STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

RICHARD M. LONG, Complainant,	)	CASE 16455-U-02-4225
vs.	)	DECISION 8140 - PECB
TACOMA SCHOOL DISTRICT, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

D. Michael Shipley, Attorney at Law, for the complainant employee.

Patricia K. Buchanan, Attorney at Law, and *Marion Leach*, Attorney at Law, for the employer.

On June 18, 2002, Richard M. Long filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Tacoma School District (employer) as respondent. A preliminary ruling was issued under WAC 391-45-110 on July 9, 2002, finding a cause of action to exist on allegations summarized as:

> Employer discrimination in violation of RCW 41.56.140(1) [and derivative "interference" in violation of RCW 41.56.140(1)], by failure to select Richard Long for a team leader position, in reprisal for his union activities protected by Chapter 41.56 RCW.

The employer filed a timely answer. A hearing was held on November 19, 20, and 21, 2002, before Examiner David I. Gedrose. The parties filed post-hearing briefs.

Based upon the record, the statutes, and the relevant precedents, the Examiner rules that the complainant failed to prove that the employer discriminated against him in violation of Chapter 41.56 RCW. The complaint is DISMISSED on its merits.

BACKGROUND

The employer operates public schools in one of the largest cities in the state of Washington. Its table of organization includes a Facilities Department headed by Ken Price, who has responsibility for functions ranging from the routine repair of doors and windows to major capital projects involving $1,000,000 or more. Maintenance employees in the Facilities Department work on both a night shift supervised by Rick Watson and a day shift supervised by Margaret Ohlson. Both shifts are further divided into teams comprised of separate crafts (*e.g.* plumbers, electricians, laborers, and carpenters) headed by team leaders, who are paid a $2.75 per hour premium over the base wage for their craft. The carpenter crews are referred to as the day and night "structural" crews, respectively.

Richard Long is a carpenter. During the time period pertinent to this proceeding, he had been employed by this employer for about 26 years and was a member of the day shift structural crew.

The crafts employees in the employer's Facilities Department are represented for the purposes of collective bargaining. Nate Drake is a union business agent responsible for representing the carpenters in that bargaining unit. Although the union did not initiate this proceeding and did not intervene on behalf of either party, Drake testified as a witness for Long in this proceeding.

The Complaint -

In his complaint,[1] Long alleged that the employer appointed another employee to the day shift team leader position on January 2, 2002, that Long had competed for that promotion, and that:

> The reason I was not given the opportunity to be team leader . . . by Margaret Ohlson, Supervisor, was not due to a lack of qualifications on my part, but due to union activities over the years. I have, when needed, filed grievances against Margaret Ohlson, due to contract violations, and her not adhering to the negotiated bargaining agreement. Margaret Ohlson has, I believe, demonstrated a history of discrimination against a few of us who have stood-up to her on union contract issues, as well as other issues concerning discrimination, retaliation, and harassment.

The complaint made reference to matters outside of the collective bargaining process,[2] alleged that Ohlson retaliated previously by moving Long to the night shift,[3] and alleged that Long filed "at least two" grievances concerning overtime.[4] Long testified he believed the six-month period for filing a complaint was about to end, and that he had to file when he did to preserve his rights.

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1 Although Long was represented by legal counsel at the hearing, he filed his complaint *pro se*.

2 Those matters are not before the Examiner in this case. A "whistleblowing" activity in 1991 or 1992 allegedly resulted in Ohlson becoming "outraged" at Long. In a controversy between management officials, Ohlson's supervisor allegedly prevented Ohlson from reprimanding Long in 1993.

3 That transfer is not before the Examiner in this case. It impliedly occurred some time after 1993. While it is clear that Long had returned to the day shift by 2002, the timing of that event is also unclear.

4 The merits of those grievances are not directly before the Examiner for resolution in this case. The complaint did not provide any details concerning those grievances.

Evidence Concerning Union Activity -
At the hearing, the parties divided their history into three periods, as follows:

- Prior to 1998: Long stated that any grievances from this period were addressed for "purely historical" reasons, to show that he had "historically assert[ed] his rights under the collective bargaining agreement and did grieve several issues, ..." The employer acknowledged that "certain grievances were filed, certain complaints were filed, certain matters were litigated and certain matters were resolved."
- 1998 to January 2002: The employer asserted (and Long acknowledged) that Long did not file any grievance in this period.
- January 2002 to June 2002: It is clear that a grievance was filed concerning the promotion at issue here.[5] The employer's initial response cited an earlier agreement between the employer and union that team leader jobs did not have to be posted, but that grievance was later resolved by a one-time agreement to post and conduct interviews for the position.[6]

While Long testified of his personal belief that his union activities were a substantial factor in his not being selected for the team leader position, there was no evidence that he is now or ever

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5 Union official Drake testified that the union does not originate grievances on its own, and that it only grieved the issue of whether the team leader position should be posted. The selection of the other employee was not grieved, because no union member complained.

6 The decision resulting from that interview process is before the Examiner in this proceeding, even though the complaint was filed prior to the interview, but a grievance filed by Long in October of 2002 is irrelevant to this proceeding, because it could not have been among the union activities alleged to have been a basis for the "discrimination" claimed to have occurred in June 2002.

has been a union officer, a union shop steward, or a union activist.

The Interview Process -
The interview committee created to implement the settlement of the January grievance was made up of Price, Ohlson, Watson, and Don Bowers, the facilities planner. Long testified of his belief that the interview process was a sham, and that the interview committee was simply "going through the motions" and was not serious about his candidacy. Long indicated, however, that he was not alleging that either Price or Bowers discriminated against him. Long indicated a belief that Watson might have discriminated against him, although he offered no evidence to support that belief. Long's focus was thus clearly on Ohlson.

Long was interviewed on June 19, 2002, along with the employee originally promoted and one other applicant. Employer officials testified that the decision of the interview committee was unanimous, so that seniority was not used as a tie-breaker. The promotion was again given to the employee who had been promoted in January 2002.

POSITIONS OF THE PARTIES

Long alleges that Ohlson promoted a less-senior, less-qualified, and less-experienced employee in retaliation for Long's union activities. As a remedy for the alleged discrimination, Long asks for appointment as the day shift team leader with back wages or, in the alternative, future wages for the remainder of his employment with the employer to equal the difference between his base pay and what he would have received as team leader.

The employer has raised several defenses, including challenges to the Commission's jurisdiction based upon: (1) "whistleblower" activity is outside of the rights protected by the collective bargaining law; (2) the settlement agreements entered into between the parties in the 1990's preclude Long's reliance on those incidents in this proceeding; (3) the dispute at hand is contractual, and should be resolved through the grievance arbitration procedure of the collective bargaining agreement between the union representing Long and the employer; and (4) the complainant had no cause of action when the complaint was filed, because the interviews had not yet been held under the terms of the grievance settlement and the disputed position had not been re-awarded to the successful applicant.[7] The employer contends that it appointed the more qualified applicant to the disputed position. The employer denies that it retaliated or discriminated against Long for his union activities, and contends he did not establish a prima facie case of discrimination because he failed to show any union activities for which the employer allegedly retaliated against him. The employer contends that the complaint is frivolous, and requests sanctions, to include attorney fees, against Long.

DISCUSSION

Applicable Legal Standards

The Commission's authority in this case is drawn from the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, and

[7] The employer filed a summary judgment motion prior to the hearing, moved for dismissal at the conclusion of Long's case-in-chief, and also moved for dismissal at the close of the hearing. The Examiner denied each of those motions.

specifically from the unfair labor practice provisions of that statute, RCW 41.56.140 through 41.56.160. RCW 41.56.040 protects the right of the "classified" employees of public school districts to organize and bargain, and prohibits discrimination against the exercise of rights protected by Chapter 41.56 RCW.

The authority of the Examiner in this case is limited to the "discrimination for union activities" cause of action framed in the preliminary ruling. The Commission decides "discrimination" allegations under standards drawn from decisions of the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991). That formula is as follows:

> [T]he first step in the processing of a "discrimination" claim is for the injured party to make out a prima facie case showing retaliat[ion]. To do this, a complainant must show:
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> 1. The exercise of a statutorily protected right, or communicating to the employer an intent to do so;
> 2. The employee has been deprived of some ascertainable right, benefit, or status; and,
> 3. That there was a causal connection between the exercise of the legal right and the discriminatory action.
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> If a plaintiff provides evidence of a causal connection, a rebuttable presumption is created in favor of the employee. . . . While the complainant carries the burden of proof throughout the entire matter, there is a shifting of the burden of production. Once the employee establishes his/her prima facie case, the employer has the opportunity to articulate legitimate, non-retaliatory reasons for its actions. . . . the employee may respond to an employer's defense in one of two ways:
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> 1. By showing that the employer's reason is pretextual; or
> 2. By showing that, although some or all of the employer's stated reason is legitimate, the employee's pursuit of protected rights was neverthe-

> less a substantial factor motivating the employer to act in a discriminatory manner.

Brinnon School District, Decisions 7210-A (PECB, 2001); *Educational Service District 114,* Decision 4631-A (PECB, 1994).[8] If the complainant were to prove that Ohlson discriminated against him while acting within the scope of her authority, the employer would be liable for Ohlson's actions. *See Bethel School District,* Decision 6731 (EDUC, 1999).

The Employer's "Jurisdictional" Defenses

Matters Unrelated to Collective Bargaining -

The employer correctly points out that the Commission does not enforce the protections conferred by statutes outside of Chapter 41.56 RCW. *See City of Lynnwood,* Decision 6986 (PECB, 2000); *King County,* Decisions 7139, 7140 (PECB, 2000). It is important to note, however, that Long did not actually argue a "whistleblowing" theory at the hearing or in his post-hearing brief in this case.

Violation of Contract Claims -

The employer correctly points out that the Commission does not determine or remedy contract violations through the unfair labor practice provisions of the statute. *City of Walla Walla,* Decision 104 (PECB, 1976). Again, however, Long has not asked the Examiner to rule that the employer violated the collective bargaining agreement by not promoting him.

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[8] That standard has been followed in numerous decisions. *See City of Mill Creek*, Decision 5699 (PECB, 1996); *Mansfield School District*, Decision 5238-A (EDUC, 1996); *Pasco Housing Authority,* Decisions 6248, 6248-A (PECB, 1998); *City of Renton*, Decision 7476-A (PECB, 2002); *City of Orting,* Decision 7959 (PECB, 2003).

Reference to Settled Grievances -
The employer has challenged Long's utilization of information concerning previously-settled grievances, but that defense is found to be without merit. It is the act of filing a grievance that is protected by Chapter 41.56 RCW. *Valley General Hospital*, Decisions 1195, 1195-A (PECB, 1979). It matters not whether the grievances actually had merit, or were the subject of some settlement or arbitration award. The passage of time does not erase the fact of the employee having engaged in protected activity. *City of Mercer Island*, Decision 1580 (PECB, 1983). An employer can be found guilty of an unfair labor practice any time its agent discriminates in reprisal for filing of grievances. The employer's attempt to exclude the pre-1998 grievances from consideration is rejected.

Ambiguity as to When Cause of Action Arose -
The employer correctly points out that the complaint was filed in this case before the final decision was made in the interview process conducted as the result of the grievance settlement, but that does not provide basis to rule that the complaint was defective. The settlement of the grievance concerning the initial promotion did not deprive Long of his claim that he was deprived of some ascertainable right, status, or benefit when the employer promoted another employee in January of 2002. Consistent with looking back to the January decision, his remedy request in this case included back pay for the period following January of 2002. His claim for that period would not have evaporated even if the employer had promoted him as a result of the interviews conducted on June 19, 2002.

The Examiner has latitude to waive some procedural requirements in the interests of justice and an absence of prejudice, as noted in the Commission's general procedural rules, Chapter WAC 391-08 WAC:

> WAC 391-08-003 POLICY--CONSTRUCTION--WAIVER. The policy of the state being primarily to promote peace in labor relations, these rules and all other rules adopted by the agency shall be liberally construed to effectuate the purposes and provisions of the statutes administered by the agency, and nothing in any rule shall be construed to prevent the commission and its authorized agents from using their best efforts to adjust any labor dispute. The commission and its authorized agents may waive any requirement of the rules unless a party shows that it would be prejudiced by such a waiver.

Drake testified that no grievance was filed over the *selection* of team leader, so Long was entitled to pursue his "discrimination for union activities" claim about the January promotion even if his complaint was filed before the June reaffirmation of that promotion. Inasmuch as the employer did not select Long in June, the worst that can be said about this complaint is that it should have been filed one day later for that part of the overall claim. The issues have been clearly framed so there is no prejudice to the employer.[9] The (exceedingly minor) procedural error is waived.

Application of Legal Standards

Prima Facie Case - Evidence of Protected Activities - Long initially testified that he could not remember if he had filed any grievances after 1998, other than the one regarding team leader posting in January of 2002. Nevertheless, the record includes evidence that Long had filed grievances prior to 1998, and that activity did not expire with time. Taken as a whole, the record

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[9] Even if the employer's motion for dismissal made in November of 2002 had been granted as to the second promotion, the complainant would have had until at least December 19, 2002, to file a timely complaint on the June transaction. The employer has not explained how it was prejudiced by proceeding on the merits in November rather than a few months later.

establishes that Long has historically engaged in activities protected by Chapter 41.56 RCW, and that the employer was or should have been aware of that protected activity.

Prima Facie Case - Deprivation -
Long had no right or reasonable expectation of automatic appointment to the team leader position, but he did have a right and reasonable expectation to be considered for the position on the basis of merit, and not have the position denied him based upon retaliation for protected activities.

A "seniority-based" claim of rights is expressed or implied in this case, even if not directly based on the applicable collective bargaining agreement. All of Long's witnesses who were willing to state an opinion on whether Long was the more qualified to be team leader tied their conclusions to Long's many years of service with this employer. Long testified that most team leaders had been appointed based on seniority, and he asserted it was an aberration for him not to be appointed to the position since he was more senior than the successful applicant. Long cited his 26 years of experience with the employer, while pointing out that the successful applicant had only been a permanent employee of this employer for two years. Seniority was not a stated qualification for the position, however, and union official Drake acknowledged that seniority has been a factor in selecting team leaders at some times, but not at other times. The employer provided testimony that seniority has only been used in the selection of team leaders as a tie-breaker between equally qualified candidates. Thus, the evidence fails to support a conclusion that seniority alone meets the requirements for a prima facie case here.

A "good record" claim of rights is asserted by Long, who spent the greater part of his testimony recounting his abilities and service

to the employer and provided documentary evidence consisting of his job evaluations over the years (showing that he has been a good employee) and complimentary letters from clientele (thanking him for his services). Long testified that he had been appointed temporary team leader for over 600 hours, whereas the successful applicant had only been a temporary team leader for about 60 hours.[10] Other witnesses called by Long confirmed his general competence and qualifications for the team leader position, and management and supervisory witnesses also confirmed Long's general competence and qualifications for the disputed position. Employer official Price testified that Long was a "close second" in the interview process. Importantly, however, none of the other witness testified that Long was more capable than the successful applicant, or that Long should have been given the job based on superior qualifications apart from his seniority. Again, the record fails to establish that Long had clearly superior qualifications for the promotion he sought.

<u>Long questioned the successful applicant's experience claims</u>, arguing that the successful applicant had misrepresented his experience on capital projects to the employer, but an absence of union hall referrals does not prove that other claims of experience were false or misleading. The employer contested Long's challenge, maintaining that it made its decision to promote the successful applicant based on the information it had before it regarding his stated background and qualifications. Again, the record does not sustain a finding that the employer knew or should have known of any experience claims of the successful applicant then being (or now being) false or misleading.

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[10] Ohlson testified the successful applicant was competent as team leader. Other witnesses called by Long confirmed (or at least did not deny) that fact.

<u>Prima Facie Case - Causal Connection</u> - Employer witnesses stated that the employer looked at overall experience, not just experience with this employer, and that the successful applicant is a journeyman carpenter who has been a supervisor on capital projects as well as the owner of his own construction company. Experience with capital projects involving substantial resources (as opposed to only maintenance experience) was an issue before the committee, because the employer is undertaking more capital projects than in the past and desired someone with capital projects experience. Ohlson testified that Long has mostly maintenance experience. Employer witnesses stated that for these reasons it exercised its discretion in choosing the successful applicant as the more qualified, and that seniority was not considered because the committee was able to choose the successful applicant as more qualified than the other two.

<u>The successful applicant's demeanor as a witness</u> is cited by Long as demonstrating that he lacks the leadership ability claimed by the employer, and that the difference between the successful applicant's demeanor at the hearing and Long's demeanor constitutes evidence that the employer's decision was not based upon the successful applicant's alleged superior qualifications, and supports Long's contention that retaliation against him was a substantial motivating factor in the employer's decision to pass him over. Even if the successful applicant presented a less-than-imposing model of leadership while testifying as a witness, Long's zeal to discredit the ability and qualifications of the successful applicant seemed to be explained by a fundamental feeling (shared by Long with other witnesses) that it was unfair for the employer to promote a relatively new employee. That does not establish that the failure to promote Long was in reprisal for Long's union activities, and certainly does not rise to the level of being an "unfair labor practice" within the meaning of the statute.

The unanimous decision of the interviewers weighs heavily against Long's claim that Ohlson alone was substantially motivated by union animus. In the context of that unanimous decision, Long's specific denial that Price and Bowers retaliated against him is an admission against interest, as is his unsupported speculation that Watson could have been part of the plot against him. Although Long tried to raise as an issue that Ohlson was controlling the interview, no evidence was produced to that effect. In fact, the third interviewee testified that no one person seemed to be controlling the interview. To accept Long's theory of the case, the Examiner would need to have evidence that Ohlson worked her will to retaliate by convincing or coercing the other members on the committee to vote for the successful applicant *in order to punish Long for his past union activities.*[11] There is simply no direct or circumstantial evidence that that occurred.

The evidence concerning union activity was minimal at best, even though Long called six witnesses to testify on that subject:

Three of Long's witnesses were employer officials. The employer's superintendent, the employer's facilities director (Price), and the supervisor involved (Ohlson). All of them denied that union activity played any part in their decision on the disputed promotion. Price and Ohlson testified that (in their opinions) the employee awarded — and then re-awarded — the promotion was the more qualified for the position.

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[11] Even if evidence existed that Ohlson had persuasively argued in favor of the successful applicant over Long and convinced or coerced the other members of the panel to vote with her, Long would need to prove that she intended to retaliate against him and that the other members of the panel understood this and went along with her unlawful intent.

Long's fourth witness on this subject was union official Drake, who testified of his belief that Ohlson denied Long the promotion because of Long's union activity, but did not provide any particulars as to either the basis for his belief or as to Long's union activity.

Long's fifth witness on this subject was Jim Cail, a team leader on another crew. Cail testified that Long has always been vocal in questioning management, but did not offer an opinion on whether that affected the employer's decision to promote the other employee instead of Long.

Long's sixth witness on this subject was Charles Vidovic, whose retirement from the disputed position created the promotion opportunity for which Long and other employees had applied. The testimony of Vidovic was both compelling and credible.[12] Vidovic had worked with and overseen the work of both Long and the successful applicant, and he testified about the promotion:

> Q: [By Mr. Shipley] In your opinion, who was more qualified to be team leader [the successful applicant] or Richard Long?
>
> A: [By Mr. Vidovic] That's not up to me.
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> Q: I'm asking you what your opinion was.
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> A: I would have no opinion because I don't know the requirements wanted when they posted the job or nothing.

Under cross-examination by counsel for the employer, Vidovic testified as follows:

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12 All other witness arguably had some vested interest in the proceeding (as employees of the employer or as a union official), so that their testimony could have been screened through the prism of their respective interests. Vidovic had nothing to gain or lose by his testimony.

Q: [By Ms. Buchanan] How many years did you work with Margaret Ohlson?

A: [By Mr. Vidovic] I have no idea. How long has she been there? Twelve, 13 years? I said I'm not good on time.

Q: Okay. Did you ever see Margaret Ohlson discriminate against anyone for them filing grievances?

A: No.

Long is bound by that testimony, which falls far short of being convincing evidence that any of the employer officials were motivated by union animus. Vidovic had been a union member while working for this employer, and had the opportunity to provide key testimony in support of Long's charge of anti-union bias by the employer against Long, but clearly did not do so.

Timing and sequence of events can be a basis for finding a causal connection between protected activity and adverse action. *City of Winlock,* Decision 4784-A (PECB, 1995). However, the timing must be in reasonable proximity, and not so attenuated that no reasonable trier of fact could find a causal connection. *See Reardon-Edwall School District,* Decision 6205-A (PECB, 1998). In order to prevail in the instant case, the Examiner would have to accept that the employer took action adverse to Long in 2002, based on his protected union activities prior to 1998. There is, however, no circumstantial evidence of references to the pre-1998 grievances or anything else that links the events over those three years or so.

In summary, Long produced no evidence that he has ever been a union officer, or that he has been disciplined, demoted or denied any right or benefit as the result of any action on his part, much less union activities. Undermining his own claim of discrimination, Long produced evidence of his positive evaluations and the lack of disciplinary measures, as well as pointing out that he had been assigned as temporary team leader by Ohlson. Excepting the

grievance filed on the disputed promotion in January of 2002, Long had not filed a grievance of any kind since 1998.[13] The matters in his complaint referring to events taking place in the early 1990's do not deal primarily with union activities, but even if they did they would be so attenuated as to be irrelevant to the present proceeding. Taking Long's perspective, it is possible to see how he could have felt the promotion of an employee with far less seniority was more than simply employer unfairness, but his success in this proceeding depended on his establishing a causal connection between his protected activity and the employer's failure to promote him. Long failed to meet that burden.

The Employer's Rebuttal

Although the Examiner now concludes that Long failed to make out a prima facie case, the Examiner denied a dismissal motion made by the employer at the close of the complainant's case in chief. The employer thus produced evidence under the second phase of the *Wilmot/Allison* test. Recognizing that reasonable minds could differ as to the Examiner's conclusion concerning the prima facie case in this decision, the Examiner deems it appropriate to briefly comment on the employer's evidence and the third portion of the *Wilmot/Allison* test.

The employer has never denied (and, in fact, has admitted), that Long met the minimum qualifications for the promotion he sought. The employer has credibly claimed that, in its view, the successful applicant was more qualified and fit the needs of the employer for the position at the time of hiring.

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[13] According to Long's theory that Ohlson had already made her choice in December, the thin thread provided by the January grievance would even disappear. A discrimination would then have to be based exclusively on the pre-1998 union activity.

The employer acknowledged that seniority has been a factor in selecting team leaders, as a tie-breaker where two applicants in the selection process are similarly qualified. The employer has credibly claimed that there was no tie in this case, since Long was a "close second" to the successful applicant, so that seniority was not a factor. The employer considered overall experience, not only years of service with the employer, and the successful applicant is a journeyman carpenter with several decades of relevant experience.

The employer successfully rebutted any inference of unlawful activity and demonstrated legitimate, non-retaliatory reasons for its decision. Long failed to show that the employer's reasons were pretextual, or that his protected activity was a substantial motivating factor in the employer's decision to promote the successful applicant rather than Long.

Request for Sanctions

The employer has requested sanctions against Long for the filing of a frivolous and meritless claim. The Commission has authority to impose extraordinary remedies under RCW 41.56.160. *Municipality of Metropolitan Seattle*, Decision 2845-A (PECB, 1988), *aff'd,* 118 Wn.2d 621 (1992). That authority is only exercised, however, against respondents who have been found guilty of unfair labor practices. *Anacortes School District*, Decision 2464-A (EDUC, 1986). Sanctions are not available against Long for his unsuccessful pursuit of his claims in this case.

FINDINGS OF FACT

1. Tacoma School District is operated pursuant to Title 28A RCW, and is a public employer within the meaning of RCW 41.56.020 and 41.56.030(1).

2. Richard Long is an employee of the Tacoma School District who has filed grievances during more than 26 years of employment with the employer. Long has received good performance evaluations from his supervisor, Margaret Ohlson, and the record reflects that under the evidence presented, Ohlson has never disciplined, demoted, or taken any other adverse job action against Long.

3. Long applied for a promotion that was awarded to another employee in January of 2002. He filed a grievance in January of 2002, protesting the failure of the employer to post the promotional opportunity. In the processing of that grievance, the employer and union agreed to posting of the promotional position on a one-time basis.

4. Long filed a complaint charging unfair labor practices with the Commission on June 18, 2002, alleging that the employer's failure to select him as team leader was in reprisal for his union activities.

5. Long was interviewed for the promotion on June 19, 2002, under the terms of settlement of the grievance described in paragraph 3 of these findings of fact. Two other applicants were also interviewed. Shortly thereafter, the employer re-awarded the promotion to the employee who had been promoted in January of 2002.

6. To the extent that the complaint described in paragraph 4 of these findings of fact contained any reference to "whistle-blower" activity or any claim of rights outside of Chapter 41.56 RCW, that subject matter was not referred to the Examiner in the preliminary ruling in this case and was not pursued by Long in this proceeding.

7. To the extent that the complaint described in paragraph 4 of these findings of fact contained any reference to the collective bargaining agreement covering Long's employment, a "violation of contract" cause of action was not referred to the Examiner in the preliminary ruling in this case and was not pursued by Long in this proceeding.

8. Although some past hiring decisions concerning team leader positions have resulted in award of the promotion to the most senior applicant from within the employer's facilities maintenance workforce, the evidence in this case does not establish that seniority has consistently been applied as a controlling factor in such promotional decisions except as a tie-breaker between applicants who are otherwise equally qualified.

9. In connection with undertaking a number of capital projects valued at $1,000,000 or more, the focus of the Tacoma School District in awarding the promotion to team leader in January of 2002, and again in re-awarding the promotion in June of 2002, was on experience with oversight of capital projects.

10. Long named Ohlson as the agent of the employer who, acting within the scope of her authority, allegedly failed to select him for the team leader position in reprisal for his union activities. The evidence establishes, however, that the interview committee unanimously selected another applicant for the promotion.

11. Long presented no evidence that he is or ever has been a union officer, shop steward, or activist. His filing of grievances during or prior to 1998 was not the subject of any recent or renewed comment or controversy, so there is no basis for an

inference that his prior union activity was any part of the employer's motivation in 2002.

12. Long's grievance filed in January of 2002 was resolved in a timely manner, and was not the subject of any further or renewed comment or controversy, so there is no basis for an inference that his union activity in 2002 was any part of the employer's motivation in June of 2002.

13. While the employer acknowledges that Long was qualified to be a team leader, and that he had greater seniority than the employee who was promoted, the employer presented evidence that the successful applicant was more qualified based on experience as a carpenter and contractor outside of the employer's workforce, in view of increased focus of the employer on capital projects involving $1,000,000 or more.

14. On the record made in this proceeding, the complainant failed to establish a prima facie case of discrimination in reprisal for his activities protected by Chapter 41.56 RCW.

15. The employer provided evidence of lawful reasons for its actions in regard to the promotion at issue in this case.

16. Long has failed sustain his burden of proof that the employer's actions in regard to the promotion at issue in this case were pretextual, or were substantially motivated by union animus.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. Under the authority conferred by WAC 391-08-003, the Examiner has waived any technical prematurity of the complaint filed as described in paragraph 4 of the foregoing findings of fact as to the re-award of the disputed promotion, and proceeded with the hearing on the merits of the case in the absence of any known or claimed prejudice to the employer.

3. Under the circumstances described in paragraphs 6 and 7 of the foregoing findings of fact, the employer's motions to dismiss based upon lack of jurisdiction were properly denied under RCW 41.56.160.

4. Based on paragraphs 8 through 16 of the foregoing findings of fact, Richard Long has failed to sustain his burden of proof to establish that the Tacoma School District acted in reprisal for his protected union activities when awarding and re-awarding the promotion sought by Long, so that no unfair labor practice has been established under RCW 41.56.140(1).

ORDER

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

Issued at Olympia, Washington, this 14th day of July, 2003.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID I. GEDROSE, 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.