

department has since acknowledged that it made "coding errors" resulting in omission of at least two supervisors from its supplied lists: Steven Williams had been a supervisor since June 2004; Kimberly Harper had been a supervisor since March 14, 2005.³

The parties participated in an Investigation Conference on April 19, 2005,⁴ when they agreed to remove one name from the list provided by the department, and to add three other names to the eligibility list. None of the parties raised any issue concerning Williams or Harper at that time, and their names were omitted from the eligibility list (containing 79 names) which was attached to the Investigation Statement for the separate unit of supervisors.

Without objection from the parties, the Commission staff conducted mail ballot elections for both units simultaneously. Ballots were mailed on May 4, 2005, with a return deadline of May 25. The supervisor ballots were printed on yellow paper, while the nonsupervisory ballots employees were printed on green paper.

Kathy Sundberg was on the eligibility list for the separate unit of supervisors. Ballot materials were mailed to her, but she nevertheless presented herself and requested a duplicate ballot at the Commission's Olympia office while the ballots were out to the employees. A Commission staff member erroneously provided Sundberg with a green ballot at that time.

George Kaminsky was on the eligibility list for the separate unit of supervisors, and ballot materials were mailed to him. His wife (who was also an eligible voter) presented herself at the Commis-

³ The agency placed Williams and Harper on the list for the nonsupervisory bargaining unit.

⁴ The Investigation Conference for the nonsupervisory unit was held on the same day.

sion's Olympia office while the ballots were out to the employees, and sought to deposit her husband's ballot along with her own. A Commission staff member asked for identification and accepted the ballot of Mrs. Kaminsky, but indicated Mr. Kaminsky's ballot would be challenged because he had not hand delivered it himself.

The ballots for the separate unit of supervisors were counted first on May 26, 2005. The Tally of Ballots form signed by a department representative and a WFSE representative on that date shows:

Approximate number of eligible voters	79
Void ballots	2
Votes cast for WFSE	27
Votes cast for No Representation	26
Challenged ballots	1
Valid ballots counted plus challenged ballots . . .	54
Number of valid ballots needed to determine election	28

The challenged ballot was from George Kaminsky, and was challenged by the Commission staff based on the delivery described above.

After signing the Tally of Ballots for the supervisors unit, a department representative asserted that Williams and Harper should have been eligible voters in that unit. The Commission staff declined to reopen the tally for the supervisors at that time.⁵

Barrie filed timely objections on May 31, 2005. On June 2, 2005, the department filed a letter admitting it placed Williams and Harper on the wrong lists. The Executive Director asked the department and the WFSE to respond to the objections, and each filed a written response.

⁵ Following the supervisory election, the ballots for the nonsupervisory unit were then counted. The ballots cast by Williams and Harper were challenged in that tally, along with a small number of ballots cast on paper of a different shade of green than was used for that election.

ISSUES

If objections and responses raise questions of fact, the Commission remands the case for a hearing. If objections and admissions filed by other parties are sufficient or deficient on their face, the Commission can summarily grant or deny objections. *Mason County*, Decision 1699 (PECB, 1983). The issues at hand are:

1. Was the duplicate ballot cast by Sundberg mishandled?
2. Should the ballot delivered on behalf of George Kaminsky be opened and counted?
3. Should Williams' and Harper's ballots be opened and counted in the supervisors' unit election despite the fact that they were cast in the nonsupervisory election?

The Commission concludes that the ballot of George Kaminsky was properly challenged, but the first and third objections are sufficient on their face. A new election is ordered.

ANALYSIS OF ISSUE 1

Under mail ballot procedures, the return addresses on ballot envelopes are used to verify the eligibility of persons seeking to cast ballots. When the Commission staff reviewed the ballots returned in this case, it discovered that two ballots had been received from Sundberg.⁶ The normal procedure would have been to solicit a stipulation to open the later-submitted ballot, but the

⁶ We do not know what prompted Sundberg to believe she could cast two ballots. No person is entitled to cast more than one ballot in a representation election. It is impossible for on-site voters to retract ballots once they have been deposited in the ballot box. Commission staff provides duplicate materials to mail ballot voters only if they claim they have not received the original materials.

duplicate ballot was the later-filed and its non-conforming color was discerned through the outer envelope. The Commission staff members conducting the tally initially set the duplicate ballot cast by Sundberg aside, but did not formally challenge the ballot. When the initial counting of ballots disclosed a tie vote, the non-conforming ballot was opened and counted.

The decertification petitioner correctly asserts that the duplicate ballot from Sundberg was mishandled by the Commission staff, and should not have been counted in a manner that disclosed the secrecy of the ballot.⁷ The WFSE argues that the Commission staff followed normal procedures, and that it was proper to count the later-received ballot of Sundberg. The department did not address this issue in its responses to the objections.

Non-conforming ballots are properly challenged by the Commission staff to guard against a potential for fraud. Because the non-conforming ballots in this case were due to an error in our process, it would have been appropriate for the Commission staff to formally challenge the non-conforming ballot, and then for the Executive Director or the Commission to vacate the "tie" result and to re-run the election.

⁷ She points out that concerns about the secrecy of ballots were the basis for challenging wrong-colored ballots in the election for the nonsupervisory unit. While the nonsupervisory election is not directly before us in this case, we observe that the challenge to the non-conforming ballots in that election was appropriate. Subsequent investigation disclosed that a test sheet likely got caught up in an automated stuffing/mailing process, so that a few voters in the nonsupervisory unit received ballots printed on a different shade of paper. The Executive Director has instructed the Commission staff to guard against repetition of that situation in the future.

The first error was compounded by a second error, when the non-conforming ballot was counted. The inevitable result of opening Sundberg's ballot in isolation is that everybody now knows how she voted. RCW 41.80.080(1)(a) requires secret balloting, and preservation of secrecy requires that all questioned ballots be cleared before any ballots are counted.

ANALYSIS OF ISSUE 2

The decertification petitioner asserts that nothing published by the Commission precluded Kaminsky from using his wife to deliver his ballot. The WFSE argues that the Commission staff followed normal procedures, that it was proper to challenge the ballot under these circumstances, and that the Commission would be setting a dangerous precedent if it were to accept the disputed ballot in this case. The agency did not address this issue in its responses.

Regardless of whether it concerns the selection of public officials or the selection of an exclusive bargaining representative, any election process encompasses four basic components. In on-site elections under WAC 391-25-490, the components occur in one sequence: (1) Persons claiming a right to vote present themselves and give their names to be checked against the eligibility list at the polling place, where observers present on behalf of the parties assist in the identification of voters and challenge unfamiliar or ineligible voters; (2) persons claiming a right to vote mark their ballots; (3) persons deemed eligible to vote deposit their ballots directly in the ballot box, while the ballots of challenged voters are set aside; and (4) the unchallenged ballots are counted.

In mail ballot elections under WAC 391-25-470, the same four components occur in a different order: (2) Persons claiming a right to vote mark their ballots; (1) persons claiming a right to vote

present themselves by means of the return addresses on the mail ballot envelopes, and observers present on behalf of the parties challenge unfamiliar or ineligible voters; (3) the ballots of persons deemed eligible to vote are deposited in the ballot box and mixed during removal of the return envelopes and secrecy envelopes, while challenged ballots are set aside; and (4) the unchallenged ballots are counted. Employees voting by mail ballot invoke the assistance of the United States Postal Service (and thereby invoke the protection of federal laws prohibiting mail fraud) when they use their return addresses to present themselves to vote.⁸

The instructions mailed to each employee eligible to vote in this case included:

TO MAINTAIN SECRECY, seal your marked ballot in the enclosed "secret ballot" envelope, then seal that envelope in the postage-paid envelope addressed for return to the Commission, *and then deposit the return envelope in the U.S. Mail. . . .*

(emphasis added). Some principles are so fundamental that they go without saying: Employees have no basis on which to believe that somebody else can cast a vote on their behalf.

In essence, Kaminsky sought to turn this election into an on-site procedure, and to have his wife cast his vote for him. To maintain the integrity of the election process, Commission staff properly requested Mrs. Kaminsky's identification, and properly challenged the ballot received from somebody other than the eligible voter or

⁸ The Executive Director would properly turn over evidence of mischief in mail ballot elections to federal authorities, for prosecution as mail fraud.

the United States Postal Service. This objection is insufficient on its face to set aside the election.⁹

ANALYSIS OF ISSUE 3

The decertification petitioner asserts that the election process was defective by its exclusion of Williams and Harper from the eligibility list, and she suggests their ballots (now held intact as challenged ballots in the nonsupervisory unit election) should be counted. The WFSE asserts that the issues concerning Williams and Harper were not raised in a timely manner, and that all parties should be held to their earlier stipulations on the eligibility list. The department refers back to the explanations it gave on Williams and Harper in its letter filed on June 2, 2005.

We readily reject the proposed solution of opening the ballots cast by Williams and Harper in the nonsupervisory unit. That procedure would create a high potential to improperly destroy the secrecy of their votes.

We are deeply concerned by the department's admission that it provided garbled eligibility lists in this and the related case:

- The Commission has no independent source of information about the workforces of employers under our jurisdiction, and we rely on the information provided by employers.
- WAC 391-25-130 expressly requires employers to provide lists at the outset of representation proceedings. In the context that the names of public employees are a matter of public record (rather than proprietary information as sometimes

⁹ One pragmatic side effect of the ruling on other issues is that Kaminsky will have a fresh opportunity to vote his own ballot in the proper manner.

claimed by private employers), the Commission's procedures actively promote stipulations on voter eligibility from the lists provided by employers.

- The Investigation Conference process and any stipulations entered into by the parties in this case were fatally prejudiced by the department's factual errors. One of those coding errors occurred more than one year prior to the filing of the petition in this case. The other coding error related to a promotion that occurred within the month prior to the filing of the petition, and should have been fresh in the minds of the department's personnel staff.

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.

In *Lufkin Rule Co.*, 147 NLRB 341 (1964), the National Labor Relations Board (NLRB) ordered a second election in a case where certain pre-election conduct of the employer interfered with the exercise of employee free choice and warranted setting aside the election conducted by the NLRB. The petitioning party filed a motion with the NLRB to include appropriate language in the election notices to insure that eligible voters were fully informed that a new election was being conducted because of employer conduct that adversely affected the first election. Washington courts endorse reliance on NLRB precedents where the state law(s) we administer are similar to the NLRA. *Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24 (1984). We order a similar requirement here. Overturning the election result and posting a notice explaining the reasons why the Commission is overturning the election to bargain-

ing unit employees in this case should reinforce the importance of an employer's obligation to adhere to the Commission's processes.

NOW, THEREFORE, it is

ORDERED

1. The results of the representation election conducted in the above-captioned matter are VACATED.
2. The case is remanded to the Executive Director for the conduct of a new election in the above-captioned matter. The notices for the new election in the above-captioned matter shall explain the reasons for the new election, including the erroneous lists provided by the employer, as described in *Lufkin Rule Co.*, 147 NLRB 341 (1964).

Issued at Olympia, Washington, on the 9th day of August, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARILYN GLENN SAYAN, Chairperson


PAMELA G. BRADBURN, Commissioner


DOUGLAS G. MOONEY, Commissioner