STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SOUTH KITSAP EDUCATION ASSOCIATION, Complainant, v. SOUTH KITSAP SCHOOL DISTRICT NO. 42, Respondent.	CASE NO. 1523-U-78-200 DECISION NO. 896-EDUC FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Symone Scales, attorney at law, appeared on behalf of the complainant.

Christopher Hirst, attorney at law, appeared on behalf of the respondent.

South Kitsap Education Association, (hereinafter referred to as the "complainant") filed a complaint with the Public Employment Relations Commission on July 3, 1978, wherein it alleged that the South Kitsap School District No. 42, (hereinafter referred to as the "respondent" or "district") committed certain unfair labor practices. The material portions of the complaint state:

"Basis for the Complainant

The above-named employer by its board members, superintendent, agents and representatives has discriminated against members of the bargaining unit by the following:

A. On or about May 15, 1978, the employer engaged in bad faith bargaining by withdrawing the tentative agreement previously reached in negotiations concerning the pay of department chairpersons as a result of and in retaliation for the filing of a grievance by the association concerning stipends for certain chairpersons under the previous collective bargaining agreement.

B. On or about May 10, 1978, the above-named employer, through its superintendent, James Swick, undermined and circumvented the bargaining process by dealing directly with employees in respect to the negotiations process, specifically disparaging the South Kitsap Education Association by informing employees that the SKEA bargaining committee was not prepared to bargain, was incompetent, and informed the employees that he believed they should hire a professional negotiator. By the foregoing conduct, the employer improperly has attempted and continues to attempt to interfere with the internal processes of the South Kitsap Education Association, improperly to influence its members and hold the SKEA up to ridicule by false and/or misleading accusations.

C. Since on or about May 10, 1978, the above-named employer, through its representatives, has harassed, coerced and discriminated against a member of the SKEA bargaining committee, Mark Stevens, because of his participation in the negotiations sessions with the employer.

D. On or about June 5, 1978, the above-named employer unilaterally established the first day of the 1978-79 school year, without reaching negotiated agreement thereon."

"Relief Sought

To cease and desist from the aforesaid unfair labor practices and affirmatively to bargain in good faith and further that it be directed to rescind and give no effect to the unilaterally adopted calendar."

BACKGROUND

Facts Relating to Paragraph "A" of the Complaint

When the 1976-78 agreement between the parties was being put together, the question was raised as to whether the district would have department chairmen at the junior high schools. It was agreed that while it could be a possibility, there was no certainty at that time. However, the parties did agree to establish a point system for the junior high department chairmen to be ready should such an eventuality occur. An agreement that the junior high department chairmen would not be established at that point was clearly laid out. There were no department chairpersons at the junior high schools during the life of the 1976-78 contract. Such chairpersons were planned for the 1979-80 school year.

Early in April, 1978, when the bargaining process for the 1978-81 agreement began, the parties agreed to go through their 1976-78 contract and identify items or sections which the parties wished to change. Those items which neither party wanted to change were considered as approved and were given "tentative agreement" status. One of the items so approved and set aside was a page entitled "Extracurricular Point System For Department Chairmen."

On May 5, 1978, a grievance was filed by the complainant on behalf of a junior high teacher who claimed to have been performing as a junior high department head since the start of the 1977-78 school year without receiving extracurricular pay. The remedy requested was: "That all designated employees performing department chairman functions be paid per the negotiated stipend schedule retroactive to 9/1/78 [sic]." Superintendent Swick responded on May 9, 1978, saying there were no department chairmen at junior high schools, that the matter had been clearly discussed at the bargaining table and that no such positions would exist for the 1977-78 school year. He concluded that since no such positions exist at the junior high level, there was no violation and no

justification for the grievance. On June 5, 1978, the claimant withdrew the grievance, stating, "Because of miscommunication and misunderstanding on the part of our members, this matter proceeded to this point. I regret the inconvenience this action may have caused the district."

Following receipt of the grievance on May 5, 1978, the district negotiator withdrew the page concerning department chairmen from the list of TA'd items, indicating that further discussion was needed in view of an obvious misunderstanding concerning the matter. The amended page was later included as appendix "D" in the current bargaining agreement, having been discussed and agreed in the bargaining process.

Facts Relating to Paragraph "B" of the Complaint

The superintendent was invited to attend a faculty meeting at Orchard Heights Elementary School on May 2, 1978 to discuss issues of concern at that building. He was asked if he (i.e., the district) had a professional negotiator; to which he answered affirmatively. In answer to the question, "Do you think that the teachers association or somebody should have a professional negotiator?", he responded "I felt professional negotiators can generally do a better job - they understand the process." The teachers commented concerning their own bargaining team and then asked if the superintendent had any feeling about this type of thing. He did not respond to their feeling about their own team. He went on to say, "I did indicate that the negotiations we have often had to train at the table members of the opposing team simply because they have not understood the processes at times. Mr. Smith (the district negotiator) has had to spend a lot of his time training during the process of negotiations." When asked, "Well, do you think if we had our own professional negotiator, the negotiations would go better?", his response was, "Yes, they probably would." He did not make any statement as to any member of the team or as to what the team was doing.

During the hearing, in response to counsels direct question, "Did you state at all that you felt that some of the bargainers for the association were just not competetent to do the job?", the superintendent responded, "No. I never made a statement in that light relative to a bargaining team to a staff in any building."

Facts Relating to Paragraph "C" of the Complaint

An academic freedom issue was presented by the district on May 2, during collective bargaining negotiations. That management proposal spoke to so-called "controversial" issues. Prior administrative approval was to be required before such issues could be presented by certificated employees in the classroom. A request for clarification of "controversial" by the teachers bargaining team led to an "off-the-record" talk

about the issue. The teams discussed the issue of pregnancy, defining that as a controversial issue. When principal Cartier asked SKEA negotiator Stevens what he would do, in his position as a certificated employee, if some (junior high) girl came to him and was pregnant, Stevens responded that he would "ask her what she wanted to do, that if the girl needed information about an abortion, and that was something she wanted, that he would provide her with that information". Testimony for the respondent indicated Mr. Stevens had made the remarks during and following the bargaining session, and that he also stated he "had counseled some of them where these facilities were available within the county".

The district team met with the superintendent after the bargaining session. During that meeting the assistant superintendent informed the superintendent of Mr. Stevens' remarks.

On the following day, May 3, Stevens was called to the building principal's office. She stated the superintendent had directed her to ask Stevens whether he "advocates abortions in this district, within this building and in your present position". Stevens responded, "No. I do not advocate abortion in this district".

In testimony, the superintendent indicated that he had requested principal McIntyre to ask Stevens if he felt he had the right and had or had not exercised such right to refer girls for abortion. After Stevens response in the negative, the matter was dropped. No further action was taken.

During the time Stevens served on the negotiating team, he applied for a leave to attend a workshop. His request was submitted to and approved by Dr. Drotz. The district then withdrew approval saying "I was on the negotiating team, they wanted negotiations to proceed and without me and the district they could not do that. [sic]."

The district was attempting to meet as frequently as possible during this time to come to some agreement. The district negotiator stated that in the judgement of the district. "the association was utilizing delaying tactics by not coming to an agreement. We wanted to get things over so we could plan for the next year."

Facts Relating to Paragraph "D" of the Complaint

School calendar was an issue earmarked to be discussed in the bargaining process. Before any agreement was reached at the table however, Dr. Swick recommended to the board an opening student day for the 78-79 school year. His recommendation was approved and the 78-79 opening day

established by board action. The board decision was announced in early May, 1978. The district had initially proposed a 3 year contract with 187 days per contract year while the association proposed a 2 year contract and a continuation of the previous 183 day contract year.

POSITION OF THE PARTIES

The complainant alleges:

A) The employer engaged in bad faith bargaining by withdrawing a tentative agreement concerning the pay of department chairpersons.

B) The employer undermined and circumvented the bargaining process by making disparaging remarks concerning the association bargaining team.

C) The employer harassed, coerced and discriminated against a member of the SKEA bargaining committee.

D) The employer unilaterally established the first day of the 1978-79 school year without reaching negotiated agreement. The complainant further alleges that the question of when school is to begin (starting date) is paramont as to how long the calendar needs to be - because of the manner in which the holidays are spread.

The respondent contends the allegations of the complainant are without merit, that is bargained fairly and that the claims of unfair labor practices should be dismissed.

DISCUSSION

It is a normal practice at the bargaining table to include reservations such as the right to modify, amend or substitute, keeping in mind that the parties are trying to move toward a point of agreement. Major shifts of position to avoid agreement will be found to violate the duty to bargain in good faith. Sunnyside Valley Irrigation District, Decision No. 314 (PECB, 1977), Island County Commissioners, Decision No. 857 (PECB, 1980). The ground rules of bargaining most often include an understanding that in the course of negotiations, the parties may retract a tentative agreement on specific items, but they will be subject to the total agreement. This appears to be the understanding of the parties in the instant case. While they agreed they did not currently challenge an item, it did not preclude the item from a later challenge.

The subject of chairpersons had received an early tentative agreement along with many other parts of the bargaining agreement which had been agreeable to the parties. It rose to the surface as a matter for concern when the grievance concerning chairpersons was filed on May 5, 1978, and that grievance defeated the earlier presumption that it needed no modification or discussion.

The district responded promptly (May 9) to the grievance, stating the rationale for its position. The grievance was subsequently withdrawn by the then president of the association. The subject of chairpersons was later negotiated by the parties and new or modified language agreed to by the parties sometime in late July or August.

The association used three different bargaining teams sequentially during the course of the negotiations, the first serving from April to mid-July. Testimony by two witnesses who were members of the first bargaining team indicated there was no discussion of chairpersons until the grievance was withdrawn, claiming the grievance was not withdrawn until it appeared at the end of the third package of third team proposals. Testimony also revealed that the first team did on several occasions attempt to reinsert the deleted chairperson wording of the past contract into the current agreement. The district declined as it had a right to do. When alternate language was later considered by the second team, an agreement was reached.

The grievance was withdrawn June 5 by the then president of the association and no testimony was offered to indicate any association disagreement with the actions or statements of the president. The district should be entitled to rely on her statements as being accurate, factual and reflective of the membership voice. Negotiation and agreement took place in late July/August.

The superintendent was the sole witness called by the complainant to offer testimony concerning comments supposedly made by the superintendent at the meeting at Orchard Heights School. The superintendent's statements of what took place at the meeting were not disputed.

He had been invited to a meeting and responded to individual questions which had been asked him on a variety of issues, offering his personal opinion in answer to at least several of the questions. He offered an opinion that professional negotiators "generally do a better job", that things would probably go better if the association were using a professional negotiator and that the district negotiator had spent a lot of time training during the negotiations because members of the opposing (SKEA) team had not understood the process.

Such statements do not constitute the sort of egregious conduct which had been alleged. Stating a personal opinion of another's proficiency in negotiating, sports, music or performing is simply that, just an opinion - something less than proficient needn't be construed as slanderous, disparaging or misleading. The burden of proof rests upon the accuser and is found lacking.

Stevens had applied for and was granted leave during the time he was to be on the bargaining team and during a period when negotiations were being scheduled on a frequent basis. The question of motivation in applying for the leave at that specific time was neither raised nor challenged. Assistant Superintendent Dr. Dale Linebarger participated as a member of the district's negotiating team during the period in question. He retired from the district following completion of the 1977-78 school year and was replaced by Dr. Drotz as assistant superintendent. During the 1977-78 school year, Dr. Drotz had served as director of curriculum. Although the request had been approved by Dr. Drotz, the labor relations staff of the district was not aware early of the approval. The district did move to cancel the leave when it became known. Viewing the matter for their overview perspective, more senior officials of the employer simply chose to overrule Drotz's earlier decision for purposes of expediency, not with malice.

It is difficult to understand how such a "stay and bargain" action by the district, which neither hindered nor prevented the process, could be deemed as an attempt to interfere with or undermine bargaining efforts. When the association's bargaining team reacted by cancelling bargaining sessions during the period in question, the leave request was again approved by the district, allowing Mr. Stevens to proceed with his personal plans.

The negotiation process represents only a fragmentary portion of the total responsibilities of the superintendent's position. Operation of the district and education of the students are his foremost interests. When informed by whatever means that a counselor in his district may be advising or counseling junior high girls concerning abortions, it is not unreasonable for a superintendent to react by expressing a desire to obtain more information relating to such an allegation. In the instant case, the superintendent responded in a discreet manner. The inquiry was pursued via the counselor's immediate supervisor who asked only one question. When the response was in the negative, the matter was dropped. No subsequent action was taken on the part of the district. The mere fact that the particular counselor in question happened to also be a member of the association negotiating team is not in itself adequate grounds to support a charge of interference or undermining of bargaining efforts.

RCW 28A.59.180(7) defines the authority of the school board to establish the start of school as follows:

> "To determine the length of time over and above one hundred eighty days that school shall be maintained: Provided, That for purposes of apportionment no district shall be credited with more than one hundred and eighty-three day's attendance in any school year; and to fix the time for annual opening and closing of schools and for the daily dismissal of schools before the regular time for closing schools (emphasis added)."

RCW 41.59 which prescribes certain rights and obligations of the educational employees of the school districts of Washington, defines collective bargaining as follows:

> "41.59.020(2) The term 'collective bargaining' or 'bargaining' means the 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: Provided, That prior law practice or interpretation shall be neither restrictive, expansive, nor determinative with respect to the scope of bargaining. (Emphasis added.)"

The Public Employment Relations Commission has determined the school calendar to be a bargainable subject:

> "Under applicable National Labor Relations Act precedents, the school calendar constitutes 'hours of work' and would thereby be a bargainable subject. Further, a consideration of state decisions regarding calendar, suggest that under a statutory scheme similar to Chapter 41.59 RCW, calendar is a mandatory bargaining item."
>
> Edmonds School District No. 15, Decision No. 207 (EDUC, 1977).

Testimony offered by the association is somewhat confusing as to the actual impact created when the district established an opening day for the school session.

> "Q. When you negotiated the calendars that become part of Joint Exhibit 2, aren't these the kinds of days during the school year that you negotiate about?
>
> A. Yes, of course, it is.
>
> Q. And wouldn't the ending day of the school year depend upon whether you and the district agreed that there were going to be 183, 185 or 187 days?
>
> A. That is true.

Q. So, it really isn't true that establishing the first student day automatically determines the balance of the calendar?

A. It does not, because if you pick a particular date then you are going to have so much spill time which you have to allot, and you are going to lock yourself into only one or two or three schematas, depending upon the length of it. Those schematas then make the overall impact of the calendar either desirable or undesirable as a matter of fact. Therefore, the choice of the opening day is like choosing the beginning move in the weave of carpet, you are going to choose the rest of the pattern. So, by choosing the first lot you have chosen the calendar. (TR 30)"

While the first day may not lock in all of the balance of the school year, it does have an obvious and substantial effect on the balance of the school year.

There is no question that RCW 28A.59 supra gives the district a right to establish an opening date for school. Nor is there any doubt that RCW 41.59 requires that "hours, terms and conditions of employment" be bargained.

Rather than evolve into a "chicken and egg" discussion over which statute came first or which takes precedence, it would appear that justice might be better served by attempting to dovetail or harmonize the statutes into a workable combination which could reasonably apply to the instant case. Without RCW 28A, the district would have no power to adopt a calendar and the parties would have nothing to bargain about. RCW 41.59 limits the exercise of the authority granted in RCW 28A.

The matter for concern here is whether, in early May, there was an urgent and adequate need for the district to adopt a starting date for the following school year. Both parties were fully aware and agreed that calendar was a bargainable issue. Negotiations were currently in progress at the time of adoption. Subsequent to that adoption, the district did proceed to bargain the balance of the calendar for the next school year and the total calendar for the 1979-80 and 1980-81 school years. The number of negotiated contract days for the 1978-81 contract period remained, without change from the 1976-78 contract period, at 183 days per school year.

The school start date which was unilaterally adopted by the district was September 4, 1978, the day after Labor Day. The negotiated start day for the two subsequent school years was also the day following Labor Day. Whether the starting date in 1978 represented some sort of innovation for the district or was merely a continuance of the traditional start date does not appear in the evidence. It is assumed by the Examiner to be the latter.

Lacking any demonstrated urgency for the unilateral adoption, such as a lawful impasse in bargaining or a time later in the year when the need to establish such a date could be demonstrated as critical for the succesful, coordinated opening of schools, it would appear by any reasonable standard that the district did, in fact, breach its duty to negotiate the opening day prior to adoption. To unilaterally act on a negotiable item at the time it is being negotiated is a violation of RCW 41.59 and constitutes an unfair labor practice. Use of RCW 28A in this instance is not a sufficient defense for the unilateral action, lacking evidence of need or urgency for such an adoption.

REMEDY

Having found that the respondent did engage in an unfair labor practice in violation of RCW 41.59.140(1)(e), the respondent must be ordered to cease and desist from violation of the Act and to take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the respondent unlawfully adopted by unilateral action, the starting date for the 1978-79 school year. The respondent will be required to cease and desist from the aforesaid practice and to affirmatively bargain in good faith concerning starting dates for future school years following expiration of the current bargaining agreement.

No rescission order will be issued since it is not possible to reconstruct history. The parties are currently under a negotiated calendar which they should continue with, and they should bargain calendar for future school years.

FINDINGS OF FACT

1. South Kitsap School District No. 42 is an employer within the meaning of RCW 41.59.020(5).

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

3. On or about May 15, 1978, in response to the filing of a grievance by the association concerning stipends for certain chairpersons under the previous collective bargaining agreement, the employer withdrew a tentative agreement concerning the pay of department chairpersons. The item was subsequently negotiated and agreed by the parties.

4. On May 2, 1978, the superintendent was invited to attend a faculty meeting at Orchard Heights Elementary School. In response to specific questions asked by faculty members concerning the possible value of using a professional negotiator, the superintendent offered a personal opinion, saying he felt that a professional negotiator can do a better job since they understand the process.

5. On or about May 10, 1978, the employer cancelled a previously approved leave for association negotiator Mark Stevens. The leave was subsequently re-approved.

6. At the direction of the superintendent, Mr. Stevens was queried by the principal of his building regarding comments made by Stevens at a bargaining session concerning his counseling activities. Such inquiry was made privately and the matter was not pursued by the district.

7. On or about June 5, 1978, the employer unilaterally established the first day of the 1978-79 at a time when calendar was being negotiated, when no impasse existed between the parties and there was no showing of urgency for such an adoption.

CONCLUSIONS OF LAW

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

2. By the events described in findings of fact 3 through 6, the employer did not interfere with the exercise of employee rights or fail or refuse to bargain collectively in good faith, and did not commit unfair labor practices in violation of RCW 41.59.140.

3. By its unilateral action, as described in finding of fact 7, the employer violated its duty to bargain in good faith concerning hours, and terms and conditions of employment, and thereby committed an unfair labor practice in violation of RCW 41.59.140(1)(e).

ORDER

1. The complaint alleging unfair labor practices by the respondent as described in findings of fact 3 through 6 and conclusion of law 2 is dismissed.

2. South Kitsap School District No. 42, its agents, officers and representatives, shall immediately:

A. Cease and desist from:

1. Refusing to bargain collectively with South Kitsap Education Association as the exclusive bargaining representative of its employees with respect to the starting date of future school calendars for school years commencing after the expiration date of the current (1978-81) collective bargaining agreement.

B. Take the following affirmative action which is necessary to effectuate the policies of RCW 41.59.

1. 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 A". Such notices shall, after being duly signed by an authorized representative of the South Kitsap School District No. 42, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the South Kitsap School District No. 42 to ensure that said notices are not removed, altered, defaced or covered by other material.

2. Notify the Executive Director of the Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by the preceeding paragraph.

DATED at Olympia, Washington, this 3rd day of JUNE, 1980.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

J. T. COWAN, Examiner

"Appendix A"

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION SOUTH KITSAP SCHOOL DISTRICT NO. 42 HEREBY NOTIFIES OUR STAFF THAT:

WE WILL cease and desist from refusing to bargain collectively with the representatives of the employees on calendar start date.

WE WILL, upon request by the union, bargain collectively in good faith with the South Kitsap Education Association as the exclusive representative of the certificated staff with respect to hours, terms and conditions of employment, specifically with respect to starting dates for any school calendar years for the school years after expiration of the current (1978-81) bargaining agreement.

DATE:_____

SOUTH KITSAP SCHOOL DISTRICT NO. 42

BY:_____

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. 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 98504. Telephone: (206) 753-3444.