STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, LOCAL 275, Complainant, vs. ABERDEEN SCHOOL DISTRICT, Respondent.	)	CASE 13386-U-97-3266 DECISION 6434 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

David Kanigel, Attorney at Law, appeared on behalf of the union.

David Edwards, Attorney at Law, appeared on behalf of the employer.

On September 5, 1997, Washington State Council of County and City Employees, Local 275 (union), filed an unfair labor practice complaint alleging that the Aberdeen School District (employer) had violated RCW 41.56.140(1) and (3), by its discharge of Richard Hickerson on March 7, 1997. A hearing was held at Aberdeen, Washington, on June 15, 1998, before Examiner Vincent M. Helm. The parties filed post-hearing briefs.

BACKGROUND

Early Employment History of Alleged Discriminatee

Richard Hickerson began working for the employer as a custodian, in June, 1979. He started in a nine-month position at an elementary

school, and moved to a 12-month position on July 7, 1980. In 1984, at his request, Hickerson was transferred to a nine-month position at a high school. In 1988, again at his request, Hickerson was transferred to a 12-month position in a junior high school.

Hickerson's employment was terminated on January 24, 1994. He was subsequently reinstated to his position with back pay, pursuant to an arbitration award.

Other than his actions leading to the overturned discharge and two reprimands in 1991 for leaving work early, the employer had no major complaints about Hickerson's work performance. Indeed, his evaluations by principals of the schools in which he worked, throughout his period of employment were consistently satisfactory.

Union Activity of Alleged Discriminatee

Hickerson became a union steward in the mid-1980's. For all but one year of the period from 1986 or 1987 until his discharge in 1994, Hickerson functioned as union's chapter chair for the maintenance and operations unit. Upon being reinstated following the arbitration award,[1] Hickerson again became chapter chair and served in that position until 1997. As chapter chair, he was a chief steward, participated in contract negotiations, processed grievances, and acted as the union's representative to the local central labor council.

The union called five witnesses in addition to Hickerson, including fellow employees, local union officials and a teacher. It elicited

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[1] The Arbitrator's decision did not indicate that Hickerson's union activity was a factor in his discharge.

testimony from all six of its witnesses about Hickerson's union activity.[2] The anecdotal evidence supplied by those who testified showed that Hickerson was extremely vocal, even confrontational, in advancing the union's position on various matters. Hickerson was depicted as being at odds with his supervisors, including the maintenance superintendent and principals at the various schools in which he worked, over work assignments, safety issues, and other matters. Hickerson testified that, as a union member of the safety committee, he had questioned an accident claim of the employer's superintendent, Karen Koschak.

Hickerson was also very visible in the community, through appearances before the school board and comments in the newspaper. In particular, he opposed various school tax levies, because the employer refused to commit to contract only with local unionized employers for goods and services, and he questioned the propriety of the salaries paid to various school district administrators.

The 1997 Discharge At Issue In This Proceeding

Hickerson's employment was terminated in March, 1997, for falsification of an employment application.

The Employment Application -

Hickerson was required to complete an employment application in connection with a transfer request in 1988. The application form contained a question as to whether the applicant had been convicted of a crime in a court of law in the past seven years. The application noted that conviction per se would not necessarily

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[2] In addition, a deposition of a union staff representative was stipulated into the record.

disqualify the applicant for employment. Just above the space for the applicant's signature there was a printed notation to the effect that the applicant guarantees the correctness of statements contained in the application, and an acknowledgement that the making of any false statement would be cause for dismissal.

Hickerson submitted a signed application under date of March 9, 1998. While Hickerson now admits that he had twice been convicted of misdemeanor offenses (one each for possession of marijuana and alcohol) in 1985, he did not include that information in the application he filed in 1988.

Detection of the Falsification -
RCW 28A.400.304, enacted in 1996, required all school districts to have a criminal record check made of all employees who have "... regularly scheduled unsupervised access to children and were hired before June 11, 1992 ..." The statute required the obtaining of fingerprints of all such employees, and their submittal to the Washington State Patrol.

In late 1996, Superintendent Koschak received notification of Hickerson's criminal record. Upon receipt of this information, Koschak reviewed the two job applications submitted by Hickerson, and interviewed him. She verified that he had completed the 1988 job application, and had not responded truthfully to the question about criminal convictions.

Employer Actions After Falsification Detected -
Subsequent to her interview with Hickerson, Koschak recommended to the employer's board that Hickerson's employment be terminated because of the falsification of his 1988 job application.

The board approved Hickerson's discharge at a meeting held on March 4, 1997. Discussion by the board relative to the matter was conducted in an executive session, and no testimony was furnished as to what transpired. Koschak testified that she heard no discussion by board members of Hickerson's union activity.

Treatment of Others Similarly Situated

Over 500 of the employer's employees had their criminal records reviewed pursuant to RCW 28A.400.340. According to Koschak, Hickerson was the only full-time employee for which comparison of the results of the criminal record check against the employer's files established that there had been a falsification of the employment application relative to criminal convictions. Among the employer's part-time employees, three substitute teachers and two seasonally-employed coaches were discharged for the same offense.

Hickerson testified that three other employees had falsified their employment applications with respect to criminal convictions. His testimony was hearsay and, in some cases, hearsay upon hearsay. No direct probative evidence was submitted to substantiate Hickerson's claim in this regard.

POSITIONS OF THE PARTIES

The union contends that Hickerson was the most visible and aggressive local union official employed by this employer, and that his numerous grievance filings, acrimonious bargaining tactics, and public criticism of the employer made him a prime target for discrimination. The union now argues the discharge of Hickerson in 1994 was motivated by union animus. The lack of progressive

discipline or of any attempt to rehabilitate Hickerson was also cited as evidence of the employer's discriminatory motivation. Hickerson's extensive (and generally satisfactory) employment history, his union activities, and the prior unsuccessful effort to terminate his employment furnish, in the union's judgment, a basis for a finding that the reason advanced by the employer for the 1997 discharge was pretextual, or that the discharge was motivated in substantial part as retaliation for Hickerson's exercise of rights protected by Chapter 41.56 RCW.

The employer contends that, while Hickerson was a leading local union advocate, his discharge was solely for his admitted falsification of his employment application. It maintains that Hickerson's actions warranted discharge, and that he was treated in exactly the same manner as all similarly-situated employees. Moreover, the employer notes that the individual who made the recommendation to terminate Hickerson's employment was unaware at the time of his past union involvement and that no evidence was introduced to indicate that the school board predicated its decision in any manner upon hostility toward Hickerson because of his union activities.

DISCUSSION

The Applicable Legal Standard

In Educational Service District 114, Decision 4361-A (PECB, 1994), the Commission enunciated a policy change with respect to discriminatory discharge cases. That policy shift was precipitated by two decisions of the Supreme Court of the State of Washington on discrimination claims arising under other statutes. Wilmot v.

Kaiser Aluminum, 118 Wn.2d 46 (1991) involved an allegation that an employee was discharged in retaliation for filing a worker's compensation claim, in violation of RCW 51.48.025(1); Allison v Seattle Housing Authority, 118 Wn2d 79 (1991) involved an allegation that an employee was discharged in retaliation for filing a discrimination complaint, in violation of RCW 49.60.210.

In Wilmot and Allison, the Supreme Court adopted a "substantial factor" test to be applied in both pretext and mixed motive cases. In Wilmot, the Supreme Court held the complainant need not prove the employer's sole motive was unlawful retaliation or discrimination, but merely that it was a factor in the employer's decision. While a burden of production shifts to the employer, to produce legitimate, non-discriminatory reasons for its actions, the burden of proof remains upon the complainant to show that either:

- The employer's asserted basis for the disputed action is pretextual, or
- The complainant's activity protected by statute, was nevertheless a substantial factor motivating the employer's action.

In Allison, the Supreme Court overruled further reliance upon the burden-shifting approach which had been used by numerous courts, by the National Labor Relations Board and by the Commission after Mt. Healthy City School District Board of Education v. Doyle, 429 US 274 (1977). Under the Mt. Healthy approach, a "but for" standard was used in "mixed motives" cases, under which the burden of proof was shifted to the employer to prove it would have made the same decision regardless of any protected activity by the affected employee.

In Allison, the Supreme Court further noted that its adoption of the "substantial factor" test was an "intermediate standard" to balance competing public policy considerations.[3] On the one hand, employees should not be able to shield themselves from discharge by spurious claims of employer discrimination; on the other hand, employers should not be encouraged to fabricate reasons for discharge where employees have brought discrimination claims.

Because of the similarity of the Washington statutes applied by the Supreme Court in Wilmot and Allison to those administered by the Commission, the Commission embraced the "substantial factor" test in Educational Service District 114, supra. More recently, the Commission has set forth the analytical steps in the following manner:

> A complainant has the burden to establish a prima facie case of discrimination, including that:
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> (1) the employee has participated in protected activity or communicated to the employer an intent to do so;
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> (2) the employee has been deprived of some ascertainable right, benefit or status; and
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> (3) there is a causal connection between those events.

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[3] In "pretext" cases, the NLRB and federal courts require the complainant to establish a prima facie case of discrimination, after which the burden of producing evidence of a legitimate motive falls upon the employer, but the burden of persuasion remain upon the complainant at all times with the obligation of establishing intentional discrimination. In such cases the complainant is obligated to show that a discriminatory reason was "more likely" a motivating factor or that the employer's asserted reason was not credible. McDonnell Douglas Corp v. Green 411 US 792 (1973); Texas Department of Community Affairs v. Burdine 450 US 248 (1981).

> If that burden is met, the employer has the opportunity to articulate legitimate, non-retaliatory reasons for its actions.
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> The burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing that:
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> (1) the reasons given by the employer were pretextual; or
>
> (2) union animus was nevertheless a substantial motivating factor behind the employer's action.

Oroville School District, Decision 6209-A (PECB, 1998).

The Commission has noted that illegal motivation may be established by circumstantial evidence, since it is the rare employer who will publicly state a discriminatory motive. For the Examiner hearing and deciding the case, however, the current standard can require a measure of clairvoyance rarely exhibited by mere mortals. In all honesty, how is one to determine whether a reason is pretextual, unless the asserted conduct never occurred or was never a basis for discipline of similarly-situated employees? If the "pretext" analysis is resolved in the employer's favor, an even more difficult problem is presented with respect to determining whether employer antipathy for the employee's protected activity was a substantial factor in the employer's decision. Absent the most gratuitously reprehensible employer conduct, how does the trier of fact quantify the unstated motivations of the employer? By what standards is the conduct to be measured: That of a reasonable and prudent labor representative; that of a reasonable and prudent management representative; that of the trier of fact; or that of an appellate body? Except in the most egregious cases, such a determination is difficult in the extreme.

Application Of The Standard

Prima Facie Case - Protected Activity -

There can be no doubt that Richard Hickerson was once a highly energized advocate of the union position. As union steward, chapter chair and central labor council representative, he was described by fellow employees (some of whom are local union officials) and an international staff representative as a leader in espousing the union's position vis-a-vis grievances, contract negotiations, safety issues and political concerns. Hickerson's approach was described by all as being confrontational, although short of hostile. His filing and vigorous pursuit of many grievances concerning work assignments, environmental concerns, and other matters brought him into direct conflict with his maintenance supervisor, as well as principals of various schools. In contract negotiations, he engaged in heated discussions with employer representatives. He was quoted in the local newspaper on various occasions as opposing excessive salaries for school administrators, the hiring of unqualified supervisors and school bond levies. He also espoused such positions to the school board in public meetings. Knowledge of Hickerson's past union activity, can be imputed to the employer under principles of agency, even following personnel changes at the administrative and board levels of the employer.

Hickerson was reinstated by an arbitrator after his discharge in 1994. His filing and processing of that grievance was clearly a protected activity under Chapter 41.56 RCW. See, Valley General Hospital, Decision 1195-A (PECB, 1979).

Prima Facie Case - Deprivation of Ascertainable Right -
Hickerson was deprived of his job in 1997, after serving as a custodian at various schools for approximately 18 years. Although he was twice reprimanded in 1991, his performance evaluations signed by the principals of the schools to which he was assigned were generally satisfactory. His reinstatement by the arbitrator in 1994 precludes any negative opinion of him for that incident. Thus, the evidence does not support an inference that his employment was doomed before the events giving rise to this case.

Prima Facie Case - Causal Connection -
The union's approach would be to presume a connection between Hickerson's union activity and his discharge, just because he was a union activist. In cases where there is a definitive cause-and-effect relationship, a simplistic application of the test has much to recommend it. In Wilmot and Allison, the discharges quickly followed the filing of a statutory claim or vindication of a statutory right, so one could scarcely argue against presuming a connection. On the other hand, the mechanical making of such a presumption any time action is taken against a long-time employee and/or union activist would clothe such persons in a protective mantle not contemplated by the statute or the Supreme Court, and which is not enjoyed by fellow employees.[4]

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[4] Under a too-liberal application of the current standard, employers would need to be prepared to defend themselves in administrative proceedings each and every time they take adverse action against an employee who has been a union representative or who has zealously pursued collective bargaining rights. Once such a complaint is filed, the employer inevitably will have to defend its actions before the Commission and perhaps the courts. The potential time and expense of a defense against such a charge can, in no small measure, give an employer cause to withhold action against such an employee where it

In this case, the specific instances of confrontations between Hickerson and the employer appear to relate primarily to the time period from about 1985 through about 1990 or 1991. As to the period since 1991, the testimony related to witnesses' beliefs that Hickerson was called to account for real or imagined deficiencies, where others similarly situated were not, but did not highlight major disputes with employer representatives or any public disputes with the employer. Indeed, Hickerson supported a school tax levy in a letter published in the local newspaper in 1996.

The employer personnel and financial representatives who were depicted as Hickerson's adversaries in contract negotiations were either dead or retired long before Hickerson's 1997 discharge. The record contains no indication of ill-will between Hickerson and the individuals who held personnel and financial positions with the employer at the time of the 1997 discharge.

Superintendent Koschak, who made the discharge recommendation in 1997, was not even employed by this school district during the turbulent period described by the various witnesses. Koschak began working for the employer in 1994, as curriculum director, and became superintendent in 1995. Although she arrived around the time of Hickerson's reinstatement, she gave credible testimony that she was unaware of his union activism or any problems with him prior to the events giving rise to the discharge at issue in this proceeding. Koschak specifically stated she had no discussions with school principals relative to Hickerson prior to recommending his termination, and was unaware of any discussions in safety

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might not hesitate to take action against another employee who committed similar misconduct but has not been a union activist.

meetings which she did not attend.[5] Indeed, she testified that her sole previous contact with Hickerson had been a casual encounter at a central labor council meeting in 1995 or 1996, relative to the school levy that both she and Hickerson were supporting. Her testimony with respect to her knowledge of the grievant's union activity (or lack thereof) stands un-refuted and supports an inference that there was no causal connection between Hickerson's union activities and his termination.

It was established that two of the school board members who accepted the recommendation to discharge Hickerson had been elected to serve on the board only the year prior to the discharge at issue in this proceeding. While her testimony that there was no discussion of Hickerson's union activities with the school board is largely self-serving, it does not provide any hint of a connection warranting further scrutiny.

In the absence of strong evidence of union animus occurring in close proximity to the asserted discriminatory action, an Examiner should require convincing evidence of a causal connection between past union activity and current employment transactions. The union has not presented such evidence in this case.

The Employer's Articulated Reasons -

Although the analysis could end with the conclusion that the union has failed to make out a prima facie case of discrimination, the

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[5] She testified that any grievances which may have been filed by Hickerson during her tenure had been dealt with by a principal without any involvement on her part. She also stated she had no knowledge of any discussions during the course of safety meetings.

Examiner chooses to set forth and comment on articulated reasons which are rooted in state statute and public policy.

According to Koschak, the first step taken under RCW 28A.400.304 after the employer obtained the criminal records of its employees from the Washington State Patrol was a comparison of those records with the employment applications the employer had on file. In each instance where an employment application was found to have been falsified with respect to the employee's criminal record, the employee was discharged. A total of six employees, including Hickerson, were involved. Her testimony in this regard is unrefuted by any credible evidence. The actions taken were in keeping with the directive of the Legislature.

Substantial Factor Analysis -

The employer's stated reason for Hickerson's discharge is not pretextual. He committed the offense with which he was charged: He clearly omitted mention of two misdemeanor convictions in 1985 from the employment application which he signed in 1988. While some might question the extreme nature of the discharge penalty,[6] it must be considered in the context of the statute which gave rise to the records check.[7]

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[6] Discharge has often been characterized as the "capital punishment" of the employment setting.

[7] The Legislature enacted RCW 28B.400.303 in 1992, calling for records checks on applicants for school jobs under the following statement of public policy:

> The legislature finds that additional safeguards are necessary to ensure the safety of Washington's school children. The legislature further finds that the results from state patrol record checks are more complete when fingerprints of individuals are

Nor does the record support a finding that the employer sacrificed five other employees, in order to retaliate against Hickerson for his past union activity. All employees who committed the same offense received the same sanction.

The Examiner does not find evidence of fundamental unfairness or other basis from which to infer that Hickerson's union activity was a substantial factor in his 1997 discharge. The evidence counteracting such an inference includes:

- The remoteness in time between the Hickerson's vocal union activism and his 1997 discharge is significant, and there is no context of union animus in 1997. The consistently satisfactory performance ratings that Hickerson received from his supposed antagonists erodes the foundation for any inference that the employer was building a case to discharge him in retaliation for his protected activity.

- There was no suggestion of union animus in connection with the arbitration proceedings or arbitration award in 1994.

- The employer did not pursue progressive, or even stronger, disciplinary sanctions for Hickerson's offenses in 1991, which were proximate in time to his most vocal union activity.

> provided, and that information from the federal bureau of investigation also is necessary to obtain information on out-of-state criminal records ....

RCW 28B.400.304, which extended the record check requirement to existing employees, was enacted with an emergency clause and a June 30, 1997 deadline.

- The remoteness in time between the 1988 offense and the 1997 penalty is explained by the fact there was no cause to question Hickerson's veracity until the employer complied with the intervening legislative enactment. Once the falsification was discovered, the employer acted promptly.

- The seven-year period questioned on the employment application was clear, so that Hickerson knew or should have known he was called upon to disclose his criminal convictions no more than three or four years earlier. By signing the 1988 application, Hickerson acknowledged that falsification would be cause for dismissal.

Finally, the Examiner is not persuaded by union arguments which claim that a double standard was applied to Hickerson:

- The employer has not accused Hickerson of falsifying an application to obtain employment, but RCW 28A.400.304 extended the background check requirement to existing employees four years after it was first adopted for new employees.

- While there was no evidence as to whether the substitute teachers and coaches who were discharged had falsified original applications before being hired or applications required after being employed, they too would have been subject to background checks because of RCW 28B.400.304 rather than based on some whim of the employer.

- It is of decidedly secondary significance that the falsification occurred in a job application which Hickerson submitted for a transfer in 1988. Koschak testified that there did not appear to be any definitive basis for requiring a second

employment application in connection with changing shifts, work locations, or moving between nine-month and 12-month positions. A random check on her part indicated that updated job applications had been required in some instances, but not in others.[8] This goes, at most, to analysis which might be apt for an arbitrator under a contractual "just cause" standard,[9] and does not establish that Hickerson's union activity was any part of the employer's discharge decision.

FINDINGS OF FACT

1. The Aberdeen School District is a public employer within the meaning of RCW 41.56.030(1).

2. Washington State Council of County and City Employees, Local 275, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of operations and maintenance employees of the Aberdeen School District.

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[8] While at least five classified employees in bargaining units were found to have completed two or more employment applications between 1987 and 1997, none of those was shown to be a union activist.

[9] In fact, the parties arbitrated a grievance protesting Hickerson's 1997 discharge, and the arbitrator denied the grievance on the basis that the employer had just cause to discharge Hickerson. While the Commission does not defer to arbitrators on "discrimination" issues, there is certainly no reason for the Examiner to second-guess the arbitrator on this fundamentally contractual claim.

3. Richard Hickerson was employed by the Aberdeen School District as a custodian, from June of 1979 until March 7, 1997.

4. With the exception of a period of approximately two years, Hickerson was a committee chair for the union from about 1987 until the termination of his employment in 1997. In that role he functioned as a chief steward representing the union in grievance processing, contract negotiations, safety committee and liaison with the local central labor council.

5. Hickerson was extremely vocal and confrontational in dealing with employer representatives regarding union matters. Between 1988 and 1991 he appeared before the employer's board to protest salaries paid to administrative employees, to contest the qualifications of a supervisor hired by the employer, and to advocate the adoption of a policy that the employer would only contract for goods and services with firms whose employees were represented by unions. On behalf of the union he voiced opposition to a school levy during that time period, because of the failure of the board to adopt the union source policy. His opposition to employer actions voiced at board meetings were publicized in the local newspaper.

6. Hickerson processed numerous grievances protesting actions taken by the maintenance superintendent and school principals.

7. Hickerson, during contract negotiations, engaged in bitter discussions with employer representatives.

8. Fellow employees, including a local union chair and president, believed Hickerson to be the union's foremost advocate, and

also believed Hickerson was singled out by employer officials when placing blame for operational deficiencies.

9. In 1985, Hickerson was twice convicted of misdemeanor offenses involving possession of drugs and alcohol.

10. Hickerson completed an updated employment application in 1988, in connection with his request for a transfer. In response to a question on the application form about criminal convictions within the past seven years, Hickerson failed to disclose his misdemeanor convictions in 1985. Hickerson signed that application under an acknowledgment that the making of a false statement was cause for dismissal.

11. Notwithstanding his union activity, Hickerson received generally satisfactory ratings from school principals throughout his employment, and the employer did not impose any extraordinary sanctions upon him in 1991, when he was twice reprimanded for leaving work early.

12. Hickerson was discharged by the employer in 1994, but was reinstated with back pay pursuant to an arbitration award. There is no evidence that Hickerson's union activity was a factor in either that discharge or its reversal.

13. The employer administrators with whom Hickerson had confrontations in the past had terminated their employment with the employer prior to the events giving rise to this case.

14. Pursuant to the requirements of RCW 28A.400.304, background and fingerprints checks were done on more than 500 employees of the employer, including Hickerson. As the result of that

process, the employer discovered the falsification of Hickerson's job application submitted in 1988. Hickerson's employment was terminated for that reason.

15. In addition to its actions regarding Hickerson, the employer terminated the employment of three substitute teachers and two coaches who had falsified their employment applications with respect to their prior criminal records.

16. The recommendation to discharge Hickerson was made by the employer's Superintendent, who has been employed by this employer only since 1994 and has held her current position only since 1995. At the time she made the recommendation, the superintendent had no specific knowledge of Hickerson's prior union activity. Her only previous contact with Hickerson was in connection with a school levy they both supported.

17. The recommendation to discharge Hickerson was accepted by the employer's school board. Among the members of that body, at least two had held their offices for less than one year.

CONCLUSIONS OF LAW

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

2. The union has failed to sustain its burden of proof to establish that there was a causal connection between Richard Hickerson's union activities and the employer's decision to discharge him, so that the union has failed to establish a

prima facie case of discrimination in violation of RCW 41.56.140(1).

3. Even if the evidence were sufficient to support a prima facie case that union animus was a motivating factor in the employer's discharge of Richard Hickerson, the employer has articulated lawful reasons for its actions in the context of its compliance with RCW 28B.400.304.

4. Even if the evidence were sufficient to support a prima facie case that union animus was a motivating factor in the employer's discharge of Richard Hickerson, the union has failed to sustain its burden of proof that union animus was actually a substantial motivating factor in the employer's action, so that the discharge of Richard Hickerson did not violate RCW 41.56.140(1) and (3).

ORDER

The complaint charging unfair labor practices filed in this matter is hereby DISMISSED.

Issued at Olympia, Washington, this 28th day of September, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Vincent M. Helm

VINCENT M. HELM, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.