Tacoma School District (Tacoma Education Association), Decisions 5465-C and 5466-B (EDUC, 1996)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TACOMA SCHOOL DISTRICT, Employer.	)	
LOIS MEHLHAFF, Complainant, vs. TACOMA EDUCATION ASSOCIATION, Respondent.	)	CASE 11775-U-95-2770 DECISION 5465-C - EDUC
LOIS MEHLHAFF, Complainant, vs. TACOMA SCHOOL DISTRICT, Respondent.	)	CASE 11776-U-95-2771 DECISION 5466-B - EDUC CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

L. Curtis Mehlhaff, Attorney at Law, appeared on behalf of the complainant.

Michael J. Gawley, Attorney at Law, appeared on behalf of the Tacoma Education Association, and appeared specially on behalf of the Tacoma School District.

Susan Schreurs, Attorney at Law, appeared on behalf of the Tacoma School District.

On May 17, 1995, Lois Mehlhaff filed two unfair labor practice complaints with the Public Employment Relations Commission under Chapter 391-45 WAC. Although the charges were closely related, separate complaint forms and separate statements of fact were

filed. Charges which named the Tacoma Education Association (TEA or union) as respondent were docketed as Case 11775-U-95-2770; charges which named the Tacoma School District (employer) as respondent were docketed as Case 11776-U-95-2771. Preliminary rulings were issued in both cases under WAC 391-45-110, and partial dismissals were issued in both cases to narrow the scope of the litigation to issues within the jurisdiction of the Commission.[1] J. Martin Smith of the Commission staff was designated as Examiner, to conduct further proceedings in the matters.

The TEA filed a motion for a more definite and certain complaint, which was denied by the Examiner.[2] The TEA also filed a motion to dismiss on May 6, 1996, contending the complainant neglected to serve a copy of the complaint and its pertinent attachments on the TEA, but that motion was also denied by the Examiner.[3]

A hearing was conducted before the Examiner on July 11, August 28 and 29, October 10, and October 23, 1996. Briefs were filed to complete the record in these cases.

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[1] Tacoma School District, Decision 5465 (EDUC, March 12, 1996) was the partial dismissal in the case against the union. Tacoma School District, Decision 5466 (EDUC, March 12, 1996) was the partial dismissal in the case against the employer. Tacoma School District, Decision 5466-A (EDUC, June 10, 1996) corrected an error in the initial order in the case against the employer.

[2] Tacoma School District, Decision 5465-A (EDUC, April 19, 1996).

[3] Tacoma School District, Decision 5465-B (EDUC, June 10, 1996). Service of process is required by applicable statutes and rules. The Examiner denied the motion, however, because it was clear that the union had been properly served before Mr. Gawley appeared as counsel in this case.

BACKGROUND

The Tacoma School District operates 6 high schools, 10 junior high schools and 39 elementary schools for students in kindergarten through 12th grade. Its basic instructional force is approximately 1650 teachers who hold individual contracts. The employer also hires certificated employees to work as "substitute" teachers when regularly-assigned classroom instructors are absent from their usual duties.

The Tacoma Education Association is affiliated with the Washington Education Association and the National Education Association.[4] The TEA is the exclusive bargaining representative, under the Educational Employment Relations Act, Chapter 41.59 RCW, of a bargaining unit which includes all non-supervisory certificated employees of the Tacoma School District.

In Tacoma School District, Decision 655 (EDUC, 1979), the bargaining unit represented by TEA was clarified as follows:

> 1. Substitute certificated employees employed by Tacoma School District No. 10 sporadically on call as needed and who have not worked at least 30 days during a period of 12 months ending during the current or immediately preceding school year are casual employees who are not included in the appropriate bargaining unit for which Tacoma Association of Classroom Teachers is recognized as the exclusive bargaining representative of employees of Tacoma School District No. 10.
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> 2. Substitute certificated employees employed by Tacoma School District No. 10 for more than 30 days of work within any 12 month period ending during the current or immediately pre-

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[4] The local organization was formerly known as the "Tacoma Association of Classroom Teachers".

> ceding school year and who continue to be available for employment as substitute teachers are regular part time employees of Tacoma School District No. 10 and are included in the appropriate bargaining unit for which Tacoma Association of Classroom Teachers is recognized as the exclusive bargaining representative.
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> 3. Substitute certificated employees employed by Tacoma School District No. 10 in positions where it is anticipated or comes to pass that a member of the bargaining unit will be absent from his or her regular assignment and will be replaced in such assignment for a period in excess of 20 consecutive work days are regular part time employees of Tacoma School District No. 10 and are included in the appropriate bargaining unit for which Tacoma Association of Classroom Teachers is recognized as the exclusive bargaining representative.

The "30 days" test represented approximately one-sixth of the normal work year for contracted teachers, and was slightly below the average reported in that decision for the work records of Tacoma substitute teachers in a previous year.

The employer and union have negotiated a series of collective bargaining agreements. In their latest contract, which covers the period from September 1, 1995 through August 31, 1998, regularly-assigned classroom teachers were paid during the 1995-1996 school year at annual salary rates ranging from $22,608 to $48,605. Those rates convert to a range of approximately $126 to $270 per day worked. Three distinct groups of substitute teachers have been employed by the Tacoma School District in recent years:

1. Per diem substitute teachers, sometimes called "on-call" substitutes. These teachers are placed on a roster, and are summoned to schools in the morning after messages are gathered from regularly-scheduled teachers who will be absent for that particular day. Per diem substitutes are assigned to build-

ings by subject area, geographical considerations, or the requests of the absent teacher. These employees were paid in 1995-1996 at a daily rate of $87.00 for the days they worked, so that their monthly incomes varied considerably. Per diem substitutes are often on the rosters of several school districts within driving distance of their homes. Some per diem substitute who begin work in a particular classroom on a one-day assignment continue in that assignment for a longer period. Per diem substitutes can also be assigned to pre-arranged assignments, where different wage rates may apply.

2. Cadre substitute teachers were employed on an experimental basis during a two-year period in 1991 through 1993. At least 50 substitute teachers were employed under personal services agreements, and were guaranteed 160 days of work each year. They were to be paid at a daily rate of $94.00, as compared to the $82.00 rate then paid to per diem substitutes. The "cadre" substitutes were given a preference in future hiring for full-time positions.

3. Contract substitute teachers are full-time employees who, for a variety of reasons, are not assigned to a particular building. They are entitled to a salary determined by placement on the certificated employee salary schedule. Since these teachers are guaranteed their salaries, every effort is made to place them in classrooms for all 180 days of the school year when students are in attendance.

Lois Mehlhaff holds a bachelor's degree from the University of Washington and a master's degree from Pacific Lutheran University. Her particular fields of interest are science and chemistry. She holds an "ESA certificate" issued by the State of Washington for counseling, as well as a "continuous plus seven" standard teaching

certificate issued by the State of Washington.[5] Prior to 1987, Mehlhaff taught full-time in Delaware, and at the Clover Park School District near Tacoma. She apparently became a member of a WEA affiliate when employed at Clover Park.

Mehlhaff's Work History as a Tacoma Substitute

Lois Mehlhaff's date of hire as a teacher at Tacoma is September, 1981. She has worked as a substitute teacher in the Tacoma Public Schools, in the "per diem substitute" group, since the 1987-88 school year. Her recent work record is summarized as follows:

- For the 1990-91 school year, she worked 56.5 days;
- for the 1991-92 school year, she worked 48.0 days;
- for the 1992-93 school year, she worked 35.0 days;
- for the 1993-94 school year, she worked 32.0 days;
- for the 1994-95 school year, she worked 24.5 days;[6]
- for the 1995-96 school year, she worked 43.0 days.

Mehlhaff has been a member of the union since 1987. She was entitled to be included in the certificated employees bargaining unit by virtue of the definition of part-time employees contained in the collective bargaining agreement, and because she had worked more than 30 days during each school year.

Mehlhaff has a history of involvement in controversies concerning the substitute teachers:

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[5] Certification is required of all substitute teachers under Chapter 28A.410 RCW.

[6] For at least this year, Mehlhaff indicated she was only available for full days in the math, chemistry, biology and science subject areas at the six high schools. This was a substantial limitation on her availability to work.

- In 1992, she protested that the TEA removed a list of substitute teachers, and attempted to amend its bylaws to eliminate a "department of substitutes" within the organization;

- Also in 1992, she promoted a grievance concerning 42 "cadre" substitutes;

- In 1993, Mehlhaff protested a new TEA requirement that substitute teachers renew their membership every school year, rather than "roll-over" their membership from one year to the next.[7] Soon thereafter, UniServ Representative George Blood and TEA officers Patty Maruca and Theresa Tommaney began attending meetings held by the substitutes' group.

Mehlhaff particularly pressured the union on a number of fronts in 1994:

- Mehlhaff and other substitute teachers filed a grievance arguing that eligibility for "optional days" under the collective bargaining agreement should extend to substitute teachers, in common with regularly-assigned teachers;[8]

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[7] In the autumn of 1993, the TEA negotiated a new rate of $87.00 per day per diem for substitute teachers, which increased to $100 per day once an individual worked over 75 days in a school year. On October 10, 1993, substitute teachers were told that they had to reapply for TEA membership each year by October 21, and that their maximum dues would be equal to one-third of the dues paid by full-time certificated employees.

[8] The 1993-1995 collective bargaining agreement provided for employees to be paid for up to five "optional days". Mehlhaff argued that a state law authorizing payment for optional days allocated funds for "certificated" employees", without any distinction between substitute, part-time, or full-time employees.

- Similar claims were made that substitute teachers should be eligible to apply for "professional growth funds" made available to regularly-assigned teachers under the contact;

- Substitute teachers claimed they should be paid in proportion to the base (minimum) salary provided by the collective bargaining agreement for regularly-assigned teachers; and

- Mehlhaff, along with fellow substitute teachers Jon Carlson and Linda Hohn, unsuccessfully opposed a by-laws change proposed by TEA in September of 1994, under which each substitute teacher was required to pay an "absolute one-third" of the annual dues paid by regularly-assigned teachers, rather than a "$1.90 per day worked up to a maximum of one-third" formula formerly applied to substitute teachers.[9] A related change was that the "absolute one-third" was to be collected in four equal payments prior to the mid-point of the school year,[10] instead of by deductions spread over the entire year. The substitutes objected to assessing union dues on any method other than a per diem basis, saying that per diem was the most fair. With no authorization or sponsorship of the TEA, Mehlhaff filed a grievance on the dues issue, but it was denied by the employer on November 21, 1994. (Exhibit 14.)

After grievances, a lawsuit in court, and other forays against the union were unsuccessful, Mehlhaff filed these unfair labor practice charges.

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[9] It was argued that some substitute teachers paid as little as $14.00 in dues and that some paid the maximum, but both were equally represented under the contract.

[10] Substitutes were assessed $45.66 per month for September, October, November and December of the school year, for a total of $182.64. (Exhibit 12.) Regularly-assigned teachers paid the $45.66 monthly dues for 12 months.

DISCUSSION

The ultimate issues before the Examiner are whether the employer and union, either separately or in concert, carried out their labor relations responsibilities in such a way as to discriminate against Mehlhaff in violation of the Educational Employment Relations Act, Chapter 41.59 RCW. Owing to the structure of the complaints and answers, the numerous primary and secondary issues identified in those pleadings, and the varying roles of counsel,[11] the Examiner has undertaken to group the facts, arguments and analysis for issues separately, under the headings which follow.

I. ALLEGATIONS AGAINST THE UNION

The Union's Dues Rates

Was it an unfair labor practice for the TEA to collect dues or fees for substitutes at rates different from those charged to other employees?[12] Chapter 41.59 RCW provides as follows:

> RCW 41.59.060 Employee rights enumerated--Fees and dues, deduction from pay. (1) Employees shall have the right to self-organization, to form, join, or assist employee organizations, to bargain collectively through representatives of their own choosing, and shall also have the right to refrain from any or all of such activi-

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[11] Attorney Michael Gawley represented the interests of the employer, as well as those of the TEA, on certain "union security" issues in these cases. The Examiner notes the existence of a "hold harmless" clause in the union security provisions of the collective bargaining agreement.

[12] Case 11775-U-95-2770, complaint paragraphs V.1.0-1.1; 1.2(b-d) and 1.6. See, especially, testimony of July 11 and August 28, 1996, exhibits 1-32, and testimony of G. Blood, J. Carlson, Robin Fox, and Lois Mehlhaff.

ties except to the extent that employees may be required to pay a fee to any employee organization under an agency shop agreement authorized in this chapter.

(2) The exclusive bargaining representative shall have the right to have deducted from the salary of employees, upon receipt of 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 employer and the exclusive bargaining representative, unless an automatic payroll deduction service is established pursuant to law, at which time such fees and dues shall be transmitted as therein provided. If an agency shop provision is agreed to and becomes effective pursuant to RCW 41.59.100, except as provided in that section, the agency fee equal to the fees and dues required of membership in the exclusive bargaining representative shall be deducted from the salary of employees in the bargaining unit. [1975 1st ex.s. c 288 § 7.]

...

RCW 41.59.100 Union security provisions--Scope--Agency shop provision, collection of dues or fees. A collective bargaining agreement may include union security provisions including an agency shop, but not a union or closed shop. If an agency shop provision is agreed to, **the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues.** All union security provisions must safeguard the right of nonassociation of employees based on bona fide religious tenets or teachings of a church or religious body of which such employee is a member. Such employee shall pay **an amount of money equivalent to regular dues and fees** to a nonreligious charity or to another charitable organization mutually agreed upon by the employee affected and the bargaining representa-

tive to which such employee would otherwise pay the dues and fees. The employee shall furnish written proof that such payment has been made. If the employee and the bargaining representative do not reach agreement on such matter, the commission shall designate the charitable organization. [1975 1st ex.s. c 288 § 11.]

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RCW 41.59.140 Unfair labor practices for employer, employee organization, enumerated. (1) It shall be an unfair labor practice for an employer:

(a) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in RCW 41.59.060.

(b) To dominate or interfere with the formation or administration of any employee organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made by the commission pursuant to RCW 41.59.110, an employer shall not be prohibited from permitting employees to confer with it or its representatives or agents during working hours without loss of time or pay;

(c) **To encourage or discourage membership in any employee organization by discrimination** in regard to hire, tenure of employment or any term or condition of employment, but nothing contained in this subsection shall prevent an employer from requiring, as a condition of continued employment, **payment of periodic dues and fees uniformly required to an exclusive bargaining representative pursuant to RCW 41.59.100;**

(d) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under *this chapter;

(e) To refuse to bargain collectively with the representatives of its employees,

(2) It shall be an unfair labor practice for an employee organization:

(a) To restrain or coerce (i) employees in the exercise of the rights guaranteed in RCW 41.59.060: PROVIDED, That **this paragraph shall not impair the right of an employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein;**

> or (ii) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;
>
> (b) **To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (1)(c) of this section;**
>
> (c) To refuse to bargain collectively with an employer, provided it is the representative of its employees subject to RCW 41.59.090. ...

[Emphasis by **bold** supplied.]

The specific issue here is whether the TEA, or the TEA and the employer jointly, have violated the "periodic dues and fees uniformly required" principle found in the statute.

Jurisdictional Defense -

The TEA argued that the Public Employment Relations Commission lacks jurisdiction over this particular claim, citing IAFF Local 2916 vs. PERC, 128 Wn.2d 375 (1995). That argument is rejected as inapposite, however. The cited case was decided under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. In areas critical to union security, that statute is, at best, a paraphrase of the provisions of the federal Labor-Management Relations Act of 1947. In particular, union security is found in a stand-alone section of that statute, at RCW 41.56.122, without any tie-in to the unfair labor practice provisions found in that statute at RCW 41.56.140. The case before the Examiner arises, however, out of the provisions of the Educational Employment Relations Act, Chapter 41.59 RCW, which are set forth above. They more clearly parallel Section 8(a)(3) of the federal law, and the tie-in between RCW 41.59.100 and the prohibition of "discrimination" in RCW 41.59.140-(1)(c) is far more clear than in Chapter 41.56 RCW. The Examiner thus asserts jurisdiction here based on a different, and distinguishable, statute.

A second distinction between this case and IAFF Local 2916 vs. PERC is factual: No mandatory "union shop" clause is at issue here. The record indicates that the collective bargaining agreement between the TEA and the Tacoma School District does not contain the 30-day obligation typical of "union shop" agreements under Chapter 41.56 RCW. The text of the "representation fee" arrangement effective at all times relevant to this case is as follows:

> Section 11. Dues Deduction
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> a. Upon written authorization, whether for unified membership dues in the Association or equivalent fee, the [employer] agrees that said sums will be deducted from payrolls and forwarded promptly to the Association. All enrollments and cancellations shall be handled by the appropriate officers of the Association.
>
> Cancellation of dues must be received in the business office directly from the Officers of the Association ....
>
> b. **The Association must notify the Superintendent in writing no later than September 1 annually of the Payroll deduction for substitutes. The District will deduct the amount specified by the Association for dues if authorized in writing by a regular substitute.**
>
> Section 12. Representation Fee
>
> No employee will be required to join the Association; however, those employees who are not Association members but are members of the bargaining unit will have deducted from their salaries a representation fee. The District is authorized to deduct the required amount from each monthly paycheck. The amount of the representation fee will be determined by the Association and communicated to the Business Office in writing. The representation fee shall be an amount less than the regular dues for the Association membership in that non-members shall be neither required nor allowed to make a political [...] contribution. **The representation fee shall be regarded as fair compensation and reimbursement to the Association for fulfilling**

its legal obligation to represent all members of the bargaining unit. (Reference RCW 41.59.090)

[Emphasis by **bold** supplied.]

The testimony and documentary evidence in this record establish that sections 11 and 12, which are undisputably "representation fee" arrangements of the "agency shop" type, were NOT made applicable to per diem substitute teachers after November 17, 1994, which is the earliest date for this Mehlhaff's complaint to be timely.

Nor is this a case in which agency fees and/or representation fees are a factor. Mehlhaff never paid fees of this type. What is at stake here is no more than a *voluntary* payment of union dues. Mehlhaff chose to pay those fees and dues as per section 11(b) of the collective bargaining agreement.

Existence of Separate Dues Rates -

Nothing in the statute requires the TEA, or any other employee organization, to enforce the maximum form of union security allowed by the law. To so require would interfere in the bargaining process, and would also obviate the opportunities for "waivers" of contract terms which are quite legal, and often aid in calming troubled waters in the labor-relations harbor. Renton School District, Decision 924 (EDUC, 1980). An example of this flexibility is found in a case decided early in the history of the statute: The employer and union in Mukilteo School District, Decision 1122-A (EDUC, 1981) had first negotiated a union security arrangement containing a "grandfather" clause which excluded those who were not then members from union security obligations, and later negotiated a full agency shop in a successor contract. When challenged by an employee whose "grandfather" status was eliminated, neither the

agreement to create the loophole nor the agreement to close that loophole was found unlawful.

Allowing Employer Involvement in Setting Dues -

We agree with both the TEA and the employer that an employer role in setting the amount of union dues, representation fees or agency fees for substitutes would be wholly beyond any authority retained by employers under the statute.[13] RCW 41.59.140(1)(b) generally precludes employer involvement in the internal affairs of unions. Employers have a legitimate interest in knowing the amount(s) they are to deduct, however, and the language of the collective bargaining agreement applicable in this case fits within that range of legitimacy. Hence, the evidence does not support a conclusion that the union permitted improper employer involvement in its internal affairs.

The Union's Dues Collection Schedule

The next question before the Examiner is whether the TEA violated the EERA by the time period prescribed for substitute teachers to pay their annual union dues and fees.[14] The specific question is whether the TEA violated the "monthly" or "periodic dues and fees" principles found in the statute by calling upon Mehlhaff and other substitute teachers to compress their *voluntary* payments of union dues into a four-month period at the beginning of the school year.

The evidence shows that the schedule for payment prescribed by the union impacted substitute teachers in a manner that was neither

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[13] See below, Case 11776-U-95-2771; Complaint 1.0, 1.1, 1.3.

[14] Complaint in Case 11775-U-95-2770, paragraphs V.1.0 - 1.1; 1.2(b-d) and 1.6. See, especially: Transcript of July 11 and August 28, 1996; exhibits 1-32; testimony of G. Blood, J. Carlson, R. Fox, and Lois Mehlhaff.

"uniform" (in relation to the method applied to regularly-assigned teachers), nor "monthly" (as required by RCW 41.59.060(2)), nor "periodic" (as required by RCW 41.59.140(1)(c)). While regularly-assigned teachers were permitted to spread their dues payments over all 12 months of the school year,[15] the accelerated dues payment schedule for substitute teachers was imposed without regard to the amount the employee actually worked in those months.[16] The fact that the substitutes were only required to pay one-third of the amount paid by regularly-assigned teachers does not alter the fact that the amount was demanded on a basis that was not "monthly". As a whole, this method of collecting dues and fees acts to discourage voluntary membership and participation by a class of employees who are required to be in the bargaining unit, and was an interference with their rights in violation of RCW 41.59.140(2)(a).

Union Handling of Mehlhaff's "Optional Days" Grievance

Did the union discriminate against Mehlhaff, by aligning itself in interest against her when she filed a grievance concerning pay for optional days under the contract, or by failing to process her grievance on a timely basis?[17] Mehlhaff has alleged that, as to her and other substitute teachers, the TEA has aligned itself in interest against her grievance filed over the denial of optional days, in violation of RCW 41.59.140(2). The union argues that it fulfilled its obligation under its by-laws and the contract, and

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[15] This includes months after they had completed all of their work for the school year.

[16] Some substitutes might not have earned enough in the first four months of the school year to pay the fee.

[17] Decision 5465, complaint as amended at 3.3(b); testimony of L. Mehlhaff, Maruca, Graf, and G. Blood; Exhibits 73-75; and, especially, Exhibits 95-100.

that it did not discriminate against Mehlhaff because she was a substitute teacher.

"Optional days" are extra days of work beyond the 180 school year, during which classroom preparation and training activities take place.[18] State statutes limit the salaries of school district certificated employees,[19] but contain an exception for extra days of work for which employees are compensated at their daily rates of pay. Monies for these days are usually local funds, not dependent upon the state pass-through amounts.[20] The issue here is whether there was discrimination within the meaning of Chapter 41.59 RCW, as opposed to a breach of duty of fair representation claim arising from the processing of a contractual grievance.

The record here is clear that TEA represented Mehlhaff for purposes of Step One and Step Two of the grievance procedure, but declined to advance her case to the arbitration step. Mehlhaff was allowed two hearings before union bodies. The Employee Rights Committee rejected her request for arbitration, on the grounds that optional days eligibility for substitutes was sought in the last round of

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[18] Although Mehlhaff framed her arguments in terms of the processing of her grievance on this matter, which would normally be excluded from consideration by Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982), this issue has its roots in the contract negotiated by the employer and union.

[19] Since at least "House Bill 166" of 1981, the state Legislature has limited the salaries which can be paid by local school districts to their certificated employees, and has limited bargaining of "wages" under the EERA. See, RCW 41.59.935.

[20] Mentions of "professional growth funds" are intertwined in this record with the issue concerning optional days. Professional growth funds are provided on a reimbursement basis, so the teacher must make the initial payment for seminars or classes they attend. See, Exhibit 96.

negotiations, and could better be achieved at the bargaining table than through arbitration. The union's Executive Council ratified this rationale. Those decisions seemed to follow a logical basis, and it is entirely plausible that TEA reached its decision after hearing Mehlhaff present her case. This precisely describes the testimony of union officials Tommaney and Blood, given at the last day of the hearing in this matter. The exhibits also line up in support of their position here. Mehlhaff had due process rights on this grievance. The record does not support a conclusion that Theresa Tommaney, or anyone else affiliated with TEA, felt "pressured" by the employer to not pursue the grievance.[21]

The employer's position on the grievance was consistent, i.e., that the language of the 1995-98 contract was never intended to provide payment for optional days to anyone other than regularly-assigned certificated staff. The testimony of the union's chief negotiator, Bob Graf,[22] was that the employer "costed-out" the proposal by using a yardstick of:

Number of certificated employees at .5 FTE or more

x

number of optional days

=

total cost

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[21] The attorney for the TEA allowed testimony and exhibits to come into the record concerning the two meetings held by union in order to determine whether to take up Mehlhaff's grievance on the optional days issue, without objection that those internal union affairs were privileged. In fact, that evidence made a good case for the TEA. No employer witnesses were called to testify. It is also noteworthy that, after the .5 FTE limitation was imposed on the optional days benefit, Mehlhaff was actually granted approval for inservice days to which she was not entitled by the contract. No effort was made to recoup those amounts. (Tr. 898; testimony of Maruca.)

[22] Tr. 939-940.

The Examiner will not substitute his judgment for that of the parties at the bargaining table. Perhaps it should be otherwise, but both the collective bargaining agreement and the Examiner's own experiences over a period of years indicate that the pay and benefits provided to substitute teachers are traditionally less than the pay and benefits made available to regularly-assigned teachers. Mehlhaff appears to have stood alone in asserting a right to optional days. She cites neither authoritative precedent nor practices in other school districts from which the Examiner could infer that the TEA knew or should have known that her claim had actual or potential merit. Thus, there is no basis to find that the union "traded away" rights of substitute teachers during bargaining on the optional days. Being aware of the bargaining history regarding the optional days, the TEA agreed with the conclusions reached by the employer on this grievance.[23] Because the employer and union agreed does not make out a case of discrimination in violation of the statute.[24] The activities of the union here fall within that ambit of authority reserved to an exclusive bargaining representative.

The TEA has negotiated contract terms which grant substitute teachers many of the benefits extended to full-time, regularly-

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[23] Mehlhaff had not worked 90 or more days in the previous school year, so she was not in a position to claim optional days on a basis of having met the .5 FTE qualification. She was only claiming the benefit on the basis of her status as a "substitute".

[24] Mehlhaff does not appear to appreciate that the TEA drafted the language to which she objects, and understands its impact in a labor relations sense. The TEA also represents full-time faculty, and understands problems being addressed during negotiation. The union is fully credible when it says that the language on "optional days" was never intended to extend to substitute teachers.

assigned teachers. It is not a requirement of the collective bargaining process that a resulting contract must equally benefit all of the members of the bargaining unit. Spokane County, Decision 4073 (PECB, 1992). No case has been made that the Memorandum of Agreement signed by the employer and union to clarify the ineligibility of substitute teachers for optional days is a forgery or unauthentic document. The most obvious reason for the latter conclusion is that those parties would not have placed a date on a phony document, and then published it for the world to see. Barkley, Graf, and Kvamme gave credible testimony that the document was negotiated to clarify a misunderstanding, and to state more specifically that only teachers contracted for .5 FTE or more were entitled to professional growth and optional days. Since the amount of funds appropriated for this purpose was not large, the overall cost of paying for substitutes along with regularly-assigned teachers at Tacoma would have been a significant factor.

Union Hostility Towards Substitutes' Membership

Did the union align itself in interest against substitute teachers by changes in its dues structure and internal governance?[25]

The Executive Council Changes -

Mehlhaff has framed these issues as "breach of the duty of fair representation," claims under RCW 41.59.140(2)(a), alleging that the union has aligned itself in interest against a segment of the bargaining unit. Specifically it is alleged that a change in the union by-laws in November of 1994 abolished a "department of substitutes" within the union's structure, eliminated funding of a newsletter which had been published for the substitutes, and

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[25] See, Decision 5465. Complaint paragraphs 6.1 - 6.4; 7.1 and 7.2; testimony of Mehlhaff on October 23, 1996; Exhibits 54 and 79.

required that substitutes hold their meetings at the union office rather than the employer's Willard Service Center. The union responds that elimination of the substitute teachers' group was approved by the TEA because the group was holding itself out as a labor organization separate from TEA, in fact deciding unilaterally to call itself the "Tacoma Substitutes Organization" (TSO).

Mehlhaff does not acknowledge the TSO designation, but fellow substitute teacher Jon Carlson testified that he was the elected chairman-spokesman for that group, without apparent authorization of the TEA by-laws. Carlson admitted using the TSO designation to ask the employer for addresses and telephone numbers of substitute teachers, as well as other bargaining information. Carlson had no legal right to make such requests, and the employer erred if it honored them.[26] Under RCW 41.59.090, the TEA is the "exclusive bargaining representative" of all of the non-supervisory certificated employees of the Tacoma School District. The possibility of a separate bargaining unit for substitute teachers was lost when the unit clarification decision was issued which included them in this bargaining unit, and particularly after the decision in Columbia, et al., supra, expressly precluded multiple units. It is well-established that the term *exclusive* in RCW 41.59.090 means that the TEA is the only organization which has a right (and obligation) to negotiate with the Tacoma School District concerning the wages, hours and other terms and conditions of employment for all of the employees in the bargaining unit, without competing organizations or "individual" contracts. See, Ridgefield School District, Decision 102-B (EDUC, 1977), citing NLRB v General

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[26] An employer commits "interference" and "circumvention" unfair labor practices if it negotiates a mandatory subject of collective bargaining directly with a bargaining unit member or with some "other" organization. City of Wenatchee, Decision 2216 (PECB, 1985).

Electric, 418 F.2d 736 (2nd Cir. 1969). See, also, Snohomish County Fire District 3, Decision 4336-A (PECB, 1994).

The statute does not regulate what segments within an "appropriate bargaining unit" are entitled to representation on the bargaining committees and executive boards of unions. The TEA persuasively argued that it sought to eliminate the "department of substitutes" and create a "substitute issues committee", but otherwise entitle TEA members who were substitute teachers access to the bargaining issues which were being negotiated on their behalf. On its face, the alteration of the by-laws to have the substitutes represented on the union's executive council by zone (instead of by Carlson as the head of a quasi-separate department) does not indicate any discrimination or diminution of substitutes' input into bargaining issues. No evidence was presented that the representatives from the zones ignored the wishes or concerns of the substitutes, or failed to attend meetings or otherwise involve the dwindling substitute membership.[27] Nor do exhibits 80-81 indicate how substitute-to-representative ratios of 1:10 or 1:12 alter the input that substitutes maintained for the last three school years.

Re-Application for Union Membership -

Mehlhaff did not contest one important feature of the substitute teacher system at Tacoma: The employer distributes a "notification of continued employment" form each spring to substitute teachers that it wishes to retain in the future, but all substitutes are required to complete a "substitute teacher application renewal" form each autumn, regardless of whether they qualified as a

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[27] The dwindling membership may also have been attributable to the fact that membership was voluntary, and that many or most of the major goals of the substitutes had been achieved in the lengthy labor contract.

bargaining unit member or were a TEA member in the previous year.[28] Given that regularly-assigned classroom teachers are also asked to indicate each Spring whether they will return in the Autumn, it is difficult to see how re-applying for TEA membership each year (as opposed to a "continuing" membership), is either coercive or discriminatory. A union is entitled to prescribe its own rules regarding obtaining and retaining membership. RCW 41.59.140(2)(a). No abuse of that right has been shown here.

Bargaining Team Selections -

Mehlhaff argues that the statute requires unions representing teacher bargaining units to allow direct representation of substitutes on their bargaining teams. This is a false conclusion, however, under both the facts and the law.

The means and manner by which a union's bargaining team is selected, as well as the means and manner by which it communicates with bargaining unit members regarding the status or progress of contract talks, are matters of internal union affairs. Such actions are not regulated by the statute unless they rise to the level of an attempt to deny employees their rights under the collective bargaining statute. City of Bonney Lake, Decision 4916 (PECB, 1994).[29] Most of the terms of the contract between the TEA and the employer apply to substitute teachers, and those terms appear to have been adequately negotiated by TEA bargaining teams in the past, without need for the Commission or its Examiner to invade the internal affairs of the TEA.

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[28] See, exhibits 71 and 70, respectively.

[29] In that case, a union bargaining team did not reveal all matters to the membership, bargained wage increases for themselves greater than for other classifications in the bargaining unit, and failed to carry forward another employee's grievance.

The regularly-assigned teachers who have served as TEA negotiators have certifications, just as do substitutes.[30] The system in Tacoma is more than adequate to communicate unique substitute issues (see Exhibits 89-90-91) to the TEA bargaining team. No segment of the unit has been singled out for disparate treatment on this basis. In fact, meetings were held with substitute teachers on March 6, 1996, only a few months prior to hearing in this case. Ex. 97-99. UniServ Representative Graf indicated that the agenda of substitute items recommended by Mehlhaff was forwarded to the TEA bargaining team for their consideration for upcoming bargaining. An election was held to elect an "association representative" for the substitutes, as per Article VII, Section 3 of the TEA by-laws. While the Examiner has no direct jurisdiction to pass judgment on such an election or the by-laws which called for it, all of these efforts indicate that the TEA acted within the collective bargaining statute by its treatment of the substitute teachers. There is no violation of Chapter 41.59 RCW.

Union Disparagement of the Substitutes as a Group

Did the union allow its own officials or the employer to disparage the "department of substitutes", so as to encourage discrimination against substitutes by the employer's representatives?[31] Mehlhaff contends that the TEA was duty-bound, by RCW 41.59.140(2)(b), to

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[30] If it were discriminatory to allow negotiation by representatives, then no public employee could be represented by an attorney or consultant who is not an employee for the employer. No certifications of bargaining representatives would make sense under either RCW 41.56 or RCW 41.59 et seq. PERC will make no conclusion of law which eviscerates the central purpose of the statutes which it is duty-bound to administer.

[31] Complaint paragraphs 8.0 - 8.2 and its amendments; Decision 5465; Exhibits 91, 92, 93-100; testimony of Maruca and Graf.

investigate why she was not being hired for per diem substitute assignments.[32] The complainant neither explained nor provided evidence, however, on how or why the union (or any of its constituents) could legally dislodge the school district's obvious legal authority to: (1) determine on any day whether a substitute teacher needs be called; (2) determine which substitute teacher to call;[33] (3) determine whether there is a shortage of substitutes, and whether additional substitutes need to be called;[34] or (4) determine whether a particular substitute is in need of more work, or is over-assigned in particular areas.

The assignment of substitute teachers is not addressed in the collective bargaining agreement. Inasmuch as the general subject area deals with staffing, there may be some legitimate doubt as to whether such a topic would be a mandatory subject of bargaining in any event. See, generally, Lake Chelan School District, Decision 4940-A, EDUC 1994; City of Centralia, Decision 5282-A (PECB, 1996); King County Fire District 39, Decision 2160-A (PECB 1985); City of Tacoma, Decision 4740 (PECB, 1994). Hence, the effort of UniServ Representative George Blood to investigate whether all of the substitutes had been called was not *less*, but was seemingly *more*, than he was obligated to undertake. Blood's investigation at the employer's office verified that all of the substitutes had been called; he reported that information to Carlson; he set out his

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[32] Embedded in this line of argument is a possible theory that the union is the guarantor that all per diem substitutes will work the minimum of 30 days per year, so that the union can continue to collect dues from them.

[33] Regularly-assigned classroom teachers may request a particular substitute, but those requests are not binding on the employer.

[34] Hence, on the testimony of Jon Carlson that "emergency subs" were working, or that on the employer was "short 12 substitutes" on March 3, 1995, is not credible, given his lack of access to district records.

opinion that there was no cognizable grievance to be filed under the agreement, because the contract did not require that all substitutes be called. (Tr. 980.) As an official of the exclusive bargaining representative, Blood had every right under the statute to investigate grievances, negotiate settlements, and even to criticize what he thought were inaccurate statements in the newsletter promulgated by the substitute teachers. The record in this case does not make out a violation of RCW 41.59.140.

Change in Union Governance and Participation

Did the TEA discriminate against substitute teachers by changing its by-laws concerning governance of the organization?[35] It is contended that the by-laws changes have diluted the political participation of substitute teachers in the local association.

The TEA changed its by-laws in May of 1995. The question here is whether the TEA made this change to dilute the power that substitute teachers had over issues related to them, or to retaliate against Lois Mehlhaff for her involvement in labor relations issues away from the bargaining table? It must be remembered that the Educational Employment Relations Act draws a distinction between union members and employees who are not union members. As in the private sector, there is no requirement that non-members be accorded the same privileges as members with regard to political rights within the union. Non-members may be barred from union meetings where salary issues (a mandatory subject of collective bargaining) are discussed. Pe Ell School District (Pe Ell Education Association), Decision 3801 (EDUC, 1991).[36] While an

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[35] See, Decision 5465, preliminary ruling; paragraphs 9.0 - 9.4; testimony of Maruca and Graf.

[36] Accord: Lewis County, Decision 464-A (PECB, 1978).

exclusive bargaining representative owes non-members a duty of fair representation on matters within the collective bargaining process, it is not obligated to provide non-members with access to membership rights outside of the collective bargaining process. Pateros School District (Pateros Education Association), Decision 3744 (EDUC, 1991).

On this issue, Mehlhaff has not proved that the altered by-laws are more restrictive than the old by-laws in dealing with substitute issues. Exhibits 8 through 10 were admitted as a group, but the complainant made no attempt to argue or brief factual issues as to whether the by-laws changes made the substitutes worse off than they were before. Several surrounding circumstances support a conclusion that there was no significant change: First, the 1:10 ratio for electing association representatives did NOT change when the reference to a "Department of Substitutes" was deleted from Article VII Section III(B); second, the only change is that representation on the Executive Council was through the "zone configuration", meaning that substitutes would appoint a member through the Woodrow Wilson High School "zone",[37] but it was not indicated how this diluted their power or voice in the TEA.

It cannot be said that RCW 41.59.140 was violated by interference against substitute teachers generally, or against Lois Mehlhaff in particular. The only evidence here is that Mehlhaff, Carlson and a few other substitutes did not like the by-laws changes, and were

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[37] It could, of course, be argued that representation through this "league of substitutes" based at Woodrow Wilson High School actually gave the substitutes more access and influence throughout the TEA and in this particular attendance area in the northwest portion of the Tacoma School District. Most of the substitutes who were active union members spent considerable time working in this area; this was their "base of support".

verbal about it. The Commission extends a wide latitude in issues that involve the internal workings of labor organizations, especially under a statute like Chapter 41.59 RCW where the definition of employee organization is broad and non-restrictive. North Thurston School District, Decision 4764 (EDUC, 1994). It is up to employees to control their own organizations through representatives of their choosing.[38] The method of choosing is left to the union, as a whole.

General Union Bias Against Substitutes

The last issue treated here, although the first pleaded in the complaint against the union, deals with Mehlhaff's claim of general discrimination against substitute teachers which discouraged their membership in TEA.[39] Mehlhaff correctly notes that there is little precedent about campaigns by exclusive bargaining representatives to denigrate a portion of its bargaining unit, or to discourage union membership and activity by key components of a bargaining unit. This is understandable, in light of the unpleasant consequences for unions if such a violation is found: As recently as Shoreline School District, Decision 5560 (PECB, 1996), it was observed that unions risk loss of their status as exclusive bargaining representative if they carry out egregious actions against disfavored groups within an appropriate bargaining unit.[40]

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[38] See, generally, RCW 41.59.020(1); RCW 41.56.030(3).

[39] Case 11775-U-95-2770; paragraphs 2.2 - B.2.

[40] See, also, King County, Decision 5739 (PECB, 1996). A Commission order vacating status as an exclusive bargaining representative could open the way for other organizations to seek representation rights.

The complainant changed strategies in the brief, now characterizing the union's actions over the past few years as an actionable breach of the "duty of fair representation".

The types of "breach of duty of fair representation" claims that are processed by the Commission were.[41] The subject was dealt with extensively in Pateros School District (Pateros Education Association), supra, citing Vaca v. Sipes, 386 U.S. 171 (1967), which held that an exclusive bargaining representative is required to deal with bargaining unit employees: (1) without hostility or discrimination; (2) in a reasonable, non-arbitrary manner; and (3) in good faith. The "arbitrariness" test had previously been applied in City of Redmond, Decision 886 (PECB, 1980), and the "hostility and discrimination" test had been applied in Elma School District (Elma Teachers' Organization), Decision 1349 (EDUC, 1982). Thus, "duty of fair representation" issues before the Commission are limited to discrimination claims under RCW 41.59.140(2), as Shoreline School District, supra.[42]

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[41] There are two varieties of "fair representation" claims, as noted above. Employees asserting breach of the duty arising exclusively out of the processing of contractual grievances must, under Mukilteo School District (Public School Employees of Washington), Decision 1381 (PECB, 1982), pursue their rights in court, as third-party beneficiaries to a contract over which the court can assert jurisdiction.

[42] After reviewing federal precedent in Allen v. Seattle Police Guild, 100 Wn.2d 361 (1983), the Supreme Court of the State of Washington ruled that the privileges which accompany status as "exclusive bargaining representative" under a collective bargaining statute are accompanied by a duty upon a union to treat all portions of its membership without hostility or discrimination, to exercise its discretion regarding the rights of individual members in good faith and honesty, and to avoid arbitrary conduct.

Mehlhaff has the burden of proof as the complainant on a discrimination claim, including the burden to show that she has been deprived of some ascertainable right, status, or benefit. She has sought to prove that the following union actions were taken to discriminate against substitute teachers in Tacoma: (1) A WEA decision to NOT ENFORCE union security obligations on substitute teachers statewide (and of course at Tacoma), and a related decision to disallow the "representation fee" method regarding substitute teachers; (2) TEA's action to alter its membership re-enrollment periods, and to require substitute teachers to re-new their local union membership on a year-by-year basis; (3) TEA's eventual alteration of its dues amount for substitute teachers to the "absolute one-third" basis, which further reduced the participation of per diem substitute teachers; (4) TEA's decision to not pursue her grievances under the collective bargaining agreement; (5) TEA's agreement with the employer to exclude substitute teachers from the "optional days" benefits of the contract; and (6) TEA's abolishing of the "department of substitutes" within its organization, which further diluted the influence of substitute teachers within the TEA.

Unions are often faced with conflicts between component groups within appropriate bargaining units. Even in certificated employee bargaining units, which are considered to be homogeneous,[43] dramatic

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[43] RCW 41.59.080(1) requires that all non-supervisory certificated employees of a school district be included in one bargaining unit. A broader diversity of interests might be anticipated in bargaining units of school district classified employees, where a "wall-to-wall" unit would encompass occupations as diverse as office-clericals, school bus drivers, and maintenance workers. See, San Juan School District, Decision 5013 (PECB, 1995). Interest groups might also be identified on bases such as longevity/seniority, skill levels, equipment or assignment selections, etc.

differences may exist between included interest groups, such as between high school and primary grades teachers or between classroom teachers and ancillary personnel such as counselors, speech specialists, or psychologists. That is the nature of bargaining units, and the Commission has dismissed cases involving intra-unit conflicts. See, Auburn School District, Decision 3406 (EDUC, 1990) [allegation that adoption of state salary model discriminated against employees holding masters degrees]; North Thurston School District, Decision 4764 (EDUC, 1994) [allegation that union failed to advocate employee's position not related to union membership or discrimination on other invidious grounds]. Some benefits are negotiated for all; some are customized to particular groupings within the unit. That is the *collective* in "collective bargaining".

In Tacoma, as elsewhere, substitute teachers who are included in bargaining units under Tacoma School District, Decision 655 (EDUC, 1979) and its progeny benefit from being represented for the purposes of collective bargaining, as compared with enduring the vagaries of status as unrepresented employees. The pattern of employment described for per diem substitute teachers in this case (i.e., being called in the morning to replace regularly-assigned employees who have just called in to report they would be absent for the day) is the same pattern observed by the Commission when it made the "20/30 test" applicable on a state-wide basis in Columbia School District, et al., Decision 1181 (EDUC, 1981).

While the parties largely ignored the first two exhibits in this record, which are the latest manifestations of collective bargaining affecting teachers in the second-largest school district in the state, close analysis of their terms are revealing: In a document containing 79 generic "sections", 53 of those apply to per diem substitute teachers. Clearly, there has been no showing by

Mehlhaff that substitute teachers were singled out for ill-treatment under the terms of the contract. She has indicated six areas where substitutes were dealt with *differently*, but the question is whether they were dealt with *discriminatorily*.

Disagreements, and even occasional shouting matches at emotional meetings do not, by themselves, establish illegal hostility. Strong feelings are common in school labor-management relations, and a number of strikes and lockouts mark the path of maturation of the collective bargaining process under Chapter 41.59 RCW since 1976. The evidence in this record does not sustain a finding of "hostility" on the part of the union.

The Examiner concludes that the TEA did NOT discriminate against Lois Mehlhaff, or against the per diem substitute teachers in general, during the period for which this complaint is timely. Nor does the evidence establish that the union acted dishonestly or in an arbitrary manner. If anything, the TEA's efforts made it more probable that per diem substitute teachers could afford to participate in the TEA's activities. Put another way, nothing in this record looks like action by TEA "to rid themselves of a political problem", as has been alleged by Mehlhaff.

II. ALLEGATIONS AGAINST THE EMPLOYER

Employer's Failure to Deduct Dues from All Substitutes

Mehlhaff argues that the employer discriminated against the substitute teachers when it failed to deduct union dues from all substitutes.[44] The record shows that the employer complied with a request of the TEA, made in 1991, that it cease deducting "agency

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[44] Complaint at 1.3; testimony of Blood, Carlson, and Fox.

shop" amounts from the pay of substitute teachers. Testimony in this record was clear that the WEA and TEA waived their right under the statute to bargain for, and their right under the contract to collect, union security payments from per diem substitute teachers. Since Chapter 41.59 RCW allows flexibility in negotiations on union security, as discussed above, that waiver was not inherently unlawful.

Mehlhaff cites RCW 41.59.100, but invites the Examiner to read the statute as if it stopped after the first independent clause:

> If an agency shop provision is agreed to, the employer shall enforce it *[~~by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues.~~]*

The complainant's argument is a strained interpretation of the statute which conflicts with the clear directive that employers keep out of union affairs. RCW 41.59.140(1)(b). The motivation for the TEA's waiver of its right to union security revenues appears to have originated with its parent organization, the Washington Education Association. A memo in 1991 (referring to a memo in 1988) described a legal exposure under Chicago Teachers Union v Hudson, 475 U.S. 292 (1986).[45] The TEA may have had serious problems in collecting "agency fee" amounts from substitute

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[45] The WEA provides litigation support to its locals. See, generally, Pateros School District, supra, at page 12:

> [M]onthly membership dues assist in creating and maintaining funding for legal services provided to WEA members. The WEA has effectively become a guarantor, or at least subsidizer, of the ability of its members to pursue their individually-conferred legal remedies through the statutory procedures....

teachers who passed the "20/30 day" test, and hence became members of the bargaining unit. While the record is unclear as to what role, if any, Mehlhaff or the substitutes' department within the TEA had in such problems, the TEA and WEA were clearly less exposed to liability when it allowed substitute teachers to join as members on a voluntary basis.

The TEA consistently explained to substitute teachers why they had to re-enroll each school year, it encouraged them to "Keep track of your days and apply as soon as you are eligible", and it directed them to the employer for official documentation of how many days remained before they could begin or renew their memberships. There is no evidence that the employer failed or refused to cooperate with substitute teachers in assessing their eligibility for inclusion in the bargaining unit under the 20/30 days test prescribed by the Commission, or in their efforts to join the TEA.

In order for there to be a finding that an employer and union have conspired or colluded in violation of the statute, "[T]here must be some communication on the subject between representatives of those parties." Pateros School District, supra, at page 10. Here, as there, no evidence of such communications or meeting exists. In contrast to the agreement between the employer and union about the rates of pay for substitute teachers, there was no conferring or negotiating about the union's waiver of its right to agency fees from substitute teachers. There can be no finding of collusion.

Employer Involvement in Union Dues

The complainant asks the Examiner to find that the Tacoma School District discriminated against substitute teachers by assisting the

TEA in collecting illegal, or discriminatory, dues amounts from union members.[46]

The statute does not require an employer to inquire into the reasons, rationale, political correctness or common sense of its employees paying union dues, or what those amounts are to be. The statute only requires an employer to receive and process the checkoff authorizations and agency shop rates provided to it by the treasurer of its employees' exclusive bargaining representative, and remit the funds that it deducts from the pay of bargaining unit employees. It suffices to say that this employer had no influence whatever in the decisions made by the TEA. The record is clear, through the testimony of Payroll Department employee Robin Fox, that she receives information about union dues deductions from Shirley Blood at the TEA, and that payroll computers make the deductions from employee paychecks. For those actions, there is no violation by the employer of RCW 41.59.140.

Again, to show "collusion" on the part of the employer, it would be necessary to show some communication and agreement between the employer and union on the subject. There were no communications between the Tacoma School District and the TEA as to what union dues ought to be. No violation of RCW 41.59.140 is found.

Employer Denial of Optional Days and Professional Growth Funds

Mehlhaff argues that the Tacoma School District discriminates against her (and other substitute teachers), by failing to apply the optional days and professional growth benefits to substitute

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[46] Complaint paragraphs 1.2 and 1.3; Exhibits 1-23 and 30; testimony of Fox, Mehlhaff, Carlson, and G. Blood.

teachers.[47] Specifically, she complains that the employer does not reimburse substitute teachers for attending training seminars, even if the classes are on the approved list and are relevant to substitutes.

It is possible for a "discrimination" violation to occur under RCW 41.59.140 through language included in a collective bargaining agreement. Extra suspicion or strict scrutiny is properly given where a contract is in place, and the parties decide to negotiate a "supplemental arrangement" or "memorandum of understanding" which purports to amend the existing contractual terms. Port of Seattle, Decision 3064-A (PECB 1989)[Gene Minetti]; Port of Seattle, Decision 3294-A (PECB, 1991) [Hugh Weinreich]. Both of those cases involved union hiring halls, and varying rights among several classes of employees (e.g., "casual", "part-time," etc). No such events have happened here, however.

Mehlhaff's theory is that the employer and the TEA were worried over a disturbed hornet's nest buzzing around the issue of how many substitutes would get pay for attending workshops, so that: Graf (for the union) and Barkley (for the employer) held a quick meeting, drew up a memorandum of understanding which excludes substitutes from optional days and professional growth monies under the State-allocated amount, and backdated the document to make it look like it was done soon after the negotiations were concluded in 1993. The employer argues that substitutes were never contemplated as sharing in the amount of funds allocated for optional days, because it would draw from the only "pool" of money available for full-time teachers to get a pay raise. The employer was presented with a considerable political problem -- draining the only fund

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[47] Complaint, paragraph 3.5(a); Exhibits 33-42, 44; 51-63, 58, 62, 63; testimony of Fannin, Carlson, Kvamme, Buranen, and Barkley.

that represented a true wage increase for their regularly-assigned faculty. The original contract language simply wasn't clear enough, and left the door open for a costly grievance arbitration.

Rueben Kvamme, who was the acting assistant superintendent for human resources at the time of his testimony, has been on the employer's bargaining teams at all times relevant to this proceeding. He testified that the Memorandum of Agreement challenged by Mehlhaff was intended to inform the staff as to what training would be appropriate to assist in a new curriculum direction, and which activities would be eligible for compensation as optional days. A good deal of negotiation time spent on what the "eligible activities" would be, with a purpose of getting the maximum training for the money spent. The other critical point in the discussion was the cost of optional days, where the employer and union used a figure of 1650 eligible employees, reflecting the number of regularly-assigned classroom teachers. Those employees were to share the available funds for optional pay, at a rate of three days per employee. Extending the optional days benefit to substitute teachers was never discussed at the bargaining table. The idea of extending professional growth and/or training to per diem substitutes was deemed impractical, because the workshops were aimed at *grade levels* and *subject areas*. Kvamme also testified that mid-contract memoranda like the April 15, 1994 document challenged by Mehlhaff (see below) were pretty ordinary over the last 15 years, and were always considered part of the collective bargaining agreements to which they were attached.

Luella Buranen is the employer official responsible for keeping a record of what classes are taken and training is acquired by the certificated employees. Buranen also kept records on the optional days for two years, and saw to it that teachers were properly compensated for that time. She testified that substitutes were not

eligible for optional days, and only those certificated employees with over a .5 FTE contract were eligible. She cited the memorandum of agreement at page 96 of the contract.

Dan Barkley, who has been the employer's principal negotiator for a number of years, testified that substitutes have never been granted the optional days benefit. He was well aware of Mehlhaff's applications for optional days, and of their rejection, and he was aware that the union had also told Mehlhaff she was not eligible. Barkley expanded on the meaning of the memorandum of agreement published at page 96 of the contract, as allocating resources for the 1993-1995 period. He indicated that time-specific tasks are often written in separate documents, as opposed to within the body of the contract. Barkley also explained a subsequent one-page document, Exhibit 51, which was the clarifying memorandum signed by Barkley and Graf on April 15, 1994. The text of that document is as follows:

> MEMORANDUM OF AGREEMENT BETWEEN
> TACOMA SCHOOL DISTRICT AND
> TACOMA EDUCATION ASSOCIATION
>
> re: optional days
> professional growth monies
>
> The parties agree that the above captioned items only apply to regularly contracted employees with an FTE of .5 or more.
>
> This excludes substitute employees.

Barkley explained that this document was prepared several months after the new contract went into effect, because:

> [I]t followed a number of questions by substitutes with respect to whether or not they were eligible. We discussed it internally, the association discussed it internally, and we

> agreed clearly that our intent was that substitutes would not be included.... We distributed it to people responsible for signing off on eligibility; specifically Margie Griffin, who is the administrator for professional and staff development in the District.

Tr. 552.

Taken together, the testimony of the employer officials sets out a common-sense rationale for agreeing to exclude substitutes from the optional days and professional growth benefits.[48]

It does appear that Mehlhaff applied for and received a $250 payment for attending a professional growth seminar in June of 1994. There was no explanation as to why this payment was made. The fact that Mehlhaff was paid for this training to which she was not entitled, albeit probably in error, seems to negate any inference that she was targeted or otherwise illegally treated merely because she was a substitute teacher. Nor is this $250 payment to Mehlhaff probative evidence that the April 15, 1994 document was fraudulent or otherwise designed to mislead. This one questionable payment is also not probative evidence that making the substitutes eligible for these benefits would cost $300,000 to $400,000 per year (or even an $87,000 per year amount mentioned by counsel in the same paragraph). There may be merit to the idea that money could be used to provide professional growth opportunities for substitutes who have long-term relationships with this employer, and it might be a good idea to encourage substitutes to take such courses at their own expense. Even if such ideas are worth exploring in the future, the employer is not obligated to

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[48] Counsel for Mehlhaff did not impeach Barkley's testimony that the "short form" memo was written after the employer received a lot of questions from substitutes as to their eligibility for these benefits. The Examiner credits Barkley's version of events in this regard.

negotiate with Lois Mehlhaff, Jon Carlson or any group of substitute teachers employed in the Tacoma School District.[49] And last, the fact that the employer actually spent only 90% of the money set aside of these benefits is not probative evidence of discrimination against the substitutes. It simply is irrelevant. There is no violation stated here under RCW 41.59.140(1)(a).

Employer's Use of Two-Tier Wage System for Substitutes

Mehlhaff alleges that it was unlawful for the union and employer to negotiate a wage plan which pays a premium rate to those persons on the employer's roster of substitutes who have retired from the Tacoma School District.[50] The contract now in effect grants a daily pay premium for substitutes who are retired Tacoma teachers in the following circumstances: (1) When they begin work on the 16th day of a particular assignment; (2) when they are paid a per diem rate based on the existing salary schedule for regularly-assigned teachers, and are paid a per diem based upon that schedule; and (3) when they qualify for inclusion in the bargaining unit.

The complainant's brief mis-states the law on the bargaining unit inclusion of substitute teachers, stating that retired teachers cannot be in the bargaining unit unless they work 20 consecutive days. This is not correct. If a substitute works 30 days during a 12-month period, it is irrelevant whether they are retired from any school district, even Tacoma. They are employees of the Tacoma

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[49] Counsel for the employer objected to questioning of Barkley on why excluding the substitutes lacked a rational basis as a business decision, if it cost "only" $87,000. The Examiner doubted (and still doubts) the complainant's mathematics, and still sustains the objection.

[50] Complaint at paragraph 5.0, 5.1.

School District, and they are in the bargaining unit. Columbia School District, Decision 1189 (EDUC, 1981).

No evidence was adduced that retired teachers were excluded or absented from the bargaining unit as substitutes. There was no record made whatever that their employment by this employer discriminated against or reduced employment opportunities for other per diem substitutes. Whether retired teachers are members of the TEA-WEA, or were officers in the union, was not established.[51]

Employer Animosity Against Mehlhaff

The complainant alleged that statements were made to her that the substitutes' organization was being lead by persons (including her) who the employer would never hire for full-time teaching positions.[52] No record was made on this allegation, and it is deemed to have been abandoned.

Employer Discrimination Against Mehlhaff in Hiring

Mehlhaff alleges that she was seen by employer officials as a "troublemaker", after she began filing grievances and lawsuits, and was retaliated against thereafter by a systematic reduction of days of assignment.[53] In other words, Mehlhaff alleges that the word

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[51] Complainant should bear in mind that some teachers become *lifetime members* of the WEA-NEA, which entitles them to certain benefits even if they are not employed by any school district. Others may join the American Federation of Teachers or other employee organizations, as they have a right to do.

[52] Complaint at 6.0-6.2.

[53] Complaint at 7.0 - 7.4; testimony of L. Mehlhaff, Fannin, Carlson, C. Williams, Willhoft, Robertson, and Kvamme.

went out to discourage regularly-assigned teachers from calling Mehlhaff to substitute in their classrooms. It is clear that Mehlhaff worked only 24.5 days during the 1994-95 school year, and hence was not on the substitute roster or a member of the bargaining unit at the start of the 1995-96 school year.

Cindy Williams, who calls substitute teachers for the employer, gave lengthy testimony about substitute assignments for April 10, 1995. It is alleged that both Mehlhaff and Carlson were not called to work on that day when they ought to have been, because they were being "punished" for being troublemakers. Williams rebutted the assertion that Carlson was not called, establishing that he was called on that day, that he worked as a substitute teacher at the Remann Hall juvenile detention center, and that he was paid accordingly. Exhibit 67 in this record is a report on all substitute assignments for Carlson in the 1994-95 school year. He was pretty busy, working 156 school days out of 180. Certainly no discrimination is shown here.[54]

Called as a witness for Mehlhaff, a teacher named Fannin testified that she had requested Mehlhaff as a substitute in April of 1995, but was told by the building secretary at Wilson High School (Tracy Robertson) that Mehlhaff probably wouldn't be assigned because it was known that she was "trouble", or at least her supervisors thought so. Robertson was called as a witness, and denied that she told Fannin about "trouble" with Mehlhaff or that the vice-principal at Wilson High School had indicated that Mehlhaff was not welcome to substitute there. The Examiner declines to sort out the

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[54] An assertion in the complainant's brief that Williams "lied twice" is troubling. It is the conclusion of the Examiner that Williams' testimony under oath was credible. Carlson also had a responsibility to remember where he worked on April 10, 1995.

credibility of these witnesses, however, because Robertson did not have authority to assign substitutes on behalf of the Tacoma School District. This was not a per diem assignment where a substitute was to be called on the morning of an absence, but rather was a pre-arranged assignment by the request of a particular classroom teacher. In such cases, the building principals retain a veto power over who is to be in their classrooms. The principal at Wilson High School requested a different substitute for the April 23 absence described by Fannin, but the record shows that he requested Mehlhaff for another assignment in April of 1995. Thus, the record is not sufficient to make a prima facie case that officials of Wilson High School denied Mehlhaff assignments because she had filed grievances or was otherwise "trouble" as a union advocate. Seattle School District, Decision 5237 (EDUC, 1995).

This controversy has caused the employer to review its records for each and every school day during two school years at issue here, searching for days when Mehlhaff was **not** called as a substitute teacher by the Tacoma schools. There is no proof that her contact with a Mr. Stewart at the district office evoked anything more than a reaction by an administrator under pressure. Stewart was not called as a witness, so there is no basis for a conclusion as to whether he was even aware of Mehlhaff's grievances. There is no evidence as to why he chose someone other than Mehlhaff to replace Jerry Collins.

The Examiner finds it significant that Mehlhaff severely limited her availability for assignments. Exhibit 45 is irrefutable: She indicated she would only substitute in high schools, for only full-day assignments, and only in math, science, biology, and chemistry. As the employer points out, the complainant could have expanded her assignment opportunities by over 100%, by making herself available to substitute at the 10 middle schools in addition to the 6 high

schools. The record is clear that the most Mehlhaff ever substituted in the Tacoma schools was 56.5 days during 1990-91. This was only about one-third of the days worked in 1995-96 by Jon Carlson, who made himself available for any assignment that the employer had for him. With or without standard deviations and statistical analysis, it appears clear that discrimination was not a factor in Mehlhaff's work record for the 1994-95 school year. No discrimination has been established under RCW 41.59.140(1).

Remedy

Given that this decision is being issued in the summer months when the employer's schools are not in session, and that the only violation of statute found on this record concerns the dues payment schedule for substitute teachers who are unlikely to see a customary compliance notice if one were posted, the Examiner has chosen to dispense with the customary notice and instead require the TEA to mail notices to the substitute teachers who were or might have been affected by the violation found.

FINDINGS OF FACT

1. The Tacoma School District, an employer within the meaning and coverage of Chapter 41.59 RCW, has a workforce which includes certificated employees hired to work as substitute teachers.

2. The Tacoma Education Association (TEA), an employee organization within the meaning of Chapter 41.59 RCW, is the exclusive bargaining representative for all non-supervisory certificated employees of the Tacoma School District. The bargaining unit includes substitute teachers who are only paid for the days they work, if they work at least 30 days in a one-year period or 20 consecutive days in the same assignment.

3. Lois Mehlhaff has been employed by the Tacoma School District as a substitute teacher since 1981, and has generally worked in that capacity more than 30 days per year, but has never worked more than 90 days in any year. On May 17, 1995, Mehlhaff initiated these unfair labor practice proceedings related to that employment.

4. Substitute teachers employed by the Tacoma School District have skills similar to those of regularly-assigned teachers working for the employer. The duties and working conditions of substitute teachers differ, by tradition and actual practice, from those of regularly-assigned teachers.

5. The TEA and the employer have been parties to a series of collective bargaining agreements. Many of the provisions in those contracts have been equally applicable to regularly-assigned teachers and substitute teachers, while other benefits have been limited to one or the other of those classes within the bargaining unit. With respect to pay for "optional days", the employer and union agreed and based their cost calculations in contract negotiations on a formula which limited eligibility for the benefit to employees working .5 FTE or more (90 or more days per year). When a controversy arose concerning eligibility for the optional days benefit, the employer and union signed a memorandum of agreement which reiterated their original agreement in more clear terms.

6. Prior to November 17, 1994, the TEA changed its procedures to require substitute teachers to renew their membership in the TEA each year, rather than having membership which continues from year-to-year.

7. Prior to November 17, 1994, the TEA changed its by-laws to alter its dues structure for substitute teachers, so that they were to pay an "absolute one-third" of the dues paid annually by regularly-assigned teachers.

8. On and after November 17, 1994, the TEA required substitute teachers who desired to acquire and maintain membership in the TEA to pay their entire union dues for the year over a four-month period at the beginning of the school year, or to make a single payment for the year within 30 days after becoming eligible for inclusion in the bargaining unit. This method of collecting dues adversely impacted substitute teachers, because: (a) it is different from the method of dues payment applicable to other employees in the bargaining unit; and (b) the substitute teacher may have had neither sufficient work in the four-month period to qualify for membership in the bargaining unit nor sufficient pay in the four-month period to pay the dues demanded by the TEA.

9. Several substitute teachers, including Mehlhaff, were vocal in their opposition to the changes described in paragraphs 6, 7, and 8 of these Findings of Fact.

10. Mehlhaff filed a grievance asserting that substitute teachers were or should be eligible for the "optional days" benefit provided in the collective bargaining agreement. The TEA's subsequent refusal to advance that grievance to arbitration was made by two union committees after a hearing in which Mehlhaff was afforded an opportunity to present her arguments, and was consistent with the evidence concerning the bargaining history on the "optional days" benefit.

11. The TEA altered its by-laws and changed its governance structure, including elimination of a separate "department of substitutes" which had purported to act in derogation of the rights and status of the TEA as exclusive bargaining representative of all non-supervisory certificated employees of the Tacoma School District. Those changes did not, however, dilute the membership rights of the substitute teachers within the TEA or discriminate against the substitute teachers. The access of substitute teachers to issues relevant under the contract were not impaired. Criticism of a newsletter written by and/or for substitute teachers was not based upon a discriminatory motive.

12. Mehlhaff claimed she was being discriminated against with respect to the number of calls she received for work as a substitute teacher in the Tacoma School District. The TEA investigated the "low call rate" claim, and TEA representatives made a reasonable effort to determine whether all substitute teachers were being utilized in Tacoma School District. There was no discrimination in the union's efforts to find an answer on this subject.

13. The substitute teachers at Tacoma benefit from most of the provisions of the existing collective bargaining agreement, including grievance procedure and insurance. They are not subject to lay-off and recall, special education meetings or leave without pay issues. As a whole, the TEA did not discriminate against them so as to discourage their membership in the TEA, but dealt with the substitutes as a cohesive subgroup within the certificated bargaining unit.

14. There is no evidence in the record that the Tacoma School District has involved itself in the internal affairs of the

TEA, with respect to negotiating the level of dues to be paid voluntarily by bargaining unit employees. Communications between the employer and the TEA on such matters were within the range permitted and necessary to the proper administration of the dues checkoff rights provided by Chapter 41.59 RCW.

15. The Tacoma School District made a reasonable effort to place substitute employees in per diem assignments during the time in question, pursuant to its authority to assign personnel. The employer has placed Lois Mehlhaff, Jon Carlson, Linda Hohn, and other similarly-situated substitute teachers in assignments consistent with the availability of the employee's themselves. Lois Mehlhaff imposed substantial limitations on her availability for work, by notice to the employer that she was only available for math and science assignments at the four high schools operated by the employer. While individual building principals may request substitutes different than those suggested by the regularly-assigned teacher being replaced, there is no evidence of discrimination by the employer in assigning substitute teachers. There is no evidence in the record that the employer has discriminated against substitute teachers with respect to union dues, collusion with the TEA, or against "troublesome" substitutes.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this case under Chapter 41.59 RCW.

2. The Tacoma Education Association violated RCW 41.59.140(2)(a) and (b), by insisting that substitute teachers who choose to join the TEA pay their annual dues obligations on a basis that was neither "periodic" nor "monthly", as described in para-

graph 8 of the foregoing Findings of Fact, and by asking or causing the employer to collect union dues in such a manner.

3. The complainant has not sustained her burden of proof to establish that the TEA has aligned itself in interest against substitute teachers who are members of the bargaining unit, or has deprived such employees of any ascertainable right, status or benefit, except as described in paragraph 2 of these Conclusions of Law, so that there is no basis for a finding that the TEA committed unfair labor practices in violation of RCW 41.59.140(2).

4. The complainant has not sustained her burden of proof to establish that the Tacoma School District has improperly involved itself in the internal affairs of the TEA or has discriminated against substitute teachers, so that there is no basis for a finding that the employer committed unfair labor practices in violation of RCW 41.59.140(1).

ORDER

1. [Case 11775-U-95-2770] The Tacoma Education Association, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

   a. CEASE AND DESIST from:

      (1) Insisting that substitute teachers who choose to join the TEA pay their annual union dues on a basis which is not both "periodic" and "monthly". The TEA may continue to offer its "annual" and "pay-in-four-months" plans as alternative methods of payment, so

long as there is no discrimination against employees who choose to pay their dues on a monthly basis.

(2) In any other manner interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

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

(1) Notify all substitute teachers who qualified as members of the bargaining unit during the 1996-1997 school year that they are entitled to pay their union dues on a monthly basis, if they choose to become members of the TEA. Such notice shall be provided by first class mail, addressed to the last known addresses of the employees.

(2) 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 copy of the notice required by the preceding paragraph.

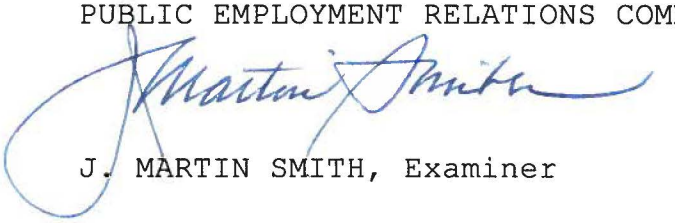
(3) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a copy of the notice required by the preceding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

c. Except as provided in sub-paragraphs a. and b. of this paragraph 1, the complaint charging unfair labor practices filed against the Tacoma Education Association is DISMISSED.

2. [Case 11776-U-95-2771] The complaint charging unfair labor practices filed against the Tacoma School District is DISMISSED.

Dated at Olympia, Washington, this 29th day of July, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



J. MARTIN SMITH, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.