STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

C-TRAN, Employer.	)	
DANIEL DURINGER, Complainant, vs. AMALGAMATED TRANSIT UNION, LOCAL 757, Respondent.	)	CASE 14872-U-99-3746 DECISION 7087-B- PECB DECISION OF COMMISSION
C-TRAN, Employer.	)	
BARBARA DEJEAN, Complainant, vs. AMALGAMATED TRANSIT UNION, LOCAL 757, Respondent.	)	CASE 14873-U-99-3747 DECISION 7088-B - PECB DECISION OF COMMISSION

Daniel Duringer and *Barbara DeJean* appeared pro se.

Susan Stoner, Attorney at Law, appeared for the respondent.

This case comes before the Commission on an appeal filed by Daniel Duringer and Barbara DeJean, seeking to overturn findings of fact,

conclusions of law, and an order of dismissal issued by Examiner Rex L. Lacy.[1] We affirm; the complaints are dismissed.

BACKGROUND

Clark County Public Transportation Benefit Area d/b/a C-TRAN, operates a public passenger transportation system in Clark County, Washington. Prior to July 1, 1999, Amalgamated Transit Union, Local 757 (union) was the exclusive bargaining representative of drivers employed by C-TRAN.

On July 1, 1999, C-TRAN assumed operation of a paratransit service formerly operated by Laidlaw, Inc. (Laidlaw), a private employer. The union was also the exclusive bargaining representative of the drivers employed by Laidlaw in the paratransit operation. The union learned that C-TRAN would be assuming operation of the paratransit service and, on April 5, 1999, the union asked C-Tran to bargain the wages, hours, and working conditions of the paratransit drivers. C-TRAN agreed to bargain and requested that the paratransit drivers be included in the parties' existing collective bargaining agreement.

Prior to July 1, 1999, Daniel Duringer and Barbara DeJean were each employed as drivers in the paratransit service operated by Laidlaw. Because they were both employed by local school districts as school bus drivers, their work with Laidlaw was limited to weekends during the portion of the year when school was in session.[2]

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[1] *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-A (PECB, 2001).

[2] They receive benefits through their school district employment.

There was no guarantee that former Laidlaw employees would be hired by C-TRAN when C-TRAN began operating the paratransit service on July 1, 1999. Duringer, DeJean, and other Laidlaw employees had to submit applications, interview, pass tests, pass a physical examination, and have their background checked to be hired by C-TRAN.

On May 19, 1999, the employer and union reached agreement on the wages, hours, and working conditions of the paratransit drivers.[3] The collective bargaining agreement they signed on June 23, 1999, contained the following provisions relevant to this proceeding:

> **ARTICLE 1. UNION RECOGNITION**
>
> **Section 1. Recognition**
> The Employer hereby recognizes the Union as the exclusive collective bargaining representative for all employees of the Employer who are employed as coach operators and C-VAN operators, including regular full-time, extra board and part-time operators. . . .
>
> **ARTICLE 18. POSTING OF C-VAN WORK**
>
> . . .
>
> **Section 2. Run Scheduling**
> A minimum of forty percent (40%) with a target of sixty percent (60%) of the employees shall be classified as full time.
>
> **Section 3. General Sign-Up Procedures**
> . . . Blocks shall be determined *by the Employer*. Blocks shall be bid by seniority.
> . . .
>
> **ARTICLE 34. PART-TIME EMPLOYEE INSURANCE**
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> . . .

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[3] The Examiner indicated the agreement was reached on May 18, 1999, but we read the record to indicate it was reached on May 19, 1999.

Section 4. Benefit Eligibility

In order to be eligible for Employer contributions to medical and dental benefits, a part-time employee *must be available to work at least twenty (20) hours per week.*

. . .

ARTICLE 36. MONTHLY HOURS

Effective with the implementation of the first sign-up after ratification, *part-time operators shall be available for service a minimum of five (5) days per week.* Part-time operators shall receive a minimum of eighty (80) hours' pay (including all paid leave). *Operators unavailable for service shall be penalized toward the Employer's guaranteed obligation, the greater of six (6) hours or the assigned work hours for each day unavailable.*

. . .

ARTICLE 39. C-VAN PART-TIME WORK ASSIGNMENTS

. . .

B. Employees who do not obtain a bid work assignment will be called part-time relief operators.

C. Additional work shall be assigned to part-time relief operators, until such time as the hours of relief operators are roughly equivalent to part-timers working on bid work assignments.

D. Once the hours have been roughly equalized between operators with bid assignments and relief operators, all additional part-time work will be assigned in the following manner:

1. All part-time employees available to work additional hours will be listed by seniority order on the part-time work list.

. . .

ARTICLE 44. DEFINITIONS

. . .

4. Full-time C-VAN Operator - shall mean a person employed by the Employer to operate C-VAN service on a full-time basis and who chooses a full-time work assignment.

> 5. Part-time C-VAN Operator - shall mean a person employed by the Employer to operate in a part-time status to operate C-VAN service on a relief basis, or operate work which cannot be assembled into full-time runs . . . .
>
> 6. Extra Board C-VAN Operators - shall mean a person employed by the Employer to operate C-VAN scheduled and/or non-regular service on a non-regular relief basis.

(emphasis added).

On its face, the contract indicated it was to become effective on September 1, 1999. Duringer, DeJean, and other former Laidlaw paratransit operators who were hired by C-TRAN did not begin work with C-TRAN until July 1, 1999.

On August 4, 1999, Duringer sent an e-mail message to Ron Heintzman, the president of the union, inquiring about his interpretation of Article 36 of the contract. Duringer wrote:

> [I]t seems to be up to C-Tran if they work us five days per week or one. Also it seems to say that any driver unavailable for work would reduce the obligation of the employer. Therefore, say for us school bus drivers, since we are at times unavailable for work, C-Tran would not be obligated to pay us for 80 hours of labor each month. . . .[sic]

In the same message, Duringer asked Heintzman to clarify Article 39 of the contract. Regarding Paragraph C of that article, Duringer asked:

> If we are given one day routes on a weekend day would we not be part-time regular and not be considered part-time relief operators and therefore not subject to this provision of equalization of work hours? . . .

Regarding Paragraph D of Article 39, Duringer asked: "Does this mean that since we are not available to work, we would not be listed and therefore not be required to work?"

At the hearing in this matter, Heintzman testified that he responded with confirmation that Duringer's interpretation that there was no imminent threat to school bus drivers was correct and,

> [T]hat C-TRAN made the work schedules, and that the only requirement of being available five days a week was for guaranteed hours. If a part-timer worked less than that or were not available five days a week, they'd still be allowed to bid; they just would not be guaranteed hours.

Heintzman testified that his initial response to Duringer's e-mail message was by means of a telephone call.

Duringer sent another e-mail message to Heintzman on August 26, 1999, as follows:

> . . . C-TRAN had No duty whatsoever under the law to hire any Laidlaw employee. Additionally, Laidlaw employees were not involved in negotiations because they did not exist. Former Laidlaw employees and new hires were hired into a position already in existence covered by a collective bargaining agreement. . . . [sic]

On September 10, 1999, C-TRAN submitted a memorandum of understanding to the union for its signature. The memorandum read:

> In order to address scheduling concerns of part-time C-VAN Operators and provide increased flexibility in paratransit service and vacation scheduling, C-TRAN and Amalgamated

> Transit Union, Division 757, agree to the following:
>
> 1. Article 36, Monthly Hours, will be further interpreted to mean the eighty (80) hour guarantee will not apply to C-VAN Operators who declare availability to work less than five (5) days per week.
>
> 2. In addition, the Employer may make available a maximum of two (2) part time weekend positions for C-VAN Operators desiring to work less than twenty (20) hours per week. These positions will not be eligible for leave accrual, holiday pay, or employer paid medical, dental, life, or long term disability (LTD) insurance. These positions will continue to receive wage increases in accordance with C-VAN Operator Schedule A.

The union responded on September 16, 1999, stating that the employer had proposed changes to the collective bargaining agreement signed in June 1999.[4] The union stated that it was willing to reopen negotiations on the current contract, with the understanding that it reserved the right to bring other items "to the table" and that any negotiated change would require a membership vote after appropriate notice.

The employer did not respond to the union's offer, and the contract language remained as negotiated.

On September 30, 1999, Human Resources Personnel Service Manager Arlene Dorene of C-TRAN sent Duringer an e-mail, as follows:

> . . . [W]e have decided not to offer "weekend only" work as there is no way to ensure we will not be paying benefits at some point.

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[4] At the hearing, the union expressed concern that the employer was asking it to change a potentially benefitted position into an unbenefitted position.

On November 2, 1999, Duringer and DeJean filed unfair labor practice complaints with the Commission. Because the complaints were identical, they were consolidated for processing. A preliminary ruling issued on January 24, 2000, framed the issues as:

> Union breach of its duty of fair representation on or after July 1, 1999, by making proposals which benefit bargaining unit employees working full-time while discriminating against bargaining unit employees working part-time.

Examiner Rex L. Lacy held a hearing on November 28, 2000. He subsequently dismissed the complaints on their merits, finding that the complainants: (1) were not deprived of any ascertainable right, status, or benefit to which they were entitled by Chapter 41.56 RCW; (2) failed to establish a prima facie case that the union breached its duty of fair representation by discriminating against them; and (3) failed to establish that the union aligned itself in interest against them on or after July 1, 1999, by proposing or accepting contract provisions that the complainants have asserted as benefitting bargaining unit employees working full-time to a greater extent than bargaining unit employees working part-time.

The complainants filed a notice of appeal on June 6, 2001, and filed an appeal brief on June 18, 2001. The union filed its appeal brief on June 14, 2001.

DISCUSSION

The Commission has jurisdiction in this matter under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Unfair

labor practices are processed by the Commission under RCW 41.56.140 through 41.56.160, and Chapter 391-45 WAC.

Timeliness of Appeal Brief

The union's claim that the complainants' appeal brief was untimely is based on a rule that is no longer in effect. WAC 391-45-350 was amended in 1998, to substitute "notice of appeal" for the "petition for review" terminology formerly used and to modify the time limits for appeal briefs.[5] WAC 391-45-350(6) now sets the due date for any brief that the party filing an appeal desires to have considered by the Commission as "fourteen days following the filing of the notice of appeal." In this case, the due date for the complainants' appeal brief was June 20, 2001, and it was timely when filed on June 18, 2001.

Applicable Standards

Commission Jurisdiction Limited to Current Employment -
We agree with the terms of the preliminary ruling and Examiner's ruling that the Commission has no jurisdiction to hear or determine any claims concerning the period before July 1, 1999. While Duringer and DeJean were employees of Laidlaw, their bargaining rights as private employees were regulated by the National Labor Relations Board and the federal courts under the National Labor Relations Act. Although we have received and reviewed background information from the period before July 1, 1999, we have only considered events occurring after July 1, 1999, for purposes of determining whether an unfair labor practice has been committed.

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[5] The rule formerly required that a "petition for review and supporting brief" be filed within 20 days after the order was dated.

Substantial Evidence and Deference to Examiner -

On appeal, Washington courts look for substantial evidence to support our findings. *Brinnon School District*, Decision 7210-A (PECB, 2001)(citing *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. *Brinnon School District, supra*. We similarly review challenged findings of fact issued by examiners to determine whether they are supported by substantial evidence and, if so, whether the findings of fact support the examiner's conclusions of law. *Brinnon School District, supra* (citing *Curtis v. Security Bank*, 69 Wn. App. 12 (1993); *Cowlitz County, supra*.)

The Commission attaches considerable weight to the factual findings and inferences therefrom made by our examiners. This deference, while not slavishly observed on every appeal, is highly appropriate in fact-oriented appeals. *Brinnon School District, supra*.

Interference and Discrimination Prohibited -

Chapter 41.56 RCW prohibits unions from interfering with or discriminating against public employees who exercise their rights secured by the statute:

> *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.

RCW 41.56.040 (emphasis added).

The standards for determining discrimination allegations under RCW 41.56.160 were recently restated in detail by the Commission in *Brinnon School District*, 7210-A (PECB, 2001). In *Educational Service District 114*, Decision 4631-A (PECB, 1994) and numerous subsequent decisions, the Commission has consistently utilized the three-prong burden-shifting 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).[6] When discrimination is claimed, the complainant must first establish a prima facie case of discrimination. *Wilmot, supra; Educational Service District 114, supra.*[7] The burden-shifting scheme then requires the respondent to articulate a legitimate, nonpretextual, nondiscriminatory reason for its actions. *Wilmot, supra; Educational Service District 114, supra.* The third prong of the burden-shifting scheme allows the complainant to satisfy the ultimate burden of persuasion by showing that the reasons articulated by the respondent are a mere pretext for what, in fact, is a discriminatory purpose, or that protected activity was nevertheless a substantial motivating factor behind the discriminatory action. *Wilmot, supra; Educational Service District 114, supra.*

Once a discrimination case has been decided on the merits, any issues concerning the parties' respective burdens effectively merge into the ultimate disposition of the case by the appellate body. *Brinnon School District, supra.* The Commission's role on this

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

[7] Part of the proof of a prima facie case involves showing that the employee has been deprived of some ascertainable right, benefit, or status. *Wilmot, supra; Educational Service District 114, supra.*

appeal is to determine whether the Examiner's ultimate findings on the issue of discrimination meet the usual standard of review for factual findings. *Brinnon School District, supra.*

The Duty of Fair Representation -

The duty of fair representation grows out of the rights and privileges held by a union once it is certified or recognized as "exclusive bargaining representative" under a collective bargaining statute. *City of Seattle*, Decision 3199-B (PECB, 1991). Thus:

> The bargaining representative which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and *shall be required to represent, all the public employees within the unit* without regard to membership in said bargaining representative. . . .
>
> RCW 41.56.080 (emphasis added).

The duty of fair representation originated with decisions of the Supreme Court of the United States, holding that an exclusive bargaining agent has the duty to represent fairly and *without discrimination* all those for whom it acts. *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192 (1944). Since that time:

- In *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), the Supreme Court described the duty of a union as follows:

  > The bargaining representative . . . is responsible to, and owes complete loyalty to, the interest of all whom it represents . . . . A wide range of reasonableness must be allowed a statutory representative in serving the unit it represents, *subject always to complete good faith and honesty of purpose* in the exercise of its discretion.
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  > *Ford Motor Co. v. Huffman, supra* (emphasis added).

- Since *Miranda Fuel Co.*, 140 NLRB 181 (1962), the NLRB has exercised jurisdiction concurrent with the courts, by finding breaches of the duty of fair representation to constitute unlawful *interference* under Section 8(b)(1)(A) of the NLRA.

- In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Supreme Court held that a union breaches its duty of fair representation when its conduct is *arbitrary, discriminatory, or in bad faith.* The Supreme Court later held that the rule announced in *Vaca, supra*, applies to all union activity, including contract negotiation, administration, and enforcement.

- In *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361 (1983), the Supreme Court of the State of Washington found that there is no bright line dividing the collective bargaining process and intraunion affairs. The Court explained that collective bargaining is a continuing process that involves day-to-day adjustments in contracts and working rules, resolutions of new problems, and protection of employee rights already secured by contract. The Court noted that the potential for abuse inherent in majority rule requires that the duty of fair representation cover a wide range of union activities. *Allen v. Seattle Police Officers' Guild, supra.* Thus, a union must conform its behavior to a three-fold standard that is consistent with *Vaca, supra*:

> First, it must treat all factions and segments of its membership *without hostility or discrimination.* Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in *complete good faith and honesty.* Finally, the union *must avoid arbitrary conduct . . . .*

Allen v. Seattle Police Officers Guild, supra; Pe Ell School District, Decision 3801-A (EDUC, 1992) (emphasis added).

> Our Supreme Court went on to state its belief that this standard best reflected the underlying goal of the duty of fair representation doctrine: Assuring the individual employee [or minority] that his union will represent his interest unless it conflicts with the group's interest; to achieve this goal, the union must be required to consider individual and minority interests. *Allen v. Seattle Police Officers Guild, supra.*[8]

Nevertheless, no statutory requirement guarantees each member of a bargaining unit that their individual goals will be accomplished, or even adopted by the union as its proposals, in collective bargaining. *City of Pasco*, Decision 2327 (PECB, 1985). Conflicting opinions within a bargaining unit are to be expected. Being involved in a collective process necessarily requires individuals to submit to the will of the majority under most circumstances. *King County*, Decision 3245-A (PECB, 1989); *City of Pasco, supra*. A union can rarely provide all things desired by all of the employees it represents, and absolute equality of treatment is not the standard for measuring a union's compliance with the duty of fair representation. *Pierce County Fire District 2, supra*.

The Commission's role in the collective bargaining process includes ruling on disputes concerning the subjects for bargaining and enforcing the good faith bargaining obligation on both employers and unions. *King County Fire District 24*, Decision 2404 (PECB, 1986). In deciding such controversies, it is necessary to distinguish between "unequal" and "unfair" treatment of employees. *King County Fire District 24, supra*. While a union is not required to bargain provisions of equal benefit to all bargaining unit

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[8] Applying this standard, the Court did not find that union financing of a legal challenge to an employer affirmative action program violated the union's duty to fairly represent unit members who were of racial minorities.

members, it may not use the role of exclusive bargaining representative to obtain special benefits for union officials or otherwise align itself in interest against one or more unit members.[9] *Allen v. Seattle Police Guild, supra; City of Seattle, supra; King County Fire District, supra. See also Elma School District*, Decision 1349 (PECB, 1982); *Enumclaw School District*, Decision 5979 (PECB, 1997);

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[9] The Commission recognizes a duality of jurisdiction:

> The Commission recognizes the jurisdiction of arbitrators and courts with respect to violations of collective bargaining agreements, and it does not assert jurisdiction to remedy contract violations through the unfair labor practice provisions of the statute. *City of Walla Walla*, Decision 104 (PECB, 1976). Consistent with that policy, the Commission does not assert jurisdiction over "breach of duty of fair representation" claims arising exclusively out of the processing of grievances. *Mukilteo School District (Public School Employees of Washington)*, Decision 1381 (PECB, 1982).
>
> The Commission does police its certifications and will assert jurisdiction in the types of cases described by the Supreme Court of the State of Washington in *Allen v. Seattle Police Officers' Guild, supra,* as follows:
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> > Certainly, if the unions are forbidden from discriminating on the basis of union membership, they should also be prohibited from discriminating on the basis of race or other ground. Thus, though [RCW 41.56.080] explicitly states the union is prohibited from discriminating only as to union membership, *we believe this language should be interpreted broadly* to impose an affirmative obligation on the part of the union to reconcile, as far as possible, the conflicting interests of its members.
>
> (emphasis added).
>
> The Commission has thus asserted jurisdiction in cases where unions have been accused of aligning themselves in interest against an employee or class of employees within the bargaining unit it represents on some improper or invidious basis.

Pierce County Fire District 2, Decision 4064 (PECB, 1992); *Pe Ell School District*, *supra*.

A complaining party's dissatisfaction with the level and skill of representation does not form the basis for a cause of action, unless the complaining party can prove that the union violated rights guaranteed in Chapter 41.56 RCW. *City of Renton*, Decision 1825 (PECB, 1984). The employee claiming a breach of the duty of fair representation has the burden of proof and must demonstrate that the union's actions or inaction were done discriminatorily or in bad faith. *City of Renton*, *supra*.

Application of Standards

These complainants assign error to paragraphs 8, 11, and 12 of the findings of fact, as well as to a statement made in the Examiner's discussion. The union argues that the challenged materials are supported by the record, and it cites numerous transcript pages in support of that assertion. The union claims the Examiner made appropriate credibility determinations where the evidence in the record conflicts. Thus, we must determine whether there is substantial evidence to support the challenged findings of fact. If the Examiner's findings of fact support the conclusions of law as a whole in this case, we will affirm the Examiner's decision.[10]

Verities on Appeal -

A party assigning error has the burden of showing that a challenged finding is not supported by substantial evidence. In the absence

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[10] Usually, assignments of error are made as to one or more specific conclusions of law, and we must specifically address whether those conclusions are supported by the findings of fact. Here, however, no conclusions of law were claimed to be in error.

of any challenge, findings are taken as verities on appeal. *Brinnon School District, supra* (citing *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364 (1990)). Although the complainants' notice of appeal assigned error to Finding of Fact 8, they did not address that finding in their appeal brief. Because the complainants' arguments do not show how Finding of Fact 8 is in error, the complainants have not met their burden, and we treat that finding as a verity on appeal. *See Fisher, supra.*

Harmless Error -

The discussion set forth in the Examiner's decision included the following material under a "Absence of Deprivation of Ascertainable Right" heading:

> As the commencement of the next school year (in late August or early September) approached, Duringer and DeJean were to return to their jobs as school bus drivers for the Washougal School District, and they wanted to limit their C-VAN assignments to weekends.

The complainants point out testimony indicating that Duringer is employed by the Camas School District and that DeJean is employed by the Evergreen School District. Although it is clear that the Examiner's statement was incorrect, we find it to be a harmless error that did not affect the outcome of the case. The error was not repeated in Finding of Fact 6, where the Examiner wrote, "Duringer and DeJean were employed as school bus drivers with another employer." Finding of Fact 6 was not challenged, and was sufficient to support the Examiner's decision.

Substantial Evidence Supports Findings of Fact -

Whenever contradictory evidence is submitted on issues, our examiners are required to weigh that evidence. As is our usual

practice, we defer to the factual findings and inferences made by the Examiner in this case. See *Brinnon, supra*. The Commission finds the Examiner's findings are supported by substantial evidence.

Finding of Fact 11 concerns the coordination of schedules between the C-TRAN and school bus jobs held by the complainants. The Examiner wrote:

> Duringer and DeJean requested deviation from the "five day availability" requirement practiced at C-TRAN, and requested that school bus drivers be given a preference for weekend work at C-VAN, in order to avoid conflicts with their regular and ongoing school bus jobs described in Finding of Fact 6.

Multiple issues have been raised in this appeal concerning that finding:

First, the complainants maintain that the union insisted that the employer not provide a limited amount of nonbenefitted part-time work to match their availability and that the union did not always promote the interpretation it offered at hearing (i.e., that bargaining unit members could "declare themselves unavailable and thus not be required to be available five days and also not be eligible for the minimum pay guarantee"). The complainants' arguments are misplaced. The focus of the challenged finding is on their request. Regardless of whether the union would allow deviations from the five-day availability requirement, it is undisputed that the complainants requested such a deviation.

Second, the complainants argue there is no evidence they ever requested that school bus drivers be given a preference over other drivers for weekend work. The complainants assert the employer asked, in its proposed memorandum of understanding, that two

employees be given a preference. They acknowledge that they requested that the employer build one-day weekend routes that they could secure through exercise of their seniority, but somehow distinguish that from asking for a preference. This is a matter of semantics. Although the complainants do not agree with the use of the word "preference" by the Examiner, we believe it reflects a reasonable and accurate interpretation of their request for one-day weekend routes. To receive a "preference" means to secure an advantage or priority. If the employer had built the one-day weekend routes requested by the complainants, the effect would have been to give these complainants an advantage. There is no evidence in the record that other drivers were allowed to specify the routes they wanted and then secure them by bidding on them.

Thus, the challenged parts of Finding of Fact 8 are supported by substantial evidence, and the unchallenged portion is a verity on appeal.

Finding of Fact 12 concerns the termination of the complainants' employment by C-TRAN. The Examiner wrote:

> The employer rejected the deviations from practice described in Finding of Fact 11, and the union had no means or duty to impose those deviations upon the employer. As a result, Duringer and DeJean were unable to continue working two jobs as described in Finding of Fact 5 and 6.

The complainants claim that the union's "refusal to be their exclusive bargaining representative in a matter that did not adversely affect other drivers" was the reason the deviations did not occur and was the cause of the employer's final decision against providing the requested deviations. The complainants contend it was the union's demand for a guaranteed minimum monthly

salary that caused the employer to require a minimum number of hours to be worked each month. The complainants assert that by demanding a guaranteed minimum monthly salary for all operators the union knew it would prevent certain part-time persons working at C-VAN from being able to continue their employment. Again, the complainants' arguments are misplaced. The focus of the finding is on the termination of their employment, and it is undisputed that it was ultimately the employer that rejected the complainants' request for one-day weekend routes.

Additionally, the Examiner adopted Duringer's testimony about the five day availability requirement. The Examiner wrote:

> [T]he contract contains a "five day availability" clause which could if implemented according to its terms effectively preclude the 'weekend only during the school year' schedule by which Duringer and DeJean made themselves available to work as employees of Laidlaw, Inc.

Although the union asserted, at hearing, that it was up to the employer to build one-day only routes and that the minimum monthly salary guarantee was only applicable to part-time operators who were available to work a minimum of five days per week,[11] we defer to the expertise of the Examiner who had an opportunity to observe the witnesses.

Regarding the portion of the finding that says the union had no means to impose deviations upon the employer, it is undisputed that the employer was responsible for building routes. Thus, if the

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[11] In other words, a part-time operator could choose not to be available five days a week, but they would not receive the "guaranteed" salary.

employer chose not to build one-day weekend routes, work would not be available to these complainants on the basis they desired. There are several reasons why the union had no duty to force the employer to build one-day weekend routs (and thus did not violate its duty of fair representation by discrimination in failing to force such routes):

First, the paratransit drivers had been accreted to an existing bargaining unit of C-TRAN employees and a collective bargaining agreement was in effect for that entire bargaining unit, so the union was entitled to exercise great caution before reopening the contract to negotiate what amounts to a narrow exception that would apparently have affected only these two employees.

Second, while the union owes a duty of fair representation without discrimination to all employees it represents, including a duty to represent the interests of bargaining unit members who work part-time, the evidence does not support a finding or conclusion that the union aligned itself in interest against the part-time employees. Indeed, the union negotiated contract terms that secured for part-time employees guaranteed work hours and benefits that they had not received previously. On and after July 1, 1999, there are no facts that support the allegations that the union engaged in any discriminatory activity or that it aligned itself in interest against part-time operators. It is understandable that the union did not want to simply sign the memorandum of understanding proposed by the employer, as it was concerned that the proposed agreement could have resulted in a loss of guaranteed hours and benefits from future employees. The union offered to reopen the contract for discussion of a broader range of issues, but the employer did not pursue that option. Instead of appearing discriminatory, or of aligning itself against part-time employees, the union seems to have been looking out for the needs of part-time employees as a whole.

We hold that the challenged parts of this finding of fact are supported by substantial evidence. The union was not motivated by a discriminatory purpose in administering the contract as it did. Furthermore, we agree with the Examiner that the complainants were not deprived of any ascertainable right, status, or benefit: The weekend only routes desired by the complainants were never theirs to begin with; the failure of C-TRAN to offer routes similar to those offered by Laidlaw in the past does not mean the complainants were discriminated against because the union did not force C-TRAN to provide them their preferred routes. The unchallenged portion of the finding is taken as a verity on appeal.

Conclusion

In this case, the burden was on the complainants to set forth facts sufficient to support their allegations. The incidents that occurred on and after July 1, 1999, do not support finding any unfair labor practice violation. The union did not breach its duty of fair representation by discrimination, and did not align itself in interest against the complainants on or after July 1, 1999, by proposing or accepting contract provisions that the complainants have asserted as benefitting bargaining unit employees working full-time to a greater extent than bargaining unit employees working part-time. We affirm the Examiner's decision, as the findings of fact support the conclusions as a whole.

NOW, THEREFORE, it is

ORDERED

1. [Decision 7087-B] The findings of fact, conclusions of law, and order issued by Examiner Rex L. Lacy in Case 14872-U-99-

3746, dismissing the complaint charging unfair labor practices filed by Daniel Duringer, are AFFIRMED.

2. [Decision 7088-B] The findings of fact, conclusions of law, and order issued by Examiner Rex L. Lacy in Case 14873-U-99-3747, dismissing the complaint charging unfair labor practices filed by Barbara DeJean, are AFFIRMED.

Issued at Olympia, Washington, on the 8th day of January, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner