STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

NACHES VALLEY EDUCATION ASSOCIATION, Complainant, vs. NACHES VALLEY SCHOOL DISTRICT JT3, Respondent.	CASE NO. 6018-U-85-1126 DECISION NO. 2516 - EDUC
NACHES VALLEY SCHOOL DISTRICT, JT3, Complainant, vs. NACHES VALLEY EDUCATION ASSOCIATION, Respondent.	CASE NO. 6023-U-85-1127 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Faith Hanna, Attorney at Law, Washington Education Association, appeared on behalf of the union.

Lyon, Beaulaurier, Weigand, Suko and Gustafson, by Lonny R. Suko and Richard Wilson, Attorneys at Law, appeared on behalf of the employer.

The above-captioned cases have been consolidated for purposes of hearing and decision. On October 9, 1985, the Naches Valley Education Association filed unfair labor practice charges with the Public Employment Relations Commission, alleging that the Naches Valley School District had refused to engage in collective bargaining. On October 10, 1985, the school district filed its own complaint charging unfair labor practices with the Public Employment

Relations Commission, contending that the association failed to bargain in good faith by refusing to sign a collective bargaining agreement reflecting terms negotiated by the parties. J. Martin Smith was assigned as examiner and a hearing was held at Yakima, Washington, on March 18, 1986. The parties filed post-hearing briefs and reply briefs to complete the record.

BACKGROUND

Naches Valley School District JT3 is centered at the town of Naches, some 12 miles west of Yakima at the confluence of the Naches and Tieton Rivers. The district was formed by consolidation of the former Naches, Gleed and Wenas Valley School Districts. It now maintains a high school, a middle school, and an elementary school for its 1,250 students.

The school district's approximately 65 certificated teachers are represented for purposes of collective bargaining under Chapter 41.59 RCW by the Naches Valley Education Association (hereinafter, the NVEA or union), an affiliate of the Washington Education Association and National Education Association. The collective bargaining relationship has existed since 1972.

Contract talks were opened in June of 1985 to replace a collective bargaining agreement due to expire on August 31, 1985. The district hired Jeff Thimsen to bargain on its behalf. In addition, John Jones, the school district's superintendent, participated in the negotiations as he has done for the last four years. The association designated Mary K. O'Brien, its uniserv representative, to be its chief spokesperson. She was joined at the bargaining table by Pete Jarvis, the president of the NVEA, and by bargaining unit members Gretchen Campbell and Shirley Hansen.

The parties met on July 16, 1985, when the NVEA presented its initial proposals to the school district. The union's proposals were prepared on a word processor in a format which set forth the existing contract language on each matter with proposed changes underlined.

In a second meeting held July 22, 1985, the district presented its responses and proposals. The written proposals presented by the district on July 22nd consisted of pages from the union proposal, with handwritten deletions and amendments to the text.

Essentially, there were nine issues on the table for bargaining after the district's July 22, 1985 response. They were:

1. The salary schedule or format for payment;
2. Distribution of Basic Education Act (BEA) funds received from the state of Washington;
3. Payment of extracurricular stipends;
4. Creation of a $1,500 fund for staff development;
5. Assignment and transfer of staff members;
6. Optional paid day of work;
7. Leave for union business and political lobbying;
8. Emergency leaves provision in re: sick leave; and
9. Cash-out of accumulated sick leave.

Specifically in regard to the last item, the union proposed a change concerning sick leaves in Article 16, Section A, by adding the following to the existing contract language:

> Sick leave cash-out provisions shall be in accordance with the law

A similar provision had been included in the collective bargaining agreements between the parties at an earlier time, but had been deleted from the contract in intervening negotiations. In the district's July 22nd counter-proposal, a school district official wrote "current contract language" as the employer's response to the union's proposal on sick leave cash-out.

The bargaining session continued into the afternoon of July 22, 1985, when the union made a counter-proposal to the school district. It continued to seek reduction of the basic work year from 182 work days to 180 work days, coupled with addition of three work days (two mandatory and one optional) to be paid at the "per diem" rate above and beyond the basic annual salary. The union also held to its initial positions concerning association leave and sick leave cash-out privileges.

Later in the afternoon of July 22, 1985, the district made another written offer, which is here reproduced in full:

> Board Proposal #2
> July 22, 1985
>
> 1. Salary pool per District calculations in Board proposal #1.
>
> The calculations are based upon state funding. If the District received more funds for BEA salaries, adjustments will be made according to the formula presented by the District.
>
> If the District is funded at a lower level, adjustment will be made according to the formula presented by the District.

A critical movement on the issues occurred when, during a private conversation between the superintendent and the uniserv representative, the superintendent indicated a willingness on the part of the employer to include inservice days for both years of a new 2-year contract if the union would agree to leave the sick leave language unchanged from the expiring contract.

The testimony indicates that the union's entire bargaining team discussed the district's offer and approved it. The parties thus reached a tentative agreement on July 22, 1985, on the basis discussed between the uniserv representative and the superintendent. Following discussion in which the superintendent's initial preference for scheduling of the optional day in October was resisted by the union's bargaining team, it was also agreed that

the optional inservice day for 1985-86 would be scheduled before the start of school, on August 28, 1985.

As the parties were leaving the building after the conclusion of the negotiations on July 22, 1985, Superintendent Jones asked President Jarvis when a ratification vote would be taken by the union membership. Jarvis indicated that no vote would be taken until after September 1st, when all of the teachers had returned from vacation. Nothing was said about the agreement for several weeks thereafter.

During the week of August 20, 1985, the district sent supplemental contracts to the teachers for the extra day of work to be made available on August 28, 1985. The letter of transmittal stated:

> August 16, 1985
>
> To: All Naches Valley School District Faculty
>
> The opening of school is just around the corner and I believe we are all looking forward to a very positive and successful year.
>
> Negotiations went very well and we have a new two-year agreement with the NVEA that calls for one day's per diem for inservice identified and scheduled at the district's discretion. To reach that decision we reviewed the needs assessment results from last Spring. Two of the highest rated topics were Writing and Classroom Management/ Discipline. Thus, we have made arrangements for one-half day workshops on each topic, with excellent presentors. These workshops will be geared to primary (K-6) and secondary (7-12) and are scheduled separately for teachers in each category. Kindergarten teachers are scheduled for a workshop to implement the full day kindergarten concept we have initiated for this Fall. Special education and Chapter 1 teachers and their support staff have two full days additional training and preparation to implement program changes.
>
> Enclosed you'll find supplemental contracts at one day's per diem per workshop. Please sign and return two copies when you report to your initial assignment. A schedule

of activities is enclosed for your reference. If you have any questions, be sure to contact your principal. I look forward to seeing all of you again.

Sincerely

/s/ John Jones
Superintendent of Schools

The teachers were thus to sign and return the individual supplemental contract documents on or before August 28th.

A meeting of the school district's board of directors was held on August 26, 1985. Several members of the community were in the audience. Jarvis attended the school board meeting in his capacity as union president. The agenda of the meeting called for school board review of the tentative agreement reached with the union in July. Superintendent Jones reviewed the terms of the agreement reached on July 22, 1985 for the board members and answered their questions regarding the settlement. The board's chairman, Dennis Charlet, then asked Jarvis if the teachers "had any problem" with the agreement. Jarvis responded that he did not perceive any problems with the agreement. At that point, the board voted to ratify the collective bargaining agreement.

On or before August 28, 1985, all of the teachers signed and returned their individual supplemental contracts for the optional day, and all of them worked the August 28, 1985 inservice day which had been negotiated for them by the union.

On or about September 5, 1985, the union held a meeting at which all members of the bargaining unit were invited to be present. A motion was made to "not ratify" the tentative agreement reached in July. This motion failed.

Thereafter, Jarvis was asked by Superintendent Jones to describe the status of the contract. Jones recalled Jarvis saying that the contract had met with approval, and that since the turnout had been "too low", he wanted to hold

another meeting. Jarvis denied this version of the conversation. Jones told Jarvis that the district believed a contract already had become effective on August 26th, when the board voted its approval and signed the document.

On September 11, 1985, Jarvis informed the school district, by letter, that another union meeting had been held, that another vote had been taken, and that the tentative agreement had been rejected by the union membership. Jarvis asked for meetings to complete negotiations. Since that date, the school district has declined to negotiate further with the union, taking the position that a contract had been reached and made effective.

POSITIONS OF THE PARTIES

Although it acknowledges that a tentative agreement was reached on July 22, 1985, the union argues that no contract was created by the actions of its representatives. In its view, the school district knew that, as in the past negotiations between the parties, there would be no contract until there had been a ratification by affirmative vote of the union membership. Therefore, it contends, the school district is obligated to continue bargaining until agreement is reached on a contract for 1985-87. The union urges that the employer has violated RCW 41.59.140(4) by refusing to bargain. The union denies that it has refused to bargain by refusing to sign a contract reflecting the tentative agreement reached in July of 1985.

The district takes the position that no further bargaining is justified, inasmuch as a contract was created and made effective August 26, 1985, when the school board approved and signed the agreement reached by the parties on July 22, 1985. The district denies that it had any duty to bargain in response to the union's requests after September 11, 1985, and that the union has violated RCW 41.59.140(2)(c) by refusing to execute the July 22, 1985 agreement.

DISCUSSION

The issue in this case is whether a collective bargaining agreement has been formed between the parties. If a contract has been created, then the terms and conditions of that agreement have been in effect and neither party would be allowed, at this late hour, to demand re-negotiation of portions of the agreement. If, on the other hand, no collective bargaining agreement was formed, then the parties have been operating since September 1, 1985 without a contact and the employer would be obligated to maintain the status quo while bargaining in good faith until a new contract or impasse is reached. NLRB v. Carilli, 648 F.2d, 1206, 107 LRRM 2961, (9th Cir., 1981).

The record shows that the two bargaining teams reached complete agreement in July, 1985. Each of the items outlined above was discussed and memorialized in a single, hand-written document. That document was initialed and assented to by representatives of both the union and the school district.

The Statutory Obligation To Sign A Contract

Both the Public Employees Collective Bargaining Act, Chapter 41.56 RCW, and the Educational Employment Relations Act, Chapter 41.59 RCW, impose an obligation upon labor and management alike to execute a written agreement at the conclusion of the bargaining process. In RCW 41.56.030(4), the collective bargaining obligation is defined quite explicitly as 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 . . . . (emphasis added)[1]

In RCW 41.59.020(2) the definition of collective bargaining includes the

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[1] It has even been opined that only written contracts are enforceable as collective bargaining agreements under Chapter 41.56 RCW. See, State ex. rel. Bain v. Clallam County, 77 Wa.2d 542 (1970).

> . . . mutual obligation of the representatives of the employer and the exclusive bargaining representative 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 . . . . A written contract incorporating any agreements reached shall be executed if requested by either party. (emphasis added)

Section 8(d) of the National Labor Relations Act (NLRA) similarly obligates the parties to execute a written contract if there is a request that an agreement be reduced to writing, and refusal to sign a contract document incorporating terms agreed upon has been held in numerous cases to be a per se violation of the NLRA. Duro Paper Bag Mfg. (Teamsters Union Local 100), 216 NLRB 1070, enf. 91 LRRM 2849 (6th Cir., 1976); International Union of Elevator Constructors Local 8, 185 NLRB 769, enf. 81 LRRM 2091 (9th Cir., 1972); H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941); K-Mart Corp., 238 NLRB 166 (1978); NLRB v. Longshoremen (Lykes Bros. S.S. Co.), 443 F.2d 218, 77 LRRM 2366 (5th Cir., 1971); Operating Engineers Local 12 and Tri-County Association, 168 NLRB 27 (1967).

The Public Employment Relations Commission has, on a number of occasions, addressed the nature of collective bargaining agreements, and how they are formed and terminated. In its recent opinion in Mason County, Decision 2307-A (PECB, 1986), the Commission affirmed that an employer committed a "refusal to bargain" unfair labor practice by asserting a legal excuse for refusing to take steps to consider ratification of a collective bargaining agreement reflecting terms agreed to by representatives of both the union and the county involved. The Commission noted specifically that:

> Under the National Labor Relations Act, Section 8(d), 29 U.S.C. sec. 158(d), the refusal of a party to sign a contract after agreeing to the same is a per se violation of that Act. Likewise, RCW 41.56.030(4) includes the specific obligation to execute a written agreement. (emphasis added)

Decision 2307-A (PECB, 1986) at pg. 3.

In prior opinions, it had been held that an unfair labor practice was committed where a party tried to avoid execution of an agreement. Thus, an employer which was dissatisfied with the results of negotiations after its offer was accepted by the union committed a violation when it sought to retrench from its offer and bring another issue to the bargaining table. Island County, Decision 857 (PECB, 1980). See, also, Olympic Memorial Hospital, Decision 1587 (PECB, 1983), where modification of a previously signed contract was ordered based on evidence which established that the document signed by the parties did not reflect the true terms agreed upon in bargaining. In South Columbia Irrigation District, Decision 1404-A (PECB, 1982) an employer was ordered to sign a contract where evidence disclosed that the employer had made an ambiguous offer, and that the union never agreed to a concession sought by the employer.

The Commission and its examiners must survey this field with a great deal of care. It can be safely said that the Commission has taken a strict view of the statutory command to reduce collective bargaining agreements to writing. Indeed, the Commission made reference in Mason County, supra, to "breach" of good faith bargaining in circumstances where one of the parties to an agreement seeks to "disavow" a contract undertaking. Such language, borrowed from the prose of British common law and American contract law, is not to be taken lightly.

The Claimed "Right" of Ratification

The duty to bargain operates between the organization which is certified or recognized as "exclusive bargaining representative of the employees in an appropriate bargaining unit" (as an entity) and the employer. RCW 41.59.090; 41.59.020(2). The employees within the bargaining unit may select and change exclusive bargaining representatives, but once they have done so the duty to bargain does not run to them directly. Nothing in Chapter 41.59 RCW (or, for that matter, in the NLRA or Chapter 41.56 RCW) requires employee ratification of the agreements reached between employers and unions duly recognized or certified as exclusive bargaining representative of those employees.

Even Title I of the Labor Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act or LMRDA), which is subtitled "Bill of Rights of Members of Labor Organizations" provides no right of employees to ratify contracts. Section 101(a)(1), which is entitled "Equal Rights", ensures that each union member has the right to nominate candidates for union office, and has the right to vote in elections for such offices, vote on referendums, attend membership meetings, and to vote on the business of such meetings, subject to the by-laws of the union. Section 104 of the Act also creates a duty on the part of the union to:

> . . . forward a copy of each collective bargaining agreement made by such labor organization with any employer to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement . . . .

Union members are also guaranteed certain freedoms of speech and assembly as members of a labor organization. 29 U.S.C. Sec. 401-531 (1959). There is no mention, however, of a member's right to participate in the ratification of a particular labor agreement, addendum or proposal. It has been held that the dissemination of copies of a proposed contract prior to a ratification vote was not required by the above provisions of the LMRDA. Gilliam v. Steelworkers Union, 116 LRRM 2547 (DC - W.VA, 1983). It has also been held that Section 101(a)(1) does not require modification of a bargaining contract to be submitted to union members for ratification. Leary v. Western Union Telegraph Co., 117 LRRM 3005 (DC - NY, 1983); Stelling V. IBEW Local 1547, 587 F.2d 1379, 100 LRRM 2366 (9th Cir., 1978); American Postal Workers Union Local 6885 v. American Postal Workers Union, 665 F.2d 1096, 108 LRRM 2105 (D.C. Cir., 1981). A reason for this rule has been seen as arising out of a comparison of Sections 9(a) and 8(a)(5) of the NLRA:

> Under Section 9(a) of the National Labor Relations Act (NLRA) . . . a duly certified bargaining representative is the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. The duty imposed on an

> employer by NLRA Sections 9(a) and 8(a)(5) on union representatives in the negotiation of collective bargaining agreements and amendments thereto.

American Postal Workers, supra, 665 F.2d at 1108-9; 117 LRRM at 3008 (emphasis added).

In American Postal Workers, supra, the court found a violation of LMRDA Section 101(a)(1) only because the employees in the bargaining unit were allowed to vote for ratification on a discriminatory basis, in violation of the equal rights and privileges provision of that section. This doctrine is taken from Calhoon v. Harvey, 379 U.S. 134, 57 LRRM 2561 (1964), which held that section 101(a) was "no more than a command that members and classes of members shall not be discriminated against in their right to nominate [officers] and vote". 379 U.S. at 139; 57 LRRM at 2563.

The Naches Valley Education Association is undoubtedly not covered by the LMRDA. Even if it were and the statute required ratification, there is no provision for enforcement of the LMRDA in state unfair labor practice proceedings. Further, there is no counterpart to the LMRDA in state law.

The practice of ratification comes only from the conduct and agreement of the parties. In this case, the record does not contain documentary evidence of any ratification rights reserved by the parties, either at the outset of their negotiations or at the time of the tentative agreement. In the "real world" of collective bargaining, such legal niceties are often shunned. There may have been a time when, in the spirit of solemnity and deference to the NLRB, parties kept close watch over what was said at the bargaining table. To this day, some parties practice strict recordkeeping, such as keeping jointly signed minutes of negotiations sessions where specific remarks may be made "for the record" as to how the agreements reached are to be ratified, printed, bound and prepared for signature. Over the course of several contracts, however, such formalities and cautions may be dispensed with. It can be inferred from the words and conduct of each side on July 22, 1985 that some "approval" was to be forthcoming on both sides. The union now

argues that it has the right to revoke its acceptance of the contract, because the membership failed to ratify it by a majority vote.[2]

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[2] The employer made extensive efforts to gain access to the internal workings of the union. The examiner reviewed certain documents in camera, and allowed discovery of the union's constitution and bylaws, notes from the 1985 negotiations and minutes of union meetings held after July 17, 1985 (deleting the names of members who made and seconded motions).

The examiner denied discovery of information about the participation of individuals in the union's meetings. In resisting discovery, the union relied on federal court decisions dealing with internal workings of various groups. In NAACP v. State of Alabama, 357 U.S. 449 (1958), the state sought to compel disclosure of the names and addresses of members of a civil rights group, with a view toward disqualifying it as a non-profit corporation under state law. Writing for the court Justice Harlan said that a discovery order of the type sought would entail the likelihood of a substantial restraint upon the exercise of the members' rights to freedom of association with NAACP, and thus violated their rights to due process under the 14th Amendment. The state had failed to show "compelling justification" permitting it to violate the members' rights of privacy and association, given the broad history of coercion and economic retaliation which usually followed revelation of members' names in this particular state. That holding was followed in Hastings v. North East Independent School District, 615 F.2d 628 (5th Cir., 1980), where a school district's request for production, among other things, of the names of members of a labor organization was found to be overly broad and constitutionally suspect. The protracted litigation in Black Panther Party v. Smith, 661 F.2d 1243 (D.C. Cir., 1981) was ended with a ruling noting that

> . . . privacy is particularly important where the group's cause is unpopular; once the participants lose their anonymity, intimidation and suppression may follow.

The holding in Federal Election Commission v. Machinists Non-Partisan League, 655 F.2d 380 (D.C. Cir., 1981) would appear to sustain the same line of thinking, extending the rationale to a government request for volunteers' phone numbers which the court characterized as "sweeping". The examiner is not going to quarrel with the opinions of federal jurists such as Harlan, Wright and Politz. Thus, it seems clear that the secrecy of matters such as the names of union members participating in the ratification meetings are protected by the First Amendment, the Due Process Clause of the Fourteenth Amendment, and the corollary constitutional provisions of Washington State law, notably Article I, Section 7 of the State Constitution. These cases would be reason enough to rule in the instant case that the Naches Valley School District could not compel the discovery of a list of the names of members of the Naches Valley Education Association. However, it is also clear that the district is fully cognizant of the names of all of the association's members, by virtue of the union security provision which

Application of Statute and Precedent

Given the background of statutory law, it is clear that the interests of parties to collective bargaining are better served by the commitment to execute a written agreement than by debate about the method whereby a tentative agreement is ratified. A thorough treatment of the ratification dilemma is found in NLRB v. Teamsters Local #100 (Duro Paper Bag Mfg.), supra, where the court said in pertinent part:

> . . . [I]n determining whether the parties have in fact reached agreement under a particular set of circumstances, the Board is not strictly bound by technical rules of contract law. Lozano Enterprises v. NLRB, 327 F.2d 814, 818, 55 LRRM 2510 (9th Cir. 1964). . . . while a Union's membership may require ratification by the membership [citation omitted] an employer may rely upon the apparent authority of the Union representatives to conclude an agreement where there is a basis for such reliance . . . .

There is basis for such a finding here.

The evidence fails to establish that the school district and the union had a standing negotiations rule stating that ratification was a pre-condition for final settlement. The testimony of the union president was that there was a "past practice" of delaying any ratification meetings until after the start of the school year, but he also recalled that no tentative agreement had ever been voted down, and admitted that the "past practice" was of the union alone. The union's immediate past president, C. T. Purdom, testified that, since 1970, ratification votes always followed tentative agreement between

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requires the district to deduct association dues from the salaries of all certificated employees.

The examiner also refused to allow discovery of a poll taken by the union among its members, purportedly showing the relative importance of bargaining issues for the 1985 negotiations. This ruling was based on the confidentiality of collective bargaining information (which is the rationale for excluding confidential employees from the coverage of the Act per IAFF v. City of Yakima, 91 Wn.2d 101 (1978)).

these parties except in 1975 (prior to the enactment of the Educational Employment Relations Act), when the school board refused to ratify an agreement and bargaining continued until January, 1976.

The uniserv representative, Mary O'Brien, testified that tentative agreements failed of ratification by union memberships on only two occasions in 1985 among the 35 local associations in her jurisdiction.

There is evidence in this record that the district had a right to rely upon the authority of the union's representatives to conclude a collective bargaining agreement, with a ratification vote being only a formality. The association itself does not necessarily require a ratification vote for collective bargaining agreements. At Article XII of its "Constitution and Bylaws", called "Ratification of Agreements", it is stated only that:

> . . . agreements may be ratified during summer or other vacations or holidays, when a quorum is present.
>
> Agreements will be considered ratified when accepted by a simple majority of the members present, as long as the notice concerning the ratification vote has been publicized to the General Membership.

That language is totally permissive, and asserts an obligation to guarantee members the notice of such votes and the right to vote only when there is a quorum of members present. Aside from this, it attaches no obligation or burden on the people who have been selected to represent the members for purposes of collective bargaining.

Further, there is a basis to be found in reliance on the part of the district. First, there is the matter of delay on the part of the union. [Superintendent Jones asked Jarvis after the signing of the tentative agreement when a ratification vote would be taken. Although its founding documents would have permitted earlier ratification, or at least an attempt to get a quorum at an earlier time, Jarvis indicated that the union would not act until sometime near the beginning of school (apparently because of "past

practice" and/or the number of people on vacation).] Second, there is the matter of notice to all of the employees. [The letters sent by Jones on August 16 to all teachers indicated specifically that

> negotiations went very well and we have a new two-year agreement with the NVEA that calls for one-day's per diem for in-service identified and scheduled at the District's discretion. (emphasis supplied)

The inservice day was a new benefit which should readily have been recognized as such by the employees. Attached to the letter was a supplemental contract for work on August 28, 1985 at a stated rate of pay; also a new feature in the employment relationship.] Third, there is the matter of inducement. [When the school board met on August 26, 1985, there was still time for the school district to reject the tentative agreement or to cancel the August 28, 1986 inservice day (which was the obvious trading stock for the tentative agreement) if the deal were falling through from the union side. At that meeting, the board chairman asked Mr. Jarvis whether or not the teachers had any problem with the collective bargaining settlement. Jarvis said that they did not, and the board was thereby induced to sign the agreement.] Fourth, there is the matter of acceptance by the actions of the employees themselves. [All of the teachers returned these contracts, and all of them worked on August 28, 1985.] Fifth, Superintendent Jones believed after the union's September 5, 1985 meeting that Jarvis had informed him that the contract had been ratified. [Although Jarvis' retraction of this message can be credited -- the settlement had in fact been tabled -- it is an understandable conclusion to reach on Jones' part, given the circumstances.]

It must be reiterated that when a union or employer representative says to the other party: "We will reach agreement with you at this table, but we must ratify it with our [membership/board of directors] before we have a contract", each party must anticipate a period of only limited risk while the tentative agreement is converted into a binding contract. This situation is not addressed by Chapter 41.59 RCW or Chapter 41.56 RCW; these statutes only command that the parties must execute collective bargaining agreements and

that they will reduce them to writing. Bain v. Clallam County, op. cit. The statutory scheme in Washington rests upon notions of "agency". The exclusive bargaining representative and the principal representative of the employer possess a mutual duty to bargain in good faith, and each party has apparent authority as well as actual authority to reach agreement which will become a collective bargaining agreement. Each party has a right to rely upon the other's authority to reach such an agreement. American Postal Workers, supra; Grant County, Decision 1638 (PECB, 1983); Franklin County, Decision 1890 (PECB, 1983).[3] Similarly, in the context of a record in the instant case that shows that almost nothing was said during the course of bargaining with respect to how or whether the agreement would have to be ratified, the employer had a right to rely upon the actions and representations of the union's officials, so that a contract had been formed.

Even if no contract was formed on July 22, 1985, well accepted principles of contract law lead to the conclusion that the employees accepted the terms of the tentative agreement on August 28, 1985, when they accepted the advantages

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[3] In Operating Engineers Local 12, 66 LRRM 1270 (1967) op. cit. at p. 11, the parties had reached a "memorandum of agreement", put it in writing, signed the document, and agreed to continue in force and effect the remainder of the existing collective bargaining agreement. The employees were to have a choice of taking $.15 cents per hour in wages or to add this amount per hour to their pension fund. The union conducted an election to implement the option. In the first election, the majority of employees voted to take $.15 cents as wages. Relying upon this news, the employer implemented a retroactive pay increase of $.15 cents per hour. For some reason, the union urged the members to vote again. In the second vote, a majority favored placing the $.15 cents into the pension fund. The employer filed unfair labor practice charges. The NLRB ruled, 2-1, that the union was in violation of 8(b)(5). The NLRB found the memorandum of agreement to be "final" and "clear", with the only contingency being the first of the votes taken which had taken place. Every

> term of the contract was defined with certainty. The contract was formed at the point when the union official gave the employer the notice of the vote, and the employer went ahead with retroactive pay increases. There was justifiable reliance".

The union was ordered to cease and desist from refusing to reduce the agreement to writing.

of the new agreement and worked the extra inservice day at per diem salary. This time was worked just two days after the school board was induced to approve, and signed, the agreement.

The association cites Kennewick School District, Decision 1950 (PECB, 1984) and City of Port Orchard, Decision 483 (PECB, 1978) for the proposition that verbal manifestations of assent and written, tentative agreements do not form a contract under Chapter 41.56 RCW. Those cases are inapposite. They addressed the three-year limit on contracts and the "contract bar rule" concerning the filing of representation petitions. They do not establish the existence of any requirement, by statute or rule, of contract ratification by the membership of a bargaining unit. To establish a formal ratification rule would be to disturb the essence of the policy that employees may select representatives to engage in collective bargaining. It also would exalt technical rules of parliamentary procedure over the policy of the law.[4]

Employer's Motions at Hearing

At the close of the hearing, the school district made a motion to conform the pleadings to the evidence presented. It argued that the record revealed that

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[4] This case has many similarities to those in the private sector where tentative agreement has been reached but the ratification process was conducted in a bizarre or confusing manner. In NLRB v. M & M Oldsmobile, 377 F.2d 712, 64 LRRM 2149 (2nd Cir. 1967), the union president presented a last, best, and final offer to the membership by calling for a show of hands favoring a strike. When a minority of hands went up, he asked for votes "against ratification" and again a minority of hands went up. NLRB and the court agreed that a ratification had taken place, noting that "in enforcing the National Labor Relations Act, it is not necessary to import either Roberts' Rules of Order or common-law intricacies". (65 LRRM at 2153). The employees in V & M Manufacturing Co. and Teamsters Local 249, 168 NLRB 61, 67 LRRM 1015 (1967) approved a newly negotiated contract once they received a printed version. The NLRB ordered the union to execute the agreement. The courts in Washington state have been in accord where the issue was whether a collective bargaining agreement had been formed for purposes of Section 301 of the LMRA. See: Retail Employees Local 1207 v. Sears, Roebuck and Comp., 47 LRRM 2354 (DC W. Wash, 1960) and Concrete Technology Corp. v. Laborer's International Union Local 252, 3 Wa.App 869, 76 LRRM 2711 (Wa.App II, 1970).

the union had not recommended ratification of the tentative agreement reached in July of 1985, and that an unfair labor practice had thereby been committed in addition to the refusal to sign the tentative agreement. The school district also made a motion to amend the complaint based upon the same evidence and proof. The examiner took both motions under advisement.

The motions in Case No. 6023-U-86-1127 must be viewed in the light of WAC 391-45-070 which says in pertinent part:

> [A]ny complaint may be amended upon motion made by the complainant to the executive director or the examiner prior to the transfer of the case to the commission.

A motion to conform the pleadings to the evidence can be made at any time by any party, even after a judgment is rendered, according to Civil Rule 15(b), Washington Court Rules, 1984 at pp. 518. This motion to conform the pleadings to the evidence was timely made under either standard, and is granted.

It was obviously late in the litigation process when the employer first suggested that the lack of a bargaining team recommendation was, by itself, an unfair labor practice under Chapter 41.59 RCW. The employer devotes some six pages of its post-hearing brief arguing this proposition. A review of the testimony and cross-examination on this issue leads to an inevitable conclusion: The union's bargaining team made no affirmative statement of recommendation at either the September 5th or September 10th meeting.

In asserting that the failure of the union bargaining team to recommend approval of the tentative agreement was, by itself or in conjunction with the entire scheme of events, an unfair labor practice, the district relies on NLRB v. Virginia Electric and Power Co., 314 U.S. 469 (1941). It is true that the "whole course of conduct" between the parties must be examined. Other cases use the phrase "totality of circumstances" in describing a standard of proof for bargaining in bad faith. NLRB v. Tomco Communications, Inc., 567 F.2d 871, 97 LRRM 2660 (9th Cir. 1978); Seattle-First National Bank

v. NLRB, 638 F.2d 1221, 106 LRRM 2623 (9th Cir. 1981) and cases cited therein.

The examiner has reviewed the cases relied upon by the association and finds them distinguishable. In Royal School District, Decision 1419-A (PECB, 1984), a motion was made by the union because it first heard of circumvention activity on the part of the employer in testimony before PERC. The examiner there allowed the motion and issued a conclusion of law as to the amended charge, but the commission reversed and excised this conclusion of law, because the union had failed to move to conform the pleadings to the proof. In the case at bar, the moving party has made both motions. In Seattle-King County Health District, Decision 1458 (PECB, 1982), the amendment of the complaint was timely performed at the hearing but failed to amend the "factual allegations" contained in the complaint. This can be accomplished with a motion to conform the pleadings to the evidence. There are no internal union affairs to protect here, and the union has already made its answer to the charge, so there is no real reason to deny the motion to amend the complaint, notwithstanding the delay in its presentation.[5]

The district has cited no authority for the proposition that a union must recommend approval of tentative agreements. Indeed, any duty to recommend approval of a collective bargaining agreement to a union's membership would have to arise out of an express agreement between the parties during negotiations, and not from RCW 41.56.140. When the evidence of record in this case is examined, however, it reveals very little with respect to such an obligation on the part of the union. While the record reveals nothing as to whether the union's bargaining team agreed to recommend approval of the tentative agreement, the testimony of Pete Jarvis, Gretchen Campbell and the

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[5] The events complained of took place more than six months before the amendment was made, suggesting possible application of the "statute of limitations" set forth in RCW 41.59.160. On the other hand, an employer is not at liberty to delve into the internal affairs of a union, and so may have had these facts concealed from it so as to toll the period of limitations. This issue is not determined, since the allegation must be dismissed on the merits anyway.

other bargaining team members shows that they believed an implicit recommendation was being made, and that the members of the union's bargaining team assumed that the contract would be approved as negotiated. No unfair labor practice is made out by these facts.

FINDINGS OF FACT

1. Naches Valley School District JT-3, a school district organized and operated under Title 28A RCW, is an employer within the meaning of RCW 41.59.020(5).

2. Naches Valley Education Association, an employee organization under RCW 41.59.020(1), is the exclusive bargaining representative of non-supervisory certificated employees of Naches Valley School District.

3. The parties commenced negotiations in June, 1985, to replace a collective bargaining agreement due to expire on August 31, 1985.

4. On July 22, 1985, after two meetings, the parties reached tentative agreement on a two-year collective bargaining agreement for the period 1985-1987. A settlement document was prepared and signed on July 22, 1985 by representatives of both parties. Among items agreed to was provision for an extra day of work for bargaining unit employees in each of the two years of the contract (to be paid at their "per diem" salary in addition to their annual salary). The union agreed to drop its request for cash-out of accumulated sick leave.

5. A union official indicated to the school district's superintendent on July 22, 1985 that a ratification vote would be held soon after the September 3, 1985 beginning of the new school year.

6. At a meeting of the school district board of directors held on August 26, 1985, the president of the union gave assurance to the school board that the teachers "had no problem" with the tentative agreement reached

on July 22, 1985. Relying upon that information, the board of directors voted to approve the agreement and signed a contract for 1985-1987.

7. By August 28, 1985, all members of the bargaining unit returned signed supplemental contracts for the extra work day negotiated by the parties on July 22, 1985. All such employees worked the extra work day on August 28, 1985 and have been paid for that work in accordance with the terms agreed upon on July 22, 1985 and ratified by the school district board of directors on August 26, 1985.

8. On September 5, 1985, the union membership voted on the agreement reached by the parties on July 22, 1985. A motion to "not ratify" failed. Most members of the union believed they had tabled consideration of the contract. The president of the union scheduled another vote on the matter. On September 10, 1985, the union membership voted to reject the agreement reached on July 22, 1985. The union thereafter informed the school district of the rejection.

9. Since September 10, 1985, the union has requested additional collective bargaining meetings and has declined to sign and execute the tentative agreement reached July 22, 1985. The school district has declined to participate in further negotiations, and has demanded that the union sign a contract reflecting the terms agreed upon on July 22, 1985.

CONCLUSIONS OF LAW

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

2. The additional work day to be worked by bargaining unit employees at per diem salary and the withdrawal of the union's demand for sick leave cash out were substantial components of the agreement reached by the union and the district under Chapter 41.59 RCW on July 22, 1985.

3. By giving assurances to the board of directors of the school district, in person and while acting in his official capacity, that the union members had "no problem" with the July 22nd tentative agreement, the president of the union induced the employer to ratify the terms agreed upon between the parties on July 22, 1985 and induced it to proceed with plans for holding the agreed upon extra work day on August 28, 1985. The district justifiably relied on those representations.

4. By signing and returning individual supplemental contracts and by working on the extra work day made available by the school district on August 28, 1985 in accordance with the agreement reached on July 22, 1985, all of the employees in the bargaining unit indicated their assent to, performed and accepted the benefits of a material term and condition of that agreement, so that a contract was formed between the parties under RCW 41.59.020(2).

5. Since a contract was formed between the parties by the actions of the union's officials and members on July 22, 1985, August 26, 1985 and August 28, 1985, the purported actions of the union membership on and before September 10, 1985 to withhold ratification are of no force and effect.

6. By refusing, on and after September 11, 1985, to re-open negotiations on the agreement, Naches Valley School District JT 3 has not breached its duty to bargain in good faith and has not violated RCW 41.59.140.

7. By refusing, on and after September 11, 1985, to execute a collective bargaining agreement reflecting the terms agreed upon by the parties on July 22, 1985 and tendered to it by the Naches Valley School District, the Naches Valley Education Association has failed and refused to bargain collectively in good faith within the meaning of RCW 41.59. 020(2) and has committed unfair labor practices within the meaning of RCW 41.59.140(2)(c).

8. The representatives of the Naches Valley Education Association did not violate RCW 41.59.140 by failing to recommend affirmatively approval of the collective bargaining tentative agreement reached on July 22, 1985.

From the foregoing findings of fact and conclusions of law, the examiner makes the following:

ORDER

IT IS ORDERED, that

1. The complaint charging unfair labor practices in Case No. 6018-U-85-1126, alleging violations on the part of the Naches Valley School District, is DISMISSED.

2. The amended complaint charging unfair labor practices in Case No. 6023-U-85-1127 is DISMISSED insofar as it alleges a violation on the part of the Naches Valley Education Association for the failure of its officials to recommend affirmatively ratification of the agreement reached by the parties in collective bargaining on July 22, 1985.

3. To remedy its violation of RCW 41.59.140(2)(c), the Naches Valley Education Association, its officers and agents, shall immediately:

   A. Cease and desist from:

      1. Refusing to execute a collective bargaining agreement reflecting the terms agreed upon by the parties on July 22, 1985.

      2. Demanding that the Naches Valley School District reopen collective bargaining negotiations by reason of the purported rejection of the July 22, 1985 agreement by its membership.

B. Take the following affirmative action which the examiner finds will effectuate the purposes and policies of the Educational Employment Relations Act, Chapter 41.59 RCW:

1. Execute the collective bargaining agreement tendered by the Naches Valley School District for the period 1985-87 in accordance with the agreement reached on July 22, 1985.

2. Post, on such bulletin boards on the employer's premises where union notices to bargaining unit employees are usually posted, copies of the notice attached hereto and marked "Appendix A". Such notices shall, after being duly signed by an authorized representative of the Naches Valley Education Association, be and remain posted for twenty (20) days. Reasonable steps shall be taken by the Naches Valley Education Association to ensure that said notices are not removed, altered, defaced or covered by other material.

3. Notify the Executive Director of the Commission, in writing, within twenty (20) days following the date of this order, as to what steps have been taken to comply herewith 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, this 9th day of January, 1987.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

J. MARTIN SMITH, Examiner

This order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-35-350.

APPENDIX "A"

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, AND IN ORDER TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT, WE HEREBY NOTIFY CERTIFICATED EMPLOYEES OF NACHES VALLEY SCHOOL DISTRICT JT 3 THAT:

Collective bargaining for a 1985-87 agreement was concluded on July 22, 1985 with a tentative agreement signed by representatives of the Naches Valley Education Association (NVEA) and the Naches Valley School District. Important provisions of that agreement included the addition of one "optional" inservice day per year (for which employees were to be paid by the district at per diem of their regular salary) and the continued omission of sick leave cashout provisions from the contract.

The agreement reached on July 22, 1985 became binding upon the NVEA by reason of: 1) Assurances given by an NVEA official to the Naches Valley School District on August 26, 1985, which induced the board of directors of the school district to ratify and sign the agreement; and 2) By reason of the acceptance and performance of the terms of the contract by most, if not all, bargaining unit employees, when they tendered supplemental individual contracts for and worked on August 28, 1985. The purported rejection of that agreement on September 10, 1985 was without legal effect.

WE WILL NOT insist that the Naches Valley School District reopen collective bargaining negotiations for 1985-87 by reason of the purported rejection of the July 22, 1985 agreement by the membership of the Naches Valley Education Association.

WE WILL execute the collective bargaining agreement tendered by the Naches Valley School District for the period 1985-87 in accordance with the agreement reached on July 22, 1985.

NACHES VALLEY EDUCATION ASSOCIATION

By: _____
AUTHORIZED SIGNATURE

DATED: _____

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

This notice must remain posted for twenty (20) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice of compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone (206) 753-3444.