State - Labor and Industries, Decision 9052 (PSRA, 2005)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
KIMBERLY JOHNSON	)	CASE 19356-E-05-3063
	)	
Involving certain employees of:	)	DECISION 9052 - PSRA
	)	
STATE - LABOR AND INDUSTRIES	)	ORDER DISMISSING PETITION
	)	
	)	

Kimberly Johnson, a nonsupervisory employee, appearing pro se.

Parr and Younglove, by *Edward E. Younglove, III*, Attorney at Law, for the Washington Federation of State Employees.

Attorney General Robert McKenna, by *MB Newberry*, Assistant Attorney General, for the employer.

This case comes before the Commission on an appeal filed by the Washington Federation of State Employees (union) seeking to overturn a decision of Executive Director Marvin L. Schurke not to dismiss a decertification petition for failing to submit at least a 30 percent showing of interest to support her petition. For the reasons set forth below, we find that the Commission's showing of interest requirements are mandatory, not discretionary, and dismiss the petition.

BACKGROUND

On April 1, 2005, William Ireland, the initial petitioner, filed a representation petition seeking decertification of the union as the exclusive bargaining representative of the nonsupervisory employees working at the Washington State Department of Labor and Industries

(agency). Although Ireland timely filed and served his petition, he failed to supply evidence demonstrating that 30 percent of the bargaining unit employees supported his petition required by Commission rules. Following the docketing of the petition, Representation Coordinator Sally Iverson issued a letter on April 7, 2005, to the employer requesting a list of employees in the bargaining unit and informing the employer that Commission rules required it to maintain the status quo as to the wages, hours, and working conditions pending the outcome of the representation petition. Following receipt of the employer's list, the Representation Coordinator issued a deficiency notice on April 19, 2005, notifying Ireland that he failed to support his petition with a 30 percent showing of interest and his petition would be dismissed unless he demonstrated good cause by May 2, 2005.

On May 2, 2005, Kimberly Johnson, the successor petitioner, responding for Ireland, claimed the union and employer interfered with the rights of employees supporting the decertification petition to collect showing of interest cards. It appears that in that same filing, Ireland also assigned control of the petition to the petitioner and directed all future correspondence to be directed towards her.[1]

The Executive Director issued a letter on May 20, 2005, informing the petitioner that her allegations contained two causes of action that warranted consideration, and declined to dismiss the

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[1] Commission records indicate that both Johnson's objections and Ireland's letter of assignment were delivered in the same package. Ireland's assignment letter indicates that Glenn Christopherson (formerly of Department of Labor and Industries) and Gladys Burbank (union staff) were sent copies of this letter. No formal certificate of service accompanied this mailing.

petition.[2] He also noted that the Commission's blocking charge rule was not applicable absent a formal unfair labor practice complaint.[3] It appears that based upon the successor petitioner's allegations, the Executive Director declined to immediately dismiss the decertification petition for failure to support it with 30 percent showing of interest.

On June 2, 2005, the petitioner filed formal unfair labor practice charges against the union and the employer, and Commission staff docketed those as cases 19519-U-05-4952 and 19520-U-05-4953.[4] Those charges reiterated the allegations asserted in the petitioner's May 2, 2005, filing.

The union filed a June 8, 2005, letter addressed to the Executive Director seeking dismissal of the petition based upon its assertion that the petitioner failed to serve copies of its May 2, 2005, letter upon the union. The union also asserted in its letter that in the event the Executive Director declined to dismiss the representation petition for the alleged procedural defects, it would appeal the Executive Director's May 20, 2005, decision not to

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[2] The petitioner alleged violations of RCW 41.80.110 and WAC 391-25-170. Neither of those claims affect the outcome of this particular appeal, and will only be discussed as necessary.

[3] *See* WAC 391-25-370 (The Executive Director may suspend the processing of a representation petition pending the outcome of a related unfair labor practice where a properly filed unfair labor practice complaint on its face asserts that a party's actions could improperly affect the outcome of a representation petition).

[4] The petitioner also filed an unfair labor practice complaint against the Office of Financial Management, Case 19521-U-05-4954. Commission staff made an administrative determination to process that case separately. Consideration of that case is not required in this appeal.

dismiss the petition. On June 9, 2005, the union filed a purported appeal restating the union's June 8, 2005 objections.

On June 30, 2005, the Executive Director issued a letter notifying the parties of the status of the representation petition and the unfair labor practice cases. In that letter he explained why summary judgment would not be available for the unfair labor practice cases and rejected the union's June 9, 2005, appeal as premature. The Executive Director also informed the parties that application of the Commission's blocking charge rule was apt in this case. The Executive Director provided no guidance to the parties as how they should maintain the status quo.[5] The Executive Director also sent copies of his correspondence to the full Commission to inform them of his decision.

The union filed a second notice of appeal of the Executive Director's decision on July 18, 2005. The union argued for the first time that by not dismissing the decertification petition for the petitioner's failure to file a 30 percent showing of interest, the blocking charges associated with the petitioner's unfair labor practice prevented the implementation of the union's negotiated contract covering the agency's nonsupervisory employees. The union once again asked the Commission to dismiss the representation case as being procedurally deficient.

On July 28, 2005, the Commission issued a letter informing the parties that upon review of the record, application of the blocking charge rule was inappropriate for the present case and that it would direct dismissal of the representation petition. The

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[5] *See* WAC 391-25-140(2)(Changes of the status quo concerning wages, hours or other terms and conditions of employment of employees in the bargaining unit are prohibited during the period that a petition is pending before the commission under this chapter).

Commission also informed that parties that this formal decision would soon follow.

DISCUSSION

Commission's Existing Rules Apply to All Representation Cases

The Personnel System Reform Act of 2002 (PSRA) directs the Commission to determine and administer all questions concerning representation with regards to the election of an exclusive bargaining representative. The authorizing statute, RCW 41.80.080, reads in part:

> REPRESENTATION -- ELECTIONS -- RULES. (1) The commission shall determine all questions pertaining to representation and shall administer all elections and be responsible for the processing and adjudication of all disputes that arise as a consequence of elections. The commission shall adopt rules that provide for at least the following:
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> (a) Secret balloting;
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> (b) Consulting with employee organizations;
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> (c) Access to lists of employees, job classification, work locations, and home mailing addresses;
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> (d) Absentee voting;
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> (e) Procedures for the greatest possible participation in voting;
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> (f) Campaigning on the employer's property during working hours; and
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> (g) Election observers.

Although this statute directs the Commission to adopt rules for "at least" the provisions outlined in RCW 41.80.080(1)(a)-(f), that language does not limit the Commission to adopt, or adapt other rules for the processing of representation cases.

In an effort to maintain this Commission's statutory mission of uniformity, the Commission applies its regular representation rules, Chapter 391-25 WAC, to petitions raising questions concerning representation to employees covered by the PSRA. *See, e.g.,*

RCW 41.48.005(1); *State - Natural Resources*, Decision 8458-B (PSRA, 2005)(Commission rules and precedents apply to PSRA representation proceedings).

A representation petition that appears to comply with the provisions set forth in WAC 391-25-070, as well as the service requirements set forth in Chapter 391-08 WAC, is presumed valid for purposes of processing. Like an unfair labor practice complaint, a properly filed representation petition is considered valid until Commission staff examine the showing of interest. Following receipt of the petition, Commission staff then request from the employer a list of employees under WAC 391-25-140, and instruct the employer to post notices informing employees that the employer will maintain the status quo during the pendency of the petition.[6]

In addition to these requirements, WAC 391-25-110 requires the petitioning party to submit evidence demonstrating that at least 30 percent of the bargaining unit employees support the petition. Until Commission staff examine the submitted showing of interest in relation to the list of employees provided by the employer, Commission staff presume validity of the showing of interest.

Commission Rules Favor Speedy Resolution of Representation Cases

This Commission favors speedy processing of representation cases to prevent employers, employees, and bargaining representatives from facing as little workplace uncertainty as possibly. To facilitate speedy processing of representation cases, the Commission adopted WAC 391-25-390(3), to place certain limitations upon the timing for appeals of interim orders. WAC 391-25-390(3) states:

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[6] This Commission does not independently investigate alleged violations of WAC 391-25-140, rather the burden is on an aggrieved party to file a formal unfair labor practice complaint.

> A direction of election and other rulings in the proceedings up to the issuance of a tally are interim orders, and may only be appealed to the commission by objections under WAC 391-25-590 after the election. An exception is made for rulings on whether the employer or employees are subject to the jurisdiction of the commission, which may be appealed under WAC 391-25-660.[7]

The Commission's reasoning for adopting such a rule, which we continue to adhere to, is simple: outside of jurisdictional issues, an appeal of certain rulings becomes moot depending on the outcome of the election. *See City of Redmond*, Decision 1367-A (PECB, 1982). Therefore, to prevent the unnecessary waste of Commission resources and time, appeals of most ruling only become "ripe" once the tally of election is issued.

For example, if a union wins an election where the employer asserts that certain employees should be excluded from the bargaining unit, any disputed employee votes by challenged ballot. To allow the parties certainty about the nature of their employment relationship, the Executive Director will issue an interim certification to allow the union to commence representation of the employees while the Commission sorts out the eligibility issues that generally do not affect the negotiations for a collective bargaining agreement. *City of Redmond*, Decision 1367-A.

The Union Raises Jurisdictional Issues Ripe For Appeal

In its June 8, 2005, letter and June 9, 2005, notice of appeal, the union argued that the Executive Director's May 20, 2005, letter was an order that may be appealed under WAC 391-25-660, and that the representation petition should have been dismissed based on the petitioner failure to comply with WAC 391-25-110. Relying on WAC

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[7] WAC 391-25-590 pertains to objections to specific conduct surrounding the representation election itself, and not to any specific rulings of the Commission or its staff.

391-25-390(3), the Executive Director ruled in his June 30, 2005, letter that the union's appeal was premature. On July 18, 2005, the union filed a second appeal reasserting that the representation petition should have been dismissed for the petitioner's failure to serve its May, 2, 2005 response, but also asserting for the first time that it was improper not to dismiss the representation petition based upon the petitioner's failure to submit a sufficient showing of interest.

We find that the application of WAC 391-25-390(3) as applied to the instant case, in conjunction with the requirements of WAC 391-25-110, confer appellate jurisdiction over representation cases similar in nature to this one because the union is seeking review of a jurisdictional question. The jurisdictional question we answer is whether the Executive Director should have dismissed the decertification petition because the petitioning party failed to support their petition with a 30 percent showing of interest.[8]

Commission's Showing of Interest Requirement Is Mandatory

The Commission's showing of interest requirement is found within WAC 391-25-110. That rule states:

> SUPPORTING EVIDENCE -- SHOWING OF INTEREST CONFIDENTIAL. (1) A petition filed by employees or an employee organization shall be accompanied by a showing of interest indicating that the petitioner has the support of thirty percent or more of the employees in the bargaining unit which the petitioner claims to be appropriate. The showing of interest shall be furnished under the same timeliness standards applicable to the petition, and shall consist of original or legible copies of individual authorization cards or letters signed and

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[8] This question arises based upon the Representation Coordinator's administrative determination that the showing of interest was deficient. We note that the sufficiency of the showing of interest, which is an administrative determination, is not appealable. *See* RCW 34.050.010(3), WAC 391-25-110(b).

> dated by employees in the bargaining unit claimed appropriate.
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> (2) The agency shall not disclose the identities of employees whose authorization cards or letters are furnished to the agency in proceedings under this chapter.
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> (a) A petitioner or intervenor shall not serve its showing of interest on any other party to the proceeding.
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> (b) The question of whether a showing of interest requirement for a petition or for intervention has been satisfied is a matter for administrative determination by the agency and may not be litigated at any hearing.
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> (c) In order to preserve the confidentiality of the showing of interest and the right of employees freely to express their views on the selection of a bargaining representative, the agency shall not honor any attempt to withdraw any authorization submitted for purposes of this section.

The purpose for this rule lies within the Commission's desire for as speedy of resolution of representation cases as possible.

Requiring 30 percent of the bargaining unit to support the question concerning representation demonstrates that at least a significant minority of employees desire a change as to invoke the jurisdiction and resources of the Commission.[9] WAC 391-25-110 provides no exception in its interpretation and administration. We reiterate

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[9] The NLRB adopted the 30 percent showing of interest requirement to avoid unnecessary expenditure of time and funds where there is no reasonable assurance that a genuine representation question exists, and prevents persons with little or no stake in a bargaining unit from abusing the Board's machinery and interfering with the normal administration of the National Labor Relations Act. See NLRB's Internal Instructions and Guidelines - Representation Proceedings. This Commission which is based in part upon the practices and policies of the NLRB adopted this requirement for similar reasons.

what has always been: WAC 391-25-110 showing of interest requirements are mandatory, and must be applied as so.[10]

Although we dismiss the petition for failure to comply with WAC 391-25-100, a party asserting that it was prevented from collecting the requisite showing of interest is not without redress. In many instances where a party asserts an unfair labor practice that potentially affects the outcome of a representation election, the Commission would invoke WAC 391-25-370(1) and suspend the representation petition pending the outcome of the unfair labor practice cases. However, WAC 391-25-370(1)(3) requires that the alleged unfair labor practice needs to affect the outcome of a *representation election.* Without a 30 percent showing of interest, a representation election would normally never happen. By limiting the remedy in cases which assert the petitioning party was prevented from collecting its showing of interest to those unfair labor practice provisions themselves, we do not assume that a representation election would ever occur. Dismissal of the petition does not prevent a remedial order in an unfair labor practice case to redress the lack of sufficiency of the showing of interest.[11]

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[10] Because we find that a party's remedies in such case are found within the unfair labor practice provisions, asserting that a party interfered with collection efforts is not good cause.

[11] Washington Courts have upheld extraordinary remedies in special cases where parties have shown a patent disregard for the state's collective bargaining statutes and the Commission's rules and procedures. *Municipality of Metropolitan Seattle v. Public Employment Relations Commission*, 118 Wn.2d 621 (1992).

CONCLUSION

We conclude with a brief summation. A petition raising a question is presumed valid if properly filed under the Commission's rules. The Commission's showing of interest requirement, WAC 391-25-110(1), is mandatory, not discretionary. Once demonstrative evidence exists that the petition is not supported by the requisite showing of interest, the petition shall be dismissed. If a petitioner asserts that it was prevented from collecting its showing of interest by some action of another party, that party should file an unfair labor practices complaint, and if a violation is found, the appropriate remedy will come from the unfair labor practice provisions, and the representation proceeding should be dismissed for procedural insufficiencies.

NOW, THEREFORE, it is

ORDERED

Case 19356-E-05-3063 is dismissed due to the petitioner's failure to comply with WAC 391-25-110 and supply evidence that at least 30 percent of the bargaining unit employees supported the question concerning representation.

Issued at Olympia, Washington, the 10th day of August, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner