STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KULDEEP NAGI, Complainant,	)	CASE 10768-U-93-2500
vs.	)	DECISION 5237-B - EDUC
SEATTLE SCHOOL DISTRICT, Respondent.	)	DECISION OF COMMISSION

Judith A. Lonnquist, Attorney at Law, appeared on behalf of the complainant.

Karr Tuttle Campbell, by Lawrence B. Ransom, Attorney at Law, appeared on behalf of the employer.

This case comes before the Commission on a timely petition for review filed by Seattle School District, seeking to overturn a decision issued by Examiner Pamela G. Bradburn.[1]

BACKGROUND

The Seattle School District (employer) and Seattle Education Association (union) were parties to a collective bargaining agreement for the years 1991 to 1993, covering a bargaining unit of nonsupervisory educational employees.

Kuldeep Nagi was a certificated employee of the Seattle School District, within the bargaining unit represented by the union. After three years as a substitute teacher in the Seattle public schools, Nagi became a full-time employee in 1988. He taught math and science subjects at Cleveland High School during the 1988-1989

[1] Seattle School District, Decision 5237 (EDUC, 1995).

school year. Nagi taught at Rainier Beach High School in the autumn of 1989, but was transferred after a few weeks to teach math and science subjects at Roosevelt High School for the remainder of the 1989-1990 school year. Joan Roberson, the principal at Roosevelt, evaluated Nagi's performance and gave him a satisfactory rating at that time. Nagi returned to Roosevelt for the 1990-1991 school year and taught science subjects. Assistant Principal Marta Cano-Hinz evaluated Nagi during that year, and told him he had some deficiencies and needed to improve. Nagi moved to Nathan Hale High School for the 1991-1992 school year. The schedule was not what he thought it was going to be,[2] and he learned he could not teach mainstream math, so he attempted to return to Roosevelt. Roberson told Nagi that the environment would be negative if he returned to Roosevelt, and that members of both the science and math departments there were concerned about his returning. On October 19, 1991, Nagi wrote a letter to Ray M. Cohrs, the personnel director for the Seattle public schools, inquiring about the conditions that were interfering with his return, and reiterating that he wanted to return to Roosevelt.

Nagi exercised his seniority rights under the collective bargaining agreement, and returned to Roosevelt for the 1992-1993 school year. His assignment included remedial math classes designed as compensatory or recovery classes for those students who have failed mainstream classes. These classes are not favored among teachers, as the students often have a history of emotional or family problems, crime, drug abuse, and homelessness.

Cano-Hinz and Roberson met with Nagi on November 2, 1992, to discuss numerous complaints from students and parents about his

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[2] No issue concerning the schedule at Nathan Hale High School is before the Commission in this case.

performance in the classroom.[3] This began a process where Nagi's classrooms were frequently observed, and follow-up meetings were held with him regarding his performance.

On November 5, 1992, Nagi, along with fellow math teachers Marilyn Adams, Kaiso Eng and Rod Magat, wrote a letter to Superintendent William Kendrick, expressing concern about the racial/sexual parity in the distribution of classes in the math department. The group felt the classes with a high number of "at-risk" students were disproportionately assigned to minority males. They offered some solutions to the problems.

On November 9, 1992, Cano-Hinz and Nagi met again regarding his performance. A memorandum from Cano-Hinz to Nagi, dated November 10, 1992, documented this meeting.

On November 13, 1992, Nagi, Adams, Eng, and Magat wrote a memo to Roberson initiating a grievance pursuant to the informal grievance provisions of the collective bargaining agreement.[4] They stated their belief that the employer was violating the nondiscrimination rights section of the collective bargaining agreement. These concerns were pursued formally on December 2, 1992, when the union filed a grievance on behalf of the four teachers, alleging racial and sexual discrimination in the math department and violation of the collective bargaining agreement.[5] On December 17, 1992, a grievance hearing was held, which both Cano-Hinz and Roberson attended. On January 6, 1993, Roberson found no violation of the collective bargaining agreement and denied the grievance. Roberson

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[3] Another individual also attended. This meeting was documented by memorandum to Nagi on November 5, 1992.

[4] Under the terms of the contract, an informal discussion with an immediate supervisor must take place prior to use of the formal grievance procedures.

[5] Grievance Number 92-93-A004.

stated that it was not possible to make changes in the master schedule to impact second semester scheduling, as the grievants wanted. On January 13, 1993, the union submitted a step 2 grievance form.[6]

On January 15, 1993, Nagi was informed he was receiving an unsatisfactory performance evaluation. Nagi wrote to Cano-Hinz on the same date, requesting that a union representative attend all future meetings, and requesting advance written notice if anyone was going to visit his classes in the future. Nagi also commented about the problems with scheduling of classes. A copy of that letter went to the union.

On January 22, 1993, the union filed a grievance on Nagi's behalf, grieving the unsatisfactory performance evaluation.[7] The union requested the employer to destroy the unsatisfactory evaluation and cooperate with Nagi in efforts to improve the quality of education of his students.

On January 22, 1993, Superintendent Kendrick placed Nagi on probation for the period from February 1, 1993 until May 1, 1993, based upon his review of Cano-Hinz's evaluation of Nagi's performance as unsatisfactory and Roberson's recommendation. The letter outlined seven specific areas of deficiency, and stated that the purpose of the probationary period was to give him the opportunity to improve.

The grievance protesting the unsatisfactory performance evaluation was taken to step 2 on March 9, 1993. At the grievance hearing on

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[6] Through a series of meetings during the spring of 1993, the administration and the math department worked on the problem. Ultimately there was agreement as to a tentative schedule for the future, and a resolution that satisfied the union.

[7] Grievance number 92-93-0028.

March 31, 1993, the union representative and Nagi alleged that Nagi received the unsatisfactory rating because of the letter that he and others wrote to the superintendent, and because the principal did not want him to return to Roosevelt. The grievance was denied with a formal response on April 5, 1993.

On March 9, 1993, Nagi, Adams, Eng, and Magat wrote to Roberson again, suggesting ways to improve the scheduling process within the math department. The group suggested that a written policy be developed, with "weights" assigned to each math class. The group claimed their suggestions would improve faculty morale.

By letter of May 5, 1993, Cano-Hinz advised Cohrs that she and Roberson had thoroughly reviewed Nagi's work performance, and concluded that his overall performance was still unsatisfactory. Cano-Hinz, with Roberson's concurrence, recommended that the superintendent consider issuing a notice of nonrenewal to Nagi. On May 11, 1993, the superintendent wrote to Nagi advising that there was probable cause for the nonrenewal of his employment contract. The superintendent advised Nagi the action was based on his unsatisfactory performance, and failure to demonstrate necessary improvement during his probationary period.

RCW 28A.405.310 provides a procedure for certificated employees who receive a notice of probable cause for nonrenewal of contract to have a hearing. Nagi availed himself of that procedure and requested a hearing. After a six-day evidentiary hearing, the hearing officer in that case decided that the employer had sufficient grounds to nonrenew Nagi. Finding the decision supported by substantial evidence, the King County Superior Court affirmed the decision of the hearing officer.

Nagi filed this unfair labor practice complaint with the Commission on November 5, 1993, alleging the employer violated RCW 41.59-.140(1) by nonrenewing his certificated employment contract due to

retaliation for exercising his rights pursuant to RCW 41.59.060. On January 9, 1995, the employer moved for summary judgment, which was denied by Examiner Pamela G. Bradburn on March 3, 1995.

The Examiner held a hearing on March 16, 17, and 22, 1995, and issued Findings of Facts, Conclusions of Law and Order on August 24, 1995. Examiner Bradburn concluded that Nagi exercised legally protected rights when he returned to Roosevelt for the 1992-1993 school year, when he and four other teachers petitioned the superintendent on November 5, 1992 about work load distribution, when he participated in filing a grievance on December 2, 1992, and when the four teachers wrote Roberson on March 9, 1993 suggesting solutions to the scheduling problem. Examiner Bradburn found a causal connection between the exercise of rights protected by Chapter 41.59 RCW and Nagi's nonrenewal, and found that the employer committed an unfair labor practice.

The employer filed a timely petition for review on September 13, 1995, thus bringing the matter before the Commission.

POSITIONS OF THE PARTIES

Contending the complaint was untimely, the employer argues the "complained of action" should begin with the time Nagi was orally informed he would be on probation, which was more than six months prior to the filing of the complaint. The employer asserts the case was improperly decided based on matters not pleaded by Nagi. It argues the Examiner erred in not granting the employer's motion for summary judgment. It claims the hearing and conclusions ignored the employer's evidence, violated appearance of fairness principles, and was arbitrary and capricious or violated the employer's due process rights. The employer claims Nagi's unsatisfactory performance was the reason for his termination, and

that the decision in the Chapter 28A.405 nonrenewal hearing should be given collateral estoppel effect.

Nagi argues that the complaint was filed five months after the nonrenewal, and was timely. Nagi contends that the issue of whether the employer had a legitimate reason for nonrenewing Nagi is not dispositive of the issue of whether it retaliated against Nagi for exercising his rights under the collective bargaining law, and that the doctrine of collateral estoppel does not apply in this case. Nagi argues that the timing of his nonrenewal and the animus of the administrators shows that the employer retaliated against him for having exercised his statutory rights. Nagi asserts that the record does not establish bias of the Examiner or that her conclusions were arbitrary and capricious, and urges the Examiner's decision be affirmed.

DISCUSSION

The Jurisdiction of the Commission

This employer and employee are subject to the Educational Employment Relations Act (EERA), Chapter 41.59 RCW, which includes:

> **RCW 41.59.060 EMPLOYEE RIGHTS ENUMERATED--FEES AND DUES, DEDUCTION FROM PAY.** (1) Employees shall have the right to self-organization, to form, join, or assist employee organizations, to bargain collectively through representatives of their own choosing, and shall also have the right to refrain from any or all of such activities except to the extent that employees may be required to pay a fee to any employee organization under an agency shop agreement authorized in this chapter.
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> . . .
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> **RCW 41.59.140 UNFAIR LABOR PRACTICES FOR EMPLOYER, EMPLOYEE ORGANIZATION, ENUMERATED.**

> (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 in RCW 41.59.060.**
> (b) To dominate or interfere with the formation or administration of any employee organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made by the commission pursuant to RCW 41.59.110, an employer shall not be prohibited from permitting employees to confer with it or its representatives or agents during working hours without loss of time or pay;
> (c) **To encourage or discourage membership in any employee organization by discrimination in regard to hire, tenure of employment or any term or condition of employment**, but nothing contained in this subsection shall prevent an employer from requiring, as a condition of continued employment, payment of periodic dues and fees uniformly required to an exclusive bargaining representative pursuant to RCW 41.59.100;
> (d) **To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this chapter**;
> (e) To refuse to bargain collectively with the representatives of its employees.

[Emphasis by **bold** supplied.]

A "discrimination" violation under RCW 41.59.140(1)(c) or (d) involves an intentional action by an employer based on protected union activity, and so requires a higher standard of proof than an "interference" violation.[8]

The Test for Discrimination -

In two cases decided under statutes which parallel the collective bargaining laws administered by this Commission, Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority 118 Wn.2d 79 (1991), the Supreme Court of the State of

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[8] See, Port of Tacoma, Decisions 4626-A and 4627-A (PECB, 1995).

Washington adopted a "substantial motivating factor" test for determining allegations of retaliatory discrimination. In Allison, our Supreme Court specifically rejected continued reliance on Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). In Educational Service District 114, Decision 4631-A (PECB, 1994), the Commission explicitly rejected continued reliance on the Wright Line test, which had been based on Mt. Healthy.[9]

Where a complainant establishes a prima facie case of discrimination, the burden of production is shifted to the employer to articulate legitimate, nonretaliatory reasons for its actions.[10] The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing: (1) The reasons given by the employer were pretextual; or (2) that union animus was nevertheless a substantial motivating factor behind the employer's action.

Claim of collateral estoppel -

The employer asserts the Examiner erred in denying its motion for summary judgment and ruling that the doctrine of collateral estoppel was inapplicable to the Chapter 28A.405 hearing officer's decision. The employer argues that Nagi should be collaterally

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[9] Under Wright Line, 251 NLRB 1083 (1980), cited in City of Olympia, Decision 1208-A (PECB, 1982), the burden of proof shifted in a two-stage analysis: If a prima facie case of discrimination was made out, the employer had the burden to establish valid reasons for its action. In formulating that approach, the NLRB had specifically relied on Mt. Healthy, supra. Under the new test, the burden of proof does not shift.

[10] A violation will be found if the employer does not meet its burden of production. For example, in City of Winlock, Decision 4783 (PECB, 1994), an Examiner sustained a "discrimination" allegation on the first of two discharges of an employee, because the reasons asserted by the employer for that discharge were patently unlawful.

estopped from relitigating the issue of whether the employer had a legitimate reason for his nonrenewal. The employer argues that Nagi litigated the issue of retaliation and to litigate the issue separately now would negate the prior judgment. As we understand the employer's argument, it would bar litigation of any unfair labor practice case before the Commission, if such case involves the separation of a certificated employee from employment under Chapter 28A.405 RCW.

Collateral estoppel may bar relitigation of issues determined by an administrative agency if (1) the agency, acting within its competence, has made a factual decision, and (2) application of the doctrine does not contravene public policy. Malland v. Retirement Systems, 103 Wn.2d 484 (1085). Each case is dependent upon a number of factors, and agency and court procedural differences are taken into consideration. State v. Dupard, 93 Wn.2d 268 (1980); Shoemaker v. Bremerton, 109 Wn.2d 504 (1987). The elements of collateral estoppel are as follows:

* The issue decided in the first litigated case must be identical to the one raised in the later case,
* The party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication,
* The decision must be a final judgement on the merits, and
* Application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action. Shoemaker v. Bremerton, supra; Malland v. Retirement Systems, supra; Lutheran Day Care v. Snohomish County, 119 Wn.2d 91 (1992); Ecology v. Yakima Reservation Irrigation District, 121 Wn.2d 257 (1993); Barr v. Day, 124 Wn.2d 318 (1994).

The Commission has unquestioned authority to rule on unfair labor practice complaints under collective bargaining laws that govern the relationships of a public employer with its unionized employees. City of Yakima v. International Association of Fire Fighters, Local 469, 117 Wn.2d 655 (1991). Upon application of the standards for collateral estoppel, we do not find the proceeding under Chapter 28A.405 to be a complete bar to unfair labor practice proceedings before the Commission.

The focus in the Chapter 28A.405 proceeding was whether there was sufficient cause for Nagi's nonrenewal. The issue in the proceeding under Chapter 41.59 RCW was whether: (1) Nagi's union activities protected by Chapter 41.59 RCW were the real reason for his nonrenewal and his alleged teaching deficiencies were just a pretext, or whether (2) Nagi's union activities protected by Chapter 41.59 RCW were a substantial factor in his nonrenewal. Under the plain terms of the statutes, the hearing officer under RCW 28A.405.310 did not have the power to conduct an inquiry into whether there was an unfair labor practice under Chapter 41.59 RCW and to make the findings necessary to resolve that issue. Even if the issue of retaliation due to union activity may have been litigated in that proceeding, it is not determinative in this case, because the hearing officer was considering a different record and a different law.[11] Therefore, we agree with the Examiner that collateral estoppel is inapplicable to the Chapter 28A.405 RCW hearing officer's decision.

The Commission recently addressed a similar jurisdictional challenge in Mansfield School District, Decision 5238-A and 5239-A

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[11] An order issued under Chapter 28A.405 RCW, could not include a prospective order requiring the employer to cease and desist from discrimination and interference in the exercise of employees' collective bargaining rights, which would be included in the conventional remedies issued upon an unfair labor practice finding by the Commission.

(EDUC, 1996), where one of two complainants had initiated a challenge of his nonrenewal under Chapter 28A.405 RCW. The employer claimed a nonrenewal was subject to exclusive appeal remedies provided by Chapter 28A.405 RCW, and that the Commission lacks jurisdiction to resolve a complainant's claim for reinstatement. In that case, the employer contended the Commission must defer to the Chapter 28A.405 RCW administrative remedy under the "priority of action" rule as stated in Sherwin v. Arveson, 96 Wn.2d 77, 80 (1981), but we were unable to infer a requirement for the Commission to defer to the RCW 28A.405 procedure. Here, as in Mansfield, an adjudication of the Chapter 28A.405 case does not serve as a bar to proceedings before the Public Employment Relations Commission.

Supremacy of Collective Bargaining Statutes -
In Rose v. Erickson, 106 Wn.2d 420 (1986), the Supreme Court of the State of Washington held that Chapter 41.56 RCW prevails in conflicts with other statutes. It did so on the basis of the wording of RCW 41.56.905:

> Except as provided in RCW 53.18.015, **if any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of this chapter shall control.**

[Emphasis by **bold** supplied.]

RCW 41.59.910 contains similar language:

> This chapter shall **supersede existing statutes not expressly repealed to the extent that there is a conflict between a provision of this chapter and those other statutes.**

[Emphasis by **bold** supplied.]

The Educational Employment Relations Act has limited the discipline and discharge powers of school boards, by precluding use of that

authority to discriminate against lawful union activity. Since the legislature intended that collective bargaining statutes control where there is conflict, however, we conclude that the Educational Employment Relations Act was rightfully applied here.

Timeliness of the Unfair Labor Practice Complaint

In his complaint, Nagi alleged that the May 11, 1993 letter notifying him that there was probable cause for the nonrenewal of his employment contract was in retaliation for his having exercised his right to participate in a grievance over the terms and working conditions of his employment. The Examiner found the May 11, 1993 letter to be the action that began the six-month statute of limitations period.

Under RCW 41.59.150(1), an unfair labor practice complaint is timely if it is filed within six months of the actual unfair labor practice. The Commission has uniformly held that the six-month period begins to run with the date of notice or constructive notice of the complained-of action. City of Pasco, Decision 4197-A and 4198-A (PECB, 1994). In this case, the complained-of action is the notice of probable cause of nonrenewal, which is the affirmative act of the employer creating the cause of action for an unfair labor practice.[12] The notice of probable cause of nonrenewal was serious adverse action. Unless Nagi initiated the statutory hearing process under RCW 28A.405 and prevailed at that hearing, his discharge was to transpire in due course. The employer's argument that the statute of limitations should begin when Nagi was orally informed he would be on probation is not persuasive, as probation does not always result in nonrenewal. We conclude that the complaint was timely, based on the May 11, 1993 letter to Nagi.

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[12] Had there only been a placement on probation and nothing more, there may not have been a cause of action for an unfair labor practice.

Discrimination - The Prima Facie Case

To make out a prima facie case, a complainant claiming unlawful discrimination needs to show:

1. That the employee exercised a right protected by the collective bargaining statute, or communicated to the employer an intent to do so;

2. That the employee was discriminatorily deprived of some ascertainable right, benefit or status; and

3. That there was a causal connection between the exercise of the legal right and the discriminatory action.

Nagi's employment as a teacher was nonrenewed, so the second element of a prima facie case was established. The focus must be on whether the incidents relied upon by Nagi were protected activity under Chapter 41.59 RCW, and whether he has established a causal connection between any protected activity and his nonrenewal. In this case, the Examiner found there was such a connection.

An employee may establish the requisite causal connection by showing that adverse action followed the employee's known exercise of a right protected by the collective bargaining statute, under circumstances from which one can reasonably infer a connection. Employers are not in the habit of announcing retaliatory motives, so circumstantial evidence of a causal connection can be relied upon. Wilmot, p. 70. See, also, Port of Tacoma, Decisions 4626-A and 4627-A (PECB, 1995). At the same time, it is recognized that there are many varieties and degrees of protected activity, and that the burden to establish a causal connection increases for activities that are remote from organizing and bargaining. In other words, the evidentiary and proof problems for a union leader and visible organizer are easier than for one who merely claims benefits under an existing contract.

The Prima Facie Case - Union Animus

Absence of Anti-Union Sentiments - In a discriminatory discharge case, union animus may be inferred from a wide variety of employer behavior. In Mansfield, supra, for instance, the superintendent of schools exhibited strong anti-union sentiments through statements made to a union activist, as well as remarks made to his secretary and another bargaining unit member. In that case, a pattern of union animus was indicated by a record in an earlier unfair labor practice proceeding. In City of Winlock, supra, union animus was found partly because of the employer's vigorous opposition to a representation case, and in anti-union statements of employer representatives. In City of Federal Way, Decision 4088-A (PECB, 1993), affirmed, Decision 4088-B (PECB, 1994), an employer's negative campaign letters showed union animus, and in City of Federal Way, Decision 5183-A (1996), the vigorous campaign the employer conducted against the selection of an exclusive bargaining representative in the previous case was sufficient to show union animus against one of the principal union activists. Actions showing employees that the employer was concerned or upset about union activity were part of the basis for a similar conclusion in Educational Service District 114, Decision 4361-A (PECB, 1994).

In this case, there were no anti-union statements to either Nagi or anyone else. There was no vigorous opposition to a union organizing effort. A thorough review of the records shows no evidence of anti-union sentiments exhibited by any employer representative.

General Animus -
The Examiner outlined several items which showed evidence of employer "animus". It would be an unwarranted extension of case law, however, to consider evidence of "animus" in finding a causal connection between employee activities protected under collective bargaining law and adverse actions of the employer. Our task is to strictly examine the animus of the employer toward union activity.

Union Representative's Ability to Speak at Meetings - A union representative testified that he attended meetings between Roberson, Cano-Hinz and Nagi during Nagi's probation, but that he was discouraged from active participation in the meetings. The Examiner found evidence of union animus in the employer's actions. Article II, Section D(1) of the collective bargaining agreement states:

> An employee who has received a written communication from his/her supervisor indicating deficiencies requiring improvement, at his/her request shall be entitled to have a representative of the Association or legal counsel present at subsequent meetings with his/her supervisor when the elements of the initial communique are to be considered.

It is not clear, from this language, whether the parties had agreed that an employee in probationary status would be entitled to union representation at all meetings throughout that probationary period. The clause also does not address the extent to which the union representative would be permitted to participate in any meetings.

In this case, it is clear the union representative was eventually allowed to participate in the meetings. It is not clear, however, specifically how many meetings the representative was prohibited from participating in, and how the union's nonparticipation impacted Nagi's rights. The record is insufficient for us to infer the employer's actions were a result of any animus toward Nagi's exertion of rights under the collective bargaining statutes.[13]

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[13] We are not called upon here to decide whether the employer committed an unfair labor practice in denying the union the right to speak at the meetings, but only whether there were any anti-union sentiments within that denial.

Credibility of Witnesses -

The Examiner's conclusions rested in large part upon credibility findings as to certain of the employer's witnesses. As the Commission has previously noted:

> We attach considerable weight to the factual findings and inferences therefrom made by our Examiners. They have had the opportunity to personally observe the demeanor of the witnesses. The inflection of the voice, the coloring of the face, and perhaps the sweating of the palms, are circumstances that we, as Commission members are prevented from perceiving through the opaque screen of a cold record. This deference, while not slavishly observed on every appeal, is even more appropriate of a "fact oriented" appeal ...

City of Pasco, Decision 3307-A (PECB, 1990), citing Asotin County Housing Authority, Decision 2471-A (PECB, 1987); Educational Service District 114, Decision 4361-A (PECB, 1994).

Where the record shows that an Examiner too readily makes inappropriate and unsupported inferences from the testimony, without giving due consideration to the entire record, however, the Commission has made inferences and drawn conclusions that are supported by the record. Port of Tacoma, Decision 4626-A and 4627-A (PECB, 1994).

The Examiner found union animus in the attitude Cano-Hinz displayed toward Nagi, and body language Cano-Hinz displayed at the hearing. The Examiner had the impression that Cano-Hinz intended to wound Nagi, or "get even with" him. A thorough review of the record shows that Cano-Hinz was working with Nagi to help him improve his performance in the classroom. Even if it is true that Cano-Hinz harbored some negative feelings toward Nagi, we are unable to draw any conclusions from the record that the intentions of Cano-Hinz were directed at protected activity. Cano-Hinz's actions in regard to Nagi appear to consist of nothing more than an attempt to bring

an employee up to certain performance standards.[14] The record is devoid of any statements of Cano-Hinz that could be interpreted to be critical of union activity, or any expressions of anti-union sentiments whatsoever. The facts and conclusions we make in this case do not rely on Cano-Hinz's credibility, so her body language exhibited at the hearing is not critical.

The Prima Facie Case - Protected Activity and Causal Connection

The Return to Roosevelt -
The Examiner found Nagi's exercise of contractual seniority rights to return to Roosevelt for the 1992-1993 school year to be protected activity for the purpose of a prima facie case. The employer takes issue with that conclusion, arguing that the return to Roosevelt occurred prior to any alleged retaliation or discrimination action addressed by Nagi in his unfair labor practice complaint. The discriminatory action for which a remedy is being found must have occurred within the six-month period preceding the filing of the complaint, but complainants may rely on events predating the six-month period to show union activity and union animus. Any union activity predating the six-month period may be used only as background to allegations of union animus.[15] Because

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14 Prior to the probation imposed, Cohrs met with Roberson, Nagi's secondary evaluator, and Cano-Hinz, Nagi's chief evaluator and the district's legal counsel. Cohrs met monthly with Roberson to assure twice monthly evaluations were followed and to try to help Nagi succeed. Cano-Hinz recommended that Nagi be placed on probation, but Roberson made sure the decision was made based on valid reasons. Cano-Hinz came to Roberson with a criteria checklist and information regarding Nagi's performance in class. Roberson expressed her concern that probation is a very serious situation. She reviewed the information Cano-Hinz collected, encouraged Cano-Hinz to observe Nagi's performance, and ensured that the information justified a recommendation of probation.

15 See, Port of Tacoma, Decision 4626-A, 4627-A (PECB, 1995).

of the lack of union animus in this case, we find the record insufficient to establish a causal connection between Nagi's act of exercising his seniority rights to return to Roosevelt under the collective bargaining agreement and the subsequent nonrenewal of his employment.[16]

The November 5, 1992 letter -

The next instance of protected activity found by the Examiner was the November 5, 1992 letter of the four teachers to the superintendent of the school district. This letter outlined issues of concern regarding the math department, mainly involving the racial/sexual parity in the distribution of classes. In his complaint, Nagi attempts to connect this letter to the December 2, 1992 grievance, which was filed by the union.

Under federal case law, the letter may be considered "concerted activity".[17] Chapter 41.59 RCW, however, contains no "concerted activity" clause such as is found in Section 7 of the National Labor Relations Act (NLRA). Considering that the EERA was patterned in large part after the NLRA, the absence of the "concerted activities" clause has significance. The omission must

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16 Had Nagi not returned to Roosevelt, he may not have been nonrenewed, but this fact alone cannot establish a causal connection between the exercise of a right under the collective bargaining agreement and retaliatory motives on the part of the employer.

17 See, Meyers Industries, 268 NLRB 493, 115 LRRM 1025 (1984), rev'd sub nom. Prill v. NLRB, 755 F.2d 941, 118 LRRM 2649 (CA DC), cert. denied, 474 U.S. 971, 120 LRRM 3392 (1985), decision on remand sub nom. Meyers Industries, 281 NLRB 882, 123 LRRM 1137 (1986), aff'd sub nom. Prill v. NLRB, 835 F.2d 1481, 127 LRRM 2415 (CA DC, 1987), cert. denied sub nom. Meyers Industries v. NLRB, 487 U.S. 1205, 128 LRRM 2664 (1988). See, also, Gold Coast Restaurant Corp. v. NLRB, 304 NLRB No. 96, 139 LRRM 1256, enforced and remanded, ___ F.2d ___, 143 LRRM 2505 (CA DC, 1993).

be judged as intentional.[18] Under Washington law, "concerted activities for ... mutual aid or protection" is not, per se, protected under the Act.[19]

The Commission has long held that individual activity in the presentation of grievances to an employer constitutes protected activity under state law and Commission precedent only when it takes place in a collective bargaining context.[20] Individual activity in protesting terms of employment has not been considered protected activity under state law.[21] In at least one case, the Commission found that pursuit of a break time issue on the part of one employee, the result of which could impact others, was protected activity, and that a formal grievance need not be filed. See, Valley General Hospital, Decision 1195-A (PECB, 1981). In that case, however, there were employee contacts with the union, and the Commission found union animus on the part of the employer.

In Educational Service District 114, Decision 4361-A (PECB, 1994), the Commission was unable to draw a conclusion of protected activity from a handwritten note regarding work matters. In City of Winlock, Decision 4784-A (PECB, 1995), cited by the Examiner, an individual's union activity was open and unconcealed when he spoke in favor of a union insurance plan at a city council meeting, after he had contacted the union. In Lewis County, Decision 4691-A (PECB, 1994), the protected activity cited by the Examiner includes a writing to a department head about mandatory bargaining subjects. In that case, an individual had written to a department head in

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[18] See, Spokane Transit Authority, Decision 2078-A (PECB, 1985).

[19] See, City of Seattle, Decision 489 (PECB, 1978), affirmed, Decision 489-A (PECB, 1979).

[20] See, Educational Service District 114, Decision 4361-A (PECB, 1994) and cases cited therein.

[21] See, City of Seattle, supra.

response to an anti-union letter from that department head suggesting that the vote to unionize is the right of the employees. Those instances are very clearly connected to union activity.

Here, the November 5, 1992 letter was not connected to union activity. The union was not involved in the November 5, 1992 letter. The letter was not copied to the union. There is nothing to indicate that Nagi or the union coordinated the November 5, 1992 letter in a representative capacity. The four employees were bringing some scheduling concerns to the attention of the employer without mentioning the union in any way, or getting the union involved. Any non-unionized employee could have written the same type of letter to their management.

We note the November 5, 1992 letter occurred three days after Cano-Hinz met with Nagi to discuss numerous complaints about him from students and parents. It is difficult to conclude there was a causal connection between the letter and subsequent events, when the letter came so soon after a performance discussion which placed the employee on notice that his performance was going to be carefully reviewed in the future.

We also note that the union equated the November 5, 1992 letter with Nagi's performance ratings only after Nagi was placed on probation.[22] With the process leading to Nagi's probation already underway before the letter, the assertion of a causal connection made nearly three months later than the letter is suspiciously untimely. If Nagi truly felt the employer's actions regarding his

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[22] On January 15, 1993, Nagi was informed he was receiving an unsatisfactory performance evaluation. On January 22, 1993, Nagi was placed on probation from February 1, 1993 to May 1, 1993. On January 22, 1993, the union grieved the unsatisfactory performance evaluation. It appears that the first time the union and Nagi equated the unsatisfactory rating with the November 5, 1992 letter was at the step 2 grievance hearing on March 31, 1993.

performance were in retaliation for the November 5, 1992 letter, there were enough meetings and correspondence soon thereafter for him to express that concern long before he did.

We are persuaded that not all writings to superiors or discussions with other employees or superiors about work matters can be considered activity protected under the collective bargaining laws, even if the individuals are members of a bargaining unit where there is an exclusive bargaining representative. Had the employer made some anti-union statements to the employees in connection with the memo, had there been more evidence of union animus, had there been more associated union activities, or a greater connection to union activities, a letter of this nature could constitute protected activity. In this case, where we find that the employee was already on notice that his performance was going to be reviewed, protesting terms of employment without eliciting the representation of an exclusive bargaining representative or otherwise creating a nexus to union activity is remote from the "right to organize and designate representatives of their own choosing for the purpose of collective bargaining", such that the letter cannot be considered union activity for the purpose of making out a prima facie case.

The March 9, 1993 Letter -
The next item the Examiner considered protected activity was the March 9, 1993 letter to Roberson from the same four teachers, which makes suggestions to improve the scheduling process within the math department. Because of the lack of any connection to union activity and the lack of any general showing of employer anti-union sentiments, we do not consider this letter protected activity in this case.

The Grievance of December 2, 1992 -
Finally, we are left with Nagi's participation in the grievance filed by the union dated December 2, 1992. Participating in a

grievance is protected activity. See, City of Seattle, Decision 3066 (PECB, 1988), affirmed, Decision 3066-A (PECB, 1988); King County, Decision 3178 (PECB, 1989), affirmed, Decision 3178-A (PECB, 1989); Clallam County, Decision 1405-A (PECB, 1984). Both Roberson and Cano-Hinz attended the grievance hearing of the four teachers on December 17, 1992, so the employer representatives who recommended Nagi's probation and nonrenewal were aware of the grievance in which Nagi participated.

The activity of signing a grievance with three other people, however, does not rise to the level of union activity of that found in many of the Commission's recent cases.[23] This case is analogous to cases where the Commission has found "limited" union activity.[24] Here, there is no indication Nagi spearheaded the grievance, contacted union representatives about the issues, or participated actively in any other union affairs.

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[23] For example, in Port of Tacoma, supra, one complainant was an assistant shop steward, a negotiator, and represented others in grievances and arbitrations. Both complainants were active in filing a group grievance, and attended union meetings. In Mansfield School District, Decision 5238-A and 5239-A (PECB, 1996), one complainant served in several union offices and was president elect at the time of the adverse action. The other complainant had been the local union president several times, had been the union's chief negotiator several times, had filed a grievance on her own behalf, and had testified at an unfair labor practice hearing against the employer. In Federal Way, Decision 5183-A (PECB, 1996), the complainant wrote a strong "vote union" letter to employees, and testified against the employer at an unfair labor practice hearing.

[24] For example, in Educational Service District 114, Decision 4361-A (PECB), the Commission found union activity "limited" on the part of a complainant where she only attended two meetings to discuss union representation. In Federal Way, Decision 4088-A (PECB, 1994), the level of union activity of the complainants was low, where they only signed authorization cards and attended a union organizational meeting.

Although limited, we do find that Nagi engaged in protected activity in the filing of the December 2, 1992 grievance, so that the first element of a prima facie case is established.

In cases where the Commission has found a causal connection previously, there have been facts which strongly support an inference of a connection. See, Mansfield, supra; City of Winlock, supra; and City of Federal Way, Decision 5183-A (PECB, 1996). Here, because of the lack of union animus on the part of the employer, and Nagi's limited protected activity, we are unable to infer a causal connection between Nagi's participation in the December 2, 1992 grievance and his nonrenewal.

The timing of adverse actions in relation to protected union activity can serve as circumstantial evidence of a causal connection between the protected activity and the adverse action.[25] The Examiner found that the adverse action in this case followed Nagi's return to Roosevelt through his seniority by nine months, and the November 5 letter by six months, and found the timing to be evidence of a causal connection.

The employer exhibited concerns about Nagi's performance long before his participation in the grievance, however, and long before he was advised there was probable cause of the nonrenewal of his employment contract. Nagi was discouraged from returning to Roosevelt in the autumn of 1992. The November 5, 1992 letter of the four teachers occurred three days after a meeting that Cano-Hinz had with Nagi to discuss numerous complaints from students and

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[25] See, City of Olympia, Decision 1208-A (PECB, 1992). See, also, City of Winlock, Decision 4784-A (PECB, 1995), where the timing of the adverse action and the employee's participation in union activity served as additional circumstantial evidence of a causal connection. The discharge of a union activist close to significant events in a representation case raised a suspicion of discrimination. See, also, Mansfield School District, Decision 5239-A (EDUC, 1996).

parents about his classrooms. The November 13, 1993 informal request for a grievance meeting by the four individuals occurred three days after a meeting between Cano-Hinz and Nagi regarding his performance. Thus, the December 2, 1992 grievance occurred subsequent to at least two meetings concerning Nagi's performance. In addition, none of the other participants to the November 5, 1992 letter or the group grievance were placed on probation during the school year or recommended for nonrenewal at the end of the school year. From this sequence of events, we are unable to infer any retaliatory motive on the part of the employer toward Nagi's participation in the December 2, 1992 grievance. The timing shows Nagi was reacting to the employer's actions. A finding of union animus necessarily includes a finding that the employer has reacted to an employee's actions.

Conclusions on Prima Facie Case

The complainant has not established a prima facie case. Thus, the employer has no burden of producing relevant, admissible evidence of a legitimate, non-retaliatory motive.

The Interference Violation

The definition of an interference violation in RCW 41.59.140(1)(a) is similar to RCW 41.56.140(1) and to Section 8(a)1 of the National Labor Relations Act. In deciding unfair labor practice complaints filed under Chapter 41.59 RCW, the Commission has been guided by precedent developed under Chapter 41.56 RCW. An interference violation occurs under RCW 41.59.140(1)(a) when an employee could reasonably perceive the employer's actions as a threat of reprisal or force or promise of benefit associated with their union activity. Seattle School District, Decision 2524 (EDUC, 1986).[26]

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[26] For that precedent, see City of Seattle, Decision 3066-A (PECB, 1988); City of Seattle, Decision 3566-A (PECB, 1991); City of Pasco, Decision 3804-A (PECB, 1992); Port of Tacoma, Decisions 4626-A and 4627-A (PECB, 1995); and King County, Decision 4893-A (PECB, 1995).

In this case, we have found that Nagi participated in limited union activity, and we could find no evidence of union animus on the part of the employer. With this record, there is little on which to base a conclusion that employees could reasonably perceive Nagi's probation and nonrenewal as threats of reprisal associated with Nagi's union activity.

Fellow teacher Adams testified that she felt Nagi's probation resulted from his participation in the petition to the employer to distribute math classes differently, but she may not have been aware of the employer's prior and ongoing efforts to work with Nagi's performance. Also, she had no basis to believe Nagi was retaliated against for his participation in the petitions or the grievance, as she was a participant as well and was not placed on probation or nonrenewed. Eng testified that an employer official approached him about the petition and stated he should not get involved with the other individuals signing it, but the reason was because of complaints from students about the performance of others, and not that it was considered union activity.

Because of the limited union activity of Nagi, the lack of union animus of the employer, the timing of the filing of the grievance after the employer began working with Nagi's performance, and the extent to which the employer worked with his performance, we find that Nagi or any other employees could not reasonably perceive that the employer's actions in placing Nagi on probation and non-renewing him were in reprisal for his participation in union activities.

NOW, THEREFORE, the Commission makes and enters the following:

AMENDED FINDINGS OF FACT

1. Seattle School District is an employer within the meaning of RCW 41.59.020(5). The employer offers general math classes at

Roosevelt High School to students who have failed eighth grade math. Among these students are some who are seriously "at risk" due to economic difficulties, including homelessness, criminal histories, histories of drug abuse, and backgrounds of family and emotional problems.

2. Seattle Education Association is an employee organization within the meaning of RCW 41.59.020(1), and is the exclusive bargaining representative of an appropriate bargaining unit of certificated teachers employed by the employer.

3. Kuldeep Nagi is a certificated teacher who was employed by the employer within the union's bargaining unit from the 1988-1989 school year through the end of the 1992-1993 school year, when he was nonrenewed.

4. After teaching at Cleveland, Rainier Beach, Roosevelt, and Nathan Hale High Schools, Nagi requested to return to Roosevelt High School and, exercising his seniority rights under the collective bargaining agreement, returned to that high school for the 1992-1993 school year. His assignment included remedial math classes.

5. On November 2, 1992, assistant principal Marta Cano-Hinz met with Nagi to discuss numerous complaints from students and parents about his performance in the classroom. This meeting was documented by memorandum to Nagi on November 5, 1992.

6. On November 5, 1992, Nagi and three other Roosevelt math teachers (comprising three minority males and one white female) wrote then-Superintendent William Kendrick, expressing their concern that math classes with "at risk" students were disproportionately assigned to minority male, or female, teachers. This letter was not copied to the union, and there is no evidence the union was involved.

7. On November 9, 1992, Cano-Hinz again met with Nagi regarding his performance. A memorandum from Cano-Hinz to Nagi, dated November 10, 1992, documented this meeting.

8. On November 13, 1992, Nagi, along with the same three other math teachers who wrote the letter to the superintendent on November 5, 1992, requested an informal step one grievance meeting pursuant to the collective bargaining agreement, stating their belief that the employer was violating the nondiscrimination rights section of the collective bargaining agreement. On December 2, 1992, the union filed a grievance on behalf of the four teachers. Ultimately, the grievance was settled to the satisfaction of the union and employees involved.

9. Based upon a review of the principal and assistant principal's evaluation of Nagi's performance as unsatisfactory and their recommendation, on January 22, 1993, the superintendent placed Nagi on probation for the period from February 1, 1993 until May 1, 1993. The letter outlined seven specific areas of deficiency, and stated that the purpose of the probationary period was to give him the opportunity to improve.

10. On January 22, 1993, the union filed a grievance on Nagi's behalf, stating that Nagi was orally informed he was receiving an unsatisfactory evaluation on or about 1/15/93 and that, if that was the case, such an evaluation would violate the collective bargaining agreement. It was requested that the unsatisfactory evaluation be destroyed. At the Step II grievance hearing on March 31, 1993, the union representative and Nagi alleged that Nagi received the unsatisfactory rating because of the letter that he and others wrote to the superintendent, and because the principal did not want him to return to the school. No violation of the collective bargaining agreement was found, and relief to Nagi was denied.

11. During the probation, regular meetings were held among Cano-Hinz, Roberson, Nagi, and union official Kraig Peck. Cano-Hinz and Roberson refused to permit Peck to participate substantively in the first meetings, but within time he was allowed to participate in the meetings.

12. On May 5, 1993, Cano-Hinz wrote to the personnel director and stated that Nagi's performance was still unsatisfactory, and recommended that the superintendent consider issuing a notice of nonrenewal to Nagi. By letter of May 11, 1993, the superintendent advised Nagi that there was probable cause for the nonrenewal of his employment. None of the other math teachers who signed the letter to the superintendent on November 5, 1992 and were involved in the grievance were placed on probation or received a nonrenewal notice.

13. Nagi sought review of the nonrenewal pursuant to the procedures of Chapter 28A.405 RCW. A Chapter 28A.405 hearing officer decided the employer had proven by a preponderance of the evidence that the reasons specified in the nonrenewal notice were sufficient cause to nonrenew Nagi. This decision was upheld by the Superior Court.

14. On November 5, 1993, Nagi filed an unfair labor practice complaint alleging the employer had nonrenewed him in retaliation for his exercising his right to file a grievance.

AMENDED CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.59 RCW and Chapter 391-45 WAC. The decision of the hearing officer pursuant to Chapter 28A.405 RCW does not determine the outcome of this unfair labor practice proceeding by the theory of collateral estoppel, or any other theory.

2. The unfair labor practice complaint in this matter was timely filed.

3. Seattle School District did not commit an unfair labor practice by discriminating against Kuldeep Nagi in placing him on probation or nonrenewing his teaching contract, in violation of RCW 41.59.140(1)(c) or (d).

4. Seattle School District did not commit an unfair labor practice by interfering with employee's rights in violation of RCW 41.56.140(1)(a).

AMENDED ORDER

The remedial order issued by the Examiner is vacated, and the complaint charging unfair labor practices is DISMISSED.

Issued at Olympia, Washington, the 5th day of June, 1996.

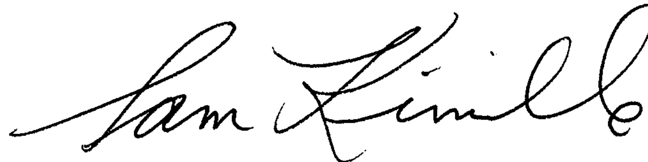
PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

JOSEPH W. DUFFY, Commissioner

CONCURRING OPINION

Inasmuch as the complainant did not charge the employer with an unfair labor practice for exercising his seniority rights, which in my view is a protected activity, and because the record demonstrates a lack of union animus, I am compelled to agree with the majority.



SAM KINVILLE, Commissioner