Organizational Campaigns Prior to PERC Filing

Effective June 13, 2002 the Public Employment Relations Commission (PERC) will assume jurisdiction for the determination of which labor organization, if any, represents the majority of the employees in appropriate bargaining units in state agencies. Petitions for investigation of a question concerning representation of employees may be filed no sooner than June 13, 2002. Labor organizations have begun organizing efforts in advance of the June 13 date.

Many agencies are being asked to accommodate labor organizations' efforts to communicate with the state employees prior to that date. The following guidelines may be helpful to agencies in responding to requests. **Specific questions should be posed to your assigned Assistant Attorney General at the Labor & Personnel Division.**

Employee Questions:

- Employees with questions regarding their rights should be referred to PERC at 360-570-7300

Prohibited Employer Conduct:

- No threats for supporting or selecting a union
- No questioning of employees with regard to union activity or their support of it
- No promise of any benefits if the employee will work or vote against a union
- No surveillance of or participation in union activity

Employee Rights:

- Right to organize or refrain from organizing during non-work hours
- Right to freely campaign for or against a union during non-work hours
- Right to participate or decline to participate in any meetings or activities without interference or fear of reprisal from either their employer or the union

Permitted Employer Conduct:

- May impose a non-discriminatory no solicitation rule in work areas
- May preclude distribution of union campaign literature in work areas
- May prohibit meetings scheduled in facilities by non-employees during work hours
- May permit meetings scheduled in facilities by non-employees during lunch, break times or other non-work hours.
- May permit and govern the use and/or access to facilities, including use of conference rooms, bulletin boards, telephones, and e-mail under same use guidelines applied to other outside organizations
- May permit communication, including by telephone and email, of a reasonable duration under same guidelines applied to other personal communication

Any employer imposed rules shall be enforced in a non-discriminatory manner

Requests for Information:

- Generally, these are requests for employee names, position, work location, telephone and e-mail address. These requests are handled like other requests for public documents.

Once a petition has been filed, PERC rules govern. Please call your assigned L&P AAG if a petition is filed.

STATE OF WASHINGTON

June 21, 2002

TO: Agency Directors

FROM: Marty Brown, Director
Office of Financial Management
Gene Matt, Director
Department of Personnel

SUBJECT: UNION ORGANIZATIONAL EFFORTS

The Office of the Attorney General recently sent information to your Human Resources staff regarding union organizational campaigns. This document will help your agency when responding to requests from labor organizations to communicate with your employees.

Attached is another document that also addresses union organizing efforts. This document, while similar to the AGO's, provides anecdotal information that may also be helpful to your organization.

Another source of helpful information can be found in the advisory opinions of the Executive Ethics Board. Those opinions are available on their website at http://www.wa.gov/ethics.

If you have questions regarding legal issues you should continue to contact your assigned Labor & Personnel Assistant Attorney General. If you have general questions concerning union organizing efforts, please contact either your Human Resources office or Susan Miller at (360) 664-1985 or Sharon Whitehead at (360) 664-6348 at the Department of Personnel.

Attachment
cc: Michael Sellars, AAG
Brian Malarky, Ethics Board
Joyce Turner, OFM
Human Resource Managers

UNION ORGANIZING EFFORTS IN STATE AGENCIES

Employees have the right to join or assist a labor organization, as well as the right to refrain. An employee has a right to encourage other employees to support a union. Likewise, an employee has a right to not support a union. The employer has the right to maintain the operation of the agency without disruption.

Reasonableness is the key in these circumstances. Whether particular actions by a union or by management are legal depends upon the circumstances of each case.

Union Access To The Workplace And To The Employees

Generally, employees have the right to talk to other employees about union-related matters to the same degree they are allowed to converse about any nonwork related matters. If employees are allowed to talk about any subject, they can talk about unions. If a particular employee is spending too much of his or her work time talking with co-workers about non-work items, that is an issue that can be addressed by supervisors, regardless of the content of the employee's speech. Distribution of union-related material by employees to employees must be allowable to the same degree that distribution of any other material is allowed. Employers can get in trouble when they impose limits on only those involved in union-related conduct or begin enforcing a general rule only after union organization efforts have begun.

Employees who are on their own time also have the right to solicit other employees. That would include breaks, lunchtime, before and after work, and while on annual leave or days off. Non-working employees can do union solicitation in the workplace to the same degree that non-working employees are allowed in the workplace to do anything else. If an employee on their off-hours can come into the workplace to, for example, visit with a co-worker or show off a new baby, then an employee campaigning for a union can do so as well. The employer does have control over the amount of time spent by the at-work employees but only to the same degree that they exercise control over visits of any other nature.

Employees may post union-related materials to the same degree they are allowed to post any other materials. If there is an employee bulletin board where employees are allowed to post ads to give away kittens or sell a truck, then an employee may post a union-related flyer there. An employee may hang up a union-related posting in his or her office or cubicle if employees are allowed to do the same with any other material. Employees may generally wear union insignia or buttons unless there is an enforced general prohibition for valid business purposes against wearing any pin or button.

Non-employees may be treated differently than employees. Non-employee union organizers may be excluded from the workplace to the same degree that any non-employees are excluded. For example, non-employee union organizers may be excluded from employee-only areas of the workplace if other non-employees are likewise excluded. Non-employees may also be excluded from public areas of the workplace if the activity engaged in is disruptive to the operation of the employer. An example may be public patient care areas in a hospital or public reception desks. Anyone may handbill (hand out literature) on any public place like a sidewalk.

Because state government facilities are by nature "public" places, it would be hard to conceive of a valid justification for excluding organizers handing out flyers from parking lots unless there was interference with the agency's business or access by the public.

Another circumstance that may be a factor is whether the union doing the organizing is currently certified as an exclusive representative in that workplace. If so, there may be greater access granted by the terms or past practice of a collective bargaining agreement.

Telephone calls or other communication placed from outside an agency to agency employees is something that may be outside the ability of the agency to control. This is not to say it is right or wrong, just recognition that from a practical standpoint there is not much that can be done about it. Communications from inside an agency to agency employees are a different matter. The same general rules discussed above about employee conduct apply here as well. Further, the use of state resources for non-state business may violate the Ethics in Public Service Act and other provisions. Again, however, an employer must not inequitably apply rules and policies because of the union content of the message being given.

Disclosure Of Information

Union representatives may approach agency officials seeking information about an agency's employees and operations. If the union is a certified exclusive representative of the agency's employees, the agency should look to its collective bargaining agreement and its continuing duty to provide collective bargaining information to that union. The agency should remember that there is an obligation to provide home mailing addresses to the certified exclusive representative.

If the agency does not have a collective bargaining relationship with the requesting union, then the agency should treat the request as it would any valid request for information from the public.

If the request is made as a public disclosure request, the agency must follow appropriate public disclosure guidelines, just like any other public disclosure request. Agencies should remember that home addresses and telephone numbers of employees are exempt under public disclosure.

Conclusion

An agency should be cautious about creating a general rule that may impact the matters discussed here. Although an agency may adopt a neutral rule or practice, the timing of that adoption during or just before a union organization drive may be used to demonstrate an illegal intent.

Agencies should remember that there is a balance that must be struck between their employee's right to join or form a union, management's right to manage the workplace and the unions' rights to contact those employees. It is clear, however, that employers must not threaten to take reprisals against employees for selecting a union or promise to give a benefit if a union is not selected. Such conduct is illegal.

Specific legal questions should be addressed to the Labor and Personnel Division of the Office of the Attorney General. Questions regarding options the agency may want to consider should be addressed to the labor relations officer of the agency, the Human Resources office of the agency, or Susan Miller, (360) 664-1985 or Sharon Whitehead, (360) 664-1985 at the Department of Personnel.

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UNION ORGANIZING AND DECERTIFICATION CAMPAIGNS:

What You Say May Be Used Against You . . .

LABOR RELATIONS INSTITUTE

May 18, 2006

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REPRESENTATION AND DECERTIFICATION CAMPAIGNS:
What You Say May Be Used Against You . . .

I. INTRODUCTION.

A. Union organizing campaigns and efforts to decertify incumbent unions present a number of unique issues in the public sector. For starters, determining what opinion (if any) a public sector employer wishes to express about a pending campaign can often be a difficult process. When that process results in a determination to oppose a union's effort to organize a workforce, determining the way in which that opinion can be legally communicated with employees presents another daunting challenge.

C. These materials are intended to assist employers facing union organizing or decertification campaigns by providing an overview of the basic legal framework governing such proceedings.

II. THE EARLY STAGES OF UNION ORGANIZING OR DECERTIFICATION.

A. How Does an Employer Learn of a Union Organizing or Decertification Campaign?

Usually, employers first find out about a union organizing drive when authorization cards are being circulated throughout the workplace. Authorization cards designate the union as the representative of the employee signing the card. The more formal indication of an organizing drive can come in a variety of ways. Unions sometimes approach an employer directly, claiming they represent a majority of employees in an appropriate unit and requesting that the employer recognize the union as the bargaining representative. Alternatively, a union may take its authorization cards straight to the Public Employment Relations Commission ("PERC") where a formal petition is filed. The employer gets a copy of the petition, without the supporting authorization cards.

Decertification campaigns, since they are almost by definition "grass roots" efforts by employees, often come to the attention of the employer when an employee shows up seeking advice on the process. These interactions are perilous for employers. As described below, employers risk an unlawful interference violation when they sow the seeds for a decertification campaign or assist employees in prosecuting it. For this reason, managers need to be trained to refer inquiries about the decertification process to PERC representatives.

B. When Can a Representation Petition Be Filed?

Generally, employees within a work unit that is not currently unionized are free to file a representation petition whenever they can demonstrate the necessary "showing of interest." To meet this test, the petitioner must include with the petition signed authorization cards or signed/dated letters from thirty percent or

more of the bargaining unit claimed appropriate by the petitioner. WAC 395-25-110.

Where there is an existing bargaining representative, or where employees voted but failed to elect a representative within the prior year, petitions may only be submitted as follows:

1. The Certification Bar.

   Employees who voted and failed to elect a representative are precluded from filing another petition for twelve months, even if the petition is for representation by a different union. WAC 391-25-030(2)(b). Similarly, a bargaining representative certified following an election or cross-check may not be challenged by a decertification petition or a petition from a rival union for twelve months. WAC 391-25-030(2)(a).

2. The Contract Bar.

   Once a union negotiates a contract with the employer, the contract bar doctrine takes effect. Generally, this principle prohibits any effort to decertify the unit or change bargaining representatives during the term of the contract, with the following exceptions:

   a. Employers governed by RCW 41.56 are prohibited from executing contracts of greater than three years in duration. The contract bar applies for the length of any contract executed, with the exception of a month-long "window" that opens between ninety and sixty days from the termination of the contract. A decertification or a petition from a rival union can be filed during the window, even if the parties have agreed to extend or replace the contract. WAC 391-25-030(1).

   b. Employers governed by RCW 41.80 are precluded from executing contracts that last longer than a fiscal biennium. RCW 41.80.001. The "window" opens between 120 and ninety days from the end of the agreement. WAC 391-25-036. Notably, this period occurs months *after* the October 1 deadline by which ratified agreements must be submitted to the governor for action by the legislature.

   c. Employers governed by RCW 41.76 are not precluded from entering into agreements of any length. The "window" opens between ninety and sixty days from the end of any agreement of three or less years. In the event the agreement has a duration of longer than three years, the window opens between ninety and sixty days from the third anniversary of the agreement, and between ninety and sixty days from each subsequent anniversary. WAC 391-25-037.

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C. Are Their Limits on Employer Activity Prior to the Filing of a Petition?

The filing of a representational petition begins a period of "laboratory conditions" during which employers are generally precluded from making changes to the status quo.

1. Laboratory Conditions Take Effect Upon Filing, Not Before.

In *Lynden School District*, Decision 6391 (1998), the PERC considered an unfair labor practice charge based on employer changes to the status quo prior to the filing of a petition. The SEIU represented three units within the District, and began organizing a fourth while bargaining with the employer. The parties reached agreement on new contracts that extended to unit members additional time off benefits. Following ratification of the agreements, but before SEIU filed a representation petition, the District extended the same additional benefits to its non-represented staff according to its past practice of equalizing benefits for all employees. The union filed an unfair labor practice alleging that the employer committed an interference violation by changing benefits during an organizing campaign. The examiner noted that in rare and egregious cases in the private sector, the National Labor Relations Board has ruled that pre-petition conduct can constitute interference. Absent the facts to justify this exception, however, the examiner noted that pre-petition conduct is not relevant in an interference charge. The examiner explained that employers are not required to maintain the status quo prior to the filing of a petition, and that to rule otherwise would create an impossibility for employers and could disadvantage employees.

2. Dynamic Status Quo.

In *Adams County*, Decision 7961 (2003), PERC explained that the "status quo" can be "dynamic" in that it incorporates changes to wages, hours and working conditions pre-announced by the employer. Adams County was struggling with years of budget shortfalls, and began a budget review process to address them. Amid the County's discussion of potential reductions, employees began an organizing campaign. During the month of December, the Commissioners held workshops regarding cost reductions, and finalized a plan for hours reductions in the coming year late in the month. Approximately a week after the budget, including planned hours reductions, was adopted, the employees filed a petition with PERC. In deference to the organizing campaign, the County forestalled the planned implementation of its hours reductions. Ultimately, however, its economic situation became sufficiently dire that it went ahead with the reductions a month late but still during the union campaign. The union filed an interference charge. In ruling for the union, the examiner explained that the employer's planned hours reductions were part of a dynamic status quo that existed when the petition was filed, and it

therefore had the right to follow through with those reductions as announced. By delaying the reductions, the employer deviated from the dynamic status quo and, even though this was done for laudable reasons, created unlawful interference.

D. Who May File a Petition?

A petition concerning representation may be filed by an employee, group of employees, employee organization or employer. WAC 391-25-010. Employers can file a petition to begin an election process in those circumstances where a union has demanded recognition. It can also file a petition challenging the majority status of a representative where it has objective evidence upon which to base a good faith belief that the union no longer represents a majority of employees in the unit. Evidence supporting the employer's good faith belief must be filed with the petition. WAC 391-25-090.

III. THE RULES OF THE ROAD WHILE A PETITION IS PENDING.

A. What Are the Procedural Steps Following the Filing of a Petition?

1. Determining the Unit.

After the petition is filed, a representative of the PERC will contact the employer to see if there are any issues that would require a hearing. This could involve a dispute with the union over whether employees are confidential or a dispute concerning whether the requested bargaining unit is appropriate. The PERC will attempt to work with the union and the employer to resolve issues without a hearing. If a hearing is necessary, expect several months' delay in an election.

2. Elections vs. Cross-Checks.

Once any issues involving the potential unit have been resolved, there are two paths through which PERC may certify a bargaining representative. The first is by conducting a secret ballot election. Generally, elections are conducted by mail ballot, although the PERC may choose (in its discretion) to conduct a live election. A simple majority of those voting determines the outcome in any election. Ties are resolved in favor of having no union. WAC 391-25-530. At the logical extreme, if only two employees vote, one voting "yes" and one voting "no", the union would lose. If a majority of employees vote in favor of the union, the PERC will certify the union as the bargaining representative of the unit.

The second possibility for certifying a unit is through the "cross-check." Cross-check is the process through which the PERC certifies a representative based on a majority showing through examination of the authorization cards. This process is available by stipulation between the union and employer. In addition, for employers governed by RCW 41.56

and RCW 41.80, PERC may direct a cross-check if the showing of interest submitted by the union with the petition contains authorization cards from 70 percent or more of the unit members. In such cases, PERC will compare the cards to the unit roster, and certify the unit without an election.

B. What Are the Limits on Employer's Communications During an Organizing Campaign?

The law does not compel an employer to be pro-union or maintain neutrality during an organizing campaign. In fact, public sector employers retain free speech rights that they may exercise during the campaign, including the right to express personal opinions concerning whether unionization makes sense.

Freedom of speech notwithstanding, employers must be careful during the organizing process, as there are strict limits on what an employer may communicate during a campaign. It is an unfair labor practice for an employer to interfere with, restrain or coerce public employees in the exercise of their right to organize. In the election context, problems can arise if the "laboratory conditions" for a fair election are interfered with. If an employer engages in prohibited election misconduct, the results of the election may be overturned (assuming the employer won) and another election held.

1. TIPS for Avoiding Election Problems.

The rules of the road for employers during an organizing campaign can be captured by the pneumonic device "T I P S."

a. Threats. An employer must not use threats to influence votes. An example of such misconduct would be a statement during the campaign that if the employees vote for a union, the current package of benefits would automatically be taken away from employees. It is fair to make reasonable predictions of the likely results of a union organization campaign. For example, if every contract by the petitioning union at other agencies has a union security clause, it is fair to tell employees they will likely be covered by such a clause.

b. Interrogation. An employer must not interrogate employees about union affairs or how they plan to vote. This can be very difficult, particularly when an employer has no idea that an organizing campaign is in the works. Human nature causes supervisors to want to understand why employees want a union. There are mechanisms by which you can lawfully encourage employees to share such underlying concerns (e.g., use of "open door" policy). Also, if employees want to voluntarily discuss their views of

unions, you need not close your ears or stop the employee from talking.

c. Promises. The employer must not promise any new benefits to employees during the period between filing of a PERC petition and holding of a union election. If the employer would have proceeded to make changes in wages or benefits in absence of the union organizing campaign, it has a right to continue to do so while an election is proceeding.

If, on the other hand, an employer extends new wages or benefits that would not have occurred in absence of the union petition, they are guilty of improper election conduct. For example, if every January 1, an employer gives cost of living increases to employees, the mere fact that a union filed a petition in December would not preclude the employer from continuing with the scheduled cost of living increase. In fact, if the employer withheld the scheduled increase, using the union petition as the excuse, the employer would be guilty of an unfair labor practice. This situation would be in contrast to the case where an employer decided to institute a new benefit program after finding out about the union petition.

d. Surveillance. An employer must not take steps to monitor which employees participate in union organizing activity or which employees vote in favor of the union.

C. If a Public Employer Undertakes an Anti-Union Organizing Campaign, Must It Give Equal Time to the Union?

No, there is no equal time requirement in public sector labor law. Therefore, if you want to schedule a series of mandatory employee meetings to discuss the union campaign during work time, there is no requirement that you grant the union the same right.

Employers can enact and enforce rules prohibiting employees from soliciting each other during working hours, which can preclude employees using work time for union campaigning. In evaluating such rules, and whether they unfairly preclude employees from exercising their right to organize for union representation, PERC has applied the private sector test developed by the NLRB, which permits enforcement of non-solicitation rules that apply equally to union solicitation and non-union solicitation. Put differently, employers may prohibit union solicitation on work time if they also prohibit solicitation for non-union purposes, including such things as selling Girl Scout cookies and raising funds for charitable causes.

Employers may not prohibit union organizing efforts by employees that take place during off-duty time, such as employee break or meal times. Union business

agents do not, however, have to be permitted access to employees during the work day.

D. What Types of Information Can a Public Employer Share With Employees During an Organizational Campaign?

As noted above, employers must steer clear of threats or promises during representation campaigns, and any factual information shared with employees must be demonstrably accurate. Within those restrictions, there remains a wide variety of information that employees can safely share with employees. For example, employers may:

- Tell employees about the benefits they presently enjoy.
- Tell employees about the progress that has been made in wages and benefits in recent years.
- Remind employees that they may now bring any grievance to the attention of the employer without fear of reprisal or discrimination.
- Discuss examples of how the employer has historically responded to employee complaints, emphasizing ways in which the employer has shown its concern for the employees' well being.
- Tell the employees of the cost of union dues and initiation fees.
- Tell employees that good faith bargaining does not require the employer or the union to agree to anything to which it does not wish to agree. With the exception of interest arbitration-eligible groups, employers cannot be forced to pay wages and benefits in excess of those it believes are warranted by economic conditions.
- If true, point out the employer's practice of giving wage increases in the past and indicate that there are no plans to stop this practice.
- Advise the employees that they are free to sign or not to sign a union authorization card and to vote for or against the union without fear of reprisal from either the union or the employer.
- Tell employees that although they may have signed a union authorization card, they need not vote for the union or support it even though the card may have been written in the form of an application for membership.
- Inform employees that the election will be secret, supervised by PERC, and that neither the union, the employer, nor fellow employees will know how any individual votes.

E. In Addition to Its Communications With Employees, Are There Other Limits on Employers During Representation Campaigns?

1. No Discrimination.

Employers are prohibited from hiring, firing, or otherwise discriminating against an employee because of his or her exercise of representational rights. Obviously, this means that an employer cannot fire or otherwise punish individuals for their involvement in an organizing effort.

2. Maintaining Laboratory Conditions

As noted above, during the pendency of a petition, employers are obligated to maintain "laboratory conditions," and may not make changes to employees' wages, hours and working conditions. Notably, this rule not only prohibits employers from making changes to reduce or diminish benefits, it also requires that an employer follow through on pre-announced benefit increases. Thus, for example, where an employer has announced a wage increase in advance of the filing of a petition, it will be required to follow through with that increase if a petition is subsequently filed and is pending when the increase was scheduled to take effect. This principle has been used by unions to argue that employers who have a custom of granting cost-of-living increases each year must continue to do so according to their normal practice during a representation case. Where the employer's pattern is well established, as is the case where the employer regularly bases a January 1 increase on the Consumer Price Index, claims that a dynamic status quo exists have succeeded.

3. Electioneering.

Employers are permitted during a union campaign to schedule and require attendance at meetings during which they present to employees their perspective on the union question. To eliminate the prospect of undue coercion at such meetings, employers are prohibited from scheduling them during the twenty-four hour period prior to the election. WAC 391-25-490. Where the election is conducted by mail ballot, the blackout period for electioneering by the employer begins on the scheduled date for issuance of ballots and continues through the tally of ballots. WAC 391-25-470.

IV. SPECIAL CONSIDERATIONS FOR PETITIONS WITH AN INCUMBENT REPRESENTATIVE.

A. What Role May Employers Play in Decertification Proceedings?

In theory, an employer's right to free speech applies equally to decertification proceedings as it does in initial organizing campaigns. In practice, however, employers exercising that right are far more likely to draw an unfair labor practice

charge. The reason for this is likely twofold. First, unions involved in a decertification campaign are necessarily in a defensive position, and are often "fighting for their lives." It is much more likely, therefore, that they will challenge employer actions, in hopes that an interference violation will result in dismissal of the decertification petition. Second, PERC has applied the free speech standard differently in organizing campaigns than it has in decertification campaigns. Many PERC cases recognize that the passion of a representation campaign will necessarily show in the statements made by an employer about that campaign, but distinguish such permissible electioneering from the tone appropriate to communications about an incumbent union.

1. Free Speech vs. Interference.

The PERC has articulated a series of factors to determine when an employer's speech crosses the line between protected speech and unlawful interference. Of most significance in representation cases are the following factors:

- Were the statements misleading or factual?
- Has the employer made new benefits available in its communication?
- Does the communication have a tendency or purpose to undermine the union?
- Is the communication, in tone, coercive as a whole?

City of Seattle, Decision 3566 (1990). Notably missing from this test is a set of considerations applied by the PERC in evaluating statements made during organizing campaigns that evaluate the materiality of a statement of law or fact, the timing of the statement and the opportunity of the other party to effectively respond to the statement. WAC 391-25-470.

B. What Kinds of Employer Statement or Actions Have Resulted in Unfair Labor Practice Charges?

There are relatively few PERC decisions involving employer conduct during decertification proceedings. The picture that emerges from those cases, however, makes clear that even the slightest suggestion of employer involvement in the process is often enough to prompt an unfair labor practice charge. That fact, combined with the fact that "intent" is not a required element in an unlawful interference charge, means that employers must make certain that supervisors understand that they cannot support or encourage a decertification effort. In addition, supervisors need to make sure that any such effort started by employees is prosecuted without the use of any employer facilities or supplies. The following cases are illustrative:

1. *King County*, Decision 2553 (PECB 1986)

An employee within the "Courthouse Unit" became dissatisfied with the union and started a decertification effort. She retrieved paper from the recycle bin and typed a petition on a county typewriter while on her lunch and rest breaks. She and a second employee paid the cost of copying the petition, then distributed copies of the petition to much of the unit. To access employees in one part of the unit, the instigators passed the petitions to the confidential secretary of the department director, and asked that she distribute them. She was not told the content of the petition.

The union filed an interference charge, asserting that the employee's use of a county typewriter to create the petition, distribution of the petition by an employee "identified" with management, and the fact that the County did not actively disavow the petition created the impression that the County supported the petition. The examiner rejected the charge, finding that the use of County equipment was de minimis, and in any event not authorized. The examiner also rejected the argument that distribution of the petition by a confidential secretary created an impression of employer support. Finally, the examiner determined that the fact the County took no petition on the decertification petition was an appropriate employer response, not an unfair labor practice.

2. *City of Tukwila*, Decision 2434 (1986).

City employees filed a decertification petition. The City Administrator hand-delivered a letter to employees (on City letterhead) making the case that the union had not accomplished much of anything during its two years as the employees' representative. The City communicated with employees multiple additional times during the pendency of the petition, including a letter to schedule a voluntary meeting on the day of the election to answer questions about the process (a meeting the City suggested had been blessed by the PERC), and later canceled that meeting with a derogatory letter about the union's threatened legal challenge to it.

The examiner began his analysis by reviewing the administrator's letter to employees. In it, the administrator takes credit for many things provided to employees outside of bargaining. This, the examiner concluded, was legitimate propagandizing. Of greater concern were illusions to the number of employees involved in the decertification effort, a fact that is supposedly secret, and a claim about the wages of non-represented employees that strongly suggested that employees would fare better without their union. Both of these elements of the letter led the examiner to conclude that it was improperly coercive.

The employer's aborted attempt at an election day meeting was deemed objectionable for a number of reasons. First, it gave the false appearance

that it had PERC's blessing. Second, it violated the prohibition about electioneering within twenty-four hours of the election. And finally, the City unfairly derogated the union when the union (rightfully) objected to the illegal meeting. Taken as a whole, the examiner decided that the employer's conduct warranted extraordinary remedies, including payment of the union's attorneys' fees.

3. *Clallam County Public Hospital District No. 1*, Decision 5445 (1996).

The union based its interference charge on the fact that the employer's postage meter was used to file and serve the decertification petition. The record established that envelopes placed in the employer's outgoing mailbox were "processed routinely thereafter," and no management officials granted approval for this use of the employer's postage meter. The examiner decided that the unauthorized use of "sixty four cents of postage is not enough to tie this employer to the decertification effort."

The examiner noted, however, that a violation had been found in a previous case where an employee could reasonably have perceived that ongoing use of an employer's office space, work time, and telephones, constitutes employer support for an organization, even though the employer did not expressly condone that usage or otherwise indicate its preference for that organization.

4. *Pasco Housing Authority*, Decision 5927-A (1997).

The employer and the union were involved in negotiations, and bargaining for a new agreement had been going on for almost a year. At a bargaining session, the union representative claimed that the employer had laid off a number of union employees in order to destroy the union. The employer responded by inquiring whether this meant the union no longer represented a majority of bargaining unit employees, and the union "jokingly responded that it was surprised it had not received notice of a decertification effort." Apparently believing that the union was serious, the employer canceled the next bargaining session. The employer also sent a memorandum to all employees, stating that the union was ineffectively representing employees, that it wanted a "closed shop," and that the employer had spent the equivalent of a three percent wage increase on its attorneys in representing itself at the bargaining table. The union responded with an unfair labor practice.

The PERC found that an interference violation was appropriate. The employer's memo was "coercive in tone." It was addressed directly to employees, and therefore also appeared to be an effort to engage in direct dealing.

In its decision, the PERC pointed out that a more appropriate response, assuming that the employer had a good faith doubt that the union lacked majority status, would have been to file a petition for an election with the PERC. The employer's failure to do so suggested that it was engaged in an effort to undermine the union's majority status.

Clearly, the PERC was unhappy with the actions of the employer. Some parts of the decision, however, are quite disturbing. For instance, the employer reminded employees of the wage increases they had received prior to the union's coming on the scene. The PERC found that this reminder, although it was completely factual, suggested "an implied promise of benefit to those employees if they would forego the union" and decertify.

In addition, the employer indicated that union dues would amount to approximately twenty dollars per month, or two hundred forty dollars per year per employee. The PERC found that this statement was misleading (apparently because the union dues would actually be higher) and further suggested that the purpose of the statement was to "scare employees into rejecting the union."

Concluding that the "employer's continued attempts to defend its misrepresentation" in the memo constituted a blatant disregard of the facts and evidence created by the record in this case, an extraordinary remedy of attorney's fees was awarded. The PERC did find, however, that the Examiner's imposition of interest arbitration was inappropriate, given that this was primarily an interference violation rather than a refusal to bargain violation.

5. Okanogan-Douglas County Hospital District, Decision 5830 (1997).

District nurses formed a union, but the union failed to successfully negotiate a contract within the one-year certification bar. Following that bar, an employee initiated a petition to decertify the union. Tamara Brown, a nurse at the District who had voted in the prior election, signed the petition. The employees generated a sufficient showing of interest to file a decertification petition with PERC. Responding to a PERC request for a list of eligible unit members, the District listed Brown as a supervisor who should be excluded from the unit. The union filed an unfair labor practice charge alleging that as a supervisor, Brown's signature on the decertification petition constituted both improper assistance of that effort and interference with the union.

The examiner began the analysis by explaining that an assistance violation requires a showing that the employer has assisted a union. Since the decertification effort was not a rival union, there could be no improper assistance. With respect to the union's interference charge, the examiner

analyzed Brown's role and determined that she was not, in fact, a supervisor under the PERC's standards. Even had she been a supervisor, the examiner noted that in the absence of some showing that Brown held herself out as supervisor supporting decertification, there would be no improper interference.

6. Port of Bellingham, Decision 7613 (PECB 2002).

Over a period of years, employees in a portion of one of the Port's bargaining units began to function as their own bargaining unit. Eventually, the parties bargained a separate agreement for this group, known as unit "7a." At the start of negotiations for a renewal contract, the employee head of the unit launched a decertification effort. He then played "both sides against the middle" for a period of time, scheduling meetings with the employer in his capacity as a union representative while simultaneously drumming up support for a decertification. Through a series of meeting with the employer and public disclosure requests, the employee sought from the employer information about the wage grid used for non-represented employees, and where employees in the unit would fall on the grid if they were not subject to a bargaining agreement. The employee then advertised to the unit members that if they decertified the union, they would receive a better wage rate by virtue of their placement on the Port's grid for non-represented employees.

The union filed an interference charge against the Port, alleging among other things that the employer had promised wage increases to the employees if they decertified the union. The examiner began the analysis by revisiting PERC precedent regarding an employer's duty to maintain "laboratory conditions" during a pending election process. In that environment, "[a]ny promise of benefits is inherently coercive . . . ." The examiner went on to conclude, however, that Port officials had not promised any pay increases to employees. That promise was made by the employee representing the bargaining unit as part of his effort to promote decertification of the union. The examiner did find, however, that the Port had committed a technical interference violation by failing to post the PERC notices it received when the decertification petition was filed.

7. *Community College District 13 – Lower Columbia*, Decision 8118 (2003).

WPEA filed a series of charges making scattershot allegations, which were initially dismissed. An amended complaint was filed and permitted to proceed after WPEA alleged that supervisors of the employer knowingly permitted WFSE to use employer time to drum up support for its effort to replace WPEA, and made WFSE's effort a topic at mandatory staff meetings.

C. What Happens to Contract Negotiations If a Decertification Petition Is Filed?

PERC has ruled in a number of cases that during a pending decertification petition or a petition to change union representatives, bargaining between the employer and the incumbent representative must cease. That standard has also been built into the PERC's regulations for representation cases. WAC 391-25-140(4).

D. May an Employer Express a Preference for One of Two Rival Unions?

No. When a representation case involves a choice between multiple bargaining representatives, employers are prohibited from expressing a preference between the rival representatives. WAC 391-25-40(2). Notably, conduct that suggests, rather than expressly states, a preference for one of two representatives is also unlawful.