STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

MANSFIELD SCHOOL DISTRICT, Complainant,	)	CASE 10762-U-93-2499
vs.	)	DECISION 4552-A - EDUC
MANSFIELD EDUCATION ASSOCIATION, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER.

Schwerdtfeger and Associates, by Robert D. Schwerdtfeger, represented the employer.

Eric R. Hansen, Staff Attorney, Washington Education Association, represented the union.

On November 3, 1993, the Mansfield Education Association filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the Mansfield School District had violated RCW 41.59.140, by its conduct during the parties' negotiations for a successor collective bargaining agreement. The complaint was the subject of a preliminary ruling issued on November 10, 1993, in which certain allegations were found to state a cause of action, while others were not. The complainant was given a period of 14 days in which to file and serve an amended complaint with respect to the insufficient allegations.

An amended complaint was filed on November 24, 1993. On December 8, 1993, the Executive Director issued a preliminary ruling which dismissed some allegations in the complaint and amended complaint as untimely, or because they did not state a cause of action.[1] The

[1] Mansfield School District, Decision 4552 (PECB, 1983).

Executive Director's order found a cause of action to exist with respect to allegations that the employer:

* Rejected union proposals on May 4, 1993, without explanation or direct response.

* Refused to schedule bargaining sessions except at intervals of several weeks.

* Sent its negotiators to the bargaining table without authority to respond to union proposals.

* Rejected a union proposal for dues deduction.

* Claimed that matters involving past practices were a management prerogative, and not subject to negotiations.

* Stated that the determination of just cause for discipline was a management prerogative, and not subject to bargaining.

* Stated that all decisions regarding assignment, transfer, layoff, recall, teacher stipend day at the end of the school year, and supplemental contracts for extracurricular duty were to be made by management, and were not subject to bargaining.

* Provided "very few" explanations for its proposals, or for its rejections of union proposals.

* Demonstrated bad faith by the totality of its conduct, which constituted a general "refusal to bargain".

This case was given a priority for processing,[2] and the undersigned was assigned as Examiner on December 20, 1993. A hearing was conducted in this matter at Wenatchee, Washington, on January 10, 1994. The parties filed post-hearing briefs which were received on or before March 4, 1994.

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[2] There was indication that negotiations had "broken off", so that there was a complete shutdown of bargaining. The employer had requested factfinding on October 15, 1993, under RCW 41.59.120. On November 3, 1992, the complainant in this case moved for suspension of the factfinding process and reinstatement of mediation. That motion was denied by the Executive Director in the preliminary ruling. The factfinding process was delayed, however, apparently at the behest of the employer.

BACKGROUND

The Mansfield School District (employer) operates a public school system for approximately 134 K-12 students in the town of Mansfield and surrounding rural countryside in north-central Washington. William Thornton is the superintendent of schools.

The faculty for the school district consists of 12 or 13 teachers. They are represented for the purposes of collective bargaining by the Mansfield Education Association (union), an affiliate of the Washington Education Association.

The parties' latest collective bargaining agreement expired on August 30, 1993. Superintendent Thornton and school board members Tim Hicks and Doug Tanneberg were the employer's representatives in the parties' initial negotiations for a successor agreement. The union was represented initially by Roy Huffman, the president of the local association, and by Clarene Ricarte and Diana Michaelson, all three teachers in the district.

Negotiation Meeting - March 30, 1993 -
At their first negotiating session held on March 30, 1993, the union submitted its proposals to the employer. The union's proposal included eliminating substantial language from the management rights clause, changes in just cause procedures, changes in assignment, transfer and vacancies language, a new layoff and recall article, a new section on dues deduction, mandatory class size requirements, and changes in salary credits language, changed language concerning supplemental contracts, and changes to the extracurricular salary schedule.

The employer neither submitted its own proposals at that meeting, nor did it respond to the union's proposals.

Negotiating Meeting - May 4, 1993 -

The parties next met on May 4, 1993,[3] where the employer responded to the union's proposals. The employer's responses consisted primarily of deletions of existing language or new proposals which had the effect of removing language and changing existing working conditions outlined in the expiring collective bargaining agreement. The employer rejected the union's proposal that would have put layoff/recall and dues deduction language into the collective bargaining agreement for the first time. It rejected a proposal concerning the use of 30 minutes before and after school, because it limited "management's rights". It proposed eliminating supplemental contract language and existing extracurricular salary scales, asserting that such matters remain the prerogative of management. Union proposals on legislative salary mandates, training / clock hours / endorsements, sick leave sharing, personal leave, on-the-job accidents, and pay for attending training were also rejected.

Negotiating Meeting - June 8, 1993 -

At the parties' third meeting, on June 8, 1993, the union presented counter-proposals to the items the employer had placed on the bargaining table at the previous meeting. The parties did agree to retain the language of their expiring agreement on issues where neither side had proposed changes. As to a majority of the union's proposals, the employer's representatives indicated that they needed further time to "think about them".

Negotiating Meeting - June 28, 1993 -

At their next meeting, the parties discussed several of the proposals on the table. They tentatively agreed to a section on

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[3] A second meeting between the parties had been scheduled for April 27, 1993, but it was subsequently canceled. The union alleged that it was canceled because a member of the board of directors had a scheduled golf game.

the school board's agenda and minutes, but did not reach any substantial agreements on the remaining items under discussion.

Negotiating Meeting - July 13, 1993 -
From the testimony presented at the hearing, it appears that no significant issues were resolved at this meeting. There apparently was discussion of several outstanding issues, however.

Negotiating Meeting - August 3, 1993 -
From the testimony presented at the hearing, it appears that the main thrust of the discussions at this meeting was management's interest in putting together a "package" proposal, and its concern about preserving "management's rights". The employer indicated that the specific areas of concern affected by "management rights" were: Past practices, maintenance of benefits, layoff and recall, the due process proposals, assignments, vacancies and transfers, the use of the 30 minutes before and after school, and the extracurricular salary schedule. At the conclusion of this meeting, the union decided that the parties were at impasse and that it was interested in asking for a mediator to assist them in reaching an agreement.

Mediation Meeting - September 21, 1993 -
On September 21, 1993, the parties met with Katrina Boedecker, a mediator from the Commission's staff. At that meeting, the employer's labor relations consultant, Robert Schwerdtfeger, joined the management bargaining team, while the union's Uniserv representative, James Nelson, joined the union's bargaining team.

The employer reiterated that it considered several of the provisions under discussion to be "management's rights", and did not intend to include them in any collective bargaining agreement. The language and supplemental contracts schedule of the expiring collective bargaining agreement were specifically mentioned, because it was the employer's intent to hire and fire employees for

those positions without any "encumbrance" by contract language. The employer again rejected reduction-in-force, due process, and leave sharing provisions. As in earlier meetings, the employer neither offered counter-proposals nor indicated agreement with any of the proposals under discussion. Instead, the employer maintained that many, if not most, of the items on the table were "management's rights" that, from its perspective, should not be included in the collective bargaining agreement.

Mediation Meeting - October 11, 1993 -

At a second mediation meeting held on October 11, 1993, the union gave the mediator a new proposal. The union viewed its proposal as "comprehensive", and its stated purpose was to achieve closure on some of the issues. The mediator presented the union's revised positions to the employer, and worked back and forth between the parties for a time. Eventually, the mediator returned to the union with the message that there were only two changes in the employer's position: (1) A response on the reduction-in-force provisions, and (2) a response to on the legislative impact issue.

Request for Fact-finding -

A third mediation meeting was scheduled, but the employer canceled that meeting and filed for fact-finding.

POSITIONS OF THE PARTIES

The union argues that the employer failed to fulfill its legal requirement of bargaining in good faith. It asserts that the employer created difficulties when the union first attempted to schedule negotiation meetings, that the employer then gave minimal responses (or no responses at all) to the union's proposals when the parties finally did meet, and that the employer's limited counter-proposals were merely to remove current benefits or protections from the parties' collective bargaining agreement. The

union alleges that the employer used the responses of "management's rights" in a pattern which left the association with no ability to counter-propose so that, without using direct language, the employer's responses effectively became a refusal to bargain on specific issues raised by the union.

The employer first argues that the Examiner should reject the amended complaint filed on November 23, 1993 as untimely. It defends against the core allegation of bad faith bargaining, by asserting that the union is attempting to use the unfair labor practice procedure to circumvent the fact-finding procedure. It argues that it bargained in good faith "by sending a bargaining team to the table, by meeting with the union, and by exchanging proposals". It acknowledges it did not agree with the union's proposals in many instances, and that it did not always offer counter-proposals because it did not want certain subjects to be included in the collective bargaining agreement. It further acknowledges that it responded to many issues by stating that it wanted the subject matter to be controlled by management. It asserts, however, that such responses meant it was unwilling to delegate authority to the union, not that it was unwilling to negotiate on the subject. Finally, the employer asserts that it is only required to give a single response to a bargaining proposal under the Commission's rules, and that it is not required to give "endless repetitive explanations ... to enlighten even the most uninformed or unskilled negotiator".

DISCUSSION

Motion to Dismiss the Amended Complaint

The employer argues that the amended complaint should be dismissed because the allegations contained therein are untimely. The

governing statutory provisions on filing and amending unfair labor practice complaints are RCW 41.59.150(1) and WAC 391-45-070:

> RCW 41.59.150 COMMISSION TO PREVENT UNFAIR LABOR PRACTICES--SCOPE. (1) The commission is empowered to prevent any person from engaging in any unfair labor practice as defined in RCW 41.59.140: PROVIDED, That **a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission.** This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, equity or otherwise.
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> * * *
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> WAC 391-45-070 AMENDMENT. Any complaint **may be amended** upon motion made by the complainant or the examiner **prior to the transfer of the case to the commission.**

[Emphasis by **bold** supplied.]

The union's original complaint filed on November 3, 1993 was timely with respect to events occurring on and after May 3, 1993.

In interpreting the provisions set forth above, the Commission has held that charges in an amended complaint will be considered as new items under the six-month time limitation, unless they relate back to specific charges set forth in the original complaint. Fort Vancouver Regional Library, Decision 2396-A (PECB, 1986). Applying that standard, the employer's claim in this case that the specifics set forth in the amended complaint occurred more than six months prior to the filing of the amendment is not persuasive.

In every instance, the union's amendments neither enumerate new events, nor raised subjects substantially different from those documented in the original complaint. Instead, the amendments consisted of statements added to the original complaint, detailing specific examples of what had been described in more general terms

in the original complaint. The union thus identified and further explained the specific management position on each of the subjects of the original complaint.[4] The motion for a dismissal of the amended charges of unfair labor practices is DENIED.

"Good Faith" Bargaining

The obligation to "bargain in good faith" is common to collective bargaining statutes at both the federal and state levels. In Washington, it is an integral part of the requirements statutorily imposed on both parties in a bargaining relationship:

> RCW 41.59.020 DEFINITIONS. As used in this chapter:
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> ...
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> (2) The term 'collective bargaining' or 'bargaining' means that performance of the **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: ...
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> [Emphasis by **bold** supplied.]

Also common to both federal and state collective bargaining laws is that the "good faith" obligation does not equate to attaining agreement on each and every issue raised in bargaining. RCW 41.59.030(2) concludes with:

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[4] For example, the employer's claim that paragraph nine of the amended complaint related back to a dues deduction proposal made on March 30, 1993 is both factually and legally incorrect. The phrase "such matters" in the amended statement actually referred to a "past practices" proposal complained of in the original complaint, rather than to the dues deduction topic. The complaint relating to past practices had been clearly identified and discussed in the original charge. The amendment only specified the management position on that subject.

> The obligation to bargain does not compel either party to agree to a proposal or to make a concession.

Thus, it is not surprising that the Commission was called upon early in its existence to provide guidance and definition to employers and bargaining agents on this subject.

In Federal Way School District, Decision 232-A (EDUC, 1977), the union accused the employer of engaging in surface bargaining, maintaining inflexible positions, and refusing to make counter-proposals.[5] The Commission's decision explained the background of the statutory language, and its application:

> Chapter 41.59 RCW superseded Chapter 28A.72 RCW, the Professional Negotiations Act. The prior law contained no provision for unfair labor practices and did not require that a school board bargain in good faith. It merely extended a right to an employee organization "to meet, confer and negotiate" with the school board with respect to proposed school policies, in order "to communicate the considered professional judgment of the certified staff prior to the final adoption by the Board. (See: Repealed RCW 28A.72.030).
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> In interpreting the [Educational Employment Relations] Act, we are obliged to consider the precedents of the National Labor Relations Board. (RCW 41.59.110(2)). As developed under the National Labor Relations Act, the duty to bargain in good faith is an "obligation ... to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement ...".
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> ...
> Differentiating between good faith "hard bargaining" and bad faith "surface bargaining" is no simple task. Where there have been

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[5] The complaint in Federal Way alleged other "incidents" of bad faith bargaining, but the Examiner found that they were not argued by the complainant nor supported by the record made by the parties.

> bargaining sessions, one cannot look at any one action or nonaction by the parties in making a determination. **The totality of conduct must be considered.** [emphasis by **bold** supplied.]

In a subsequent case decided under the Public Employees' Collective Bargaining Act,[6] the fact pattern was parallel to the instant case. In its analysis, the Commission came to the following conclusions:

> [The statute] states that "neither party shall be compelled to agree to a proposal or be required to make a concession". A similar provision is found in Section 8(d) of the National Labor Relations Act. Both this Commission and the federal tribunals have found that although there is no requirement that a party make concessions, a party is not entitled to reduce collective bargaining to an exercise in futility. In other words, the parties must negotiate with the view of reaching an agreement, if possible. See: NLRB v. Highland Park Mfg., 110 F.2d 632 (4th Cir., 1940). Thus, **a balance must be struck between the obligation of the parties to bargain in good faith and the requirement that the parties not be forced to make concessions.**
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> Specific decisions of the NLRB and of this Commission are illustrative of the balancing process. The NLRB has held that making predictably unacceptable or unpalatable proposals to another party is not, in and of itself, an unfair labor practice. NLRB v. Fitzgerald Mills, 313 F.2d 260 (2nd Cir., 1964). Nor is taking a firm position on certain issues necessarily an unfair labor practice. Philip Carey Mfg., 140 NLRB 1103 (1963), enf. in part, 331 F.2d 720 (6th Cir., 1964), cert. den., 379 U.S. 888 (1964). Isolated instances of less-than-commendable conduct do not dictate the conclusion that a refusal to bargain has occurred. See, generally, The Developing Labor Law, Chapter 13 - III. (Morris, ed. 1983). On the other hand, **if a party engages in tactics which evidence an intent to frus-**

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[6] Chapter 41.56 RCW imposes a similar duty to bargain in good faith, at RCW 41.56.030(4).

> **trate or stall agreement, then an unfair labor practice will be found.** NLRB v. Mar-Len Cabinets, Inc., 659 F.2d 995 (9th Cir., 1981); NLRB v. Wright Motors, Inc., 603 F.2d 604 (7th Cir., 1979). **Examples of such tactics would be to set forth an "entire spectrum" of proposals that would be predictable unpalatable to the other party**, so that the proposer would know that agreement is impossible, Mar-Len Cabinets, supra, at 999. **Offering no explanation for a bargaining position or untenable explanations** for a position, also evidence the intent to frustrate agreement. Id. **Increasing demands during bargaining or adding new demands** raises suspicion as to good faith. Sunnyside Irrigation District, Decision 314 (PECB, 1977). Entering negotiations with a **take-it-or-leave-it attitude** on items of importance is risky for a party. See generally, General Electric Co., 150 NLRB 1491 (1970); Ridgefield School District, Decision 103-B (EDUC, 1977); Whitman County, Decision 250 (PECB, 1977).
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> The conduct of the party being charged with a refusal to bargain must be evaluated in the totality of circumstances, and evidence of good faith bargaining will be considered along with the evidence of bad faith. NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941); Island County, Decision 857 (PECB, 1980). Additionally, we agree with the union that **in the public sector, where the use of the strike and other economic weapons are not made part of the collective bargaining process, this Commission should give close scrutiny to the duty to bargain in good faith.**

City of Snohomish, Decision 1661-A (PECB, 1984) [emphasis by **bold** supplied].

Specific charges detailed by the union are discussed, seriatim, under the headings which follow.

Refusal to Respond -

The union charged that the employer rejected the union's opening proposals at the parties' May 4 meeting, and refused to respond to proposals that it had presented at their first negotiating meeting.

The details supplied by the union's witnesses do not substantiate that this charge, standing alone, is an unfair labor practice. Clarene Ricarte, a member of the union's negotiating team, recounted that the management team presented a series of counter-proposals about district levy monies, extracurricular contracts, evaluations, dues deduction, and district management. Some of those counter-proposals deleted language from the expiring agreement, including sections on pay for extracurricular activities. Ricarte's testimony does not present a picture of a management team negotiating in bad faith at the May 4th meeting, however. Although it is common for parties to respond back and forth (i.e., with proposals and counter-proposals), there is no statutory mandate that bargaining must be done in that fashion. More particularly, there is nothing which prevents an employer from presenting its own proposals, from proposing to delete existing contract language, or from proposing to cease existing employment practices.[7]

Bargaining Schedule -
The union complains that bargaining sessions were held only approximately once per month, and that the parties were unable to establish a future meeting date only after the superintendent checked his schedule with his secretary on the day following a bargaining session.

Regardless of the reasons for a particular bargaining schedule, be they personal, professional or otherwise, the charging party has

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[7] An alternate interpretation of the employer's conduct is that it was, in fact, doing exactly what it was legally bound to do. Countless Commission precedents have stated and reiterated the principle that an employer must give notice to the exclusive bargaining representative of its employees prior to making changes of employee wages, hours or working conditions. If it desired to effect the changes described by the union in this case as "take aways", the employer would properly have raised those matters in collective bargaining.

the burden of proving that the schedule somehow relates to the failure of the other side to bargain in good faith. It is clear that the teacher-negotiators at the bargaining table were frustrated by the meeting schedule that developed in this case, but the union did not prove that schedule actually had any impact on the progress of negotiations. The union **did not** argue in this case that it lacked sufficient time to present its arguments, or that the time schedule had any substantive impact on any of the issues bargained by the parties.[8]

The evidence does not sustain a conclusion that the employer was using the scheduling process to avoid negotiations in this case. Although the superintendent's reliance on his secretary to keep his calendar might be described as awkward, the union made no showing that it had any actual impact on the scheduling or conduct of bargaining. Examined by themselves, neither the scheduling process used by the employer nor the schedule as it evolved between the parties constituted an unfair labor practice.

Authority to Bargain -

The union charged that the management negotiating team did not have the authority to bargain. Specifically, the union alleges that the employer responded to specific proposals with statements concerning school board "parameters" which are claimed to have limited, or even prevented, the parties from reaching agreement.

This employer's practice of having its bargaining team negotiate from a set of guidelines established by its board of directors, and then referring the final ratification of the collective bargaining agreement back to the school board, does not violate the statute and is not an unfair labor practice. In actual fact, the process complained of by the union in this case is an accepted and

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[8] An example of such a "time critical" issue would be if retroactivity of wage increases had been an issue under discussion.

appropriate practice in most collective bargaining negotiations. The final decision makers for either side are rarely present at a bargaining table in the public sector.[9]

Testimony from Superintendent Thornton indicated that, although the management team did have instructions from the board, the team was willing to discuss proposals which were outside the guidelines given to them. It is not clear that this was explained to the union team during negotiations. Although explanation would have been desirable, and might have assisted the parties' communications, the failure to communicate such flexibility does not, in and of itself, constitute an unfair labor practice.

Dues Deduction

Dues deduction is a statutory right of an exclusive bargaining representative under Chapter 41.59 RCW, as follows:

> RCW 41.59.060 EMPLOYEE RIGHTS ENUMERATED -- FEES AND DUES DEDUCTION FROM PAY.
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> ...
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> (2) The **exclusive bargaining representative shall have the right to have deducted** from the salary of employees, upon receipt to an appropriate authorization form which shall not be irrevocable for a period of more than one year, **an amount equal to the fees and dues required for membership.** Such fees and dues **shall be deducted monthly** from the pay of all appropriate employees by the employer and transmitted as provided for by agreement between the employee and the exclusive bargaining representative, unless an automatic payroll deduction service is established

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[9] A public employer must ratify any agreement reached in collective bargaining at an open, public meeting. State ex. rel. Bain v. Clallam County, 77 Wn.2d 542 (1970). Unions normally take tentative agreements back to their memberships for ratification, except where a bargaining unit so small that all of its members are on its negotiating team.

> pursuant to law, at which time such fees and dues shall be transmitted as therein provided.
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> [Emphasis by **bold** supplied.]

Employer deduction of union dues provides a potential exception to the general principles discussed under the Refusal To Bargain heading, above. For an employer to refuse dues deduction, or for it to cease a historical practice of deducting union dues, would be tantamount to a withdrawal of recognition of the exclusive bargaining representative, and would be an unfair labor practice. Renton School District, Decision 1501-A (PECB, 1982); Snohomish County, Decision 2944 (PECB, 1988).

In this case, however, the employer had been deducting union dues from employee pay checks, and the evidence provided by the union did not show that the employer actually intended to cease the deduction and transmittal of union dues. Thus, the employer's position fell short of a "withdrawal of recognition" of the type that would constitute a per se unfair labor practice.

At most, the evidence suggests the existence of a dispute about the forum(s) for enforcement of the dues deduction obligation. What the employer rejected was putting dues deduction language into the parties' collective bargaining agreement. Such a position would be suspect if evaluated in terms of "good faith" principles,[10] but is far less offensive where the right to dues checkoff exists, and is subject to enforcement by the Commission, independent of any contract. It was not a per se violation for the employer to resist a union proposal presumed to relate only to enforcement of dues checkoff through the contractual grievance procedure.

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[10] Parties have a statutory obligation to reduce agreements reached in collective bargaining to written and signed contracts. One fundamental reason for the documentation of such agreements is to form a basis for their enforcement through grievance/arbitration mechanisms or "violation of contract" litigation in the courts.

"Totality" of Bargaining Conduct

Even where individual incidents, standing alone, might not be a sufficient basis to find a "refusal to bargain" unfair labor practice, a collection of incidents taken together as a "totality" of bargaining conduct can be found to evidence a lack of good faith. Allegations regarding the employer's general course of conduct are discussed, seriatim, under the headings which follow:

"Management's Rights" -
The union argues that the employer's bargaining team consistently used "management's rights" as a rationale, either for not agreeing to a union proposal or to support a proposal which the union saw as a loss of its hard-earned benefits. Thus, the union charges, the employer's repetitious responses of "management's rights" effectively took away any ability by the union to formulate counter-proposals.

From the testimony of the teacher-negotiators, it is clear that they interpreted the repeated references by the employer's negotiators to "management's rights" as a refusal to bargain on those subjects. One example is the parties discussion of the "past practices" language of the expiring agreement, where the employer did not offer any counter-proposal other than rejecting the union's proposal with its ubiquitous "management's rights" response.

Proposals and Counter-proposals -
The union argued that the employer's responses to specific issues during the course of the negotiations had **the effect** of a refusal to bargain. Several examples are cited:

* The union made proposals concerning "just cause" and "assignments, transfers and vacancies". Apart from stating that such decisions should be exclusively management's, the employer's only counter-proposal (i.e., to reduce the contractual notice

requirement for employees requesting a transfer or reassignment) appears to have been retaliatory.

* The union proposed two changes to the "release from duty" language found in the expiring contract, but the employer rejected those proposals and countered that a mandatory ("shall") term in the expiring contract be changed to a permissive ("may") term.

* The union proposed to amend the employee evaluation sections of the expiring contract and to add "layoff and recall" standards, but the employer counter-proposed only minor language changes and asserted a management right to make all layoff and recall decisions.

* The union proposed language concerning class size, planning time before and after student hours, and leave sharing, but the employer simply rejected all such proposals.

* The union proposed a paid leave of absence for on-the-job injuries, to which the employer proposed that any injury leave not compensated by Worker's Compensation be deducted from sick leave.

The employer came forth with its own predictably unacceptable proposals on several subjects. Those included deleting contract language providing for a pass-through of legislative salary appropriations, deleting language that covered shortfalls in state-funded insurance benefits with state salary appropriations, deleting language which protected grievants, witnesses and union representatives in connection with the processing of grievances, and deleting supplemental pay provisions from the collective bargaining agreement. Finally, the employer proposed adding district approval to a provision which previously provided for an automatic additional paid day for bargaining unit employees.

In summary, the employer countered many of the union's proposals with language more restrictive than that which currently existed, or proposed that the subject area not be covered by the contract at all. It is clear that such proposals were enormously difficult for

the union to deal with or accept, either individually or collectively.

Employer Bargaining Explanations -

When questioned concerning the employer's responses to union proposals, Superintendent Thornton gave various descriptions. Concerning the "management's rights" clause, he stated:

> In the very first session that was one of the first things that we pointed out. We pointed out to them that we felt the management clause was important to the school district especially given that it's a small school district with a very small staff and they needed to be retained. And we felt very strongly that that Management Rights clause and the issues contained in there needed to be retained.
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> Transcript at page 109.

Regarding the "reduction-in-force" topic, Thornton stated:

> We felt that the management right to hire and dismiss that was contained in the original agreement was necessary to manage a small school district. And so we feel that -- or felt, and the position is that that needs to be maintained as a management right.
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> TR. at 115.

The superintendent's position on "past practices" was:

> My position is that that interferes with what we're doing, what we're trying to do, and can create a situation where there is an extended contract beyond what's bargained. We don't know what they -- what exists and they can come in and say well, that's past practices. And then we're off to the races.
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> We feel that that interferes with the -- a contract should be a contract. What's in the contract is what should be there. This is a catchall phrase that runs out and gathers thing up. I feel it causes problems.
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> TR. at 119.

Thornton testified about "supplemental contracts", as follows:

> Our explanation was that this is a year-to-year contract. That we're a small school, very small number to teachers available, and that we felt that we should have available for the students the very best possible coaches for those kids, and we felt that the management had the responsibility to make that decision. And so we felt that should be out of the contract.

TR. at 126.

While such statements do provide some amount of reasoning and explanation of the management positions, the union is accurate in claiming that they provided little or no room for it to construct effective counter-proposals beyond merely accepting the management position.

"Course of Conduct" Analysis -

Difficult bargaining is not synonymous with illegal or bad faith bargaining, unless the difficult issues indicate an intent to not actually bargain in good faith. Fort Vancouver Regional Library, supra. The employer may be changing long-standing policies or existing contract language, may be demanding flexibility, or may even be seeking full control in one or more areas, but such bargaining positions or tactics do not constitute an unfair labor practice unless the employer takes the position that it has no flexibility, whatsoever, on most, if not all issues critical to final settlement.

The Commission's discussion in Federal Way and the Examiner's discussion in Fort Vancouver are instructive:

> The school did not engage in unlawful surface bargaining as the school could not be compelled to agree to a proposal or make a concession, although the union understandably objected to many of the changes in the

> school's lay-off policy. The duty to bargain in good faith is an obligation to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement. ... **The totality of the conduct must be considered.**

Federal Way, supra [emphasis by **bold** supplied].

> Bargaining in good faith requires the parties to the collective bargaining process to explain and to provide reasons for their proposals. Federal Way School District, Decision 232-A (EDUC, 1977); City of Snohomish, Decision 1661-A (PECB, 1984); International Telephone and Telegraph Corp. v. NLRA, 382 F.2d 366 (3rd Cir., 1967); Anacortes School District, Decision 2544 (EDUC, 1986); Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir., 1981). The reason for such a requirement is elementary: **Adequate information concerning proposals is necessary in order to effect the type of communications necessary for good faith bargaining.** The party receiving a proposal must itself fulfill the obligation to make a sincere effort to understand the position of the other, to breach differences and, if possible, to reach an agreement.
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> ...
> The finding of a violation generally cannot be based solely on contract proposals put forth by a party. American National Insurance Company, 343 U.S. 395 (1952). Seattle-First National Bank v. NLRB, 638 F.2d 956 (9th Cir., 1981). Since "it would be extraordinary for a party directly to admit a bad faith intention", **the motives of a party must be ascertained from circumstantial evidence, which may properly include some evaluation of contract proposals.** Continental Insurance Co. v. NLRB, 495 F.2d 44 (2nd Cir., 1974). Reed and Prince Mfg. Co. v. NLRB, 205 F.2d 131 (1951). City of Snohomish, supra. A-1 King Size Sandwiches, 732 F.2d 872 (11th Cir., 1984). As the court noted in NLRB v. Cable Vision, 660 F.2d 1 (1st Cir., 1981):
>
> > **[T]he failure to come close to agreement accompanied by a failure to make meaningful concessions on nearly every subject suggests that**

> **something is awry ... if management has adhered uniformly to proposals predictably unacceptable to the Union, has refused to make meaningful concessions in nearly every area, and has insisted (without clear justification in principle) on maintaining its original positions in these areas (and the Union has not), one has some evidence for concluding that the company has engaged in surface bargaining instead of bargaining in good faith.**
>
> Good faith also demands that an employer meet with a willingness to hear and consider a union's view and a willingness to change its mind. M. A. Harrison Manufacturing Company, 253 NLRB 675 (1980), enf. 682 F.2d 580 (6th Cir., 1982). However, even where a respondent behaves in a number of ways evidencing good faith, such behavior cannot mitigate other behavior violative of its good faith obligation. A-1 King Size Sandwiches, supra; City of Snohomish, supra.

Fort Vancouver Regional Library, Decision 2350-C (PECB, 1988) [emphasis by **bold** supplied].

A comparison of the employer's positions at the beginning of bargaining with its positions at the breakdown of negotiations provides a basis for testing its willingness to do more than merely say that it was bargaining in good faith.

In this case, the employer's positions as of May 4, 1993 included deletion of several key provisions from the parties' collective bargaining agreement, as follows:

* Past practices
* Maintenance of benefits
* Supplemental contracts
* Sick leave sharing
* Legislative salary mandates
* Training / clock hours / endorsements
* Insurance benefits
* "Freedom from reprisals"
* Extracurricular salary scale

* Planning time
* Required courses and requested courses

The employer also provided counter-proposals on the following subjects:

* Management's rights
* Availability of budget information
* Reduced notice of transfer or reassignment
* Reduced time for return of individual contracts
* Policy books
* On the job injury
* Association leave
* Calendar

At the May 4 meeting, the employer also rejected the following union proposals, without offering counter-proposals:

* Representation at disciplinary meetings
* Assignment, transfer and vacancies
* Employee evaluations
* Union security
* Class size
* Dues deduction
* Mentor program
* Leaves of absence

During the course of negotiations, the parties did arrive at tentative agreements on some subjects, as follows:

* Status of agreement
* Ratification of the contract
* Conformity to law
* Cost and distribution of the contract
* Joint meetings
* Salary and placement information
* Freedom to join and negotiate
* Non-discrimination
* Complaints against employees
* Academic freedom
* Meetings and conferences
* Salary limits and compliance
* Business travel
* Bereavement leave
* Court appearances

* Association leave
* Military leave
* Time limit for filing an appeal of a grievance
* Grievance confidentiality

Only at the mediation meeting held on October 11, 1993, did the employer did offer counter-proposals on:

* Layoff and recall
* Notice to the union on funding changes

Even a brief review of these lists reveals that the overall pattern presented by the employer was to delete and limit most of the significant provisions customarily provided by collective bargaining agreements. Its bargaining positions on individual issues might be characterized as "hard bargaining", but the employer's overall position is found to have been one of "stripping" the agreement of negotiated benefits and protections. The Examiner concludes that the employer was willing to agree on what can only be characterized as minor issues or language that restates external law (e.g., the "non-discrimination" and "freedom to join and negotiate" clauses). Meanwhile, it refused to consider a whole range of union proposals.

By refusing to make meaningful compromises on either its own proposals or the union's proposals, and by remaining adamant into mediation that any agreement reflect its first positions, the employer has committed an unfair labor practice. Similar to the conclusion reached by the court in Cable Vision, supra, the Examiner concludes that the Mansfield School District has engaged in surface bargaining and refused to make meaningful concessions in every significant area of disagreement between the parties. Through its mantra of "management's rights", the employer effectively refused to bargain with the exclusive bargaining representative of its certificated employees. Regardless of the possibility that its individual positions on many of the union's proposals were

(or could have been) perfectly lawful standing alone, the overall pattern of the employer's conduct left the union with literally no place to go. Such bargaining tactics frustrate the negotiating process, and are in violation of state law.

FINDINGS OF FACT

1. Mansfield School District is a school district organized under Tile 28A RCW, and is an employer within the meaning of RCW 41.59.020(5).

2. Mansfield Education Association, an employee organization within the meaning of RCW 41.59.020(1), has been recognized as the exclusive bargaining representative of non-supervisory certificated employees of Mansfield School District.

3. Beginning in March of 1993, the parties met to negotiate a new collective bargaining agreement to replace the contract due to expire on August 30, 1993. At the parties' initial meetings in those negotiations, the employer was represented by Superintendent of Schools William Thornton and school board members Timothy Hicks and Doug Tanneberg. The exclusive bargaining representative was represented by three bargaining unit employees: Roy Hoffman, Clarene Ricarte and Diana Michaelson.

4. The parties opened negotiations for a successor collective bargaining agreement on March 30, 1993.

5. At their second negotiation meeting, held on May 4, 1993, the employer presented its proposals for revising the contract. Those proposals included removing language contained in the existing agreement covering past practices, maintenance of benefits, use of the 30 minutes before and after school, a

sick leave sharing bank, part of the personal leave section, training, clock hours and endorsements, freedom from reprisal language in the grievance procedure, and supplemental contracts. The employer also rejected the union's proposals concerning assignments and transfers, class size, dues deduction, and layoff and recall.

6. The parties held additional meetings on June 8, June 28, and July 13, 1993. Although some tentative agreements were reached at those meetings, they concerned relatively minor issues. As to the more significant issues, the employer indicated that it would need more time to think about the issues on the table.

7. At a negotiating meeting held on August 3, 1993, the employer told the union team that it would not negotiate limits to "management's rights". It indicated that the issues it considered limiting of its rights were: Maintenance of benefits, just cause and due process, assignment vacancies and transfer, the use of 30 minutes before and after school, past practices, and the extracurricular salary schedule. Following this meeting, the union filed for mediation.

8. At the first mediation meeting held on September 21, 1993, professional negotiators Robert Schwerdtfeger and James Nelson joined the employer and union bargaining teams, respectively. Management reiterated its initial bargaining position to the effect that much of the current contract language and many of the union's proposals were unacceptable as infringement of "management's rights". The employer did not submit any proposals at this meeting, or otherwise demonstrate any effort to reach an agreement.

9. At the second mediation meeting held on October 11, 1993, the union made what it believed was a "comprehensive" counter-

proposal. The employer modified its position only as to the layoff / recall issue and the contract language concerning notice to the union on funding changes.

10. A subsequently scheduled mediation meeting was canceled by the employer. The employer then requested fact-finding.

CONCLUSIONS OF LAW

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

2. By the events and course of action described in paragraphs 6, 7, 8, and 9 of the foregoing findings of fact, and by the totality of its conduct in consistently refusing to entertain alternative proposals or compromises from its initial bargaining positions, the Mansfield School District has failed and refused to bargain in good faith as described in RCW 41.59-.020(2), and has committed unfair labor practices within the meaning of RCW 41.59.140(1)(e).

Based upon the foregoing findings of fact and conclusions of law, the Examiner makes the following:

ORDER

Pursuant to RCW 41.59.150 of the Educational Employment Relations Act, it is ordered that the Mansfield School District, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

a. Refusing to bargain in good faith with the Mansfield Education Association as the exclusive bargaining representative of its certificated employees.

b. Engaging in conduct which frustrates or prevents concluding a signed collective bargaining agreement with the Mansfield Education Association.

c. In any other manner interfering with, restraining or coercing its certificated employees in the exercise of their right to organize and bargain collectively under Chapter 41.59 RCW.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.59 RCW:

a. Upon request, meet with the authorized representatives of the exclusive bargaining representative of its certificated employees at reasonable times and places, and bargain in good faith in an effort to reach an agreement on all issues outstanding between the parties.

b. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced or covered by other material.

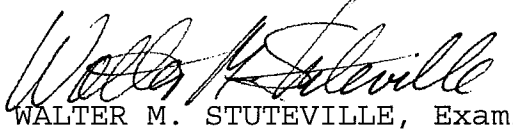
c. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps

have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

d. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington, on the 8th day of June, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



WALTER M. STUTEVILLE, Examiner

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL NOT fail or refuse to bargain with the Mansfield Education Association as the exclusive bargaining representative of our non-supervisory certificated employees.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____

MANSFIELD SCHOOL DISTRICT

BY: _____
Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (206) 753-3444.