Chelan County PUD, Decision 8496-B (PECB, 2006)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 37083	)	CASE 18263-E-04-2932
	)	
	)	
Involving certain employees of:	)	DECISION 8496-B - PECB
	)	
CHELAN COUNTY PUBLIC UTILITY DISTRICT	)	DECISION OF COMMISSION
	)	

Schwerin Campbell Barnard, by *Robert H. Lavitt*, Attorney at Law, for the union.

Davis Grimm Payne & Marra, by *Eileen M. Lawrence*, Attorney At Law, for the employer.

This case comes before the Commission on a timely appeal filed by Chelan County Public Utility District (employer) seeking to overturn certain Findings of Fact, Conclusions of Law, and Order issued by Executive Director Marvin L. Schurke[1] and Operations Manager Kenneth J. Latsch.[2] The employer also seeks to vacate election results based upon errors it asserts the Operations Manager committed in his decision to include certain employees within the bargaining unit, and procedural irregularities committed by Commission staff in the tally of election. Communications Workers of America, Local 37083 (union) supports the Operations Manager's decision and supports the election results as demonstrating the employees at issue conclusively support being represented by the union.

---

[1] *Chelan County PUD*, Decision 8496 (PECB, 2004).

[2] *Chelan County PUD*, Decision 8496-A (PECB, 2005).

ISSUES PRESENTED

1. Did the Executive Director commit reversible error in *Chelan County PUD*, Decision 8496, when he ruled that the one-year certification bar found at WAC 391-25-030 did not apply to the private election agreement between the employer and the International Brotherhood of Electrical Workers, Local 77 (Local 77)?

2. Did the Operations Manager commit reversible error in ruling that the petitioned-for bargaining unit was appropriate?

3. Did the Operations Manager commit reversible error in ruling that certain employees did not meet the definition of a confidential employee under the labor nexus test?

We reverse the Executive Director's decision that the employer's private election agreement did not invoke a one year certification bar. However, because at least one year has expired since the private election occurred, we decline to dismiss the union's petition. Ruling on the merits of the petitioned-for unit, we affirm the Operations Manager's findings and conclusions that certain employees should have been included within the bargaining unit. We vacate the June 10, 2005, election results, remand this case to the Executive Director, and direct a second election consistent with this decision.

We also identify two other issues raised by the employer and could be raised following the second election. Those issues are:

4. Should the Commission recognize that only employees who are still employed at the time of the tally of ballots, rather than the date of the election, be considered to have cast valid ballots?

5. Should the Commission overturn WAC 391-25-530(2) and require that representation elections are determined by a majority of employees in the bargaining unit without regard to the number of choices on the ballot?

We find that all employees who are employed on the date of the direction of election, and not the date of the tally, are eligible to vote in the election, and that a majority of valid ballots cast shall determine the outcome of the election.

ISSUE ONE - ONE-YEAR CERTIFICATION BAR

Conflict Between Commission and NLRB Statutes and Decisions

Decisions construing the National Labor Relations Act (NLRA), while not controlling, are generally persuasive in interpreting state labor laws that are similar to or based upon the NLRA. *Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24 (1981). The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is substantially similar to the NLRA, and the Commission may look to National Labor Relations Board (NLRB or Board) decisions when ruling on disputes between most employers and employees under its jurisdiction.

The statutes concerning public utility districts grant public utility districts and their employees rights different from those accorded other employees under Chapter 41.56 RCW:

> RCW 54.04.170 -- COLLECTIVE BARGAINING AUTHORIZED FOR EMPLOYEES. Employees of public utility districts are hereby authorized and entitled to enter into collective bargaining relations with their employers *with all the rights and privileges incident thereto as are accorded to similar employees in private industry.*
>
> RCW 54.04.180 -- COLLECTIVE BARGAINING AUTHORIZED FOR DISTRICTS. Any public utility district may enter into collective bargaining relations with its employees in *the same manner that a private employer might do* and may

> agree to be bound by the result of such collective bargaining.

(emphasis added). In *Public Utility District v. Public Employment Relations Commission*, 110 Wn.2d 114 (1988), the Supreme Court held that the Commission has jurisdiction over labor disputes between public utility districts and their employees, except where Chapter 41.56 RCW conflicts with RCW 54.04.170 or .180. *See also* RCW 41.56.020 (Chapter 41.56 RCW applies to any county or municipal corporation except as otherwise provided in RCW 54.04.170 and .180). That ruling did not explicitly upset a previous ruling stating that because public utility district employees have the same collective bargaining rights as similar employees in the private sector, disputes between those parties should be determined by reference to the substantive principles of federal labor law. *Electrical Workers v. PUD*, 40 Wn. App. 61 (1985).

In a follow-up case, *Public Utility District 1 of Clark County*, Decision 2045-A (PECB, 1989), *aff'd*, Decision 2045-B (PECB, 1989), an examiner stated that "closer adherence" to NLRB precedent is required in cases falling under RCW 54.04.170 and .180 than the general deference permitted by *Nucleonics*. We therefore apply Commission precedent to this situation to the extent that it is consistent with NLRA precedent. If inconsistencies between the two sets of laws exist, NLRB precedents are controlling.

NLRB's Election Procedures and its One-Year Certification Bar

Section 9 of the NLRA provides the framework for the NLRB's process of selecting and rejecting exclusive bargaining representatives through Board-conducted elections. *NLRB v. Western Meat Packers, Inc.*, 350 F.2d 804 (10th Cir. 1965). Like Chapter 41.56 RCW, nothing in the Act precludes a union's majority status from being established through other means so long as the parties do not

disagree about the selection of the bargaining representative, and a majority of the employees in the unit support the union. *United Mine Workers of America v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72 (1956). If voluntary recognition is extended, the unit is still subject to the unit determination authority of the NLRB. *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 231 (9th Cir. 1978).

The NLRB has construed the NLRA to extend comity to a certification issued pursuant to an election conducted by a state agency or by an impartial private third party provided that the procedures used in that election conform to due-process requirements and effectuate the policies of the Act. *Cornell University*, 183 NLRB 329 (1970). A brief history of the NLRB recognition of elections is warranted to provide proper context for application of the certification bar to elections not conducted by the NLRB.

In its early days the NLRB developed a policy, then without benefit of a specific statutory command, to deny an election in any bargaining unit where it had certified an exclusive bargaining agent in the preceding 12 months. *See Brooks v. NLRB*, 348 U.S. 96 (1954)(holding an employer committed an unfair labor practice by refusing to bargain with the union even though a majority of the employees repudiated the union one week after the election). In 1947, the Taft-Hartley Act sanctioned the *Brooks* holding, and expanded on this policy by enacting Section 9(c)(3). In *General Box Co.*, 82 NLRB 678 (1949), the NLRB interpreted the Taft-Hartley amendments as precluding the Board from thereafter certifying a collective bargaining agent based on anything other than an NLRB-conducted election.

In *National Container Corp.*, 87 NLRB 1065 (1949), a divided NLRB panel reversed *General Box Co.*, and held that a representation

petition was barred when it came within six months after an election conducted by state authorities. The *National Container* decision, however, was influenced in part by the petitioner's agreement to be bound by the result of the state's election.

Less than six months later, the NLRB reverted to its earlier position in *Punch Press Repair Corp.*, 89 NLRB 614 (1950). In that decision, a party filed a representation petition with the NLRB barely a month after it had lost a state-conducted consent election. A divided NLRB panel held that Section 9(c)(3) of the NLRA was "clearly directed against elections conducted by the [NLRB] and is not concerned with elections conducted by other agencies or persons whether acting in a public or private capacity." *Punch Press Repair Corp.*, 89 NLRB 614.

Five years later, the NLRB reversed itself once again. In *Interboro Chevrolet Co.*, 111 NLRB 783 (1955), the NLRB held that the full statutory effect should be accorded not just to its own elections but also to "an election conducted by a Government agency, or one privately conducted but with an impartial overseer in charge, wherein the true desires of employees with respect to representation are reflected with a high degree of certainty". The NLRB refused to recognize the private election in *Interboro Chevrolet Co.* because the election was conducted by the parties themselves, and not by an impartial third-party.

With the *Interboro Chevrolet Co.* decision, the NLRB's ultimate interpretation of Section 9(c)(3) extends comity to elections conducted by a state agency or to elections that are privately conducted with an impartial overseer in charge, provided that the election's procedures conform to due-process requirements and effectuate the policies of the Act and it is not contended that the

election was affected by any irregularities.[3] *NLRB v. Western Meat Packers*, 350 F.2d 804 (10th Cir. 1965); *Bluefield Produce & Provision Company*, 117 NLRB 1660 (1957); *Olin Mathieson Chemical Corp.*, 115 NLRB 1501 (1956). The NLRB premised that doctrine on the absence of any provision in the NLRA prohibiting the determination of a union's majority status through procedures other than those of the NLRB. *NLRB v. Western Meat Packers.*

Commission's One-Year Certification Bar

The Public Employee's Collective Bargaining Act, Chapter 41.56 RCW, reserves to the Commission exclusive authority to determine questions concerning representation and to certify exclusive bargaining agents for public employees covered by the Act. RCW 41.56.050 states:

> In the event that a public employer and public employees are in disagreement as to the selection of a bargaining representative the commission *shall* be invited to intervene as is provided in RCW 41.56.060 through 41.56.090.

(emphasis added). The Legislature therefore mandates that the Commission "shall" be invited to situations where employers and unions disagree about representation in cases governed by Chapter 41.56 RCW.[4] Although it is possible for an employer and union to enter into a voluntary recognition agreement, if any disagreement

---

[3] Our research has failed to find another case where the NLRB ruled upon the validity of a private election, and absent any authority specifically overruling *Interboro Chevrolet Co.* and its progeny's recognition of private elections, we must recognize that holding as good law.

[4] It is well settled that the word "shall" in a statute is presumptively imperative and operates to create a mandatory duty. *Erection Company v. Department of Labor and Industries*, 121 Wn.2d 513 (1993).

about the nature of the relationship exists, then the Commission shall be invited.[5]

In order to promote the goal of stability in labor relations, RCW 41.56.070 provides a time limitation on the frequency of representation petitions. That statute unambiguously states in part:

> No question concerning representation may be raised within one year of a certification or attempted certification.

To effectuate the purpose of Chapter 41.56 RCW, the Commission adopted Chapter 391-25 WAC. The rules outlined in this chapter detail the steps for Commission staff to follow while processing a representation case filed under the Act. To further clarify the one-year certification bar found at RCW 41.56.070, the Commission adopted WAC 391-25-030. That rule states in part:

> WAC 391-25-030 Petition -- Time for filing.
> . . .
> (2) A "certification bar" exists where a certification has been issued by the agency, so that a petition involving the same bargaining unit or any subdivision of that bargaining unit will only be timely if it is filed:
> (a) More than twelve months following the date of the certification of an exclusive bargaining representative; or
> (b) More than twelve months following the date of the latest election or cross-check in which the employees failed to select an exclusive bargaining representative.
> . . .

The authority to conduct representation elections under Chapter 41.56 RCW is vested solely with the Commission. Nothing in the statute permits any other person or organization to hold a valid

---

[5] For example, if a second union attempted to represent the employees, or if the parties disagreed about the confidential status of certain employees.

election for purposes of determining the employees' exclusive bargaining representative.

Application of Standards

RCW 41.56.020, RCW 54.04.170, and RCW 54.04.180 require us to consider and apply the standards set forth in *Interboro Chevrolet Co.* and its progeny, and thus require us to reverse the Executive Director's ruling in *Chelan County PUD*, Decision 8496. Unlike cases under RCW 41.56.070, which *requires* the Commission to rule settle disputes regarding the selection of an exclusive bargaining representative, NLRB precedent clearly demonstrates that the one-year certification bar applies when the election to which the certification bar attaches is conducted by either state agency or impartial third-party, provided that the election was fairly conducted and no party objected to the processes used in the election.

In this case, the private election agreement between the employer and Local 77 provided that the parties stipulated to a particular unit of employees. The election agreement also provided:

- That the independent election would be conducted by secret ballot;
- Would be conducted by a "neutral third party mutually agreed" upon by the employer and Local 77; and
- Would be "governed by the election principles for on-site elections used by [the Commission] as set forth in [Chapter 391-25 WAC] and [Chapter 391-35 WAC]".

In the event that Commission rules failed to address any procedural question, those parties agreed resolve the issue prior to the election.

The tally sheet of the private election shows that David Orcutt oversaw the election. We take administrative notice of Case 19483-U-05-4944 and note that Orcutt is listed as a contact for Energy Northwest, which is the employer in that case. Orcutt's status as an employer representative does not presumptively disqualify him from being a third-party neutral. The employer and Local 77 jointly selected Orcutt to be the third-party neutral, and neither party objected to the conduct of that election. Neither the employer nor Local 77 asserted that Orcutt committed any action in violation of his duty as the third-party neutral, and no evidence exists demonstrating that Orcutt committed any actions that could challenge his status as the third-party neutral.

The parties' use of the on-site election procedures found in Chapter 391-25 WAC presumptively demonstrates that the election procedures used in the private election were fair and conformed with the due process requirement to effectuate the underlying purposes of the NLRA. Thus, the evidence demonstrates that the private election procedures used by the employer and Local 77 would be found acceptable under the NLRA.

The evidence demonstrates that the NLRB would grant comity to this election, and invoke the one-year certification bar to subsequent petitions filed within one-year of the date of the private election. The union's petition would therefore be untimely.

Despite our finding that the union's petition is untimely, we decline to dismiss these proceedings. In *Weston Biscuit Co.*, 117 NLRB 1206 (1955), the NLRB declined to dismiss a representation petition that was filed more than five months before the end of the one-year certification bar period. At the time the case reached the Board for review, more than one year had elapsed. In justify-

ing its conclusion, the Board noted that "to dismiss the petition at this time would subject the Board to an immediate repetition of the proceeding as a new petition could be timely filed as soon as a decision in this case issues." *Weston Biscuit Co.*, 117 NLRB at 1208. This case presents a similar scenario, and we decline to dismiss a case that would otherwise be validly before us.

The application of the certification bar would have made the first election invalid. Additionally, some of the employees who voted in the first election have resigned from their positions with the employer. We remand this proceeding to the Executive Director for a second election to accurately capture the will of the employees. We therefore rule on the appropriateness of the unit and on the employer's challenges to the confidential status of certain employees.

ISSUE 2: THE APPROPRIATE BARGAINING UNIT

Employer's Challenges to the Description of the Unit

The Legislature granted this Commission the authority to determine appropriate bargaining units for purposes of collective bargaining. RCW 41.56.060 guides the Commission in structuring bargaining units. That statute states:

> In determining, modifying, or combining the bargaining unit, the commission shall consider the duties, skills, and working conditions of the public employees; the history of collective bargaining by the public employees and their bargaining representatives; the extent of organization among the public employees; and the desire of the public employees.

The Commission makes unit determinations on a case-by-case basis, and it is often difficult to readily apply one unit determination situation to another. However, the starting point for any unit determination analysis remains the configuration sought by the

petitioning organization. *King County*, Decision 5910-A (PECB, 1997). No requirement exists for the Commission to determine the "most" appropriate unit, and the Commission need only determine that a petitioned-for unit be an appropriate unit. *City of Winslow*, Decision 3520-A (PECB, 1990).

In structuring bargaining units, the Commission strives to group together employees who have sufficient similarities (community of interest) to indicate that they will be able to bargain effectively with their employer. *NLRB v. Action Automotive,* 469 U.S. 490 (1985); *Quincy School District*, Decision 3962-A (PECB, 1993). The "duties, skills, and working conditions" criteria outlined in RCW 41.56.060 are applied collectively to discern the existence of a "community of interest" among the employees of a particular employer, and generally operates in all unit determination cases. *Benton County*, Decision 7651-A (PECB, 2001); *NLRB v. Campbell Sons' Corp.*, 407 F.2d 969 (4th Cir. 1969); *see also City of Seattle*, Decision 5910-A. An examination of the extent of organization and the desires of employees may be considered, but are not dominant factors towards the ultimate determination.[6]

Substantial Evidence Supports Operations Manager's Unit Description

We agree with the Operations Manager's conclusion that the administrative assistant position occupied by Nicole Villacres is properly included within the bargaining unit.[7] The evidence demonstrates that the majority of her time is spent with the other

---

[6] Unlike cases decided under Chapter 41.56 RCW, the NLRB generally does not accord great weight or extensively examine the employer's history of bargaining.

[7] The union did not challenge the Operations Manager's decision to exclude Mark Bolz as a supervisor, and we agree with his conclusion excluding him from the unit.

information technology employees, and while some work she does can be considered administrative in nature, her work does not substantially differ from the work of the other petitioned-for employees.

We also agree with the Operations Manager that even though the employer has persuaded other unions representing its employees to exclude certain administrative assistants from bargaining units, we are not compelled to consider those agreements in this case. The Operations Manager correctly concluded that unit determination is not a subject of bargaining, and no party in a representation proceeding is bound by another party's unit determination agreement. *City of Richland*, Decision 279-A (PECB, 1978) *aff'd* 29 Wn. App. 599 (1981) *review denied* 96 Wn.2d 1004 (1981).

ISSUE 3: ARE CERTAIN PETITIONED-FOR EMPLOYEES CONFIDENTIAL

Confidential Employees

This Commission, using established case precedent, applies a labor nexus test to determine the confidential status of employees to be included or excluded from a bargaining unit. That test, which originated in *International Association of Fire Fighters, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978), states that a confidential employee is an employee whose duties imply a confidential relationship that must flow from an official intimate fiduciary relationship with the executive head of the bargaining unit or public official. The NLRB applies a similar test and defines confidential employees as persons "who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981).

The nature of this close association must concern the official and policy responsibilities of the public officer or executive head of

the bargaining unit, including *formulation of labor relations policy*. *City of Yakima*, 91 Wn.2d 101, 106-107. The mere handling of or access to confidential business or labor relations information, including personnel or financial records, is insufficient by itself to render an employee confidential. *Union Oil Co. of California*, 607 F.2d 852 (9th Cir. 1979)(access information upon which labor relations policy is based not sufficient to establish confidential status). Additionally, the typing or preparation of confidential labor relations memoranda does not suffice to imply confidential status. *U.S. Postal Service*, 232 NLRB 556 (1977).[8]

Application of Standards

Applying the standards to the positions at issue, we find that substantial evidence supports the Operations Manager's decision, that all of the challenged positions are not confidential and are properly included in the bargaining unit.

Nicole Villacres: The record demonstrates that Villacres does not participate in any of the employer's labor relations negotiations, and her actual duties do not reflect that she assists in the preparation of the employer's collective bargaining proposals. Although Villacres may have some access to confidential information, this is not by itself enough to warrant excluding her from her collective bargaining rights as a confidential employee. Additionally, the employer's speculation that Villacres may have future contacts with the collective bargaining process is speculative. This Commission has consistently held only the actual duties of the employees will be considered. *City of Redmond*, Decision 7814-B (PECB, 2004).

---

[8] *But cf. Reymond Banking Co.*, 249 NLRB 1100 (1980)(a receptionist who was the employer's only typist and who prepared the employer's collective bargaining proposals was found to be confidential).

Darryl Doughty, Megan Horner, and Randy Pauli: The record demonstrates that these three employees do not qualify as confidential employees under the labor nexus test. The employer's security director testified that he foresaw the potential for these employees to investigate other employees and that a conflict of interest could occur. This argument is speculative at best, and not the type of argument on which we can rely upon to deny employees their collective bargaining rights. The record demonstrates that none of these employees has any significant contacts with confidential labor relations material warranting their exclusion from the unit.

The employer's reliance upon *State - Transportation*, Decision 8317-A (PSRA, 2005)(*State - Transportation I*) that the Commission now recognizes a broader definition of confidential employees is misplaced. In *State - Transportation*, Decision 8317-B (PSRA, 2005)(*State - Transportation II*), we affirmed the Executive Director's decision in *Transportation I*, but did so on other grounds. Unlike the Executive Director, who examined the actual duties of the "internal auditors" in question, we found that RCW 41.80.005(6) specifically exempted "internal auditors" from their collective bargaining rights. Based upon this narrow statutory exclusion, we concluded that any employee who conducted "internal audits" in the state system was to be excluded from bargaining units.[9] In reaching our conclusion in *State - Transportation II*, we affirmatively rejected the Executive Director's reasoning. The employer's reliance on *State - Transportation I* as embracing an expanded definition for confidential employees is misplaced.

---

[9] It is also worth noting that in *State - Transportation II* the Commission did not rule upon the confidential status of any employee in question.

ISSUE 4: DATE OF THE ELECTION CONTROLS EMPLOYEE ELIGIBILITY

NLRB's Eligibility Test

Generally, under NLRA precedent, an employee is eligible to vote in a board-conducted election if the employee is employed in the appropriate unit on the established eligibility date, which is normally during the payroll period immediately preceding the date of the direction of election and the employee is still employed on the date of the election. *Plymouth Towing Co.*, 178 NLRB 651 (1969); *Bill Heath, Inc.*, 89 NLRB 1555 (1949). The NLRB does not determine eligibility based on events that occur after an election. *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003).

Commission's Eligibility Test

WAC 391-25-230(1)(f) states that the appropriate test for determining an employee's eligibility in the typical representation election conducted by the Commission, and states:

> A list containing the names of the employees eligible to vote in the election and the eligibility cut-off date for the election. If the election is to be conducted by mail ballot, the list shall include the last known address of each of the employees eligible to vote. If no eligibility cut-off date is specified by the parties, the eligibility cut-off date shall be the date on which the election agreement is filed;

WAC 391-25-390(1)(b) is a second rule that re-states the Commission's default standard for determining the eligibility of an employee to vote in a representation election following any proceeding before the Executive Director (or his designee), and states:

> Unless otherwise provided in a direction of election, the cut-off date for eligibility to vote in an election shall be the date of issuance of the direction of election.

WAC 391-25-430 is a third rule stating the test to determine the eligibility of an employee to vote in representation elections, and states:

> 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.

This third rule places a second standard on eligibility by requiring employees to remain employed at the time of the tally of ballots. Thus, an employee who is hired between the direction of election and the tally of ballots is ineligible to vote, and an employee who ceases employment between the direction of election and the tally of ballots is also ineligible to vote.

It is clear that all three Commission rules generally conform with established NLRB precedent.[10] We clarify, however, in cases involving public utility districts, the applicable standard for determining for the eligibility of voters shall be those employees who are employed during the payroll period immediately preceding the date of the direction of election, and continue to be employed on the date of the election. For mail ballot elections, the date of the election is the date and time when the ballots are due.[11]

---

[10] Unlike the NLRB, however, in most Chapter 41.56 RCW cases where mail ballot procedures are used, employees are considered eligible if they were still employed at the time the ballots are due. Thus, if an employee is terminated after the ballots are due but before the actual tally has occurred, the ballot is still considered valid and counted in the election.

[11] This Commission decision serves as the direction of election, and therefore all petitioned-for employees on the employer's payroll immediately prior to the date this decision is issued are eligible to vote in the election.

ISSUE 5: EMPLOYER'S CHALLENGE TO WAC 391-25-530(2)

A Majority of Ballots Cast Decides Representation Elections

The NLRB determines representation elections by a majority of valid votes cast. *See* NLRB Casehandling Manual, Part II, Representation Proceedings, sections 11300 - 11350. WAC 391-25-530(2) provides the Commission's rule for the number of votes needed to determine a representation election. That rule states:

> Representation elections shall be decided by *a majority of those voting*. Where there are only two choices on the ballot, a tie vote shall result in a certification of no representative.

(emphasis added). The NLRB and the Commission unambiguously rule that representation elections shall be decided by a majority of votes cast, and not by a majority of those in the unit.[12]

In this case, the election officer, after discounting the three "void" ballots, determined that 18 total votes were cast, and that 10 of those votes were for the union. Despite this proper tally under the Commission's election procedures, the employer argues that the election should be determined by a majority of employees eligible to vote, rather than a majority of votes cast, and urges the Commission to overturn the election (and essentially to rewrite its own rules) on those grounds. The employer essentially asks the

---

[12] Two situations exist in the Commission's rules where a "majority of those eligible to vote in the election" standard is applied:
- Local government elections where three or more choices are on the ballot. See RCW 41.56.070 and WAC 391-25.531; and
- Unit determinations election under WAC 391-25-420.

Neither of those situations is applicable to this case.

Commission to consider voter apathy as a factor to be considered in representation elections.

We admit the record demonstrates certain inconsistencies between WAC 391-25-530, the notice of election, and the Operations Manager's order. The latter two state:

- The Notice of Election states: The majority of ballots cast will determine the outcome of the election.
- The Operations Manager's order states: Except as provided in paragraph 1 of this Order, the ballots received in this case on or before September 14, 2004 (and impounded by the Public Employment Relations Commission), shall be counted to determine whether a majority of the employees in that bargaining unit have authorized the [union], to represent them for the purpose of collective bargaining.

Although the Operations Manager's election order mis-stated the method of counting that the Commission would use to determine the election, the Operations Manager lacked the authority to issue an order that countermanded the established rule. WAC 391-25-530(2) continues to state the appropriate method for counting ballots in representation elections conducted by this Commission, including those involving public utility districts, when only one union appears on the ballot.

NOW, THEREFORE, the Commission makes the following:

AMENDED FINDINGS OF FACT

1. Chelan County Public Utility District is a municipal corporation of the state of Washington, and is a public employer within the meaning of RCW 41.56.020.

2. On October 22, 2003, the employer and the International Brotherhood of Electrical Workers, Local 77, conducted a private representation election involving employees substantially similar to those petitioned for by the Communications Workers of America, Local 37083. The employer and Local 77 agreed that Chapter 391-25 WAC would govern the election, and that an impartial third party supervised the election. Neither the employer nor Local 77 objected to the conduct of the election.

3. Communications Workers of America, Local 37083, a bargaining representative with the meaning of RCW 41.56.030(3), filed an untimely but properly supported petition for investigation of a question concerning representation with the Commission. That union seeks certification as exclusive bargaining representative of certain employees working in the employer's information technology department.

4. Prior to the filing of the petition in this case, the petitioned-for employees had no history of collective bargaining with the employer other than the situation set forth in Finding of Fact 2.

5. Information technology services are provided as part of the employer's enterprise business solutions organization. Greg Larsen directs that organization.

6. Mark Bolz is a supervisor, as defined by Section 2(11) of the National Labor Relations Act.

7. Nicole Villacres works as the administrative assistant in the enterprise business solutions organization. Villacres has some office-clerical duties, but a majority of her position

description concerns the information technology functions of the employer. Villacres has not had any involvement in activities related to the collective bargaining process.

8. Darryl Doughty, Megan Horner, and Randy Pauli do not have any involvement in activities related to the collective bargaining process.

AMENDED CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW, Chapter 54.04 RCW, and Chapter 391-25 WAC.

2. The private election conducted by the employer and Local 77, as described in Finding of Fact 2, should have invoked the one-year certification bar and precluded the Communications Workers' petition from being filed until one year after that election.

3. Because more than one year has passed since the private election between Chelan Public Utility District and Local 77, the Commission declines to dismiss the Communication Workers' petition.

4. A bargaining unit consisting of all full-time and regular part-time employees of the Chelan County Public Utility District in the Information Technology Department, excluding supervisors and confidential employees, is an appropriate unit for the purposes of collective bargaining under RCW 41.56.060.

5. Mark Bolz is a supervisor under the federal substantive law applicable in this case under RCW 54.04.170 and 54.04.180.

6. Administrative Assistant Nicole Villacres is not a confidential employee within the meaning of RCW 41.56.030(2)(c) or WAC 391-35-320, and has a community of interest under RCW 41.56.060 with the employees in the bargaining unit described in paragraph 2 of these conclusions of law.

7. Darryl Doughty, Megan Horner, and Randy Pauli are not confidential employees within the meaning of RCW 41.56.030(2)(c) or WAC 391-35-320.

8. A question concerning representation presently exists in the appropriate bargaining unit described in paragraph 2 of these conclusions of law, and the circumstances for concluding the election process under WAC 391-25-390 have been met.

AMENDED ORDER

Case 18263-E-04-2932 is REMANDED to the Executive Director for a new election consistent with this opinion.

Issued at Olympia, Washington, the 15th day of March, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner