

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
)
WASHINGTON STATE COUNCIL)
OF COUNTY AND CITY EMPLOYEES,)
AFSCME, AFL-CIO) CASE 13667-E-98-2288
)
Involving certain employees of:) DECISION 6285 - PECB
)
CLALLAM COUNTY PARKS AND)
RECREATION DISTRICT 1, d/b/a) ORDER DISMISSING
Sequim Aquatic Recreation Center) ELECTION OBJECTIONS
)
)
_____)

Lane Powell Spears Lubersky, LLP, by C. Akin Blitz,
Attorney at Law, appeared on behalf of the employer.

J. Pat Thompson, Director of Legislation/Political
Action, appeared on behalf of the petitioner.

Charles E. Lamb, appeared pro se.

Sean Saffold, appeared pro se.

This case comes before the Commission on election objections filed
by Clallam County Parks and Recreation District 1 (employer), by
eligible voter Charles E. Lamb, and by eligible voter Sean Saffold.

BACKGROUND

On January 26, 1998, the Washington State Council of County and
City Employees, AFSCME, AFL-CIO (WSCCCE), filed a petition for
investigation of question concerning representation with the Public
Employment Relations Commission under Chapter 391-25 WAC. WSCCCE

sought certification as exclusive bargaining representative of a bargaining unit consisting of approximately 32 employees and described as "All full-time and regular part-time employees excluding confidential employees" of the employer. The petition identified a "Susan Jacobs" as the contact person for the employer.

Responding to a request made by the Commission staff under WAC 391-25-130, the employer's attorney filed a letter on February 17, 1998 which: (1) Stated that the notices provided by the Commission under WAC 391-25-140 had been posted; (2) enclosed a list of names, addresses, titles, hire dates and work hours of 38 persons; and (3) resisted inclusion of several of those listed in any bargaining unit, and asserted there were only 16 eligible voters. The enclosure listed "Sue A. Jacobs" with the title of director, but her status was not addressed in the text of the letter.

An investigation conference was held on March 3, 1998, by telephone conference call. The employer and WSCCCE undertook responsibility to have further discussion of the matter.

By a letter dated March 10, 1998 and filed on March 13, 1998, counsel for the employer submitted a stipulated eligibility list containing names and addresses (but not titles) of 39 persons. On close inspection, we now note that Sue A. Jacobs was listed as an eligible voter.

A statement of results of the investigation conference was issued on March 16, 1998. It reflected the following stipulations:

1. The following matters were resolved ...:
 - ...
 - f. The description of an appropriate bargaining unit:

All full-time and regular part-time employees of the Clallam County Parks and Recreation District, excluding supervisors, confidential employees, and all other employees.

- g. The correct eligibility list is the list dated March 10, 1998 prepared by the employer.

The eligibility cut-off date is March 9, 1998 and the date of the election, April 14, 1998.

2. The parties are willing to participate in a mail ballot election in order to certify a bargaining representative. Accordingly, the **mail ballots will be mailed March 30, 1998 and counted at 3:00 p.m. on April 14, 1998.**

[Emphasis by **bold** in original.]

The list attached to the statement of results contained the 39 names filed by the employer on March 13th, including the names of Sue A. Jacobs, Charles Lamb, Aric Miller, Lois Perry, and Sam Saffold. No objections were filed within the time period specified in the statement of results.

The mail ballot procedure set forth in WAC 391-25-470 was utilized. Notices were transmitted to the employer for posting, under cover of a letter which included:

The ballots will be counted at 3:00 p.m. on April 14, 1998, at Olympia, Washington. **Each party is entitled to have an observer at the tally.**

[Emphasis by **bold** supplied.]

That letter was addressed to Susan Jacobs. The Commission staff received and acted upon address changes supplied by Jacobs for Aric

Miller and two other eligible voters, but no challenges to voter eligibility were communicated to the Commission staff prior to the time set for the tally of ballots.

The ballots were counted in the Commission's Olympia office at 3:00 p.m. on April 14, 1998. Neither party exercised its right to have an observer present at that time, and none of the ballots were challenged. The results were as follows:

APPROXIMATE NUMBER OF ELIGIBLE VOTERS	<u>39</u>
VOID BALLOTS	<u>0</u>
VOTES CAST FOR <u>WSCCCE</u>	<u>17</u>
VOTES CAST FOR <u>NO REPRESENTATION</u>	<u>16</u>
VALID BALLOTS COUNTED	<u>33</u>
CHALLENGED BALLOTS CAST	<u>0</u>
VALID BALLOTS COUNTED PLUS CHALLENGED BALLOTS	<u>33</u>
NUMBER OF VALID BALLOTS NEEDED TO DETERMINE ELECTION.	<u>17</u>

A tally of ballots was issued under WAC 391-25-550, and was served on the employer and union on April 14, 1998.

After the ballots were counted on April 14th and over the course of the next two days, the Commission staff received a number of telephone calls from the parties' representatives and news media representatives, inquiring about the election results. On April 16, 1998, the Executive Director sent a letter to the parties' representatives, as follows:

We received a phone call today from Sue Jacobs of the Clallam County Parks and Recreation District, stating that she left a message on or about April 8, 1998, by voice mail to notify the Commission that Lois Perry had resigned and Aric Miller was terminated. She later telephoned to say that this may have occurred at an unspecified time on April 14, 1998. She acknowledged that she did not follow up with a confirming letter or fax, and apparently did not notify the union.

No such message reached Representation Coordinator Sally Iverson, and the individuals were not treated as "challenged voters" when the ballots were counted. We have checked all voice mail records in the agency and all staff members who might have received such a message. No one recalls ever receiving the message.

A copy of that letter was sent to Sue Jacobs at the employer's office.

THE POST-TALLY FILINGS

On April 21, 1998, the employer's attorney filed and served objections citing WAC 391-25-590(1)(a).

On April 23, 1998, eligible voter Charles E. Lamb filed and served objections citing WAC 391-25-590.

On May 7, 1998, eligible voter Sean Saffold filed a letter claiming he did not receive ballot materials. The letter was addressed to the Commission's Representation Coordinator, and did not indicate that copies were sent to any other parties.

On May 14, 1998, the employer's attorney filed and served a letter stating he had "just learned from Sue Jacobs that ... Sean Saffold ... did not receive a ballot".

On May 15, 1998, Sue Jacobs filed a letter with the Commission, enclosing a copy of the employer's telephone bill for the April 8, 1998 to May 1, 1998 period. There was no indication that copies of that letter and enclosure were sent to the WSCCCE representative, or even to the employer's attorney.

DISCUSSION

The procedures for appealing the results of a representation election conducted by the Commission are as follows:

WAC 391-25-590 FILING AND SERVICE OF OBJECTIONS. **Objections must be filed within seven days after the tally has been served** under WAC 391-25-410 or under WAC 391-25-550.

(1) Objections filed by the petitioner, the employer or any intervenor may consist of:

(a) Designation of specific conduct improperly affecting the results of the election; and/or

(b) Designation of one or more previous rulings or directions in the matter which the objecting party desires to have reviewed by the commission.

(2) **Objections filed by individual employees are limited to conduct or procedures which prevented them from casting a ballot.**

(3) Objections shall contain, in separate numbered paragraphs, statements of the specific conduct, if any, alleged to have improperly affected the results of the election and, in separate numbered paragraphs, the specific rulings or directions, if any, which the party filing the objections desires to have reviewed.

(4) The original and three copies of the objections shall be filed with the commission at its Olympia office, and the party filing the objections shall serve a copy on each of the other parties to the proceedings. Objections must be timely filed, whether or not challenged ballots are sufficient in number to affect the results of the election.

[Emphasis by **bold** supplied.]

All objections are decided by the Commission, but the procedure for doing so varies from case to case. The first questions before the Commission are whether: (1) The objections are properly before it; (2) the filing party has standing to object; and (3) the objections state claims for relief available under WAC 391-25-590.

The Objections Filed by the Employer

Eligibility Challenges Untimely -

The objections filed by the employer on April 21, 1998, were limited to the following:

2. The tally for election ballots shows that 16 votes were cast for no representation; and that 17 votes were cast for WSCCCE.
 - a. Aric Miller, was warned repeatedly for missing work and tardiness. In accordance with those warnings, his employment was terminated on April 6, 1998.
 - b. Lois Perry submitted to the employer a voluntary, written resignation on April 8, 1998. In writing, she identified her last day of work as April 10, 1998.
3. The Notice of the Election, prepared by PERC and posted in accordance with PERC requirements stated clearly:

"Employees will be eligible to vote if they were employed within the bargaining unit on March 9, 1998 and still eligible on the date of the tally."
4. Perry and/or Miller knew or should have known that each of them was ineligible to cast ballots. One or both of them did so.
5. The employer objects to the ballots of Perry and Miller due to their ineligibility and the impropriety of their conduct in submitting a ballot to PERC.
6. A single ballot is material to the outcome of this election.
7. This objection is founded on the bedrock principle that a majority of eligible voters have a right to determine the outcome of an election. PERC did not notify parties that failure to attend a ballot opening could constitute a waiver of a right to object or that mail ballot objec-

tions must be anticipated or that an employer must investigate and determine in advance if any mailed in ballots in fact were sent from an ineligible voter. PERC procedures when utilizing a mail-in ballot do not safeguard voter accountability nor do the procedures take into account changes which can occur which alter voter eligibility. Thus, no procedure exists which is calculated to avoid an outcome such as has occurred in this election. Nonetheless, the outcome violates the principles the Commission is charged with upholding.

8. In order to uphold employee rights relating to self-determination, the employer requests that this election be set aside and that another mail ballot election be held under such voter eligibility requirements as PERC and the parties may determine appropriate.

Significantly, those objections do not claim the employer communicated a challenge to the eligibility of Miller and/or Perry to the Commission staff before the ballots were counted.

RCW 41.56.070 and the Commission's rules implement a secret ballot election procedure. WAC 391-25-510 sets forth the procedure for challenging the eligibility of any person seeking to cast a ballot in a representation election:

WAC 391-25-510 CHALLENGED BALLOTS. Any observer or the election officer may challenge, for good cause, the eligibility of any person seeking to cast a ballot in the election. No person shall be denied the right to cast a challenged ballot. The election officer shall not have authority to resolve challenges, and the ballot of the challenged voter shall be placed in a sealed envelope identifying the voter and the observer or election officer challenging the eligibility of the voter. The ballot shall not be opened until

the challenge is resolved. Any party may withdraw a challenge previously made and, unless the eligibility of the voter is challenged by another party or by the election officer, the challenge shall thereby be resolved. If the challenged ballots are insufficient in number to affect the results of the election, they shall be impounded and no ruling shall be made thereon. If the challenged ballots are sufficient in number to affect the results of the election, the election officer shall ascertain the position of each party as to each challenged ballot and shall include the information in his or her report. If challenges raise material questions of fact which cannot be resolved without a hearing, there shall be issued and served on each of the parties a notice of hearing before a hearing officer. The rules relating to the conduct of hearings on petitions shall govern hearings on challenges, except that the scope of the hearing shall be limited to matters relevant to the disposition of the challenged ballots. The executive director shall have authority to rule on all challenges except those made by a party to preserve an objection to a ruling previously made by the executive director as to the eligibility of the challenged voter. If challenges of a type excepted from the authority of the executive director are sufficient in number to affect the results of the election, the matter shall be transferred to the commission for its determination under the provisions of WAC 391-25-670.

[Emphasis by **bold** supplied.]

That rule has been in effect since 1980, and has been in its present form since 1996. It dates back to rules previously in effect in Chapter 391-21 WAC (1978) and Chapter 391-20 WAC (1976), and is also similar to the rules and procedures of the National Labor Relations Board. There is no basis for the employer's claim or implication that those procedures are non-existent or unfamiliar.

As anyone familiar with the American tradition of secret balloting should readily understand, there is no way to identify or pull back the ballot of any voter in a representation election after the ballot is cast. Thus, any challenge must be made *before* the ballot is deposited in the official ballot box:

- At an on-site election, the challenge must be communicated to the election officer before the voter presents himself/herself at the polls, or must be made by an observer when the voter presents himself/herself at the polls, so that the voter can be given instructions on how to place their marked ballot in a challenged ballot envelope.
- In a mail ballot election, the challenge must be communicated to the election officer or made by an observer prior to the opening of the return envelopes. The return address stickers affixed by the Commission to the return envelopes represent the voters "presenting themselves" at the tally, and are used to determine eligibility before the ballots are removed from the return envelopes and mixed in the ballot box. If a challenge is made, that will be written on the return envelope and it will remain unopened.

The employer did not exercise its right to have an observer present at the tally or to communicate a timely challenge to the eligibility of Miller and/or Perry. As the employer did not use the procedure in WAC 391-25-510 to challenge ballots, it cannot now use objections under WAC 391-25-590 to overturn the election results.

Allegations of Voter Misconduct -

The employer implies that Miller and/or Perry engaged in some misconduct, and spoiled the election procedure, if they sent in

ballots.¹ We find that argument to be meritless and (under the specific circumstances of this case) possibly disingenuous.

Ballot materials were sent to all of the individuals listed as eligible voters on the stipulated eligibility list supplied by the employer's attorney. The employer even supplied an updated address for Miller after the ballots were issued, so that materials returned by postal authorities as undeliverable could be re-mailed to him. The agency staff has no independent source of information about the comings and goings of employees, and must rely upon the parties and their observers to effect last-minute changes of eligibility.

The employer's argument glosses over the fact that its director cast a ballot in the election,² even though she surely should have known that she was ineligible for inclusion in any bargaining unit. Chapter 41.56 RCW contains the following provisions pertinent to this question:

RCW 41.56.030 DEFINITIONS. As used in this chapter: (1) "**Public employer**" means any **officer**, board, commission, council, or other person or body **acting on behalf of any public body** governed by this chapter, or any subdivision of such public body. ...

¹ The Commission does not disclose whether either or both of the individuals cast ballots, because employees have a right to abstain from voting as well as a right to vote in representation elections.

² This fact was communicated to the Executive Director by the employer's attorney in a telephone conversation after the employer filed its objections, but the portion of those objections alleging that ballots cast by Miller and/or Perry spoiled the election have not been withdrawn by the employer.

(2) **"Public employee" means any employee of a public employer except** any person (a) elected by popular vote, or (b) appointed to office pursuant to statute, ordinance or resolution for a specified term of office by the executive head or body of the public employer, or (c) whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to **the executive head or body of the applicable bargaining unit**, or any person elected by popular vote or appointed to office pursuant to statute, ordinance or resolution for a specified term of office by the executive head or body of the public employer, ...

Had the "Sue A. Jacobs" listed without title on the March 13 list been recognized before the tally of ballots as being one-and-the-same with the "Susan Jacobs" now known to be the employer's director, the agency staff could properly have challenged her ballot to protect the sanctity of the election process.³

This employer will not be heard to now argue that Miller and/or Perry spoiled the election by mailing in a ballot they were not eligible to cast, where its executive head of the bargaining unit engaged in the precisely the same conduct.

³ Chapter 41.56 RCW is patterned after the National Labor Relations Act, and the legislative history of the federal statute is filled with arguments about the evils of employer involvement in unions and the collective bargaining rights of employees. See, generally, Washington State Patrol, Decision 2900 (PECB, 1987). RCW 41.56.140(2) thus outlaws employer involvement in internal union affairs, and the Commission has excluded employer domination from its representation processes. See, Kitsap County, Decision 2116 (PECB, 1984), where a representation petition was dismissed upon finding it had been filed by a supervisor, and Quillayute Valley School District, Decision 2809-A (PECB, 1988), where an employer-dominated group was excluded from an election ballot.

Claim of Lost Ballot -

The letter filed by the employer's attorney on May 14, 1998, reflects the claim filed separately by the employee involved, as discussed below.

The Commission strictly applies the time requirements of WAC 391-25-590. See, Colville School District, Decision 5319-B (PECB, 1996). Here, the tally of ballots was issued on Tuesday, April 14, 1998, so any objections had to be filed, in writing, by the close of business on Tuesday, April 21, 1998. Even accepting that the employer's attorney only learned of the allegations recently, the letter filed on May 14th is untimely as an employer objection.

Claim of Timely Challenges -

The letter filed by Jacobs on May 15, 1998, asserts that she actually left voicemail messages for the Commission staff on April 14th. The objection is both untimely and unfounded:

- Even though Jacobs made similar claims in telephone calls on April 16th, this claim was not advanced in writing until May 15, 1998. It was clearly untimely under WAC 391-25-590.
- The telephone bill enclosed by Jacobs with her letter does not show any calls to Olympia telephone numbers on April 8th or 9th, as she earlier had claimed. The only calls indicated to Olympia telephone numbers prior to 3:00 p.m. on April 14th were to numbers which, upon investigation, are not assigned to the Commission.⁴ Even taking the enclosed telephone bill as an offer of proof, the only calls to the Commission were:

⁴ In fact, they are telephone numbers for the Environmental Health Section of the Department of Health.

April 14 at 3:43 p.m. to (360)753-3444,⁵
April 14 at 4:05 p.m. to (360)753-3444,
April 14 at 4:08 p.m. to (360)664-3135,⁶
April 16 at 11:05 a.m. to (360)664-3135,
April 16 at 2:56 p.m. to (360)664-3135, and
April 16 at 3:25 p.m. to (360)664-3135.

Thus, all of the calls to the Commission that are reflected on the telephone bill were placed after the ballots were counted, and do not support a claim of timely challenges.

For the reasons indicated, the material filed on May 15, 1998 also fails to state a cause of action.

The Objections Filed by Charles E. Lamb

On April 23, 1998, Charles Lamb filed a letter complaining about the scope and description of the bargaining unit agreed upon by the employer and WSCCCE, the eligibility list stipulated and submitted by the employer and WSCCCE, and the campaign practices used by the WSCCCE.

Lamb's objections were filed beyond the seven-day period allowed by WAC 391-25-590. Thus, Lamb's objections must be dismissed as untimely.

In addition, WAC 391-25-590(2) limits objections filed by individual employees to conduct or procedures which prevented them from casting a ballot. Lamb does not claim he was prevented from

⁵ 753-3444 is the Commission's general information number, as specified on the agency letterhead.

⁶ 664-3135 is the direct telephone number of Representation Coordinator Sally Iverson, as specified on the letter transmitting the election notices.

casting a ballot. Thus, Lamb's objections would have to be dismissed for lack of standing, even if they were timely.

The Objections Filed by Sean Saffold

On May 7, 1998, Sean Saffold filed a letter stating that he never received a ballot, and so was unable to vote. Saffold requested that a revote be taken, or in the alternative that he be sent a ballot and allowed to vote late.

Saffold's letter was filed long after the seven day period for filing objections stated in WAC 391-25-590. Saffold's objections must be dismissed as untimely.⁷

NOW, THEREFORE, it is

ORDERED

1. The objections filed by the employer are DISMISSED.
2. The objections filed by Charles E. Lamb are DISMISSED.

⁷ It appears that Saffold's objections would also be subject to dismissal for lack of service on other parties, as required by both WAC 391-25-590 and WAC 391-08-120. The letter filed by the employer's attorney on May 14th is based on what had been learned from Jacobs, rather than by reference to Saffold's letter. The Commission staff received an inquiry from the WSCCCE on May 19, 1998, in which the WSCCCE indicated it was not familiar with the claim covered by Saffold's letter to the Commission. There is no need to pursue a "proof of service" inquiry in this case, however, since the objection was, and unalterably remains, untimely.

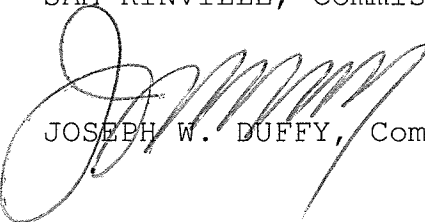
3. The objections filed by Sean Saffold are DISMISSED.
4. This case is remanded to the Executive Director for issuance of an appropriate certification.

Issued at Olympia, Washington, on the 12th day of June, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARILYN GLENN SAYAN, Chairperson


SAM KINVILLE, Commissioner


JOSEPH W. DUFFY, Commissioner