STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SHELTON EDUCATION ASSOCIATION, Complainant, vs. SHELTON SCHOOL DISTRICT NO. 309, Respondent.	Case No. 293-U-76-25 (293-ULW-205) Decision No. 579 EDUC
SHELTON SCHOOL DISTRICT NO. 309, Complainant, vs. SHELTON EDUCATION ASSOCIATION, Respondent.	Case No. 523-U-76-64

CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES:

Judith A. Lonnquist, General Counsel, and Symone B. Scales, Attorney, Washington Education Association, for the Shelton Education Association.

B. Franklin Heuston, Attorney at Law and Elvin J. Vandeberg, Attorney at Law, for Shelton School District No. 309.

BACKGROUND:

These cases deal with events which occurred in 1976 and 1977. The Commission takes notice of its records in mediation case 1038-M-77-372 indicating that the parties have since entered into a collective bargaining agreement which will not expire until July 1, 1979. This circumstance does not, however, render case number 293-U-76-25 moot. The employer's motion to dismiss the allegations against it is denied.

The turgid course of this litigation is as follows:

March 9, 1976, the superintendent of the Shelton School District contacted the Executive Director of the Commission, by letter, complaining of the delay of the Shelton Education Association in beginning bargaining.

June 2, 1976, the association filed an unfair labor practice charge against the school district, alleging that since April 22, 1976 the school district had failed and refused to bargain with it in good faith by: (1) imposing illegal pre-conditions to bargaining; (2) engaging in surface and other bad faith bargaining in derogation of its obligations under the law; (3) unilaterally establishing salaries, promulgating individual contracts with employees containing such salaries, and withdrawing economic items from bargaining; and (4) attempting to undermine the status of the bargaining representative. This charge was originally docketed as case no. ULW-205, was subsequently renumbered as case no. U-76-25, and was finally renumbered as case no. 293-U-76-25.

July 16, 1976, the Commission adopted emergency rules for the processing of unfair labor practice cases under the Educational Employment Relations Act, RCW 41.59, as part of Chapter 391-30 WAC. Those rules became effective on filing with the Code Revisor on July 31, 1976.

July 29, 1976, the Commission adopted additional emergency rules relating to the disposition of "scope of bargaining" disputes under the Educational Employment Relations Act, RCW 41.59, as WAC 391-30-552, 391-30-554 and 391-30-704. Those rules became effective on filing with the Code Revisor on August 5, 1976.

Notice was issued on August 11, 1976 setting the matter for hearing on September 2, 1976.

August 18, 1976, the association filed an amended charge refining the allegations of the original charge and adding three more, namely: (5) on April 1, 1976 and thereafter, the district representatives declared that they would never sign a written collective bargaining agreement with the association and threatened loss of benefits such as personal leave; (6) after April 29, 1976 the district refused to discuss and negotiate binding arbitration, assignment and transfer, employee support facilities such as desks and files, agency shop, inclusion of part time personnel in the bargaining unit, and took an intransigent position on these subjects; and (7) on or about July 8, 1976 unlawfully interrogating, intimidating and coercing an applicant for employment by inquiring into his sympathies for and activities in labor organizations; and spelling out in detail the relief it requested.

August 19, 1976, the school district filed an answer to the original charge, denying the allegations.

The district responded to the amended charge on August 27, 1976, with motions to make the charge more definite and certain and to strike the amended charge.

The hearing was postponed to October 4, 1976. A pre-hearing conference was held on September 10, 1976 for the purpose of defining the issues.

September 20, 1976, the association filed a second amended charge, elaborating and refining the charges it had made earlier.

The district responded on September 27, 1976 with an elaborate motion to compel the association to produce documents, asking for time to plead to the second amended charge after the documents had been furnished and asking that the hearing dates of October 4-7 be stricken.

On September 30, 1976, the district moved to strike portions of the second amended charge and filed its answer thereto with affirmative defenses and a counterclaim. The rules of the Commission make no provision for "counterclaims" as such, and so the "counterclaim" was docketed as a separate case under case no. U-76-64. The case was later renumbered as case no. 523-U-76-64. In that proceeding, the employer charged the association with refusing to bargain in good faith in two particulars: (1) dilatory tactics in bargaining; and (2) bargaining in a lockstep with units outside the district.

The hearing was finally held on October 4, 5, 6, 7, 15 and 18, 1976. The transcript of the hearing comprises 911 pages in seven volumes. More than 100 exhibits, comprising in excess of 1000 pages, were received in evidence.

The Chinook UniServ Council appeared by counsel before the Examiner at the October 5, 1976 session of the hearing and moved to quash an elaborate subpoena duces tecum which the district had served. The motion was granted in part.

More motions followed which would be useless to detail, except for those discussed below under the heading: "Discrimination Against Witnesses".

On February 3, 1977, the association filed its third amended charge including all of its previous accusations and elaborating its prayer for relief.

Pleadings and motions were received as late as April, 1978. The Examiner resigned his employment with the Commission in December, 1976, and these cases have been transferred to the full Commission for disposition.

DISCRIMINATION AGAINST WITNESSES:

On December 2, 1976, the association moved to reopen the record to admit evidence that the pay of its witnesses had been docked for the days they attended the hearings on these matters. On January 19, 1977, the association moved to amend its second amended charge further by adding a charge relating to the docking of witness pay. The district answered on January 20, 1977, admitting that it had reduced the pay of the witnesses involved. The association moved on February 22, 1978 for summary judgment on the issue of the docking of the pay of the four employee witnesses for the days they attended the hearings. This motion should be, and hereby is, granted.

Ordinarily each party to litigation is responsible for producing its own witnesses and compensating them. Neither party has a right to produce witnesses at the expense of the other. In this instance, however, the district sent each employee whose pay had been docked a letter containing this paragraph:

> "You were under contract with the district to perform your regular teaching duties on those days but were absent and during your absence were engaged in the prosecution of an unfair labor practice complaint against the district."

The language of that letter is conclusive evidence of unlawful discrimination. To penalize those employees for prosecuting an unfair labor practice charge against their employer is an unfair labor practice under RCW 41.59.140(1)(d). Each of the employees involved must be made whole, with interest. See: Ridgefield School District, Decision 102-B (EDUC, 1977).

INTERROGATION OF JOB APPLICANT:

An applicant for employment was asked these questions in July, 1976:

> "1. Are you familiar with the WEA and/or NEA?
>
> 2. Suppose you accepted a teaching position with the school district and the WEA/NEA voted to go on strike for the 1977-78 school year; what would you do?
>
> 3. Suppose 40% of the teachers were going to work and 60% were going to strike, what would you do?" (TR. 235)

The association charges that propounding these questions to the applicant violated RCW 41.59.140(1)(a). The district defends with reliance on the Blue Flash Express, 109 NLRB 591 (1954), line of cases. The district's

reliance is misplaced. The interrogation there approved was to determine whether or not a union claiming to be the representative of a majority of the employees was such in fact. That was not the purpose of the interrogation here. No strike was imminent. The applicant was not being interviewed as a strike replacement. The questions have an obvious tendency to make an applicant apprehensive about affiliating with the parent organizations of the exclusive bargaining representative. Hence, they violated the cited section of the Act. It is not the actual coercive effect of interrogation which renders it repugnant to the statute. It is the tendency of the interrogation to coerce.

The district will be ordered to cease and desist from such interrogation.

REFUSALS TO BARGAIN IN GOOD FAITH:

We now turn to the multi-faceted charges of refusal and failure to bargain in good faith which the parties have leveled against one another.

EMPLOYER CHARGES AGAINST THE ASSOCIATION

The association's delay in commencing bargaining in 1976 would be subject to censure if it had not been for the novelty of the statutory obligation and the inexperience of both parties with collective bargaining. The bulk of the statute was enacted as Chapter 288, Laws of 1975, 1st. ex. sess. with a deferred effective date of January 1, 1976. However, the Governor vetoed the portions of the statute creating the administrative agency for the law, and it was not until September, 1975 that an administrative agency was established by Chapter 5, Laws of 1975-76, 2nd. ex. sess. The obligations of the law went into effect on January 1, 1976 with no administrative rules and little administrative guidance. The parties had no history of written collective bargaining agreements, and the association had some admitted difficulty in the preparation of its demands for a first contract. As noted above, WAC 391-30-552, which outlines the bargaining procedure expected of parties under RCW 41.59, was not adopted by the Commission until July 29, 1976. By that time, the association had long since placed its demands on the table for bargaining and the parties were, in fact, already embroiled in this litigation. Under these circumstances, we find the delay understandable and excusable.

There was no impropriety in the association's consultation with its state and national affiliates in formulating its demands and structuring its strategy in bargaining. The school district did likewise in consulting the Washington State School Director's Association and using materials, information and suggestions issued by that organization. The association did not attempt to negotiate for any unit of employees other than the unit it represented.

ASSOCIATION CHARGES AGAINST THE EMPLOYER

In considering the charges of refusal to bargain in good faith made against the school district by the association in its third amended charge in case no. 293-U-76-25, we observe at the outset that we find no witnesses on either side to be "inherently incredible", although we recognize that infirmity of recollection, emotional coloration and subjective interpretation of words and events inhibited the testimony on both sides.

The entire course of bargaining on the part of the school district in 1976 up to the time of the hearing bespoke an abysmal ignorance and egregious misconception of the meaning of, and the legal obligation attendant on, collective bargaining in good faith. The totality of the school district's conduct of these negotiations, measured by any known standard, shows lack of good faith bargaining and the lack of any real desire to reach an agreement.

From the school district's own brief it is apparent that, once these negotiations did get started, the district approached this initial negotiation with the attitude that it was "bargaining from scratch", and that existing benefits, some of long standing, had to be renegotiated or traded for new concessions. Good faith bargaining is never "from scratch", but from status quo, although, of course, a new concession may be granted as a substitute for, or replacement or modification of, an existing benefit. For example, one holiday may be traded for another, sick leave may be traded for disability insurance benefits, days of one vacation period for another or for duration of the school year and so on. But here, the school district proposed a longer school year than had been the practice and expected credit for each day of shortening as for a "concession". Such action is not good faith bargaining.

The association complained bitterly about the school district's reluctance to "sign off" on, or initial, clauses that were tentatively agreed. While it is often convenient to do so, such a procedure is by no means a requirement of the law. The parties are required to sign a final written agreement if requested to do so; but they need not sign tentative or partial agreements.

The school district's negotiators, by word and deed, did seek to foster the impression that they would not sign any written collective bargaining agreement, and that the certificated staff might lose more than it would gain through the collective bargaining process. In a way, the latter impression is a truism, since bargaining, like anything else may be ineptly conducted; but for an employer to foster such an apprehension is in derogation of state policy.

With respect to economic items, the school district seems to have labored under two fundamental misconceptions: (1) that its characterization of itself as

a "non-levy" district is of some significance; and (2) that the words "in light of the time limitations of the budget-making process" in RCW 41.59.-020(2) give the school district absolute, unilateral power over salaries and all matters of direct or indirect economic impact, both with respect to timing and with respect to amount.

Neither party can impose on the other the obligation of agreeing to a particular item by a certain date, although in a mature bargaining relationship, which this relationship was not in 1976, the parties may be expected to respect one another's convenience courteously.

While any employer is constrained to negotiate within the limits of its resources, it will not do to have an employer arbitrarily refrain from using an available resource and then, in effect, plead inability to pay. The Shelton School District had the same access to special levies for maintenance and operation as any other school district. That it did not choose to avail itself of this resource was not the problem of the bargaining agent or a defense to good faith bargaining.

Neither was it of any significance that the school district had historically issued individual contracts to certificated employees on April 15 of each year for the following school year. Historically, the school district had granted personal leaves and other benefits and operated a school year of 183 days; but it did not feel bound to perpetuate those practices. The school district repeatedly used "the time limitations of the budget-making process" as a weapon to frustrate negotiations. It could have issued its contracts at any time subject to the outcome of negotiations, as many school districts did, and could thereby have obtained its count of the number of teachers who would be returning for the following school year. The budget then required by May 10 was only a preliminary budget in any event; but the school district used the statutory requirement to precipitate an impasse in bargaining. By-passing the bargaining agent and sending out the individual employment contracts with salaries fixed unilaterally was a refusal to bargain in good faith. See: Ridgefield School District, supra. There was no genuine impasse. The only impasse had been illegally contrived by the school district, which then sought to take advantage of it. No legally cognizable impasse exists where created by the unfair labor practice of one of the parties. Federal Way School District, Decision 232-A (EDUC, 1977).

The school district is correct in asserting that it need not make any specific concession or concessions on specific items. But in 1976, it created a context of bad faith to such a degree that its position on specific items cannot be evaluated in isolation. A position taken by a party in a context of good

faith bargaining may be perfectly lawful, while the same position if adopted as part of an overall plan to frustrate agreement, and to penalize employees for trying to exercise their statutory right to bargain collectively, cannot be given agency imprimatur. For this reason, we decline to discuss individually the laundry list of "scope of bargaining" issues brought to our attention by the parties.

REMEDY:

The association has asked that extraordinary remedies be imposed. Because of the novelty of the statute in 1976 and the inexperience of both parties in collective bargaining at that time, imposition of extraordinary remedies would be inappropriate. The school district will be ordered to cease and desist from failing and refusing to bargain in good faith, from interfering with, restraining and coercing employees in the exercise of their rights under RCW 41.59.060, and from discriminating against employees for prosecuting unfair labor practice charges against the school district. The school district will also be required to post appropriate notices to employees in all of its school buildings, and to make the discriminatees whole with interest.

FINDINGS OF FACT

1. Shelton School District No. 309 is an employer within the meaning of RCW 41.59.020(5).

2. The Shelton Education Association is an employee organization within the meaning of RCW 41.59.020(1).

3. Prior to January 1, 1976, the Shelton Education Association was recognized, under repealed RCW 28A.72, as the representative of the certificated staff of the Shelton School District; and was, at all times material hereto, the exclusive bargaining representative within the meaning of RCW 41.59.020(6) of non-supervisory educational employees of Shelton School District No. 309.

4. The Educational Employment Relations Act, Chapter 288, Laws of 1975, 1st ex. sess. (RCW 41.59), became effective January 1, 1976. On that date there was no collective bargaining agreement in effect between the Shelton Education Association and Shelton School District No. 309.

5. Shelton School District, through its superintendent, Louis Grinnel, first contacted the Shelton Education Association to initiate bargaining for the 1976-1977 school year on January 22, 1976. The parties met for the first

time on February 19, 1976. The association's complete package proposal consisting of some 87 pages, was delivered to the district on or about March 15, 1976. The district made no preparation for negotiations prior to receiving the association's complete package.

6. The district and the association held negotiation sessions on: February 19, 1976; March 4 and 18, 1976; April 1, 22, 26 and 29, 1976; May 3, 7, 10, 13, 17 and 27, 1976; June 22, 1976; August 3 and 12, 1976; and September 16, 1976. By the totality of its conduct, its actions and its words, the district failed and refused to bargain in good faith throughout the course of these meetings.

7. The Shelton Education Association was in contact with its state affiliate, the Washington Education Association, during the course of bargaining. The Shelton School District discussed collective bargaining strategies with the Washington State School Director's Association.

8. The Shelton Education Association did not act on behalf of a multi-unit consortium, nor was it under any duty to condition agreements with the Shelton School District upon the concurrence of employees outside of the local bargaining unit.

9. At the May 7, 1976 negotiating session, representatives of the district told the representatives of the association that the employees would be "worse off" if the association tried to go into mediation.

10. At the May 17, 1976 session the district proposed a salary schedule which was calculated in such a manner that at least all of the association's negotiators would receive an increase while other bargaining unit employees would receive no increase.

11. Individual certificated employee contracts were issued by the district to bargaining unit employees on May 24, 1976, containing a set salary figure unilaterally adopted by the school district.

12. On July 8, 1976, superintendent Louis Grinnel questioned an applicant for employment in a bargaining unit position regarding the applicant's sympathies for and activities in labor organizations.

13. On or about November 30, 1976, the district made deductions from the salary warrants of Rodger A. Tuson, William Steinbacker, Robert G. Owens and Sheila Rogers for each day that they attended, under subpoena, the unfair labor practice hearing in these matters. In a letter to these teachers dated November 30, 1976, the district evidenced that the deductions were made in discrimination against the employees for their participation in the prosecution of an unfair labor practice complaint against the district.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.59 RCW.

2. By consulting with their affiliates concerning collective bargaining, the parties did not refuse to bargain in violation of RCW 41.59.140(1)(d) and 2(c).

3. By refusing to bargain collectively and in good faith as required by RCW 41.59.020(2), with the representatives of its employees, the Shelton School District No. 309 violated RCW 41.59.140(1)(e) and (a).

4. By threatening the Shelton Education Association that the exercise of its statutory right to the mediation process would harm the association, the Shelton School District violated RCW 41.59.140(1)(a).

5. By proposing a salary increase which could jeopardize the Shelton Education Association's duty of fair representation, the Shelton School District violated RCW 41.59.140(1)(e) and (a).

6. By issuing to its certificated employees individual contracts with unilaterally determined salary figures, the Shelton School District violated RCW 41.59.140(1)(e) and (a).

7. By interrogating a job applicant about his union sympathies, the Shelton School District violated RCW 41.59.140(1)(a).

8. By discriminatorily penalizing four teachers because they engaged in the prosecution of an unfair labor practice against the district, the Shelton School District violated RCW 41.59.140(1)(d) and (a).

On the basis of the foregoing findings of fact and conclusions of law, the Public Employment Relations Commission makes and enters the following:

ORDER

It is ordered that the Shelton School District No. 309, its Board of Directors, officers and agents, specifically including Louis R. Grinnel, Superintendent of Schools, shall immediately:

1. Cease and desist from:

   a. Interfering with employees in the exercise of their rights to bargain collectively through the statutory process;
   b. Interfering with the right of employees to form and join employee organizations by interrogation of applicants for employment concerning the attitude toward employee organizations; and
   c. Refusing to bargain in good faith with the Shelton Education Association.

2. Take the following affirmative action which the Commission finds will effectuate the policies and purposes of RCW 41.59:

   a. Make Rodger A. Tuson, William Steinbacker, Robert G. Owens and Sheila Rogers whole for any loss in pay and benefits they may have suffered while absent from teaching for the purpose of attending the unfair labor practice hearings in these matters, by payment to each of them the sum of money equal to that which he/she normally would have earned or received as an employee for those days;

b. Upon request, bargain collectively with the Shelton Education Association as the exclusive representative of all employees in the appropriate bargaining unit with respect to wages, hours and conditions of employment and if an understanding is reached, embody such understanding in a signed agreement;

c. Post the accompanying notice for a period of 60 days on bulletin boards where notices to employees of the Shelton School District are usually posted; and

d. Inform the Public Employment Relations Commission, in writing, within 20 days from the date of this order, as to the steps taken to comply herewith.

It is further ordered that the unfair labor practice complaint against the Shelton Education Association, Case No. 523-U-76-64, be and the same is hereby dismissed.

DATED this 30th day of January, 1979.

PUBLIC EMPLOYMENT RELATIONS COMISSION

Mary Ellen Krug
MARY ELLEN KRUG, Chairman

Paul A. Roberts
PAUL A. ROBERTS, Commissioner

Don E. Olson
DON E. OLSON, JR., Commissioner

L-3
4/77

PUBLIC EMPLOYMENT RELATIONS COMMISSION

293-U-76-25
Case No. 523-U-76-64 Date Issued January 30, 1979

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, SHELTON SCHOOL DISTRICT NO. 309, HEREBY NOTIFIES OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain collectively in good faith with the Shelton Education Association, an affiliate of the Washington Education Association, as the exclusive representative of the employees in the appropriate bargaining unit.

WE WILL NOT threaten the Shelton Education Association that the exercise of its statutory right to the mediation process would harm the association.

WE WILL NOT propose a salary increase which could jeopardize the Shelton Education Association's duty of fair representation.

WE WILL NOT issue to our certificated employees represented by the Shelton Education Association individual contracts with a unilaterally set salary figure.

WE WILL NOT interrogate job applicants about their union sympathies.

WE WILL NOT discriminate against employees because they engage in the prosecution of an unfair labor practice against the district.

WE WILL, upon request, bargain collectively in good faith with the Shelton Education Association or any other employee organization selected as the exclusive representative of our employees, with respect to wages, hours and working conditions.

WE WILL make Rodger A. Tuson, William Steinbacker, Robert G. Owens and Sheila Rogers whole for any loss in pay and benefits he/she may have suffered while absent from teaching for the purpose of attending the unfair labor practice hearings in these matters.

DATED: _____

SHELTON SCHOOL DISTRICT NO. 309

BY: _____

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. Any questions concerning this notice or compliance with its provisions may be directed to the PUBLIC EMPLOYMENT RELATIONS COMMISSION, 603 Evergreen Plaza Building, Olympia, Washington. Telephone: (206) 753-3444.