STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF LYLE,	)	
	)	
Complainant,	)	CASE NO. 6488-U-86-1275
	)	
vs.	)	DECISION 2736-A - PECB
	)	
LYLE SCHOOL DISTRICT NO. 406,	)	
	)	
Respondent.	)	DECISION OF COMMISSION
	)	

Eric T. Nordlof, Attorney at Law, appeared on behalf of the complainant.

W. Robert Garrett, Superintendent of Schools, appeared on behalf of the respondent.

Examiner William A. Lang issued Findings of Fact, Conclusions of Law and Order in the above-entitled matter on July 24, 1987, dismissing the complaint. Public School Employees of Lyle filed a timely petition for review and brief in support of the petition for review, thus bringing the matter before the Commission.

These proceedings were commenced on October 21, 1986, when Public School Employees of Lyle, an affiliate of Public School Employees of Washington (PSE), filed a complaint charging unfair labor practices with the Public Employment Relations Commission. PSE alleged that the Lyle School District made unilateral changes in working conditions, circumvented the exclusive bargaining representative, and retaliated against union officers for their activities. A hearing before the Examiner was concluded in January, 1987.

BACKGROUND

PSE is the exclusive bargaining representative of all classified employees of the employer, except supervisors and the secretary to the administrator. At all times relevant to this case, Doug Lambert was the Vice-President of the local PSE chapter and was the PSE shop steward for the employer's bus drivers. Lambert was the most senior bus driver, but his work time was split between bus driving and building maintenance assignments.

On February 24, 1986, Superintendent of Schools W. Robert Garrett notified five bus drivers of proposed changes in their bus routes, one of which he proposed to abolish. Garrett outlined the reasons behind the proposed changes, including reducing supervision of children and cutting costs. Garrett quoted the sections of the collective bargaining agreement that, he believed, enabled him to make the changes. He informed employees of their rights to consult with their union representatives about the proposals, and mentioned that they had preferential rights to assignments based on seniority. Garrett scheduled a meeting for the same day to discuss the changes with the affected employees.

Herb Hawkins, a PSE Field Representative, was advised of the February 24, 1986 meeting, and he attended. Lambert was not affected by the changes and was not specifically invited to the meeting, but he attended anyway in his capacity as shop steward. Garrett regarded the meeting as a preliminary, informational session, and was surprised by Hawkins' presence, but he permitted Hawkins to attend the meeting. After considerable discussion, the meeting concluded with an agreement, which was reduced to writing and signed by Garrett and the five drivers.

There was no evidence that the agreement reached on February 24, 1986, was unacceptable to Garrett, or that he somehow "lost face" by the compromise. Similarly, there was no evidence that Garrett was coerced into the agreement by the presence of Hawkins and/or Lambert.

The parties' collective bargaining agreement was to expire on August 31, 1986. On April 21, 1986, Garrett notified PSE of a meeting to discuss "preliminaries" to the negotiation of a successor agreement. On May 5, 1986, the local union president, Tom Jellum, advised Garrett that local officers would represent the union in negotiations, with the PSE field representative on call.

After several bargaining sessions, PSE asked for convening of a "mandatory meeting", to report on proposals and answer questions.[1] Garrett scheduled such a meeting and sent a reminder notice on the day of the meeting. In that notice, he mentioned that PSE had questioned whether holding such a meeting at no expense to the district would violate the Fair Labor Standards Act. Garrett reported that he had checked with the Department of Labor, and had been informed that such a meeting did not violate the Act. Garrett expressed regret

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[1] Section 2.3 of the existing collective bargaining agreement provided:

> The District reserves the right to meet with the Association at mutually agreeable times to discuss District policies and/or operations at the option of the District, at least four (4) such meetings per year shall be mandatory. Employees shall attend these meetings at no expense to the District.

In at least this situation, the provision was implemented by the parties as calling for a meeting of the employer with all bargaining unit employees.

that the meeting was mandatory, but promised to order doughnuts as a gesture of good faith, and indicated his belief that the meeting should be informative.

The mandatory meeting was held. One of the proposals discussed at the meeting was a change of the agency shop provision.

In June, 1986, Garrett wrote to the union president to clarify certain points they had discussed, including contracting out of custodial services or a reduction in custodian hours coupled with adding two hours per day to Lambert's building maintenance duties. The expiration of the three-year collective bargaining agreement and the retirement of a custodian were given as reasons for the timing of these proposals. Garrett's letter mentioned that the increase of Lambert's maintenance hours and duties would require him to choose between bus driving and maintenance. Garrett offered to meet with the president or other union representatives to exchange additional information.

Apparently, the employer did decide later to contract out for custodial services, and even asked the union president for assistance in preparing bid specifications. Simultaneously, Garrett informed Lambert that the school board had approved increasing his maintenance assignment to six hours daily, effective with the 1986-87 school year. Garrett gave Lambert the choice between maintenance and bus driving, but requested that he be advised of Lambert's decision by July 21, 1986. He noted that additional maintenance time could be necessary occasionally.

Lambert filed a grievance, alleging that he was denied an opportunity to bump a less senior bus driver in order to retain an eight hour work day. He also alleged that the employer's action was retaliatory. Garrett denied the grievance, but

offered to discuss it further. When the school board denied the grievance, Garrett offered to get Lambert eight hours of maintenance work. He also indicated that Lambert could choose a straight bus driving assignment and bump any combination of drivers to obtain eight hours of work.

Garrett later advised Lambert that he could bump less senior custodians to obtain eight hours of work per day as a custodian, but that subcontracting of custodial work was still being considered.

Next, Garrett wrote to Jellum (apparently as an individual employee affected by the change, rather than in his capacity as a union official), advising that the employer and the union had agreed to study the issue of subcontracting custodial services for a year. While implementation of subcontracting was postponed, the custodians' hours were changed.

Garrett then invited the union to negotiate on a reduction of the custodian work year from twelve months to nine months, since a custodian was retiring. Garrett stated that Lambert could bid for the position, thus resolving his grievance.

In August, 1986, Arbitrator Alan Krebs issued an arbitration award on Lambert's grievance. The arbitrator ruled that the employer had the right to assign a work shift of less than eight hours under the agreement. The arbitrator thus denied the grievance. Lambert then chose employment as a custodian.

The parties thereafter reached agreement on a new contract, but this unfair labor practice complaint was not withdrawn.

The Examiner dismissed the complaint, concluding that the union did not make out a prima facie case that Lambert's protected

activity was a motivating factor in the challenged employer conduct.

DISCUSSION

The Appropriate Standard and its Application

In its brief in support of its petition for review, the union agrees with the Examiner that the controlling precedent in this case is City of Olympia, Decision 1208-A (PECB, 1982) and Clallam County, Decision 1405-A (PECB, 1982), aff. 43 Wn.App 589 (Division II, 1986). The Commission and the courts have embraced the causation test adopted by the National Labor Relation Board in Wright Line, Inc., 251 NLRB 150 (1980). Under that legal standard, the complainant in a "discrimination" unfair labor practice such as this one must first make a prima facie showing sufficient to support an inference that the employee's protected conduct was a motivating factor in the employer's decision to take the adverse action or actions.[2]

The union disagrees with the Examiner's conclusion that it did not provide sufficient evidence to make out a prima facie case, specifically taking issue with the Examiner's Conclusion of Law No. 2, which read:

> The complainant has failed to establish a prima facie case showing that the alteration of the position held by Lambert was made in reprisal for Lambert's activities

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2 Once such a showing is made, the burden shifts to the employer to show, as an affirmative defense, that the same action would have occurred even in the absence of protected conduct. For a general discussion of this topic, see Morris, The Developing Labor Law, 2nd Edition, at page 191.

> as an officer of the union, so that the employer has not violated RCW 41.56.140(1).

Specifically, the union's brief on review fastens upon the wording of the conclusion, which omits the word "inference". As we interpret that conclusion, however, the Examiner simply held that the union did not establish the prima facie showing referred to in our precedents. We conclude that the Examiner clearly intended to apply, and did apply, the Wright Line test.

It does appear that the Examiner heard and weighed all of the evidence, including the employer's evidence tending to show the employer's action or actions were not causally related to any protected conduct. Therefore, we have studied the entire record on review, including the transcript of the hearing, with an eye firmly affixed to the microscope of appellate analysis. Under that intense scrutiny, we conclude that the Examiner was correct in his conclusion about the failure of the union to make out a prima facie case.

The union argues that some hostility by the superintendent toward Doug Lambert was rooted in Lambert's participation in the meeting months earlier with Hawkins and the five bus drivers. Like the Examiner, we fail to see how the evidence shows that the compromise (regarding changing of bus routes or hours) that was reached in February, 1987, somehow "showed up" the superintendent, so as to cause any motivation on his part to retaliate against anyone. Moreover, Lambert was not even a beneficiary of that compromise.

The union also challenges the Examiner's statement that Lambert and Dolores Eiesland were not credible in their accounts of the statements allegedly made by the superintendent and Al Radke immediately after the meeting with Hawkins and the bus drivers, because the testimony was largely elicited through leading

questions. Our review reveals that the Examiner is essentially correct about that part of the testimony. A leading question is one that contains within it the suggestion of the answer to be given; in order to be leading it need not necessarily require a "yes" or "no" answer. The problem is one of direction or suggestion, i.e., the questioner is leading the witness down a certain path or course, as opposed to asking direct interrogatory questions that could elicit a broad range of responses, such as, "What did he say at that time?" Interestingly, leading questions are frequently affirmative or declaratory sentences, at the end of which one could simply remove the court reporter's question mark and replace it with a period. Often, it is merely inflection of the questioner's voice that makes such statements questions. Perhaps that is why the objecting lawyer will sometimes wonder aloud if his adversary is being allowed to testify in the matter. In short, we share the Examiner's concern regarding leading questions. They detract from the candor, and perhaps more importantly, from the persuasiveness of the testimony of a witness who has been led. The testimony of the "corroborating" witness, Eiesland, was also elicited in part by leading questions, or by an introductory statement by counsel, reiterating the earlier testimony by Lambert (Transcript, p. 135, 139-140).

The union claims that Al Radke, the Transportation Supervisor for the employer, admitted that he had made a similar statement after the meeting in question. Actually, the transcript of Radke's testimony shows the following:

> Q. Now did you make the statement that the drivers had backed Mr. Garrett into a corner and he had no choice but to retaliate against them?
>
> A. I felt that he -- my personal opinion is that, yeah, I felt that he got a little bit put on the spot, personally.

> Q. And did you make that statement to the drivers?
>
> A. I may have made that statement, yes.
>
> Q. Now did you hear Mr. Garrett say anything similar to that at the meeting?
>
> A. No, he did not.
>
> Q. You didn't hear him say that?
>
> A. I didn't recall anything to that effect.
>
> Q. You concede that you may have made the statement later on?
>
> A. I may have.

Although it would have been interesting, and perhaps helpful, to have had the benefit of redirect examination of Mr. Radke, we think even the above direct examination falls short of a damaging admission. Radke recalled no retaliatory statement by Garrett after the meeting. Radke may have stated that Hawkins' presence put Garrett "on the spot" or "backed Garrett into a corner." He may even have stated that he felt, subjectively, that Garrett would be inclined to retaliate. But clearly, Radke is not Garrett, and there is no showing that Radke had any basis other than a "feeling" for a supposition that the superintendent might retaliate. Therefore, we do not find that Radke's testimony creates a sufficient inference of improper motivation to satisfy the Wright Line, as urged by the union at page 7 of its brief.

The union next contends that the Examiner ignored evidence of anti-union conduct, focusing instead solely on things which happened to Doug Lambert. The union cited numerous examples of such alleged wrongful conduct in its brief.

The union, for example, questions the superintendent's stated desire to negotiate the successor contract with the local group, as opposed to the local chapter's state affiliate, Public School Employees of Washington. Yet, this ignores the evidence that it was the local union officers that initially advised Garrett that the PSE field representative would not be involved in the contract negotiations.

Another example cited by the union is that the superintendent made a comment that the employees did not need a union. Our reading of Dolores Eiesland's testimony in its entirety shows that Garrett's statement was actually not nearly so one-sided:

> He wanted to make it open so we could either join, be in if we wanted to, or make the choice of where it was either open or closed. And he stressed both sides, he gave views on both sides.

Transcript, page 143, lines 13-19.

We, too, could take her testimony out of context, or rely only on part of it. By fastening upon the sentence that precedes the above quote, the union attorney has taken the testimony out of context, and indeed, misrepresented what the witness stated on the matter. Such advocacy before this agency is neither helpful, nor effective. We prefer to scrutinize the entire record.

Like the Examiner, we fail to see among the "examples" cited by the union a sinister pattern of discrimination against union members engaged in protected activity. We note that both the Examiner and this Commission have reviewed the exhibits and the transcript thoroughly, and we find the contentions are not supported by a preponderance of the credible evidence. Because we believe that the union has looked at the employer's conduct

with a jaundiced eye, we understand how it reached what we believe to be an erroneous conclusion. On this record, we agree with the Examiner that there was insufficient evidence to establish a prima facie case to support an inference that the employer's action was caused by improper motives.

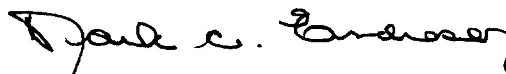
Even if the Examiner were incorrect about the shift of the burden to the employer, the totality of the evidence contains ample proof that the employer's action was not causally related to protected conduct. Having reviewed the entire record, as noted above, we also sustain the Examiner's decision on the alternative ground that the employer came forward with credible evidence proving that its action or actions would have occurred anyway, regardless of the protected union activity set forth in the record. The employer has set forth rational business or management reasons for all actions taken.

The Findings of Fact, Conclusions of Law and Order issued by the Examiner are AFFIRMED.

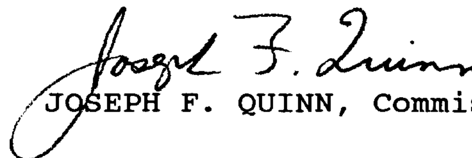
ISSUED at Olympia, Washington, this 11th day of May, 1988.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANE R. WILKINSON, Chairman



MARK C. ENDRESEN, Commissioner



JOSEPH F. QUINN, Commissioner