

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

TAN NGUYEN

Involving certain employees of:

KING COUNTY HOUSING AUTHORITY

CASE 25388-E-13-3764

DECISION 11631 - PECB

ORDER DENYING
MOTION TO DISMISS

Tan Nguyen, appeared pro se.

Foster Pepper, PLLC, by *Janelle Milodragovich*, Attorney at Law, for the employer.

Robblee Detwiler & Black, PLLP, by SaNni M-K Lemonidis, Attorney at Law, for Office & Professional Employees International Union, Local 8.

On January 9, 2013, Tan Nguyen (Nguyen or petitioner) filed a petition with the Public Employment Relations Commission to decertify Office & Professional Employees International Union, Local 8 (Local 8) as the exclusive bargaining representative of certain employees of the King County Housing Authority (employer). The case was reviewed for compliance with the applicable statutes and rules and was determined to be deficient. On January 11, 2013, a Deficiency Notice was issued giving the petitioner until January 25, 2013, to cure the defects of the petition.

On January 16, 2013, Local 8 filed a motion to dismiss Nguyen's petition on the basis that a contract is in effect between Local 8 and the employer and therefore Nguyen's petition was not timely under WAC 391-25-030. To support its motion, Local 8 submitted evidence demonstrating that on December 19, 2012, Local 8 and the employer agreed "to extend all terms and conditions of the November 1, 2009 – October 31, 2012 Collective Bargaining Agreement between the parties through January 31, 2013." According to Local 8, the current agreement is

still in effect and the decertification petition was not filed in the 90 to 60 day window period provided for in RCW 41.56.070 and WAC 391-25-030.

On, January 17, 2013, a letter was issued directing the parties to explain why the extension to the expired agreement should act as a contract bar under the principles announced in *West Valley School District*, Decision 2913-B (PECB, 1988). Both Local 8 and the employer filed timely responses. Nguyen did not file a response. Local 8's motion to dismiss Nguyen's petition is denied.

DISCUSSION

WAC 391-25-030 governs the time periods when a decertification petition can be filed. That rule states, in part:

Petition — Time for filing.

(1) A "contract bar" exists while a valid collective bargaining agreement is in effect, so that a petition involving any or all of the employees covered by the agreement will be timely only if it is filed during the "window" period not more than ninety nor less than sixty days prior to the stated expiration date of the collective bargaining agreement.

(a) To constitute a valid collective bargaining agreement for purposes of this subsection:

(i) The agreement must cover a bargaining unit that is appropriate under the terms of the applicable statute;

(ii) The agreement must be in writing, and signed by the parties' representatives;

(iii) *The agreement must contain a fixed expiration date not less than ninety days after it was signed;* and

(iv) The agreement will only operate as a bar for the first three years after its effective date.

(b) An agreement to extend or replace a collective bargaining agreement shall not bar a petition filed in the "window" period of the previous agreement.

(c) A "protected" period is in effect during the sixty days following a "window" period in which no petition is filed, and a successor agreement negotiated by the employer and incumbent exclusive bargaining representative during that period will bar a petition under this chapter. If the filing and withdrawal or dismissal of a petition under this chapter intrudes upon the protected period, the employer and incumbent exclusive bargaining representative shall be given a

sixty-day protected period commencing on the date the withdrawal or dismissal is final.

(d) A certification of issues for interest arbitration issued under WAC 391-55-200 serves as a valid agreement under subsection (1)(a) of this rule.

(2) A "certification bar" exists where a certification has been issued by the agency, so that a petition involving the same bargaining unit or any subdivision of that bargaining unit will only be timely if it is filed:

(a) More than twelve months following the date of the certification of an exclusive bargaining representative; or

(b) More than twelve months following the date of the latest election or cross-check in which the employees failed to select an exclusive bargaining representative.

(3) Where neither a "contract bar" nor a "certification bar" is in effect under this section, a petition may be filed at any time.

(emphasis added).

Under a plain reading of WAC 391-25-030(1)(a)(iii), a collective bargaining agreement will not serve as a contract bar unless that agreement has a fixed expiration date that is not less than 90 days after the agreement was signed.

In *West Valley School District*, Decision 2913 (PECB, 1988), the absence of normal ratification procedures and the absence of a full "30 day window period" in an agreement to extend an expired collective bargaining agreement did not create a contract bar that precluded the filing of a representation petition. In that case, the incumbent union and school district were parties to a collective bargaining agreement that expired on August 31, 1987. The parties agreed to extend the existing collective bargaining agreement until October 31, 1987. On October 5, 1987, a different union filed a petition to represent the employees and the incumbent filed a motion to dismiss based upon the RCW 41.56.070 contract bar principles.

In allowing the representation petition to move forward, the Executive Director stated that an agreement to extend an expired or expiring agreement will only serve as a contract under RCW 41.56.070 if the parties to the extension "use their usual and customary ratification procedures or the deviation from practice must be explained." Such evidence was lacking in that case. Additionally, the Executive Director found that an agreement to extend an expiring contract will

only serve as a bar to a petition if the agreement is of a sufficient time to guarantee third parties their statutory right under RCW 41.56.070 to file a change of representation or decertification petition. The agreement in that case failed to provide a full 30 day window period. The Commission affirmed the Executive Director's decision. *West Valley School District*, Decision 2913-B (PECB, 1988).

Here, the agreement between Local 8 and the employer to extend the November 1, 2009 – October 31, 2012 collective bargaining agreement through January 31, 2013 fails to constitute a contract bar under both WAC 391-25-030(1)(a)(iii) and *West Valley School District*.

The parties' original collective bargaining agreement expired on October 31, 2012. The parties' agreement to extend the expired contract was signed on December 19, 2012. The extension expired on January 31, 2013. This period only constitutes 45 days. In order for the extension to constitute a contract bar under WAC 391-25-030(1)(a)(iii), the agreement could have expired no sooner than March 19, 2013, which is the ninetieth day *after* the extension was signed. Because the agreement to extend the existing contract did not provide for an expiration date that was 90 days after the signing of the agreement, the extension fails to satisfy the WAC 391-25-030(1)(a)(iii) requirement.

Furthermore, it readily appears that the parties failed to utilize their usual and customary ratification procedures and have failed to adequately explain why they failed to do so. Local 8 argues that allowing parties to make short terms extensions to the existing agreement will afford employees the protection of the previous agreement during negotiations for the successor agreement. Local 8 also argues that nothing in its by-laws requires that a contract be sent to the membership for ratification, and that Local 8 and the employer did not believe that the ratification of the agreement was necessary. Finally, Local 8 argues that requiring the parties to follow through with their customary ratification procedures for an agreement to extend an existing agreement would be unduly burdensome on the parties, particularly while negotiations are ongoing. None of these arguments are compelling reasons as to why the parties should be allowed to deviate from their usual and customary ratification procedures.

Local 8's attempt to justify the extension to provide the bargaining unit employees with the protection of the expired agreement is without merit. RCW 41.56.123, enacted in 1989, states that "all of the terms and conditions specified in the collective bargaining agreement shall remain in effect until the effective date of a subsequent agreement, not to exceed one year from the termination date stated in the agreement." Thus, this employer is precluded by law from altering the terms and conditions specified in the expired collective bargaining agreement that it entered into with Local 8 for a period of one year. Although Local 8 asserts that it was seeking to afford the employees the protections of the expired agreement through a short term extension, RCW 41.56.123 already provided the employees the protection of the expired contract.

With respect to Local 8's argument that ratification of the membership was not required by its constitution and by-laws, Local 8 is correct that nothing in Chapter 41.56 RCW compels ratification votes on tentative agreements reached between unions and employers in collective bargaining. See *Community College District 7 (Shoreline)(Washington Federation of State Employees)*, Decision 9094-A (PSRA, 2006). However, the *West Valley School District* test is not whether the union was *required* to send the agreement to a vote of the membership; rather, the test is whether the parties have used their "usual and customary ratification procedures." The declaration of Deputy Executive Director Connie Davis demonstrates the parties customarily sent ratification of a complete successor agreement to the union's membership and the employer's governing board for ratification. However, Davis's declaration also demonstrates that the parties did on occasion agree to extend an expired agreement without the ratification of the membership or governing board. No evidence suggests those agreements satisfied the WAC 391-25-030(1)(a)(iii) 90-day requirement.

Finally, Local 8's argument that it would be burdensome to require ratification during negotiations for a successor agreement is also without merit. Nothing in Chapter 41.56 RCW prohibits a bargaining representative from sending an agreement to extend an existing agreement for a fixed period while continuing negotiation for a successor agreement.

NOW, THEREFORE, it is

ORDERED

1. The motion to dismiss the representation petition filed by Office & Professional Employees International Union, Local 8 is hereby DENIED.
2. Processing of this matter shall be remanded to the Representation Case Administrator for further processing.

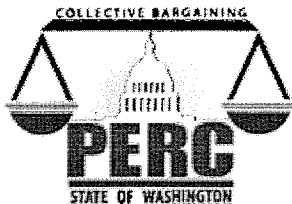
Issued at Olympia, Washington, this 1st day of February, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MICHAEL P. SELLARS, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-25-590.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: S. ROBBLEE DUFFIELD

CASE NUMBER: 25388-E-13-03764 FILED: 01/09/2013 FILED BY: PARTY 2
DISPUTE: QCR DECERT
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