STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF REARDAN-EDWALL, Complainant, vs. REARDAN-EDWALL SCHOOL DISTRICT, Respondent.	)	CASE 12593-U-96-2997 DECISION 6205 - PECB CASE 12767-U-96-3069 DECISION 6206 - PECB CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Eric T. Nordlof, Attorney at Law, appeared on behalf of the complainant.

Jeffrey J. Thimsen, Attorney at Law, appeared on behalf of the respondent.

On July 12, 1996, Public School Employees of Washington (PSE), filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the Reardan-Edwall School District (employer) had violated RCW 41.56.140(1) and (4). Case 12593-U-96-2997. In a preliminary ruling issued on August 30, 1996,[1] the Executive Director found a cause of action to exist and directed the employer to file its answer. The employer filed its answer on September 16, 1996. On September 24, 1996, Examiner Kathleen O. Erskine was assigned to conduct further proceedings in the matter under Chapter 391-45 WAC.

On October 18, 1996, PSE filed a second unfair labor practice complaint with the Commission, this time alleging the employer had

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[1] Under WAC 391-45-110, 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 Commission.

conditioned its participation in the collective bargaining process upon a unit determination issue, in violation of RCW 41.56.140(4). (Case 12767-U-96-3069.) In a preliminary ruling issued on December 12, 1996, pursuant to WAC 391-45-110, the Executive Director found a cause of action to exist, directed the employer to file its answer, and designated Kathleen O. Erskine as Examiner. The employer filed its answer on September 16, 1996.

The two cases were consolidated for hearing, and a hearing was held at Spokane, Washington, before the Examiner, on April 23 and 24, 1997. The parties submitted post-hearing briefs.

BACKGROUND

The Reardan-Edwall School District operates common schools for approximately 630 students in a rural area about 20 miles west of Spokane, Washington. Thomas Crowley was superintendent of schools at all times pertinent to this case. Two school buildings and the employer's main bus compound share a campus at Reardan, Washington; a satellite bus yard is located in the north end of the area served.[2] The employer has approximately 33 classified employees.

From 1984 until 1994, the employer's classified employees were represented for the purposes of collective bargaining by the Classified Public Employees Association/WEA, an organization which is not party to these proceedings.[3] In a representation election

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[2] All of the bus drivers work out of the main facility. Some of the bus drivers use an employer-owned vehicle to travel between Reardan and the satellite facility.

[3] On September 10, 1984, the Classified Public Employees Association/WEA was certified as exclusive bargaining representative of "all full-time and regular part-time classified employees," following a representation election conducted by agreement of the parties. Reardan-Edwall S D, Decision 2005 (PECB, 1984).

conducted by the Commission in June of 1994, a tie vote of the employees in that wall-to-wall unit resulted in a certification of "no representative".[4]

In the spring of 1995, PSE began an organizing campaign among the employer's classified employees, including the school bus drivers. PSE filed a representation petition with the Commission on July 10, 1995,[5] while another organization filed a representation petition for a different bargaining unit on July 21, 1995.

Following a hearing, the Executive Director issued a Direction of Elections, in which appropriate bargaining units were described and elections were ordered. Reardan-Edwall School District, Decisions 5549, 5550 (PECB, 1996). PSE prevailed in a bargaining unit described as:

> All full-time and regular part-time employees of the Reardan-Edwall School District performing school bus driving, groundskeeping, and mechanic work, excluding the superintendent, confidential employees, and all other employees of the employer.

PSE was certified as exclusive bargaining representative of that unit on July 31, 1996.[6]

Some of the events at issue in these consolidated cases occurred while the representation petition was pending, others occurred after PSE and the employer commenced negotiations for their initial collective bargaining agreement, in late September of 1996.

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[4] The certification was issued on June 23, 1994. Reardan-Edwall S D, Decision 4754 (PECB, 1994).

[5] Case 11899-E-95-01952.

[6] Reardan-Edwall S D, Decision 5549-A (PECB, 1996).

I.A. THE SUBSTANCE ABUSE POLICY

Facts Concerning Substance Abuse Policy

As an operator of a school transportation service, the employer is subject to various state and federal regulations. 49 CFR Sec. 382.115(b) calls upon operators of transportation systems to adopt and implement procedures for drug and alcohol testing of employees. For employees who operate safety-sensitive functions, including the operation of school buses, random drug and alcohol testing is also required. In light of that requirement, the following events are relevant to this case:

- **June 20, 1995**: A policy on drug testing (policy 8110) was given its first reading at a meeting of the employer's school board.

- **July 10, 1995**: PSE filed its representation petition with the Commission.

- **July 14, 1995**: The employer received notice from the Commission that the representation petition had been filed.

- **July 25, 1995**: The second reading of policy 8110 occurred at a meeting of the employer's school board.

- **August 15, 1995**: The employer's school board adopted policy 8110. The policy was to take effect on January 1, 1996.

Policy 8110 consists of 24 pages, includes extensive definitions, prohibits the use of alcohol or controlled substances during work time or work-related activities, contains extensive provisions concerning "pre-employment", "reasonable suspicion", "return-to-duty and follow-up" and "post-accident" testing, and provides for random testing, as follows:

Random Testing

The District will participate in the testing consortium of Cascade Transportation Services.

1. Random Alcohol Testing: Alcohol testing shall be conducted at an annualized rate of twenty-five percent (25%). Random alcohol testing shall not be performed on non-covered employees. (The Federal Highway Administration (FHWA) may adjust the percentage required for annual random testing.) Drivers shall only be tested for alcohol while they are performing safety-sensitive functions, immediately prior to performing or immediately after performing safety-sensitive functions. Individuals such a supervisors, who might be called upon to perform a safety-sensitive function without notice, are considered on-call and therefore may be tested even though they are not about to actually perform a safety-sensitive function immediately following the alcohol test.

2. Random Controlled Substance Testing: Random drug testing shall be conducted at an annualized rate of fifty percent (50%) for both covered and non-covered employees (The FHWA may adjust the percentage required for annual random drug testing.)

3. Process

a. The consortium will ensure that random alcohol and substance abuse tests are unannounced and dates for administering the random tests are spread reasonably through the calendar year.

b. The selection of employees for random alcohol and controlled substance testing shall be made by a scientifically valid method. Under the selection process used, each employee shall have an equal chance of being tested each time selections are made.

c. The District shall ensure that employees selected for random alcohol and substance abuse tests proceed immediately to the testing site upon notification of being selected, unless the employee is performing a safety-sensitive function, in which case the driver will cease performing the function and proceed to testing as soon as possible.

> **d. In the event an employee who is selected for a random alcohol and/or substance abuse test is absent, the District may select another employee for testing or keep the original selection confidential until the employee returns, if the employee is expected to be available for testing during the current designated testing period.**
>
> [Emphasis by **bold** supplied.]

The policy sets forth extensive testing procedures, and also sets forth test results and consequences, as follows:

> SECTION VI Test Results and Consequences
>
> A. Alcohol Tests
>
> 1. Results of alcohol concentration less that [sic] 0.02 will be reported to District designee as negative and employee is clear to perform safety-sensitive and other job functions.
>
> 2. If the results of the employee's alcohol test indicate a blood alcohol concentration of 0.02 or greater, but less than 0.04, the employee shall not be permitted to work until the start of the employee's next regularly scheduled duty period but not less than 24 hours following the administration of the test.
>
> Disciplinary action up to and including discharge may occur to any employee who tests positive to the drug test and/or shows blood alcohol concentrations between 0.02 and 0.04, especially multiple violations. This is District policy and not by DOT regulations.
>
> **3. Results of** alcohol concentration of 0.04 or greater or **refusal to be tested:**
>
> **a. The employee will be removed from performing any safety-sensitive function and placed on suspension from work without pay pending the outcome of an investigation. Disciplinary action up to and including discharge may occur.**
>
> Before returning to safety-sensitive duties, any employee must undergo an evaluation by a

qualified substance abuse professional (SAP), complete any recommendations (including treatment) made by the SAP, pass a return-to-duty alcohol and/or drug test and agree to return-to-work-conditions that include follow-up, observations, and other drug and/or alcohol testing. Return-to-work provisions may include the signing of a return-to-work agreement specifying exact employment conditions including a possible probationary period.

b. If terminated, the employee will be provided a written list of resources available for evaluating and resolving problems associated with the misuse of alcohol.

B. Drug Tests

1. MRO will notify the District of all controlled substance test results. For any employee receiving a verified positive controlled substance test result,

a. The employee will be removed from performing any work and placed on suspension without pay pending the outcome of an investigation by the District as well as the outcome of a substance abuse evaluation performed by a qualified substance abuse professional approved by the District. Disciplinary action, up to and including discharge, may result from the investigation and/or evaluation.

Before returning to safety-sensitive duties, any employee must undergo an evaluation by a qualified substance abuse professional (SAP), complete any recommendations (including treatment) made by the SAP, pass a return-to-work alcohol and/or drug test and agree to return-to-work conditions that include follow-up, observations, and other drug and/or alcohol testing.

Return to work provisions may include the signing of a return-to-work agreement specifying exact employment conditions including a possible probationary period.

2. The District shall notify employees of drug test results conducted under this policy and procedure. If the test results are verified positive, the District shall inform the employee which controlled substance or substances are verified as positive.

> 3. If Terminated, the employee will be provided a written list of resources available for evaluating and resolving problems associated with the misuse of controlled substances.
>
> [Emphasis by **bold** supplied.]

The policy also contains provisions on: Referral, evaluation and treatment; test costs and compensation; record retention and confidentiality; and required training for employees. The last page of the package calls for the signatures of the individual employees on a certificate that reads as follows:

> ACKNOWLEDGMENT/CERTIFICATE OF RECEIPT OF SUBSTANCE ABUSE POLICY
>
> I have been given a copy of the Substance Abuse Policy for the REARDAN-EDWALL SCHOOL DISTRICT, effective January 1, 1996.
>
> 1.) I understand that I must abide by this policy to ensure my safety and that of my fellow workers as well as the reputation of the District.
>
> 2.) I understand that as an employee of this District, I may be required to take an alcohol and/or drug test, and that refusal to submit to such a test will be considered grounds for termination and could be treated as if the test result (if taken) were positive.
>
> 3.) I understand that if I am a job applicant I am required to pass an alcohol and/or drug test and that if I fail such a test I will be denied employment.
>
> 4.) I understand that this policy may be changed from time to time with the only notification being the posting of changes on the employee bulletin board.
>
> 5.) I understand it is my responsibility to read and understand this policy and if I have any questions, to ask my supervisor for clarification.
>
> _____ _____
> Employee Signature Date
>
> *Section 382.601(d) in the VMCSR state: "Each employer shall ensure that each driver is

> required to sign a statement certifying that he or she has received a copy of these materials described in this section. Each employer shall maintain the original of the signed certificate and may provide a copy of the certificate to the driver."

It is clear that the employer went ahead with the adoption of the policy, and put it into effect, without any direct notice to or bargaining with PSE.

Positions of Parties on Substance Abuse Policy

PSE contends the employer unilaterally implemented its drug testing policy (policy 8110, also referred to as the "substance abuse" or "drug" policy) at a meeting of bus drivers in December of 1995, while its representation petition was pending before the Commission.[7] It argues that the employer illegally changed the status quo of the bargaining unit employees, by implementing the policy on that date without notifying or consulting with the union, in violation of the duty to bargain in good faith. On the complaint form filed to initiate this proceeding, PSE marked the box appropriate to allege an "interference" violation, as well as the box appropriate to allege a "refusal to bargain" violation. The text of the statement of facts cited only RCW 41.56.140(4) as to the adoption of the substance abuse policy. In its post-hearing brief, PSE moved to amend the complaint to substitute a citation of RCW 41.56.140(1) as to the adoption of the substance abuse policy.

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[7] In its post-hearing brief, PSE states that this meeting was in December of 1996. In his opening statement, PSE's attorney said, "[T]he District's drug and alcohol policy ... was implemented on December 18, 1995 ...". For purposes of this decision, it is assumed that the 1995 date which fits with the representation proceeding is correct, and that the 1996 date in the brief is in error.

The employer contends it had no obligation to bargain the implementation of its drug and alcohol testing policy with the union. It first asserts that it had no discretion in the adoption of the policy, and acted as mandated by federal law. It also notes that the policy was under consideration (i.e., had its "first reading") before PSE ever petitioned for recognition as exclusive bargaining representative, and that the policy was adopted by the school board prior to the certification of PSE as exclusive bargaining representative of the bus drivers.

Discussion on Substance Abuse Policy

Union's "Refusal to Bargain" Theory Inapposite -
Once its employees have organized for the purposes of collective bargaining, an employer has an obligation to maintain the "status quo" unless it gives notice to the exclusive bargaining representative, provides an opportunity for bargaining prior to making a decision affecting a mandatory subject of bargaining, and engages in good faith bargaining when requested by the union. Numerous Commission decisions have held that unilateral changes were "refusal to bargain" violations under RCW 41.56.140(4) and, derivatively, "interference" violations under RCW 41.56.140(1).

The employer correctly points out that it was under no duty to bargain with PSE in July and August of 1995 (when the disputed policy was given its second reading and adopted) or in January of 1996 (when the disputed policy was put into effect), because PSE was not yet the exclusive bargaining representative of the affected employees at those times. PSE's citation of RCW 41.56.140(4) was thus inapposite in this case.[8] That conclusion does not, however, end the analysis.

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[8] RCW 41.56.140(4) was also cited in the preliminary ruling on this issue, but the employer's answer did not expressly challenge that citation, nor did the employer request reconsideration of the preliminary ruling.

Union's "Interference" Claim Untimely -

An employer has an obligation to maintain the "status quo" once a petition for investigation of a question concerning representation has been filed concerning its employees. WAC 391-25-470(1)(e); 391-25-490(1)(e). In addition to being objectionable conduct in the representation proceeding, unilateral changes during the pendency of a representation petition constitute an "interference" violation under RCW 41.56.140(1). Once this case was referred to the Examiner, WAC 391-45-070 authorizes the Examiner to consider and rule upon the union's motion to amend the statutory citation for the substance abuse policy.

If there was any "interference" violation, however, that cause of action certainly arose when the employer proceeded with the second reading of its policy in July of 1995, when the employer proceeded with adoption of the policy in August of 1995, and/or when the employer put the disputed policy into effect on January 1, 1996. Under RCW 41.56.160, unfair labor practice complaints must be filed within six months after the action or event for which a remedy is sought. In this case, the complaint filed on July 12, 1996 can be considered timely only as to events occurring on or after January 12, 1996. Thus, this allegation could properly have been dismissed at the preliminary ruling stage of the proceedings, or could properly have been the subject of a motion for dismissal filed by the employer in its answer or at any subsequent time.

A claim by PSE that it did not discover the existence of the policy until May of 1996 is not creditable. The statute of limitations period is computed from the date when the injured party knew or reasonably should have known of the violation of its rights. Once it filed its representation petition in July of 1995, PSE had an interest and involvement in this employer's workforce. Even if it had no reason to read the minutes of school board meetings held in July and August of 1995, it should have acted within six months

after its prospective members were required, in December of 1995, to sign the "acknowledgment/certificate of receipt" documents.

The fact that this jurisdictional defect was not picked up prior to this time does not, however, overcome the defect. The Examiner thus dismisses this allegation. It is not necessary to reach or decide the employer's defense that the dispute policy was excluded from bargaining by force of federal law.

I.B. THE DISCHARGES OF SUSAN LEONETTI

Facts Concerning This Allegation

Bargaining unit employees Susan Leonetti and Clayton Kenney were directed to take drug tests. Neither Leonetti nor Kenney took the test, as scheduled. Leonetti was not allowed to reschedule the test, and was discharged for failing to take the test as scheduled. Kenney was allowed to reschedule the test, and to continue his employment. Leonetti was allegedly a union supporter, while Kenney was allegedly a "known management sympathizer".

Positions of Parties on Discharge of Leonetti

PSE contends the employer unlawfully discriminated against Susan Leonetti, and interfered with the rights of bargaining unit employees, by targeting Leonetti for discharge because of her union activity. PSE maintains that Leonetti's role in organizing the union, and her other union-related activities, were common knowledge among the employer and other employees during the organizing campaign. It contends the employer discharged Leonetti twice: Once on May 29, 1996, when it advised her that she would not be re-employed for the following school year; and again on May 30, 1996, when it gave her a letter terminating her employment effective immediately based on her failure to take a drug test

ordered per policy 8110. PSE argues that both discharges were pretextual and substantially motivated by anti-union animus, and constituted unlawful interference in the exercise of protected collective bargaining rights and discrimination on the basis of union activity.

The employer claims that PSE failed to make a *prima facie* case of discrimination with respect to either discharge of Leonetti. It argues that there is no causal connection between the discharges and Leonetti's union activity, that the employer established non-discriminatory reasons for both terminations, and that the union failed to prove the employer's reasons for terminating Leonetti were either pretextual or motivated by anti-union animus.

Discussion of Leonetti Discharges

The Legal Standard for "Discrimination" Claims -
In Educational Service District 114, Decision 4361-A (PECB, 1994), the Commission set forth a "substantial factor" test based on the decisions of the Supreme Court of the State of Washington in Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991), Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991). The Commission wrote:

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

> exist for a wrongful discharge tort claim independent of statute, the court was concerned about the public policy mandate of the statute.
>
> In Allison, the Supreme Court overturned a Court of Appeals decision which used the Mt. Healthy approach in shifting the burden of persuasion to the employer. The Court described the "substantial factor" test as an "intermediate standard" that was the most sensible approach, because of competing policy considerations. The Court acknowledged that some employees may file discrimination claims to shield themselves from discharge, but expressed concern that employers may be encouraged to fabricate pretexts to discharge employees who have brought discrimination claims, if the courts make the burden of causation too high.
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> ...
> Wilmot and Allison involved statutes where employees had legal rights to pursue claims, free of discrimination or retaliation by adverse actions of their employers. We too are concerned about the public policy mandate inherent in a statute which provides employees freedom from interference in the exercise of their rights involving collective bargaining.

Both of the statutes on which Wilmot and Allison were based are comparable to the collective bargaining statutes administed by the Commission. Chapter 41.56 RCW includes:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE. No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.
>
> ...
>
> RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be an unfair labor practice for a public employer:

> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
>
> ...
>
> (3) To discriminate against a public employee who has filed an unfair labor practice charge ...

The Examiner thus proceeds in this case with what has become a familiar line of analysis.

The *Prima Facie* Case -

The first step in the processing of a "discrimination" claim is for the injured party to make out a *prima facie* case showing a retaliatory action. To do this, a complainant must show:

1. The exercise of a statutorily protected right, or communicating to the employer an intent to do so;

2. That he or she was deprived of some ascertainable right, status or benefit; and

3. That there was a causal connection between the exercise of the legal right and the discriminatory action.

In this case, Principal Behrends denied having knowledge of Leonetti's union activities, but Superintendent Crowley gave direct testimony that he was aware that Leonetti had some role in the organizing by PSE and of her participation on behalf of PSE at the hearing held in the representation case in December of 1995:

> A: [By Mr. Crowley] I have some knowledge along that line. That December hearing that we just referred to this morning and the testimony deciding the composition of the units and the balloting, Sue Leonetti was at that hearing and seemed to be there as an interested party for PSE. I had also picked up on a comment

> or two that she had distributed meeting notices and fliers and handled some paperwork sort of things.
>
> Q: [By Mr. Thimsen] Had you identified her in your own mind as a leader in the organizing effort?
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> A: In my mind I saw Dave Foxworth as the primary leader and organizer and the one trying to bring PSE in, and I saw Susan Leonetti as sort of his secretarial type person handling paperwork sort of things.
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> Transcript, pp. 173-174.

Leonetti testified that she saw herself as fulfilling more than a "secretarial" role in the organizing drive, and the PSE representative responsible for the organizing drive saw Leonetti as his "eyes and ears" at the workplace.

The testimony, pleadings, and exhibits also reveal that the parties agree on several general points:

- Leonetti submitted a letter dated March 4, 1996, resigning her position as a regular route driver effective March 22, 1996, and requesting that she remain on the employer's list as a substitute bus driver. She apparently continued to work her regular route.

- Leonetti later sought to withdraw her resignation. That request was accepted by Superintendent Crowley on March 19, 1996, and she continued to work her regular route.

- Leonetti met with Crowley on May 29, 1996, at which time he informed her that she would not be re-employed for the 1996-97 school year.

- On May 30, 1996, Leonetti was informed that she had been randomly selected to take a drug test that day.

- Leonetti did not take the drug test on May 30, 1996, and was discharged on the same day for "nonsubmission to the testing", effective immediately. This was described as superseding the previous "non-renewal" of her employment.

The Examiner concludes, under these facts, that the union has made a *prima facie* case.

Articulation of Lawful Reasons -
Once a complainant makes a *prima facie* case, the burden shifts to the employer to articulate lawful reasons for its actions. In this case, the employer has advanced reasons for both of its discharges of Susan Leonetti.

The May 29, 1996 "non-renewal" was the subject of direct testimony by Superintendent Crowley, as follows:

> Q: [By Mr. Thimsen] Now, on May 29 of 1996 you had a conversation with Susan Leonetti?
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> A: [By Mr. Crowley] Yes, I did.
>
> Q: Would you describe that conversation, please?
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> A: I informed Sue Leonetti on that date that it was not the District's intention to offer her employment for the following school year, and I discussed with her a number of reasons why we were choosing not to offer her employment in the following year.
>
> Q: What were those reasons?
>
> A: The primary reason was inability to control the students and unsatisfactory student discipline and control.
>
> ...
>
> Q: What led you to believe that Mrs. Leonetti had problems controlling the students?
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> A: The primary source of information on that came through the principals that deal

with Susan directly on student bus discipline. I had also heard from some parents directly via phone call, via several eye-to-eye communications at ball games, and at various occasions.

Q: Did you mention to her in your conversation that she was not a team player?

A: That probably is not wording that I would have used, but I very well may have said something to that effect. And what I was probably trying to communicate to her at that time was that we had administratively talked to her and worked with her on a number of occasions and she was argumentative and defensive and didn't seem to heed the advice we were giving her on how this area could be improved.

Transcript, pp. 166-168.

Crowley further testified that he had received "many" complaints regarding Leonetti over the course of time, prior to her resignation on March 4, 1996.

Crowley's testimony regarding the decision to "non-renew" Leonetti was corroborated by the testimony of Kenneth D. Behrends, a former principal in the Reardan-Edwall School District. Behrends had direct contact with Leonetti during the 1995-1996 school year, as she was a driver who delivered students to the school where he was employed in that year. His credible testimony was to the effect that, in his experience, Leonetti had poor control over student discipline, and that this lack of control created a burden for him, as principal. He testified that he had advised Crowley that it was not a "wise move" to allow Leonetti to withdraw her March 4, 1996 resignation. Regarding his discussions of Leonetti's job performance with Crowley, Behrends testified in direct examination:

Q: [By Mr. Thimsen] Did you ever discuss her job performance with Mr. Crowley?

A: [By Mr. Behrends] Yes, I did.

Q: What was the nature of that discussion?

A: My recommendations and concerns with Doctor Crowley was the fact that I felt that Mrs. Leonetti did not have good control of her bus – discipline on her bus. And that she didn't do a very good job of communicating with parents of those children when she did have problems. And quite frankly I had on a number of occasions challenged him as to why we continued to have her as a driver with the District.

Transcript p. 240

Behrends also testified regarding how discipline referrals from bus drivers were handled as part of the student discipline system:

Q: [By Mr. Thimsen] Was it part of [Leonetti's] responsibility from time to time to submit discipline referrals to you?

A: [By Mr. Behrends] Yes, it was.

Q: How did that work? Just describe generally how the system worked.

A: Generally the system that was in place at Reardan last year was a system, which first of all required the drivers to be the first line of discipline or maintaining discipline on the school buses. That they have their own standards and rules and regulations that they had the kids abide by on the bus. And it was their responsibility to correct children or reward children, either way, when they had a problem or when you did something well. If they found that the kids did not respond to them, we had a system, a check-off system in which they would record that a student had a discipline problem. And then they would send that as a referral to my office after they had taken their first action with the student.

Q: Do you have a recollection as to whether Mrs. Leonetti submitted more or less discipline referrals than the other bus drivers did?

A: Mrs. Leonetti did submit more discipline referrals to the office than the other drivers did, yes.

Q: Was it slightly more or significantly more?

A: Significantly more.

Q: Were you aware of any changes made to Mrs. Leonetti's bus route during the year you were — excuse me, during the year that you were a principal there?

A: Yes, during the school year there was an adjustment made to the area that Mrs. Leonetti served. We had a section of our route, I believe if I recall correctly, that was called Ritchie Road section, and I believe that section of the route was reassigned to another driver or to a new driver resulting in the number of students that were on her bus being changed. I may not be correct on the Ritchie Road, but there was a section of her route that changed during that period of time.

Transcript, pp 236-238.

There had also been previous controversies concerning discipline problems and disciplinary referrals during the course of Leonetti's employment with this employer. The testimony and exhibits describe a petition dated October 6, 1991, and directed "To Reardan Superintendent of Schools Crowley and School Board Members", which reads as follows:

> We, the undersigned parents of the children who ride the bus driven by Mrs. Susan Leonetti, believe there is an ongoing problem on the bus. This problem has resulted in great unhappiness and emotional upset for many, if not most, of our children. We believe that it is in the best interest of our children's academic and emotional health to address this frustration and anger.
>
> To foster a respectful and healthy attitude towards the school experience of our children, which is a goal we are sure you share, we hereby request that another driver be assigned this route by no later than November 1, 1991.

A total of 19 parents signed that statement expressing dissatisfaction with Leonetti, and individual letters from parents and students complaining about Leonetti were admitted in evidence.[9] The outcome of the controversy in 1991 was that Leonetti was required to trade routes with another bus driver.

The May 30, 1996 discharge was the subject of extensive testimony and documentary evidence.

The testing procedure used by the employer conformed with its policy 8110 (excerpts from which are quoted above), as well as with the provisions of 49 CFR Sec. 382.211 which state, in relevant part:

> No driver shall refuse to submit to ... a random alcohol or controlled substance test. ... No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety sensitive functions.

A list of social security numbers of the employees to be tested is conveyed to the employer quarterly by Cascade Transportation Services, the organization that provides the actual testing for the employer. In direct testimony, Crowley explained how Leonetti came to be selected to take a random drug test on May 30:

> Q: [By Mr. Thimsen] Do you know how she came to be selected ?
>
> A: [By Mr. Crowley] My understanding is that in the quarterly list of social security numbers conveyed to us from Cascade of those that we had to get tested that quarter that in response to that Beverly had set up a testing at the Davenport Clinic, which is the one that has

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[9] The correspondence was not all one-sided. A letter dated October 8, 1991, from parents Larry and Christy King, supported Leonetti.

> the contract to do the testing for us, on May 30. And that one of the people who was scheduled to be tested, a gentleman by the name of Ken Peterson, was not present that day. And our procedure when someone is not present who has been selected then there's a drawing of social security numbers within the District by Beverly Bucher to replace that person. And as a result of that Sue Leonetti was drawn and so notified on the morning of May 30.
>
> Transcript, p. 170.

Leonetti was informed that she had been chosen to take the random drug test on May 30 by Clayton Kenney, who often acted as the communication link for messages between the drivers and Bucher.[10] Leonetti testified that she had previously-scheduled personal plans for that afternoon, but did not attempt to explain her scheduling problem to Bucher. Instead, she told Kenney that she had other plans for the afternoon, and left it to him to inform Bucher that she would not be taking the test that afternoon.

When Leonetti returned for her afternoon driving run on May 30, she received a message to report to Bucher's office immediately. Leonetti was accompanied to that meeting by Dave Foxworth, a fellow bus driver and union activist. At the meeting, she was given a trip sheet indicating her extra trips, a pay stub, and a letter from Crowley, as follows:

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[10] Kenney is the employer's head mechanic, and is in charge of grounds for the schools. He is a member of the bargaining unit, and is not a supervisor, but Crowley testified that he often performs "supervisory-type duties" for Transportation Supervisor Bucher. Kenney's work area is in the bus barn, where he has frequent contact with the drivers, while Bucher's work area is in the administration building, approximately one block away from the bus barn. Thus, it was not unusual that the message regarding the drug testing appointment was delivered to Leonetti by Kenney.

> This morning at the end of your morning bus route, you were informed that you had been selected for random drug and alcohol testing and needed to proceed to the Davenport Clinic for the testing. You did not submit to the test. According to Board Policy 8110 Section 3, you may be terminated from employment for refusing to submit to the testing. We are, therefore, immediately terminating you from employment. We have employed a substitute bus driver to replace you, starting with the afternoon run today.
>
> Please be advised that your action this morning may have implications for working any safety-sensitive job for another employer as well. The law has requirements that must be met before you may work in any safety-sensitive duty for any employer who is under the Department of Transportation regulations for drug and alcohol testing; namely, you must undergo appropriate referral, evaluation and treatment, including having a negative test before beginning this duty.
>
> As you know, we were not planning to renew your contract for next year. Your non-submission to the testing today, along with the termination that has resulted, has superseded that action. You are terminated effective immediately, as opposed to nonrenewed at the end of this school year.

At the meeting, Foxworth questioned Bucher as to why Kenney had been permitted to re-schedule his drug test and Bucher responded that there had been an "emergency" situation regarding Kenney's test. In response to the union's allegation that the employer had given preferential treatment to an employee who was more sympathetic to management during the union organizing, Crowley testified as follows:

> Q: [By Mr. Thimsen] Do you have any knowledge as to whether Clayton Kenney was allowed to reschedule a random drug test?
>
> A: [By Mr. Crowley] It's my understanding that he did not.
>
> Q: What is your understanding?

> A: That his social security number appeared on one of the quarterly drawings by Cascade, and that on the particular day that Beverly had set up with the Davenport Clinic for the testing that quarter, that was a day that Clayton Kenney was not present at the work site. And as I explained earlier, the procedure then is to draw a replacement. But on anyone that's not present on a testing day, we do include those people in the next testing date, but they are not informed of the fact that they have been drawn. It is by law to be a surprise to them on the day that they actually go in for the testing. It's my understanding that Clayton did in fact get picked up on the next testing date and that he did in fact go into for the testing at the time he was first informed to do that.
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> Transcript, p. 180.

Thus, while it may have originally appeared to Leonetti and Foxworth that there was a disparity in the treatment between Leonetti and Kenney, both of their situations were addressed by the explicit language of policy 8110.

The Examiner concludes that the employer has produced relevant and admissible evidence of legitimate, non-discriminatory reasons for Leonetti's discharges on May 29 and May 30, 1996.

The Substantial Factor Analysis -

The search for a "substantial motivating factor" follows where, as here, an employer puts forth lawful reasons for its actions. The complainant retains the burden of proof at all times, but will prevail if it shows that the reasons articulated by the employer are pretextual (i.e., designed to conceal a true motivation of anti-union animus), or if it shows that anti-union animus was nevertheless a substantial motivating factor behind the employer's action.

The evidence on union animus is not convincing. While it is clear that Leonetti was active on behalf of PSE, the evidence certainly does not support a conclusion that the employer was engaged in any sort of wide-spread assault on the union or on the collective bargaining process. Dave Foxworth, who was identified by Superintendent Crowley as the primary union organizer, was still employed at the time of the hearing and there were no disciplinary issues with regard to Foxworth. Testimony from other bargaining unit employees does not establish that working conditions changed for them as a result of the union organizing effort. Nor does the evidence show that other drivers specifically connected Leonetti's union activity with her discharges.

Leonetti's performance evaluations are not conclusive. While PSE correctly notes that the only performance evaluations on Leonetti produced from the employer's files were marked with "average" or "above average" ratings, that is not conclusive. The employer explained that these evaluations were done to assess the individual skills and ability of the driver to safely and efficiently operate a bus rather than as evaluations of the overall performance of the drivers. The evaluations in October of 1991 and May of 1992 were conducted by Transportation Supervisor Beverly Bucher,[11] while the more recent evaluations were by Karen Stahl, a bus driver and trainer whose role in the evaluation process was described by Crowley as follows:

> Q: [By Mr. Thimsen] As to Karen Stahl, would you describe her position, please.
>
> A: [By Mr. Crowley] She's a bus driver and also a trainer. The trainer position is a rather narrow scope position that she carries out the training in order for drivers to acquire the commercial

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[11] Bucher is paid on the basis of 60 percent as high school attendance clerk, and 40 percent as transportation supervisor.

> driver's license. And she also does on-bus evaluations, which were presented in the testimony yesterday. She rides a couple times a year on each bus and gets a snapshot of their ability to operate the bus.
>
> Q: You say a snapshot. Does that evaluation cover simply the time she observes or is it also — well, let me just put it that way.
>
> Does the evaluation encompass simply the time that she travels on the bus?
>
> A: It would be my understanding that it would just cover the time that she's on the bus.
>
> Transcript, p. 160.

With that explanation, the testimony of the former principal about Leonetti's student discipline problems in 1995-96, and the evidence concerning the petition and change of routes in 1991, the evaluations do not support a conclusion that the complaints against Leonetti were pretextual.

The conclusion of the Examiner is that the union has not sustained its burden of proof to show that anti-union animus was a motivating factor behind the employer's discharges of Leonetti on May 29 and May 30, 1995, or that the reasons given by the employer for those discharges were pretextual.

II. INSISTENCE ON UNIT DETERMINATION ISSUE

Facts Concerning This Allegation

It is undisputed that negotiations between the parties broke off on October 3 and 16, 1996, because the parties did not agree on the bargaining unit status of the transportation supervisor and the

employer refused to negotiate any other matters until the bargaining unit status of the individual was cleared up.

Positions of Parties on Insistence to Impasse

PSE argues that this breakdown in the negotiations constituted an illegal abandonment of the bargaining process, and illegal conditioning of bargaining on a permissive subject of bargaining.

The employer contends that it did not refuse to bargain with the union or attempt to condition bargaining. Rather, it asserts that there was confusion on the part of the employer regarding the status of the disputed position, and that it resumed bargaining when it found and reviewed the Commission decisions that clarified the matter to the satisfaction of the employer.[12]

Discussion on Insistence to Impasse Issue

As early as City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981), the Commission clearly indicated that unit determination is not a subject for bargaining in the usual "mandatory/permissive/illegal" sense. In Spokane School District, Decision 718 (EDUC, 1979), the Executive Director found a cause of action to exist on an unfair labor practice complaint alleging that an employer had insisted to impasse on unit determination concessions as a condition of bargaining on mandatory subjects. This policy conforms with the decision of the Commission in Public Utility District of Clark County,, Decision 2045-A (PECB, 1989), where an unfair labor practice was found because an employer insisted to impasse on withdrawal of unfair labor practice charges as a condition of bargaining on mandatory subjects. The existence of

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[12] Reardan-Edwall School District, Decisions 5549, 5549-A, 5550 (PECB, 1996).

administrative dispute resolution machinery within the statute has taken such matters off the bargaining table, or at least precludes their being an impediment to negotiations on mandatory subjects.

In this case, the employer mistakes its alleged "confusion" over the unit placement of the transportation supervisor as a defense to its actions which truncated the collective bargaining process, at least for a time. An employer which has any doubts about such a question may file a unit clarification petition under Chapter 391-35 WAC, or it may set the issue aside while it obtains information sufficient to clear up its confusion, but it commits an unfair labor practice if it holds up bargaining because of the unit issue. Even though the negotiations resumed when the employer was satisfied as to the bargaining unit placement of the transportation supervisor, the employer's refusal to meet and negotiate other items on two occasions had both an immediate and long-term chilling impact on the negotiations process. Such behavior on the part of a party to the negotiations process not only wastes the time and efforts of the parties, but also sets an unacceptable tone of disruption and disrespect toward the legitimacy of the bargaining process itself.

FINDINGS OF FACT

1. The Reardan-Edwall School District is a common school district organized and operated under Title 28A RCW, and is an employer within the meaning of RCW 41.56.140. Tom Crowley was superintendent of schools at all times pertinent hereto.

2. Public School Employees of Reardan/Edwall an affiliate of Public School Employees of Washington (PSE) and a "bargaining representative" within the meaning of RCW 41.56.030(2), is the exclusive bargaining representative of bus drivers,

groundskeepers, and mechanics employed by the Reardan-Edwall School District.

3. On an unspecified date in the spring of 1995, PSE began an organizing campaign among the employer's classified employees, including school bus drivers.

4. On June 20, 1995, a policy on drug testing (policy 8110) was given its first reading at a meeting of the employer's school board.

5. On July 10, 1995, PSE filed a representation petition with the Commission, seeking certification as exclusive bargaining representative of a unit which included bus drivers.

6. On July 14, 1995, the employer received notice from the Commission that the representation petition had been filed.

7. On July 25, 1995, the second reading of policy 8110 occurred at a meeting of the employer's school board. There is no evidence that the employer concealed its action, which was a matter of public record that should reasonably have been known to or discovered by PSE in light of its involvement with the employer's workforce.

8. On August 15, 1995, the employer adopted policy 8110 with an effective date of January 1, 1996. There is no evidence that the employer concealed its action, which was a matter of public record that should reasonably have been known to or discovered by PSE in light of its involvement with the employer's workforce.

9. In December of 1995, bus driver employees of the district, including Susan Leonetti, attended a meeting held by the district regarding policy 8110. At that meeting, Leonetti

received a copy of the policy and signed a document titled "Acknowledgment / certificate of receipt of substance abuse policy" that stated explicitly each employee's understanding that s/he may be required to take an alcohol and/or drug test, and that refusal to submit to such a test would be considered grounds for termination and could be treated as if the test result (if taken) were positive. There is no evidence that the employer concealed these actions to implement policy 8110, which should reasonably have been known to or discovered by PSE in light of its involvement with the employer's workforce.

10. Under its policy 8110 and the federal regulations on which it was based, the employer received quarterly lists from an outside testing firm, identifying the employees who were to be subjected to random testing by their social security numbers. Where an employee so identified was at work on the day set for the random testing, the employee was required to submit to the testing on that same day; where an employee so identified was not at work on the day set for the random testing, the fact of their selection was withheld until the next testing date and the employee was then notified and required to submit to the testing on that day. There is no evidence that the employer concealed these actions to implement policy 8110, which should reasonably have been known to or discovered by PSE in light of its involvement with the employer's workforce.

11. In March of 1996, Leonetti tendered and then sought to withdraw a resignation of her position as a bus driver assigned to a regular route. The employer permitted her to withdraw her resignation, and she apparently continued to perform her usual duties without loss of status or pay.

12. Prior to May 29, 1996, the employer made a decision to "non-renew" Leonetti's employment at the conclusion of the 1995-1996 school year, based on her historical lack of control over

students riding her bus. That decision was communicated to Leonetti on May 29, 1996.

13. On May 30, 1996, Leonetti's name appeared on the quarterly list of employees to be subjected to random testing under policy 8110. When informed in the morning that she was required to report to the testing facility between her morning and afternoon bus runs, Leonetti informed one or more fellow employees that she had other plans for that time period. Leonetti did not request or obtain a rescheduling of the random testing through contact with the transportation supervisor or any more senior management official, and she did not submit to the testing.

14. When Leonetti reported for her afternoon bus run on May 30, 1996, she was discharged by the employer. In a letter handed to Leonetti at that time, her failure or refusal to submit to the random testing was stated as the sole reason for her discharge.

15. PSE did not file the original complaint charging unfair labor practices in these proceedings until July 12, 1996. At that time, it alleged only a violation of RCW 41.56.140(4) as to the adoption and implementation of policy 8110, which it acknowledged as having occurred by January 1, 1996.

16. On July 31, 1996, PSE was certified as exclusive bargaining representative of a bargaining unit that included employees performing school bus driving, groundskeeping, and mechanic work, excluding the superintendent, confidential employees, and all other employees of the employer.

17. During collective bargaining negotiations in October of 1996, the employer pre-conditioned negotiations on the union's agreement to exclude the transportation supervisor from the

bargaining unit. Upon the refusal of PSE to make the concession demanded, the employer terminated the sessions.

18. The record in this proceeding does not support a conclusion that the employer had or evidenced an anti-union animus in its dealings with Susan Leonetti or other employees in the bargaining unit now represented by PSE.

19. The record in this proceeding does not support a conclusion that the reasons asserted by the employer for its discharges of Susan Leonetti on May 29, 1996 and May 30, 1996 were pretexts designed to conceal any discriminatory motive.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in these matters under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The complaint charging unfair labor practices filed on July 12, 1996 is untimely, under RCW 41.56.160, as to the employer's adoption and implementation of policy 8110. That jurisdictional defect was not cured by the complainant's later amendment of the complaint to cite RCW 41.56.140(1).

3. The complainant has failed to sustain its burden of proof that the employer's discharges of Susan Leonetti on May 29, 1996 and/or May 30, 1996 were substantially motivated by Leonetti's union activity protected by RCW 41.56.040, so that no unfair labor practice under RCW 41.56.140(1) has been established with respect to those discharges.

4. By pre-conditioning collective bargaining negotiations on the resolution of a unit determination issue which is not a mandatory subject of bargaining, and by terminating collective bargaining negotiations upon the refusal of the complainant to

make concessions on such unit determination issue, the Reardan-Edwall School District failed and refused to bargain collectively as required by RCW 41.56.030(4), and committed unfair labor practices under RCW 41.56.140(4) and (1).

ORDER

I. [Case 12593-U-96-2997; Decision 6205 - PECB] The complaint charging unfair labor practices is DISMISSED.

II. [Case 12767-U-96-3069; Decision 6206 - PECB] The Reardan-Edwall School District, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Preconditioning collective bargaining on mandatory subjects on the making of concessions concerning unit determination issues, which are not mandatory subjects of collective bargaining, and terminating of collective bargaining sessions upon the failure of Public School Employees of Reardan-Edwall to make concessions on such unit determination issue.

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

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix".

Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

b. Read the notice attached hereto and marked "Appendix" into the record of the next public meeting of the Board of Directors of the Reardan-Edwall School District, and permanently append a copy of said notice to the official minutes of that meeting.

c. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

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

Issued at Olympia, Washington, on the 9th day of February, 1998

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Kathleen O. Erskine

KATHLEEN O. ERSKINE, 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.

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

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

WE WILL CEASE AND DESIST from insisting upon concessions concerning unit determination issues as a pre-conditioning on collective bargaining on mandatory subjects of bargaining, and terminating collective bargaining sessions upon the failure of Public School Employees of Reardan-Edwall to make concessions on such unit determination issue.

WE WILL CEASE AND DESIST from, in any other manner, interfering with, restraining or coercing our employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

WE WILL read this notice into the record of the next public meeting of the Board of Directors of the Reardan-Edwall School District, and permanently append a copy of said notice to the official minutes of that meeting.

DATED: _____

REARDAN-EDWALL JOINT SCHOOL DISTRICT

By: _____
AUTHORIZED REPRESENTATIVE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for sixty (60) days from the date of posting and must not be altered, defaced, or covered by other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.