STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WILLARD L. ROBERTS, Complainant,	)	CASE 12336-U-96-2919
vs.	)	DECISION 5899-A - PECB
MUKILTEO SCHOOL DISTRICT, Respondent.	)	DECISION OF COMMISSION

James S. Sable, Attorney at Law, appeared on behalf of the complainant.

Montgomery, Purdue, Blankinship & Austin, by Christopher L. Hirst, Attorney at Law, appeared on behalf of the respondent.

This case comes before the Commission on a petition for review filed by Willard L. Roberts, seeking to overturn a dismissal order issued by Examiner Mark S. Downing.[1]

BACKGROUND

The Mukilteo School District (Mukilteo) and Public School Employees of Washington (union) are parties to a collective bargaining relationship for a bargaining unit which includes classified employees in general job classifications of: Data processing, crossing guard, food service, secretarial/bookkeeping, transportation, community schools, custodial, maintenance, and professional-technical.

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[1] Mukilteo School District, Decision 5899 (PECB, 1997).

The Prior Proceedings

The Commission takes notice of its records for Case 10736-U-93-2497, which was initiated by a complaint charging unfair labor practices filed by Willard Roberts on October 22, 1993. According to documents filed in that case:

1. Willard Roberts was employed by Mukilteo as a substitute bus driver from 1991 to 1993.
2. On September 2, 1993, Mukilteo advised Roberts that he would not be hired as a permanent driver.
3. By letter of September 9, 1993, Mukilteo advised Roberts that he would no longer be used as a bus driver.[2]
4. On September 29, 1993, Roberts and a union representative presented Mukilteo with a grievance for wrongful firing, claiming there was not justifiable cause for discharging Roberts.[3]
5. On October 5, 1993, Mukilteo advised Roberts he had no legal right to file a grievance, as his status was that of substitute bus driver paid at step one for each hour of required work.
6. The complaint in Case 10736-U-93-2497 alleged that Mukilteo violated Article XI of the applicable collective bargaining agreement ("Discipline and Discharge of Employees"), Article I, Section 1.6 ("Recognition and Coverage of Contract"), and RCW 41.56.040.

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[2] The letter stated, "You have not consistently demonstrated the qualities and skills expected of a Mukilteo School Bus Driver and your employment as a substitute is terminated."

[3] Roberts further charged that Mukilteo changed substitute assignments, denied wages to the affected substitutes, and violated an understanding with the union that substitutes would be hired as permanent employees in seniority order.

Upon initial review under WAC 391-45-110, Roberts' claims were found insufficient to state a cause of action, absent allegations that he was discharged due to union activity. Roberts supplemented his complaint by a letter filed October 29, 1993, in which he alleged that, after he left the employ of Mukilteo and was hired by Journey Lines (a charter company that contracted with Mukilteo), Mukilteo informed Journey Lines that Roberts could not drive charters for Mukilteo because he had a "lawsuit" pending against the school district. Roberts believed the reference made was to the unfair labor practice case he filed on October 22, 1993. Roberts alleged that, as a result, Journey Lines told him they did not know how much work they would have for him in the future. Roberts also alleged that he had reason to believe Mukilteo had telephoned Chinook Charters, a company where Roberts had inquired about employment, and told Chinook Charters that Roberts was not allowed to drive students of the Mukilteo School District. Roberts alleged that Chinook Charters then called Journey Lines and repeated what Mukilteo said about him. A cause of action was found to exist as to Roberts' claim that the Mukilteo School District had started a campaign to effectively blacklist him from possible places of employment. Examiner William A. Lang was assigned to conduct further proceedings under Chapter 391-45 WAC.

During an off-the-record discussion at a hearing before Examiner Lang on December 7, 1994, the parties reached an agreement, which was described as follows:

> The employer, the respondent, Mukilteo School District, and Mr. Roberts agree to issuance of a cease and desist order whereby the Mukilteo School District will refrain from contacting any past, current, or future employers of Mr. Roberts.

The settlement agreement provided for the employer to issue two letters, as follows:

> One stating that Roberts was employed as a substitute school bus driver during the school years in 1991, 1992 and 1993, that he demonstrated reliability and appeared regularly for work, and that he demonstrated technical competence as a substitute bus driver; and
>
> The other providing that the school district does not or never had any reason or knowledge to believe that Roberts poses or had posed a threat of harm to children under his supervision.

In turn, Roberts agreed to withdraw the unfair labor practice complaint in that matter. A stipulated order submitted by the parties included:

> 1. Respondent shall cease and desist from contacting past, present or future employers of complainant; and
> 2. Respondent shall provide copies of this order to John Keiter, Tom Hingson, Dianne Bailey, Journey Lines and Chinook Charter Service.

On February 21, 1995, Examiner Lang signed the stipulated order, and it was duly entered. Case 10736-U-93-2497 was then closed.

The Current Controversy

On February 20, 1996, Roberts filed another complaint charging unfair labor practices with the Commission, this time alleging that Mukilteo had interfered with, restrained or coerced him in

violation of RCW 41.56.140(1) and (3), by breaching the agreed order.

On March 5, 1996, Roberts applied for a bus driver position with 3A/EDJ Transit, a company which provides bus services for the Seattle Public Schools. At the time, Operations Manager Helene McDonald of 3A/EDJ used a routine screening procedure to evaluate applicants' qualifications to drive school buses. The procedure included making contact with school bus companies where the applicants formerly worked. No school bus companies were listed on the application Roberts submitted in 1996, but he had listed the Mukilteo School District as a past employer on an application he filed with 3A/EDJ Transit in September of 1993. McDonald then placed a routine call, on March 5, 1996, to Supervisor of Transportation Tom Hingson at the Mukilteo School District. Hingson was not available at the time, so McDonald left a message for Hingson to return the call. McDonald's message made reference to Willard Roberts as a former employee of Mukilteo School District. Hingson responded to McDonald's message within a couple days, by placing a telephone call to McDonald. During the telephone conversation which ensued, McDonald asked Hingson if Roberts was eligible for rehire. Hingson replied "No", and gave no further information.

The unfair labor practice complaint filed on February 20, 1996 was reviewed under the preliminary ruling process set forth in WAC 391-45-110, and a letter sent to the parties on March 27, 1996 indicated that the complaint was insufficient to state a cause of action. The complainant filed an amended complaint on April 10, 1996, in which he detailed the transaction between Hingson and McDonald. In a preliminary ruling issued on May 9, 1996, the scope of the case was limited to the one communication detailed between Hingson and McDonald.

Examiner Mark S. Downing held a hearing on October 25, 1996. He found that Roberts failed to make a prima facie showing that the Mukilteo School District violated RCW 41.56.140(1) or (3). The Examiner thus dismissed the unfair labor practice complaint. The complainant petitioned for review on May 1, 1997, thus bringing the case before the Commission.

POSITIONS OF THE PARTIES

The complainant argues that Hingson's telephone call to McDonald was a communication between Mukilteo and a potential future employer, and thus a "contact" within the meaning of the agreed order and a repetition of conduct that led to the agreed order. The complainant requests that the Examiner's decision be reversed. He seeks unspecified compensation for his economic and wage losses, together with reimbursement for his attorney fees incurred in the prosecution of this case.

The Mukilteo School District argues that Hingson's actions in returning a telephone call did not violate the agreed order, which it interprets as only prohibiting it from initiating contacts with past, present or future employers of the complainant. It argues that the questions and responses during the telephone conversation between Hingson and McDonald had nothing to do with protected activities, and that the Examiner correctly determined the complainant did not establish any causal connection between the telephone call and the prior grievance or unfair labor practice complaint. The employer requests the Examiner's decision be upheld.

DISCUSSION

The Agreed Order

The complainant argues that, on its face, the agreed order ***prohibits all contact*** between Mukilteo and his past, present or future employers. Inasmuch as the agreed order was drafted by the employer, the complainant urges that any ambiguities are to be construed against the drafter of the document.

The Supreme Court of the State of Washington has stated that "unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions", and that extrinsic evidence may be helpful in elucidating the meaning of words in an agreement but is not to be utilized "to emasculate the written expression of that intent". U.S. Life Credit Life Insurance Company, 129 Wn.2d 565 (1996). After a careful review of the record, we find that the words used in the agreed order and the circumstances surrounding its creation form a cohesive explanation as to the intent of the parties, as follows: Regarding the complainant's employment with Mukilteo School District, the agreed order was clearly meant to prohibit the employer from ***initiating contact*** with any past, present or potential employer of the complainant. To rule otherwise would "emasculate the written expression of the intent" of the parties.

The Intent of the Parties -

Where an issue exists as to the meaning of words in an agreement, we must first look to the intent of the parties as indicated in the agreement itself. In this case, the agreed order provides that the Mukilteo School District "shall cease and desist from contacting". The words "cease and desist" indicate that Mukilteo was to stop

doing something it was doing or had done. In this context, the word "contacting" can fairly be read as an active verb, indicating that the parties desired that Mukilteo stop active efforts to contact past, present or future employers of the complainant.

The Surrounding Circumstances -

We can also discern the intent of the parties from the circumstances surrounding the making of the agreement, and the problem it was designed to resolve. The record in Case 10736-U-93-2497 shows that the agreed order was meant to put a stop to an active "blacklisting" effort where Mukilteo had initiated contacts with at least present and future employers of the complainant, to advise them that Roberts could not transport students of the Mukilteo School District. The focus of the complainant's amendatory letter filed in Case 10736-U-93-2497 on October 29, 1993, was on the ***contacts initiated by Mukilteo***, as follows:

> My former employer, The Mukilteo School District has managed to retaliate against me even though I am no longer employed by them. I have been hired by Journey Lines, a charter company that does charter work for a number of people, including the Mukilteo School District. On October 25, 1993, I was informed by my new employer that **the Mukilteo School District had called up and said that I could not drive the school district's charters because I had a "law suit" pending against the school district.** I believe this was done due to the unfair labor practice I filed on October 22, 1993. My new employer was very apologetic about not allowing me to drive for Mukilteo's charters and stated that he had only heard good things about me and my driving. However, since he is a small business man and is dependant [sic] upon Mukilteo School District's business, he was forced to comply with their wishes. He stated he would try to find other things for me. He did not

> fire me but did not know how much work he would have for me. I am low man on the totem pole, as I was the last to be hired in, and the short, school district charters are the kind of work that is given to the new hire. The better charters go to those with more seniority. My current employer would not say who **told him I could not drive for the Mukilteo School District** Charters but when I mentioned Mr. Hingson, he did not deny that it was him. ...
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> I have reason to believe that Mr. **Hingson has also called Chinook Charters**, on October 26, 1993, a company that I am not employed with, nor had I applied with except to make a phone call to inquire about if they were hiring. It is my understanding that in that conversation Mr. **Hingson inquired if I was employed** by them. They told him I was not **and then he said to them that "I was not allowed to drive children in the Mukilteo School District."**
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> This is greatly disturbing to me as at one time I was considering applying with that company because of Mr. **Hingson's previous demands to Journey Lines** and now he has effectively prevented any future employment with Chinook Charters by raising questions regarding my character and conduct around children. Chinook then called my current employer, Journey Lines and asked if they knew anything about me and then repeated what Mr. Hingson had said. ...
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> It is my understanding that there is a federal law against blacklisting. Mr. **Hingson has now started a campaign to effectively have me blacklisted** from possible places of employment. If **he has called Chinook** Charters, where else has he **called and "warned"** them about me? ...

[Emphasis by **bold** supplied.]

Thus, the allegations of the complainant which resulted in the agreed order do not make any reference to Mukilteo responding, in

a more passive mode, to inquiries from current or potential employers of Roberts. A person cannot "cease and desist" from doing something it has never done. Therefore, the only activity the agreed order could have been intended to stop was the initiating of contacts with other employers for the purpose of warning them that the complainant was not allowed to drive for the Mukilteo School District.

Interpretation of the agreed order as concerned with ***initiating contact*** is supported by the opening statement of the complainant's attorney at the hearing in Case 10736-U-93-2497, where he stated:

> [Hingson] undisputably **made several phone calls** to Mr. Robert's then current employer and another charter bus company operator, who Mr. Hingson thought had employed Mr. Roberts. **Calling them to tell them not to permit Mr. Roberts to drive charter buses for the School District due to a lawsuit**, as he put it, that was pending against the School District. ... **Mr. Hingson was attempting to black list him with employers ...**

[Emphasis by **bold** supplied.]

It was the active role of Hingson that was at issue, not a passive or responsive role in replying to questions initiated by others.

The Action Now In Question -

In responding to the telephone message left for him by McDonald, Hingson was not initiating a contact of the type at issue in the prior case. We do not find significance in the fact that Hingson placed a telephone call to McDonald, as substantially the same conversation could have taken place if Hingson had been available to take McDonald's call on March 5, 1996. The inquiry was initiated by McDonald. Hingson's action of responding to the

message left for him was common courtesy. There is nothing in the record to indicate the agreed order was intended to stop all reference checks of the type commonly made by employers when considering applicants for employment.[4] We therefore find no violation of the agreed order.[5]

Legal Standards for Discrimination Cases

Chapter 41.56 RCW prohibits employers from discriminating against public employees who exercise the rights secured by the collective bargaining statute:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE. No public employer, or other person, shall directly or indirectly, **interfere with, restrain, coerce, or discriminate against any public employee** or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

[Emphasis by **bold** supplied.]

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[4] The letters written in conjunction with the agreed order are certainly subject to interpretation as being of a type that might be tendered by Roberts to future employers as substitutes for direct reference checks. They were not, however, denominated by the agreed order or by their own terms as the exclusive form of reference to be provided by Mukilteo on Roberts.

[5] Under RCW 41.56.160 and RCW 34.05.578, the Commission has discretion to authorize the Attorney General to file suit for enforcement of a remedial order issued in an unfair labor practice case, upon a finding that the respondent has violated the order.

Enforcement of those statutory rights is through the unfair labor practice provisions of Chapter 41.56 RCW:

> RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be an unfair labor practice for a public employer:
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> (1) **To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;**
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> (2) To control, dominate or interfere with a bargaining representative;
>
> (3) **To discriminate against a public employee who has filed an unfair labor practice charge;**
>
> (4) To refuse to engage in collective bargaining.
>
> [Emphasis by **bold** supplied.]

RCW 41.56.160 authorizes the Commission to determine and remedy unfair labor practices.

A discrimination violation occurs under Chapter 41.56 RCW when: (1) The employee exercises a right protected by the collective bargaining statute, or communicates to the employer an intent to do so; (2) the employee is discriminatorily deprived of some ascertainable right, benefit or status; and (3) there is a causal connection between the exercise of the legal right and the discriminatory action. Educational Service District 114, Decision 4361-A (PECB, 1994) and Mansfield School District, Decision 5238-A and 5239-A (EDUC, 1996).

The Supreme Court of the State of Washington has established the standard of proof for "discrimination" cases. Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991); Allison V. Seattle Housing Authority, 118 Wn.2d 79 (1991). A complainant has the burden to establish a prima facie case of discrimination. If that burden is

met, the employer has the opportunity to articulate legitimate, nonretaliatory reasons for its actions. The 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 that: (1) the reasons given by the employer were pretextual; or (2) union animus was nevertheless a substantial motivating factor behind the employer's action.

The Prima Facie Case

In September of 1993, Roberts filed a grievance protesting his discharge. A month later, he filed an unfair labor practice complaint with the Commission. Both of those actions were protected activities related to his employment with Mukilteo.

The complainant showed that 3A/EDJ refused to hire him, and his arguments include discussion of McDonald's actions, as if they were at issue in this case, including:

> Based upon the foregoing, McDonald's allegation that she determined Roberts was ineligible to be hired due to his lack of annual inservice training constitutes a mere pretext for the true basis for her decision not to hire Roberts. That basis was Hingson's remark about Roberts being ineligible for rehire.

Even if the evidence showed that 3A/EDJ discriminatorily refused to hire Roberts, this Commission has no jurisdiction over the actions of that private employer. Such allegations would be for the National Labor Relations Board to decide. Only the actions of Mukilteo School District are at issue in this case.

Roberts was entitled to a reference from Mukilteo that was free of discrimination on the basis of his protected activity under Chapter 41.56 RCW. McDonald asked a simple, direct question: "Is this person rehireable?" Hingson gave a simple, direct response: "No".[6] As Roberts was not eligible for rehire by the Mukilteo School District, the record supports an inference that Hingson would have responded in a similar fashion to any employer making such an inquiry in regard to any past employee who was not subject to rehire. Therefore, we are hard-pressed to find that Mukilteo discriminatorily deprived Roberts of any right, status or benefit.

Chapter 42.17 RCW does not altogether exempt information about public sector employment relationships from public disclosure. The existence and termination of an employment relationship, as well as eligibility for rehire, would not appear to come within the scope of personal information protected by "privacy" concerns in RCW 42.17.310(1)(b). RCW 42.17.255 narrowly confines "privacy" to information that would be "highly offensive to a reasonable person" and "not of legitimate concern to the public". Hingson's response to the legitimate inquiry of a potential employer about a matter that is of public record appears, therefore, to have been entirely within his legal responsibilities as a public official.[7]

In Seattle School District, Decision 5237-B (EDUC, 1996), affirmed Superior Court for King County (No. 96-2-17727-O KNT, 1997), the Commission dismissed an unfair labor practice complaint because of the lack of union animus on the part of the employer. While union

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[6] As the Examiner aptly pointed out, Hingson declined to answer an open-ended question by McDonald.

[7] One of the logical purposes of the letters written in conjunction with the agreed order would have been that they be disclosed by Mukilteo in response to public records requests made under Chapter 42.17 RCW.

animus may be inferred from a wide variety of employer behavior,[8] the complainant here provided no showing that Mukilteo expressed anti-union sentiments to him or anyone else. The record contains nothing to show the employer had a sentiment against unions or union activity which would cause it to retaliate against someone who filed a grievance or an unfair labor practice. There was no contemporaneous opposition to a union organizing effort. We find no evidence that Hingson alerted McDonald to Roberts' grievance or unfair labor practice complaint. The complainant provides no support from Commission precedent or any NLRB precedent for its argument that Mukilteo School District discriminated against him for union activity, and offered no support to show the prima facie case was met.

Roberts has failed to establish a prima facie case of discrimination. It is therefore not necessary to engage in detailed analysis of the reasons articulated by the employer for its actions, to evaluate the evidence for potential pretexts, or to implement the "substantial motivating factor" test in this case.

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[8] In Mansfield, supra, the superintendent of schools exhibited union animus by strong anti-union statements made to a union activist, as well as remarks made to his secretary and another bargaining unit member.

In City of Winlock, Decision 4784-A (PECB, 1995) the Commission found union animus partly because of the employer's vigorous opposition to a representation case, and because of anti-union statements of employer representatives.

In City of Federal Way, Decision 4088-A (PECB, 1993), affirmed, Decision 4088-B (PECB, 1994), an employer's negative campaign letters showed union animus.

In Educational Service District 114, supra, employer expressions of concern about union organizing efforts constituted sufficient union animus to infer a causal connection between employees' protected activity and the employer's adverse actions.

The Interference Allegation

The burden of proving unlawful interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party, but the test is different from that applied to discrimination claims. An interference violation will be found when an employee could reasonably perceive the employer's actions as a threat of reprisal or force or promise of benefit associated with the union activity of that employee or of other employees.[9]

The complainant cites J.N. Ceazan Company, 246 NLRB 637 (1979) in support of its argument that employees could reasonably perceive the Hingson-McDonald conversation as a threat of reprisal or force associated with union activities. In that case, line drivers sought union representation after a substantial reduction in their compensation, and a union filed a representation petition seeking certification as their exclusive bargaining representative. The employer told the drivers that, if the union came in, the company would have to increase the pay, cease the line operations and sell the trucks. After cutting back operations, the company discharged several drivers. Two of the discharged drivers applied for jobs at a non-union company, and listed Ceazan as their previous employer. The prospective employer telephoned Ceazan and asked questions concerning the driving ability, reliability, and honesty of the applicants, and whether they drank or gambled, etc. After providing replies favorable to the applicants, Ceazan went on to tell the prospective employer that the line drivers were attempting

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[9] See, City of Seattle, Decision 3066-A (PECB, 1988); City of Seattle, Decision 3566-A (PECB, 1991); City of Pasco, Decision 3804-A (PECB, 1992); Port of Tacoma, Decisions 4626-A and 4627-A (PECB, 1995); King County, Decision 4893-A (PECB, 1995); Mansfield School District, Decision 5238-A (EDUC, 1996); and Kennewick School District, Decision 5632-A (PECB, 1996).

to organize, and that the two applicants were involved in the organizational effort. The NLRB found that, while the remark did not influence the prospective employer's hiring decision, it still interfered with the employees' rights to seek union representation. The NLRB ruled that Ceazan "had to know such a comment might influence [the prospective employer] against hiring [the applicants] to avoid seeking to organize" the drivers at that non-union company. The Ceazan case is clearly distinguishable, on its facts, from the case at hand. Hingson made no remarks to McDonald about unions, union activities, or Roberts' filing a grievance or an unfair labor practice, which are the only protected activities shown in the record as having been engaged in by Roberts.

The complainant's petition for review points to no other authority for us to consider which would support an interference charge on the only conversation before us in this case.[10] Hingson confirmed for McDonald that Hingson had worked as a substitute bus driver for the Mukilteo School District, and he stated that Roberts was not eligible for rehire by the Mukilteo School District. The Commission is unable to infer from that conversation that employees could reasonably perceive a threat of reprisal or force associated with union activities.

Clarification of Conclusion of Law

The Examiner correctly noted that the actions of 3A/EDJ were not before him, but a reference to 3A/EDJ in the Examiner's conclusions of law could be misconstrued. We thus amend that paragraph.

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[10] The cases cited in the complainant's brief to the Examiner related to the alleged breach of the agreed order, and do not support the finding of an independent interference violation.

NOW THEREFORE, it is

ORDERED

1. Paragraph 3 of the conclusions of law in this matter is amended to read as follows:

   3. Roberts has failed to make a prima facie showing of a causal connection between the exercise of his protected rights and the response of the Mukilteo School District to 3A/EDJ's request for an employment reference, or that employees could reasonably perceive the reference given as an interference with their collective bargaining rights, and has not established any violation of RCW 41.56.140(1) or (3).

2. The findings of fact, conclusions of law (as amended in paragraph 1 of this order), and order issued in the above-captioned matter by Examiner Mark S. Downing are affirmed.

Issued at Olympia, Washington, on the 24th day of July, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner