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No. 69641-6-I

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE**

AMALGAMATED TRANSIT UNION LOCAL 1576,
INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS DISTRICT 160, and LANCE NORTON,

Appellants,

v.

SNOHOMISH COUNTY PUBLIC TRANSPORTATION BENEFIT
AREA, d/b/a COMMUNITY TRANSIT,

Respondent.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The Washington Legislature amended RCW 36.57A.050 with the stated purpose of expanding the governing boards of public transportation agencies, including Community Transit, to include a nonvoting labor representative. However, the Legislature recognized that there may be instances when the governing boards would need to meet in executive session without the labor representative present. The Legislature addressed this issue expressly by: (1) imposing a narrow, categorical ban prohibiting nonvoting labor representatives from attending executive sessions addressing labor negotiations and; (2) granting board chairs the discretion to decide whether or not the labor representative should attend any other executive sessions on a case-by-case basis. The Legislature repeatedly rejected proposals to extend the categorical ban beyond executive sessions addressing labor negotiations. Instead, it chose to preserve the Chair's discretion to decide whether to include the labor representative in all other executive sessions. By forcing the Chair to exclude the nonvoting labor representative from executive sessions addressing personnel matters, Section 3.3(c) of the Community Transit bylaws conflicts directly with state law and is void.

II. ARGUMENT

A. Mr. Norton and the Unions Have Standing to Challenge Section 3.3(c) of Community Transit's Bylaws.

Mr. Norton and the Unions plainly have standing to challenge the bylaws provision at issue in this litigation. To have standing under the Uniform Declaratory Judgments Act (“UDJA”), RCW 7.24, a party must be: (1) “arguably within the zone of interests to be protected or regulated by the statute” in question; and (2) have suffered an “injury in fact, either economic or otherwise.” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (“Grant County II”) (en banc) (internal citations omitted). Community Transit does not contest that Mr. Norton and the Unions meet the first prong of the test. It argues only that they have not suffered an “injury in fact” as a result of Section 3.3(c). *See* Respondent’s Br. at 4-6.

Community Transit has misconstrued the UDJA’s “injury in fact” requirement. Mr. Norton and the Unions need not establish that Community Transit’s bylaws deprived Mr. Norton of an *absolute right* to attend executive sessions addressing personnel matters. They need only show that they have been injured by Section 3.3(c). The fact that, in the absence of Section 3.3(c), the Chair *could have* exercised his discretion under RCW 36.57A.050 to exclude Mr. Norton from any executive session addressing personnel matters does not eliminate plaintiffs’ injury.

There is a qualitative difference between: (1) permitting the Chair to exercise discretion and decide whether to include the nonvoting member in an executive session addressing personnel matters on a case-by-case basis, as RCW 36.57A.050 provides; and (2) imposing a blanket rule requiring the Chair to exclude the nonvoting member from all executive sessions addressing personnel matters regardless of circumstance, as Section 3.3(c) dictates. Under the first scenario, Mr. Norton retains the opportunity to attend executive sessions addressing personnel matters at the Chair's discretion. In any given instance, the Chair may decide to include Mr. Norton or exclude him based on the facts and circumstances present at the time. However, the opportunity for Mr. Norton to participate in those sessions, and to lobby the Chair to be included, remains. Under the second scenario, that opportunity does not exist. There is no circumstance in which Mr. Norton could participate in any executive session addressing personnel matters.

There is nothing speculative about plaintiffs' injury. Section 3.3(c) has been adopted and is currently in effect. By forcing the Chair to exclude Mr. Norton, Section 3.3(c) conclusively eliminates Mr. Norton's opportunity to participate in any executive sessions addressing Community Transit personnel matters, now or in the future. Eliminating the Chair's discretion to include Mr. Norton in these executive sessions

directly impairs his participation, and the Unions' representation, on the Community Transit Board.

Community Transit insists that to establish standing, Mr. Norton and the Unions "would need facts in the record that the nonvoting member was excluded from at least one particular executive session *solely* because Community Transit amended its bylaws." Respondent's Br. at 5 (emphasis supplied). Specifically, Community Transit asserts, "The ATU provides no factual testimony that the nonvoting member was excluded from an executive session as a result of the contested bylaws *and the board chair would otherwise have allowed attendance.*" *Id.* (emphasis supplied).¹

The UDJA does not require plaintiffs to prove Community Transit's counterfactual or make a but-for showing that the Board Chair would have decided to include Mr. Norton in a particular executive session in the absence of Section 3.3(c)'s categorical ban. Furthermore, Community Transit's blanket policy makes it impossible for plaintiffs to prove this negative. Indeed, the gravamen of plaintiffs' claim is that

¹ In support of Plaintiffs' Motion for Summary Judgment, Mr. Norton submitted a declaration stating, "Since I began serving on the Board, I have been excluded from every executive session except one, which addressed a potential real estate purchase. I have never participated in an executive session pertaining to personnel matters. I am the only Board member who is excluded from these executive sessions." CP 39 at ¶ 8.

there is no circumstance in which the Chair could have permitted Mr. Norton to participate in an executive session addressing personnel matters, or even considered the possibility, because Section 3.3(c) eliminated that choice. As a result, Mr. Norton is prevented from participating in such a session without regard to the interests of the Board, the interests of the labor community he represents, or any other factor. This absolute loss of any opportunity to participate in executive sessions addressing Community Transit personnel issues is an “injury in fact” that confers standing under the UDJA.

B. Section 3.3(c) of Community Transit’s Bylaws Directly Conflicts with RCW 36.57A.050.

This Court must give effect to the plain meaning of RCW 36.57A.050. That provision categorically bans the nonvoting member from attending executive sessions addressing labor negotiations *only*. It then expressly grants the Chair – not the Board majority – the discretion to decide whether the nonvoting labor representative may attend any other executive session on a case-by-case basis.

“A local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits.” *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004) (en banc). RCW 36.57A.050 expressly

permits the Chair to exercise discretion to include the nonvoting labor representative in executive sessions addressing personnel matters. Section 3.3(c) of the bylaws expressly prohibits the Chair from exercising that discretion. That is a direct and irreconcilable conflict.

Community Transit argues, “There is nothing in the statute which states the Board of Directors cannot direct the chair of the board to exclude the nonvoting member from certain executive sessions.” Respondent’s Br. at 10. In fact, that is exactly what RCW 36.57A.050 accomplishes. The Washington Legislature granted the Chair – not the Board majority – the authority to decide whether to include or exclude the nonvoting member from any executive session that does not address labor negotiations. Community Transit is bound by RCW 36.57A.050 and cannot re-write it through its bylaws.

The fact that RCW 36.57A.050 does not give the nonvoting labor representative an absolute right to attend executive sessions addressing personnel matters is irrelevant. The irreconcilable conflict in this case arises not from the *labor representative’s* right to attend an executive session addressing personnel matters, but from the *Chair’s* right to include him if he so chooses. Like the business owners in *Entertainment Industry Coalition v. Tacoma-Pierce County*, 153 Wn.2d 657, 105 P.3d 985 (2005) (en banc), who had the statutory right to designate smoking areas in their

establishments if they so chose, the Board Chair has the statutory *right* to include the labor representative in executive sessions addressing personnel matters if he so chooses. By banning the nonvoting member from attending executive sessions addressing personnel matters, Section 3.3(c) of the Community Transit bylaws prohibits what RCW 36.57A.050 permits: the ability of the Chair to decide whether to include the nonvoting member in those sessions.

Similarly, in *Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004), the Washington Supreme Court invalidated a county Board of Health regulation mandating that water districts fluoridate their water on the ground that state law grants water districts – not the Board of Health – the authority to decide whether to fluoridate their water systems. The Court reasoned, “the Board’s resolution is a local regulation that prohibits what state law permits: the ability of water districts to regulate the content and supply of their water systems expressly granted them by statute.” *Id.* It concluded that upholding the Board of Health regulation would render “the express statutory authority granted to water districts” meaningless. *Id.* at 433-34.

Entertainment Industry Coalition and Parkland Light & Water Co. firmly establish that where a state statute expressly grants decision-making

authority to a particular party and a local regulation eliminates that discretion, the regulation is invalid. The fact that both cases were filed by the party whose discretion was eliminated does not change the conflict analysis. *Cf.* Respondent's Br. at 12. Any party who was directly injured by the elimination of the discretion at issue could have asserted the same argument. Similarly here, the Board Chair is not the only party injured by Section 3.3(c) and he is not the only party with standing to challenge it.

C. The Board Chair Can Exercise Discretion Without Acting Arbitrarily and Capriciously.

Community Transit insists that directing the Chair to exclude the nonvoting member from executive sessions addressing personnel matters was necessary to avoid arbitrary and capricious decisions about which sessions he could attend. The Superior Court agreed, noting: "the Chair having discretion on a case-by-case basis in personnel matters is highly problematic; it would lead to charges of arbitrariness; there is no way to make a distinction of who can participate." CP 7. Community Transit and the Superior Court erroneously equate an exercise of discretion with arbitrariness. Public officials lawfully exercise statutorily-granted discretion to make decisions every day. An agency action is only "arbitrary and capricious" if it is "willful and unreasoning and taken without regard to the facts and circumstances." *State, Dep't of Ecology v.*

Theodoratus, 135 Wn.2d 582, 598, 957 P.2d 1241 (1998). There is no basis to presume that a Chair will arbitrarily exercise his or her discretion.

Mr. Norton and the Unions do not dispute that the Board may provide guidelines for the Chair to consider when exercising his statutory authority to decide whether to include the nonvoting member in an executive session. Such guidance does not conflict with RCW 36.57A.050 as long as the Chair retains the authority to make the decision. Mr. Norton and the Unions have not challenged the latter portion of Section 3.3(c), which states:

The Chairperson or Acting Chairperson may allow the nonvoting member to attend an executive session, if he or she finds that the attendance by the nonvoting member at the executive session would be in the best interest of the Corporation or not be detrimental to its operations. The decision of the Chairperson or Acting Chairperson shall be final and binding.

CP 47. While the Board may properly *guide* the Chair's discretion, it may not *eliminate* it without running afoul of RCW 36.57A.050.

The Board Chair may avoid arbitrary and capricious action by making reasoned decisions about whether the nonvoting member should participate in a particular executive session, based on the individual facts and circumstances surrounding that session. It is not necessary to eliminate the decision altogether. To the contrary, it is the Board's blanket

exclusion of the nonvoting member from all executive sessions addressing personnel matters without regard to the circumstances that is arbitrary.

Finally, Community Transit's argument proves too much. Section 3.3(c) of the bylaws permits the Board Chair to exercise discretion to decide whether to include the nonvoting member in any executive session other than those addressing labor negotiations or personnel matters. The Board has provided guidelines for the Chair to consider when making those decisions. Just as the Board Chair is capable of making non-arbitrary and capricious decisions about whether the nonvoting member should participate in other executive sessions, so too can he make non-arbitrary and capricious decisions about whether to include the nonvoting member in executive sessions addressing personnel matters.²

² The uncontested part of Section 3.3(c) provides sufficient safeguards to maintain the confidentiality of personnel matters discussed in these executive sessions. It states:

If the non-voting member attends an executive session of the Board of Directors, such non-voting member shall not disclose any information obtained in such executive sessions to anyone and shall not use such information to further the interest, either directly or indirectly, of any collective bargaining unit or employee(s) of the Corporation.

CP 47 at § 3.3(c).

D. Community Transit's Equal Protection Argument is a Red Herring.

Community Transit's equal protection challenge has no basis in fact or law. First, the Legislature's decision to grant the Chair the responsibility for determining whether to include the nonvoting member in executive sessions was wholly reasonable. It was also consistent with prior law and the Board's own practice. Even prior to the 2010 amendments, RCW 36.57A.050 recognized distinctions between the Chair and other members of the Board. *Cf.* Respondent's Br. at 6-7 (claiming that the amended RCW 36.57A.050 provides the first and only reference to the positions of "Chair" or "Cochair" in the enabling legislation). *See* CP at 16 (redline of ESHB 2986) (authorizing travel and per diem payments for any board member who "attends official meetings of the authority or performs prescribed duties *approved by the chair of the authority*" and providing that "[i]n no event may a member be compensated in any year for more than seventy-five days, *except the chair who may be paid compensation for not more than one hundred days.*") (Emphasis supplied).

Furthermore, the Board's own bylaws create distinctions among individual board members by creating the offices of Board Chairperson, Vice Chairperson, and Secretary. *See* CP 47, 49 (Section 3.2 and Article

4). The bylaws also grant the Chair certain powers and responsibilities not possessed by other board members. These include, but are not limited to: (1) calling special meetings (Section 3.3(b)); (2) appointing individual board members to serve on standing or special committees (Section 3.8); (3) selecting a board member to serve on the Executive Committee in the event there is no immediate, past Chairperson (Section 3.8); and (4) acting as the Board spokesman or representative, or delegating that duty to another board member (Section 4.2). CP 47-49. Thus, the Board's own bylaws demonstrate that delegating responsibility to the Chair for determining who will sit on certain committees, or attend certain meetings, is an entirely reasonable, appropriate, and lawful way to operate the Board.

The one person, one vote principle that Community Transit relies on simply does not apply in this case. *See* Respondent's Br. 13. One person, one vote addresses the problem of vote dilution. It requires that the votes of citizens electing government representatives be of equal weight. *See Cunningham v. Municipality of Metropolitan Seattle*, 751 F. Supp. 885, 887-88 (W.D. Wa. 1990). Here, Community Transit's apparent complaint with RCW 36.57A.050 is not that the board members' votes are weighted differently, but that the decision about whether to include the nonvoting member in executive sessions is not subject to a

vote at all. However, neither the one person, one vote principle nor the Equal Protection Clause more broadly requires that *every* decision about the internal governance of the Community Transit Board, no matter how minute, be decided by a majority vote. Indeed, as demonstrated above, the Chair routinely makes decisions about calling special meetings, appointing board members to various committees, or assigning other tasks to board members without a vote. So too may the Legislature decide to give the Chair the discretion to include the nonvoting member in executive sessions addressing personnel matters without putting the matter to a vote.

III. CONCLUSION

This Court should reverse the Superior Court's decision and should order the grant of summary judgment to ATU 1576, IAM 160, and Mr. Norton.

Respectfully submitted this 22nd day of April, 2013.

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