

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BRINNON EDUCATION ASSOCIATION,)	
)	
Complainant,)	CASE 13847-U-98-3395
)	
vs.)	DECISION 7210 - PECB
)	
BRINNON SCHOOL DISTRICT,)	
)	
Respondent.)	
)	
-----)	
BRINNON EDUCATION ASSOCIATION,)	
)	
Complainant,)	CASE 14193-U-98-3517
)	
vs.)	DECISION 7211 - PECB
)	
BRINNON SCHOOL DISTRICT,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent.)	AND ORDER
)	
-----)	

Faith Hanna, Staff Attorney, appeared on behalf of the union.

Vandenberg, Johnson and Gandara, by Clifford D. Foster, Jr., Attorney at Law, appeared on behalf of the employer.

On April 14, 1998, the Brinnon Education Association (union) filed a complaint charging unfair labor practices against Brinnon School District (employer), alleging that the employer had taken adverse personnel action against several employees in retaliation for the exercise of rights guaranteed to public employees under Chapter 41.56 RCW. That complaint was docketed as Case 13847-U-98-3395. Specifically, the complaint alleged that the employer interfered with employee rights and discriminated against employees for their support of and participation in union organizing activities, in

violation of RCW 41.56.140(1), by reducing Vicki Jones' hours of work, eliminating Kathi Mueller's position, laying off Randy Schleich, and eliminating Sue Hardie's position.

On October 19, 1998, the union filed a second unfair labor practice complaint alleging both interference and discrimination in violation of RCW 41.56.140(1), and discrimination for filing unfair labor practice charges in violation of RCW 41.56.140(3). That complaint was docketed as Case 14193-U-98-3517. Specifically, that complaint alleged that the employer prohibited certificated employees from using Jones and Mueller as volunteers and/or substitute employees during the 1997-1998 school year, because of the involvement of Jones and Mueller in the earlier unfair labor practice complaint.

A hearing on Case 13847-U-98-3395 was commenced before Examiner Mark S. Downing on October 20, 1998, and continued on October 21, October 22, and December 17, 1998. At the start of the December 17th session, the Examiner noted that the Executive Director had issued a preliminary ruling in Case 14193-U-98-3517 on December 15, 1998, finding that the second complaint stated a cause of action. That preliminary ruling had acknowledged the unique nature of the situation, in the following terms:

Chapter 391-45 WAC now requires the filing of an answer in response to a preliminary ruling which finds a cause of action to exist. See, WAC 391-45-110(2). In this case, however, **the parties are already involved in a hearing process before Examiner Mark S. Downing on a parallel unfair labor practice case (Case 13847-U-98-3395), and have made reference in that hearing to the allegations of this complaint. It is thus appropriate to deviate from the usual procedure,** and to accommodate the parties by consolidating the proceedings and accepting the employer's answer and de-

fenses on-the-record in the consolidated proceedings.

[Emphasis by **bold** supplied.]

The employer waived notice of hearing on the second complaint, and made an oral answer denying the allegations. The union did not object to consolidation of the two complaints, and agreed to accept the answer presented by the employer at hearing. Accordingly, the record made in this matter encompasses both unfair labor practice complaints filed by the union against the employer.

During the course of the hearing, the employer and union stipulated to bifurcate the "merits" and "remedy" issues in the proceedings. The parties' stipulation was accepted, and the parties thus only presented evidence concerning the existence of unfair labor practice violations. In the event that violations were found, the parties requested that a second hearing be conducted to determine appropriate remedies. The parties submitted post-hearing briefs to complete the record.

BACKGROUND

For purposes of this decision, general background information concerning the employer's operations is detailed first. Specific events surrounding the employees named in the unfair labor practice complaints are then detailed under separate headings.

The Employer and its Administration

The Brinnon School District provides educational services to students in kindergarten through the eighth grade, in an area near the Hood Canal in western Washington. Older students from that

area attend schools in neighboring school districts such as Quilcene and Chimacum. The employer is under the policy direction of an elected five-member school board, and daily operations are administered by a superintendent appointed by the school board. James Workman began his duties as superintendent on July 1, 1996, and continued in that capacity at all times pertinent to these proceedings.

When Workman began as superintendent, the employer's workforce consisted of six certificated employees and 10 classified employees. The employer was facing uncertain economic times because of the loss of revenue following a levy failure.¹ In studying the employer's operations, Workman found that the employer's highest enrollment had occurred in the 1991-1992 school year, when 114 full-time equivalent (FTE) students were enrolled. There were only approximately 90 FTE students in 1996.

The employer had traditionally conducted its operations in an informal manner. After Workman was hired, the school board determined that it needed to establish a more structured approach. The school board told Workman that he needed to establish different administrative procedures, and he began those endeavors shortly after his arrival in 1996.

Workman's style was very different from that of his predecessor, Carolyn Ensler, and his approach was not well-received by employees. Workman initiated a number of procedures for dealing with business and curriculum issues, but there appeared to be a general lack of communication as to the need for the new processes.

¹ Voters had rejected a proposed operating levy in two consecutive elections, so the employer would not have levy funds to supplement its operating budget.

In February 1997, another levy request was presented to voters. While the levy was approved, the employer did not begin receiving funds from the levy until the following spring.

By the spring and early summer of 1997, staff concerns about the employer's operations led to employee interest in unionization. In June 1997, certificated and classified employees met with officials from the Washington Education Association to discuss the possibility of unionizing. A meeting held in a facility away from the school district was well-attended by employees. Mary Smith, a certificated employee, was active in setting up the meeting, and Workman was aware that the meeting was taking place.

Communication difficulties between Workman and employees continued, and certificated employees met with the school board in September 1997, to discuss a number of communication issues. The employer and union disagree as to the genesis of that meeting: Several union witnesses testified that the school board initiated the meeting; Workman indicated that employees asked to meet with the school board.

The employer's certificated employees decided to proceed with organization efforts, and a petition for investigation of question concerning representation was filed with the Commission on July 30, 1997. On October 30, 1997, the Washington Education Association was certified as the exclusive bargaining representative of a bargaining unit described as:

All full-time and regular part-time non-supervisory certificated employees of the Brinnon School District, excluding supervisors, confidential employees, and all other employees.

Brinnon School District, Decision 6102 (EDUC, 1997).

The record indicates that the employer's classified employees decided not to pursue unionization at that time.

Facts Concerning Sue Hardie

Sue Hardie began work as business manager for the employer in 1991. She reported directly to the superintendent, and worked in a small administrative office area. Hardie's duties included payroll, personnel files, accounts payable, monthly billings and reports, and food service accounting. She also prepared quarterly financial reports, and she assisted in preparation of the annual budget, year-end report and information for levy requests.

Hardie performed her work in an informal manner, and often came in late at night or early in the morning to complete her assignments. In addition, Hardie often met privately with school board members and employees, without telling the former superintendent about the subject of the meeting. Hardie's work habits were accepted by Workman's predecessor, and Hardie always got her work done in a timely manner.

Hardie testified that Workman expressed a dislike for unions shortly after he started as superintendent in July 1996. Workman denied that he made any such comments.

Workman testified that the school board pressured him to make significant changes in Hardie's style of work. Workman indicated that school board members asked him to consider eliminating Hardie's position at some point before the employer began experiencing monetary problems, but he resisted such efforts because he liked working with Hardie and believed that her position was important.

Hardie was aware of the union organizing activities during the spring of 1997, but did not attend the off-site meeting held in June 1997. She was unsure whether her position would be included in any proposed bargaining unit. Hardie's concern arose from the nature of her work as business manager, since she dealt with financial matters on a regular basis.

In the spring of 1997, Hardie and Workman began initial work on the budget for the 1997-1998 school year. Work on that budget continued through the summer of 1997. As part of the budgeting process, Workman proposed that certain classified employees be given additional duty time, with corresponding increases in salary. Those were: (1) Head Cook Susan Bettinger; (2) Technology Coordinator Gay Corey; (3) Transportation Coordinator Roxanne Slimp; and (4) Superintendent's Secretary Delilah Dowd. The proposed budget also reflected reductions in hours for certain employees. Those were: (1) The work hours of Donald Baisch, a school bus driver, were cut;² (2) The work year of Julie Baker, a teacher who had served as special education director was cut when Workman took the director title and responsibility for himself; and (3) the number of work days of Kathi Mueller, a "Title I" instructional assistant working for Baker, were reduced to reflect the reduction of Baker's work year.

Hardie testified that Workman told her the four employees receiving increased hours were "being rewarded for their loyalty" and for their service with the employer. Workman testified that increases were made because of program responsibilities, and he denied that

² The record indicates that Baisch encouraged this reduction, so he could take advantage of other business opportunities during the afternoon hours.

he ever discussed "loyalty" with Hardie, but acknowledged that he had mentioned the employees' seniority with the district.

On May 14, 1997, Hardie sent a letter to Workman and the school board, expressing her disagreement over the reductions in hours that were taking place. After admonishing Workman for the decision to make reductions, particularly in the special education program, Hardie stated:

On a personal note, I would like to share my concerns about writing this letter. I believe that Mr. Workman will probably question my "loyalty". I would respond that I have been and will remain loyal to the district, but that he is not "the district." It is not my intent to create trouble; it is my hope that we may move toward communication before action. If I had had the opportunity to discuss these issues with Mr. Workman prior to the Board's action, then the answers to these concerns and the potential future liability could have been investigated. It is also possible that Mr. Workman has already investigated the potential liability. In which case, a simple two minute conversation with me would have saved all of us time and stress. If my position is the next one "RIFFed" for financial reasons, I hope the Board will remember that this information was shared freely and confidentially and in the best interest of the district.

The record does not indicate any other pertinent interaction between Workman and Hardie prior to the start of the 1997-1998 school year.

As part of the budget process, Workman assumed that the employer would start the 1997-1998 school year with 88 students. In fact, student enrollment for the school year averaged 74 students. This reduction had a dramatic impact on the budget, as the employer

relied heavily on student enrollment to obtain funds from the state Superintendent of Public Instruction office. Workman brought these concerns to the school board for deliberation, and a number of cost-cutting steps were discussed. Concurrently, the working relationship between Workman and Hardie became more difficult in the autumn of 1997.

On October 6, 1997, Hardie arrived at work and discovered that the door to her office had been removed. Workman had left her a note, explaining:

Sorry for the new door situation. We are getting some work done on the door, please make sure you take appropriate care of items in your office - like keeping the file cabinet locked and personal items in a safe place.

Hardie was concerned, because she had never been told that such a change was imminent, and she often kept sensitive personnel information in her office. She asked Workman about the situation, but never received a direct answer to her questions. Workman testified that the door was removed in an effort to make the administrative work space more open and accessible. In addition, the removal of Hardie's door addressed one of the school board's concerns about the manner in which Hardie conducted private meetings without informing Workman first.

On October 10, 1997, Hardie and Workman met to discuss a number of issues. Workman gave Hardie her evaluation for the 1996-1997 school year which showed that her overall performance was satisfactory. On the same day, Workman gave Hardie a set of "performance expectations" for the business manager position. The document set forth the following provisions:

Employee is under the supervision of and reports directly to the school administration - i.e. the Superintendent. All communications concerning School Business Manager activities shall be routed through and approved by the Superintendent in advance.

Employee's duty hours shall be between the hours of 7 a.m. and 4:30 p.m. unless prior permission to vary these hours has been granted by the superintendent.

Employee will conduct duties relevant to the Business Manager and those meetings necessitating a private meeting will be conducted via appointment and prior approval of Superintendent. All other non-job related meetings will be during non-duty hours and off school grounds.

Employee will demonstrate professionalism and loyalty to the school administration in word or deed at all times.

Employee will route any questions, clarifications, and differences of opinion through proper channels via superintendent and school district policy.

Employee will provide support for the fiscal operations of the District contributing to the goal of success for all Brinnon students.

Employee will maintain a professional and neutral manner at any public meeting concerning school business.

Until further notice the Superintendent will deliver the Treasurer's Report at the Brinnon School Board meeting and the Business Manager will not be required to attend in the capacity of Business Manager.

Employee's job duties are solely concerned with the fiscal operations of the District. Employee will refrain from becoming involved with District personnel, operations or community relations matters during the duty hours except as specifically directed in advance in writing by the superintendent. If employee is in doubt as to the propriety of his/her actions, employee will seek immediate clarification from Superintendent.

The Employee will be flexible in adjusting to the many diverse duties required and potentially assigned by the superintendent in a district the size of Brinnon.

A number of those expectations resulted from concerns Workman had about the manner in which Hardie performed her duties. Workman indicated that those expectations arose from specific directives from the school board, and their concerns about Hardie's method of performing her duties. Workman testified that he was concerned that Hardie had stated she was loyal to the school district and to the school board, without reference to the superintendent's position. At the same time, Workman acknowledged that he had less interaction with Hardie as he assumed more administrative duties.

Hardie and Workman met again on October 13, 1997. They discussed the new performance expectations, and Hardie told Workman that she perceived the expectations as very restrictive. Hardie believed that Workman had to give prior approval for almost everything that she did during her regular workday. In that vein, Hardie presented documents detailing who she could meet with and what she would be allowed to do as business manager. In addition, Hardie presented Workman with a document questioning a number of the performance expectations. Specifically, Hardie asked Workman to provide examples of the problems addressed in the performance expectations such as inappropriate private meetings, inappropriate involvement with district personnel, and unprofessional "word or deed" which caused Workman concern. Workman indicated that the performance expectations were not intended to be as restrictive as Hardie believed. He testified that the expectations were in line with the school board's efforts to make the employer's administration more professional and accountable. He declined to address the specific matters detailed in Hardie's documents.

As more information came in concerning the falling student enrollment, several cost-saving strategies were implemented. Workman indicated that most of these strategies involved layoffs of classified employees. Workman would have considered some layoffs of certificated employees but those employees were under contract through the "continuing contract" process, and thus could not be laid off during the 1997-1998 school year.

Hardie was aware that the employer faced economic difficulties, and Workman and Hardie had several conversations about the situation.³ In a memorandum dated October 27, 1997, Hardie set forth several cost-saving ideas involving layoffs of classified employees. Among possible options was elimination of two instructional assistant positions which, if implemented by November 1, 1997, could save approximately \$27,000.

On November 5, 1997, the school board met in regular session. Minutes from that meeting indicate that the board directed Workman to take action to deal with the budget problem as follows:

Board Chair Karen Martin made a motion to direct Superintendent Workman to take appropriate measures to meet the necessary changes regarding classified and certificated staff due to revenue shortfall. Motion carried.

At a meeting held on November 7, 1997, Workman informed employees Kathi Mueller, Vicki Jones and Sandra Grant that their hours of work would be reduced to save money.⁴

³ Hardie testified that Workman told her to start preparing cuts in the range of \$5,000 to \$20,000. Workman testified that the employer was facing a projected deficit of at least \$40,000.

⁴ The specifics of these conversations are detailed in following sections dealing with each of those employees.

On November 12, 1997, the school board held a special meeting to discuss the employer's financial situation in light of decreased enrollment. During the course of the meeting, Workman read an open letter that was being mailed to district residents explaining the financial problems. The letter explained Workman's response to the shortfall as follows:

Some of you may wonder - "What about that levy we approved last spring?"

The monies from that levy will not be available until May, 1998. The levy that you approved (and we thank you for it) is also allocated to the maintenance and repair of the school building (for a necessary and long overdue plumbing renovation) and payments to Quilcene and Chimacum School Districts for Brinnon students attending their high schools.

I have reviewed our education program to see if our staff structure supports our program and have concluded that our school is over-staffed for its size in comparison with other schools of similar size and enrollment.

After careful analysis, I have reassigned a certified teacher, Mrs. Smith, to coordinate the Brinnon School federal Title I reading, writing, and mathematics improvement program. Mrs. Smith is currently teaching seven students in her second grade classroom. The entire school population will be served by this important program which Mrs. Smith will design and supervise. Assigning a certified teacher to our Title I program will give renewed emphasis to developing the basic skills needed for success in school and life. At the same time, we will be aligning our classroom structure more closely to state guidelines. ...

Having two bus runs is an added expense with no direct benefit to the educational needs of the students. School will begin at the same time for all students effective Monday, December 1, 1997. This will enable the Junior High students to gain an extra hour of sleep and ride the bus to school with their

younger brothers and sisters. Kindergartners will have the same starting time as the other students but will be excused at an earlier time. ...

No one has been fired. One employee volunteered to take a leave of absence. Another employee was offered a position with reduced hours and reduced pay but chose not to accept the offer and resigned. A third employee accepted reduced hours. As I make further program changes, further adjustments may be forthcoming.

The administration will also be affected by cuts. I am realigning staffing, functions, and duties within the superintendent's office. The bottom line is that our staffing level must reflect our enrollment. ...

[Emphasis by **bold** in original.]

After Workman and the school board discussed the situation, Workman answered several questions from the audience. The minutes of that meeting indicate that Workman was asked about the impact that unionization had on the budget issue:

- Q: How does the teacher's union impact the school budget?
- A: The school district may have to budget for a negotiator/facilitator, attorney fees, other outside professional assistance.

Workman also testified that, based on the deteriorating economic situation, he had decided to take over the bulk of the business manager duties.

On November 14, 1997, Workman informed Hardie that her position was being eliminated, effective January 1, 1998. Hardie testified that this was the first notice she had that her position was in jeopardy. Hardie sent a letter to the school board on November 22,

1997, expressing concern that she had never received any written notification of her termination. She wrote:

On November 14, 1997, James Workman verbally informed me that, effective January 1, 1998, my position would be terminated. I was told that this was being done for financial reasons. During that meeting on November 14, 1997, I told Mr. Workman that I would need notice in writing. He agreed. As of Nov. 21, 1997, I have still received no written notification. I am also unaware of any specific Board action regarding the termination of this position.

Nevertheless, in order to protect my rights, I am filing this notice of appeal of the decision to terminate my position and request a hearing before the Brinnon School District Board of Directors to discuss this matter.

On November 24, 1997, Workman sent Hardie a letter confirming the termination of her employment in the following terms:

The Brinnon School District would like to thank you for your valuable service to the District. Unfortunately, due to the financial challenges in the Brinnon School District your current position of Business Manager has been reorganized. As mentioned in our conversation on Friday November 14, the Brinnon School District will not require your services after January 1, 1998. This letter is to inform you of such changes.

In a document sent to the school board in December of 1997, at approximately the same time as the employer's Christmas break began, Hardie explained why the board should overrule Workman's decision to eliminate her position. Hardie did not claim any union activity or possible union animus in connection with her

dismissal.⁵ In essence, the document was intended to show that the employer's financial condition did not require elimination of the business manager position, and that retention of the position was to the employer's long-term benefit. While the school board received Hardie's document, it did not reverse Workman's decision. Hardie finished her last payroll work on December 31, 1997.

Facts Concerning Vicki Jones

Vicki Jones began working for the employer in January 1993, as an instructional assistant. During the 1996-1997 school year, Jones worked in playground, lunchroom and classroom assignments. During the 1997-1998 school year, she primarily worked in two classrooms, assisting certificated employees as needed.

Jones attended the union organizing meeting held in June, 1997. She recalled that all employees were at the meeting, except for Hardie and Workman, and that a "straw vote" was taken to determine if there was enough interest among the employees to proceed.

During the autumn of 1997, Jones spoke with other employees about unionization, and expressed her support for such action.

On October 17, 1997, Jones attended a meeting for classified employees where Workman explained that the employer was facing difficult economic times. Jones testified that this was the first that she was aware that staff reductions could take place.

At a meeting on November 7, 1997, Workman gave Jones, Kathi Mueller, Sandra Grant, and Susan Bettinger a further explanation of

⁵ Hardie testified that she did not become aware of a pattern of anti-union retaliation until other classified employees were adversely affected by employer actions.

the employer's fiscal situation. Workman told the employees that cuts were necessary because of declining student enrollment, and that staff reductions would be forthcoming. In an effort to reduce the employer's expenditures, Workman asked for somebody to volunteer to take a leave of absence. No one volunteered during the meeting, so Workman asked the participants to think things over and get back to him as soon as possible.

Jones considered the situation in light of her concern about the stressful work environment brought about due to the impending staff cuts. Worried about her health, Jones told Workman that she would take a leave of absence if he provided her with a copy of her last evaluation and promised to give her a good recommendation. Workman agreed, and asked Jones if she would be interested in working a reduced schedule as a playground assistant. Jones decided that she could not make enough money on the reduced schedule, and went ahead with the leave of absence. She left her job at the end of November 1997.

The unfair labor practice complaint filed in the first of these cases on April 14, 1998, named Jones as one of the employees adversely affected by the employer's staff reductions. During April and May of 1998, Jones was approached by Gay Corey, the employer's technology coordinator and librarian, to work as a substitute employee in the library. Jones agreed to do so, but was then informed by Corey that her services were not required. Workman decided that it would be inappropriate to have Jones work as a substitute. He wanted to avoid confusing students as to Jones' employment status with the district. He also was concerned about the potential for Jones filing a wage and hour claim for unpaid services. Workman testified that his decision did not have anything to do with Jones' union sympathies, and was only motivated by a concern over the district's ongoing economic difficulties.

At approximately the same time as Jones indicated a willingness to work as a substitute employee, the classified staff decided to proceed with organization efforts. On April 16, 1998, the union filed a petition for investigation of question concerning representation for the employer's classified employees. On June 25, 1998, the Washington Education Association was certified to represent a bargaining unit described as:

All full-time and regular part-time classified employees of the Brinnon School District, excluding supervisors, confidential employees, and all other employees.

Brinnon School District, Decision 6342 (PECB, 1998).

Jones testified that she favored unionization and was outspoken about her feelings. Workman testified that he never had any specific knowledge of Jones' union sympathies.

Facts Concerning Kathi Mueller

Kathi Mueller was hired by the employer in 1989. During the 1996-1997 school year, she served as the employer's Title I coordinator, administering federal grants for specialized reading and math programs aimed at children having learning difficulties. Mueller also worked with volunteer tutors and assisted in classroom activities dealing with Title I matters.⁶

Mueller was aware of the unionization effort in the spring of 1997, and testified that she was active in organizing activities. Mueller attended the meeting in June of 1997, and recalled the

⁶ For example, she sometimes graded papers from Title I students to determine what kind of assistance they might need.

"straw ballot" taken to determine whether the staff was interested in unionizing. Mueller then had a series of informal discussions with other employees about the benefits of joining a union. Workman testified that he was aware of the staff's interest in union matters, but did not have any specific knowledge of Mueller's attitude toward organizing.

Mueller first learned of the employer's budget problems at a general meeting of classified staff called by Workman on October 17, 1997. Workman explained that cuts might be necessary if enrollment continued to decline.

Mueller attended a meeting on November 7, 1997, along with Vicki Jones, Sandra Grant and Susan Bettinger, where Workman asked for volunteers to take a leave of absence. Nobody agreed to do so, and Workman informed Mueller later that day that her Title I position would be eliminated and that her duties would be transferred to a certificated employee. Workman offered Mueller a playground assistant position for three to five hours per day. Mueller considered the situation for several days, then informed Workman that she did not want the playground assignment. Mueller left her employment with the district in the latter part of November, 1997.

After leaving her job, Mueller volunteered to work as an instructional assistant and asked to be placed on a list of substitute employees. Mueller testified that she was informed that she would not be placed on the substitute list and would not be called to perform work with the employer in any capacity. Mueller did not follow up on this information with Workman, and did not have further contact with the employer. Mueller indicated that she did not have any specific conversations with Workman about union matters.

The union's second unfair labor practice complaint, filed on October 19, 1998, concerned the employer's alleged refusal to use Vicki Jones and Mueller as volunteers and/or substitute employees during the 1997-1998 school year.

Facts Concerning Randy Schleich

Randy Schleich worked for the employer as a school bus driver and custodian. After working part-time in the 1995-1996 school year, Schleich became a full-time employee in 1996-1997. Schleich was aware of the union organizing effort in the spring of 1997, and he testified that Workman told him that unionization would not be a good idea. Workman indicated that he told several people that unionization could lead to increased costs for the employer, but that he never stated that organizing was wrong.

During the 1997-1998 school year, Schleich drove a school bus and performed a variety of custodial and maintenance assignments. Schleich and Workman had several disagreements about work assignments during that school year. In one instance, a bomb threat was reported to the administration. Schleich believed that the affected school building should be evacuated immediately, but Workman ordered Schleich to inspect the building to find out if any device was present before evacuating the building.

In early October 1997, Workman directed Schleich to remove the door from Sue Hardie's office. Schleich testified that Workman told him the door had to be "re-sized". Schleich was unaware of any problems necessitating the door's removal.

In November 1997, Workman told Schleich that bus routes were being consolidated, and that his position was being eliminated for economic reasons. Schleich's custodial and maintenance duties were

also eliminated. Schleich ended his employment with the school district on November 30, 1997.

POSITIONS OF THE PARTIES

The union argues that the employer committed a series of unfair labor practices by its personnel actions against Sue Hardie, Vicki Jones, Kathi Mueller and Randy Schleich. The union contends that those employees were adversely affected because they attempted to exercise their right to unionize, and that the employer's stated economic justifications are not legitimate. The union notes that the employer actually increased work hours for certain employees at the same time that the affected employees suffered hours reductions or lost their jobs. The union argues that the employer's actions must be analyzed in light of the ongoing union organization efforts at the school district, and that the employer's actions were motivated by anti-union sentiment. The union maintains that the employer's discriminatory intent is evidenced by its refusal to allow Jones and Mueller to volunteer or substitute as instructional assistants. The union argues that the employer took that action primarily because Jones and Mueller were litigants in the first unfair labor practice complaint.

The employer denies that it committed any unfair labor practice violations. The employer contends that it was forced to make difficult decisions in light of falling revenues, but that none of those decisions had anything to do with union organizing activities. The employer maintains that the union failed to prove a causal connection between the disputed personnel actions and union organizing activities, and requests that the complaints be dismissed. As to the allegations concerning Sue Hardie, the employer argues that Hardie was a confidential employee excluded

from the definition of "public employee" and from the coverage of Chapter 41.56 RCW, so that the Commission lacks jurisdiction to hear her complaint.

DISCUSSION

Chapter 41.56 RCW protects public employees from interference or discrimination by employers concerning collective bargaining rights secured by the statute:

RCW 41.56.040 -- RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE. No public employer, or other person, shall directly or indirectly, **interfere with, restrain, coerce, or discriminate against any public employee** or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

[Emphasis by **bold** supplied.]

RCW 41.56.140 prohibits certain types of employer conduct which would inhibit the free exercise of employee organizational rights:

It shall be an unfair labor practice for a public employer:

(1) **To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;**

(2) To control, dominate or interfere with a bargaining representative;

(3) **To discriminate against a public employee who has filed an unfair labor practice charge;**

(4) To refuse to engage in collective bargaining.

[Emphasis by **bold** supplied.]

The allegations of the union's two unfair labor practice complaints concern RCW 41.56.140(1) and (3). The first complaint alleges that the employer discriminated against Hardie, Jones, Mueller, and Schleich in retaliation for their participation in union organizing activities. The second complaint alleges that the employer discriminated against Jones and Mueller for their support of and participation in union organizing activities and for filing the first unfair labor practice complaint. While each complaint will be analyzed separately, there are specific legal precedents that apply to both complaints.

The Commission's decision in City of Port Townsend, Decision 6433-A (PECB, 1999), referenced the following discussion from Seattle School District, Decision 5946 (PECB, 1997) for the standard of proof on "discrimination" claims:

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, protects the right of public employees to organize and designate representatives of their own choosing for the purposes of collective bargaining. Employees also enjoy protection from interference with their statutory collective bargaining rights under RCW 41.56.140(1), and protection from discrimination for filing unfair labor practice complaints under RCW 41.56.140(3).

The standard for enforcing the "interference" and "discrimination" protections has been established by 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), the Court adopted a "substantial factor" test for determining discrimination cases. While a charging party retains the burden of proof at all times, it only needs to establish that the statutorily protected activity was a "substantial" motivating factor in the employer's decision to take adverse action against the

employee. As the Court indicated in *Wilmot*, at page 70:

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

The Commission has embraced a "substantial factor" test. Educational Service District 114, Decision 4361-A (PECB, 1994); City of Federal Way, Decision 4088-B (PECB, 1994). That standard was discussed recently in North Valley Hospital, Decision 5809 (PECB, 1997) and Mukilteo School District, Decision 5899 (PECB, 1997).

The Prima Facie Case

As described in Seattle School District, Decision 5237-B (EDUC, 1996) and North Valley Hospital, *supra*, the requirements necessary for a complainant to establish a prima facie case of unlawful discrimination are threefold:

- The exercise of a statutorily protected right, or communication to the employer of an intent to do so;
- The employee must be discriminatorily deprived of some ascertainable right, status or benefit; and
- There must be a causal connection between the exercise of the legal right and the discriminatory action.
- Proof of one or two of those elements is not sufficient to shift the burden of production to the employer.

Having set forth the applicable legal standard, analysis can now turn to the specific events set forth in the instant complaints.

Discrimination for Union Organizing Activities

The union contends that the employer reacted against four employees because of their involvement in union organizing activities. The record demonstrates that all of the employees were generally supportive of unionization, and that the employer knew that organization meetings were taking place. However, the union has not demonstrated that the employer's actions were motivated in any way by an anti-union animus.

It is clear that Superintendent Workman had a somewhat troubled relationship with employees, and some might say that certain of his actions were ill-conceived or ill-timed. For example, his decisions to remove Sue Hardie's door and to make a restrictive list of expectations were not well-explained, and helped to perpetuate a difficult personnel situation. However, poor decisions cannot be construed as anti-union in nature, unless there is some credible evidence that the particular actions were motivated by a discriminatory intent.

Workman made statements questioning the need for a union, and also expressed a concern that unionization could lead to additional costs for the employer. While unions may find such statements to be offensive, employer officials retain some free speech rights so long as there are no threats of reprisal or force or promise of benefit. A simple statement that the employer would incur costs is not unlawful. The statements made by Workman do not rise to the level of the solicitation and implied promises found unlawful in Pasco Housing Authority, Decision 5927-A (PECB, 1997), affirmed WPERR CD-983 (Franklin County Superior Court, 1998).

The union attempted to show that the employer actually had sufficient funds to keep the affected employees on the payroll.

The employer presented credible evidence that it took appropriate action to deal with unexpected revenue shortfalls caused by steadily declining student enrollment. The employer provided substantial reasons for each of its employment decisions. The union failed to prove that the employer's acts were motivated in any part by discriminatory intent arising from anti-union animus.

The union proved that the affected employees were interested in organizing a union and that the employer knew that they held such interest. The union also proved that the employer took adverse personnel action against the four employees. However, the union has not proven that the adverse action was motivated by a discriminatory intent based on the employer's anti-union sentiment. The union failed to prove any casual connection between the employees' exercise of their legal rights and actions taken by the employer. The first unfair labor practice complaint must be dismissed.

Retaliation for Filing Unfair Labor Practice Charges

The second unfair labor practice complaint centers on the employer's actions concerning Vicki Jones and Kathi Mueller, after they left district employment. In essence, the union alleges that the employer refused to allow Jones and Mueller to serve as volunteers or to give them any consideration for employment opportunities. For this allegation, it is immaterial whether the first unfair labor practice was found to be meritorious.

The employer's actions during the time period after the first unfair labor practice was filed must be analyzed to determine whether any statutory violations occurred. The union's claims draw some strength from the fact that these particular actions took place much closer to the election which led to unionization of the classified employees. Both Jones and Mueller presented credible

testimony that they supported the idea of unionization, and the employer certainly knew that organizing activities were under way. However, the union has not supplied the critical causal connection between the employer's motivation and the disputed personnel action. In effect, the union asks the Commission to presume that the employer's acts were motivated by discriminatory intent since the two named employees were mentioned in the earlier unfair labor practice complaint. Such a finding is not forthcoming from the record in this case.

The employer presented credible evidence that it took reasonable steps to deal with the volunteer and substitute employee issue. In fact, the entire situation might have been clarified if Jones and Mueller had contacted the employer's administration before making direct arrangements with non-supervisory staff members to volunteer and/or substitute. The employer presented persuasive evidence that it believed that it could be in a legal quandary by allowing the two employees to volunteer and/or substitute. While that may or may not be legally correct, the employer was not motivated by improper intent. As in the first unfair labor practice complaint, the record shows that there was a breakdown in communication, and that the employer may not have explained itself as well as it could, but such failings do not rise to the level of statutory violations. Thus, the second unfair labor practice complaint must also be dismissed.

FINDINGS OF FACT

1. The Brinnon School District provides educational services for students in kindergarten through the eighth grade, and is a "public employer" within the meaning of RCW 41.56.030(1). At

all times relevant to these proceedings, James Workman served as superintendent of the Brinnon School District.

2. The Brinnon Education Association is a "bargaining representative" within the meaning of RCW 41.56.030(3).
3. When Workman commenced his duties as superintendent in 1996, the employer was suffering from the economic effects of a "double levy failure". Workman's management style was very different from that of his predecessor, and the school board ordered him to make the administration more professional and accountable.
4. When Workman started work with the employer, Sue Hardie was the district's business manager. Hardie worked in a casual atmosphere, and routinely performed her duties late at night or early in the morning before the regular work day began. In addition, she often met with school board members and employees without notice to the superintendent.
5. Workman decided that Hardie would have to change the manner in which she performed her duties. This decision led to a deterioration in their working relationship.
6. In the spring of 1997, the employer's classified and certificated employees explored the possibility of organizing for the purposes of collective bargaining. A meeting was held in June of 1997, where the employees discussed unionization. While supportive of the unionization effort, Hardie did not attend the meeting because she believed that her duties as business manager could preclude her from participating in any union. Vicki Jones, Kathi Mueller and Randy Schleich attended the organizational meeting.

7. The employer's certificated employees proceeded with unionization in 1997, and the Washington Education Association filed a representation petition with the Commission, seeking certification as exclusive bargaining representative of the employer's non-supervisory certificated employees. The employer's classified employees did not pursue unionization at that time.
8. Workman was generally aware of the organizational effort among the employees, and of the meeting held in June of 1997. While he made statements in opposition to unionization and stated that the employer would incur costs in connection with a bargaining relationship, those statements were not reasonably perceived by employees as threats of reprisal or force or as promises of benefit.
9. At the beginning of the 1997-1998 school year, certificated employees met with the school board to discuss communication issues.
10. At the beginning of the 1997-1998 school year, the employer was faced with additional budgetary problems due to student enrollment running far below projections. That resulted in a loss of state funding.
11. At the beginning of the 1997-1998 school year, Workman and Hardie had further difficulties with their working relationship. Workman had the door removed from Hardie's office, and presented Hardie with a list of specific job performance expectations. The expectations made it clear that Hardie would no longer be allowed to meet with school board members or employees without Workman's approval.

12. By November 1997, it became apparent that the employer would have to make staff reductions to deal with the continued decline in funding caused by falling student enrollment. The reductions were targeted at the classified employees, because the certificated employees had individual contracts in effect.
13. On November 7, 1997, Workman met with classified employees, to explain the employer's financial situation. Workman asked for volunteers to take a leave of absence to deal with the projected budget shortfall.
14. Vicki Jones decided to accept a leave of absence. Workman offered her a reduced work schedule (with a corresponding reduction in salary), but Jones declined. Jones left her job at the end of November, 1997.
15. Kathi Mueller was offered a work schedule with reduced hours. She declined that offer, and left her job in the latter part of November, 1997.
16. Workman informed Randy Schleich that the employer was consolidating its bus routes, thus eliminating the school bus driving portion of his duties. Schleich's custodial duties were also eliminated, and he left employment with the district at the end of November, 1997.
17. On November 14, 1997, Workman informed Sue Hardie that he would be assuming her business manager duties, and that her position was being eliminated. Hardie ended her employment with the district on December 31, 1997.
18. The evidence supports a conclusion that the personnel actions described in paragraphs 14, 15, 16 and 17 of these Findings of Fact were motivated by a double levy failure and declining

enrollment, and does not establish a causal connection with the employees' union activity.

19. Subsequent to the events described in paragraphs 14, 15, 16 and 17 of these Findings of Fact, the employer's classified employees decided to pursue union organizing. The Washington Education Association then filed a representation petition with the Commission, seeking certification as exclusive bargaining representative of the employer's non-supervisory classified employees.
20. During the 1997-1998 school year, Jones and Mueller approached non-supervisory employees of the employer about working as substitute employees, but neither of them discussed the matter with Workman. When informed of their requests, Workman decided that neither person would be called as a volunteer or substitute. Workman's reasoning was based, in part, on a concern that the employer might incur financial obligations under wage and hour statutes for the employees' services.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in these matters under Chapter 41.56 RCW and Chapter 391-45 WAC.
2. By initiating the personnel actions affecting Sue Hardie, Vicki Jones, Kathi Mueller and Randy Schleich, as described in paragraphs 14, 15, 16, 17 and 18 of the foregoing Findings of Fact, the Brinnon School District did not commit an unfair labor practice under RCW 41.56.140(1).
3. By refusing to allow Vicki Jones and Kathi Mueller to serve as volunteers or substitute employees following the termination

of their regular employment, as described in the foregoing Findings of Fact, the Brinnon School District did not commit an unfair labor practice under RCW 41.56.140(1) and (3).

ORDER

The complaints charging unfair labor practices filed in these matters are DISMISSED.

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARK S. DOWNING, 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.