

Washington State - Revenue (Washington Public Employees Association), Decision 8972-A (PSRA, 2006)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE - REVENUE,)	
)	
Employer.)	
-----)	
DAVID LAZAR,)	
)	
Complainant,)	CASE 19264-U-05-4893
)	
vs.)	DECISION 8972-A - PSRA
)	
WASHINGTON PUBLIC EMPLOYEES)	
ASSOCIATION, affiliated with)	
UNITED FOOD AND COMMERCIAL)	
WORKERS, LOCAL 365,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent.)	AND ORDER
_____)	

David Lazar represented himself.

Schwerin Campbell Barnard, by *Lawrence Schwerin*, Attorney at Law, appeared for the union.

David Lazar filed an unfair labor practice complaint against the Washington Public Employees Association (union), on March 10, 2005. After the Commission notified Lazar of certain defects in the complaint, he filed an amended complaint May 16, 2005. The amended complainant stated a cause of action for union interference with employee rights in violation of RCW 41.80.110(2)(a). The complaint stated that the union failed to provide adequate notice of a contract ratification vote, and failed to allow all bargaining unit employees to participate in that contract ratification vote.¹

¹ Certain other allegations were dismissed. See *Washington State - Revenue (Washington Public Employees Association)*, Decision 8972 (PSRA, 2006).

Examiner Katrina I. Boedecker held a hearing on November 10, 2005, in Olympia, Washington. The parties filed post-hearing briefs by February 1, 2006. Later that month, the Examiner notified the parties that three appeals involving the sufficiency of union action in ratification elections were pending before the Commission. Since the decision in this case would be influenced, if not controlled, by the Commission's decisions, the Examiner advised the parties that she would issue this decision after the Commission had ruled on the appeals. The Commission issued *Western Washington University*, Decision 8849-B (PSRA, 2006); *Community College District 7 (Shoreline)*, Decision 9094-A (PSRA, 2006); and *Community College District 19 (Columbia Basin)*, Decision 9210-A (PSRA, 2006) on June 20, 2006.

ISSUES PRESENTED

1. Does the Commission have jurisdiction over a complaint concerning notice and opportunity to vote on the ratification of a collective bargaining agreement?
2. If the Commission has jurisdiction, did the union commit an unfair labor practice by failing to provide adequate notice and opportunity to vote in the ratification election?
3. If the Commission has jurisdiction, and the union is found to have committed an unfair labor practice, what should be the remedy?

The Examiner rules that the Commission has jurisdiction to adjudicate the complaint regarding the union's behavior during a ratification process. The Examiner finds that the employer and union agreed to allow all bargaining unit employees to vote on the

tentative agreement. The Examiner rules that the union failed to fairly and adequately inform all bargaining unit employees, who were not members of the union, of their opportunity to vote on the acceptance or rejection of the tentative agreement. The union is ordered to cease and desist from interfering with employee rights. The union is also ordered to post, read, and publish, notice that it violated the law.

ISSUE 1: THE COMMISSION'S JURISDICTION

Legal Standards -

The Commission recently ruled that it has jurisdiction over the question of whether a union wrongfully denied non-union members a meaningful and informed vote in the ratification process of a collective bargaining agreement. *Western Washington; Shoreline; and Columbia Basin.*² In all three cases, the Commission specifically dealt with the issue of jurisdiction over the contract ratification process. In each case, the union and the employer negotiated an agreement pursuant to the Personnel System Reform Act, Chapter 41.80 RCW (PSRA). That agreement contained the provision that all bargaining unit members, even non-members of the union, were able to vote on the proposed contract. Several non-union members filed claims, individually, that the union interfered with their ability to vote on the agreement. Some claimed that the union did not inform them that they could vote. Others asserted that the union specifically told them that they could not vote. Still others claimed that the union did not give enough forewarning to allow them time to vote.

The Commission cited with approval *Beatrice/Hunt-Wesson, Inc.* 302 NLRB 224 (1991), where the NLRB found it appropriate to give a

² The second and third cited cases are currently on appeal to state court while the first is not.

measure of protection to the expectancy interests of the parties where the parties had made the ratification process part of their bargaining.

Application of Standards -

In *Western Washington, Shoreline, and Columbia Basin*, the Commission held that it had jurisdiction, over the union's objection, since the union conferred rights upon non-members when it agreed with the employer's proposal that all bargaining unit members would be allowed to vote.

That is the same fact pattern present in the instant case. The same reasoning applies: It is no longer an internal union affair once the union agrees with the employer to alter its usual ratification process. At this juncture, the interests of all of the members of the bargaining unit are entitled to the protections of the PSRA. The Commission administers the PSRA. Thus, the Commission has jurisdiction to rule on the allegations.

ISSUE 2: UNION INTERFERENCE

Legal Standards -

Having determined that the Commission has jurisdiction over the issue, the next inquiry is whether the union interfered with employees' rights in violation of its duty to fairly represent all bargaining unit members. See *Western Washington; Shoreline; and Columbia Basin*.

In *Allen v. Seattle Police Officers Guild*, 100 Wn 2d 361 (1983), the Supreme Court specifically recognized that the doctrine of a union's duty of fair representation to all bargaining unit members

exists within Chapter 41.56 RCW.³ The court outlined and explained the standards to be applied in cases alleging a violation of the union's duty of fair representation:

- A union must treat all factions and segments of its membership without hostility or discrimination. A finding of discrimination requires a showing that an individual was deprived of a right based on his/her assertion of a protected activity, and that there is a casual connection between the exercised right and the discriminatory action;
- A union's broad discretion in addressing the rights of individual members must be exercised in good faith and honesty;
- A union must avoid arbitrary conduct. A union's actions are arbitrary only if, in the light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness" as to be irrational.

The Court further explained that to prove that a union has breached its duty, the complainant must show that the union behaved irrationally, invidiously, or indifferently as to the rights of bargaining unit employees or that the union's conduct was so grossly deficient as to be declared arbitrary. Unions do not have to bargain contract provisions of equal benefit to all bargaining unit employees. Unions are prohibited, nonetheless, from aligning themselves against one or more employees in the bargaining units

³ The duty of fair representation owed under PSRA mirrors provisions in Chapter 41.56 RCW. *State Natural Resources*, Decision 8458-B (PSRA, 2005).

they represent. *C-Tran*, Decision 7087-B (citing *Allen v. Seattle Police*).

If the terms of a negotiated contract, or a union's by-laws, require ratification of negotiated agreements by affected employees, a failure to submit a contract to a meaningful vote of those employees breaches the union's duty of fair representation. *Deboles v. Trans World Airlines*, 552 F.2d 1005 (3rd Cir. 1977) cert. denied 434 U.S. 837 (1977). By denying a group of workers the chance to ratify, the union risks subjecting the employees to the disadvantages of a contract they could have prevented. It also risks depriving the employees of the benefits of a contract whose acceptance they could have ensured. *International Brotherhood of Teamsters, Local 310 v. NLRB*, 587 F.2d 1176, 1882.

In *Western Washington*, the union sent employees an e-mail before the tentative agreement was reached, stating that only union members would be able to vote on the contract. However, at the very end of the negotiations, the employer agreed to a union security clause, but only if all bargaining unit members would be allowed to vote in the ratification process. Following the settlement of the tentative agreement, the union sent an e-mail to employees stating that all employees could vote on the agreement, including non-union members. The Commission found that the union interfered in the vote by confusing employees as to who could vote. However, the Commission did not order any remedy because the union had been decertified.

In *Shoreline*, the union and the employer reached a tentative agreement on September 4, 2004. The tentative agreement contained a union proposed union security clause, again in exchange for the employer's proposal that all bargaining unit members would be

allowed to vote in the ratification process. An e-mail was sent to members of the bargaining unit seven days later. The e-mail incorrectly stated that only members could vote. The Commission found that the union had interfered with employees' ability to vote. First, the union did not give the employees enough time for an informed vote. Second, the union had misstated who was eligible to vote. The Commission ordered the union to cease and desist.

In *Columbia Basin*, the union and the employer reached a tentative agreement on September 17, 2004. On September 20th, the Chapter President sent an e-mail to all employees to check the union website. He sent a second e-mail, just to union members, to remind them to vote on the proposed agreement. On those facts, the Commission also found that the union had interfered with the employees' ability to vote. The Commission ordered the union to cease and desist.

Application of Standard -

The inquiry here, focuses not on whether the union followed its own internal by-laws or constitution, nor whether the union violated the contract, but whether the union interfered with employees' right to be free from restraint or coercion in the exercise of rights guaranteed by Chapter 41.80 RCW.⁴

On Thursday, September 16, 2004, the union and the employer reached a tentative agreement on a new collective bargaining agreement that covered Lazar's bargaining unit. During the months of bargaining

⁴ The statute at RCW 41.80.050 guarantees employees the right to self-organization, to form, join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion.

preceding the tentative agreement, the union had constantly proposed that a union security clause be included in the agreement. The employer had consistently resisted the clause. Finally, on September 16th, the employer agreed to include a union security clause in the contract, if all employees in the bargaining unit would be allowed to vote on the contract as part of the union's ratification process.

On Monday, September 20th, Leslie Liddle, Executive Director of the union, posted a copy of the tentative agreement on the union's website. She also posted a notice of polling times and places for the ratification vote. Liddle sent notice, on the union's electronic bulletin board, that the tentative agreement would be discussed at the upcoming, regularly scheduled district meetings. She included the location of each meeting; she noted that voting on the agreement would occur that coming Saturday and Sunday, September 25th and 26th. This notice also included a list of the polling sites.

On Tuesday, September 21st, the union held district meetings throughout the state to review and discuss the proposed agreement. Also on that date, Chapter President William Johnson sent an e-mail to numerous employees that they needed to get the word out about the new agreement since the ratification vote was scheduled for that weekend. His e-mail stated that non-dues paying unit members would have the opportunity to vote on the contract only if they paid membership dues before they voted. Chapter Vice President Steve Allman forwarded that e-mail to all unit employees.

On September 25th and September 26th, bargaining unit members voted on the proposed agreement. Some union members and some non-union members voted. The union challenged the ballots of non-union members and placed the ballots in separate envelopes.

On Monday, September 27th, Lazar read the e-mail sent by Allman to all employees. This was the first he learned that voting had occurred. Following a series of e-mails by Lazar to the union and the employer seeking to have the ratification re-done, he filed the present unfair labor practice complaint. Lazar contends that the union interfered in his ability to vote on the contract. He bases this on the fact that the chapter president misinformed the unit members that only union members could vote on the contract. He also claims interference due to the fact that the union did not give employees enough time to review the contents of the proposed agreement before having to vote. Lazar charges that the union violated the PSRA because it did not give him, as a bargaining unit member, the opportunity for an informed and meaningful vote on the proposed collective bargaining agreement.

Lazar presents a similar fact pattern to the ones in *Western Washington, Shoreline, and Columbia Basin*. At the very last minute of bargaining, the employer agreed to accept the union's proposal for union security only if the union agreed that all non-members, as well as members, would be allowed to vote on the agreement. The union did agree. By doing so, the union created rights for those who may have not previously enjoyed such rights. Employees were given the expectation that their votes would count towards the ratification process. The union thus exposed itself to scrutiny regarding any allegation that it interfered with, restrained or coerced employees during the voting.

The record in this case establishes that the union committed interference. The union gave notice of the ratification process in a confusing manner concerning who could vote. The union delivered the notice in a hasty manner not giving employees enough time to make an informed vote. The union treated non-members votes differently when their ballots were placed in a separate envelope

and "challenged." All of these factors amount to union conduct that is so grossly deficient that it is arbitrary. See *Allen v. Seattle Police Officers Guild*, 100 Wn 2d 361. The union interfered with Lazar's statutory rights.

ISSUE 3: THE APPROPRIATE REMEDY

Legal Standard -

The authority of the Commission to prevent and remedy unfair labor practices is set forth in PSRA at RCW 41.80.120(2): "If the Commission determines that any person has engaged in or is engaging in an unfair labor practice, the Commission shall issue and cause to be served upon the person an order requiring the person to cease and desist from such unfair labor practice, and to take such affirmative action as will effectuate the purposes and policy of this chapter, such as the payment of damages and the reinstatement of employees."

The fashioning of remedies is a discretionary act of the Commission. In interpreting the Commission's remedial authority, the Supreme Court of the State of Washington has approved a liberal construction of the statute to achieve its purpose. [See *City of Seattle*, Decision 8313-B (PSRA, 2004).] The Court has also recognized and given deference to the Commission's expertise in resolving labor-management disputes. *Public Employment Relations Commission v. City of Kennewick*, 99 Wn.2d 832 (1983).

In *Shoreline*, the Commission ordered the union to cease and desist from improperly notifying bargaining unit members of their contract ratification rights. It also directed the union to read into the record of its next state-wide convention an attached notice and to permanently attach such notice to the official minutes of that

meeting. The Commission ordered the union to publish the notice in its newsletter. The Commission overturned the Examiner's remedy of ordering a new election and directing the union to cease enforcing union security. It reasoned that the complainant did not show that the votes of the non-union members would have affected the outcome of the vote on the proposed agreement.

In *Columbia Basin*, the Commission ordered the identical remedy as the one ordered in *Shoreline*. The Commission found the Examiner's remedy of ordering the union to cease and desist from enforcing any union security obligation inappropriate since the employees had received benefits under the contract.

Application of the Standard -

The above cited cases are precedential in that they concern similar facts and law. Lazar requests as a remedy that "everything be put back the way it was before the vote." However, he does not argue that the benefits he received under the contract, such as pay raises and insurance increases, be rescinded. Lazar wants the union to rescind all new memberships and return all paid dues. He requests that the union be ordered to apologize. He wants the union to be disqualified from representing the bargaining unit. Finally, he requests reimbursement for expenses.

Here, there is no showing that the outcome of the vote would have been affected by Lazar's vote. Therefore, returning to the state of affairs before the election is not appropriate. Ordering the union to post a notice, read the notice and append the notice per the above cases is tantamount to an apology. Rescinding the memberships, and refunding the dues, of any individual who enrolled in the union on the day of the vote, pursuant to the incorrect information sent out by the Chapter President, is not appropriate. The record reflects that the union allowed non-

members to vote and they did not have to join the union to do so. The Commission did not order reimbursement of expenses in the *Western Washington, Shoreline, or Columbia Basin* decisions. Lazar has not established unique circumstances requiring deviation from those decisions.

FINDINGS OF FACT

1. The State of Washington is a covered employer under RCW 41.80.005(8).
2. Washington Public Employees Association (union) is an employee organization within the meaning of RCW 41.80.005(7). It is the exclusive bargaining representative of a bargaining unit of certain employees of the Department of Revenue, a state agency under RCW 41.80.005(1). David Lazar is in the bargaining unit.
3. The employer and the union came to a tentative agreement for the terms of a new collective bargaining agreement on September 16, 2004.
4. On September 16, 2004, the employer agreed to a union proposal for a union security clause to be included in the contract, in exchange for the union accepting an employer proposal that all bargaining unit employees would be able to vote during the ratification process. The union agreed to the employer's proposal.
5. On Monday, September 20, 2004, Leslie Liddle, Executive Director of the union, posted a copy of the tentative agreement on the union's website along with a notice of polling times and places for the ratification vote.

6. Liddle used the union's electronic bulletin board to send notice to Lazar's bargaining unit that the tentative agreement would be discussed at the upcoming, regularly scheduled district meetings. She included the location of each meeting; she noted that voting on the agreement would occur that upcoming Saturday and Sunday. This notice also included a list of the polling sites.
7. On Tuesday, September 21, 2004, Chapter President William Johnson sent an e-mail to numerous employees concerning the coming weekend's ratification. He stated that non-dues paying unit members could vote on the contract only if they paid membership dues before they voted. Chapter Vice President Steve Allman forwarded that e-mail to all unit employees.
8. On September 25 and 26, 2004, some union members and some non-union members voted on the proposed agreement. The union challenged the ballots of non-union members.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.80 RCW. The Commission has jurisdiction, under RCW 41.80.110, to determine and remedy, complaints of interference when the employer and the union agree to give non-members voting rights as described in paragraph 4 of the above findings of fact.
2. By its actions, described in paragraphs 5 through 8 of the above findings of fact, the union interfered with the rights of employees under RCW 41.80.050. The union committed an unfair labor practice in violation of RCW 41.80.110(2)(a).

NOW, THEREFORE, it is

ORDERED

The Washington Public Employees Association, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:
 - a. Failing to adequately notify all bargaining unit employees of their voting rights conferred by agreement of the union with the employer in collective bargaining.
 - b. Sending out confusing and incorrect information to bargaining unit members about who can vote on the ratification of a tentative agreement.
 - c. Establishing conditions, not agreed to by the employer, for non-members to participate in the ratification process.
 - d. In any other manner, restraining or coercing employees in the exercise of their rights under Chapter 41.80 RCW.
2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS to effectuate the purposes and policies of Chapter 41.80 RCW.
 - a. Post, in conspicuous places on the employer's premises where union notices to all employees are usually posted, copies of the notice attached to this order. Such notice shall be duly signed by an authorized representative of the Washington Public Employees Association.

- b. Read the notice attached to this order into the record of its next state-wide convention and permanently attach the notice to the official minutes of that meeting.
- c. Publish a true-sized copy of the notice in its newsletter that is sent or delivered to union members.
- d. Notify David Lazar, 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 him with a signed copy of the notice attached to this order.
- e. Notify the Compliance Officer 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 Commission with a signed copy of the notice attached to this order.

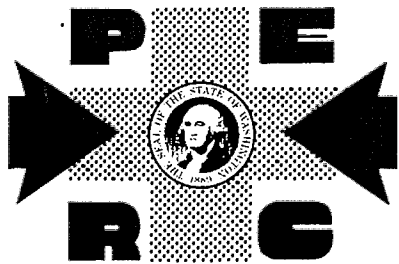
Issued at Olympia, Washington, the 5th day of January, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



KATRINA I. BOEDECKER, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY failed to fairly and adequately notify all bargaining unit employees who are not union members, but who are in the bargaining unit that we represent, of the opportunity to vote on the tentative collective bargaining agreement reached between the State of Washington and ourselves, the Washington Public Employees Association.

WE UNLAWFULLY breached our duty of fair representation by interfering with or restraining all bargaining unit employees, who are not union members, in the exercise of their statutory rights.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL inform all bargaining unit employees, who are not union members, of the opportunity to vote on the tentative collective bargaining agreement reached between the union and employer, **WHEN THE PARTIES AGREE IN NEGOTIATIONS TO ALLOW NON-UNION MEMBERS THE RIGHT TO VOTE.**

WE WILL NOT give notice to voters in a confusing manner, as we did for the September 25 and 26, 2004, ratification process.

WE WILL NOT give notice to voters in such a hasty manner that does not allow employees enough time to make an informed vote, as we did for the September 25 and 26, 2004, ratification process.

WE WILL NOT treat non-members ballots differently than members ballots, as we did for the September 25 and 26, 2004, ratification process.

WE WILL NOT engage in conduct that is so grossly deficient that it is arbitrary and illegal, as we did for the September 25 and 26, 2004, ratification process.

WE WILL NOT, in any other manner, interfere with or restrain bargaining unit employees in the exercise of their collective bargaining rights under the laws of the state of Washington.

DATED: _____

WASHINGTON PUBLIC EMPLOYEES ASSOCIATION

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days, and must not be altered or covered by any other material. Questions about this notice or compliance with the Commission's order may be directed to the Public Employment Relations Commission (PERC), 112 Henry Street NE, Suite 300, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's web site, www.perc.wa.gov Decision 8972-A, Case 19264-U-05-4893.