STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| SHELTON EDUCATION ASSOCIATION,<br><br>Complainant,<br><br>vs.<br><br>SHELTON SCHOOL DISTRICT NO. 309,<br><br>Respondent. | CASE NO. 293-U-76-25<br>(293-ULW-205)<br><br>DECISION NO. 579-B - EDUC |
| SHELTON SCHOOL DISTRICT NO. 309,<br><br>Complainant,<br><br>vs.<br><br>SHELTON EDUCATION ASSOCIATION,<br><br>Respondent. | CASE NO. 523-U-76-64 |

# REVISED CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES:

Judith A. Lonnquist, General Counsel, and Symone B. Scales, Attorney, Washington Education Association, for the Shelton Education Association.

B. Franklin Heuston, Attorney at Law and Elvin J. Vandeberg, Attorney at Law, for Shelton School District No. 309.

BACKGROUND:

These cases deal with events which occurred in 1976 and 1977. The turgid course of this litigation is as follows:

On March 9, 1976, the superintendent of the Shelton School District contacted the Executive Director of the Commission, by letter, complaining of delay by the Shelton Education Association in beginning bargaining.

On June 2, 1976, the association filed Case No. 293-U-76-25, an unfair labor practice charge against the school district, alleging that since April 22, 1976 the school district had failed and refused to bargain with it

in good faith by: (1) imposing illegal pre-conditions to bargaining; (2) engaging in surface and other bad faith bargaining in derogation of its obligations under the law; (3) unilaterally establishing salaries, promulgating individual contracts with employees containing such salaries, and withdrawing economic items from bargaining; and (4) attempting to undermine the status of the bargaining representative.

On July 16, 1976, the Commission adopted emergency rules for the processing of unfair labor practice cases under the Educational Employment Relations Act, RCW 41.59, as part of Chapter 391-30 WAC. Those rules became effective on filing with the Code Revisor on July 31, 1976.

On July 29, 1976, the Commission adopted additional emergency rules relating to the disposition of "scope of bargaining" disputes under the Educational Employment Relations Act, RCW 41.59, as WAC 391-30-552, 391-30-554 and 391-30-704. Those rules became effective on filing with the Code Revisor on August 5, 1976.

On August 18, 1976, the association filed an amended charge refining the allegations of the original charge and adding three more, namely: (5) on April 1, 1976 and thereafter, the district representatives declared that it would never sign a written collective bargaining agreement with the association and threatened loss of benefits such as personal leave; (6) after April 29, 1976 the district refused to discuss and negotiate binding arbitration, assignment and transfer, employee support facilities such as desks and files, agency shop, inclusion of part-time personnel in the bargaining unit, and took an intransigent position on these subjects; and (7) on or about July 8, 1976 unlawfully interrogating, intimidating and coercing an applicant for employment by inquiring into his sympathies for and activities in labor organizations. The association spelled out in detail the relief it requested. On September 20, 1976, the association filed a second amended charge, elaborating and refining the charges it had made earlier.

The district responded to the association charges with an answer, several motions and a counterclaim. The rules of the Commission make no provision for "counterclaims" as such, and so the "counterclaim" was docketed separately as Case No. 523-U-76-64. In that proceeding, the employer charged the association with refusing to bargain in good faith in two particulars: (1) dilatory tactics in bargaining; and (2) bargaining in a lockstep with units outside the district.

A hearing was held on October 4, 5, 6, 7, 15 and 18, 1976. The transcript of the hearing comprises 911 pages in 7 volumes. More than 100 exhibits, comprising in excess of 1000 pages, were received in evidence.

On February 3, 1977, the association filed its third amended charge including all of its previous accusations and elaborating its prayer for relief.

Numerous pleadings and motions were received as late as April, 1978, which would be useless to detail, except for those discussed below under the heading: "Discrimination Against Witnesses".

The Examiner resigned his employment with the Commission in December, 1976, without issuing a decision. These cases were transferred to the full Commission for disposition. The Commission issued a decision with accompanying Findings of Fact, Conclusions of Law and Order on January 30, 1979, finding that the school district had committed unfair labor practices in violation of RCW 41.59.140(1)(a), (d) and (e). It further granted the association's post-hearing motion for summary judgment pertaining to discrimination against witnesses at the hearing. The association was found not to have committed any unfair labor practices. The remedies imposed by the Commission included a cease and desist order, an order to post a specified notice, an order to bargain collectively in good faith, and an order compensating witnesses at the hearing.

The school district appealed the decisions of the Commission in both cases to the Mason County Superior Court, where the decision was reversed and remanded to the Commission on the grounds the Commission failed to follow the requisite procedures of RCW 34.04.110. A remand order was signed by the Court on July 31, 1981.

In September, 1983, the Commission, following the procedures of RCW 34.04.110, reissued its original decision to the parties, giving them opportunity for comment. Comments and briefs in support of those comments were submitted in November of 1983. Subsequently, one member of the Commission read the entire record in the case, and the remaining members of the Commission read all of the relevant portions of the record.

## CONTENTIONS OF PARTIES

The school district challenges the Commission's proposed decision, findings and conclusions, arguing that:

1. The case should be dismissed for mootness.

2. The procedures followed in issuing the decision were improper because the hearing officer who heard the testimony was required to issue the decision.

3. Summary judgment was inappropriate because: (a) there is no authority for summary judgment; (b) material issues of fact existed; and (c) the resultant remedy was erroneous.

4. The Commission should reverse its decision finding the association not guilty of unfair labor practices.

5. The Commission erred in finding that the school district did not bargain in good faith.

The district also takes exception to several specific statements contained in the decision, and to specific findings and conclusions in regard to its objections.

The association argues that:

1. The refusal to bargain remedies imposed in the proposed decision are inadequate.

2. The monetary awards to the witnesses are inadequate.

3. The Commission should have decided the numerous "scope of bargaining" issues raised in this case.

4. A finding relating to the credibility of witnesses is not supported by the record.

## DISCUSSION

### Mootness

We cannot agree with the employer's contention that the case is now moot, or that a bargaining order is irrelevant because, over the passage of time, the parties allegedly have made considerable improvement in their collective bargaining relationship. It has long been held under the National Labor Relations Act that an employer's subsequent compliance with an NLRB order, or its cessation of unfair labor practices, does not render a case moot or preclude the NLRB from obtaining enforcement of its orders. Such orders impose a continuing, prospective obligation on a violator. See: NLRB v. Mexia Textile Mills, Inc., 399 U.S. 563 (1950), where the Court wrote: "The Act does not require the (National Labor Relations) Board to play hide and seek with those guilty of unfair labor practices."

An injustice to the parties, and to the beneficial purpose of the public sector labor laws, would occur if cases were dismissed or remedies were

abated because an improvement in a collective bargaining relationship occurs while a case makes its way through a long and tedious course of litigation.

## Procedures - Examiner

The school district's citation of WAC 391-45-310, and its argument that this decision must be delegated for original issuance to an examiner, misconstrue the purpose of the regulation. WAC 391-45-310 is simply a delegation provision. It allows, but does not require, examiners to issue decisions in unfair labor practice cases. Subject matter jurisdiction over unfair labor practices is vested in the Commission by RCW 41.59.150, so certainly the Commission may elect to issue a decision in the first instance. WAC 391-45-130 supports this position. We agree with the school district that it would be appropriate for an examiner familiar with the record to issue a decision if the Commission were not acquainted with it. When the Commission issues the decision in the first instance on a case that involves controverted facts, at least a majority of the Commissioners must have read the record to the extent required by RCW 34.04.110. Thus, such a review has occurred here.

## Discrimination Against Witnesses - Summary Judgment

On December 2, 1976, the association moved to reopen the record to admit evidence that the pay of its witnesses had been docked for the days they attended the hearings on these matters. On January 19, 1977, the association moved to amend its second amended charge further, by adding a charge relating to the docking witness pay. The district answered on January 20, 1977, admitting that it had reduced the pay of the witnesses involved. Allegedly, those employees received the following letter from the district:

> You were under contract with the district to perform you (sic) regular teaching duties on those days (of the hearing) but were absent and during your absence were engaged in the prosecution of an unfair labor practice complaint against the district.

In our proposed decision, the association's motion for a summary judgment on this issue was granted, although we recognized that ordinarily each party to litigation is responsible for producing its own witnesses and compensating them. We proposed to order the school district to compensate the employees involved at their regular rate of pay for the time spent at the hearing.

The school district challenges the issuance of a summary judgment in this matter, correctly pointing out that the Commission's rules did not provide for summary judgments at the time the motion was made, although such rules

are authorized by RCW 34.04.090(3). Moreover, it would be improper to draw on RCW 34.04.090(3) for direct authority because the required due process guarantees (e.g., notice and an opportunity and hearing) were not provided for here. The Commission subsequently adopted WAC 391-08-230, providing for summary judgments.

We agree with the school district's contention on the procedural issue. We also agree with its argument that the remedy imposed in our previous/proposed decision may not necessarily flow from the offense. Accordingly, we are directing the Executive Director, at the association's request, to determine whether under current rules, a summary judgment would be appropriate, and if so, provide notice and a hearing opportunity to the parties. If summary judgment does not appear to be the appropriate procedure, then, if requested by the association, the Executive Director is directed to assign the issue to an examiner for an evidentiary hearing and decision. The association's argument regarding interest and retirement fund contribution will be considered on remand, if the outcome is favorable to the association.

## Employer Charges Against the Association

We continue to adhere to our proposed ruling that the association's delay in commencing bargaining in 1976 would almost certainly be subject to censure if it were not for the novelty of the statutory obligation and the inexperience of both parties with collective bargaining. The bulk of the statute was enacted as Chapter 288, Laws of 1975, 1st. ex. sess. with a deferred effective date of January 1, 1976. However, the Governor vetoed the portions of the statute creating the administrative agency for the law, and it was not until September, 1975 that an administrative agency was established by Chapter 5, Laws of 1975-76, 2nd. ex. sess. The obligations of the law went into effect on January 1, 1976, with no administrative rules and little administrative guidance. The parties' history of written collective bargaining agreements was limited, and the association had some admitted difficulty in the preparation of its demands for a first contract. As noted above, WAC 391-30-552, which outlined the bargaining procedure expected of parties under RCW 41.59, was not adopted by the Commission until July 29, 1976. By that time, the association had long since placed its demands on the table for bargaining and the parties were, in fact, already embroiled in this litigation. Under these circumstances, we find the delay understandable and excusable.

There was no impropriety in the association's consultation with its state and national affiliates in formulating its demands and structuring its strategy in bargaining. The school district did likewise in consulting the Washington State School Director's Association and using materials, information and suggestions issued by that organization. The association did not attempt to negotiate for any unit of employees other than the unit it represented.

Association Charges Against the Employer

The entire course of bargaining on the part of the school district in 1976 up to the time of the hearing bespoke an abysmal ignorance and egregious misconception of the meaning of, and the legal obligation attendant on, collective bargaining in good faith. The totality of the school district's conduct of these negotiations, measured by any known standard, shows lack of good faith bargaining and the lack of any real desire to reach an agreement.

From the school district's own brief it is apparent that, once these negotiations did get started, the district approached this initial negotiation with the attitude that it was "bargaining from scratch", and that existing benefits, some of long standing, had to be renegotiated. Good faith bargaining is never "from scratch", but from the status quo. Here, as an example, the school district proposed a longer school year than had been the practice and expected credit for each day of shortening as a "concession". Such action is not good faith bargaining.

The school district's negotiators, by word and deed, did seek to foster the impression that they would not sign any written collective bargaining agreement, and that the certificated staff might lose more than it would gain through the collective bargaining process. In a way, the latter impression is a truism, since bargaining, like anything else may be ineptly conducted; but for an employer to foster such an apprehension is in derogation of State policy.

With respect to economic items, the school district seems to have labored under two fundamental misconceptions: (1) That its characterization of itself as a "non-levy" district is of some significance; and (2) That the words "in light of the time limitations of the budget-making process" in RCW 41.59.020(2) gave the school district absolute, unilateral power over salaries and all matters of direct or indirect economic impact, both with respect to timing and with resect to amount.

While any employer is constrained to negotiate within the limits of its resources, it will not do to have an employer arbitrarily refrain from using an available resource and then, in effect, plead inability to pay. The Shelton School District had the same access to special levies for maintenance and operation as any other school district. It at least should have bargained in good faith over wages, hours, terms and conditions of employment and then consider its fiscal alternatives, including a special levy (although this does not mean a levy is mandatory). That it did not choose to avail itself of this resource was not the problem of the exclusive bargaining representative or a defense to good faith bargaining.

With respect to time limits and deadlines, in most cases, neither party can impose on the other the obligation of agreeing to a particular item by a certain date, although in a mature bargaining relationship, which this relationship was not in 1976, the parties may be expected to respect one another's convenience courteously. We find it not significant that the school district had historically issued individual contracts to certificated employees on April 15th of each year for the following school year. Historically, the school district had granted personal leaves and other benefits and operated a school year of 183 days; but it did not feel bound to perpetuate those practices. The school district repeatedly used "the time limitations of the budget-making process" as a weapon to frustrate negotiations. The budget then required by May 10th was only a preliminary budget in any event; but the school district used the statutory requirement to precipitate an impasse in bargaining. It could have issued its contracts at any time subject to the outcome of negotiations, as many school districts did, and could thereby have obtained its count of the number of teachers who would be returning for the following school year. Bypassing the bargaining agent, and sending out the individual employment contracts with salaries fixed unilaterally, was a refusal to bargain in good faith. See: Ridgefield School District, Decision 102-A (EDUC, 1977). There was no genuine impasse. The only impasse had been illegally contrived by the school district, which then sought to take advantage of it. No legally cognizable impasse exists where created by the unfair labor practice of one of the parties. Federal Way School District, Decision 232-A (EDUC, 1977).

The school district is correct in asserting that it need not make any specific concession or concessions on specific items. Neither did it commit an unfair labor practice by refusing to "sign off" on, or initial, clauses that were tentatively agreed. While it is often convenient to do so, such a procedure is by no means a requirement of the law. The parties are required to sign a final written agreement if requested to do so; but they need not sign tentative or partial agreements.

We find, however, that in 1976 the district created a context of bad faith to such a degree that its position on specific items cannot be evaluated in isolation. A position taken by a party in a context of good faith bargaining may be perfectly lawful, while the same position if adopted as part of an overall plan to frustrate agreement, and to penalize employees for trying to exercise their statutory right to bargain collectively, cannot be given agency imprimatur. Decisions involving a failure to bargain in good faith reflect qualitative rather than a quantitative evaluation. Because of the overall bad faith posture of the district, we continue to decline to discuss individually the laundry list of "scope of bargaining" issues brought to our attention by the parties, although the association continues to urge a review of each of those issues.

Interrogation of a Job Applicant.

An applicant for employment was asked these questions in July, 1976:

1. Are you familiar with the WEA and/or NEA?

2. Suppose you accepted a teaching position with the school district and the WEA/NEA voted to go on strike for the 1977-78 school year; what would you do?

3. Suppose 40% of the teachers were going to work and 60% were going to strike, what would you do? (TR.235)

The association charges that propounding these questions to the applicant violated RCW 41.59.140(1)(a). The district defends with reliance on the Blue Flash Express, 109 NLRB 591 (1954), line of cases. The district's reliance is misplaced. The interrogation there approved was to determine whether or not a union claiming to be the representative of a majority of the employees was such in fact. That was not the purpose of the interrogation here. No strike was imminent. The applicant was not being interviewed as a strike replacement. The questions have an obvious tendency to make an applicant apprehensive about affiliating with the parent organizations of the exclusive bargaining representative. Hence, they violated RCW 41.59.140(1)(a). It is not the actual coercive effect of interrogation which renders it repugnant to the statute, but rather it is the tendency of the interrogation to coerce.

Remedy

The district will be ordered to cease and desist from its unlawful interrogation of applicants for employment, to cease and desist from failing and refusing to bargain in good faith, and to cease and desist from interfering with, restraining and coercing employees in the exercise of their rights under RCW 41.59.060. The school district will also be required to post appropriate notices to employees in all of its school buildings.

The association has asked that extraordinary remedies be imposed. In our proposed decision, we opined that because of the novelty of the statute of 1976 and the inexperience of both parties in collective bargaining at that time, imposition of extraordinary remedies would be inappropriate. We continue to adhere to that position.

## FINDINGS OF FACT

1. Shelton School District No. 309 is a school district organized under Title 28A RCW and an employer within the meaning of RCW 41.59.020(5).

2. The Shelton Education Association is an employee organization within the meaning of RCW 41.59.020(1).

3. Prior to January 1, 1976, the Shelton Education Association was recognized, under repealed RCW 28A.72, as the representative of the certificated staff of the Shelton School District; and was, at all times material hereto, the exclusive bargaining representative within the meaning of RCW 41.59.020(6) of non-supervisory educational employees of Shelton School District No. 309.

4. The Educational Employment Relations Act, Chapter 288, Laws of 1975, 1st ex. sess. (RCW 41.59), became effective January 1, 1976. On that date there was no collective bargaining agreement in effect between the Shelton Education Association and Shelton School District No. 309.

5. Shelton School District, through its superintendent, Louis Grinnel, first contacted the Shelton Education Association on January 22, 1976 to initiate bargaining for the 1976-1977 school year. The parties met for the first time on February 19, 1976. The association's complete package proposal, consisting of some 87 pages, was delivered to the district on or about March 15, 1976. The district made no preparation for negotiations prior to receiving the association's complete package.

6. The district and the association held bargaining sessions on: February 19, 1976; March 4 and 18, 1976; April 1, 22, 26 and 29, 1976; May 3, 7, 10, 13, 17 and 27, 1976; June 22, 1976; August 3 and 12, 1976; and September 16, 1976.

7. The Shelton Education Association was in contact with its state affiliate, the Washington Education Association, during the course of bargaining. The Shelton School District discussed collective bargaining strategies with the Washington State School Directors' Association.

8. The Shelton Education Association did not act on behalf of a multi-unit consortium, nor did it condition agreements with the Shelton School District upon the concurrence of employees outside of the bargaining unit of certificated employees of Shelton School District.

9. Throughout the course of negotiations in 1976, the representatives of the district sought to foster the impression that the district would not

sign any collective bargaining agreement. The district, in effect, asserted an inability to pay, while at the same time failing and refusing to consider any proposals which would have called upon the district to make use of "levy" revenue sources potentially available to it. The district thus sought to deter, as an exercise in futility, the exercise of collective bargaining rights by its employees.

10. Throughout the course of negotiations in 1976, the district sought to extract bargaining concessions in exchange for the continuation of previously existing practices of the district concerning wages, hours and conditions of employment of certificated employees, while implying that employees stood to lose more from collective bargaining than they would gain. At the May 7, 1976 bargaining session, representatives of the district told the representatives of the association that the employees would be "worse off" if the association tried to go into mediation.

11. At the May 17, 1976 session the district proposed a salary schedule which was calculated in such a manner that at least all of the association's negotiators would receive an increase, while other bargaining unit employees would receive no increase.

12. Individual certificated employee contracts were issued by the district to bargaining unit employees on May 27, 1976, containing a set salary figure unilaterally adopted by the school district, without reservation that the final salary would be adjusted to conform to the outcome of collective bargaining.

13. On July 8, 1976, Superintendent Louis Grinnel questioned an applicant for employment in a bargaining unit position regarding the applicant's sympathies for and activities in labor organizations.

## CONCLUSIONS OF LAW

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

2. By consulting with their affiliates concerning collective bargaining, the parties did not refuse to bargain in violation of RCW 41.59.140(1)(d) and (2)(c).

3. By the totality of its conduct throughout the course of the meetings, held by the parties between February 19, 1976 and September 16, 1976, its actions and its words, the Shelton School District failed and refused to bargain in good faith as required by RCW 41.59.020(2), with the exclusive bargaining representative of its employees, and the Shelton School District No. 309 thereby violated RCW 41.59.140(1)(e) and (a).

4. By threatening that the exercise of the association's statutory right to the collective bargaining and mediation processes would harm the employees represented by the association, Shelton School District violated RCW 41.59.140(1)(a).

5. By proposing a salary increase, the acceptance of which would jeopardize the Shelton Education Association's duty of fair representation, the Shelton School District violated RCW 41.59.140(1)(e) and (a).

6. By issuing to its certificated employees individual contracts with unilaterally determined salary figures, and without reservation of changes per the outcome of collective bargaining then ongoing, the Shelton School District violated RCW 41.59.140(1)(e) and (a).

7. By interrogating a job applicant about his union sympathies, the Shelton School District violated RCW 41.59.140(1)(a).

On the basis of the foregoing findings of fact and conclusions of law, the Public Employment Relations Commission makes and enters the following:

## ORDER

I. The allegations concerning docking of pay of certain witnesses called by the association are remanded to the Executive Director for further proceedings consistent with this Decision. If no request for further proceedings is made by the association within ten (10) days following the date of this Order, the allegations shall be deemed to be abandoned and closed.

II. It is ordered that the Shelton School District No. 309, its Board of Directors, officers and agents, shall immediately:

1. Cease and desist from:

a. Interfering with employees in the exercise of their rights to bargain collectively through the statutory process;

b. Interfering with the right of employees to form and join employee organizations by interrogation of applicants for employment concerning the attitude toward employee organizations; and

c. Refusing to bargain in good faith with the Shelton Education Association.

2. Take the following affirmative action which the Commission finds will effectuate the policies and purposes of RCW 41.59:

   a. Upon request, bargain collectively with the Shelton Education Association as the exclusive representative of all employees in the appropriate bargaining unit with respect to wages, hours and conditions of employment and if an understanding is reached, embody such understanding in a signed agreement;

   b. Post the accompanying notice for a period of 60 days on bulletin boards where notices to employees of the Shelton School District are usually posted; and

   c. Inform the Public Employment Relations Commission, in writing, within 20 days from the date of this order, as to the steps taken to comply herewith.

III. It is further ordered that the unfair labor practice complaint against the Shelton Education Association, Case No. 523-U-76-64, be and the same is hereby dismissed.

DATED at Olympia, Washington, this 5th day of July, 1984.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R. Wilkinson
JANE R. WILKINSON, Chairman

Mark C. Endresen
MARK C. ENDRESEN, Commissioner

Mary Ellen Krug
MARY ELLEN KRUG, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

# NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, SHELTON SCHOOL DISTRICT NO. 309, HEREBY NOTIFIES OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain collectively in good faith with the Shelton Education Association, an affiliate of the Washington Education Association, as the exclusive representative of the employees in the appropriate bargaining unit.

WE WILL NOT threaten employees that the exercise of the Shelton Education Association's statutory right to the processes of Chapter 41.59 RCW would harm the employees represented by the association.

WE WILL NOT propose a salary increase which could jeopardize the Shelton Education Association's duty of fair representation.

WE WILL NOT issue to our certificated employees represented by the Shelton Education Association individual contracts with a unilaterally set salary figure.

WE WILL NOT interrogate job applicants about their union sympathies.

WE WILL, upon request, bargain collectively in good faith with the Shelton Education Association or any other employee organization selected as the exclusive representative of our employees, with respect to wages, hours and working conditions.

DATED:_____

SHELTON SCHOOL DISTRICT NO. 309

BY:_____

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. Any questions concerning this notice or compliance with its provisions may be directed to the PUBLIC EMPLOYMENT RELATIONS COMMISSION, 603 Evergreen Plaza Building, Olympia, Washington. Telephone (206) 753-3444.