

In re: WAC 391-95-010 (October 27, 2004)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of petition for)
rulemaking concerning:)
) ORDER DENYING PETITIONS
WAC 391-95-010)
)
_____)

On various dates beginning on July 25, 2004, 35 individuals and the Evergreen Freedom Foundation (EFF) filed rulemaking petitions with the Public Employment Relations Commission under RCW 34.05.330, requesting amendment of WAC 391-95-010. The amendment as proposed in the EFF petition filed on August 25, 2004, was:

WAC 391-95-010 NOTICE OF UNION SECURITY OBLIGATION. (1) Whenever a collective bargaining agreement negotiated under the provisions of chapter 28B.52, 41.56, 41.59, 41.76, or 41.80 RCW contains a union security provision, the exclusive bargaining representative shall: (a) permit each affected employee equal participation in decision making on the terms and conditions of their employment; and (b) provide each affected employee with a copy of the collective bargaining agreement, and shall specifically advise each employee of his or her obligations under that agreement, including informing the employee of the amount owed, the method used to compute that amount, when such payments are to be made, and the effects of a failure to pay.

(2) Disputes concerning whether an employee is within the bargaining unit covered by a union security provision shall be resolved through unit clarification proceedings under chapter 391-35 WAC, and shall not be a subject of proceedings under this chapter.

(3) Disputes concerning interpretation or application of a union security provision shall be resolved through grievance arbitration or other procedures for interpretation or application of the collective bargaining agreement, and shall not be a subject of proceedings under this chapter.

Thus, the proposed rule would arguably require unions to poll bargaining unit members on the proposals to be advanced by a union in bargaining and on ratification of contracts,¹ and it would arguably entitle all bargaining unit members to voting rights on such matters.²

The matter was placed on the agenda for an open, public meeting of the Commission held on September 27, 2004. Public School Employees of Washington (PSE) filed a brief on September 24, 2004, opposing the proposed amendment. At its meeting on September 27, 2004, the Commission received and considered arguments from Michael Reitz and Jamie Lund on behalf of the EFF, from Greg Deveraux on behalf of the Washington Federation of State Employees, from Nancy Kennedy on behalf of the American Federation of Teachers, from Eric Nordlof on behalf of PSE, and from Susan Jankowski, a private individual. At the conclusion of the public comments, the Commission considered a motion to deny the petitions for rulemaking. The motion was adopted by unanimous vote of the Commission members, and this order is issued to provide written

¹ There is no statutory requirement for employee voting on contract matters, and such procedures only exist per union constitutions/bylaws. *Naches School District*, Decision 2516 (EDUC, 1987), *aff'd*, Decision 2516-A (EDUC, 1987). The EFF representatives stated at the Commission meeting on September 27 that unions would not be required to submit such matters to votes of bargaining unit employees. However, the actual language of the proposed rule amendment is not so limiting.

² The EFF representatives confined their focus at the September 27 meeting to employees who pay agency fees under union security provisions, and stated that employees exempt from union security obligations would not have voting rights under the proposed rule. However, the actual language of the proposed rule amendment is not so limiting.

confirmation of that action and the reasons for the denial, as required by RCW 34.05.330.

Comparison With the National Labor Relations Act

As enacted by Congress in 1935 (the Wagner Act) and as amended by Congress in 1947 (the Taft-Hartley Act), the National Labor Relations Act (NLRA) created the National Labor Relations Board (NLRB) and regulates collective bargaining involving most of the private sector. The Public Employment Relations Commission is somewhat patterned after the NLRB, and RCW 41.59.110(2) directs us to consider the rules, practices and precedents of the NLRB. The Supreme Court of the State of Washington has endorsed reliance on NLRA precedent where the state law(s) we administer are similar to the NLRA. *Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24 (1984).

During the oral presentations on September 27, 2004, an EFF spokesperson asserted that there are substantial differences between the NLRA and state laws in regard to the scope of representation. We disagree. Section 9 of the NLRA provides:

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive representatives of all the employees in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

(emphasis added). Several of the state laws administered by the Commission contain language similar to the NLRA:

RCW 41.56.080 CERTIFICATION OF BARGAINING REPRESENTATIVE -- SCOPE OF REPRESENTATION. The bargaining representative which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the *exclusive bargaining*

representative of, and shall be required to represent, all the public employees within the unit without regard to membership in said bargaining representative:

. . . .
RCW 41.59.090 CERTIFICATION OF EXCLUSIVE BARGAINING REPRESENTATIVE -- SCOPE OF REPRESENTATION. The employee organization which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the *exclusive bargaining representative of, and shall be required to represent all the employees within the unit without regard to membership* in that bargaining representative:

. . . .
RCW 41.76.015 EXCLUSIVE BARGAINING REPRESENTATIVES -- DUTY OF REPRESENTATION. The employee organization which has been determined by the commission to be the exclusive bargaining representative of a bargaining unit shall be required to *represent all the faculty members within the bargaining unit without regard to membership* in that employee organization:

. . . .
RCW 41.80.080 REPRESENTATION -- ELECTIONS -- RULES.

. . . .
(2)(a) If an employee organization has been certified as the exclusive bargaining representative of the employees of a bargaining unit, *the employee organization may act for and negotiate master collective bargaining agreements that will include within the coverage of the agreement all employees in the bargaining unit as provided in RCW 41.80.010(2)(a)*. . . .

(emphasis added). Thus, we reject the assertion that our statutes somehow support a different outcome than the NLRA.

Voting Rights of Employees

Throughout the history of the NLRA, the NLRB has declined to regulate the internal relationship between a union and its members. The Supreme Court of the United States agreed when public employee collective bargaining was in its infancy, ruling in *NLRB v. Allis*

Chalmers Manufacturing Co., 388 U.S. 175 (1967) that a union is entitled to limit its internal political processes to its members. The Supreme Court revisited the subject area in *NLRB v. Financial Institution Employees*, 475 U.S. 192 (1986), where it observed that, "[T]he Act allows union members to control the shape and direction of the their organization and 'non-union employees have no voice in the affairs of the union.'" *Financial Institution*, 475 U.S. at 205 (quoting *NLRB v. Allis Chalmers Manufacturing Co.*). The *Financial Institution* decision specifically cited the right to 'ratify a collective bargaining agreement' as an example of a internal union matter which non-union employees may be excluded from voting.³

Even under the Labor Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act), which imposes some limited requirements to assure internal union democracy, nothing gives non-member employees within a bargaining unit any voting rights within the union. Important to the issue now before us, no federal court ruling under that law has allowed the agencies charged with administering the federal labor relations laws to delve into internal union affairs such as contract ratification rights.

Just as the NLRA is silent about the internal operations of unions, none of the state collective bargaining laws administered by this Commission provide any explicit support for the proposed rule.

³ Similarly, the NLRB has (with the Supreme Court's blessing) taken the position that Congress did not intend Section 8(b)(1)(a) (which prohibits union interference with employee rights) be given the broad application accorded Section 8(a)(1) (which prohibits employer interference with employee rights). See *NLRB v. Drivers Local 639*, 362 U.S. 274 (1960), where the Supreme Court cited the NLRB's position with approval. Thus, Section 8(b)(1)(a) of the NLRA has been limited to proceedings against union tactics involving violence, intimidation reprisal and reprisals.

Like the NLRB, this Commission has historically declined to regulate the relationship between unions and individual employees except insofar as the union conduct affects the individual's terms and conditions of employment. In *Lewis County*, Decision 464-A (PECB, 1978), the Commission dismissed an employer's unfair labor practice complaint alleging a union unlawfully prevented non-member employees from voting on formulation of the union's proposals for contract negotiations between the union and employer. The Executive Director had commented that, even if the employer were to prove that the union committed the alleged actions against non-member employees, the facts described were a matter of internal union affairs which would not constitute a violation of RCW 41.56.150. See also *Lewis County*, Decision 556 (PECB, 1978), *aff'd* Decision 556-A (PECB, 1979).

The Washington State Legislature can be presumed to have been familiar with federal labor law precedent when (over the period from 1967 through 2002) it enacted the state laws administered by this Commission. Against the background of non-interference in internal union affairs, it is reasonable to presume that our state laws were designed to protect the same set of employee rights as the federal law: The right to organize, the right to be free from employer interference in the participation of employee organization activity, and the right to be represented in the employee/employer relationship by the exclusive representative.

This historical policy of non-interference was reinforced in 1996 when the Washington Supreme Court held that this Commission has been given limited authority and responsibility, and that "there is no room for implied additional jurisdiction." *Local 2916, IAFF v. Public Employment Relations Commission*, 128 Wn.2d 375, 382 (1996). Although the *Local 2916* case involved union security clauses, that Court stressed that this Commission's responsibility is to prevent

unfair labor practices, and with respect to collective bargaining agreements involving a union security provision, that responsibility is limited by RCW 41.56.150(1).

In its brief, the EFF argued that the subject matter of their proposed amendment, voting rights, is not controlled by the *Local 2916* decision, and therefore any reliance on this case to summarily disregard their petitions would be in error. However, the EFF's proposed amendment, which would be placed within Chapter 391-95 WAC (Union Security Dispute Rules) attempts to directly regulate collective bargaining agreements with union security provisions. The Legislature, being fully aware of the *Local 2916* decision, has nevertheless declined to expand the Commission's authority. Because neither Chapter RCW 41.56.150(1), the NLRA, or state and federal decisions interpreting those statutes have determined that the subject matter of the EFF's petition is an unfair labor practice, the *Local 2916* decision prevents this Commission from asserting jurisdiction.

Although the Commission has determined that it is without jurisdiction to act upon the petitioner's proposed amendment, the petitioners are not without a forum for redress. The rights of public sector agency-fee payers derive from decisions of the U.S. Supreme Court applying constitutional rights, which are beyond the jurisdiction of this agency, but are within the jurisdiction of the federal courts. *Local 2916*, 128 Wn. at 382. The rights granted to employees by union constitutions, which Washington Courts have traditionally treated as contracts, are within the jurisdiction of the state courts. Any decision to alter the rights granted within

those contracts should be made by the courts⁴ and not with this Commission.⁵

CONCLUSION

It would be a major policy change for this Commission to now involve itself in internal union affairs.⁶ The change of policy contained within the proposed rule would have to come from either the Legislature or the federal courts, and not through the rulemaking authority granted to this Commission through Chapter 34.05 RCW.

NOW, THEREFORE, it is

ORDERED

The petitions for rule-making filed by Defore Cochran, Jim Loucks, Diand Jacques, Karen Smeed, Lois McMahan, Cindy Omlin, Jan Slama,

⁴ See *Local Union 112, International Brotherhood of Electrical Workers, AFL-CIO v. Bray*, 112 Wn.2d 253 (1989) (explaining that the regulation of the relationship between union and employee is a contractual matter governed by local law).

⁵ This Commission has consistently refused to assert jurisdiction of contract violations. See *City of Walla Walla*, Decision 104 (PECB, 1976).

⁶ The continued zeal of the Supreme Court of the United States for protecting the rights of private organizations is indicated by *California Democratic Party v. Jones*, 520 U.S. 567 (2000) where the Court protected the rights of political parties (as private organizations) to deny voting rights on the selection of party candidates to registered voters who do not share their beliefs. See also *Democratic Party of United States v. Wisconsin ex rel. La Follet*, 450 U.S. 107, 122 n.2 (1981).


Michelle McCartney, Jennifer R. Snyder, Donald P. Schumacher, James E. Miles, Norman McDonell, Curtis White, Jean Eskridge, Melvin R. Nieuwsma, Anne Davis, Nancy Thompson, Daniel C. Johnson, Doug Longly, Karen E. Petty, Theodore C. Redman, Jerry Marsh, Stephen Powell, Karen Chaney, Hugh Macaulay, Skip Leuschner, Ronald P. Andring, Roderick R. Kirkwood, John Vasko, Phyllis Stengl, Sandy Elliot, Rhea M. Sandstrom, Barton L. Hartzell, Douglas M. Crawford, Eddie Dawson, and by the Evergreen Freedom Foundation are DENIED.

Issued at Olympia, Washington, the 27th day of October, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARILYN GLENN SAYAN, Chairperson


JOSEPH W. DUFFY, Commissioner


PAMELA G. BRADBURN, Commissioner