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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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Case No. 43604-3-II

**COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON**

TEAMSTERS LOCAL UNION NO. 117, and
PHYLLIS CHERRY,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS

Respondents.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT.....1

A. Phyllis Cherry’s Emails Constitute Protected Union Activity.....1

B. The DOC’s Actions Create a Chilling Effect in the Workplace.....6

C. The Personnel System Reform Act Should be Construed Liberally, not Narrowly.....8

III. CONCLUSION.....10

TABLE OF AUTHORITIES

CASES:	Page(s)
PUBLIC EMPLOYMENT RELATIONS COMMISSION	
Cmty. Coll. Dist. 5, Decision 8850-A (PSRA, 2006).....	2
<i>Clallam County</i> , Decision 4011 (PECB, 1996).....	5
<i>Renton Technical College</i> , Decision 7441-A (CCOL, 2002).....	5
<i>University of Washington</i> , Decision 11199 (PSRA, 2011).....	4
STATUTES	
RCW 41.80.050.....	1,8

I. INTRODUCTION

Appellant is not arguing that any and all communication between a shop steward and a bargaining unit is automatically protected under RCW 41.80.050. The argument is that such protection should be afforded when a union member, shop steward or otherwise, engages in activity that is part of the ongoing process of self-organization that lies at the heart of unionism. It is immaterial whether that self-organization relates to the initial process of forming a union, joining an existing union, negotiating a contract or rallying around an issue of importance for the employees. In this case, Phyllis Cherry was the voice of the Union in her facility. She was communicating to the bargaining unit in the only effective way possible regarding an issue that was vitally important to the group as a whole and was part of the ongoing labor-management relations dialog that was relevant in that workplace at that time.

II. ARGUMENT

A. **Phyllis Cherry's Emails Constitute Protected Union Activity**

After reviewing the record of the unfair labor practice hearing in this case, PERC Examiner Huang held that the DOC discriminated against Phyllis Cherry and interfered with her employee rights. CP at 494-516. He found that Ms. Cherry's actions were protected activity because she

was an active Union shop steward who was well known for being the voice of the Union at her institution. The emails she sent to the members of her bargaining unit related to important issues in the workplace that directly impacted her coworkers. When the DOC suspended her IT access and issued a letter of reprimand, the only reasonable conclusion that could be drawn was the one arrived at by the PERC Examiner: the DOC was discriminating against Ms. Cherry by disciplining her for engaging in union-related activities. That ruling should stand.

The essence of Respondent's argument in this case is that public sector employees are only protected when they clearly communicate to their employers that their activities and/or communications pertain directly to collective bargaining. That is simply not the case. Respondent states that "simply raising a workplace issue without notice to the employer of intent to invoke collective bargaining rights is not engaging in protected union activity." Brief of Respondent (Brief of Respondent) at 17, n.3 (citing *Cnty. Coll. Dist. 5*, Decision 8850-A (PSRA, 2006)). Respondent's reliance on PERC Decision 8850-A is misplaced. In that case the employee was simply complaining to his employer about his own personal medical disability accommodation and vacation leave request issues. The issue that PERC was dealing with there was whether personal disputes such as those constitute protected activity just because the rights

at issue are also addressed in a Collective Bargaining Agreement. The employee in that case did not file a grievance or in any way put the employer on notice that he was fighting for the rights of his coworkers in general. He was simply fighting for his own rights. In contrast, Ms. Cherry was clearly communicating to her entire bargaining unit about an important issue that impacted the entire workplace.

The fact that Ms. Cherry did not claim that the emails were official union communications or somehow directly related to collective bargaining issues is immaterial. The DOC considered Ms. Cherry to be the voice of the Union at her facility. She was well known as an active union shop steward and whenever she communicated to all of her coworkers through the DOC email system it was never regarding anything other than Union business, even if not officially directed by the Union as an organization. It is important to keep in perspective that unions are democratic institutions run by officials who are elected by the membership. The issues of concern to the Union as an organization and the issues of concern to the members are one and the same. It does not matter whether the issue originates at the union hall or in the workplace. Phyllis Cherry's emails to her coworkers were Union business and the DOC knew that.

Respondent mischaracterizes Appellant's argument in this case. Respondent claims that "the Appellant states that its position is simply that Ms. 'Cherry acted in her capacity as a Union shop steward when she sent out two emails', *ipso facto*, the communications constitute protected union activity." Brief of Respondent at 18. This sort of oversimplification misses the whole point of the issue in this case. It is not because Phyllis Cherry was a shop steward that her activity was protected, it is because her communication related to working conditions that impacted the entire bargaining unit and she was bringing the issue up in her role as a shop steward advocating on members' behalf.

While not all communications between a shop steward and the bargaining unit are automatically protected, there are certainly a wide variety of communications that could be protected. For example, in *Univ. of Wash.*, Decision 11199 (PSRA, 2011) the Examiner found for the employer because the shop steward there was simply insubordinate and disrespectful without any real representational issues in play. Even the Respondent here admits that the Examiner in the *Univ. of Wash.* case may have found for the union "if the complainant had acted in a manner reasonably expected of a shop steward when presenting an issue to a supervisor on a member's behalf." Brief of Respondent at 20-21. In other words, the communications of a shop steward to membership, or

management, could be protected activity as long as the communication relates to wages, hours, working conditions and other issues that are of importance and concern to bargaining unit members. The communications do not have to directly relate to collective bargaining. That is what PERC held in *Renton Tech. Coll.*, Decision 7441-A (CCOL, 2002) and *Clallam Cy.*, Decision 4011 (PECB, 1996). Although both cases involved communications made while the parties were engaged in contract negotiations, neither of the cases involve comments made at the bargaining table or proposals made during negotiations.

Unionized employers are in a perpetual state of negotiations with the unions that represent their employees. The DOC is no different. The emails that Ms. Cherry sent to her coworkers involved an issue that was at the heart of DOC's labor management relations at the time – the staffing changes occurring throughout the State's women's prisons in response to a class action lawsuit filed by inmates regarding sexual abuse from staff. The Union was receiving a significant number of complaints from its membership at the time about the reorganizations and job changes that were occurring as male staff were being blocked out of many positions in the women's prisons that they had held for years. The parties were engaged in lengthy and contentious negotiations about how to implement changes that would address the safety and security of the employees and

the inmates. Many security measures that could have been implemented in lieu of problematic staffing changes (most of which violated seniority bid rights under the parties' Collective Bargaining Agreement) were dismissed as too costly. At the same time, the DOC was hiring expensive management level personnel such as the PREA Victim Advocate that Ms. Cherry wrote about in her email. It is entirely disingenuous to pretend that Ms. Cherry's emails did not involve issues that were of critical importance to the union membership at that time, issues that directly related to labor-management relations topics being negotiated.

B. The DOC's Actions Create a Chilling Effect in the Workplace

Respondent claims that even if Ms. Cherry's actions were protected union activity, the DOC did not discriminatorily retaliate when it blocked her IT access and issued a letter of reprimand. This position is untenable. It is axiomatic that disciplinary actions such as those imposed in this case can and do have a chilling effect on the actions of other employees in the bargaining unit. That Phyllis Cherry was a well known Union activist and shop steward only makes the chilling effect of the DOC's response more pronounced. The clear message that was sent to the bargaining unit in this case is that use of the DOC's email system, while generally okay for shop stewards to use for Union business, could result in discipline and restricted access if the communication is critical of the

employer. That is precisely what happened to Ms. Cherry. She acted as a shop steward representing her membership when she sent an email that criticized the DOC's use of resources and programming regarding an issue that was an active part of the labor-management relations at that time.

A written reprimand, while in and of itself not a serious level of discipline, is generally kept in an employee's personnel file and is often used as the progressive foundational basis for more significant disciplinary actions such as suspension or termination. Accordingly, the letter of reprimand Ms. Cherry received is significant, both as a message to others and as a potential basis for more serious discipline.

The DOC dismisses the suspension of Ms. Cherry's IT access as a routine process put in place whenever someone is suspected of misuse of IT resources. The DOC ignores the fundamental distinction between Ms. Cherry's case and the vast majority of IT abuse cases, typically involving access to inappropriate material or simply time wasting activities. Here Ms. Cherry was under investigation for sending out an email in her role as shop steward to the entire bargaining unit. This is not a garden variety IT abuse case. Prisons are large, spread out institutions where the workers often staff isolated posts far removed from coworkers. The email system is not only the most effective way to communicate with union members; it is often the only way for a working shop steward.

When Ms. Cherry's IT access was cut off, for an unusually long time, the DOC not only stopped her from carrying out her shop steward duties, it sent a message to the entire bargaining unit that it had the power to silence the Union's voice.

C. The Personnel System Reform Act Should be Construed Liberally, not Narrowly

In order to read the Personnel System Reform Act (PSRA) in accordance with the Supreme Court's mandate to construe remedial statutes liberally rather than narrowly, the Act must protect concerted activity even if it is not official union activity. The PSRA guarantees the right of State employees to "self-organization, to form, join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint, or coercion." RCW 41.80.050. The Act does not distinguish between represented and unrepresented employees. Nor does it specifically define what is meant by "self-organization."

The Act clearly protects the right to "join" a union. Employees looking for union representation typically join existing unions to take advantage of established organizations with resources and experience fighting for workers' collective rights. The right to "join" a union

protected by the Act can only mean that employees have the right to join existing labor organizations.

The Act also protects the right to “form” a union. Employees typically form their own labor organizations, such as police and firefighter guilds and the like, when they want to collectively bargain over wages, hours and working conditions but do not want to join a pre-existing union that represents other workers in other industries. The Act’s reference to forming a union can only mean that such activity is protected.

If the Act protects the right to join an existing union or form a union from scratch, what can the right to self-organization mean? Respondent would have this Court hold that the right to self-organization is limited to the time when unrepresented employees are becoming unionized. But that argument ignores and would render meaningless the language already in the Act regarding joining and forming unions. The right to self-organization cannot be limited to initial union organizing efforts. As anyone involved in the labor movement knows, the process of self-organizing is an ongoing process that does not end upon certification of a bargaining representative. Bargaining units self-organize around selecting bargaining representatives and stewards, around contract issues, working conditions and all sorts of ongoing issues before, during and after contract negotiations.

The right to self-organization has to be read broadly enough to encompass the actions of a shop steward who reaches out to her members regarding an important workplace issue. Reading the Act otherwise is simply reading it too narrowly.

III. CONCLUSION

For the reasons set forth above and in the Appellant's opening brief, the Appellants respectfully request that the Court overturn the Decision of the PERC Commission and reinstate the Examiner's Findings of Fact, Conclusions of Law and Order in Decision No. 10998.

RESPECTFULLY SUBMITTED this 19th day of November, 2012.



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CERTIFICATE OF SERVICE

I certify that I served, or caused to have served the foregoing
REPLY BRIEF OF APPELLANT on all parties or their counsel of record
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Under penalty of perjury, under the laws of the State of
Washington, the undersigned certifies that the foregoing is true and
correct.

Dated this 19th day of November, 2012 at Tukwila, WA.

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