STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SELAH EDUCATION ASSOCIATION,	)	
	)	
Complainant,	)	CASE 14852-U-99-3739
	)	
vs.	)	DECISION 7190 - EDUC
	)	
SELAH SCHOOL DISTRICT,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Respondent.	)	AND ORDER
	)	
	)	

Faith Hanna, Staff Attorney, Washington Education Association, appeared on behalf of the complainant.

Vandeberg Johnson & Gandara, by William A. Coates, appeared on behalf of the respondent.

On October 25, 1999, the Selah Education Association (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Selah School District (employer) as respondent. A preliminary ruling was issued on November 2, 1999, under WAC 391-45-110, finding a cause of action to exist on allegations of:

> Employer discrimination against employee Art Green in reprisal for his protected activities as an officer and representative of the Selah Education Association, in violation of RCW 41.59.140(1)(c), by a course of conduct including manipulation of positions for which Green had applied since April 25, 1999.

The undersigned Examiner was assigned to conduct further proceedings in the matter. A hearing was held on March 28, 29 and 30, 2000. Both parties had a full opportunity to present their

evidence and arguments. The record was closed with filing of briefs on June 26, 2000.

Based upon the evidence presented, the arguments of the parties, and the record as a whole, the Examiner finds that the union did not carry its burden of proof that the employer had interfered with Green's rights as an employee protected by statute; nor did it prove that the employer's formulation of teaching assignments for the 1999-2000 school year discriminated against Green because of his union office or activity. The complaint is DISMISSED.

BACKGROUND

The Selah School District serves approximately 3700 students in Yakima County.[1] Jerry Jenkins was the superintendent of the district at all times pertinent to this case. The employer's operations are accredited by the Northwest Association of Schools and Colleges, which requires that teachers have certain preparation for teaching specific classes.

Art Green graduated from Central Washington University (CWU) in 1978, with a major in physical education and minor in traffic education. He holds a standard K-12 teaching certificate, and was a substitute teacher in several school districts until 1981, when he became an employee of the Selah School District. In 1983, he earned a master's degree in physical education from CWU. Green's first assignment at Selah was teaching driver education in an "eight-tenths full time equivalency" (0.8 FTE) position.

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[1] 1998-1999 Washington Education Directory, Barbara Krohn and Associates.

Green's Teaching and Qualifications to Teach Mathematics

Green has taught physical education, driver education, and health classes at the 8th, 9th, 10th, 11th and 12th grade levels during the regular school year, and taught driver education in the employer's summer program.[2] Approximately 13 years ago, a building principal asked Green to teach some mathematics classes. Although Green did not have a background in mathematics as he had only taken a basic math class in college, he agreed to teach a prealgebra class and a basic math class. Green testified that he went through the textbook for the prealgebra class page by page, and worked all of the problems, before he attempted to teach them to the students. In the 1997-1998 school year Green mostly taught mathematics, including four algebra classes, with one physical education class "...thrown in."

Issues concerning Green's qualifications to teach math arose on a number of occasions beginning in the mid-1990's. Superintendent Jenkins first raised the issue in 1994-1995, citing the standards of the accreditation organization, but he believed at that time that Green was "grandfathered" because he had been successfully teaching math for some years. The question re-emerged at a faculty meeting in August of 1997, when Jenkins announced that several teachers would need to take additional classes to meet the minimum qualifications of the accreditation agency. When the two met several days later, Jenkins told Green that he needed to take an additional 5 credits of college level algebra. Green took a 5

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[2] Additionally, Green was the head wrestling coach at the employer's junior high school and assistant wrestling coach at the high school for 2 years, after which he served as the head wrestling coach at the employer's high school for 11 years.

credit algebra class from City University,[3] and the employer paid for the books and tuition, as well as for time that Green spent on the class. When Green submitted a claim for 55 hours spent on the class, Jenkins responded that the employer's policy only allowed 10 paid hours per college credit. Green sent a letter to the employer's school board concerning this issue, but no change was made in the policy and Green was paid for 50 hours.

In June of 1998, after their audit team visited Selah School District, the Northwest Association informed Green that he was still one credit short of meeting the standard for an algebra teacher. Because of that shortfall, Green was informed in July of 1998 that his assignment would have to be changed so that he was only teaching basic math. Later, because of the disruption that would result from removing Green from teaching algebra, the employer decided that it would give Green one year in which to secure the appropriate course work in algebra. Green thereupon decided that he did not want to deal with the issue any more, and he indicated that he would only teach basic math, prealgebra, health, PE or driver's education the following year. Nevertheless, Green taught four freshman algebra classes (0.8 FTE),[4] and only one physical education class (0.2 FTE) during the 1998-1999 school year.

A Time of Change

Prior to the autumn of 1999, the employer operated two elementary schools (grades K-5); one middle school (grades 6-8); one high

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[3] The class was a distance learning class done completely by correspondence, without any on-site class time.

[4] Although other teachers were also teaching algebra, Green testified that he was teaching the majority of the district's algebra classes.

school (grades 9-12); and one alternative school (grades 6-12). The opening of a new intermediate school in the autumn of 1999 brought about significant change in the school district. The new school did not replace an existing facility, but impacted all of the schools in the district by adding another school level, a junior high school, to the historical division of grade levels: Fifth grade classes were moved from the elementary schools to the new intermediate school; sixth grade and seventh grade classes were moved from the middle school to the new intermediate school; the middle school became a junior high school serving the eighth grade and ninth grade classes; and the high school population was limited to the 10th, 11th and 12th grades. This new arrangement resulted in smaller schools, and aligned them with the benchmark grade levels (4th, 7th and 10th) established by the Washington Assessment of Student Learning (WASL) tests. This new class alignment also meant that staff and teaching assignments in every district school were impacted.

Green's situation was further complicated by the accreditation issue. On April 13, 1999, the employer notified Green that his probable assignments for the next school year would be 0.8 FTE basic math and 0.2 PE, both at the junior high school. On April 20, 1999, Green notified the employer that he wanted to apply for a 0.8 FTE physical education position at the high school. The vacancy was to be created by the retirement of a high school teacher who taught 0.8 FTE physical education and 0.2 FTE drafting.

Green's Union Activity

On April 27, 1999, Green was elected to the office of "executive secretary" of the local union. Although the union's officers include an elected president, a president-elect, a past-president, and a secretary-treasurer, it is the executive secretary that is

responsible for representing the certificated employee bargaining unit as chief negotiator and as chief grievance representative. Prior to his election, Green had not held any union offices, nor had he represented the union in any manner in an official capacity.

In May of 1999, just prior to taking office on June 1, 1999, Green sat in on his first negotiating session with the employer. After that first meeting, Green called Jenkins and stated that he wanted to change some of the procedures used in negotiations. Green wanted the participants to sit as two negotiating teams (rather than sitting in alternating seats), he wanted the union team to meet in caucus (which had not been the recent practice), and he indicated that he would be the chief spokesperson for the union team. Jenkins agreed with the proposed changes.

At the next negotiations session, on June 14, 1999, Jenkins stated that he viewed the changes in bargaining procedure as less collaborative. The parties proceeded with negotiations in the format advocated by Green, however, and they reached agreement on contract "reopeners" after three or four meetings.

Reassignments and Conversations

The parties to this case produced evidence concerning a number of job postings, reassignment requests, and conversations in the spring and summer of 1999. Those included:

- The employer posted the 0.8 FTE high school physical education position on May 4, 1999, but paired the assignment with a 0.2 FTE special education position at the alternative school. The employer posted the drafting assignment as a stand-alone 0.2 FTE position.

- On June 7, 1999, Green told the junior high school principal that he was interested in 0.6 FTE physical education position at his school.

- Also on June 7, 1999, Green notified the employer that he was interested in a 0.8 FTE physical education position at the high school.

- On June 8, 1999, Green submitted a request form for a transfer to a physical education assignment at the junior high school or any combination of physical education assignments at the junior high school and high school.

- In mid-June, Green was notified that he would be assigned the 0.6 FTE physical education position at the junior high school.

- Later in June, Green was assigned to a 1.0 FTE position as a physical education teacher in the junior high school.

- On August 4, 1999, Green submitted a request for a change of assignment. He specifically mentioned being interested in a split assignment between the high school and the junior high school.

- On August 24, 1999, Green submitted a Request for Change of Assignment to teach 0.6 FTE physical education at the high school, coupled with teaching 0.4 FTE physical education at the junior high school. At that time, an employee named Smith was under contract for the classes at the high school.

- Jenkins and Green had a telephone conversation on August 25, 1999. Jenkins initiated the contact, seeking an update on several grievances filed by bargaining unit members concerning

transfers and assignments, so that he might report the status of those grievances to the school board the following day. Smith's resignation came up in the discussion, and Jenkins initially stated he was thinking of refusing to release Smith from his contract. Green asked Jenkins about the vacancy that would be created by Smith's resignation. The WASL test scores were also discussed, after which Jenkins stated that he probably would release Smith from his contract.

- On September 7, 1999, the high school principal told Green that Smith had been released from his contract, and that Green would need to submit a resume and be interviewed in order to be considered for the physical education assignment at the high school. Green submitted a resume.

- At a school board meeting held on September 9, 1999,[5] Jenkins made a presentation regarding student performance on the WASL tests. Jenkins' presentation included charts which compared the scores of all the math teachers, and he pointed out calculations showing that algebra students taught by mathematics-trained teachers had higher scores than students taught by teachers who did not have specific training in mathematics.[6] When questioned by the board, Jenkins acknowledged that several years of testing would be necessary for valid test score comparisons. One of the board members pointed out that there were even larger discrepancies between two of the district's geometry teachers, but it is not clear

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[5] Green was in attendance as a union representative.

[6] Jenkins indicated that these calculations had been worked out by his office. Letters were used to identify the teachers, and Jenkins did not mention any names.

whether or how that discrepancy was related to teacher preparation.

- Green and one other applicant were interviewed for the high school physical education assignment on September 15, 1999, and the interview team recommended Green for the position. While the principal and assistant principal recommended the other applicant, Jenkins overrode their counsel and selected Green for the position.

- Green was offered the high school physical education assignment on September 21, 1999, but Jenkins told Green that accepting the job would mean Green would be splitting his time between the middle school and the high school, that he would have to waive any right to automobile reimbursement or the cost of substitutes needed because of the split position, and that he would have to attend teacher-parent functions at both schools. Green agreed to the conditions, and accepted the split position.

This unfair labor practice complaint followed, on October 25, 1999.

POSITIONS OF THE PARTIES

The union argues that the employer discriminated against Green and interfered with his statutory rights, because of his role as chief negotiator and chief grievance officer for the union. It points to Green's election to union office, his demand for a change of the negotiations format, his taking of an assertive role in the parties' contract negotiations, and his filing of grievances as examples of him being a visible leader for the teacher's bargaining unit. Cited as examples of unlawful interference and discrimina-

tion are the employer's demand that Green obtain more credentials for teaching math, the obstacles to Green obtaining an appropriate reassignment (including realigning of assignments and requiring Green to submit a resume and be interviewed), the conditions placed on his acceptance of a split assignment, and public identification of Green by the superintendent as a teacher whose math students were underperforming.

The employer expresses some confusion about Green's complaint. It acknowledges that Green went through a somewhat torturous process to arrive at his teaching assignment for the 1999-2000 year, but points out that Green eventually was given the assignment he requested. The employer argues that many of Green's complaints, and particularly those concerning the manner in which his teaching assignment was changed, concerns issues and decisions that arose before he became a union officer. The employer denies that it has interfered with Green's rights as a represented employee or as a union official, or that it discriminated against Green for his filing of grievances. It asserts that the decisions made on Green's transfer requests were based upon documented needs of the district, and that he was treated in the same manner as other employees in similar circumstances have been treated.

DISCUSSION

The Applicable Statute

The Educational Employment Relations Act, Chapter 41.59 RCW, protects the rights of public employees to engage in collective bargaining activities:

> RCW 41.59.060 EMPLOYEE RIGHTS ENUMERATED .... (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 employee may be required to pay a fee to any employee organization under an agency shop agreement authorized in this chapter. ...
>
> [Emphasis by **bold** supplied.]

Enforcement of those rights is through the unfair labor practice provisions of the statute:

> 41.59.140 UNFAIR LABOR PRACTICES FOR EMPLOYER, EMPLOYEE ORGANIZATION ENUMERATED.
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> (1) It shall be an unfair labor practice for an employer:
>
> (a) **To interfere with, restrain, or coerce employees** in the exercise of their rights guaranteed in RCW 41.59.060.
>
> (b) To dominate or interfere with the formation or administration of any employee organization or contribute financial or other support to it; ....
>
> (c) **To encourage or discourage membership in any employee organization by discrimination in regard to hire, tenure of employment or any term or condition of employment, ...**
>
> (d) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this chapter.
>
> (e) To refuse to bargain collectively with the representatives of its employees.
>
> [Emphasis by **bold** supplied.]

The Public Employment Relations Commission has jurisdiction to determine and remedy unfair labor practices under RCW 41.59.150. In this case, the complainant is alleging that the employer has committed both "interference" and "discrimination" violations.

To prove an interference violation, a complainant need only establish that the respondent engaged in conduct which employees could reasonably perceive as a threat of reprisal or force or

promise of benefit associated with their union activity. City of Seattle, Decision 3066 (PECB, 1989), affirmed Decision 3066-A (PECB, 1992). Thus:

> The burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party, but the test for deciding such cases is relatively simple. To establish an interference violation under RCW 41.56.140(1), a complainant need only establish that a party engaged in conduct which employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity. See, Mansfield School District, Decision 5238-A and 5239-A (EDUC, 1996); Kennewick School District, Decision 5632-A (PECB, 1996); and cases cited in those decisions. A showing that the employer acted with intent or motivation to interfere is not required. Nor is it necessary to show that the employees concerned were actually interfered with or coerced.

City of Omak, Decision 5579-B (PECB, 1997).

The standard of proof for "discrimination" claims is more complex, as summarized in Seattle School District, Decision 5946 (PECB, 1997):

> In Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991), the Court adopted a "substantial factor" test for determining discrimination cases. While a charging party retains the burden of proof at all times, it only needs to establish that the statutorily protected activity was a "substantial" motivating factor in the employer's decision to take adverse action against the employee. As the Court indicated in Wilmot, at page 70:
>
> > If the plaintiff presents a prima facie case, the burden shifts to the employer. To satisfy the burden of

> production, the employer must articulate a legitimate nonpretextual nonretaliatory reason for the discharge. ... [I]f the employer produces evidence of a legitimate basis for the discharge, the burden shifts back to the plaintiff ... [to] establish [that] the employer's articulated reason is pretextual.

The Commission embraced the "substantial factor" test in Educational Service District 114, Decision 4361-A (PECB, 1994) and City of Federal Way, Decision 4088-B (PECB, 1994). The standard was the subject of further discussion in North Valley Hospital, Decision 5809 (PECB, 1997) and Mukilteo School District, Decision 5899 (PECB, 1997).

Timeliness of Complaint

RCW 41.59.150(1) establishes a six-month statute of limitations on the filing of unfair labor practice complaints and the complaint filed in this matter on October 25, 1999, can only be considered timely as to employer actions or decisions occurring on or after April 25, 1999. Evidence concerning events occurring more than six months prior to the filing of a complaint can be utilized (and has been utilized here) only to establish the background to events for which the complaint is timely. See, City of Seattle, Decision 5930 (PECB, 1997).

The Prima Facie Case

As described in Seattle School District, supra, and North Valley Hospital, supra, the requirements necessary for a complainant to establish a prima facie case of unlawful discrimination are threefold:

- The employee must exercise a statutorily protected right, or communicate an intent to do so;

- The employee must be discriminatorily deprived of some ascertainable right, status or benefit; and

- There must be a causal connection between the exercise of the legal right and the discriminatory action.

Proof of all three elements is necessary to shift the burden of production to the employer. Seattle School District, supra.

Exercise of the Protected Right -

The first element of the three-part test is the most straightforward in this case, as the specific time when Green's protected union activity commenced is clear: Green's election to union office clearly invokes the protections of the statute, and Green clearly exercised protected rights when acting as negotiator and grievance representative for the teachers at Selah after April 27, 1999. At the same time, the record indicates that Green's election to union office in April of 1999 was his first involvement with the union or activities protected by the collective bargaining statute. Thus, it is also clear that several of the incidents offered as "background" in this case occurred prior to any union activity on the part of Green. In particular:

- Green's qualifications to teach algebra were called into question by the accreditation body as early as 1994, and Green was told in 1997 that he would need to obtain more math credits if he was to continue teaching algebra;

- While Green individually pursued the controversy about the pay for the time spent on the City University course in 1997 individually, by means of a letter to the school board, that

controversy was short-lived and was not pursued as a grievance under the collective bargaining agreement;

- Green was told in 1998 that he could no longer teach mathematics above the basic level, and that his teaching assignment would be revised to meet the program standards adopted by the employer's school board;

- The April 13, 1999, assignment of Green to teach math and physical education classes at the junior high school occurred in the dual context of the qualification issue and of numerous assignment changes related to the opening of the new intermediate school;

- Green's April 20, 1999, expression of interest in a high school physical education assignment concerned an impending vacancy that had not yet been posted by the employer.

Thus, the only transactions coming within the "exercise a statutorily protected right or communicate an intent to do so" test are those which occurred after April 27, 1999.

Deprivation of Ascertainable Right -
The record establishes that most of the transactions that occurred after April 27, 1999, completely fail under the "deprivation ... of right" component of the prima facie case test:

The May 4, 1999, posting by the employer related to the high school physical education position sought by Green on April 20. While the employer re-packaged the 0.8 FTE physical education assignment with a 0.2 FTE special education assignment for which Green was impliedly not qualified, that does not support a conclusion that Green was deprived of anything to which he was entitled. Nothing in this record suggests that Green was qualified to teach the 0.2 FTE technical drafting class historically packaged with the

physical education assignment, or that there was any other 0.2 FTE vacancy for which Green was qualified.

Green's June 7, 1999, request was for either a 0.6 FTE physical education position at the junior high school or a 0.8 FTE physical education position at the high school. Green was later given a 0.6 FTE physical education assignment at the junior high school, which contradicts any suggestion that he was deprived of anything in this instance.

Green's June 8, 1999, request appears to have introduced the idea of assignments split between two schools. In the alternative to a physical education position at the junior high school, Green asked for any combination of physical education assignments at the junior high school and high school. Green was later given a 1.0 FTE physical education assignment at the junior high school, which contradicts any suggestion that he was deprived of anything in this instance.

The August request and August 25 telephone conversation revived the idea of having Green's assignment split between the high school and the junior high school. However, Green's request for a 0.6 FTE physical education assignment at the high school coupled with a 0.4 FTE physical education assignment at the junior high school depended upon the employer's release of the incumbent of the 0.6 FTE assignment from his contract. The union argues that the August 25, 1999, conversation between Green and Jenkins proves that Green was being treated differently because of his protected union activities. It particularly cites Jenkins' questioning of Green about the status of several grievances, and Jenkins' statements about not allowing Smith to get out of his contract. The granting of a release to the employee already under contract cannot be regarded as a foregone conclusion, particularly where it occurred

close to the customary beginning of the new school year.[7] Moreover, Green had no statutory right to the position regardless of whether the incumbent was released from contract. Again, therefore, the evidence does not support a conclusion that Green was deprived of anything to which he was entitled.

The employer's demand for a resume and interview followed the release of the former incumbent from the 0.6 FTE physical education assignment at the high school. The only evidence supporting Green's allegation of a deviation from past practice was based upon his own experience.[8] The building principal testified that district policy is to require resumes and interviews whenever there were two or more district employees applying for and qualified for the same position, and the Examiner credits that clear and definite testimony based on a broader perspective about the handling of hiring and assignment decisions. A substitute teacher who had been teaching physical education at the high school had also applied for the vacated position, so the Examiner concludes the union did not carry its burden of proof to show that Green was treated differently than other employees in the same circumstance.

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[7] RCW 28A.405.210 precludes an employee who has signed an individual employment contract with one Washington school district from signing a contract with another Washington school district for the same school term, unless he or she is "released" by the school district holding the first contract. The natural effect of that provision is to protect the stability of the employment situation for both the teacher(s) and school district(s) involved.

[8] The example given involved a 0.2 FTE special education position. The resume/interview procedure was not used in that situation, but only one current employee was qualified for the position. Different facts can result in the use of different procedures.

The presentation on math scores by Jenkins at the September 9, 1999, meeting of the school board does not provide basis for a conclusion that Green was deprived of any right, status or benefit. First, the importance of a math background for teaching algebra and higher math courses had been thrust upon the employer in the past by the accreditation body; second, the WASL testing was thrust upon the employer by state requirements. The record does not support a finding that Green was singled out for disparate treatment.

The conditions placed upon the split assignment arguably deprived Green of compensation for his travel between the two buildings and imposed some additional responsibilities upon Green for participation in teacher-parent activities at both buildings, but those facts must be balanced against the fact that the employer was honoring Green's request to move from the 1.0 FTE junior high school physical education assignment that had been given to Green in conformity with his June 7, 1999, request, and that it was Green who had initiated and reiterated the idea of a split assignment.

Existence of a Causal Connection -

Accepting that Green clearly engaged in union activity protected by Chapter 41.59 RCW and that there was some arguable deprivation of his rights in regard to the travel between buildings and teacher-parent activities, the record certainly does not sustain the existence of a causal connection between Green's union activities and the developments during the summer and autumn of 1999.

An overarching problem for the union is an absence of evidence of anti-union animus directed at the union in general or at Green personally. Although Green attended the first negotiations session held by the union and employer in 1999, Green did not take an active role in that meeting. Although Green requested a change of the negotiating format and the superintendent expressed some

concern about the less-collaborative format, the parties reached an agreement on the contract reopener after just a few sessions. Although several other bargaining unit employees held union office, there is no evidence of animus toward any of them.

A further difficulty with the incidents that occurred after Green was elected to union office is that the union has not supplied evidence sufficient to attach any of them to Green's union activities.

The May 4, 1999, posting occurred just one week after Green was elected to union office and two or more weeks before his attendance at a bargaining session drew attention to his new union role. This incident was approximately three weeks before Green made his request for a change of the negotiations format. The position was given to a bargaining unit employee who was qualified to teach both subjects. The union's assertion that the employer "put together" a position which included the special education component to shut out Green ignores the documented need for the 0.2 FTE special education coverage and fails to assert why Green's preferences should trump the preferences of other employees. Beyond Green having no statutory right to a transfer to a new position, and the absence of any obligation on the employer to "put together" combinations that particularly fit one teacher's skills or interests, there is no evidence of causal connection between Green's election to union office and the posting.

Green's June 7, 1999, request for a physical education position at the junior high school was granted by the employer on June 10, 1999. Such a decision is not at all consistent with the argument that the employer had engaged in a pattern of interference or discrimination.

The August 25 telephone conversation presents some debatable issues, and the Examiner strongly questions the wisdom of some of the statements attributed to Jenkins. However, Green's perceptions about Jenkins' desire to avoid a grievance from an employee refused a release from contract must be balanced against the fact that the employer had a statutory right to hold that employee to his contract. Green's interpretation/accusation that Jenkins was offering Green a personal benefit of access to the vacated position in exchange for the settlement of other grievances is problematic, but the evidence is not sufficient to sustain a finding against the employer. Proof of such an accusation would require more than Green's assumption that Jenkins was attempting to bribe him, yet the circumstantial evidence supports the employer. Jenkins testified that he contacted Green in his role as a union officer and for the purpose of discussing already-pending grievances, not as a bargaining unit employee or potential applicant for a vacant position. The grievances concerned assignment and transfer issues, and so could have impacted the employer's ability to replace the employee who was requesting release from his contract. Green told the superintendent that an earlier grievance meeting had gone well, and that there were only minor items left to be resolved. Even as related in Green's testimony, nothing in the conversation was directly connected to Green's interest in the position.[9] If Green's interpretation were to be credited, there would be a high probability that other employer statements or actions would also be indicative of discrimination, but that is not the case. There was no evidence suggesting that the offer of a personal benefit perceived by Green was consistent with any other transaction involving Jenkins and Green or, for that matter, Jenkins and any other teacher in the district.

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[9] Jenkins testified that he knew that Green wanted to teach in the high school.

The employer's demand for a resume and interview came from the building administrators, without any indication of involvement by Jenkins. When the interview team recommended Green and the building administrators recommended another candidate, Jenkins took the first recommendation and overruled the building administrators. Thus, the net effect of the resume and interview process was to give Green precisely the split-building assignment he had requested prior to the August 25 telephone conversation.

The presentation on math scores to the school board was a predictable outcome of WASL requirements which have been imposed upon (and are presumably a matter of concern to) all Washington school districts. It is arguable that the school board and public would have had a right to the names of the individual teachers involved, but Jenkins took pains to conceal their identities by the use of a letter code. Although Green may be correct in his belief that the school board members could have recalled the earlier issues about his qualifications to teach math, it is difficult to determine how Green was negatively affected by the discussion, other than that he might well have been personally embarrassed. The information was clearly labeled as preliminary results.[10] While it is true that the information presented to the school board was later found to be incorrect, an ill-advised presentation of the test scores does not prove any causal connection with Green's union activity.

The conditions placed upon the split assignment was explained as being consistent with district policy. Evidence was presented showing that the employer's policy on travel expenses makes a distinction between travel incurred at the request of the district

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[10] It was explained that it was later discovered that the compilation of the test results had been in error and that Green's students had not performed markedly different than had the students of other math teachers.

and travel incurred at the request of the employee. Because the split assignment was made at Green's request, and in place of a 1.0 FTE position at the junior high school given to Green in conformity with his June 8 request, the split assignment was legitimately classified as being of the "employee request" type. Again, the union did not present evidence that this policy on travel reimbursement was discriminatorily administered by the employer, or that the decision made on Green's situation was related to his union activity.

The overall timing of events is asserted by the union as evidence of a causal connection with Green's union activities. The Examiner disagrees. The union argues that Jenkins did not like the change of the negotiations format to a more adversarial model, but there was no testimony concerning any negative reaction from the employer other than Jenkins' one comment lamenting a less-collaborative format. The fact that the contract negotiations were quickly and successfully concluded, together with the evidence showing that two of Green's assignment requests made in early June were granted, weighs against an inference that the employer discriminated against Green in August and September of 1999.

The employer's entire staff and operations were undergoing a major change in 1999, and Green's personal preference for teaching at the high school had to be balanced with the educational needs of the schools and the rights/interests of other teachers with different skills. Even if some of the employer's decisions might have been made differently, there was no showing that any of the decisions were a direct reaction to Green himself.

The union has failed to make a prima facie case, and the discrimination allegations are thus dismissed.

Independent "Interference" Allegation

The union asserts that Jenkins' August 25, 1999, telephone call to Green constituted an independent interference violation, because Green could reasonably perceive the employer's actions as a threat of force or a promise of benefit associated with the his union activity. In other words, if Green would agree that the grievances were settled, then Jenkins would look favorably at releasing Jones from his high school physical education position, thus opening up that position for Green; that is, a promise of a benefit.

Three factors weigh against the union's proposed interpretation of that telephone conversation:

First, because the two grievances involved employee assignment and transfer, it is reasonable to conclude that Jenkins was waiting for the resolution of those grievances before determining his course of action in the Jones situation.

Second, both the implementation of the customary competitive selection process for the high school physical education position and the conditions that Jenkins placed on Green's acceptance of the split high school/junior high school position contradict the reasonability of an interpretation by Green that the job was being wired for him or that he was being offered a "promise of a benefit". These "roadblocks," "deliberately placed" on Green's acceptance of the position, are inconsistent with an interpretation that Jenkins was truly interested in unduly or illegally influencing Green as a union officer, and are more consistent with the situation having been misinterpreted by a new and inexperienced union official.

Third, examination of the totality of the relationship between Green and the employer provides no pattern of harassment, threat or unjustified focus on Green as an employee and/or union officer. The complaint processed to hearing in this case includes a string

of incidents which Green considers to be unfair treatment by the employer. As discussed previously, however, broadening the focus to include the new building coming on-line, the intervention of the accreditation body on teacher competency issues, the application of consistent personnel policies, and the attempt to reconcile personnel requests for assignments with student needs and objectives, greatly reduces the impact of Green's allegations. The issues concerning Green's teaching assignment predate his union activity, and there was no proof of a pattern or effort to keep him from teaching where and what he wanted that can be associated with his union activity. The charges of employer interference must be dismissed.

After Acquired Evidence

During the course of the hearing, the union made an offer of proof concerning the employer's processing of a grievance in February of 2000, some three months after the filing of the complaint in this matter. In arguing for consideration of this testimony, the union cites Oroville School District, Decision 6209-A (PECB, 1998) where the Commission stated:

> ... While no remedy can be ordered regarding an occurrence outside of the allegations set forth in the complaint, related events can be used to show the existence of union activity or anti-union animus. See e.g., Port of Tacoma, Decision 4626-A (PECB, 1995).

The employer objected to the offer of proof as after-acquired evidence that was not germane to the allegations in this complaint. The Examiner allowed the testimony, but reserved the right to determine its relevance.

The disputed testimony concerned a grievance filed by the high school athletic director. Tim Aberle was disputing a warning issued to him for what the employer deemed to be an inappropriate conversation between Aberle and a student. Green had been involved in the early steps of the grievance, but Aberle chose to use his own legal counsel (instead of bargaining unit representation) when the issue was advanced to the superintendent's level. While the legal representatives were drawing up a possible resolution of the grievance, Jenkins called Aberle and suggested that he take the initiative and talk to the high school principal and attempt to resolve their differences between themselves. Aberle testified that Jenkins was "implying" during that call "having Art [Green] there, having the Association there" was "screwing up relations."

The complaint had not been amended in advance of the hearing, and the offered evidence has been considered for the limited purpose described in the cited Commission precedent. In the union's complaint, the allegation which comes closest to employer interference with grievance processing is the August 25 telephone conversation. Further examples of similar behavior could strengthen the union's arguments concerning that allegation. However, while the union is arguing that Jenkins' comments should be viewed as evidence of Jenkins' continuing interference with the union's processing of grievances, the facts do not support such a position.

The employer's response to the February situation is that Jenkins was trying to resolve what was becoming a deepening personality conflict between two employees. That is a credible explanation of the situation, even though the Examiner strongly questions the wisdom of the superintendent attempting to act as employer, hearing officer, and mediator, all in the same context. Consistently throughout the time period relevant to this case, the evidence depicts Jenkins as becoming impatient with allowing established

procedures to run their course,[11] and indicates that his intervention into situations creates confusion. In this instance, his impatience led him to make a telephone call and a statement, which, had an appropriate amendment or separate unfair labor practice complaint been filed, could easily have been the basis for finding that the employer committed an unfair labor practice.[12] However, the facts of the Jenkins/Aberle telephone conversation are too different from the facts of the Jenkins/Green telephone conversation to constitute a pattern of active interference. With a different factual context and the passage of six months between the Jenkins/Green conversation in August and the Jenkins/Aberle conversation in February, the argument that they constitute a pattern of interference is not persuasive.

FINDINGS OF FACT

1. The Selah School District is a school district organized under Title 28B RCW, and is an employer within the meaning of RCW 41.59.020(5). Jerry Jenkins has been Superintendent of Schools for the district during all times relevant to these proceedings.

2. The Selah Education Association, an employee organization within the meaning of RCW 41.59.020(1), is the exclusive bargaining representative of all non-supervisory, certificated

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[11] This includes both employer procedures and contractual procedures.

[12] Disparaging the exclusive bargaining representative to one of the employees it represents, encouraging a bargaining unit employee to forego the use of the exclusive bargaining representative and circumventing the exclusive bargaining representative to deal directly with a bargaining unit employee can all be unlawful acts.

employees of the Selah School District. Art Green has been Executive Secretary of the union since taking office June 1, 1999. Prior to that time he held no union offices and had not represented the union in any capacity.

3. Green's 1998-1999 teaching assignment was ninth grade mathematics in the high school. His qualifications to teach math had previously been questioned by the body responsible for the accreditation of the employer's school programs.

4. For the 1999-2000 school year, the employer's opening of a new intermediate school and re-allocation of grade levels among its other schools resulted in numerous changes of teacher assignments throughout the school district. Late in the 1998-99 school year, Green was notified of his preliminary assignment for the 1999-2000 school year to teach 0.8 FTE basic mathematics and 0.2 FTE physical education in the junior high school. Green preferred to teach physical education, particularly at the high school, and he submitted several notices and applications to the employer between April and September of 1999, indicating his preferences.

5. On May 4, 1999, the employer posted a position which included teaching 0.8 FTE physical education at the high school. The previous incumbent of that position had combined the assignment with a 0.2 FTE technical drafting assignment for which Green would not have been qualified. In posting the position, the employer combined it with a vacant 0.2 FTE special education assignment for which Green was not qualified. Green had no right to have the employer offer a 1.0 FTE physical education assignment at the high school, or to have the employer combine the 0.8 FTE physical education assignment with a class that Green would be qualified to teach.

6. On or about June 7, 1999, Green requested a 0.6 FTE physical education position at the junior high school. Green was given that assignment.

7. On or about June 7, 1999, Green requested a physical education assignment at the junior high school or any combination of physical education assignments at the junior high school and high school. Later in June, Green was given a 1.0 FTE physical education assignment at the junior high school.

8. In August of 1999, Green learned that the incumbent of a 0.6 FTE physical education position at the high school was applying for a position outside of the Selah School District, and he notified the employer of his interest in having that position.

9. The opening of the new intermediate school and related events, as described in paragraph 4 of these Findings of Fact, were accompanied by multiple grievances concerning transfers and assignments of teachers. Green was involved in the processing of those grievances. On August 25, 1999, Jenkins telephoned Green to discuss the status of those grievances. During the course of that conversation, Jenkins stated that he was considering not releasing the teacher currently occupying the 0.6 FTE high school physical education position from his contract, which would have eliminated the opportunity for Green to transfer into that position. Before the end of that conversation, Jenkins indicated that he would release the teacher then occupying the 0.6 FTE high school physical education position from his contract.

10. On September 7, 1999, Green was informed that he would need to submit a resume and be interviewed in order to be considered

for the high school physical education position. Because another Selah School District employee had expressed interest in the position, that procedure was consistent with the policy and practice in the school district.

11. On September 9, 1999, Jenkins made a presentation to the school board concerning scores achieved by students on the Washington Assessment of Student Learning tests, including a chart which concealed the identities of individual teachers and comments comparing the scores of students taught by mathematics-trained teachers with the scores of teachers who lacked credentials in mathematics. That presentation and his comments were the logical outgrowth of the recommendations of the accreditation body and of implementation of requirements and testing imposed by state regulations. Green was present at the meeting in his capacity as a union official, but was not identified by name as one of the teachers involved.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.59 RCW and Chapter 391-45 WAC.

2. The Selah Education Association has failed to make a prima facie case that Art Green was deprived of any right, status or benefit to which he was entitled after the onset of his union activities protected by Chapter 41.59 RCW for which a causal connection exists between the employer's actions and Green's union activities, so that no discrimination in violation of RCW 41.59.140(1)(c) has been established in this case.

3. Based on the evidence submitted and the circumstances as a whole, the statements made by employer official Jenkins to union official Green during their telephone conversation on August 25, 1999, were not reasonably perceived by Green as a threat of reprisal or force or as a promise of benefit associated with Green's union office or activities, so that no interference in violation of RCW 41.59.140(1)(a) has been established in this case.

4. The conversation between employer official Jenkins and another bargaining unit employee in February of 2000, coming nearly six months after the August 25, 1999, conversation between Jenkins and Green, is not sufficiently related to the events at issue in this complaint to constitute proof of a pattern of unfair labor practices in violation of RCW 41.59.140(1).

ORDER

The complaint charging unfair labor practice filed in the above-captioned matter is DISMISSED on its merits.

Issued at Olympia, Washington, this 3rd day of October, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALTER M. STUTEVILLE, 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.