University Place School District, Decision 9341 (PECB, 2006)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

UNIVERSITY PLACE EDUCATION ASSOCIATION, Complainant, vs. UNIVERSITY PLACE SCHOOL DISTRICT, Respondent.	CASE 19565-U-05-4962 DECISION 9341 - EDUC FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Eric Hansen, Attorney at Law, for the Union.

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On June 16, 2005, University Place Education Association (union), filed a complaint charging unfair labor practices with the Public Employment Relations Commission (Commission), naming University Place School District (employer) as respondent. Mark S. Downing, Unfair Labor Practice Manager of the Commission, issued a preliminary ruling on the complaint on July 8, 2005. The preliminary ruling held, assuming all of the facts alleged to be true and provable, a cause of action would be stated for:

Employer interference with employee rights in violation of RCW 41.59.140(1)(a) and discrimination in violation of RCW 41.59.140(1)(c) by comments of principal Susan Follmer to union building representative Renee Verone concerning Verone's involvement in an employee survey and suggestions that Verone might want to apply for a vacant position at another school, in reprisal for union activities protected by Chapter 41.59 RCW.

Examiner Vincent M. Helm held a hearing in this matter on January 9, 2006. The parties filed post-hearing briefs on March 1, 2006.

ISSUES PRESENTED

Issue 1: Did the employer interfere with, restrain or coerce Renee Verone in the exercise of her rights as a result of comments made by her supervisor during the course of an evaluation of Verone's work performance?

Issue 2: Did the employer discriminate against Renee Verone because she exercised protected rights?

Based on the evidence and arguments submitted by the parties, the Examiner rules that the employer violated RCW 41.59.140(1)(a) by the supervisor's comments, but did not violate RCW 41.59.140(1)(c).

ANALYSIS

Issue 1: Did the employer interfere with, restrain or coerce Renee Verone in the exercise of her rights as a result of comments made by her supervisor during the course of an evaluation of Verone's work performance?

Applicable Legal Provisions and Precedent

Applicable provisions of Chapter 41.59 RCW provide:

> RCW 41.59.060 Employee rights enumerated — Fees and dues, deduction from pay. (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 . . .
> . . . .

> RCW 41.59.140 Unfair labor practices for employer, employee organization, enumerated. (1) It shall be an unfair labor practice for an employer:
>
> (a) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in RCW 41.59.060.

An unlawful interference violation must be established by the complainant by a preponderance of the evidence. *Lyle School District*, Decision 2736-A (PECB, 1988); *City of Vancouver*, Decision 6732-A (PECB, 1999). A complainant need only show that a party engaged in conduct which employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with union activity. *City of Seattle*, Decision 3066 (PECB, 1989), *aff'd*, Decision 3066-A (PECB, 1989); *Seattle School District*, Decision 7348 (PECB, 2001). The complainant need not establish the employer acted with unlawful intent or motivation or establish that employees were actually interfered with or coerced. *Clallam County v. Public Employment Relations Commission*, 43 Wn.App. 589 (1986); *City of Omak*, Decision 5579-B (PECB, 1998); *King County*, Decision 7104 (PECB, 2001). To the contrary an employer violation may be established where employee perceptions of the employer activity are inaccurate, or where the employer in fact intended to act lawfully. *King County*, Decision 7104-A (PECB, 2001); *King County*, Decision 7819 (PECB, 2001).

As indicated in *City of Mill Creek*, Decision 5699 (PECB, 1996), and cases cited therein, the burden of proof WAC 391-45-270(1)(a) imposes upon the complainant is not substantial. *Mill Creek* also illustrates that an employer may interfere with an employee's statutorily protected rights by using the occasion of a performance review to make remarks with respect to the employee's manner of exercising protected rights connoting an adverse impact upon the employer's perception of work performance.

The parties to this proceeding enjoy a long-standing, generally harmonious and collaborative working relationship marked by a high degree of respect and cooperation at the highest administrative level. The major figures in this case are Renee Verone, a teacher, bargaining unit member, and union representative, and Susan Follmer, a junior high school principal.

Verone taught at Curtis Junior High from 2000 until the summer of 2005 when she transferred to Curtis Senior High School. Verone taught eighth grade English and reading and ninth grade drama and cultures and functioned as a building representative on behalf of the union from the summer of 2001 until she transferred from the junior high school. Commencing in 2004 she began serving as an executive board member of the union.

As a building representative Verone performed union steward duties. Trista Dawson also was a building representative for the junior high school during the same period of time.

The relationship between Follmer and Verone began when Follmer became principal at the junior high school in the 2003-2004 school year. In connection with their duties as building representatives, Verone and Dawson formally met three times with Follmer in her first year as principal, as well as informally on numerous occasions.

In the formal meetings, the building representatives conveyed concerns of teachers relative to: a perceived lack of support of teachers in cases involving discipline of students; Follmer's misuse of teachers' planning time and late starts; and the tone of her one-on-one communications with teachers both verbally and through e-mail.

Because of on-going teacher complaints, the building representatives held two meetings with junior high school teachers in February 2004. At these meetings the building representatives took notes concerning complaints about Follmer. Arnie Handeland, the union president, thereafter informed Follmer of the concerns expressed by the teachers.

As a consequence, Follmer initiated a written survey of teachers at the junior high school in April 2004. She assured teachers the survey results would be confidential and would not be reviewed by her. In May 2004, Follmer reviewed survey results in a meeting with the teachers, reading aloud portions of the teachers' written comments.

The tenuous relationship between Follmer and teachers continued in the 2004-2005 school year. This prompted the two building representatives to take an informal survey of union members concerning working conditions and their attitude with respect to a no confidence vote in Follmer's leadership. The building representatives concluded that approximately 70 percent of the staff did not have confidence in Follmer.

The two building representatives and the union president then met with Superintendent Patty Banks, and shared the results of the survey with her. The parties at the meeting agreed that the best course of action was for a outside consultant to survey the entire staff at the junior high school.

In March 2005, during the course of a meeting between the building representatives and Follmer, the two union representatives indicated that teachers were happy about changes in discipline policy initiated by Follmer without in any manner referencing the teacher discontent of which they had recently made the superintendent aware.

After Follmer's March 2005 meeting with Verone and Dawson, Follmer's superior, Assistant Superintendent Tony Pullen, advised her of the teacher discontent reported to them by the building representatives and the decision to perform the survey. The agreed upon survey was taken in April 2005 and the results shared with the staff.

Against this background, a May 13, 2005, performance evaluation meeting between Follmer and Verone provides the catalyst for this complaint. There is little dispute as to what transpired at this meeting.

Verone objected to initial written comments relative to her arriving late to work and being disorganized in maintaining records, noting that the labor contract required matters such as this be brought up at the time the problem arose and that she had no prior notice of deficiencies in these areas. Follmer deleted these references in the written evaluation.

Verone then questioned the rationale for the following written comment in the evaluation: "I hope next year you will commit to be working through problems face to face. . . ." Follmer responded that she believed Verone had gone behind her back to initiate a vote of no confidence after telling her in their March meeting that everything was fine. Follmer also referenced the fact that Verone and other union representatives went to the superintendent with complaints about her without first talking to her. She indicated the fact that the two building representatives cancelled a previously scheduled meeting with her in order to take their complaint directly to her supervisor heightened her concern.

The foregoing comments prompted Verone to embark on an extensive discourse regarding her role as a union representative as opposed

to her functions as a teacher. Follmer and Verone indicate that Follmer then, in effect, conveyed the hope that Verone did not see her role as that of one stirring the pot or causing problems.

In order to bring this aspect of the conversation to a halt, Follmer stated she had consulted an attorney and learned a good deal about slander and defamation of character.

At this point the conversation moved to a discussion of Verone's teaching assignment the following year. Follmer noted that Verone did not seem happy with her position and indicated there was an opening at the high school for an English teacher. Follmer said she would write a letter of recommendation if Verone desired to change work locations. Verone countered by noting she wished to teach social studies and that a position teaching in that area would be open the following year at the junior high school and inquiring as to why she could not have that position. Follmer said she would check into the matter.

Follmer, during the course of her conversation with Verone, made comments that clearly constituted violations of RCW 41.59.140(1)(a). Where, as here, an employer attempts to impact an employee's exercise of rights guaranteed by the statute through negative performance reviews and comments designed to stifle future protected activities, a statutory violation occurs. The negative comments in the written evaluation concerning Verone's need to work through problems face to face as amplified upon by Follmer in the meeting were directed toward Verone's legitimate and statutorily protected activities as a union representative rather than any matter involved with her work performance. Follmer's written comment in the evaluation, as amplified by her verbal explanation conveyed her displeasure with Verone's bypassing her to confer directly with the superintendent relative to complaints of

bargaining unit employees and Follmer's offer to assist Verone in transferring to a different school all constituted efforts to inhibit legitimate protected activity and violated the statute. Lastly, Follmer's comments concerning having consulted an attorney with respect to slander and defamation of character also violated the statue because of the inherently coercive nature of the comment and the reasonable inference of adverse impact upon Verone.

Issue 2: Did the employer discriminate against Renee Verone because she exercised protected rights?

Applicable Legal Provisions and Precedents

> RCW 41.59.140 Unfair labor practices for employer, employee organization, enumerated. (1) It shall be an unfair labor practice for an employer:
> . . . .
> (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, but nothing contained in this subsection shall prevent an employer from requiring, as a condition of continued employment, payment of periodic dues and fees uniformly required to an exclusive bargaining representative pursuant to RCW 41.59.100;

Legal Standards for Discrimination

A discrimination violation occurs when: (1) the employee exercised a right protected by the collective bargaining statute, or communicated to the employer an intent to do so; (2) the employer, with knowledge of one (1) above, deprived the employee of some ascertainable right, benefit or status; and (3) a causal connection exists between the exercise of the legal right and the discriminatory action. *See Educational Service District 114*, Decision 4361-A (PECB, 1994); Mansfield School District, Decision 5238-A and 5239-A (EDUC, 1996); and *Brinnon School District*, Decision 7211-A (PECB, 2001).

The Commission has developed a three-pronged shifting burden approach with respect to discrimination cases. To meet the initial burden, a complainant must establish a prima facie case of discrimination as set forth above. Then the burden shifts to the employer to articulate legitimate, nonretaliatory reasons for its actions by producing evidence sufficient to warrant a finding that its action was taken for a nondiscriminatory reason. This evidence need not meet the preponderance of evidence standard because the burden of persuasion remains with the complainant. If the employer does not provide this evidence, liability attaches as a matter of law. If such evidence is produced, the presumption of a violation of statute is rebutted.

The complainant must then show, by a preponderance of the evidence, that the stated reason for the disputed employer action was pretextual and in fact was in retaliation for the employee's exercise of statutory rights. This may be done by direct or circumstantial evidence showing: (1) the reasons given by the employer were pretextual; or (2) union animus was nevertheless a substantial motivating factor behind the employer's action. If this is not established, the case is dismissed. If it is, the complainant has established a reasonable inference of discrimination. *Educational Service District 114*, Decision 4361-A; *King County*, Decision 7506-A (PECB, 2003).

As noted in *Educational Service District 114*, an employer usually does not publicize a retaliatory motive and therefore circumstantial, rather than direct evidence, is most often the basis for a finding of a discriminatory motive. In establishing the causal connection, Washington Supreme Court decisions indicate it is sufficient to show the employee engaged in protected activities, the employer had knowledge of such activities, and under the facts it can reasonably be inferred the employee was discharged or

suffered other adverse consequences to his employment status as a result thereof. *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991); *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991).

The May 2005 meeting between Follmer and Verone generated a flurry of activity. Verone left the meeting and immediately recorded the highlights of the discussion in writing. She then contacted the union president and her fellow building representative and informed them of what had transpired. Verone brought the situation to the attention of the union's staff representative Toni Graff. The union told the superintendent its concerns about the May 13, 2005, conference within a matter of days. The employer obtained a statement from Verone and discussed the matter with Follmer.

Absolutely no credible evidence was introduced that could establish a violation of RCW 41.59.140(1)(c). While Follmer's words constituted interference, restraint and coercion, they did not constitute an act causing a deprivation of any ascertainable right, benefit or status. The employer, through its central administrative staff, took immediate and effective action to notify the union that Follmer's remarks were unacceptable and that corrective action had been taken with respect to her. Concurrently, at the direction of the superintendent the employer advised Verone of various employment options available to her for the coming school year. Included in these were: continuing her current assignment; accepting an assignment at the junior high school to teach social studies; and teaching U.S. history at the high school. The third option was exactly the type of position Verone testified was her career preference. While Verone was considering these options, the employer's human resources representative assured her that she would have a secure work environment at the junior high school.

While there may be instances where the mere words of an employer representative may cause an employee to terminate employment or request a changed work assignment and thereby create a discrimination violation the evidence here falls far short of a violation of the statute. While Verone claims her fear of a hostile work environment prompted her request to change jobs, I find her contentions to have no reasonable support in the evidence. This was a single instance of bad conduct in the context of an extremely harmonious bargaining relationship. The prompt actions by top level employer representatives outlined above provide convincing evidence that Verone elected to change jobs to achieve her career objective rather than as a reaction to Follmer's comments.

FINDINGS OF FACT

1. The University Place School District is a common school district organized and operated under Title 28A RCW, and is an employer within the meaning of RCW 41.59.020(5). Patti Banks was superintendent of schools at all times pertinent hereto.

2. The University Place Education Association, an employee organization within the meaning of 41.59.020(1), is the exclusive bargaining representative of non-supervisory certificated employees in the University Place School District.

3. At all times material herein: Renee Verone was a bargaining unit member employed as a teacher at the employer's junior high school, a union executive board member, and building representative; Susan Follmer was principal of the employer's junior high school and Verone's direct supervisor.

4. At all times material herein the employer and the union have maintained an open, collaborative bargaining relationship.

5. Verone, along with fellow building representative Trista Dawson, met on several occasions with Follmer to discuss major concerns of teachers with respect to Follmer's conduct as principal during the 2003-2004 school year.

6. The two building representatives met informally with bargaining unit members in the 2004-2005 school and determined that approximately 70% of the bargaining unit supported a "no confidence" vote with respect to Follmer.

7. In a meeting with Follmer in March 2005 Verone and Dawson did not inform Follmer of the wide-spread displeasure of the bargaining unit with Follmer.

8. Shortly after meeting with Follmer the two building representative along with union president Arne Handeland met with Banks to inform her of the unhappiness with Follmer's leadership.

9. The parties agreed to hire a consultant to survey bargaining unit attitudes.

10. After the survey decision was reached, Tony Pullen, assistant superintendent, advised Follmer in March or April 2005 that the building representatives had informed the superintendent that 70% of the bargaining unit favored a no confidence vote and that the employer had agreed to have a consultant conduct a survey of bargaining unit employees.

11. The consultant conducted the bargaining unit survey in April and reported the results prior to May 13, 2005.

12. On May 13, 2005, Follmer reviewed with Verone her written evaluation of Verone's performance as a teacher.

13. In her written comments Follmer stated, inter alia, "I hope next year you will commit to be working through problems face to face. . . ." When Verone questioned her about the basis for that comment, Follmer said the reference was not to Verone's functioning as a teacher but her actions as a union representative. Follmer indicated that Verone had gone directly to her fellow teachers to obtain a vote of no confidence after indicating to her that relations between Follmer and the teachers were fine. Follmer also complained of Verone going to the superintendent with teacher complaints including the pendency of a "no confidence" vote, without first informing Follmer of the situation.

14. In response to the comments referenced in 13 above, Verone initiated an extended discourse as to her role as a union representative. Follmer then, in effect, stated she hoped Verone did not see her role as that of stirring the pot or causing problems. Follmer ended that portion of the discussion by informing Verone that she had consulted a lawyer with respect to slander and defamation.

15. Follmer concluded the evaluation conference by noting that Verone did not appear happy with her current job and that if she wished to apply for an open position as an English teacher, Follmer would write her a letter of recommendation.

16. Verone inquired about applying for a social studies teaching position at the junior high school. Follmer stated she would see if the position was available.

17. Following the May 13, 2005, meeting Verone contacted union representatives who brought Follmer's comments to the attention of the employer's superintendent.

18. The employer immediately launched an internal investigation which resulted in Follmer receiving a corrective action plan which, if not met, could result in her termination or reassignment.

19. The employer, through its human resources representative, had several conversations with Verone where the employer repeatedly assured her there would be no reprisals if she elected to stay at the junior high school and offered her a choice of three teaching positions. Verone elected to teach U.S. History at the high school. This is her preferred subject area.

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 University Place School District interfered with, restrained and coerced employers in the exercise of rights guaranteed in RCW 41.59.060 by the actions of its Curtis Junior High School principal as set forth in items 12 through 15 of the foregoing findings of fact and thereby committed an unfair labor practice in violation of RCW 41.59.140(1)(a).

3. The comments referenced in items 12 through 15 of the foregoing findings of fact viewed in the context of items 17 through 19 of the foregoing findings of fact do not establish that the employer violated RCW 41.59.140(1)(c).

ORDER

Upon the basis of the above Findings of Fact and Conclusions of Law and pursuant to RCW 41.59.150 of the Educational Employment

Relations Act, it is ordered that University Place School District, its officers and agents, shall immediately:

1. CEASE AND DESIST from:

   a. Reprimanding employees or indicating negative inferences or consequences during the course of work performance evaluations for conduct unrelated to work performance and which constitutes the exercise of rights guaranteed in RCW 41.59.060.

   b. In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed in RCW 41.59.060.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS to remedy its unfair labor practices and to effectuate the policies of the Act:

   a. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto. Such notices shall, after being duly signed by an authorized representative of the University Place School District, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the University Place School District to ensure that said notices are not removed, altered, defaced or covered by other material.

   b. Read the notice required by the preceding paragraph aloud at the next public meeting of the employer's board, and append a copy thereof to the official minutes of said meeting.

c. Notify the University Place Education Association, in writing, within 20 days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide that organization with a signed copy to the notice required by the preceding paragraph.

d. Notify the Executive Director of the Commission, in writing, within 20 days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding paragraph.

Issued at Olympia, Washington, on the 31st day of May, 2006.

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 WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY interfered with restrained and coerced our employee by comments of our supervisor during the course of an evaluation of the employee's work performance which constituted a reprimand or indicated negative employment or personal consequences for exercising rights protected by statute.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL NOT interfere with restrain or coerce employees in the exercise of rights guaranteed in RCW 41.59.060 by comments of supervisor reprimanding an employee or inferring negative employment or personal consequences during the course of job performance reviews for his/her manner of exercising such rights.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____ University Place 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,112 Henry Street N.E. PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's website: www.perc.wa.gov.