STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PE ELL SCHOOL DISTRICT, Employer,	
ALEX RAJALA, Complainant, vs. PE ELL EDUCATION ASSOCIATION, Respondent.	CASE 8736-U-90-1906 DECISION 3801-A - EDUC FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Alex Rajala, Attorney at Law, appeared pro se.

Eric R. Hansen, Attorney at Law, appeared on behalf of the union.

On August 21, 1990, Alex Rajala filed a complaint charging unfair labor practices against the Pe Ell Education Association (union), alleging that the union discriminated against him in negotiating the salary schedule for the 1989-90 school year, in violation of RCW 41.59.140(2)(a) and (b). A hearing was held in Pe Ell, Washington, on September 17, 1991, before Examiner Mark S. Downing. Both parties waived the filing of post-hearing briefs.

BACKGROUND

The Pe Ell School District (employer) is located in the southwest portion of the state of Washington.

The Pe Ell Education Association, an affiliate of the Washington Education Association (WEA), is the exclusive bargaining represen-

tative for a unit of approximately 23 non-supervisory certificated (teacher) employees of the employer.

Alex Rajala is a non-supervisory certificated employee of the Pe Ell School District. He was formerly a teacher in the Pomeroy School District, which is located in the southeast portion of the state of Washington.

The State of Washington utilizes a salary allocation formula to distribute state monies to local school districts for employee salaries. The state salary schedule in effect at the time of this complaint consisted of 9 columns recognizing the educational levels attained by employees,[1] and 16 rows recognizing employees' years of experience (0, 1, 2 ... 15). As the state schedule is merely a funding formula, employers and unions are free to negotiate any salary schedule for certificated employees that they so choose. See, Auburn School District (Auburn Education Association), Decision 3406, 3407 (EDUC, 1990).

The allegation before the Examiner in this case is limited to a claim that Rajala's salary was discussed during union meetings held in the spring and summer of 1990, and that the union engaged in unlawful discrimination when it decided which salary schedule to pursue in collective bargaining negotiations with the employer.[2] Rajala alleges that the discussion of his salary at the union meetings included how the amount of money generated by his

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1 The columns represent the BA (baccalaureate), BA+15, BA+30, BA+45, BA+90, BA+135, MA (masters), MA+45, MA+90 or PhD (doctorate) degrees.

2 Prior to the assignment of this case to the undersigned Examiner, it was reviewed by the Executive Director of the Commission in accordance with WAC 391-45-110. A preliminary ruling made under that rule assumes that the factual allegations set forth in a complaint are true and provable. The only question involved there is whether the complaint states a cause of action within the meaning of the applicable collective bargaining statute.

education and experience under the "state allocation model" could be reduced and divided among other union members through a "contrived" salary schedule.[3] Rajala alleges that the union

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[3] Rajala's original complaint alleged that the union had failed to notify him of union meetings. In a preliminary ruling issued on December 12, 1990, the Executive Director referred to Lewis County, Decision 464-A (PECB, 1978), noting that although unions have a duty of fair representation for all bargaining unit employees, they also have the right to limit participation of non-members in union business. See, also, Lewis County, Decision 556-A (PECB, 1979), where the Commission rejected an employer argument that it had no obligation to bargain with a union that did not allow non-members to participate in the formulation of bargaining proposals. Rajala was given 14 days to supply additional information, or face dismissal of the complaint.

Rajala responded on December 27, 1990, indicating that he was not a member of the union, but was a member of another teacher organization. He alleged that he was unaware of his wages, hours and conditions of employment, because the union had refused to inform him of the results of the previous year's contract negotiations.

Another preliminary ruling issued on April 9, 1991 reiterated the holding of Lewis County, supra, with regard to the exclusion of a non-member from participation in union business. In regard to the allegation of an inability to obtain information from the union, Rajala was directed to provide more details about his requests and union refusals, or risk dismissal of his complaint.

A response filed by Rajala on April 23, 1991, set forth excerpts of letters he had written to the union about his exclusion from union meetings. Rajala stated that the union had provided him with a contract representing the results of the 1989-90 negotiations.

A formal order issued by the Executive Director on June 12, 1991, Pe Ell School District (Pe Ell Education Association), Decision 3801 (EDUC, 1991), found a cause of action to exist only with respect to:

> Discrimination by the union in negotiating a salary schedule which disadvantages the complainant, because of his activities protected by Chapter 41.59 RCW.

The undersigned Examiner was designated to conduct further proceedings. The allegations concerning notice of union meetings were dismissed for failing to state a cause of action. Rajala did not file a petition for Commission review of that order of dismissal.

purposefully reduced his salary for the 1989-90 school year from what it might been under the state schedule. Rajala claimed that the union was discriminating against him based on his dealings with the WEA in the Pomeroy School District, where he formed an independent union that lost a representation election to a WEA affiliate in 1979-80. Rajala also alleges that the president of the WEA affiliate at Pomeroy spoke against his position during an arbitration hearing in 1982.[4]

POSITIONS OF THE PARTIES

Rajala now acknowledges that the union did not intentionally discriminate against him. He alleges, however, that the results of the collective bargaining negotiations conducted by the union amounted to discrimination against his interests. Rajala claims that he made $5,000 less under the salary schedule negotiated for the 1989-90 school year than the monies generated by his level of education and experience under the state salary schedule. Rajala lays the blame for this alleged discrimination at the door of the WEA, contending that it consulted with the Pe Ell Education Association concerning collective bargaining negotiations, at a time when it knew of its previous controversies with Rajala.[5]

The union denies that any discrimination occurred against Rajala in negotiating the 1989-90 salary schedule. The union maintains that the salary schedule agreed upon in collective bargaining had been in existence for 25 years, and was adopted because "a majority of

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4 Rajala joined the American Federation of Teachers (AFT) in the autumn of 1990, but that was after the conduct complained of in this case.

5 Rajala continued to complain at the hearing about the union's failure to notify him of meetings held to decide bargaining strategies, claiming that all bargaining unit employees, not just union members, should have been allowed to vote on union negotiations proposals.

members in the school district would benefit" from it,[6] as compared to being under the state salary schedule. The union claims that its members were unaware of Rajala's decertification efforts at the Pomeroy School District or that he was an AFT member. The union seeks an award of attorney's fees, arguing that Rajala failed to bring forth any evidence of discriminatory intent by the union.

DISCUSSION

Res Judicata Principles

The portions of the complaint dealing with Rajala's exclusion from union meetings were dismissed by the Executive Director in his order issued on June 12, 1991. Rajala made no attempt to appeal that ruling, pursuant to WAC 391-45-350. In the absence of an appeal, orders of the Commission are final. Public Utility District 1 of Clark County, Decision 3815-A (PECB, 1992).

Rajala continues to argue that the union had an obligation to notify him of its meetings, although he was not a union member. The dismissed portions of Rajala's complaint were not forwarded to the undersigned Examiner for further proceedings, and those issues are not considered by the Examiner in this decision.

The Duty of Fair Representation

An employee organization owes a duty of fair representation to all employees in a bargaining unit that it represents. That duty arises out of the "exclusive bargaining representative" status bestowed upon a union under the Educational Employment Relations Act, Chapter 41.59 RCW, at RCW 41.59.090:

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[6] Although counsel for the union used the term "members" in closing argument, that is not interpreted as distinguishing union members from other bargaining unit members.

> 41.59.090 CERTIFICATION OF EXCLUSIVE BARGAINING REPRESENTATIVE -- SCOPE OF REPRESENTATION. The **employee organization** which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and **shall be required to represent all the employees within the unit without regard to membership in that bargaining representative** ... [emphasis by **bold** supplied]

The right of employees to refrain from union membership or activity is secured by Chapter 41.59 RCW, as follows:

> 41.59.060 EMPLOYEE RIGHTS ENUMERATED ... (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 of such activities** ... [emphasis by **bold** supplied]

The obligation of employee organizations to represent all employees in a bargaining unit without consideration of union membership status is enforced through the unfair labor practice provisions of the statute, as follows:

> 41.59.140 UNFAIR LABOR PRACTICES FOR EMPLOYER, EMPLOYEE ORGANIZATION, ENUMERATED.
> (1) It shall be an unfair labor practice for an employer:
> ...
> (c) **To encourage or discourage membership in any employee organization by discrimination** in regard to hire, tenure of employment or any term or condition of employment ...
> ...
> (2) It shall be an unfair labor practice for an employee organization:
> (a) To restrain or coerce (i) employees in the exercise of the rights guaranteed in RCW 41.59.060 ...
> (b) **To cause or attempt to cause an employer to discriminate against an employee**

> **in violation of subsection (1)(c) of this section; ...** [emphasis by **bold** supplied]

The respondent union in this proceeding enjoys the status of exclusive bargaining representative of the certificated employees of the Pe Ell School District, including the complainant.

A union's duty of fair representation was described by the Supreme Court of the United States in Vaca v. Sipes, 386 U.S. 171 (1967), as follows:

> [T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. [citation omitted]

Vaca v. Sipes, at page 177.

Under this standard, a union cannot discriminate against employees based on membership or non-membership in a labor organization.

Vaca v. Sipes, supra, arose out of a dispute concerning a union's failure to process a contract grievance, but the same principles were recently applied to other situations by the unanimous ruling of the Supreme Court in Air Line Pilots Association v. O'Neill, ___ U.S. ___, 111 S.Ct. 1127, 136 LRRM 2721 (1991). In the latter case, a group of employees filed suit against the union, alleging that it had breached its duty of fair representation in negotiating a settlement agreement to end a strike that had lasted for over two years. The Court ruled that the Vaca v. Sipes standard of "arbitrary, discriminatory, or in bad faith" applies to all union activity, including contract negotiations. The Court made reference to its previous rulings applying the duty of fair representation to a union's contract administration and enforcement efforts, and to a union's actions in a representative role, such as

when it operates a hiring hall. The Court stated that a union owes employees a duty to represent them adequately as well as honestly and in good faith.[7]

Duty of fair representation principles were adopted by the Supreme Court of Washington in Allen v. Seattle Police Officers' Guild, 100 Wn.2d 361 (1983). The Court held that a union must conform its behavior to the following three-fold standard based on Vaca v. Sipes:

> First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. ...

Allen v. Seattle Police Officers' Guild, at page 375, quoting Griffin v. UAW, 469 F.2d 181, 183 (4th Cir., 1972).

The duty of fair representation was first applied under Chapter 41.59 RCW in Elma School District (Elma Teachers Organization), Decision 1349 (EDUC, 1982). An independent employee organization held "exclusive bargaining representative" status, and was requested to assist a unit employee who belonged to the WEA in challenging a discharge decision. After the grievance was dropped by the union as lacking merit, the employee filed an unfair labor practice complaint, claiming that the union had failed to adequately assist her in pursuing the grievance because she was not a member of that organization. While the legal principles drawn from Vaca v. Sipes, supra, were found to be applicable, the Examiner concluded that the employee failed to prove that she was treated

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[7] The Court held, however, that the conduct of the union involved in the O'Neill case was well within the "wide range of reasonableness" that a union is allowed in the bargaining arena.

any differently because of her union membership status, so no violation of the duty of fair representation was found.

The Commission asserts jurisdiction to police its certifications under RCW 41.59.090 and to determine unfair labor practices under RCW 41.59.140, where it is alleged that a union has discriminated, or has aligned itself in interest against an employee within the bargaining unit it represents. See, Pateros School District (Pateros Education Association), Decision 3744, 3745 (EDUC, 1991). In addition to a remedial order in favor of a successful complainant employee in such a case, a union found guilty of discriminating against a bargaining unit employee for protected activities jeopardizes its right to continue to enjoy status as exclusive bargaining representative. City of Seattle (International Federation of Professional and Technical Engineers, Local 17), Decision 3199 (PECB, 1989).

The Burden of Proof

To establish a "discrimination" violation by a union, it must be demonstrated that the organization has:

> ... deprived a bargaining unit member of some ascertainable right, withholds benefits to which an employee would otherwise be entitled, takes adverse action against an employee in reprisal for the exercise of protected activity, has unfairly or unequally applied policy, or differs in its treatment of the members of a bargaining unit in reprisal for that member's pursuit of lawful activities.

City of Seattle (International Federation of Professional and Technical Engineers, Local 17), Decision 3199-B (PECB, 1991), at page 37.

A complainant alleging an unfair labor practice violation has the burden of proof. See, WAC 391-45-270. Allegations of discrimination in reprisal for an employee's exercise of protected activities

are analyzed under a three-part test. The complainant in such a case must show that:

> 1) The employee was engaged in protected activity; 2) The [respondent] was aware of the employee's protected activity; and 3) The [respondent] intended to discriminate. [citation omitted]

City of Seattle, Decision 3066 (PECB, 1988), at page 9.

In this matter, Rajala must prove that he was engaged in protected activities, that the union was aware of such activities, and took certain actions against him with the intent to discriminate.

The Commission has adopted the Wright Line causation test for balancing the rights of employees with those of a union or employer in cases where discriminatory motivation is alleged. City of Olympia, Decision 1208-A (PECB, 1982), citing with approval Wright Line, 251 NLRB 1083 (1980). Under that test, an employee must first make a prima facie showing that protected conduct was a motivating factor in the respondent's decision. Once such a showing is made, the burden shifts to the respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. See, City of Seattle, supra; Port of Seattle, Decision 3294-A, 3295-A (PECB, 1991).

Was Rajala Engaged in Protected Activities?

Actions and activities undertaken by public employees to advance or enforce rights granted to them under state collective bargaining statutes are known as "protected activities". For example, the filing and processing of grievances through a contractual grievance procedure is a protected activity. Valley General Hospital, Decision 1195-A (PECB, 1981). RCW 41.59.060(1) specifically protects the right of employees to form and join unions of their

own choosing, so an employee's efforts to create an employee organization or seek certification for it are "protected".

Rajala presented uncontradicted testimony that, while employed by the Pomeroy School District in 1979-80, he formed and was president of an independent teachers union involved in a representation proceeding before the Commission. A WEA affiliate was also on the ballot. While Rajala failed to substantiate his allegation that the independent union lost the election to the WEA affiliate, the docket records of the Commission confirm that claim.[8]

Rajala also provided uncontradicted testimony concerning an arbitration hearing held in 1982, while he was still employed at Pomeroy. Rajala indicated that there was substantial correspondence prior to the hearing,[9] relating to who would represent him

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8 Notice is taken of the docket records of the Commission for Case 2395-E-79-437, which indicate that the Garfield County Education Association was certified, on November 13, 1979, as the exclusive bargaining representative for all regular part-time and full-time teachers employed by the Pomeroy School District. See, <u>Pomeroy School District</u>, Decision 764 (EDUC, 1979). The certification was issued after an election between the incumbent Association and a petitioning organization known as the "Independent Pomeroy Educators". Rajala appeared for the later party in those proceedings.

9 It also appears that Rajala initiated an unfair labor practice complaint against the WEA involving this issue. See, <u>Pomeroy School District (Garfield County Teachers Association)</u>, Decision 1610 (EDUC, 1983). Rajala sought to litigate a dispute over funding of the arbitration process, and the arbitration procedure itself. Documents indicated that the WEA conditioned funding for arbitration of Rajala's grievance on its having control of the proceedings. When Rajala insisted on the use of his own legal counsel, the WEA threatened to withdraw its support. The Executive Director dismissed the complaint, ruling that an individual is not entitled to invoke the arbitration procedure, and that the provisions of RCW 41.59.090 allowing an employee to present a grievance without union intervention do not provide otherwise.

in arbitration, and that the president of the local WEA affiliate spoke against Rajala's position.

Rajala does not claim that he was engaged in any protected activities at Pe Ell at the time of the alleged discrimination. His testimony concerning events in the Pomeroy School District was sufficient, however, to meet his burden of proof regarding his participation in protected activities in the past.

Did the Union Intend to Discriminate Against Rajala?

Union meetings were held during the spring and summer of 1990, to select a salary schedule to propose to the employer in contract negotiations. Four different salary schedules had been created for the union membership to consider. Those included the schedule historically in effect at Pe Ell, the state salary schedule, and two schedules taking somewhat of a "middle of the road" approach.

Rajala called only one witness to testify concerning what transpired at the disputed union meetings. Sharon Rhodes is a teacher in the Pe Ell School District, and she attended union meetings during May and June of 1990 where different proposed salary schedules were discussed. She testified that after a vote of the membership resulted in a tie, a tie-breaking vote was taken to select the salary schedule to be proposed to the employer in contract negotiations.

In contrast, the union presented testimony from four witnesses, three of them members of the union negotiating committee for the 1989-90 school year. The fourth union witness, Diane Sibbert, was not a member of the union negotiating committee, but had been president of the union for the 1987-88 and 1988-89 school years, and was involved in the preparation of the salary schedules considered at the disputed union meetings in advance of the 1989-90 negotiations.

Sibbert explained that the "Pe Ell salary schedule" had been in existence for over 25 years, with only minor changes. It provides employees with salary increases at more levels of educational achievement than does the state salary schedule.[10] The effect is that employees receive pay increases for their educational achievements at a faster pace under the Pe Ell schedule than under the state schedule.

Three votes were taken by the union membership to decide which salary proposal should be taken to the bargaining table. The first vote eliminated the least popular schedule. A second vote was taken for the same purpose. In the final vote, with only two choices remaining, the union membership voted to stay with the schedule historically used at Pe Ell. Although Sibbert herself made less money under the Pe Ell schedule than under the state schedule, she stated that a majority of employees would receive more money by keeping the Pe Ell schedule. Sibbert testified that Rajala's name was never mentioned at these union meetings, nor were there any discussions about reducing his salary because he was not a union member.

Confirming testimony was provided by Jill Feuchter, Joann Timpone and Judy Gundersen, who were members of the union's negotiating team for 1989-90.[11] All three of those witnesses testified that there were no discussions about Rajala by members of the negotiating committee, and all three of them affirmed Sibbert's testimony

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[10] While the state schedule provides for salary increases at increments of 45 credit hours after the "BA+45" column, the Pe Ell schedule provides for salary increases at "BA+60" and "BA+75" levels of achievement. Credit hours refers to college quarter-hour credits and equivalent inservice credits, in accordance with RCW 28A.415.020, earned by the employee after a B.A. degree.

[11] Feuchter was also president of the union for the 1989-90 school year.

that there was no mention of Rajala's name during the union meetings.

A union can rarely provide all things desired by all of the employees it represents, and a union is under no obligation to negotiate equal rights and benefits for all bargaining unit employees. Absolute equality of treatment is not the standard for measuring a union's compliance with the duty of fair representation. Citing Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), the Court in Air Line Pilots Association v. O'Neill, supra, held that a union's actions are arbitrary only if they are so far outside a "wide range of reasonableness" as to be irrational. The Supreme Court's statement in Ford Motor Co. v. Huffman is illustrative of the discretion that a union is allowed:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Ford Motor Co. v. Huffman, supra, at page 338.

The union membership or leadership must often make hard decisions concerning priorities for its bargaining goals and strategies. A union is permitted wide latitude in negotiating collective bargaining agreements, so long as it acts in good faith and with honest intentions.

In this case, the union membership voted to seek continuation of the salary schedule historically used in the Pe Ell School District. There is no evidence to suggest that this decision was made with any discriminatory intent toward Rajala. It is not

surprising that the union membership reached such a decision during its deliberations. There is no evidence to suggest that the union acted in anything other than complete good faith and honesty of purpose in making this decision.

Was the Union Aware of Rajala's Protected Activities?

Discriminatory intent cannot be proven unless the party accused of discrimination is aware of an employee's involvement in protected activities. Rajala failed to present any evidence demonstrating that the union was aware of his protected activities at the Pomeroy School District.

Nor is there any basis to make adverse inferences against the union. Although Sibbert attended a WEA training session to learn the duties of a union officer, she testified that she received no help from WEA representatives in drawing up the proposed salary schedules. She was unaware that Rajala led an organizing effort on behalf of another union at the Pomeroy School District, or that Rajala was a AFT member during the 1989-90 school year. Feuchter, Timpone and Gundersen also indicated an absence of knowledge concerning Rajala's protected activities while employed in the Pomeroy School District, or that he was an AFT member during the 1989-90 school year.

Conclusions

Under the Wright Line test, Rajala failed to make a prima facie showing that protected conduct was a motivating factor in the union's decision to select retention of the Pe Ell salary schedule as its bargaining position. There was no proof that the union was even aware of his prior protected activities at the Pomeroy School District. Rajala's membership in the AFT could not have been a motivating factor in discriminatory conduct by the union during the

spring and summer of 1990, as the evidence indicates that he did not become a member of the AFT until the autumn of 1990.

As Rajala failed to carry his burden of proof, there is no need to shift the burden to the union for any substantiation or explanation of its actions. The complaint charging unfair labor practices must be dismissed.

FINDINGS OF FACT

1. The Pe Ell School District is organized and operated under Title 28A RCW, and is an employer within the meaning and coverage of the Educational Employment Relations Act, Chapter 41.59 RCW.

2. The Pe Ell Education Association is an employee organization within the meaning of RCW 41.59.020(1). The union is the exclusive bargaining representative for a unit of certificated employees of the Pe Ell School District.

3. Alex Rajala is a certificated employee of the Pe Ell School District and holds a position within the bargaining unit represented by the union. Rajala is not a member of the union. In 1979-80, while employed at the Pomeroy School District, Rajala formed and was president of an independent teachers union that lost a representation election to an affiliate of the Washington Education Association (WEA). Rajala was subsequently involved in disputes with the WEA concerning the arbitration of a grievance concerning his employment at the Pomeroy School District.

4. During the spring and summer of 1990, the union met and voted to propose the retention of the "Pe Ell salary schedule" in collective bargaining negotiations with the employer. That

salary schedule, with minor changes, had been in existence for over 25 years. The record does not sustain a finding that the union was aware of Rajala's protected activities while employed in the Pomeroy School District, or that the union's actions were debated or designed to discriminate against Rajala.

5. In the autumn of 1990, after the complaint was filed in this matter, Rajala joined another labor organization, the American Federation of Teachers (AFT).

6. On June 12, 1991, the Executive Director of the Commission issued a preliminary ruling on Rajala's complaint, as amended. That ruling dismissed an allegation involving the exclusion of Rajala from union meetings. Rajala did not appeal the ruling.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.59 RCW and Chapter 391-45 WAC.

2. The order of dismissal issued by the Executive Director, as described in paragraph 6 of the foregoing findings of fact, is res judicata as to the issues decided therein, and those matters are not before the Examiner under Chapter 391-45 WAC.

3. Alex Rajala was engaged in activities protected by Chapter 41.59 RCW when he led an organizational effort on behalf of another employee organization at the Pomeroy School District, and when he sought to arbitrate a grievance arising out of his employment with the Pomeroy School District.

4. Rajala failed to make a prima facie showing sufficient to support an inference that his participation in protected

activities at the Pomeroy School District was a motivating factor in the union's decision to propose retention of the "Pe Ell salary schedule" in collective bargaining negotiations with the employer, and so has failed to establish a violation of RCW 41.59.140(2) by the Pe Ell Education Association.

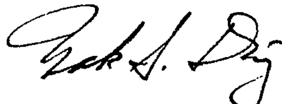
NOW THEREFORE, IT IS

ORDERED

The complaint charging unfair labor practices filed in this matter is hereby dismissed.

ENTERED at Olympia, Washington, on the 1st day of May, 1992.

PUBLIC EMPLOYMENT
RELATIONS COMMISSION



MARK S. DOWNING
Examiner

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