STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

MANSFIELD SCHOOL DISTRICT, Complainant,	)	CASE 10762-U-93-2499
vs.	)	DECISION 4552-B - EDUC
MANSFIELD EDUCATION ASSOCIATION, Respondent.	)	DECISION OF COMMISSION

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

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

This case comes before the Commission on a petition for review filed by Mansfield School District, seeking to overturn a decision issued by Examiner Walter M. Stuteville.[1]

BACKGROUND

The Mansfield School District (employer) is a small district with about 150 students, and approximately 12 or 13 faculty members. A collective bargaining agreement between the employer and the Mansfield Education Association (union) covering the teachers was to expire on August 31, 1993.

In January of 1993, the union notified the employer it was ready to begin negotiations for a successor agreement. The employer designated a bargaining team consisting of Superintendent Bill Thornton, and school board members Timothy Hicks and Doug Tanneberg. Thornton served as chief spokesperson for the employer. The

[1] Mansfield School District, Decision 4552-A (EDUC, 1994).

union's bargaining team consisted of Clarene Ricarte, Roy Huffman, and Diana Michaelson.

At the first bargaining session on March 30, 1993, the union presented a package of proposals to the employer.[2] The employer did not offer proposals at that meeting.

At the next bargaining session, on May 4, 1993, the employer expressed its particular interest and concern in clauses relating to issues that were not funded by state monies, extracurricular portions of the contract, and issues that would adversely affect its ability to manage the district. At that session, the employer presented a number of proposals to delete language from the collective bargaining agreement.[3] At the same bargaining session, the employer made a number of proposals to change clauses so that the effect would be more restrictive on employee rights than the

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[2] The union's proposal included eliminating 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.

[3] The employer proposed to delete the following sections:

1.	Article I,	Section D - Past Practices
2.	Article I,	Section E - Maintenance of Benefits
3.	Article III,	Section H - Policy Books (delete or change)
4.	Article V,	Section C, Item 5 - 30/30 BAR
5.	Article VI,	Section A, Item 6 - Sick leave sharing
6.	Article VII,	Section A, Item 6 - Legis. sal. mandates
7.	Article VII,	Section B - Training/Clock/Hours/Endorse.
8.	Article VII,	Section F - Insurance Benefits
9.	Article VII,	Section G - Supplemental Contracts
10.	Article VIII,	Section C, Item 4 - Freedom from Reprisal
11.	Appendix B -	Extracurricular salary schedule

previous contract,[4] it proposed to replace the management rights clause with more comprehensive and general language, and it rejected many of the proposals the union had made earlier.[5] The employer expressed an interest in bargaining teacher evaluation provisions at a later date. At that meeting, the parties reached

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[4] The employer proposed change in the following clauses so that the effect would be more restrictive than the previous bargaining agreement:

1.	Article II,	Section A, Item 2 - Dist. bud. & fin. rep.
2.	Article III,	Section E - Assign., Transfer and Vacancies
3.	Article III,	Section F - Individual Employee Contract
4.	Article III,	Section G - Release from Contract
5.	Article III,	Section H - Policy Books (delete or change)
6.	Article IV,	Section G - Association leave
7.	Article VI,	Section B - Personal leave
8.	Article VI,	Section E - Accidents on the Job
9.	Article VI,	Section I - Long term leave of absence
10.	Article VII,	Section A, Item 2 - Payment
11.	Article VII,	Section A, Item 5 - Salary credits
12.	Article VII,	Section C - Insurance
13.	Article VII,	Section D - Work year
14.	Article VII,	Section E - Work day
15.	Article VIII,	Section B - Grievance Procedure Definitions
16.	Article VIII,	Section C, Item 3 - Confidentiality
17.	Article VIII,	Section D - Grievance Procedure

[5] The employer rejected union proposals relating to:

1.	Article II,	Section A, Part 5 - Dues deductions
2.	Article III,	Section E - Assignment, Transfer and Vacancies
3.	Article V -	Proposal for new article dealing with layoff and recall
4.	Article V -	Section B - Proposal to expand current language re: class size
5.	Article VII -	Proposal that would have included substitute teachers in the salary section
6.	Article VII,	Section A, Item 6 - Legislative salary mandates

tentative agreement on an employer proposal regarding the grievance procedure.[6]

The next bargaining session was held on June 8, 1993. The union presented a written response to the employer's previous proposals. The parties did agree to retain the language of their expiring agreement on issues where neither side had proposed changes.

At the next meeting on June 28, 1993, the parties tentatively agreed to a section concerning the school board's agenda, minutes, budget, and financial reports.[7]

Discussion relating to the proposals and responses continued at the next bargaining session, which was held on July 13, 1993.

At the parties' last bilateral bargaining session, held August 3, 1993, the employer took the position that certain clauses would limit its management rights, and that the package was a global one. The employer again rejected several union proposals.[8] The union

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[6] The agreement related to Article VIII, Section D, which was step 1 of the grievance procedure. An employee who is dissatisfied with an initial private conference with an immediate supervisor, may request a formal conference with the immediate supervisor and a representative of the board. The parties agreed to delete "and a representative of the board."

[7] The agreement related to Article II, Section A, 2. An initial copy of the budget, budget reports, and board minutes would be provided to the union at no cost.

[8] It rejected the just cause and due process provisions of the union's proposed agreement, the Assignment, Vacancies and Transfers clause (Article III, Section E), the clause dealing with the use of 30 minutes before and after school (Article VI, Section C), Article VIII, Section D dealing with a stipend for an additional day of work, and extracurricular activity. Also discussed as limiting the employer's management rights were past practices, maintenance of benefits, and the layoff and recall provisions.

told the employer the parties were at an impasse, and that it was interested in mediation.

Mediation took place on September 21, 1993 and October 11, 1993. The employer maintained that many, if not most, of the items on the table were "management's rights" that should not be included in the collective bargaining agreement. By the end of the second mediation meeting, the employer had changed position on only two issues: The reduction-in-force and legislative impact issues. The next mediation session was set for October 19, 1993, but the employer ended the process by filing for fact finding.

On November 3, 1993, the union filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the employer had interfered with employee rights and refused to bargain. Since some allegations did not state a cause of action, the union submitted an amended complaint on November 24, 1993. The complaint consisted of allegations that the employer delayed negotiations, and proposed deletions of existing language which removed rights and benefits granted by the expired agreement. The union alleged the employer rejected union proposals without explanation, made proposals without explanation, and refused to bargain mandatory subjects of bargaining.[9]

Allegations found to state a cause of action were heard before Examiner Walter M. Stuteville on January 10, 1994. Examiner Stuteville concluded that the employer failed and refused to bargain in good faith in violation of RCW 41.59.020(2) and RCW 41.59.140(1)(e), by its totality of conduct in consistently refusing to entertain alternative proposals or compromises from its

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[9] On December 8, 1993, the Executive Director issued a preliminary ruling dismissing some allegations as untimely or because they did not state a cause of action. See, Mansfield School District, Decision 4552 (PECB, 1993).

initial bargaining positions.[10] The employer subsequently filed its petition for review of the Examiner's decision, thus bringing the matter before the Commission.

POSITIONS OF THE PARTIES

The employer seeks review of paragraphs 6, 7, 8, and 9 of the Examiner's findings of fact. The employer argues that the law does not compel either party to make a concession or reach an agreement. It contends that the totality of conduct on which the Examiner based his decision should include a consideration of other actions of the employer, such as charges by the union that were dismissed in the preliminary ruling process. The employer argues that the Commission's practice of allowing amended complaints worked in this case to cure the union's defective claims of bad faith bargaining, that the practice is not good labor relations policy and that it has a dangerous impact. It is concerned that the Examiner in this case may have believed that his immediate supervisor had found a violation prior to any hearing, and that the Examiner may have been influenced in his decision. The employer asks the Commission to reverse the Examiner's decision.

The union argues that, contrary to the employer's view of the facts, the employer did not provide most of the initial rationale

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[10] The Examiner denied a motion to dismiss the amended complaint in its entirety. He found the scheduling process did not constitute an unfair labor practice, that the fact the management negotiating team needed to get school board approval for its actions was not an unfair labor practice, and that the employer's rejections of the union's proposals and the employer's refusal to respond to proposals at the first meeting, standing alone, did not substantiate a charge of unfair labor practices. The Examiner found 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.

in written form, and that rationale was not provided for most of the employer's responses to the union's proposals. The union contends that the employer did not cooperate during mediation, citing that no movement was forthcoming on most issues. The union asserts that it is improper to look at one action and claim such an action is not evidence of bad-faith bargaining. It agrees with the Examiner's decision and would have the Commission affirm it.

DISCUSSION

The Legal Standard

The obligation of educational employees and school districts to "bargain in good faith" arises from the statutory framework of the Educational Employment Relations Act, Chapter 41.59 RCW:

> RCW 41.59.020 DEFINITIONS. As used in this chapter:
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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**: ... The obligation to bargain does not compel either party to agree to a proposal or to make a concession.

[Emphasis by **bold** supplied.]

Under the law, a finding of a refusal to bargain is predicated on a finding of bad faith bargaining in regard to mandatory subjects of bargaining, i.e., issues concerning wages, hours, and terms and conditions of employment. See, Spokane School District, Decision 310-B (EDUC, 1978).

Differentiating between lawful "hard bargaining" and unlawful "surface bargaining" can be difficult in close cases. This fine line reflects a natural tension between the obligation to bargain in good faith and the statutory mandate that there is no requirement that concessions be made or an agreement be reached. Walla Walla County, Decision 2932-A (PECB, 1988). A party is entitled to stand firm on a position, and an adamant insistence on a bargaining position is not, by itself, a refusal to bargain.[11] The obligation to bargain in good faith, however, encompasses a duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and employees. A party is not entitled to reduce collective bargaining to an exercise in futility. See, Mason County, Decision 3706-A (PECB, 1991), and cases cited therein. See, also, Flight Attendants v. Horizon Air Industries, Inc., 976 F.2d 541 (CA 9, 1992), where the court found the employer violated the law, in part, by making contract proposals which it knew were consistently and predictably unpalatable to the union and by failing to exert every reasonable effort to reach agreement.[12] Good faith is inconsistent with a predetermined resolve not to budge from an initial position. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

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[11] See, Atlanta Hilton and Tower, 271 NLRB 1600 (1984), and cases cited therein.

[12] In American Meat Packing Corp., 301 NLRB 835 (1991), the employer made proposals at the outset of negotiations, but maintained an obdurate insistence that agreement would be obtained only by the union accepting the employer's proposals. The NLRB found the employer's overall bargaining to be imbued with bad faith, partly due to its own statements which failed to evince a "serious intent to adjust differences" and illustrated a "take-it-or-leave it" bargaining stance proscribed by General Electric Co., 150 NLRB 192 (1964), enfd. 418 F.2d 736 (2nd Cir. 1969), and cases cited therein.

In determining whether a party engaged in bad faith bargaining, the Commission cannot look at any one action or nonaction by the parties. The totality of conduct or circumstances surrounding the negotiations must be considered. See, Federal Way School District, Decision 232-A (EDUC, 1977); Shelton School District, Decision 579-B (EDUC, 1984); Mason County, Decision 3706-A (PECB, 1991); Walla Walla County, Decisions 2932-A, 2932-B (PECB, 1990); City of Snohomish, Decision 1661-A (PECB, 1984). A particular position taken on an issue in good faith may be perfectly lawful, while the same position would be considered part of an unlawful course of conduct if shown to be part of an overall plan to frustrate the progress of negotiations. A decision involving a failure to bargain in good faith reflects qualitative rather than a quantitative evaluation. See, Shelton School District, supra.

The Totality of Conduct

Pertinent facts are set forth in the Examiner's decision and are not substantially disputed. By the end of the bargaining, the parties had tentatively agreed to approximately 24 items. About 17 of those involved clauses unchanged from the collective bargaining agreement. Five of the clauses were the result of employer proposals, indicating some compromise on the part of the union.[13] The parties made no movement on the 11 clauses that the employer had proposed to delete. Nor did the parties make any movement on

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[13] They were as follows:

1. Article 1, Section G - Distribution of contract - employer proposal regarding tentative agreements
2. Article II, Section A.2 - School district budget and financial reporting - began as an employer proposal to change wording - appears to be a compromise benefitting both parties
3. Article V, Section D - Mentor teacher program - employer proposal for minor change
4. Article V, Section E - Clock hours - employer proposal to delete
5. Article VIII, Section C - Grievance confidentiality - employer proposals

the 17 clauses the employer had proposed to change with more restrictive effect.

Each one of the clauses the employer had proposed to delete and those it proposed to change with more restrictive effect relates to wages, hours, or terms and conditions of employment and are mandatory subjects of bargaining. Had the parties agreed to the employer's proposals, employees would have realized substantial cutbacks in various benefits they had previously gained. An example of the "take-aways" is the employer's proposal to delete the provisions relating to the administration of the sick leave sharing bank. The purpose of the sick leave sharing bank is to provide employees the means to come to the aid of co-workers suffering extraordinary or severe illnesses, or conditions likely to cause that employee to take leave without pay or terminate employment. Another provision the employer wanted to delete was the provision on freedom from reprisal, which paralleled statutory rights in providing that individuals who participate as grievants, witnesses, representatives of the association, and the like, would not suffer restraint, interference, discrimination, coercion or reprisal on account of their participation in the process. The employer wanted a provision that required employees to make written requests for transfer or reassignment to be changed from within 15 days of notice of vacancies to 2 days. The employer wanted to remove a provision that allowed an employee to request more than 2 days of personal leave per year. The employer wanted to remove, from the work day, the 30 minutes before and 30 minutes after the student day, despite the state requirement that teachers and other certificated personnel be at school during those times.[14] These

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[14] WAC 180-44-050 reads as follows:

> Teachers and other certificated personnel are required to be at their respective schools for the benefit of pupils and patrons at least thirty minutes before the opening of school in the morning and at least thirty minutes after the closing of school in the afternoon.

are just a few examples of the proposals which the employer brought forth at the second bargaining session, and on which the employer made no change in approach throughout the rest of the negotiations.

From the beginning of bargaining, the employer approached the negotiations with the attitude it was bargaining from "scratch", and that existing benefits had to be renegotiated. However, when a successor contract is being negotiated, as in this case, good faith bargaining is never from "scratch", but from the status quo. See, Shelton School District, Decision 579-B (EDUC, 1984), where the Commission found the employer failed to bargain in good faith when it proposed a longer school year, then from thereafter expected the union to count each day the employer shortened its proposed school year as a "concession".

In the case before us, the Examiner found the employer's overall position to have been one of "stripping" the agreement of negotiated benefits and protections. During the course of the entire negotiation, the employer fostered, by word and deed, the impression, inter alia, that the employees might lose more than they would gain. In Shelton, the Commission found that for an employer to foster such an apprehension in employees was in derogation of State policy, and we find that true here as well. Good faith bargaining requires full and frank discussions on disputed issues. There is no requirement that agreement be achieved on every issue, but an employer is expected to evidence some willingness to address a union's legitimate concerns. In rejecting union proposals the employer considered such matters as management rights, reduction-in-force, past practices, and supplemental contracts, to be the responsibility of management. The explanations the employer gave for its proposals provided the union no room to construct effective counter-proposals, and led the union to believe the employer was unwilling to compromise.It is not enough to repetitively invoke "management rights" without engaging in meaningful attempts to see if mutual accommodation is possible. In this case, we do not see

that any efforts toward accommodation were made on the part of the employer.[15]

Some actions of the employer were found to have not been the basis for a cause of action.[16] Those actions, to the extent there is proof of them in the record, are part of the totality of the employer's conduct. However, our conclusions, as to whether good faith bargaining occurred, are based upon the employer's overall conduct.

The Challenged Preliminary Ruling Process

The employer asserts the Examiner misread a preliminary ruling made by the Executive Director under WAC 391-45-110. In sending the allegations to hearing, the Executive Director stated:

> The Examiner who hears this matter will be entitled to take all of those allegation [sic] together, in evaluating whether a "refusal to bargain" has occurred by the totality of the employer's conduct, as well as by its individual actions.

Mansfield School District, Decision 4551 (EDUC, 1993).

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[15] See, also, Ridgefield School District, Decision 102-B (EDUC, 1977), where the employer's insistence on an all or nothing package, without affording the union a reasonable basis or opportunity to reach agreement, was found to be part of a refusal to bargain violation.

[16] Those allegations include the employer caused delay in coming to the bargaining table, the employer failed to respond to union proposals at the first session, one bargaining session was canceled, most of one bargaining session on July 13, 1993 was spent bringing a management official up to speed on what transpired at previous meetings, the employer failed to accept proposals advanced by the union, employer rejected union proposals or proposed to delete existing contract provisions, bargaining sessions were held 20 days apart and the employer advanced only limited proposals, the employer canceled a mediation session and requested factfinding.

In his decision, the Examiner stated that the Executive Director's order found a "cause of action" to exist with respect to allegations that the employer:

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

Mansfield School District, Decision 4552-A (EDUC, 1994).

Finding a cause of action is not the same as making a final determination. Our Examiners are well aware of this. The preliminary ruling expressly noted that it was based on an assumption that all of the facts were true and provable. The Examiner was to decide the case on the actual facts proved at hearing. The statements to which the employer refers merely indicate that, in determining whether the employer demonstrated bad faith which would constitute a general "refusal to bargain" violation, the Examiner could consider the totality of its conduct. It is the circumstances at the bargaining table that determine whether or not good faith bargaining has taken place. See, Walla Walla County, Decision 2932-A (PECB, 1988).

The Challenged Amendment Procedures

The employer generally challenges the Commission rules allowing amended complaints, claiming that the practice allowed the union to cure its defective claims of bad faith bargaining in this case. WAC 391-45-070 states as follows:

> 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 employer's procedural argument is without merit. The amended complaint was made at the preliminary ruling stage of our proceed-

ings, well before the hearing. The employer had clear notice of what was alleged.

As an administrative agency, our process for initial handling of unfair labor practice complaints does not involve the formal pleading requirements of court proceedings. The Executive Director serves in a screening capacity with respect to complaints filed, and endeavors to consider substance over form. See, Walla Walla County, Decision 2932-A (PECB, 1988). Preliminary ruling letters issued on insufficient complaints routinely provide an opportunity for the complainant to file an amended complaint, rather than going through the expense and delay of a dismissal order and appeal to cure what may be relatively minor defects. We fully support the Examiner's denial of the employer's motion to dismiss the amended charges in this case.

The Challenged Findings of Fact

The employer argues that paragraphs 6, 7, 8, and 9 of the Examiner's findings of fact were in error. It does not, however, point to any specific areas where those findings are incorrect as facts. Instead of arguing with the Examiner's findings as factual matters, it disagrees with the inferences made by the Examiner from the facts, and the use made of those inferences in his decision. The employer argues that these findings cannot lead one to conclude that it was guilty of anything except hard bargaining.

We conclude there is sufficient evidence in the record to support the Examiner's findings. By engaging in a course of conduct throughout negotiations which did not evidence a good faith effort to reach an agreement, and by failing to evidence any willingness to compromise on mandatory subjects of bargaining, the Mansfield School District failed and refused to bargain collectively and committed unfair labor practices in violation of Chapter 41.59.140 RCW.

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact, Conclusions of Law and Order issued in this matter by Examiner Walter M. Stuteville are affirmed and adopted as the findings of fact, conclusions of law and order of the Commission.

2. The Mansfield School District, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

   a. 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.

   b. Notify the above-named complainant, in writing, within 30 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.

   c. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 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, the 28th day of March, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

SAM KINVILLE, Commissioner

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: (360) 753-3444.