

SUPREME COURT OF OREGON

Novick and Nesbitt v. Myers; Bosak and Sager v. Myers

333 Or. 490 (2002) · No. SC S48525; S48535 · Decided March 14, 2002

SUMMARY

The Oregon Supreme Court reviewed objections to a modified ballot title for Initiative Petition 39 (2002), which concerned union representation and payment for union services. The court held that the modified caption, result statements, and summary did not substantially comply with Oregon law because they failed to accurately identify the measure's effect on employees' ability to receive union representation without payment, and referred the ballot title to the Attorney General for further modification.

CASE DETAILS

COURT	Supreme Court of Oregon
WRITING FOR THE COURT	Durham, J.
JURISDICTION	Oregon
DECIDED	March 14, 2002
DOCKET	SC S48525; S48535
DISPOSITION	remanded
PROCEDURAL POSTURE	Petitioners Bosak and Sager objected to the Attorney General's modified ballot title for Initiative Petition 39 (2002). The Oregon Supreme Court reviewed the modified ballot title under ORS 250.085(9).
STANDARD OF REVIEW	Under ORS 250.085(9), the court determines whether the modified ballot title substantially complies with the requirements of ORS 250.035.
PRECEDENTIAL VALUE	Published, en banc opinion of the Oregon Supreme Court; precedential.
PARTIES	Steven Novick, Tim Nesbitt, Tricia Bosak, James Sager v. Hardy Myers, Attorney General, State of Oregon

TOPICS

[election law](#)[election administration](#)[appellate procedure](#)[appellate jurisdiction](#)

PRACTICE AREAS

election law

appellate procedure

constitutional law

QUESTIONS PRESENTED

1. Whether the Attorney General's modified ballot-title caption substantially complied with ORS 250.035.
2. Whether the modified result statements and summary accurately identified the subject matter and effects of Initiative Petition 39.
3. Whether the modified ballot title should be referred to the Attorney General for additional modification under ORS 250.085(10)(b).

HOLDINGS

1. The modified caption did not substantially comply with ORS 250.035 because it failed to identify that the proposed measure would allow workers to receive union representation without paying for it unless and until they requested the representation in writing, and the caption misleadingly suggested that written acceptance was required before representation could be received.
2. The modified result statements and summary also failed to substantially comply with ORS 250.035 because they repeated the misleading written-request description and failed to identify the measure's effect of allowing employees to receive union representation without cost unless they requested it in writing.
3. The court referred the modified ballot title to the Attorney General for additional modification and further proceedings under ORS 250.085(9).

KEY QUOTATIONS

“Under the proposed measure, workers would be entitled to receive union representation services free of charge unless and until the workers requested those services in writing and thereby exposed themselves to the obligation to pay for those services.” (333 Or. 490)

“The Attorney General's ballot title caption must identify that subject matter to describe accurately the subject matter of the proposed measure to the voters.” (333 Or. 490)

FACTUAL BACKGROUND

Initiative Petition 39 proposed constitutional changes concerning employees' ability to bargain directly with employers and their obligation to pay for union representation or other services. The Attorney General's modified ballot title stated that acceptance of or payment for union representation was contingent on an employee's written request. Petitioners argued that the modified title misleadingly suggested that an employee could receive union representation only after making a written request, while the proposal would permit workers to receive representation without charge unless and until they requested it in writing.

PROCEDURAL HISTORY

In an earlier decision, the Oregon Supreme Court sustained in part challenges to the certified ballot title and referred it to the Attorney General for modification. The Attorney General filed a modified ballot title, and Bosak and Sager objected to it. The Supreme Court concluded that the modified caption, result statements, and summary did not substantially comply with Oregon's ballot-title requirements and referred the title back to the Attorney General for additional modification.

DISPOSITION

remanded

REMAND INSTRUCTIONS

The modified ballot title was referred to the Attorney General for additional modification and further proceedings under ORS 250.085(9).

CASES CITED

- Novick/Bosak v. Myers, 333 Or. 18, 36 P.3d 464 (2001)
- Dale v. Kulongoski, 321 Or. 108, 114, 894 P.2d 462 (1995)

OPINION

& Novick/Bosak v. Myers (on objections)

333 Or. 490

DURHAM, J.

  Filed: March 14, 2002    IN THE SUPREME COURT OF THE STATE OF OREGON    STEVEN NOVICK and TIM NESBITT,   Petitioners,   v.   HARDY MYERS, Attorney General, State of Oregon,   Respondent.   TRICIA BOSAK and JAMES SAGER,   Petitioners,   v.   HARDY MYERS, Attorney General, State of Oregon,   Respondent.   (SC S48525; S48535) (Consolidated for Opinion)   En Banc   On petition objecting to modified ballot title.*   Submitted on the record January 9, 2002.   Paul B. Gamson, Smith, Gamson, Diamond & Olney, Portland, filed the petition objecting to modified ballot title for petitioners Bosak and Sager.   Rolf C. Moan, Assistant Attorney General, Salem, filed the Attorney General's response for respondent. With him on the response were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.   No appearance by petitioners Novick and Nesbitt.   DURHAM, J.   Modified ballot title referred to Attorney General for additional modification.   *Novick/Bosak v. Myers, 333 Or 18, 36 P3d 464 (2001) (referring ballot title

for modification).¹³ ¹⁴ DURHAM, J.¹⁵ ¹⁶ These are two consolidated ballot title proceedings¹⁷ regarding Initiative Petition 39 (2002). In *Novick/Bosak v.*¹⁸ *Myers*, 333 Or 18, 36 P3d 464 (2001), this court sustained in part¹⁹ the challenges that petitioners Novick, Nesbitt, Bosak, and Sager²⁰ filed regarding the certified ballot title and referred the²¹ certified ballot title to the Attorney General for modification. ²² The Attorney General filed a modified ballot title, and²³ petitioners Bosak and Sagar (hereafter "petitioners") objected to²⁴ the modified ballot title. ORAP 11.30(10). At the court's²⁵ request, the Attorney General responded to petitioners'²⁶ objection, arguing that the court should deny the objection. ORS²⁷ 250.085(9) requires the court to review the Attorney General's²⁸ modified ballot title to determine whether it "substantially²⁹ complies with the requirements of ORS 250.035."³⁰ ³¹ The Attorney General's modified ballot title states:³² ³³ "AMENDS CONSTITUTION: MAKES ACCEPTANCE³⁴ OF, PAYMENT FOR UNION REPRESENTATION³⁵ CONTINGENT ON WRITTEN REQUEST;³⁶ DECLARES INDIVIDUAL 'BARGAINING' RIGHT³⁷ ³⁸ ³⁹ "RESULT OF 'YES' VOTE: 'Yes' vote makes⁴⁰ acceptance of or payment for union representation⁴¹ contingent on written request; declares constitutional⁴² right of individual employees to 'bargain' directly⁴³ with employers.⁴⁴ ⁴⁵ ⁴⁶ "RESULT OF 'NO' VOTE: 'No' vote rejects written-request requirement for acceptance of, payment for,⁴⁷ union representation; rejects declaration of⁴⁸ constitutional right of individuals to 'bargain'⁴⁹ directly with employers.⁵⁰ ⁵¹ ⁵² "SUMMARY: Amends constitution. If workplace is⁵³ represented by union, existing law precludes employer⁵⁴ and individual employees from making agreements that⁵⁵ are inconsistent with collective bargaining agreement,⁵⁶ requires union to represent all employees in unit,⁵⁷ allows union to negotiate agreement requiring all⁵⁸ employees to contribute to representation costs. ⁵⁹ Proposed amendment declares state constitutional right⁶⁰ of individual employees to 'bargain' directly with⁶¹ employers about wages, benefits. Proposed amendment⁶² does not define 'bargain.' Makes acceptance of and⁶³ payment for union representation or other services⁶⁴ contingent on written request from employee. ⁶⁵ Authorizes an employee to cancel a request for union⁶⁶ representation or other services with 30 days written⁶⁷ notice; any obligation to pay for representation or⁶⁸ other services shall cease on the thirty-first day⁶⁹ after notice is sent. Other provisions."⁷⁰ ⁷¹ ⁷² Petitioners argue that each section of the modified⁷³ ballot title is inadequate. Petitioners' argument focuses on the⁷⁴ following sentence in the proposed initiative: (1)⁷⁵ ⁷⁶ "Employees have the right to bargain directly as⁷⁷ individuals with their employers to establish the wage⁷⁸ and benefits the employee shall receive, and shall not⁷⁹ be required to accept or pay for representation or any⁸⁰ other service provided by a union or employee⁸¹ association unless the representation or service was⁸² requested in writing by the employee."⁸³ ⁸⁴ ⁸⁵ According to petitioners, the modified caption is inaccurate,⁸⁶ because, "[c]ontrary to the modified caption, this

proposal would allow an employee to obtain and accept union representation without meeting the contingency, i.e., without making a written request for it." Petitioners contend that both result statements and the summary contain the same flaw. The Attorney General argues that the following sentence in this court's opinion in Novick/Bosak supports the modified wording that he chose: "Instead, under the proposal, the employee's request is a condition that must exist before the employee must 'accept' or 'pay for' union representation or service, and the employee may choose whether to make the request." Id. at 24. That sentence, however, explained only why the text of the proposal did not justify the Attorney General's use of the term "require" in the original ballot title. Moreover, that sentence preceded the court's analysis and conclusion that the original ballot title had failed to identify one of the proposed measure's two subject matters and that the original ballot title required revision to resolve that deficiency. Id. at 24-26. We will summarize below that analysis and conclusion. In Novick/Bosak, this court explained that the proposed measure's purported protection of workers from being required to "accept" union representation was "deceptive, because the law does not impose such an obligation on any employee." Id. at 26. After discussing the legal context of the proposed initiative, the court concluded that the proposal sought to change Oregon law by enabling workers, by the device of refraining from requesting union representation, to circumvent any contractual requirement to pay for the cost of union representation. The court stated: "The same is not true, however, with respect to the proposal's prohibition on 'be[ing] required to * * * pay for' union representation or service. Under current law, unions and employers may negotiate union security agreements that, in one form or another, require bargaining unit employees who are not union members to pay for the cost of union representation. In practical terms, a prohibition on such agreements enables those employees to receive union representation without cost, [Dale v. Kulongoski, 321 Or 108, 114, 894 P2d 462 (1995)] and represents a significant change in Oregon law. We agree with petitioner that that prohibition is one of the two 'subject matters' that the proposed measure addresses and that the Attorney General's caption fails to identify that subject matter." Id. The Attorney General's modified caption does not identify the subject matter of the proposed measure discussed in that passage. Under the proposed measure, workers would be entitled to receive union representation services free of charge unless and until the workers requested those services in writing and thereby exposed themselves to the obligation to pay for those services. The Attorney General's ballot title caption must identify that subject matter to describe accurately the subject matter of the proposed measure to the voters. The phrasing that the Attorney General has chosen continues to suggest, incorrectly that, under the proposed measure, workers would receive union representation (by "acceptance of" it) only if they

first request; representation in writing. That reference in the caption does; not identify a subject matter of the proposed measure and, in; context, is misleading. The Attorney General's modified result; statements and summary are insufficient for the same reason.;   ORS 250.085(10)(b) provides:  "If the Supreme Court determines that the modified; ballot title does not substantially comply with the; requirements of ORS 250.035, the court shall modify the; ballot title and certify the ballot title to the; Secretary of State or refer the modified ballot title; to the Attorney General for additional modification and; further proceedings under subsection (9) of this; section."   We conclude that the caption, result statements, and; summary of the Attorney General's modified ballot title do not; substantially comply with the requirements of ORS 250.035 for the; reasons discussed above. We refer the modified ballot title to; the Attorney General for additional modification and further; proceedings under ORS 250.085(9).   Modified ballot title referred to Attorney General for; additional modification.    

1. The court's opinion in Novick/Bosak, 333 Or at 21-22,
sets out the full text of the proposed initiative.  Return to previous location.
 