Clover Park School District, Decision 7073 (EDUC, 2000)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SUZANNE DELACEY, Complainant,	)	CASE 13823-U-98-3385
vs.	)	DECISION 7073 - EDUC
CLOVER PARK SCHOOL DISTRICT, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

King and Gautschi, by Larry King, Attorney at Law, and Frederick H. Gautschi, III, Attorney at Law, represented the complainant.

Vandeberg, Johnson, and Gandara, by William A. Coats, Attorney at Law, represented the employer.

On April 3, 1998, Suzanne DeLacey (complainant), filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that Clover Park School District (employer) violated RCW 41.56.140(1) and (3). The Executive Director issued a preliminary ruling on April 30, 1998, finding a cause of action to exist on allegations of:

> The employer's interference with the rights of bargaining unit employee Suzanne DeLacey, by its refusal to allow her union representation in a meeting to discuss her probationary status, and by creating intolerable working conditions leading to her constructive discharge, in retaliation for her having engaged in protected activities.

A hearing was held on June 10 and 11, and July 9, 12, and 13, 1999, before Examiner Rex L. Lacy. The parties filed briefs.

On the basis of the evidence presented at the hearing, and the record as a whole, the Examiner concludes that the evaluation and observation meetings between Hansen and DeLacey were not investigatory interviews, and that the evidence fails to establish that DeLacey could have reasonably believed that they concerned discipline. Therefore, the allegation that the employer interfered with DeLacey's rights to union representation was not proven. The complaint is dismissed.

BACKGROUND

The Clover Park School District operates educational programs for approximately 13,000 students in kindergarten through high school. The employer operates 2 high schools, 4 middle schools, 19 elementary schools, and 3 alternative schools. Dr. Hugh E. Burkett was superintendent at the time of the hearing on this matter.

The Clover Park Education Association (CPEA) is the exclusive representative of the employer's non-supervisory certificated employees. Lyle Attebury was president of the CPEA at the time of the hearing. Toni Graf is the union representative for the CPEA.

Suzanne DeLacey was employed as a certificated teacher in the Clover Park School District from September of 1996 until June of 1998. As an employee in her first two years of employment by this employer, DeLacey was a "provisional" employee subject to non-renewal under RCW 28A.405.220.

The employer and the CPEA were parties to a collective bargaining agreement effective for the period from September 1, 1997 to August 31, 1998. That contract contained provisions governing the evaluation of certificated employees, including provisional

employees. Section 6.6 of that contract provided that first year provisional employees were to be formally evaluated within the first 90 days of employment. Section 6.6.2 provided that provisional employees were to be notified of any performance deficiencies within 15 working days following the date on which the problem(s) were observed, and were to be notified of any recommendation(s) for corrective action.

DeLacey worked at Woodbrook Middle School, where Karen Hansen was the principal and Mark Demick was the assistant principal. Demick made the evaluation during the first year of DeLacey's employment, and he testified that he rated DeLacey as satisfactory even though he believed she had some problems with classroom management and student discipline. Hansen conducted the evaluation during the second year of DeLacey's employment, and the matters at issue in this proceeding relate to the second year of DeLacey's employment.

On October 8, 1997, Hansen scheduled a meeting with DeLacey to discuss some student complaints about DeLacey. Hansen gave DeLacey a summary of the student complaints, and left her office while DeLacey read those complaints. During the course of the meeting, Hansen made some suggestions to DeLacey about working with students. Both Hansen and DeLacey described that meeting as being cordial and professional.

Shortly after the October 8 meeting, DeLacey contacted Attebury and filed a grievance asserting that the employer had violated Section 6.4.1.7 of the collective bargaining agreement. The specific claim was that the students complaints about DeLacey arose in another teacher's classroom.

On October 9, 1997, Hansen convened a meeting of the teaching team to which DeLacey was assigned, to discuss the student complaints.

DeLacey requested that a union representative be present at the meeting. Hansen told DeLacey to get a union representative so the meeting could be held. DeLacey could not locate a union representative, and she did not return to the meeting.[1]

The first step meeting was held on DeLacey's grievance on October 13, 1997. Hansen expressed concern that the student complaint matter should be resolved in a collegial manner, and she expressed disappointment that DeLacey did not agree to discuss the issue with the other team members. Attebury testified that he considered Hansen's attitude to be "nonprofessional".

The performance evaluation process for the 1997-98 school year called for a pre-evaluation conference, a classroom observation, and a post-evaluation conference. Throughout that three-step process, DeLacey requested that a union representative be present.[2] In denying DeLacey's requests for union representation at those meetings, Hansen stated that the union should not be a part of the evaluation process.

At the pre-evaluation meeting, which occurred early in November of 1997, the discussion centered on DeLacey's lesson plans and her teaching goals for the rest of the school year. No disciplinary action resulted from that meeting. Even so, DeLacey testified that she felt she was disciplined and reprimanded.

On November 25, 1997, Hansen conducted the classroom observation portion of the evaluation process.

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[1] DeLacey was not criticized for requesting union representation, nor was she disciplined for failing to return to the meeting.

[2] The evidence in this matter contains several references to DeLacey being terrified to be alone with Hansen.

Two post-observation sessions were held on December 9 and 10, 1997. The first of those dealt with the classroom evaluation; the second concerned Hansen's belief that DeLacey was not correctly implementing the writing program. DeLacey testified that she felt she was being "attacked", because of Hansen's questions.

Hansen presented DeLacey with a post-evaluation report on December 17, 1997. That report indicated that DeLacey did not meet minimum standards in five of seven categories that formed the basis of the evaluation. Hansen informed DeLacey that she would be placed on an "action plan" or "plan for improvement". As part of such plans, the employer hires an outside evaluator, Jeanne Pettersen, to perform another evaluation and assist teachers who have been placed on an improvement plan.

In late December of 1997 or early January of 1998, Hansen attempted to meet with DeLacey about an incident in DeLacey's classroom. The matter concerned the content of a writing project which a student had completed and was reading to the class.[3]

On January 14, 1998, Pettersen and Hansen met with DeLacey to discuss the events associated with the action plan. At the outset of that meeting, DeLacey took verbatim notes of what was said. Hansen was concerned that the detailed note-taking was extending the length of the meeting. Nevertheless, DeLacey continued taking verbatim notes. Hansen then asked Demick to attend the meeting, and to take notes for the employer. Pettersen suggested that a neutral party be obtained to take notes, so the meeting could

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[3] The situation was observed by Suzanne Beeks, a member of the same teaching team as DeLacey. When Beeks contacted Hansen about the student's remarks, Hansen told Beeks to have the students write down their complaints, and to bring any such complaints to her. Beeks did so.

proceed. DeLacey thereupon exited from the meeting, and did not return.[4]

On January 23, 1998, Pettersen conducted a pre-observation conference with DeLacey, an observation in DeLacey's classroom, and a post-observation conference with DeLacey. Pettersen rated DeLacey's performance as "poor" and "below average". DeLacey did not request the presence of a union representative either before or during those sessions.

DeLacey sought assistance from the union after the January 23 meeting, and the union offered several suggestions, including resignation. On January 22, 1998, the employer and DeLacey entered into a settlement agreement drafted by the union, by which DeLacey was permitted to finish the 1997-98 school year without further observations or evaluations and was assured of a "neutral" recommendation by the employer, in exchange for her resignation.

On April 3, 1998, DeLacey filed the complaint charging unfair labor practices to initiate this proceeding. She asserted that she should be reinstated to her employment with the employer, because she had been denied union representation in the evaluation process.

POSITIONS OF THE PARTIES

DeLacey contends that she was discriminated against by the building principal for requesting union representation at meetings with the principal, for filing a grievance, and for requesting that a union representative be present at performance evaluation conferences and meetings concerning the "action plan".

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[4] DeLacey was not criticized for or disciplined for leaving that meeting.

The employer contends that the Commission lacks jurisdiction to enforce collective bargaining agreements. Even if the Commission assumes jurisdiction in this case, the employer argues that it did not discriminate against DeLacey when it refused to rehire DeLacey after she had voluntarily resigned her position. The employer cites three reasons for its assertion: (1) That DeLacey agreed to resign as part of a settlement agreement negotiated by her union; (2) that DeLacey has not proven anti-union animus on the part of the employer; and (3) that DeLacey's poor work performance provided a valid reason for refusing to renew her employment.

DISCUSSION

The Legislature has delegated the Public Employment Relations Commission authority to determine and remedy unfair labor practices involving certificated employees in the common schools system. RCW 41.59.140 enumerates unfair labor practice for employers:

> RCW 41.59.140 UNFAIR LABOR PRACTICES FOR EMPLOYER ... ENUMERATED. (1) It shall be an unfair labor practice for an employer:
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> (a) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in RCW 41.59.060.
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> (b) To dominate or interfere with the formation or administration of any employee organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made by the commission pursuant to RCW 41.59.110, an employer shall not be prohibited from permitting employees to confer with it or its representatives or agents during working hours without loss of time or pay;
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> (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;
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> (d) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under *this chapter;
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> (e) To refuse to bargain collectively with the representatives of its employees.

General procedures for adjudication of unfair labor practice claims are set forth in RCW 41.59.150. The Commission has adopted Chapter 391-45 WAC to set forth additional procedures for the processing of unfair labor practice complaints.

The Employer's "Jurisdiction" Arguments -

Citing City of Walla Walla, Decision 104 (PECB, 1976), and contending that this case concerns matters covered by the collective bargaining agreement applicable to DeLacey's employment, the employer argues that the Commission lacks jurisdiction to adjudicate this controversy. It is true that the Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute, but the employer overlooks the claims of interference with or discrimination in reprisal for the exercise of statutory rights. As quoted above, the only issues advanced to hearing by the Executive Director concerned "refusal to allow ... union representation" and "creating intolerable working conditions ... in retaliation for ... protected activities". The Commission does not defer interference or discrimination complaints to arbitration or any other forum. City of Yakima, Decision 3564-A (PECB, 1991).

Standards for "Discrimination" and "Interference" -

The complainant has the burden of proof in unfair labor practice proceedings. WAC 391-45-270. To establish "discrimination", a

complainant must prove: (1) Exercise of a statutorily protected right, or communicating an intent to do so; (2) being deprived of some ascertainable right, status or benefit; and (3) a causal connection between the exercise of the legal right and the discriminatory action. If that burden is met, the respondent is called upon to articulate non-discriminatory reasons for its actions. The burden of proof remains on the complainant, but it may prevail by showing either: (4) that the reasons asserted were pretextual; or (5) union animus was nevertheless a "substantial motivating factor" behind the disputed action. Educational Service District 114, Decision 4631-A (PECB, July 25, 1994).[5]

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[5] In Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991), the Supreme Court of the State of Washington adopted the "substantial motivating factor" test for determination of discrimination claims. The Court wrote in Allison:

> On balance, the [state statute] supports a more liberal standard of causation than the "but for" standard .... Washington's law against discrimination contains a sweeping policy statement strongly condemning many forms of discrimination. RCW 49.60.010. It also requires that "this chapter shall be construed liberally for the accomplishment of the purposes thereof". RCW 49.60.020. This language suggests that a rigorous "but for" causation requirement is too harsh a burden to place upon a plaintiff in a retaliation case.
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> ...
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> Rejecting both the "to any degree" and the "but for" standard of causation, **this court instead requires plaintiff to prove that retaliation was a substantial factor behind the decision.**

[Emphasis by **bold** supplied.]

In doing so, the Court rejected further reliance upon Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), which formed the basis for Wright Line, 251 NLRB 1083 (1980) and Commission precedents such as City of Olympia, Decision 1208-A (PECB, 1982).

To establish "interference" with protected rights, a complainant need only prove that a party engaged in conduct which employees reasonably perceived as a threat of reprisal or force or promise of benefit associated with their union activity. The actual intent is not a factor or defense. City of Seattle, Decision 3066 (PECB, 1989), affirmed Decision 3066-A (PECB, 1989).

The Right to Union Representation -

In National Labor Relations Board v. Weingarten, Inc., 420 U.S. 251 (1975), the Supreme Court of the United States ruled that employees have a right to union representation at investigatory interviews, where the employee reasonably perceives that they may be subject to discipline as a result of the meeting. An employer thus commits an "interference" violation if it refuses an employee's timely request for union representation. The Commission has adopted the same principles in numerous decisions implementing state collective bargaining laws which are similar to the federal law. See, Okanogan County, Decision 2252-A (PECB, 1986). The Commission has previously rejected employer attempts to distinguish what have been termed "voluntary" and "non-investigatory" meetings, and has even imposed extraordinary remedies upon an employer which committed repetitive violations. See, City of Seattle, 3593-A (PECB, 1989).

The Commission's jurisdiction in this matter arises out of that statutory right, rather than any contractual right.[6] Moreover,

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[6] Section 3.2.2 of the applicable collective bargaining agreement states, in regard to "due process":

> An employee shall be entitled to have present a representative of the Association during any meeting which might reasonably be expected to lead to disciplinary action. When a request of such representation is made, no action shall be taken with respect to the employee until such representative of the Association is present. ...

the evidence does not establish that the CPEA ever filed and processed a contractual claim (grievance) involving the denial of union representation at any step of the evaluation process.[7]

Application of Standards - The Right to Representation Claim

The only requests for union representation at issue here concern meetings held as part of the evaluation process required by both Title 28A RCW and the applicable collective bargaining agreement.[8] The Examiner accepts the employer's assertion that DeLacey did not have a right to union representation at those evaluation meetings.

The record clearly indicates that DeLacey feared being alone with Hansen, but does not provide any explanation for that fear. Simply because an employee is afraid of a supervisor does not mean that any and all meetings with that supervisor automatically give rise to a right to union representation under the statute. The basic premise of Weingarten is to insure that an employee may have the assistance of the exclusive bargaining representative in circumstances where the employee may be too intimidated, inarticulate or unsophisticated to properly present the facts in an ***investigatory*** setting. At a minimum: (1) the employer must be posing questions to the employee about some alleged misconduct; and (2) the employee must ***reasonably*** believe the interview might result in disciplinary action. Cowlitz County, Decision 6832-A (PECB, 2000).

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[7] The CPEA also did not file or process this unfair labor practice case.

[8] Unrefuted evidence clearly establishes that DeLacey requested union representation each and every time she was called upon to attend any kind of meeting with Hansen. Other than meetings held as part of the evaluation process, Hansen told DeLacey to get her union representative. On those occasions when DeLacey was unable to obtain union representation and failed to return, Hansen did not mete out any form of discipline.

In this case, DeLacey knew or should have known that her performance was going to be evaluated by employer officials. Apart from her presumed knowledge of state law, Section 6.1.1 of the applicable collective bargaining agreement provided:

> Employees are expected to perform and will be evaluated in accordance with state laws and district guidelines as defined in RCW 28A.67.065, the job description, and evaluation process found in Appendices 4-7B.

Because she was working at Woodbrook Middle School, DeLacey knew or should have known that her evaluations would be conducted by the building principal (Hansen) and/or assistant principal (Demick).

The focus of the evaluation process is on the performance of the individual employee. There is no evidence which would have provided (or now provides) basis for any inference that DeLacey was under investigation for any misconduct which could have warranted her immediate discipline or discharge. Evaluation procedures are likely a mandatory subject of collective bargaining,[9] and are included in many, if not most, collective bargaining agreements which this Examiner has encountered in more than 20 years of resolving disputes under the EERA. Even when codified in collective bargaining agreements and made enforceable through grievance procedures, however, procedures for evaluation of teachers generally are not regarded as disciplinary. Such is clearly the case in the Clover Park School District. Attebery credibly testified that the employer was not required to permit union representation at evaluation and observation meetings, unless the meeting was for disciplinary purposes.

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[9] There is no occasion for the Examiner to make a specific ruling on the scope of bargaining in this case, where the union is not a party to the proceedings.

Consistent with Attebery's testimony, there is a substantial question under Commission precedent as to whether the substance of evaluations is within the union's sphere of concern.

> In City of Bellevue, Decision 4324-A (PECB, 1994), the Commission clearly and firmly refused to extend the rights and obligations of the collective bargaining process to "due process" hearings which are conducted by public employers to meet their obligations under the United States Constitution, as interpreted by the Supreme Court of the United States in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). The Commission subsequently reiterated that stance in City of Winlock, Decision 4784-A (PECB, 1995), saying:
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> > [T]he Commission has declined to extend the collective bargaining process and its unfair labor practice procedures to enforce the constitutional "due process" rights on which Loudermill is based, City of Bellevue, Decision 4324-A (PECB, 1994)...
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> The same principle has been enunciated in decisions at least as far back as Okanogan County, Decision 2252-A (PECB, 1986).

Town of Steilacoom, Decision 6213 (PECB, 1998).

Like the due process concerns imposed upon public employers by the Loudermill decision, performance evaluation is a responsibility imposed upon school districts by the Legislature, through statutes codified in Title 28A RCW.

Additionally, the collective bargaining agreement applicable to DeLacey's employment limited the bargained-for grievance procedure at Section 5.3.2, as follows:

> The arbitrator shall have no power or authority to rule on any matter involving:
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> A. An employee evaluation, provided that the evaluation procedures shall be subject to the arbitrator's review, or
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> B. The termination of services or nonrenewal of any provisional employee.

In Pateros School District, Decision 3744 (EDUC, 1991), an Examiner rejected an employee's claim that a union was required to provide legal representation for all bargaining unit members in the Title 28A RCW nonrenewal process, merely because that process "relates to employment". The statutory process was seen as being beyond the union's duty of fair representation under RCW 41.59.090 and Allen v Seattle Police Officers' Guild, 100 Wn.2d 361 (1983).

There is no evidence that the employer converted any of the "evaluation" meetings into pre-disciplinary investigative interviews, as occurred in Cowlitz County, supra. Nothing in this record supports a conclusion that Hansen was using the evaluation process to discipline or discharge DeLacey. Any such conclusion by DeLacey can only be attributed to DeLacey's insecurity about her performance and/or her fear of Hansen.

Application of Standards - The Prima Facie Case

The discrimination allegation in this complaint flows from DeLacey's unfounded claim of a right to union representation at the evaluation meetings, but is analyzed separately. Again, the Examiner rules that DeLacey failed to sustain her burden of proof.

Union Activity and Visibility -

A finding of employer intent inherently requires proof that the employer had the knowledge necessary to form such an intent.

In this case, DeLacey proved that she requested the presence of a union representative at meetings between herself and Hansen. Thus, DeLacey was claiming rights under the collective bargaining law, even if she was mistaken about the extent of her rights. Additionally, DeLacey's union had filed a grievance on her behalf concerning the handling of the student complaints presented to her by Hansen. The evidence is thus sufficient to establish this component of a prima facie case of discrimination.

Indications of Employer Animus -

Where union discrimination is found, the evidence must show that the employer bears sentiments against the collective bargaining process, the particular union chosen by or seeking to organize its employees, or the particular leaders of a union.

In this case, nothing in the record establishes any generalized animus by the employer or any of its officials against the CPEA. The most that can be said is that Hansen testified that she did not appreciate dealing with the union concerning DeLacey's grievance, and would have preferred to resolve the problems raised by the student complaints in a "collegial" manner.[10] While certainly falling short of the classic situation described above, Hansen's testimony is minimally sufficient to establish this component of a prima facie case of discrimination.

Deprivation of Ascertainable Right -

DeLacey alleges that her participation in protected activities formed the basis for a discriminatory decision to place her on an "action plan" as a precursor to termination of her employment. The Examiner rejects the complainant's arguments.

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[10] Hansen's preferred approach would have been to call a meeting of the teaching team to which DeLacey was assigned, and work out a solution with the team members.

At the point in the evaluation process when the "Action Plan" arose, union representative Lynn Macdonald sought out Hansen and asked to be present throughout the improvement process. Hansen denied that request but, for reasons indicated above, DeLacey was not entitled to union representation for meetings held in regard to the evaluation process.

The employer hired an outside consultant to evaluate DeLacey's teaching performance, and that person suggested two observations in January and a total of at least five observations and conferences, to evaluate and correct DeLacey's alleged deficiencies. Nothing in this record provides any basis for a finding that DeLacey was entitled to complete exclusion from a process routinely used by this employer for teachers with performance problems. Based on DeLacey's evident fear of dealing with Hansen, bringing in another person should have eased DeLacey's concerns.

The process involving the outside consultant broke down at the "get acquainted" meeting held on January 14, 1998, when DeLacey's note-taking became an issue. DeLacey became agitated, and left the meeting, when steps were taken to provide a "neutral" note-taker. Contradicting her arguments here, no discipline was imposed upon DeLacey for leaving that meeting.

January 21, 1998, was established as the date for the first action plan observation, but DeLacey was not available that day. The meeting was then rescheduled for January 23, 1998.

Based on her observation, the consultant concluded that DeLacey's performance was not satisfactory. The results of the observation were provided to the employer and to DeLacey. Again, nothing in the facts or in the collective bargaining process would exclude DeLacey from review of her performance.

After receiving the results of the consultant's first observation, DeLacey contacted her union. Macdonald testified of concerns about DeLacey's mental and emotional state, and of suggesting alternatives. One of Macdonald's suggestions was that DeLacey resign her position. DeLacey adopted the resignation idea, and authorized the CPEA to negotiate on her behalf. The CPEA then negotiated an agreement with the employer, as follows:

> Below please find the criteria for the resignation of Ms. Suzanne Delacey [sic].
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> 1. Ms. DeLacey will resign effective June 30, 1998.
> 2. Ms. DeLacey will receive Cobra benefits as allowed by law.
> 3. The District will discontinue the Action Plan, and will allow Ms. DeLacey to continue teaching without meetings with the outside evaluator. Ms. DeLacey will not be formally observed for evaluation purposes during the remainder of the year. The District will continue current practices and policies, and Ms. DeLacey will continue to perform her duties as directed by those policies, the Negotiated Agreement, and the rules and procedures of Woodbrook Middle School
> 4. The District will provide a neutral recommendation for Ms. DeLacey.
> 5. The District will continue the current practice wherein Ms. DeLacey's personnel file will not be sent to any prospective school districts.

Although the settlement document prepared on the letterhead of the Soundview UniServ Council (which includes the CPEA) contains a typewritten date of January 22, 1998, DeLacey signed it on January 26, 1998. The evidence that DeLacey resigned at the suggestion of her union contradicts any suggestion that she was deprived of her position at the insistence of the employer.

In her brief, DeLacey's situation is characterized as a constructive discharge, but the evidence does not support that assessment. The union's suggested alternatives included that DeLacey could complete the improvement plan. That alternative was not pursued, however, because DeLacey chose to resign under the terms negotiated by her union. The testimony suggests that the exclusion from further observations and evaluations set forth in paragraph 3 of the agreement was negotiated out of concern for DeLacey's mental and emotional condition. Paragraphs 4 and 5 undoubtedly protect her ability to obtain employment as a teacher elsewhere. DeLacey testified she entered into that agreement knowingly and without coercion, and that she fully understood the settlement agreement. Rather than being forced by the employer to resign, it appears that DeLacey jumped at her union's first suggestion of a means to avoid further contact with Hansen and the outside consultant.[11]

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[11] Although not specifically pleaded or argued, the Examiner has considered the possibility of a claim that the employer engaged in unlawful discrimination when it refused to permit DeLacey to rescind her resignation.

Some time after January 26, 1998, Hansen was notified that she was to be transferred to an assistant principal position at Clover Park High School. In April of 1998, after learning of Hansen's impending departure from Woodbrook Middle School, DeLacey asked to rescind her resignation. The employer refused that request.

While the exact timing of events is uncertain in this record, the Examiner infers that much of the time that the employer would have needed to complete the observations by the outside consultant and the action plan had gone by before DeLacey attempted to withdraw her resignation, and that the employer would not have been able to complete the procedures necessary to nonrenew DeLacey as a provisional employee under RCW 28A.405.220. Facing the possibility of being prejudiced by the passage of time, or of having DeLacey acquire "continuing contract" rights under RCW 28A.405.210, the employer was within its rights when it refused to agree to DeLacey's request.

The effects of a voluntary resignation were dealt with in Pasco Housing Authority, Decision 6248-A (PECB, 1998), where the Commission held that an employee forfeited her right to a further financial remedy when she resigned her employment. Where an employee voluntarily resigns or participates in a negotiated separation from employment, concepts usually associated with discharge are inapplicable. Thus, where the employee evidences clear and unmistakable intent to terminate the employment relationship, the case cannot be treated in the same manner as a disciplinary matter. The Examiner thus concludes that the employer has not deprived DeLacey of any ascertainable right, status or benefit.

Causal Connection -

The final element that a complainant must show to establish a prima facie case is that there is a causal connection between union activities and the employer's actions.

> An employee may establish the requisite causal connection by showing that adverse action following the employee's known exercise of a protected right under circumstances from which one can reasonably infer a connection. Employers are not in the habit of announcing retaliatory motives, so circumstantial evidence of a causal connection can be relied upon.

Port of Tacoma, Decisions 4626-A (PECB, 1995).

In this case, the evidence does not support finding such a causal connection.

The Examiner notes that Demick felt DeLacey had some problems with classroom management and student discipline during her first year on the job. In asserting her reasons for wanting union representation, DeLacey's brief acknowledges that she was aware of those or other concerns about her performance. The Examiner rejects the

claim that DeLacey's request for union representation triggered a course of discrimination against her, and concludes that her performance deficiencies formed the basis for what appears to have been a relatively routine course of observation, evaluation and development of an action plan.

Conclusions on Prima Facie Case -

The complainant has failed to sustain her burden of proof as to the existence of a prima facie case of discrimination. Close scrutiny of this record does not indicate DeLacey was singled out for discipline because she desired to have a union representative present at her evaluation meetings. The action plan devised for DeLacey appears to be a straightforward plan designed to improve her teaching techniques and performance in the classroom. Many provisional employees throughout the state of Washington have undoubtedly completed such improvement plans while working as provisional employees, and have prospered in their profession. While a few facts do support of some of the required elements, they do not make a convincing case when considered as a whole. Thus, the burden of production need not be shifted to the employer, and there is no need for inquiry into pretext or motivation.

FINDINGS OF FACT

1. The Clover Park School District operates under Title 28A RCW, and is an employer within the meaning of RCW 41.59.020(5).

2. The Clover Park Education Association, an employee organization within the meaning of RCW 41.59.020(1), is the exclusive bargaining representative of a bargaining unit of non-supervisory certificated employees employed by the Clover Park

School District. Lyle Attebery is president of the CPEA; Lynn Macdonald is president of the Soundview UniServ Council.

3. Suzanne DeLacey was employed by the Clover Park School District from September 1996 through July 30, 1998, as a certificated teacher. She worked at Woodbrook Middle School at all times during her employment.

4. During the 1996-97 school year, DeLacey was evaluated by Assistant Principal Mark Demick. Demick rated DeLacey as satisfactory even though he indicated she needed improvement in classroom management and student discipline.

5. During the 1997-98 school year, DeLacey was evaluated by Principal Karen Hansen. Based on her observation of DeLacey teaching a class, Hansen rated DeLacey's performance as being deficient in five of seven categories on the evaluation form.

6. On October 8, 1997 Hansen scheduled a meeting with DeLacey to review some student complaints against DeLacey. Hansen made some comments concerning working with, and teaching students. The meeting was described as being done in a cordial and professional manner.

7. After the October 8 meeting ended, DeLacey contacted her union regarding the substance of the meeting. Attebery was concerned about the manner in which Hansen solicited another member of the teaching team to have students write down and submit the complaints to Hansen. Acting on Attebery's advice, DeLacey filed grievance.

8. On October 9, 1997, Hansen convened a meeting of the teaching team to which DeLacey was assigned. Hansen, DeLacey, and two

other bargaining unit employees were present at that time. A discussion ensued concerning the student complaints which were the subject of the previous meeting and grievance. DeLacey stated that she would not continue the discussion without a union representative present. Hansen advised DeLacey to contact her union representative, so the meeting could continue. DeLacey was unable to obtain a union representative, and did not return to the meeting. No discipline was meted out against DeLacey for not returning to the meeting.

9. On October 13, 1997, a step one grievance meeting was held on the grievance filed by DeLacey, with Hansen, Demick, DeLacey and Attebery in attendance. During that meeting, Hansen expressed frustration at not being able to resolve the dispute amongst the teaching team in a collegial manner. Hansen also indicated her disappointment that the subject matter of the student complaints had been aired with the team and students.

10. During early to mid-November of 1997, Hansen commenced a three-step evaluation of DeLacey, as required by Title 28A RCW and as acknowledged by the collective bargaining agreement between the employer and the CPEA. At each step of the observation process DeLacey requested that a union representative be present. Hansen denied each request.

11. Hansen held a pre-observation meeting with DeLacey in November of 1997, to discuss lesson plans, projects, and goals for the balance of the school year. No disciplinary action was initiated against DeLacey, but DeLacey testified that she felt she was disciplined and reprimanded.

12. On November 25, 1997, Hansen conducted a classroom observation of DeLacey. On December 9 and 10, 1997, two post-observation

meetings were held. Hansen rated DeLacey's performance as "not satisfactory for a teacher at Woodbrook".

13. As a result of the observation described in Paragraph 12 of these Findings of Fact, Hansen placed DeLacey on an "action plan". The purpose of that plan was to improve DeLacey's work performance, especially in the areas of classroom management and student discipline. The "action plan" devised for DeLacey was not discriminatory in nature, nor was it designed to discipline DeLacey because of her request for union representation at each and every meeting she had with Hansen.

14. By early January of 1998, the employer hired an outside consultant, Jeanne Pettersen, to carry out the terms of the action plan developed for DeLacey. The employer's use of an outside consultant was a routine practice for such situations.

15. On January 14, 1998, Pettersen met with Hansen and DeLacey to discuss the action plan. Throughout that meeting, DeLacey took detailed notes of the discussion. Hansen encouraged DeLacey to move the meeting along, asked Demick to take notes, and proposed to have notes taken by a "neutral" person. DeLacey exited the meeting before it ended. The employer did not discipline DeLacey for leaving the meeting.

16. DeLacey again consulted her union, and the union provided suggested alternatives. Among those were completion of the action plan prescribed by the employer and resignation. DeLacey chose the resignation alternative, and authorized the union to negotiate on her behalf. On January 22, 1998, the union prepared a settlement document by which DeLacey agreed to resign her position in exchange for certain consideration.

17. On January 23, 1998, Pettersen observed while DeLacey taught a language arts/social studies class for 78 minutes. After the conclusion of the observation, Pettersen supplied the employer and DeLacey with her comments concerning the observation which showed DeLacey's strengths and weaknesses.

18. On January 26, 1998, DeLacey signed the settlement agreement which had been prepared on the union's letterhead under date of January 22, 1998. DeLacey acted of her own volition, and fully understood the settlement agreement.

19. Th employer accepted the settlement agreement on January 27, 1998, and thereupon discontinued evaluation of DeLacey and the action plan, as specified in the settlement agreement.

20. In April of 1998, after learning that Hansen would no longer be the principal at Woodbrook Middle School after the end of the 1997-98 school year, DeLacey sent a letter to the employer, asking to rescind her resignation. By that time, the passage of time would have prevented the employer from completing the action plan and other procedures necessary to nonrenewal of DeLacey as a provisional employee under RCW 28A.405.220.

21. On May 8, 1998, the employer refused to renew DeLacey's teaching contract for the 1998-99 school year. In a letter to DeLacey, the employer set forth three reasons for its decision: (1) The settlement agreement was appropriate and legally enforceable; (2) DeLacey did not complete the action plan devised by the employer and the outside evaluator; and (3) students, parents and other staff members had expressed concern about DeLacey's teaching performance. The same letter informed DeLacey that she had the right to appeal the deci-

sion. Thereafter, DeLacey appealed to the employer's board of directors, which affirmed the decision.

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. Suzanne DeLacey was not entitled to union representation at meetings held for the purpose of conducting performance evaluations under Title 28A RCW and the collective bargaining agreement applicable to DeLacey's employment, so that the Clover Park School District did not interfere with employee rights or violate RCW 41.59.140(a)(1) by its rejection of DeLacey's requests for representation at such meetings.

3. Suzanne DeLacey as failed to sustain her burden of proof to establish a prima facie case of discrimination by the Clover Park School District in violation of RCW 41.59.140(a)(3).

ORDER

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

Issued at Olympia, Washington, on this 18th day of May, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

REX L. LACY, 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.