IN THE SUPREME COURT OF THE STATE OF OREGON

JILL GIBSON,
Petitioner,

v.
ELLEN F. ROSENBLUM, Attorney General, State of Oregon,
Respondent,

S063356 (Control)

HANNA VAANDERING and BETHANNE DARBY,
Petitioners,

ELLEN F. ROSENBLUM, Attorney General, State of Oregon,
Respondent,

S063362

ERIC WINTERS,
Petitioner,

v.

ELLEN F. ROSENBLUM, Attorney General, State of Oregon,
Respondent,

S063363

Initiative Petition 2016-035
Ballot Title Certified June 17, 2015

REPLY MEMORANDUM ON PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL

Petitioners Vaandering and Darby submit this reply memorandum to assist the court in resolving this consolidated ballot title review case for IP 35 (2016). In addition to addressing the Attorney General's response to Vaandering and Darby's specific challenge to the caption, petitioners will briefly respond to the arguments raised by Jill Gibson and Eric Winters.

1. IP 35 will allow bargaining unit employees to refuse to share in the costs of collective bargaining while still receiving the benefits of bargaining.

The threshold question in this ballot title review is whether IP 35 will allow "free riders." The Attorney General correctly concluded that it will, although as set forth in Vaandering and Darby's petition, the certified caption fails to adequately address this subject. Petitioners Gibson and Winters, on the other hand, claim that there is no free rider problem under IP 35, because the initiative changes the definition of collective bargaining to exclude nonmembers and eliminates the union's duty to represent non-union members. Gibson Petition at 6; Winters' Petition at 5. They are incorrect.

As both the Attorney General and *amicus* Heather Conroy explain, IP 35 does not change the basic structure of the PECBA. ORS 243.650 *et. seq.* The first step is for a labor organization to be certified by the Employment Relations Board or recognized by a public employer as the "exclusive representative" for "all employees in an appropriate bargaining unit." ORS 243.650(8). IP 35 does not change the definition of appropriate bargaining unit set forth in ORS 243.650(1); the scope of the unit turns on the nature of the job position or classifications, not on the individual desires of employees. ORS 243.682; OAR 115-025-0050(1). Contrary to Gibson's suggestion, if an employee chooses not to join the union, he or she is still a "covered" employee – *i.e.,* a member of the bargaining

unit entitled to all of the protections of the PECBA. This conclusion is obvious when one considers the fact that an employee can only choose *not* to be in the union, if he or she has the option of the being in the union in the first place – *i.e.,* the employee is in a position that is within the bargaining unit which the union represents.

Once designated as the "exclusive representative" of a bargaining unit, the union is responsible for bargaining the wages, benefits and other terms and conditions of employment for all covered positions in that unit. Under ORS 243.672(1)(a) and (c), which is not changed by IP 35, it is illegal for a public employer to offer different employment terms (either better or worse) to covered employees based on their membership status.[1] That is, the "natural and probable effect" of providing better employment terms to non-union bargaining unit employees would be to discourage union membership; the "natural and probable effect" of providing less favorable employment terms to non-union bargaining unit employees would be to encourage union membership. *See, e.g. Oregon Nurses Assoc. v. OHSU*, 19 PECBR 590, 594 (2002). Either way, treating non-union members differently constitutes an unfair labor practice. Similarly, even if the public employer attempts to justify the different employment terms based on "legitimate, non-discriminatory reasons," (*see,* Gibson Petition at 8), the only reason the non-union member could even theoretically negotiate individually is because of PECBA-protected activity – the employee's choice to not join the union.

Petitioner Gibson's discussion of the ERB precedent is unpersuasive. In essence, she claims that the PECBA anti-discrimination provisions do not apply because employees

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[1] Under ORS 243.672(2)(a), it would also be an unfair labor practice for the union to attempt to bargain different employment terms for non-union members.

choosing not to join the union are not "participating in union activity" and are therefore not protected by the PECBA. Gibson Petition at 8-9. This argument is circular and demonstrates a fundamental lack of understanding of labor law. First, whether to join the union is itself plainly protected activity under the PECBA. ORS 243.662. Second, as discussed above, being a "bargaining unit" employee turns on the nature of the employee's position, not union-membership status. All bargaining unit employees are protected by the PECBA, which means that they are entitled to receive the wages, benefits and other terms and conditions of employment negotiated by the exclusive representative. And because IP 35 prohibits fair share agreements, bargaining unit employees can receive the benefits of collective bargaining while refusing to share in the costs of that activity. Thus, the Attorney General correctly concluded that one of the "actual major effects" of IP 35 is to allow free riders. The court should reject all arguments to the contrary.

2. The Certified Caption Fails to Adequately Identify the Free Rider Issue

Although the Attorney General correctly determined that the "free rider" issue must be described in the caption, as set forth in Vaandering and Darby's petition, the actual language used falls short of the statutory standard and must be revised. It reads:

> **Non-union public employees may benefit from union bargaining without sharing representation costs; modifies representation obligations.**

There are two problems. First, the phrase "non-union public employee may benefit" is insufficiently definite to alert voters to the fact that the measure *will* allow non-union public employees to be free riders. Second, the reference to "representation costs" is over-inclusive. *See* Vaandering and Darby Petition at 6. In response, the Attorney General contends that voters will not be confused when they read the caption and

the "yes" vote result together. They will "readily understand" that a non-union member public employee would have the legal ability or permission to obtain union-bargained benefits without having to pay union representation costs." Answering Memorandum at 12. Vaandering and Darby respectfully disagree. As drafted, the caption merely suggests that non-union public employees *could be* passive beneficiaries of free union representation. In fact, IP 35 *will* empower non-union members to actively refuse to share in the costs of collective bargaining, while still receiving the benefits of bargaining. This is a crucial distinction that must be clarified in order for the caption to accurately and completely describe the subject as required by ORS 250.035(2)(a). The caption must be revised.

Second, the Attorney General argues that because non-union members may still receive the benefits of certain grievances, it would be under-inclusive to just refer to "bargaining" costs. Answering Memorandum at 13. This argument ignores the fact that under IP 35, unlike earlier anti-union initiatives, the union's "representation" obligations are limited, with the effect unclear.[2] A reference to "bargaining" costs focuses voters' attention on the benefit non-union members will undoubtedly receive under IP 35 –

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[2] Petitioner Winters contends that IP 35 unambiguously eliminates the union's duty to represent non-union members, which makes the statement in the summary that the effect is "unclear" false and argumentative. Winters also claims that the Attorney General's reliance on *Caruthers v. Myers,* 344 Or 596, 502, 189 P3d 1 (2008) is misplaced because the proposal at issue in *Caruthers* was just five unnumbered sentences, as compared with the detailed amendments made by IP 35. Winters at 9. The argument should be rejected. As set forth in Vaandering and Darby's comments at 10, and as recognized by the Supreme Court in *Caruthers*, the actual effect of the change in representation obligations is unclear given the complex and interrelated nature of labor law. Moreover, the initiative at issue in *Caruthers* contained functionally equivalent language ("* * * no union shall be required to represent or bargain for an employee who chooses not to be a member of the union."). In short, the court's discussion from *Caruthers* is equally applicable here.

union-negotiated employment terms. In addition, the reference to "bargaining costs" is not under-inclusive. The type of grievances that benefit all bargaining unit members, regardless of union membership (such as the Portland high school workload arbitration referenced in Vaandering and Darby's Petition at 4) are contract enforcement matters that so closely rely on bargaining that the reference to bargaining costs is accurate. In contrast, the phrase "representation" invokes the kind if individual representation a union must currently provide to all bargaining unit members when facing discipline or layoff. That is the kind of "representation" that is eliminated by IP 35, which makes the use of the term misleading and renders the caption noncompliant with the statutory standards. *Lavey v. Kroger*, 350 Or 559, 563, 256 P3d 1194 (2011).

CONCLUSION

The court should find that the Attorney General correctly identified the "free rider" issue as one of the actual major effects of the measure that needs to be described in the caption and remainder of the ballot title. However, it should find that the certified caption fails to do so adequately, and remand the matter back to the Attorney General for revision.

DATED August 19, 2015.

Respectfully Submitted,

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CERTIFICATE OF FILING

I certify that I directed the original REPLY MEMORANDUM ON PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition #2016-035) to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on August 19, 2015.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing REPLY MEMORANDUM ON PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition #2016-035) upon the following individuals on August 19, 2015, by using the court's electronic filing system pursuant to ORAP 16 on August 19, 2015.

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