MORTON SCHOOL DISTRICT, Decision 5838 (PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KIRK HOFF, Complainant, vs. MORTON SCHOOL DISTRICT, Respondent.	)	CASE 11454-U-94-2688 DECISION 5838 - PECB
JAY HENDERSON, Complainant, vs. MORTON SCHOOL DISTRICT, Respondent.	)	CASE 11455-U-94-2689 DECISION 5839 - PECB CONSOLIDATED FINDINGS FACT, CONCLUSIONS OF LAW AND ORDER

Van Siclen and Stocks, by Robert C. Van Siclen, Attorney at Law, appeared on behalf of the complainants.

Lane Powell Spears Luberskey, by Craig W. Hanson, appeared on behalf of the respondent.

On November 30, 1994, Kirk Hoff and Jay Henderson filed complaints with the Public Employment Relations Commission, charging that the Morton School District (employer) committed unfair labor practices: (1) by discriminating against Hoff and Henderson because of their union activities; (2) by violating contractual due process rights of those employees; and (3) by violating a contractual evaluation process. Two separate cases were docketed, as indicated above. The Executive Director considered the complaints for purposes of making a preliminary ruling under WAC 391-45-110, and found a cause of action to exist only as to the "discrimination" allegation in

each case.[1] In a letter issued February 1, 1995, the Executive Director found the "due process" and "unilateral change" allegations failed to state a cause of action. An amended complaint filed on February 27, 1995, alleged that the failure to renew the coaching contracts, the change of evaluation procedures, and the failure to provide an opportunity to challenge allegations made against them were all incidents of discrimination by the Morton School District against Hoff and Henderson, in violation of RCW 41.59.140(1)(a) and (c). The Executive Director then issued a preliminary ruling March 13, 1995, finding a cause of action as to the various forms of discrimination for union activity alleged to have occurred on or after May 30, 1994. The employer filed its answer on March 23, 1995. Examiner Paul T. Schwendiman conducted a hearing on September 14, 1995. Both parties filed post-hearing briefs.

BACKGROUND

The Morton School District provides K-12 education for about 500 students through schools located in Mineral and Morton, Washington. Richard Morton was the employer's superintendent of schools during the period relevant to these cases.

The Morton Education Association is the exclusive bargaining representative of the employer's non-supervisory certificated employees. From about 1991, and continuing through the 1994-1995 school year, Kirk Hoff and Jay Henderson were co-presidents of the union. Both Hoff and Henderson represented the union and its members at school board meetings and with the employer's administration. Both of them had served on the union's grievance committee between 1988 and 1991, when controversy arose because the

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[1] At this stage of the proceedings, all of the facts alleged in a complaint are assumed to be true and provable. The question at hand is whether an unfair labor practice violation could be found.

union refused to process 20 grievances filed by another teacher, Ron Nilson.

Hoff had about 19 years of teaching experience at the time this controversy arose, including 8 years in the Morton School District. Hoff coached several sports during his tenure at Morton: He was head football coach for six years, with a cumulative record of 39 wins and 20 losses and several playoff teams;[2] he coached softball for five years, reviving a program that had been discontinued for lack of interest to become league co-champions and state-level competitors; he was assistant coach for both boys' basketball and girls' basketball. Hoff received the highest possible ratings for his coaching from his immediate supervisor, Principal Richard Conley.

Henderson teaches business education at Morton High School, and has served in extra-curricular coaching positions during his 10-year teaching career with the Morton School District. He was head coach for girls' basketball for three years; he coached junior high girls' basketball for one year; he was an assistant coach for football for a total of five years, working on a three-fifths basis during the 1993-1994 school year. As assistant football coach, Henderson received the highest possible rating from Conley.

The Community

Uncontroverted testimony indicates the Morton School District has been an interesting place to work and coach in recent years. One teacher who was an active union member had her mailbox blown up, and she received harassing telephone calls at night. Beginning on an unspecified date and continuing through two weeks prior to the hearing in this case, eggs have been thrown at the residences of

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[2] One of Hoff's football teams placed third in the state, around 1989 or 1990.

union officers, including those of Hoff and Henderson.[3] Hoff and Henderson believed that union members had been afraid to stand up for themselves. Henderson testified, "That's why they relied a lot on me and Hoff, because we stood up and were counted",[4] and that he believed the chilling effects on union members began in 1991. Hoff testified of his belief that teachers had become very fearful in the past few years.

Athletic programs are important to patrons of the Morton School District, the employer and the union. At least five coaches were employed for the football program in a combined junior/senior high school having less than 300 students. Varsity teams have competed successfully in a number of tournaments, and the union and employer have agreed that the employer may unilaterally close the schools whenever a varsity team plays in a tournament. The employer has even shut down the high school early on days when there have been varsity games that are not tournament games. Coaching of student athletes was a matter of public concern. Evaluation criteria for coaches, hiring and renewal of coaches, and interviews with coaching applicants were recurrent topics at school board meetings in 1994, and at least one town meeting was held exclusively for review of Henderson's basketball coaching. Coaching positions did not require teacher certification in the 1993-1994 school year, and volunteer coaches were approved by the school board to assist some of the employed coaches.

The Six-year Collective Bargaining Agreement

Some prior school board members resigned midterm, and some declined to run for re-election to the board, so that at least four of the five positions on the school board were up for election in November

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[3] A report to the police on the latest "egging" implicated the son of a school board member.

[4] Tr. 52.

of 1993. Departing board members complained that they got tired of abuse, and of telephone calls in the middle of the night, that came with being a board member. After the date for filing had passed, and only one candidate had filed for most of those seats, the "lame duck" board proposed and later approved a six-year collective bargaining agreement with the union that was signed on September 10, 1993. The union was motivated to negotiate a long-term agreement, because its officers wanted to protect their working conditions and avoid negotiating with the persons who had filed to run for the board in November of 1993.

The 1993-1999 collective bargaining agreement includes the following provisions:

> ARTICLE I
> ADMINISTRATION OF AGREEMENT
>
> Recognition
>
> A. The District hereby recognizes the Morton Education Association as the sole and exclusive collective bargaining representative for all contracted non-supervisory employees and non-supervisory certified employees on leave by Board action.
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> ...
>
> ARTICLE III
> INDIVIDUAL EMPLOYMENT CONTRACTS
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> ...
>
> D. Supplemental Contracts: There shall be a Supplemental Contract for the co-curricular and supplemental assignments. Appointments to co-curricular, special and supplemental assignments shall be for one (1) year and shall be consistent with statutory provisions; specifically that the supplementary contract is not a continuing contract.
>
> 1. No employee shall be required, as a part of his/her contracted responsibilities, to perform co-curricular duties. In the event the employee should fail to fulfill the terms of the co-curricular contract,

the amount of financial remuneration paid in advance shall be deducted from the employee's pay check at the same rate as the employee received the financial remuneration.

2. The assignment may or may not be renewed for the subsequent year. Renewal of the supplemental contract shall be made upon a yearly assessment of the effectiveness of the employee. The teaching contract status of a certified employee shall not be effected [sic] by performance of the co-curricular or supplemental employment.

3. The employer agrees to notify employees, in writing, of appointments to co-curricular and supplemental assignments for the following year by June 1, except in unforseen circumstances.

...

ARTICLE XII
RIGHT TO JOIN AND SUPPORT ASSOCIATION

The parties agree that every certified employee shall have the right to freely organize, join and support the Association for the purpose of engaging in collective bargaining or to refrain from such activities. They agree that they ... will not discriminate against any certified employee with respect to any terms and conditions of employment by reason of ... his participation or non-participation in the Association, ...

...

ARTICLE XV
RIGHT TO DUE PROCESS

...

B. A process of progressive discipline shall be used; ... Progressive discipline includes oral warning, written reprimand or suspension as appropriate to the infraction. Employees formally disciplined by written reprimand or suspension shall receive written notice for the grounds of such disciplinary action.

C. No certified employee shall be reprimanded or disciplined without sufficient cause.

ARTICLE XVI
PERSONNEL FILE

...

E. Citizen Complaints and Procedures. When a verbal citizen complaint is made with the school district, the employee(s) shall be notified of the complaint and its source.

...

ARTICLE XVII
OTHER TERMS AND CONDITIONS OF EMPLOYMENT

Evaluation of Teachers

...

... After a teacher has four (4) years of satisfactory evaluations in the District, the administrator may use a short form of evaluation ... In no instance may the above mentioned short form be used as a basis for determining that a teacher's work is unsatisfactory or serve as the basis for determining that there is probable cause for nonrenewal.

...

ARTICLE XIX
PAYMENTS - WARRANTS

...

C. Co-curricular positions shall first be offered to Employees. If an Employee applicant(s) is by passed in favor of a non Employee [sic], the Employee Applicant(s) shall be notified in writing within ten (10) days of the appointment for the reasons for being bypassed. Co-curricular salary schedule (See Appendix B).

CALENDAR

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B. In the event a varsity team participates in a state level tournament, school may be closed for those days of participation or attendance.

...

ARTICLE XXI
GRIEVANCE PROCEDURE

A. Definition

A grievance is an alleged misinterpretation of, or violation of, terms and/or provisions of this Agreement.

...

B. Procedure for Processing Grievances

1. Immediate Supervisor. - Step I.

...

2. Superintendent - Step II

If no satisfactory settlement is reached at step I, the grievance may be appealed to step II, superintendent, or his designated representative ...

The Superintendent or his designated representative shall arrange a grievance meeting ... The purpose of this meeting shall be to effect a resolution of the grievance.

The superintendent or his designated representative shall provide a written decision, incorporating the reasons upon which the decision was based to the grievant(s), Association representative, and immediate supervisor within five (5) days from the conclusion of the meeting.

3. Arbitration - Step III

If no satisfactory settlement is reached at step II, the Association within fifteen (15) working days of the receipt of the Step II decision may appeal the final decision of the employer to the American Arbitration Association under the voluntary rules. Any grievance arising out of or relating to the interpretation and/or application of this Agreement may be submitted to arbitration unless specifically and expressly excluded within this Article. ...

...

4. Jurisdiction:

The arbitrator shall be without power or authority to add to, subtract from, or alter any of the terms of this Agreement.

The arbitrator shall be without power or authority to make any decision which requires the commission of an act prohibited by law.

> The arbitrator shall have no power or authority to rule on any of the following:
>
> a. The termination of services of or failure to re-employ any provisional employee.
>
> b. The termination of services or failure to re-employee any employee to a position on the supplemental salary schedule.
>
> c. Any matter involving employee evaluation, provided that the Evaluation Procedure shall be subject to the arbitrator's reviews.
>
> d. Any matter involving employee prohibition procedures, discharge, non-renewal, adverse effect, or reduction in force.

APPENDIX B to that contract, which is titled "Extra Curricular Salary Schedule", contained salaries and experience increments for up to five years. All of those were percentages of the base teacher salary, which was $21,425 for the 1993-1994 school year.[5] Some 35 different job titles were listed, including: "Head Football" at $2,785 to $2,946, "Assistant Football" at $1,928 to $2,089, "Head Baseball" at $2,250 to $2,410, "Head Softball" at $2,035 to $2,196, and "Knowledgebowl Advisor" at $214 to $375.

1993 Election Campaign and Immediate Aftermath

The school board election campaign in 1993 drew interest from the union. Hoff and Henderson questioned school board candidates about their agendas at various meetings. Discussions at a meeting held at Mineral, in October of 1993, were described as "frank" and the questions as "pointed". Animosity was expressed at that meeting.

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[5] Each year of experience adds a noncompounded 0.15% of the base to every classification on Appendix B. This amounted to $32 during the 1993-1994 school year. The base teacher salary is subject to an annual adjustment, so the $32 amount would increase with changes of the base rate in subsequent years.

School board candidate Pat Emerson was employed by the Onalaska School District as a high school science teacher and counselor.[6] Emerson's comments at the meeting held at Mineral touched on his view of future working conditions for school district employees, including concerns about compensatory time off for teachers and making sure that employees do their job. He responded to a question about employee time off by questioning the integrity of teachers. Offense was taken to his response, and Emerson was questioned further about teacher integrity. Emerson was elected to the Morton School Board in November of 1993, and he was elected chairman of the board in January of 1994.

School board candidate Mike Herron was a Washington State Patrol trooper. He had been active in the high school football program, and had served as an assistant football coach under Hoff, before becoming a candidate for the school board. An inquiry made by Hoff to Herron at an unspecified time, but likely during the autumn of 1993, suggests there may have been some animosity between Herron and Assistant Football Coach Henderson. Herron was elected to the Morton School Board in November of 1993.

Shortly after she took office, newly-elected school board member Judy Ramsey wrote a letter to the editor of a local newspaper, in which she pointed out that the union had signed the six-year contract with the prior board, and asserted that the union was not operating in good faith by trying to tie the hands of the new

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[6] Emerson was a teacher at Morton prior to 1989. He also served as an assistant football coach for Morton High School. He testified he resigned because he was not satisfied with the leadership provided by the administration, that he believed the employer was not moving forward, and that the employer was behind in innovation, technology, computer networking, and curriculum update. Emerson felt Superintendent Morton resisted a student aid program that was dropped before Emerson left for the Onalaska School District. While he was teaching at Morton, Emerson's signature appeared on a memo criticizing the administration.

board. The letter was published by the newspaper, and was viewed by the union as negative toward the union.

It appears there was a communications problem between the new school board and Superintendent Morton, as the board placed Morton on a paid leave of absence in June of 1995. This occurred during a time of financial difficulties for the school district.

The Coaching Contracts

At its meeting on February 15, 1994, the board unanimously acted to renew Hoff as head softball coach for the 1994 season.

At a meeting on May 9, 1994, with both Hoff and Henderson present, the board postponed action on hiring of coaches for the 1994-1995 school year until a special meeting to be held on May 23, 1994.[7]

Some parents and students complained to board members Emerson and Herron about Hoff's football coaching. The complaints concerned Hoff's interaction with student athletes, harsh discipline for missing practice, and not allowing all team members a fair amount of playing time. Hoff asked for particulars of those complaints, but received no specifics concerning their source(s). Animosity existed or developed between Hoff and Herron, who particularly refused to give Hoff the names of those who had complained. Herron's sons advised him that Hoff was discriminating against them because Herron was a school board member. Herron felt the contract did not require disclosure, and that there could be retaliation against his children and the others he refused to name.

The renewal of football coaching contracts was considered by the school board at its meeting on May 23, 1994, with Henderson and

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[7] On May 9, the board unanimously adopted a motion to re-hire all of the continuing contract teachers, including Hoff and Henderson, for the 1994-1995 school year.

Hoff's wife in attendance. A series of 17 separate motions were acted upon, of which the third, ninth and tenth had to do with the hiring of football coaches. In the seventh of those motions, the board renewed Henderson's contract as girls' basketball coach for the 1994-1995 school year. The 17th motion in the series combined the renewal of Hoff's contract as head football coach with renewal of Henderson's contract as assistant football coach, but failed for lack of a second. The minutes of that meeting do not reflect any specific action being taken on Hoff's softball coaching contract for the 1994-1995 school year.

Grievances were filed on June 6, 1994, protesting the failure to renew Hoff's contract as head football coach and the failure to renew Henderson's contract as assistant football coach.

The hiring process for the extra-curricular positions continued into the summer. At its meeting on June 13, 1994, the board scheduled a special meeting to be held on June 28, 1994, for the purpose of hiring coaches. In a letter dated June 21, 1994, the superintendent denied the grievances filed on behalf of Hoff and Henderson. At its meeting on June 28, 1994, the board opened a two-week period for applications for all unfilled 1994-1995 coaching positions.

At a special board meeting held on July 26, 1994, the board considered a series of 10 motions on hiring for extracurricular activities jobs. The minutes of that board meeting include:

> [*1st motion*] Superintendent Morton recommended Kirk Hoff as head football coach and Jay Henderson on a three/fifths basis assistant football coach. He further stated that Cliff Sandberg wanted to advise the board of his willingness to act as "interim head football coach" during the period Kirk Hoff's grievances and related actions were being completed.

> Bob Voss moved to hire Kirk Hoff and Jay Henderson as head and assistant football coaches respectively. The motion died for a lack of a second.
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> [*2nd motion*] Judy Ramsey moved to hire Cliff Sandberg as interim head football coach. Mike Herron seconded. The motion passed.
>
> [*3rd motion*] Dave Coleman moved to hire Ken Cheeseman as assistant football coach. Judy Ramsey seconded. The motion carried.
>
> [*4th motion*] Judy Ramsey moved to hire Jay Henderson as a full assistant football coach. Bob Voss seconded. The motion carried with all in agreement.
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> [*5th motion*] In the event Mr. Henderson does not accept the assistant position, Mike Herron moved to hire Brian Wamsley as assistant football coach. Dave Coleman seconded and the motion passed with all in favor.
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> [*6th motion*] Superintendent Morton recommended Kirk Hoff as head softball coach and Ron Walker as assistant softball coach.
>
> Bob Voss moved to hire Kirk Hoff and Ron Walker as head and assistant softball coaches respectively. The motion died for lack of a second.
>
> [*7th motion*] Judy Ramsey moved to hire Ron Walker as head softball coach, with Dave Coleman seconding. The motion carried with one nay vote.
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> ...
> [*10th motion*] Upon Mr. Morton's recommendation, Judy Ramsey moved to hire Jim Johnson as head baseball coach. Dave Coleman seconded and the motion carried with all in agreement.

[Headers in [*italics*] supplied.]

Hoff testified that he investigated the reasons for the nonrenewal of his coaching contracts:

> They indicated there were many complaints, phone calls. That's -- in the football one that's what they said. In the softball one

> they said the same thing. They mentioned two complaints, which in fact, I'd already cleared with my superiors, and they weren't complaints at all. They had been taken care of, and they knew that, the Board knew that.
>
> ...
> In the football one they gave no specifics at all. They said we can't do that. We don't want to do that.

[Tr. 43-44.]

Superintendent Morton told Henderson that the offer of a full-time football coaching position was contingent on Henderson dropping his grievance. Henderson told Morton he would accept the offer and drop his grievance, if the board would publicly apologize. Henderson's request for an apology was not communicated to the board, and the board did not apologize. Henderson rejected the full-time football coaching job, after which Wamsley accepted it.

POSITIONS OF THE PARTIES

The complainants argue that the employer's refusal to renew their football and softball contracts was substantially motivated by discrimination based on their protected activities as union co-presidents under Chapter 41.59 RCW, and that Henderson received no consideration for a baseball coaching position because of such discrimination. The reasons given by the employer for the nonrenewals are alleged to have been pretextual. The complainants request back-pay with interest, and an order requiring the employer to abide by the collective bargaining agreement.

The employer claims the decision not to renew the complainants' coaching contracts was motivated by legitimate, nondiscriminatory reasons. It contends the complaints were untimely under the statute, and that the collective bargaining agreement and Title 28A RCW authorize nonrenewal of any extracurricular contract.

DISCUSSION

The Applicable Statute

Both of these complaints were filed and argued under the Educational Employment Relations Act, Chapter 41.59 RCW, which is applicable only to "certificated" employees of school districts. In Castle Rock School District, Decision 4722-B (PECB, 1994), the Commission ruled on unfair labor practice charges brought by a coach against both an employer and union which had purported to bargain for coaches under Chapter 41.59 RCW.[8] The Commission ruled that employees who conduct extracurricular activities in school districts are not covered by Chapter 41.59 RCW for that work, unless educator certification is required for the extracurricular activities assignment, and that any collective bargaining rights of non-certificated employees of school districts are under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.[9] The Commission then adopted an emergency rule which required the separation of non-certificated extracurricular positions from all certificated employee bargaining units state-wide.

The Examiner takes administrative notice of a posting made by the employer and the Morton Education Association dated April 26, 1995, excluding all coaching positions from coverage under Chapter 41.59 RCW and from the bargaining unit of certificated employees. The facts that: (1) Herron and community people served as coaches prior to June of 1994, and (2) community people were hired as coaches in June of 1994, supports an inference that educator certification was not required for coaches in the 1994-1995 school year critical to this case. Thus, the fact that Hoff and Henderson were teachers in

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[8] The complainant in that case, Ron Nilson, was employed at one time as a teacher in the Morton School District. He was at Castle Rock only as a coach.

[9] Both statutes are administered by the Public Employment Relations Commission.

the Morton School District does not alter the conclusion that their coaching work was outside of the scope of the certificated employee bargaining unit and collective bargaining agreement.

The Examiner's conclusion that the coaching jobs actually fell under Chapter 41.56 RCW does not alter the legal principles applicable to this case. Both Chapter 41.56 RCW and Chapter 41.59 RCW protect the right of employees to organize and engage in lawful activities in support of unions and collective bargaining concerning their wages, hours and working conditions. Both statutes make it an unfair labor practice for an employer to discriminate against employees because of their protected union activities.[10] Thus, the Examiner concludes that the union activities of Hoff and Henderson under Chapter 41.59 RCW could be the basis for finding a "discrimination" violation, even if the case is ultimately decided under Chapter 41.56 RCW.

Limited Scope of Proceedings

Although no formal order of partial dismissal was issued in this case,[11] the preliminary ruling issued by the Executive Director clearly narrowed the scope of the proceedings.

Violation of Contract Claims -

The Public Employment Relations Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statutes it administers. City of Walla Walla, Decision 104 (PECB,

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[10] The complainants are teachers as well as coaches, and certification was required of them as teachers. They were thus "dual status" employees who could properly be included in both the certificated employees' bargaining unit and an extracurricular staff bargaining unit.

[11] Current Commission practice would call for issuance of an order of partial dismissal by the Executive Director, which would be final unless appealed to the Commission.

1976). Remedies for claimed contract violations must be pursued through the grievance and arbitration machinery of the contract or through the courts, and are not before the Examiner here.[12]

Due Process Claim -

The Commission does not have jurisdiction to determine or remedy all issues which might arise out of "public employment". Claims of discrimination on the basis of race must, for example, be taken to an agency having responsibility for enforcement of the laws against such discrimination. City of Seattle, Decision 205 (PECB, 1977). The Commission has declined to stretch the collective bargaining process to encompass rights which flow from the federal constitution, such as due process rights under Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). City of Bellevue, Decision 4324-A (PECB, 1994). Thus, the "due process" theory advanced in the original complaints is also not before the Examiner.

Unilateral Change Claims -

A union which obtains status as "exclusive bargaining representative" of an appropriate bargaining unit has the right to bargain with the employer on mandatory subjects of bargaining affecting employees in that bargaining unit, including a right to notice of any contemplated changes affecting those mandatory subjects of bargaining and an opportunity for bargaining prior to implementation of changes. Conversely, no person or organization other than the "exclusive bargaining representative" can pursue unfair labor practice charges alleging that the employer has failed or refused to bargain in good faith. Grant County, Decision 2703 (PECB, 1987). Bargaining rights and obligations do not extend to the wages, hours or working conditions of persons outside of the

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[12] In fact, the parties have submitted their dispute to arbitration under the contractual procedure, and the arbitrator ruled that he had no jurisdiction to decide the claims advanced under the collective bargaining agreement, due to a contract provision which excludes extracurricular contracts from the arbitration process.

bargaining unit. In the aftermath of Castle Rock, supra, it is now clear that the Morton Education Association has no legal standing, as exclusive bargaining representative of the certificated employees of the Morton School District, to pursue any "unilateral change" claims concerning coaching jobs outside of the certificated employee bargaining unit. Any such claims are not before the Examiner in this proceeding.

Timeliness of Complaints

RCW 41.56.160(1) contains a statute of limitations on the processing of unfair labor practice complaints, as follows:

> (1) The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, That a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission. ...

The six-month period begins to run with notice or constructive notice of the complained-of action. Port of Seattle, Decision 2796, 2796-A (PECB, 1987); Emergency Dispatch Center, Decision 3255, 3255-B (PECB, 1990). The only exception to that general rule is where the existence of an unfair labor practice violation is concealed from the injured party. City of Pasco, Decision 4197 (PECB, 1994).

The Football Contracts -

The complaints allege that the employer discriminated against Hoff and Henderson by failing to renew their football contracts "as of June 1, 1994". The record in these matters discloses, however, that the school board took specific action to deny them football contracts on May 23, 1994. These complaints were filed six months and seven days thereafter, on November 30, 1994, and are untimely as to the actions which occurred on May 23, 1994. The fact that

grievances were filed or in process under a contractual procedure did not extend the time for filing an unfair labor practice complaint under the statute.[13] If no other action had been taken by the school board on football contracts for Hoff and Henderson, it would be necessary to dismiss these complaints as to those contracts.

The actions taken by the board at its meeting on May 23, 1994 were not the employer's final action on the football contracts for Hoff and Henderson.[14] The school board specifically acted on those questions again on July 26, 1994, which was within the period for which the complaints are timely. Superintendent Morton made a specific recommendation to the school board that Hoff and Henderson be hired as football coaches, and a board member made a specific motion to hire Hoff and Henderson as football coaches. This reconsideration of the issue at the behest of the employer's own officials distinguishes this case from Port of Seattle, supra, where the only subsequent action was the routine implementation of the decision for which the complaint was untimely.

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[13] This is not a case where the claimed unlawful conduct was concealed from the complainant. Charlotte Hoff, who is described in the testimony as a member of Kirk Hoff's immediate family, was present at the May 23 meeting. Complainant Henderson was present at that meeting, and specifically testified that he was present as Kirk Hoff's union representative. Thus, both Hoff and Henderson had actual or constructive notice of the nonrenewal of their football coaching contracts as of May 23, 1994.

[14] Events predating the six-month period can be a basis for inferences about the motivation of parties in subsequent events for which the complaint is timely. If the Commission was limited to an analysis of alleged discriminatory acts in isolation, it would not be able to understand the total context in which those acts took place. Port of Tacoma, Decision 4626-A, 4627-A (PECB, 1995). The effect of the statute of limitations is that unlawful conduct which predates the six-month period cannot be directly remedied.

The motion made on July 26, 1996 failed for lack of a second. If the silence of school board members was in reprisal for the union activities of Hoff and/or Henderson, a remedy could be ordered for Hoff and Henderson based on that inaction.

Hoff's Softball Contract -

Contracts for coaches of some 1994 spring sports, including Hoff's contract as head softball coach, were renewed at a board meeting held on February 15, 1994. Apart from the fact that the complaint filed in November of 1994 is untimely as to actions taken at that meeting, it does not appear that anything detrimental to Hoff occurred at that meeting.

The hiring of softball coaches for the 1994-1995 school year came up at the meeting held on July 26, 1994, when a motion to renew Hoff's contract as head softball coach failed for lack of a second. Immediately thereafter, a motion was adopted to hire Ron Walker as head softball coach. The complaint filed on November 30, 1994, was timely as to the action/inaction which occurred on July 26, 1994.

Henderson's Baseball Contract -

Henderson's complaint alleged that the employer discriminated against him by failing to give him any consideration for selection as assistant baseball coach. The complaint filed in November of 1994 is untimely as to actions taken in February of 1994, when the school board filled baseball positions for the 1994 season. There is evidence which suggests that Henderson re-applied for a baseball position for the 1995 season, and this complaint is timely as to actions taken on or after May 30, 1994 with respect to an application by Henderson for a baseball coaching position.

Legal Standards for "Discrimination" Charges

Both complainants were covered by Chapter 41.59 RCW in their capacities as teachers for the employer. RCW 41.59.060 provides:

> (1) Employees shall have the right to self-organization, to form, join, or assist employee organizations, to bargain collectively through representatives of their own choosing, and shall also have the right to refrain from any or all of such activities ...

Both of them were covered by Chapter 41.56 RCW in their capacities as coaches for the employer. RCW 41.56.040 provides:

> No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

RCW 41.56.140 enumerates unfair labor practices for public employers, as follows:

> **It shall be an unfair labor practice for a public employer:**
>
> **(1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;**
>
> (2) To control, dominate or interfere with a bargaining representative;
>
> (3) **To discriminate against a public employee who has filed an unfair labor practice charge;**
>
> (4) To refuse to engage in collective bargaining.

[Emphasis by **bold** supplied.]

In Educational Service District 114, Decision 4361-A (PECB, 1994), the Commission adopted a "substantial motivating factor" test for deciding cases where discrimination on the basis of union activity is claimed. That test is based upon the rulings of the Supreme

Court of the State of Washington in Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991). Under the "substantial motivating factor" test, the burden of proof remains at all times on the complainant, and only a burden of presentation shifts to the respondent.[15]

The Prima Facie Case

The first step in the processing a discrimination complaint is for the injured party to make out a prima facie case showing a retaliatory action. To do this, a complainant must show:

1. The exercise of a statutorily protected right, or communicating to the employer an intent to do so;

2. That he or she was deprived of some ascertainable right, status or benefit; and

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

Participation in Protected Activity -

The complainants were co-presidents of the local union. That fact was well known to employer officials, as the complainants appeared on behalf of the union at school board meetings and at political forums. Additionally, they were named as grievants in the three grievances filed on June 6, 1994. The complainants have clearly established the first element of a prima facie case.

Adverse Action -

Discharge is a classic example of employer discrimination based on union activity. City of Winlock, Decision 4784-A (PECB, 1995).

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[15] Until 1994, the Commission applied an analysis by which the burden of proof shifted from the complainant to the respondent. See, City of Olympia, Decision 1208-A (PECB, 1982), citing with approval Wright Line, 251 NLRB 1083 (1980). The new test has also been applied under Chapter 41.59 RCW. Seattle School District, Decision 5237-B (EDUC, 1996).

Even notice of probable cause of nonrenewal of an individual teacher's contract can be viewed as an event sufficiently adverse to satisfy the second element of the a prima facie case. Seattle School District, supra. The employer's refusal to renew the complainants' extracurricular coaching contracts extinguished their status, benefits and income from those jobs, even if they continued to hold their certificated positions with the employer. The second requirement for a prima facie case is also met here.

Causal Connection -

The third element is usually the most difficult to prove. Because employers are not in the habit of announcing retaliatory motives, it is often necessary to rely upon circumstantial evidence of a causal connection. Port of Tacoma, Decision 4626-A, 4627-A (PECB, 1995). Only rarely is there a "smoking gun" as in Clallam County, Decision 1405-A (PECB, 1982), affirmed Clallam County v. Public Employment Relations Commission, 43 Wn.App. 589 (Div. II, 1986), review denied, 106 Wn.2d 1013 (1986).[16] When protected activities occur in the context of employer knowledge and evident animus towards that effort, however, it can reasonably be concluded that there was a causal connection between the protected activities and the adverse action by an employer. Thus, an employee may establish the requisite causal connection by showing that adverse action followed the employee's known exercise of a protected right under circumstances from which one can reasonably infer a connection.[17]

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[16] In Clallam County, the evidence included a tape recording of a hearing before the county commissioners, in which a supervisor stated that the employee was discharged, in part, for his collective bargaining activity.

[17] The Supreme Court held that a plaintiff may establish the required causal connection for an action under Title 51 RCW, by showing no more than that the worker filed a worker's compensation claim, that the employer had knowledge of the claim, and that the employee was discharged. Wilmot, supra.

The Examiner finds circumstantial evidence sufficient to imply causation here: The co-presidents of the union were the only coaches whose contracts were not renewed for the 1994-1995 school year. That conclusion is supported by direct evidence of union animus on the part of board members, as well as by other, more remote, circumstantial evidence.

The testimony of Superintendent Morton in this case provides a "smoking gun" as to the existence of union animus. While there was no tape recording to be played back, as in Clallam County, supra, Morton's testimony concerning his recall of board member statements provides a near-substitute for a tape recorder or verbatim transcript. Morton testified that one or more board members frequently made statements about "getting and keeping the union off the backs of the board". (Tr. 117-118).

Evidence concerning the decisionmaking process concerning a trip to Disneyland later in the 1994-1995 school year also supports an inference that union animus was part of the decisionmaking process about the coaching contracts for that year. The record establishes a tradition of the high school senior class making a trip to Disneyland at the end of the school year, and a related practice of sending a teacher as a chaperone if he or she has a child who is a member of the senior class. Hoff had a child in the class which graduated in 1995, but was denied employer funding for his trip to Disneyland. Hoff testified concerning his perception of discrimination against him when the school board withdrew funding for Hoff's expenses after having approved payment:

> ... It was very embarrassing to me as an employee to be chosen to go as a chaperone with the Disneyland trip as also a teacher and a parent of one of the students going. And to be accepted to go and then for that to be, without any warning, just cut off at the next Board meeting. And they cut the number of employees so that I would be not able to go. I was very embarrassed because the teachers

> and community were so appalled by it that they raised the money to send me. I ended up going with their money -- with the money that they raised to go.

(Tr. 50.)

Although the employer objected to the introduction of any evidence concerning the Disneyland trip, discriminatory acts post-dating the filing of a complaint may be relied upon to show union animus.[18] The handling of this entire situation took an unusual turn after it was pointed out that Hoff had filed an unfair labor practice complaint protesting the nonrenewal of his coaching jobs. Even if any discrimination regarding the Disneyland trip is not subject to a remedy in this proceeding,[19] evidence that the employer deviated from past practice in regard to the Disneyland trip provides support for an inference that there was union animus among board members and a causal connection between Hoff's union activity and the actions which are challenged in these proceeding.

Hoff's supplemental contract as advisor for the high school Knowledgebowl team was renewed, but Hoff complained:

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[18] Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Evidence of subsequent union animus tends to make the existence of animus at the time of the disputed act more probable, and may be particularly important in a case where recently-elected public officials have little or no history of acting on behalf of an employer. See In re Purvis, 54 Wn.2d 206 (1957), in which widespread publication of an appealable decision as "final" was taken as evidence of animus when a complaint was filed.

[19] An amendment to the complaint, or at least a motion to conform the pleadings to the evidence, would have been necessary to place the Disneyland trip directly before the Examiner. No such amendment was requested; no such conforming motion was made. An amendment concerning the Disneyland trip might even have been untimely, but that is also not before the Examiner.

> After my coaching was nonrenewed, in that next winter our [Knowledgebowl] team qualified to go to state competition, which is -- it's a real high honor, specially for small schools. Just to qualify it's real difficult and we qualified. We had an exceptional group of knowledgeable students, and we requested the money to go to the state tournament. There were only four or five students and myself, and we were denied general funding to go, and it wasn't very much money. And every other activity that day that was being listed for trips was okayed with general funding, including an invitational track meet whereby a couple of students, one being a son of one -- one or two being sons of the Board members themselves -- that was granted with general funding, and I thought that was discriminatory.

Tr. 46-47

In this instance, Hoff has seemingly confused the sequence of events. Minutes of the April 13, 1994 board meeting show that the denial of funding for the Knowledge Bowl team to attend the competition occurred on that date. This incident thus predated the nonrenewal of Hoff's coaching contracts. While the issue is not directly before the Examiner and a complaint or amendment would be untimely as to this incident, this evidence tends to support an inference that there was animus against Hoff among school board members. All of the other groups that had funding requests before the school board on April 13, 1994 received approval for their trips, with employer funding. Hoff had nothing to do with the other requests, so an inference is available that the rejection of funding was aimed at him.

Conclusions on Prima Facie Case -

The Examiner concludes that the record made in this case is sufficient to find that the complainants have made out prima facie cases of unlawful discrimination against them for their union activities.

The Employer's Burden of Production

If a complainant shows that pursuit of a protected right was possibly a cause of adverse action, a rebuttable presumption is created in favor of the complainant. The burden then shifts to the employer, to articulate lawful reasons for its actions. If the employer fails to produce any evidence of other motivation for its actions, the complainant will prevail. City of Winlock, supra.

Hoff's Softball Contract -

The employer has not articulated any legitimate reason for refusing to renew Hoff's contract as head softball coach for the 1995 season. The testimony in this record only shows that the employer told Hoff, at some unspecified time, that there were complaints against him. The employer's focus at the hearing in this matter was clearly on the football contract.[20] The Examiner concludes that

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[20] As noted at page 22 of the employer's post-hearing brief:

> ... the employer has more than met [the] burden of production to establish legitimate, nonretaliatory reasons for the non-renewal of the football coaching contracts in question.

The only reference to a specific reason for nonrenewal of Hoff's softball contract came from Hoff's testimony:

> ... They indicated there were many complaints, phone calls. That's -- in the football one that's what they said. In the softball one they said the same thing. They mentioned two complaints, which in fact, I'd already cleared with my superiors, and they weren't complaints at all. They had been taken care of, and they knew that, the Board knew that. (Tr.43)

All of the testimony provided by the employer regarded a community loss of confidence in Hoff because of his treatment of athletes and the way he ran the football program. All purported support of the board's reasons for not renewing Hoff's contracts was by way of examples of purported citizen complaints concerning Hoff's football coach.

the presumption created by Hoff's prima facie case inferring discrimination in violation of Chapter 41.56 RCW is not rebutted. The Examiner must, therefore, conclude that the failure to second a motion to hire Hoff as head softball coach on July 26, 1994 was substantially motivated by unlawful discrimination based on Hoff's protected union activities.

The Football Contracts -

The employer's articulated reasons for not renewing Hoff's football contract for the 1994 season were that the community had lost respect for him, and that he was not doing an adequate job of coaching football. The employer thus argues that the failure to second a motion to hire Hoff as football coach, on July 26, 1994, was a legitimate response to parent and student complaints, such as not allowing one football player enough playing time, and dropping another player from the team for walking off the practice field. Those reasons are sufficient to shift the analysis back to the complainants' burden of proof.

The employer's articulated reasons for not renewing Henderson's football contract for the 1994 season were that Henderson was not sufficiently committed to the football program. Examples given were that he did not attend all of the football practices, and that he was seen at a girls' volleyball game at a time when the football team was playing in a championship game elsewhere. Those reasons are sufficient to shift the analysis back to the complainants' burden of proof.

Henderson's Baseball Contract -

The employer's articulated reason for not hiring Henderson as baseball coach for the 1995 season was that Henderson had resigned as baseball coach before the 1994 season, that another coach was hired before the 1994 season began, and that all baseball coaching positions for the 1995 season went to coaches who were rehired from the 1994 season. The board additionally had not needed to hire

Henderson to replace an assistant baseball coach who quit at midseason in 1994, because participation in the program had declined and two volunteer baseball coaches had been added since the beginning of the season, making the hiring of any replacement unnecessary. Those reasons are also sufficient to shift the analysis back to the complainants' burden of proof.

Employer Actions Pretextual and/or Unlawfully Motivated

The complainant has the ultimate burden to show that protected activity was a "substantial motivating factor". That can be done by showing that:

1. The employer's proffered reasons for its actions are pretextual; or

2. Although some or all of the employer's stated reasons are legitimate, the employee's pursuit of collective bargaining rights was nevertheless a substantial factor motivating the employer to act in a discriminatory manner. Educational Service District 114, supra.

Testimony of Superintendent Morton -
Superintendent Richard Morton testified extensively concerning conversations with and by board members. The Examiner finds Morton's testimony credible, based upon the entirety of the record.

Morton's testimony regarding the offer of a full-time football contract to Henderson on July 26, 1994, provided evidence of improper motivation:

> The current Board, I think earlier referred to as the new Board, decided to offer Jay a five-fifths contract with the stipulation that he drop the grievance which he had previously submitted.

(Tr. 113)

Q. [By Mr. Van Siclen] My question is: Was there any discussion about the fact prior to extending the contract offer to Jay Henderson, that maybe the Board ought to extend the contract because they had let it be known that they were nonrenewing the co-presidents' supplemental contracts?

A. [By Mr. Morton] That's correct. In Executive Session the Board flat out stated that they needed to make a proposal -- needed to offer a contract to one of the two coaches, and I use this phrase and this was not the phrase used, I don't want to put phrases in specifically, basically to save face because of the nonrenewal of -- the previous nonrenewal for the football positions of both men. At that time I mentioned to them that was not, in my opinion, a legitimate reason or cause to so do. There was a rather lengthy discussion, which I precipitated reviewing the records of both coaches. Specifically or centering on reviewing of the records of Jay Henderson. And my effort was to try to cause something at least to be said that wouldn't leave me with the impression and understanding that this was really the root cause of whoever was making the proposal. Nothing was said. There was no change made. It stood in that way. And that was the reason for making the offer.

Q. Do you recall whether or not there was any discussions among the Board members to the effect that the appearance of not making the offer to Jay Henderson of this contract would be that they had discriminated against him because of union related activities?

A. The word discrimination I don't recall having been used by the Board. I know I used it. I've used it on several occasions. And I know at that time that I used that. The statement was made in the meeting about getting and keeping the union off the backs of the Board. This was a statement that was quite frequently made to me. Telling me to get the union off the backs of the Board; and to get the presidents, particularly Kirk Hoff, off

their backs. And those were the words used, but not my generation.

Q. Do you recall any language mentioned or words exchanged among Board members or yourself concerning the possibility of an unfair labor practice because of discriminatory actions based on -- or maybe not discriminatory practices -- but based upon union related activities? Was that ever discussed?

A. I had brought that up to the Board each time the Board had discussed not employing or re-employing these two coaches. Not just at this time dealing with the assistantship, but also by dealing with the Hoff head coach position. I had cautioned them about it. I had written at least one memo to them cautioning them about it. That they needed to be careful on these things dealing with the union leaders that they gave the appearance of being fair and equitable.

Q. Was there concern expressed with the Board, either by yourself or among the Board themselves, that they were taking retaliatory actions against these people because of union related activities?

A. I expressed concern about it. Board member Bob Voss, who's one of the returning Board members from the earlier Board prior to the election, he repeatedly expressed that concern, very ably expressed it. And did so many times in many situations.

(Tr. 117-120)

Regarding a meeting held in April of 1995, Morton testified:

... Pat Emerson, the Chair, starts off by saying the Board has received a lot of complaints about Hoff being one of the chaperones. And the citizens feel, the complaining citizens feel, that because he is suing the district, and that was the phrase, suing the district, the Board should not then pay his way on the Disneyland trip. And he

> went on to say something to the effect, he's suing the district with one hand and he's holding the other hand out to get a free trip to Disneyland. ... He was followed by Dave Coleman, the Board member sitting next to him as I recall, who said yes, I've gotten comments about that, too. And both men agreed with him. ... I remember after those Board members commented, I then asked well, what does the rest of the Board feel. Each Board member in turn commented. Mike Herron commented that he agreed with the complaints of the parents. That is, Hoff should not go because he was suing the district. Judy Ramsey agreed and so stated. ... Coleman, and I don't know who else commented well, the people downtown feel this way and we're supposed to honor what they -- we're supposed to do what they want. ...

(Tr. 237-240)

In distinct contrast, board member Herron had difficulty recalling meetings and conversations clearly recollected by Morton:

> Q. [By Mr. Hanson] You've just heard Richard Morton testify regarding communications he had with the Board about the appearances of impropriety if a union president is subjected to a nonrenewal of his contract.
>
> Did you hear his testimony in that regard?
>
> A. [By Mr. Herron] Yes, I did.
>
> Q. Would you react to that testimony?
>
> A. To the effect that I don't recall any conversation of that nature.
>
> Q. Did he ever have any discussion with you regarding the appearances of Mr. Hoff and Mr. Henderson and the fact that you shouldn't do that because they were union leaders?
>
> A. Not that I recall, no.

(Tr. 139)

While Herron claimed to have specific recall of some of what happened during the deliberations on April 21st, he did not actually contradict Morton's testimony that the board took Hoff's legal action against the employer into consideration:

> Q. [By Mr. Hanson] Mr. Herron, you've just heard Mr. Morton testify regarding deliberations in Executive Session per his testimony on April 21, 1995 on the issue of the chaperones being sent to Disneyland.
>
> Do you recall the deliberations in Executive Session on that issue?
>
> A. [By Mr. Herron] Yes, I do.
>
> Q. Were monetary considerations discussed in that Executive Session?
>
> A. Yes, they were.
>
> Q. What was your understanding of the monetary condition of the district at that time?
>
> A. That we were horribly in the red.

(Tr. p. 247-248)

Herron's recall of the April 21 meeting improved when he was recalled as a rebuttal witness, but Herron confirmed that some of Morton's testimony concerning the April 21 meeting could be correct:

> Q. [By Mr. Van Siclen] You remembered my question about whether you remembered the Disneyland incident before, and you said you really couldn't recall it. How come you recall it now?
>
> A. [By Mr. Herron] Mr. Morton refreshed my memory.
>
> Q. And then you will recall whether or not the financial situation was discussed in

Executive Session as opposed to the open meeting?

A. I believe that it was, yes.

Q. Well, are you sure?

A. I'm not positive, but I believe that it was.

Q. So it is possible that Mr. Morton is correct on that; is that correct?

A. It's possible.

(Tr. 248)

School board Chairman Emerson's recollection was initially better than Herron's, but latter became less certain:

Q. [By Mr. Van Siclen] Did you have any knowledge that he [Henderson] was asking for an apology, he would then drop the grievance, and he would come on as a coach? Did that ever come to your attention at all?

A. [By Mr. Emerson] No, it did not.

Q. Never?

A. No.

(Tr. 227)

...

Q Do you know whether -- I take it, with regard to this apology situation, you say you never knew that Mr. Henderson had said if you give me an apology I'll drop the grievance and become the coach?

A. I certainly don't recollect a communication to me of that nature.

Q. So, I take it then, that Mr. Herron did not communicate that to the Board?

A. Mr. Herron?

Q. Yes. This man over here.

A. As I indicated, I don't recollect that statement.

Q. Would it also be your position then that Mr. Morton didn't let you know that was something that would satisfy Mr. Henderson, the grievance would be done, they'd be off your back; all you had to do was to issue an apology, and you guys wouldn't do it?

A. I don't recollect, you know, hearing that myself.

(Tr. 229)

Henderson confirmed the timing of Morton's discussion regarding a contingency of dropping his grievance as a condition of being rehired as a full-time football coach:

A. [By Mr. Henderson] ... I was contacted by Mr. Morton.

Q. [By Mr. Van Siclen] Morton is Superintendent?

A. Yes.

Prior to that meeting [of July 26, 1994], and it was offered through him. He said that he was a spokesman for the Board and they've instructed him to ask me if I would be willing to drop my grievance if they offered me a full-time assistant job in football. ... I told Dick Morton that all he had to do was to tell them that they need to go back, and in a public session apologize to me for the way they handled it. And if there was a problem with me being three-fifths, or they needed to free-up that money for a five-fifths person, to offer it to me and chances are I'd probably just say, go ahead and hire a five-fifths person. Because when I started the job in the first place I did it on a volunteer basis. But the basic thing that I really wanted them to do was to

apologize for the way they treated me before, and I would drop my grievance at that point.

...

A. They offered me a five-fifths assistant coaching job.

Q. The Board did?

A. Yes.

Q. Or did Mr. Morton?

A. No, the Board did at the next meeting. But then the next motion after that was, when I didn't take that position, they were going to give it to Brian Wamsley.

Q. Why didn't you take the position?

A. Because I felt that I was being discriminated against, and to show the fact that they weren't discriminating, all they had to do was apologize to me.

...

A. Well, I told them that I would refuse to drop my grievance on the basis of discrimination at that point.

(Tr. 81-88)

The Examiner notes that Morton's testimony consistently was clearer and more consistent than the testimony of the employer's witnesses.

The employer gave Morton considerable control over relations with the union. Morton was the chief executive officer and chief labor relations spokesman of the employer at all times relevant to the adverse renewal or rehiring decisions made by the school board. The board designated Morton as its negotiator at its April 13, 1994 school meeting. Morton also represented the employer at the "step II" proceedings held on June 14, 1994, regarding the grievances concerning the coaching contracts of Hoff and Henderson, and he denied those grievances on June 21, 1994.

Counsel for the employer suggested a conflict between Morton's testimony about union animus on the part of school board members and his letter denying the grievances, particularly pointing to the following language in the letter:

> ... I failed to see from the information presented, any reasonable connection between your position President/Spokesman of the Morton Education Association and the Board's failure to re-offer you the head/assistant football coach position. I find that you have presented no factual basis to support the claim that you have been discriminated against as a result of your position as President/-Spokesman for the teachers union.

The letter must be taken for what it is, however. It clearly was the superintendent's "written decision, incorporating the reasons upon which the decision ... within five (5) days from the conclusion of the meeting" of June 14, 1994, held "to effect a resolution of the grievance."[21] On its face, it is a comment on the evidence presented by Henderson, Hoff, and the union, which does not equate with sworn testimony about all of the knowledge in his possession. Moreover, much of Morton's testimony implying union animus on the part of board members centers on events which took place after the June 14, 1994 grievance meeting.

While the school board placed Morton on administrative leave in June of 1995, any implication that Morton might be less-than-candid is weakened because: (1) The leave was with pay and caused Morton no financial loss, so it afforded him what many would view as a year-long paid vacation; (2) other employer witnesses testified of having no recollection of Morton's statements implying union animus by board members, rather than firmly denying the events and statements reported by Morton; (3) Morton's testimony is corrobo-

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[21] Exhibit 3, collective bargaining between the employer and the union, Article XXI, Section B(2).

rated by testimony of other witnesses; (4) the board had voted unanimously to appoint Morton as its negotiator on April 13, 1994, which implies close communication with the school board members and contradicts an inference of serious problems between Morton and the school board at the time most critical to these cases.[22]

The Examiner also finds Morton's testimony concerning union animus credible because of the demeanor of the witnesses and corroborating circumstantial evidence implying union animus, including: (1) Only the coaching contracts of the union co-presidents were non-renewed on May 23, 1994, when the school board approved hiring of 16 other coaches, including three football coaches; (2) only the union co-presidents were denied coaching contracts at the July 26, 1994 school board meeting, when all other coaches were hired; (3) only the motions concerning the union co-presidents were prefaced in the board minutes with mention of others who were prepared to take on the coaching duties, suggesting that the seeds of their rejection were planted even as they were being proposed; (4) after the motions to rehire Hoff as head football coach and head softball coach each failed, the employer immediately moved ahead with hiring the named alternates; (5) only the union co-presidents had their coaching contracts non-renewed, even though complaints were filed against at least three employees concerning extracurricular work; (5) both Hoff and Henderson were experienced coaches with long tenure at the Morton School District and some history of winning records; (6) both Hoff and Henderson had received the highest possible evaluations by their immediate supervisor on the coaching evaluation form; (7) the school board provided no satisfactory explanation for its claim that Hoff and Henderson had poor performance as coaches, where that claim contradicted the evalua-

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[22] The board reviewed Morton's performance in executive session on June 28, 1994, less than a month before the July 26, 1994 meeting when renewal of the football contracts and Hoff's softball contract failed for lack of a second. The action to put him on administrative leave did not occur until nearly a year later, on June 7, 1995.

tions made by the principal under the same criteria which (according to minutes of school board meetings) the board intended to use for hiring of coaches; (8) it was the school board that rejected Superintendent Morton's recommendation that the union co-presidents be hired as coaches; (9) the employer's announced reasons for refusing to renew the football coaching contracts of union co-presidents in May of 1994 differed from the reasons given in the step II grievance letter dated June 14, 1994; and (10) only the Knowledgebowl team coached by Hoff was denied funding for a trip for a state competition, while three other trips of seemingly no greater import were funded at the April 13, 1994 board meeting.

Reprisals for Filing Grievances and/or Charges -
The Examiner finds the minutes of the July 26, 1994 school board meeting particularly enlightening as to the existence of union animus against the union co-presidents, in particular Hoff, for filing grievances:

> ... Cliff Sandberg wanted to advise the board of his willingness to act as **"interim head football coach" during the period Kirk Hoff's grievances and related actions were being completed.**
> ...
> Judy Ramsey moved to hire Cliff Sandberg as **interim head football coach.** Mike Herron seconded. The motion passed.

[Emphasis by **bold** provided.]

The specific reference in the official minutes of the board meeting to Hoff's grievances and other related actions is compelling evidence against the employer's own interests.

After the board tacitly agreed with Superintendent Morton at one meeting about sending Hoff as a chaperone on the senior class trip to Disneyland, the board recanted at a subsequent meeting. Even if

board members received constituent complaints about paying for Hoff to make the Disneyland trip while he was processing an unfair labor practice complaint against the school district, it was unlawful under RCW 41.56.140(3) for the employer to take action based on such a basis. It is clear the employer broke with past practice by reducing the number of chaperones sent with the senior class.

The Collective Bargaining Agreement -

Both parties have argued extensively that their collective bargaining agreement supports their position(s) in this case. Those arguments are, for the most part, inapposite to this unfair labor practice proceeding. As noted above, the Public Employment Relations Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. City of Walla Walla, Decision 104 (PECB, 1976).[23]

The employer argues that, as the result of provisions of the collective bargaining agreement, the employer "reserved unto itself the right to determine which individuals will hold supplemental agreements". It cited the "individual employment contracts" provisions in Article III of the contract, the "grievance procedure" provisions in Article XXI which limits the jurisdiction of an arbitrator in the case of supplemental contracts, and the "management rights" language of ARTICLE XXV. The employer's argument is flawed for two fundamental reasons, however:

First, the collective bargaining agreement relied upon by the employer did not cover the coaching positions. The contract between the employer and the union was for a bargaining unit of

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[23] A collective bargaining agreement may, however, provide persuasive evidence of the practices the employer would normally follow in the absence of discrimination. Disparate application of a collective bargaining agreement may also be evidence of union animus.

certificated employees. While they acted in 1994 as if it covered the complainants in their coaching jobs, including the processing of the grievances filed by Hoff and Henderson, the Castle Rock decision came down early in 1995. By the time of the last of the events discussed herein, it was clear that coaches were excluded from the coverage of that contract.

Second, even if there had been a bargaining relationship and/or a collective bargaining agreement covering the coaching positions, an employer and union cannot agree in a contract to allow either party to discriminate against an employee for exercising rights guaranteed by Chapter 41.56 RCW.[24]

The Employer's Authority Under Title 28A RCW -

The employer relies on provisions of Title 28A RCW as the basis for its actions. RCW 28A.400.300(1) provides:

> Every board of directors, unless specifically provided by law, shall:
> (1) Employ for not more than one year, and for sufficient cause discharge all certificated and noncertificated employees;

The employer argues in its post-hearing brief, at page 31, that RCW 28A.405.240 provides that no supplemental contract shall be subject to the continuing contract provisions of Title 28A RCW. It follows, according to the employer, that school employees providing services under supplemental employment contracts have no property rights under those contracts.[25] The procedure for nonrenewal of

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[24] Both RCW 41.56.100 and RCW 41.59.100 grant public employers and unions to enter into limited union security agreements, generally making payment of union dues or representation fees a condition of employment.

[25] Chapter 28A.405 RCW covers employment practices relating to employees of the employer required to maintain educational certification as a condition of employment. It generally requires that additional work be covered by supplemental contracts that are not subject to the continuing contract provisions of Title 28A RCW.

individual contracts for certificated employees set forth in RCW 28A.405.210 does not, however, eradicate the collective bargaining statute. The Supreme Court of the State of Washington ruled, in Peninsula School District v. Public School Employees of Peninsula, 130 Wn.2d 401 (October 3, 1996), that a school district's authority to nonrenew individual employment contracts **may** be limited by a collective bargaining agreement, notwithstanding the prohibition in RCW 28A.400.300(1) against contracts in excess of one year. The court noted that working conditions, including job security provisions and "just cause" provisions restricting nonrenewal of non-certificated employees, are a mandatory subject of bargaining under Chapter 41.56 RCW. The Court noted:

> Under RCW 41.56.070, a collective bargaining agreement may remain in effect as long as three years. Therefore, the terms and conditions of employment in a collective bargaining agreement govern covered employees for as long as three years. The collective bargaining agreement is not a hiring agreement, nor does it create a contract of employment for any individual employee for any specific length of time. Thus, it does not conflict with RCW 28.400.300(1), which prohibits only employment contracts that exceed one year. While this statute prohibits multi-year employment contracts between a school district and individual employees, it does not limit the terms negotiated with respect to reemployment under RCW 41.56. ...
>
> We conclude that RCW 28A.400.300(1) does not preclude a provision in a collective bargaining agreement between a school district and its public employee' bargaining representative which restricts the district's nonrenewal authority.

Had the parties' collective bargaining agreement actually covered the coaches, Chapters 28A.400 and 28A.405 RCW would not have given the employer an unfettered right to non-renew the coaching contracts of Hoff and Henderson.

Chapter 41.56 RCW Prevails in Conflict of Laws -

Even if the Peninsula case had reached a different result about the year-to-year job security concerns of employees,[26] nothing in Chapter 28A.400 RCW or Chapter 28A.405 RCW specifically authorizes a school district to discriminate against employees for union activity. On the other hand, RCW 41.56.040, RCW 41.56.140(1) and RCW 41.56.140(3) clearly combine to prohibit such discrimination.

RCW 41.56.905 anticipates the possibility of conflicts between the Public Employees' Collective Bargaining Act and other statutes:

> The provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose. Except as provided in RCW 53.18.015, if any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of this chapter shall control.

RCW 41.56.905 was given an expansive reading in Rose v. Erickson, 106 Wn.2d 420 (1986), where the Supreme Court held that conflicts are to be resolved in favor of Chapter 41.56 RCW. If a nonrenewal is substantially motivated by union animus, neither Chapter 28A.400 RCW nor Chapter 28A.405 RCW would shield a school district from a finding that it committed an unfair labor practice under Chapter 41.56 RCW. See, Mansfield School District, Decision 5238-A (EDUC 1996); Seattle School District, supra.

Conclusions as to Hoff's Football Contract -

The Examiner finds that the employer was substantially motivated by union animus on the part of at least four members of the school board when it did not rehire Hoff as head football coach. While

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[26] The Supreme Court did not find it necessary to resort to the RCW 41.56.905 "supremacy clause" in Peninsula, supra. The Court found there was no conflict between Chapter 41.56 RCW and RCW 28A.400.300(a).

the employer claimed the nonrenewal of Hoff's football contract was because the community had lost respect for him as football coach, because of community complaints concerning the way Hoff treated football players, because Hoff "put down" a student who did not turn out for the football team, and because some players did not receive enough playing time, the testimony of Superintendent Morton and other evidence unquestionably establishes the union animus of the school board members.

Conclusions as to Henderson's Football Contract -
The Examiner also finds that the employer was substantially motivated by union animus on the part of at least a majority of its board members,[27] when it did not rehire Henderson as assistant football coach on the same terms as previously.

While the employer had earlier questioned whether Henderson was "committed" to the football program, that matter was resolved prior to July 26, 1994. The concerns had been based on Henderson not being at football practice two nights each week, and on Henderson being seen at a volleyball game near Spokane while the football team was playing a championship game elsewhere. The testimony of Herron and Emerson confirms that board members learned some time between May 23 and July 26, 1994, that Henderson was only contracted as a football coach on a three-fifths basis, and that he had been excused from attending the championship football game.[28] Emerson testified to his feeling about refusing to renew Henderson's three-fifth time 1993-1994 football contract:

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[27] Renewal of Henderson's football contract was initially tied to Hoff's contract. One board member made a motion to renew Henderson as assistant football coach on a three-fifths basis. Four of the five members of school board declined to second that motion.

[28] Henderson had been excused from the football game to attend to a family emergency in Spokane.

> Q [By Mr. Van Siclen] So this Board knew that this guy was committed, and nevertheless they nonrenewed him; isn't that right, Mr. Emerson?
>
> A [By Mr. Emerson] I think probably I would have to say, to the best of my recollection, that when all the facts came out about Mr. Henderson's three-fifths contract, his family emergency, and all those assorted things, that the Board recognized they made an error and corrected it by offering him a contract.
>
> ...
>
> Q Have we covered all the reasons why Henderson was not -- what you're saying is, Henderson was nonrenewed as a result of an error?
>
> A I think probably maybe a rush to judgment. Perhaps.
>
> Q Is that an error?
>
> A I can only speak for myself.
>
> Q Well, you heard Herron say that there were other reasons why. In other words, he said lack of commitment.
>
> A Well, I think that's why there are five members on a Board. Each one has their own individual feelings about a situation. My feeling is, it was a rush to judgment. There was an error, and the Board attempted to correct the error by offering him a contract.

(Tr. 225-226)

Similarly, Herron recalled an error in the board's information resulted in not offering Henderson a three-fifths time contract:

> Q [By Mr. Van Siclen] Do you think that it would be improper for Kirk Hoff [sic] to take a family leave day, shall we say? In other words, not attend the football game at the tournament because there was a

> death in his family. I mean, would that be a permissible reason to miss a game?
>
> A [By Mr. Herron] I believe so, yes.
>
> ...
>
> A I believe it was a little misinformation on the Board's part.
>
> Q I'm sorry; you believe it was...
>
> A A little misinformation on the Board's part.

(Tr. 172-173)

At an executive session of the board some time between May 23 and July 26, 1994, Henderson was told that the reason for nonrenewal was his failure to ride to games on the bus with the team. Henderson explained that he would ride the bus, if desired. This should no longer have been of concern as of July 26, 1994. Thus, all that persisted of the "commitment" claim when the board denied Henderson a three-fifths football contract was a belief that some constituents might perceive a lack of commitment on Henderson's part if he did not want to work as a full-time assistant football coach. Even then, board members testified that they had put their constituents' on notice that there was no lack of commitment on Henderson's part. The Examiner thus finds the employer's articulated reason for not rehiring Henderson as a three-fifths time football coach for the 1994-1995 school year were pretextual. The record clearly shows that when the motion failed for lack of a second on July 26, 1994, board members had already corrected the misinformation leading to their earlier conclusion that Henderson was not sufficiently committed to the football program.

There is ample evidence to conclude that Henderson's three-fifths football contract was tied to Hoff's contract as head football coach, and that Henderson was swept out of the football program as part of the discrimination against Hoff. Henderson gave unrebutted

testimony concerning his recollection of a conversation with Herron after the board meeting held on May 23, 1994, as follows:

> [Herron] basically stated to me that I was being hooked on -- Kirk and I were being hooked on each other's coat tails, I believe, was the wording he said at the time to me. I asked him if there was problems with me as a coach, and he said there wasn't. ...

(Tr. 80)

As had occurred on May 23, 1994, their football coaching contracts were taken together on July 26, 1994. Having found that the employer acted unlawfully regarding Hoff, the Examiner necessarily reaches a similar conclusion as to the effects of the same motion on Henderson.

Immediately after the motion to renew Henderson's three-fifths football contract failed, the board adopted a motion to offer Henderson a somewhat different football coaching position. Herron testified as follows:

> Q [By Mr. Van Siclen] Did you attempt to correct [the misinformation on the board's part]?
>
> A [By Mr. Herron] Yes, I did.
>
> Q Did it make any difference?
>
> A I'm not sure what you mean.
>
> Q In other words, did the Board continue to nonrenew him because of the fact that he is, as you refer to it, I don't know -- to use your exact words, he was not committed enough to the program because he was not at that program -- at that particular game?
>
> A We offered him a contract.

(Tr. 172-173)

The offer of the full-time football coaching contract is held out by the employer as evidence of the board's desire to respond to constituent perceptions that Henderson was missing practices and games that he was required to attend. This seems unlikely, however, because of Emerson's testimony that board members were able to (and did) explain at board meetings that Henderson's absences were permissible. Morton's testimony about the conversations which preceded the offer of a full coaching position to Henderson is compelling evidence of an unlawful motivation.

An additional reason for finding the offer of a "five-fifths" football contract on July 26, 1994, was unlawful is that it was conditioned on Henderson dropping his grievance against the employer. As noted above, Henderson's testimony in that regard was buttressed by Superintendent Morton.

Henderson's Baseball Contract -

The record supports the employer's claim that Henderson resigned as baseball coach before the 1994 baseball season, and that he was not a "continuing" baseball coach as of July 26, 1994.[29] Another person was hired as assistant baseball coach shortly before the 1994 baseball season began, and all of the 1994 baseball coaches were continued for the 1995 season. The employer's action to rehire the returning baseball coaches for the 1995 season was in conformity with past practice and the interpretation of collective bargaining agreement which is favored by the complainants in this proceeding (i.e., that the contract required offering returning coaches similar coaching contracts for the following school year, unless all procedures in the collective bargaining agreement for non-renewal were fulfilled). Under these circumstances, the Examiner finds no fault with the employer's actions.

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[29] The record suggests Henderson notified the administration in November of 1993 that he was not intending to coach baseball in the 1994 season.

An assistant baseball coach quit during the 1995 season, but the employer did not hire Henderson as a mid-season replacement. The employer explained that it did not hire anyone as a replacement, because participation in the baseball program was less than expected and two volunteer coaches had joined the baseball program after the beginning of the 1995 season. The reasons given by the employer were not disputed by Henderson. The Examiner finds no basis to conclude that the employer's articulated reasons are pretextual.

Henderson has not sustained his burden of proof with respect to his claim that the refusal to hire him as assistant baseball coach for the 1995 season was substantially motivated by union animus. While there is evidence of union animus in this case as a whole, the weight of that evidence dissipates slowly as claimed incidents move away from the board meeting of July 26, 1994. Evidence of union animus may also be more compelling as to one employee than to another, and the relative weight of the entire record may also balance differently as to one employer action than to another involving the same employee. In this case, several events intervened between the proven discrimination against Henderson in regard to the football contract and the failure to hire him as assistant baseball coach mid-season in 1995 baseball season:

1. Henderson was renewed as basketball coach for the 1994-1995 season, even though Hoff was not renewed for any 1994-1995 coaching job;

2. The school board conformed to the complainant's interpretation of the collective bargaining agreement when it renewed the continuing baseball coaches for the 1995 baseball season;

3. It is not disputed that the turnout for baseball declined in 1995, and that volunteer coaches had joined the program;

4. Nearly a year passed without further intervening incidents of discrimination against Henderson; and

5. Henderson's basketball coaching contract appeared in no jeopardy for the 1995-1996 basketball season.

In reviewing the record, the Examiner concludes that the decision not to hire Hoff as a baseball coach for the 1995 baseball season was not substantially motivated by union animus.

Remedy

The standard remedy for a "discrimination" violation is an offer of reinstatement coupled with back pay to make discriminatees whole for their loss of pay and benefits from the effective date of the discrimination up to the effective date of the unconditional offer of reinstatement. WAC 391-45-410.

The order for reinstatement in this case is based upon an inference that there have been no substantial changes affecting the coaching positions. While there is no basis for any claim of rights regarding coaching positions under the collective bargaining agreement after April 26, 1995, when the union and employer agreed that all 19 coaching classifications listed in Appendix B of their contract did not require educator certification and thus fell out of the certificated bargaining unit,[30] analysis cannot end there. The emergency rule left open the possibility of changes affecting the excluded employees, after imposing a limitation on changes during a transition period, but the record before the Examiner does not establish that the employer actually implemented any changes of the year-to-year hiring/renewal arrangements for coaches.[31] The Examiner takes administrative notice of Commission's docket records for Case 12297-E-96-2047, a representation proceeding in which the Morton Education Association was certified as exclusive bargaining representative of the employer's extracurricular activities staff.

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[30] The form and language of the notice was prescribed by the Commission's emergency rule, WAC 391-45-560.

[31] Testimony about a change of criteria for evaluation of coaches was countered by employer-provided evidence that it was continuing to use the same evaluation criteria that had been used during the prior season.

The certification was issued on April 4, 1996. Bargaining in that new relationship would have commenced from the status quo in existence when that petition was filed on January 29, 1996.

Employees are normally expected to attempt to mitigate their wage losses by seeking and accepting other employment while an unfair labor practice complaint is pending, and an employee who refrained from seeking interim employment was denied a back pay remedy in Town of Fircrest, Decision 248-A (PECB, 1977). That principle is inapposite, however, to the "five-fifths" football coaching contract offered to Henderson. As noted above, that offer was based on unlawful union animus considerations, and was unlawfully conditioned upon Henderson withdrawing his grievance. Even if Morton's communication of such a condition to Henderson was the result of some miscommunication between Morton and the school board,[32] Henderson had no reason to doubt that Morton was speaking on behalf of the employer. Even if Henderson would have accepted the offer if he had believed it was unconditional, the employer is bound by the foreseeable consequence of Morton's communication of the condition to Henderson. As a result, Henderson had no obligation to mitigate his wage loss by accepting the five-fifths coaching offer.[33]

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[32] After refusing to second a motion to rehire Henderson as a three-fifths football coach on July 26, 1994, the board voted to hire him as a five-fifths football coach. Superintendent Morton advised Henderson that was contingent on withdrawal of his grievance. Board members who testified could not recall making the five-fifths coaching offer to Henderson conditional on withdrawal of his grievance, and the minutes of the July 26, 1994 school board meeting do not indicate the motion regarding the offer was conditional.

[33] A three-fifths coaching position may very well have been more acceptable to Henderson in any case. He was originally a volunteer coach, until the school board negotiated a three-fifths coaching agreement so that he would be at certain practice and games. His other interests and activities may have made a five-fifths coaching position during football season unacceptable.

These complainants are also entitled to remedies tailored to the peculiarities of this case. The jobs at issue are for particular sports, and occur at particular seasons, apart from their full-time jobs as teachers. It is thus necessary to adapt the quarterly computation described in WAC 391-45-410, to limit offsets to employment which was obtained, on a season-by-season basis, as replacement for the coaching contracts at issue here. Thus, the only offsets would be as follows:

If Hoff worked as a football coach elsewhere during the 1994, 1995 or 1996 seasons, his earnings from such activities will properly be offset from his back pay remedy under this decision;

If Hoff worked as a softball coach elsewhere during the 1995 or 1996 seasons, his earnings from such activities will properly be offset from his back pay under this decision; and

If Henderson worked as a football coach elsewhere during the 1994, 1995 or 1996 seasons, his earnings will properly be offset from his back pay under this decision.

- - -

NOW, THEREFORE, Based on the entire record, observation of the demeanor of the witnesses, contradictions in the testimony, and careful consideration of the briefs filed by the parties, the Examiner makes the following:

FINDINGS OF FACT

1. The Morton School District (employer), a "public employer" within the meaning of RCW 41.56 030(1) and an "employer" within the meaning of RCW 41.59.020(5), is governed by an elected school board. Four new school board members elected in November of 1993 took office in December of 1993. Richard Morton was superintendent of schools at all times relevant to these proceedings.

2. The Morton Education Association (union), a "bargaining representative" within the meaning of RCW 41.56.030(3) and an "employee organization" within the meaning of RCW 41.59.020(1), is the exclusive bargaining representative of the all non-supervisory certified employees of the Morton School District.

3. Kirk Hoff was employed by the Morton School District as a certificated teacher from an unspecified date prior to 1990 until the beginning of the 1995-1996 school year.

4. Jay Henderson has been employed by the Morton School District as a certificated teacher for approximately ten years.

5. Hoff and Henderson served as co-presidents of the union from 1990 through the 1993-1994 school year. They represented the union and its members before the school board and administration, as well as at political meetings during the campaign prior to the election of school board members in 1993. Their union leadership and activities were known to Superintendent Morton and school board members.

6. The union and employer signed a collective bargaining agreement on September 10, 1993, covering a six-year term. That contract was signed during the campaign for the election of school board members in 1993, after the closing date for filing had passed. The overall intent of the union and the incumbent school board members was to protect employees, to the extent possible, from detrimental actions by the new school board members to be elected in 1993.

7. When they signed their six-year collective bargaining agreement, the union and employer believed that it controlled the wages, hours and working conditions of employees contracted as coaches for extracurricular activities. Individuals hired by the employer as coaches for interscholastic athletics are paid

substantial compensation for their work in those positions. Appendix B to the collective bargaining agreement specified pay of up to $2946 for the head football coach, up to $2196 for the head softball coach, up to $2089 for an assistant football coach, and up to $1875 for an assistant baseball coach. Extracurricular coaches were not required, as a condition of employment, to hold certification as educators. The provisions of the continuing contract law applicable to certificated positions were not applied to coaches but, under past practice and the terms of the collective bargaining agreement, the contracts of individuals who held coaching positions in one year were generally renewed for the next year by June 1. A process of progressive discipline was prescribed, discipline was to be for sufficient cause, employees were afforded a first right of refusal in regard to coaching positions, and a ten-day written notice was called for in the event employees were passed over in favor of non-employees.

8. During the 1993-1994 school year, Hoff was employed under a supplemental contract as head football coach at Morton High School and was also employed under a supplemental contract as head softball coach at Morton High School. An evaluation of his coaching by his immediate supervisor gave Hoff the highest rating possible in all categories.

9. During the 1993-1994 school year, Henderson was employed under a supplemental contract as an assistant football coach at Morton High School, on a three-fifths basis. Henderson's association with the football program had begun on a volunteer basis, and there is no evidence of his having sought a full position as assistant football coach. The employer subsequently offered him a contract on a three-fifths basis for that activity. An evaluation of his coaching by his immediate supervisor gave Henderson the highest rating possible in all categories.

10. Henderson had been employed as a baseball coach at Morton High School during the 1992-1993 school year. For reasons which are not at issue in this proceeding, he no longer held that position in the 1993-1994 school year.

11. In statements made subsequent to taking office, members elected to the employer's school board in 1993 expressed dissatisfaction with the collective bargaining agreement, and with the restrictions imposed upon the employer by the union and the collective bargaining agreement. In conversations on or before July 26, 1994, members of the employer's school board and Superintendent Morton discussed taking steps to "get the union off the back" of the school board, or words to that effect. Particular animus was directed at Hoff and Henderson in their capacities as co-presidents of the union.

12. At a meeting of the employer's school board on May 23, 1994, the employer deviated from the ususal format of motions for renewal of coaching contract, by taking the football contracts of Hoff and Henderson together as part of the same motion. That motion failed for lack of a second.

13. On June 6, 1994, Hoff and Henderson initiated grievances under the collective bargaining agreement between the employer and union, protesting the failure to renew their football coaching contracts.

14. At unspecified times, members of the employer's school board received concerns from patrons about Henderson's commitment to the football program. Upon investigation, it was learned that concerns about Henderson being absent from football practices related to days when he was not obligated to be present under the "three-fifths" terms of his coaching contract. Upon investigation, it was learned that concerns about Henderson being seen at a girls' volleyball game at a time when the

football team was playing a game related to a date when Henderson had been excused for good cause from attending the football game. In a conversation held prior to July 26, 1994, Henderson responded to concerns about his not riding the bus to games with the team, by agreeing to ride the bus in the future. These responses were communicated by board members to patrons prior to July 26, 1994, with indication that the board saw no lack of commitment on Henderson's part.

15. In a conversation which occurred prior to July 26, 1994, Superintendent Morton informed Henderson that an impending offer of a football coaching position to him was conditioned upon his dropping his grievance.

16. At a meeting of the employer's school board held on July 26, 1994, the employer again deviated from the ususal format of motions for renewal of coaching contracts, by taking the football contracts of Hoff and Henderson together as part of the same motion. That motion failed for lack of a second. A motion to offer Henderson a contract as assistant football coach on a "five-fifths" basis deviated from the usual format of motions for renewal of coaching contracts, by identifying another employee who was to be offered the position if it was declined by Henderson. That motion was adopted. A motion to renew Hoff's contract as head softball coach deviated from the usual format of motions for renewal of coaching contracts, by taking the contracts of Hoff and an assistant softball coach as part of the same motion. That motion failed for lack of a second. The board then adopted a motion to offer a contract as head softball coach to the individual who had earlier been proposed as assistant softball coach. The board adopted a motion to renew the contract of the individual who had served as head baseball coach in the 1993-1994 school year.

17. The employer's articulated reasons for refusing to renew Hoff's contract as head football coach were that school board members had received unwritten complaints from parents and students such as: That Hoff did not allow some players enough playing time; that Hoff removed one student from the team for missing practice; and that Hoff had poor interaction with student athletes. Hoff asked for particulars of the parent and student complaints, but received no specifics concerning the source of the complaints. Animosity existed between Hoff and board member Herron, who refused to give Hoff the names of those who had complained about Hoff. Herron's own sons complained that Hoff was discriminating against them because Herron was a school board member. Hoff testified that he responded to the issues that were communicated to him, that those matters were resolved with his superiors, and that those resolutions were known to the board prior to the nonrenewal of his coaching contracts.

18. The employer failed to articulate any legitimate reasons for its refusal to renew Hoff's softball coaching contract.

19. The employer's articulated reasons for refusing to renew Henderson's contract as assistant football coach on a three-fifths basis were that school board members had received unwritten concerns from parents and students about Henderson's commitment to the football program. Those concerns related to the issues concerning attendance at practices, attendance at a football game and riding on the team bus, as described above.

20. The employer's articulated reasons for refusing to hire Henderson as an assistant baseball coach were that the positions were given to the employees who held those jobs in the previous year, that a decline in enrollment in the baseball program reduced the need to fill a position vacated

at mid-season, and that the addition of two volunteer coaches to the program reduced the need to fill a position vacated at mid-season.

21. During the 1994-1995 school year, the employer demonstrated its ongoing animus against Hoff's union activity by denying him funding for a trip with the senior class which included his child, contrary to past practice of paying the expenses of a teacher/chaperone who had a child in the graduating class, because Hoff had litigation including these unfair labor practice charges pending against the employer.

22. The refusal of the employer, on July 26, 1994, to renew Kirk Hoff's contract as head football coach was substantially motivated by union animus.

23. The refusal of the employer, on July 26, 1994, to renew Kirk Hoff's head softball coaching contract was substantially motivated by union animus.

24. The reasons articulated by the employer for its refusal, on July 26, 1994, to renew Jay Henderson's contract as assistant football coach on a three-fifths basis were pretexts designed to conceal the true nature of the employer's actions, which are found to have been substantially motivated by animus toward Jay Henderson's union activity and leadership.

25. The refusal of the employer, on and after July 26, 1994, to hire Jay Henderson as assistant baseball coach were not pretextual or substantially motivated by union animus.

CONCLUSIONS OF LAW

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

2. In their capacity as coaches, Hoff and Henderson were "public employees" covered by Chapter 41.56 RCW.

3. The Morton School District was not obligated to recognize or bargain with the Morton Education Association as exclusive collective bargaining agent for coaches under Chapter 41.59 RCW, and the complaints charging unfair labor practice filed in these matters fail to state a cause of action to the extent that they allege unilateral changes and/or violations of the collective bargaining agreement negotiated and signed by the employer and union under Chapter 41.59 RCW.

4. The Morton School District interfered with, restrained, coerced and discriminated against Kirk Hoff, and has committed unfair labor practices in violation of RCW 41.56.140(1), by considering the union activities of Kirk Hoff as a substantial factor motivating its refusal, on July 26, 1994, to renew Hoff's contract as head football coach.

5. The Morton School District interfered with, restrained, coerced and discriminated against Kirk Hoff, and has committed unfair labor practices in violation of RCW 41.56.140(1), by considering the union activities of Kirk Hoff as a substantial factor motivating its refusal, on July 26, 1994, to renew Hoff's contract as head softball coach.

6. The Morton School District interfered with, restrained, coerced and discriminated against Jay Henderson, and has committed unfair labor practices in violation of RCW 41.56.140(1), by considering the union activities of Kirk Hoff and/or Jay Henderson as a substantial factor motivating its refusal, on July 24, 1994, to renew Henderson's contract as assistant football coach on a three-fifths basis.

7. The Morton School District interfered with, restrained, coerced and discriminated against Jay Henderson, and has committed unfair labor practices in violation of RCW 41.56.140(1), by considering the union activities of Kirk Hoff and/or Jay Henderson as a substantial factor motivating its offer, on July 24, 1994, to hire Henderson as assistant football coach on a five-fifths basis where that offer was designed to obtain Henderson's rejection of the offer.

8. The Morton School District has not violated RCW 41.56.140 with regard to its actions on the application of Jay Henderson for a position as assistant baseball coach.

ORDER

The Morton School District, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Discriminating against Jay Henderson, Kirk Hoff or any employee, former employee or applicant for employment with the Morton School District, in reprisal for lawful union activities.

   b. In any other manner, interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Offer Kirk Hoff immediate and full reinstatement as head football coach, and make him whole by payment of back pay, for the amounts he would have earned or received as football coach for the 1994, 1995, and 1996 seasons. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410, except that offset for other earnings shall be limited to earnings as a football coach.

b. Offer Kirk Hoff immediate and full reinstatement as head softball coach, and make him whole by payment of back pay, for the amounts he would have earned or received as softball coach for the 1995 and 1996 seasons. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410, except that offset for other earnings shall be limited to earnings as a softball coach.

c. Offer Jay Henderson immediate and full reinstatement as assistant football coach on a three-fifths basis, and make him whole by payment of back pay, for the amounts he would have earned or received for the 1994, 1995, and 1996 seasons. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410, except that offset for other earnings shall be limited to earnings as a football coach.

d. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notices attached hereto and marked "Appendix A". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

e. Append a copy of this decision to the minutes of the first regular school board meeting held following the posting of the notice required by the preceding paragraph of this order.

f. Notify Kirk Hoff and Jay Henderson, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainants with signed copies of the notice required by the preceding paragraph of this order.

g. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

ISSUED at Olympia, Washington, this 7th day of March, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

PAUL T. SCHWENDIMAN, Examiner

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL offer Kirk Hoff immediate reinstatement as head football coach for the 1997 football season, and will make him whole by payment of back pay in the amount of the salary for the head football coach position for the 1994, 1995, and 1996 football seasons with interest provided by WAC 391-45-410, but with offset for only substitute earnings as a football coach.

WE WILL offer Kirk Hoff immediate reinstatement as head softball coach for the 1997 softball season, and will make him whole by payment of back pay in the amount of the salary for the head softball coach position for the 1995 and 1996 softball seasons with interest provided by WAC 391-45-410, but with offset for only substitute earnings as a softball coach.

WE WILL offer Jay Henderson immediate reinstatement as assistant football coach on a three-fifths basis for the 1997 football season, and will make him whole by payment of back pay in the amount of the salary for an assistant football coach position for the 1994, 1995, and 1996 football seasons with interest provided by WAC 391-45-410, but with offset for only substitute earnings as a football coach.

WE WILL NOT interfere with, restrain or coerce Kirk Hoff, Jay Henderson or any other employees in the exercise of their rights under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW or the Educational Employment Relations Act, Chapter 41.59 RCW.

DATED:_____

MORTON 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) 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, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.