaluating Shanley's responses, the faculty representatives awarded an average of 4.67 points, while the administrators awarded an average of 4.5 points. In evaluating the complainant's responses to the same questions, the faculty members awarded an average of 5 points, while the administrators awarded an average of 2.67 points.

Davis contends she was further influenced by excellent references furnished on behalf of Shanley. Hunt and Davis had furnished excellent references on behalf of complainant in May of 1998, when her future employment status was uncertain, and those letters were based on her performance as both an SBD teacher and a counselor. It is also noteworthy that two teachers, Maines and Minta Norton, and counselor Gilletti all testified at the hearing in most favorable terms concerning complainant's work as a counselor. In addition, Davis had given complainant a favorable performance evaluation for her work as a counselor.

Davis indicated she was strongly interested in hiring Shanley because of his extra-curricular activities, primarily as a basketball and track coach. Davis stated a belief that complainant did not volunteer for any extra-curricular roles.

Both Gilletti and Maines believed the panel was going to reconvene to interview additional applicants and/or make a final decision. Hunt and Davis stated that the panel would only reconvene if an additional female candidate was found, and Davis said the hiring decision was hers alone to make. Davis researched resumes on file, and claimed to have found no suitable female candidate. In the end, Davis was so taken with Shanley that she rated him as a "10" on the candidate recommendation form she completed to initiate a job offer, even though the form itself indicated "9" to be the highest numerical designation to be given an excellent candidate. She rated the complainant as a "6", which signifies satisfactory.

Complainant's Reactions

Several days after the interviews, Davis telephoned to advise complainant of the decision to hire Shanley, and to notify complainant that her assignment as a special education teacher would be fulfilled at Cedarcrest. Because complainant felt Davis' attitude would make it impossible for her to succeed at Cedarcrest, complainant notified the respondent, on August 14, 1998, that she would not accept the contract for the following school year. Complainant accepted employment as a special education teacher in another school district, where she worked during the 1998-99 school year.

Complainant and her husband each testified that complainant was depressed during the summer of 1998, slept a lot, lost her appetite, lost her interest in sex, and lacked energy to participate in her normal activities such as biking and hiking. Complainant ascribes these symptoms to what she perceived to be vindictive actions by Davis in regard to filling the counselor position. Since complainant was not aware of the decision on the counselor position until approximately July 23, 1998, it appears the time

period involved was the five to six weeks until the end of the summer vacation and her resumption of teaching duties.

POSITIONS OF THE PARTIES

Complainant contends that Davis induced her to take the counselor position by stating a belief that the employee on leave would not return to work and by assuring that complainant would then get the job on a permanent basis, so that she was deceitfully induced to give up a job which she would have had on a permanent basis. Complainant contends she performed in a highly satisfactory manner as a counselor, and that Davis indicated on many occasions her satisfaction with her work performance. Complainant asserts that Davis stated her unhappiness in no uncertain terms after complainant voiced concerns about her job security to the union. In the context of the second levy failure and rumors that an assistant principal would take the counselor position she was filling, the union contacted Davis' superiors, and the union and employer worked out an offer of permanent employment to complainant as a special education teacher. Complainant then contends that, although Davis permitted complainant to apply and be interviewed when the counselor position again became open, Davis discriminated against complainant in awarding that position because of complainant's previous invoking of union assistance. Complainant requests an award of attorney fees, $20,000 damages for pain and suffering, and placement in a counselor position either at Cedarcrest or another school if no opening exists at Cedarcrest.

The employer contends that complainant's seeking union assistance was not a factor in the decision to give the counselor position to Shanley. It argues that complainant was mistaken in her belief as to animus on the part of Davis, and contends in effect that it went the proverbial extra mile when it offered the special education

position to complainant to demonstrate its willingness to accommodate the union and allay complainant's concerns regarding job security. According to the employer, the sole reason Shanley was selected for the counselor position was that he was the better candidate. The employer contends neither the facts nor the statute support the demand for damages.

DISCUSSION

Applicable Legal Standard

An interference violation can be found under RCW 41.59.140(1)(a), where employee(s) can reasonably perceive employer actions as a threat of reprisal or force, or promise of benefit, associated with the employee(s) exercise of protected activity, without regard as to whether the employer intended such an effect. North Valley Hospital, Decision 5809-A-1 (PECB, 1997), affirmed WPERR CD-965 (Okanogan County Superior Court, 1998). Were this case limited to the alleged threats made by Davis to complainant after complainant sought assistance from the union, that simple analysis would be all that was necessary.

A discrimination violation under RCW 41.59.140(1)(c) involves actual action for or against an employee, such as the alleged denying of the complainant the counselor position, and requires use of a more complex test set forth in Educational Service District 114, Decision 5238-A (EDUC, 1996), citing Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991), and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991):

- A prima facie case for finding a discrimination violation is established when: An employee exercises a right protected by statute or communicates to the employer an intent to do so; is

then deprived of an ascertainable right, benefit or status; and a causal connection exists between the exercise of right and the employer response. The complainant has the burden to establish a prima facie case;

- Where a prima facie case of discrimination is established, the respondent is then obligated to articulate legitimate, non-retaliatory reasons for its actions; and

- 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. This may be established by showing that: (1) the employer stated reasons for its actions were pretextual; and/or (2) union animus was nevertheless a substantial motivating factor behind the employer's action.

The Context in Which These Allegations Must Be Examined

This case requires resolution of sharp conflicts in testimony in order to render a decision. Credibility determinations are more than ordinarily difficult, because it does not appear that certain key witnesses on either side have been entirely candid or forthcoming in various aspects of their testimony. Accordingly, on occasion the Examiner credits some, but not all, of the testimony given by a particular witness.

In deciding which version of events is more credible, appropriate weight has been given to the demeanor of the witnesses on the stand. Each witness' testimony has been considered in conjunction with established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. In evaluating testimony, recognition has been given to a general tendency to testify about impressions or interpretations of

what was said or done, rather than to give a verbatim account of what was seen or heard. Experience has shown that witnesses may express what they intended to say in clearer or more explicit language than they actually used in conversations, and this factor has also been included in the evaluation of testimony. Where any witness has testified in contradiction with the findings of fact set forth below, such testimony has been discredited either as conflicting with the testimony of credible witnesses or documentary evidence or as being in and of itself unworthy of belief. All testimony has been reviewed and carefully weighed in light of the entire record. Where specific credibility conflicts arise, reasons for crediting or discrediting any particular witness on any particular portion of his or her testimony will be identified.

The evidence brought forth by both parties makes it clear that the union and employer have a relationship which is characterized at the top levels of both organizations by a high degree of trust and a mutual desire to resolve issues in a collaborative manner. That admirable attitude does not, however, absolve the employer from close scrutiny of and ultimate responsibility for discriminatory actions of its agents. What must be determined in this case is whether the decision of Deborah Davis, as principal at Cedarcrest, to deny complainant the counselor position in July of 1998 was substantially motivated by the fact that complainant had gone to her union to address her concerns about her job security. If such is the case, the employer must answer for the conduct of its agent under the applicable legal standard.

Prima Facie Case of Discrimination

Once employed as an SBD teacher, it appears complainant was a very satisfactory employee. The evaluation of her work performance by Davis, the testimony by fellow employees, and the clear evidence

that Davis and Hirst urged her to apply for the counselor position all evidence that fact, which is deemed significant below.

While Davis denied recall of the discussion, both complainant and Hirst testified that two counselor positions were open at another junior high school at the time complainant was approached about taking the counselor position at Cedarcrest. While there is no guarantee that she would have been selected for either of those jobs, there is credible evidence that Davis and Hirst actively discouraged complainant from applying for those openings. That fact is also deemed significant below.

Davis and Hirst concede telling complainant that the employee on leave from the counselor position would not return from that leave of absence. The evidence also supports complainant's claim that Davis and Hirst held out the carrot of having the counselor position on a permanent basis when complainant was considering taking the counselor position on a non-continuing contract. Hirst recalled telling complainant that she would have a leg up when the position became open, if she did a good job. Davis did not deny having told complainant that she would get the job on a permanent basis. Further, fellow-counselor Gilletti testified that he twice heard Davis tell complainant that she would get the job on a permanent basis, because she was doing a good job.

Two teachers at Cedarcrest and Gilletti all testified, without contradiction, that complainant's performance as a counselor was superior. Moreover, compelling evidence that complainant performed in a more-than-satisfactory manner while employed as a counselor is furnished by the written evaluation by Davis dated of May 28, 1998, and by a letter of reference dated May 8, 1998, wherein Davis refers to complainant's performance as a counselor as "outstanding". To the extent there is any conflict, the Examiner credits the testimony of Gilletti, who has no reason to lie and whose

testimony is consistent with the official written performance evaluation. It is only reasonable to conclude that Davis would have given complainant assurance of future employment, given Davis' documented belief that complainant was filling the position more than adequately on an interim basis. In view of the foregoing, one might have expected that complainant would have been awarded the counselor position when it became open on a permanent basis, perhaps even without an interview.[4]

Complainant did not seek assistance from the union until her promised elevation to permanent status was placed in jeopardy by the levy failure and the rumors concerning the reversion of an assistant principal to the counselor position within the bargaining unit. The fact that complainant may have perceived, and expressed, that she had been talked out of a permanent position is irrelevant to this inquiry: She had a statutory right to seek help from the union; the union had a right and obligation to intercede on her behalf; any reprisals against that intervention are unlawful.

Complainant's testimony about the comments made to her by Davis after the union interceded with Davis' superiors is clearly sufficient to support a prima facie case of discrimination. Although there was some debate and doubt as to the precise timing and location of that conversation, complainant's testimony about what was said is credible.

The change of Davis' attitude toward complainant is evidenced by Davis' comments to Maines while arranging for Maines to participate

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[4] While the collective bargaining agreement calls for interviews to fill a continuing contract position, that process can be circumvented. It is clear that no competitive process was conducted before complainant was offered the permanent position as a special education teacher, to resolve the union's complaint.

in the interview process. This sudden change of attitude coming soon after the union intervened on complainants' behalf with Davis' superiors supports a finding that there was a causal connection between the union activity and subsequent events.

Evaluation of the Counselor Selection Process -

The employer has articulated a "business as usual" defense based on the interview process conducted under Davis' direction. That defense invites close scrutiny of the backgrounds of the two candidates, the test scores awarded by the panel members to the two candidates, and surrounding circumstances including the needs of students. The Examiner concludes the selection of Shanley was a pretext designed to conceal union animus on the part of Davis.

While Shanley had five years experience as a counselor at the junior high level in a school district in an east coast state, complainant was a strong candidate with an established record of performance on site. In addition to her work at Cedarcrest, she had prior experience as a grade school counselor for four years and received her master's degree in counseling. Although Davis testified that she did not interview female candidates who had prior counseling experience at the grade school level (citing the transition involved), this did not prevent Davis from urging complainant to accept the counselor position the prior year with no experience as a counselor outside of the grade school level. The pro-active effort of Davis and Hirst to discourage complainant from seeking the other counselor positions that were available for the 1997-98 school year further discredits Davis' narrowed focus for 1998-99, after complainant sought union assistance.

While Shanley had excellent references, complainant was a strong candidate with an established record of performance on site. Teachers and the other counselor at Cedarcrest were unanimous in the use of superlatives to describe complainant's work as a

counselor. Davis herself had given Rigoulot an outstanding written evaluation for her work as a counselor and a glowing job reference. Hunt also furnished complainant with an outstanding written recommendation. Again, the evidence discredits the change of attitude by Davis and Hunt shortly after complainant took her concerns about job security to the union.

Although the faculty members rated Shanley higher than complainant on responses to non-objective interview questions, the quantitative difference between the two candidates was negligible. This is predicated upon the testimony of Maines, who believed she had given the two candidates tie scores, and Gilletti who had in fact given complainant one more point than Shanley. Moreford's scorecard indicated Shanley ahead of complainant by only one point.

Davis testified she was surprised and dismayed by the fact that the faculty members failed to rate complainant as significantly better than Shanley, and stated a belief that faculty members tend to be supportive of those they have worked with. However, if two candidates both respond well to the questions posed, and are both excellent candidates, it is entirely reasonable for objective evaluators to rate them as substantially equal. Thus, there is little to justify Davis' reaction to the comparative test scores given by the faculty members.

The testimony of Davis that five of the six panel members rated Shanley higher than complainant is untrue, when one considers the actual recorded test scores. The parent representative did not score the candidates or voice a preference between them. Overall, however, it is clear all of the faculty members preferred complainant based on her demonstrated proficiency as a counselor. Moreover, Assistant Principal Hunt noted that the faculty members weighed in heavily in support of complainant in the post-interview discussion. Viewed in this context, Davis' testimony that she had

no sense that the faculty members supported complainant must be discredited as inexplicable. Moreover her reasoning that Shanley was a superior candidate because of a proven track record ignores completely the complainant's outstanding service in her year as a counselor and involves an incredible act of faith on Davis' part that Shanley based only on references and an interview was the better choice. It, again, is difficult to logically reach Davis' conclusion.

Lastly, the perceived need and expressed preference of the faculty members for a female counselor makes the selection of Shanley even more questionable. Indeed, the need for a female counselor was implicitly recognized by Davis, in deferring the hiring decision until she could determine whether there were any suitable females who might be interviewed for the job. Again, logic dictates a conclusion that the needs of the students were ignored in the decision made soon after complainant sought help from the union.

Davis' Actions Were Motivated by Anti-Union Animus -
It is appropriate to also consider whether animus toward complainant's union activity protected by Chapter 41.59 RCW caused, or was a substantial factor in, the employer's decision to deny complainant the counselor position in July of 1998.

From the evidence, the earliest that the employer could have been aware of complainant's request for union assistance was May 21, 1998, when Holdaway sent the e-mail to Steve Brown concerning complainant's situation. According to Rawlings, he took no action with respect to the union's contact concerning complainant for a period of time. The period of Rawlings' inaction easily included May 28, 1998, when Davis issued the highly-complimentary performance evaluation of complainant. Complainant did not submit her synopsis of events to the union until early June, and the high-level discussions leading to the contract offer occurred in mid-

June. It is inferred that Rawlings contacted Davis about the union's complaint in that same mid-June period.

As noted above, Davis evidenced a clear (and very negative) change of attitude toward complainant after the union interceded on her behalf. There can be no doubt that Davis was aware of complainant's request for union assistance when she made her statements to complainant, when she spoke with Maines in the course of arranging for Maines to participate in the interview process, when she invited complainant to interview for the job, when she selected the other candidate(s) for interview, when she wrote the interview questions, when she established the scoring protocol for the interview panel, and when she personally participated on the interview panel.

Further support for concluding that Davis' hiring decision was discriminatorily motivated is found in the testimony of Gilletti and Maines. Neither of these individuals have been shown to have any motivation to discredit Davis or to support complainant. Except to the extent noted below, their testimony is credited. While Gilleti's testimony concerning what complainant told him with respect to Davis' comments concerning complainant's contact with the union suffers from the same vagueness as to a time frame as does complainant's testimony and is hearsay, it is believable. There is no rational basis for complainant telling Gilletti of the incident other than it, in fact, occurred. In addition to independently establishing animus on the part of Davis, Maines' testimony supports complainant's testimony about the conversation with Davis because, in significant part, it parallels complainant's testimony as to Davis' unhappiness with what Davis thought was a misstatement of fact. While not in so many words telling Maines that her dissatisfaction was due to complainant's contact with the union, Maines reasonably inferred such a connection. Additionally, Davis' comments to Maines make it manifest that Davis entered

the interview process with a fixed intent to deny complainant the counselor position. Maines testimony is credited because she had no motive to prevaricate and because Davis, as in many other instances, did not deny the conversation but conveniently failed to recall it.

While both Davis and Rawlings testified nothing was said by the latter that would convey to Davis the impression that the employer had a problem due to the union contact concerning complainant, there can be no doubt that the focus of employer concern could not have been a statement attributed by the union to Hirst. As a bargaining unit employee, Hirst had no supervisory authority. Further, the union's complaints placed onus on both Davis and Hirst for complainant's predicament. At the time of the decision to hire Shanley, Davis was fully aware of the union's accusation. Her comments to Rigoulot and Maines indicate she was deeply angry about and resentful of complainant's contact with the union, and the reflection the union's contact with her superiors had upon her. Taking into account her recent problems arising out of complaints to the union by over 30 teachers, complainant's request for union assistance undoubtedly provoked a very strong negative reaction by Davis.

In view of the credited testimony and the generally irrational basis for Davis failing to give complainant the counselor position, particularly after repeated assurances to the contrary, complainant has met her burden of proof to show that anti-union animus was a substantial factor, if not the sole reason, for Davis' decision to deny her the counselor position in July of 1998. Together with the evidence of the previous discussions and performance evaluation, the sudden antipathy toward complainant can only be explained in the context that complainant's contact with the union was the proximate cause for Davis' decision. By virtue of such actions,

the respondent discriminated against the complainant in violation of RCW 41.59.140(c).

Derivative and Independent "Interference" Violation

The finding of a "discrimination" violation routinely carries with it a derivative "interference" violation. Since fellow employees were aware of complainant having gone to the union about her situation, the subsequent decision by Davis to deny complainant the counselor position coupled with Davis' comments to complainant and Maines, complainant and other bargaining unit employees could reasonably perceive a threat of reprisal associated with the exercise of rights protected by RCW 41.59.060. This is particularly true where, as in this case, a substantial portion of the bargaining unit perceived they were at risk if they complained to the union about Davis. Respondent therefore independently interfered with employee rights in violation of RCW 41.59.140(a).

The Appropriate Remedy

The appropriate remedy for violation of the statute is an order reinstating the employee to the disputed position or a substantially equivalent position, and making the employee whole for lost pay and benefits, computed with interest from the date of unlawful action to the effective date of the unconditional offer of reinstatement, less interim earnings. See, WAC 391-45-410. In this case, the make-whole remedy includes credit with seniority in the Bethel School District for the 1998-99 school year, the difference, if any, between what she earned in the Eatonville School District and what she would have earned in the Bethel School District, and the difference, if any, between the benefits she received in the Eatonville School District and those she would have received in the Bethel School District. Respondents found guilty of unfair labor practices are also routinely required to post and

make permanent record of appropriate notices to employees. Such remedies are appropriate in this case, and are ordered below.

The complainant's request for "damages" is denied. Extraordinary remedies are ordered only when a defense is frivolous, where there is a pattern of egregious conduct, or where needed to make an effective order. City of Burlington, Decision 5841-A (PECB, 1997). Although the Educational Employment Relations Act includes the word "damages" at RCW 41.59.150, complainant cites no case where damages for pain and suffering have been awarded under the statute. Even assuming such an award is intended under the statute, discretion is left to the Commission to fashion an appropriate remedy. For several reasons, there appears to be no basis for departing from the standard make whole remedy of reinstatement, restoration of seniority, and back pay and benefits where applicable, and signing, posting, and publication of a notice to employees:

First, while violative of the statute, the respondent's conduct is not of such an egregious nature as to justify an extraordinary remedy. Indeed, the respondent's overall relationship with the union at the upper echelons is exemplary, and its top administration intervened in a positive manner when approached by the union. The union believed the offer of a special education position was just.

Second, the respondent has, in essence, run afoul of the statute because of the unlawful conduct of a maverick principal with her own agenda. Under established principles of respondeat superior the respondent is responsible for the unlawful action of Davis since her actions were obviously within the scope of her authority. While the employer will need to deal with Davis, there is no evidence supporting a conclusion that an extraordinary remedy such as an award of damages would effectuate the purposes of the act.

Third, a complainant must have "clean hands" to obtain an equitable remedy. Under the most favorable view of the facts, it

cannot be denied that complainant's description of her situation to the union was not entirely candid. There can be little doubt that she knew there was no ironclad guarantee of a permanent job when she took the counselor position under a leave replacement contract. Also, there can be no doubt that she knew her original position as an SBD teacher was also on a non-continuing contract basis. The misleading nature of her statements to the union likely contributed to the vitriolic nature of the union's contacts with the employer. While this evidence of provocation does not excuse the subsequent unlawful actions by Davis, it undermines complainant's request that the Examiner break new ground in the remedies arena.

Lastly, the damages claimed by complainant are speculative, unsupported by independent evidence from medical experts, and are of a nature not ordinarily reasonably to be expected to flow from the respondent's unlawful conduct.

FINDINGS OF FACT

1. Bethel School District is an employer within the meaning of RCW 41.59.020(5) and .140(a) and (c). At all times material herein Deborah Davis was the principal of Cedarcrest Junior High School in the Bethel School District and a supervisor within the meaning of RCW 41.59.020(4)(d). At all times material herein Elizabeth Rigoulot was an employee within the meaning of RCW 41.59.020(4). At all times material herein Bethel Education Association and Summit Uniserv Council were labor organizations within the meaning of RCW 41.59.020(1).

2. Rigoulot was hired by the employer in January 1997 as an SBD teacher at Cedarcrest Junior High School in a non-continuing contract position.

3. While so employed, Rigoulot was approached by Davis who urged her to accept a non-continuing contract position for a counselor at Cedarcrest Junior High School. The position was open for the 1997-98 school year due to the incumbent taking a one-year leave of absence.

4. Rigoulot was induced to take the counselor position by Davis' assurance that the incumbent would not return to work and that Rigoulot would then get the job on a permanent basis.

5. On various occasions during the 1997-98 school year, Davis told Rigoulot, in effect, that she was doing a good job and that she would have the counselor position in the future because the incumbent would terminate her employment at the expiration of her leave.

6. In April 1998, with the second failure of a bond levy, Rigoulot heard a rumor that an assistant principal was going to bump into the counselor position occupied by Rigoulot for the 1998-99 academic year.

7. Alarmed at the prospect of losing her position, Rigoulot talked to Davis regarding her employment situation. In Rigoulot's judgment, Davis was unsympathetic and in effect told her to be prepared to seek other employment.

8. Concerned with Davis' response, Rigoulot contacted a fellow employee, Ron Holdaway, who was also a union representative. Rigoulot either told Holdaway or Holdaway assumed that the position she had originally filled was a continuing contract position. In any event, Holdaway was informed by Rigoulot that Davis had assured her that she would have the counselor position on a permanent basis and that relying on that

representation she had taken the counselor position and faced the prospect of losing employment as a result thereof.

9. On May 21, 1998, Holdaway e-mailed what he understood to be Rigoulot's version of events emphasizing his belief that the administrators (Davis and Hirst) had deliberately misled Rigoulot as to the job security she would enjoy in the counselor position to satisfy short term employer needs. He also emphasized the contemporaneous efforts of the two to discourage Rigoulot from applying for two permanent counselor positions which were open at another junior high and his belief that the employer had a moral obligation to fulfill the promise made by Davis and Hirst.

10. By at least May 23, 1998, the complaints of the union concerning Rigoulot came to the attention of upper level administrators of the employer.

11. At all times relevant herein, the employer and the union have enjoyed a cooperative and amicable relationship at the upper echelons of the organizations.

12. During the period between May 23, 1998 and no later than June 17, 1998, the employer reviewed the union's contentions respecting Rigoulot, concluded that in a spirit of maintaining the harmonious relationship between the parties, and because of the need for special education teachers, it would offer a continuing position as a special education teacher to Rigoulot for the 1998-99 school year.

13. The employer disposition was made after Davis gave the employer an excellent recommendation with respect to Rigoulot's performance as an SBD teacher. The union believed

the offering of the special education position to Rigoulot was a fair resolution of its complaint.

14. Sometime after June 3, 1998, Davis met with Rigoulot. Davis in essence informed her that she had just talked to the employer's executive director of human resources and she (Davis) did not like what Rigoulot had told the union. Davis went on to basically state that she was in trouble with her superiors as a result of the contact. Davis continued the conversation noting that Rigoulot knew when she took the counselor position that it was not a continuing position and she should stop being a baby and deal with the situation. Davis concluded by informing Rigoulot she was a trouble maker, that administrators talk and did not like troublemakers in their schools.

15. Sometime in June or July 1998, Davis became aware that the position for a counselor was open because the incumbent did not return to work and the employee slotted to bump into the job had taken another position.

16. Davis told Rigoulot that the position for a counselor was open and she could interview for the job.

17. In July 1998, prior to the interviews of applicants for the counselor position on July 20, 1998, Davis requested Cedarcrest teacher Harriet Maines to participate in the interview panel. Maines, in accepting, told Davis that Rigoulot should get the job because of the outstanding work she had done as a counselor in the past year. Davis responded that she did not want Rigoulot in the counselor position for several reasons, including Rigoulot's lying about what Davis had said about her employment status as a counselor. Maines

inferred that Davis was referring to Rigoulot's contact with the union on the matter.

18. In May 1998, Davis had given Rigoulot an excellent work performance evaluation and a highly complimentary recommendation, both with respect to Rigoulot's performance as a counselor. Three fellow faculty members, including two who served on the interview panel, believed Rigoulot had performed in an exemplary manner.

19. On July 20, 1998, the interview panel met with Rigoulot and another applicant, Kevin Shanley.

20. Davis developed 12 questions to be asked each individual and directed the panelist to assign a point total to each response ranging from a low of 1 to a high of 5. After the interviews were completed, the panel began a discussion of the applicants. A consensus among the faculty panel members immediately coalesced in support of Rigoulot. This was predicated upon her work performance at Cedarcrest as a counselor, the perceived need to have a female counselor to deal with unique problems of female students, and her responses to interview questions. The faculty panel members agreed both candidates made outstanding presentations resulting in a virtual tie insofar as responses to questions were concerned.

21. Davis' scores with respect to Shanley mirrored those of the faculty panel members, but were nearly 30 percent lower for Rigoulot than those compiled by the faculty panel members.

22. Davis' reasons for not awarding Rigoulot the counselor position were pretextual and intended to mask the substantial motivation of Davis to retaliate against Rigoulot for coming to the union with her concerns about job security.

23. Teachers at Cedarcrest were aware of Rigoulot's complaint to the union concerning what she was told by Davis when she took the counselor position. At least as late as the summer of 1997 a substantial number of teachers at Cedarcrest feared repercussions if Davis knew they were complaining to the union. In the spring of 1998, a union official employed at Cedarcrest expressed concern about a negative reaction from school administrators because of his raising Rigoulot's complaints.

24. Rigoulot, after not being offered the counselor position, revoked her acceptance of a continuing education teachers contract with the employer when she became aware that the position would be at Cedarcrest and spent the 1998-99 school year as a special education teacher in the Eatonville School District.

25. Rigoulot's evidence with respect to pain and suffering and emotional distress was unconvincing.

CONCLUSIONS OF LAW

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

2. The evidence as described in the foregoing Findings of Fact, establishes a prima facie case sufficient to support an inference that union animus in reprisal for the exercise of rights protected by RCW 41.59.140 was a substantial motivating factor in the employer's failure to offer Elizabeth A. Rigoulot a continuing contract as a counselor at Cedarcrest Junior High School for 1998-99 academic year. The employer

thereby has interfered with, restrained or coerced the complainant in violation of RCW 41.59.140(a).

3. The evidence, as described in the foregoing Findings of Fact, establishes that the reasons asserted by the employer for its failure to offer the counselor position to Elizabeth Rigoulot were pretexts designed to conceal reprisal for the exercise of employee rights protected by RCW 41.59.140, and the employer thereby has interfered with, restrained or coerced Elizabeth Rigoulot in violation of RCW 41.59.140(a).

4. The evidence, as described in the foregoing Findings of Fact, establishes that Elizabeth Rigoulot failed to receive the counselor position at Cedarcrest Junior High School for the 1998-99 academic year as a direct result of the employer's unlawful discrimination against her in violation of RCW 41.59.140(c).

5. Rigoulot and other employees could reasonably perceive the employer's actions in not awarding her the counselor position at Cedarcrest Junior High School for the 1998-99 academic year as a threat of reprisal associated with the exercise of rights protected by RCW 41.56.040, so that the employer interfered with employee rights in violation of RCW 41.59.140(a).

ORDER

Bethel School District, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

a. Interfering with or discriminating against Elizabeth Rigoulot for her exercise of her collective bargaining rights under Chapter 41.59 RCW.

b. In any like or related manner, interfering with, restraining or coercing its employees in their 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 Elizabeth Rigoulot immediate and full reinstatement in the counselor position she occupied at Cedarcrest Junior High School if it still exists, and if not to any counselor position which is open and to which her seniority would entitle her. Make her whole by payment of back pay and benefits, for the time she would have worked in the counselor position for the period from the effective date of the start of the 1998-99 academic year at Cedarcrest Junior High School to the date of the unconditional offer of reinstatement made pursuant to this Order, less interim earnings. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410.

b. 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.

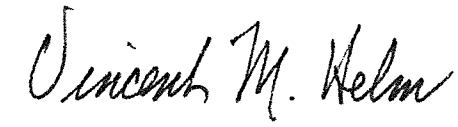
c. Read the notice attached hereto and marked "Appendix" aloud at the next public meeting of the Board of Bethel School District and append a copy thereof to the official minutes of said meeting.

d. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

e. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington, on the 8th day of July, 1999.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



VINCENT M. HELM, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

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

WE WILL offer reinstatement to Elizabeth A. Rigoulot, as an employee in good standing, in her counselor position at Cedarcrest Junior High School and will provide her with accumulated seniority, back pay and benefits for the period since the commencement of the 1998-99 academic year.

WE WILL read this notice into the record of the next public meeting of the Board, and append a copy thereof to the official minutes of such meeting.

DATED: _____

BETHEL 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.