

FILED
Court of Appeals
Division III
State of Washington
2/12/2020 4:16 PM

No. 370542

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LINCOLN COUNTY,

Appellant/Cross-Respondent

v.

TEAMSTERS LOCAL 690,

Cross-Appellant/Respondent

and

PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondent.

CROSS-APPELLANT/RESPONDENT TEAMSTERS LOCAL 690's
REPLY BRIEF

Attorney for Cross-Appellant/Respondent

Michael McCarthy, WSBA #17880
REID, McCARTHY, BALLEW & LEAHY, LLP
Attorneys for Teamsters Local 690
100 West Harrison Street, Suite 300
Seattle, WA 98119
Phone: (206) 285-3610
Email: Mike@rmbllaw.com

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INTRODUCTION

In the Union's view, the County's Reply is in largest part based upon fundamental misunderstandings of the issues on appeal and the implications of a ruling in Local 690's favor. Most important, contrary to the County's central argument, a ruling for the Union will not, as the County asserts, "close bargaining sessions around the state." Similarly, the County's refrain that the arrangements for collective bargaining rest exclusively within its unfettered discretion evidences an autocratic, my-way-or-the-highway approach that contrasts starkly with the principles and policies that animate Washington's Public Employees Collective Bargaining Act.

ARGUMENT

I

THE COUNTY MISCHARACTERIZES THE EFFECT OF A RULING IN THE UNION'S FAVOR.

As the Union's Opening/Response Brief makes clear, it does not seek an order that all collective bargaining in the State take place in private. Instead, it asks that the Court affirm PERC's ruling that the County committed an unfair labor practice when it refused to bargain mandatory subjects unless the Union capitulated to its unilaterally-implemented position on a permissive subject: whether negotiations would occur in public or private. The Union further seeks a ruling that, in the precise circumstances of our case – where there was a past

practice of successful private bargaining, the County itself had demanded private bargaining of certain mandatory subjects, the Union had cooperated in efforts to bargain in public, but the parties ultimately could not agree that all bargaining must occur in public – Local 690 was entitled to insist upon private bargaining. Neither of these rulings prohibits parties from bargaining the arrangements for bargaining and agreeing to public sessions, or private sessions, or some combination of the two.

The Union therefore requests that the Court reject the County’s argument that a decision for the Union will require “clos[ing] bargaining sessions around the State,” “make a definitive rule that it is always better for elected officials to negotiate over the use of public funds privately” or make “opening meetings an unfair labor practice.” *See*, County’s Reply, pp. 1, 5.

II

THE COUNTY’S AUTOCRATIC PRESUMPTION EPITOMIZES AN APPROACH TO LABOR RELATIONS THAT CONFLICTS WITH PECBA.

The County’s first-stated argument is so autocratic, presumptuous and unilateral that it borders on the feudal. In its opening paragraph the County blithely tells the Court, that, faced with a disagreement between it and its employees (and PERC) regarding arrangements for collective bargaining, “the answer is obvious:” the County can do as it pleases, period, and its employees

(and PERC) can shut up. Thus, PERC and the Superior Court were blind to the “obvious” and the 100+ pages of briefing in this Court represent a waste of time. The haughtiness of this argument is exemplified by the fact that the County sees no need to cite any authority in support of it. The County’s authority is itself, *ipse dixit*. See, County’s Reply, p. 1.¹

In fact, the County’s argument epitomizes, both stylistically and substantively, the very thing PECBA was enacted to discourage. As PERC stated below, and both parties have explained, the primary obligation levied by the statutory duty to bargain is to *refrain* from unilateral action. Further, PECBA’s stated purpose is to improve the “relationship” between employers and employees by granting employees the right to join unions for the purpose of “be[ing] represented...in matters concerning their employment relations...,” implying a mutually respectful and legally balanced interaction. See, RCW 41.56.010. To the extent the County’s position implies a “relationship,” it is sovereign-and-subject or master-and-servant.

Finally, the County’s argument fails to account for the realities of collective bargaining protocols. Most glaring, there is no rule requiring that bargaining take place on the premises of the employer. In fact, bargaining often takes place at the union hall or at a neutral site such as a hotel conference room.

¹ The County autocratic tendencies are so much a part of it that they seep into its Brief in ways of which it might not even be aware. Note that it habitually capitalizes “the County,” but not “the union.”

To understate, it is far from “obvious” that management’s ostensible prerogative extends to remote locations, including those under the control of the union.²

III

PAGE-BY-PAGE REPLIES

P. 2 – There is insufficient credible evidence to establish a link between a tax increase and the County’s Resolution. Notably, the County does not dispute the Union’s assertion (Union’s Opening/Response Brief, p. 7, fn. 16) that the Union requested all documentary evidence in support of the alleged link. Nonetheless, the only documentary evidence it can point to is Employer Exhibit 19, a cryptic item that includes none of the usual indicia of authenticity or relevance. Among other defects, it is on a blank piece of paper and is undated and unsigned; it contains neither the name of its alleged sender, nor the name[s] of its recipients. *See*, AR 645. Its ostensible writer concedes that he merely gave it to the County’s “secretary.” *See*, AR 757, ll. 6-11. Although he believes that the secretary sent it to “department heads and elected officials,” the County failed to come forward with any evidence to support this claim. *See*, AR 757, ll. 22-25 (department heads). In any event, it is undisputed that neither the Exhibit nor anything with similar content was ever distributed to the public, and the County was unable to

² The County’s reference to “home rule,” at page 7, also evidences an autocratic bias. Local 690’s members at issue in this case are employees and residents of Lincoln County; that is, they ARE at home and should have a right to participate in decisions affecting them.

come forward with any evidence (minutes, notes, etc.) corroborating any mention of a connection between the tax increase and the Resolution at a public meeting of the Board of Commissioners.³

P. 6 – Contrary to the County’s claim, the Union did not “create an anecdote,” but relayed an express finding of the PERC Hearing Examiner.

The County wrongly accuses the Union of “creat[ing] an anecdote” about Sheriff Magers’s demand to bargain mandatory terms in private, citing a section of the Union’s Brief titled, “Despite Resolution 16-22, the *County* demands to bargain in private.” *See*, Union Opening/Response, p. 11 (emphasis in original). In fact, the PERC Hearing Examiner, Jamie Siegel, expressly found that “the employer’s sheriff spoke up and asked to engage in a separate conversation away from the public bargaining table,” and concluded that this non-public conversation “constituted bargaining...” *See*, AR 254. This finding and conclusion are not mere “anecdotes,” and the Union did not “create” anything.

PP. 6-7 – On the circumstances of our case, PERC did indeed express a preference for private bargaining. The County wrongly argues that PERC was somehow neutral with respect to whether collective bargaining at Lincoln County

³ Page 3, footnote 1 of the County’s Reply Brief refers to an alleged article in the Odessa Record newspaper, citing CP 271. However, page 271 of the Clerk’s Papers is an attachment to a Declaration of Rob Coffman in Support of Lincoln County’s Motion for Stay of Agency Decision While Review is Pending. In any event, the alleged article does not appear anywhere in the Agency Record. Once again, the County appears to be citing willy-nilly to materials not in the record.

should be public or private. This argument ignores that PERC ordered the parties to bargain in private if, after two negotiation sessions, they could not agree on whether bargaining should be in public or private. *See*, AR 115, Commission Decision, p. 18, Order to Lincoln County, paras. 2b, c.

PP. 10-11 – Unable to rebut the guidance provided by the D.C. Circuit in *Aggregate Industries*, the County simply ignores it. Specifically, the County does not quote or distinguish the *Aggregate Industries* Court’s statement, quoted and relied upon at page 21 of the Union’s Brief, that “if one party refuses to bargain about a [permissive] issue, **both sides must maintain the status quo.**” *Aggregate Industries*, 824 F.3d 1095, 1099, fn. 4 (D.C. Cir., 2016)(emphasis added). Instead, the County purports to distinguish *Aggregate Industries* on the basis of legal principles that the D.C. Circuit itself elucidated, including that some permissive subjects can indeed be implemented unilaterally by a party, depending upon which has the prerogative to do so. *See, id.*, at fn. 4.

P. 12 – The County conditioned bargaining on the Union’s capitulation to the County’s position on the public/private permissive issue. Thus, the Court should ignore the County’s coy statement that it “did not condition agreement ‘regarding mandatory subjects on acceptance of a particular position on a permissive subject’.” It is quite true that the County did not condition agreement to a particular mandatory subject on the Union’s agreement to the County’s

position on a permissive subject; it conditioned bargaining **AT ALL** on that agreement. PERC so found and the County does not challenge that finding.

P. 12 – The County’s reliance upon a quote from *Port of Seattle* is misplaced.

The quote itself makes clear that it is limited to so-called “effects” bargaining. Our case has nothing to do with effects or their bargaining.

P. 14, Fn. 7 – The County cites no authority for its argument that bargaining

about bargaining arrangements is not “bargaining.” Further, the argument defies common sense and labor law parlance. In any event, as detailed at page 8 of the Union’s Brief, the very same correspondence that included bargaining about bargaining included an exchange of positions on an archetypical mandatory subject of bargaining: whether to “roll over” the collective bargaining agreement for a new term. *See*, Er. Ex. 12, AR 633.

P. 16 – Contrary to the County’s claim, the Union did not “fail to respond” to the County’s management prerogative argument.

Section VII of the Union’s Opening/Response Brief, at page 44, is titled “The County’s ‘Management Prerogative’ Argument is Misplaced and Legally Baseless.”

P. 18 – The County overstates the lessons taught by the cases in its string cite.

None of the cases state that, as the County claims, the collective bargaining exemption in the OPMA is “permissive,” let alone “permissive, not...mandatory.” *ACLU v. Seattle*, 121 Wa. App. 544, 557 (2004), simply holds that documents, as

opposed to meetings, are not covered by the OPMA's collective bargaining exemption. *Columbia Pub. Co. v. Vancouver*, 36 Wa. App. 25, 32-33 (1983), deals exclusively with the Public Disclosure Act, RCW 42.17, expressly stating that it "need not consider" an argument based upon the OPMA. The court's mere use of the word "may" in this context is an awfully thin reed upon which to base the County's broad argument. *In re Recall of Bolt*, 177 Wash. 2d 168 (2013), never mentions the collective bargaining exemption of the OPMA. Instead, it simply applies the terms of a separate provision of the OPMA, RCW 42.30.110, which unambiguously creates an exception for "executive sessions" to the OPMA's general rule that governing bodies' meetings take place in public, but forces the governing body to clear a number of hoops before it may close the session. That is, the legislature did the very thing for executive session that it did *not* do for collective bargaining: require that it take place in public, unless the parties' can establish and document a need for privacy.

P. 19 – The County's preemption analysis misperceives the nature of preemption. Contrary to the County's argument, under preemption law, a statutory provision outlawing or implicitly permitting one thing CAN AND DOES prohibit permitting or outlawing other things, despite that the statute does not say as much. Nowhere is this dynamic more pronounced than in labor law. For example, Section 8(a) of the Labor-Management Reporting Act (LMRA), 29 U.S.C. 158(a), outlaws unfair labor practices by employers, and lists them.

Despite that the statute itself does not contain an express preemption clause, the U.S. Supreme Court, in *Building Trades Council (San Diego) v. Garmon*, 359 U.S. 236 (1959), held that the states cannot enact legislation that either permits or prohibits conduct that is “arguably protected or prohibited” by Section 8 of the LMRA. *Id.*, at 244-246. Thus, the *Garmon* court reversed a verdict that a union had violated California state law when it peacefully picketed in an effort to force an employer to execute a union shop agreement with a minority union. Significantly, the court so held despite that (indeed, *because*) the picketing was perhaps prohibited or perhaps protected by the picketing provisions of federal law. This uncertainty, the court explained, must be resolved under federal law, and the states are not free to intrude.

The logic of Lincoln County’s preemption argument is remarkably similar to that of California’s, which the *Garmon* court necessarily rejected. Federal law prohibits certain kinds of picketing, and California simply sought to prohibit even more picketing. Likewise, Lincoln County argues that Washington state law prohibits certain kinds of private meetings and the County simply seeks to prohibit even more private meetings. Yet, the Supreme Court soundly rejected this logic, as this Court should here.⁴ *See also, Street, Elec. Ry. & Motor Coach*

⁴ Indeed, California’s argument was actually stronger than Lincoln County’s. After all, California is a constitutional sovereign, while Lincoln County is an administrative subdivision of Washington State, the sovereign. In addition, although in the *Garmon* case it was unclear whether the disputed picketing was prohibited or protected by federal law, the same is not true here; it is undisputed that

Emps. v. Lockridge, 403 U.S. 274 (1971) (state breach-of-contract action against employer for discharge for non-payment of union dues preempted because the union’s conduct arguably violated Section 8(b)(2) of the LMRA); *Wisconsin Department of Industry, Labor & Human Relations v. Gould*, 475 U.S. 282 (1986) (state statute that prohibited procurement from repeat violators of federal labor law preempted by federal labor law).

P. 21 – The County’s analogy to *Lenci v. City of Seattle*, 63 Wash. 2d 664 (1964) is inapt. The fence-height statute at issue in *Lenci* lacks an essential provision necessary to make it comparable to the OPMA: an exemption similar in form to the collective bargaining exemption in the OPMA. That is, the fence-height statute did not include a provision specifically addressing taller or shorter fences in the way that the OPMA specifically addresses collective bargaining. Thus, the OPMA contains a clear indicium of legislative intent not found in the fence-height statute. *Lenci’s* holding and analysis are therefore inapplicable here.⁵

PP. 23-24 – The County continues to refer to materials not in the record. The County again references so-called “Transparency Resolutions” from other jurisdictions. As the PERC Hearing Examiner explained at footnote 8 of her

Lincoln County’s Resolution seeks to prohibit conduct that is expressly permitted by state law: conducting collective bargaining in private.

⁵ Unrelated aspects of *Lenci* were superseded in *Chong Yim v. City of Seattle*, 194 Wash. 2d 682, 702 (11/14/2019).

decision (AR 257), these items were not exhibits at the hearing, but were attached to the County's post-hearing brief. After the Union objected, the Examiner declined to consider them and the County did not challenge her decision in its appellate brief (AR 180). In any event, to the extent one examines the excluded materials, they only serve to corroborate that this dispute is entirely the handiwork of the Freedom Foundation; every resolution uses the identical language, as drafted and pushed by this radical right-wing organization bent on destroying collective bargaining.

P. 24 – The County wrongly argues that “it is not necessary for PERC explicitly to state that ‘the PECBA preempts the County’s Transparency Resolution’ for it to actually do so.” Actually, it IS necessary. The County does not cite any case in which an adjudicating body found that a legal enactment of a government entity was preempted in which that body did not expressly invoke “preemption,” and the Union is not aware of any. Moreover, PERC’s ruling against the County is based upon the County’s conduct, not a preemptive conflict between PECBA and the Resolution’s bare terms.

CONCLUSION

For all of these reasons, the Union requests that the Court deny the County’s appeal and grant the Union’s, in the manner detailed in the Union’s Opening/Response Brief.

RESPECTFULLY SUBMITTED this 12th day of February, 2020.

By 

Michael R. McCarthy, WSBA #17880
REID, McCARTHY, BALLEW &
LEAHY, LLP
100 West Harrison Street, Suite 300
Seattle, WA 98119
Phone: (206) 285-3610
Email: Mike@rmbllaw.com

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and

PUBLIC EMPLOYMENTS

RELATIONS

CASE No. 370542

CERTIFICATE OF SERVICE
FOR TEAMSTERS LOCAL 690's
REPLY BRIEF

DECLARATION OF SERVICE

The undersigned hereby certifies that on the 12th of February, 2020, she caused the foregoing **Teamsters Local 690's Opening and Response Brief** to be filed electronically via the e-filing system. This copy has a corrected signature page, now with attorney Michael R. McCarthy's signature. A true and correct copy has also been served by electronic mail (pursuant to the parties' agreement for service by electronic mail) to:

Mark S. Lyon, AAG
Laura K. Reese, Paralegal
Charlotte Armstrong, Legal Assistant
TPC EF Mailbox

mark.lyon@atg.wa.gov
Laura.Reese@atg.wa.gov
Charlotte.Armstrong@atg.wa.gov
tpcef@atg.wa.gov

Jeffrey S. Barkdull, Attorney

jbarkdull@co.lincoln.wa.us

Caleb Jon F. Vandebos, Attorney
Eric R. Stahlfeld, Attorney
Jennifer (Jenn) Matheson, Paralegal
Kirsten Nelsen, Paralegal

cvandebos@freedomfoundation.com
estahlfeld@freedomfoundation.com
jmatheson@freedomfoundation.com
knelsen@freedomfoundation.com

Paul M. Ostroff, Attorney
Jeni Norton, Legal Assistant
Carmen Smith, Legal Assistant
Docketing

ostroffp@lanepowell.com
nortonj@lanepowell.com
smithc@lanepowell.com
docketing-PDX@lanepowell.com

I declare under penalty of perjury under the laws of the State of Washington that
the foregoing is true and correct.


Jenny Haverkamp

REID MCCARTHY BALLEW LEAHY LLP

February 12, 2020 - 4:16 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
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Appellate Court Case Title: Lincoln County v. Public Employment Relations Commission, et al
Superior Court Case Number: 18-2-00081-6

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- jenny@rmbllaw.com
- lawyer@stahlfeld.us
- richard@rmbllaw.com

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Sender Name: Shelly Trahin - Email: shellyt@rmbllaw.com

Filing on Behalf of: Michael R. Mccarthy - Email: mike@rmbllaw.com (Alternate Email: richard@rmbllaw.com)

Address:
100 West Harrison Street North 300
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Phone: (206) 285-3610 EXT 238

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