

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

OLYMPIC UNISERV COUNCIL,)	
)	CASES 9675-U-92-2184
Complainant,)	9712-U-92-2200
)	
vs.)	DECISION 4361 - PECB
)	
EDUCATIONAL SERVICE DISTRICT 114,)	
)	FINDINGS OF FACT,
Respondent.)	CONCLUSIONS OF LAW
)	AND ORDER
)	

Faith Hanna, Attorney at Law, appeared on behalf of the union.

Hanson and Dionne, by James J. Dionne, Attorney at Law, appeared on behalf of the employer.

On March 4, 1992, the Olympic UniServ Council, an affiliate of the Washington Education Association, filed two complaints charging unfair labor practices with the Public Employment Relations Commission, alleging that Educational Service District 114 had committed unfair labor practices under RCW 41.56.140(1) and (2). Both complaints concern an alleged refusal to rehire employees in retaliation for their activities in support of organizing a union. The complaints were consolidated for hearing before Examiner William A. Lang. A hearing was held before the Examiner at Bremerton, Washington, on July 13 and 14, 1992 and September 1, 1992. Post-hearing briefs were filed on November 2, 1992.

BACKGROUND

Educational Service District 114 (hereinafter, ESD) provides a variety of educational services on a regional basis to 15 school districts located in Clallam, Jefferson and Kitsap Counties. Among the various services, the ESD provides substance abuse intervention

under a federal Drug Free Schools grant and the omnibus state grant. Those grants, which totaled \$680,000 for a two-year period, were designed to place substance abuse intervention specialists in 42 schools on approximately a half-time basis. The substance abuse program is under the supervision of Director John Hughes of the ESD's Drug Education Department. Hughes reports to Assistant Superintendent Todd Herberg. Frank M. Deebach is the superintendent of ESD 114.

In 1989-90, Hughes hired 20 "intervention specialist" employees, to provide assistance and referrals to students. Job qualifications set forth in the position description for those positions required a bachelor's degree, with a master's degree and a Washington State ESA Certificate preferred.¹ These employees are to provide pre-assessments and referrals to high school students experiencing substance abuse problems, and are to conduct early intervention for students suspended for drug use. The duties include development of support groups for recovering students, and for children of alcoholics. These employees also provide training and awareness programs for school staff, students and parents. The position demands good human relations and interpersonal skills, with experience in training and consulting with schools. Good public relations and interagency experience is also needed.

Linda Colfax and John Helget were among the individuals hired by the ESD for the "intervention specialist" positions filled in 1989.

Hughes hired Charles Lawrence as the sole "intervention specialist II", to supervise the intervention specialists. Lawrence made an on-site observation of each of his subordinates once each year, at the schools where they worked. Lawrence also discussed the drug

¹ The "Educational Staff Associate" (ESA) certification is a combined certificate issued by the Superintendent of Public Education and the state association of the discipline involved.

intervention program with the school administrators, who were the "clients" of the ESD.

The Drug Education Department functioned through committees, two of which concern these proceedings: The drug education team was chaired by Intervention Specialist Mona Johnson; the program committee was chaired by Intervention Specialist Cheryl Thompson.

On October 24, 1990, the drug education team forwarded a memorandum to the intervention specialists, observing that many of those employees had talked individually or in groups about their concerns, but that dissention continued to prevail in the program. The drug education team listed eight concerns that had been discussed at staff meetings, but remained unresolved. Among those concerns were: (1) access to all forms necessary for student information gathering; (2) a master list of definitions of terms for statistical data; (3) celebration of monthly birthdays; (4) training calendar; (5) updated interventionist phone list; and (6) clarification of legal obligations and rights for court testimony. John Helget was not member of the drug education team, but he added another concern, writing, "When are we going to say it straight?"

The memo was signed by Johnson and Thompson.²

Lawrence acknowledged the October 24 memo on October 26, 1990. He assured the intervention specialists that he had discussed the memo with Hughes and Herberg, and that he would address each of their concerns, by letter, in the near future. Lawrence expressed appreciation for their professional and personal manner in which the matter was handled.

Lawrence resigned the "intervention specialist II" position in February of 1991, effective in March of 1991. Johnson was promoted

²

Kristin Schutte and Dan Glaze were also listed as members of the drug education team, but they did not sign this particular memo.

to the "intervention specialist II" position. The title "Coordinator of Student Assistance Programs" has since been used in relation to that position.

On March 22, 1991, three ESD employees, including Helget and Lisa Barnett, had a meeting with Sheryl Stevens, a Uniserv representative for the Olympic Uniserv Council. They decided to hold a union organizational meeting at the ESD annual retreat, to be held at Camp Indianola on March 29, 1991. Helget subsequently asked Thompson, who was chair of the program committee, to schedule 15 minutes at the end of the retreat, for the employees to discuss union representation.

The program committee met in a special session on March 26, 1991. The principal topics for discussion at that time included concerns over Johnson's promotion into the position formerly held by Lawrence, and the fact that some of the intervention specialists had approached a union representative. Helget testified that most of the program committee's meeting time was used to discuss forming a union. The minutes of the meeting mention that Johnson encouraged those seeking union information to discuss it with Hughes or Herberg for further clarification. Helget recalled that Johnson was very emotional and was crying because she believed that they were forming a union because of a lack of confidence in her.

The union representation topic was not made a part of the agenda for the ESD retreat. At lunch on March 29, 1991, Helget and Intervention Specialist Barbara Prentice informed Hughes that they were planning to hold a union informational meeting at the conclusion of the retreat. Hughes testified that he later told Herberg of the conversation, and they discussed union organizing.

After the retreat, Helget and Stevens met with 10 other employees in a corner of the large meeting room. The discussion concerned forming a union. Helget testified that Johnson and another group

of employees observed the meeting from across the room. Johnson testified that she waited in her car with Schutte for Brooke Scheib who attended the union meeting. Because of the interest expressed at that meeting, the employees decided to have another meeting about union organization.

Prentice testified that she happened to meet Lawrence at the ferry in Edmonds sometime in late March or April, 1991, and that they discussed the union organizing on that occasion. Prentice recalled that Lawrence was very knowledgeable about the organizing effort, and that he commented that he understood that Prentice had become a rebel.

On April 5, 1991, Helget and Prentice sent a memorandum to all of the intervention specialists, informing them that an informational meeting about the advantages of being represented by the WEA was held after the retreat. They invited the employees to attend a dinner meeting with WEA representative Stevens, to be held at a restaurant in Poulsbo, Washington, on April 17, 1991.

By a memorandum dated April 8, 1991, Thompson informed the intervention specialists of particulars of the program committee meeting held prior to the March 29 retreat, quoting Johnson as stating that ESD policy was that union discussions may not take place during business hours.³

The dinner meeting with Stevens was apparently held as scheduled. Helget's notes on that meeting show that he and Colfax, together with intervention specialists Barbara Prentice, Brooke Scheib, Lisa Barnett, Hodge Wasson, Dan Glaze, and Barb Phalen were at the

³

Johnson testified that she had discussed the matter with Herberg in a chance meeting in the hall outside their offices. Herberg told Johnson that the policy of providing space for union meetings outside of working hours was developed as a result of a union organizing effort by the secretarial staff several years earlier.

dinner. Those in attendance were assigned other staff to contact about representation by the WEA.

On April 23, 1991, Thompson and six others⁴ forwarded the following memorandum to all intervention specialists:

It is no secret that currently there are ongoing efforts to unionize our positions in the OESD. Up to this point, those of us that are opposed to bringing in a union have remained silent. We now believe it is time to present our reasons for opposing this action.

First, let us categorically state that we respect any individuals right to seek representation. Unions have proven that given certain conditions, they serve a useful purpose in some work places. However, we do not believe that our working conditions warrant [*sic*] such action, and in fact attempting to unionize could prove to be disastrous to all that we have worked for.

On June 30, 1991, our current contract period with the OESD will end. Assuming that the funding will be renewed, a new contract period will begin. The OESD is under no obligation to continue our employment under any circumstances. In any employer/employee relationship, the employee serves at the employers discretion. If the effort to obtain WEA representation is successful, it is highly likely that the OESD will end our employment in June, then contract with outside agencies to provide interventionists in the schools. This is how interventionists are employed in King and Pierce county, at substantially lower pay rates than we currently receive. Should the OESD choose this course of action, we would have no recourse union or not.

While certain events have caused dissention between some interventionists and the administration, we believe that our overall working conditions are far superior to those offered in other agencies. Bringing in a union seems

⁴

Other intervention specialists who signed the memo were Lisa Higgins, Anne Caldicott, Joe Butler, Kristen Schutte, Peggy Carreau, and Mary Ann Boardman.

an overreaction to what may just amount to errors in judgement, something we are all subject to on occasion, rather than a deliberate attempt to treat us in an unfair manner.

There is no reason to believe that the OESD won't take drastic action to protect their interests. We ask that you carefully consider this issue before further action is taken to unionize, as this will effect all of us. After all, what good is a union if we have no jobs?

We are hopeful that we may all have an opportunity to meet and discuss this situation as soon as possible.

[Emphasis by bold supplied.]

None of the intervention specialists who testified in this proceeding could recall that contracting out services had ever been considered previously.

Evaluation conferences were held with intervention specialists in April of 1991. Hughes revealed in testimony that, during their evaluation conferences, Schutte and Thompson expressed concern that they would be identified as supporting the union.

At a regional meeting called for that purpose on May 1, 1991, Deebach gave individual written notices to each of the intervention specialists, informing them that their positions had been "discontinued" as of June 30, 1991. The layoffs were purported to have been made pursuant to ESD Board Policy 3210, which governs reductions in staff for non-personal causes, including a loss of funding. The notice gave the reason for the layoff as:

... the insecurity of funding for the next year and the OESD's intent to contract these services (if funds are later available) to local agencies and local school districts.

The layoff notices also advised the intervention specialists that if the ESD board determined in the future to change this decision,

they would be notified of the opportunity for reemployment in available positions. The notice concluded with a statement that the employees should:

... realize that the decision was not made on the basis of your individual performance and that your efforts are appreciated by all on behalf of our client school districts.

Deebach discussed the layoff notices with the intervention specialists, explaining that he was optimistic that the funding would be renewed, and that he hoped they all would be hired back. In answer to a question from Hodge Wasson to the effect of whether the layoff was an attempt to "weed out", Deebach is quoted to have responded, "Don't worry about it, you will be hired back." Colfax recalled that she was upset that the intervention specialists were to be paid on a school year basis, and not year-around as was the practice under the current grant.⁵ In addition, there was general concern that the ESD would contract out the services to each school district. Colfax thought Deebach was evasive at this meeting.

At the end of their May 1, 1991 meeting with Deebach, the intervention specialists held a second meeting to vote on whether they should seek representation from a union. About half of those present voted in favor of representation by the WEA. The group decided not to pursue unionization, however, because they did not have the two-thirds vote which they felt they needed.⁶

In July of 1991, Jackie LaChapelle succeeded Hughes as the director of the employer's drug program, and she thereafter supervised the

⁵ Colfax claimed that each would lose \$2000 per year of income due to the change.

⁶ Hughes testified that he was informed sometime after May 1, 1991 that the intervention specialists had voted against joining a union.

intervention specialists funded by the state omnibus grant.⁷ Hughes retained his former title and the part of his duties relating to the federal "Drug Free Schools" grant, which relates to how the schools are collaborating within their communities on drug education.

Together with LaChapelle, Hughes and Johnson, Intervention Specialist Thompson worked during the summer of 1991 on writing an application for funds from the state omnibus grant. Their salaries during that period were supported by other grant monies. The ESD was concerned that state funding would be reduced, because of a deficit in the state budget, but the Legislature included the grant in the budget at the same funding level as the previous grant.

Around September 1, 1991, Hughes received informal notice that the grant had been fully funded. On September 6, 1991, the ESD was officially notified that the grant had been renewed. LaChapelle and Johnson then placed advertisements in various community newspapers, notified the former intervention specialists, and notified the constituent school districts, that they were hiring for 16 intervention specialist positions (18 total positions).⁸

The hiring process consisted of an initial screening of applications by Johnson and LaChapelle. They sorted applications into three piles: "Minimally qualified"; "meets qualifications"; and "not qualified".

LaChapelle and Johnson began interviewing applicants later in the month of September, 1991. Each of them rated the applicants, and

⁷ LaChapelle used the new title "director of student assistance programs".

⁸ In light of the full funding of the state omnibus grant at the prior year level, the reduction in the number of "intervention specialist" positions from the 20 hired in 1989 to the 16 hired in 1991 is not fully explained.

LaChapelle recommended those they felt were acceptable to Herberg for further interviews. Herberg would then forward the successful applicants to Deebach for acceptance. New applicants were also interviewed by the school district where they were to be assigned.

Linda Colfax and John Helget were not rehired by the ESD in the autumn of 1991.

POSITION OF THE PARTIES

The union argues that both Colfax and Helget actively supported the effort to organize the intervention specialists for the purposes of collective bargaining, and that these organizational activities were known to their supervisors: Deebach, Hughes, Herberg, LaChapelle, and Johnson. The union contends that, in addition, Colfax was not rehired because she actively spoke out on employee grievances regarding the use of vacation and the salary cut that the employer planned to make after the grant was renewed. The union asserts that the May 1, 1991 layoff notice stating that the employer intended to contract out the intervention services was contrived to undermine the union organizational meeting scheduled later that day, and showed anti-union animus. The union claims that the employer's reasons for refusing to reemploy Colfax and Helget in September of 1991 were pretextual, and that the employer has not carried its burden of proof.

The employer argues that the only conduct which is subject to remedy in this proceeding is limited to that which occurred within the six month period preceding the filing of the complaint. The employer asserts that it had no prior knowledge of Colfax's union activity, and that there is no evidence that either Herbert or Deebach was aware of the identity of any of the union activists. The employer challenges Helget's testimony that he was warned against organizing a union by Lawrence and LaChapelle as not

credible, because the claimed warnings were supposedly made either prior to the union activity in March, 1991, or after the intervention specialists had voted on May 1, 1991 against pursuing union representation. The employer asserts that the record supports a conclusion that the mention of contracting out in the May 1, 1991 layoff notice as a grant requirement. Moreover, the employer argues that Deebach gave assurances at the May 1, 1991 meeting that all of the intervention specialists would be rehired in spite of the layoff notice. The employer argues that there was no credible evidence of anti-union animus, and that the record shows that Colfax and Helget were not rehired because their client school districts asked that they not be rehired.

DISCUSSION

If based on a motivation to discriminate against the individual or other employees because of previous or current union activity protected by Chapter 41.56 RCW, an employer's action to deny employment or advancement to an otherwise qualified applicant is an unfair labor practice under RCW 41.56.140(1). Port of Seattle, Decision 2796 (PECB, 1987), involved an application for promotion; Auburn School District, Decision 2291 (PECB, 1985), involved hiring; Toutle Lake School District, Decision 2659 (PECB, 1987), involved a rehiring decision.

The Jurisdiction of the Commission

The employer's defense based on the "statute of limitations"⁹ was raised for the first time at the hearing, as a motion to dismiss

⁹ RCW 41.56.160 includes, inter alia:

... 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 complaints. The Examiner denied the motion at that time, ruling that the act or event giving rise to the unfair labor practice claim was the employer's refusal to rehire Colfax and Helget in late September of 1991, which was within six months prior to the March 4, 1992 filing of the complaints in these matters.

The employer renewed that defense in its post-hearing brief, arguing that the period of limitation is computed literally under Port of Seattle, Decision 2796 (PECB, 1987). Thus, the employer asserts that the March 4, 1992 filing of the complaint precludes consideration of events which took place prior to September 4, 1991. Because the complainant admitted that no union activity occurred after May 1, 1991, the employer reasons that nothing after September 4, 1991 could be a basis for a valid claim for relief.

The Examiner herein reaffirms the ruling made earlier on this issue. The complaints filed in these cases in March of 1992 allege that the employer refused to rehire Linda Colfax and John Helget in late-September or October of 1991, because of their union activities during the spring of 1991. The only actions before the Examiner here are those "refusal to hire" incidents. While it is arguable that other potential unfair labor practice claims might have been pursued for a remedy on an earlier-filed complaint,¹⁰ those matters can only be considered as "background" here.

¹⁰

For example, from the facts set forth above: Did the employer interfere with employee rights by the statements and/or actions of its officials in connection with the program committee meeting or retreat held in March? Did the employer interfere with employee rights by the memo issued in April concerning the program committee meeting held in advance of the March retreat? Is the employer chargeable with authorship or sponsorship of the memo distributed by Thompson in late April? Did the employer discriminate against its employees by laying them off on May 1? Did the employer interfere with employee rights by the statements made by Deebach at the May 1 meeting? Did the employer discriminate in favor of Thompson (or against other employees) by singling her out for employment during the summer of 1991?

The fact that union activity on which a "discrimination" claim is based occurred at a point in time earlier than the six-month time period specified under RCW 41.56.160 does not prevent reliance on those facts as background to subsequent events. City of Mercer Island, Decision 1580 (PECB, 1983). City of Seattle, Decision 3066 (PECB, 1989), which is cited by the employer as authority supporting the employer's "jurisdictional" argument, is actually helpful to reaching the opposite conclusion. That decision clearly held that protected activity of employees that occurred more than six months prior to the filing of the complaint **may be taken into consideration** when determining whether the employer was motivated by an anti-union animus in its subsequent actions. The fact situation of that case parallels the facts of this controversy. The employer's "jurisdictional" defense fails.

The Standard for Decision in Discrimination Cases

Where discrimination is alleged under RCW 41.56.140(1) or RCW 41.56.150(2), and the respondent defends that it had legitimate reasons for its action, the situation is evaluated under the "dual motivation" test adopted by the Commission in City of Olympia, Decision 1208-A (PECB, 1982), citing with approval Wright Line, 251 NLRB 1083 (1980). The use of that test was endorsed by the court in Clallam County vs. PERC, 43 Wn.App. 589, 599 (Division II, 1986), affirming the Commission's finding of an unfair labor practice concerning the discharge of an employee in Clallam County, Decision 1405-A (PECB, 1984). The test operates in two parts:

1. The complainant initially has the burden of making a prima facie showing sufficient to support an inference that union discrimination was a motivating factor in the decision or action being challenged.

2. If the complainant establishes its prima facie case under the Wright Line analysis, the burden shifts to the respondent(s), to prove that the same action would have occurred without regard to

the employees' protected activity. This evidence usually consists of evidence of a "legitimate business purpose".

Application of Precedent - The Prima Facie Case

Participation in Protected Activity -

It is clear from the record in this case that John Helget was involved in the attempt to organize a union among the employees of the ESD. His activity, including attending all of the meetings with Stevens, was open and unconcealed.

Linda Colfax was also active in support of the formation of a union. Additionally, Colfax was active in presenting grievances concerning vacation time to the employer, and she openly challenged Deebach at the May 1, 1991 meeting over the loss of pay that would result from the change of the employees' work year.¹¹

Employer Knowledge of Union Activity -

Knowledge of union activity is an important link in the chain of evidence, because an employer cannot form an intent to discriminate if it was unaware of protected union activity.

Conflicting evidence was offered regarding the employer's knowledge of Colfax's involvement in the efforts to organize a union:

Colfax portrayed herself as an active participant to form a union. She testified that she participated in the union organizing meetings, arguing in favor of the union. She recalled that, at one meeting, she described her parents' involvement in unions. At the May 1, 1991 meeting, where the intervention specialists voted not

¹¹ Contributing to a conclusion as to their openness, it is also clear from the record that Helget and Colfax were not aware at the time that their union activities would be held against them. The first time they realized that the employer would retaliate for the protected activities was when employer representatives informed them that they were not being rehired.

to form a union, Colfax urged that the effort be continued in the next year. Colfax testified that she spoke to Johnson about the union organizing, in order to allay her fears that the employees opposed Johnson's promotion.

Hughes testified that he was not aware of Colfax's role in forming the union, and LaChapelle also denied any knowledge. Other testimony by peers indicated that Colfax had limited involvement with the creation of the union, because of the distance she worked from the ESD. Johnson's testimony that she was "surprised" to hear that Colfax was involved in the union inherently acknowledged, however, that Johnson was aware of Colfax's union activity.

There is a variety of evidence which establishes that the employer had knowledge of Helget's union activity:

While there is some confusion in the testimony as to the dates on which some of the transactions took place, it seems clear that Helget's concerns over the management style of the ESD administration began in the spring of 1990. The record shows that Helget spoke to Stevens in the spring of 1990.

Johnson remembered that it was around the spring of 1990 that Helget asked her if she was interested in a union.¹²

Apparently, considerable discussion on forming a union took place among some of the intervention specialists over the summer of 1990, and into the autumn of 1990. Those discussions culminated in the list of concerns which the drug education team forwarded to Lawrence on October 24, 1990. Helget stepped forward as one of those expressing dissatisfaction with the current situation, writing, "When are we going to say it straight?" across a copy of the drug education team document.

¹²

In response to a question about whether she mentioned this conversation with Helget to anyone in the ESD, Johnson testified: "No, there wasn't any need to. We were co-workers talking ..." [Transcript at page 570.] The implication of Johnson's answer is, of course, that Johnson would have felt some need to tell ESD administrators if she was a supervisor, rather than a co-worker.

Helget (together with Prentice) informed Hughes at the retreat that they were having a union informational meeting at the end of the day, and he then participated in that meeting while employer officials and other employees observed from a distance.

Helget testified that he had a meeting with Lawrence between the time of Lawrence's February 20, 1991 resignation and Lawrence's departure in late March of 1991,¹³ to get feedback from Lawrence on how he was doing. The subject of the union activity was broached by Lawrence, who already knew of the activity.¹⁴

Helget also testified that LaChapelle was aware of his union activity. Helget stopped by LaChapelle's office in late April, when Hughes was unavailable for a scheduled evaluation interview, and the subject of the union activity arose in their conversation at that time. LaChapelle confirmed mentioning the union activity in a conversation with Helget.

The employer contends that, because Lawrence had resigned, he should not be considered a supervisor at the time of the alleged warning. The fact that Lawrence had resigned is, however, not a basis for rejecting the content of the conversation as establishing employer knowledge of the existence of union activity. Lawrence had clearly been a supervisor, and Helget was consulting Lawrence in Lawrence's capacity as Helget's superior in the employer's organization.

¹³ The record indicates that Lawrence resigned to pursue graduate study in New Mexico, and that his departure had nothing to do with the union activity at the ESD.

¹⁴ Helget testified:

[Lawrence] then asked me if I was one of the ringleaders about union activities. And I remember smiling at him at that time and he -- it got kind of quiet in the room and I said well, yes. Anyhow he knew about it. And he asked me if I was one of the ringleaders about this and I said yes.

Apart from testimony directly tied to Colfax or Helget, there is ample evidence that the employer gained awareness from other sources about the union activity among its employees.

At its March 26, 1991 meeting prior to the Indianola retreat, the program committee discussed having time at the end of the program to talk about unionization. Prentice testified that Johnson reacted to the discussion by crying, because she believed that the employees had a lack of confidence in her as Lawrence's successor.

Testifying about a subsequent conversation she had with Hughes, Johnson stated:

[Hughes] wasn't part of the hiring process and if we had a conversation, it was that he let me know that Barbara Prentice and John Helget had approached him after the Indianola in service to let him know that they were involved in union activity, period.

Transcript at page 593.

The Examiner considers Johnson's statements as further indication that the supervisory staff kept each other informed of the union activity of their subordinates.

Prentice wrote a letter to the intervention specialists on April 5, 1991, inviting them to a meeting on April 17 to discuss the pros and cons of unionization.

Sometime in late March or April of 1991, Prentice had her chance meeting with Lawrence at the ferry, where they discussed the union. Prentice recalled that Lawrence laughingly commented that he understood that Prentice had become a rebel.

The Examiner has carefully studied the transcript and the arguments advanced by the employer, leading to a conclusion that the employer had full knowledge of the union activity. The fact that the Drug Intervention Program was a comparatively small operation supports an inference that rumors were readily discussed among those at the ESD, and a presumption can be made that knowledge of the union

activity was widespread among the managers.¹⁵ For the same reasons, the Examiner concludes that the April 23 memo would have been known throughout the ESD, merely because of its nature and content.

Evidence of Employer Animus -

The existence of employer animus against union activity can be inferred from the actions of employer officials, as well as from direct statements made by employer officials to employees and others.

After testifying about Lawrence's awareness of the union activity during their conversation just before Lawrence's departure from the ESD, Helget went on to testify:

... [Lawrence] asked me if I was one of the ringleaders about this and I said yes. He warned me at that time. He said, you know, you got to be careful because these guys won't take that. They'll -- you're a danger, your a risk. Clearly what it was -- I don't remember his exact words , but he said be careful about what you're doing because these guys will retaliate and you will be at -- you are at risk for doing this. ...

And if anything I know that this is still my resolve, but for the very reasons that we had approached the union in the first place was right in my face. I was being threatened, warned by my supervisor, even though he was on his way out, that if I continue doing this that I was at risk and I was angry about that.

Transcript at pages 86 and 87.

The employer challenges Helget's testimony about a warning by Lawrence, pointing out that Lawrence left the ESD staff two days before Helget met with Stevens on March 22, 1991. In view of the

¹⁵

The fact that LaChapelle immediately related her conversation with Helget to Johnson suggests as much.

history, however, it cannot be ruled out that Helget discussed his concerns about management style and his interest in unionization with Lawrence prior to Lawrence's departure, and even before the March 22 meeting with Stevens. Even though the warning is not being pursued for a remedy in this proceeding, it demonstrates the attitude of employer officials as early as March of 1991.

Helget also recalled that LaChapelle warned him about union activity when he stopped by her office, asserting that LaChapelle said:

These guys will do what they have to do to take care of themselves. Don't kid yourselves about that, they'll do those things. It was a very clear warning that I was at risk.

Transcript at page 100.

LaChapelle emphatically denied that she told Helget that the ESD would retaliate. Initially, she gave the following testimony about the incident when Helget stopped by her office:

He dropped in one day and talked to me about how unhappy he was with John Hughes and with the Student Assistance Program as it was. And after that meeting I went back and talked with Mona about union issues, but it wasn't about John's behavior in the district until after she had met -- she and [Hughes] had met with Central Kitsap and that was the point at which I got information about that piece.

Transcript at page 465.

Later, on redirect examination, LaChapelle elaborated about the conversation when Helget spoke to her in late June of 1991:

John was unhappy about a lot of things and he came in and talked to me and was telling me what he thought was wrong and what he thought should be done about it. What I said to him was -- I tried to explore the problem with him

and have him tell me what he thought the problem was and then when he started talking about the union I simply said to John that I felt that I understood the problem, I agreed with him on some of his issues, and that I felt that there were ways that he could solve his problems without necessarily having to unionize, but that was his information and his decision.

Transcript at page 481.

The employer contends that similarities of wording between the two alleged warnings (i.e., the statements made by Lawrence and LaChapelle, according to the testimony of Helget) proves that Helget's testimony was contrived. Helget's choice of somewhat similar words in his testimony about conversations with two different employer officials is not conclusive as a basis for disregard of Helget's testimony, however. It may only show a recall that is focused on substance, rather than literal content.

The employer argues that, even if given in the terms claimed by Helget, LaChapelle was not a supervisor at the time the warning was made. LaChapelle's status at the time of the alleged threat is not relevant, however. ~~The issue here is, again, the attitudes of the employer officials who made the challenged "refusal to rehire" decision in September of 1991. LaChapelle admits that Helget spoke to her about his employment concerns, and the record is clear that she discussed Helget's interest in unionization with Johnson immediately after her conversation with Helget. The record fails to disclose why LaChapelle did so. The record also fails to reveal what she discussed with Johnson other than Helget's interest in unionization. It is clear that LaChapelle had become a supervisor by the time the "refusal to rehire" actions took place.~~

LaChapelle's inconsistent testimony about her knowledge of the April 23, 1991 memorandum does not contribute to her credibility. Her initial testimony tied her knowledge of opposition to unionization within the intervention specialist group to Johnson, who was

said to have had a copy of that memo near the time it was issued. LaChapelle subsequently denied having knowledge of that memo until months later.

The employer hypothesizes that, if Helget was truly warned about continuing his union activities, he would have at least mentioned it to the other intervention specialists who were involved with him in union activity at the time, and would prudently have assumed a lower profile. Instead, the employer contends that Helget made himself more visible as a union activist by arranging an organizing meeting at the Indianola retreat and informing Hughes of the fact. The argument mistakenly presupposes a "reasonable man" standard built on an assumption that employees will shy away from lawful activities because of an unlawful threat. The law is just the opposite, and does not put a burden of doubt on an employee who openly pursues the right to organize protected by RCW 41.56.040 and RCW 41.56.140(1). Helget might have passed on the threat to his fellow employees, but he might also have decided to avoid conveying a message that could have dissuaded them from their lawful activities. He might have sought counsel from Stevens about the threat, but he might also have hesitated to do so absent a group commitment to the particular organization Stevens represents.

The employer argues that the union offered no corroboration of the conversations testified to by Helget. Although Helget's testimony about his conversation with Lawrence was not corroborated by other witnesses, neither was it controverted.¹⁶

¹⁶

Lawrence has moved out of state and was not available to testify, but the burden caused by his unavailability does not fall on the complainants here. Counsel for the parties made an unsuccessful attempt to arrange a telephone conference call with Lawrence, for the purpose of entering into stipulations. If it was important to the employer's case to have Lawrence controvert Helget's testimony, it was up to the employer to arrange for Lawrence's presence at the hearing.

At the retreat, Prentice asked Johnson to walk with her on the beach. Prentice wanted Johnson to know she supported her in her new job as Interventionist Specialist II. Prentice recalled:

... and then she mentioned to me that she was concerned about my job. ...

She didn't -- to my knowledge she didn't mention anything specific, but I took that to mean that she was saying if you continue with union activity, Barb you're in trouble.

Transcript at page 282.

Johnson denied that her statements to Prentice concerned involvement with the union. Johnson recalled that:

Never involvement with the union, but I know we had a conversation sometime in April and it was around grant funding. She asked me whether or not her job would be secure and I said well, I don't know if any of our jobs are secure because we're in the process of -- we will be in the process this summer of writing the new grant, and hopefully we will have jobs. If you don't, I don't.

Transcript at pages 589 and 590.

The testimony of Johnson seemed evasive, however. She frequently responded to questions by rephrasing the question so as to carefully respond only to a narrow inquiry. Johnson created the impression that she was "stonewalling", and avoiding incriminating responses. At one point, Johnson strongly denied that she discussed the union meeting with Scheib and Schutte after the Indianola retreat, even though she carpooled with them. Later, Johnson seemed to contradict herself, by admitting that Schutte gave her a copy of the April 23 anti-union memo which she later shared with LaChapelle.

Both LaChapelle and Johnson admitted to having the conversations with Helget and Prentice, but denied that they warned the employees

against union activity. Instead, they attributed their discussions with Helget and Prentice about job loss as relating to a possible loss of grant funding. Their testimony has an uneasiness about it, however, which appears to be that of "a confession and avoidance". In one respect, the evidence clearly shows that LaChapelle was against unionization, believing that it was not necessary; a sentiment later elaborated on in the April 23 anti-union memo. The record also indicates that Johnson thought the union efforts were directed personally. Both Johnson and LaChapelle referred to Helget's decision to unionize as "his information", a curious characterization which seems to suggest a collaborative approach to their testimony.

Based on the foregoing analysis, the Examiner concludes that the record does show that Johnson and LaChapelle were opposed to the union organizational effort.

The Anti-union Memorandum of April 23, 1991 -

Statements made by non-supervisory personnel are ordinarily not attributable to management, but this memorandum from a small group of employees is worthy of comment. It is unique in its characterization of the administrative mind. The intervention specialists who took credit for authoring the memo warned their colleagues that the ESD administrators would take drastic action to protect their interests, and that it was highly likely that the ESD would end their employment and contract out their jobs if the employees chose to organize a union.

Johnson testified Schutte was one of her sources of information regarding the union activities, and Schutte was one of the employees who signed the April 23 memorandum. Schutte also gave Johnson a copy of the memo. Two of the signers of the April 23 memo, Schutte and Thompson, each assured Hughes during performance evaluation interviews in late April, 1991 that she was not involved in the union organizational effort.

By her own testimony, as well as that of Helget, Colfax and Prentice, Johnson was distraught by the effort to unionize. The record is clear that Johnson opposed the union, which she interpreted as a threat to her position as supervisor. Against that background, the question arises as to whether the communications between Johnson and Schutte were a two-way street.

A week and a day later, the dire prophesy made in the April 23 memo was fulfilled. Each intervention specialist was handed a written notice of layoff on May 1, 1991, to be effective on June 30, 1991. Moreover, that notice specifically stated that the ESD intended to contract out the jobs of the intervention specialists, even if the funding was renewed. While the record does not disclose the source of the information contained in the April 23 memo, it is unlikely that Schutte and Thompson would have strongly disparaged their employer's intentions unless they knew that there would be no reprisals.

In any event, the April 23 memo clearly and emphatically indicates an employee perception that the ESD would act illegally to discourage union activity. The record establishes that the ESD management was briefed by an attorney on the limits of acceptable conduct several years earlier, when the employer's office-clerical staff was considering union representation. Johnson testified that Herberg was her source for the information that the employees could meet on the employer's premises after working hours. It seems likely, therefore, that Hughes, Herberg or Deebach would have responded to the April 23 memo immediately, with a denial they would act illegally. Instead, the ESD management did nothing to counter these serious allegations, even though Deebach had a full and appropriate opportunity to do so at the May 1 meeting. In fact, the ESD furthered the legitimacy of an inference of "insider knowledge" on the part of the authors of the April 23 memo, by telling the employees in the layoff notice that the employer had decided to contract their jobs.

The Timing and Content of the Layoff Notice -

Under the terms of the employer's board policy, the end of the funding cycle of the omnibus grant did not necessarily require a layoff of personnel. The ESD chose to interpret its policy as warranting a layoff, however, even though it could have retained the personnel pending the refunding of the grant.¹⁷

The union contends that the timing of the layoff notice was designed to coincide with the union meeting scheduled for later the same day, and thus was intended to intimidate the intervention specialists away from their interest in a union. The record shows that the employee meeting was scheduled by telephone calls among the employees, in reaction to the April 23 memo. The record does not indicate whether the ESD was aware of the employee meeting, which was to follow a staff meeting scheduled by the employer for May 1, 1991.

The union contends that the reference in the layoff notice to contracting out was also designed to intimidate the employees. The employer argues that the subcontracting reference was necessary because the funding grant application required such a statement.

The Examiner has reviewed the arguments and testimony on this point, and concludes that the rationale given by the employer does not explain why the layoff notice specifically stated that if the grant funds were renewed, the ESD still intended to contract out the services.

The record does not disclose why the employer decided to announce that the work of the intervention specialists would be contracted out, even if the grant was renewed. Minutes of the Board of Directors meeting were not placed in evidence, and neither Deebach nor Herberg was called to testify as a witness in this proceeding.

¹⁷

If the grant application was not approved, then the personnel could have been terminated under the policy.

LaChapelle testified that there is a section in the grant application which asks what the ESD would do if funds were not available, that Deebach told her that the school districts would have to hire their own intervention specialists if the funding was not renewed, and that the ESD answered the grant application query by indicating that the school districts would have to pay for the service.¹⁸ That would explain altogether taking the ESD out of the loop, but does not explain the ESD staying in the drug intervention business as a contractor.

At the May 1 staff meeting, Deebach told the intervention specialists to disregard the reference to contracting out, that the Board of Directors did not intend to contract out the work, and that the ESD would hire them back. That came, however, only after the shock effect of the notice itself. This statement, made a week after the intervention specialists received the April 23 memo from some anti-union colleagues, who thought it highly likely that the ESD would lay them off on June 30, 1991 and contract out their services, if they organized a union.

Even without a conclusion that the April 23 memo was employer-inspired, and discarding the coincidence of the April 23 memo and the employer's actions of May 1, what is left is a naked threat. The test is not the intent of the employer in making a statement, but how employees reasonably perceive the statement. City of Olympia, supra. In this case, it is clear that the employees could reasonably have perceived a threat in the employer's statement. When omnibus grant funds came through, and it actually came time to implement Deebach's assurance that the intervention specialists would be rehired, the employer did not rehire union activists Linda Colfax and John Helget.

¹⁸

LaChapelle testified of hearing a rumor that Deebach had discussed the contracting out of the services with the superintendents of the constituent school districts, and that the superintendents were reported to have told him they were not interested in that alternative. The record does not disclose when this informal survey took place.

Conclusions of Employer Motivation -

Based on the analysis set forth above, the Examiner concludes that the record supports an inference that the employer's "refusal to rehire" action in September of 1991 was motivated by animus towards the earlier effort of its employees to form a union.¹⁹ The Examiner thus shifts the burden of proof in this matter to the employer, to show that its action would have occurred without regard to the protected activity.

The Employer's Defense

The employer contends that Helget and Colfax was not rehired, because the client school districts did not want them back. The union believes that the reasons given by the employer are pretextual, because the employer initially stated that it wanted to hire the most qualified employees, but then changed positions at the hearing to contend that the client school districts did not want them back.

¹⁹

In reaching this conclusion, the Examiner has chosen to disregard testimony given by Prentice about a chance meeting she had with LaChapelle while shopping at the Silverdale Mall. Prentice's interpretation of that conversation was strongly controverted by LaChapelle, who gave straightforward testimony on this issue. The Examiner is also disturbed by the speculative nature of Prentice's testimony, who did not directly state that she was warned by LaChapelle against union activities, but merely interpreted LaChapelle's remarks as a warning. At the time Prentice testified, the Examiner had an uneasy feeling that she may have been stretching the conversations to help a colleague without crossing the line into perjury. Further, because the record establishes that the union organizing ended on May 1, 1991, it is not reasonable to put a "warning against union activity" interpretation on Prentice's conversation with LaChapelle more than two months later, in July. Moreover, Prentice was rehired to her former position.

Linda Colfax Work History -

Colfax commenced her employment with the ESD in January, 1989. She possesses a bachelor's degree in English, a master's degree in counseling, and is certified as a mental health counselor. Her previous experience includes work as an alcohol and drug counselor with the Quillayute tribe, and the training of teachers in writing. Colfax was interviewed for the position by Hughes, Lawrence and Herberg, who believed that Colfax was qualified for the intervention specialist assignment because the responsibilities involved working in a school district which had a large Native American population. Colfax was assigned to the Neah Bay and Clallam Bay School in the Cape Flattery School District.

Hughes and Lawrence evaluated Colfax's performance on May 29, 1990, and rated her as "meets expectations".²⁰ Colfax was observed to have very strong skills and background in the field of counseling, and to work well with Native American students and families. The evaluators noted that Colfax had been able to establish an effective referral system, even though she worked in difficult communities and school situations. In the area of professional development, Colfax was thought to have needed to continue to work closely with her administrators, informing them of issues and problems. Colfax was rated "needed improvement" in judgment and common sense because she thought students should do an intervention on a teacher who was believed addicted to alcohol. As a result of a letter written by Colfax to Director John Heinz of the Indian Health Service, Hughes specified that Colfax must go through her

²⁰

The performance appraisal form used to evaluate ESD employees contains seven performance degrees: personal relations, judgement, leadership, decision making, work habits, personal development and overall performance. The employee is rated in each performance degree using four categories: "exceeds expectations"; "meets expectations"; "needs improvement", and "does not meet minimum requirements".

supervisors in the future, before making any major decisions that had community impact.²¹

Colfax's second performance evaluation, a year later, was completed by Hughes on April 22, 1991. Hughes wrote the evaluation from notes Lawrence prepared prior to his departure in March, 1990. In an evaluation conference held on May 6, 1991, Hughes rated Colfax as meeting expectations in every category. Hughes observed that Colfax had improved her working relationships with her building administrators and community agencies, and that the superintendents in the school districts believed that she "made some positive improvements with interpersonal communications". Hughes thought Colfax had done "an exceptional job in her work with community agencies by bridging services to the schools".

At Colfax's request, Lawrence wrote a letter of recommendation on her behalf, on May 22, 1991. That letter restated observations contained in her previous evaluations. Lawrence noted that Colfax regularly handled sensitive and/or serious problems in a professional and effective fashion.

Annette Towne, a mental health specialist and counselor at Neah Bay, testified that she helped Colfax establish the program and assisted in referrals of students. Towne believed that Colfax helped a lot of students to make it through school. She thought Colfax had an excellent understanding of the program. Towne

21

On September 6, 1990, Colfax wrote a letter stating that she viewed a new policy discontinuing drug testing for surveillance as an intentional block in a counselor's efforts to close down illegal drug use. Director Heinz replied, on September 17, 1990, that no individual or organization is more concerned about illegal drug use than he and the Indian Health Service, but that they lack resources. Heinz suggested Colfax discuss the matter with the school board, and he forwarded a copy of his letter to the principal of Neah Bay High School.

testified that she gave the evaluation both as a friend and supervisor.

Principal Gregg Saunders of the Cape Flattery School District testified that he was not Colfax's supervisor, but that he had heard complaints that she was negative and was not a "team player". As an example, Saunders recalled that when Colfax initially reported to work, he told her that the school did not have an office and phone for her. She responded that she would leave and would come back only when he had a place with a phone for her.

Notwithstanding his positive evaluation of Colfax, Hughes testified that Colfax had problems with getting along with staff during her first year on the job. Hughes talked with Saunders prior to the second evaluation, and was told she had improved but Saunders did not give her a full endorsement because she still had "people problems", but that too was left out of Colfax's evaluation.

The record shows there was a considerable controversy in June of 1991 concerning Colfax's vacation entitlement. Hughes was upset because the grant budget did not include provision for payment for unused vacation credits. Colfax claimed that she had worked during the winter and spring breaks instead of using vacation time, and she relied on an arrangement with Lawrence, in writing, to accumulate compensatory time for the time she spent on the long commute to ESD meetings.²² As a result of this dispute, Colfax sent a note to Johnson around June 26, 1991, forwarding a handwritten summary of her work hours each day for the school year. The note mentioned that Colfax was to meet with Johnson on June 26, to discuss the matter. Colfax testified that Hughes, who was a family friend, became distant as a result of this controversy.

²²

Hodge Wasson (who was assigned to Forks, Washington) had also arranged to accumulate compensatory time. Hughes also required Wasson to account for his hours of work.

After the layoff notices had been issued, Hughes called Saunders about whether Colfax took vacation during school breaks. Saunders told Hughes he did not think Colfax had worked during the breaks, and Hughes thought Saunders implied a lack in trust in Colfax. Saunders told Hughes that Superintendent Shirl Spelgatti of the Cape Flattery School District did not want Colfax back, because she was upset that Colfax wrote the letter to the Indian Health Service, and because she believed Colfax had serious problems at Neah Bay. Hughes testified that Lawrence thought it a disadvantage for Colfax to be living in the community, because it inhibited the students from sharing confidences.

During the summer of 1991, the ESD received five letters from teachers and other school district staff members, including Superintendent Spelgatti and Principal Ronald Hawk, praising the efforts of Colfax and the drug intervention program in the school district.

Colfax returned from vacation in late September, 1991, and heard from Wasson that many of the former ESD staff had been rehired. She called LaChapelle, and was told that she was still under consideration for rehiring. LaChapelle testified that Colfax's application was placed in the pile marked, "meets qualifications", but that, in conversation with Spelgatti, the school district had indicated that they would like a change.

Colfax later discussed the matter of reemployment directly with Superintendent Spelgatti. While Colfax was in her office, Spelgatti called the ESD, but was unable to get a status report on Colfax's rehiring.

Colfax later heard from her former colleagues that her position had been filled. Wally Sealye was hired by the ESD for the intervention work in the Cape Flattery schools on November 4, 1991. Colfax never received official notice that she was not being rehired.

Colfax wrote to a member of the ESD Board of Directors, asking why she had not been rehired. On November 13, 1991, Deebach sent Colfax a blunt, two-sentence letter informing her that he had been asked to respond to her note, and that the reason she was not selected for the position was because other applicants were considered more qualified for the position.

Conclusions Regarding Colfax's Reemployment -

The Examiner finds it necessary to entirely discredit the testimony of Gregg Saunders. Apart from the fact that "not a team player" is sometimes a euphemism for "union activist", it was clear from his testimony that Saunders did not appreciate having to deal with a woman who would stand up for herself. Saunders' testimony about the views of Superintendent Spelgatti contradicted the complimentary letter written by that school district official. The Examiner found Saunders to be very vindictive in his testimony, and twice had to caution Saunders to confine his answers to the question posed, and not use the occasion to embark on a character assassination.

The record does not explain why Johnson and LaChapelle continued to tell Colfax she was still under consideration, or why they waited until November 4, 1991 to fill the position at the Cape Flattery School District with another applicant while Colfax was qualified and available in the community. Putting Colfax's application in a pile with other applicants contradicts Deebach's May 1 assurances that all of the intervention specialists would be hired back if the grant funds came through. The Examiner concludes that the ESD did not want to rehire Colfax, and was willing to hold up the program for two months while they sought other applicants.

The union points out that Sealye did not appear by his application to meet the minimum qualifications in education, because he only had an AA degree and did not possess a bachelor's degree. The union believes that the lack of the degree shows that the failure

to rehire Colfax is pretextual. The employer argues that Sealye's 10 years of experience in drug/alcohol counseling in the military, together with an ESA Certificate, more than adequately satisfied the job requirements. The employer's argument begs the basic question, however. The employer informed Colfax that she was not rehired because there was someone more qualified. On its face, that assertion is untrue. Sealye may meet the minimum qualifications of the position, but the assertion that he is more qualified is not plausible in light of Colfax having a master's degree in clinical psychology, a certificate in drug and alcohol studies, and 10 years of counseling experience that included working with the people in the tribal communities. Colfax had 100 hours continuing education in drug and alcohol, and 18 months experience in the ESD.

Although it did not say so in Deebach's November 13, 1991 response to Colfax's inquiry, the employer attempted to create an impression at the hearing that the initial hiring of Colfax because she lived in and was connected to the tribal community was a mistake. Any reasons given subsequently for a discriminatory action are suspect. In this case, the claim that students had problems with sharing confidences is specious. All professionals, including lawyers, physicians, nurses and mental health specialists, customarily deal with problems of confidentiality every day. By the employer's rationale, no professional person should live in the community where they practice.

Another defense asserted by the employer long after the fact is that Colfax had problems with the administrators in the school district where she worked. If it existed at all, this problem was not serious enough to warrant a "does not meet minimum requirements" evaluation rating in her first year of employment, and even Saunders acknowledged that Colfax improved in her second year on the job. Similarly, the episode concerning the letter to the Indian Health Service was dealt with in the first evaluation without a "does not meet minimum requirements" evaluation rating,

and there is no indication of any recurrence of unauthorized communications by Colfax after she was admonished in the first evaluation. The record describes Colfax as being an outspoken woman who challenged Deebach, Hughes, Heinz and Saunders. She was not viewed as a "team player", and it is evident that her assertiveness was a factor which weighed against her reemployment. One of the key requirements of the position of intervention specialist is the ability to have "good human relations and interpersonal skills". The employer anticipated that, being new, the drug intervention program would have many problems. The record shows that a number of intervention specialists encountered difficulties which Lawrence and Hughes resolved with them and their school districts. The employer admits that it is the nature of the program to have conflicts and other problems, because most people are not comfortable with it. The employer also recognized that Colfax did not cause all the problems, and that Cape Flattery School District did not have more problems than any other school district. Lawrence investigated the problems with the school staff and then discussed the situation with Colfax. She apparently improved, because Superintendent Spelgatti described Colfax as getting along with the school staff and community.

The union argues that when Colfax and Wasson pursued their vacation entitlement and when Colfax challenged Deebach at the May 1 meeting over the loss of salary, she was engaging protected activities. The argument is valid. The record shows that Hughes was greatly agitated by the vacation credit episode, and that Johnson inherited the controversy. While Hughes was said to not be directly involved in the rehiring of the intervention specialists, he was still connected to the drug education program, and available to influence decision making within the ESD management. The Examiner concludes that there was a casual connection between her grievances on vacation compensation, her protest of a salary cut, her efforts to organize a union, and the decision not to rehire her. Based on

these observations, the ESD has not established legitimate business reasons for its decision not to rehire Colfax.

John Helget's Work History -

Helget commenced employment with the ESD as an intervention specialist on February 26, 1990, filling a vacancy created by the resignation of another employee. Helget has a bachelor's degree in secondary education, and he earned a master's degree in social work in 1988. Helget served a nine-month internship as a drug-alcohol counselor at a high school, and a one-year internship in mental health. He also worked as psychiatric technician for 14 months. He did not possess a Washington ESA certificate.

Helget was assigned to Fairview Junior High School and Central Kitsap Alternative High School. In his interview, Hughes and Lawrence told Helget that his predecessor had conflicts with the staffs in the schools, and that a major part of the job was to heal the rift with the school staff.

Hughes and Lawrence evaluated Helget's work performance on May 21, 1990, rating him as "meets expectations". Hughes wrote that Helget had done a good job, and that both schools had given Helget high marks for developing support groups and for working with students. Hughes commented that Helget developed good working relationships with the administration and teaching staffs, and had demonstrated strong leadership skills through networking and committee meetings. Hughes stated a belief that Helget had a good understanding of how to work with students, teachers and his peers.

The record shows that Helget brought problems he was encountering at the alternative high school to the attention of Lawrence on several occasions, and that Lawrence told Helget to do what he could. When similar problems were brought to Johnson, she did not give him guidance, because she was too new to her position.

In an evaluation on April 22, 1991, Hughes rated Helget's work performance based on notes written by Lawrence. Hughes believed that Helget met performance expectations in all categories, and observed that Helget's work in the alternative high school had been challenging but rewarding. Hughes noted that Helget had taken part in many class presentations on chemical dependency at both schools, and had shown originality. Hughes commented that the administrators had enjoyed and appreciated his work. Helget was viewed as being in a continuing leadership role, but was thought to have needed to develop skills in assessing students.

Tom James, who supervises teachers at Fairview Junior High School and also functions as the student coordinator who handles discipline, considered Helget to be open and easily approached. He believed there were no complaints about Helget's work. James was a friend of Helget, and thought Helget had good rapport with the school's staff. James also testified that Karen Hansen, the assistant principal of the school, tried to get Helget back.

Hansen wrote to LaChapelle on July 3, 1991, expressing support for the drug intervention program work done by Helget. Hansen praised Helget's efforts, and stated that he had become an active part of the faculty. She thought her school was fortunate to have had Helget's assistance.

The praise of Helget was not universal, however. Robert Morton, a teacher/coordinator at the alternative high school, testified that he and Helget had a difference in philosophy on how to deal with the students in the alternative school setting. Many of those students are former drop-outs or had been expelled from other schools. Morton thought the emphasis should be to get the students back in school, and to take care of substance abuse problems the best they could. Morton asserted that the students needed a safe place, and should not be confronted. Morton believed that Helget was not as effective as Peggy Carreau, the previous interven-

tionist, because he confronted the students. Helget, on the other hand, admitted the difference in approach believing that the students needed to address their substance abuse problems at the same time.

Hughes testified that Morton told him that everything was fine prior to the evaluation, but then called back after the evaluations to complain that there had been problems with Helget at the alternative school, and that they wanted to meet without Helget. Morton told Hughes that there was nothing going on, and that the staff resented Helget sitting around reading the newspaper. Hughes said that he was surprised at the negative feelings, but that he viewed Helget as a negative personality.

Johnson met with Helget on May 23, 1991. Her notes for that meeting show that they discussed the alternative high school, and that Helget described it as a tough situation, with no referrals from the teachers. Helget mentioned the "old boy network", and that he worked with who he could, with focus on the ninth grade. There is no evidence that Helget was reprimanded, or that the ratings given in his evaluation were revised.

On September 4, 1991, Helget wrote LaChapelle that he desired to return as an intervention specialist, with a preference for a position in Belfair. Helget recalled that Herberg had called him on a Friday evening, to tell him that LaChapelle and Johnson were reviewing the applicants, and that rehiring of former staff would not be automatic, because the ESD intended to hire the best qualified applicants. When Helget called later in the month to inquire on the status of his application, Johnson informed him that she was to refer him to Herberg who would answer his questions. Helget remembered that he was taken back at this response.

LaChapelle stated she was not aware that Helget requested that he be moved to Belfair. LaChapelle also testified that the superin-

tendent and principals at the Central Kitsap School District told her they would rather not have the program if Helget returned.

Johnson stated that she had two meetings at Central Kitsap in June of 1991, and was told that Helget missed meetings, that Helget's records showed poor assessments, and that not much was happening in the program. Johnson mentioned this to LaChapelle in August, 1991. Johnson later testified that she did not discuss Helget's deficiencies with him.

Helget was later informed that his position had been filled. Catherine Soden began work at Fairview Junior High School on October 28, 1991, and Peggy Carreau was transferred to the Central Kitsap Alternative School.

Conclusions Regarding Helget's Reemployment -

One difficulty for the union in this matter is that a positive evaluation received by Helget one month after Helget and Prentice told Hughes that they were involved in organizing the union tends to contradict the "discrimination" claim. Moreover, Prentice was rehired, notwithstanding that she was known to be a strong union advocate. The union attempted to establish that a personal friendship between Prentice's family and Deebach's family over-rode Prentice's union activity, but the record falls short of persuading the Examiner that such was the case.

The union contends that Soden was not as qualified as Helget, because her application showed that she did not have a master's degree. LaChapelle testified that she understood that Soden in fact had a master's degree, although her application did not show it, but the Examiner has some difficulty comprehending why an applicant for employment would not mention having a master's degree when that degree would have given her a better chance to be hired.

The union also argues that, except for the animus, LaChapelle could have transferred Helget to the position eventually given to Soden, which did not include working in the alternative high school, or to either of two vacancies caused by attrition. In addition, the union asserts that the two newly hired intervention specialists were less qualified than Helget. Indeed, one of the new employees, Robin Thalheimer, was hired with only one year of field experience. In view of the positive response to Helget's work at the junior high school, the ESD's actions are suspect.

One difficulty for the employer in this case is that the written record of its formal evaluations show that Helget was doing a creditable job. It was only after the layoff notice that Morton told Hughes that there were problems in Helget's performance at the Central Kitsap Alternative High School.

Although Morton's testimony is corroborated by LaChapelle and Johnson, who conducted two meetings with the staff at the school, the story did not begin with Helget and does not end there. Helget was told at the outset that he was being hired into a troubled situation, and he several times acknowledged difficulties at the high school which he attributed to the difference in philosophy. The teaching staff did not want to confront students over drug or alcohol problems because they believed that would cause them to drop out of the school, so it is somewhat predictable that Johnson found skimpy files which she interpreted as supporting the school staff's perception that not much was being accomplished in the program. Helget was hired on a grant intended to provide substance abuse intervention, and he thought these problems should be corrected. There is general agreement in the record that working in the school was very difficult in the best of circumstances and that Helget sought a transfer which employer officials did not communicate among themselves or consider.

The union urges the Examiner to consider placement alternatives that would have been available to the employer, so as to avoid refusing to rehire Helget. While Wright Line analysis is confined to determining whether the employer had a legitimate business reason not to rehire Helget, it is relevant to that inquiry to ascertain whether Helget was denied consideration which was given to others. The record establishes that the employer did shift staff, transferring Peggy Carreau back to her former position at the alternative school and hiring Soden to cover both Carreau's former job and Helget's former assignment at Fairview Junior High School. The employer's argument that the school district did not want Helget back is not persuasive, because it overstates the facts. That was the position of the principal at the Alternative High School only. The junior high school wanted Helget back. The record does not support a conclusion that the employer's decision to hire Soden for the job was based on a legitimate business consideration. The employer had other alternatives available than to not rehire Helget.

Although it never said so in Helget's evaluations, the employer contended here that Helget was perceived as being a negative personality. The union argues that Helget was never told of the deficiencies, given an opportunity to present his side of the matter, or offered any assistance. At the same time, the union argues that other intervention specialists who had problems in their schools, such as Wasson and Thompson, were treated differently, because ESD officials met with the school district staffs and resolved the problems. While it is not entirely clear if the employer's "negative personality" view resulted from Helget's general deportment, the record does clearly show that his unhappiness with the autocratic actions of management led to agitation for union organization. The Examiner concludes that Helget's union activity led to him being labeled as a negative personality.

It has been established that the employer threatened employees with loss of their jobs in connection with their union activity, and that both Johnson and LaChapelle opposed the union. While Hughes testified that Herberg did not get involved in the day-to-day operations of the drug intervention program, the record shows (but does not explain) that Herberg intervened in the rehiring process, to make Helget his special project. Taken together, the circumstances surrounding the failure to rehire Helget do not establish legitimate business reasons for the employer's decision. The employer has failed to defeat the inference that Helget was denied rehiring because of his union activity.

FINDINGS OF FACT

1. Educational Service District 114 is a "public employer" within the meaning of RCW 41.56.030(1). During the period relevant to these proceedings, Frank M. Deebach was the superintendent and Todd Herberg was assistant superintendent. John Hughes and Jackie LaChapelle, as his successor, were the directors of the Drug Education Department. Charles Lawrence and Mona Johnson, as his successor, were intervention specialist II's and the immediate supervisors of the intervention specialists I's.
2. The Olympic Uniserv Council, an affiliate of the Washington Education Association, is a labor organization and a bargaining representative within the meaning of RCW 41.56.030(3).
3. Linda Colfax and John Helget were employees of Educational Service District 114, and within the bargaining unit sought by the Olympic Uniserv Council from the time of their employment in 1989 to their lay off on June 30, 1991. Linda Colfax and John Helget were employed as intervention specialists and

received satisfactory performance evaluations as late as April 22, 1991.

4. John Helget openly opposed the management of the drug education program, calling its policies, "autocratic". John Helget contacted the Olympic Uniserv Council on several occasions in 1990 and 1991. Helget, Barbara Prentice and several other intervention specialists arranged to meet with Sheryl Stevens, Uniserv Representative on March 22, 1991. Helget arranged a meeting to discuss forming a union following a regional staff meeting of the drug education program on March 29, 1991. Helget informed John Hughes and Mona Johnson of the meeting. Prentice invited all interested intervention specialists to a follow-up dinner meeting with Sheryl Stevens on April 17, 1991.
5. On April 23, 1991, Kristine Shutte and Cheryl Thompson with several other interventionists wrote a long letter to their colleagues urging that they not form a union because the administrators of the Educational Service District 114 would react harshly and would contract out their jobs. Mona Johnson, a supervisor, was given a copy of the letter by Schutte with whom she carpooled so as to keep her informed. The administrators did not act to repudiate these statements which castigated their reputations by declaring that they would take illegal actions. Frank Deebach had the opportunity to repudiate the statements at a May 1, 1991 meeting with all the intervention specialists but failed to do so.
6. On May 1, 1991 Superintendent Deebach called a regional meeting at which he gave each intervention specialists a letter informing them that they were to be laid off effective June 30, 1991, because the funding had not yet been renewed. The letter also falsely informed each employee that their positions would be contracted out even if the grant funding is

renewed. The intervention specialists met and conducted a vote on whether they should form a union. Because less than two-thirds of the employees voted in favor of forming a union, their organizational efforts were discontinued.

7. Colfax was very interested in forming a union. She attended meetings concerning the creation of a union. At the May 1, 1991 meeting urged her colleagues to form a union the next year. Colfax urged her supervisor, Mona Johnson, not to take the creation of a union personally. Colfax had a acrimonious dispute over vacation pay with John Hughes, director of the Drug Education Department. At the May 1 staff meeting, Colfax challenged Deebach about the intended amount of the salary under the grant submitted for the next biennium.
8. Supervisors Mona Johnson and Jackie LaChapelle discussed the need for the union with Helget. They also discussed the employees' interest in a union with other supervisors. Johnson was very upset because she believed that the employees were forming the union because she had been promoted. Both Johnson and LaChapelle did not believe that the union was needed to solve the problems.
9. After the funding grant was renewed, a hiring procedure was established under which the open positions were advertized and applications received. Supervisors Johnson and LaChapelle then segregated the employment applications into three piles: not qualified, minimally qualified, and qualified. The qualified applicants were scheduled for an initial interview by supervisors Johnson and LaChapelle. Successful applicants were then scheduled for interview by Assistant Superintendent Herberg. Herberg would recommend the applicant for the final interview by Superintendent Deebach who made the decision to hire.

10. LaChapelle told Helget to write a letter expressing interest in being rehired. Helget did so on September 4, 1991, asking to be considered if possible for a transfer to Belfair. Colfax also expressed her interest in being reemployed. Johnson and LaChapelle put the applications of Colfax and Helget in the qualified stack, but never scheduled either of them for interview. When Helget called to inquire on the status of his application, Johnson told him that she was to refer him to Assistant Superintendent Herberg who would answer his questions. The record indicates that Herberg was not involved in the operations of the drug intervention program. The record does not show a satisfactory explanation for this departure from the hiring procedure. Colfax also inquired about the status of her application and was told that she was still under consideration.

11. LaChapelle stated that Superintendent Deebach told her to hire the most qualified applicant. LaChapelle and Johnson held the application process open until November 4, 1991, a full two months after the school year began in order to replace Colfax and Helget with applicants who were less qualified. The employer also claimed that after the evaluations were written the client school districts changed their minds and asked that Colfax and Helget not be returned to their districts. The record does not support this contention.

CONCLUSIONS OF LAW

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

2. The evidence, as described in paragraphs 4 through 8 of the foregoing findings of fact, establishes a prima facie case sufficient to support an inference that union animus was a motivating factor in not reemploying Colfax and Helget.

3. The evidence, as described in paragraphs 3, and 9 through 11 of the foregoing findings of fact, sufficiently establishes that the employer did not have legitimate business reasons for not rehiring Colfax and Helget, so that those actions did constitute an unfair labor practice under RCW 41.56.140.

ORDER

Educational Service District 114, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:
 - a. Interfering with employees in their selection of representatives of a bargaining representative under Chapter 41.56 RCW.
 - b. Interfering with or discriminating against Linda Colfax for her exercise of her collective bargaining rights under Chapter 41.56 RCW.
 - c. Interfering with or discriminating against John Helget for his exercise of his collective bargaining rights under Chapter 41.56 RCW.
 - d. In any like or related 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.
2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

- a. Offer Linda Colfax immediate and full reinstatement as an employee in good standing of Educational Service District 114, and make her whole by payment of back pay and benefits, for the period from September 6, 1991 to the date of the unconditional offer of reinstatement made pursuant to this Order. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410.
- b. Offer John Helget immediate and full reinstatement as an employee in good standing of Educational Service District 114, and make him whole by payment of back pay and benefits, for the period from September 6, 1991 to the date of the unconditional offer of reinstatement made pursuant to this Order. Such back pay shall be computed, with interest, in accordance with WAC 391-45-410.
- c. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". 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.
- d. Notify the above-named complainants, 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 a signed copy of the notice required by the preceding paragraph.
- e. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days follow-

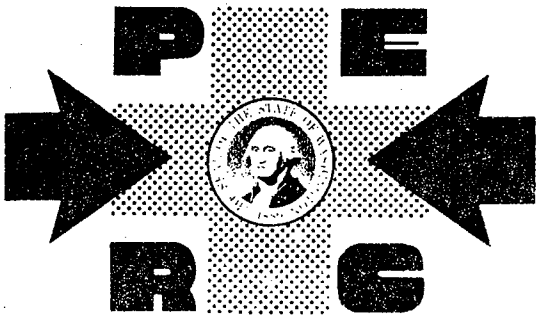
ing the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington on the 30th day of April, 1993.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


WILLIAM A. LANG, 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

APPENDIX

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 NOT interfere with employees in their selection of representatives for the purpose of collective bargaining.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

WE WILL reinstate Linda Colfax and John Helget as employees in good standing, and shall provide Ms. Colfax and Mr. Helget back pay and benefits for the period of their termination.

DATED: _____

EDUCATIONAL SERVICE DISTRICT 114

BY: _____
Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (206) 753-3444.