Skagit Valley Community College, Decision 11935 (PSRA, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: DAVID HAUSER Involving certain employees of: SKAGIT VALLEY COMMUNITY COLLEGE	CASE 24802-E-12-3717 DECISION 11935 - PSRA ORDER DENYING MOTION
In the matter of the petition of: JULIE BISHOP Involving certain employees of: SKAGIT VALLEY COMMUNITY COLLEGE	CASE 24893-E-12-3723 DECISION 11936 - PSRA ORDER DENYING MOTION

On May 14, 2012, Dave Hauser (Hauser) filed a petition to decertify the Washington Public Employees Association (WPEA) as the exclusive bargaining representative of the supervisory employees employed by Skagit Valley Community College (employer). Case 24802-E-12-3717. On June 13, 2012, Julie Bishop (Bishop) filed a petition to decertify the WPEA as the exclusive bargaining representative of the nonsupervisory employees employed by the employer. Case 24893-E-12-3723. The most recent collective bargaining agreement that covered the employees covered by both petitions expired on June 30, 2011. At the time Hauser and Bishop filed their petitions, the employer and WPEA had negotiated a new collective bargaining agreement that had been approved under RCW 41.80.020 which took effect on July 1, 2012 and expired on June 30, 2013. Both petitions were timely filed because no collective bargaining agreement was in effect.

On June 6, 2012, the WPEA filed an unfair labor practice complaint alleging that the employer interfered with protected employee rights by suggesting to bargaining unit members that they would not receive a scheduled three percent temporary salary reduction if they decertified the union. Case 24857-U-12-6345 (supervisors) and Case 24859-U-12-6347 (nonsupervisory).

Preliminary rulings were issued in each case and processing of Hauser's and Bishop's petitions were blocked by WAC 391-25-370.

On June 7, 2013, Examiner Claire Nickleberry issued a decision finding the employer interfered with employees' protected rights in violation of RCW 41.80.110(1)(a) when employer officials stated that employees would not be subject to an upcoming three percent salary reduction if they were not represented by the WPEA. *Skagit Valley Community College*, Decision 11536-A (PSRA, 2013). The Examiner ordered the employer to cease and desist from its unlawful action and to post notices outlining its unlawful behavior. The Examiner's decision was not appealed and compliance was tendered and accepted, thereby unblocking both representation petitions.

On November 14, 2013, WPEA filed a motion to dismiss both decertification petitions. WPEA argued that the employer's improper conduct was the cause of the bargaining unit employees' dissatisfaction with the union and therefore the decertification should be dismissed.

ISSUE PRESENTED

Should Hauser's and Bishop's decertification petitions be dismissed based upon the unfair labor practice committed by the employer in *Skagit Valley Community College*, Decision 11536-A?

The WPEA's motion to dismiss the petitions is denied. The employer's conduct is not the type of conduct that warrants dismissal of the representation petition. The petitions are remanded to the Representation Case Administrator for further processing.

DISCUSSION

The WPEA asserts that Hauser's and Bishop's petitions should be dismissed. The WPEA relies upon decisions construing the National Labor Relations Act (NLRA) that state a petition to decertify an exclusive bargaining representative should be dismissed if an employer's related unfair labor practice is the impetus for the employees' dissatisfaction.

Applicable Legal Standards

RCW 41.80.050 guarantees employees covered by Chapter 41.80 RCW the right to self-organize, form, join, or assist an employee organization. The employer committed an unfair labor practice when it interfered with those rights. The question raised by the WPEA's motion is whether the employer's unfair labor practice warrants dismissal of Hauser's and Bishop's petition.

Decisions construing the NLRA, while not controlling, are generally persuasive in interpreting state labor laws that are similar to or based upon the NLRA. *Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24 (1981). While there are differences, the Personnel System Reform Act of 2002, Chapter 41.80 RCW, is similar to the NLRA, and the Commission may look to National Labor Relations Board (NLRB or Board) decisions when ruling on disputes between most employers and employees under its jurisdiction.

The fact of this case are almost identical to the facts in cases involving a decertification petition and related unfair labor practices at Columbia Basin College. *Columbia Basin College*, Decision 11609 (PECB, 2012) *aff'd* Decision 11609-A (PECB, 2013). In *Columbia Basin College*, an employer official informed bargaining unit employees that they would not be subject to an upcoming three percent salary reduction if they were not represented by the WPEA. A bargaining unit employee subsequently filed a petition to decertify the WPEA as the exclusive bargaining representative of the employees. The WPEA filed a complaint with this agency, which blocked the processing of the representation petition under WAC 391-25-370. The employer was subsequently found to have interfered with protected employee rights through its official's statements. *Id.*

The WPEA then moved to dismiss the decertification petition based upon the employer's unfair labor practices. The WPEA's motion was dismissed. *Columbia Basin College*, Decision 11776 (PSRA, 2013). The WPEA petitioned the Commission for review of that interim order, which was also denied. *Columbia Basin College*, Decision 11776-A (PSRA, 2013).

In these cases, the WPEA forwards many of the same argument that it did in the *Columbia Basin College* case. The WPEA asserts that a decertification petition must be dismissed where the

employer's unlawful actions "taint" the petition. The WPEA also argues that the *Columbia Basin College* decision misinterprets the NLRB cases that it cites to support its position. The WPEA also asserts the decisions of this agency, such as *Lower Columbia Community College*, Decision 8117-B (PSRA, 2005), support its conclusion that these petitions must be dismissed.

Unfair Labor Practices that Encourage and Promote a Showing of Interest -
The WPEA relies upon *Hearst Corp.*, 281 NLRB 764 (1986), for the proposition that "a decertification petition must be dismissed when the employer's unlawful actions 'taint' the petition." *Hearst Corp.* is inapposite because the announced standards do not apply to a decertification petition filed by *a state civil service employee.*

Under NLRA precedent, an employer has no duty to recognize or bargain with a union that represents less than a majority of the employer's employees. *Levitz*, 333 NLRB 717 (2001). An employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees. *Levitz*, 333 NLRB 717. In doing so, an employer must have objective evidence that the union has lost the support of the employees in the bargaining unit and that evidence must be in a form that would be sufficient for a processing of a representation case before the NLRB. *Levitz*, 333 NLRB 717. If an employer withdraws recognition from a union that still enjoys majority status, it commits an unfair labor practice. *Levitz*, 333 NLRB 717.

In *Hearst Corp.*, the employees presented the employer letters demonstrating that a majority of them no longer wished to be supported by the union. The employer then withdrew recognition from the incumbent union. The union filed an unfair labor practice alleging the employer unlawfully withdrew recognition from the union because the employer urged employees to withdraw support from the union.[1] The NLRB's administrative law judge found that supervisors actively encouraged employees to withdraw their support of the union by stating that the union "wasn't necessary" and "were not needed where there is good management." The supervisors also persuaded employees to withdraw their support for the union.

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[1] The NLRB docketed the complaint in *Hearst Corp.* case as a "CA" case, which are complaints filed against employers under Section 8(a)(1)-(5). *See* NLRB Case Handling Manual, 10014.

Hearst Corp. is distinguishable from the instant case. The NLRB held that the key inquiry is whether an employer engaged in conduct designed to undermine employee support for or cause their disaffection with the union in the context of an employer's withdrawal of recognition. If the loss of support for the union was based upon the employer's unfair labor practices, then the employer's withdrawal of recognition was tainted by its own misconduct and, therefore, improper. *Hearst Corp.*, 281 NLRB 764. The NLRB has subsequently held that the *Hearst Corp.* decision applies only in "the *narrow* circumstance where an employer unlawfully instigates or propels a decertification campaign, and then invokes the results of that campaign to justify its unilateral withdrawal of recognition from its employees' representative." *SFO Good-Nite Inn, LLC*, 357 NLRB 16 (2011)(emphasis added).

The *Hearst Corp.* decision is not applicable to cases decided under Chapter 41.80 RCW. Employers governed by Chapter 41.80 RCW do not have authority to withdraw recognition from a certified bargaining representative for any reason. Instead, state civil service employers are limited to raising claims that a union has abandoned a bargaining unit or become defunct. WAC 391-25-096. In that event, the Commission may then revoke an existing certification only if the bargaining representative cannot rebut the presumption that it has become defunct or abandoned the bargaining unit. *See State – General Administration*, Decision 8087-A (PSRA, 2004). Furthermore, employers covered by Chapter 41.80 are *precluded* from submitting cards or letters demonstrating that employees no longer wish to be represented to this agency as evidence that the union lacks support. WAC 391-25-096(2)(The documentation provided under this section shall not include signature documents provided to the employer by the employees).

Unfair Labor Practice that Lead to Employee Dissatisfaction -

The WPEA next asserts that the NLRB will dismiss a decertification petition if it can be demonstrated that the decertification effort is spurred by an employer's unfair labor practices. The WPEA cites to *Master Slack Corp.*, 271 NLRB 78 (1984), where the NLRB adopted an objective four part test that examines whether a causal connection exists between the employer's misconduct and the efforts to decertify the bargaining representative. That test examines: (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3)

any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. The WPEA argues that once taint is demonstrated, the petition must be dismissed no matter how many employees in the unit were unaware of the employer's unlawful acts. The WPEA argues that the facts of *Skagit Valley Community College*, Decision 11536-A, established a causal connection under *Master Slack Corp.* that warrant dismissal of the petition. The WPEA argues that the petition should be dismissed because the employer's unfair labor practices resulted in the employee dissatisfaction.

The Commission has not adopted the *Master Slack Corp.* standard. Additionally, a request to formally adopt the *Master Slack Corp.* standards was rejected in *Columbia Basin College*, Decision 11776. Instead, the *Columbia Basin College* decision turned to this agency's precedents to determine whether the factual situation was one that warranted dismissal of the petition and determined that dismissal was not warranted. The same conclusion is reached here.

In *Lower Columbia College*, Decision 8117-B (PSRA, 2005), an incumbent bargaining representative (incumbent) had represented the bargaining unit for almost 30 years. The bargaining unit officers grew dissatisfied with the incumbent and contacted the petitioner bargaining representative (petitioner) to become the bargaining unit's new representative. Without resigning their positions as officers of the incumbent bargaining unit, the officers assisted the petitioner's efforts to organize the employees by disabling access to the incumbent's website, and by turning the regularly scheduled incumbent union meeting over to organizers of the petitioning union. The petitioner filed a representation petition to represent the employees which was blocked by the incumbent's complaint alleging the petitioner interfered with protected employee rights.

The examiner found the petitioner interfered with protected rights and ordered the petitioner to withdraw its petition and destroy the unlawfully obtained showing of interest cards. On appeal, the Commission reversed the Examiner's remedial order. *Lower Columbia College*, Decision 8117-B.

In reaching this conclusion, the Commission noted that Washington law grants employees the rights to select a bargaining representative of their choosing. The Commission also noted that the evidence demonstrates that a large number of employees signed showing of interest cards. The Commission held that because there was no evidence that the petitioner coerced employees into signing cards, a presumption that all of the showing of interest cards were tainted could not be supported. However, the Commission accepted the fact that *some* of the cards may have been tainted by the petitioner's misconduct. *Lower Columbia College*, Decision 8117-B. The Commission provided the employees a limited opportunity to withdraw their showing of interest cards.

The WPEA's assertion that dismissal is warranted where the facts demonstrate *any* taint on the employer's part to the gathering of a showing of interest is contrary to *Lower Columbia College*, Decision 8117-B. The Commission's *Lower Columbia College* decision indicates that the dismissal of a representation petition is disfavored even where a party to unlawful interference creates the existence of some taint in the gathering of showing of interest cards. While the *Lower Columbia College* addressed a situation where two rival unions were competing for the same employees, there is no reason why this standard should not apply to employers, particularly in light of the employer's inability to withdraw or challenge the incumbent union's majority status.

Although the *Lower Columbia College* decision does not comment on what kinds of interference warrants dismissal of a decertification petition, other Commission decisions have discussed situations where egregious conduct will warrant the dismissal of a pending representation petition.

In the event an employer engages in a pattern of unfair labor practices that undermine a union's majority status as an exclusive representative of a bargaining unit, both this Commission and the NLRB have the authority to order the offending employer affirmatively bargain in good faith with the incumbent union for a protected period of time. *Public Utility District 1 of Clark County*, Decision 2045-A (PECB, 1989), *citing NLRB v. Gissel Packing Co.*, 391 U.S. 575 (1969). "If outrageous and pervasive unfair labor practices have occurred, a bargaining order may be deemed appropriate because the coercive effects of the employer's misbehavior cannot not be eliminated by more traditional remedies." *City of Tukwila*, Decision 2434-A (PECB, 1987). In that

instance, the Commission may order that the decertification petition be dismissed to ensure that the employer does not benefit from its unfair labor practices. *See City of Tukwila*, Decision 2434-A.

Conclusion

The WPEA's motion to dismiss Hauser's and Bishop's representation petitions is denied. The request to adopt the NLRB's *Master Slack* standards concerning unfair labor practices that lead to employees' dissatisfaction is rejected. This agency only dismisses representation petitions where an employer's misbehaviors cannot be eliminated by transitional remedies. The employer's unfair labor practices have been remedied through the unfair labor practice process.

NOW, THEREFORE, it is

ORDERED

The Washington Public Employees Association's motion to dismiss the above-captioned petitions is denied.

Issued at Olympia, Washington, this 26th day of November, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MICHAEL P. SELLARS, Executive Director

This Order may be appeared by filing
timely objections with the Commission
under WAC 391-25-590.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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RECORD OF SERVICE - ISSUED 11/26/2013

The attached document identified as: DECISION 11935 - PSRA has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: S/ ROBBIE DUFFIELD

CASE NUMBER:	24802-E-12-03717	FILED:	05/14/2012	FILED BY:	PARTY 2
DISPUTE:	QCR DECERT				
BAR UNIT:	SUPERVISORS				
DETAILS:	-				
COMMENTS:					

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: S/ ROBBIE DUFFIELD

CASE NUMBER:	24893-E-12-03723	FILED:	06/13/2012	FILED BY:	PARTY 2
DISPUTE:	QCR DECERT				
BAR UNIT:	MIXED CLASSES				
DETAILS:	-				
COMMENTS:					

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