STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARLENE CARR,	)	Case No. 5815-U-85-1076
	)	
Complainant,	)	DECISION 2659 - PECB
	)	
vs.	)	
	)	
TOUTLE LAKE SCHOOL DISTRICT,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND ORDER
	)	
	)	

Mrak and Blumberg, by Christine M. Mrak, attorney at law, appeared on behalf of the complainant.

Calbom, Pond, Falkenstein, Warme and Engstrom, by Steven H. Pond, attorney at law, appeared on behalf of the respondent.

On May 9, 1985, Marlene Carr (complainant) filed a complaint charging unfair labor practices with the Public Employment Relations Commission (PERC), alleging that the Toutle Lake School District (respondent), had violated RCW 41.56.140(1) and (3), by refusing, due to her prior union activities, to consider her for a regular bus driver assignment. The matter was assigned to Examiner Martha M. Nicoloff and a hearing date was set. An answer was received on June 24, 1985, framing factual issues for hearing.

On July 15, 1985, the complainant filed an amendment to the complaint, alleging that she had been denied employment as a substitute and had been excluded from the employer's premises subsequent to the filing of the complaint. A hearing was scheduled on the complaint, as amended, and a date was set for filing of an answer to the additional charges. No amendment to the answer was filed prior to the opening of the hearing in the matter.

The hearing was held at Toutle, Washington, on September 10 and 11, 1985. The complainant moved at the hearing for an order that the facts alleged in the additional charges be deemed admitted by virtue of respondent's failure to answer. The Examiner gave the respondent an opportunity to show good cause for its failure to file an answer, and also allowed the respondent to state its answer on the record at the hearing. The respondent was also granted, at its request, an extended meal recess in order to prepare and present affirmative defenses. The respondent offered no explanation for its failure to answer the amended complaint, except that it was an oversight. The respondent admitted that the complainant had not been used as a bus driver since the original charges in this matter were filed, but it denied all other allegations raised for the first time in the amended complaint. It claimed that no prejudice to complainant resulted from its oversight, and urged that the failure to file an answer should not work to the prejudice of the respondent. The complainant disputed the respondent's prejudice arguments, and refused to waive its objections regarding the timeliness of respondent's answer to the amended complaint. The Examiner ruled at the hearing that the respondent was in default with regard to the reprisal allegations of the amended complaint, and that those allegations were deemed to be admitted. The respondent noted exception to the Examiner's ruling.

The parties submitted post-hearing briefs and a number of post-hearing motions relating to withdrawal of letters of recommendation previously written on behalf of the complainant. The complainant's allegations concerning the letters of recommendation were taken to constitute an additional retaliation charge, and a hearing was scheduled for April 1, 1986 to take evidence on the additional charge. Prior to that date, however, the parties stipulated to certain facts and waived hearing on the additional charges.

BACKGROUND

The Toutle Lake School District, located in Toutle, Washington, enrolls approximately 500 students. Jack Adams is the Superintendent of Schools for

the school district. Bill Leeper serves as the Supervisor of Maintenance and Transportation, and David "Corky" Tenant is the Assistant Maintenance and Transportation Supervisor. Virgil Williams was a member of the school district board of directors throughout the period involved here, and was the chairperson of the board at the time of hearing in this matter.

The respondent employs a group of bus drivers and maintains a fleet of school buses to transport its students to and from school. Those bus drivers who are employed on a regular basis are represented for the purposes of collective bargaining by Public School Employees of Washington (PSE) in a bargaining unit which includes:

> All classified employees in the following job classifications: Custodial-Maintenance, Food Service, Transportation, Teacher Aides and Secretarial, excluding Superintendent's Secretary and Business Manager.

The broad terms of that unit description notwithstanding, the parties to this proceeding agree that "substitute" bus drivers are not included in the bargaining unit.[1]

Marlene Carr, the complainant, was employed by the respondent as a bus driver from September, 1973 through May, 1979. She was president of the Toutle Lake chapter of PSE in 1978. She resigned as president in December, 1978, but continued to serve as a shop steward. During the time she was active in the union, she filed a number of grievances, both on her own behalf and on behalf of others. For example, Carr was active in a grievance involving insurance

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1 The agreement of the parties on this point is also in conflict with substantial case precedent. See, Sedro Woolley School District, Decision 1351-C (PECB, 1982). Kennewick School District, Decision 1950 (PECB, 1984). Mount Vernon School District, Decision 2273 (PECB, 1986). Mead School District, Decision 2410 (PECB, 1986). Although the Examiner notes that status as a member or potential member of the bargaining unit could, at least in theory, have some bearing on the outcome of this case, the propriety of the bargaining unit is not at issue in this proceeding and the Examiner has proceeded on the record as made by the parties.

coverage for another employee. The settlement of that grievance cost the district a year-end rebate from the insurance carrier. She also pursued a grievance in which she believed the district was making inappropriate use of a van to transport children, apparently thereby depriving bus drivers of "extra trip" income. Carr testified that Bill Lehning, who was the superintendent of the school district at that time, became very upset whenever they discussed anything related to the union. She perceives Lehning as having believed her to be petty and pushy.

In May, 1979, the respondent terminated the complainant's employment, citing her driving record, misuse of sick leave, and poor attitude. PSE filed and processed a grievance concerning the termination, claiming both that it was not for just cause and that it was because of her union activities. The dispute was arbitrated before a five-member panel chaired by a member of the PERC staff appointed pursuant to RCW 41.56.125. That dispute remained unresolved until May of 1981, as described below.

In February, 1981, the school board asked for and received Lehning's resignation as superintendent. Although Lehning's contract ran through the end of that school year, the board determined that he should leave his position immediately. Adams, who had been the high school principal, was appointed interim superintendent.[2]

The school board was asked to reconsider the Carr termination in light of Lehning's termination. Carr testified that it was her belief that by discharging Lehning, the board was indicating that it no longer considered her discharge credible. The board determined, however, that it would await the decision of the arbitration panel.

An arbitration award was issued in May, 1981, with the panel upholding the Carr discharge on a 3-2 vote. When that decision was rendered, the board voted to accept the panel's decision on Carr's discharge. The testimony in

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2 Adams was appointed permanently as superintendent in July, 1981.

the instant proceeding indicated that the arbitration of Carr's discharge was the only arbitration in the district during at least the past ten years.

In the latter part of 1981, Carr asked for and received employment recommendations from both Williams and Adams. Williams spoke with Carr "for some period of time" and he felt, based upon their conversation, that Carr had undergone "a personality change". She told him she had undergone some counseling. Williams testified:

> She used to be negative and I would say argumentative and I felt she had changed. From listening to her I felt she needed a break and if I could give her one I was going to, so I wrote the letter.

Williams indicated he was also no longer as certain as he once had been that the matters involved in Carr's termination were entirely her fault. Adams was apparently willing to give her a recommendation, "no questions asked". Neither Adams nor Williams believed, nor does Carr claim, that the recommendations were solicited or given in connection with her applying for a bus driver position.

In August, 1984, Carr applied for work as a substitute bus driver with the school district. Adams encountered Carr while she was at the respondent's premises, looking at the posting of the substitute driver position. The complainant inquired about whether she should even bother applying for the position, and they entered Adams' office and talked for some period of time. Carr told Adams she had undergone counseling since the termination of her employment with the school district, that she acknowledged that some of the problems surrounding her discharge may have been her fault, but that she did not believe the problems had all been her fault. Adams testified,

> I listened to her presenting her case to me on that way and I bought it . . . I looked at Marlene and I said that "Political wise it was probably not a good decision for me to hire you as substitute because you have been fired here and I am superintendent in a small community." And I said also, I said, "If I hired you, Marlene," I said

> "It's highly unlikely that I would hire you full-time unless a couple of years go by when I can evaluate it and look at the situation."

Carr's recall of the situation is somewhat different, as she did not recall that Adams ever indicated it would be unlikely that she would be hired as a regular driver.

Following the conversation in the superintendent's office, Adams introduced Carr to Leeper and told Leeper that Carr was applying to be a substitute driver. Leeper, who had not been an employee of the school district during Carr's earlier employment, testified that Adams informed him later on the same day that Carr had previously been terminated from employment with the district, but that Adams thought that her attitude was different and that she would be a good substitute. Leeper also recalled Adams telling him it would be unlikely that Carr would become full-time in the near future.

At an executive session of the school board held some time in September or October, 1984, Leeper and Adams submitted a list containing the names of the individuals they proposed to use as substitute bus drivers during that school year. Two members of the board questioned why Carr was being hired as a substitute, since she had previously been fired by the school district.[3] The discussion concerning hiring of Carr was rather heated. Leeper was unable to recall exactly what was said by the board members who objected to hiring Carr as a substitute, but he did recall that the interchange included profanity on the part of at least one board member. Adams felt he was being told that he was "messing up" by hiring Carr. At some point, Adams advised the school board that he had told Carr he would be evaluating her and that it was unlikely he would hire her full-time for a couple of years. Carr's name remained on the list of substitute drivers after the school board meeting. Carr qualified as a substitute bus driver in October, 1984, after going through the necessary paperwork and training.

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[3] Williams was not one of the board members who objected to Carr's employment as a substitute.

Leeper testified, without contradiction, that he did not maintain an official rotation list or use a specific system for assigning substitute bus drivers. He testified, however, that it was generally his practice in scheduling substitute bus drivers to attempt to ensure that each driver on his substitute list got some driving time. It was Leeper's belief that if everyone on the list was receiving some income as a substitute driver, it was more likely that they would keep themselves available for substitute work. He testified that he maintained a "mental list" as to which substitute should be provided with the next assignment. His practice varied when he needed a substitute on very short notice, in which event he might make a call based on availability or proximity to the school district's facility.

Carr placed no restrictions as to times when she was available as a substitute bus driver, and she provided the district with telephone numbers and an invitation to contact her for driving assignments either at her home or at another part-time job which she held. Leeper had, in fact, contacted Carr at both her home and her other place of employment, and she had never refused a request that she drive. The record indicates that Carr worked as a substitute bus driver for the school district for an average of 14 to 15 hours per month from October, 1984 through March, 1985. During that time period, she averaged more driving time than any other substitute.

In April, 1985, Carr and approximately six others applied for a permanent bus driver position that had become available. Among the applicants were two other employees (Sadler and Day) then on the school district's roster of substitute bus drivers. Adams gave the applications to Leeper with instructions to screen them as he saw fit. The superintendent and Leeper were to interview the individuals Leeper selected.

For various reasons, Leeper quickly eliminated certain of the applicants, leaving only the three who were then substitute drivers for the district. He ranked Sadler as his first choice, Day as his second choice, and Carr third. Leeper then gave the applications to his assistant, Tenant, for separate evaluation, so that the two of them would not prejudice each other. Tenant

did not consider the applicants other than the three current substitutes. Tenant testified that he ranked Sadler first, Day second, and Carr third.[4] When Leeper received Tenant's input, he called Adams and asked if it was necessary that more than two people be interviewed for the position. Adams replied that it was not, and interviews were arranged, on or about April 15, 1985, with Sadler and Day.

On April 16th, Marlene Carr's husband, Steve Carr, questioned Leeper as to when interviews would take place. Leeper told Steve Carr there would be no interviews.

Adams and Leeper interviewed Sadler and Day on April 17, 1985. After the interviews, they determined that they would recommend to the board that Sadler be hired.

Sometime during the day on April 17th, Steve Carr learned that interviews had, in fact, been scheduled. That afternoon, Steve and Marlene Carr went to Leeper's office and confronted him, receiving confirmation that interviews had been held. Following their discussion with Leeper, the Carrs proceeded to the home of board member Virgil Williams, where Marlene Carr asked Williams for some honest, straightforward answers as to why she was not interviewed for the permanent bus driver position. While there are widely differing versions of the conversation which followed, this complaint is based on a claim that Virgil Williams said Carr was not interviewed because of her prior union activities.

The board met in executive session on April 17th, and hired Sadler to fill the permanent driver vacancy. On or about April 19th, Leeper called Carr into his office and apologized about the way the interview situation had been handled. He questioned whether she would want to continue working as a

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4 Leeper testified that Tenant ranked Sadler first and Day second, saying that either of them would be fine with him, and that Tenant did not rank Carr. The distinction is without a difference, as Carr was not Tenant's choice.

substitute. Carr replied that she would like to continue, and Leeper told her he would like to have her do so.

The complaint charging unfair labor practices was filed in this case on May 9, 1985. The allegations of the first amendment which were deemed admitted by reason of the respondent's failure to answer are:

> At all times since the filing of the original complaint with PERC herein on May 8, 1985, the employer has refused to provide Marlene Carr with any work in retaliation for her filing of said complaint. Furthermore, the employer has denied Ms. Carr access to the employer's bus shack to prevent her from protected communication with coworkers.

It is clear that Marlene Carr was not called to drive after May 10, 1985, but there is a significant difference of view between the parties as to why Carr was not called to drive. The "access" allegation relates to an incident which occurred at the end of May, 1985, when Marlene and Steve Carr drove to the employer's bus shack to pick up Marlene's check. It had been her practice to pick up her check personally, rather than to have it mailed to her home. As Marlene Carr approached the building, Leeper told her that her check had been mailed to her home. At the time of hearing, she had not made further attempts to go to the bus shack.

The hearing was held in this matter approximately one week into the 1985-86 school year. Carr had not been scheduled to drive during that time, although three other substitute drivers had already worked during that week, and one was scheduled to work on the second day of the hearing.

On October 1, 1985, after the close of hearing in this matter, Adams and Williams notified Carr in separate letters that they no longer wished to be considered as job references for her, and they would not provide her with favorable job recommendations in the future.

Further details and contested facts are set forth in the discussion which follows.

POSITIONS OF THE PARTIES:

The complainant claims that this case meets all of the criteria of an illegal refusal to hire because of protected activities: that Carr had engaged in protected activities; that the employer was aware of those activities; and that the employer had animus concerning those activities. The complainant argues that comments by both Adams and Williams show animus, and also asked the Examiner to take notice of collateral evidence of animus brought forth in parallel proceeding between PSE and the employer.[5] Additionally, the complainant argues that the reasons put forth by the employer for selecting another individual for promotion were inconsistent, insubstantial, and pretextual, as well as a violation of past practice. The complainant claims that, even if it were found that the employer had some legitimate reasons for refusing to promote Carr, the employer's case would still fail under the standards of proof in Wright Line, 241 NLRB 1983 (1980). The complainant argues that the Examiner properly deemed certain allegations of its first amended complaint admitted by reason of respondent's failure to answer, but contends in the alternative that there is ample evidence from which to conclude that the reasons given for the employer's refusal to schedule Carr, and for its denial of access to its premises after she filed the initial complaint in this matter, are clearly pretextual. Finally, the complainant argues that the withdrawal of the letters of recommendation after the hearing is retaliatory on its face, and additional evidence of animus.

The respondent argues that complainant has failed to sustain her burden of proof in the matter. It denies that Carr was engaged in any protected activities during the period of time involved in the complaint, and argues that there is no evidence of animus on the part of the employer. Anticipating the possibility that the burden of proof might be shifted to it, the respondent argues that there is no evidence that the district's decision not to hire the complainant was made for impermissible reasons. While the respondent argues that no reliance was placed on Carr's prior termination

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5 Toutle Lake School District, Case No. 5826-U-85-1078.

from employment and the circumstances surrounding that action, it also argues that reluctance to rehire an employee previously terminated for cause is not impermissible under the law. The respondent urges the Examiner to reconsider her ruling deeming the facts of the first amendment to the complaint to have been admitted by respondent's failure to answer, claiming that the ruling denies it due process and punishes the respondent for the oversight of its attorney. Further on that point, it argues that there was no prejudice to complainant. Although it admits that letters of recommendation previously written on behalf of the complainant were withdrawn, the respondent denies that there was any retaliatory motive for that action.

DISCUSSION:

The Request To Take Notice Of Parallel Proceedings

Public School Employees filed unfair labor practice charges against the school district on May 22, 1985, less than one month after the filing of the initial complaint in this matter. That case, which involved a variety of "refusal to bargain" and "interference" allegations, was heard and decided by another Examiner in Toutle Lake School District, Decision 2474 (PECB, 1986). The Examiner in that matter sustained only one refusal to bargain allegation. There were no findings of animus in that case.

The Failure To Answer

WAC 391-45-210 provides, in part,

> The failure of a respondent to file an answer . . . shall, except for good cause shown, be deemed to be an admission that the fact is true as alleged in the complaint, and as a waiver of the respondent of a hearing as to the facts so admitted.

Default rulings have been made under that rule in the past, and have been sustained by the Commission and the courts. Seattle Public Health Hospital,

Decision 1781, 1781-A (PECB, 1984); Benton City, Decision 436, 436-A (PECB, 1978), aff. Benton County Superior Court (1979). The employer knew of its obligation to file an answer, and it filed a timely answer to the original complaint. The renewal of its objection in its post-hearing brief does not alter the fact that it had notice of its obligation to answer the amended complaint and failed to do so. The Examiner does not find it appropriate to reverse her ruling in this regard.

Discrimination Allegations, Generally

The collective bargaining statute protects applicants for employment from discrimination based on union animus. Auburn School District, Decision 2291 (PECB, 1985). The standard for determination of "discrimination" allegations was established by the Commission in City of Olympia, Decision 1208, 1208-A (PECB, 1981) in accordance with the decision of the National Labor Relations Board in Wright Line, supra. That standard has been endorsed by the Washington courts. Clallam County v. PERC, ___ Wn.App ___ (Division II, 1986), cert. den. ___ Wn.2d ___ (1986). The complainant is required to make a prima facie showing sufficient to support an inference that protected activity was a motivating factor in the employer's decision. Once that showing is made, the burden shifts to the employer to show that the same action would have taken place even in the absence of the protected conduct. See, also, Clallam County, Decision 1405-A (PECB, 1982); Port of Seattle, Decision 1624 (PECB, 1983); Seattle Public Health Hospital Decision 1911 (PECB, 1984).

There is no claim in this case that the complainant was engaged in any protected activity in connection with her employment as a substitute bus driver or her application for the regularly scheduled bus driver position. Rather, the complainant's theory of the case rests on the contention that the respondent harbored a lingering resentment of the union activity which took place more than five years before the actions complained of here. The statute of limitations contained in RCW 41.56.160 applies to the filing of charges in relation to the conduct complained of, rather than to the timing of protected activities on which discriminatory conduct is based. City of

Bellevue, Decision 2096 (PECB, 1984). The complaint cannot be discredited solely on the basis of the passage of time since the complainant's clearly proven participation in protected union activities.

The record reflects that Williams and Adams were agents of the district during both periods of Carr's employment. There is no question that they knew of her prior union activity. Leeper, also an agent of the district, was not employed by the district at the time of Carr's prior employment but was made aware that Carr had previously been employed by and terminated by the school district. Tenant was not an employee of the school district at the time of Carr's prior employment, and there is no direct evidence that he had knowledge of her prior union activities.

Discrimination In Hiring

In considering the complainant's claim that she was discriminated against when passed over in favor of another applicant, a step-by-step review of the April, 1985, selection process is necessary.

Carr was the only one of the three finalists who had school bus driving experience prior to that school year, and Carr had begun driving prior to either of the other finalists during that school year. At the time the applications were filed, Day had driven only eight hours during the year, while Sadler had approximately 84 hours and Carr had approximately 88 hours.

All bus drivers were required to possess first aid certification. At some unspecified prior time, Carr had possessed certification as an emergency medical technician (EMT), which requires training in excess of that required for a first aid certification. Her EMT certificate had expired some time prior to the hearing, apparently prior to April, 1985.

It is uncontroverted that Adams gave no preliminary instructions to Leeper and Tenant regarding the hiring process. It is also undisputed that Leeper and Tenant considered the applications separately.

Tenant testified that he ranked the finalists based on three criteria: personality, driving ability, and attitude (toward the children and toward supervision). Tenant testified, further, of his belief that in order to be a bus driver, a person needed to be able to get along with students while maintaining control of them. He felt that Sadler was better at that than the other two. He downgraded Carr out of a belief that she felt, because of her prior driving experience, that she knew all about driving a bus. He also did not believe that Carr showed a good attitude toward the students, basing his conclusion upon having overheard a general discussion among the bus drivers in which Carr was heard to say that she just turned up her radio when the students were unruly. In addition, Tenant testified that he downgraded Carr because of her performance on a day when the bus she was driving became stuck in snow. Carr had not been able to get chains on the bus, and had to radio for help. Tenant's explanation of his evaluation of Carr's performance, and his resulting ranking of Carr among the applicants, is not fully credible to the Examiner. This conclusion is particularly based upon the "turn up the radio" incident (where it appears that Tenant overheard what may have been a flip comment made in jest) and the "snow days" incident (where there was other testimony that the weather was terrible on that occasion, that Day had been applauded for refusing to drive on that occasion, that Carr became stuck in her assigned turning area, and that the drivers were never given instruction on the installation of chains). However, there is nothing in the record which would sustain a finding that Tenant had a union animus towards this complainant.

Leeper knew that all of those already working for the respondent as substitutes were qualified to drive, and he testified that he therefore eliminated driving skill as a criterion. Leeper's explanation of his ranking of the candidates focused on their attitudes, his primary consideration being their "attitude and handling of the kids and just overall camaraderie". Sadler and Day had more of the qualities he "liked", while Carr was more vociferous, loud, and forward than the others. It is clear that Leeper later gave Steve Carr incorrect information about the interview process. When confronted by the Carrs with an inquiry as to "what the deal was on the

interviews", Leeper told them that there were "two board members who would not allow Marlene to be interviewed". Leeper did not deny making the statement attributed to him, but claimed in his testimony that the substance of that statement was inaccurate and that the board members had nothing to do with the failure to select Marlene Carr for an interview. What becomes clear is that Leeper was prone to remove himself from uncomfortable situations and, on that occasion, was "in a hurry to get out of the conversation". The Examiner finds no independent evidence, however, which would indicate that Leeper held any union animus toward the complainant at the time of the April, 1985, selection process.

Assuming, arguendo that reasons given by either Tenant or Leeper were pretextual, absent a finding of animus, no violation can be found. Whatcom County, Decision 1886 (PECB, 1984), and cases cited therein. Certainly, an employer's problem with an employee's "attitude" can be a mask for that employer's problem with that employee's protected activities. See, Port of Seattle, supra, and cases cited therein. But the inference of animus must be based on more than doubts as to the credibility of the employer's agents.

Adams was the next step in the hiring process. It is clear that he received recommendations from Leeper and/or Tenant that ranked Sadler and Day ahead of the complainant. The complainant seeks to show current animus on Adams' part by its recitation of two incidents involving union business. One of those involved a dispute concerning the bargaining unit status of employees hired under an Indian Education grant and was among the subjects litigated and dismissed in Toutle Lake School District, Decision 2474 (PECB, 1986). The other occasion involved testimony by Nancy Brandhorst[6] of a statement made by Adams at the beginning of negotiations, to the effect that it might be beneficial to the employees if they were not part of the union, or "we could do better by ourselves if we weren't in the union". Adams recalls the incident as occurring in the context of a conversation in which drivers were making comments about the union. He claims to have said that the drivers could

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6 Brandhorst is a full-time bus driver for the respondent and a friend of Marlene Carr, and has also been a union activist.

become part of another union, or could form their own union and then apply their union dues toward their medical insurance. Adams also recalled that conversation as involving laughter during the exchange of remarks. In the context of the entire record in this case, this Examiner does not find that either the Indian Education incident or the pre-negotiation discussion reflect animus on Adams' part.

There is other evidence in the record which would weigh against a conclusion that Adams held animus toward the complainant at the time a decision was to be made on the hiring of a regularly scheduled bus driver. He had previously written a letter of recommendation for her, at her request. He recommended her for hiring as a substitute bus driver in the autumn of 1984, and then defended his decision and kept her on the substitute list in the face of opposition from some members of the school board. Those actions, on their face, contra-indicate any claim of animus. Adams' explanation of his decision to recommend Carr for hiring as a substitute included observations about her change of attitude, but his references to her attitude refer to the time period of her prior employment. Her attitude at that time was considered by the arbitration panel, and sustained as part of the cause for her discharge. His references to "attitude" do not support a conclusion now that Adams had animus toward the complainant.

It is clear that a recommendation was going to the school board to hire one of the finalists other than Carr. The complainant's claim that the district had a prior practice of always hiring the most experienced substitute driver is not sustained by the record. The Carrs confronted Leeper with their claim of such a practice during their conversation on the day interviews were held, and Leeper claimed to be unaware of any prior practice in that regard. Brandhorst's testimony establishes that the senior substitute has been hired on some occasions, but there is no contractual or legal basis to bind the employer to such a practice in this proceeding.

As indicated above, the initial focus of this unfair labor practice case was on the conversation between the Carrs and Virgil Williams held just a few

hours before the school board meeting where the hiring decision was to be made. Williams and his wife were both present when the Carrs came to their home, although Mrs. Williams was in and out of the room during the conversation. Both Mr. and Mrs. Williams testified that the Carrs were agitated, overrode each other in conversation, and did most of the talking. The Carrs did not believe that was the case.

Marlene Carr testified that Williams told her she was not interviewed because of her prior union activities, that the district had gotten rid of their union troublemakers and weren't going to have any more of that. She claims to have responded that she didn't have to be involved with the union.

Steve Carr recalled Virgil Williams saying that there were two board members who did not want Marlene hired, that they had gotten rid of their union troublemakers and were going to have no more of it.

Mrs. Williams did not recall hearing any statement by her husband concerning union troublemakers.

Virgil Williams recalled telling Marlene Carr, in response to her initial query about the interviews, that he had no knowledge about who was being interviewed, because board members had not been involved in the process up to that point. He testified, however, that he had been relatively certain that Marlene Carr's name would not have been submitted at that time,

> . . . because I had talked with the superintendent previously and he told me that he had told her when she (sic) hired her it was highly unlikely that he would hire in the immediate future -- that he was going to observe her and that was enough for me. So I knew relatively certain that her name wouldn't be the first one -- she wouldn't be hired as the first person.

Williams claimed that Marlene Carr told him several times in the course of the conversation that she would not be involved in the union any more, and that he told her "that" (implying her union activity) had nothing to do with

the matter. He claimed he never said the district had gotten rid of its union troublemakers or any words to that effect. Williams testified that he indicated surprise that Marlene Carr was unaware that she would not be interviewed.

Marlene Carr recalled Mr. Williams asking her several times whether Adams had told her she would not be considered for full-time employment with the district. Her recollection was, additionally, that Williams said Adams had been instructed to so inform her when she was hired as a substitute driver.

Steve Carr also testified that Williams asked several times whether Adams had told Marlene she would not be hired full-time, and recalled Williams saying that he had instructed Adams to tell Marlene that.

The complainant's claim that Virgil Williams harbored animus toward her is undermined by the fact that Williams had previously written an employment recommendation for her and had not opposed her hiring as a substitute bus driver. Those actions are not indicative of animus. The evidence which could show animus on Williams' part is troublesome. It comes from the Carrs' recitation of his comments about union troublemakers in their conversation on April 17th, where their version and Williams' differ by 180 degrees. Williams was a credible witness. His testimony that he felt certain that Carr wouldn't be hired as "the first one" leads away from a conclusion that he had determined that she would never be hired. Further, it is credible that the subject of union activities was introduced by the complainant in the Williams-Carr conversation, rather than by Williams. It is evident from the record that the complainant believed at the time of her discharge, and believes now, that her discharge was because of her union activities. Evidence of that belief is found in her testimony regarding Lehning's attitude toward her activities as union president and shop steward. Further evidence comes in complainant's claim that the respondent has indicated by its actions subsequent to her discharge that it did not believe the discharge to be bona fide. But the school board had opportunity to reconsider its termination of the complainant, both immediately after the discharge of

Lehning and when the arbitration award was received, and chose not to do so. It is only the complainant's entirely conclusionary testimony which supports her theory that the board no longer found her discharge credible. Further, it is clear from the record that there were at least two board members other than Williams who continued to place heavy reliance on that discharge.

Also to be considered in interpreting the intentions of the employer is the testimony concerning a conversation held between Brandhorst and Adams on April 18th. Brandhorst went to Adams' office after completion of her morning bus run. Both she and Adams agree that Brandhorst was upset about the hiring process, and that she felt that the school district had been unfair to Marlene Carr. Brandhorst asked Adams why Carr had not been interviewed, and Adams responded that Carr was not to have been interviewed. As with the testimony on other issues in this case, versions differ from that point.

Brandhorst quotes Adams as saying that Williams had directed that Carr be told when she was first hired that Carr would not work as a full-time driver for the school district, because they would not ever be able to fire her in that event. Brandhorst also testified of a statement by Adams to the effect that he had not told Carr of the limitation on her hiring, initially because he feared hurting Carr's feelings, and later because he simply hadn't thought about it.

Adams' recall of his conversation with Brandhorst was that he explained having told Carr when she applied as a substitute that she would not be hired full-time for a couple of years. He also claimed to have told Brandhorst that Carr would have been interviewed if Leeper and Tenant had selected Carr for interview, and that she would have had a chance at the job unless he vetoed her selection.

Both Adams and Brandhorst were generally credible witnesses. Brandhorst was unable to recall reference to union activities, as such. Her testimony generally corroborates that there was to be some limitation on Marlene Carr's employment possibilities when she was hired as a substitute driver.

The conflict in the testimony as to precisely who originated the limitation on Marlene Carr's future employment does not affect the outcome of the case. We are dealing here with the state of mind of the employer's officials. It becomes clear that Adams had in mind to delay any hiring of Marlene Carr on a "full-time" basis when he hired her as a substitute. The origin of that intention matters little. He probably did not communicate his intentions to Marlene Carr, and his failure to do so may have led to many of the employer's problems in this case. It is clear that he did communicate his intentions to his subordinate, Leeper, and that he discussed the limitation with Williams and the other members of the school board.

There are many troublesome components to respondent's defense. The respondent, claims that it placed no reliance on the complainant's prior discharge, yet it is quite clear from the record that the respondent did rely on Carr's prior discharge in its selection process. Two board members gave Adams and Leeper a very difficult time when they submitted Carr's name as a substitute. It is perfectly credible to the Examiner that Leeper's decision to not recommend Carr for interview may have been based on his not wanting to face the anger of those board members. Similarly, it would have been perfectly credible for Adams to decide against Carr based on his previous confrontation with the board. Having understood the board members to be of the view that he was "messing up" by hiring Carr as a substitute, Adams could well have had no desire to submit himself to further recriminations by recommending Carr for full-time employment. Similarly, it is perfectly credible to the Examiner that Adams would want time to observe Carr's performance before considering her for full-time employment, because she had previously been discharged for poor performance. As the respondent notes in its brief, reluctance to hire an employee previously discharged for cause is not impermissible under the law. Had Adams informed Carr of his limited intentions at the time of her hiring as a substitute, he could have simply reminded her of those limitations at the time she applied for the full-time driver position. The actions of employer officials which are seemingly or directly contrary to available and obvious defenses present difficult issues,

and call forth close scrutiny of the employer's motives and actions in this case. As noted above with reference to Whatcom County, however, this is not a "just cause" proceeding. Suspicion is insufficient to carry the complainant's burden under City of Olympia and Wright Line, supra.

Refusal to Schedule Driving

Discrimination in the form of changing of scheduling or assignment practices toward an employee who engages in protected activities is an unfair labor practice. Warden School District, Decision 1062 (EDUC, 1981). Transportation Management Corp., 258 NLRB 363 (1981). Marlene Carr's availability to continue as a substitute was re-affirmed in her conversation with Leeper shortly after the hiring decision was made on the full-time position. Her filing of unfair labor practice charges is an activity protected by RCW 41.56.040 and RCW 41.56.140(3). The respondent is not excused from continuing to schedule Marlene Carr for her normal share of substitute bus driving.

That the respondent failed to schedule Carr for substitute bus driving after she filed the unfair labor practice complaint is deemed admitted by virtue of respondent's failure to answer that section of the first amended complaint.

The respondent was permitted to adduce evidence in support of a claimed affirmative defense regarding its scheduling of Carr during the remainder of the 1984-85 school year. Leeper testified that he called the Carr home on May 10, 1985 to schedule Marlene Carr to drive, that he reached Steve Carr, that Steve Carr took the message, and that Steve Carr indicated that he would have Marlene Carr call Leeper back. Leeper further testified that after making that call, but prior to receiving any response from Marlene Carr, Leeper first learned from Adams that Carr had filed the unfair labor practice complaint. Leeper questioned whether it was all right to have Carr come in to drive, and was told that it was. According to Leeper, he did not hear from Marlene Carr and since she did not "have the decency" to call him back, he did not call Marlene Carr at her other job. Neither did he call her to drive for the remainder of the school year.

The Carrs claimed in testimony that it was their practice to have Steve accept driving requests on his wife's behalf. Steve Carr claims never to have received a call on the day in question here.

This record regarding scheduling would be insufficient to avert a finding of a violation, even absent the failure to answer. Leeper's customary practice had been to call Carr either at her home or at her other place of employment. Prior to April, 1985, she had driven more than any other substitute. It is uncontroverted that Leeper did not call her again after he learned that she had filed charges. Even if Leeper's version of the phone call on May 10th is credited as explaining the failure to employ her on that day, the Examiner is not persuaded that he would have failed to call her again during the balance of that school year had she not filed charges. The school district will be ordered to reimburse the complainant for the period from May 10, 1985 through the end of the 1984-85 school year, computed according to the average amount she worked as a substitute bus driver during the 1984-85 school year, but not more than the school district's actual utilization of substitute bus drivers during that period.

The hearing was held in this matter approximately one week into the 1985-86 school year. With respect to that year, the respondent offered testimony that other substitutes had driven in that time, and that a substitute assignment was available for at least one of the days scheduled for the hearing. Marlene Carr had not been called for the latter assignment, on the assumption that she would not be available. Based on the evidence offered by the respondent in its affirmative defenses, the Examiner is not convinced that respondent had improperly denied the complainant any work opportunity as a substitute driver during the 1985-86 school year. Therefore, no violation is found on the record available and no remedy is ordered for that time period.

The Barring of Access

The National Labor Relations Board has held that a rule denying off-duty employees entry to parking lots, gates, and other outside non-working areas

will be found invalid except where justified by business reasons. Tri-County Medical Center, 222 NLRB 174 (1976). There is no indication that the respondent had promulgated any rule on access, or had otherwise precluded off-duty employees from entering its premises. Even if it had such a rule, there is a credible argument that Marlene Carr had a valid business reason (i.e., picking up her paycheck) for her presence on the employer's premises. Also germane to the "access" allegation is the prohibition of the statute against discriminating in any way against an employee who has filed unfair labor practice charges, as noted above.

That the respondent barred Marlene Carr from its bus shack after she filed the unfair labor practice complaint is deemed admitted by virtue of respondent's failure to answer that section of the first amended complaint. As noted above, Marlene Carr remained and remains available for work as a substitute driver, and is entitled to access to the employer's premises on the same basis as other employees of that class. Respondent will be ordered to cease and desist from any exclusionary activity.

The Withdrawal of Letters of Recommendation

The letters of recommendation previously written for the complainant by Williams and Adams were withdrawn shortly after the close of the hearing. That fact, which is not in dispute, was called to the attention of the Examiner in a motion contained within the complainant's post-hearing brief. The allegation was taken to be amendatory of the complaint. The respondent denies that any violation of the statute has been committed.

Williams claimed in an affidavit executed on January 13, 1986, that he withdrew his letter of recommendation concerning Carr because her representations at the hearing in this matter had caused him to believe that he had erred in considering that she had undergone a personality change.

Adams claimed in an affidavit executed on January 13, 1986, to have withdrawn his letter of recommendation because he had never intended the letter to be a

general letter of recommendation, as Carr was apparently using it, and because he did not believe that Carr had been truthful in her testimony regarding their conversation prior to her hiring as a substitute driver. Further, he claimed there was no retaliatory motive in his withdrawal of the letter of recommendation, that the school district was continuing to use Carr as a substitute, and that his decision to withdraw his letter of recommendation was based upon "matters which came to light at the hearing itself."

The parties stipulated to admission of the affidavits as evidence in this proceeding. The respondent's defenses are without merit. Substantial case law has been developed by the NLRB holding that an employer violates the law by retaliating against an employee for testifying in a National Labor Relations Board proceeding. United Hydraulic Services, Inc., 271 NLRB 18 (1984). Coca Cola Bottling Company, 274 NLRB 195 (1985). Vokas Provision Company, 271 NLRB 159 (1984). Here, the respondent's agents admit that the letters were withdrawn because of Carr's testimony at hearing. The respondent will be ordered to reinstate those letters of recommendation.

FINDINGS OF FACT

1. Toutle Lake School District is a school district of the state of Washington organized and operated pursuant to Title 28A RCW, and is a public employer within the meaning of RCW 41.56.030(1). At all times germane to this proceeding, Virgil Williams was a member of the board of directors of the school district. Jack Adams is Superintendent of Schools of the school district. Bill Leeper is Supervisor of Maintenance and Transportation. Williams, Adams and Leeper are agents of the employer.

2. Certain classified employees of the school district, including bus drivers employed on a regular basis, are represented for the purposes of collective bargaining by the Public School Employees of Washington (PSE).

3. The parties to this proceeding agree that substitute bus drivers are not represented within the bargaining unit described in paragraph 2 of these findings of fact.

4. Marlene Carr was employed by the school district as a regular bus driver from September, 1973 through May, 1979. She was president of the Toutle Lake chapter of PSE in 1978, and continued to serve as a shop steward for the union thereafter. She was an active union advocate, bringing a number of issues to the district's attention, and filing a number of grievances. Williams and Adams were aware of her union activity during that period.

5. Marlene Carr's employment was terminated by the school district in May, 1979. A grievance concerning her termination was arbitrated by PSE, which claimed that her discharge was not for just cause, but was rather because of her union activities. An arbitration panel rendered an opinion in May, 1981, upholding the discharge.

6. In August, 1984, Carr applied for work as a substitute bus driver with the school district. Adams recommended her to Leeper as a substitute driver, after having talked with her and being convinced that she had a change of attitude since her termination.

7. In September or October, 1984, Adams and Leeper were criticized by members of the school board other than Williams for considering hiring someone (referring to Marlene Carr) who had been previously terminated by the district. Adams told the board he would be evaluating Carr and would probably not hire her full-time for "a couple of years". Carr's name remained on the substitute list.

8. In October, 1984, Carr began driving as a substitute. She placed no restrictions upon her availability to drive and never refused a request from the employer to work as a substitute. During the time period between October, 1984, and the end of March, 1985, she drove more than

any of the employer's other substitute drivers, averaging between 14 and 15 hours per month.

9. In April, 1985, Carr and others applied for a full-time bus driver position with the school district. Leeper and his assistant screened the applications separately, each placing two other substitute drivers, Mary Day and Sandra Sadler, as their top two choices for the position.

10. On April 17, 1985, Adams and Leeper interviewed Sadler and Day. Adams and Leeper decided to recommend to the board that evening that Sadler be hired. The evidence fails to sustain an inference that any of the management officials involved in the interview process had animus toward Carr due to her previous union activities.

11. On April 17, 1985, Carr and her husband learned that she was not being interviewed for the full-time position. They confronted Leeper, who told them that two board members would not allow Carr to be interviewed. The Carrs then proceeded to Williams' home, where they discussed the hiring process with him. Williams was surprised that Carr was unaware that she would not have been interviewed. To the extent that union activity was a subject of that conversation, it appears to have been raised by Marlene Carr in an attempt to persuade Williams that she need not be involved with the union should she be hired. The evidence fails to sustain an inference that Williams had animus toward Carr due to her previous union activities.

12. Sadler was hired by the board on April 17, 1985.

13. On May 9, 1985, Carr filed a complaint charging unfair labor practices with the Public Employment Relations Commission alleging that she had been refused hire as a permanent bus driver because of her previous union activities. The school district learned on May 10, 1985 that a complaint had been filed.

14. From May 10, 1985, through the end of the 1984-85 school year, Carr was not scheduled to work as a substitute bus driver for the school district. Leeper deviated from his prior scheduling practices after he learned that a complaint had been filed.

15. On an unspecified date at the end of May, 1985, Leeper prevented Marlene Carr from gaining access to the school district's bus facility when she arrived on the premises to pick up her paycheck. The employer had deviated from its prior practice by mailing Carr's paycheck to her home.

16. On July 15, 1985, Carr filed an amendment to her unfair labor practice complaint, alleging that the school district had refused to provide her with any work since she had filed the complaint, in retaliation for that filing, and that the school district had also denied her access to the bus shack since that time. The school district failed to answer those allegations prior to hearing, and was found to be in default on those charges. The district was allowed to submit affirmative defenses to those charges.

17. On October 1, 1985, after the close of hearing in this matter, Adams and Williams withdrew letters of recommendation they had previously written on behalf of Marlene Carr, and notified her that they no longer wished to serve as employment references for her. The complainant moved that those documents be admitted into evidence, and those actions were deemed to constitute additional unfair labor practice charges.

18. The parties have stipulated the admission in evidence of an affidavit in which Williams claims no retaliatory motive but admits that the letter of recommendation was withdrawn based upon Carr's testimony at the hearing in this matter.

19. The parties have stipulated the admission in evidence of an affidavit in which Adams claims no retaliatory motive but admits that the letter of

recommendation was withdrawn for reasons which include his belief that Carr had not been truthful at the hearing in this matter.

20. The evidence of record fails to disclose that Marlene Carr was denied employment opportunities or access to the employer's premises following the July 15, 1985 filing of the first amendment to the complaint.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. The complainant has failed to support an inference that the Toutle Lake School District violated RCW 41.56.140(1) when it failed to select Marlene Carr for the full-time bus driver position in April, 1985.

3. By its actions in failing to employ Marlene Carr as a substitute bus driver between May 10, 1985 and the end of the 1984-85 school year, the Toutle Lake School District has committed unfair labor practices in violation of RCW 41.56.140(3) and (1).

4. By its actions in denying Marlene Carr access to its premises between May 10, 1985 and the end of the 1984-85 school year, the Toutle Lake School District has committed unfair labor practices in violation of RCW 41.56.140(3) and (1).

5. By the actions of its agents to withdraw letters of recommendation they had previously issued for Marlene Carr in response to her filing of charges and/or giving testimony before the Public Employment Relations Commission in this matter, the Toutle Lake School District has committed unfair labor practices in violation of RCW 41.56.140(3) and (1).

ORDER

On the basis of the above Findings of Fact and Conclusions of Law, and pursuant to RCW 41.56.160 of the Public Employees Collective Bargaining Act, it is ordered that Toutle Lake School District, its officers and agents, shall immediately:

1. Cease and desist from:

   A. Failing to schedule Marlene Carr as a substitute bus driver for the period from May 10, 1985 until the end of the 1984-85 school year in retaliation for her having filed a complaint of unfair labor practices with the Public Employment Relations Commission.

   B. Failing to allow Marlene Carr access to its premises for the period from May 10, 1985 until the end of the 1984-85 school year in retaliation for her having filed a complaint of unfair labor practices with the Public Employment Relations Commission.

   C. Withdrawing letters of recommendation previously issued on behalf of Marlene Carr in retaliation for her having filed a complaint of unfair labor practices with and/or testified in a proceeding before the Public Employment Relations Commission.

2. Take the following affirmative actions to remedy the unfair labor practices and effectuate the policies of the Act:

   A. Reimburse Marlene Carr for the period from May 10, 1985 through the end of the 1984-85 school year according to the average amount she worked as a substitute bus driver during that school year, not to exceed the amount of substitute bus driving time which the school district actually incurred during that time period.

B. Reinstate to Marlene Carr the letters of recommendation previously written on her behalf by Virgil Williams and Jack Adams.

C. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix A". Such notice shall, after being duly signed by an authorized representative of Toutle Lake School District, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the Toutle Lake School District to ensure that said notices are not removed, altered, defaced, or covered by other material.

D. Notify the Executive Director of the Public Employment Relations Commission, in writing, within thirty (30) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding.

DATED at Olympia, Washington, this 3rd day of April, 1987.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARTHA M. NICOLOFF, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

"APPENDIX A"

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF RCW 41.56, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to schedule Marlene Carr as a substitute bus driver for the period from May 10, 1985 through the end of the 1984-85 school year in retaliation for her having filed a complaint of unfair labor practices with the Public Employment Relations Commission.

WE WILL NOT refuse to grant Marlene Carr access to the school district bus facility for the period from May 10, 1985 through the end of the 1984-85 school year in retaliation for her having filed a complaint of unfair labor practices with the Public Employment Relations Commission.

WE WILL NOT withdraw letters of recommendation previously issued on behalf of Marlene Carr by Virgil Williams and Jack Adams in retaliation for her having filed a complaint of unfair labor practices with and/or testified in a proceeding before the Public Employment Relations Commission.

WE WILL reimburse Marlene Carr for the period from May 10, 1985 through the end of the 1984-85 school year according to the average amount she worked as a substitute bus driver during that school year, not to exceed the amount of substitute bus driving time actually incurred by the school district during that time period.

WE WILL reinstate to Marlene Carr the letters of recommendation previously written on her behalf by Virgil Williams and Jack Adams.

DATED_____

TOUTLE LAKE SCHOOL DISTRICT

By:_____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone: (206) 753-3444.