STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WILLIAM GREENE, Complainant, vs. PATEROS SCHOOL DISTRICT, Respondent.	CASE 8189-U-89-1774 DECISION 3744 - EDUC
WILLIAM GREENE, Complainant, vs. PATEROS EDUCATION ASSOCIATION/ WASHINGTON EDUCATION ASSOCIATION, Respondent.	CASE 8190-U-89-1775 DECISION 3745 - EDUC FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

R. John Sloan, Jr., Attorney at Law, appeared for complainant.

Johnson and Johnson, P.S., Attorneys at Law, by Phillip R. Johnson, appeared for the employer.

Catherine O'Toole, Attorney at Law, and Maureen Hoy, Legal Assistant, appeared on behalf of the union.

On September 22, 1989, William Greene filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the Pateros School District had acted in violation of RCW 41.59.040 and 41.59.140, when it took action to non-renew his employment contract for 1989-90.[1]

[1] Case 8189-U-89-1774.

On the same date, William Greene filed a complaint charging unfair labor practices with the Commission, alleging that the Pateros Education Association and/or the Washington Education Association (WEA) had acted in violation of RCW 41.59.040 and 41.59.140, with respect to its functioning as the exclusive bargaining representative for certificated employees of the Pateros School District.[2]

A hearing on the consolidated matters was held at Pateros, Washington, on August 15 and 16, 1990, before Examiner J. Martin Smith.[3] The parties filed post-hearing briefs.

BACKGROUND

The Pateros School District provides educational services in southern Okanogan County for students in kindergarten through the 12th grade. About 260 students attend classes at one school complex. The employer is governed by an elected Board of Directors. Gary Patterson is the superintendent of schools, and is primarily responsible for labor relations matters for the employer. Joe Worsham is the high school principal.

The Pateros Education Association is the exclusive bargaining representative of all non-supervisory certificated employees of the Pateros School District. The organization is affiliated with the Washington Education Association. Woody Hunter was president of the local union when these complaints were filed. At all times relevant to these proceedings, James Nelson was the Uniserv representative assigned to the Pateros Education Association.

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[2] Case 8190-U-89-1775.

[3] On February 21, 1990, the employer filed a motion to have the complaint in Case 8189-U-89-1774 made more definite and certain. That motion was withdrawn after a telephonic conference between the Examiner and the representatives of the parties.

The collective bargaining agreements between the Pateros School District and the Pateros Education Association have dealt with layoff and recall of certificated employees, but disputes concerning non-renewal of teacher contracts are referred to statutory procedures of RCW 28A.67.070, and are not arbitrable under the contract. Those contracts have not contained "union security" provisions.

William Greene was a certificated employee of the Pateros School District, employed within the bargaining unit represented by the Pateros Education Association. Greene served as "librarian" and "counselor". He was not a dues-paying member of the Pateros Education Association.

The Pateros School District has been experiencing a declining enrollment for some time. Under state funding formulae, a loss of students means a loss of revenue and, hence, consideration of "reduction-in-force" for teaching personnel at the school district.

In May of 1988, a reduction-in-force was made by order of the school board, based upon a conclusion that the school district was overstaffed in the special education area. At that time, the employer non-renewed the full-time teaching contract of Roger Howe, a special education teacher, and offered him a "two-sevenths" contract. Howe was not able to find additional part-time work in the Pateros area, and hence accepted a full-time teaching position with the Inchelium School District.[4] Howe was a dues-paying member of the Pateros Education Association/WEA.

In the spring of 1989, the employer considered the additional reduction-in-force that is disputed in this proceeding. Superintendent Patterson testified that the Pateros School District was

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[4] The record does not indicate that the "two-sevenths" position offered to Howe was ever filled.

overstaffed early in 1989, when the student enrollment totalled 297, and that he had told union representatives of the significant drop of enrollment:

> I alerted the representatives ... I wrote a letter to the employees, alerting them to the fact and asking them for voluntary reductions in their spending requests for the short term while we looked at long-term solutions. I alerted the Board. We talked about enrollment, I think, at virtually every Board meeting, monitoring it. I had talked to staff members wondering if we might possibly have some attrition, all the time hoping that figures would go back up, that enrollment figure. And there was a possibility of one teacher seeking a job in another District, and that didn't materialize. There was a possibility of another teacher taking a year's leave of absence to return to school, and that didn't materialize either ....

Superintendent Patterson considered cuts in maintenance, athletic programs, and foreign language programs, but the community loudly and clearly admonished him to cut some other aspect of the district's program.[5]

The school board's March 16, 1989 directive, authored by Patterson and referred to as "Resolution 101", specified:

> ... The effect on programs of the 1.0 FTE certificated employee reduction shall be distributed between regular educational programs and general <u>instructional support services</u> ... [emphasis supplied]

There were only three positions in the school district that met the definition of "instructional support services": Superintendent

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[5] There is reference in the record to a long-term effort on the part of the Pateros School District to implement "enriching" programs for their schools.

Patterson, Principal Worsham and the librarian/counselor, William Greene. Of those three, Greene had the least seniority, with three years less than the principal.

On March 22, 1989, Patterson distributed a new seniority list to all certificated staff members. That list eliminated Greene from the "K-6" category, leaving him listed only under the "support services" category. That change was made because Patterson contended that Greene's prior listing on the seniority list under the "K-6" category had been "an error".

Greene brought the revised seniority list to the attention of Uniserv Representative Nelson, and they discussed the potential for a layoff. Nelson advised Greene to consider filing a grievance over the seniority list, but Greene was reluctant to enter into the grievance process and preferred to wait to see what happened. It is clear that no grievance was filed concerning the seniority list.

Patterson next recommended that Greene, as the least senior employee in the support services category, be laid off:

> And by doing that, we were able to preserve as much curriculum as we could, although we did lose a half of a principal and we did lose two teaching positions, you know [sic] two slots that could have had classes offered ... So we distributed, in effect, a RIF across general education, but most of it occurred in support services to maintain the curriculum.

On March 27, 1989, Superintendent Patterson delivered a notice of "probable cause for non-renewal" to Greene,[6] stating:

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[6] The statute referred to, RCW 28A.67.070, regulates the non-renewal of employment contracts for school district certificated personnel.

> ... I am sorry to inform you of my determination that pursuant to RCW 28 A 67--070 [sic] there is probable cause for nonrenewal of your employment contract ...
>
> ... [T]his notice is issued pursuant to RCW 28A.67.070, and you are therefor entitled to exercise appeal procedures outlined in that statute. You should promptly consult your Pateros Education Association representative for a complete explanation.

Within a few days after Greene received the March 27 notice from the employer, Greene's wife telephoned Nelson at his office in Wenatchee.[7] Nelson told Mrs. Greene that there may have been a violation of the contract, based on Mr. Greene's seniority in the school district, and that the union would represent him in the processing of a grievance. Nelson advised that the union would not represent Mr. Greene in proceedings under RCW 28A.67.070, because Greene was not a union member. Nelson testified that he mentioned the need to "contact private legal counsel straight-away", and he referred Mrs. Greene to William Powell, an attorney in Spokane, and/or Greg Nelson, an attorney in Wenatchee.

Nelson sent a letter to Greene on April 3, responding to the telephone call and materials supplied to the union, saying:

> I have received and read the materials your wife sent related to the RIF notice you have received from the Pateros School District.
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> Based on my reading of the materials and the Master Agreement there is reason to believe that the district may not be in full compliance with the Agreement. However, because you are not a member of the Association we are not permitted to take your case.
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> The Agreement specifically states that matters related to RIF procedures must be handled

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[7] Sharon Greene testified that the telephone call took place on March 30 or April 1.

> through the remedy provided in the statutes. They are therefore, [sic] not grievable.
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> Had you been a member of the Association we very likely would have represented you in court on the matter. As I am certain that you will appreciate, our limited resources can only be used in the defense of members.

In his testimony before the Examiner, Nelson explained that his reference in that letter to "full compliance with the Agreement" was intended to mean Greene's placement on the seniority list.

Greene sent a letter to the employer on April 3, 1989. Greene failed to initiate the statutory appeal process in a timely manner by filing on or before April 6, 1989, however, and his contract was non-renewed. On appeal, the Court of Appeals wrote:

> Mr. and Mrs. Greene then met personally with Superintendent Patterson on April 5, 1989, at the District office. The seniority issue was discussed, with Mr. Greene suggesting he also had seniority in K through 6. Both Superintendent Patterson and Mr. Greene agree that appellant was appealing the seniority listing, but they disagree whether Mr. Greene indicated he was also appealing the notice of non-renewal. Earlier the same day, Mr. Greene made an appointment for that afternoon with an attorney in Wenatchee to discuss the nonrenewal issue. During the meeting with Superintendent Patterson, he mentioned that he was considering contacting an attorney. Superintendent Patterson's response discouraged resort to the courts, although their affidavits conflict on the exact wording used. Superintendent Patterson told Mr. Greene he still had a right to appeal to the school board within 10 days if he did not agree with the superintendent's response. Mr. Green [sic] did not keep the appointment with the attorney.

Greene v. Pateros School District, 59 Wn.App. 522 (Division III, 1990). [Footnote setting forth contractual procedure for appeal of seniority list omitted.]

The Court's decision details correspondence between Greene and the school district, contacts with colleges to verify Greene's claims of qualifications, and Greene's eventual filing of the untimely appeal under the statute. Apart from affirming dismissal of the statutory appeal on procedural grounds, the Court indicated that it would also have been rejected on the merits, noting that the school board was not required to give Mr. Greene preference over junior qualified teachers in other positions.

The Court of Appeals decision indicates that Greene sent a letter to the employer on April 14, 1989, appealing "My Seniority and Placement on the Seniority List", but there is no indication that Greene asked the union for help with that appeal. Greene represented his own interests before the school board on April 20, 1989. The appeal was denied by the employer on or about April 26, 1989.

Greene initiated a grievance under the "Transfer and Vacancy" provisions of the collective bargaining agreement, and union officials discussed that theory with Greene and his attorney. The union and employer negotiated a proposed settlement that would have assured Mr. Greene of the first available position for which he was qualified, but Greene rejected that settlement. The union invoked the arbitration procedures of the collective bargaining agreement. The union eventually declined to pursue the grievance to arbitration, however, based on a conclusion that arbitration would not yield any relief to Mr. Greene for the non-renewal itself.

POSITIONS OF THE PARTIES

William Greene contends that both the employer and union discriminated against him, in violation of RCW 41.59.140(1)(c) and (2)(b). He alleges that they agreed to allow the layoff of Greene, and agreed to deny him the opportunity to appeal his layoff through the statutory procedures of RCW 28A.67.070. Greene argues that another

teacher in the school district -- a union member -- had been treated differently, and more fairly, under similar circumstances in the prior school year. Greene alleges that, as a result, he was being encouraged to be a union member at a time when his statutory right was to remain a non-member pursuant to RCW 41.59.060.

The employer argues that Greene was laid off because he was the only non-administrative employee in a support services capacity, and that all other certificated employees were strictly classroom teachers. Further, the employer contends that Greene had adequate notice of the statutory appeal procedure in his non-renewal letter, and that Greene failed to file an appeal within the 10-day period called for by the statute. The employer urges that it had no duty to give Greene legal advice regarding his appeal, and that it did not otherwise "misdirect" him in his actions. The employer claims Greene has now dropped any allegation that it was "in collusion" with the union to deny Greene his rights under RCW 28A.67.070.

The union asserts that the employer had sufficient cause to lay off William Greene in 1989, and that a review of his nonrenewal under the statutory procedure would have availed Greene no relief. The union argues that it fulfilled its statutory duty to fairly represent Greene, even though it eventually decided to discontinue arbitration of the "Transfer and Vacancy" grievance filed on his behalf. The union denies that it was in "collusion" with the Pateros School District to deny Greene his rights, or that it treated Greene differently because he was not a union member.

DISCUSSION

The Duty of Fair Representation

The duty of fair representation grows out of the status of "exclusive bargaining representative" which is conferred upon a

union under RCW 41.59.090 or a counterpart statute. The well-known standard set forth in Vaca v. Sipes, 386 U.S. 171 (1967) requires that the union deal with all employees in the bargaining unit: (1) Without hostility or discrimination; (2) in a reasonable, non-arbitrary manner; and (3) in good faith.[8]

The Public Employment Relations Commission first embraced the "duty of fair representation" doctrine in the context of Chapter 41.56 RCW, concluding that the duty of fair representation would be applied to union representation in the public sector as well:

> Since no reason is apparent for the Associations' action, it must be deemed to be arbitrary. This conclusion is buttressed by the Association's perfunctory handling of the grievance. There is no indication that the Association ever met with the City to discuss the grievance or seek a compromise ...

City of Redmond, Decision 886 (PECB, 1980).

A violation of RCW 41.56.150(1) was found in that case, because the union took "arbitrary" action regarding the grievance of an employee who had been discharged.[9]

The duty of fair representation analysis was applied under Chapter 41.59 RCW in Elma School District (Elma Teachers' Organization), Decision 1349 (EDUC, 1982), where an independent organization held

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8 Morris, The Developing Labor law, 2d Edition (BNA, 1983), indicates that "... a union has a duty to represent fairly the employees for whom it acts as exclusive bargaining agent. The duty is thus the product of a federal common law of statutory origin." Morris at 1285.

9 In addition to Vaca, the Redmond case reviewed the historical precedents of Steele v Louisville and Nashville Railway, 323 U.S. 192 (1944); Ford Motor Comp. v Huffman, 345 U.S. 330 (1953); and Humphrey v Moore, 375 U.S. 370 (1964). Those cases are cited by both the employer and union in their briefs here, but the Examiner does not think embellishment or re-examination is necessary.

status as exclusive bargaining representative. A bargaining unit employee who supported the Washington Education Association asked for representation on a discharge grievance, but the independent organization eventually dropped the grievance as lacking merit. Although the complaint was ultimately dismissed, the Examiner found that the duty of fair representation was inferred from Chapter 41.59 RCW, citing the same cases as those relied upon in City of Redmond, supra.

The Examiner finds no merit in the union's contention here that Chapter 41.59 RCW grants bargaining representatives only limited exclusive representation, with a correspondingly limited duty of fair representation. Compare RCW 41.59.090 with Section 9(a) of the National Labor Relations Act:

RCW 41.59.090:
The employee organization which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and shall be required to represent all the employees within the unit without regard to membership in that bargaining representative: PROVIDED, That any employee at any time may present his grievance to the employer and have such grievance adjusted without the intervention of the exclusive bargaining representative, as long as such representative has been given an opportunity to be present at that adjustment and to make its views known, and so long as the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect. [1975 1st ex.s. c 288 sec.10]

NLRA Section 9(a):
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: PROVIDED, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of collective-bargaining contract or agreement then in effect: PROVIDED FURTHER, That the bargaining representative has been given opportunity to be present at such adjustment.

The National Labor Relations Act and Chapter 41.59 RCW each provides elsewhere among its terms for: (1) administrative processing of disputes concerning bargaining unit determination;[10] (2) administrative certification of exclusive bargaining representatives based upon the results of representation elections;[11] (3) administrative determination of unfair labor practices;[12] (4) a duty on the part of the employer to meet, confer, negotiate, and arrive at collective bargaining agreements with the exclusive bargaining representative; (5) the lawfulness of agreements concerning "union security";[13] (6) use of final and binding arbitration to resolve grievance disputes;[14] and mediation of disputes arising in contract negotiations.[15] In other words, Chapter 41.59 RCW sets forth a <u>complete</u>, <u>not</u> <u>limited</u>, system of labor relations as that process is applied throughout the United States. There is nothing from which to infer that our Legislature had any different intentions about the duty of fair representation when it adopted Chapter 41.59 RCW.

The evident concern of Congress in Section 9(a) of the NLRA was to make a small exception to the general rule of exclusive representation. An employee might file a grievance and have it resolved, but only in a way that is <u>not inconsistent with the negotiated contract</u>. The exclusive bargaining representative has a right to be present, to protect its interests. Clearly, the proviso is not a substitute for the traditional duty of fair representation, which is rooted in the first sentence of the section.

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[10] RCW 41.59.080; NLRA Section 9(b).

[11] RCW 41.59.070; NLRA Section 9(c).

[12] RCW 41.59.140 and .150; NLRA Section 10.

[13] RCW 41.59.100; NLRA Section 8(a)(3).

[14] RCW 41.59.130; LMRA Section 203(d).

[15] RCW 41.59.120; LMRA Section 203.

The Public Employment Relations Commission has identified two different types of "duty of fair representation" situations, and has structured its involvement accordingly. Ever since Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982), the Commission has declined to assert its unfair labor practice jurisdiction to "duty of fair representation" cases arising exclusively from the processing of grievances. That policy is based on the Commission's lack of jurisdiction to address violations of collective bargaining agreements through the unfair labor practice procedures of the statutes,[16] and recognizes that such matters are properly within the purview of a court having jurisdiction over the contractual claim.[17] The Commission continues to assert jurisdiction in "duty of fair representation" cases involving union discrimination or alignment in interest against a member of the bargaining unit it represents. In this case, the "collusion" and "discrimination" allegations are of the type over which the Commission asserts jurisdiction.

Alleged Collusion Between Employer and Union

The Examiner finds no evidence to support the allegation that Greene was treated differently, and with discriminatory design, as the result of "collusion" between the employer and the union. For

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16 See, City of Walla Walla, Decision 104 (PECB, 1976).

17 See, also, the unusual situation in Highland School District, Decision 2684 (PECB, 1987). A classified school employee had been discharged, and the grievance procedure ended with an "appeal" to the school board, rather than in arbitration. The union appealed the school board's decision to the superior court, but later sought to process an unfair labor practice case before the Commission on a "refusal to provide information" theory. The Commission held that the appeal to court had placed the union in the position of prosecuting a "statutory" proceeding, subject to the discovery rules of the superior courts, and not subject to the provisions of the collective bargaining statute. Thus, no unfair labor practice violation was found.

there to be an agreement between an employer and union, there must be some communication on the subject between representatives of those parties. Here, there were no such communications.

Certainly, all of the teachers were aware of the employer's need and intent to lay off certificated employees. Most school board meetings in February and March of 1989 were devoted to that unpleasant topic. But there was no request by the union to negotiate about the layoff decision, or to re-negotiate the layoff/recall provisions of the collective bargaining agreement then in effect. Neither was there a request by either the employer or union to meet and confer regarding the seniority list. The record indicates the only conversations occurred at school board meetings.

The "reduction-in-force", "grievance procedure" and "seniority" clauses in the collective bargaining agreement are all traditional employee concerns, and mandatory subjects of collective bargaining under RCW 41.59.020(2). The fact of the employer and union having negotiated on those matters does not, in and of itself, form the basis for finding an unfair labor practice under RCW 41.59.140. Mukilteo School District, Decision 1323-B (EDUC, 1984). The terms of those contract provisions make no distinction between union members and employees who are not union members. The employer apparently preferred an "election of remedies" in the grievance and layoff procedures, thus avoiding the expense and risk of non-compatible remedies, but there is no indication that the parties put such language in the collective bargaining agreement to make employees who were not union members "expendable" in the event of a reduction-in-force.

Neither is there any indication that contract provisions operated, in fact, to benefit union members over non-members. It appears the union made no effort to "appeal" or otherwise challenge the layoff of its member in 1988, in a similar climate of enrollment decline and financial adversity for the school district. There is no

indication in the record that Superintendent Patterson had talked to local union official Hunter, to Uniserv Representative Nelson, or to any other union official, prior to his April 5 discussion of seniority and the layoff list with Mr. and Mrs. Greene. Nor did Mr. and Mrs. Greene mention union membership in their conference with Patterson on April 5, 1989.

The suggestion of an animus against Greene based on his lack of union membership is also contradicted by Patterson's actions to put Greene in a new "media and guidance" classification. Three other certificated employees, including Principal Worsham, were already on that list. As it turned out, there were no vacancies to be filled from that list, but Greene's listing in that category would seem to have been to his benefit, rather than to his detriment.

Also supporting a conclusion that there was no "collusion" is the evidence of a subsequent effort on the part of the employer and union to settle the "Transfer and Vacancy" grievance on a basis providing some benefit to Greene. A conversation between Nelson and the employer's attorney resulted in an offer of settlement on terms more favorable than the existing contract language.[18] Greene's own attorney was favorably disposed to the settlement, and clearly is not alleged to be part of a conspiracy. Greene rejected that proposal, however.

Processing of Greene's Contractual Grievances

The record indicates that the union and its representatives complied with their duty to inform and represent Greene in his grievances arising under the collective bargaining agreement. Nelson and the association appear to have done all that they could do -- and perhaps more than they had to do. In particular:

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[18] It almost appears that Nelson and Johnson negotiated a "RIF" clause for one teacher -- William Greene.

(1) Seniority Grievance: Nelson properly raised an issue regarding the application of the seniority provisions of the contract. Greene refused to allow the union to assist him in filing such a grievance. Greene's individually-filed grievance on this issue was carried to the Board level.[19] It does not appear that Greene sought to proceed to arbitration following the employer's rejection of his claim.

(2) Assignment and Transfer Grievance: The union filed this grievance, even though its hopes for winning it for Mr. Greene were scant. The Examiner cannot fault the union for refusing to fund further processing of a grievance where a nominal "victory" would yield less than the contracts' terms.

(3) Settlement: Mr. Nelson assisted in communication with Mr. Greene's attorney, such that Greene could have had an open-ended promise of the next job at Pateros for which he qualified. That result would have been better than the one-year or two-year-extended resolution of the Layoff and Recall procedures. Mr. Greene rejected such a settlement, however.

The Examiner finds no basis to conclude that the employer and/or the union would have treated Greene differently, but for the fact that Greene was a non-member. The teacher laid off in 1988 was a classroom/special education teacher who was qualified for a different range of assignments than was Greene.

Duty to Represent in Statutory Proceedings

Separate and apart from their rights under the collective bargaining statute and an applicable collective bargaining agreement, certificated employees of Washington school districts have job

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[19] Although never formally filed as a grievance under the contractual procedure, the employer waived this oversight when it heard Greene's appeal.

security protections, as individuals, under Title 28A RCW. Thus, the "non-renewal" of a teacher must be initiated by a "notice of probable cause" issued on or before May 15,[20] a "non-renewal" may be challenged by the individual in proceedings before a hearing officer who is empowered by statute to decide the dispute,[21] and the employee can appeal adverse decisions to the courts.[22]

What distinguishes dues-paying members from non-members in terms of their representation in statutory "non-renewal" proceedings is the financing of the costs. The view expressed here by the Washington Education Association and its affiliate is that monthly membership dues assist in creating and maintaining funding for legal services provided to WEA members. The WEA has effectively become a guarantor, or at least subsidizer, of the ability of its members to pursue their individually-conferred legal remedies through the statutory procedures. Such guarantees and subsidies are usually not present for non-members where there is no union security provision under the contract.[23]

Greene chose not to pay dues or "fair share" fees to the union, and there was no union security clause in the contract at Pateros. Hence, it was within the rights of the labor organization to refuse

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[20] RCW 28A.67.070.

[21] RCW 28A.58.455.

[22] RCW 28A.58.460 through .510.

[23] Chicago Teachers v. Hudson, 475 U.S. 292 (1986), permits a public sector union to enforce union security obligations only to collect the portion of its full dues that relates to the costs of collective bargaining and contract administration. An interesting question (which the Examiner need not and does not decide in this case) thus arises: Could a union lawfully refuse such legal services to a non-member if it has sought to impose collection of union security payments which include the proportion of the full dues amount spent on representation of members in statutory non-renewal proceedings?

to pay a portion, or all, of the legal fees that might be incurred by a non-member for representation in a statutory proceeding outside of the collective bargaining process. The complainant's reliance on National Treasury Employees Union v Federal Labor Relations Authority, 721 F.2d 1402 (1983), is not helpful. The same court appears to have overruled the cited decision in National Treasury Employees Union v Federal Labor Relations Authority, 800 F.2d 1165 (1986). The Examiner is wary of dissenting opinions, especially those which rely upon dicta. Further, the Examiner rejects a view that a union must offer legal representation for all non-members if their case merely "relates to employment", because such a broad criteria is beyond the requirements of RCW 41.59.090 and Allen v Seattle Police Officers' Guild, 100 Wn.2d 361 (1983). If there are to be stricter regulations of the exclusive bargaining representative, they must be established by the Legislature.

Moreover, the record in this case, and particularly the intervening court decision at 59 Wa.App. 522, reveal that Greene would have lost on the merits even if the WEA had appointed its own attorney to appeal Greene's layoff by April 6. The situation might have been only slightly different if Greene had contacted his attorney "straight-away", as Nelson suggested soon after the layoff notice was issued. Such an action would have made irrelevant only the failure to keep the appointment with the attorney on April 5, 1989.

The "Damage" Claim

The Examiner has considered the letters originated by the union on December 4, 1990, and by Mr. Greene's attorney on December 10, 1990, with regard to the possible impact of the Court of Appeals decision. The Examiner need not comment on "damage" or "remedy" issues, because there is no finding here of a violation of the union's duty of fair representation. The Examiner does not agree with the complainant's assertion here that the Court of Appeals expressly approved WEA representative Nelson's "proper notifica-

tion" to Greene that appeal of the layoff was covered by the statute. Such a finding of fact is made, however, in this opinion.[24]

Alleged Discrimination by the District

The Court of Appeals decision makes it clear that the Pateros School District complied with RCW 28A.67.070 on March 26, 1989, when it gave Greene notice of probable cause to terminate his employment. The record in this case, and the record before the Superior Court for Okanogan County, contains the layoff notice, which states that the teacher has a right of appeal under the laws of the State of Washington. Certainly, the Pateros School District was under no greater obligation to quote the 10-day appeal period than was the union. The employer is not in a position to act as legal counsel for its employees.

Greene's contention that he was misdirected by the employer has also been treated by the Court of Appeals, which pointed out that Greene apparently thought he was appealing his statutory rights on

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[24] Greene's comments of January 8, 1991 have also been reviewed. The Examiner will not rule on issues raised by citation of Peters v South Kitsap School District, 8 Wn.App. 809, rev. denied, 82 Wn.2d 1009 (1973), because such issues were appropriately before the courts and the Court of Appeals has provided an exhaustive analysis of such issues as applied to this complainant. Whether or not the labor contract is unclear on seniority lists or certification of positions is best left to an arbitrator, who the parties agree should interpret the contract. It bears repeating that Mr. Greene was treated differently from Mr. Howe because the employer did not eliminate the entire classroom special education program in 1988, as it did with the library and counseling in 1989, nor did it "stretch" administrative personnel to cover Howe's former tasks in 1988, as it did with Greene's former tasks in 1989. The Court of Appeals approved of both of these procedures [at pages 533 and 534]. Whether Mr. Greene is entitled to a library or counseling position, if re-established in 1990 or 1991, is not before the Commission at this time.

April 5, by appealing his seniority list standing with the Board of Directors. Both the labor agreement and the statute have 10-day appeal periods from the notice of the decision to an employee. Greene appears to have made up his mind to avoid a court challenge through the statutory procedure, however. His April 12 letter, written a week after he could have filed his statutory appeal, says in part:

> I did consult an attorney and once thought seriously about having the courts decide the legality of this situation, but have decided at present to appeal to your own sense of integrity in following such an important procedure properly ....

It does not seem to follow, therefore, that Superintendent Patterson misled him on April 5, when he discouraged Greene's attempts to hire an attorney. If Greene canceled his appointment with an attorney later that same day, it cannot be the fault of the employer, and hence cannot form the basis for finding any unfair labor practice under Chapter 41.59 RCW.

FINDINGS OF FACT

1. The Pateros School District is a school district operated pursuant to Title 28A RCW, and is an employer for purposes of Chapter 41.59 RCW.

2. The Pateros Education Association, an affiliate of the Washington Education Association, is the exclusive bargaining representative of non-supervisory certificated personnel of the Pateros School District. Jim Nelson was the Uniserv representative assigned to the Pateros Education Association.

3. William Greene was employed as a certificated employee of the Pateros School District during the 1988-89 school year. He

performed "librarian" and "counselor" duties, and was within the bargaining unit represented by the Pateros Education Association. There was no union security obligation in effect, and Greene chose not to be a member of the Pateros Education Association.

4. The Pateros School District has suffered declining enrollment in recent years, and it eliminated part of a certificated position in 1988. Prior to March of 1989, the employer was considering further reductions of its certificated employee workforce.

5. On March 22, 1989, the employer issued a revised seniority list which listed Greene under the "support services" category only. Greene was not listed under the "K-6" category, since the Superintendent of the Pateros School District believed, on the basis of transcript information, that Greene did not qualify for elementary school teaching. Greene consulted with Nelson, who advised him to file a grievance under the contract. Greene declined assistance offered by the union, but later filed such a grievance as an individual and processed it himself to the school board. The employer denied the grievance, and Greene did not seek union support for arbitration of that grievance.

6. On March 27, 1989, Greene was given notice of probable cause for non-renewal of his employment contract, as required by RCW 28A.67.070. Under that statute, the non-renewal had to be appealed to the school board within 10 days, the deadline day being April 6, 1989. The employer advised Greene to consult promptly with his union representative.

7. In telephone calls and a letter to Nelson on or after March 27, 1989, Greene and his wife raised issues with respect to the non-renewal of his employment contract. Nelson advised

that the reduction-in-force clause of the collective bargaining agreement did not allow an appeal through the grievance procedure. Nelson assured Greene that the WEA would represent him in a grievance procedure under the contract, and that a grievance could be filed regarding the seniority list. Nelson also advised Greene and/or his wife that, because Greene was not a union member, the union could not represent him in any statutory hearing, and that Greene should consult an attorney "straight-away".

8. Greene had a conference with the superintendent on April 5, 1989. The superintendent acknowledged Greene's "grievance" concerning the seniority list. The superintendent advised Greene that his appeal under the non-renewal statute had to be made to the school board in writing.

9. Greene failed to keep an appointment to meet with an attorney on April 5, 1989. The deadline for filing an appeal with the school board under RCW 28A.67.070 passed on April 6, 1989, without an appeal being filed. The superior court and the state court of appeals later ruled that this failure was fatal to Greene's appeal rights under the statute.

10. Greene pursued his seniority "grievance" as an individual, but it was denied by the school board.

11. The Pateros Education Association filed and pursued a grievance on Greene's behalf under the "assignment and transfer" provision of the contract. That grievance was filed after consultation with an attorney hired by Greene. Greene rejected a proposed settlement which would have given him the next position in the district for which he qualified. The union thereafter voted to not proceed with the Assignment and Transfer grievance, because it was calculated that the

grievant would be entitled to no better a remedy than was already provided by the 1988-89 contract.

12. There is no evidence of any discussion, negotiation or agreement between the Pateros School District and the Pateros Education Association that was designed to discriminate in favor of union members, or which in fact operated to discriminate in favor of union members, with respect to job security of bargaining unit employees.

13. The job security rights conferred upon William Greene by Chapter 28A.67 RCW are individual rights outside of the collective bargaining process, and were not within the duty of fair representation imposed upon the Pateros Education Association under the facts of this case.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.59 RCW and Chapter 391-45 WAC.

2. The complainant has failed to sustain his burden of proof to show that the Pateros School District has interfered with, restrained, coerced, or discriminated against William Greene in the exercise of his rights under RCW 41.59.040, so as to have engaged in any unfair labor practice under RCW 41.59.140.

3. The complainant has failed to sustain his burden of proof to show that the Pateros Education Association and/or the Washington Education Association has interfered with, restrained, coerced, or discriminated against William Greene in the exercise of his rights under RCW 41.59.040, or that it has

breached its duty of fair representation towards him, so as to have engaged in any unfair labor practice under RCW 41.59.140.

ORDER

1. DECISION 3744 - EDUC. The complaint charging unfair labor practices filed against the Pateros School District in Case 8189-U-89-1774 is DISMISSED.

2. DECISION 3745 - EDUC. The complaint charging unfair labor practices filed against the Pateros Education Association and/or the Washington Education Association in Case 8190-U-89-1775 is DISMISSED.

Dated at Spokane, Washington, this 15 day of April, 1991.
Issued at Olympia, Washington, this 18th day of April, 1991.

PUBLIC EMPLOYMENT
RELATIONS COMMISSION

J. MARTIN SMITH
Examiner

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