STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KULDEEP NAGI, Complainant, vs. SEATTLE SCHOOL DISTRICT, Respondent.	)	CASE 10768-U-93-2500 DECISION 5237 - EDUC FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Kuldeep Nagi, appeared pro se.

Karr Tuttle Campbell, by Lawrence B. Ransom, Attorney at Law, appeared on behalf of the employer.

On November 5, 1993, Kuldeep Nagi filed a complaint charging unfair labor practices with the Public Employment Relations Commission. Nagi alleged the Seattle School District had terminated his employment as a teacher in retaliation for his filing a grievance, which was a right under the Educational Employment Relations Act, Chapter 41.59 RCW. The complaint was found to state a cause of action under WAC 391-95-110, and Examiner Pamela G. Bradburn was designated to conduct further proceedings in the matter pursuant to Chapter 391-45 WAC.

On January 9, 1995, the employer moved for summary judgment on the unfair labor practice complaint, arguing Nagi was collaterally estopped from pursuing the complaint by the decision of a hearing officer under Title 28A.[1] The employer also argued the unfair

[1] Procedures for nonrenewal of certificated employees' yearly contracts appear at RCW 28A.405.210 et seq. An employee receiving a notice of nonrenewal is entitled to a hearing at which the employer must prove that the grounds specified in the notice are sufficient cause for nonrenewal.

labor practice was filed more than six months after Nagi received notice of his probation, and that Nagi could not prove Superintendent William M. Kendrick knew about Nagi's union activity when making the probation and nonrenewal decisions.[2] The Examiner denied the employer's motion by a letter ruling dated March 3, 1995, noting that the complaint stated a cause of action under Chapter 41.59 RCW that was independent of Nagi's rights under Chapter 28A.405 RCW.

A hearing was held before the Examiner on March 16, 17, and 22, 1995, at which the employer elected to call no witnesses and present no substantive evidence supporting its decision to place Nagi on probation and nonrenew his teaching contract. The parties' final briefs were filed by June 1, 1995.

BACKGROUND

The events that generated this matter began with the 1988-1989 school year and culminated in May, 1993. During the relevant period: William M. Kendrick was the employer's Superintendent of Schools; Joan Roberson and Marta Cano-Hinz were the principal and assistant principal, respectively, at Roosevelt High School, and certificated teachers, including Kuldeep Nagi, were represented for collective bargaining purposes by the Seattle Education Association, an affiliate of the Washington Education Association.

Relevant Classes

Math and science are the academic subjects relevant to this case. Roosevelt offers three levels of classes in these subjects: classes for college-bound students; regular math classes and physical

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[2] This claim inevitably raises a factual issue, thereby defeating the employer's motion for summary judgment.

science classes that satisfy graduation requirements for students not interested in college, and remedial math classes. There are two kinds of remedial math classes at Roosevelt: freshmen entering Roosevelt are recommended by their eighth grade teachers for "general math" because they have failed eighth grade math, while high school students who fail a semester of a regular math class (designated by Roman numerals) are placed the next semester in a remedial section of that class (designated in Arabic numerals as math __.5).[3] The record indicates that at least some of the general math students are the most "at risk" students in the district, with histories of drug abuse, criminal convictions, emotional and family problems, and economic difficulties including homelessness.

Nagi's Early Teaching Experience

Nagi emigrated to the United States from India in 1984.[4] He obtained a continuing teaching contract with the employer in 1988 after three years of substitute teaching. All of his experience with the employer has been at the high school level. Nagi taught a combination of regular math and physical science classes during the 1988-1989 school year and was surplussed in June, 1989. He began the 1989-1990 school year at Rainier Beach High School, but moved after six weeks to Roosevelt, where he taught physical science, math II, and math I. Roosevelt Principal Roberson evaluated Nagi's teaching performance as satisfactory at the end of that school year. During the 1990-1991 school year, Nagi taught only physical science at Roosevelt and was again given a satisfac-

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[3] For instance, if a student failed the first semester of math I, she or he would take math 1.5 the next semester.

[4] Nagi had obtained a BA and a Master's degree, each in science and education, in India. He had taught at a school for the children of staff at the Indian Institute of Technology in Bombay. Most of his students were aiming at careers in the engineering or medical professions.

tory evaluation, this time by assistant principal Cano-Hinz.[5] The employer claims now that Nagi was given the benefit of the doubt in these evaluations but presented no evidence that the evaluations had been qualified at the time they were made. Nagi was surplussed again from Roosevelt at the end of the 1990-1991 school year.

1991-1992 School Year

During the spring staffing procedure,[6] Nagi learned of a position at Nathan Hale High School teaching math II, math I, and physical science. He took the position and discovered the actual assignment was physical science and two or three general math classes.[7] Principal Elizabeth Jackson evaluated his teaching performance as satisfactory using the long method of two observations with a four-page criteria checklist.[8]

Nagi found the general math students at Nathan Hale difficult to teach and had also observed Roosevelt math teacher Rod Magat's problems when he taught all the general math classes.[9] Nagi decided to exclude general math from his list of teaching categories for transfer purposes; the effect was that the employer could

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[5] Satisfactory or unsatisfactory are the only choices on the annual performance evaluation form. It was the practice at Roosevelt for all the teachers in a department to be evaluated by the same administrator.

[6] A procedure when teachers who are going to be surplussed interview principals of other schools for positions that will be available the following school year.

[7] These were the only sections of general math offered at Nathan Hale.

[8] The parties' collective bargaining agreement requires use of the long evaluation method the first four years of a teacher's employment.

[9] Magat had been placed on probation that year but had kept his job.

not force him to take an assignment that included general math classes, though he could voluntarily accept such classes.[10]

Nagi wanted to return to Roosevelt and he pursued several avenues toward that goal.[11] Nagi completed a transfer request some time after the school year began. By this time in his career, Nagi possessed sufficient seniority to obtain a position at Roosevelt. Then Personnel Director Ray Cohrs explained that the parties' collective bargaining agreement had given teachers absolute rights to transfer by seniority into open positions in approximately the mid-1970s. This change eliminated the wide discretion in staffing that principals had previously had, substituting an interview with the teacher who desired the transfer. As a result, Cohrs testified

> And so it was not uncommon practice for principals who had some strong feelings about an employee, if they have previous knowledge of the employee, to often discourage a person from wanting to transfer if they thought the working relationship was going to be unsatisfactory.

Transcript, page 27.

Nagi had telephoned Roberson several times during the 1991-1992 school year, telling her of his desire to return; Roberson only recalled conversations during spring, 1992. Cohrs testified Nagi said during a meeting held in autumn, 1991, that Roberson did not want him to return to Roosevelt and that she had said he would face a negative environment if he did. The Examiner credits Cohrs, and

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[10] Roberson testified the general mathematics category was limited to junior high schools, but it is included on the employer's list of secondary categories completed by high school teachers like Nagi.

[11] The best-performing students were automatically assigned to Roosevelt, Nagi felt the parents of Roosevelt students were involved with their children's education, he knew several math teachers were retiring, and he had made friends among the staff.

rejects Roberson's, testimony on this question because Cohrs' recollection was more detailed, it was corroborated by Nagi's testimony, and Cohrs was not personally embroiled with Nagi. The Examiner concludes that Roberson knew as early as autumn, 1991, that Nagi was attempting to return to Roosevelt.

The Open Position

John Boucher taught math at Roosevelt during the 1991-1992 school year and was told by the math department head[12] before the school year ended that he would teach math 2.5, math II, and math III if he returned for the 1992-1993 school year.

June 26, 1992, Roberson prepared a request for staffing a vacant position due to a math teacher's retirement. Roberson added "JOHN BOUCHER - surplussed 91-92 school year" in a blank space in the middle of the form even though Personnel had told her Nagi had seniority rights to the open position. The form listed two math I classes and three general math classes.[13] Roberson agreed the classes listed for the open position differed from those Boucher had been promised and from those the retiring teacher had taught, but she could not give a specific explanation for what the Examiner concludes was a substantial change.

The Examiner concludes Roberson decided which classes the open position would teach. Ordinarily, department heads prepared individual class assignments and administrators revised them only when departmental schedules conflicted. In the present case, the Examiner concludes the usual practice did not occur. When Boucher learned in August, 1992, that Nagi would be getting the open math position, Boucher phoned the department head who had hoped until

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[12] Doug Anderson is a bargaining unit member.

[13] These were all the general math classes offered that year at Roosevelt.

then that Boucher would be returning and gave Boucher no reason to think he would not receive the classes he had been promised.

1992-1993 School Year

Nagi's Efforts to Ameliorate Schedule -

Nagi obtained the open position at Roosevelt by his seniority. Shortly after the 1992-1993 school year began, Nagi asked Roberson whether the general math classes could be distributed among the math teachers. She told him he knew what classes he would be teaching when he chose to come to Roosevelt. On November 2, 1992, Nagi made a number of written suggestions to Roberson which he felt would improve the performance of the general math students. These included reducing the number of students per class,[14] using team teaching if the larger classes were retained, aligning the curriculum of the two types of classes so students succeeding in general math could transfer during a semester into a regular class, providing special help for Hispanic and African-American students similar to that made available for bilingual students, and using a more democratic process for devising teacher assignments in the math department. None of the suggestions were implemented. Nagi also asked the Roosevelt Parent-Teacher-Student Association for a $300 grant to buy materials designed for general math students' special needs; the grant was not approved.

Nagi invited colleagues and student teachers to observe his classes and sought feedback from two bilingual instructional assistants who had been teachers in their countries of birth.

None of these efforts brought any change to Nagi's teaching assignment. Only when another teacher volunteered to exchange a

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[14] Roosevelt had between 23 and 30 students per general math class, while Nathan Hale had only 10 to 15.

class with him for the second semester was Nagi relieved of teaching all three general math classes.

Memo to Superintendent -
Several math teachers had been concerned for years that Roosevelt's higher-level classes, which were felt by all teachers to be more desirable, had not been equally distributed. Kaiso Eng, a math teacher at Roosevelt since approximately 1981, had shared his concerns with the department head in earlier years but was ignored. Eng and Marilyn Adams, who had taught math at Roosevelt since 1982, had submitted a grievance to Roberson over these concerns at some unidentified time. It produced no results and Roberson had no recollection of receiving it.

On November 5, 1992, Nagi, Eng, Adams, and fellow math teacher Rod Magat wrote Superintendent Kendrick explaining their belief that white male math teachers were assigned far fewer classes with high populations of "at risk" students than minority males and suggesting ways to make the distribution of attractive and unattractive math classes more equitable.[15] Kendrick viewed these issues as a principal's responsibility and immediately sent the matter down to Roberson through her superior, the director of secondary education.

Roberson had seen the November 5 letter before her superior contacted her about it.[16] Just like Kendrick, Roberson contended the November 5 letter was an issue for someone else, in this case for the department head. She did recognize that her superiors regarded the issue as her responsibility, and admitted she was concerned the issue had been presented to Kendrick before she had an opportunity to resolve it within Roosevelt. Roberson did not

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[15] This was one of the suggestions Nagi made to Roberson in his November 2, 1992 memo.

[16] Roberson and Cano-Hinz each believed they had been given the November 5 letter by the other.

criticize the four signers of the November 5 letter at the hearing, but Cano-Hinz claimed three of the four signers were neither capable nor qualified to teach upper level math classes. The Examiner concludes the November 5 letter was a severe professional embarrassment to Roberson and Cano-Hinz. The allegations were of a serious nature, and the fact that they had been forwarded to the Superintendent suggested Roberson was incapable of, or unwilling to, handle them. Chains of command exist to protect people from exactly this kind of embarrassment.

There was no visible response to the November 5 letter for months. In line with her contention that it was a department issue, Roberson testified she gave the department head a copy of the letter. He testified the letter was left anonymously in his mailbox in January or February of 1993. The Examiner credits the department head's testimony on this issue and discredits Roberson's because the department head considered the November 5 letter an aspersion on his character and would likely recall his receipt of it very clearly. Neither Cano-Hinz nor Roberson took any steps to encourage resolution of the issue by the math department until schedules were being prepared for the 1993-1994 school year. Meanwhile, on March 9, 1993, the four signers sent Roberson a letter with suggestions for equalizing staff input on scheduling. Eventually, several departmental meetings were held to discuss the scheduling issues, including at least one attended by Roberson and Cano-Hinz on March 24, 1993. A more satisfactory method of matching teachers with classes resulted from these meetings.[17]

Nagi's Probation -

There were some incidents in Nagi's general math classes that caused him to consult with Cano-Hinz. Her response was that he had

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[17] The union grievance filed on this subject December 2, 1992, was withdrawn from arbitration October 1, 1993, because the new method of assigning classes satisfied the remaining signers.

chosen to come back to Roosevelt knowing the situation he would face. During October, Cano-Hinz brought the long form criteria checklist into his classroom for observations. Because Nagi had four years of satisfactory evaluations, he felt the only purpose for using the long form criteria checklist was to recommend probation. In early to mid October, 1992, Cano-Hinz asked Roberson for a math specialist to observe Nagi and recommend improvements he could make in his teaching.[18] By mid to late October, Cano-Hinz shared her concerns about Nagi's teaching with Roberson and discussed the possibility of probation for him. Roberson advised Cano-Hinz to be sure Nagi's performance was unsatisfactory and probation was necessary, and cautioned her that obtaining action on such a recommendation was difficult. On November 5, 1992, Cano-Hinz memorialized a November 2 meeting with Nagi to discuss his problems with classroom control and complaints from general math students and their parents about Nagi's attitude toward the students' capabilities. The memo makes it clear Cano-Hinz assessed Nagi's situation very differently than he did.

One of the suggestions in Cano-Hinz's memo was that Nagi use the referral process when a student disrupted class. When Nagi followed her directions and sent a problem student out of the class on November 9, others left in a show of solidarity. The next day Cano-Hinz met with the students outside Nagi's presence. She admonished them, but also told them she understood why they walked out.

Teachers' probations follow a strict timetable dictated by statute and their collective bargaining agreements. The parties' agreement requires completion of a performance evaluation by January 15 on any teacher deemed unsatisfactory. The agreement and RCW 28A.405.-100 (1) require the superintendent to inform the teacher of

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[18] Cano-Hinz had studied little math and lacked experience teaching it.

specific areas of deficient performance, and give suggestions for improvement, by February 1. The probationary period, during which the teacher's progress is monitored at least twice a month, must end by May 1. A final performance evaluation must be prepared by May 15 and notice that a teaching contract will not be renewed must be given by the same date. The agreement limits grievances over probations and non-renewals to alleged failures of the employer to follow the applicable procedures; teachers cannot grieve the decision to place them on probation or to nonrenew them.

An average of five or six teachers are evaluated as unsatisfactory and placed on probation by the employer each year. The employer's legal posture of refusing to submit substantive evidence of its decision-making in Nagi's case leaves the record rather bare. It appears the employer's procedure for implementing probations begins with the evaluator reviewing the documentation with the personnel director and the employer's attorney, and then recommending probation to the superintendent. If the superintendent approves probation, the employer prepares a plan for the teacher's improvement. Regular meetings of the personnel director, evaluator, and attorney are held to assure that the evaluations are being properly performed, the plan is followed, and the documentation is persuasive. If the teacher's performance does not improve, the evaluator recommends to the personnel director that the teacher be nonrenewed. The personnel director reviews the supporting documentation to assure it is technically correct and complete. After the superintendent discusses the situation with the evaluator, the personnel director, and perhaps the attorney, he decides whether to nonrenew the teacher. The record suggests this procedure was followed in Nagi's case.[19]

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[19] The Examiner cannot credit Kendrick's testimony since he later acknowledged he had no specific memory of the case.

The math expert Cano-Hinz had requested made his first observation of Nagi's teaching in mid-January, 1993, and gave suggestions at a meeting with Roberson, Cano-Hinz, and Nagi. Some time during the first half of January, 1993, Cano-Hinz recommended that Kendrick place Nagi on probation. This was her first experience with a probation, and the recommendation had been cleared with Roberson. Cohrs met with Cano-Hinz and employer attorney Lawrence Ransom to discuss the probation some time before it was imposed. Cano-Hinz and Roberson told Nagi and union official Kraig Peck on January 15, 1993, that probation was pending. A grievance was filed January 22 challenging the oral notice on the grounds the probation was retaliation for Nagi's efforts to return to Roosevelt and for his participation in the November 5 letter.[20]

Nagi's probation formally began February 1, 1993. Cano-Hinz was his primary evaluator and Roberson the secondary evaluator. Many people observed Nagi's teaching during the probationary period: the math expert, who returned once or twice; Peck; an educator from Western Washington University, at the union's request; Cano-Hinz and Roberson, and student teachers at Nagi's request.

Nagi's probation was difficult for all parties. Union official Peck described the regular meetings with Cano-Hinz and Roberson as unproductive for two reasons. The first was the administrators' unwillingness to listen to Nagi's perceptions which differed from theirs, and Nagi's unwillingness to listen because he suspected the administrators' motives. The second problem Peck identified was Cano-Hinz and Roberson's belief that his role was just to observe the regular meetings without speaking. Peck believed the probation was not working because of the parties' mutual mistrust. He recommended a disinterested evaluator be appointed and assistance

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[20] The union withdrew the grievance from arbitration October 7, 1993, because the contract limited challenges to procedural defects.

be provided to Nagi by someone not involved in any of the Roosevelt issues. The employer rejected Peck's suggestions.

Monthly meetings also occurred among Cohrs, Roberson, and Ransom during the probationary period.[21] Cohrs testified the two evaluators kept very careful notes that were as extensive as any he had seen during his 11 years as personnel director.

Nagi's Nonrenewal -
Cano-Hinz and Roberson concluded Nagi's teaching performance had not improved and they recommended on May 5, 1993, that Kendrick nonrenew Nagi. The nonrenewal notice was dated May 11, 1993. Nagi pursued the Chapter 28A.405 RCW process for challenging nonrenewals. After six days of hearing, the Chapter 28A.405 hearing officer decided the grounds specified in the notice were sufficient cause to nonrenew Nagi. The King County Superior Court found this decision to be supported by substantial evidence, not arbitrary or capricious, not in violation of the constitution, not beyond the hearing officer's statutory authority, not resulting from unlawful procedure, and not affected by any other legal error.

On November 5, 1993, Nagi filed the complaint charging unfair labor practices, which alleged he was nonrenewed in retaliation for exercising his right to file a grievance.

POSITIONS OF THE PARTIES

Nagi argues the burden is on the employer to prove by a preponderance of the evidence it had sufficient cause to nonrenew him and that it has failed to sustain that burden. Nagi asserts the satisfactory performance evaluations from his earlier years at

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[21] Roberson testified Cano-Hinz participated in these meetings; Cohrs did not list Cano-Hinz as a participant.

Roosevelt and other high schools contradict the negative assessments of the 1992-1993 school year. Nagi contends that the employer ignored the fact that general math was not on his list of categories and his resulting need for additional assistance in teaching that subject, and that he could not legally teach general math without that category. Nagi further asserts he raised the problem of equal distribution of the general math classes at every meeting, both before and during his probation, and that neither Roberson nor the union was interested in resolving these concerns. Nagi argues Roberson and Cano-Hinz refused to acknowledge the difficulty of teaching general math students, claiming they were "mainstream", although those teaching such students agreed they were significantly "at risk". Nagi also contends Roberson, Cano-Hinz, and his department head resisted his return to Roosevelt for the 1992-1993 school year, and downgraded the class schedule to give him all the general math classes. Finally, Nagi contends his participation in the November 5 letter triggered his probation and nonrenewal, noting that fellow teachers Eng and Adams saw the connection. Responding to the employer's argument that he raised the scheduling issue to insulate himself from adverse action, Nagi asserts he had been questioning the distribution of math classes at Roosevelt since 1991. Responding to the employer's contention that the Chapter 28A.405 hearing officer decided the issue now before the Examiner, Nagi argues: that proceeding focused on the technicalities of performance evaluations and the probation plan; the Chapter 28A.405 hearing officer did not consider the retaliation claim, and that numerous witnesses in the unfair labor practice proceeding had not testified in the Chapter 28A.405 proceeding.

The employer asserts the timing of its actions regarding Nagi's probation were dictated by the statute and agreement, and were not a response to any protected activity by Nagi. The employer argues if the Examiner accepts Nagi's contention, any teacher fearing that he or she might be evaluated unsatisfactorily and placed on probation could avoid the consequences by hurriedly engaging in

protected activities. The employer contends, as it did in its motion for summary judgment, that the Examiner should accept the Chapter 28A.405 hearing officer's decision as determinative on the question of whether the employer had a legitimate business reason for nonrenewing Nagi.[22] The employer reasons that the same issue was presented in both forums, it was finally resolved through the Chapter 28A.405 process in the employer's favor, and proof the employer discharged Nagi because of his unsatisfactory performance makes it impossible to find the employer's actions violated Chapter 41.59 RCW. Alternatively, the employer contends it has satisfied its burden before the Examiner by articulating its legitimate business reason for nonrenewing Nagi, and that it is not required to produce evidence of the probationary and nonrenewal process a second time. In accord with this legal posture, the employer called no witnesses in the Chapter 41.59 proceeding and presented no substantive evidence about its decision-making processes. The employer also asserts Nagi's complaint is untimely, reasoning that the six month statute of limitations began when Nagi was informed January 22, 1993, that he would be on probation, rather than when he was notified of his nonrenewal. Turning to Nagi's obligations in establishing his case, the employer argues Nagi cannot show the necessary link between his protected activity and his nonrenewal because Kendrick was unaware of the math scheduling grievance, and had forgotten Nagi had signed the November 5 letter, when Kendrick decided to place Nagi on probation, and later to nonrenew him. The employer also contends Nagi has shown only coincidence, not causation, with regard to his protected activities and the actions of Roberson and Cano-Hinz in initiating his probation and nonrenewal, since both administrators and department heads wanted nothing to do with Nagi well before the November 5 letter and the math scheduling grievance. The employer also contends its actions could

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[22] The employer argues Nagi's use of the caption, burden of proof, and citations of case authority from the Chapter 28A.405 proceeding in his brief to the Examiner prove Nagi is merely relitigating the earlier hearing.

not have been improperly motivated because the other three signers of the November 5 letter were not adversely affected, and the concerns identified in that letter were ultimately resolved. Responding to Nagi's claim that he lacked the category of general math during the 1992-1993 school year, the employer notes that Nagi chose to accept the general math assignment at Roosevelt. Finally, the employer asserts no other employee could reasonably perceive Nagi's probation and nonrenewal as retaliation because the employer's actions were dictated by the schedule set by statute and the agreement.

DISCUSSION

THE STATUTE OF LIMITATIONS

RCW 41.59.150 (1) provides in pertinent part:

> The commission is empowered to prevent any person from engaging in any unfair labor practice as defined in RCW 41.59.140: PROVIDED, That a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission. ...

Because an untimely filed complaint charging unfair labor practices must be dismissed, this issue should be discussed first. The burden of proof is on the party asserting that a claim is untimely. City of Pasco, Decision 4197-A (PECB, 1994).

Employer's Argument Unavailing

The employer argues the six month period should begin with the notice that Nagi was being placed on probation, reasoning that the filing period begins with notice of an adverse action, rather than when its impact is felt. This argument necessarily means the

employer views the probation as the alleged unfair labor practice, not the later nonrenewal. The employer cites several Commission decisions which it believes support its claim. None of them do.

In City of Pasco, supra, the employer contended a complaint filed on February 25, 1991, was untimely because the challenged expense reimbursement contract had been signed by a bargaining unit member some two years earlier. The Commission held the complaint was timely because the union had filed within six months after learning the expense reimbursement contract existed. It was actual or constructive notice of the complained-of action that started the six month filing period. In the present case, Nagi's complaint asserts "[t]he District's May 11, 1993, non-renewal of Mr. Nagi's certificated employment contract is in retaliation..." for his exercise of union rights. The complaint was filed November 5, 1993, just less than six months after the May 11 notice of non-renewal. City of Pasco does not help the employer.

The employer also cites Port of Seattle, Decision 4106 (PECB, 1992), which dismissed an unfair labor practice complaint that was mailed within the six month period but received by the Commission after the six month period expired. There is no issue in the present case about constructive service. Port of Seattle does not assist the employer.

The employer cites King County, Decision 3558-A (PECB, 1990),[23] where the complainant was notified on July 28 and August 17, 1989, that he would be transferred to a new work unit, and began work there on September 1, 1989. The Commission took the August 17,

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[23] The employer actually cited the Examiner's decision in that case; this Examiner prefers to rely on the Commission's decision in a matter when it addresses the question at issue.

1989 notice as initiating the filing period[24] and rejected various policy arguments for extending the filing period. Those policy arguments bear no relationship to the issue the employer raises in the present case, so King County does not advance the employer's claim.

Finally, the employer cites City of Seattle, Decision 1887 (PECB, 1984), which held that a complaint filed October 7, 1983, was untimely for events occurring more than two years earlier. There is no question in that case about notice or the effective date of the complained-of events, so City of Seattle is no more help to the employer than the preceding cases.

The Correct Legal Standard

The employer's first difficulty is that it has seized upon Nagi's probation, not his later nonrenewal, as the action challenged by the complaint. But it is the complainant, not the respondent, who has the power to designate the action believed to be illegal. And here Nagi asserts it is his nonrenewal, not his probation, that is unlawful retaliation. City of Pasco demonstrates the employer's error. It teaches that in answering statute of limitations questions, the focus must be on the act complained of in the complaint. There, two possible unlawful acts existed: the employer's insistence that the bargaining unit member sign the expense reimbursement contract, or the employer's enforcement of the expense reimbursement contract.[25] City of Pasco also holds

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[24] Neither the Executive Director's dismissal nor the Commission's decision describe either of the notices; consequently it is unclear why the Commission decided the later of the two notices initiated the filing period.

[25] It was not necessary for the Commission to decide which employer action initiated the filing period because the complainant discovered both actions at the same time and filed within six months after discovery.

that the filing period begins with either actual or constructive notice of the challenged action.

City of Dayton, Decision 2111-A (PECB 1985), suggests that the employer's notice must be of imminent action in order to initiate the filing period, rather than of acts that may possibly occur some time in the future. There, the employer and union agreed to add an existing position to the bargaining unit. After a disagreement over the appropriate wage,[26] the position was added to the bargaining unit and the employer told the union it had rejected the union's suggestion on wages. The employer reduced the position's wage on January 1, 1984, and the union filed a complaint on February 9, 1984. The Commission rejected the employer's claim the complaint was untimely, "because the action of which the union complains did not take place until January 1, 1984." The Commission saw the May 1983 addition of the position to the bargaining unit and the January 1984 wage reduction as separate transactions, both of which were subject to the duty to bargain. It is noteworthy that the Commission did not reverse, or even refer to, City of Dayton in City of Pasco, supra.[27]

The correct legal standard is that the six month filing period for unfair labor practice complaints begins with the latest of: 1) actual notice of the act alleged to be unlawful; 2) constructive notice of the act alleged to be unlawful, or 3) occurrence of the act alleged to be unlawful. It is important to note that only the act alleged to have been discriminatory need have occurred during the six month filing period; neither the protected activities nor

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[26] The employer was willing to maintain the higher wage until January 1, 1984, but then reduce it to that of other bargaining unit members, while the union wanted the higher wage to continue in effect.

[27] The Commission does refer in City of Pasco to Emergency Dispatch Center, Decision 3255-B (PECB, 1990), which describes City of Dayton as a late notice case.

actions evidencing union animus must occur within the six month period.

There are two other problems with the employer's argument. By contending that the probation was the initiating action, the employer assumes all probations will end in nonrenewal. The experience of Roosevelt math teacher and November 5 letter signer Rod Magat proves that is incorrect; Magat was placed on probation when he was teaching all the general math classes, but improved sufficiently to retain his employment. Second, RCW 28A.405.100 (1) states that being placed on probation is not adverse action affecting the teacher's continuing contract.[28]

Conclusions on Statute of Limitations

Kendrick's nonrenewal notice to Nagi was dated May 11, 1993. It is the notice of nonrenewal, rather than the actual cessation of Nagi's employment, that initiates the filing period. The Examiner concludes Nagi timely filed his complaint within the period beginning with the May 11, 1993 notice he was going to be nonrenewed.

THE LEGAL STANDARD FOR DISCRIMINATION CASES

Neither party has correctly stated the legal standard applicable to this case. Since July 25, 1994, the Commission has applied a "substantial factor" test when complainants allege employers have discriminated against them for union activities.

> [T]he 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:

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[28] The effect is to prevent Chapter 28A.405 challenges to probations.

> 1. The exercise of a statutorily protected right, or communicating to the employer an intent to do so;
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> 2. That he or she was discriminated against; and
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> 3. That there was a causal connection between the exercise of the legal right and the discriminatory action.
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> If a plaintiff provides evidence of a causal connection, a rebuttable presumption is created in favor of the employee.
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> ...
> 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. If the employer fails to produce any evidence of other motivation for the discharge, however, the complainant will prevail.

Educational Service District 114, Decision 4361-A (PECB, 1994).

The Commission continues to apply this approach. See City of Winlock, Decision 4784-A (PECB, 1995), and Port of Tacoma, Decisions 4626-A, 4627-A (PECB, 1995).

PRIMA FACIE CASE

Exercise of Legally Protected Right

Nagi exercised the seniority rights granted him by the agreement to obtain the open position and return to Roosevelt for the 1992-1993 school year. Pursuit of a right guaranteed in a collective bargaining agreement was held to be protected activity in Valley General Hospital, Decision 1195-A (PECB, 1981).

Nagi and other bargaining unit members petitioned the employer's chief executive officer on November 5, 1992, about work load distribution. The same four teachers wrote Roberson on March 9, 1993, suggesting solutions to the problem raised in the November 5 letter. Addressing a city council meeting and writing a department head about mandatory bargaining subjects, were held to be protected activities in City of Winlock, Decision 4784-A (PECB, 1995), and Lewis County, Decision 4691-A (PECB, 1994), respectively.

Nagi participated in filing a grievance on December 2, 1992. Filing and processing a grievance was held to be a protected activity in City of Seattle, Decision 3198 (PECB, 1989).

The Examiner concludes Nagi was exercising rights protected by Chapter 41.59 RCW when he engaged in each of these activities. Nagi has established the first element of a prima facie case.

Subsequent Discrimination

Having established the exercise of protected rights, Nagi must now show subsequent adverse employer action. Discharge is the classic example of employer discrimination following union activities. City of Winlock, supra. Nagi's employment as a teacher was nonrenewed at the first opportunity permitted by Title 28A after his exercise of rights protected by Chapter 41.59 RCW. The Examiner concludes Nagi has shown adverse employer action following his exercise of protected rights. Nagi has satisfied the second requirement of a prima facie case.

Causal Connection

Establishing a causal connection between the exercise of protected rights and the adverse employer action is the final element of the complainant's prima facie case. The complainant must show that the employer knew of her or his protected activities and that the

discriminatory act occurred in circumstances permitting an inference it was related to the union activities. City of Winlock, supra. Direct proof rarely exists, and it is to be expected that the circumstances will support varying inferences, including innocent ones.

Employer Knowledge -

The employer strenuously argues that Kendrick had forgotten Nagi's involvement in the November 5 letter by the time Kendrick placed Nagi on probation and nonrenewed him. It is certainly true that Kendrick lacked any particularized recollection of Nagi's probation and nonrenewal when Kendrick testified on March 22, 1995. This necessarily reduces the persuasiveness of Kendrick's testimony that his decisions about Nagi were unrelated to the November 5 letter.

The employer's narrow focus on Kendrick's personal knowledge reveals its erroneous assumption that Kendrick is the only person whose acts are attributable to it. In the circumstances of this case, this assumption is not tenable; it ignores the crucial role administrators Cano-Hinz and Roberson played in recommending both probation and nonrenewal. It is simplistic, but true, that Kendrick would have had no occasion to nonrenew Nagi without the administrators' recommendations. The employer is responsible for any discriminatory motivation behind the recommendations upon which Kendrick acted.

Attribution of a lower level supervisor's knowledge to the employer despite the ignorance of a higher level employer representative is not uncommon in discrimination cases. In Educational Service District 114, supra, the program coordinator's knowledge of a complainant's union activities was sufficient to find employer knowledge although her superior testified he did not know the

complainant was involved in the organizing.[29] A complainant's shop steward activities with the predecessor employer satisfied the requirement of the successor employer's knowledge in Spokane Transit Authority, Decision 2078 (PECB, 1984), affirmed Decision 2078-A (PECB, 1985).[30] In City of Olympia, Decision 1208 (PECB, 1981), affirmed Decision 1208-A (PECB, 1982), knowledge of union activities on the part of the supervisor who recommended complainant's discharge was attributed to the employer. On the other hand, where the record clearly establishes the discharging official lacks knowledge of union activities, and others who may have possessed knowledge lacked any influence on the discharge decision, no violation can be found. West Valley School District 208, Decision 1179-A (PECB, 1981).

Our attention must shift, therefore, to the issue of Roberson and Cano-Hinz's knowledge of Nagi's protected activities. As has been described above, the Examiner concludes Roberson knew by September, 1991, that Nagi was attempting to use his seniority to transfer back to Roosevelt for the following school year. Both Roberson and Cano-Hinz knew almost immediately about the November 5 letter. Roberson testified she learned of the November 5 letter from Cano-Hinz within a week, while Cano-Hinz testified she became aware of the letter in mid or late November. The Examiner does not credit Cano-Hinz's testimony because Cano-Hinz had commented in earlier testimony about how much time had passed since the November 5 letter and that her recollection was vague, and because Cano-Hinz's responsibility for evaluating the math department makes it very likely Roberson would have shared her knowledge of the November 5 letter with Cano-Hinz immediately. The Examiner concludes both

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[29] The Commission found the program coordinator's knowledge relevant because she participated in the decision not to rehire the complainants.

[30] The conclusion in this case is particularly compelling because the successor's chief executive officer had not worked for the predecessor employer.

Roberson and Cano-Hinz knew within a week that the November 5 letter had been sent. Roberson held the step 1 meeting on the math scheduling grievance, and Cano-Hinz testified she had "fleeting knowledge" of it. Roberson was the addressee of the March 9, 1993 suggestions from Nagi, Eng, Magat, and Adams, the four signers of the November 5 letter. All of these events occurred before either the early January 1993 recommendation for probation, or the May 5, 1993 recommendation for nonrenewal.

The Examiner concludes Nagi has shown sufficient and timely knowledge of his protected activities by employer officials who participated in the subsequent adverse action.

Evidence of Animus -

After establishing timely employer knowledge of the protected activities, the complainant must show circumstances from which an inference can be drawn that the protected activities were a cause of the adverse action.

The employer contends Nagi has failed to show anything but a "coincidence of timing" linking his protected activities with the recommendations of Cano-Hinz and Roberson. Timing alone has supported an inference that protected activities were at least a factor motivating an adverse employer decision. Lewis County, supra; City of Winlock, supra; City of Olympia, supra. Here, the adverse action followed Nagi's return through his seniority by nine months, and the November 5 letter by six months. This may seem like a substantial delay, but there is no statute of limitations on union animus; the only requirement is that a causal connection be shown between the union animus and the adverse employer action. In addition, a school district's ability to terminate a certificated teacher's employment is severely restricted by Chapter 28A.405 RCW. Conviction of serious crimes against children is the sole ground for terminating a teacher's employment during the contract year. RCW 28A.405.470. Absent such considerations, nonrenewal must be

preceded by a probationary period from February 1 to May 1. RCW 28A.405.100. The Examiner concludes the employer took adverse action against Nagi as soon as was permissible. The timing of Nagi's nonrenewal is such as to cast suspicion on the employer's motivation.

In this case, additional inferences may be drawn from the record which support the conclusion that Nagi's probation and nonrenewal were causally connected to his protected activities. First, when Roberson learned in September, 1991, that Nagi was interested in a position at Roosevelt, she repeatedly told him that he would face a negative environment if he insisted on returning to Roosevelt. She never told him why the environment would be negative. The Examiner concludes Roberson used the limited means available to her under the parties' agreement to discourage Nagi from using his seniority rights to transfer back to Roosevelt.

Second, knowing Nagi wanted to return and that there was a math department opening, Roberson assigned all the general math classes to the position the personnel office had told her Nagi was entitled to. Although schedules were ordinarily prepared by each department head and coordinated by an administrator (Cano-Hinz for the 1992-1993 school year), the record is clear neither of them participated in determining the class load for the open position. Cano-Hinz knew nothing about the open position, and the math department head hoped Boucher would return and had no idea Nagi would, instead.[31] The Examiner concludes Roberson gave all the general math classes

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[31] The Examiner is persuaded the employer would have presented any evidence it had that the math department head created Nagi's schedule because the employer has argued he and other teachers didn't want Nagi to return.

to the open position, knowing Nagi would obtain it and knowing general math was a difficult assignment.[32]

Third, Roberson had no explanation for changing the class schedule so drastically from the one Boucher had been promised and the one the retiring teacher had taught.[33]

> Q. [By Mr. Ransom] Would you explain, please, what exhibit 11 is and how it came to be prepared and signed by you?
>
> A. [By Ms. Roberson] This RSVP, request to staff vacant position, number 8, is done as a result of vacant positions during the staffing process. And this was submitted because there was a vacant position for three [general] math and two [math I] as a result of John Aimes' retirement.
>
> Q. Now, let's clarify one thing. Are three [general] and two [math I], are those the classes that John Aimes taught?
>
> A. No.
>
> Q. How did, if you know, how did this position come to be defined on June 26, 1992, as the position arising from John Aimes' retirement, when this isn't exactly what Mr. Aimes taught?

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[32] Adams' evaluation for the 1990-1991 school year, when she taught general math, stated "Mrs. Adams has done well with a particularly difficult assignment this year. She has worked with low level and at-risk students in a creative and organized manner" (emphasis added). Magat, who signed the November 5 letter, had classroom management problems and was placed on probation when he taught several general math classes.

[33] Nagi knew John Aimes would be retiring from Roosevelt, leaving an open position for 1992-1993. The Examiner concludes the initial math schedule for the 1992-1993 school year had been prepared, and Boucher promised his particular assignment, with Aimes' retirement in mind.

> A. There are a number of things that occur that would make us change a schedule. One of which would be enrollment and identification of those people who are left in the department, and positioning of classes and where we had the needs. And we arrive at what we need, and that's how we come up with it.
>
> Transcript, page 845.

The Examiner believes Roberson would have remembered specific reasons for that drastic a change in the assignment if the reasons were innocent. The question was very pointed, but Roberson's answer was vague, general, and speculative. The Examiner does not believe Roberson changed the open position's assignment so much from that promised to Boucher for any of the possible reasons mentioned, but that the change was deliberate and made to discourage Nagi from using his seniority to return to Roosevelt.

Fourth, the admitted attitude of Roberson and Cano-Hinz was that Nagi could sink or swim with the assignment. They refused to ameliorate it or respond in any way to Nagi's suggestions for improvement of the students' performance.[34] The Examiner finds that administrators sincerely concerned about the learning experiences of "at risk" students would have taken steps in these circumstances, particularly if they believed Nagi's performance was questionable.

Fifth, Cano-Hinz had probation on her mind at least from early October, 1992, when she began using the long method of evaluating Nagi's performance. The parties' agreement says the long evaluation method need not be used for teachers, like Nagi, who have four years of satisfactory evaluations, unless they are to be placed on

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[34] The employer asserts it reduced the number of Nagi's general math classes the second semester. The record demonstrates that reduction occurred because another teacher volunteered to exchange a class with Nagi; there is no evidence of employer involvement in the exchange.

probation. The long method, which requires two observations and completion of two criteria checklists with specific ratings in 23 categories, is much more work than the short method with its satisfactory/unsatisfactory boxes and three lines for comments. The Examiner concludes Cano-Hinz knew she would be recommending probation for Nagi from early October or mid-October at the latest, when she consulted Roberson about that step.

Sixth, the Examiner has concluded Roberson and Cano-Hinz were professionally embarrassed when Nagi, Eng, Magat, and Adams failed to follow the chain of command but took their concerns over class distribution directly to the superintendent. Supervisors take it personally when their subordinates circumvent them and submit problems directly to the head of an organization. Supervisors generally prefer the organization's head to hear nothing about their part of the operation, thinking that no news is good news. In addition, such circumvention is regarded as demonstrating either the supervisor's lack of control over the subordinates, or the supervisor's inability to discover or resolve the problem. The Examiner finds further evidence supporting this conclusion in Cano-Hinz's personalized and negative attitude toward the signers of the November 5 letter.

> Q. [By Mr. Nagi] Let me rephrase. In your opinion, then, these teachers who sign on this letter, whatever they were alleging in this letter was incorrect?
>
> A. [By Ms. Cano-Hinz] To an extent, yes.
>
> Q. Elaborate on to an extent, please. [An objection by Ransom to the form of the question and an extended discussion among him, Nagi, and the Examiner are deleted]
>
> A. Well, first of all, the tone of the letter is very angry. And I do recognize individual frustrations. However, the basis for the letter, I feel doesn't have much foundation in that three of the four signators on this letter really are not

either qualified or capable of teaching upper level math courses.

...

Q. [By the Examiner] What was the basis of your testimony that you felt three of the four signers of the November 5 letter were not capable or qualified to teach upper level math classes?

A. What was the basis? One of them did not have the endorsements in order to teach a certain number of classes or just teach -- there are various endorsements in math. There is a calculus, pre-calculus endorsement, there is a general math endorsement, and there is an integrated math geometry endorsement. I may -- let's see. I know that Mr. Magat did not have the upper level endorsement.

Q. Was he the one who lacked the endorsement?

A. Yes.

Q. And what was the basis for the others?

A. Ms. Adams did not draw students as a sign up. And I'm not so sure about Mr. Eng. I know that Mr. Eng was teaching an honors integrated math, and he may not have a calculus endorsement. Actually, yeah.

Transcript, pages 220-221, 259-260.

Cano-Hinz's demeanor during the majority of her testimony had been unemotional, understated, and withdrawn. But the Examiner noted during this testimony, Cano-Hinz's voice shifted from a calm, low tone to a higher tone laden with scorn and disgust. Her manner was judgmental, dismissive, and belittling toward those who signed the November 5 letter and their capabilities. In addition, though the November 5 letter is certainly strongly phrased, the Examiner does

not read it as expressing anger.[35] Cano-Hinz also did not adequately support her assessment of the signers' capabilities. Cano-Hinz admitted her lack of expertise in teaching math by asking for a specialist to observe Nagi, yet she opines on the capacities of the four signers. Several of the signers had successfully taught higher level math classes.[36] Eng taught honors math III both semesters of the 1992-1993 school year. Adams taught math III the same year and Cano-Hinz's evaluation states, "Marilyn Adams has demonstrated effectiveness as a teacher of mathematics. Her technique for checking for understanding and positive reinforcement is excellent." During the preceding year, Adams had taught math analysis and math III; Cano-Hinz said "Ms. Adams provides her students with a variety of activities in order to meet her objectives. She is conscientious and well organized." In addition, the rationale Cano-Hinz advanced for her judgment about Adams, that she did not draw students, simply does not support the conclusion that Adams lacked the ability or qualifications to teach upper level math.

Seventh, union official Peck reported both Roberson and Cano-Hinz resisted any active participation by him in their meetings with Nagi about the progress of his probation.

> Q. [By Mr. Nagi] During the probation period, you had some exchanges with Marta and Joan?
>
> A. [By Mr. Peck] That is correct.
>
> Q. Would you describe what they were.

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[35] Anger is closely associated in Cano-Hinz's mind with both the November 5 letter and its signers; she thought Adams had taken the lead in writing the November 5 letter "because Marilyn Adams is, or was, an angry lady."

[36] Roosevelt's math classes, in descending order, are calculus, precalculus, math analysis, math III, math 2.5, math II, math 1.5, Math I, and general math.

> A. Well, it was a rocky probation in the sense that -- well, it was the only probation of the kind that I experienced where they believed that my role in the meeting was to observe the meeting, rather than to represent Mr. Nagi and to assist in the process of ensuring that the probation was fair and useful to Mr. Nagi.
>
> And so they would tell me that I had no right to speak up in the meetings.

Transcript page 301.

Peck explained that Roberson and Cano-Hinz's attitude toward his participation in these meetings changed only after Nagi had been nonrenewed. An expectation that a union representative's role is to be a passive observer is an unfair labor practice in some contexts,[37] and additional evidence of union animus in these circumstances.

The final indication that Nagi's exercise of protected rights were causally connected to his probation and nonrenewal is found in the attitude Cano-Hinz displayed toward Nagi. At two points in her testimony, she engaged in what the Examiner perceived as gratuitous personal attacks on Nagi.

> Q. [By Mr. Nagi] Let me repeat this question. If you could answer fine, otherwise it's okay. Were you aware that Mr. Nagi wrote a letter to the [bilingual instructional assistants] during the probation period? [An exchange among Ransom, Nagi, and the Examiner about whether the subject had already been covered is deleted]
>
> A. [By Ms. Cano-Hinz] Yes, I was.
>
> Q. What was your reaction?

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[37] City of Bellevue, Decision 4324-A (PECB, 1994); King County, Decision 4299-A (PECB, 1993).

A. Quite candidly my reaction was that if I were you, I would have been embarrassed to invite anybody into my classroom.

Q. And why would be that?

A. Because your classroom management was distressing, and your level of instruction was greatly lacking in skill, and your treatment of the students was unconscionable. [Another exchange among Ransom, Nagi, and the Examiner about the form of Nagi's question is deleted]

Q. As an expert in the field of education, you have a teacher in your school who invites people to his classes. What will be your feelings about that, or understanding, or his teaching perhaps?

A. Well, I suppose we need to look at the circumstances. Under normal circumstances, a teacher who invites other people to the classroom invites people for lots of reasons. One is because he or she is extremely proud of what it is they do, or because they are seeking to get feedback as to methods of instruction and making it more meaningful for the students. Under normal circumstances.

Under adverse circumstances, it could be for several reasons. One, seeking input from additional sources. Or two, being completely out of touch with reality.

Transcript, pages 244-247.

Cano-Hinz, who had previously avoided looking directly at Nagi, leaned forward and looked into his eyes during this testimony. Her voice increased in volume and her tone became forceful rather than cool. She spoke these words very emphatically. The Examiner was left with the definite impression Cano-Hinz intended to wound Nagi. This conclusion was corroborated by another exchange.

Q. [By Mr. Nagi] When Mr. Nagi was working in 1991 school year teaching science, would you describe just in brief what kind of relationship you had with him? [Another interchange among Ransom, Nagi,

> and the Examiner about the relevance of the question is deleted]
>
> A. [By Ms. Cano-Hinz] Mr. Nagi, we had a professional relationship. It was friendly, but you were going through an extremely difficult time in your life. You were getting a divorce, your wife wanted custody of a child that was not hers, your son was rejecting you, you were a mess. And being a compassionate person, I listened to you. I tried to give you some advice. I advised you to seek counselling, tried to put you in touch with the employee assistance program, and I treated you kindly.

Transcript, pages 256-257.

The Examiner can imagine no benign reason an administrator would consider such personal matters an appropriate subject for comment in a hearing focused on the exercise of union rights and the employer's defense of inadequate performance. Cano-Hinz's testimony left the Examiner with a conviction Cano-Hinz was taking any opportunity presented to express her disgust for, or to "get even with", Nagi.

Animus Related to Union Activity -

The employer suggests Nagi is simply disliked, but this is not a case of mere personal or political animosity, as in Town of Granite Falls, Decision 2692 (PECB, 1987). There, a union activist had been laid off and then not rehired. The Examiner in that case found the abundant evidence of the mayor's bad feelings toward the complainant was due to their political conflicts. The record lacked evidence of anti-union animus or unlawful employer action.

In the present case, Roberson resisted Nagi's exercise of his seniority rights to transfer back to Roosevelt. Roberson and Cano-Hinz's refusal to permit union official Peck to effectively participate in meetings about his bargaining unit member's

performance during the probation are a classic expression of union animus. Cano-Hinz castigated the merit and qualifications of the November 5 letter signers other than Nagi; similar actions were one factor upon which a finding of union animus was made in Port of Tacoma, Decisions 4626-A, 4627-A (PECB, 1995). And finally, but for Nagi's return to Roosevelt through exercise of his union rights, his performance would not have come under Roberson and Cano-Hinz's purview. The Examiner concludes the employer's animosity was not merely a reaction to Nagi, personally, but directed toward union activities.

Absence of Adverse Effect on Others -

The employer asserts it could not have retaliated against Nagi for signing the November 5 letter because the other signers were not evaluated unsatisfactorily. Such a defense has been soundly rejected in the past. Port of Tacoma, Decisions 4626, 4627 (PECB, 1994).[38] The argument that one person cannot have been discriminated against if other potential discriminatees have not been adversely affected is logically unsound. The respondent may be engaging in picking off annoying persons one by one, or testing whether action against a single person produces the desired behavior in others, or simply more negatively inclined toward one of a group. In addition, the concept of discrimination requires differential treatment of the discriminatee, compared to similarly situated employees. Suffice it to say the argument fails to persuade in the circumstances of this case.

Conclusion on Prima Facie Case

The Examiner concludes Nagi has established that he engaged in activities protected by Chapter 41.59 RCW, that administrators Roberson and Cano-Hinz knew about his activities, that his

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[38] Although the Commission reversed the Examiner on other points, this conclusion was not disturbed by Port of Tacoma, Decisions 4626-A, 4627-A (PECB, 1995).

employment was terminated at Roberson and Cano-Hinz's recommendation, and that his protected activities were a cause of Roberson and Cano-Hinz's recommendation that he be nonrenewed. Nagi has made a prima facie case of discrimination.

EMPLOYER'S LEGITIMATE, NON-RETALIATORY MOTIVE

The employer has consistently resisted the Commission's jurisdiction in this matter. Its answer claimed the complaint was barred by its simple denial that it had retaliated against Nagi. It moved for summary judgment although its legal argument depended on a disputed fact, despite a legal standard precluding summary judgment when a material fact is in dispute. When a hearing was required, the employer attempted to severely limit any review by the Commission of its actions toward Nagi by contending it had satisfied its burden under Educational Service District 114, supra, by merely articulating a legitimate, non-retaliatory reason for nonrenewing Nagi. This argument seriously misstates the employer's obligation in a discrimination case. A close reading of Commission decisions demonstrates the employer cannot rest after articulating a legitimate, non-retaliatory motive, but bears a burden of producing relevant, admissible evidence of that motive. Educational Service District 114, supra.[39]

Collateral Estoppel Inapplicable

The employer contends the Chapter 28A.405 hearing officer's decision should control this case through the legal theory of collateral estoppel. The employer cites no Commission or National

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[39] City of Winlock, supra, and Port of Tacoma, supra, which appear to focus on articulation of legitimate reasons, do not constitute a changed standard. Winlock states the employer has a burden of producing admissible evidence to support its articulated reasons; in Port of Tacoma, the Commission dissects the employer's evidence.

Labor Relations Board authority for this proposition and the Examiner has found none directly on point.[40]

The burden of proof that collateral estoppel applies in a given situation is on the party urging that it should. McDaniels v. Carlson, 108 Wn.2d 299, 303 (1987). Collateral estoppel prevents relitigation of an issue or factual determination. Numerous preconditions must exist before the theory is applied. The party to be estopped must have had a full and fair opportunity to have presented her or his case in the first proceeding; the first proceeding must have been finally decided; the issues in the two proceedings must be identical; the issue or factual finding must have been important in the prior proceeding, and application of collateral estoppel in the second proceeding cannot work an injustice. Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 114-116 (1992), cert.den. ___US___, 113 SCt 1044, 122 LEd 2d 353 (1993).[41] It is evident that collateral estoppel does not apply in the present circumstances.

The issue must be identical in both cases for collateral estoppel to govern the second proceeding. It is true the employer has argued in both proceedings it nonrenewed Nagi because his teaching performance was unsatisfactory, but identity of defenses does not translate automatically into identity of issues.

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[40] Decisions of the National Labor Relations Board the employer has cited do not support its contention. For instance, the issue in Phoenix Newspapers, 294 NLRB 47 (1989), was whether a trial court decision that a lawsuit had merit should be given deference in deciding whether the employer had committed an unfair labor practice by filing it. The Board held it should give deference to the court's decision unless there was a compelling reason, cogently explained, for not doing so.

[41] After a conditional use permit had been denied a second time, the Supreme Court said an earlier trial court decision that the first denial had been arbitrary and capricious, was controlling in an action for a writ of certiorari and damages after the second denial.

The issue in the Chapter 28A.405 proceeding was whether the employer had shown by a preponderance of the evidence that the teaching deficiencies specified in Nagi's notice of nonrenewal were sufficient cause for his nonrenewal. RCW 28A.405.310. The issue in this Chapter 41.59 proceeding is whether: 1) Nagi's alleged teaching deficiencies were a pretext for his nonrenewal, or 2) Nagi's union activities protected by Chapter 41.59 RCW were a substantial factor in his nonrenewal even though his teaching performance was deficient. The focus in the Chapter 28A.405 proceeding would necessarily be on the mechanics of the probation (i.e., whether notices were timely, whether required observations were made, whether the plan was appropriate, and followed). Motivation appears irrelevant so long as the employer's data demonstrates there were teaching problems. In contrast, the present proceeding focuses directly on the employer's motivation for its actions. To decide the Chapter 41.59 RCW issue, the Examiner and Commission must delve under the surface (excavating, as it were) to get at a full understanding of why the employer acted as it did. The Examiner concludes that the Chapter 28A.405 proceeding dealt with only part of the issues raised by the unfair labor practice complaint. Accordingly, the two proceedings present issues that are not identical.

The employer would not prevail even if the issues in the two proceedings were to be regarded as identical. The Washington state Supreme Court has held that collateral estoppel does not apply where the same issue arises in two different contexts, or what had been a tangential issue in the first proceeding becomes the crucial issue in the second proceeding. The Court reaches this conclusion by distinguishing ultimate facts, which lie at the heart of a controversy, from evidentiary facts that are tangential. Barr v. Day, 124 Wn.2d 318, 325 (1994). See also Cascade Nursing Services, Ltd. v. Employment Security Department, 71 Wn. App. 23, 30-31 (Div. I, 1993).

The facts of Barr and Cascade Nursing Services clearly indicate collateral estoppel would not determine this Chapter 41.59 proceeding even if its issues were identical to those of the Chapter 28A.405 proceeding. In Barr, a judge approved the structured settlement of a personal injury action as reasonable in all aspects, including the attorneys' fee agreement. When the injured person died soon thereafter, his widow sued the attorneys for excessive fees, and failure to advise that the injured person's fragile health made a lump sum settlement more beneficial for them than a settlement paid over a number of years. The attorneys relied on collateral estoppel and lost. The Court reasoned the attorneys' fee arrangement had been tangential to the propriety of the settlement agreement, while the adequacy of their advice had been irrelevant. Therefore, the malpractice action was not precluded by the earlier approval of the personal injury settlement. Cascade Nursing Services considered whether a nurse referral service was the employer of the nurses for unemployment compensation purposes. The referral service argued an earlier decision in an industrial insurance case should control through collateral estoppel. The industrial insurance case had held that the referred nurses worked for the hospitals to which they were sent. The court rejected the argument because, though the same question arose in both cases, two different legal standards determined the answer.

Here, too, the legal standards in the Chapter 28A.405 and Chapter 41.59 proceedings differ. The employer has not shown that evidence of a discriminatory motivation would have prevented the Chapter 28A.405 hearing officer from finding that sufficient cause for nonrenewal had been established, even though the probation had been properly conducted and the evidence confirmed the reasons in the nonrenewal notice. Accordingly, possible discriminatory motivation was legally irrelevant in the statutory hearing proceeding.[42]

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[42] It is noteworthy the Chapter 28A.405 hearing officer made no factual findings or legal conclusions about the employer's motivations although his decision reveals he

Finally, there is a serious deficiency in the employer's case even if the Examiner were to conclude that the legal theory of collateral estoppel applied to the Chapter 41.59 proceeding. The employer introduced the Chapter 28A.405 hearing officer's decision, the superior court order affirming it, and the oral closing argument Nagi's attorney made to the Chapter 28A.405 hearing officer.[43] The exhibits and transcript of the Chapter 28A.405 hearing were not introduced in the Chapter 41.59 proceeding. This minimal record falls short of the legal requirement. Where collateral estoppel is argued, the entire record of the prior action must be made available to the court. Bunce Rental, Inc. v. Clark Equipment Co., 42 Wn. App. 644, 647-648 n. 4 (Div. II, 1986).

Alternatively, the employer argues the theory of priority of action supports its contention that the Chapter 28A.405 hearing officer's decision should collaterally estop Nagi's unfair labor practice complaint. City of Yakima v. International Association of Fire Fighters, 117 Wn.2d 655 (1991), does grant jurisdiction over an unfair labor practice complaint to the superior court or the Commission depending on which received the claim first. However, this case does not involve the question of which forum should determine an unfair labor practice, and the priority of action theory is not helpful in reaching a decision.

Independent Evidence of Legitimate Motive

The employer chose to call no witnesses in the Chapter 41.59 hearing, in accordance with its legal posture that the Chapter 28A.405 hearing officer's decision bound the Commission. As mentioned above, the employer introduced the Chapter 28A.405

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knew the circumstances of Nagi's return to Roosevelt and the existence of the November 5 letter.

[43] The employer submitted this to support its contention Nagi had presented his discrimination claim to the Chapter 28A.405 hearing officer.

hearing officer's decision, the superior court order affirming it, and the oral closing argument made by Nagi's attorney in Chapter 28A.405 hearing.

Hearing Officer's Decision Inadmissible -
The general rule is that, where a judgment is not given collateral estoppel effect, it is not admissible evidence.

> If neither res judicata nor collateral estoppel apply, however, courts have traditionally been unwilling to admit [civil] judgments in prior cases.
>
> ...
> In addition, it is argued that there is a danger that if such judgments are admissible parties offering them will tend to rely heavily upon them and not introduce significant amounts of other evidence, with the result that the evidence available in the second case will not be adequate upon which to reach a reliable decision.

McCormick on Evidence (2d Ed., 1972), page 739.

Washington's courts follow this general rule; the only exception to the hearsay rule for prior judgments is for convictions of certain crimes. ER 803 (22). The employer's dilemma in the present case demonstrates the wisdom of McCormick's rule.

While hearsay evidence is admissible in proceedings before the Commission, careful consideration must be given to whether its hearsay nature detracts from its value. Port of Tacoma, supra. In addition, its value is very limited unless it is supported by other, fully reliable evidence. Southwest Snohomish County Public Safety Communications Agency, Decision 3289-B (PECB, 1990). Because none of the record considered by the Chapter 28A.405 hearing officer has been introduced in the Chapter 41.59 proceeding, the Examiner has no way to independently assess the decision

of the Chapter 28A.405 hearing officer. To give any weight to that decision in these circumstances would produce a result indistinguishable from granting it collateral estoppel effect; the Examiner would be adopting the Chapter 28A.405 decision simply because it had been made. The hearsay nature of the Chapter 28A.405 hearing officer's decision, together with the lack of corroborative evidence, prevents the Examiner from giving it any value.

Although the burden of proof does not shift to the employer under the "substantial factor" analysis, the employer does bear a burden of production with regard to its defense. In the present case, the employer has failed to sustain its burden of producing relevant, admissible evidence that it discharged Nagi for a legitimate, nonretaliatory reason. Accordingly, the complainant's prima facie case must prevail. Educational Service District 114, supra. The Examiner concludes Nagi has established that his exercise of rights protected by Chapter 41.59 RCW was a substantial factor in his nonrenewal.

Appropriate Remedy

The customary remedy in a discrimination case is one of reinstatement, making whole, posting, and an order to cease and desist. Port of Tacoma, supra. Such an order is appropriate in the present case.

FINDINGS OF FACT

1. Seattle School District is an employer within the meaning of RCW 41.59.020 (5). The employer offers general math classes at Roosevelt High School to students who have failed eighth grade math. Among these students are some who are seriously "at risk" due to economic difficulties, including homeless-

ness; criminal histories; histories of drug abuse, and backgrounds of family and emotional problems.

2. Seattle Education Association is an employee organization within the meaning of RCW 41.59.020 (1), and is the exclusive bargaining representative of an appropriate bargaining unit of certificated teachers employed by the employer. The parties' collective bargaining agreement gives a teacher the right to open positions by seniority.

3. Kuldeep Nagi is a certificated teacher who was employed by the employer within the union's bargaining unit from the 1988-1989 school year through the end of the 1992-1993 school year, when he was nonrenewed.

4. From the beginning of the 1991-1992 school year, when Nagi was teaching at another school, he contacted Roosevelt Principal Joan Roberson and told her he wanted to return to Roosevelt. Roberson tried to discourage Nagi from returning, which was the only method available to her under the parties' collective bargaining agreement to prevent his return.

5. A Roosevelt math teacher retired at the end of the 1991-1992 school year, leaving an open position. Roberson assigned all three of the school's general math classes to the open position, knowing Nagi had a right to it by seniority and knowing such a class load was a very difficult one. This assignment differed substantially from that which the retiring teacher had, and from that which math teacher John Boucher was promised if he returned for the 1992-1993 school year. Nagi obtained the open position because he was more senior than Boucher.

6. When Nagi sought assistance with his general math classes from Roberson and Assistant Principal Marta Cano-Hinz, they gave

him no help and said he had known what he was going to teach when he decided to return to Roosevelt. Nagi's teaching load changed only because another teacher volunteered to exchange a class with Nagi for the second semester, leaving him with two general math classes; the employer did not bring about this change.

7. Cano-Hinz, who was assigned to evaluate all teachers in the math department, began observing Nagi's general math classes in early October 1992, using the criteria checklist form. Nagi had enough years of satisfactory evaluations that the criteria checklist was necessary only in preparing to recommend probation. In mid to late October 1992, Cano-Hinz consulted Roberson about recommending probation for Nagi.

8. On November 5, 1992, Nagi and three other Roosevelt math teachers (comprising three minority males and one white female) wrote then Superintendent Bill Kendrick, expressing their concern that math classes with "at risk" students were disproportionately assigned to minority male, or female, teachers. Kendrick viewed this as Roberson's problem to resolve, rather than his.

9. Roberson and Cano-Hinz learned of the November 5, 1992 letter almost immediately. Having such a letter sent directly to the superintendent, rather than presented to them according to the chain of command, was a severe professional embarrassment to Roberson and Cano-Hinz. Cano-Hinz claimed, but failed to establish, that three of the four signers of the November 5, 1992 letter were not qualified or capable of teaching the higher level math classes which the letter contended were disproportionately assigned to white males.

10. Cano-Hinz recommended to Kendrick during the first half of January 1993, that Nagi be placed on probation for alleged

teaching deficiencies. Chapter 28A.405 RCW and the parties' collective bargaining agreement require a probationary period before a certificated teacher's employment can be ended. When Nagi received verbal notice the probation was imminent, he grieved it as retaliatory for his use of seniority to return to Roosevelt and for the November 5, 1992 letter. Nagi's probation commenced February 1, 1993, with Cano-Hinz as his principal evaluator and Roberson as secondary evaluator.

11. During the probation, regular meetings were held among Cano-Hinz, Roberson, Nagi, and union official Kraig Peck. Cano-Hinz and Roberson refused to permit Peck to participate substantively in the meetings, telling him his role was to observe only.

12. Cano-Hinz and Roberson recommended to Kendrick on May 5, 1993, that Nagi's employment be nonrenewed, alleging his performance had not improved. Because of the procedures imposed by Chapter 28A.405 RCW and the collective bargaining agreement, this was the earliest time any action could be taken to nonrenew Nagi's employment. Kendrick's formal notice to Nagi that he was nonrenewed for alleged deficient teaching performance was dated May 11, 1993.

13. Nagi sought review of the nonrenewal pursuant to the procedures of Chapter 28A.405 RCW. A Chapter 28A.405 hearing officer decided the employer had proven by a preponderance of the evidence that the reasons specified in the nonrenewal notice were sufficient cause to nonrenew Nagi. This decision was upheld by the Superior Court.

14. On November 5, 1993, Nagi filed an unfair labor practice complaint alleging the employer had nonrenewed him in retaliation for his exercising his right to file a grievance.

15. The employer argued in its motion for summary judgment and at the unfair labor practice hearing that the decision by the Chapter 28A.405 hearing officer collaterally estopped Nagi from arguing his nonrenewal was motivated by his exercise of protected activities. The employer called no witnesses at the unfair labor practice hearing and presented no substantive evidence supporting its allegations that Nagi's teaching performance had been defective.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.59 RCW and Chapter 391-45 WAC. The decision of the hearing officer pursuant to Chapter 28A.405 RCW does not determine the outcome of this unfair labor practice proceeding by the theory of collateral estoppel.

2. The unfair labor practice complaint in this matter was timely filed.

3. Seattle School District has failed to comply with its burden of producing relevant, admissible evidence supporting its alleged legitimate, non-discriminatory reason for nonrenewing Nagi's employment. It has, therefore, committed unfair labor practices within the meaning of RCW 41.59.140 (1) (c) by nonrenewing the employment of Kuldeep Nagi in retaliation for his exercise of rights protected by Chapter 41.59 RCW.

ORDER

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

1. CEASE AND DESIST from:

   a. Nonrenewing or otherwise discriminating against Kuldeep Nagi or any other certificated teacher employed by the Seattle School District for the exercise of activities protected by Chapter 41.59 RCW.

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

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.59 RCW:

   a. Offer Kuldeep Nagi immediate and full reinstatement in his former position or a position substantially similar to it, and make him whole with regard to benefits and back pay, computed pursuant to WAC 391-45-410, for the period from the effective date of his 1993 nonrenewal until the date of the unconditional offer of reinstatement made pursuant to this order.

   b. 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.

   c. Notify the above-named complainant, 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 complainant with a signed copy of the notice required by the preceding paragraph.

d. 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.

Dated at Olympia, Washington on the 24th day of August, 1995.

Public Employment Relations Commission

Pamela G Bradburn

PAMELA G. BRADBURN, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

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

WE WILL offer Kuldeep Nagi immediate and full reinstatement in his former position or one substantially similar to it, and will make him whole with regard to benefits and back pay computed pursuant to WAC 391-45-410 for the period from the effective date of his 1993 nonrenewal until the date of the unconditional offer of reinstatement pursuant to the order in this proceeding.

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.

DATED: _____

SEATTLE SCHOOL DISTRICT

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: (360) 753-3444.