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-A - PECB
	)	
EDUCATIONAL SERVICE DISTRICT 114,	)	
	)	
Respondent.	)	DECISION OF COMMISSION
	)	
	)	

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.

This case comes before the Commission on a timely petition for review filed by Educational Service District 114 (ESD or employer), seeking to overturn a decision issued by Examiner William A. Lang.[1]

BACKGROUND

ESD 114 provides educational services on a regional basis to 15 school districts on the Olympic Peninsula. During the period 1988-1991, Frank Deebach was the superintendent of ESD 114 and Todd Herberg was the assistant superintendent.

One of the employer's services is an intervention program for students experiencing and recovering from substance abuse problems. John Hughes supervised the substance abuse intervention program as

[1] Educational Service District 114, Decision 4361 (PECB 1993).

director of the ESD's Drug Education Department. Hughes reported to Assistant Superintendent Herberg.

At the outset of the 1989-90 school year, a state omnibus grant allowed the ESD to hire 20 "intervention specialists" to work with school staff, students and parents.[2] Requirements for those jobs included educational training and consulting experience, good human relations and interpersonal skills. At the outset of the grant period, Charles Lawrence supervised the intervention specialists and made annual on-site observations of his subordinates. Lawrence also discussed the drug intervention program with the school administrators, who were the "clients" of the ESD.

John Helget and Linda Colfax were hired as intervention specialists in the 1989-90 school year. Colfax started work in January of 1990, at Neah Bay High School and Clallam Bay High School in the Cape Flattery School District. Helget began working in February of 1990, at Fairview Junior High School and an alternative high school in the Central Kitsap School District. Toward the end of that school year, Hughes gave Colfax and Helget overall ratings of "meets expectations" on their performance evaluations. Colfax and Helget were to continue in the next year at the same schools.

Helget was dissatisfied with the ESD's management style in the spring of 1990, and he contacted a representative of the Washington Education Association (WEA) about obtaining union representation for the intervention specialists. Helget also asked Mona Johnson, another of the intervention specialists, if she was interested in union representation. A group of intervention specialists discussed the subject of union representation at a training session in the summer of 1990, but decided to work from within to improve communication between program managers and the employees.

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[2] Upon hire, the intervention specialists were specifically told that their jobs were assured only for the two-year period of the state omnibus grant that funded them.

At the beginning of the 1990-91 school year, Colfax wrote a letter to the director of the Neah Bay Indian Health Center, stating her views on an Indian Health Service (IHS) decision to stop conducting drug screening tests except for clinical reasons. Colfax described the IHS decision as an "intentional block" of counselors' efforts to establish illegal drug use, as taking "an enabler's stand and ... helping the addiction process to continue ...". She stated:

> A suspicion arises in my own mind that those person's ultimately responsible for putting pressure on the clinic to stop urine testing, are themselves involved in using drugs and may face losing their jobs if found out.

The Indian Health Center sent a copy of the letter to the principal of Neah Bay High School. Superintendent Shirl Spelgatti of the Cape Flattery School District discussed the letter with Lawrence, who counseled Colfax to be more judicious in her statements. Lawrence directed Colfax to send all letters to him for review.

Mona Johnson and Cheryl Thompson signed a memo as Drug Education Program Team chairperson and member in October of 1990, describing concerns that had surfaced during regional staff meetings. Helget was not a member of the Drug Education Team, but he added a ninth item to the list: "When are we going to do say it straight?"[3] That memo was distributed to Hughes, Lawrence and all of the intervention specialists.[4] By memo dated October 26, 1990, Lawrence assured the intervention specialists that he would address each of their concerns in the future, and expressed appreciation for the professional manner in which the group handled the matter.

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[3] The "Say It Straight" program was a communications workshop, for which Helget had become a certified trainer in the summer of 1990.

[4] A copy of the memo was also sent to Assistant Superintendent Herberg.

Lawrence announced his resignation at a regional meeting on February 20, 1991.[5] The following week, Helget met with Lawrence to express an interest in the position Lawrence had held, but was informed that ESD management had already decided to appoint Mona Johnson as Lawrence's replacement.[6] Helget was upset that other employees had not been considered for the position, and he again contacted the WEA about obtaining union representation.

In March of 1991, Helget talked with Lawrence about issues arising at the alternative school. Helget testified that Lawrence expressed concern about Helget being an angry person, that Lawrence asked if he was one of the union ringleaders, and that he acknowledged that he was. Helget further testified that Lawrence warned him to be careful, and said, "these guys will retaliate and you will be at -- you are at risk for doing this".

Lawrence left his position about March 20, 1991. At an unspecified time prior to his departure, he told Hughes that some intervention specialists were looking into bringing in a union at the ESD.

After consulting with a WEA representative on March 22, 1991, Helget and fellow employees Lisa Barnett and Barbara Prentice decided to hold an informational meeting about union representation at the ESD annual retreat scheduled for March 29, 1991. As a member of the program team which set the agenda for the retreat, Helget asked the program team chairperson, Cheryl Thompson, for time at the end of the agenda for the employees to discuss union representation. Thompson scheduled a program team meeting for March 26, 1991, and told Mona Johnson about Helget's request. Johnson conferred with Herberg regarding Helget's request.

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[5] The resignation was to be effective the following month.

[6] Johnson was one of the first people hired by the ESD to do drug intervention work, and had greater experience in that role with the ESD than any other intervention specialist.

When Johnson met with employees Cheryl Thompson, John Helget, Dan Glaze, Barbara Prentice, and Kristin Schutte on March 26, 1991, there was discussion, among other things, of the fact that some intervention specialists had approached a union representative to gather information. Johnson advised the program team that the ESD policy was that union discussions could not occur during business hours.[7] During the discussion, Johnson became visibly upset, and expressed concern that interest in the union reflected a lack of confidence in her as the new coordinator. Helget stressed that they had only gathered information, and he tried to reassure Johnson that the interested employees simply felt a union might be able to do things that Johnson could not.[8]

The retreat was held on March 29, 1991, at Camp Indianola. Helget and Barbara Prentice approached Hughes at midday, and advised him that they were planning to hold a union informational meeting at the conclusion of the retreat. Hughes did not seem surprised, and did not voice any objection.[9]

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[7] A policy of providing space for union meetings outside of working hours had developed several years earlier, in relation to organizational activity among the ESD's office-clerical employees. Notice is taken of the Commission's docket records for case 7481-E-88-1284, which indicate that Public School Employees was certified as exclusive bargaining representative of the office-clerical employees on September 12, 1988, and for case 9132-E-91-1510, in which the office-clerical employees voted for "no representation" in June of 1991.

[8] Colfax also described a conversation with Johnson in which she tried to convince Johnson that interest in the union was not something that Johnson should take personally. Colfax was uncertain about when the conversation occurred, but recalled telling Johnson that union representation was something that "we felt would help the whole intervention team as a whole, everyone. That these were things that she couldn't negotiate for us with her level of administration."

[9] Hughes later reported to Herberg that a union informational meeting had been held.

At the end of the retreat, Helget announced to everyone that a meeting regarding union representation was going to be held. About 12 intervention specialists gathered in a corner of the room. Helget recalled that those making remarks were himself, Barbara Prentice, Lisa Barnett and Stan Harrison. Colfax recalled telling those present of her parents' union experiences, and that her father had been "a union person" most of his life.[10]

On April 5, 1991, Helget and Prentice issued a memo advising other employees of a dinner meeting with Cheryl Stevens of the WEA, to be held on April 17, 1991. Johnson received a copy of that memo.

Helget's notes from the April 17th meeting show that he and Colfax were present, along with six other employees. Some attendees, including Helget but not Colfax, were assigned to contact other employees about WEA representation.

On April 23, 1991, Thompson and six other employees forwarded the following memorandum to all of the intervention specialists:[11]

> 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 representa-

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[10] There is a conflict in testimony about whether Johnson engaged in surveillance of this meeting. Helget testified that Johnson watched the union meeting from an opposite corner of the large room. Johnson denies this, and testified that she waited outside during the meeting because she felt that she needed to stay away due to her new position. Prentice did not recall anyone else remaining in the room.

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

> tion. 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 warrent [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 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.]

Thompson gave Mona Johnson a copy of that memo. Hughes testified that it was never shown to him.

At a May 1, 1991 regional meeting, Deebach gave each of the intervention specialists written notice that their positions were being discontinued as of June 30, 1991. ESD Board Policy 3210 governs reductions in staff for non-personal causes such as a loss of funding, but the notice gave two somewhat contradictory reasons for the layoff:

> ... 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.
>
> [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.

The layoff notices 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. Deebach indicated at the meeting that every attempt would be made to re-hire people, depending on the available funding. He told the employees that they would have to re-apply, and that any offered contracts might be for less than a full calendar year. Colfax asked how much that meant the employees' pay might be cut, and she felt Deebach's response amounted to "administrative garble".

At the end of the May 1, 1991 meeting, the intervention specialists met and voted 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, and because the issue seemed moot in light of the layoff notices that had just been received.

During May of 1991, Hughes held evaluation conferences with Helget and Colfax for the 1990-91 school year. He gave each of them an overall rating of "meets expectations".

During Mona Johnson's first discussion with Helget as his supervisor, in late May of 1991, Helget acknowledged he was having problems at the Central Kitsap Alternative School. Helget expressed a desire to work full-time at his other assigned school.

After an official from the Central Kitsap Alternative School reported staff concerns about Helget's performance in late May, Hughes and Johnson met with the staff of that school in early June, 1991. Later that same month, an assistant superintendent of the Central Kitsap School District advised Hughes that the school district would prefer not to have Helget returned to the alternative school.

In July of 1991, Jackie LaChapelle was assigned to the newly created position of "director of student assistance programs". Reporting to Herberg in her new role,[12] LaChapelle supervised Johnson and the intervention specialists. Hughes retained his former title and the part of his duties relating to a federal "Drug Free Schools" grant.[13]

Over the summer of 1991, LaChapelle, Hughes, and Johnson, along with Cheryl Thompson, worked on writing the employer's application for funds from the state omnibus grant. Their salaries during this period were supported by other grant monies.

In early September, 1991, the ESD received word that the grant was being renewed at the same funding level as the previous grant.

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[12] She had been with the ESD as "community liaison director".

[13] This grant focuses on how the schools are collaborating on drug education within their communities.

After official notification was received on September 6, 1991, the ESD began recruiting for the intervention specialist positions, and notified the former employees of the openings. As part of that process, LaChapelle discussed needs with the school districts served by the ESD. LaChapelle testified that the Cape Flattery, Central Kitsap, and Port Townsend school districts expressed dissatisfaction with the interventionists assigned to them.

LaChapelle and Johnson screened the applications, looking for three criteria: (1) academic background, (2) experience with students, and (3) ability to communicate and get along with staff and community. They then sorted applications into three categories: "Minimally qualified", "meets qualifications", and "not qualified". The applications from Helget and Colfax were placed in the "meets qualifications" category.

LaChapelle and Johnson began interviewing applicants on September 9, 1991. They each rated the applicants, and recommended acceptable candidates to Herberg for further interviews. Herberg would then interview the candidates and make a recommendation to Deebach for approval.[14] Applicants who had not previously worked for the ESD were also interviewed by the school district where they were to be assigned.

Former intervention specialists Brook Scheib, Hodge Wasson, Peggy Carreau, Cheryl Thompson and Lisa Higgins were interviewed first, and all of them were rehired.[15] Barbara Prentice was also rehired.[16] Helget and Colfax were not interviewed or rehired.

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[14] Hughes was not involved in the selection process.

[15] Scheib and Wasson had supported the union effort, while Carreau, Thompson, and Higgins had opposed the union organizing effort.

[16] Prentice had been highly visible in her support for union representation.

On March 4, 1992, the Olympic UniServ Council, an affiliate of the Washington Education Association, filed two complaints charging unfair labor practices with the Commission. Those complaints alleged that the ESD refused to rehire Helget and Colfax in retaliation for their activities in support of organizing a union, and thus had violated RCW 41.56.140(1) and (2). The complaints were consolidated for hearing. Examiner William A. Lang held a hearing on July 13 and 14, 1992 and September 1, 1992, and issued his findings of fact, conclusions of law, and order on February 16, 1993. After concluding that the complainants made a prima facie case of anti-union discrimination, the Examiner concluded that the employer had not proven legitimate business reasons for its decision. He thus found a violation of RCW 41.56.140, and directed the reinstatement of Helget and Colfax along with other specified remedies. The employer petitioned for our review.

POSITIONS OF THE PARTIES

The employer challenges numerous findings of fact made by the Examiner, as well as the legal analysis applied by the Examiner. It argues that the Commission should not defer to the Examiner's credibility findings, because they are not supported by substantial evidence. The employer asserts that the evidence does not support a finding of illegal animus. Even if the record did support an inference that union activity was a motivating factor in the decision not to rehire Colfax and Helget, the employer contends the record demonstrates that the decision would have been the same without any organizing activity. The employer thus contends that the Examiner's conclusions of law are unsupported by the record and legally incorrect.

The union supports the Examiner's decision, and asks that it be affirmed by the Commission.

DISCUSSION

The Appropriate Legal Standard

For many years, this Commission has applied a two-stage analysis by which the burden of proof has been shifted in "discrimination" cases. The burden of proof was initially on the complainant, to establish a prima facie case that protected activity could have been a basis for the disputed employer action. If that burden was met, the burden of proof was shifted to the respondent, to establish valid reasons for its actions. City of Olympia, Decision 1208-A (PECB, 1982), citing with approval Wright Line, 251 NLRB 1083 (1980).[17] The Examiner applied that standard in this case, and the union agrees with the Examiner's application of the traditional standard. The employer's appeal asks us to reconsider that standard, and particularly to distinguish between "pretext" cases and "mixed motive" cases.[18] We have taken up the employer's invitation and, for reasons detailed below, we are adopting a new standard in this case.

A Troubled Distinction -

The "**mixed motive cases**" use a "but for" standard, under which the burden of persuasion shifts to the employer to prove that it would have made the same decision regardless of any protected activity.

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[17] See, also, Wellpinit School District 49, Decision 3625-A (PECB, 1991); Metropolitan Park District of Tacoma, Decision 2272-A (PECB, 1986); Asotin County Housing Authority, Decision 2471-A (PECB, 1987); Port of Pasco, Decision 3307-A (PECB, 1990). The Commission's use of this test was endorsed by the court in Clallam County v. PERC, 43 Wn.App. 589, 599 (Division II, 1986), which affirmed the Commission's finding of an unfair labor practice concerning the discharge of an employee in Clallam County, Decision 1405-A (PECB, 1984).

[18] See, Holmes v. Marriott Corp., 831 F.Supp. 691 (S.D. Iowa 1993) and Odima v. Westin Tucson Hotel Co., 991 F.2d 595 (9th Cir. 1993) for discussions distinguishing the two types of cases.

These cases traditionally involved both legitimate and impermissible reasons for the employer's action. In Wright Line, however, the National Labor Relations Board (NLRB) began applying this approach adapted from Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) to **all** discrimination cases arising under the federal law.[19] Since City of Olympia, supra, the Commission has also used this analysis for **all** cases arising under the state collective bargaining statute where an unfair labor practice complaint alleges discrimination because of union activity.[20]

The "**pretext cases**" shift a burden of production to the employer, but do not shift the burden of proof. These cases traditionally involved situations where an employer's asserted justification for adverse action against an employee is a pretext, and no legitimate business justification for the action actually exists. Pretext cases have traditionally followed McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). While they also require the plaintiff to establish a prima facie case of discrimination, they

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[19] The NLRB's decisions have been affirmed by the federal courts. See, NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), which enforced the NLRB's allocation of the burden of proof under Wright Line, and Holo-Krome Co. v. NLRB, ___ F.2d ___, 139 LRRM 2353 (2d Cir. 1992), where the court distinguished between pretext and mixed motive cases, but sanctioned the NLRB's approach using the Mt. Healthy/Wright Line analysis in all cases turning on employer motivation.

[20] See, Washington Public Employees Association v. Community College District No. 9, 31 Wn.App. 203 (Div. II, 1982), where the court identified three categories of unfair labor practice cases alleging discriminatory discharge -- (1) Those where the employer asserts no legitimate ground for discharge, (2) those where the employer's asserted justification for discharge is a sham and no legitimate business justification for discharge exists (pretextual firings), and (3) those where there is both a legitimate and impermissible reason for the discharge (dual motive discharges), but adopted the Mt. Healthy/Wright Line test for complaints filed under RCW 41.56.140 and 41.56.190.

only require the employer to articulate a nondiscriminatory reason for its action. The burden of persuasion remains at all times with the plaintiff, but the plaintiff:

> ... may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, at page 256.

The U.S. Supreme Court has recently clarified that the ultimate burden of persuasion remains with the employee at all times under this line of cases, and that there must be a finding of intentional discrimination. See, St. Mary's Honor Center, ___ U.S. ___, 113 S.Ct. 2742 (1993).

The employer argues that this is a pretext case more properly analyzed under Burdine and McDonnell Douglas. It contends this is not a mixed motive case, because it does not concede its actions were motivated in any way by the complainants' protected activities. The employer argues both the Washington state courts[21] and the 9th Circuit have followed the Burdine approach in cases involving retaliatory discharge or discrimination.[22]

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[21] See, Jones v. Sanitary Landfill, 60 Wn.App. 369 (1991); Pannell v. Food Services of America, 61 Wn.App. 418 (1991), *pet. rev. den.*, 118 Wn.2d 1008 (1992); Carle v. McChord Credit Union, 65 Wn.App. 93 (1992); Xieng v. Peoples National Bank, 120 Wn.2d 512 (1993); Hatfield v. Columbia Federal Savings, 68 Wn.app. 817 (1993), *pet. rev. den.*, 121 Wn.2d 1030 (1993); Burnside v. Simpson Paper Co., 66 Wn.App. 510 (1992), *affirmed*, 123 Wn.2d 93 (1994).

[22] Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346 (9th Cir. 1984); White v. Washington Public Power Supply System, 692 F.2d 1286 (9th Cir. 1982); Ruggles v. California Polytechnic State University, 797 F.2d 782 (9th Cir. 1986); Dister v. Continental Group, Inc., 859 F.2d 1108 (9th Cir. 1988); Equal Employment Opportunity Commission v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989); Merrick v. Farmers Insurance Group, 892 F.2d 1434 (9th Cir. 1990).

A New Direction -

The policy change we adopt in this case is based on two cases decided by the Supreme Court of the State of Washington in 1991. In Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991), our Supreme Court adopted a "substantial factor" test in two cases involving discriminatory discharges under statutes that parallel Chapter 41.56 RCW. The Supreme Court stated the substantial factor test could be applied to either pretext cases or mixed motive cases.[23] The charging party now retains the burden of proof at all times, but need only establish that union animus was a substantial motivating factor in the employer's decision to take adverse action against the employee.

Wilmot involved an alleged discharge in retaliation for filing a workers' compensation claim under Chapter 51.48 RCW. RCW 51.48-.025(1) provides:

> No employer may discharge or in any manner discriminate against any employee because such employee has filed or communicated to the employer an intent to file a claim for compensation or exercises any rights provided under this title.

Allison arose out of an alleged discrimination against an employee in reprisal for filing a claim under the state law against discrimination. RCW 49.60.210 provides:

> It is an unfair practice for any employer, employment agency, labor union or other person to discharge, expel, or otherwise discriminate

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[23] Wilmot and Allison adopted the shifting of burdens set forth in Grimwood v. Puget Sound, 110 Wn.2d 355 (1988), and Baldwin v. Sisters of Providence, 112 Wn.2d 127 (1989), both of which used the McDonnell Douglas/Burdine approach, and emphasized that the plaintiff at all times carries the burden of persuasion.

> against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

In Wilmot, the court held that in establishing a prima facie case, the employee need not attempt to prove the employer's sole motivation was retaliation or discrimination, but merely that it was a cause. The burden of production then shifts to the employer, which must articulate a legitimate nonpretextual, nonretaliatory reason for the discharge. The burden of proof remains on the employee, who must establish the employer's articulated reason is pretextual or show that although the employer's stated reason is legitimate, the worker's pursuit of or intent to pursue workers' compensation benefits was nevertheless a substantial factor motivating the employer to discharge the worker. Although the court in Wilmot determined that a cause of action could exist for a wrongful discharge tort claim independent of statute, the court was concerned about the public policy mandate of the statute.

In Allison, the Supreme Court overturned a Court of Appeals decision which used the Mt. Healthy approach in shifting the burden of persuasion to the employer. The Court described the "substantial factor" test as an "intermediate standard" that was the most sensible approach, because of competing policy considerations. The Court acknowledged that some employees may file discrimination claims to shield themselves from discharge, but expressed concern that employers may be encouraged to fabricate **pretexts** to discharge employees who have brought discrimination claims, if the courts make the burden of causation too high.

Use of Wilmot/Allison Test for Chapter 41.56 RCW -
Both of the statutes on which the Wilmot and Allison cases were based are comparable to the collective bargaining statutes administered by the Commission. Chapter 41.56 RCW includes:

> **RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE.** No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.
>
> ...
>
> **RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED.** It shall be an unfair labor practice for a public employer:
>
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
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> ...
>
> (3) To discriminate against a public employee who has filed an unfair labor practice charge ...
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> ...
>
> **RCW 41.56.150 UNFAIR LABOR PRACTICES FOR BARGAINING REPRESENTATIVE ENUMERATED.** It shall be an unfair labor practice for a bargaining representative:
>
> ...
>
> (2) To induce the public employer to commit an unfair labor practice;
>
> (3) To discriminate against a public employee who has filed an unfair labor practice charge ...

Wilmot and Allison involved statutes where employees had legal rights to pursue claims, free of discrimination or retaliation by adverse actions of their employers. We too are concerned about the public policy mandate inherent in a statute which provides employees freedom from interference in the exercise of their rights involving collective bargaining.

Because of the closely parallel statutes, and the binding effect of the Supreme Court's decisions on this Commission, we adopt the "substantial factor" test as set forth in Wilmot and Allison. By

adopting the Wilmot and Allison burden of proof, the Commission today ceases to follow the NLRB in embracing Mt. Healthy/Wright Line and begins to use the Burdine/McDonnell Douglas line of cases, as clarified by Wilmot and Allison to support the burden of proof in all retaliatory discharge cases, without distinguishing between "pretext" and "mixed motive" cases.

Establishing the Prima Facie Case -

Under the Wilmot/Allison test, the first step in the processing of a "discrimination" claim is for the injured party to make out a prima facie case showing a retaliatory discharge. To do this, a complainant must show:

1. The exercise of a statutorily protected right, or communicating to the employer an intent to do so;
2. That he or she was discriminated against; and
3. That there was a causal connection between the exercise of the legal right and the discriminatory action.[24]

If a plaintiff provides evidence of a causal connection, a rebuttable presumption is created in favor of the employee:

> [I]n establishing the prima facie case, the employee need not attempt to prove the employer's sole motivation was retaliation or discrimination based on the worker's exercise of [protected rights]. Instead, the employee must produce evidence that pursuit of a [protected right] was a cause of the firing, and may do so by circumstantial evidence ....
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> Wilmot, page 70 [emphasis in the original].

The focus on circumstantial evidence recognizes that employers are not in the habit of announcing retaliatory motives.

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[24] As to the third element of the prima facie case, the Supreme Court held that a plaintiff may establish the required case for an action under Title 51 RCW, by showing that the worker filed a worker's compensation claim, that the employer had knowledge of the claim, and that the employee was discharged.

The Employer's Burden of Production -

While the complainant carries the burden of proof throughout the entire matter, there is a shifting of the burden of production. Once the employee establishes his/her prima facie case, the employer has the opportunity to articulate legitimate, non-retaliatory reasons for its actions. The employer must produce relevant and admissible evidence of another motivation, but need not do so by the preponderance of evidence necessary to sustain the burden of persuasion.[25] If the employer fails to produce any evidence of other motivation for the discharge, however, the complainant will prevail.

The Complainant's Ultimate Burden -

As stated by the Examiner in City of Federal Way, Decision 4088 (PECB, 1993),[26] the "substantial motivating factor" standard:

> [I]s not as high as in the past decade. The charging party must only establish that union animus was a "substantial factor" in the employer's decision to take action adverse to the employee.

With adoption of the "substantial factor" test as the appropriate standard by which an employee must prove his or her claim, the employee may respond to an employer's defense in one of two ways:

1. By showing that the employer's reason is pretextual; or
2. By showing that, although some or all of the employer's stated reason is legitimate, the employee's pursuit of protected

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[25] Wilmot, at page 70.

[26] The Examiner in City of Federal Way, Decisions 4088-A, 4495, 4496 (PECB, 1993), applied the "substantial factor" standard to determine if participation in protected activities formed the basis for an employer's discharge decision. The Commission is today also affirming that Examiner's adoption of the "substantial factor" standard in Federal Way, Decision 4088-B, 4495-A, 4496-A (PECB, 1994).

> rights was nevertheless a substantial factor motivating the employer to act in a discriminatory manner.[27]

It is this ultimate burden on the alleged discriminatee to show that protected activity was "a substantial motivating factor" that distinguishes the Wilmot/Allison test from the standard used under Chapter 41.56 RCW in the past.

The Prima Facie Case

Participation in Protected Activities -

The employer takes issue with the Examiner's findings that Helget and Colfax engaged in activities protected by Chapter 41.56 RCW. While we differ with the Examiner on some details, we concur with his ultimate conclusion that they engaged in protected activities.

The Examiner appears to have found an instance of protected activity in Helget's addition of a handwritten note to an October 14, 1990 memo from the intervention specialists to ESD management. The note was described as saying: "When are we going to say it straight".[28] In actuality, the added note said: "When are we going to **do** say it straight." [Emphasis by **bold** supplied.] Because he overlooked the word "do" in the added phrase, the Examiner appears to have viewed Helget's note as making evident a challenge to management (e.g., suggesting that the intervention specialists needed to state their concerns more directly). In actuality, "Say It Straight" was a communication workshop developed for the schools. Helget had become a certified trainer in that program during the summer of 1990. His note appears to have only been a query as to when the workshop would be done in the client schools, and does not support a conclusion that Helget was criticizing the employer-employee communications at the ESD. Helget's testimony did not suggest otherwise. We draw no conclusion of protected

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[27] Wilmot, at page 73.

[28] Decision 4361, at pages 3, 15.

activity from Helget's addition to the October 14, 1990 memo, but that is not conclusive in this case.

The employer takes issue with the Examiner's findings that Helget "openly opposed" the ESD management, that he ever openly called its policies "autocratic" prior to the hearing, or that he acted alone in arranging a March 29, 1991 meeting about union representation. Whether Helget labelled the employer's policies as "autocratic" before the hearing or first did so in his testimony is an inconsequential distinction. Regardless of the words used, the record clearly supports the conclusion that Helget was openly critical of ESD management of the drug education program. Although he may not have acted alone, it is also clear that Helget was involved in arranging the meeting on March 29, 1991. Paragraph 4 of the Examiner's findings of fact is correct as to its critical aspects. It is clear that John Helget spearheaded the effort to obtain union representation for employees of ESD 114. We concur with the Examiner that Helget openly engaged in protected activities.

The Examiner concluded that Colfax pressed a "grievance" regarding vacation pay. The record indicates that Colfax requested pay for allegedly unused vacation time in June of 1991, claiming that she had continued to work during school vacations when students were not present. Hughes questioned the veracity of that claim. While it appears that Colfax was ultimately paid for the time claimed, and that Hughes remained distrustful of Colfax's claim, there is no evidence that any of their exchanges over the issue became "acrimonious". We will eliminate that characterization from the findings of fact. Further, individual activity in presenting grievances to an employer constitutes protected activity under state law and Commission precedent, only in a collective bargaining context. See, City of Seattle, Decision 489 (PECB, 1977); City of Bellevue, Decisions 4242, 4243, 4244, and 4245 (PECB, 1992); Pierce County Fire District, Decision 4063 (PECB, 1992). Since an exclusive bargaining representative had not been selected in this

case, we are unable to find that Colfax was engaged in protected activity in connection with her own claim for vacation pay.[29]

The Examiner found that Colfax "challenged" Deebach when the superintendent indicated that the contracts to be offered any reemployed intervention specialists might be shortened to a school year basis. It is clear that Colfax questioned Deebach about the shorter contracts when that possibility was raised at the May 1, 1991 meeting where the layoffs were announced. The record is subject, however, to the interpretation that Colfax only asked a clarifying question about the dollar impact of such a reduction. There was no testimony that she did so in a manner that "challenged" Deebach, or that her inquiry was viewed by anyone in that way. We will revise the findings of fact to eliminate that characterization.

Although Colfax's protected activity was not as extensive as thought by the Examiner, it is nevertheless clear that she attended two meetings to discuss union representation. Colfax described statements she made during those meetings, and the Examiner

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[29] Under federal case law, the result could be different in that the instances would be protected activity if other employees were involved in the same disputes and had called on her to represent them. Meyers Industries, 268 NLRB 493, 115 LRRM 1025 (1984), *rev'd sub nom.* Prill v. NLRB, 755 F.2d 941, 118 LRRM 2649 (CA DC), *cert. denied*, 474 U.S. 971, 120 LRRM 3392 (1985), *decision on remand sub nom.* Meyers Industries, 281 NLRB 882, 123 LRRM 1137 (1986), *aff'd sub nom.* Prill v. NLRB, 835 F.2d 1481, 127 LRRM 2415 (CA DC, 1987), *cert. denied sub nom.* Meyers Industries v. NLRB, 487 U.S. 1205, 128 LRRM 2664 (1988). See, also, Gold Coast Restaurant Corp. v. NLRB, 304 NLRB No. 96, 139 LRRM 1256, *enforced and remanded*, ___ F.2d ___, 143 LRRM 2505 (CA DC, 1993). Federal case law interprets Section 7 of the National Labor Relations Act, which includes the term "concerted activity". Washington state omitted reference to "concerted activities" in the law, leaving employees who have not elected an exclusive bargaining representative without recourse under state law.

reasonably viewed them as evidencing her support for union representation. Colfax's involvement with the union organizing activity was limited because of the distance she worked from the ESD office, but the conclusion that she participated in the union organizing effort is fully supported by the record.

Employer Knowledge of Protected Activities -
The conclusion that the employer knew of the union activity among its employees is inescapable. At a minimum, Lawrence and Hughes discussed the matter before Lawrence departed from his supervisory position in the spring of 1991.

Helget's union activity was clearly visible to the employer, as he signed memos that were distributed to employees about the organizing effort. Hughes knew that Helget was holding meetings about union representation, because Helget told him. Johnson knew of Helget's involvement as a result of conversations she had with him, and LaChapelle knew of Helget's protected activity through a conversation she had with him in the summer of 1991, as well as through a conversation she had with Johnson sometime thereafter.

The employer's knowledge of Colfax's union activity is a closer question. Hughes testified that he was not aware Colfax had played a role in contacting the union, and LaChapelle also denied any knowledge of Colfax's union activity. Johnson testified that, prior to completion of the rehire process, she had no knowledge that Colfax was involved in the organizing effort, and that she was "surprised" when she first heard of that. We share the employer's puzzlement in the Examiner's finding that this statement of surprise "inherently acknowledged" that Johnson was aware of Colfax's union activity but, as noted below, there is evidence in the record to controvert Johnson's claim.

Johnson's interactions with various individuals were such that she had ample opportunity to form opinions as to which intervention

specialist favored union representation and which did not. Both Helget and Colfax testified that they encouraged Johnson that the union organizing effort was not directed at her personally. She waited outside while the union meeting was being held at the close of the Indianola retreat, and so had opportunity to observe which employees remained inside for that meeting. The week after the Indianola retreat, Johnson moved into an office near Herberg, Hughes, and LaChapelle. Johnson then received a copy of the memo, written at the end of that same week, in which Helget and Prentice informed other intervention specialists of a union meeting.

Johnson's knowledge is important, because she was subsequently involved in the hiring process, and in the operative decision which denied Helget and Colfax interviews. The Examiner concluded that, through her interactions with various individuals, Johnson would likely have known of Colfax's protected activity, and we find no reason to second-guess that credibility finding. We find these circumstances all suffice to find employer knowledge of Colfax's protected activity.

The Existence of Union Animus -

When protected activities occur in the context of employer knowledge and evident animus towards that effort, it can reasonably be concluded that there was a causal connection between the protected activities and the adverse action by an employer. We agree with the employer that the Examiner erred when he drew negative inferences from certain events, but sufficient evidence to support the ultimate finding of animus remains in this case, even after eliminating those inferences.

The Examiner was troubled by the timing and content of the layoff notice. We note, however, that the intervention specialists were told when they were initially hired that their employment would end when the grant expired, and that reapplication would be necessary if the grant was renewed. The reapplication process in the autumn

of 1991 was thus consistent with representations made by the employer before any organizing effort had begun.

The employer could have just let the employees' contracts expire on June 30, 1991, but it chose instead to present them with layoff notices two months earlier. A witness gave unrebutted testimony that this was done so that the intervention specialists could qualify for unemployment compensation. There seems more reason to credit this non-discriminatory motive than to infer that the layoff was motivated by union animus, especially since the WEA has not challenged the layoffs as an independent discriminatory action.

The content of the written layoff notice is somewhat confusing, in that it states the employer intended to contract out the work of the intervention specialists if the grant funding was renewed. Witnesses agreed, however, that Deebach stated in his oral remarks that the ESD would instead employ intervention specialists if the funding came through. Because of that fact, we draw no negative inference from the wording of the layoff notice.

Neither do we draw any negative inference from Deebach's failure to repudiate the April 23, 1991 memo written by employees opposed to the union organizing effort. There is insufficient evidence that Deebach had notice of the April 23, 1991 memo, or of the fears expressed therein as to possible adverse responses by the employer. We note, however, that Mona Johnson was given a copy of that letter, and that she took no action to repudiate what was said.

Further, we do not share the Examiner's concern about Herberg's involvement in the subsequent hiring process. It is clear from the record that the tiered interview procedure used in the autumn of 1991 was quite similar to the one used previously. Our reading of the record indicates it was the norm for Herberg to be involved in the hiring process, not a departure from the norm.

Regardless of how one views the foregoing events, the record still supports the Examiner's conclusion that ESD supervisors were upset by the union organizing effort. Both Johnson and LaChapelle had discussions with Helget about the need for a union. They also discussed the union activity with other supervisors, and both expressed the view that a union was not needed to solve problems. Johnson admitted the organizing effort upset her, and she expressed her fear to those involved that it would be taken as showing a lack of confidence in her.

During a walk on the beach while on a break at the Indianola retreat, Johnson expressed concern about Prentice's job. While Johnson's recall of the conversation was that she expressed a concern about all of their jobs, and that she was referring to uncertainty over renewal of the state grant, Prentice thought Johnson's remark was related to the union activity. The Examiner had a similar reaction, one which we find no reason to overturn.

Prentice testified that Charles Lawrence seemed knowledgeable about the union organizing effort when she had a chance encounter with him at the Edmonds ferry dock. According to Prentice, Lawrence commented that he understood Prentice had become a rebel. This appears likely to have occurred after the retreat.

There is evidence of direct threats to Helget of adverse employment consequences if he persisted in his protected activity. According to Helget, Johnson warned him that his job was at risk because of his union activities. The Examiner also credited Helget's testimony that he received warnings from both Lawrence and LaChapelle that his organizing efforts would have adverse employment consequences. Even if one credits denials by Johnson and LaChapelle that they made any such threat, the evidence regarding Lawrence stands unrebutted. Lawrence did not testify in this proceeding, and his refusal to cooperate with the employer certainly supports

an inference that he did not want to be questioned regarding remarks he had made.[30]

The facts that (1) Helget and Colfax engaged in protected activities which were known to the supervisors who were later involved in the hiring decision, and (2) this organizing activity occurred in an environment where union animus was expressed by employer officials, are sufficient to infer a causal connection between the protected activities engaged in by Helget and Colfax and the employer's refusal to rehire them. A prima facie case having been made, we turn to the question of the employer's asserted motivation for its actions.

The Substantial Factor Analysis

Once a prima facie case is established, a complainant will prevail if the employer fails to produce any evidence of other motivation for the adverse action at issue. The ESD did offer evidence of other asserted reasons or discharge, but the Examiner found most of those reasons to be pretextual.

The Examiner's conclusions rested in large part upon credibility findings he made as to certain of the employer's witnesses. As the Commission has previously noted:

> We attach considerable weight to the factual findings and inferences therefrom made by our Examiners. They have had the opportunity to personally observe the demeanor of the witnesses. The inflection of the voice, the coloring of the face, and perhaps the sweating of the palms, are circumstances that we, as Commission members are prevented from perceiving through the opaque screen of a cold record. This deference, while not slavishly observed on every

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[30] Lawrence had left the state by the time of the hearing. When contacted by the employer, Lawrence proved unwilling to testify even by telephone.

> appeal, is even more appropriate of a "fact oriented" appeal ...
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> City of Pasco, Decision 3307-A (PECB, 1990), citing Asotin County Housing Authority, Decision 2471-A (PECB, 1987).

Our review of the record reveals sufficient evidence to support the Examiner's conclusion that protected activities were a substantial factor motivating the employer to act in a discriminatory manner.

John Helget -

The employer argues that there was dissatisfaction with Helget's work at Central Kitsap Alternative School, and that administrators and staff in that school district did not want Helget to return. The persuasiveness of this argument is undermined by the nature of the evaluations that Helget received for his performance while assigned to the Central Kitsap School District. Allowing that Helget's 1991 evaluation was somewhat lower than the prior year's evaluation, we note that both evaluations rated his performance as meeting expectations.[31]

While Helget's overall performance may have been viewed as satisfactory, we do not find the assertion that there were concerns to be pretextual. Helget's own testimony supported the contention of ESD witnesses that he did not have a good working relationship with the staff at the alternative school. Helget acknowledged that he was unhappy with his assignment to the alternative school, because of problems he was having in working with the staff there. The testimony of Central Kitsap School District official Robert Morton corroborated the assertion by ESD supervisors that the alternative school staff changed their responses regarding Helget's

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[31] The employer contends those evaluations were only minimally satisfactory, and that all other employees had higher evaluations than Colfax and Helget. The record fully supports the Examiner's finding. There is no evidence that their performance was characterized to them as "minimally satisfactory". Whether other intervention specialists had higher evaluations is irrelevant.

interaction after the 1991 performance evaluation was prepared. However, that same testimony undermined the assertion that the level of discontent was so great that the ESD had legitimate justification not to rehire Helget.

When testifying about a meeting of alternative school staff with Hughes and Johnson regarding Helget's continued assignment to that school, Morton described the staff reaction towards Helget as "mixed", but "leaning a bit" towards the negative. Morton's testimony revealed that the staff was lobbying hard to get Peggy Carreau assigned in Helget's place, because she was more popular with the staff. Carreau had been the school's intervention specialist during the first part of the 1989-1990 school year, and was viewed as philosophically more compatible with the alternative school staff.

While Helget may have been having some problems, they appear to have been localized to only one of his assigned schools. Hughes acknowledged that the principal of Fairview Junior High School said she was satisfied with Helget's performance. LaChapelle did a "needs assessment" as part of the rehire process, and conceded that the Fairview principal said Helget had done a good job there. Another witness who worked at Fairview testified that the principal there had said she wanted Helget back. In short, the employer did not establish that there were any significant problems with Helget's performance at Fairview Junior High School.

The employer claims that any success Helget achieved at Fairview was overridden by the request of the Central Kitsap School District that Helget not be returned to that district. We find that assertion unpersuasive. The request that Helget not be returned allegedly came from a Central Kitsap official who did not testify at the hearing. Thus, the ESD relies here only upon hearsay testimony from LaChapelle as to what that school district official supposedly said. We note, moreover, that LaChapelle testified that

the official "essentially" said the school district did not want Helget back in the district. In the Examiner's eyes, LaChapelle was not an entirely credible witness. Without the first-hand testimony, LaChapelle's choice of words raises a question as to how accurately she understood or related comments that are crucial to the employer's defense here.

The alternative school was acknowledged to be a difficult place in which to work. The ESD ultimately reassigned Carreau there, and hired someone new to take over Helget's assignment at Fairview and the school Carreau had left. Helget had sought reassignment from the alternative school, and was performing successfully at Fairview. We share the Examiner's skepticism as to why the ESD had any need to replace Helget entirely, instead of simply having him switch schools with Carreau.[32] This skepticism is reinforced by a comparison of Helget's training and experience with that of his replacement.

We need not decide whether Helget's union activities were the employer's principal motivation; we need only decide whether they were a substantial factor. Helget's known leadership role in the organizing effort, the threats that were voiced to him, the satisfactory nature of Helget's performance at one of his assigned schools, and the fact that concerns about his performance at the other school would easily have been addressed by his reassignment, all support the conclusion that Helget's protected activity was a substantial motivating factor in the decision not to rehire him. We concur with the Examiner's conclusion that the employer violated RCW 41.56.140 when it refused to rehire John Helget for an intervention specialist position in the autumn of 1991.

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[32] The ESD filled a number of openings in the fall of 1991. Exhibit 22 indicates there were six new interventionists hired in the fall of 1991. That many openings certainly gave the ESD some flexibility in reassigning Helget, since he did not reside in a remote location.

Linda Colfax

As in the case of Helget, the ESD claims Colfax's client school district did not want her reassigned there. That request allegedly came from Cape Flattery Superintendent Shirl Spelgatti. There is sufficient evidence in the record to support the finding that this offered business justification was pretextual.

Spelgatti did not testify at the hearing. While there appears to be an understandable reason for her absence,[33] our Examiners are properly cautious about crediting out-of-court statements of nontestifying witnesses. Hearsay is admissible at Commission hearings, but any experienced factfinder recognizes that cross-examination allows a party the chance to correct misstatements of fact, to place facts in true perspective, to reconcile apparent contradictions, to impeach the reliability and credibility of a witness, and to elicit known facts or admissions that might be favorable to that party's case. Thus, the weight accorded hearsay testimony will generally depend upon the degree of independent corroboration that exists for the hearsay statement. In this case, the hearsay testimony as to the claimed request by Spelgatti is contradicted in large part by other evidence in the record.

If Spelgatti did not want Colfax returned to her school district, one has to wonder why there was no indication of that request in the ESD's evaluation of Colfax's performance for the 1990-91 school year. That evaluation rated Colfax's performance as "meets expectations" overall, and provides no indication that any aspect of her performance had fallen to an unsatisfactory level. Hughes testified that he talked with Spelgatti and the then-current high school principals when preparing the most recent evaluation, and that they all said Colfax had met their expectations. Hughes described Spelgatti as reporting that her relationship with Colfax

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[33] There was testimony that Spelgatti had taken a job in Thailand by the time of the hearing, and was thus unavailable to testify on the ESD's behalf.

had improved, that Colfax was getting along better with the staff, that Colfax seemed to be working more on communicating, and that Colfax was not being so negative with people. That description of Spelgatti's feedback is consistent with the following comment made on the 1991 evaluation:

> Linda has improved her working relationships with her building administrators and community agencies in the last year. The superintendent feels that she has also made some positive improvements with interpersonal communications. Linda has done an exceptional job in her work with community agencies by bridging services in the schools.

Many of the employer's asserted performance concerns appear to relate to problems that had been resolved, or had become moot. For example, the employer established that Colfax had some conflict with one of the building administrators, but that individual was gone by the 1990-91 school year. The ESD established that Colfax sent a rather intemperate letter to the Indian Health Service at the outset of the 1990-91 school year,[34] but we question whether it was still a matter of concern by the following spring. If the letter had caused as much continuing concern as claimed by the employer, it hardly makes sense that Colfax's performance evaluation would improve. Despite the IHS letter, Colfax was given a performance evaluation at the end of the school year that was better than she had been given the year before.

In addition to a satisfactory performance evaluation, Colfax also received a complimentary letter of recommendation from her former supervisor. In his May 22, 1991 letter, Lawrence stated, inter alia:

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[34] The Examiner erred in his description of this letter as having been dealt with in Colfax's first evaluation which covered the 1989-90 school year. The letter, dated September 6, 1990, was written the following autumn.

> Linda is regularly confronted with various problems of a sensitive and/or serious nature. She has handled these situations in a professional and effective fashion.
>
> Linda is one who can be counted on to complete assigned tasks with a minimum of supervision. After giving Linda an assignment, you can count on the task being completed in a timely fashion and **her work is always of the highest quality.**

Exhibit 14 [emphasis by **bold** supplied].

Such comments exceed what one would expect from a supervisor with knowledge of any significant performance problems.

Hughes testified that Deebach told him, at one point, that Spelgatti did not want Colfax back. Deebach did not testify, however, and the hearsay description of what Deebach or Spelgatti allegedly said is not persuasive in the face of all the other contradictory evidence.

LaChapelle was the only witness who testified as to a direct conversation with Spelgatti, in which the superintendent allegedly voiced dissatisfaction with Colfax. That description of alleged concerns was inconsistent, however, with Hughes's description of his conversation with Spelgatti in the spring of 1991. The Examiner clearly felt LaChapelle was not an entirely credible witness, and we find insufficient reason in the record to overturn that assessment.

The employer offered only one legitimate concern about Colfax's performance for which there is credible corroboration in the record. In June of 1991, after Colfax's evaluation had been completed, Colfax claimed she had worked during the winter and spring breaks instead of taking vacation then. When she sought pay for the unused vacation time, Hughes questioned whether Colfax had performed any work during those periods, since schools had been closed and students were not present. Hughes testified in a

convincing manner about his skepticism that Colfax had actually worked as claimed, and he admitted this was the main reason he expressed the view to ESD supervisors that Colfax was a marginal employee. We do not doubt that Colfax's claim for unused vacation pay was a source of concern for Hughes,[35] but there is no evidence that Hughes mentioned his concern to Johnson or LaChapelle. Colfax's application for reemployment never made it past those two individuals, and LaChapelle testified that she was never told by Deebach or any other administrator not to recommend Colfax for rehire. Thus, there was no established link between the vacation claim and the disputed hiring decision.

The qualifications of Colfax vis-a-vis her replacement have been well-described by the Examiner. We agree with his conclusion that Colfax was plainly better qualified that her replacement, in terms of training and experience. This fact reinforces the conclusion that protected activities were a substantial motivating factor in the employer's decision not to rehire Colfax. The Commission will correct those findings that have been found to be in error, but the corrections do not change the result in this case. We affirm the Examiner's ultimate conclusion that the employer violated RCW 41.56.140 when it did not rehire Colfax for the 1991-92 school year.

NOW, THEREFORE, the Commission makes the following:

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[35] Colfax offered evidence that she had taken some compensatory time with the concurrence of Lawrence, because of the time spent making the long commute from Neah Bay to ESD meetings. Hughes was unhappy, however, over the Colfax claim that she also continued to work days when schools were closed. There is no evidence that Colfax did this with the prior knowledge of any ESD administrator, or the knowledge of either of the principals of her assigned schools. Colfax's claim, therefore, could reasonably be expected to raise the suspicions and ire of an administrator like Hughes.

AMENDED 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 the immediate supervisors of the intervention specialists assigned to various schools.

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 1990 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. 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, Kristin Schutte 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.

6. On May 1, 1991 Superintendent Deebach called a regional meeting at which he gave each intervention specialist 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 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 Colfax 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 dispute over vacation pay with John Hughes, director of the Drug Education Department. At the May 1 staff meeting, Colfax questioned 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. Some of 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's involvement in the intervention program's hiring procedure was consistent with his prior involvement. 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 in terms of their training and experience. The employer 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.

Based on the foregoing amended findings of fact, it is

ORDERED

1. The conclusions of law entered by Examiner William A. Lang are affirmed and adopted as the conclusion of law of the Commission in these matters.

2. The order entered by Examiner William A. Lang is affirmed and adopted as the order of the Commission in these matters, except that the time for compliance shall be computed as 20 days following the date of this order with respect to the directives that the employer:

   a. 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.

   b. 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.

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

Issued at Olympia, Washington, this 25th day of July, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

DUSTIN C. McCREARY, Commissioner

Commissioner Sam Kinville did not take part in the consideration or decision of this case.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

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

WE WILL 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.