

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WESTERN WASHINGTON UNIVERSITY,)	
)	
Employer.)	CASE 19017-U-04-4843
-----)	
ANNE YAKE,)	DECISION 8849-A - PSRA
)	
Complainant,)	
)	
vs.)	
)	
WASHINGTON PUBLIC EMPLOYEES)	
ASSOCIATION, UFCW LOCAL 365,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent.)	AND ORDER
)	
_____)	

Anne Yake, a classified employee, appeared *pro se*.

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

On December 1, 2004, Anne Yake filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Washington Public Employees Association, UFCW Local 365 (union), as the respondent. Yake is a classified employee of Western Washington University (employer), and is a member of a bargaining unit of professional and technical employees which was represented by the union.¹

¹ While this case was being processed another union filed a representation petition for the bargaining unit, the Commission conducted an election, and the Commission certified Public School Employees of Washington as the exclusive bargaining representative of the professional and technical employees bargaining unit. *Western Washington University*, Decision 8962 (PSRA, 2005).

The original allegations of this complaint concerned union restraint of Yake in the exercise of her collective bargaining rights, in violation of RCW 41.80.110(2)(a), and "other unfair labor practice" allegations concerning: (1) a failure to provide adequate notice of a contract ratification election; (2) a failure to provide for all participation by all eligible employees in the contract ratification vote; (3) providing misleading information as to eligibility of employees to vote on the contract ratification; (4) failing to count votes of employees who were not union members; and (5) failing to include a union security clause in a list of highlights of the new contract.

Unfair Labor Practice Manager Mark S. Downing reviewed the original complaint under WAC 391-45-110, and he issued a deficiency notice on December 28, 2004. The deficiency notice pointed out that Yake did not have legal standing to pursue the rights of other employees, so that allegations related to the experiences or information received by other employees did not state a cause of action, and that only allegations directly relating to Yake could go forward. The deficiency notice further pointed out that the Commission does not assert jurisdiction over alleged violations of collective bargaining agreements,² so that an allegation that the union violated a Memorandum of Agreement it had reached with the employer did not state a cause of action. On January 5, 2005, Yake filed a letter withdrawing the "other unfair labor practice" allegations.

On January 24, 2005, Unfair Labor Practice Manager Downing dismissed the withdrawn allegations, and directed further proceedings on the remaining charges.³

² See *City of Walla Walla*, Decision 104 (PECB, 1976).

³ *Western Washington University (Washington Public Employees Association)*, Decision 8849 (PSRA, 2005).

Examiner Walter M. Stuteville held a hearing in this matter on April 19, 2005.⁴ Yake and the union filed post-hearing briefs to complete the record.

ISSUES

1. Does the Commission have jurisdiction to adjudicate allegations of union restraint of employee rights concerning the ratification of a collective bargaining agreement?
2. Did the union violate the statute by failing to provide Yake with adequate notice of her voting rights on a ratification vote concerning the 2005-2007 collective bargaining agreement?
3. Did the union violate the statute by failing to provide Yake with adequate notice of the union security clause contained in the 2005-2007 collective bargaining agreement?
4. Did the union violate the statute by failing to count the ballots cast by nonmembers on the contract ratification vote concerning the 2005-2007 collective bargaining agreement?⁵

The Examiner finds that the Commission has jurisdiction and rules that the union violated the statute by the manner in which it provided notice of non-member voting rights on the contract

⁴ The hearing was held on the employer's campus and the Examiner asked the employer to have a representative present to supply information, should the need arise. Assistant Attorney General Wendy Bohlke was present at the outset of the hearing, and entered an appearance on the record, but did not take an active role in the questioning of witnesses.

⁵ The Preliminary Ruling somewhat misstated Yake's allegation. Yake complained that non-members had their ratification vote challenged, rather than that the union violated the statute by allowing non-members to vote.

ratification, but only a technical remedy is ordered because the union has subsequently been decertified. The Examiner rules against Yake on the third and fourth issues.

Issue 1: Does the Commission Have Jurisdiction?

Restraint Prohibited

The Personnel System Reform Act of 2002, Chapter 41.80 RCW (PSRA), prohibits employee organizations from restraining state employees in the exercise of their collective bargaining rights:

RCW 41.80.050 RIGHT OF EMPLOYEES. Except as may be specifically limited by this chapter, employees shall have the right to self-organization, to form, join, or assist employees organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion. Employees shall also have the right to refrain from any or all such activities except to the extent that they may be required to pay a fee to an exclusive bargaining representative under a union security provision authorized by this chapter.

RCW 41.80.110 UNFAIR LABOR PRACTICES ENUMERATED.

(2) It is an unfair labor practice for an employee organization:

(a) To restrain or coerce an employee in the exercise of the rights guaranteed by this chapter. . . .

The Commission has adopted Chapter 391-45 WAC to regulate the processing of unfair labor practice cases.

The interpretation of the counterpart provisions of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW (at RCW 41.56.150(1)) were discussed in *King County*, Decision 7108 (PECB, 2000), as follows:

To establish interference with protected rights, a complainant need only prove that a party engaged in conduct which employees reasonably perceived as a threat of reprisal or force or promise of benefit associated with their union activity. The actual intent is not a factor or defense. *City of Seattle*, Decision 3066 (PECB, 1988), [aff'd] Decision 3066-A (PECB, 1989).

The "restraint" and "coercion" terms appear in both Chapter 41.56 RCW and Chapter 41.80 RCW, and the Examiner applies the same standards to the facts alleged and the evidence presented in this case.

There is some precedent for avoidance of Commission involvement in internal union affairs. The preliminary ruling issued in this case cited both *Lewis County*, Decision 464-A (PECB, 1978) and *Lake Washington School District*, Decision 6891 (PECB, 1999), and noted that unfair labor practice complaints concerning union actions concerning contract ratification votes are normally dismissed on the basis that the Commission lacks jurisdiction over internal union affairs. The Examiner infers that this complaint would have been dismissed if Yake (who was not a union member) was merely claiming a right to exercise political rights within the union that represented the bargaining unit in which she was employed.

A possible basis for Commission intervention in this case was pointed out in the preliminary ruling process, by citation of *Branch 6000, Letter Carriers*, 232 NLRB 263 (1977) and *Boilermakers Local 202 (Henders Boiler & Tank Co.)*, 300 NLRB 28 (1990). The order dismissing the withdrawn allegations pointed out that the National Labor Relations Board (NLRB) asserts jurisdiction where a union delegates its role as exclusive bargaining representative to a referendum vote among all bargaining unit employees. The NLRB then requires such a union to provide fairness to all bargaining unit employees, and any shortcomings on the part of the union are

then subject to scrutiny before the labor relations agency as violations of the statutory prohibition of restraint and coercion. See *Western Washington University*, Decision 8849 (PSRA, 2004).

Analysis

The union argues that the NLRB decisions cited in the preliminary ruling do not apply to the facts of this case and/or are poorly reasoned. This Examiner agrees that the facts differ. In *Letter Carriers*, the NLRB emphasized a narrow focus on the particular facts of that case, where all employees were allowed to vote on a very specific work scheduling pattern that affected union members and non-members alike. In *Boilermakers*, all employees were allowed to vote on a very specific holiday-work issue which also affected union members and non-members alike. In both cases, it was the fact of a vote being conducted on a specific decision affecting all bargaining unit members that resulted in the intervention by the NLRB in what could have been a union decision. Thus, neither case involved the broader question of a contract ratification.

The union argues that Commission precedents concerning lack of jurisdiction over internal affairs should be applied in this case. The Examiner finds the cited precedents are also factually distinguishable, however. *Lake Washington School District*, Decision 6891, concerned whether union members should be allowed to vote by absentee ballot in union elections where only union members were eligible to vote, and the attempts of some bargaining unit members to have specific issues presented in negotiations.⁶ *Lewis County*,

⁶ The *Lake Washington* decision does refer to irregularities in the tally of contract ratification ballots, and that would be closer factually to the instant case, but the decision was an appeal from a preliminary ruling and was therefore without benefit of an evidentiary record. Conversely, *Lake Washington* did concern the rights of union members, which is arguably closer to "internal union affairs" than the instant case.

Decision 464-A, concerned the right of non-members to participate in union meetings called to formulate proposals for future bargaining. Again, neither case involved the broader question of a contract ratification.

This case concerns the obligations of an exclusive bargaining representative toward bargaining unit employees who are not union members. The Commission has asserted jurisdiction in at least one previous controversy involving contract ratification procedures, *Naches Valley School District*, Decision 2516-A (EDUC, 1987). That decision notes that the statute does not obligate an exclusive bargaining representative to present tentative agreements for a vote; the union involved in that case was obligated to accept a contract when it induced the employer to implement the new contract and then accepted the benefits of the new agreement. *Naches* thus establishes a precedent for Commission scrutiny as to what constitutes an appropriate contract ratification process. The instant case is a case of first impression for the Commission, in that it involves the rare circumstance of a union agreeing to allow nonmembers to vote on ratification of a collective bargaining agreement. At the same time, no statutory language in the PSRA contradicts the Commission's intervention as it did in *Naches Valley*.

Conclusion

In light of the precedent establishing the Commission's role of preventing restraint and coercion of bargaining unit members, it is appropriate for the Commission to assert jurisdiction in this case.

Issue 2: Did the Union Fail to Provide Yake Adequate Notice?

A New Legal Context

Along with changes to the state civil service law, the PSRA created a new collective bargaining system for state employees. The scope

of collective bargaining was significantly expanded to include (for the first time) wages, the amount of money paid by the employer for employee benefits, and union security.⁷ Collective bargaining agreements under the PSRA were to go into effect no earlier than July 1, 2005,⁸ and RCW 41.80.010(3)(a) effectively required the employer and union to complete their negotiations for their first PSRA contract by October 1, 2004.⁹

As part of the implementation of the PSRA, the employer and union began negotiations for a new collective bargaining agreement during the spring and/or summer of 2004. As negotiations proceeded, the union communicated with its members concerning the progress being made in anticipation of holding a ratification vote on a tentative agreement to be reached some time prior to October 1. By a quid pro quo at some point in those negotiations, the employer agreed to include a union security clause in the contract and the union agreed to allow all bargaining unit employees to vote on ratification of the contract. The employer and union reached an overall tentative agreement by September 23, 2004.

⁷ Union security arrangements existed in some state employee bargaining units prior to July 1, 2005, but only by operation of union shop elections conducted by the Department of Personnel under the provisions of RCW 41.06.150 as it existed through June 30, 2004. The bargaining unit of professional and technical employees at Western Washington University had not voted to approve a union shop under that process, and no union security obligations were in effect for that unit.

⁸ See RCW 41.80.001.

⁹ The October 1 deadline is related to approval of contracts by the director of the Office of Financial Management (in RCW 41.80.010(3)(b)), submission of a request for funds by the Governor to the Legislature (in RCW 41.80.010(3)), and legislative approval or rejection of the request for funds as a whole (in the final paragraph of RCW 41.80.010(3)).

Analysis

Yake alleges that the union failed to provide adequate notice of the ratification election. The Examiner concurs.

The notice given by the union about the contract ratification vote was part of a larger communication process which began much earlier. At least some of the union's communications to the bargaining unit consistently discouraged involvement of employees who were not union members in the contract negotiation process, or reminded them that they would not be able to vote on ratification of the contract. An example is an e-mail message sent on April 6 by LeBaron Price,¹⁰ giving all bargaining unit members an update on the progress of the negotiations and including the following statement:

We've decided that we're going to stop trying to solicit involvement from non union members, though you're always welcome to contact us with your questions on concerns.

Other e-mail messages sent by union officials to bargaining unit employees placed limitations on who would be eligible to vote. An example is an e-mail message sent on August 20 by Kathy Sheehan,¹¹ describing the progress of negotiations and including:

The . . . negotiating team invites you to an informational session on the WWU contract talks on Aug. 31 and/or Sept. 8. Details are on the attached flyer.

We can update you on the discussions we've had about wages and working conditions and hear your views on what's important.

¹⁰ Price is identified in this record as a member of the union's negotiations committee.

¹¹ Sheehan is identified in this record as another member of the union's negotiating committee.

Although only WPEA members will be eligible to vote on the contract that will take effect on July 1, 2005, all members of [the bargaining unit] are invited to attend these meetings.

The evidence in this case establishes that Yake received both of these e-mail messages.

At 3:55 a.m. on September 23, 2004, Sheehan sent out an e-mail message to all bargaining unit members, as follows:

Good morning! Your WPEA bargaining team has reached a tentative agreement with WWU management on the first ever labor contract in which we could bargain over wages and benefits. The WPEA bargaining committee recommends ratification of the two-year contract, which will take effect July 1, 2005.

You will have an opportunity to vote on ratifying the contract on Saturday, Sept. 25, 2004, in Bond Hall 104.

An informational session on the contents of the contract will be held at 9 a.m.

Voting will be from 10 a.m. to 1 p.m.

For more information, check the WPEA Web site, <http://www.wpea.org>.

. . .

Yake received that message. Yake inquired in 2 e-mails sent to Sheehan on Thursday, September 23 and on Friday, September 24, 2004, asking: "Can non-members vote?" and "We in Telecom are not dues paying members and are still trying to figure out if we can vote or not? Please advise." Sheehan never directly answered Yake's questions.

Sheehan sent out another e-mail message to all bargaining unit employees at 3:11 p.m. on September 24, 2004, re-announcing that a

tentative agreement had been reached and that a vote would take place the following day. That message included:

2. Bargaining unit members, dues payers or otherwise, will have the opportunity to cast a ballot on Saturday. However, the WPEA is recommending that you become a member to avoid having your ballot challenged. The WPEA bylaws, like other organizations' permit only member in good standing to vote. To become a member in good standing, you should sign a membership card (available on Saturday) and provide one month's dues, approximately \$32, in cash, money order or cashier's check.

Bargaining unit members who don't want to become union members will still be able to vote. It may be challenged, however.

The evidence in this record does indicate that the quid pro quo agreed upon by the employer and the WPEA violates the WPEA's founding documents.

Without regard to whether "interference" or "restraint" or "coercion" is used, allegations under RCW 41.80.110(1)(a) and RCW 41.80.110(2)(a) and their counterparts in other state laws are decided from the perspective of the employee. The question is whether the conduct at issue was reasonably perceived by the employee as an intrusion on his or her exercise of rights protected by the collective bargaining statute. When that standard is applied to the communications between the WPEA and Yake, and particularly to the foregoing excerpts from e-mail messages sent by a union representative, Yake reasonably perceived as totally confusing the following information:

- Bargaining unit members were told earlier that employees who were not union members could not vote on the new contract; then

- The message sent on September 23 was unclear about the right of employees who were not union members to vote; then
- The message sent on the afternoon before the contract ratification vote was to take place (thus providing only one day's notice) was self-contradictory in mentioning: (1) that employees who were not union members would have "the opportunity" to vote, (2) that the union bylaws only allowed union members in good standing to vote, and (3) that employees who were not union members could vote a "challenged" ballot without providing any explanation as to the challenged ballot process or whether challenged ballots would be counted.

The result of this confusing communication issued at the last minute was predictable: Out of 152 employees in the bargaining unit,¹² only 25 voted.¹³ Only 18 ballots were cast in favor of ratifying the proposed collective bargaining agreement. Four ballots were cast against ratification. Three ballots were challenged, presumably because they were cast by employees who were not union members. Yake did not vote in that election.

The union defends that the last-minute communication concerning the voting rights of bargaining unit employees who were not union members was the result of the employer's proposal at the end of negotiations, linking union security with who could vote on ratification of the contract. This explanation does not, however, take into consideration the union's duty to represent the interests of all the members of the bargaining unit throughout the negotia-

¹² The number of total eligible voters is derived from Commission records in the representation case in which the union was later decertified. *Western Washington University*, Decision 8962, PSRA, 2005.

¹³ The distribution of ballots cast in the contract ratification vote were part of an exhibit in this case.

tion process. The union must also take responsibility for its action if it accepted the quid pro quo on union security at a time when it could not fulfill its obligations to all bargaining unit members. The union should have known that there would not be adequate time to notify all bargaining unit employees, particularly where that meant contradicting information that the union itself had been providing to non-members since April 2004. Holding out the "benefit" of voting rights conferred on non-members as a quid pro quo for union security, when coupled with not giving those employees adequate notice of their new-found rights, constitutes restraint of the non-union bargaining unit members in the exercise of their rights.

Conclusion

By putting out conflicting and self-contradictory information, the union unlawfully restrained bargaining unit employees who were not union members in the exercise of their statutory rights.

Issue 3: Did the Union Mislead the Nonmember Employees?

Yake alleges that the union failed to provide adequate notice of the ratification election or of the content of the final tentative agreement. The legal principles applicable to this allegation are the same as for the previous issue, but the facts are different.

It is true that the e-mail message sent out by Sheehan at 3:11 p.m. on September 24, 2004, announced some of the highlights of the tentative agreement, and it is true that Sheehan did not mention the union security provision that was part of the tentative agreement. The simple facts are, however, that Yake did not even attempt to cast a ballot on the contract ratification, or attend the ratification meeting to obtain more information. She thus has not provided sufficient evidence to support a finding (or even an

inference) that she surrendered her voting rights because of the union's silence on the union security arrangement. No violation can be found on this claim.

Issue 4: Did the Union Violate the Statute by Failing to Count the Challenged Ballots?

This issue turns on legal standing. While employees have the right to file and process unfair labor practice complaints asserting violation of their own rights, under WAC 391-45-010 one employee cannot assert rights on behalf of another employee.

In her original complaint, Yake alleged that other bargaining unit members who were not union members had their contract ratification votes challenged, or were not allowed to vote. A deficiency notice was issued as part of the preliminary ruling process under WAC 391-45-110, and it correctly pointed out that Yake did not have legal standing to pursue rights on behalf of others.

At the hearing in this case, the union objected to testimony offered by Yake about the ballots cast by other employees. The Examiner allowed Yake to present testimony concerning the experience of other employees when they attempted to vote.¹⁴ That evidence was reviewed to ascertain whether it had probative value on the "confusing notice" issue that Yake did have legal standing to raise; but those actions do not give Yake legal standing to obtain a remedy for others.

The union is correct in arguing that Yake cannot pursue a charge of restraint on behalf of other employees. *C-Tran*, Decision 4005

¹⁴ This complainant was representing herself, and was given some leeway in establishing her burden of proof.

(PECB, 1992). Unlike the situation in 19 cases similar to this, where 19 different employees of Shoreline Community College filed charges against the union, Western Washington University employees other than Yake chose not to file complaints. Yake did not attempt to cast a ballot on the contract ratification question, and she cannot use the experiences of other employees in casting their ballots to prove a violation of her own rights. This part of Yake's case is dismissed.

REMEDY

Because the union has been decertified from its status as exclusive bargaining representative of the professional and technical employees bargaining unit, and because the union no longer represents any employees on the employer's campus, no purpose would be served by the notice to employees customarily required when an unfair labor practice violation is found. The Examiner thus confines the remedial order in this case to a "cease and desist" order together with reporting of compliance to Yake and to the Commission.

FINDINGS OF FACT

1. Western Washington University is an institution of higher education of the state of Washington within the meaning of RCW 41.80.005(10).
2. Washington Public Employees Association, UFCW Local 365, is an employee organization within the meaning of RCW 41.80.005(7).
3. At all times relevant to this case, the union was the exclusive bargaining representative of a bargaining unit of all

full-time and regular part-time professional and technical employees of the employer.

4. During or about April 2004, the employer and union commenced negotiations for their first collective bargaining agreement under the Personnel System Reform Act of 2002 (PSRA).
5. By its communications issued to employees in the bargaining unit described in paragraph 3 of these findings of fact between April 2004 and September 23, 2004, the union notified employees that were not union members that they would not have voting rights on ratification of any negotiated contract.
6. The employer and union reached a tentative agreement on or about September 23, 2004. As part of that tentative agreement, the union agreed to a contract ratification procedure in contravention of its own constitution and/or bylaws, to wit: As a quid pro quo for the employer's agreement on a union security provision in the new collective bargaining agreement, the union agreed to give bargaining unit employees who were not union members voting rights on ratification of the contract.
7. By an e-mail message sent to bargaining unit employees at 3:55 a.m. on September 23, 2004, the union provided insufficient and confusing notice as to the right of employees who were not union members to vote on ratification of the tentative agreement described in paragraph 6 of these findings of fact.
8. On September 23 and 24, 2004, Yake specifically inquired about the voting of rights of employees who were not union members, in e-mails sent to the author of the message described in

paragraph 7 of these findings of fact. Yake received no direct reply to her inquiries.

9. Out of approximately 152 employees in the bargaining unit, 18 ballots were cast for ratification of the tentative agreement, 4 ballots were cast against ratification of the tentative agreement, and 3 ballots were challenged.
10. Yake did not exercise her right to vote on ratification of the tentative agreement.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.80 RCW and Chapter 391-45 WAC.
2. State civil service employees have legal standing to file, and the Commission has jurisdiction under RCW 41.80.110 to determine and remedy, complaints that an employee organization has restrained or coerced such employees in the exercise of their rights under RCW 41.80.050.
3. By not adequately informing bargaining unit members of their right to vote on the ratification of a new collective bargaining agreement, the Washington Public Employees Association restrained Anne Yake in the exercise of her rights under RCW 41.80.050, and so committed an unfair labor practice in violation of RCW 41.80.110(2)(a).
4. Anne Yake has failed to sustain her burden of proof, under WAC 391-45-270(a), as to her allegation concerning the failure of

the union to disclose the existence of the union security clause in the tentative agreement.

4. Anne Yake lacks legal standing to pursue claims on behalf of other employees, so that her allegations concerning the actual handling of challenged ballots fail to state claims for relief available under Chapter 391-45 WAC.

ORDER

The Washington Public Employees Association, UFCW Local 365, 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 inform bargaining unit members of their rights concerning voting in ratification elections, and thus restraining the rights of represented employees under Chapter 41.80 RCW.
 - B. In any other manner, restraining or coercing employees in the exercise of their rights under Chapter 41.80 RCW.
2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.80 RCW:
 - A. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order.

- B. 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.

Issued at Olympia, Washington, this 12th day of August, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Walter M. Stuteville". The signature is written in a cursive style with a large initial "W".

WALTER M. STUTEVILLE, 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.