STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SULTAN SCHOOL DISTRICT, Complainant, vs. TEAMSTERS UNION, LOCAL 763, Respondent.	CASE NO. 4780-U-83-796 DECISION NO. 1930 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Williams and Terry, by Joseph McKamey, Attorney at Law, and Charles P. Foster, labor relations consultant, appeared on behalf of the complainant.

Davies, Roberts, Reid, Anderson and Wacker, by Herman L. Wacker, Attorney at Law, appeared on behalf of the respondent.

On August 24, 1983, Sultan School District (complainant) filed a complaint charging unfair labor practices against Teamsters Union, Local 763 (respondent), alleging that the union violated RCW 41.56.150(2) and (4) by contacting individual school board members during the course of collective bargaining, thus circumventing the employer's designated bargaining representative. A hearing was conducted at Sultan, Washington on February 28, 1984. The parties submitted post-hearing briefs.

BACKGROUND

Sultan School District has collective bargaining relationships with two employee organizations. An affiliate of the Washington Education Association represents non-supervisory certificated teaching employees of the school district. Teamsters Union, Local 763 represents a bargaining unit of school bus drivers. Complainant and respondent have a bargaining history dating to 1980. In ensuing years, they executed several collective bargaining agreements. At the time of hearing, there were 14 employees in the bus driver bargaining unit.

During negotiations in 1982, an issue arose concerning "agency shop". Unable to secure an agency shop clause at the bargaining table, respondent asked for a meeting between union officials and the five member Sultan School Board to

discuss the "philosophy" behind respondent's union security proposal. The board members consented, and a meeting was conducted in August, 1982. Tom Krett, business representative, and Jon Rabine, chief executive officer, attended on behalf of respondent. The parties discussed the agency shop concept for several hours in general terms. The discussions did not alter the school board's position, however, and the collective bargaining agreement reached later did not contain a union security provision.

The issue arose again in 1983. Charles P. Foster, labor relations consultant represented complaintant at the bargaining table. Krett represented respondent. After several negotiation sessions, it became evident that complainant would resist concessions on agency shop. The parties encountered difficulty on other issues as well, and requested the services of a mediator from the Public Employment Relations Commission. Before mediation commenced, Krett telephoned several school board members. Undertaken at Rabine's direction, Krett made the calls to arrange meetings between individual board members, Krett and Rabine to discuss "areas of concern".

Krett first telephoned board member Jeanni Henson, who agreed to meet.

Krett then called board member Tom Green. Green was unsure of the precise date of the telephone call, but recalled that it took place during the week of August 7-14, 1983. Green believed that the proposed meeting was to be a "philosophy exchange" on the agency shop issue, similar to the discussions held in 1982. Green refused Krett's offer, and referred him to Superintendent Walt Bigby.

On August 8, 1983, Krett telephoned board member Jack Turner. Turner "cut him off" after a brief discussion, and told him that the proposed meeting would be improper. Turner also believed that the meeting was intended to be a "philosophy discussion" similar to the 1982 agency shop meeting.

After Krett spoke with Turner, he abandoned his efforts to schedule individual meetings. Neither he nor Rabine attempted to contact members of the school board during the remainder of the negotiations. Complainant filed a complaint charging unfair labor practices on August 24, 1983. The collective bargaining agreement subsequently reached between the parties did not contain an agency shop provision.

POSITIONS OF THE PARTIES

Complainant maintains that respondent's conduct should be considered a *per se* violation of RCW 41.56.150(2) and (4). In the event such a ruling is not

made, complainant argues that respondent's acts in this particular matter still constitute violations of the statute. As a remedy, complainant requests that a cease and desist order be issued.

Respondent admits that Krett contacted individual school board members during the course of collective bargaining, but contends that Krett was not attempting to circumvent the negotiations. Respondent maintains that Krett was only attempting to provide board members with information and was not engaged in substantive bargaining. Respondent further contends that its contact with school board members was protected by the Constitutions of the United States and the State of Washington because the school board was composed of elected officials who were required to discuss issues with citizens.

DISCUSSION

The National Labor Relations Board (NLRB) has determined that certain types of conduct demonstrate a complete failure to negotiate and should be considered per se violations of similar provisions of the Labor Management Relations Act. (LMRA) Violations have been found where unilateral changes have been made in subjects considered to be mandatory for purposes of collective bargaining,[1/] where either party refuses to meet at reasonable times or places,[2/] where an employer bargains directly or indirectly with employees instead of negotiating with a designated bargaining spokesperson.[3/] and where a bargaining representative circumvents the employer's chosen bargaining spokesperson.[4/] If complainant's analysis is adopted, the mere act of contacting school board members during the course of bargaining would be a per se refusal to bargain. Respondent maintains that the content of the communication must be analyzed to determine whether a violation has been committed.

The NLRB determines the existence of per se violations in the context of the private sector collective bargaining forum. The instant dispute is brought in the context of public sector bargaining. One of the characteristics which distinguishes the public sector bargaining forum from the private sector model is the "dual" ratification process. Unlike the situation which commonly exists under the LMRA, public sector unions cannot expect management representatives to possess final authority to conclude agreements at the bargaining table. The difference in ratification process recognizes

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1/ NLRB v. Katz, 369 US 736 (1962)

2/ Duro Fittings Company, 121 NLRB 377 (1958)

3/ Wings and Wheels, Inc., 139 NLRB 578 (1962)

4/ Food City West, 262 NLRB 309 (1982)

that a public employer's ratifying body is normally composed of elected officials who are subject to "open public meeting" laws such as Chapter 42.30 RCW. See: State ex rel Bain v. Clallam County Board of County Commissioners, 77 Wn.2d 541; 463 P.2d 617 (1970).

Since elected officials are involved in the ratification process, this case raises difficult freedom of speech issues. Both federal and state constitutions recognize that citizens can freely express their opinions, and while not an absolute guarantee, it is difficult for a governmental institution to limit an individual's speech. It can be argued that the "free speech proviso" found in Section 8(c) of the Labor Management Relations Act merely refers to the right of free expression already set forth in the United States Constitution. If this premise is valid, express statutory provisions would not be necessary for the exercise of the right of free speech. The free speech issue reached the United State Supreme Court in City of Madison, et al. v. Wisconsin Employment Relations Commission, et al., ____ US ____ (1976). In Madison, the court held that the Wisconsin agency and courts violated the First Amendment of the United States Constitution by prohibiting the Madison School Board from permitting any teachers, except union bargaining representatives, from speaking at open board meetings on any matters subject to collective bargaining.[6/] The court stressed that the affected teacher was not attempting to negotiate, and appeared not only as an employee, but also as a concerned citizen. It was determined that Wisconsin's prohibition required the school board to discriminate on the basis of employment or on the content of speech.

Individual states have taken several different approaches to address the circumvention issue. In Oregon, the legislature adopted a per se approach, legislating that parties in the midst of negotiations can only contact one another at the bargaining table. Other contact is prohibited by ORS 243.267(1)(i) and (2)(f), which provide:

> (1) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
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> * * *
>
> (i) Communicate directly or indirectly with employees in the bargaining unit other than the designated bargaining representative during the period of negotiations regarding employment relations, except for matters relating to the performance of the work involved.
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> * * *
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> (2) It is an unfair labor practice for a public employee or for a labor organization or its designated representative to do any of the following:
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> * * *

> (f) Communicate directly or indirectly during the period of negotiations with officials other than those designated to represent the employer regarding employment relations.

Given these stringent limitations, the Oregon Public Employment Relations Board developed specific criteria to be applied in circumvention cases. In Oregon City School District, 5 PECBR 4246 (1981), the Board stated:

> In order to be improper, a communication must meet all of the following criteria:
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> a. It must occur during the period of negotiations; that is, between the time bargaining for a new or successor agreement begins and the time that all statutory dispute resolution procedures are exhausted;
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> b. It must be an attempt to negotiate directly with a nondesignated principal or to otherwise substantially impair the relationship between the principal and its designated representative.

In applying the criteria, the Board has ruled that spoken or written communication can violate the statute.[5/] See: Ashland Public Schools, Case No. C-188-80, 5 PECBR 4499 (1981). In Mollala Union High School District No. 4, Case No. C-149-82, ___ PECBR ____ (1982), it was determined that a request for information to be used in bargaining could violate the statute if the request is made outside the negotiation process:

> ... The language of ORS 243.672(1)(i) is exact and unambiguous in proscribing the sort of communication presented in this case. It prohibits such communications regardless of motive or effect and without reference to whether the contact was "authorized" or even initiated by the accused. To conclude otherwise would be to embroider the literal terms of the statute with a potentially endless list of equity and policy based exceptions... (emphasis added)

The Washington State Legislature has not addressed the circumvention issue. Absent legislative direction, the examiner is placed in the unenviable position of establishing legal precedent without a distinct policy statement. Sensible labor relations policy would require a "no contact" rule to apply to public employers as well as to unions representing public employees. Rather than reaching such a result, it is more reasonable to assume that legislature silence requires a case-by-case analysis of

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5/ The Oregon statute does not contain a free speech provision like that found in Section 8(c) of the Labor Management Relations Act.

6/ The employees in that case sought to address their concerns to the school board. They were opposed to imposition of union security on them.

circumvention charges. Such a conclusion would be consistent with an expressed legislative policy favoring a liberal construction of Chapter 41.56 RCW. Respondent's conduct does not constitute a per se violation of RCW 41.56.150(2) or (4).

Since the act of contacting the school board members is not, by itself, an unfair labor practice, analysis must turn to the content of the communication. This case is distinct from Sunnyside Irrigation District, Decision No. 314 (PECB, 1977), where alternative proposals were submitted directly to bargaining unit employees. Uncontroverted testimony demonstrates that the parties believed that the proposed meetings would deal with the "philosophy" of agency shop as a form of union security. It is difficult to characterize such a discussion as an attempt to engage in collective bargaining in circumvention of designated bargaining representatives. The record does not indicate that Krett refused to continue meeting with Foster, nor did Krett make disparging remarks about Foster when he contacted the school board members. If Krett had advanced specific proposals or had threatened to break off negotiations if the school board refused to meet, a different result would follow. Without such evidence, an unfair labor practice cannot be found. See: Stokely-Van Camp, Inc., 186 NLRB 64 (1970), where the NLRB determined that an employer could contact emloyees during the course of bargaining to ask objective questions about the employees' rejection of a contract proposal.

In a related matter, it must be remembered that the Sultan School Board is an elected body which must answer to its constituency. Among its constituents are bargaining unit employees who must have access to the school board. If an individual school board member has doubts about the nature of a conversation with an employee, he or she can stop the conversation. It is up to both parties to monitor the bargaining process. Substantive negotiations must occur within the context of the bargaining table. While objective information can be exchanged in other settings, a collective bargaining agreement must be the result of negotiations conducted between designated bargaining representatives.

FINDINGS OF FACT

1. Sultan School District has collective bargaining relationships with two employee organizations and is a "public employer" within the meaning of RCW 41.56.030(1).

2. Teamsters Union, Local 763 represents a bargaining unit of school bus drivers employed by the school district and is a "bargaining representative" within the meaning of RCW 41.56.030(3).

3. During negotiations in 1983, the issue of "agency shop" arose. Unable to convince the employer of its position on its proposal, the union initiated telephone calls to individual school baord members. The union business representative, Tom Krett, proposed that the board members meet individually with him and union executive officer Jon Rabine.

4. Krett contacted three of the five school board members. One agreed to the meeting. The other school board members, Tom Green and Jack Turner, refused. After the refusals, Krett did not attempt any other contact with the school board.

5. During this conversation with the school board members, Krett did not propose any substantive bargaining position not did he threaten to withdraw from negotiations if the school board members refused to meet with him.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

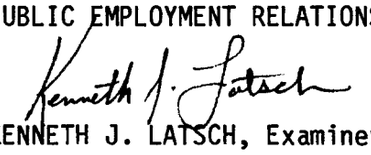
2. By events described in the above Findings of Fact, Teamsters Union, Local 763 did not violate RCW 41.56.150(2) or (4).

ORDER

Based upon the foregoing and the record as a whole, the complaint charging unfair labor practices is hereby DISMISSED.

DATED at Olympia, Washington, this 22nd day of May, 1984.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



KENNETH J. LATSCH, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.