STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ORGANIZED CLASSIFIED ASSOCIATION OF OROVILLE / WEA,	)	
Complainant,	)	CASE 12679-U-96-3028
vs.	)	DECISION 6209 - PECB
OROVILLE SCHOOL DISTRICT,	)	FINDINGS OF FACT
	)	CONCLUSIONS OF LAW
Respondent.	)	AND ORDER

Faith Hanna, Office of General Counsel, Washington Education Association, appeared for the union.

Robert D. Schwerdtfeger, Labor Relations Consultant, appeared for the employer.

On September 3, 1996, the Organized Classified Association of Oroville / WEA (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that the Oroville School District had engaged in unfair labor practices under RCW 41.56.140. Specifically, it was alleged that the employer gave custodian John Marts a negative work performance evaluation in retaliation for his activities as president of the local union which had recently won certification to represent the employer's classified employees. J. Martin Smith was designated as Examiner. A hearing was conducted on July 31, 1997 at Oroville, Washington. Briefs and legal memoranda were filed to complete the record in this case.

BACKGROUND

The Oroville School District operates a K-8 elementary school and a high school facility in the north part of Okanogan County. Lorren Hagen was the superintendent of schools at Oroville during the 1995-1996 school year. Vic Elmore was the principal at the elementary school during the events in question here.

The union was newly certified in the autumn of 1995 as exclusive bargaining representative of a wall-to-wall bargaining unit of the employer's classified employees.[1] John Marts, who was a custodian at the elementary school, was elected local union president and served on the union's bargaining team along with employees Bell, Hyde, Lynch and Teas. Ken Ivey, a trainee negotiator under the sponsorship of Washington Education Association, was assigned to assist in negotiating the parties' inaugural contract, as was Warren Henderson of the WEA staff.

Although the parties eventually reached agreement in mid-1996, their bargaining traveled a rocky road. At their first meeting on December 14, 1995, Superintendent Hagen told the union that no meeting made sense until after the results of a levy election on February 6, 1996, were known. A February 14, 1996 meeting was postponed. The employer retained Robert Schwerdtfeger as a consultant to assist Hagen in the negotiations, and Schwerdtfeger eventually met with the union February 26. Many tentative agreements were reached in a session between the principal negotiators, but it was felt that mediation was necessary to help finish the last three or four issues, which were regarded as being

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[1] Notice is taken of the Commission's docket records for Case 11769-E-95-1929. The certification was issued as Oroville School District, Decision 5214 (PECB, 1995).

difficult problems to resolve. During the first mediation session, the employer team abruptly left the meeting during an "opening statement" by Ivey, whose presence came as a surprise to the employer's negotiators. The employer filed an unfair labor practice complaint against the WEA, for its sending an "unskilled" and "untrained" negotiator to the bargaining table.[2] Another mediation meeting was scheduled. Henderson met with Marts to plan the union's strategy for that meeting, and their comments on the negotiations appeared in the local print and radio news media.

In the midst of the rather acrimonious negotiations, Marts received a job performance evaluation on June 26, 1996. Marts was "marked down" by his supervisors as deficient in "meeting the job description" by means of a loop circling both the "S" (satisfactory) and "U" (unsatisfactory) positions on the evaluation form. In a portion of the form designated "Comments/Professional Growth Plan", Vic Elmore wrote, "John needs improvement" in the following areas:

> #3. ...
> 1. Produce quality work and develop pride in how the building looks.
> 2. Spend more time working and less time talking.
> 3. Develop personal goals and schedules for intermittent tasks so they are done on a consistent basis, (i.e. windows, dusting, boiler room and janitor area clean up).
> 4. Improve waxing - corners, entries, mop-boards - show waxed over dirt.
>
> I see John involved mainly in a daily routine of items without other items getting done other than emergency items (small maintenance

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[2] Notice is taken of the Commission's docket records for Case 12403-U-96-2940. The employer's complaint was dismissed, on the basis that an employer "must deal with the representatives put forth by a union, just as a union must deal with the representatives put forth by an employer." Oroville School District, Decision 5667 (PECB, 1996).

> for teachers, etc.) I see substitute janitors doing the intermittent items instead.

Marts was somewhat surprised and upset, having never received a sub-standard job evaluation. He thought it was unfair, and was told in discussions with Elmore that the evaluation "could have something to do with my union activities". Marts had also been told not to talk to the union vice president — a bus driver — during work time in the morning hours at the elementary school.

Marts contacted WEA representative Warren Henderson, who drafted a letter to the superintendent. In his July 15, 1996 letter, Henderson sought clarification for what he thought was a confusing evaluation:

> The evaluation is ambiguous as it relates to criteria number three: "meets Job Description". Both satisfactory and unsatisfactory have been circled ... written documentation supporting unsatisfactory performance is required.... Mr. Marts has not received written warning(s) or written documentation supporting the conclusion that his performance is unsatisfactory. ... As you know ... harassment is prohibited by Chapter 41.56.140 RCW and (1) and (3) ...

Exhibit 1.[3]

Henderson surmised that if the evaluation was between "S" and "U", this could be taken as a "warning" and "not as serious".

On July 23, 1996, Hagen answered by letter, to "dispel any possible misunderstandings ... and provide clarity for Mr. Marts:

> As indicated in the evaluation form, Mr. Marts is clearly rated as unsatisfactory under

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[3] Henderson is not an attorney.

> "meets job description" in the areas listed as comments one through four. His overall evaluation can be considered as somewhere between satisfactory and unsatisfactory.... This document is a formal evaluation with areas of unsatisfactory performance clearly identified as the first step in due process.

Exhibit 15.

Superintendent Hagen did not explain what he meant by "due process", as used in that letter.

In a follow-up telephone conversation with Henderson, Hagen apparently said Marts' evaluation was, in fact, "unsatisfactory".

Another custodian who was active in union affairs, John Marcille, was evaluated on June 17, 1996.[4] He received three "S" marks and no comments at all.

Marcille succeeded Marts as president of the local union in August of 1996, and served as the union's chief negotiator in the 1996-1997 school year. As initially issued, the employer's evaluation of Marcille for the 1996-1997 school year rated him as "unsatisfactory" in the "attitude towards staff" category. Principal Elmore later changed that evaluation.

POSITIONS OF THE PARTIES

The union contends that the employer's evaluation of John Marts in the spring of 1996 was retaliatory, and that the employer had singled Marts out as the leader of the union's organizing effort in the Oroville School District. It further contends that an employer

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[4] Marcille was secretary of the local union in 1995-96.

effort to closely observe Marts' work as a custodian was substantially caused by the employer's goal of seeking to stifle dissent among employees. To this end, the union argues that the superintendent used the school principal to write the worst job evaluation received by Marts in 15 years. The union urges that the reasons given for the "unsatisfactory" ratings of Marts were plainly pretextual, and that the Commission is duty-bound under North Valley Hospital, Decision 5809 (PECB, 1997) to order that the evaluation be rescinded and that John Marts be made whole.

The employer contends that no interference or discrimination under RCW 41.56.140 has occurred. The employer argues that, in fact, the disputed evaluation was not an "unsatisfactory" evaluation overall. It urges that the superintendent had nothing to do with the evaluation, that the evaluation had nothing to do with Marts' role as leader of the union's efforts, and that the "C minus/D plus" evaluation was intended to spur Marts to return to a higher level of performance which he had previously shown.

DISCUSSION

The issue in this case is whether the employer took action against an employee which was substantially related to his protected activity on behalf of a labor organization that he headed and represented in collective bargaining negotiations with the employer. Although the hearing in this case was not lengthy, and the record in this case is not complicated, the issues in this case go to the very viscera of the collective bargaining process under Chapter 41.56 RCW.

The Statutory Criteria

The Public Employees' Collective Bargaining Act sets forth a process of negotiation aimed at a contract, but it is primarily a structure of **rights and protections** (not obligations or privileges) which are **guaranteed** to employees. The statute includes:

> RCW 41.56.030. DEFINITIONS. As used in this chapter:
> ...
> (4) "Collective bargaining" means the performance of the **mutual obligations** of the public employer and the exclusive bargaining representative to **meet at reasonable times**, to confer and **negotiate in good faith**, and to execute a written agreement with respect to **grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions**, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter. ...
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> ...
> 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 choosing** for the purpose of collective bargaining or in the free exercise of any other right under this chapter.

[Emphasis by **bold** supplied.]

Those provisions particularize the intent of the law, which is to promote improved relations between employers and employees "in

matters concerning their employment relations with public employers". RCW 41.56.010. The Examiner should not have to say — but will say here — that the rights protected by the statute will be a snare and a delusion for employees if employers can summarily punish the employees' elected officers (i.e., their "representatives of their own choosing") for criticizing the employer or its policies, or for raising their voices in contract negotiations.[5] That is why the statute also contains the following section:

> 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;
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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;
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> (4) To refuse to engage in collective bargaining.

The unfair labor practice provisions of the statute are designed to protect public employees - including those selected by their fellow employees to represent a work group or entire bargaining unit - from unremitting harassment by managers and supervisors who might

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[5] A primary reason for protecting union officers, union bargaining team members, and even shop stewards, under the statute is because their union office necessarily calls upon them to scrutinize, criticize, analyze, and otherwise question many of the things supervisors and managers do in the workplace. Elected officials, public managers, and even supervisors are, however, ultimately answerable to the voters for their policies and actions. The spirit of the statute here is that the public is better served when the employees criticize, analyze, question their superiors in an orderly process and "good faith". The result is contractual relationships, and not political servitude.

otherwise single them out as troublemakers. The analysis of unfair labor practice allegations under collective bargaining statutes sometimes draws distinctions between employer actions that are "discriminatory" and employer actions that are merely "interference". Both types of actions are, however, offensive to the policy and purpose of the statute.

Interference Violations Under RCW 41.56.140

The burden of proving an allegation of interference with the exercise of rights protected by Chapter 41.56 RCW rests with the complaining party, and must be established by a preponderance of the evidence. To establish an interference violation, however, a complainant need only show that an employer engaged in conduct which employees could reasonably perceive as a threat of reprisal or force or promise of benefit associated with their union activity. City of Seattle, Decisions 3066, 3066-A (PECB, 1992). A showing that the employer had an anti-union animus, or an actual intent to interfere is not required. Port of Seattle, Decision 3064-A (PECB, 1989); City of Pasco, Decision 3804-A (PECB, 1992).[6] See, also, Port of Tacoma, Decision 4626-A (PECB, 1995) and Mansfield School District, Decision 5238 (EDUC, 1995). Moreover, the "reasonable perception" test does *not* require a showing that particular employees actually felt that they had been interfered with, restrained or coerced.

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[6] In King County, Decision 1698 (PECB, 1983), a violation was found for interference with an employee's right to process grievances and to have union representation ("Weingarten Rights") as per Okanogan County, Decision 2252-A, (PECB, 1986). "Interference" also occurs where the employer misstates the law or misleads a bargaining unit employee with respect to rights under collective bargaining agreement. City of Seattle, Decision 2773 (PECB, 1987); City of Bremerton, Decision 3843-A (PECB, 1992; Castle Rock SD, Decision 4722-B (EDUC, 1995).

If an individual employee, or group of employees, proves that their employer took some action against them which was meant as a "warning" in response to their voicing of employment-related concerns or union activity, that is ample evidence on which to base an "interference" finding. Under such circumstances, the employer would clearly have committed an unfair labor practice in violation of RCW 41.56.140(1).

Discrimination Violations Under RCW 41.56.140

Under Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991) and Allison V. Seattle Housing Authority, 118 Wn.2d 79 (1991), both the courts and administrative adjudicators in the State of Washington are to apply a "substantial factor" test in evaluating "discrimination" claims. See, Educational Service District 114, Decision 4361-A (PECB, 1994) and Mansfield School District, Decision 5238-A (EDUC, 1996).

A complainant always retains the burden of proof, and must initially make out a *prima facie* case showing that:

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

If that burden is met, the employer has the opportunity to articulate legitimate, nonretaliatory reasons for its actions. If the employer fails to do so, or if it sets forth reasons which are

themselves unlawful, an unfair labor practice violation will be found.[7]

If the employer articulates legitimate reasons for its actions, the burden remains on the complainant to prove, by a preponderance of the evidence, that the disputed employer 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. Educational Service District 114, supra.

Application of Standards

The Prima Facie Case -

The employee principally involved in this case, John Marts, was clearly a union leader, and the employer clearly knew of his union activity.[8]

The disputed evaluation issued to Marts in 1996 must be viewed against the background of his previous evaluations by a principal named Rohn. The first such document in the record is from 1993,[9] and merely had "S" circled to indicate satisfactory ratings on all three categories, with no comments or professional growth plan

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[7] See, for example, City of Winlock, Decision 4798-A (PECB, 1995), where the reasons asserted by the employer for the first of two discharges of an employee were closely tied to that employee's union activity.

[8] This contrasts with discrimination cases where employer knowledge of the discriminatee's union activity was uncertain: Asotin County Housing Authority, Decision 2471-A (PECB, 1987); Chelan-Douglas County Mental Health, Decision 4599 (PECB, 1992)

[9] Exhibit 11.

provided. The second such document is from 1994, when Marts received three "S" ratings and the following in the "comments" section of the form:

> John is very conscientious about his job and has to work well with both teachers and administration. Goal: John will attend workshops on floor care during the upcoming year.

The third such document is from 1995, when Marts again received three "S" ratings and favorable comments as follows:

> John is dedicated to his job at Oroville Elementary School. John communicates well with the principal and responds well to suggestions for improvement. John will attend inservice as decided and directed by the district. [sic]

The disputed 1996 evaluation was the first by Elmore, and the first one which was critical of Marts' performance. There is no evidence of any related facts, such as imposition of discipline or complaints to Elmore by third parties. In fact, Elmore testified that he had not reprimanded Marts or Marcille during the 1995-96 school year for chatting too much, and that their level of conversation was "acceptable behavior".[10] Thus, there is a basis to infer that Marts was deprived of a good evaluation to which he was entitled by his unchanged performance.

There is clearly a basis to infer a causal connection in this case. The union's certification as exclusive bargaining representative and Marts' emergence as a union leader were recent developments when the disputed evaluation was issued. The comment cautioning that Marts needed to "spend more time working and less time

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[10] Tr. 120.

talking" can be related to his role as a union leader.[11] Marts' testimony that Elmore elaborated on that comment as something that "could indeed have something to do with my union activities" was deflected, rather than denied, by Elmore under cross-examination. He gave the following testimony in response to odd questioning by the employer's representative:

> Q. [By Mr. Schwerdtfeger] In the complaint on Item 7, ... its talking about – it says "When principal Vic Elmore discussed Mr. Marts performance with John Marts in June 1996, Principal Elmore stated that employee's unsatisfactory evaluation was related to the employee's union activities." How do you--how do you see that as an accurate or inaccurate statement?
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> A. [By Mr. Elmore] That's completely inaccurate.

Tr. 116.

Hence, while the record now shows that Elmore denied discriminating against Marts for union activities ***generally*** (having denied the union's allegation in the complaint) he did not ***specifically*** deny having made the "could have something to do with ... union activities" which Marts recalled him making. The employer's representative didn't ask him that question![12]

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[11] In fairness, the statement is not definitive. Marts version of the statement is also subject to the interpretation that Elmore was addressing a trend whereby Marts was simply talking to Marcille and other staff people too much during the work day, without regard to any particular topic.

[12] Tr. 116.

The Examiner concludes that the employer's actions could be taken to be discriminatory under RCW 41.56.040 and 41.56.140(1).

The Employer's Articulation of Reasons -
The employer does not articulate any reasons for its actions other than those already set forth in the disputed evaluation. At the same time, the collective bargaining statute does not protect employees from the consequences of their own actions (or from poor evaluations) if they use shoddy workmanship or fail to complete their assigned tasks, so the reasons articulated by the employer are not inherently unlawful.

The Substantial Factor Analysis -
The evaluations of Marts and Marcille remain disturbing, for the reasons stated in the analysis of the *prima facie* case.

As to the claim that Marts' performance was deficient because he "waxed over dirt", we have an odd assortment of proof:

- First, waxing was to occur in only certain areas of the elementary school — the south end of the hallway, the 15 classrooms, the gym, and the cafeteria. The other areas were carpeted or were tartan surfaced.[13]

- Second, the record shows that Elmore never assigned either Marts or Marcille to wax any of the 15 classrooms during the 1995-1996 school year.

- Third, Marts and Marcille were told during the winter break of the 1995-1996 school year to avoid "waxing over dirt in the corners" of the cafeteria, because they were being watched - presumably by the superintendent. The custodians seem to have

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[13] Tr. 105-106.

> taken extra pains to strip all of the old wax from this floor. The teachers made positive comments after they finished with this floor, but no evaluation of the job was made by the management until Marts received his evaluation months later.

The Examiner concludes that the confusion must be construed against the employer,[14] and that nothing reliable has been presented to show the existence of shoddy workmanship. Put another way, the statement in the evaluation admonishing Marts to, "improve waxing ... show waxed over dirt" is found to be pretextual.

Equally confusing are the employer's multiple interpretations of the overall meaning of the disputed evaluation of Marts:

- First, there is the evaluation itself, which is vague as to the ratings given by circling both the "S" and "U", and even as to the "meets job description" criteria. The evaluation document does not say that Marts is being disciplined.
- Second, we have the letter from the superintendent, implying that the overall job evaluation was unsatisfactory and that "due process" discipline might result.
- Third, we have the December 23, 1996 letter from the employer's consultant, stating that "there is no evidence that John Marts was judged 'unsatisfactory' in an overall sense".
- Fourth, there is a dialogue between Elmore and the employer's representative during the hearing:

> Q. [By Mr. Schwerdtfeger] What would be your overall assessment of John Marts' performance if you were making out a report card on this?

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[14] Adding to the confusion is Elmore's answer that the waxing-over-dirt problem was alleviated soon after the evaluation of Marts in 1996.

A. [By Mr. Elmore] Report card?

Q. Yeah.

A. That's interesting. I believe that was - well, I wasn't sure on that exactly where to go because there were some problems there ... I guess that's up in the "C-, D" range probably.

Q. How about the overall?

A. Overall?

Q. ... If you picked this evaluation up and someone said, "Give me a grading ... where would you place him in the overall?

A ... Good "C" I guess.

Q. Okay. This would not be an overall failure, then?

A. No.

Q. Or unsatisfactory?

A. No.

As noted above, decisions made in other contexts have found "interference" violations under RCW 41.56.140(1) where employers have confused or misled bargaining unit employees with respect to their rights under the statute or contract. City of Bremerton, Decision 3843-A (PECB, 1994). The Examiner again construes the confusion against the employer, and finds that the reasons asserted by the employer for the disputed evaluation were pretextual.

There is also support in this record for a conclusion that the employer was substantially motivated by anti-union animus:

- Marts previously had a confrontation with the superintendent over a policy concerning 10-minute breaks policy, which would be a mandatory subject of collective bargaining within the "hours" term of the statute.

- Marts held the top office in the local union and maintained a high profile during the parties' contentious negotiations for their first contract.

- The negative comments in the evaluation of John Marcille after he became president of the local union suggest a pattern of discrimination aimed at union officials generally, so that employees in this bargaining unit could reasonably perceive that they would be in jeopardy of greater scrutiny in their job performance if they participate in union activities.[15]

The likelihood is small that these criticisms of the two custodians were prompted by complaints from teachers, school board members or patrons.[16] None were proved in the record. Nor was "loyalty" or

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[15] The complaint in this proceeding was not amended to make the Marcille evaluation a cause of action on which a violation could be found and remedied, but evidence about the Marcille evaluation is probative to the question of the employer's animus. Marcille assisted Marts with the floor waxing during the winter and spring breaks in 1995-1996, but received three "satisfactory" marks (and no comments) in the evaluation issued to him by Elmore in June of 1996. That changed, however, after he succeeded Marts as the local union leader. He was cautioned not to talk to the teachers about his schedule for shampooing (extracting) the newer carpets in the building; his evaluation in June of 1997 indicated he needed "improvement ... on maintaining confidentiality and my relationship with staff" and he was marked down for "loyalty to the supervisor and the district". (Tr. 141.) Marcille and Elmore had a conference, but no final version of this evaluation existed in Marcille's personnel file at the day of hearing. The employer's representative did not cross-examine on the conference. Had the complaint been amended to specifically raise the Marcille evaluation as a separate cause of action, it is clear that a violation could be found on this record.

[16] The record reveals that "EMT" meetings at the elementary school in October and November included a report by the custodians as to what the teachers expected them to work on around the building. A list was distributed to the

the waxing of floors even an issue at staff meetings. It is no defense that other custodians were not evaluated or if so, were not given negative ratings.

The record is clear that Superintendent Hagen and, to a lesser extent, Principal Elmore equated on-job discussions among classified employees to be directed at collective-bargaining or "organizational" activity and topics. This seems to be a suspicion without proof, however. The employer had not deployed a non-solicitation policy at either school building.[17]

The record is predominant that the statements made to Marts and Marcille - private but not concealed admonishments - were consistent with the evaluations and indicated that union spokesmen were under greater scrutiny, and hence were to be measured by a higher standard of loyalty than other employees.[18] In a small workforce

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custodians, to ensure that these things were performed. Stripping and waxing of floors was not mentioned. It was expected that the custodians would mop certain hard floors on an "as needed" basis.

[17] Such policies are not inherently illegal, but can be applied or enforced in an unlawful manner. Even if the employer had some policy or rule in effect, a valid no-solicitation, no-distribution rule could not have prevented the off-duty activities described by Perkins-Peppers in her testimony. A valid employer policy might prohibit union-related activities on employee work time and in work areas, but could not prohibit discussion of such issues by employees on their breaks, during lunch periods, or on their own time. Our Way Inc., 268 NLRB 394 (1983). See, also, King County, Decision 2553-A (PECB, 1987); and City of Tukwila, Decision 2434-A (PECB, 1987).

[18] Terms such as "loyalty" or "team player" that may be appropriate in a general business or sports context are inherently suspicious in a labor relations context, where employees have a statutory right to organize and bargain. Admonishing an employee for a lack of loyalty here does

such as at Oroville, the threat of disciplinary action due to poor evaluations would be a reasonable perception of not only the employees involved in union activity but of those who watch the actions being carried out. See, Port of Tacoma, Decision 4627-A (PECB, 1995).[19] In the situation presented here, interference against Marts (and Marcille) is actually more serious. There is a pattern shown, where, if an employee becomes involved as a union negotiator, their job evaluation suffers because they spend too much time talking to the other employees. Even if "corrected" or "rescinded", as may have happened with the Marcille evaluation, the point has been made that employees chosen to speak for the union will be subjected to greater scrutiny at evaluation time. The employers actions during a time of contentious negotiations were reasonably perceived as a signal that classified employees could negotiate with the employer only with an anxiety about their status with the employer. The facts set out in this record justify a finding of a violation of RCW 41.56.140(1).

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not connote he was trying to assist the efforts of a rival or competing school district. Employers should not be swayed by an "impression that inclusion of an employee in a unit for collective bargaining somehow relieves the employee from the obligations of loyalty, integrity and discretion normally attendant on public employment and also private employment. Such is not the case." Cowlitz County, Decision 545-A (PECB, 1979). Bargaining units routinely ratify contracts containing "management rights" clauses, which are mandatory subjects of bargaining.

[19] In Port of Tacoma, the Commission upheld a finding of interference when a member of the union's bargaining team was characterized as "argumentative" and "iconoclastic" and evaluations determined that he was not to receive promotions. The Commission reasoned that the employee could reasonably perceive that he was under fire from management for the hard line he took while representing his bargaining unit in negotiations and/or grievances.

FINDINGS OF FACT

1. The Oroville School District operates common schools pursuant to Title 28A RCW, and is an employer for purposes of Chapter 41.56 RCW. Loren Hagen was superintendent of schools and Vic Elmore was the principal at the elementary school during the period relevant to this proceeding.

2. The Organized Classified Association of Oroville, an affiliate of the Washington Education Association and a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of nonsupervisory classified employees of the Oroville School District. Warren Henderson and Lora Hein served as Uniserv representatives assigned to this bargaining unit during the period relevant to this proceeding.

3. John Marts was employed by the Oroville School District as a custodian for more than ten years, and participated in a floor-waxing project during the 1995-1996 school year. His evaluations issued in at least 1993, 1994, and 1995 reflected "satisfactory" ratings and sometimes included laudatory comments about his performance. There is no evidence that the employer imposed discipline upon Marts or provided him any negative evaluation comments prior to the events giving rise to this proceeding.

4. Marts was elected president of the local union, upon its certification as exclusive bargaining representative, and served as the union's chief spokesperson in the negotiations for the parties' initial collective bargaining agreement in the 1995-1996 school year.

5. The parties' negotiations for their initial contract commenced in February of 1996, and were turbulent. The employer terminated an early meeting and filed unfair labor practice charges which were dismissed for failure to state a cause of action. Mediation was requested. During the first mediation session, the employer refused to proceed with a joint meeting with the mediator.

6. In June of 1996, while the parties' negotiations for their initial collective bargaining agreement were ongoing, the employer gave Marts an ambiguous evaluation which seemed to rate him as unsatisfactory on the written form and which was given a variety of low to unsatisfactory interpretations in oral explanations by management officials. One of the areas of criticism concerned the floor-waxing project in which Marts participated during the 1995-1996 school year; another area of criticism was Marts' talking with other employees. Marts was not disciplined as a result of that evaluation.

7. John Marcille was employed by the Oroville School District as a custodian, and was the recording secretary of the local union during the 1995-1996 school year. Marcille participated in the floor-waxing detail with Marts in the 1995-1996 school year, but his evaluation for that year contained satisfactory ratings and no negative comments.

8. Marcille became president of the local union for the 1996-1997 school year.

9. After additional negotiations and mediation, the parties signed their initial collective bargaining agreement late in 1996.

10. The employer's initial evaluation of Marcille for the 1996-1997 school year when he served as the local union president, which gave Marcille a negative rating for "loyalty to supervisor and district" indicates animus against union officials.

11. No custodians other than the two union leaders were issued negative evaluations.

CONCLUSIONS OF LAW

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

2. In issuing a written evaluation of John Marts for the 1995-1996 school year which contained negative and/or ambiguous ratings, and by its confusing and misleading oral explanations of the meaning and effect of that evaluation, the Oroville School District was substantially motivated by anti-union animus, and therefore committed an unfair labor practice under RCW 41.56.140(1).

ORDER

The Oroville School District, its officers and agents, shall immediately take the following actions to remedy its unfair labor practice:

1. CEASE AND DESIST from:

   a. Subjecting local union officials to additional scrutiny or negative evaluations of their work performance, in reprisal for their lawful union activities.

b. In any other manner, interfering with, restraining, or coercing its classified employees in their exercise of their collective bargaining rights secured by Chapter 41.56 RCW.

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

a. Withdraw the written evaluation issued to John Marts for the 1995-1996 school years, and include a copy of this order in his personnel file as an attachment to any evaluation substituted for the withdrawn document.

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

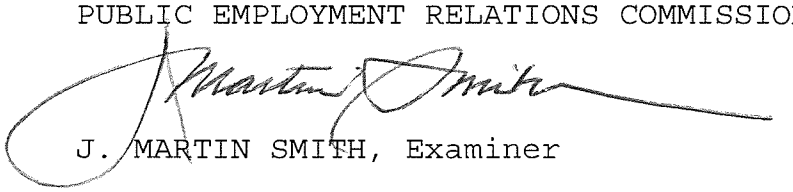
c. Read the notice attached hereto and marked "Appendix" into the record of the next public meeting of the Board of Directors of the Oroville School District, and permanently append a copy of said notice to the official minutes of that meeting.

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

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

Issued at Olympia, Washington, on the 11th day of February, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



J. MARTIN SMITH, 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 NOT subject local union officials to additional scrutiny or negative evaluations of their work performance in reprisal for their lawful union activities;

WE WILL NOT interfere with rights of employees to ask questions, through appointed representatives of the exclusive bargaining representative, regarding contractual matters or personnel policies which are mandatory topics for bargaining;

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

WE WILL withdraw the written evaluation issued to John Marts for the 1995-1996 school year and include a copy of this order in his personnel file as an attachment to any evaluation substituted for the withdrawn document;

WE WILL read this Notice, "Appendix," into the record of the next public meeting of the Board of Directors of the Oroville School District, and permanently append a copy of this notice to the official minutes of the meeting.

DATED: _____

Oroville School District

BY: _____

Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.

APPENDIX

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

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WE WILL read this Notice, "Appendix," into the record of the next public meeting of the Board of Directors of the Oroville School District, and permanently append a copy of this notice to the official minutes of the meeting.

DATED: _____

OROVILLE SCHOOL DISTRICT

BY: _____

Authorized Representative

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