STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BRINNON EDUCATION ASSOCIATION, Complainant, vs. BRINNON SCHOOL DISTRICT, Respondent.	)	CASE 13847-U-98-3395 DECISION 7210-A - PECB DECISION OF COMMISSION
BRINNON EDUCATION ASSOCIATION, Complainant, vs. BRINNON SCHOOL DISTRICT, Respondent.	)	CASE 14193-U-98-3517 DECISION 7211-A - PECB DECISION OF COMMISSION

Faith Hanna, Staff Attorney, Washington Education Association, for the union.

Dionne & Rorick, by *Clifford D. Foster*, Jr., Attorney at Law, for the employer.

This case comes before the Commission on a notice of appeal filed by the Brinnon Education Association, seeking to overturn a decision issued by Examiner Mark S. Downing.[1] We affirm; the complaint is dismissed.

---

[1] *Brinnon School District*, Decision 7210 (PECB, 2000).

BACKGROUND

The Brinnon School District (employer) provides educational services to students in kindergarten through eighth grade. At all times relevant to this case, James Workmen was superintendent of schools. Workman was appointed by a five-member school board, and he administered the school's daily operations.

The Brinnon Education Association (union) is the exclusive bargaining representative for the classified employees involved in this proceeding, under a certification issued by the Commission on June 25, 1998.[2] The union is also the exclusive bargaining representative of the employer's certificated employees under a certification issued on October 30, 1997.[3]

On April 14, 1998, the union filed a complaint charging unfair labor practices alleging that the employer interfered with employee rights and discriminated against employees for their support of and participation in union-organizing activities. The union claimed a violation of RCW 41.56.140(1).

On October 19, 1998, the union filed a second unfair labor practice complaint alleging that the employer interfered with and discriminated against employees Vicki Jones and Kathi Mueller, in violation of RCW 41.56.140(1) and (3). The union claimed the employer committed unfair labor practices when it prohibited certificated employees from using Jones and Mueller as volunteers or substitutes during the 1997-1998 school year, after they filed an earlier unfair labor practice complaint.

---

[2] *Brinnon School District*, Decision 6342 (PECB, 1998).

[3] *Brinnon School District*, Decision 6102 (EDUC, 1997).

The two complaints were consolidated for processing, and a hearing was held on October 20, 21, and 22, 1998, and December 15, 1998. The Examiner ruled that the employer did not commit unfair labor practices, and he dismissed the complaints on November 3, 2000.

On November 21, 2000, the union filed a notice of appeal, bringing this case before the Commission.

The facts are fully detailed in the Examiner's decision and are only addressed here in relevant part.

POSITIONS OF THE PARTIES

The union argues that the Examiner misstated and misread the evidence and also misinterpreted the legal standards for discrimination cases. The union asserts that the Examiner failed to consider some of the most significant evidence and did not find the timing of certain events worthy of consideration. Characterizing the Examiner's decision as conclusory and noting that it was issued well after the end of the hearing, the union asserts that the Commission has no reason to defer to the opinion of the presiding officer and should take an independent look at the record.

The employer asserts that the Examiner correctly dismissed the complaint. The employer contends that the Examiner properly and thoughtfully weighed the evidence and correctly refused to credit the union's speculative and conjectural inferences that a non-existent organizing drive by classified employees had any role in the employer's efforts to address a serious financial situation in the autumn of 1997.

DISCUSSION

Applicable Statutory Standards

Employers cannot interfere with or discriminate against the exercise of rights secured by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. RCW 41.56.040. It is an unfair labor practice for a public employer to either interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by Chapter 41.56 RCW or discriminate against a public employee who has filed an unfair labor practice charge. RCW 41.56.140(1) and (3).

The Standard for Determining Interference Allegations

The burden of proving unlawful interference rests with the complaining party. An interference violation will be found when an employee could reasonably perceive the employer's actions as a threat of reprisal or force or promise of benefit associated with the union activity of that employee or other employees. *City of Vancouver*, Decision 6732-A (PECB, 1999); *Pasco Housing Authority*, Decision 5927-A (PECB, 1997).

The Standards for Determining Discrimination Allegations

The test for determining "discrimination" allegations is (and always has been) more rigorous than the test for "interference."

Shifting Burdens of Production -

In *Educational Service District 114*, Decision 4631-A (PECB, 1994) and numerous subsequent decisions, we have consistently utilized the three-prong shifting burden scheme endorsed 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).[4] That test is traceable to the decision of the Supreme Court of the United States in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). While those courts have set forth a scheme for shifting the burden of production, the burden of persuasion rests with the complaining party at all times to prove, by a preponderance of the evidence, that the disputed action was discriminatory under Chapter 41.56. *McDonnell Douglas, supra; Wilmot, supra; Educational Service District 114, supra.* This shifting burden scheme recognizes that the employer usually knows why an employment action was taken and "helps an alleged victim of discrimination identify the reasons he [or she] must show did not in fact lead to his [or her] discharge or rejection." *Carle v. McCord Credit Union*, 65 Wn. App. 93 (1992)(citing *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355 (1988)). Over the past seven years, the "substantial motivating factor" test adopted by the Commission in *Educational Service District 114, supra*, has become well-established in Commission decisions. *Grant County Hospital*, Decision 6673-A (PECB, 1999); *Seattle School District*, Decision 5237-B (PECB, 1996); *Mansfield School District*, Decision 5238-A (EDUC, 1996); *City of Winlock*, Decision 4784-A (PECB, 1995); *Educational Service District 114, supra.*

The Prima Facie Case -

When a union or employee claims discrimination, the first prong of the shifting burden scheme is met by establishing a prima facie case of discrimination. *Wilmot, supra; Educational Service District 114, supra.* This is done by showing that: (1) the

---

[4] The *Wilmot* and *Allison* cases involved discrimination claims made under statutes that parallel the collective bargaining laws administered by this Commission.

employee has participated in protected activity or communicated to the employer an intent to do so; (2) the employee has been deprived of some ascertainable right, benefit, or status; and (3) there is a causal connection between those events, i.e., that the employer's motivation for the discharge was the employee's exercise of or intent to exercise statutory rights. *Wilmot, supra; Educational Service District 114, supra.* The prima facie case must ordinarily be shown by circumstantial evidence, since employers are not apt to announce discrimination as their motive. *Wilmot, supra; Educational Service District 114, supra.* If a prima facie case is established, a rebuttable presumption of discrimination is created. *Educational Service District 114, supra.*

Employer's Rebuttal -

The second prong of the shifting burden scheme requires the employer to articulate a legitimate, nonpretextual, nondiscriminatory reason for its actions by producing evidence sufficient to support a finding that the disputed action was taken for a nondiscriminatory reason. *Wilmot, supra; Educational Service District 114, supra.* Because the burden of persuasion remains with the union or employee, the employer must produce relevant, admissible evidence of another motive, but the employer's evidence need not be of sufficient quantum to meet even the preponderance of evidence standard. *Wilmot, supra; Educational Service District 114, supra.* If the employer fails to provide such evidence, the union or employee will be entitled to an order establishing liability as a matter of law. *Wilmot, supra; Carle, supra* (citing *Texas Dep't of Comm'ty Affairs v. Burdine*, 450 U.S. 248 (1981); *Educational Service District 114, supra.* However, if the employer produces evidence of a legitimate, nondiscriminatory reason, the presumption is rebutted. *Carle, supra* (citing *Burdine, supra*); *Educational Service District 114, supra.*

Pretext or "Substantial Motivating Factor Test" -

The third prong of the burden shifting scheme operates if the employer fulfills its burden of production. The union or employee must then satisfy the ultimate burden of persuasion and show by a preponderance of the evidence that the employer's articulated reasons are a mere pretext for what, in fact, is a discriminatory purpose. *Wilmot, supra; Educational Service District 114, supra.* That may be done by showing either through direct or circumstantial evidence that: (1) the reasons given by the employer were pretextual; *or* (2) although the employer's stated reason is legitimate, union animus was nevertheless a "substantial motivating factor" behind the employer's action. *Wilmot, supra; Educational Service District 114, supra.* If the third prong is not met, the employer is entitled to dismissal as a matter of law. *Carle, supra.* If the third prong is met, the union or employee establishes a reasonable inference of discrimination. *Carle, supra.*

Shifting Burdens Effectively Merge on Appeal -

Once an employment discrimination case has been *decided on the merits*, any issues concerning the parties respective burdens effectively merge into the ultimate disposition of whether the employer's discriminatory motive was a substantial factor in the decision to take adverse employment action. Deciding if the union or employee made out his or her prima facie case is no longer relevant, because the appellate body already has all the evidence before it needed to decide the case. Thus, the rationale for the burden shifting scheme no longer applies: The employer has been required to produce evidence of a legitimate nondiscriminatory reason. After we have determined that the correct legal standard is applied, our role on appeal is to determine whether the Examiner's ultimate findings on the issue of discrimination meet the usual standard of review for factual findings.

Substantial Evidence and Deference to Examiner -
On appeal, Washington courts look for substantial evidence to support our findings. *World Wide Video Inc. v. Tukwila*, 117 Wn.2d 382 (1991), cert. denied, 118 L. Ed. 2d 391 (1992); *Cowlitz County*, Decision 7007-A (PECB, 2000). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *World Wide Video, supra; Cowlitz County, supra* (citations omitted).

We similarly review Examiners' findings of fact to determine whether they are supported by substantial evidence and, if so, whether the findings in turn support the Examiner's conclusions of law. *Curtis v. Security Bank*, 69 Wn. App. 12 (1993); *Cowlitz County, supra*. Moreover, the Commission attaches considerable weight to the factual findings and inferences therefrom made by our Examiners, and this deference, while not slavishly observed on every appeal, is even more appropriate in fact oriented appeals. *Cowlitz County, supra; Eucational Service District 114, supra.*

Application of Standards

The union argues that the substantial delay between the hearing and the issuance of the Examiner's decision should somehow eliminate the deference customarily given to Examiner decisions, but we do not accept that argument. Passage of time does not, alone, deprive a presiding officer of his or her superior position to weigh the credibility of evidence.

The union assigns error to most of the Examiner's findings of fact and conclusions of law. Thus, the issues on appeal are: (1) whether there was substantial evidence to support the Examiner's findings of fact; and (2) whether those findings are sufficient to

support the Examiner's conclusions of law that there was no interference or discrimination violation under Chapter 41.56 RCW. The Commission finds that the Examiner applied the correct legal standard, that the challenged findings of fact are supported by substantial evidence, and that those findings support the Examiner's conclusions of law.

Verities on Appeal -

Although the union assigned error to findings of fact 3, 5, 6, 7, 10, 11, 13, 14, 15, 16, 19, and 20 in its notice of appeal, it has not otherwise addressed those findings. It appears to agree with those findings or does not argue what part(s) of those findings are in error. A party assigning error has the burden of showing a challenged finding is in error and not supported by substantial evidence; otherwise findings are presumed correct. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364 (1990) (citations omitted). *See also Green v. McAllister*, 103 Wn. App. 452 (2000). Because the union's arguments do not show how paragraphs 3, 5, 6, 7, 10, 11, 13, 14, 15, 16, 19, and 20 of the Examiner's findings of fact are in error, the union has not met its burden, and we will treat these findings as verities on appeal. *See Fisher, supra.*

Substantial Evidence Supports Findings of Fact -

The union argues its own set of facts it believes are important and applies those facts to the three-prong burden shifting scheme. Contradictory evidence was submitted on issues that required the Examiner to weigh the evidence. As is our usual practice, we defer to factual findings and inferences in which the Examiner did not embrace the facts asserted by the union. *Educational Service District 114, supra. See Franklin County v. Sellers*, 97 Wn.2d 317 (1982) (citations omitted). The Commission finds that the Examiner's findings are supported by substantial evidence.

Finding of Fact 4 states: "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."

The union states that school board members went to Hardie's office on very few occasions and that these visits were usually for routine requests, i.e., to obtain a copy of financial information from a board report. But, Workman testified that Hardie often met privately with school board members. Thus, the challenged part of this finding of fact is supported by substantial evidence, and the unchallenged portion is presumed correct.

Finding of Fact 8 states: "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."

In an effort to establish the prima facie case element that employees communicated an intent to exercise a statutorily protected right, the union argues that Workman was more than just generally aware of union organizing efforts and that he clearly knew which classified employees questioned the value of the union. It argues that because Schleich complained at a school board meeting about the superintendent's handling of a bomb threat, told other employees he would vote for unionization, and sought out other classified employees to discuss a representation election, it would have been obvious to Workman that Schleich supported the

union. Further, it argues that both Jones and Mueller told other staff members they supported a union. Workman testified that he thought there was a meeting at the Timber House (the July 1997 meeting) and that staff were "pretty open" about organizing activities, sometimes sharing with him what they were doing. Thus, there is substantial evidence in the record to support the challenged portion of this finding, and the unchallenged portion is presumed correct.

As to the last sentence of the finding, in an effort to establish a prima facie case and a causal connection, the union argues that it was error for the Examiner to decide that an employer's statements could be used as background evidence for the discrimination action only if they constituted an interference violation. The union argues that cases should be decided in light of all the circumstances. However, the union's arguments are misplaced. The union filed complaints charging both "interference" and "discrimination" violations. This finding was at least in part addressing the interference claim, but by doing so the Examiner was not necessarily excluding statements the employer made regarding unionization and the costs of unionization from the discrimination analysis.[5] Examiners have discretion to reasonably weigh and credit evidence as appropriate. It is undisputed that Workman made statements regarding the cost of unionization and opposed to unionization. However, the Examiner evidently did not think those statements were sufficient to constitute an interference violation, and on appeal, the union does not specifically argue to the contrary.

---

[5] To the contrary, the Examiner appeared to consider such statements when he wrote: "[T]he union has not proven that the adverse action was motivated by a discriminatory intent *based on the employer's anti-union sentiment.*" (emphasis added).

Finding of Fact 9 states: "At the beginning of the 1997-1998 school year, certificated employees met with the school board to discuss communication issues."

The union argues that the meeting was not called to discuss communication issues, but was called for board members to ask certificated employees why they were starting a union. Workman testified that the meeting was held to "clear the air" and that its purpose was "communication." A school board member testified that she believed the certificated employees called the meeting. Thus, there is substantial evidence in the record to support the challenged part of this finding, and the unchallenged portion is presumed correct.

Finding of Fact 12 states: "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."

The union argues that the employer did not "have to" make staff reductions and that it experienced surprisingly little savings when replacement costs are considered. The union argues that the employer could have spent its cash reserves and that classified employees were targeted because of anti-union animus. After a thorough review of the record, we agree with the Examiner that the employer presented credible evidence that it took appropriate action to deal with unexpected revenue shortfalls caused by steadily declining student enrollment. We also agree with the Examiner that the employer provided substantial reasons for each of its employment decisions. Testimony was given that the employer was experiencing the economic effects of a double-levy failure from

the previous year, that the employer was facing an enrollment decline (with consequential loss of state basic education funding) at the beginning of the 1997-1998 school year, and that the enrollment decline continued subsequently. Thus, it can be inferred that the school board and Workman reasonably exercised their discretion to reduce the shortfall while maintaining the employer's reserves. In sum, there is substantial evidence in the record to support the challenged part of the finding, and the unchallenged portion is presumed correct.

Finding of Fact 17 states: "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."

The union argues that Workman only notified Hardie that he wanted to have "someone" work with her through December to learn her duties. Workman testified that at the time he told Hardie her position was being eliminated he believed that Hardie's duties would be reallocated into others in the administrative office: Workman, Workman's secretary, and potentially others would take over Hardie's duties. Thus, the challenged part of this finding is supported by substantial evidence, and the unchallenged portion is presumed correct.

Finding of Fact 18 states: "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."

The union argues that the employer's personnel actions were motivated by anti-union animus. However, complete review of the

record shows there was substantial testimony that the employer was motivated by a double levy failure and declining enrollment, rather than a discriminatory purpose.[6]

The union also argues there was a causal connection between the union activity and the employment action, establishing a prima facie case,[7] and that the timing and pattern of the employer's personnel actions provide evidence of this causal connection. The union's arguments are misplaced. If the Examiner had meant the reference to a "causal connection" in this finding of fact as a ruling that there was no prima facie case, there would have been no reason for him to continue the analysis to the second and third prongs of the burden shifting scheme. Instead, the Examiner fully analyzed the last two prongs of the burden shifting scheme when he addressed a legitimate nondiscriminatory, nonpretextual reason for the employer's actions or the employer's financial situation, i.e., that the employer was motivated by a double levy failure and declining enrollment. We infer from the whole of this finding and the Examiner's analysis that the union established a prima facie case, but did not prove pretext or discrimination. We thus read the reference to "causal connection" in this finding as referring to the union's ultimate burden; that is, the employer was not substantially motivated by employees' union activities. We note that it is within the Examiner's discretion to consider the evidence and make reasonable inferences that we will attach weight

---

[6] See Finding of Fact 12.

[7] Under our standard of effectively merging the burdens on appeal, these arguments are misplaced because after a case has been decided on the merits, it is irrelevant whether there is a prima facie case; any issues concerning the parties' respective burdens effectively merge into the ultimate disposition of the issue of whether there was unlawful discrimination.

to on appeal. Additionally, to support these inferences we note that the Examiner addressed the third prong of the burden shifting scheme when he wrote: "[The] union has not demonstrated that the employer's actions were motivated in any way by anti-union animus." The Examiner went on to explain that Workman's 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. In conclusion, the challenged part of this finding is supported by substantial evidence, and the unchallenged portion is presumed correct.

Conclusions of Law Support Findings of Fact -
The Commission finds that Examiner's findings of fact support the conclusions of law.

Conclusion of Law 2 states: "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)."

The union asserts it established a prima facie case of discrimination, that the employer's financial situation does not explain the dismissals, and that anti-union animus was a substantial motivating factor in the employer's personnel actions. In this instance, the facts do not support the union's arguments. As detailed in responding to the union's arguments under finding 8 above, the Examiner found that Workman's statements regarding unionization and the costs of unionization where not reasonably perceived by employees as threats of reprisal or force or promise of benefit. Also, as explained in responding to the union's arguments on findings 12 and 18 above, the employer was motivated by a double levy failure and declining enrollment. Under finding 19, which is a verity on appeal, the Examiner found it significant that the

employer's classified employees decided to pursue union organizing *subsequent to* the events described in paragraphs 14, 15, 16, and 17. Thus, the findings of fact support the conclusion that the employer did not commit unfair labor practices.

Conclusion of Law 3 states: "By refusing to allow Vicki Jones and Kathi Mueller to serve as volunteers or substitute employees following the termination of their regular employment, . . . the Brinnon School District did not commit an unfair labor practice under RCW 41.56.140(1) and (3)."

The union assigns error to this conclusion on appeal, but it flows from Finding of Fact 20, and the union does not argue what part(s) of that finding is in error. Thus, the finding is a verity on appeal. In its appeal brief, the union acknowledges that Workman explained his refusal to allow Jones or Mueller to serve as volunteers or substitutes following termination of their regular employment in part as a precaution to avoid problems with wage and hour laws. The union argues facts it believes are important, but which are not included in the findings. The union has not shown there is insufficient evidence to support Conclusion of Law 3. The Examiner acknowledged that the actions at issue in the retaliation claim took place much closer to unionization of the classified employees, but stated that the union failed to prove the employer was motivated by a discriminatory purpose.[8] Thus, the findings of fact support the Examiner's conclusion that the employer did not commit unfair labor practices.

Conclusion

The union bore the ultimate burden of proving that interference and discrimination had occurred, and the Examiner properly found that

---

[8] See Finding of Fact 19.

the union did not meet that burden. Regarding the first case, the employer was motivated by a double levy failure and declining enrollment. In not allowing two classified employees to volunteer or substitute after they filed an unfair labor practice complaint, the employer was motivated, in part, by a desire to avoid problems with wage and hour laws.[9] The employer's statements regarding the costs of unionization and in opposition to unionization did not rise to the level of unlawful solicitation or promises. Substantial evidence exists to support all of the findings of fact to which the union has assigned error, and those findings support the Examiner's conclusions of law. We interpret many of the superintendent's questionable actions as proof of poor management, rather than as unfair labor practices.

NOW, THEREFORE, it is

ORDERED

The order of dismissal issued by Examiner Mark S. Downing in the above-captioned matter is AFFIRMED and adopted by the Commission.

Issued at Olympia, Washington, on the 9th day of October, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

[9] We have not been asked to and are not making any determination as to whether the superintendent's concern with the wage and hour laws is correct.