Shoreline School District (Service Employees International Union, Local 6), Decision 5560-A (PECB, 1996)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SHORELINE SCHOOL DISTRICT, Employer,	)	
TONI DELL-IMAGINE, Complainant,	)	CASE 11812-U-95-2783
vs.	)	DECISION 5560-A - PECB
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 6, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Gretchen H. Wallace, Attorney at Law, appeared on behalf of the complainant.

Terry Costello, Legal Assistant, appeared on behalf of the union.

This is the survivor of two unfair labor practice complaints Toni Dell-Imagine filed with the Public Employment Relations Commission on June 5, 1995. Shoreline School District, Dell-Imagine's former employer, was respondent in the other case.[1] Dell-Imagine had worked as operations supervisor in the employer's student transportation department (her position is often called dispatcher). A bargaining unit of regular and substitute school bus drivers, from which the operations supervisor position is excluded, has long been represented by Service Employees International Union, Local 6. Dell-Imagine generally alleged (1) the union and employer had conspired and colluded to wrongfully exclude her position from the driver bargaining unit, and (2) the union had induced the employer

[1] That matter was docketed as Case 11811-U-95-2782.

to discharge her because she refused union demands to make work assignments according to employees' union activities.

Both charges were found to state causes of action on August 17, 1995.[2] The following allegations were referred to Examiner Pamela G. Bradburn for hearing pursuant to Chapter 391-45 WAC in the case against the union:

> Union interference with employee rights and inducing the employer to commit a violation, by colluding with the employer to inappropriately exclude the dispatch supervisor position from the bargaining unit, by retaliating when Toni Dell-Imagine refused to make work assignments based on employees' union activities, and by encouraging the employer to discharge Toni Dell-Imagine.

The following allegations were referred for hearing in the case against the employer:

> (1) Employer interference and discrimination, by colluding with SEIU Local 6 to inappropriately exclude the dispatch supervisor from the bargaining unit, and by discharging Toni Dell-Imagine because she refused to make work assignments based on employees' union activities; and
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> (2) Employer domination of, or assistance to, the union by according employees active in the union more favorable working conditions, and by delegating its authority to investigate complaints about Dell-Imagine to the union.

The consolidated cases consumed 20 days of hearing between November 1995 and May 1996. Dell-Imagine announced on the fifteenth day of hearing that she had settled with the employer, and subsequently

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[2] At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission. RCW 41.56.110.

withdrew that complaint. At the close of Dell-Imagine's case, the union moved for dismissal on the grounds she had failed to present a prima facie case. This decision formalizes a May 21, 1996 letter granting the union's motion. Although the complaint against the employer has been withdrawn, occasional references to it or to the employer's actions are necessary for a complete understanding of the issues discussed and decided here.

PROCEDURAL BACKGROUND

Prehearing Conference

The parties held a prehearing conference on the consolidated cases by telephone on November 7, 1995.[3] One of a number of issues discussed was the union and employer's request that the cases be bifurcated. Both argued that Dell-Imagine's complaints would have to be dismissed if she were unable to prove her position should have been included in the drivers' bargaining unit, citing the Executive Director's July 6, 1995 letters to Dell-Imagine for this claim. The requests were denied because the allegations of the complaints were so intertwined that no dividing point for the issues was apparent.

Dell-Imagine asked that witnesses be sequestered for the hearing. Witnesses are sequestered, where appropriate, to enhance the likelihood they will testify from their own recollection rather than accommodate their testimony to that of preceding witnesses.[4] Examiners are empowered to sequester witnesses on a party's motion or on their own initiative. WAC 391-45-270. See, also, RCW 34.05.449(5). The nature of Dell-Imagine's allegations and the

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[3] Bruce Bischof represented the employer.

[4] See, Evidence Rule 615, and 5A Washington Practice: Evidence, Sec. 266.1.

tenor of the answers strongly suggested that credibility would be at issue in these cases, so I granted complainant's motion. Where witnesses are sequestered, the question of party representatives arises for parties not natural persons.[5] The union designated Shop Steward Laurie Rabinashad as its party representative. The employer said it needed Human Resources Director Pauline Love and Transportation Director Paul Plumis as party representatives throughout the hearing. Dell-Imagine had subpoenaed both and objected to the employer having more than the customary single party representative. The disagreement had not been resolved when the hearing opened on November 29, 1995.

First Day of Hearing

No testimony was taken the first scheduled day of hearing, in part because of motions revisiting matters discussed during the prehearing conference. One issue was the employer's renewed request for exclusion from the sequestration order of two party representatives who were also witnesses, over Dell-Imagine's objection.

WAC 391-45-270 is brief and to the point: "During the course of the hearing, the examiner may, upon motion by any party, or on his or her own motion, sequester witnesses." Evidence Rule 615 permits exemption from sequestration for "a person whose presence is shown by a party to be reasonably necessary to the presentation of his case."[6] The employer argued Love was unacquainted with its bus operations, while Plumis had no involvement in its personnel matters, and that the complaints implicated both areas of its

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[5] A party who is a natural person is exempt from an order sequestering witnesses. Thus, Dell-Imagine was entitled to attend the entire hearing.

[6] Administrative presiding officers must consult the evidence rules when making evidentiary rulings, except those involving hearsay. RCW 34.05.452(1),(2).

operations. Because the Commission's regulations preclude pre-hearing discovery,[7] the parties did not know whether Love or Plumis would testify to more contested facts.

Decisions in such matters are within the discretion of the judge or examiner. 5A Washington Practice: Evidence, Sec. 266. The general rule is that additional party representatives/witnesses who have only assisted with the preparation of the case can be exempted from the sequestration rule, while additional party representatives/ witnesses who participated in the events at issue in the case can properly be excluded. See, 75 Am Jur 2d Trial, Sec. 16.5 and 244, and cases cited therein.

Attempting to balance the employer's need with the purpose of sequestration and the fact that Love and Plumis were key witnesses, I ruled that Dell-Imagine would call Love and Plumis as her initial witnesses, the employer would have no party representative to assist until the first of the two had finished testifying, then both would be able to assist the employer through the rest of the hearing. After hearing the ruling, the employer withdrew its request and substituted Public Information Officer Jack Rogers as its party representative. Dell-Imagine did not object to Rogers, who was not involved in the facts of the cases.

A second matter was the union's motion for an order requiring Dell-Imagine to prove her collusion allegations before proceeding to other matters. The employer supported the union's motion and renewed its contention that Dell-Imagine should be required to prove her position was conspiratorially excluded from the bus driver bargaining unit in order to establish the Commission's jurisdiction over her.[8] The employer also objected to Dell-Imagine's announced intent to call employer officials as her

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[7] WAC 391-08-300(3).

[8] November 28 1995 prehearing memo; Transcript pages 25-28.

initial witnesses, contending she should call what it described as "her own witnesses" first. The employer and union argued complainant's burden of proof on her allegations, and the power to conduct prehearing conferences and adjudicative proceedings contained in the Model Rules of Procedure for administrative agencies, empowered me to grant their motions.[9] In essence, the union and employer were revisiting their unsuccessful bifurcation request. The facts and theories of the complaints were as intertwined on November 29 as they had been on November 7, 1995.

In addition, I found neither source of authority they cited sufficient for me to dictate the sequence in which Dell-Imagine was to present her evidence. Chapter 10-08 WAC is a model for administrative agencies, not a constraint, and agencies may differ from its procedures if variances are reasonable in the circumstances. WAC 10-08-001. The Commission has adopted its own regulations dealing with prehearing conferences and the conduct of hearings in unfair labor practice cases, which are much simpler than the respective procedures contained in the model rules. Compare WAC 10-08-130 to WAC 391-45-260(2), and WAC 10-08-200 to WAC 391-45-270. This difference reflects the Commission's choice to eschew trial formalism, as does its rejection of prehearing discovery. WAC 391-08-300(3). And rather than interpreting WAC 10-08-200(1)[10] to permit interference with a complainant's trial strategy, I read it to refer to my ability to designate which party bears the burden of proceeding first.

Finally, the union and employer's motions appeared to be an attempt to erect substantive hurdles for Dell-Imagine to overcome before being allowed to continue with her case. These efforts run counter

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[9] WAC 391-45-270; Chapter 10-08 WAC, and Transcript pages 28-29.

[10] "The presiding officer shall have authority to: (1) Determine the order of presentation of evidence;..." WAC 10-08-200.

to the Commission's procedures which contemplate testing the adequacy of a complainant's case only at the preliminary ruling stage, at the close of its case in chief, and when all parties have rested.[11] WAC 391-45-110; Southwest Snohomish County Public Safety Communications Agency, Decision 3289-B (PECB, 1990). Accordingly, I denied these renewed motions, leaving Dell-Imagine free to order the presentation of her evidence as seemed best to her.

During its argument in support of the union's motion, the employer asserted the Executive Director's July 6 1995 letters to Dell-Imagine were preliminary rulings rejecting the complaints for lack of jurisdiction.[12]

This contention is mistaken. The Commission is directed by the Administrative Procedures Act, Chapter 34.05 RCW, to "notify the [complainant] of any obvious errors or omissions [and] request any additional information the agency wishes to obtain and is permitted by law to require" before determining whether the complaint will be heard. RCW 34.05.419(2). That was the sole function of the Executive Director's July 6, 1995 letters to Dell-Imagine. It is the August 17, 1995 letters referring the complaints for hearing which are the preliminary rulings contemplated by WAC 391-45-110.

Second Day of Hearing

Early in Human Resources Director Love's testimony on the second day of hearing (the first day testimony was taken), the employer

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[11] The pleadings framed contested factual issues, mooting summary judgment proceedings pursuant to WAC 391-08-230.

[12] Those letters informed Dell-Imagine her complaints would be dismissed unless amended complaints were filed which stated the facts supporting the claimed wrongful exclusion from the bargaining unit and more clearly delineated the legal theories upon which she predicated the employer's and union's liability. She filed amendments which were found on August 17 1995 to state causes of action.

noted a number of letters sought by Dell-Imagine had been given to Love on condition they remain confidential.[13] After hearing brief argument from Dell-Imagine and the union, I ruled the writers' expectations of, or hope for, confidentiality did not vitiate the obligation to disclose them pursuant to subpoena in this proceeding. City of Bremerton, Decision 5079 (PECB, 1995); State of Washington (Washington State Patrol), Decision 4710 (PECB, 1994).

Later that day, the employer renewed a prior offer to present its reasons for discharging Dell-Imagine, arguing the matter was actually a wrongful discharge case.[14] The position Dell-Imagine held had historically been excluded from the bargaining unit. Dell-Imagine was employed by an individual contract that lacked any formalities preceding, or recourse for, discharge. Any applicability of the drivers' collective bargaining agreement and its grievance process to Dell-Imagine's discharge depended on her first proving her position was wrongfully excluded from the bargaining unit. Castle Rock School District, Decision 4722-B (EDUC, 1995). The employer's offer also misconstrued the Commission's jurisdiction, since the Commission does not remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. City of Walla, Decision 104 (PECB, 1976). Therefore, I rejected the employer's offer to prove its discharge case.

Fourth Day of Hearing

At the beginning of the fourth day of hearing (the third day of testimony), the employer moved to dismiss the complaint against the union as well as the complaint against it, arguing Dell-Imagine had failed to elicit any evidence of union-employer conspiracy in two

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[13] Transcript page 88.

[14] Transcript pages 39-40, 216-217.

days of questioning her first witness.[15] I denied the motion as premature. Once an unfair labor practice hearing has begun, the appropriate point for a motion to dismiss is at the close of complainant's case in chief. Southwest Snohomish County Public Safety Communications Agency, supra. The rules applicable to civil trials in this state are in accord. CR 41(b)(3).[16]

Loss of December and January Hearing Days

The loss of a number of scheduled hearing days in late December 1995 and January 1996 contributed to the lengthy period required to hear the surviving case. On December 20, 1995, with the union's support, the employer moved for a continuance of the hearing so it could associate Jim Dionne and either obtain judicial intervention or move for summary judgment.[17] After a full hearing on the motion by telephone conference call, I denied it.[18] When the hearing

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[15] Love testified on December 14, 15, and 18, 1995 (she had not begun testifying when the employer moved for dismissal on December 18). She was not available the first scheduled hearing day; she had been subpoenaed but was home ill after visiting her doctor.

[16] The rule states, in pertinent part:

> After the plaintiff, in an action tried to the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to recover.

[17] Dionne was out of the state until after January 1, 1996.

[18] Denial was appropriate because: this was an association not a substitution, so Bischof continued representing the employer; the employer was unlikely to succeed in court since City of Yakima v. IAFF, Local 469, 117 Wn.2d 655 (1991), holds the priority of action rule governs whether the Commission or a court should process unfair labor practice charges, and a motion for summary judgment was both untimely at this point in the hearing and precluded

reconvened on December 27, 1995, with Dionne participating by telephone, Dionne said he had advised witnesses who were the employer's managers to disregard subpoenas until those subpoenas had been confirmed by a judge.[19] As a result, Transportation Director Plumis had left the state the previous evening although it had been agreed he would resume the stand that day.[20] Dell-Imagine preferred not to call witnesses out of order, so the hearing recessed; she noted the employer had thus obtained its continuance indirectly.[21]

The hearing reconvened January 29, 1996, after the superior court for King County dissolved a temporary restraining order the

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by the factual issues.

[19] Transcript page 784.

[20] Transcript pages 799-800.

[21] The contravention of properly issued subpoenas and the delay of previously scheduled Commission proceedings is very serious. Because the employer is no longer a party to these proceedings, sanctions are not possible. The Commission's authority to impose sanctions appears at WAC 391-08-020:

> Misconduct at any hearing conducted by the commission or a member of its staff shall be ground for summary exclusion from the hearing. Misconduct of an aggravated character, when engaged in by an attorney or other person acting in a representative capacity pursuant to WAC 391-08-010, shall be ground for suspension or disbarment by the commission after due notice and hearing.

Parties should note the care taken by the Commission to protect the integrity of its proceedings. See discussion of attorney's fees in Mansfield School District, Decisions 5238-A, 5239-A (EDUC, 1996), and election procedures in City of Tukwila, Decision 2434-A (PECB, 1986).

employer had obtained and dismissed, with prejudice, the employer's petition for judicial intervention.[22]

EVIDENTIARY ISSUES

Attorney-Client Privilege

On January 30, 1996 (the eighth day of hearing but sixth of testimony), Dell-Imagine offered notes Union Representative Eldridge had made of a conversation she had with the union's attorney. Dell-Imagine's offer of proof confirmed the notes related to the union's reaction to the employer's discharge of Dell-Imagine. The notes had been given to Dell-Imagine pursuant to subpoena and without objection. The union objected to admission of the notes, contending its reservation of any objection to their use was not a waiver of the attorney-client privilege. Because of a recent Commission decision directing examiners to grant the attorney-client privilege the most stringent protection,[23] I returned the marked exhibit to the court reporter unread. Dell-Imagine and the union agreed to brief the matter during the period before the next scheduled hearing day.

Dell-Imagine argued the union's voluntary surrender of the privileged document waived its right to assert the privilege. The union contended no statute, court rule, or Commission regulation required it to assert the privilege before complying with a subpoena, and that no waiver should be implied without such a clear

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[22] The employer appealed the dismissal to the Court of Appeals. Its request for an emergency stay of the Commission hearing pending that appeal was denied by the court commissioner, whose ruling was affirmed by a panel of the Court. Shoreline School District v. PERC, Cause No. 37972-1-1 (1/30/96).

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

direction. Neither party presented authority directly on point, nor did I find any.

The next day of hearing, March 6, 1996, I rejected the notes. They clearly fell within the attorney-client privilege, the purpose of which "is to encourage free and open attorney-client communication by assuring the client that his communications will be neither directly nor indirectly disclosed to others." Port of Tacoma, Decisions 4626-A, 4627-A (PECB, 1995), pages 14-15. Public policy requires the Commission to protect the attorney-client privilege in its proceedings. Port of Tacoma, supra. Surrender of a document pursuant to subpoena cannot be considered voluntary and therefore a waiver of the privilege. Furthermore, the privilege is too important for me to conclude, without clear precedent from the Commission or appellate courts, that the existence of a process for objecting to a subpoena meant the failure to use the process was a waiver of any objection that could have been raised through it.[24]

Later that day, Dell-Imagine asked about the substance of legal advice Eldridge had sought and then shared with one of the three grievants who alleged Dell-Imagine had sexually harassed them.[25] The union again asserted the attorney-client privilege. Dell-Imagine argued Eldridge had published the advice by sharing it with a bargaining unit member who was not a union officer, likening the situation to that of a corporation where legal advice can be shared among employees constituting its control group without waiving the privilege, while the privilege would be waived if the legal advice were shared with employees outside that group.

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[24] Transcript pages 1143-1148.

[25] The conversations with the attorney and grievant occurred in August 1995, months after Dell-Imagine's discharge. Transcript pages 1234 to 1241.

The National Labor Relations Board has discussed and applied the attorney-client privilege in a single case. In Welsh Aircraft, Inc., 219 NLRB 93 (1975), the Board agreed with its Administrative Law Judge that no violation of the attorney-client privilege occurred when the ALJ permitted questioning of an attorney who had been the employer's negotiator, because the questioning was limited to identification of his letter to the union announcing his representation, and to events occurring at the negotiation table in joint session. The ALJ reasoned as follows:

> Absent a waiver, an attorney's testimony as to confidential communications between himself and his client is privileged against disclosure, and a proper objection lodged against such disclosure must be sustained. On the other hand, the essence of the privilege is that the communications in question are confidential. Where a third person or persons are present, who are not agents of the client or of the attorney, the essential element of confidentiality disappears.

Welsh Aircraft Inc., supra, at 94.

The control group model is a way of measuring whether that essential confidentiality was expected when the attorney's advice was shared within a corporation. It just does not fit the present situation. A grievant's relationship to the union that represents her is not analogous to that of an employee and her employer. The grievant can be viewed as the real party in interest or a third-party beneficiary, upon whose behalf Eldridge consulted the union's attorney. Alternatively, Eldridge can be viewed as the grievant's agent who obtained the attorney's advice for the grievant. A third way of looking at the situation is that both the union and the grievant are the attorney's client. Under any of these analyses, a grievant cannot be considered an outsider with regard to an attorney's advice about her grievance. Accordingly, I rejected Dell-Imagine's contention that Eldridge had waived the attorney-

client privilege by discussing the union attorney's advice with a grievant/bargaining unit member.[26]

Timesheets Not Contemporaneously Reviewed

During Shop Steward Rabinashad's March 12 1996 testimony, the union offered timesheets of certain bus drivers over Dell-Imagine's objection.[27] No one from the union saw the timesheets until after the unfair labor practice complaints were filed, and the timesheets were not produced by the employer in response to Dell-Imagine's subpoena of any documents constituting grounds for her discharge. Nevertheless, the union offered the timesheets as evidence that its members' complaints to Plumis and the grievances were correct in their assertions that Dell-Imagine had wrongly assigned work. The employer supported the union's position.

I rejected the timesheets as irrelevant. There was no evidence in the record at that point[28] indicating either the union or employer had looked at any timesheets before Dell-Imagine's discharge. In fact, Rabinashad testified she chose not to investigate any timesheets that could have proven the favoritism claims she and others were making against Dell-Imagine. Therefore the documents were irrelevant to the claimed violations of Dell-Imagine's rights by the union and employer. The judgment of the union as it was exercised at the time must be assessed in this case, not as bolstered by evidence it could have considered at the time, but ignored. This conclusion is consistent with judicial applications

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[26] Transcript pages 1236-1241.

[27] Transcript pages 2028-2047.

[28] In May, Transportation Secretary Charlene Davin testified she had studied substitutes' time sheets in autumn 1994 and reviewed them with Plumis. Davin also studied Haunreiter's and the junior relief driver's timesheets at some unidentified time; the results were given by Plumis to Eldridge on June 7 1995. See discussion below.

of the rules of evidence in analogous cases. Division I of the Court of Appeals has held that:

> Relevant evidence is evidence that tends to make any fact of consequence more or less probable. ER 401. Here, the alleged threat occurred after the charging period. Accordingly, the alleged threat has no relevance to whether Bartall felt threatened during the charging period.

State v. Simon, 64 Wn.App. 948, 965 (1991)(emphasis in original); modified on other grounds 120 Wn.2d 196 (1992).

In a fact situation the reverse of the present case, Division I held that evidence referring to a polygraph test of the deceased's husband was admissible in her parents' action to change the medical examiner's conclusion deceased had committed suicide.

> The only issue in this mandamus proceeding was whether the medical examiner had acted arbitrarily and capriciously in classifying Karen Taylor Erickson's death as a suicide. Central to this inquiry was an examination of the evidence relied upon by the medical examiner in making his decision, including the polygraph evidence. The fact that the examination was given was directly relevant both to the thoroughness of the police investigation, as well as the medical examiner's suicide determination.

State v. Reay, 61 Wn.App. 141, 150 (1991); rev.den. 117 Wn.2d 1012 (1991).

Thus, even evidence otherwise inadmissible was relevant because it had been considered by the person whose decision was on trial.

EFFECTS OF SETTLEMENT WITH EMPLOYER

The announcement of Dell-Imagine's settlement with the employer came as a surprise to the union on the 15th day of hearing. The union requested a continuance until it could obtain disclosure of

the settlement agreement, then file any motion for dismissal it deemed appropriate. Dell-Imagine opposed any continuance, arguing the settlement was relevant only to remedy, not to the union's liability. After confirming both parties could brief the matter very quickly and scheduling potential hearing days in May and June 1996, I granted the union's request for continuance and directed that any motion be addressed to the Executive Director if it required disclosure of the settlement's terms.[29]

Because the settlement agreement revealed she had abandoned any claim to reinstatement, the Executive Director dismissed the allegation that the union had violated Dell-Imagine's rights by wrongfully excluding her position from the bargaining unit. Reasoning that a union can commit an unfair labor practice by attempting to induce an employer to discriminate even if the employer resists, the Executive Director concluded Dell-Imagine's claim that the union had violated RCW 41.56.150(2) remained viable despite Dell-Imagine's settlement with the employer.[30]

SURVIVING LEGAL ISSUE

The Executive Director's ruling preserved for further hearing the following portion of the allegations described in his August 17, 1995 preliminary ruling:

> Union interference with employee rights and inducing the employer to commit a violation, by...retaliating when Toni Dell-Imagine refused to make work assignments based on employees' union activities, and by encouraging the employer to discharge Toni Dell-Imagine.

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[29] Transcript pages 2300-2312.

[30] Ruling by letter dated May 1, 1996, followed by a formal partial order of dismissal dated June 10, 1996. Shoreline School District, Decision 5560 (PECB, 1996).

At the close of Dell-Imagine's case, the union moved to dismiss for failure to present a prima facie case.

Facts Relevant to Surviving Claim

This case generated 20 days of hearing, 3285 pages of transcript, and 141 exhibits. Accordingly, this factual summary is condensed.

Management of employer's transportation department -
Paul Plumis has supervised the employer's transportation department since 1989. The employer reorganized this department in 1990, changing its school bus dispatcher position to the operations supervisor position which Dell-Imagine later held. A second administrative position of field operations supervisor was created, which has been filled during the relevant period by Sally Goodson, a former bus driver and former union shop steward. The positions held by Plumis, Goodson, and Dell-Imagine were excluded from the bus driver bargaining unit; Goodson and Dell-Imagine were unrepresented and employed by means of yearly contracts, while Plumis was included in a bargaining unit of administrators. Dell-Imagine became operations supervisor on August 1, 1993, overseeing day-to-day student transportation, including routine deliveries to, and pick-ups at, school ("to-and-from routes"), and special outings such as field trips and trips to athletic events. She also acted in Plumis' place when he was absent from the district.

1993 changes to transportation operations -
The employer began streamlining its departments in about 1992, assigning extra duties to a reduced number of administrators. Plumis took on supervision of custodial operations, as well as a number of narrower responsibilities, which may have reduced his presence in the transportation department.

The employer also decided to replace its former three-bell system with a four-bell system beginning with the 1993-1994 school year.[31] Two results of that change affect this case: (1) some 21 regular drivers were laid off and became substitutes at the close of the 1992-1993 school year, and (2) the remaining regular drivers had more to-and-from routes each day which left them less free time in the middle of the day to drive non-routine trips.[32] The laid-off drivers were extremely angry over their loss of regular status and their consequent loss of income. Competition among them for work grew more intense and spawned claims that Dell-Imagine had wrongly assigned work to one rather than another substitute.

Plumis, Dell-Imagine, and the two union shop stewards agreed that drivers with less than two hours free in the middle of the day would not be eligible to drive non-routine midday trips, to hold down expenses.[33] Plumis and Dell-Imagine also agreed drivers would not be permitted to hand all or part of their to-and-from routes over to substitutes in order to take non-routine trips they found more interesting and which would give them more hours and therefore more pay. Neither of these agreements were actually changes from prior practice under the September 1, 1992 to August 31, 1994 collective bargaining agreement, but their impact on drivers was increased because the reduced number of regular drivers had fewer

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[31] A three-bell system has each regular driver delivering students to, and picking them up from, three different schools each morning and afternoon. A four-bell system staggers school starting and ending times so each regular driver serves four schools in the morning and afternoon. Thus, the schools are served with fewer drivers.

[32] As is customary for school districts, the employer pays regular and substitute bus drivers only for time actually worked. The only positions guaranteed eight hours pay per day were two relief drivers.

[33] At this time, Margo Martin and Roger Johnson were the shop stewards. It is likely this agreement was reached during the parties' summer 1993 negotiations over the layoff.

free hours in the middle of their day to take non-routine trips and there were many more substitutes eager for work.

Winter and spring 1994 disagreements -
Substitute drivers received different work assignments in autumn 1993 than in prior years, because of the changes described above. By early 1994, some regular drivers began complaining substitutes were getting work that should have gone to regular drivers. Regular drivers voicing these complaints included Laurie Rabinashad, Karol Haunreiter, Konnie Carlson, and stewards Martin and Johnson; they objected to the two-hours-free rule that had been agreed upon by the union and employer in August 1993, claiming for the first time there had been a contrary past practice.

About this time Plumis first heard complaints from shop stewards Martin and Johnson about Dell-Imagine's work assignments.

Dell-Imagine applied for a dispatcher position at her former employer in December 1993. Within a day after Dell-Imagine learned in early February 1994 she was not selected, Rabinashad bought a greeting card expressing appreciation to Dell-Imagine and circulated it for signature. Many regular and substitute drivers added positive comments about Dell-Imagine staying, including Martin, Johnson, and Rabinashad; others just signed their names, including Carlson.

Eldridge had heard of disagreements over work assignments by March 30, 1994, when she mentioned that matter in a memo calling a meeting of the union representatives to the labor-management committee in order to prepare for negotiation of a successor agreement. After Rabinashad was elected to replace Johnson as shop steward in May 1994 and Scott McAbee was elected to a new third shop steward position, Dell-Imagine felt the scrutiny of her work assignments increased markedly.

Renewal of Dell-Imagine's contract -
Despite the questioning and complaints by drivers and shop stewards, Plumis told Love that Dell-Imagine had performed well and recommended renewing her individual employment contract for another year. That was done effective July 1, 1994, through June 30, 1995.

Escalation during extended negotiations -
The collective bargaining agreement expired August 31, 1994. As was customary, Plumis and Eldridge agreed the previous agreement would continue in effect during negotiations for its successor. The September 1, 1994 through August 31, 1996 agreement was not ratified by the employer's board until January 23, 1995, and a complete copy was not executed until some unknown later date. Printed copies of the new agreement were not distributed until April or May 1995, a month or two after Dell-Imagine's discharge.

During the eight or nine months in limbo, a number of incidents occurred. They ranged from: allegations drivers and shop stewards were improperly searching Dell-Imagine's desk and purse, as well as other drivers' drawers; claims of favoritism in Dell-Imagine's assignment of work to substitutes; complaints that Plumis' disengaged management style exacerbated the situation; to Eldridge's suggestion that a substitute's claim she lost seniority because shop stewards wrongly advised her would receive a better result in the grievance process if the blame were placed on Dell-Imagine instead. This resulted in a workplace divided into three groups: employees aligned with the shop stewards against Dell-Imagine; employees aligned with Dell-Imagine and against the shop stewards' group, and those in the middle who tried to get along with both sides. The situation produced grievances, meetings with Plumis, meetings with Plumis' immediate supervisor Ken Kanikeberg, team-building meetings, explanations of the chain of command and the role of shop stewards, severe attacks of paranoia, and a flood of letters and requests for investigation from all three contingents.

The employer's investigations -

Plumis' only effort to investigate the complaints and grievances he received about Dell-Imagine was to ask the transportation secretary in Autumn 1994 to check substitutes' hours and, at some unidentified time, to check the two relief drivers' hours. Except for this, his uniform response to complaining employees was that he would look into it; he never actually resolved any complaints or grievances.[34] In fact, all the grievances filed during Dell-Imagine's employment remained pending at the time of hearing.

Love and Assistant Superintendent Linda Averill together conducted what Love called an investigation of the charges and countercharges within the transportation department. These included Dell-Imagine's January 24 and February 6, 1995 letters describing problems in the department; Rabinashad's letter to Love of the same date objecting to Dell-Imagine's questioning Rabinashad's readiness to return to work after a medical leave; relief driver Haunreiter's January 29, 1995 letter to Love charging Dell-Imagine with sexual harassment, and seven letters other employees submitted before Dell-Imagine was placed on administrative leave March 6, 1995. Additional letters submitted between March 6 and March 21, when Dell-Imagine was notified the employer was going to discharge her, were not considered; the investigation ceased once the employer decided to put Dell-Imagine on administrative leave.[35]

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[34] An example of Plumis' handling of incidents is the claim that the shop stewards' group had visibly and audibly celebrated when they learned Dell-Imagine had been put on leave. Plumis asked the alleged celebrators whether they had and when they denied it, he concluded he could not prove anything.

[35] Love's only discussion with an employee after March 6 occurred when regular driver Carol Brock contacted Love March 8 to describe the behavior of the shop stewards' group when they learned Dell-Imagine was on leave.

Love and Averill talked with Dell-Imagine, Field Supervisor Goodson, Rabinashad, former shop steward Martin, and 11 drivers. Some conversations were initiated by Love and Averill, while others occurred at the request of employees. Using Love's own categorization, 11 letters and a petition with 20 signatures were received supporting Dell-Imagine, while 8 letters were received opposing her. Six supporters and eight opponents of Dell-Imagine were interviewed.

Although Love claimed she and Averill had been trained in investigative techniques by the employer's counsel, they did not seek to determine what had actually happened regarding any of the allegations. Instead, they believed the group opposing Dell-Imagine because its members repeated the same allegations in interviews without prompting. The employer concluded the fact that the workforce was polarized justified taking action against Dell-Imagine.

Events after Dell-Imagine placed on leave -
Dell-Imagine was notified she was being placed on administrative leave with pay the afternoon of March 6, 1995. Bargaining unit members were informed of this action the same day by memo. A group of drivers opposing Dell-Imagine, including Carlson, Knudsen, Andi Schloredt, and shop steward Scott McAbee, greeted the news with shouts, celebratory arm gestures, and claims they were responsible.

Polarization within the workforce continued while Dell-Imagine was on leave and after she was discharged, with nasty notes, claims of threats, and letters to Love ascribing the department's problems to Plumis' failure to assert his authority over a small group of drivers with a history of fomenting trouble. Love and Averill

washed their hands of the situation after Dell-Imagine was put on leave, referring concerned employees back to Plumis.[36]

Dell-Imagine's discharge letter was dated March 21, 1995; the decision had been made within the prior week, perhaps as early as March 14. On March 22, members of the shop stewards' group informed others at a drivers' meeting that a new operations supervisor was to be hired; no other drivers knew that.

Until he received a copy of the new, executed collective bargaining agreement in April or May 1995, Acting Operations Supervisor Bob Nethercutt continued to follow the old agreement as he had while he was Dell-Imagine's assistant. The shop stewards continued to behave as confrontationally toward Nethercutt as he had observed them behave toward Dell-Imagine. Meanwhile, Nethercutt, Plumis, and the shop stewards finalized work on new procedures for some of the work assignments that had caused so many disagreements between Dell-Imagine and the shop stewards' group; this work had begun before Dell-Imagine was put on paid leave. With these new procedures and the new collective bargaining agreement, the shop stewards obtained much of what they had been arguing for, including the ability to be taken off part or all of their regular to-and-from routes to take midday trips they preferred.

Arguments of the Parties on Motion to Dismiss

The union asserted Dell-Imagine's failure to carry her burden of proving a prima facie case entitled it to a dismissal of the complaint as a matter of law. Arguing the evidence established it had done no more than represent members of its bargaining unit by pressing for proper recognition of seniority in work assignments,

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[36] One driver expressed fear of others as late as the hearing, including that she might suffer retaliation for her testimony. I informed her of her right to file charges in such a case. Transcript pages 3268-3269.

the union contended a finding it had committed a violation would undermine the collective bargaining process. Any meetings that occurred between management and union representatives were not occasions for conspiracy but the union's concerted activities opposing Dell-Imagine's improper assignments. The union contended none of its actions regarding Dell-Imagine could be found illegal if they were in pursuit of legitimate union interests, even if the actions resulted in her discharge, which the union denied had occurred. Finally, the union asserted the Commission lacked jurisdiction to intervene in what was no more than a personality conflict.

Dell-Imagine contended she had proven misuse of power by the union against her and drivers who sided with her, and in favor of those drivers who sided with the shop stewards. The shop stewards' tortured contract interpretations, their discriminatory grievance handling, and their baseless assertions that Dell-Imagine had violated the collective bargaining agreement constituted sufficient evidence to support her claim of a coordinated union campaign to have her discharged. The employer had ceded sufficient authority to the union that it should be regarded as running a hiring hall to benefit selected bargaining unit members, Dell-Imagine argued, which had been found to violate Chapter 41.56 RCW.

Governing Legal Standard

There is only one previous case in which a motion to dismiss an unfair labor practice charge was granted at the close of a complainant's case. In City of Mercer Island, Decision 1108 (PECB, 1981), the Examiner considered the evidence and entered factual findings and legal conclusions. His order dismissing the complaint was affirmed. City of Mercer Island, Decision 1108-A (PECB, 1981).

The approach of the Examiner in City of Mercer Island, supra, is consistent with that outlined in Superior Court Civil Rule 41(b)(3), which states, in pertinent part:

> The court as trier of the facts may [upon receipt of a motion to dismiss after close of plaintiff's case] determine them and render judgment against the plaintiff.... If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a)...

The union has urged me to consider the persuasiveness and credibility of the evidence, rather than treating Dell-Imagine's evidence as true and giving her the benefit of all inferences as a trier of fact would upon summary judgment. This course is appropriate here, the union asserts, because Dell-Imagine has been given every opportunity to present her case, and because of the sheer volume of evidence received and the immense efforts all parties have made.

The parties are entitled to finality at this stage. In addition, the union is not prejudiced by the course of action it proposes. Two of the union's most important witnesses have testified fully because of the parties' agreement that each witness would be questioned once by all parties on all relevant issues; much evidence the union might otherwise have saved for its case in chief had already been received when it made this motion. Accordingly, I have considered the persuasiveness and reliability of the evidence rather than adopting a summary judgment standard.

Application of Legal Standard

Dell-Imagine alleges the union retaliated against her for refusing to make work assignments according to the union activity level of employees, thereby interfering with her rights and inducing the employer to discharge her. Whether the union has retaliated as claimed is a matter of factual proof.

I conclude Dell-Imagine has failed to present evidence the union retaliated against her for her refusal to grant work assignments according to employees' union membership or activity level. Accordingly, legal standards for union interference with rights of a public employee outside the union's bargaining unit, or for union inducement of an employer under the same circumstances, need not be defined.[37] The question whether the union is bound by the actions of shop stewards and other bargaining unit members also need not be decided.

Union campaign against Dell-Imagine -

The union contends it merely pressed its claims that Dell-Imagine was incorrectly applying seniority in her work assignments. That seriously understates what was done by shop stewards and their allies in the union's name. Dell-Imagine has presented compelling evidence that shop stewards and other union members participated in a concerted effort to persuade the employer that the bargaining unit as a whole opposed her, when that was not true, and that the opposition was for legitimate reasons, when that was either not

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[37] The Commission has not previously defined the elements of an interference violation by a union against a public employee outside the union's bargaining unit. Precedent is of limited utility because Dell-Imagine's situation vis-a-vis the union is different than that of unit members in cases of union or employer interference. For example, by physically crossing off work assignments it was challenging, a union prevented a bargaining unit employee from performing them and interfered with his rights. METRO, Decision 2746-A (PECB, 1989); aff'd without discussion of this point, METRO, Decision 2746-B (PECB, 1990). On the other hand, an employer interferes with an employee's rights when a reasonable person could view the employer's actions as threatening punishment or promising benefit for union activities. Seattle School District, Decision 5237-B (PECB, 1996), and cases cited therein. Union inducement of an employer has been defined in a manner likely to be applicable to the present circumstances: "To induce an employer to commit an unfair labor practice, a union must be requesting that the employer do something illegal." METRO, Decision 2746-A (PECB, 1989), at page 17.

true or they had not made an adequate effort to determine the truth. I reach this conclusion because of the following.

Campaign by a small group - The employer's seniority list identifies 66 bargaining unit members on December 15, 1994, and the evidence does not suggest the number varied from that before Dell-Imagine was put on leave March 6, 1995.

- Six drivers complained about work assignments during the 1993-1994 school year: Carlson; Haunreiter; Martin; McAbee; Schloredt, and Rabinashad.

- The same six and eight new drivers (Lorraine Holliday, Sharon Knudsen, Scott McAbee's wife who is Kim McAbee, Warren McDanold, Judy Miller, M.J. Steele, Richard Stave, and Jean Walker) complained about Dell-Imagine's assignment of work, or filed grievances against her, or attended small meetings[38] to discuss problems they ascribed to her, or wrote Love about Dell-Imagine between August 1994 and March 6 1995.

- Of the seven bargaining unit members who wrote Love opposing Dell-Imagine, four wrote at Rabinashad's request; the other three were Rabinashad herself, Schloredt, and McDanold.

- Only five drivers complained and filed grievances and attended meetings opposing Dell-Imagine between August 1994 and March 6, 1995: Carlson; Haunreiter; shop steward Martin; shop steward Scott McAbee, and shop steward Rabinashad.

When it became apparent a struggle to persuade Love and Averill was occurring, employees submitted 11 individual letters supporting Dell-Imagine and a petition opposing the shop stewards signed by 20

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[38] Attendance at these meetings was by invitation. McDanold thought there would be a lot more drivers at the October 30 1994 meeting at Carlson's home (Carlson, Haunreiter, Rabinashad, and he attended). Nine came to the November 1, 1994 meeting with Plumis.

people.[39] Fifteen of those signing the petition had not written letters. That yields a total of 26 employees supporting Dell-Imagine or opposing the shop stewards' group.

Thus, the evidence compels a conclusion that a small group of employees, six or seven of 66 ("the shop stewards' group"), pursued complaints against Dell-Imagine from late autumn 1994 until March 6, 1995. At its largest, the group opposing her totaled 14, while 26 supported her or felt the shop stewards had gone too far and damaged the work environment.

Group's misrepresentations - The shop stewards' group represented falsely to the employer and to Eldridge that it spoke for the bargaining unit as a whole. Eldridge was told by Rabinashad that the November 1, 1994 meeting with Plumis was an open forum, Eldridge described it as a union meeting to driver Carol Brock (a negotiation team and labor-management committee member for the union), and driver Wendy Allen was told by Knudsen and shop steward McAbee it was a union meeting. In fact, Goodson did not ask any Dell-Imagine supporters to attend the November 1, 1994 meeting with Plumis, nor was it announced with fliers and postings the way union meetings were. McDanold wrote Love that "many of us" felt Dell-Imagine was giving preferential treatment to her friends; he testified "many of us" meant the five drivers attending the meeting at Carlson's home. And Dell-Imagine and Brock were separately told by Plumis' superior Kanikeberg that the shop stewards had represented themselves as speaking for the whole bargaining unit when they complained to him in November and December 1994 about Dell-Imagine.[40]

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[39] Holliday, who wrote Love at Rabinashad's request, also signed the petition. I have included her in the numbers of both camps.

[40] This testimony is clearly hearsay. I credit it because it is corroborated by the direct testimony of Eldridge, Brock, and Allen.

An equally serious misrepresentation occurred as a result of the shop stewards' group's use of labels for Dell-Imagine's actions that overstated the facts. The shop stewards' group told Plumis and Love that Dell-Imagine had breached the confidentiality of statements made by drivers to her. Stated that way, it certainly sounds like a problem. But when Rabinashad described these breaches of confidentiality, they turned out to be either minor matters no one would have thought needed to be kept quiet, or were no more serious than the intrusions the shop stewards' group made into Dell-Imagine's personal life.[41] For example, Rabinashad labeled a breach of confidentiality the fact that Dell-Imagine mentioned to a substitute that the work was available because the regular driver was going hiking. Another instance Rabinashad considered a breach of confidentiality was Dell-Imagine mentioning to driver Janet Seavey that Rabinashad had asked whether Seavey had an assignment that afternoon.[42] Rabinashad actually telephoned Plumis' superior Kanikeberg over the weekend to complain about this, and spoke to Love when she couldn't reach Kanikeberg.

Both kinds of misrepresentation made the case against Dell-Imagine look stronger than it was.

Group ascribed others' actions to Dell-Imagine - Another indication the shop stewards' group engaged in a planned effort against Dell-Imagine was its tendency to blame her for others' actions. One matter about which the shop stewards complained was

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[41] Haunreiter questioned a driver from Dell-Imagine's former employer about her personal life, and questioned driver Wendy Allen's husband about Dell-Imagine's personal activities during the previous weekend.

[42] Seavey was reported to have left a union meeting early, saying "I've got to run." Carlson interpreted that as "I've got a run" and asked Rabinashad to check whether Seavey had been assigned mid-day work. When Seavey learned from Dell-Imagine that Rabinashad had been inquiring, Seavey objected to Plumis. Exhibits 106, 112; Transcript pages 1888-1891.

a ski school trip driver Darwin Sizer took early Saturday morning, February 4, 1995. Rabinashad told Eldridge that Sizer's being permitted to take the ski school trip despite having returned late from a trip the night before was an example of Dell-Imagine's favoritism, although Rabinashad knew Plumis had personally approved Sizer taking that trip. McDanold, who told Love and Averill the ski school trip was favoritism, did not know even by the time of the hearing that Plumis had authorized Sizer taking the trip.

The shop stewards' group ignored the fact that Plumis had approved procedures governing Dell-Imagine's handling of mid-day trips when they objected to those assignments. And it was the employer's decision rather than Dell-Imagine's to wait until a copy of the contract was at least ratified by the school board on January 23, 1995, before implementing the new language permitting drivers to drop their to-and-from routes in favor of picking up mid-day trips. Yet McDanold told Love and Averill that Dell-Imagine "buck[ed] the union contract as well as the shop stewards" by resisting their demands in this regard.[43]

In late October 1994, substitute Linda Globstad attempted to bid on a regular to-and-from route. For reasons never made clear either in the grievance process or at hearing, she lost the bid and a step on the seniority list, falling behind Schloredt (a substitute who complained about Dell-Imagine from the 1993-1994 school year forward and wrote Love). Globstad grieved, alleging shop stewards McAbee and Rabinashad had advised her erroneously and requesting her seniority back. In the grievance, during its processing, and at hearing Globstad made it clear she believed the problem was the shop stewards' fault. Despite this, Rabinashad claimed it was Dell-Imagine who blamed the shop stewards for the result.

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[43] Exhibit 43; Transcript pages 575-578, 586-588.

The foreseeable effect of each of these claims was to focus attention on Dell-Imagine to the exclusion of other persons who had or shared responsibility.

Group persisted with litany of complaints - The similarity of statements that persuaded Love and Averill to believe the shop stewards' group is another factor indicating the existence of a campaign. This similarity is not surprising, for some or all of these drivers opposing Dell-Imagine had discussed their objections to her in meetings on June 15, 1994, October 30, 1994, November 1, 1994, a grievance meeting in November or December 1994, on February 6, 1995, and February 27, 1995; other meetings may have occurred which were not mentioned in exhibits or testimony. Rabinashad testified at length; she began on March 8, 1996, testified all day March 11, 12, and 13, and finished on May 2. Her descriptions of Dell-Imagine's faults were noticeably repetitive and she occasionally inserted them though they were beyond the question's scope.

The similarity of statements to Love and Averill, and the character of Rabinashad's testimony are consistent with the notion of a well prepared case against Dell-Imagine.

Group failed to investigate claims and rejected results of others' investigations - The evidence demonstrated the shop stewards' group ignored evidence that differed from their conclusions and failed to pursue matters to determine who was correct. For example, Haunreiter asked Dell-Imagine on February 7, 1995, why substitute Tabatha Cote was cleaning windows of a bus when there was no work for Haunreiter. When Dell-Imagine said it was not Cote but a teacher who looked like her, Haureiter yelled profanely that Dell-Imagine was lying. No one ever went outside to see whether the denial was true. Rabinashad also described an undated occasion when Haunreiter was told a substitute had been given work after Haunreiter was sent home for lack of work. Rabinashad said neither she nor Haunreiter contacted the substitute to verify the facts of

the incident. Yet both instances were asserted as examples of favoritism against members of the shop stewards' group and in favor of Dell-Imagine's supporters.

One persistent claim raised during the 1994-1995 school year was that Haunreiter received less work and overtime than the junior relief driver. Even when Transportation Secretary Charlene Davin's research into timecards demonstrated Haunreiter had not received less work when her absence from work 32 out of 166 days was considered, the shop stewards' group persisted in asserting that Dell-Imagine's assignments to Haunreiter were improperly affected by favoritism.[44] At the hearing, Rabinashad opined Davin's methodology was flawed and that the overtime for each day should have been separately computed rather than averaged. Bearing in mind that no one can tell in advance exactly how long any school bus trip will take, this smacks of a stubborn retention of a position even after it has been completely demolished.

Haunreiter's claim she was given less work is also one of several puzzling failures by the shop stewards' group to research the accuracy of their claims. Rabinashad testified that timecards were readily available to her and any other employee. The evidence also demonstrates drivers' routesheets were kept in their drawers and Goodson, if not the shop stewards, had authority to enter drawers and consult them. Yet Rabinashad testified she chose not to investigate the truth of allegations of favoritism by Dell-Imagine.[45]

The tendency to press concerns based on hearsay or unproven allegations suggests the shop stewards' group engaged in a crusade with a fixed goal, rather than an effort to determine whether bargaining unit members are being fairly treated.

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[44] The union also rejected that information in a grievance response it received after Dell-Imagine's discharge.

[45] Transcript page 1950.

Group advanced irrational, unlawful claims - The sincerity of the shop stewards' justification is further undercut by the stands it took on some issues. Rabinashad grieved the assignment of a February 1995 ski school trip to driver Sizer because he returned from another trip late the preceding evening. A supplemental agreement between the union and employer provided, in part, that:

> Ski school drivers assigned to Saturday trips shall not be eligible for District weekend trips, including trips scheduled to return after 9:30 pm on Friday (emphasis added).[46]

Sizer's Friday trip had been scheduled to return at 8:30 p.m., but actually finished much later. Despite this clear language, Rabinashad told Eldridge the contract required the driver to be back by 9:30 p.m. when reporting this as an instance of Dell-Imagine's favoritism.[47] Rabinashad made the same assertion in the February 16, 1995 grievance, and argued safety was the reason for requiring an early return.[48] Once again, the union refused to concede when Plumis denied the grievance based on the contract's clear language, and pursued the grievance to the next step of the grievance process.

The record clearly reveals the shop stewards' group agitated for immediate implementation of tentative agreements dealing with their ability to take mid-day trips, before either ratification or execution of the new agreement. Dell-Imagine's refusal, with

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[46] Exhibit 57a. Exhibit 118, the 1994-1995 supplemental agreement, was not executed until after this trip occurred.

[47] Exhibit 63.

[48] Despite the safety concerns articulated in this grievance and by McDanold and Rabinashad at the hearing, the union did not challenge shop steward McAbee's having a trip that returned so late the evening before an early morning trip that Plumis permitted him to take the bus home.

Plumis' approval, to permit regular drivers to drop all or part of their to-and-from routes to take preferred mid-day trips was repeatedly and loudly challenged as a contract violation.

The union had no legal right to an immediate implementation of the tentative agreements, and should have informed the shop stewards of that fact. State ex rel. Bain v. Clallam County, 77 Wn.2d 542 (1970), holds that tentative agreements do not become collective bargaining agreements enforceable against a public employer until they are reduced to writing and executed. The 1994-1996 collective bargaining agreement was not ratified by the employer's board until January 23, 1995; the record does not indicate when the agreement was executed, but printed copies were distributed in April or May 1995. Although the employer could have voluntarily implemented the looser approach to scheduling mid-day trips before execution, the union could not force it to do so. Accordingly, the shop stewards' group had absolutely no legal right to claim Dell-Imagine was violating the agreement when she followed Plumis' directions and continued denying drivers' requests to be taken off to-and-from routes in order to take mid-day trips.

It is difficult for me to picture even an avid union supporter advancing some of these claims with a straight face. Accordingly, I conclude the spurious arguments were made not for their merit but to accomplish another objective.

Group refused to follow chain of command - The behavior of the shop stewards' group in seeking a sympathetic ear for its complaints is another factor suggesting a hidden motive. Plumis considered Dell-Imagine his next-in-command from the first, but Eldridge believed Dell-Imagine lacked any authority over the drivers and saw Plumis as the only supervisor. This led Plumis to clarify the chain of command at the December 9, 1994 safety meeting attended by Eldridge and all bargaining unit members. Rabinashad thought Goodson and Dell-Imagine were equals before this explana-

tion; when Rabinashad had been unable to resolve disputes to her satisfaction with Dell-Imagine, Rabinashad sought out Goodson, who tended to accept Rabinashad's side of disputes at face value.[49] Rabinashad did not cease taking concerns to Goodson after the December 9, 1994 safety meeting.

As could be expected, this created difficulties between Goodson and Dell-Imagine.

Group exceedingly thin-skinned - The final evidence that the shop stewards' group campaigned against Dell-Imagine is their over-reaction to others' comments or to Dell-Imagine's use of techniques they themselves were using, both of which betoken an adversarial mindset. The first of a number of such incidents in the record involves Haunreiter, who questioned a driver from Dell-Imagine's former employer at a mid-October 1994 sporting event and profanely told Globstad she had obtained information that would enable her to "get" Dell-Imagine.[50] A second incident also involved Haunreiter. Some time during autumn or winter of 1994-1995, Dell-Imagine telephoned a former transportation supervisor to consult him about her difficulties with Haunreiter, Rabinashad, and Carlson. Both Dell-Imagine and the former supervisor independently told McDanold about their conversation. Someone, most likely McDanold,[51] told

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[49] It was Goodson who suggested and arranged the November 1, 1994 meeting between Plumis, and invited drivers who supported the shop stewards and opposed Dell-Imagine.

[50] I credit this hearsay testimony because it is consistent with the language and content of several letters and notes Haunreiter wrote. Exhibits 33, 56a, 136, and 141.

[51] I conclude Dell-Imagine was extremely unlikely to have told Haunreiter about this conversation because of their strained relationship, and it was equally improbable the former manager shared the information, for Haunreiter had caused him considerable difficulties during his tenure. McDanold was the only other person with knowledge of the conversation and he testified he was trying to be friendly to both sides; he is the most probable source of

Haureiter about the conversation and Haunreiter wrote Love on January 29 1995 as follows:

> In light of what I learned this weekend about her calling former Transportation Supervisor [name deleted], I am so concerned for my safety and I am really stressed out at how insane this action of hers is. If she would do something that is so illegal and immoral what else is she capable of?

Exhibit 33.

There is nothing illegal or immoral about a supervisor seeking a former supervisor's advice about handling workplace tensions. Nor is there anything about this incident that would cause a reasonable employee to be worried for her safety. Haunreiter's purported reaction is illogical and extreme.

The same can be said about Rabinashad's anxious reaction, purportedly over comments allegedly made at a round-table discussion that was part of a department-wide team-building workshop on Friday, March 3, 1995. Rabinashad broke down at work, resulting in Plumis taking her to a medical clinic, her staying away from work Monday and Tuesday, March 6 and 7, and her consulting the union's attorney. All of this was touched off by former shop steward Johnson telling Rabinashad about comments he heard after purposely joining a table of Dell-Imagine's friends at the team-building workshop. The testimony about the content of these comments differed. Plumis recalled Rabinashad saying Johnson had told her that someone had been, or was going to be, following her.[52] Rabinashad, who as the union's party representative heard Plumis' testimony, did not deny it but testified Johnson told her the group of Dell-Imagine's friends mentioned "strange things like stalking,

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Haunreiter's knowledge.

[52] Transcript pages 1361-1363.

following people, phone calls to spouses."[53] Johnson did not say anyone in the group identified Rabinashad with these comments in any way; Rabinashad herself came to that conclusion. Rabinashad sought out Goodson after suffering the anxiety attack, and Goodson involved Plumis' supervisor Kanikeberg. It is not necessary at this point to decide what Rabinashad told Plumis; it is sufficient that the mere mention of stalking, phone calls to spouses, and following people caused her to become so upset. This reaction is simply illogical and extreme.[54]

The same is true of Rabinashad's response when Knudsen phoned her after work March 6, 1995, and relayed a comment made by unidentified drivers: "She thinks she's won, but we'll get her."[55] Knudsen and Rabinashad both assumed the "she" meant Rabinashad, and Rabinashad assumed the unidentified drivers were Brock, Allen, and Globstad. Rabinashad phoned Love and Averill's homes and left messages saying it was an emergency. Haunreiter drove Rabinashad to the employer's headquarters where Love and Averill were attending a board meeting, and the superintendent, Love, Averill, and Kanikeberg left the board meeting and spent 30 to 45 minutes talking with Rabinashad. Rabinashad told them she was frightened and concerned for her own and her family's safety because of threats made by Brock, Globstad, and Allen.[56] One of the employer representatives suggested Rabinashad and her children stay in a hotel that night, and when Rabinashad expressed concern about her

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[53] Transcript page 1688.

[54] Other elements of this incident that do not add up are Rabinashad's concern that her children (age 17 and 21) were home alone at about 5:45 p.m., and her going to a concert Saturday night though she was too upset to work the next Monday and Tuesday.

[55] Transcript pages 1704-1705.

[56] Despite Rabinashad's alleged emotional state, she was able to read notes Kanikeberg was making of their conversation.

home, arranged for the security patrol to detour by her home that night.

There is absolutely nothing in the record that would lead a reasonable person to suspect violence from any particular drivers because of the comments made by Dell-Imagine's friends on March 3, or the anonymous comment on March 6. All the threats and inappropriate behavior came from the shop stewards' group, not from Dell-Imagine's supporters, and even those were on the level of nasty talk or searching purses and drawers; not a single violent act or threat is in the record. Yet Rabinashad and others opposing Dell-Imagine behaved at times as if they were the victims of a ravening horde.

A similar over-reaction, though at a lower decibel level, prompted Rabinashad to telephone Love and Kanikeberg at home during a late January 1995 weekend because Dell-Imagine had told Seavey that Rabinashad had inquired whether Seavey had a driving assignment (see discussion above). Her behavior reveals Rabinashad's belief that as shop steward she had a right to know what work each driver or substitute was doing. She was unrealistic to expect she could make these inquiries secretly or without any reaction from fellow drivers who thought she was going overboard. Likewise, it was unreasonable for Haureiter to object to Dell-Imagine commenting that Haureiter was "calling the shots" about work assignments when Haunreiter had been making repeated demands for the most and best trips since August 1994. This "calling the shots" comment became a subject of at least one meeting among Eldridge, Plumis, Haunreiter, and Rabinashad.[57] These incidents are representative of several additional over-reactions by Haunreiter and Rabinashad to other drivers' foreseeable responses to the shop stewards' activities.

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[57] Exhibits 111c, 113.

Union request for Dell-Imagine's removal as operations supervisor - The union requested Dell-Imagine's removal from any position that would bring her into contact with union drivers as the remedy for sexual harassment grievances filed February 23, 1995 by Haunreiter, Carlson, and Martin. Eldridge thought the grievants suggested this remedy, while Rabinashad said it was Eldridge's idea; it is not necessary to resolve that conflict because the request was made in an official union document. Although Eldridge denied any intent that Dell-Imagine lose her employment as a result of this remedy, that had to be at least a foreseeable consequence since she was hired for the operations supervisor position and had no recent work experience as anything but a school bus driver and dispatcher.

Need for union status or activity nexus -
As described at length above, the evidence leads me to conclude a small group of shop stewards and their allies engaged in a deliberate campaign against Dell-Imagine and asked the employer to remove her from her position, which they reasonably should have foreseen meant her loss of employment. But this is not enough to establish a violation by the union. The union must have interfered with rights guaranteed to Dell-Imagine by Chapter 41.56 RCW in order for its actions to constitute an unfair labor practice. Local 2916, IAFF, v. PERC, 128 Wn.2d 375 (1995).

Dell-Imagine would have a right to representation, and the union would owe her a duty of fair representation, if she had proven her position had been wrongly excluded from the drivers unit. Castle Rock School District, Decisions 4722, 4723 (EDUC, 1994), aff'd Decisions 4722-B, 4723-B (EDUC, 1995). But that claim was dismissed after she settled with the employer.[58] Even if Dell-Imagine had succeeded in her claim of bargaining unit status, she would have to prove more than she has; a union that engages in such actions against a bargaining unit member commits an unfair labor

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[58] Shoreline School District, Decision 5560 (PECB, 1996).

practice only if its alignment in interest against the employee is for invidious reasons. City of Seattle, Decision 3199-B (PECB, 1991), and cases cited therein. See, also, Pe Ell School District, Decision 3801-A (EDUC, 1992), where a bargaining unit member failed to make a prima facie case of discrimination when he could not prove an improper motivation behind the union's action that harmed him.

Determining the rights an unrepresented public employee is owed by a union representing her subordinates is a matter of first impression for the Commission. In such a situation, the Commission has often consulted NLRB decisions or judicial decisions construing the National Labor Relations Act.[59] However, this approach provides little assistance on the present issue because the two statutes treat supervisory employees differently. For example, Sheet Metal Workers Local 104 (Losli International, Inc.), 297 NLRB 1078 (1990), held that a union did not interfere with employee rights when it fined and filed charges against a president of a company that installed products of the employer with which the union had a dispute, because a company president is not an employee protected by the Act. That decision makes no reference to two 1987 decisions recognizing the possibility of union liability for actions harming supervisors. In Teamsters Local 379 (J. H. McNamara, Inc.), 284 NLRB 1413, the union was found to have interfered with employee rights when it fined and suspended supervisors who were union members for photographing and turning in a sleeping driver. The Board noted the union's actions interfered with the grievance process.[60] And in UAW Local 167 (GMC), 286 NLRB

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[59] South Kitsap School District, Decision 472 (PECB, 1978), is an early example.

[60] The Ninth Circuit Court of Appeals came to the opposite conclusion in NLRB v. Sheet Metal Workers, Local 104, 64 F.3d 465 (1995). It found no violation, and denied enforcement of the Board order, where the union had fined a supervisor/member $5,000 for assigning work in a manner the union contended violated contractual work rules. The

1167, the Board found the union had not violated the Act by giving an erroneous contract interpretation to a former bargaining unit member who had promoted to a supervisory position, noting that it would take a deliberately misleading or deliberately incorrect contract interpretation by the union to violate the supervisor's rights.[61]

It seems appropriate in the circumstances of this case to conclude that Chapter 41.56 RCW grants Dell-Imagine at least the right to refuse the union's demand that she commit actions as a supervisor that would be employer unfair labor practices.[62] Thus, she had the right to resist any union requests that she make work assignments based on employees' union activities, as she alleged the union had demanded, because that would be interference.

Evidence of union nexus lacking -
Dell-Imagine used the term "union adherents" to describe those persons who repeatedly questioned her work assignments. On cross-examination she testified:

Court noted that the protection Section 8(b)(1)(B) gives employer officials representing the employer in bargaining or grievance processing had been very narrowly interpreted by the United States Supreme Court.

[61] The Board cited a duty of fair representation case involving a union and bargaining unit member as authority for this holding, without discussion of the appropriateness of finding a duty of fair representation toward one no longer a bargaining unit member. In an analogous situation, the Fifth Circuit Court of Appeals found no duty of fair representation was owed to former bargaining unit members who had become supervisors, since the nature of their new positions excluded them from the bargaining unit. Cooper v. GMC, 651 F.2d 249 (1981).

[62] As a supervisor, Dell-Imagine possessed sufficient authority to bind the employer by her actions. See discussion in Mansfield School District, Decisions 5238-A, 5239-A (EDUC, 1996) and City of Brier, Decision 5089-A (PECB, 1995).

Q: [By Mr. Costello] You accuse the union through its stewards of conspiring to have you fired and you used the term in your charge union adherents. What does that mean?

A: [By Ms. Dell-Imagine] There were some drivers that basically hid behind the shop stewards or used the shop stewards to get them preferred treatment. To -- more or less pro or con if it was for something that they wanted to benefit themselves or to cover themselves in a situation that they were not maybe in the best stead with. Does that explain?

...

Q: [By Mr. Costello] Let's see if I understand. These are people who, in your eyes, used the shop stewards to gain preferred treatment, and that preferred treatment could either take the form of benefits for themselves or protection from adverse consequences at the hands of the employer, is that correct?

A: [By Ms. Dell-Imagine] Also to use their own interpretation of the contract to manipulate it to their benefit, their interpretation.

Q: As it's used in your charge does the term union adherents include shop stewards?

A: In some circumstances.

Q: Does the term union adherents as you use it in your charge apply in any way to whether or not individuals support or oppose the union?

A: Not at all.

...

Q: [By Mr. Costello] Who were the individuals that you considered to be union adherents at the point you signed the charge?

A: [By Ms. Dell-Imagine] The three shop stewards, Karol Haunreiter, Konny Carlson, Sharon Knudsen. It was a very small group.

Q: Anyone else?

A: Dick Stave to a point. And this may seem funny to you, but Sally Goodson because she had been a former shop steward. Roger Johnson, that would -- I would basically say that's the majority.

Q: Does that exhaust the list of union adherents?

A: Kim McAbee.

Q: Anyone else?

A: Not that I can think of.

Transcript pages 2655-2657.

Employer actions that constitute interference with rights granted by Chapter 41.56 RCW are unlawful because they inappropriately either discourage or encourage membership in the union. Thus, the definition of an interference violation focuses on employees' perceptions of the employer's actions "as a threat of reprisal or force or promise of benefit associated with their union activity." Port of Tacoma, supra at page 19 (emphasis added). Without that connection to the existence or level of employees' union activity, an employer's actions may be arbitrary or unfair or violate some other law, but are unlikely to be an interference violation. This connection to employees' union activities is missing from Dell-Imagine's evidence.[63]

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[63] The use of the union for advocacy which Dell-Imagine ascribes to those she defines as union adherents is typical for bargaining unit members. It is their right to request their union's assistance in pressing contract interpretations different from those of the employer, or to seek representation when discipline looms.

Dell-Imagine argued the union varied in its treatment of bargaining unit members, favoring those allied with the shop stewards and disfavoring those who supported her. For example, Eldridge testified she would file a grievance if the grievant wanted, even if its merit were questionable. Yet in her handling of grievances for Brock and Globstad (both supporters of Dell-Imagine), Eldridge took positions contrary to their desires.

Brock wanted pay for a trip she'd been denied October 8, 1994, because she'd gone home the afternoon before due to faulty equipment giving her a headache. Eldridge told Plumis that changing Brock's sick leave to paid administrative leave was sufficient, and told Brock that she had to accept the shop stewards' interpretation of the contract language on working the prior day to qualify for a trip.[64]

Globstad's November 4, 1994 grievance alleged she had lost seniority on the substitutes' list (with the result that she fell behind Schloredt instead of preceding her) because of bad advice from the shop stewards. Despite Globstad informing Eldridge several times she was misstating the facts and that the remedy Globstad wanted was to regain her seniority, Eldridge persisted in claiming the error was Dell-Imagine's. Eldridge also changed Globstad's remedy from reinstatement of her seniority to clarification of the operations supervisor's routine in posting newly available routes, saying Globstad couldn't upset another bargaining unit member (Schloredt) by her requested remedy.[65]

This behavior of Eldridge's toward grievants who supported Dell-Imagine differs from her behavior toward Rabinashad as a grievant. Rabinashad was denied a trip by Plumis on January 25, 1995, because she had not been working full-time the day before, a situation

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[64] Exhibits 73a, 73b; Transcript pages 2875-2881.

[65] Exhibits 74a-74d, 81; Transcript pages 3206-3222.

somewhat analogous to that of Brock. In advancing the grievance, Eldridge demanded compensation for Rabinashad's missed trip, though Eldridge had told Brock she could not have that.[66] And rather than imposing her own ideas on the grievance processing, Eldridge asked for Rabinashad's guidance on processing her grievance.[67]

Discrepancies between the quality of the union's assistance to members of its bargaining unit may give rise to claims by the disadvantaged bargaining unit members for violation of the union's duty of fair representation. But that does not permit Dell-Imagine to assert those claims, because no natural person has standing to pursue before the Commission an unfair labor practice claim of another. C-TRAN, Decision 4005 (PECB, 1992). Nor does the possibility that the union violated rights of bargaining unit members give Dell-Imagine, herself, any valid claim against the union; the union owes her no duty which is violated by a possible breach of its duty of fair representation.

Conclusion

For the reasons described above, I conclude Dell-Imagine has failed to prove a prima facie case of interference by the union with rights granted her by Chapter 41.56 RCW. Therefore the complaint is dismissed.

FINDINGS OF FACT

1. Shoreline School District is a public employer within the meaning of RCW 41.56.030(1).

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[66] Exhibits 58a-58e.

[67] Exhibit 75f.

2. Service Employees International Union, Local 6, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of an appropriate unit of regular school bus drivers and substitute drivers employed by the Shoreline School District. The operations supervisor position has historically been excluded from this unit.

3. Toni Dell-Imagine was a public employee within the meaning of RCW 41.56.030(2) during her employment by Shoreline School District as operations supervisor.

4. After a significant change in transportation operations reduced the number of regular drivers and the amount of time they had available for mid-day trips, a controversy arose between Dell-Imagine and a few bargaining unit members, including the union shop stewards. These bargaining unit members objected to Dell-Imagine's work assignments during the 1993-1994 and 1994-1995 school years by complaining to her superior, filing grievances, and requesting an investigation of her alleged performance deficiencies by the employer's human resources office.

5. Dell-Imagine was discharged after the employer's investigation, although a number of regular and substitute drivers supported her.

6. The evidence fails to establish that Dell-Imagine's opponents demanded she make work assignments on the basis of employees' union activities.

CONCLUSIONS OF LAW

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

2. Toni Dell-Imagine has failed to establish a prima facie case of interference by Service Employees International Union, Local 6, with her rights in violation of RCW 41.56.150(1).

3. Toni Dell-Imagine has failed to establish a prima facie case that Service Employees International Union, Local 6, violated RCW 41.56.150(2) by inducing, or attempting to induce, Shoreline School District to discriminate against Toni Dell-Imagine.

ORDER

The complaint charging unfair labor practices filed in the above-entitled matter is DISMISSED.

Entered at Olympia, Washington, this 11th day of September, 1996.

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.