STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of Unfair Labor Practice Charge by RIDGEFIELD EDUCATION ASSOCIATION, Complainant, vs. RIDGEFIELD SCHOOL DISTRICT NO. 122, Respondent.	Case No. 391 U-76-44 MEMORANDUM OF DECISION, FINDINGS, CONCLUSIONS AND ORDER Decision No. 102-A-EDUC

Appearances:

Judith A. Lonquist, General Counsel, appearing for and on behalf of the Ridgefield Education Association.

James R. Gregg, Attorney at Law, appearing for and on behalf of Ridgefield School District No. 122.

MEMORANDUM OF DECISION

Background:

On August 6, 1976, the Ridgefield Education Association, Complainant, (hereinafter REA) caused to be filed with the Public Employment Relations Commission (hereinafter PERC), an unfair labor practice charge against Ridgefield School District No. 122, Respondent (hereinafter District), alleging generally that the employer had engaged in unfair labor practices within the meaning of the Educational Employment Relations Act, Chaper 41.59 RCW. In particular, it was

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alleged that Respondent: (1) failed to bargain in good faith; (2) maintained intransigent positions in bargaining; (3) repudiated certain agreements reached during the course of bargaining; (4) unilaterally adopted a salary schedule without bargaining on such subject on or about July 28, 1976; (5) unilaterally issued individual contracts reflecting the employer's wages and other conditions of employment provisions; and (6) refused to meet and otherwise thwarted the bargaining process by undermining and disparaging the REA as a representative of its group. Further, by way of amendment to the charge during the hearing (October 25, 1976) the Complainant alleged that RCW 41.59.140(1)(d) was violated by District refusals to approve leaves and by deducting pay from five named employees who had attended and testified at the hearing.

The pertinent provisions of the Educational Employment Relations Act, (RCW 41.59.140(1), provide that:

> "It shall be an unfair labor practice for an employer: (a) to interfere with, restrain, or coerce employees in exercise of the rights guaranteed in RCW 41.59.060 . . . (d) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this chapter; (e) to refuse to bargain collectively with the representatives of its employees. . . ."

The pertinent provisions of RCW 41.59.060(1) provide that:

> "(1) Employees shall have the right to self-organization, to form, join, or assist employee organizations, to bargain collectively through representatives of their own choosing, and shall also have the right to refrain from any or all such activities except . . . ."

In response to the former charges, the Respondent District filed an answer denying each allegation.

Thereafter, this matter was heard by PERC designated hearing examiner, commencing Wednesday, October 13, 1976. Several dates were utilized to complete the hearing which concluded October 25, 1976. Both parties were afforded the opportunity to present testimony and evidence. A 747 page transcript and 55 separate exhibits comprise the record of this matter.

Jurisdiction:

The Respondent in its answer urged that the charge be dismissed for failure to satisfy PERC requirements in WAC 391-30-504 and because the charge was not filed by a person designated in WAC 391-30-500.

Background of Case:

The subject negotiations seeking a "master contract" for school year 1976-77 (TR 406) was initiated in March of 1976 when complainant requested bargaining on such subject. Thereafter, commencing April 27, 1976 and for approximately twelve succeeding weeks, regular sessions were held between the respective negotiating teams.

The REA's initial proposal contained approximately 41 separate major headings. These were met during the sessions with varying responses by the District.

The REA, on or about May 18th, objected to the District's past practice of issuing individual contracts prior to completion of negotiation (TR 30,134). Thereafter, discussions included development of contract rider language which was intended to have

subsequently developed terms, provisions or agreements apply to the individual teacher contracts. Although the REA negotiating team neither desired nor endorsed the issuance of the individual agreements, it was realized such was probably going to happen with or without their approval. The District, on its behalf, insisted it had its commitments to make prior to the commencement of the school year by ascertaining which teachers were returning.

The central economic item, salaries, was discussed during negotiations when the REA made its proposal of a 15 percent increase. The District countered by a 5 percent increase which included incremental raises and all other economic benefits. Thereafter REA submitted a comprehensive counter to the District's offer which, as to salaries, eliminated certain fringe benefits sought previously by REA. The District's position did not change. Later, even though the District had not moved from its position regarding economic matters, the REA offered a third counter on salaries reducing, once more, the total economic package. The District finally on July 20th produced a "last and best offer" including economic and other provisions which the District agents stated required total acceptance.

Events that followed shortly thereafter in rapid succession within several days, included: (1) an REA counterproposal to the last and best offer; (2) rejection by the District with the District insisting negotiations were finished justifying adoption by the District and submittal to teachers of individual contracts based

on the last and best offer terms. As these events became imminent, the REA caused the present unfair labor practice charge to be filed contending that the issuance of the individual contracts without having bargained to agreement or impasse is invalid.

The voluminous record reflects the efforts by both sides to negotiate a sizable package to common terms. To further compound difficulties, both sides were operating under the terms and provisions of the new general state law, Chapter 41.59 RCW, for the first time.[1]

An initial provision of the Educational Employment Relations Act, RCW 41.59.010, indicates its purpose is:

> "to preserve certain rights and obligations of the educational employees of the school district of the State of Washington, and to establish procedures governing the relationship between such employees and their employers which are designed to meet the special requirements and needs of public employment in education.

Additionally, in developing interpretations of Chapter 41.59 RCW, PERC by, RCW 41.59.110(2) is to consider:

> (2) The rules, precedents, and practices of the national labor relations board, provided they are consistent with this chapter, shall be considered by the commission in its interpretation of this chapter, . . ."

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[1]Chapter 41.59 RCW became effective January 1, 1976, see RCW 41.59.940.

Accordingly, applicable precedents of the NLRB warrant recitation for the charges, as filed, present issues basic to negotiating practice consistent with the right of collective bargaining discussed in RCW 41.59.060(1), supra. Such issues included the question of whether or not the salary adoption and contract issuance by the District occurred after reaching an impasse. If so, such conduct arguably was legally allowable. If not, the charge may be well founded.

First, note NLRB v. Katz, 369 US 736, 50 LRRM 2177, (1962) where the U. S. Supreme Court recognized the principle that the duty to bargain collectively under the National Labor Relations Act[2] could be violated without a general failure of subjective good faith. In other words, "an employer's unilateral change in conditions of employment under negotiations" is a violation "for it is a circumvention of the duty to negotiate which frustrates the objectives of §(d)(5) much as does a flat refusal." The court, there, recognized authority of the NLRB at P. 2182:

> " . . . .to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement. Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the

[2] 29 USC §158(a)(5), §8(a)(5), 49 Stat. 452 as amended.

> congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of §8(a)(5), without also finding the employer guilty of overall subjective bad faith. While we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action, no such case is presented here."[3] (Emphasis supplied)

Elsewhere, the NLRB has described in Taft Broadcasting Co., 64 LRRM 1386 (1967), applicable elements for ascertaining whether a bargaining impasse exists at p. 1388:

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[3] Note, too, RCW 41.59.020(2) defines the term "collective bargaining" or "bargaining" to mean: The performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representatives to meet at reasonable times in light of the time limitations of the budget-making process, and to bargain in good faith in an effort to reach agreement with respect to the wages, hours, and terms and conditions of employment: PROVIDED, That prior law, practice or interpretation shall be neither restrictive, expansive, nor determinative with respect to the scope of bargaining. A written contract incorporating any agreements reached shall be executed if requested by either party. The obligation to bargain does not compel either party to agree to a proposal or to make a concession.

In the event of a dispute between an employer and an exclusive bargaining representative over the matters that are terms and conditions of employment, the commission shall decide which item(s) are mandatory subjects for bargaining and which item(s) are nonmandatory.

> "Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is a disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed. . . ." (Emphasis supplied.)

In order to apply such elements to a given negotiating situation the bargaining record in its totality must be examined. See, also, Marine & Shipbuilding v. NLRB, 53 LRRM 2878 (1963) where the Third Circuit Court of Appeals indicated that whether a deadlock "legally" justifies a unilateral alteration in the conditions of employment is, at the very least, a mixed question of law and fact. Note, too, at p. 2883 the authorities cited supporting the proposition that "no legally cognizable impasse", i.e., a deadlock in negotiations which justifies unilateral action, exists if a cause of the deadlock is the failure of one of the parties to bargain in good faith.

The essential arguments of the REA are that without reaching impasse the District had issued unilaterally adopted salary schedules in the form of individual contracts along with copies of its "last and best" offer to each employee. Further, REA urges that although the District may have had a duty, otherwise, to effectuate written contracts for its employees before the school year commenced, such did not warrant a new unilateral salary schedule.

REA urges also that PERC regulation, WAC 391-30-552(4), applies as such rule contemplates exhaustion of mediation and fact finding in RCW 41.59.120 prior to implementing part or all of a final offer in negotiations. Such regulation, however was not adopted by PERC on an emergency basis until August 5, 1976 and thus is inapplicable to the instant proceedings which occurred prior to the effective date of such rule.

REA additionally urges that bad faith bargaining was evidenced, amongst other things, by the District's modification of its original position on only a few (approx. 5) of the initial 45 proposals. REA argues that such inflexible position by the District on major portions of the discussions asserted as being nonmandatory, supports such charge.

Lastly, REA urges discriminatory treatment of five employees who appeared and testified at the hearing under subpoena as they were "docketed a full day's pay" for each day of absence which events it is contended amounts to a separate unfair labor practice under RCW 41.59.140(1)(d), supra.

In response the District's position essentially is that the charge was unspecific in form and failed to satisfy PERC regulations. That many "oral proposals and discussions" were exchanged regarding the 41 proposals reflected by written agreements and understandings concerning "tentative agreements, trade items, cluster approval requirements and priority schedules." That the obligation to bargain does not compel either party to agree or make concessions (See

RCW 41.59.020(2)) and that the REA was urging adoption of certain key issues under threat of filing the Unfair Labor Practice charge.

Additionally, the District urged no evidence was presented of intransigent position in bargaining and that as no actual agreements were reached on given items but rather only "tentative" agreements repudiation of such could not occur.

As to unilateral salary adoption, the District urged that by RCW 28A.67,066 and RCW 28A.67.070 it had statutory authorization to select those teachers it wished to employ without becoming subject to renewal of all contracts under RCW 28A.67.070. That the contract "rider" language demonstrated that such contracts were "subject to" the bargaining proceedings and thus, bascially, immunized such activity from any charge of an unfair labor practice. That no "specific" requests for change of ground rules of the negotiating session numbers or proceedings were put forth. That no evidence of failure to recognize the REA was presented and that the material (the last and best offer) sent to each employee, when the contract offers were mailed was authorized by RCW 41.59.140(3) respecting the public dissemination of information.

The District also urges that it was justified in "docking the pay" of five employees who attended the hearing, for their presence was contrary to District policy, and this presence not by PERC subpoena.

Lastly, the District renews its position that all evidence received about negotiation matters after the Unfair Labor Practice charge was filed is irrelevant and improper.

Before analyzing in detail such arguments, it should be mentioned that the parties did take strong positions throughout the negotiations and their respective sides were amply and ably represented during the hearings. Since the parties have eschewed other interim solutions to their dispute either by mutual agreement, or by utilization of the several other mechanisims contained in Chapter 41.59 RCW for dispute resolution the examiner's duty is to proceed to adjudicate the instant matter based on the evidence presented.

The examiner concluded by order previously issued in this matter that the District's motion to make the complaint more definite and certain should be denied. Although more precise and specific allegations or charges would be of value to all concerned, and I urge PERC to expect such details in future filings, no prejudicial error for such ruling is felt to exist in the instant matter.

Insufficient evidence was presented warranting a finding that an unfair labor practice was committed respecting bad faith bargaining, regarding the modification of positions, the taking of intransigent positions or the alleged failure to recognize the REA.

Insufficient evidence and authorities were presented to warrant a finding that the District's docking of pay of five employees for attending this hearing was an unfair labor practice charge for the District's policy arguably required advance permission which had not been obtained.

As to the District argument of irrelevancy for evidence about negotiations after the filing of the Unfair Labor Practice such

position, in the face of authorities referenced above, is without merit.

As to the District position that it had authority to select teachers it wished without becoming subjected to the renewal of all contracts under RCW 28A.67.070, such argument misconstrues the impact of RCW 28A.67.070 and ignores the District's obligation to its employees under Chapter 41.59 RCW to bargain collectively.

The language of RCW 28A.67.070 indicates that notification of non renewals for district teachers is to occur "in writing on or before May 15th preceeding the commencement of such terms of that determination." (Changed from April 15th effective in June 1976.) Thus, in July - August 1976, when the District opted to issue contracts it had already passed such statutory guidepost for narrowing the selection of teachers. Although such law, called the "continuing contract law", does not automatically create an enforceable employment contract when the non renewal date is passed, it does reveal an obligation on the District's part to offer renewal of employment to all teachers previously employed for the ensuing year.[4] Additionally, although the contract "rider" language may be construed as reflecting an intent of the parties to have the District's independently adopted

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[4]See AGO 1973 No. 3 issued Jan. 15, 1973 to PA Christopher T. Bayley, King County.

salary levels serve only as partial compensation for work performed and thus allow increases if agreed upon to be applied retroactively,[5] such does not diminish the fact of its adoption during the circumstances of this matter.

Because an obligation existed on the District's part to bargain collectively respecting such an issue as salaries, the examiner concludes the evidence supports a finding of an unfair labor practice violation contrary to RCW 41.59.140(1)(e) for the employer to refuse to bargain collectively with the representative of the employees.

The District's insistence of a last and best offer, as an all or nothing package without affording the REA a reasonable basis or opportunity to reach agreement on such provisions was the first factual/suspect conduct. Thereafter, adopting such salary terms without express agreement of the REA further represents facts all warranting such conclusion.

The rider language referenced by the parties does not, in the examiner's opinion, exempt the conduct of the District in the circumstances of this problem from such a conclusion. The District could have satisfied its statutory obligations under Chapter 28A.67 RCW and Chapter 41.59 RCW by taking a position somewhat less conditioned on total acceptance of the last and best offer.

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[5] See AGO 1974 No. 19 issued Sept. 18, 1974 to Hon. Gary Grant, St. Senator.

This conclusion is naturally premised upon the further fact that in the examiner's judgment, based upon the factors for ascertaining the existence of an impasse described in Taft, supra, the evidence does not support the District's witnesses' insistence that an impasse had been reached when the last and best offer was made and when the salary therein was included in contract offers made.

The examiner cannot predict the ultimate course of this matter, however an appeal does lie to PERC within 20 days by WAC 391-30-534. Also alternatives do exist before the parties, in the face of the instant decision, including continued negotiations on the strength of the contract rider provisions with the hope of satisfactory results for both sides. It is hoped the instant decision ultimately will serve "to promote peace in labor relations" as is PERC policy described in WAC 391-08-003.

Having heard the evidence, examined the record and submitted briefs, the hearing officer makes the following Findings of Fact, Conclusions of Law and Order pursuant to WAC 391-30-514.

FINDINGS OF FACT

I

That PERC has jurisdiction over the parties to this charge together with the subject matter thereof pursuant to Chapter 41.59 RCW and implementing regulations thereto.

II

That an unfair labor practice charge filed by an attorney for a party under RCW 41.59.140 is authorized pursuant to WAC 291-08-010.

III

That during the course of successive bargaining sessions between the charging party and the District, a wide range of issues were negotiated. One central issue, salaries, eventually became imbedded in the District's "last and best offer" extended to the charging party along with other provisions and economic matters on or about July 20, 1976. The District witnesses contended negotiations were finished, and insisted that the last and best offer required a total acceptance.

IV

The charging party contended that negotiations were still open at the time of the last and best offer. Whether impasse had been reached in context of this matter is a mixed question of fact and law. That no subjective bad faith bargaining by the District was found, however insistence of an all or nothing position for its last and best offer directly inhibited the process of discussion at a critical stage of bargaining. That the thrust by the charging party of filing the instant unfair labor practice charge did little to ease tension or enhance the discussion process.

V

That insufficient evidence was presented to establish that an unfair labor practice was committed by the District as to: taking any intransigent positions; repudiating agreements, or failing to recognize the REA as the bargaining representative.

VI

That no impasse had been reached when the last and best offer was made or implemented by the District.

VII

That by a preponderance of the evidence presented insisting on an all or nothing approach in its last and best offer, the District conduct was inimical to the collective bargaining rights intended by the legislature for educational employees in Chapter 41.59 RCW. That such conduct inhibited the actual process of discussion.

VIII

That issuance of individual contracts, while generally contemplated by law in RCW 28A.67.060 and .070 and certainly anticipated generally by these parties during the course of these negotiations, does not in and of itself, in the context of the circumstances of this problem warrant circumvention of the statutory bargaining process contemplated by law of salary matters.

That such contracts, coupled with a transmittal of the District's last and best offer reflects unilateral action in the circumstances of this case warranting PERC's issuance to the District of a cease and desist order against such practice in the future.

CONCLUSIONS OF LAW

I

That RCW 28A.67.070 requires written contracts by school districts with teachers as certificated employees without expressly specifying when such agreement need be entered.

II

That no impasse had been reached by the parties when the District issued its last and best offer and implemented the salary schedule of same.

III

That RCW 41.59.140(1)(e) was violated by the District when it insisted on an all or nothing acceptance to a last and best offer and thereafter adopted the salary schedule therein unilaterally.

ORDER

WHEREFORE, on behalf of PERC the Respondent Ridgefield School District, No. 122 is ordered to cease and desist from such practices as are hereinbefore detailed that constitute a violation of RCW 41.59.140(1)(e).

Dated this 15th day of February, 1977.

~~Hearing Examiner~~ designated by
PERC under WAC 391-30-512

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