STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
V. SARAH BARRIE	)	CASE 19318-E-05-3046
Involving certain employees of:	)	DECISION 9034-B - PSRA
WASHINGTON STATE - ECOLOGY	)	ORDER DENYING ELECTION OBJECTIONS
WASHINGTON FEDERATION OF STATE EMPLOYEES,	)	
Complainant,	)	CASE 19796-U-05-5016
vs.	)	DECISION 9165 - PSRA
WASHINGTON STATE - ECOLOGY,	)	ORDER OF DISMISSAL
Respondent.	)	

V. Sarah Barrie, a supervisory employee, filed the petition.

Steve McLain, Director of Labor Relations, by *Michael South*, Department of Ecology Labor Relations Manager, for the department.

Parr, Younglove, Lyman & Coker, by *Edward E. Younglove, III*, Attorney at Law, and *Gladys Burbank*, for the intervenor, Washington Federation of State Employees.

Case 19318-E-05-3046 is before the Commission on timely election objections filed by the Washington Federation of State Employees (union) regarding an election held on October 20, 2005. Those objections are specifically tied to an unfair labor practice complaint regarding the Department of Ecology's (department)

conduct during an election held on May 26, 2005, that the union filed in Case 19796-U-05-5016. Because the two cases are inextricably connected, we have relieved the Executive Director and Unfair Labor Practice Manager of their usual responsibilities for making the preliminary ruling under WAC 391-45-110, and we resolve all issues in both cases in this decision.

PROCEDURAL HISTORY

The petitioner filed a representation petition on March 25, 2005, seeking decertification of the union as exclusive bargaining representative of a unit of supervisory employees working in the department. On May 26, 2005, Commission staff counted the ballots and issued a tally sheet for the first representation election conducted under the petition.

The petitioner filed timely election objections regarding the accuracy of the eligibility list submitted by the department and the Commission staff's handling of certain ballots. The department subsequently filed a letter admitting that it provided an inaccurate list of eligible employees. The union argued that the eligibility list stipulated by the parties was accurate, that Commission staff committed no reversible error in their handling of the ballots, and that the first election should stand.

Based upon two of the petitioner's allegations and the department's admission regarding the inaccurate eligibility list, we vacated the first election on August 9, 2005, and ordered a new election. *State - Ecology*, Decision 9034 (PSRA, 2005)(*State - Ecology I*).[1]

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[1] The Commission declined to reconsider its decision to vacate its order in *State - Ecology*, Decision 9034-A (PSRA, 2004)(*State - Ecology II*).

We also ordered the new election notices to indicate that the original election was vacated based upon the employer's failure to provide Commission staff with an accurate eligibility list and because of the Commission staff's mishandling of certain ballots.

On September 22, 2005, the union filed a petition for judicial review of *State - Ecology I* in the Superior Court for Thurston County. The union did not ask the Court for temporary relief preventing Commission staff from processing Case 19318-E-05-3046, and the union did not file with the Commission a request to stay the proceedings under RCW 34.05.550.

Commission staff issued new election notices and mailed ballots on September 27, 2005, indicating that ballots were due at the Commission's Olympia office by the close of business on October 19, 2005, and that the tally of ballots would occur the next day. On October 20, 2005, the union requested Commission staff impound the ballots because four bargaining unit employees were out of state to assist in the Hurricane Katrina relief effort, and were unable to timely vote. Commission staff denied this request.

On October 20, 2005, Commission staff counted the ballots. The Tally of Ballots form signed by the petitioner, a department representative, and union representative on that date shows:

Approximate number of eligible voters	79
Void ballots	2
Votes cast for WFSE	22
Votes case for No Representation.	40
Challenged ballots	0
Valid Ballots counted plus challenged ballots	62
Number of valid ballots needed to determine election	32

The union filed timely objections to the tally of election on October 26, 2005, and also objected to several of the interim rulings made during the processing of Case 19318-E-05-3046.

ISSUES PRESENTED

1. Did the Commission staff err by not suspending processing of the second election pending the outcome of the union's appeal of Decision 9034 to Superior Court?

2. Did the Executive Director err by not invoking the Commission's blocking charge rule to suspend processing of the second election pending the outcome of an unfair labor practice filed by union?

3. Did the Commission staff err by not impounding the ballots and delaying the tally of ballots to allow four bargaining unit employees the opportunity to vote when they had been sent out of state to assist in a national emergency?

We find the Executive Director and Commission staff did not commit any reversible error in the processing of Case 19318-E-05-3046, and that the issues set forth in both the unfair labor practice complaint (Case 19796-U-05-5016) and the union's election objections fail to state a cause of action, because they raise factual circumstances and issues already decided by *State - Ecology I*.

ISSUE 1: The Union's Pending Court Action

Union's Superior Court Appeal Did Not Suspend Election Proceedings

This Commission is an administrative agency regulated by the Washington State Administrative Procedure Act, Chapter 34.05 RCW (APA). An administrative order is final for the purposes of

judicial review when it denies a right, imposes an obligation, or fixes a legal relationship between the parties. *Wells v. Olsten Corp.*, 104 Wn. App. 135 (Div. II, 2001) (citing *Lewis County v. Public Employment Relations Commission*, 31 Wn. App. 835 (1982), *review denied*, 97 Wn.2d 1034 (1982)). Thus, only final orders issued by the Commission are subject to judicial review.[2]

In *Renton Education Association v. Public Employment Relations Commission*, 24 Wn. App. 476 (Div. I, 1979), a union sought judicial review of a Commission order directing a representation election. In dismissing the petition for review, the Court held that "a direction of election is no more than a preliminary step in the administrative process, and since it is an interlocutory administrative order, it is not a final decision subject to judicial review." The Court explained that under the APA, the order certifying (or decertifying) an exclusive bargaining representative is the final order of the agency for purposes of administrative review, and that a direction of election is only an interim step in the administrative process. Only when the certification of the election is ripe for judicial review are all of the previous interim orders, such as the direction of election, appropriately before the courts. The *Renton* court concluded by noting that its reasoning is consistent with established precedent that administrative orders are "final" for the purposes of judicial review once an order "fixes" a legal relationship amongst the parties. *Department of Ecology v. City of Kirkland*, 84 Wn.2d 25 (1974); *see also Lewis County v. Public Employment Relations Commission*.

Like the order in *Renton*, *State - Ecology I* also directed a new election. Although our order directing the election in *State -*

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[2] RCW 34.05.534 permits judicial review only after parties exhaust all available administrative remedies.

Ecology I was preceded by our order vacating the original election, that order is nevertheless interlocutory in nature. *State - Ecology I* directed further investigation, in the form of a second election, into the relationship between the employees, the union, the petitioner, the department and the employer; it did not fix the legal relationship between the parties. *State - Ecology I* did not certify (or decertify) any party as the exclusive bargaining representative of the petitioned-for employees, and was not a final ruling of the election process.

The *Renton* decision provides Commission staff with clear and precise guidance that a direction of election may not be appealed at the time it is issued. Any petition for judicial review of a direction of election, rather than the certification of an election, is premature, and Commission staff need not suspend processing of a representation case based upon similar filings.

ISSUE 2: THE BLOCKING CHARGE RULE

Decision Whether to Invoke Blocking Charge Rule Not Appealable

WAC 391-25-390 vests the Executive Director with decision making authority in representation cases. That rule states in part:

> **Proceedings before the executive director.** (1) The executive director may proceed upon the record, after submission of briefs or after hearing, as may be appropriate.
>
> (a) The executive director shall determine whether a question concerning representation exists, and shall issue a direction of election, dismiss the petition or make other disposition of the matter.
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> . . .
>
> (3) *A direction of election and other rulings in the proceedings up to the issuance of a tally are interim orders, and may only be appealed to the commission by objections under WAC 391-25-590 after the election.* An exception is made for rulings on whether the employer or

> employees are subject to the jurisdiction of the commission, which may be appealed under WAC 391-25-660.
>
> (4) Unless appealed to the commission under WAC 391-25-660, a decision issued under this section shall be the final order of the agency, with the same force and effect as if issued by the commission.

(emphasis added). The standard set forth in WAC 391-25-390(3) limiting appeals of "all other rulings" until the issuance of a tally of election is analogous with the standard limiting judicial review of interim orders until a final order has been issued as described in *Renton School District*.[3] Both standards limit appellate review to a time in the proceedings when a determination has been made that fixes the rights of the parties. By strictly enforcing WAC 391-25-390(3), the Commission discourages piecemeal appeals that would unnecessarily delay the processing of a representation case, reduces the potential for abuse of the appellate process through unnecessary appeals, and protects the right of employees to select or reject an exclusive bargaining representative in a timely manner.

Application of the Blocking Charge Rule is Discretionary

WAC 391-25-370 provides the mechanism for the Executive Director to consider suspending the processing of a representation case based upon a related unfair labor practice. That rule provides, in part:

> (1) The executive director may suspend the processing of a representation petition under this chapter pending the outcome of related unfair labor practice proceedings, where:

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[3] Similarly, WAC 391-45-350 limits appeals in unfair labor practice cases to any order issued under WAC 391-45-100(1) or WAC 391-45-310, and like the representation rules, all previous rulings up to the issuance of the order may be appealed as limited by WAC 391-25-350.

> (a) A complaint charging unfair labor practices is filed under the provisions of chapter 391-45 WAC; and
> (b) It appears that the facts as alleged may constitute an unfair labor practice; and
> (c) Such unfair labor practice could improperly affect the outcome of a representation election.

All three components of WAC 391-25-370(1) are necessary before application of the rule is even considered. Even if all three components of the rule are met, application of the rule is still within the discretion of the Executive Director.[4]

The Commission vested the blocking charge rule authority with the Executive Director because the Executive Director, and not the Commission, has the ability to analyze representation cases "on the ground as they develop" and quickly determine whether or not the alleged unfair labor practice could improperly affect the outcome of the representation election.

In most instances where the blocking charge rule is applied, the Executive Director informs the parties that the unfair labor practice complaint alleges a claim that could affect the outcome of the representation election, that the representation proceedings will be suspended until resolution of the unfair labor practice complaint, and then invites the complainant to waive application of the blocking charge rule, if it so desires. *See* WAC 391-25-370(2). In most cases, extensive comment regarding the application of the blocking charge rule is unnecessary because the unfair labor practice complaint speaks for itself. *But cf. Community College District 13*, Decision 8117 (PSRA, 2003)(application of blocking

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[4] *See, e.g., Milton v. Waldt*, 30 Wn. App. 525 (1981)(use of the term 'may' in a statute is permissive only and operates to confer discretion).

charge rule explained where some, but not all, complained-of actions were dismissed, and complainant given an opportunity to appeal dismissal of specific parts of its complaint).

Although the Commission instructed the Executive Director to use discretion when invoking the blocking charge, WAC 391-25-370(1)(b) still requires that the unfair labor practice has the possibility of affecting the outcome of the representation election.[5] Despite the fact that the blocking charge rule occurs under the Commission's representation rules, Chapter 391-25 WAC, application of that rule is still predicated upon the issuance of a preliminary ruling made under WAC 391-45-110. Therefore, in normal cases the Executive Director or his designee must utilize the WAC 391-45-110 preliminary ruling process to make a proper determination of those facts and to prevent meritless complaints from delaying a representation election.

Ruling on Blocking Charge is an Interlocutory Order

Like a direction of election, the blocking charge rule does not deny a right, impose an obligation or fix the legal relationship between the parties. The Executive Director's decision not to invoke the blocking charge rule is interlocutory in nature, and is not the type of order that may be appealed to the Commission until an appropriate order described within WAC 391-25-390(3) has been issued. *See also Lewis County v. Public Employment Relations Commission* (an administrative order is not a final order where it is a mere preliminary step in the administrative process).

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[5] WAC 391-45-110 permits the Executive Director to designate a staff member to make preliminary rulings and issue deficiency notices.

Collateral Estoppel Prevents Relitigation of Issues Already Decided

In this case, having relieved the Executive Director of his WAC 391-45-110 responsibilities, assuming that the facts alleged within the union's objections are true and provable, and examining this case now properly before the Commission, we conclude that application of the blocking charge rule was not proper in this case.[6]

Collateral estoppel, also known as issue preclusion, bars relitigation of an issue or issues in a subsequent proceeding involving the same parties. *Christiansen v. Grant County Public Hospital District 1*, 152 Wn.2d 299 (2004)(citing Karl B. Tegland, WASHINGTON PRACTICE, Civil Procedure, sec. 35.32 (1st ed. 2003). Collateral estoppel is distinguished from claim preclusion "'in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of *issues* between the parties, even though a different claim or cause of action is asserted.'" *Christensen*, 152 Wn.2d at 306 (quoting *Rains v. State*, 100 Wn.2d 660, 665 (1983)(emphasis in original).

In *Reninger v. Department of Corrections*, 134 Wn.2d 437, 449 (1998), the Supreme Court for the State of Washington outlined four factors that must be established for collateral estoppel to apply:

1. The issue decided in the earlier proceeding must be identical to the issue presented in the later proceeding;

2. The earlier proceeding ended in a judgment on the merits;

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[6] Our conclusion that application of WAC 391-25-370 was inappropriate is based solely upon the union's failure to state a cause of action, and not upon WAC 391-25-370(3).

3. The party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding;

4. Application of collateral estoppel does not work an injustice on the party against whom it is applied.

We apply those four factors here, and find that the union's unfair labor practice complaint, Case 19796-U-05-5016, seeks to relitigate the employer's failure to supply an accurate list of employees under unfair labor practice case rules, Chapter 391-45 WAC.

1. Issues Identical to Previously Raised Issues: On May 31, 2005, the petitioner filed election objections alleging the employer's failure to provide Commission staff with an accurate list of employees eligible to vote prior to the first election prevented certain employee ballots from being counted and improperly affected the outcome of the election. The petitioner essentially argued the department's inaccurate list interfered with the employees' ability to vote in the first election, and asked that the disputed ballots be counted. The central issue in Case 19796-U-05-5016 is whether the employer interfered with protected employee rights under Chapter 41.80 RCW when the department failed to provide an accurate list for the first representation election. The issues to be decided in Case 19796-U-05-5016 and the issues already decided in *State - Ecology I* are identical.

2. Previous Decisions Ended With a Judgment on the Merits: *State - Ecology I* vacated the original election results and ordered a new election. In admonishing the department for its failure to provide an accurate list, we stated:

> The department's attempt to dismiss its actions as "coding errors" does not justify or excuse its evident

> lack of attention to detail in a process that is critical to proper implementation of the Personnel System Reform Act of 2002, and resulted in wasted effort for the Commission, for the union, for the decertification petitioner, and even for the department itself.

We thus concluded that the employer's failure to provide an accurate list was central to our findings and order. The issue presented by Case 19796-U-05-5016 has already been finally decided on its merits by our previous decision.[7]

3. Union was a Party to the Previous Proceeding: On March 31, 2005, the union filed a request to intervene in the processing of Case 19318-E-05-3046. That request was granted, and since that date the union has been a party to these related proceeding.

4. Application of Collateral Estoppel Does Not Create Injustice: The collateral estoppel doctrine is generally concerned with protecting procedural justice, not substantive irregularities. *Christensen*, 152 Wn.2d at 309 (citing *Thompson v. Department of Licensing*, 138 Wn.2d 783, 795-99 (1999)). This standard is consistent with the requirement that the party against whom the doctrine is to be asserted must have had a full and fair opportunity to litigate the issue in the first forum. *Christensen*, 138 Wn.2d at 309. Application of the collateral estoppel doctrine may be improper where the issue is first determined after an informal, expedited hearing with relaxed evidentiary standards. *Christensen*, 152 Wn.2d at 309 (citing *State v. Vasquez*, 148 Wn.2d 303, 309 (2002)). Disparity of relief may also be considered if it can be

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[7] The union filed a motion for reconsideration of Decision 9034 under RCW 34.05.470. In *State - Ecology II*, we denied that request and stressed that the record supported our previous decision, and that the precedents cited by the union were inapplicable to the instant case.

shown that a party would be unlikely to have vigorously litigated crucial issues in the first forum and so it would be unfair to preclude re-litigation of the issues in the second forum. *Christensen*, 152 Wn.2d at 309 (citing *Reninger*, 134 Wn.2d at 453).

Here, it would not create an injustice to apply the collateral estoppel doctrine to Case 19796-U-05-5016 based upon our previous holdings in *State - Ecology I* and *State - Ecology II*. The union had a full and fair opportunity to argue its position before this Commission, and the record demonstrates that the union vigorously defended the outcome of the first election.

In reaching our conclusion in *State - Ecology I*, we declined to direct the holding of a formal hearing because one was not necessary. When asked to respond to the petitioner's May 31, 2005, election objections, the parties' responses, taken as a whole, indicated that there were no questions of material fact at issue, and no hearing was required.[8] It was therefore appropriate for *State - Ecology I* to be decided on summary judgment.

In *State - Ecology II*, we declined to consider the union's motion for reconsideration of our previous ruling in the case. In reaching our conclusion, we noted the record supported our original decision, and none of the cases cited by the union to support reconsideration were factually related to the present case. Taken as a whole, the union had a fair opportunity to vigorously litigate the previous decision.

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[8] WAC 391-25-630(1) permits the Commission to issue summary judgment on the matter if the objections and any responses indicate there is no genuine issue as to any material fact.

Union's Complaint Dismissed Based Upon Collateral Estoppel

The record supports our conclusion that the issues presented in *State - Ecology I* are identical to the issues presented in Case 19796-U-05-5016, and in *State - Ecology I* we already answered those issues and ordered postings based upon election objections brought forth by the petitioner. If we allowed the union's complaint to go forward, the union could simply rely upon the factual and legal conclusions contained within *State - Ecology I* that the department provided an inaccurate list as proof that the department committed an unfair labor practice consistent with the union's complaint. That would require us to find the department twice accountable for its mistakes, an outcome that the collateral estoppel doctrine is designed to prevent.

When we ordered the new election notices to be consistent with the National Labor Relations Board's *Lufkin Rule, Co.*, 147 NLRB 341 (1964) decision, we did so to inform employees of the reasons why a new election was being conducted. By informing employees of the Commission's reasoning, we essentially applied the "posting of notices" component of our unfair labor practices remedies onto a representation election. Therefore, there is no disparity of relief that would prevent application of collateral estoppel.

ISSUE 3: UNION REQUEST TO IMPOUND BALLOTS

Commission Authorized to Conduct Appropriate Elections

RCW 41.80.050 provides a statutory right for state civil service employees to select an exclusive bargaining representative of their own choosing. RCW 41.80.070 authorizes this Commission to use its discretion as to the methodology for determining questions concerning representation for those employees. RCW 41.80.080 makes the conduct of representation elections a state function, impartially administered by the Commission. The employer and union

participating in the proceedings have a voice, but no vote, in the representation election process. *Tacoma School District*, Decision 4216 (PECB, 1992).

To facilitate the processing of representation elections, the Commission adopted WAC 391-25-430 to specify the requirements for giving the eligible employees notice of an impending representation election. WAC 391-25-430 states:

> **Notice of election.** When an election is to be conducted, the agency shall furnish the employer with appropriate notices, and the employer shall post them in conspicuous places on its premises where notices to affected employees are usually posted. The notice shall contain:
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> (1) The description of the bargaining unit or voting group(s) in which the election is to be conducted.
>
> (2) *The deadline for return of mail ballots or the date(s), hours and polling place(s) for an on-site election.*
>
> (3) The cut-off date, if any, or other criteria to be applied in establishing eligibility to vote in the election, including that the eligible employees are limited to those who continue to be employed within the bargaining unit on the day of the tally.
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> (4) A statement of the purpose of the election and the question to be voted upon or a sample ballot.
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> Notices of the election shall be posted for at least seven days, and shall remain posted until a tally of ballots has been issued. The day of posting shall be counted, but the day on which the polls are opened for an on-site election shall not be counted.

(emphasis added). Election agreements bind the parties that execute them. *See Barcelona Shoe Corp.*, 171 NLRB 1333 (1968); *see also Franklin Pierce School District*, Decision 3371-A (PECB, 1991). Election agreements may be set aside only in limited circumstances. *Community College District 5*, Decision 448 (CCOL, 1978); *see also T & L Leasing*, 318 NLRB 324 (1995). A party to an election agreement is entitled to expect that the other parties and

Commission staff will diligently uphold the provisions of the agreement that are consistent with Commission policy and are calculated to promote fairness in the election. *See Daylight Grocery Co. v. NLRB*, 678 F.2d 905 (11th Cir. 1982). In the absence of highly unusual circumstances or agreement of all of the parties, the Commission enforces election agreements and will conduct a representation election according to the parties' agreed-upon terms.

Election Results Were Conclusive

In this case, ballots were sent to employees September 27, 2005, and the notices of election informed employees that the tally of election would be October 20, 2005. As early as October 6, 2005 (nine days after the ballots were mailed to employees), the Commission staff learned that four bargaining unit employees[9] were in Mississippi to assist in the Hurricane Katrina relief effort.[10] It appears from the record that Commission staff sent a second set of ballots for those four individuals to an address in Mississippi provided to Commission staff by the department. Upon learning the four employees were moved to a second location in Mississippi, Commission staff sent a third set of ballots to the employees. None of the four individuals returned any of the ballots sent to them by the close of business, October 19, 2005.

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[9] The union alleges that four employees were sent to Mississippi, while the petitioner asserts five employees were sent. Because we are reviewing the union's objections on summary judgment, we assume the union's allegations are factually correct.

[10] In its objections, the union expressed concern that Commission staff did not inform the union about the status of the four employees when Commission staff learned of the change in location. An employer owns the responsibility for timely notifying all parties of potential changes that may impact an employee's ability to vote in these matters, and no party should rely upon Commission staff to act as a messenger service.

On October 20, 2005, before the tally of ballots, the union requested that the ballots be impounded to allow the four bargaining unit employees a meaningful opportunity to vote. Commission staff denied this request and continued with the tally. The union now asserts that Commission staff committed reversible error by conducting the tally over its objections. Although we recognize that one of the Commission's paramount duties is to protect the rights of all eligible employees to vote in a representation election, we disagree with the union that Commission staff committed reversible error by counting the ballots.

The union asserts that Commission staff have previously suspended elections to allow employees an opportunity to vote. It is true that Commission staff accommodates the parties' wishes when scheduling elections. For example, Commission staff is often asked to delay an election until the start of the school year in cases involving school district employees. Delaying an election would also be prudent if a substantial number of employees were routinely away from their place of residence for extended periods, such as during fire season. Those situations are factually different from this one, because both parties agreed to the delay, and the ballots had not even been sent to the employees at the time of the request.

Even if one or more of the four employees had returned ballots, those four votes would not have affected the outcome of the election. The October 20, 2005, tally of ballots demonstrates that 40 employees, or 64.5 percent of the valid ballots cast and more than 50 percent of the total unit, voted for no representation. Only 22 employees, or 35.5 percent of the valid ballots cast and 27.8 percent of the total unit, voted for union representation. Assuming without argument that all four individuals voted for the

union, that would only raise the vote total for the union to 26 votes, or 39.4 percent of the valid ballots cast.[11]

NOW, THEREFORE, it is

ORDERED

1. The objections filed by the Washington Federation of State Employees in Case 19318-E-05-3046 are DENIED as insufficient on their face.

2. The complaint filed by the Washington Federation of State Employees in Case 19796-U-05-5016 is DISMISSED for failing to state a cause of action.

3. Case 19318-E-05-3016 is remanded to the Executive Director for issuance of the appropriate certification.

Issued at Olympia, Washington, the 29th day of November, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner

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[11] Even if five employees (as the petitioner asserts) had been sent to Mississippi, that would not have affected the outcome of the election.