STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
THE SILVER DOLLAR CLUB	)	CASE 18047-E-03-2909
	)	
Involving certain employees of:	)	DECISION 8816-A - PECB
	)	
SNOHOMISH COUNTY FIRE DISTRICT 4	)	DECISION OF COMMISSION
	)	
	)	

Cedar River Law Professionals, by *Eileen Lawrence*, Attorney at Law, and *Amy Plenefisch*, Attorney at Law, for the petitioner.

Garvey Schubert Barer, by *Bruce Heller*, Attorney at Law, for the employer.

This case comes before the Commission on a timely appeal filed by The Silver Dollar Club (SDC) seeking to overturn findings of fact, conclusions of law, and order issued by the Executive Director dismissing the SDC's petition seeking certification as exclusive bargaining representative of part-time fire fighters employed by Snohomish County Fire District 4 (employer).[1] The employer supports the Executive Director's order. We affirm.

BACKGROUND

On December 4, 2003, the SDC filed a petition for investigation of a question concerning representation. Representation Coordinator Sally Iverson conducted an investigation conference, and on

[1] *Snohomish County Fire District 4*, Decision 8816 (PECB, 2004).

February 5, 2004, she issued an investigation statement, framing the following issues for hearing:

> a. The employer's position is that the Commission does not have jurisdiction because volunteer firefighters fall outside of RCW 41.56. The union's position is that the employees are under the Commission's jurisdiction and are eligible for collective bargaining.
>
> b. *The employer did not have enough information to stipulate whether the Silver Dollar Club is a qualified labor organization.*
>
> c. The employer questioned the appropriateness of the petitioned-for unit stating the employees are casual employees. The union's position is that it is an appropriate unit of part-time firefighters and the employees have a community of interest independent of any existing firefighter unit.

(emphasis added). On June 23, 24, and 25, 2004, Hearing Officer Christy L. Yoshitomi held a hearing, and the parties filed post-hearing briefs in support of their respective arguments. On December 16, 2004, the Executive Director issued his decision holding that the SDC failed to establish that it is a labor organization qualified for certification as an exclusive bargaining representative under the applicable statute. On January 4, 2005, the SDC filed an appeal seeking reversal of that decision.

PROCEDURAL ISSUES

Supplemental Materials Submitted Not Accepted on Appeal

With its brief on appeal, the SDC attempted to submit 11 separate exhibits not admitted in evidence during the three days of hearing of this proceeding. WAC 391-25-350(2) provides:

> Once a hearing has been closed, it may be reopened only upon a timely motion of a party upon discovery of new evidence which could not with reasonable diligence have been discovered and produced at the hearing.

RCW 34.05.476(3) provides:

> Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the *exclusive basis for agency action in adjudicative proceedings* under this chapter and for judicial review of adjudicative proceedings.

(emphasis added). At no time after the close of hearing did the SDC file a timely motion to supplement the agency record. It certainly has not shown that its new evidence could not, with reasonable diligence, have been produced at the hearing. Therefore, we have not reviewed or considered any supplemental materials submitted by the SDC on appeal.

Outside Correspondence Had No Impact On Decision

On May 17, 2004, the Washington Fire Commissioners Association (WFCA) filed a letter addressed to the "Public Employment Relations Commission" urging the Commission to find that volunteer firefighters are not eligible for collective bargaining rights under Chapter 41.56 RCW based upon their special status as volunteers. WFCA sent copies of this letter to all parties of record.

On the basis of this correspondence, the SDC requests jurisdiction of this case be transferred directly to the superior court as an alternative means of relief. It argues that since the WFCA was not granted amicus leave to file a brief in support of the employer's position, this correspondence prejudiced the proceeding. We disagree.

RCW 34.05.425(3) provides that a reviewing officer may be disqualified for any reason for which a judge is disqualified. Judges are governed by the Code of Judicial Conduct (CJC), which is applied by using "an objective test that assumes that 'a reasonable person

knows and understands all the relevant facts.'" *Sherman v. State*, 128 Wn.2d 164, 205-06 (1995). Canon 3(A)(4) of the CJC provides that a judge may "neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding."

Here, the SDC fails to establish how the Executive Director violated Canon 3(A)(4) of the CJC. All parties of record were sent copies of the unsolicited correspondence and the SDC sent a response to the employer. There is no allegation that the Executive Director initiated any ex parte contact or solicited information from individuals not party to these proceedings. The SDC fails to establish how, in fact, the unsolicited correspondence tainted the decision making process.[2] We decline to grant the SDC's request.

DISCUSSION

Issue Presented

Has the SDC established that it is a qualified labor organization qualified for certification as an exclusive bargaining representative?

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[2] The SDC's failure to allege how this correspondence prejudiced the decision making process is particularly relevant to our findings. If we were to grant the SDC's request, any interested outside party wishing to relieve this agency of jurisdiction would simply need to initiate contact with the ultimate decision maker, a result that would frustrate the legislative intent of both Chapter 34.05 RCW and Chapter 41.56 RCW. Even if we were to assume, for purposes of argument, that these communications were ex parte, the SDC did not seek to file a response as allowed under RCW 34.05.455(5).

Standard of Review

This Commission does not conduct a de novo review of decisions appealed to it in representation proceedings under Chapter 391-25 WAC. Rather, we review the findings of fact issued by the Executive Director or staff member to determine whether they are supported by substantial evidence and, if so, whether those findings of fact support the conclusions of law and order. *Whatcom County*, Decision 7322-B (PECB, 2002). Substantial evidence exists if the record supports a finding of fact of any competent, relevant and substantive evidence which, if accepted as true, would, within the bounds of reason, directly or circumstantially support the challenged finding or findings. *Ballinger v. Department of Social and Health Services*, 104 Wn.2d 323 (1985).

Silver Dollar Club Had Notice Its Qualifications Were at Issue

The SDC argues that it should not have been required to establish its qualification for certification as an exclusive bargaining representative because it was not given sufficient advanced notice that its qualifications were at issue. This argument has no merit.

The Investigation Statement issued by the Representation Coordinator on February 5, 2004, clearly states that the employer did not have enough information to stipulate whether The Silver Dollar Club is a qualified labor organization. During the Hearing Officer's opening comments to the parties, she clearly indicated that one of the issues to be decided at hearing was "whether or not the Silver Dollar Club is a qualified labor organization."[3] The SDC had ample notice that its qualifications as a labor organization were at issue, and could have asked for a delay in the proceedings to address this concern.

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[3] Transcript of Proceeding, Vol. 1, page 7, line 18-19.

Silver Dollar Club Fails to Qualify as a Labor Organization

RCW 41.56.030(3) defines "bargaining representative" as "any lawful organization which has as one of its primary purposes the representation of employees in their employment relations with employers." This Commission has previously rejected formal requirements for adoption of formal by-laws or constitutions to qualify as a labor organization (see *King County*, Decision 5910-A (PECB, 1997)). This is the first case where the Commission has been asked to rule on the qualification of a long-standing social or fraternal organization as a labor organization when its by-laws do not include any indication that representing employees is one of its purposes.

Under WAC 391-25-390(a) we have delegated sole authority to the Executive Director to issue initial decisions in all representation cases. Although the Commission has the authority to substitute its own judgments (so long as our findings are supported by substantial evidence) for those of the Executive Director's, the Commission attaches considerable weight to the factual findings and inferences therefrom made by our staff members. *Whatcom County*, Decision 7322-B; *PERC v. City of Vancouver*, 107 Wn. App. 694 (2001). Therefore, we will not rewrite a finding of fact unless we conclude substantial evidence does not exist within the record to support that challenged finding. *See Cowlitz County*, Decision 7007-A (PECB, 2000).

The SDC argues that this situation is analogous to *City of Edmonds*, Decision 3018 (PECB, 1988), where a fraternal organization of police officers formed for social purposes announced its intentions to become a labor organization. However, any reliance on *City of Edmonds*, Decision 3018 (PECB, 1988), is misplaced. The SDC incorrectly assumes that the fraternal organization in *City of Edmonds* qualified as a labor organization once it filed the

petition seeking representation. In fact, analysis of whether the fraternal organization qualified as a labor organization was unnecessary in that case because the parties entered into an election agreement covering the two bargaining units in question and established dates to conduct the representation elections.[4] *City of Edmonds*, Decision 3018 (Finding of Fact 7). That agreement effectively stipulated to the fraternal organization's status as a labor organization. Such is not the case here where the employer has declined to stipulate to the SDC's qualifications.

This case is also distinguishable from previous decisions of the Commission holding that adoption of formal by-laws or constitutions are not necessary to demonstrate a group's qualifications as a labor organization.

- In *Selah School District*, Decision 7146 (PECB, 2000), the Executive Director held that the labor organization qualified as an exclusive bargaining representative though it lacked formal documentation. The Executive Director noted that there was no evidence that the labor organization in question was in its formative stages, and the organization had, in fact, a history of bargaining with the employer through representatives, and not individual employees.

- In *Edmonds School District*, Decision 3167 (PECB, 1989), the Executive Director once again held that a labor organization qualified as an exclusive bargaining representative though it lacked by-laws or a constitution. The organization was created for the purpose of representing employees, and had

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[4] The *City of Edmonds* decision does not indicate whether the fraternal organization's qualifications as a labor organization was ever in dispute.

> negotiated collective bargaining agreements and assisted employees in grievance proceedings.

The SDC has no history of representing employees in relations with their employer. No evidence was presented that the SDC has ever negotiated a collective bargaining agreement with the employer or that the SDC ever represented employee's grievances and informal complaints with the employer.

WAC 391-25-350(a) provides that "parties shall be responsible for the presentation of their cases." The burden was placed upon the SDC to establish that it qualified as a labor organization once the employer declined to stipulate to its qualifications. Testimony at hearing indicated that, although the SDC intended to change its status, it had not in fact done so. The stated intentions of SDC officers are not enough to overcome the SDC's burden of establishing that it is a qualified labor organization. In light of the SDC's tradition of allowing all fire fighters to become members, including supervisors and other fire fighters that would not be included in the petitioned-for bargaining unit, SDC's failure to timely amend its by-laws is particularly troubling.

Despite the fact that the SDC had proper notice that its qualifications as a labor organization had been an issue since it filed its petition, it failed to establish itself as a labor organization.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Executive Director Marvin L. Schurke are AFFIRMED and adopted as

the Findings of Fact, Conclusions of Law, and Order of the Commission.

Issued at Olympia, Washington, the 15th day of June, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner