STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYEMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
DAVE WILLIAMS	)	CASE NO. 3133-E-80-608
	)	
Involving certain employees of:	)	DECISION NO. 1123 - PECB
	)	
LEWIS COUNTY	)	DECISION AND ORDER
	)	
	)	

Dave Williams, petitioner, appeared pro se.

Eugene Butler, Chief Civil Deputy, appeared on behalf of the employer.

Pamela G. Cipolla, legal counsel, appeared on behalf of the intervenor, Washington State Council of County and City Employees.

NATURE OF PROCEEDING:

The question before the Commission is whether a petition for decertification of the respondent union (Washington State Council of County and City Employees and its Local No. 1341C, AFL-CIO), filed by Dave Williams, a Lewis County employee, should be held in abeyance pending the resolution of an unfair labor practice proceeding that is now before Division II of the Washington State Court of Appeals. (Lewis County v. PERC, Docket No. 4968-II). Williams filed the petition on October 30, 1980; the Executive Director initially placed it in "blocked" status (i.e., held it in abeyance), and then scheduled the matter for argument before the Commission. Lewis County has joined Mr. Williams in seeking immediate action, while the union has intervened in support of holding the case in abeyance.

PREVIOUS PROCEEDINGS:

The unfair labor practice proceeding referred to above, and its genesis, is germane to this dispute. On March 7, 1978, the union was certified as the exclusive bargaining representative of:

> "All Lewis County Courthouse employees in the Treasurer's office, Assessor's office, Auditor's office, Clerk's office, District Court, Maintenance and Car Pool; excluding the Commissioner's office, elected officials and Juvenile Court employees."

The certification of the union was not appealed. Lewis County, however, refused to bargain with the union on the grounds that non-member employees were barred from participation in two union meetings. That issue was essentially adjudicated twice, and in both instances decided in favor of the union. Lewis County, Decision No. 464-A (PECB, 1979). Lewis County then refused to bargain anything other than wages and wage-related items on the grounds that authority of the County Commissioners is limited to those items. In Lewis County, Decision No. 644, (PECB, 1979) we found that Lewis County's refusal to bargain nonwage-related items constituted a refusal to bargain collectively, in violation of RCW 41.56.140 (4) and (1). Concurrently, we dismissed Dave Williams' earlier petition for investigation concerning representation, Lewis County, Decision 645 (PECB, 1979), invoking the one-year certification bar rule found in RCW 41.56.070. The dismissal of the representation petition was not appealed, but the decision of the Commission concerning the County's refusal to bargain was appealed to Lewis County Superior Court. That Court reversed the decision of the Commission. Lewis County v. PERC (Lewis County Superior Court, No. 37016, Jul. 30, 1980). Both the union and the Commission appealed to the Washington State Court of Appeals, Division II, where the case is now pending.

ISSUES:

The issues in this proceeding are exclusively legal. They are:

1. Does PERC have the authority to "block" Mr. Williams' petition for decertification?

2. Can PERC predicate the suspension of a representation proceeding on an unfair labor practice finding that was reversed by a court and is now on appeal to a higher court?

3. Is the unfair labor practice alleged here of a nature that compels the utilization of the "blocking charge" procedure?

DISCUSSION:

1. PERC's authority to "block" a decertification petition:

RCW 41.56.070, like Section 9(c)(3) of the National Labor Relations Act (NLRA), bars questions concerning representation for a full year following the certification of a union. The "blocking charge" rule was first invoked by the National Labor Relations Board (Board), in U.S. Coal & Coke, 3 N.L.R.B. 398 (1937). The Board interpreted the relevant

statute to mean that a certified union is entitled to one full year of good-faith bargaining. If an employer's unfair labor practices effectively deprive the union of that year, the time period will be extended. The rule has been endorsed by the federal judiciary, with several important cases coming from the Fifth Circuit in recent years. In NLRB v. Big Three Industries, Inc., 497 F.2d 43, 51-2 (5th Cir. 1974), that Court explained:

> "It would be particularly anomalous, and disruptive of industrial peace, to allow the employer's (unfair labor practices) to dissipate the union's strength, and then to require a new election, ... since employee disaffection with the union in such cases is in all likelihood prompted by the situation resulting from the unfair labor practices."

The court's sentiment grew stronger in Bishop v. NLRB, 502 F.2d 1024, 1029 (1974):

> "In the absence of the "blocking charge" rule, many of the NLRB's sanctions against employers who are guilty of misconduct would lose all meaning. Nothing would be more pitiful than a bargaining order where there is no longer a union with which to bargain."

PERC invoked the "blocking charge" principle in Mr. Williams' previous decertification petition, Lewis County, Decision No. 645, (PECB, 1979), and has since utilized its rule-making powers, adopting it as a formal rule, which states, in relevant part:

> "WAC 391-25-370 BLOCKING CHARGES - SUSPENSION OF PROCEEDINGS - REQUEST TO PROCEED. (1) Where representation proceedings have been commenced under this chapter and:
>
> (a) A complaint charging unfair labor practices is filed under the provisions of chapter 391-45 WAC; and
>
> (b) It appears that the facts as alleged may constitute an unfair labor practice; and
>
> (c) Such unfair labor practice could improperly affect the outcome of a representation election; the executive director may suspend the representation proceedings under this chapter pending the resolution of the unfair labor practice case."

* * *

We believe that the principle is interpretive of RCW 41.56.070; hence, PERC has the authority to invoke it, whether pursuant to a properly promulgated rule or through adjudication. RCW 41.56.090; 41.56.170. See K. Davis, Administrative Law Treatise, Ch. 2 and Sec. 5.01, (1958, ed., and supp. 1976, 1980).

2. Legal "existence" of unfair labor practice:

The gist of Mr. Williams' and the County's argument is that PERC cannot invoke its unfair labor practice finding (refusal to bargain) as cause for suspending Williams' petition because PERC's determination was reversed by the Lewis County Superior Court.

A difficult legal question has been raised, which is whether a judgment, that is awaiting review on appeal is res judicata in a subsequent proceeding involving the same parties. The courts are split almost evenly on the answer to this question. See Annot., 9 A.L.R.2d 984-10191 50 C.J.S. Judgments S701. In Washington, the judgment has been held res judicata. Riblet v. Ideal Cement Co., 57 Wn.2d 619, 358 P.2d 975 (1961). The reason the courts are split is that injustice can result, under an appropriate factual setting, under either view. The annotation suggests that the best solution, if feasible, is for the tribunal hearing the subsequent proceeding to continue the matter until the first appeal is resolved; the annotation adds that it may be an abuse of discretion for the tribunal not to continue the matter. We think that is an appropriate way to handle Mr. Williams' petition. In fact, the "blocking charge" principle essentially embodies the annotation's suggestion, because it is nothing more than a rule allowing the continuance of a decertification petition until the underlying unfair labor practice charge is resolved.

3. Appropriateness of "blocking charge" rule as a response to Lewis County's refusal to bargain:

The suspension of a representation petition under the "blocking charge" rule is discretionary on the part of the Executive Director. The rule, as promulgated, sets forth three criteria:

1) an unfair labor practice complaint has been filed;

2) it appears that the facts as alleged may constitute an unfair labor practice;

3) that unfair labor practice could improperly affect the outcome of the representation proceedings.

If those criteria are met, the Executive Director may suspend the petition. WAC 391-25-370.

PERC's administrative rule, we believe, is similar in application to the one established under the NLRA. It is not a "per se" rule; that is, not every unfair labor practice constitutes grounds for the "blocking charge." In two federal cases, Templeton v. Dixie Color Printing Co., 44

F.2d 1064 (5th Cir. 1971) and Surratt v. NLRB, 463 F.2d 378 (5th Cir. 1972) the Court chastised the Board for its "mechanical" application of the rule, i.e., its "per se" application. In subsequent cases, e.g., Bishop v. NLRB, supra, the Court emphasized that a Board determination only would be reversed for clear abuse of discretion. Accord, Newport News Shipbulding and Dry Dock Co. v. NLRB, 633 F.2d 1079 (4th Cir. 1980).

We believe that the WAC 391-25-370 criteria for the rule are present in this case, and it was properly invoked by the Executive Director. A complaint against Lewis County charging an unfair labor practice has been filed, and we obviously believe the complaint may have merit, for that was our ruling in the case now on appeal. The first two criteria are therefore satisfied. The third criterion, relating to the causal relationship between the employer's refusal to bargain and the alleged loss of union support is, we believe, determinable in this case as a matter of law.

We state in Lewis County, Decision No. 645 (PECB, 1979), which stands unappealed:

> "It is a matter of record that more than a year has passed since certification of the union as exclusive bargaining representative without so much as one day of good-faith collective bargaining as contemplated by RCW 41.56.030(4).
>
> * * *
>
> In this instance, the union has never enjoyed the benefits or recognition in good-faith bargaining to which it was entitled, and has been almost constantly in litigation to force the employer to the bargaining table."

Nearly two years have elapsed since that decision was rendered, and the union still has not enjoyed a single day of good-faith bargaining of nonwage-related items.

The case at hand presents the precise situation that the rule was designed to prevent. An employer who engages in various strategies to avoid good-faith bargaining with the union often succeeds in eroding the union's support among the employees. If decertification were permitted to follow, the union's rights under the statute to seek a remedy for unfair labor practices would be emasculated, and the "pitiful" scene envisioned by the Court in Bishop v. NLRB, supra, would materialize. Mr. Williams acknowledges that there will be no immediate harm to affected employees stemming from the suspension of the proceedings.

NOW, THEREFORE, it is

ORDERED

The petition for investigation of a question concerning representation filed in the above-entitled matter is remanded to the Executive Director with directions to continue the suspension of proceedings consistent with WAC 391-25-370.

DATED this 27th day of March, 1981.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R. Wilkinson

JANE R. WILKINSON, CHAIRMAN

Robert J. Williams

R.J. WILLIAMS, COMMISSIONER