

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
UNITED FOOD AND COMMERCIAL)	CASE 14453-E-99-2413
WORKERS UNION, LOCAL 381)	
)	
Involving certain employees of:)	DECISION 6791 - PECB
)	
CLALLAM COUNTY PUBLIC HEALTH)	
SERVICES DISTRICT 2 (OLYMPIC)	ORDER DISMISSING
HEALTH CARE))	ELECTION OBJECTIONS
)	
)	

Davis Wright Tremaine, LLP, by Clifton L. Elliott, Attorney at Law, and Seema Nanda, Attorney at Law, appeared for the employer.

Paul Festag, Director of Organizing, appeared for the union.

This case comes before the Commission on objections to an election filed by Clallam County Public Health Services District 2 d/b/a Olympic Health Care. We dismiss the objections.

BACKGROUND

On March 16, 1999, United Food and Commercial Workers Union, Local 381 (union) filed a petition for investigation of question concerning representation under Chapter 391-25 WAC, seeking to represent nursing assistants, aides, cooks, activities staff, and licensed practical nurses at Olympic Health Care, a facility operated by Clallam County Public Health Services District 2 (employer) at Port Angeles, Washington. An investigation confer-

ence was held on April 21, 1999, at which time the parties agreed to the description of an appropriate bargaining unit consisting of non-professional employees. A Statement of Results of Investigation Conference was issued April 22, 1999, stating that ballots would be mailed May 5, 1999, and counted May 19, 1999. At the time of the investigation conference, no matters remained in dispute between the parties.

The union acknowledges that it sent a notice to employees, on April 27, 1999, which included the following statements:

Your PERC Mail-in Ballot Election is May 5th through May 19th ... May 19th, the day your ballots need to be into the Public Employment Relations Commission, is the day you take your place in the business world as equals with the administration of OHC with a vote of UNION, YES! That's what this election means. It has nothing to do with liking or disliking anyone. It is about using your resources and being astute. The Federal and State Governments give you the right to develop a business relationship with your employer on the same grounds they have developed one with you and the right to document it in a legal and binding **Union Contract. OHC should also be posting an Election Notice. Ask for it if you don't see it. Ask them about the guarantees they make for your future, also. That's what this election is about: Your right to guarantee your future. The ballots are secret and confidential so you can sign them at home and mail them in privately or... **Bring your ballots to the Carpenter's Hall in Port Angeles on Tuesday, May 11th at Noon or 3:30 for a Ballot Signing Meeting. ...****

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

The election was conducted by mail ballot under WAC 391-25-470. Ballots and individual notices were mailed to the voters on May 5,

1999, and notices of the election were mailed to the employer for posting on the same date.

On May 19, 1999, the employer notified the representation coordinator that it would be challenging a ballot received by the Commission.¹

When the ballots were opened on May 19, 1999, the results were as follows:

APPROXIMATE NUMBER OF ELIGIBLE VOTERS	<u>119</u>
VOID BALLOTS	<u>1</u>
VOTES CAST FOR <u>UFCW, Local 381</u>	<u>47</u>
VOTES CAST FOR <u>NO REPRESENTATION</u>	<u>23</u>
VALID BALLOTS COUNTED	<u>70</u>
CHALLENGED BALLOTS CAST	<u>1</u>
VALID BALLOTS COUNTED PLUS CHALLENGED BALLOTS	<u>71</u>
NUMBER OF VALID BALLOTS NEEDED TO DETERMINE ELECTION.	<u>36</u>

The tally of election ballots issued on May 19, 1999, indicated that the challenged ballot did not affect the outcome of the election, so that the results of the election appeared to be conclusive, favoring the union.

On May 26, 1999, the employer filed objections to the election under WAC 391-25-590, as follows:

1. On Tuesday, May 11, 1999, at noon and at 3:30 p.m., the Union held a "Ballot Signing Meeting." Employees were requested to bring their ballots to the Carpenters Hall in Port Angeles to sign their ballots.

¹ The challenged ballot, according to the employer, was not in the return envelope provided by the Commission.

2. The Union's May 5, 1999 meeting impaired PERC's ability to preserve the secrecy of employee voting.
3. The Union's meeting took place during the election period, when election speeches on the employer's time are prohibited.
4. The Union's meeting constituted coercion, intimidation, and/or the promise of benefits to eligible voters.
5. The Union encouraged employees to bring in an "OHC contract questionnaire" to the meeting at Carpenters Hall in order to determine who was in fact attending the meeting.

The employer requested the election be set aside, based on what it viewed as union conduct improperly affecting the results of the election. The parties filed briefs in support of their positions.

POSITIONS OF THE PARTIES

The employer objects to the union holding a meeting during the election period, in which employees were invited to bring their ballots to the union hall and sign their ballots. It claims that the meeting violated the "laboratory conditions" required for an election, and that the meeting specifically: Impaired the secrecy of employee voting; constituted impermissible electioneering; intimidated employees into not voting; and took place during the election period, when speeches on the employer's time are prohibited.

The union claims that there was no meeting or massed assembly of employees. Even if there had been a meeting, the union contends, it was not conducted on the employer's time. The union disputes

the employer's contentions, arguing that neither a union agent or anyone else observed any employee casting a ballot, that electioneering is not prohibited during the mail-ballot period but that even if it were, brief remarks to employees do not constitute impermissible electioneering, and that there is no evidence that Local 381's conduct reasonably intimidated employees into not voting.

DISCUSSION

Laboratory Conditions

The purpose of a representation election is to determine the uncoerced choice of bargaining unit employees concerning their representation (if any) for the purposes of collective bargaining. It has long been the policy of the Commission that elections should be conducted under "laboratory conditions". See, Tacoma School District, Decision 4216-A (PECB, 1993).

The rules on mail ballot elections and objections to elections are as follows:

WAC 391-25-470 Mail ballot election procedures--Electioneering--Objectionable conduct. The executive director shall have discretion to conduct elections by mail ballot procedures designed to preserve the secrecy of employee voting. Multiple questions, including unit determination elections, may be submitted to employees at the same time on separate ballots. A notice and ballot materials shall be mailed by the agency to each eligible voter, and no less than fourteen days shall be provided between the date on which ballot materials are mailed to eligible em-

ployees and the deadline for return of the ballots.

(1) The following prohibitions apply to assure appropriate conditions for employees to cast their ballots:

(a) The reproduction of any document purporting to suggest, either directly or indirectly, that the agency endorses a particular choice in an election is prohibited.

(b) The use of deceptive campaign practices improperly involving the commission and its processes is prohibited.

(c) The use of forged documents is prohibited.

(d) Coercion or intimidation of eligible voters, or any threat of reprisal or force or promise of benefit to eligible voters, is prohibited.

(e) Changes of the status quo concerning wages, hours or other terms and conditions of employment of employees in the bargaining unit are prohibited during the period that a petition is pending before the commission under this chapter.

(f) Misrepresentations of fact or law are prohibited. To set aside an election, a misrepresentation must:

(i) Be a substantial misrepresentation of fact or law regarding a salient issue;

(ii) Be made by a person having intimate knowledge of the subject matter, so that employees may be expected to attach added significance to the assertion;

(iii) Occurring at a time which prevents others from effectively responding; and

(iv) Reasonably viewed as having had a significant impact on the election, whether a deliberate misrepresentation or not.

(g) Election speeches on the employer's time to massed assemblies of employees are prohibited during the period beginning twenty-four hours before the scheduled date for the issuance of ballots to employees and continuing through the tally of ballots.

(2) Each party may be represented by observers of its own choosing at the tally of ballots.

(3) Violations of this rule shall be grounds for setting aside an election upon objections properly filed.

The Commission uses a case-by-case approach to decide election objections. In Lake Stevens Granite Falls Transportation Cooperative, Decision 2462 (PECB, 1986), the Commission listed factors relevant to determinations of election misconduct objections, including: The timing of the conduct, the value of any gifts, the scope of any gifts, the presence of alcohol, ties of any gifts to the election, the location of a social gathering, and whether it occurs during work time. In that case, the Commission directed a new election because of the union's conduct in violating the "laboratory conditions" requirement, and having a social gathering on the eve of the election at which free beer and pizza were served. The union also violated the laboratory conditions by presenting a \$250 gift to an eligible voter who had experienced a house fire.

Violation of Laboratory Conditions Not Alleged

No Meeting Held -

The employer contends that the Commission has prohibited far less severe conduct than is alleged here, citing Lake Stevens for that proposition. In applying the standards of Lake Stevens to this case, there is no allegation that the union provided gifts to employees, the location was away from the work site, and the alleged meeting appears to have been scheduled off work time. While the union admits the meeting was scheduled, the employer alleged no specifics about the supposed meeting, such as the content of presentations or discussions, or the number of people alleged to have attended the meeting. The employer asserts that the union violated the law by holding a meeting, but does not

provide any factual statements or arguments to support the allegation that a meeting was actually held.

The union provided a declaration from Paul Festag, which stated that the meetings were scheduled at noon and 3:30 p.m. so employees could attend the meeting when they were off work, but that no one came, so that no actual meeting took place. Festag stated:

On May 11, 1999, I was at the Carpenters Hall around 11:45 a.m. I was the only Local 381 representative present. One eligible voter showed up about 11:55 a.m. That employee had her ballot envelope already sealed when she arrived. As she entered she started to open the sealed outer envelope. I told her not to open it, but she unsealed the envelope before I finished. The outer envelope was resealed. I did not see the ballot at all, let alone how this employee voted. The employee said that she could not stay and immediately left. I walked her to her car. We spoke all together for about a minute. Nobody came to the Carpenters Hall that day.

The union's affidavit that no meeting was held was uncontested by the employer.

Electioneering -

This case can be equated with Valley General Hospital, Decision 500-A (PECB, 1981), where a hospital administrator and associate administrator helped the election officer rearrange furniture in the polling room a few minutes prior to the opening of the polls at an on-site election. Upon leaving, the administrator shook hands with two employees and had an exchange of pleasantries lasting 15 to 30 seconds. In that case, the Commission followed National Labor Relations Board precedent and stated that the brief conversa-

tion amounted to "trifles" and did not, by itself, warrant setting aside the election.

The union argues that it did not engage in objectionable electioneering. It notes in its brief that when the rule was changed in 1996, the new rule covering mail ballot elections retained the prohibition against massed assembly of voters on an employer's time for mail ballot elections, but it did not retain the prohibition against electioneering. The union correctly notes that, in contrast, the rule governing on-site elections, WAC 391-25-490, specifically prohibits "election at or about the polling place during the hours of voting." The union asserts that the Commission no doubt intentionally excluded a prohibition against electioneering during the mail ballot procedure. The union argues that it could not have engaged in objectionable conduct through electioneering, citing San Diego Gas and Electric, 325 NLRB 218, slip op. 4 (1998), as indicating that the NLRB permits unions to engage in electioneering conduct to at least as great a degree as employers, and that employers remain free (during the 24 hours before balloting and during balloting) to continue to campaign through mailings and at the workplace, including conducting mass meetings, as long as the meetings are on the employees' own time and attendance is not mandatory.

At the time Tacoma School District, Decision 4216-A (PECB, 1993) was decided, WAC 391-25-470 prohibited both employers and organizations from making election speeches on an employer's time to massed assemblies of employees within 24 hours before the scheduled time for opening of the polls, or within the period beginning with issuance of ballots to employees for an election conducted under mail ballot voting procedures and the tally of ballots. The rule prohibited electioneering at or about the polling place during the

hours of voting. Since then, the rule has changed to separate out procedures for mail balloting and procedures for on-site elections, but it has maintained the prohibition against election speeches on the employer's time to massed assemblies of employees, and in the case of mail ballots, during the period beginning 24 hours before the scheduled date for the issuance of ballots to employees and continuing through the tally of ballots. The words prohibiting electioneering "at or about the polling place during the hours of voting" was maintained only in WAC 391-25-490, the procedures for on-site elections.

NOW, THEREFORE, it is


ORDERED

The objections filed by Clallam County Public Health Services District 2 d/b/a Olympic Health Care are DISMISSED, and the case is remanded to the Executive Director for the issuance of a certification.

Issued at Olympia, Washington, on the 21st day of September, 1999.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


SAM KINVILLE, Commissioner


JOSEPH W. DUFFY, Commissioner

Chairperson Marilyn Glenn Sayan did not participate in the consideration or decision of this case.