STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

STEVE RICARTE, Complainant, vs. MANSFIELD SCHOOL DISTRICT, Respondent.	CASE 11268-U-94-2637 DECISION 5238 - EDUC
CLARENE RICARTE, Complainant, vs. MANSFIELD SCHOOL DISTRICT, Respondent.	CASE 11269-U-94-2638 DECISION 5239 - EDUC FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Eric R. Hansen, Attorney at Law, appeared on behalf of the complainants.

Lukins & Annis, by Jerry J. Moberg, Attorney at Law, appeared on behalf of the employer.

On August 8, 1994, Clarene and Steve Ricarte filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that Mansfield School District had violated RCW 41.59.140 (1) (a), (c), and (d). The complaint alleged that, in retaliation for their union activities, the employer had eliminated Steve Ricarte's position and nonrenewed his teaching contract, and detrimentally changed Clarene Ricarte's teaching assignment. Following Commission policy, separate cases were docketed for each complainant. Pamela G. Bradburn was designated as Examiner to conduct further unfair labor practice proceedings under Chapter 391-45 WAC. A hearing was held before

the Examiner in Wenatchee, Washington, on February 2, February 3, and April 7, 1995. Both parties filed briefs on June 2, 1995.

BACKGROUND

Mansfield School District is a small district located in farming country in the middle of the state. Its dozen or so certificated teachers offer kindergarten through twelfth grade classes to approximately 150 students. Bill Thornton has been the employer's superintendent since summer 1992.[1] Tim Hicks has been a member of the school board since August 1988, while Lucille Miller, Jens Foged, and Doug Tanneberg have been board members since approximately 1989.[2]

The Mansfield Teachers Association has represented the employer's certificated teachers for a number of years. The association was an independent labor organization until the mid-1980s, when it merged with the parallel Mansfield Education Association and affiliated with the Washington Education Association. Jim Nelson has been director of WEA's North Central Washington Uniserv since November 1984.

When Steve Ricarte's position was eliminated and he was nonrenewed in May 1994, he had taught 22 years for the employer and his wife Clarene Ricarte had taught 15 years for the employer. Clarene Ricarte took a year's leave of absence from the employer for the 1994-1995 school year. Both Ricartes taught at Tahoma School District in western Washington during the 1994-1995 school year.

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[1] Thornton taught high school math in the district during the 1991-1992 school year.

[2] The record does not indicate how long Leroy Thomsen has served as a board member. He was not present at the relevant board meetings.

Ricartes' Teaching Experience at Mansfield

Steve Ricarte holds a certificate entitling him to teach any grade between kindergarten and twelfth. He is also a certified traffic safety instructor. He taught vocational/agricultural subjects his entire tenure with the employer. Classes he taught between 1988 and 1994 include: traffic safety; plan drawing and advanced plan drawing; basic agriculture; 6th, 7th, and 8th grade shop, and advanced shop; home maintenance; engine tuneup, small engine repair, and engine mechanics; greenhouse and ornamental horticulture; 7th and 8th grade wood shop and carpentry; electricity; auto mechanics and maintenance, and junior high crafts.[3] During that same period, his student load per year varied from a low of 44 to a high of 89.[4] He was also responsible for the district's transportation, and was designated teacher-in-charge by Thornton during his absences until Thornton hired an administrative aide.[5]

Clarene Ricarte is one of two bargaining unit members with special education qualifications. She taught elementary classes her entire time with the employer, and by 1994 had invested two years toward obtaining a master's degree in elementary curriculum development. Each of the twelve school years before the 1991-1992 school year, she taught kindergarten in the mornings and special education students in the afternoons. She began the 1991-1992 school year teaching a combined fourth/fifth grade class; after six weeks, she switched to a combined third/fourth grade class. Thornton assigned her a combined second/third grade class for the 1992-1993 school year. The following year, she taught second grade. The assignment Thornton gave her for the 1994-1995 school year is discussed below.

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[3] This class actually taught scientific principles through projects.

[4] The employer changed to a semester system from a trimester system with the 1990-1991 school year.

[5] The record is not clear on the aide's date of hire.

Ricartes' Union Activities

Steve Ricarte has been active in the union, both before and after it affiliated with the WEA. He held local union offices of president, president-elect,[6] and negotiating team member, and was elected a representative to several north-central Washington state WEA organizations and to the state-wide WEA representative assembly. Board member Hicks knew Steve Ricarte had been a union member. Thornton knew Steve Ricarte attended WEA training, programs, and activities because he would check with Thornton about travel and being absent from work.

Clarene Ricarte has held all local elective offices and been a member of the union's negotiating team for every contract. Fellow teacher Hazelynne Floyd regarded Clarene Ricarte as very active in the union. Clarene Ricarte was Nelson's primary contact with the Mansfield teachers. She filed the only grievances of record: June 19, 1985, on behalf of other teachers, and September 3, 1992, on her own behalf. She also wrote then-Superintendent Ron Cummings twice in 1989 about negotiable issues, and Hicks on July 3, 1991, about negotiating dates. Hicks considered Clarene Ricarte more active than her husband.

Labor Relations History before 1992

The parties experienced several difficulties before Thornton became superintendent, none of which appear unusual. Some teachers returned their individual contracts on Monday, June 1, rather than by the due date of Saturday, May 30, 1985. After the employer rejected the contracts and posted the teachers' positions, Clarene Ricarte filed a grievance and the matter was settled to the union's satisfaction. In 1987, negotiations were concluded at the last

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[6] Steve Ricarte would have been president of the union the 1994-1995 school year.

minute under a strike threat, with agreement coming at midnight before the first day of school. In 1989, school began before the parties had finished negotiating a new collective bargaining agreement. When the employer paid teachers their prior year's salary, Clarene Ricarte wrote Cummings and the teachers received credit for additional educational credits and experience. Finally, the union had difficulty getting negotiating dates from Hicks during summer 1991.[7] Clarene Ricarte wrote him that the union would declare an impasse and involve the Commission unless he responded within 12 days.

Labor Relations History Since 1992

Thornton became the employer's superintendent in August, 1992. He met separately with each teacher that summer to discuss perspectives on education and their perceived strengths. The union came up during his meeting with teacher Floyd because she was very active. She testified without contradiction that Thornton said he did not favor unions in general, that they were not important or significant, and he preferred dealing directly with individual teachers without the presence of a third party. Jackie Tupling, the employer's executive secretary and business manager since 1988, was Thornton's secretary.[8] Thornton mentioned to Tupling several times that both he and his wife were not in favor of unions and had declined joining them when they were teachers.[9]

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[7] Summer is a very busy time for Hicks, a wheat farmer.

[8] Tupling's position was not represented by any union. She filed suit against the employer in October, 1994, for wrongful termination. That action was still pending when she testified at the unfair labor practice hearing in this case.

[9] Clarene Ricarte testified Thornton had told her he was not interested in the WEA when she contacted him as a new teacher in autumn 1991. Thornton confirmed that comment, explaining he saw no personal advantage from paying dues

The record is unclear exactly when negotiations began for a successor to the parties' agreement covering the 1991-1992 and 1992-1993 school years. The negotiations were difficult. Tupling testified without contradiction that Thornton told her at the beginning of negotiations that they were ridiculous and he thought the parties' agreement should be reduced from 30 pages to two. Floyd described negotiations as "getting kind of sticky" in summer 1992. She vaguely recalled Thornton saying during a negotiation session that the contract might be settled more easily without the union.[10]

The union filed an unfair labor practice charge over these negotiations. Clarene Ricarte was the union's primary witness at the January 10, 1994 hearing, which Thornton and Hicks (and perhaps additional board members) attended. Examiner Stuteville held on June 8, 1994, that the employer had bargained in bad faith by insisting on removing or diluting existing benefits. Mansfield School District, Decision 4552-A (EDUC, 1994), affirmed Decision 4552-B (EDUC, 1995).

Among the provisions the employer sought to remove from the agreement in the 1992-1993 negotiations was any restriction on its ability to select the best qualified persons for coaching positions; the requirement that coaching positions be offered to employees before non-employees was the basis for Clarene Ricarte's September 3, 1992 grievance over the flag football coaching job. Only after that grievance was filed did Thornton give a test on football knowledge to Clarene Ricarte, another teacher, and the community member Thornton had appointed as coach. Thornton

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to the union.

[10] Floyd was not cross examined by the employer, and Thornton did not controvert her testimony.

explained he had missed the teacher preference language in the agreement's addendum.

From the vantage point of this proceeding, the employer's proposal to delete from the predecessor contract "language which protected grievants, witnesses and union representatives in connection with the processing of grievances",[11] takes on an added importance that may be unwarranted.

Thornton and Clarene Ricarte's Interactions

Thornton met with Clarene Ricarte in August, 1992, as he did with other teachers. There is a significant dispute about the content of that "get acquainted" meeting, which she said lasted nearly two hours. Clarene Ricarte testified in both unfair labor practice hearings that Thornton said he saw her as being the union and would like to break her in order to break the union. She testified in the present hearing that when she had expressed concerns about her second/third grade assignment during the August 1992 meeting, he said maybe her strengths lay in being a mother and wife, and maybe that's where she should look if she were unhappy with her assignment. Thornton's secretary Tupling saw Clarene Ricarte immediately after her meeting with Thornton ended. Tupling said Clarene Ricarte was very upset, cried when comforted, and said she would not be at the district much longer because Thornton said he would break her to break the union. Some time later, Nelson talked face-to-face with Clarene Ricarte about the "get acquainted" conversation.[12] Nelson distinctly remembered Clarene Ricarte was still extremely upset, she said Thornton had refused to let her leave the meeting although she was in tears, and that Thornton had said she

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[11] Mansfield School District, Decision 4552-A (EDUC, 1994).

[12] The record does not indicate how much time elapsed between the meeting with Thornton and the discussion with Nelson.

represented the union and he would break her and get rid of the union.

Thornton testified in the present unfair labor practice proceeding that he never told Clarene Ricarte she should stay home and, in response to a leading question, denied the "break you-break the union" comment.

Clarene Ricarte believed Thornton observed her classroom during the 1992-1993 school year more frequently than occurred with other teachers; Thornton explained he managed by wandering around and denied visiting Clarene Ricarte's room more often than other classes. Thornton evaluated Clarene Ricarte's teaching performance on May 14, 1993, indicating she required improvement in six of 20 areas evaluated, and rating her overall performance as needing improvement. He did not place her on probation. He noted she needed improvement in her working relationships with others at the school and in the community, and in her support for the entire program, because of her unhappiness with the assignment he had given her, which he believed she had shared with the community. He cited her negative reaction to positive and constructive feedback as the reason he felt she needed improvement in her response to supervision and constructive criticism. He questioned her instructional skill and classroom management because her room appeared cluttered and the lessons seemed geared for middle level students but did not hold the attention of high or low level students, who he observed wandering about the room. Clarene Ricarte's May 20, 1993 response suggests some of Thornton's criticisms resulted from his lack of experience with elementary students and some from his preference for a more structured approach than she favored. She stated her firm belief that her disappointment with her assignment was not an appropriate topic for a performance evaluation, and contended she had made only general, professional responses to questions from the community.

Elimination of Steve Ricarte's Position

The employer's maintenance and operations levy failed in early April 1994. When this had happened in the past, all staff were retained and the levy resubmitted, even when it failed several times in a row. This time school board meetings were held on May 3 and 10, 1994, to take public comments on program and staffing considerations for the 1994-1995 school year. Among the suggestions described without attribution in minutes of the May 3 meeting were: re-run the levy; reduce the sports program; use the reserve fund to maintain the current program, and check the low enrollment programs. Some time before the May 10 meeting, Thornton compiled a list of options. These were: use the fund balance to maintain the present program; re-run the levy; cut low-enrollment classes (identified as shop, high school crafts, German, extra 11th/12th grade sections of English and history); cut the sports program; cut staff, identified as teachers, staff, aides, and administration (noting that the state funded only .5 FTE for administration); a 10 percent cut in all programs; increase the prices of hot lunches, or cut the breakfast and hot lunch program; reduce non-necessary classes by instituting a six period day or cutting electives, and add aides, technology, upgrade library and library technology, and buy new textbooks. The record indicates this list of options was not given to the public.

Thornton approached Steve Ricarte after classes on May 10, 1993, and encouraged him to attend the school board meeting, saying topics of interest to him would be raised. Steve Ricarte was surprised when Hicks moved to drop the vocational/agricultural program, because this was the first mention of that idea in the public meetings. No motions were made with regard to any other options. Although most of the community members addressing the motion objected, the school board voted two to one to eliminate the

vocational/agricultural program. The board also approved a motion that the situation be reevaluated one year later.

The employer has given several reasons for its action. Hicks said at the May 10, 1994 meeting the program was being dropped because of declining enrollment. The May 13, 1994 notice of non-renewal from Thornton to Steve Ricarte stated "[t]he program is being eliminated because of a decline in student enrollment in the program and the Board's desire to make some changes in the program offering's [sic] for the next school year." At the hearing, Thornton testified that Steve Ricarte's position was eliminated because the levy failed.

The record is also contradictory on the state of enrollment in the vocational/agricultural classes. Thornton testified he told school board members before the May 10, 1993 meeting that enrollment in vocational/agricultural classes was decreasing, then said his testimony was that enrollment was very low rather than decreasing. When asked whether enrollment had actually decreased from prior years, he said he lacked the data to respond. Steve Ricarte's grade books reveal he taught 44 students (41 without traffic education)[13] the 1988-1989 school year, 50 students (46 without traffic education) the 1989-1990 school year, 47 students (39 without traffic education) the 1990-1991 school year, 81 students (70 without traffic education) the 1991-1992 school year, 87 students (74 without traffic education) the 1992-1993 school year, and 89 students (79 without traffic education) the 1993-1994 school year. The only evidence in the record of other teachers' junior high and high school student loads appears to be for a part of the 1993-1994 school year. Candy Hagen taught 36 students; Hazelynne Floyd taught 51 students; Jim Mickelson taught 56 students; Mary

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[13] Traffic education was an additional responsibility of Steve Ricarte's, not part of the vocational/agricultural curriculum.

Snell taught 93 students; Diana Mickelson taught 111 students; Roy Huffman taught 68 students, and Lisa Thornton taught 88 students.[14] The evidence indicates Steve Ricarte's student load was not decreasing and it was not the lowest in the district.

Another option on Bill Thornton's list was reducing the number of periods and cutting elective classes.[15] He did not recommend this course of action, and his list did not specify the elective classes. He identified the electives on the list of classes introduced at the hearing as applied, honors, and independent English; German; crafts; algebra I and II, senior math, and business math; home economics; Spanish; choir and band; drama; physics; office practice, computer application, keyboarding, accounting, advanced accounting; business law; photography, and annual. The distribution of elective classes among the junior and senior high school teachers for that part of the 1993-1994 school year was: Hagen--one; Floyd--three; Steve Ricarte--one; Jim Mickelson--one; Snell--nine; Diana Mickelson--five; Huffman--one, and Lisa Thornton--22. The board never discussed eliminating the elective classes, though Hicks personally considered that option. No specific explanation was advanced by the employer for choosing to eliminate a program rather than reduce the number of electives.

It was obvious from their testimony that neither Bill Thornton nor Hicks thought about retaining Steve Ricarte while eliminating his position, either because of his seniority or because his certificate permitted him to teach other classes.[16] Board policy 5256,

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[14] Lisa Thornton is the superintendent's wife and began teaching high school math and business skills (computers, accounting, and typing) some time in 1993.

[15] The board requires 11 electives for graduation, which is higher than the state minimum.

[16] Only two of the approximately dozen teachers in the bargaining unit were senior to Steve Ricarte.

adopted in 1982, sets out a series of steps for reducing staff in case of levy failure, lists seniority as a criteria that "has been used extensively in the past, and should continue to be a major factor where comparable performance records are noted", and directs that seniority should be used in assigning teachers to the revised program when their backgrounds are equivalent. Bill Thornton did not know what Steve Ricarte's relative seniority was, other than he was the senior and only shop teacher, and Hicks testified it was not his assumption, but a fact, that Steve Ricarte would leave if the vocational/agricultural program were eliminated.

Another listed option was to use the fund balance to continue the program unchanged and resubmit the levy; this was the approach taken in the past. Both Bill Thornton and Hicks testified the board was determined not to erode the fund balance that had been painfully accumulated. In addition, Bill Thornton explained his continued employment was contingent on his achieving and maintaining a 10 percent fund balance.

The levy was resubmitted and passed by one vote in November 1994. The employer has not reinstated the vocational/agricultural program nor offered Steve Ricarte reemployment. The reevaluation of the decision to eliminate the vocational/agricultural program had not occurred as of April 7, 1995.

Clarene Ricarte's Reassignment

Bill Thornton explained he had several difficulties in matching students with teaching assignments after he became superintendent. The number of students varied from grade to grade, widely in some cases,[17] so he continued using grade combinations as had been done

[17] His May 1994 class size forecast for the 1994-1995 school year showed a low of five students in 11th grade and a high of 16 students in third, sixth, eighth, and tenth grades.

in the 1991-1992 school year. He also tried to equalize special needs students among the teachers, and changed assignments in some cases where he felt teachers had been working in areas that were not their best subjects. He decided to assign Clarene Ricarte to teach high school math[18] for the 1994-1995 school year for several reasons: he felt Jim Mickelson had not done well teaching math; several Office of Civil Rights complaints against the district caused him to conclude a special education-qualified teacher was needed at the high school, and Clarene Ricarte had more math than the rest of the staff, except for himself.[19] In response to a leading question, Bill Thornton denied this assignment was related in any way to Clarene Ricarte's union activities.

Clarene Ricarte felt differently. She testified Bill Thornton entered her classroom after students had left on the last day of the 1993-1994 school year. He closed the door, though she had told him in the past that made her very uncomfortable. She said he told her staff reductions were responsible for her new assignment, and he hoped she would see the change to teaching high school math as a positive move. She saw it as invalidating her work toward a master's degree in elementary curriculum development. She also believed she was being set up to fail, because it had been many years since she had taken math courses, Bill Thornton was a math teacher, and she had received a negative evaluation the prior year. She testified she asked if she could leave during the meeting because she was crying, and that Bill Thornton said they were not done yet.

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[18] Bill Thornton testified Clarene Ricarte would have taught pre-algebra, algebra, basic math, 6th grade math, and reading/writing. Clarene Ricarte testified the assignment originally included geometry and trigonometry until it was revised in August 1994.

[19] The record indicates Jim Mickelson taught pre-algebra and algebra, while Lisa Thornton taught advanced math and algebra II during the 1993-1994 school year.

Clarene Ricarte's Leave of Absence

On August 24, 1994, just before school was to begin, Clarene Ricarte asked Bill Thornton for a year's leave of absence. Her written request mentioned health and family problems; he testified she told him about serious health problems, her possible need for surgery that would entail long absences from the classroom, and her desire to be with her husband. She testified on cross examination that she asked for the leave of absence due to personal reasons and health problems that would have kept her out of the classroom a number of days.[20] Bill Thornton polled the school board members by telephone and obtained approval of the leave request.

On August 29, 1994, Clarene Ricarte signed a provisional teaching contract with Tahoma School District.[21] She is teaching special education high school students who are behind in math, language arts, and social studies, as well as staffing a resource room for them.[22] She testified she told Bill Thornton she had interviewed at Tahoma when she asked him for the leave of absence on August 24. He testified on direct the fact that Clarene Ricarte was going to teach at another school district would have affected his attitude toward her leave of absence, because of its effect on the status of her replacement. On cross examination he testified Clarene Ricarte had told him before she asked for the leave of absence that she had interviewed, or was going to interview, at Tahoma. It is undisput-

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[20] These included a cyst, tumors that were possibly malignant, depression, severe anemia, and her father's diagnosis of cancer and possibly imminent death. At the time of the hearing, Clarene Ricarte was still under a doctor's care, still taking supplemental iron, and still facing possible surgery.

[21] Steve Ricarte signed a contract as replacement for a teacher on maternity leave with the same school district in late August 1994.

[22] She helps these students only with the subject(s) in which they are behind.

ed that Bill Thornton wrote a recommendation for her, and that he did not inform her of his desire that she release the employer if she took a teaching position elsewhere.[23]

The employer asked Clarene Ricarte to indicate by May 15, 1995, whether she would return to her position. She had not responded as of the last day of hearing, April 7, 1995. When questioned by the employer at the hearing, Clarene Ricarte said she was medically able, and preferred, to finish her contract year at Tahoma School District. She said her decision about returning to the employer after the 1994-1995 school year depended on where her husband would be and the outcome of the unfair labor practice proceeding.

POSITIONS OF THE PARTIES

The Ricartes argue their pursuit of grievances, performance as local union officers and union representatives, and participation on the union's negotiating team were all activities protected by Chapter 41.59 RCW and well known to Thornton and members of the school board who have served for substantial periods of time. Alternatively, the Ricartes assert they were part of a work force so small that knowledge of their union activities should be imputed to the employer even if some employer officials lacked personal knowledge. The Ricartes argue that changed scheduling and loss of employment have been held by the Commission to be discrimination. The Ricartes contend that Bill Thornton's anti-union attitude is established by the disparaging comments he made to Tupling, and that the decision in the prior unfair labor practice proceeding is additional evidence of employer union animus. The Ricartes also assert that the Clarene Ricarte and Tupling's testimony about the "break you, break the union" comment establishes that Bill Thornton

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[23] Thornton could not remember when he wrote the recommendation; it was not produced as an exhibit.

changed Clarene Ricarte's assignment because of her union activities. The Ricartes argue that this conclusion is buttressed by the fact that this was the employer's first nonrenewal despite earlier financial problems, and the first involuntary transfer from elementary to high school. The Ricartes contend the nonrenewal violated the employer's own policy requiring seniority to be considered in reducing staff, as well as its policy on affirmative action, and that these violations permit an inference that the nonrenewal was for discriminatory reasons. Additional support for such an inference, the Ricartes argue, is found in the fact that the employer's rationale for eliminating the vocational/agricultural program changed between the nonrenewal and the unfair labor practice proceeding. The Ricartes contend the nonrenewal and the changed assignment occurred as soon as possible after Clarene Ricarte's testimony in the first unfair labor practice proceeding, arguing similar timing has been held to be evidence of discriminatory motivation. The Ricartes also argue the employer's purported explanations for the nonrenewal and changed assignment are pretextual, citing evidence the enrollment in Steve Ricarte's classes was actually increasing, and the presence of other teachers with experience teaching high school math. Finally, the Ricartes assert the employer has committed an interference violation because other bargaining unit members could reasonably interpret the nonrenewal and changed assignment as a reprisal for union activities. Responding to the employer's argument that the Commission lacks jurisdiction, the Ricartes contend different issues are raised in an unfair labor practice proceeding than may be raised in Steve Ricarte's Chapter 28A.405 RCW appeal of his nonrenewal; accordingly, the Commission has jurisdiction and the priority of action rule does not apply.

The employer argues that Steve Ricarte's sole remedy for his nonrenewal is the hearing procedure made available by Chapter

28A.405 RCW, which has been initiated but not completed.[24] The employer contends that the Commission is compelled by the priority of action theory to defer to the Chapter 28A.405 procedure. Alternatively, the employer asserts that the Commission and the Chapter 28A.405 hearing officer have concurrent jurisdiction in this matter, and the Commission should yield precedence to the Chapter 28A.405 hearing officer because Steve Ricarte began that process before filing the unfair labor practice complaint. If the Commission asserts jurisdiction over this matter, the employer argues Steve Ricarte has failed to produce evidence establishing that his nonrenewal was motivated by his protected activities. The employer contends that Steve Ricarte must establish that the board was motivated by union animus when it decided to eliminate the vocational/agricultural program. The employer urges the Commission not to substitute its judgment for that of the elected board regarding the program to be offered students of the district. The employer vehemently denies the assertion Steve Ricarte made at the hearing that his nonrenewal was discrimination on the basis of national origin and/or age. With regard to Clarene Ricarte, the employer argues the allegations about the flag football coaching assignment and the performance evaluation are untimely since the incidents occurred more than six months before the unfair labor practice complaint was filed. Alternatively, the employer contends it properly denied Clarene Ricarte the flag football coaching position because she was not qualified, and that the Commission should not review performance evaluations. With regard to Clarene Ricarte's assignment to teach high school math during the 1994-1995 school year, the employer argues it had a legitimate reason for making that assignment, the need for a special education-qualified teacher in the high school, and that it would have made the same assignment even if union animus had existed. The employer urges

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[24] The statute permits the nonrenewed teacher to request a hearing by a hearing officer who decides whether the grounds specified in the nonrenewal notice are sufficient cause for nonrenewal. RCW 28A.405.210 et seq.

the Commission to avoid substituting its judgment regarding assignments for that of the board. Finally, the employer contends Clarene Ricarte's testimony about Bill Thornton's "break you, break the union" comment is not credible because she did not contemporaneously challenge him over the alleged comments.

DISCUSSION

Jurisdiction Over Steve Ricarte's Complaint

The employer argues at length that Steve Ricarte's Chapter 28A.405 RCW appeal deprives the Commission of jurisdiction to consider his claim that his nonrenewal was improperly motivated by his protected activities. This argument fails.

RCW 28A.405.210 et seq. establishes a procedure which must be followed if a school district wishes to terminate the employment of a certificated teacher. If the school district fails to comply with these steps, the teacher is conclusively presumed to be reemployed for the next school year. RCW 28A.405.210. The Chapter also provides a mechanism by which a nonrenewed teacher can obtain a hearing. RCW 28A.405.300 et seq. The only issue the Chapter 28A.405 hearing officer may decide is whether the school district has proved by a preponderance of the evidence that the specific reasons listed in the notice of nonrenewal constitute cause for nonrenewal. RCW 28A.405.300, .310 (8). Appellate review is available to the nonrenewed teacher. RCW 28A.405.320 -.360.

Close perusal of the Chapter reveals no indication the legislature intended it to be a teacher's exclusive means of challenging a nonrenewal. When the Commission was presented with a similar argument with regard to classified employees, it decided the two statutes were to be harmonized if possible. Wellpinit School District, Decision 3625-A (PECB, 1991). This was consistent with

Rose v. Erickson, 106 Wn.2d 420 (1986), which held that RCW 41.56.905 demonstrated the legislature's intent that Chapter 41.56 RCW prevail in any conflicts with other statutes. RCW 41.59.910 contains language parallel to that in RCW 41.56.905. Accordingly, the same result should obtain; a certificated teacher may pursue Chapter 28A.405 remedies without prejudice to any rights that may be granted by Chapter 41.59 RCW. See also Seattle School District, Decision 5237 (EDUC, 1995).[25]

Having concluded that the Commission has jurisdiction of the unfair labor practice complaint filed by Steve Ricarte, we must consider the employer's argument that the Commission should refrain from asserting its jurisdiction. Although the employer has advanced two assertions, they are really the same; the Commission should not decide Steve Ricarte's case because the Chapter 28A.405 hearing officer took jurisdiction of it first. The priority of action rule applies to administrative agencies and courts when two cases are identical as to subject matter, parties, and relief. The rule grants exclusive jurisdiction to resolve the matter to the agency or court first obtaining jurisdiction over it. City of Yakima v. International Association of Fire Fighters, Local 469, 117 Wn.2d 655 (1991).

There are two problems with the employer's argument. The first is that a Chapter 28A.405 hearing officer is neither an administrative agency nor a court. Kelso School District v. Howell, 27 Wn.App. 698, 700-701 (Div. II, 1980). This prevents application of the priority of action rule to the Chapter 28A.405 hearing officer. Second, even if the Chapter 28A.405 hearing officer were considered to be an administrative agency for application of the priority of action rule, neither the subject matter nor the relief in the two

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[25] The employer argued that the Chapter 28A.405 hearing officer's decision bound the Commission by the theory of collateral estoppel. The argument was rejected because the issues in the two forums were not identical.

proceedings are identical. The subject matter of the Chapter 28A.405 proceeding in Steve Ricarte's case is whether the employer can prove student enrollment in the vocational/agricultural program had declined, that the board wished to make changes in the school program for the 1994-1995 school year, and that these grounds were sufficient cause to nonrenew him.[26] Reinstatement and reasonable attorney fees are the only relief available in the Chapter 28A.405 proceeding. RCW 28A.405.310 (7)(c). Turning to unfair labor practice procedures pursuant to Chapter 41.59, the subject matter is any causal relationship between Steve Ricarte's union activities and the employer's decision to nonrenew him; consideration of the employer's grounds for nonrenewal is limited to whether they are pretexts. If a violation is established, appropriate relief would include an order to cease and desist from discrimination and interference in the future, as well as reinstatement for Steve Ricarte. Thus, the subject matter and available relief differ too greatly for application of the priority of action rule even if the Chapter 28A.405 hearing officer were to be considered an administrative agency.[27]

Prima Facie Discrimination Case

The Ricartes allege the nonrenewal of Steve Ricarte and the assignment of Clarene Ricarte to teach high school math are the result of employer discrimination because of their union activities.

> To make out a prima facie case, a complainant claiming unlawful discrimination needs to show:

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[26] These are the reasons specified in the notice of nonrenewal, which are to be the sole basis for the hearing officer's decision. RCW 28A.405.310 (8).

[27] See the parallel discussion of the theory of collateral estoppel in Seattle School District, supra.

> 1. That the employee exercised a right protected by the collective bargaining statute, or communicated to the employer an intent to do so;
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> 2. That the employee was discriminatorily deprived of some ascertainable right, benefit, or status; and
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> 3. That there was a causal connection between the exercise of the legal right and the discriminatory action.

Port of Tacoma, Decisions 4626-A, 4627-A (PECB, 1995).

Employer Knowledge of Protected Activities -

Employer representatives admitted they knew Steve Ricarte served as a local union officer, negotiating team member, and representative to several WEA bodies. Employer representatives admitted they knew Clarene Ricarte served as a local union officer and negotiating team member, filed several grievances, and testified in an unfair labor practice hearing. Holding local union office and participating on a union negotiating team are activities protected by Chapter 41.59 RCW. Wellpinit School District, supra. Pursuing grievances is another activity protected by Chapter 41.59. Valley General Hospital (Public Hospital District 1), Decision 1195-A (PECB, 1981); Peninsula School District, Decision 1477 (EDUC, 1982). Testifying in a Commission proceeding is specifically protected by RCW 41.59.140 (1)(d). The Examiner concludes the Ricartes have established their employer knew they had engaged in protected activities.

Subsequent Discrimination -

The next inquiry is whether the Ricartes were discriminatorily deprived of some right, benefit, or status. Steve Ricarte lost his employment as a teacher with the employer. Discharge is a classic example of employer discrimination following the exercise of union rights. City of Winlock, Decision 4784-A (PECB, 1995). Because he

was the first teacher the employer had nonrenewed in times of financial difficulties, a suspicion arises of employer discrimination. The Examiner concludes Steve Ricarte has established he was discriminatorily nonrenewed.

Clarene Ricarte was assigned to teach high school math after spending 15 years teaching elementary students.[28] This was the first time the employer had involuntarily transferred a teacher from primary grades to high school. She had never taught high school math, and had not studied math since completing her own college education. To prepare herself for the new assignment she attempted to take some courses to refresh her knowledge of math. She realized she would have to prepare new lesson plans and expected she would stay just ahead of her students while teaching the classes. She also knew she would be a novice in a subject Bill Thornton had experience teaching. The Examiner concludes the changed assignment was detrimental for Clarene Ricarte.

In some circumstances, a changed assignment that is generally perceived as a demotion can be discrimination, even though salary is not adversely affected. King County, Decision 3318 (PECB, 1989), is instructive in this instance. A police officer who had obtained substantial training in special assault investigations was transferred to missing persons, and then transferred to the patrol division. He filed a civil service appeal, a grievance, and an unfair labor practice charge over the transfers. Examiner Rosenberry found that the transfer to the patrol division was generally regarded by bargaining unit members as a demotion, and that it therefore constituted employer interference. It was also a divergence from the complainant's established career path in criminal investigations, and discrimination because the transfer

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[28] The highest grade she had ever taught was fifth, and that was just for the first six weeks of the 1991-1992 school year.

was a direct result of the complainant's grievance.[29] The Examiner concludes that the high school math assignment substantially increased the amount of preparation required for Clarene Ricarte, and was a major change of her career focus. Thus, as was the case in King County, supra, the Examiner concludes the assignment change adversely and discriminatorily affected Clarene Ricarte.

Causal Connection -

The final element the Ricartes must show in their prima facie case is a causal connection between their union activities and the nonrenewal and changed assignment.

> An employee may establish the requisite causal connection by showing that adverse action followed the employee's known exercise of a protected right under circumstances from which one can reasonably infer a connection. Employers are not in the habit of announcing retaliatory motives, so circumstantial evidence of a causal connection can be relied upon.

Port of Tacoma, supra.

The timing of the adverse action with regard to the protected activities can support an inference that the two are causally connected. City of Winlock, supra. See also Asotin County Housing Authority, Decision 2471-A (PECB, 1987), and Spokane Transit Authority, Decision 2078-A (PECB, 1985). Because of the strictures governing school districts, Steve Ricarte was nonrenewed and Clarene Ricarte given a changed assignment at the earliest possible time following the first unfair labor practice hearing between the parties.

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[29] See also City of Winlock, supra, where a change of work schedule to one less desirable was found to be evidence of union animus and of the necessary causal connection between the discharge and the protected activities.

Evidence of union animus on the part of employer officials involved in the adverse action can support an inference of causal connection. Port of Tacoma, supra. Bill Thornton has admitted he saw no personal benefit from paying union dues. This testimony corroborates Clarene Ricarte's testimony that he refused to join the union when he was a teacher. It also corroborates Tupling's testimony about Bill Thornton's negative attitude toward the union while negotiating, if any corroboration is needed since Tupling's testimony was not controverted. The record demonstrates Bill Thornton's disregard of the collective bargaining agreement; he said he missed the addendum on filling coaching positions, and he was not aware of Steve Ricarte's relative seniority in the bargaining unit. When questioned about teacher loads, Bill Thornton expressed approval of his wife, Lisa Thornton, for taking additional students and foregoing the planning period required by the parties' agreement.

The most direct evidence of Bill Thornton's union animus is the August 1992 "break you, break the union" comment to Clarene Ricarte. After a careful consideration of the substance of the testimony and the demeanor of the witnesses, the Examiner credits the testimony of Clarene Ricarte, Tupling, and Nelson, and discredits Bill Thornton's testimony. First, Clarene Ricarte's testimony is corroborated in substantial detail by two witnesses who discussed the comments with her face-to-face, while Bill Thornton's is not.[30] Second, Clarene Ricarte has twice testified under oath in a detailed and consistent manner about the August 1992 comments. Thornton's denial in the present proceeding was elicited by leading questions.

> Q. [By Mr. Moberg] Mrs. Ricarte testified in her direct examination that when you

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[30] The Examiner notes that, even in court, Tupling's hearsay testimony would likely be admissible under the "excited utterance" exception to the hearsay rule.

spoke to her about the 1992 transfer, that near the end of the meeting she was expressing her discontent about the new job assignment and asked you why the transfer. She alleges that you said that Mrs. Ricarte was married to a very nice man, knew my kids, said her strengths were--that you knew her kids--said her strengths were at home, and if she didn't want the assignment. Did you ever say anything like that to Clarene Ricarte?

A. [By Mr. Thornton] I believe that Steve Ricarte is indeed a very nice guy. I believe that he has--well, I know one of his children. His children are great kids. I have never told Clarene that she should stay home or anything like that.

Q. Mrs. Ricarte also alleges that you had a conversation with her where you told her that you saw her as a union person, that you would like to break her. And that if you could break her, then you could break the union. And that if she ever said you said that, you would deny it. Did you ever have any conversation like that with Clarene Ricarte?

A. I did not.

Transcript of April 7, 1995, hearing, pages 37-38.

During the testimony quoted above, Bill Thornton was fidgeting, taking his glasses off and putting them on, and moving restlessly in the witness chair. The only other time the Examiner observed him to exhibit similar activity was when he described his actions after Clarene Ricarte's grievance demonstrated that he had missed the addendum language on assigning coaching positions. The Examiner concludes Thornton's demeanor during the testimony quoted above reveals his discomfort with the questions, and undermines the value of his denials.

An employer's failure to consider other alternatives to the adverse action may support an inference of a causal connection. The record is clear the employer gave no thought to displacing someone other than Steve Ricarte as a result of eliminating the vocational/agricultural program, despite clear direction in its policies to consider seniority in staff reductions, and despite his certification to teach other subjects. Another alternative neither specifically identified nor considered, was to eliminate the elementary teacher position that was financed from high school funds.

Finally, an employer's prior unfair labor practice, supported by evidence of ongoing union animus, can support an inference of a causal connection in a second proceeding. Asotin County Housing Authority, Decision 3241 (PECB, 1989). This employer was found to have committed an unfair labor practice "[b]y refusing to make meaningful compromises on either its own proposals or the union's proposals, and by remaining adamant into mediation that any agreement reflect its first positions". Mansfield School District, Decision 4552-A (EDUC, 1994), affirmed Decision 4552-B (EDUC, 1995). The evidence discussed above indicates a continuing union animus that lends credence to a conclusion that the employer's earlier unlawful actions have not ceased.

It is necessary at this point to address the employer's argument that any union animus Bill Thornton has exhibited cannot be ascribed to the board, which the employer asserts made both the nonrenewal and the changed assignment decisions. There is no support in the record for the argument in the employer's brief that the board changed Clarene Ricarte's assignment.[31] The record does indicate it was the board that made the formal decision to

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[31] The employer did not make this contention in its answer or in its opening statement at the unfair labor practice hearing.

eliminate the vocational/agricultural program. The employer's argument assumes that the board constitutes the employer and ignores the existence and roles of other employer officials who participated in the nonrenewal decision.

In discrimination cases, a lower level employer official's knowledge of a complainant's union activities is attributed to the employer despite the actual ignorance of a higher level employer official, if the lower level official participated in the allegedly discriminatory adverse action. In Educational Service District 114, Decision 4361-A (PECB, 1994), the knowledge of a program coordinator who participated in the adverse action was sufficient to find employer knowledge although her superior testified he did not know the complainant was involved in the organizing. A complainant's shop steward activities with the predecessor employer satisfied the requirement of the successor employer's knowledge even though the successor's chief executive officer had not worked for the predecessor employer. Spokane Transit Authority, Decision 2078 (PECB, 1984), affirmed Decision 2078-A (PECB, 1985). 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 had no influence on the discharge decision, no violation can be found. West Valley School District 208, Decision 1179-A (PECB, 1981).

The record demonstrates Bill Thornton had considerable involvement in the nonrenewal decision. He proposed the list of options and controlled the preparation of the data by which the Board evaluated the options, he discussed each option with individual members of the Board, he told the Board enrollment in the vocational/agricultural program was decreasing and/or low, and he chose not to

recommend eliminating elective classes, though many of them had enrollments lower than Steve Ricarte's smallest class.

The Examiner concludes the circumstances discussed above, taken together, are sufficient to support an inference there was a causal connection between the Ricartes' protected activities and the subsequent nonrenewal and changed assignment. The Examiner concludes the Ricartes have established a prima facie case of discrimination.

Employer's Legitimate Motivation

The Commission's new approach to discrimination cases does not place a burden of proof on the employer once a prima facie case has been made, but the employer does bear an obligation to "articulate non-discriminatory reasons for its actions" and "produce relevant and admissible evidence of another motivation". Port of Tacoma, supra, and Educational Service District 114, supra, respectively. When an employer meets its burden of production,

> [t]he burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed action was in retaliation for the employee's exercise of statutory rights. That may be done by showing the reasons given by the employer were pretextual, or by showing that union animus was nevertheless a substantial motivating factor behind the employer's action.

Port of Tacoma, supra.

The employer asserts in this unfair labor practice proceeding that its financial difficulties resulting from the levy failure required a reduction in its program, that the board exercised its responsibility to make program decisions and decided to eliminate the vocational/agricultural program, which caused Steve Ricarte's

nonrenewal. The union argues the employer's rationale is pretextual, noting that the employer had survived lean times without ever eliminating programs or reducing staff, that the board violated its own policies regarding staff reductions and affirmative action when it nonrenewed Steve Ricarte, that the employer's reasons for its actions are not credible because they have changed, that the employer's treatment of both Steve and Clarene Ricarte was unique in the district's history, that the enrollment in Steve Ricarte's classes was increasing rather than decreasing, as the employer claimed, and that the employer failed to consider reducing elective classes, many of which were taught by Lisa Thornton.

It is undisputed that the employer had never before reacted to a levy loss by reducing its program and staff. That history is suspicious but not conclusive, for the employer has advanced an argument that it had committed itself to a new policy of maintaining a fund balance; in fact, Bill Thornton's continued employment as superintendent was conditioned on the existence of a fund balance of approximately ten percent. Coincidentally, the levy failure meant a loss of ten percent of the employer's budget. It appears that to continue the program and staff unchanged in hopes of the levy passing on the second effort, would have risked expending the accumulated fund balance. The Examiner cannot conclude, on the evidence in the record, that the employer's decision not to risk the accumulated fund balance was pretextual.

The union's other arguments are more successful. The Examiner has concluded that the employer ignored the role of seniority in determining which teacher should lose employment once the vocational/agricultural program was eliminated. The employer assumed that the teacher whose program was eliminated automatically lost employment, but the whole point of seniority in staff reductions is that the senior employee may lose a particular position, but it is a junior employee who is actually laid off while the senior employee takes over the junior employee's job. The board's own

policy on staff reductions contemplates such a process: the next year's program will be determined; the resulting list of positions will be prepared, and then individual teachers will be assigned to positions based on qualifications, past performance, and seniority where the backgrounds are equivalent. There is absolutely no evidence indicating the employer used this process.[32]

The written record also demonstrates that the board's rationale for eliminating the vocational/agricultural program has changed. Minutes of the May 10, 1994 meeting state:

> The Board also discussed "restructuring" and the cut of one program. Most of our students are going to college and trade schools and are not showing an interest in the agricultural field. It has been suggested to close the shop and related programs.

The May 13, 1994 notice of nonrenewal, required by Chapter 28A.405, begins:

> The Board of Director's [sic] of the Mansfield School District determined that it will eliminate the Vocational Shop program in the district effective at the beginning of the 1994-95 school year. The program is being eliminated because of a decline in student enrollment in the program and the Board's desire to make some changes in the program offering's [sic] for the next school year.

The employer's answer to the unfair labor practices complaint states, in pertinent part:

> Mansfield School District asserts that as a result of budgetary considerations and reorga-

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[32] There is also no evidence in the record that the Board discriminated against Steve Ricarte because of his age or national origin.

> nization in the programs offered by the Mansfield School District, the position for which Mr. Ricarte was qualified in teaching was eliminated resulting in a reduction in force.

Board member Hicks explained why he voted to eliminate the vocational/agricultural program. After alluding to the importance of maintaining the fund balance, the prevalence of computers in business (including agricultural businesses), the earlier board decision to improve the technological offerings in the school program, and the increasing number of students from low-income families, he said he felt it was in the district's best interest to close the vocational/agricultural program because there weren't as many students involved in it and in order to preserve the fund balance. As detailed above, Bill Thornton testified on cross examination that the vocational/agricultural program was eliminated because of the levy failure, then denied that the decision was due to budget problems, then responded that budget had everything to do with everything. An employer that gives different, or shifting, explanations for its allegedly discriminatory actions should expect to meet with considerable skepticism from the Commission.

It is undisputed that Clarene Ricarte was the first teacher the employer had involuntarily transferred from elementary classes to high school classes. The record indicates that during the 1993-1994 school year, the following high school teachers taught the following math classes: Candy Haugen--applied algebra and 9th grade applied math; Jim Mickelson--pre-algebra and algebra I; Mary Snell--algebra I, and Lisa Thornton--advanced math, senior math, business math, and algebra II. Yet Bill Thornton decided that an elementary teacher whose only experience with math was teaching kindergarten through fifth grade students, was the best person available to teach pre-algebra, algebra, geometry, and trigonometry (later reduced to pre-algebra and algebra). The Examiner cannot credit Bill Thornton's claim that he made this decision because Clarene Ricarte had more college math than other teachers; how could taking

classes in a subject some 20 years ago override experience teaching it just the prior year? Furthermore, Bill Thornton contended Jim Mickelson had not been a good choice for teaching math, yet gave no explanation why he could not have given Jim Mickelson's classes to Snell or Haugen, who had each taught an algebra class the prior year, or his wife Lisa Thornton, who had taught higher level math classes. Bill Thornton testified another reason he assigned Clarene Ricarte to teach high school math was to obtain a special education-qualified teacher at the high school. The Examiner has difficulty crediting this explanation because he did not give it to Clarene Ricarte on June 3, 1994. Clarene Ricarte testified without contradiction that Bill Thornton told her the new assignment resulted from staff reductions (of course, the only staff reduction had been the nonrenewal of Steve Ricarte). Given Clarene Ricarte's extensive work with special education students, the Examiner would expect Bill Thornton to use the district's need for her expertise as a way of reconciling her to a changed assignment. The Examiner concludes the need for a special education-qualified teacher at the high school was not Bill Thornton's motive in assigning Clarene Ricarte to teach high school math during the 1994-1995 school year.

As was discussed above, the record demonstrates that the enrollment in classes taught by Steve Ricarte was either steady or increasing, rather than decreasing as Bill Thornton told the board before the May 10, 1994 decision. Nor were Steve Ricarte's individual classes lower in enrollment than classes of other high school teachers. The record shows that Steve Ricarte's smallest class during the 1993-1994 school year (ornamental horticulture) had three students. These teachers had the following number of classes with three or fewer students during the same school year (excluding study halls): Hagen--11; Floyd--six; Steve Ricarte--two; Jim Mickelson--two; Snell--14; Diana Mickelson--one; Huffman--four, and Lisa Thornton had 18 small classes. It would appear that small enrollment classes were endemic, which is only to be expected in a district with so few students.

The employer also asserts that its student body's interest in agriculture was diminishing; the union did not present evidence specifically contesting this assertion. But it does not necessarily follow from a change in student interest that the entire vocational/agricultural program need be eliminated. As discussed above, Steve Ricarte had taught plan drawing, shop, home maintenance, small engine repair, auto tuneup and mechanics, wood shop and carpentry, electricity--all skills useful even to students eschewing farming for college or trade schools.

Finally, when Bill Thornton listed the options available to the Board, he listed shop, high school crafts (not taught in 1993-1994), German, and duplicate sections of junior and senior English and history as classes that were low enrollment: he did not mention any of the low enrollment classes taught by Hagen, Huffman, or his wife Lisa Thornton. In addition, he placed the choice of reducing electives, more of which were taught by his wife than any other teacher, last in the list of options for reducing expenditures. The evidence demonstrates Bill Thornton manipulated the information he gave the board to increase the possibility the board would eliminate the vocational/agricultural program, and thereby nonrenew Steve Ricarte.

Based upon the foregoing, the Examiner concludes the complainants have succeeded in demonstrating that the employer's rationales for nonrenewing Steve Ricarte and changing Clarene Ricarte's assignment are pretexts offered to obscure unlawful motivations. The Examiner concludes the complainants have established that the employer discriminated against them for their union activities when it nonrenewed Steve Ricarte and changed Clarene Ricarte's assignment.

Interference Case

The Ricartes' unfair labor practice complaints allege the employer has interfered with employee rights granted by Chapter 41.59 RCW by

its nonrenewal of Steve Ricarte and its change of Clarene Ricarte's assignment. The Commission has said:

> An interference violation occurs under RCW 41.56.140 (1) when an employee could reasonably perceive the employer's actions as a threat of reprisal or force or promise of benefit associated with their union activity.

Port of Tacoma, supra.

Because the definition of an interference violation in RCW 41.59.140 (1)(a) is virtually identical to that in RCW 41.56.140 (1), the Commission has been guided by precedent developed under Chapter 41.56 RCW when deciding unfair labor practice complaints filed under Chapter 41.59 RCW. See Seattle School District, Decision 2524 (EDUC, 1986), which adopts the analysis of interference violations developed in King County, Decision 1698 (PECB, 1983).

Any conclusion regarding an interference violation is based on the Commission's "finding that an employee could reasonably perceive the employer's actions as a threat of reprisal associated with their union activity", not on evidence about the actual perceptions of employees. Port of Tacoma, supra. The Examiner concludes there is ample evidence which a reasonable employee could interpret as promising reprisal for opposing this employer on labor relations matters. This is a small employer, with but a dozen certificated teachers. Every member of the bargaining unit must have known about the filing of the complaint charging bad faith bargaining and the role Clarene Ricarte played in the first hearing. While a decision on the first unfair labor practice charge was still pending, Steve Ricarte's program was eliminated without the topic having arisen at an earlier board meeting; he was the first teacher the employer had laid off. The next month, Clarene Ricarte became the first teacher in the employer's history to be involuntarily

transferred from elementary to secondary classes, in circumstances that made success difficult to achieve. The Examiner concludes the Ricartes have established that the employer interfered with employees' exercise of rights granted by Chapter 41.59 RCW.

Appropriate Remedy

The employer has urged the Commission to avoid substituting its judgment for that of the board on matters of program offerings and teacher assignments. The Commission has no intention of trespassing on the appropriate exercise of the board's responsibilities in these matters, but it would be a dereliction of its own duty if the Commission refrained from adjusting a situation that resulted from unlawful actions. When the Commission finds that an employer has violated employee rights, the Commission imposes a remedy narrowly designed to restore the situation that existed before the violation occurred, thus freeing the parties to create their own relationship in accordance with their legal obligations. Such a remedy is appropriate in the circumstances of this case.

FINDINGS OF FACT

1. Mansfield School District is an employer within the meaning of RCW 41.59.020 (5).

2. The Mansfield Teachers 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 non-supervisory certificated teachers employed by the employer.

3. Steve Ricarte is a certificated teacher who was employed by the employer in a position included in the union's bargaining unit for 22 years. His certificate entitles him to teach any

subject and any grade level between kindergarten and 12th grade. He had taught a variety of vocational and agricultural subjects, and was nonrenewed by the employer at the end of the 1993-1994 school year. He taught at the Tahoma School District during the 1994-1995 school year.

4. Clarene Ricarte, who is married to Steve Ricarte, is a certificated teacher who has been employed by the employer in a position included in the union's bargaining unit for 15 years. She primarily taught kindergarten through fourth grade, as well as special education students. She was on leave from the employer for the 1994-1995 school year, and taught at the Tahoma School District during that school year.

5. Clarene Ricarte has held all offices in the local union, been a member of the union's negotiating team for every collective bargaining agreement, and filed the only grievances in the parties' history. Steve Ricarte has held several offices in the local union, participated on the union's team in negotiations for some of the parties' collective bargaining agreements, and served as an elected representative to several Washington Education Association bodies.

6. Bill Thornton taught high school math for the employer during the 1991-1992 school year. When he became superintendent in the summer of 1992, Bill Thornton told his secretary Jackie Tupling that he and his wife were not in favor of unions, and that the 30 page collective bargaining agreement was ridiculous and should be cut to two pages. During a meeting with bargaining unit member Hazelynne Floyd in the summer of 1992, Bill Thornton said that unions were unimportant and a barrier to the direct dealing with individual teachers that he preferred. Also during the summer of 1992, Bill Thornton told Clarene Ricarte he saw her as the union and would break her in

order to break the union. Bill Thornton knew that both Ricartes were active in union affairs.

7. Tim Hicks has been a member of the employer's board of directors since August, 1988, while Lucille Miller, Jens Foged, and Doug Tanneberg have been board members since approximately 1989. The board members knew both Ricartes were active in union affairs.

8. The union filed an unfair labor practice complaint against the employer on November 3, 1993. After a hearing on January 10, 1994, at which Clarene Ricarte was the primary union witness, the employer was found on June 8, 1994, to have bargained in bad faith. The Commission affirmed the decision on March 28, 1995. Mansfield School District, Decisions 4552-A, 4552-B (EDUC).

9. The employer's maintenance and operations levy failed in April 1994. When this had happened previously, the employer had maintained its program and staff unchanged and resubmitted the levy, resulting over a period of time in financial difficulties. When Bill Thornton was hired as superintendent in 1992, the board directed him to accumulate and maintain a ten percent fund balance as a condition of continued employment; this was the amount the failed levy would have contributed to the budget.

10. Bill Thornton prepared for the board a list of options for responding to the 1994 levy failure; the first option for cutting programs was to cut classes that had low enrollments. He informed the board that Steve Ricarte's vocational/agricultural classes were decreasing and/or low in enrollment; the facts were that those classes were steady or increasing in enrollment and that every other high school teacher except one had more small classes than Steve Ricarte had. The last

option Bill Thornton listed was to cut elective classes; those classes were not specified for the board. Lisa Thornton, married to Bill Thornton, taught more elective classes than any other high school teacher. This list of options was not given to the public.

11. On May 10, 1994, the board voted to eliminate the vocational/-agricultural program; this possibility had not been mentioned at the other public meetings the board held to take suggestions on dealing with the levy failure. In May 1994, the board and Thornton said the vocational/agricultural program was cut because of declining enrollment. After the present unfair labor practice charge was filed, the employer asserted the vocational/agricultural program was eliminated because of the levy loss. The employer's contention that the vocational/agricultural program was cut because of low or declining enrollment is a pretext.

12. The board and Bill Thornton never considered retaining Steve Ricarte because of his seniority and nonrenewing another teacher, although the board's policy envisioned teacher assignments to the adjusted program by seniority.

13. Because of the statutory limits on teacher employment, May, 1994 was the earliest the employer could nonrenew Steve Ricarte's employment after the January, 1994, unfair labor practice hearing on the bad faith bargaining charge.

14. Steve Ricarte initiated the hearing procedure made available to nonrenewed teachers by Chapter 28A.405 RCW. That process was begun before the unfair labor practice charge was filed, and was still pending as of the last day of hearing, April 7, 1995. The issues raised and remedies available in the Chapter 28A.405 process differ from the issues raised and remedies available in these unfair labor practice proceedings.

15. The levy was resubmitted and approved in November 1994. As of the last day of hearing, April 7, 1995, the employer had not yet reevaluated its decision to eliminate the vocational/-agricultural program, as the board had decided on May 10, 1994, it would do.

16. On June 3, 1994, Bill Thornton informed Clarene Ricarte that because of staff reductions, she would be teaching high school pre-algebra, algebra, geometry, and trigonometry during the 1994-1995 school year. She had never taught high school classes, had not taught math above the fifth grade level, and had not taken a math class since completing her college education. Bill Thornton had taught high school math during the 1992-1993 school year, and Lisa Thornton and three other high school teachers had taught high school math during the 1993-1994 school year. At the hearing, Bill Thornton contended he changed Clarene Ricarte's assignment because civil rights complaints required the presence of a special education-qualified teacher; this contention is a pretext.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter pursuant to Chapter 41.59 RCW. This jurisdiction is not limited in any manner by the availability or pursuit of a hearing pursuant to Chapter 28A.405 RCW.

2. The Mansfield School District has committed unfair labor practices within the meaning of RCW 41.59.140 (1) (a), (c), and (d) by nonrenewing Steve Ricarte's employment in May 1994, and changing Clarene Ricarte's teaching assignment in June 1994.

Based upon the foregoing findings of fact and conclusions of law, the Examiner makes the following:

ORDER

MANSFIELD 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, detrimentally changing teaching assignments, or otherwise discriminating against Clarene Ricarte and Steve Ricarte or any other certificated teacher 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 Steve Ricarte full and immediate reinstatement in his former, or a substantially similar, position and make him whole if there has been a discrepancy between his actual wages and benefits for the 1994-1995 school year and the wages and benefits he would have received if he had been teaching for the employer during the 1994-1995 school year, computed pursuant to WAC 391-45-410, with interest, from the effective date of his nonrenewal until the date of the unconditional offer of reinstatement made pursuant to this order.

b. Offer Clarene Ricarte full and immediate reinstatement of her elementary teaching assignment and make her whole if there has been a discrepancy between her actual wages and benefits for the 1994-1995 school year and the wages and benefits she would have received if she had been teaching for the employer during the 1994-1995 school year, computed pursuant to WAC 391-45-410, with interest, from the effective date of her leave of absence until the date of the unconditional offer of reinstatement made pursuant to this order.

c. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

d. Notify the above-named 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.

e. 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 25th 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 Steve Ricarte full and immediate reinstatement in his former, or a substantially similar, position, and will make him whole if there has been a discrepancy between his actual wages and benefits for the 1994-1995 school year and the wages and benefits he would have received if he had been teaching for the employer during the 1994-1995 school year, computed pursuant to WAC 391-45-410, with interest, from the effective date of his nonrenewal until the date of the unconditional offer of reinstatement made pursuant to this order.

WE WILL offer Clarene Ricarte full and immediate reinstatement of her elementary teaching assignment and make her whole if there has been a discrepancy between her actual wages and benefits for the 1994-1995 school year and the wages and benefits she would have received if she had been teaching for the employer during the 1994-1995 school year, computed pursuant to WAC 391-45-410, with interest, from the effective date of her leave of absence until the date of the unconditional offer of reinstatement made pursuant to this order.

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

DATED: _____

MANSFIELD 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.