

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KENT EDUCATION ASSOCIATION,)	
)	Case No. 438-U-76-49
Complainant,)	
)	Decision No. 595-A EDUC
vs.)	
)	
KENT SCHOOL DISTRICT NO. 415,)	
)	
Respondent.)	DECISION ON REVIEW

APPEARANCES:

Judith Lonquist, General Counsel, and Symone Scales, Attorney,
for the complainant.

Perkins, Coie, Stone, Olsen and Williams, by John Binns, Attorney,
and Lawrence B. Ransom, Attorney, for the respondent.

Examiner Rex L. Lacy issued his findings of fact, conclusions of law and order in the captioned matter on February 9, 1979. The Examiner concluded that the employer had committed unfair labor practices, and he entered a remedial order. The employer filed a timely petition for review in which it assigned error to certain of the findings of fact and to the material conclusions of law issued by the Examiner. The employer also sought to support its petition for review with an affidavit of its Superintendent which contradicts certain inferences drawn by the Examiner from the record. The complainant moved to have that affidavit stricken, and that motion is granted.

This case arises out of a legislative anomaly, a defective bargaining proposal made and persisted in by an employee organization, and the unwise refusal of an employer to discuss any subject which is not a mandatory subject of bargaining under RCW 41.59.140(1)(e) and RCW 41.59.020(2), even though that subject is manifestly one of mutual interest.

The Legislative Anomaly

In 1965, the legislature enacted a "meet and confer law" governing relations between school districts and employee organizations. The term "employee organization" was defined in RCW 28A.72.020 as follows:

"'Employee organization' means any organization which includes as members certified employees of a school district and which has as one of its purposes the representation of the employees in their employment relations with the school district."

RCW 28A.72.030 then provided:

"Representatives of an employee organization, which organization shall by secret ballot have won a majority in an election to represent the certificated employees within its school district, shall have the right, after using established administrative channels, to meet, confer and negotiate with the board of directors of the school district or a committee thereof to communicate the considered professional judgment of the certificated staff prior to the final adoption by the board of proposed school policies relating to, but not limited to, curriculum, textbook selection, in-service training, student teaching programs, personnel, hiring and assignment practices, leaves of absence, salaries and salary schedules and non-instructional duties."
(Emphasis added)

Separately, in enactments dating back to 1955 with amendments in 1961, 1963, 1965, 1967, 1969 and 1971, the legislature made provision for "instructional materials" within Chapter 28A.58 RCW, which is applicable to all school districts. RCW 28A.58.103 provided, insofar as here pertinent:

"Instructional materials--Instructional materials committee--Disposition of used or obsolete material. Every board of directors, unless otherwise specifically provided by law, shall:

(1) Prepare, negotiate, set forth in writing and adopt policy relative to the selection of instructional materials. Such policy shall:

(a) State the school district's goals and principles relative to instructional materials;

(b) Delegate responsibility for the preparation and recommendation of teachers' reading lists and specify the procedures to be followed in the selection of all instructional materials including textbooks;

(c) Establish an instructional materials committee to be appointed, with the approval of the school board, by the school district's chief administrative officer. This committee shall consist of representative members of the district's professional staff, including representation from the district's curriculum development committees, and, in the case of districts which operate elementary school(s) only, the educational service district superintendent, one of whose responsibilities shall be to assure the correlation of those elementary district adoptions with those of the high school district(s) which serve their children;

(d) Provide for terms of office for members of the instructional materials committee;

(e) Provide a system for receiving, considering and acting upon written complaints regarding instructional materials used by the school district;

(f) Provide free textbooks, supplies and other instructional materials to be loaned to the pupils of the school, when in its judgment, the best interests of the district will be subserved thereby and prescribe rules and regulations to preserve such books, supplies and other instructional materials from unnecessary damage.

Recommendation of instructional materials shall be by the district's instructional materials committee in accordance with district policy. Approval shall be by the local school district's board of directors.

Districts may pay the necessary travel and subsistence expenses for expert counsel from outside the district. In addition, the committee's expenses incidental to visits to observe other districts' selection procedures may be reimbursed by the school district.

Districts may, within limitations stated in board policy, use and experiment with instructional materials for a period of time before general adoption is formalized.

Within the limitations of board policy, a school district's chief administrator may purchase instructional materials to meet deviant needs or rapidly changing circumstances." (Emphasis added)

In Peters v. South Kitsap School District, 8 Wn.App. 809, 509 P.2d 67, the Court of Appeals said:

"The determination of educational goals, programs, and curricula is a matter within the broad discretion of the school board. RCW 28A.58.103; RCW 28A.59.180; see generally RCW 28A.58. 8 Wn.2d 809, 816."

Since the certificated employees of a school district are highly trained professional educators, it would seem to be prudent in any event for a lay school board to consult them on the selection of instructional materials.

Kent School District No. 415 complied with RCW 28A.58.103. It negotiated with the Kent Education Association (KEA) and agreed on a policy designated as Policy 6001, whereby voting members of the Instructional Materials Committee were appointed by the Superintendent, subject to approval by the district's Board of Directors, from lists prepared by the employee organizations, all affiliated with the KEA. The organizations were required to provide the Superintendent with at least two choices for each position.

The Instructional Materials Committee developed criteria and procedures for selecting textbooks, library books, audio-visual materials and other instructional materials, and made recommendations for adoption of textbooks to the Superintendent.

In 1975, in its first extraordinary session, the legislature amended RCW 28A.58.103 in particulars immaterial to this case, and re-enacted the section as quoted above. Chapter 275, Laws of 1975 (1st. ex.s.), Section 109. The bill passed the Senate May 30th, the House June 3rd, and was approved by the Governor and filed with the Secretary of State July 2, 1975.

Meanwhile, the legislature was enacting the Educational Employment Relations Act, Chapter 41.59 RCW. Chapter 288, Laws of 1975 (1st. ex.s.). The bill which became the Act passed the Senate May 28th, the House June 2nd, and was approved by the Governor and filed with the Secretary of State July 2, 1975. This legislation repealed RCW 28A.72.020 and .030, but did not repeal, amend or refer to RCW 28A.58.103.

RCW 41.59 defines employee organization as follows:

"Definitions. As used in this chapter:

(1) The term 'employee organization' means any organization, union, association, agency, committee, council, or group of any kind in which employees participate, and which exists for the purpose, in whole or in part, of collective bargaining with employers."

RCW 41.59.140(1)(e) makes it an unfair labor practice for a public employer to refuse to bargain collectively with the representative of its employees. The term "collective bargaining" is defined in RCW 41.59.020 as follows:

"(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. A written contract incorporating any agreements reached shall be executed if requested by either party. The obligation to bargain does not compel either party to agree to a proposal or to make a concession.

In the event of a dispute between an employer and an exclusive bargaining representative over the matters that are terms and conditions of employment, the commission shall decide which item(s) are mandatory subjects for bargaining and which item(s) are non-mandatory."

The KEA bases its argument here largely on the "negotiate" terminology of RCW 28A.58.103. The district seeks a ruling from this agency that the "negotiate" language of RCW 28A.58.103 was impliedly repealed by RCW 41.59. Both positions are without merit. This Commission is empowered to prevent any person from engaging in any unfair labor practice as defined in RCW 41.59.140. See: RCW 41.59.150(1). We have no power to enforce RCW 28A.58.103.

The Defective Proposal

We now turn to what happened in 1976, when the parties first began to bargain under RCW 41.59.

The KEA advanced an initial proposal for a "Curriculum Committee", as follows:

"Within thirty (30) days of the start of school a Curriculum Committee shall be established composed of twelve (12) people, seven (7) members to be selected by the Association, and five (5) individuals to be selected by the Board. This Committee shall remain in force until the first day of school the following year. This Committee shall participate in the decision-making regarding curriculum development and revision, implementation of programs, evaluation of programs, instructional materials selection, and pupil testing plans. Careful consideration shall be given to balance and representation on this Committee in relation to grade levels, subject areas, types of students being served, and special training and interest in the particular field. This Committee shall have the authority to appoint ad hoc committees to revise and develop particular areas of the curriculum; to make recommendations to the Instructional Materials Committee; and to adopt plans for pupil testing programs. The committees herein established shall investigate and submit recommendations to the Curriculum Committee for final approval.

The Committee shall function as follows:

1. The operating procedures and time for meetings shall be determined by the Committee and reflected in its minutes.
2. The chairperson of the Committee shall be elected by the Committee.
3. The time for the Committee's meetings shall be determined by the Committee. Release time shall be granted by the Superintendent.

4. All Committee reports shall be sent to the Superintendent and the Association President.
5. The Superintendent, Committee chairperson, and Association representative shall meet to discuss all final reports.
6. The results of the final reports shall be implemented by the Superintendent.

The professional voting members of the District's Instructional Materials Committee, whose positions place them in the bargaining unit defined in Article 1, Section 1, shall be selected from lists prepared by the Association."

The last paragraph of the proposal would have continued prior policy.

The district refused to negotiate on the entire subject matter of curriculum and instructional materials. Thereafter, without prior negotiation with the exclusive bargaining representative, the district repealed the selection procedure of Policy 6001 and adopted a new and different procedure whereby bargaining unit employees from the KEA unit are selected for service on the Instructional Materials Committee on the recommendation of their principals. The KEA requested negotiations on the subject and was refused. This unfair labor practice complaint followed.

The docket records of the Commission indicate that these parties entered into mediation in October, 1976 and went on through the factfinding procedure. The 1976-77 collective bargaining agreement contains a signature date of December 22, 1976 and a "letter of Agreement" signed September 30, 1976 which refers to the instant proceedings. It is clear from the record that once the employer refused to bargain, the Association refused to modify its proposal in any way. Thus, the only scope of bargaining issue before us in this case is that which stems from the one and only proposal made by the KEA to the district in 1976.

The last sentence of RCW 41.59.910 provides:

"Where there is a conflict between any collective bargaining agreement and any resolution, rule, policy or regulation of the employer or its agents, the terms of the collective bargaining agreement shall prevail."

School districts are municipal corporations created by and exclusively authorized to act by the statutes of this State. While a school district can agree to contravene its own resolutions, rules, policies or regulations, it cannot agree to contravene a State statute. To a considerable extent, the legislature has pre-empted local determination (and local bargaining) even of

the procedures for the selection of instructional materials, by enacting RCW 28A.58.103. While we do not have the authority to enforce that statute, we must respect its existence while enforcing RCW 41.59.

In no sense can the district's statutory Instructional Materials Committee be thought of as a joint labor/management committee under RCW 41.59. It is clear, however, from the testimony of the KEA President that the KEA thought of the "representative members of the district's professional staff" on the Instructional Materials Committee as an arm of the KEA, and of the Committee as a forum in which to advance the purposes and philosophy of the KEA.

The scope of negotiation required by RCW 28A.72.030, quoted above, was different from the scope of collective bargaining established by RCW 41.59-.020(2). That difference is accompanied by obvious differences in the legal consequences of agreements reached under the two systems. RCW 28A.72 was oriented towards school policies, both educational and employment related, proposed for adoption or amendment by the school district board of directors. RCW 41.59 is employment related, and collective bargaining is expected to result in a written agreement enforceable at law for a term of up to three years.

The record in this case would not support a conclusion that the selection of instructional materials is a matter of wages, hours or terms and conditions of employment of the district's certificated staff. In attempting to address the unilateral change of practice made by the employer coincident to its refusal to bargain, the Examiner went some distance farther than he needed to go on this record. This Commission previously held that educational program, or curriculum, was not a mandatory subject of collective bargaining under RCW 41.59. Federal Way School District, Decision 232-A (EDUC, 1977). We are not the first to hold that nomination of non-supervisory employees to management advisory committees is non-mandatory in the absence of a showing of a significant impact on the wages, hours and terms and conditions of employment of the employees involved. The District of Columbia Board of Labor Relations reached precisely that result in Washington Teachers' Union, 1 NPER 09-10001 (DC, 1978), and the Wisconsin agency and Court reached that result in Oak Creek Education Association v. WERC, 91 LRRM 2821 (Wis. Cir. Ct., 1975) (See, in particular, footnote 1 at 91 LRRM 2823). The Examiner is correct that certificated employees receiving remuneration for services performed outside of the normal work day or week is analagous to hourly employees receiving overtime work, and that such remuneration would be within the term "wages". But it was unnecessary to delve into that area. The KEA never made a proposal dealing with the effects or impact of membership on the Instructional Materials Committee on bargaining unit employees. On

the other hand, the Examiner's analysis concerning distribution of overtime work stopped short. The evidence establishes that KEA nominations to the Instructional Materials Committee were made at least in part on the basis of membership and activity in the KEA, rather than on a non-discriminatory basis as would be required in a negotiated provision for the distribution of overtime work opportunities. It follows that the Examiner's conclusion of law number 2 must be reversed.

The Examiner found the school district guilty of an unlawful refusal to bargain with the KEA by accepting from the Association of School Principals, a bargaining representative other than the exclusive bargaining representative of such employees, nomination lists of non-supervisory certificated employees for appointment to the Instructional Materials Committee. That conclusion was based on an inference drawn from references in the record to "principals" and to the "Association of School Principals". We interpret the record as indicating that such nominations are solicited from individual principals in their capacities as supervisors of non-supervisory certificated employees, not from the principals' organization. It follows that the Examiner's conclusion of law number 3 must also be reversed.

The Refusal to Discuss

Whether or not it is "wages, hours, and terms and conditions of employment", the subject of instructional materials is of concern to both the district management and its certificated employees. They certainly have a different and more intimate concern with instructional materials than have other members of the public. The legislature would seem to have recognized as much in requiring appointment of "representative members of the district's professional staff" to the committees created by RCW 28A.58.103.

We can and do deplore the school district's refusal in 1976 to discuss this matter candidly with a view towards eliciting the best professional advice of the district's certificated employees and their representative. Like the situation in Federal Way, supra, and in Shelton School District, Decision 579 (EDUC, 1979), this case arose during the first few months that RCW 41.59 was in effect; and we trust that this breakdown in the relationship was and is attributable to the unfamiliarity of the parties with the process. No party can be compelled under RCW 41.59.020(2) to agree to any specific proposal or to make a concession. An impasse in bargaining may result in mediation and factfinding, but not in a duty to agree.

At about the same time the events of this case were taking place, this Commission adopted the policy now codified in our rules:

"WAC 391-30-550 COLLECTIVE BARGAINING--POLICY. It is the policy of the commission to promote bilateral collective bargaining negotiations between employers and the exclusive representatives of their employees. Such parties are encouraged to engage in free and open exchange of proposals and positions on all matters coming into the dispute between them. The commission deems the determination as to whether a particular subject is mandatory or non-mandatory to be a question of law and fact to be determined by the commission, and which is not subject to waiver by the parties by their action or inaction. It is the policy of the commission that a party which engages in collective bargaining with respect to any particular issue does not and cannot thereby confer the status of a mandatory subject on a non-mandatory subject."

On the day following the Kent School District's unilateral change of its Policy 6001, this Commission adopted WAC 391-30-552 and -554, setting forth procedures for bargaining and for determination of disputes as to the scope of collective bargaining under RCW 41.59. Those rules, and the policy of free and open discussion, remain in effect.

Article III, Section 5 of the collective bargaining agreement between the parties provides:

"Prior to their adoption, the Board shall provide an opportunity for input from the Association with respect to major revisions to educational programs and fiscal changes."

That language should obviate misunderstandings of this sort in the future. The instant case has been a protracted and costly exercise resulting in the determination of little which could not have been resolved by a reasonable exchange of proposals and counter-proposals, whether mandatory or non-mandatory in the eyes of the law.

AMENDED FINDINGS OF FACT

1. Kent School District No. 415 is a school district created under Title 28A RCW, and is an employer within the meaning of RCW 41.59.020. George Daniel is Superintendent of Schools; and Gary Patrick is manager of employee, pupil and public relations.

2. Kent Education Association (KEA) is the exclusive bargaining representative for all non-supervisory educational employees of Kent School District No. 415.

3. Kent Education Association and Kent School District No. 415 negotiated their first written collective bargaining agreement for the 1976-1977 school year. Negotiations between the parties from 1965 to 1975 were conducted under repealed RCW 28A.72, and all agreements between the parties during that period were included in district policy.

4. On May 26, 1971, Kent School District adopted its Policy 6001, relating to instructional materials. That policy made provision for procedures, budgeting, challenged materials, the organization and membership of an Instructional Materials Committee, selection and terms of office of members of the Instructional Materials Committee, meetings of said Committee, and a "school library bill of rights". The provisions for selection of members of the Instructional Materials Committee were as follows:

"The voting members of the instructional materials committee shall be selected by the superintendent and approved by the board of directors. Voting members shall be selected from lists prepared by the appropriate organizations as follows:

- Teachers - Association of classroom teachers
- Librarian - Association of classroom teachers
- Counselor - Personnel and guidance association
- Principals - Department of administration and supervision

The list shall provide the superintendent with at least two choices for each position. A particular school or department shall be represented only once on each list."

Except for minor changes of nomenclature, including substitution of "Kent Education Association" for "Association of Classroom Teachers", Policy 6001 remained in effect on the effective date of the Educational Employment Relations Act, Chapter 41.59 RCW; and the Kent Education Association continued to supply lists of teachers, librarians and counselors proposed for membership on the Instructional Materials Committee.

5. During negotiations in 1976, the KEA submitted written proposals for a comprehensive collective bargaining agreement, one of which was for the creation of a Curriculum Committee, and another of which was for modification of district Policy 6001. Negotiators for the district refused to discuss the KEA proposals on Curriculum Committee and instructional materials, stating that the district considered instructional materials to be a non-mandatory subject of bargaining.

6. On July 28, 1976, the district's board of directors amended district Policy 6001. Thereafter, Daniel stopped using KEA-provided lists of professional staff in making appointments to the Instructional Materials Committee.

7. The record in this proceeding is insufficient to base a finding that the procedures for appointment of non-supervisory educational employees of the district to the district's statutorily required Instructional Materials Committee have a significant impact on the wages, hours, and terms and conditions of employment of the employees so appointed.

AMENDED CONCLUSIONS OF LAW

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

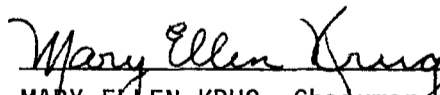
2. Kent School District No. 415, by refusing to bargain collectively on proposals advanced by the Kent Education Association concerning Curriculum Committee and Instructional Materials Committee, and by ceasing to accept nominations from the Kent Education Association for its Instructional Materials Committee, has not violated RCW 41.59.140(1)(e) or (a).

ORDER

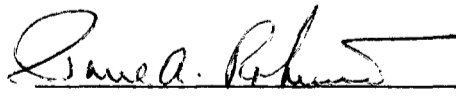
The complaint filed in the above entitled matter is dismissed.

DATED this 26th day of June, 1979.

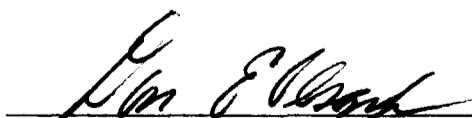
PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARY ELLEN KRUG, Chairman



PAUL A. ROBERTS, Commissioner



DON E. OLSON, JR., Commissioner