STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

RENTON FEDERATION OF TEACHERS, LOCAL 3914, WFT/AFT/AFL-CIO, Complainant,	)	CASE 13262-U-97-3228
vs.	)	DECISION 7441-A - CCOL
RENTON TECHNICAL COLLEGE, Respondent.	)	DECISION OF COMMISSION

Schwerin, Campbell, Barnard, by *Dimitri Iglitzin*, Attorney at Law, for the complainant.

Christine Gregoire, Attorney General, by *James Tuttle*, Assistant Attorney General, for the appellant.

This case comes before the Commission on an appeal filed by Renton Technical College, seeking to overturn findings of fact, conclusions of law, and an order issued by Examiner Paul T. Schwendiman.[1] Specifically, the employer challenges paragraphs 4, 5, 7, 8 , 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, and 21 of the Examiner's findings of fact, it challenges paragraphs 2 and 3 of the Examiner's conclusions of law, and it challenges the Examiner's order in its entirety. The Commission affirms and adopts the Examiner's findings of fact and conclusions of law. Thus, the Examiner's order stands.

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[1] *Renton Technical College*, Decision 7441 (CCOL, 2001).

BACKGROUND

On June 25, 1997, Renton Federation of Teachers, Local 3914 (union), filed a complaint charging unfair labor practices with the Commission under Chapter 391-45 WAC, alleging that Renton Technical College (RTC or employer) interfered with employee rights. A deficiency notice was issued on September 19, 1997, and an amended complaint was filed on September 25, 1997, alleging both interference with employee rights and discrimination. The Executive Director issued a preliminary ruling on December 22, 1997, finding a cause of action to exist on allegations summarized as:

> Discrimination against William Scott Norris, in the form of denial of tenure or renewal of his teaching contract, in reprisal for: (1) his use of the grievance procedure concerning his placement on the salary schedule; and/or (2) his actions through the Renton Federation of Teachers to obtain information concerning the use and allocation of "equity money."

Paul T. Schwendiman was designated as Examiner in the matter. The hearing was held on 11 days in 1998.

The Examiner issued his decision on June 7, 2001, ruling that the employer discriminatorily denied Norris tenure or renewal of his teaching contract, due to his union activities. The Examiner entered a remedial order.

On June 27, 2001, the employer filed a timely 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 PARTIES

The employer contends that 16 of the Examiner's findings of fact, two of the Examiner's conclusions of law, and the Examiner's entire order are in error. The employer argues that Norris's filing of grievances and his contact with a legislator about the use of equity money were not protected activity. The employer asserts that there was no causal connection between either activity and the discontinuance of Norris's probationary employment. The employer maintains that it articulated legitimate nonretalitory reasons for its actions and that the union did not prove by a preponderance of the evidence that the employer's actions were retaliatory. The employer asserts that the credibility determinations made by the Examiner more than two years after the hearing were unexplained and should not be accepted.

The union contends the Examiner's decision is thorough, persuasive, and well-supported by the factual record. The union asserts that, contrary to the employer's arguments, the Examiner did not commit an error of law when he found that Norris engaged in protected activity both by contacting a legislator regarding a matter of concern to his union and by filing grievances. The union insists that substantial evidence supports the finding that Norris's effort to learn more about the equity money and his pay grievances triggered strong and hostile reactions from the employer. The union maintains that substantial evidence supports the Examiner's inference (from the timing of the employer's actions against Norris) that Norris's protected activities were a "motivating factor" in the employer's adverse employment decision. The union asserts that the employer did not meet its burden of proving that the same adverse decision would have been made regarding Norris, even absent the occurrence of Norris's protected activities.

DISCUSSION

The Applicable Standards

Norris was employed as an academic (faculty) employee of a state technical college, so that Chapter 28B.52 RCW is applicable in this case.

Interference and Discrimination Prohibited -
Chapter 28B.52 RCW prohibits community colleges and technical colleges from interfering with or discriminating against academic employees who exercise collective bargaining rights:

> RCW 28B.52.070. DISCRIMINATION PROHIBITED. Boards of trustees of college districts or any administrative officer thereof shall not discriminate against academic employees or applicants for such positions because of their membership or nonmembership in employee organizations or their exercise of other rights under this chapter.
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> RCW 28B.52.073. UNFAIR LABOR PRACTICES. (1) It shall be an unfair labor practice for an employer:
> (a) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by this chapter.
> . . . .
> (c) To encourage or discourage membership in any employee organization by discrimination in regard to hire, tenure or employment, or any term or condition of employment.
> . . . .

The Commission has adopted Chapter 391-45 WAC to regulate the processing of unfair labor practice cases, including cases filed under Chapter 28B.52 RCW.

Standard for Determining Discrimination Allegations -
In *Educational Service District 114*, Decision 4631-A (PECB, 1994) and numerous subsequent decisions, the Commission has consistently called upon its examiners to utilize 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).[2] When discrimination is claimed, the complainant must first establish a prima facie case of discrimination. *Wilmot, supra; Educational Service District 114, supra.* This is done by showing that: (1) the 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 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 claim has been *decided on the merits*, any issues concerning the parties' respective burdens effectively merge

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

into the ultimate disposition of whether a discriminatory motive was a substantial factor in the employer's decision to take adverse employment action. *C-TRAN (Amalgamated Transit Union, Local 757)*, 7087-B (PECB, 2002); *Brinnon School District*, 7210-A (PECB, 2001). Deciding if the complainant made out a prima facie case is no longer relevant, because the appellate body already has before it all of the evidence needed to decide the case. Thus, the rationale for the burden shifting scheme no longer applies: The employer has already been called upon to produce evidence of a legitimate, nondiscriminatory reason for its actions. Once we determine that the correct legal standard has been applied, the role of the Commission 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 the findings made by administrative agencies. *World Wide Video Inc. v. Tukwila*, 117 Wn.2d 382 (1991), cert. denied, 118 L. Ed. 2d 391 (1992); *Brinnon School District, supra; 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 the findings of fact issued by our examiners, to determine whether they are supported by substantial evidence and, if so, whether the findings of fact in turn support the examiner's conclusions of law. *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 particularly appropriate in fact-oriented appeals. *Cowlitz County, supra; Eucational Service District 114, supra.*

Verities on Appeal -

Unchallenged findings of fact are treated as verities on appeal. *C-TRAN (Amalgamated Transit Union, Local 757), supra.* 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); *Brinnon School District, supra.*

Derivative Interference -

The finding of any "discrimination" violation under RCW 28B.52.070 and 28B.52.073(1)(c) automatically carries with it a finding of "derivative interference" in violation of RCW 28B.52.073(1)(a). *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998).[3]

Application of Standards

Effect of Delay on Deference to Examiner -

The employer argues that the substantial delay that occurred in this case between the hearing and the issuance of the Examiner's decision should somehow eliminate the deference customarily given to examiner decisions. We do not accept that argument.

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[3] The unfair labor practice provisions in Chapter 28B.52 RCW and other collective bargaining laws administered by the Commission are all patterned after the federal Labor-Management Relations Act of 1947 (the Taft-Hartley Act) and cases decided under the various state statutes have consistently been cited interchangeably by the Commission. *See also Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24 (1984).

The passage of time does not, by itself, deprive a presiding officer of his or her superior position to weigh the credibility of evidence. *Brinnon School District, supra*. Whenever contradictory evidence is submitted, our examiners are required to weigh that evidence. *C-TRAN (Amalgamated Transit Union, Local 757), supra; Brinnon School District, supra*. Indeed, the Examiner noted here:

> This case requires resolution of sharp conflicts in testimony in order to render a decision. Credibility determinations are more than ordinarily difficult, because it does not appear that certain key witnesses on either side have been entirely candid or forthcoming in various aspects of their testimony. Accordingly, the Examiner may credit some, but not all, of the testimony given by a particular witness. *Bethel School District*, Decision 6731 (EDUC, 1999).
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> In deciding which version of events is more credible, appropriate weight has been given to the demeanor of the witnesses on the stand. The testimony of each witness has been considered in conjunction with established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. In evaluating testimony, recognition has been given to a general tendency to testify about impressions or interpretations of what was said or done, rather than to give a verbatim account of what was seen or heard. Experience has shown that witnesses may express what they intended to say in clearer or more explicit language than they actually used in conversations, and this factor has also been included in the evaluation of testimony. Where any witness has testified in contradiction with the findings of fact set forth below, such testimony has been discredited either as conflicting with the testimony of credible witnesses or documentary evidence or as being in and of itself unworthy of belief. All testimony has been reviewed and carefully weighed in light of the entire record.

We defer to the factual findings and inferences made by the Examiner in this case, as is our usual practice. *See C-TRAN (Amalgamated Transit Union, Local 757), supra; Brinnon School District, supra.*

Substantial Evidence Supports Examiner's Findings of Fact - After reviewing the whole record, the Commission finds the Examiner's findings of fact are supported by substantial evidence.

Findings concerning the work performance of Scott Norris were made in challenged paragraphs 4 and 5 of the Examiner's findings of fact, where the Examiner wrote:

> 4. During the 1995-1996 academic year, employer officials counseled Norris on several matters, including leaving his class unattended, failing to provide timely processing of financial aid forms for students, failure to provide timely leave slips for all periods of absence, taking an employer-owned vehicle home without permission, failure to attend new faculty orientation sessions, and taking students off-campus for a picnic. As to the alleged failure to submit leave slips, Norris provided leave slips for some, but not all, of his absences. As to the alleged violation of the employer's policy on vehicle use, Norris explained and the employer later confirmed that the keys issued to Norris did not operate the lock which had to be opened to return the employer-owned vehicle and retrieve his personally-owned vehicle.
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> 5. Notwithstanding the matters described in Finding of Fact 4, the employer issued a favorable performance evaluation concerning Norris for the 1995-1996 academic year.

Regarding Finding of Fact 4, the employer argues that there is no evidence of Norris being counseled "during the 1995-1996 academic year" on the described matters. Although two harmless errors are noted, there is substantial evidence in the record to support this finding. In the context that the 1995-1996 academic year ran from mid-September 1995 to mid-August of 1996:[4]

- There were two incidents regarding leaving classes unattended. The first incident was in mid-June of 1996, when Associate Dean Karl Hommer and Norris discussed Norris leaving his class unattended so he could sit in on an emission training class. Hommer testified that on the day of the emission class he told Norris that it was inappropriate for him to leave his class unattended. The second incident took place about a week later, when it is undisputed that Norris left his class unattended while he took his daughter to the airport. Hommer testified that when Norris returned to campus about an hour later, he called Norris into his office and told him that his behavior was inappropriate, that he needed to notify Hommer's office if he was going to be out, and that the class needed to be covered by a substitute.

- Regarding the failure to timely process financial aid forms, Hommer testified that he discussed this with Norris in mid-September 1996, the first day back from summer break for teachers for the 1996-1997 academic year. Norris testified that although he knew financial aid forms were not turned in on time, no employer official brought it to his attention

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[4] Norris began working for the employer in mid-September 1995, and his first class had an end-of-year picnic in mid-August of 1996. There is a summer break that lasts for about five weeks in August and September. *See* Exhibit 4, Appendix B.

until September of 1996. Although there does not appear to be substantial evidence in the record to support this portion of the finding, we deem this error to be harmless. Because six different issues are listed, it does not appear that the timing of any of them, by itself, would change the outcome of this case.

- Regarding Norris's failure to provide timely leave slips, Hommer testified that he confronted Norris on the last day of school, August 12, 1996, and told him what the employer's procedures require. Hommer also testified that during the first week of the 1995-1996 academic year, he told Norris that absence reports needed to be filled out. The employer asserts that Norris belatedly submitted leave slips for at least some of his absences only after repeated prodding; however, because the finding does not address repeated prodding, we will not address the matter as it was reasonable for the Examiner not to include various details in his finding.

- Regarding Norris taking an employer-owned vehicle home without permission, Hommer testified that he informed Norris during the 1995-1996 academic year that it was inappropriate for Norris to take employer-owned vehicles home without prior approval. *See* Exhibit 8, D-12. The employer contends that Norris's taking an employer vehicle home over three nights was not "explained" by his key not working once, inasmuch as he made no effort to seek out a janitor, and the behavior was repeated on successive nights. Regardless of whether Norris's explanation was complete, his failure to return the vehicle and take it home is explained by his key not working.

- Regarding Norris's failure to attend new faculty orientation sessions, Hommer testified that he did not think Norris's

failure to attend these sessions was a problem because Norris was scheduled to teach at the same time the meetings were scheduled to start. Thus, there does not appear to be substantial evidence in the record to support this portion of the finding. On appeal, both the union and employer appear to agree that this was not a problem for Norris. Therefore, we deem this to be harmless error that did not affect the outcome of the case.

- Regarding taking students off-campus for a picnic, Hommer testified that on August 9, 1996, he told Norris that he could not have an off-campus picnic with his students on the last day of school.

Regarding Finding of Fact 5, the employer points out that Norris's performance evaluation for the 1995-1996 academic year stated that overall performance was "satisfactory" and that the evaluation had no reference to any counseling on the issues described in Finding of Fact 4. Norris's evaluation for the 1995-1996 school year found that the petitioner's performance was "satisfactory" overall. Hommer prepared the evaluation and wrote that it seemed Norris had his student's interests at heart and was respected by them, spent a lot of time preparing for class, contributed some ideas for improvement in the classroom, and had taken his own ASE test for program certification. Given Hommer's indication that Norris should "[k]eep up the good work" it is clear that Norris received a "favorable" first year evaluation; any argument to the contrary is a matter of semantics. Thus, there is substantial evidence in the record to support this portion of the finding. Finding of Fact 5 does not state that the evaluation contained any reference to counseling on the issues described in Finding of Fact 4. Therefore, the first clause of this finding is considered a verity on appeal.

Findings concerning Norris's inquiry to a legislator regarding the equity money were set forth in several challenged paragraphs of the Examiner's findings of fact, as follows:

> 7. During a union meeting held in July 1996, Norris announced his intention to contact a state legislature for information about the funds then being negotiated by the employer and union. One or more union officials expressed caution about a probationary employee making a controversial inquiry.
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> 8. Following the union meeting described in Finding of Fact 7, Norris made contact with the Hon. Grant Pelesky, who was then a member of the Washington State House of Representatives, and inquired about the proper use of funds then being negotiated by the employer and union.
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> 9. Shortly after the contact described in Finding of Fact 8, the president of RTC, Robert Roberts, received a telephone call from an official of the State Board for Community and Technical Colleges. The state official indicated to Roberts that a member of the Washington State Legislature had inquired about misuse of the funds allocated by the legislature at RTC.
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> 10. Shortly after the conversation described in Finding of Fact 9, Roberts directed Chuck DeMoss, a vice president of RTC that was the employer's chief negotiator, to make contact with the union about the inquiries described in Finding of Fact 8 and Finding of Fact 9.

Regarding Finding of Fact 7, the employer asserts that the only "expressed" caution in the record was by George Lake, the chairperson of Norris's tenure committee, and did not concern the making of a "controversial" inquiry. It is undisputed that Lake suggested that Norris not contact the legislator. Lake testified that he thought such *union activity* was potentially dangerous because it

could increase administrative observation of Norris who was an untenured instructor. If Lake thought the inquiry could increase administration observation of Norris, it follows that he thought the inquiry was controversial. Furthermore, the finding stating that "one or more union officials expressed caution" was accurate, even if just one union official expressed caution. We find there is substantial evidence in the record to support paragraph 7 of the findings of fact.

Regarding Finding of Fact 8, three topics must be addressed:

First, the employer correctly asserts that the legislator's name was misspelled at this point in the Examiner's decision, but we find this to be harmless error that did not affect the outcome of the case. The legislator's name was spelled correctly at other points in the decision, indicating this was a typographical/editorial error.

Second, the employer points out that Norris asked the legislator to find the "enabling language" to see if there was any "direction" that "expressed any wishes regarding how that money was to be used" and it cited Norris's testimony in its arguments. Lake testified that Norris offered to contact the legislator for help with defining what kind of money was being sent to RTC, how that money was to be distributed, and the intent of the legislature. We hold that this finding represents a reasonable summary of testimony regarding the inquiry; any argument to the contrary is merely a matter of semantics.

Third, we are not persuaded by the employer's contention that there can be no causal relationship between Norris's actions and the subsequent adverse employment actions taken against Norris. The employer argues that the equity money issue was resolved before many of those adverse actions occurred, but we agree with the union that the employer's reasoning fails to recognize that hostility against an employee who engages in protected activities (and is

> look into it. So I told him I would look into it.

Thus, the Examiner made a reasonable inference that Roberts directed DeMoss to make contact with the union about the inquiries described above. Thus, there is substantial evidence in the record to support this finding.

A finding concerning Norris's grievances was made in challenged paragraph 11 of the findings of fact, where the Examiner wrote:

> 11. During the initial portion of the 1996-1997 academic year, the union filed and pursued two grievances concerning the placement of Norris on the salary schedule. The employer initially denied those grievances as untimely, but later altered its position to deny the grievances on a substantive basis different than it initially asserted. The remaining issues were processed to arbitration under the collective bargaining agreement between the employer and union, and an arbitrator sustained those grievances. The employer was ordered to pay back pay to Norris.

The employer argues that Norris filed and pursued the two salary grievances, rather than the union. Inasmuch as the right of Norris to file the salary placement grievances stemmed from his being a member of the bargaining unit represented by the union and covered by the collective bargaining agreement between the employer and union, it is immaterial whether Norris or the union actually filed the grievances. Additionally, the union clearly pursued the salary placement grievances to arbitration on behalf of Norris. Thus, any error as to the origin of those grievances is harmless.

The employer further contends that its giving of different answers at various steps of the grievance process is contemplated by having multiple steps in that procedure and that it did not "alter" its position. This employer argument is, again, a matter of semantics. In its argument on this appeal, the employer admits that it gave different answers at different steps of the grievance process. Testimony was also given that the employer gave different answers at different steps. If it gave different answers at different steps, it was reasonable for the Examiner to find that it altered its position.

The employer suggests that it could not have discriminated against Norris's filing of the two grievances because those grievances were not filed until after the tenure committee meeting of October 18, 1996. We agree with the union that this argument is without merit, both because the employer was aware of Norris's continuing efforts to challenge his salary placement before October 18, 1996, and because the adverse employment actions were taken against Norris after the grievances were filed. See also Finding of Fact 13.

Finally, the employer contends that the arbitrator only partially sustained the grievances on May 28, 1997, by limiting the period of back pay. Here, the employer is "splitting hairs" and failing or refusing to focus on issues of real importance. Even if the arbitrator "partially sustained" (as opposed to "sustained") the grievances, the point of central importance remains: Norris filed grievances against the employer and received a favorable ruling from the arbitrator. Thus, even if an error was committed on this point, we deem it harmless error that did not effect the outcome of the case. The Commission holds that there is substantial evidence in the record to support this finding.

A finding concerning anti-union employer statements was the subject of challenged paragraph 12 of the Examiner's findings of fact:

> 12. Uncontroverted evidence in this record establishes that Roberts was upset by the contact made with a member of the state legislature and the resulting inquiry from an official of the State Board for Community and Technical Colleges; that Roberts made a statement to a union official, to the effect that employees in the tenure review process should not be active in the union; and that Roberts made a statement to a union official, to the effect that anyone in the tenure review process was not teacher material if they would go so far as to file a grievance while they were not yet tenured, since it demonstrates a lack of cooperation and faith.

The employer quotes Dave Jordan, who was president of the union in 1996, as stating that Roberts said he did not feel that "people in the tenure track should be active in the union *other than just members*." (emphasis added). The employer is again "splitting hairs." Notwithstanding the employer's accurate quotation of a portion of Jordan's testimony, the Examiner correctly and reasonably summarized Jordan's testimony as a whole. Being "just a union member" can connote merely qualifying as a bargaining unit member, or can connote that the employee is not active in the union. When he characterized Jordan's testimony in this finding, the Examiner properly considered Robert's reaction to the legislative contact as well as his opinion on probationers filing grievances. We hold there is substantial evidence in the record to support this finding of fact.

A finding on an employer inquiry about the legislative contact was made in challenged paragraph 13 of the findings of fact, where the Examiner wrote:

13. The evidence of record establishes that, by September 1996, employer officials had identified Norris as the employee who made the contact with the Hon. Grant Pelesky. Employer official DeMoss made inquiry to union officials about whether the contact made by Norris with Representative Pelesky had been authorized by the union.

Regarding this finding of fact, several employer contentions must be addressed:

First, the employer again notes that the legislator's name was misspelled in some instances. As in our discussion of Finding of Fact 8 above, we hold this is harmless error.

Second, the employer maintains that the Examiner's failure to make a finding of fact concerning the meeting held by the tenure review committee on October 18, 1996, is a serious error because that meeting refutes the Examiner's entire theory of the case. We disagree. What is important here is that the uncontested portion of this finding that states, "[t]he evidence of the record establishes that, by September 1996, employer officials had identified Norris as the employee who made the contact with" a legislator. *See also* Finding of Fact 11. Norris testified that in mid- to late-September of 1996, Hommer asked him if he had made contact with the legislature regarding the equity money and that he responded that he had. Union official Jack Devine testified that Norris had brought several issues to his attention in September of 1996, and that Lake asked Norris about contacting a state legislator. Thus, the employer knew of this inquiry before the meeting held on October 18, 1996.[5]

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[5] Additionally, although it is true that Norris did not file the salary placement grievances until after October 18, 1996, the evidence establishes that the employer was aware of his salary placement concerns at an earlier time.

Third, the employer contends that DeMoss conveyed his inquiry only to Lake, as opposed to more than one union official. This is another attempt by the employer to distract from the reasonable interpretation of the evidence as a whole, where the evidence clearly establishes that DeMoss was making an unlawful inquiry into internal union affairs: Lake testified that DeMoss contacted him in mid-August of 1996 about Norris's legislative inquiry. In his testimony, DeMoss admitted (against employer interests) that he asked Lake "is this your representative out there trying to find out what's going on," and that Lake responded that he did not think so, but that he would "need to look into it." It is reasonable to infer that Lake would ask at least one other union official whether Norris's inquiry was authorized by the union, so that the inquiry by DeMoss would, in effect, be made "second hand" to at least one other union official. Even if Lake kept the conversation to himself, we find any error is harmless and did not affect the outcome of the case. Thus, there is substantial evidence in the record to support the operative portion of this finding.

A finding concerning the September meeting of the tenure committee was made in challenged paragraph 14 of the findings of fact, where the Examiner wrote:

> 14. The tenure review committee established to review the teaching performance of Norris met in September 1996. At that time, the employer representative on that committee sought to have the committee consider the matters described in Finding of Fact 4. The committee considered the allegations concerning leaving class unattended and concerning delayed processing of financial aid paperwork, as it regarded those matters as educational issues with its jurisdiction. The committee declined to consider the other matters, which it regarded as administrative.

Again, several employer contentions regarding this finding are addressed separately:

First, the employer argues that Hommer did not seek to have the committee consider the "matters" described in Finding of Fact 4, inasmuch as that finding is erroneous. We reject that argument because we affirm Finding of Fact 4, as discussed above.

Second, the employer cites RCW 28B.50.856 as its basis for contending that the committee review focuses on "the probationer's effectiveness in his appointment," not just teaching performance. The employer claims "the committee did not regard any matters as 'educational issues with' its jurisdiction, and did not 'decline to consider' all 'other matters'." Employer's Appeal Brief, Appendix A. RCW 28B.50.856 states that the evaluation process places primary importance on the probationer's effectiveness, so that the tenure review committee was arguably established to review more than teaching performance. However, the finding does not state the committee was established to solely review the teaching performance of Norris. Thus, the initial portion of this finding is correct. Additionally, regardless of how that statute reads, testimony was given that the committee was concerned about student issues, such as the allegations about leaving class unattended and about the delayed processing of financial aid forms. Testimony was also given that the committee regarded these student issues as matters of concern to it, while it regarded the other non-student related issues described in Finding of Fact 4 as administrative issues not of their concern. Thus, there is substantial evidence in the record to support this finding.

A finding concerning the January tenure committee meeting was made in a challenged portion of Finding of Fact 15, where the Examiner wrote:

15. The tenure review committee established to review the teaching performance of Norris met in January 1997. It is inferred that the employer representative on that committee continued to seek committee consideration of all of the matters described in Finding of Fact 4, and the committee sent a letter to Norris in January 1997 regarding all of those matters.

Again, several employer contentions regarding this finding are addressed separately:

First, the employer's insistence that the committee does not review just "teaching performance" is addressed in our discussion of Finding of Fact 14 above.

Second, the employer claims that "employer representative" (Hommer) did not continue to seek committee consideration of all matters described in Finding of Fact 4 and did not seek consideration of matters that were different from what other committee members sought. We find that the Examiner reasonably inferred that Hommer continued to seek consideration of all matters described in Finding of Fact 4. Hommer testified that the committee went over all of the instances that were brought to its attention at the January 10 meeting. Lake also testified that the committee had the whole list of problems (as prepared by Hommer) before it at the January meeting. The list contains all of the matters described in Finding of Fact 4. Exhibit 8, 140. Lake also testified that "by this time issues that we had previously decided were not our purview were becoming" our purview. Additionally, the letter that Lake wrote to Norris on January 14, 1997, contained all of the matters described in Finding of Fact 4, and Lake testified that when he wrote the letter he tried to list the things that had caused the committee concern as it went through deliberation of the entire tenure process. Lastly, the issue of whether Hommer sought consideration of matters that were different from what other

committee members sought is moot, as such a determination is not part of the challenged finding. Thus, there is substantial evidence in the record to support this finding.

A finding concerning employer interference was set forth in challenged paragraph 16, where the Examiner wrote:

> 16. When questioned by a union official concerning the change of employer attitude toward Norris since the issuance of the evaluation of Norris for the 1995-1996 academic year, the chairperson of the tenure review committee made statements to the effect that a negative committee recommendation was a done deal, and that the decision came from above him.

The employer insists that Lake did not make the described statements, that union official Devine had no knowledge or reference to any 1995-96 evaluation, and that there was no "change" from that evaluation. There is, however, substantial evidence in the record to support this finding. Devine testified that Lake told him that "the decisions have come from above me" and that "[t]his is a done deal." Furthermore, testimony was given that Norris and Devine spoke about the problems Norris was having with his tenure review committee. Therefore, it is reasonable to infer that Norris informed Devine that there had been, and was in fact, a "change" from his original favorable evaluation.

A finding concerning the recommendation to the board of trustees was made in challenged Finding of Fact 18, as follows:

> 18. Roberts and other employer officials forwarded the recommendation described in Finding of Fact 17 to the board of trustees, coupled with a recommendation that

> Norris' contract not be renewed for the 1997-98 academic year.

The employer contends the committee's recommendation to terminate tenure review was not "coupled" with any recommendation that was significantly different. Terminating the tenure review process and non-renewal of a probationer's contract are not exactly the same action, but they were linked in this instance. The tenure review committee only had authority to terminate tenure review, while the board had authority to dismiss an employee. It is undisputed that, at its meeting on January 21, 1997, the tenure committee voted to terminate the tenure process for Norris. Finding of Fact 17. Roberts' recommendation was to both deny tenure to Norris and *not to renew his contract*. Paul Greco, as vice president for instruction at RTC, similarly submitted a memo in which he recommended that the tenure process for Norris cease *and that Norris not be issued a contract for next year*. Thus, the recommendations of the committee and employer officials were different. We find there is substantial evidence in the record to support this finding.

Findings concerning the actions of the board of trustees were set forth in two paragraphs, as follows:

> 19. Although it had authority to reject the recommendation of the tenure review committee and had authority to require that a new tenure review committee be formed for Norris, the board of trustees accepted the recommendation described in Finding of Fact 18.
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> 20. By the actions described in Finding of Fact 19, the employer terminated the employment of Scott Norris at the end of the 1996-1997 academic year.

Regarding Finding of Fact 19, the employer asserts that the board did not have authority to require that a new tenure committee be formed, nor had the procedures even been followed for the removal of members. However, Don Jacobson, who was then the chairman of the RTC board, testified that the union wanted to change the committee membership. *See also* Exhibit 33. He also testified the board considered whether to constitute a new tenure review committee. The Examiner made a reasonable inference from the evidence presented that the board would not have considered the matter if it could not constitute a new committee. Thus, there is substantial evidence in the record to support this finding.[6]

Regarding Finding of Fact 20, the employer states that the referenced Finding of Fact 19 is erroneous. We reject that argument because we affirm Finding of Fact 19, as discussed above.

An ultimate finding concerning discrimination and interference was set forth in challenged Finding of Fact 21, as follows:

> 21. The activities of Scott Norris described in Finding of Fact 8 and Finding of Fact 11 were a substantial motivating factor in the actions and decisions of employer officials to co-opt the tenure review process and obtain the discharge of Norris.

The employer argues that this finding is wholly erroneous, but we hold there is substantial evidence in the record to support the finding, and we agree with that portion of the Examiner's application of the substantial factor test.

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[6] Because the finding does not address the removal of members it is a moot point that we will not address.

First, substantial evidence in the record supports Finding of Fact 8 and Finding of Fact 11, above, on which this finding is based.

Second, this finding addresses the union's ultimate burden of persuasion to show that protected activity was nevertheless a substantial motivating factor behind the discriminatory action. *See Wilmot, supra; Educational Service District 114, supra.* All of the Examiner's findings support this finding, but paragraphs 10, 11, 12, 13, 14, 15, 16, and 18 specifically provide substantial evidence to show that the matters described in findings 8 and 11 were substantial motivating factors behind the employer's actions:

- Finding of Fact 10 and Finding of Fact 12 show that Roberts was concerned by and upset about the equity money inquiry.
- Finding of Fact 11 shows that the two grievances were filed before the tenure review committee voted to terminate Norris's tenure review process.
- Finding of Fact 12 shows that Roberts looked with disdain upon probationary employees being involved in union activities.
- Finding of Fact 13 shows that employer officials both knew of Norris's equity money inquiry before the start of the 1996-1997 school year and were sufficiently concerned to act on that knowledge by inquiring about the union's involvement.
- Finding of Fact 14 shows that the first meeting of the tenure review committee was held after Norris participated in union activities. During this meeting, Lake testified that Hommer (who was the only administrative member on the committee) brought up student-related and nonstudent-related difficulties Norris was having. We agree with the Examiner that he brought these to the committee's attention after many issues had already been resolved.

- Finding of Fact 15 shows that Hommer was still seeking consideration in January 1997 of student and nonstudent related matters that had occurred and had been discussed with Norris during the 1995-1996 school year.
- Finding of Fact 16 shows direct employer action to co-opt the committee process and obtain Norris's termination.
- Finding of Fact 18 shows that the employer wanted to obtain Norris's dismissal.

We agree with the Examiner that the timing of the employer's interest and the actions of the tenure committee certainly support an inference of anti-union motivation, as those actions were taken after Norris participated in union activities.

The Findings of Fact Support the Examiner's Conclusions of Law - The employer challenges both of the substantive conclusions of law entered by the Examiner. After reviewing the whole record, the Commission finds the Examiner's conclusions of law are supported by the findings of fact.

The conclusion concerning protected union activities was set forth in challenged Conclusion of Law 2, where the Examiner wrote:

> 2. The activities of Scott Norris described in Finding of Fact 8 and Finding of Fact 11 were protected union activities under RCW 28B.52.025.

We agree with the Examiner that scope of activity protected by Chapter 29B.52 RCW includes "actions and activities undertaken by academic employees . . . to assist employee organizations" and that, even though Norris was not a union official when he contacted a legislator about the equity money, his actions were an effort to

"assist" the union in collective bargaining on a "wages" issue that was clearly within the mandatory subjects of collective bargaining. *See Renton Technical College*, Decision 7441; *Pierce College*, Decision 3456 (CCOL, 1990). The union had held an all-members meeting in July 1996, where the use of equity money had been discussed. Norris testified that the union handed out extremely limited information on the topic at that meeting, and that several members were frustrated by the lack of information. Norris also testified that there was some discussion about how more information could be obtained and that he volunteered to contact a member of the legislature who was a personal friend to obtain additional information. Norris testified that only Lake objected to his offer. When asked during the hearing in this matter as to why he had objected to Norris contacting the legislator, Lake clearly acknowledged that he believed Norris was engaging in protected union activity by contacting the legislator:

> There's a feeling among campus instructors that *union activity* increases the potential for observations and perception during those observations. Many people in the union feel that *union activities* have generated impacts back into the classroom evaluation. The two are not kept separate.

(emphasis added).

Towards the end of the union's deliberations, Norris offered to share any information he found with the union leadership. After participating in that union meeting, Norris followed through with his offer and made contact with the legislator. Thus, Norris's legislative inquiry was an effort to assist his union and connected to his union activity, and was protected union activity under the collective bargaining statute.

We also agree with the Examiner that the filing and pursuit of any grievance through a contractual procedure is a clearly protected activity. *See Renton Technical College*, Decision 7441; *Valley General Hospital*, Decision 1195-A (PECB, 1981).

The findings of fact support the Examiner's conclusion that Norris's equity money inquiry and his filing of grievances were protected union activities.

The conclusion that unfair labor practices were committed was set forth in paragraph 3 of the Examiner's conclusions, which reads as follows:

> 3. By terminating the employment of Scott Norris in reprisal for his protected union activities, Renton Technical College has committed, and is committing, unfair labor practices in violation of RCW 28B.52.073 (1)(c) and (a).

The findings of fact support the Examiner's conclusion that the employer committed discrimination and interference unfair labor practices. As detailed above, we find that the union met its ultimate burden of proof by showing that the equity money inquiry and filing of grievances were a substantial motivating factor in the employer's co-opting of the tenure process to bring about the discharge of Norris.

Conclusion

There is substantial evidence to support the Examiner's findings of fact, the Examiner applied the correct legal standards to this case, and the Examiner's findings of fact support his conclusions of law. The employer seems to have appealed because it disagrees

with the weight the Examiner gave to each item of evidence, and to the evidence "as a whole." We agree with the union's argument that this type of challenge, no matter how exhaustive, cannot provide the basis for reversal of an Examiner's decision, where (as here) substantial evidence supports that decision.

NOW, THEREFORE, it is

ORDERED

1. The findings of fact, conclusions of law, and order issued in the above-captioned matter by Examiner Paul T. Schwendiman are AFFIRMED and adopted by the Commission.

2. Within thirty (30) days following the date of this order, Renton Technical College shall notify the union and the Executive Director of the Commission regarding the steps taken to comply with the remedial order issued in this case.

Issued at Olympia, Washington, on the 14th day of May, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner