

tions of fact that could reasonably have impacted the outcome of the representation election?

2. Was the union's May 4, 2007, request to proceed a strategic move intended to deny potential bargaining unit employees the right to vote?
3. Were bargaining unit employees who were returned to the bargaining unit by result of a decision issued by this agency prior to the notice of election precluded from casting ballots in the representation election?

Based upon the filings of the parties, the objections filed by Mathews fail to form a basis for overturning the election results, and we dismiss her objections. Additionally, the objections filed by individual employees that the union misrepresented factual issues are also dismissed. However, based upon the examination of the record before this Commission, as well as *Community College District 10 - Green River*, Decision 9676 (PSRA, 2007), we find that sixteen bargaining unit employees were not provided an opportunity to vote in the election. Therefore, we must vacate the June 15, 2007, election results and remand this case to the Executive Director for further processing.

APPLICABLE LEGAL PRINCIPLES

The employer and employees involved in this proceeding are covered by the Personnel System Reform Act of 2002, Chapter 41.80 RCW. The Legislature delegated the conduct of representation elections to this Commission and directed this Commission to adopt rules consistent with the best standards of labor-management relations.

RCW 41.80.080; RCW 41.58.050. Our rules governing the conduct of representation proceedings include:

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.

(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) Conduct in violation of WAC 391-25-140 is prohibited.

(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 on the scheduled date for the issuance of ballots to employees and continuing through the tally of ballots. Other electioneering allowed under (a) through (f) of this subsection is permitted during that period.

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

those who have voted or who have abstained from voting shall be surrendered to the agency at the conclusion of the tally.

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

Additionally, individual employees may file election objections under WAC 391-25-570(2), but are limited to claims that they were precluded from voting in the representation election.

ANALYSIS

Issue 1 - Allegations of Misrepresentation

The May 26, 2007 Letter

The first of Mathews' objections concerns a May 26, 2007, letter sent to bargaining unit members authored by Todd Henderson, a member of the negotiating committee and bargaining unit employee. Henderson's letter explains to bargaining unit employees why they should retain union representation, and the contractual benefits that employees will lose if they decertify the union. We examine each of Mathews' claims of significant misrepresentations in turn.

- Mathews alleges that Henderson's statement that he was elected to the negotiating team is inaccurate. This allegation fails to form the basis for an election objection under WAC 391-24-470(1)(f)(iii) and (iv). His status as an elected member of the negotiating team could not reasonably have had a significant impact on the election. Additionally, Henderson's letter was dated on May 26, 2007, and the election occurred June 15, 2007. Thus, assuming for the sake of argument that it took five days for Henderson's letter to reach bargaining unit employees, Mathews still had at least fifteen days to respond to Henderson's letter. Mathews fails to demonstrate that

Henderson's statement occurred at a time that prevented her from effectively responding.

- Mathews' objection to Henderson's statement regarding a "worker's rights organization" that would file a lawsuit on behalf of nonrepresented employees to achieve the same benefits as represented employees also fails to form the basis for an election objection under WAC 391-25-470(1)(f)(ii) and (iii). First, Henderson's statement only concerns claims that an organization has been contacted by certain employees about the *possibility* of filing a suit. Thus, Henderson is not in a position to have intimate knowledge about the matter. Additionally, Mathews again fails to demonstrate how she was prevented from effectively responding to such a claim.
- Mathews' contention that Henderson misrepresented the truth about losing "pay raises" does not form the basis for an election objection under WAC 391-25-470(1)(f)(i). Although Henderson begins his paragraph with the statement "We'd lose pay raises without our contract," he then goes on to explain the ramifications of decertification. In fact, Mathews distributed a flyer containing much the same information, but explained in a different manner.
- Mathews' claim that Henderson's statements regarding employees losing the \$756 lump-sum payment if they decertify the union fails to form the basis for an election objection under WAC 391-25-470(1)(f)(iii) and (iv). Mathews distributed campaign information that responded to Henderson's claims, and thus she cannot reasonably say that she was prevented from effectively responding or that Henderson's statements could be reasonably viewed as having an impact on the proceedings.

- Mathews' claim that a May 29, 2007, flyer distributed as part of the union's campaign also contained misrepresentations about ethics violations committed by employees supporting decertification fails to form the basis for an election objection under WAC 391-45-470(1)(f)(ii), (iii) and (iv). Mathews fails to identify how the authors of the flyer had intimate knowledge of the ethics violations, fails to demonstrate how she was precluded from effectively responding to the claims contained within the flyer, and fails to demonstrate how the claims significantly impacted the election.

This Commission will not be the judge or arbiter of each and every statement made in the campaigns preceding representation elections. *King County Public Hospital District 2*, Decision 9205-B (PECB, 2006). As a whole, the statements contained within literature distributed by the union falls under the category of "campaign puffery," which is where a party bolsters its own status or position through exaggerations and misleading statements. While statements that artificially inflate one side's position or argument may seem offensive to individuals who oppose that particular point of view, campaign puffery generally does not constitute misrepresentation under WAC 391-25-470(1)(f) because the issue is not salient,¹ or, as is demonstrated in this case, the complaining party often has ample time to effectively respond to those statements.

When election objections alleging misrepresentations are filed, this Commission will closely scrutinize the complained-of materials, and will dismiss those claims where the campaign materials amount to campaign puffery. Additionally, we will also carefully

¹ Salient issues are those issues that are outwardly conspicuous or dominate the campaign.

scrutinize the amount of time the complaining party has to respond. Even where the potential exists for a statement to be a misrepresentation of a salient issue of fact or law, if there was ample time to respond, then the objections will be dismissed.²

Issue 2 - Allegations Surrounding Union's Request to Proceed

The second of Mathews' allegations regards what she characterizes as a "purposeful misrepresentation of classified staff." This objection concerns efforts by the employer to "exempt" certain bargaining unit employees from Chapter 41.06 RCW, thus removing them from the bargaining unit. The union filed unfair labor practice complaints, Cases 19806-U-05-5019 and 19807-U-05-5020³, alleging the employer exempted the employees without first providing the union notice and an opportunity to request bargaining, and upon such request the opportunity to bargain to impasse. See *University of Washington*, Decision 9410 (PSRA, 2006) (providing a complete discussion of an employer obligation to inform an exclusive bargaining representative of its decision to exempt an employee from civil service). During the pendency of the unfair labor practice proceedings, Mathews filed the instant decertification petition. On May 4, 2007, prior to the issuance of an examiner's decision in Cases 19806-U-05-5019 and 19807-U-05-5020, the union filed a request under WAC 391-25-370(2) to proceed with the representation election.

² For example, in *King County Public Hospital District 2*, Decision 9205-B, a union kept referring to a competing labor organization by a different name. However, the Commission noted that even assuming that a misrepresentation occurred, the complaining party had more than six months to respond.

³ Case 19806-U-05-5019 involved the nonsupervisory bargaining unit employees at issue in this case. Case 19807-U-05-5020 concerned the supervisory employees.

On May 21, 2007, Examiner Paul Schwendiman issued his decision in Cases 19806-U-05-5019 and 19807-U-05-5020 finding the employer committed unfair labor practices. *Community College District 10 - Green River*, Decision 9676. The Examiner found that the employer unilaterally transferred bargaining unit employees in violation of RCW 41.80.110(e), and ordered that sixteen bargaining unit members be reinstated to the nonsupervisory bargaining unit at issue.

On May 29, 2007, the notice of election and ballots for the representation election conducted in this case were sent to bargaining unit employees. The May 29 date was a full week after the Examiner issued *Community College District 10 - Green River*, Decision 9676. The tally then occurred on June 15, 2007. The tally of ballots demonstrated the following results:

Approximate Number of Eligible Voters	149
Void Ballots	5
Votes Cast for WFSE	52
Votes Cast for No Representation	36
Valid Ballots Counted	88
Challenged Ballots	3
Valid Ballots Counted plus Challenged Ballots . . .	91
Number of Valid Ballots Needed to Determine Elec- tion	46

On the basis of those results, the outcome of the June 15, 2007, was conclusive in favor of the union. Mathews' timely objections and the timely objections filed by individual employees followed.

Mathews claims that by filing a request to proceed with the representation election despite two pending unfair labor practice complaints regarding the unilateral transfer of bargaining unit employees, the union strategically denied the employees who were

the subject of the complaint the right to vote. This claim also fails to form a basis for an election objection under WAC 391-24-470(1)(f). At the time the union filed its request to proceed, it had no way of knowing what the outcome of *Community College District 10 - Green River*, Decision 9676, would be. Thus, no invidious motive to deny employees their right to vote can be construed from the union's request.

Issue 3 - Bargaining Unit Employees Were Denied Opportunity to Vote

Despite the fact that we find no invidious motive behind the union's motion to proceed with the representation election, the timing of the representation election and the issuance of *Community College District 10 - Green River*, Decision 9676, did have the ultimate effect of denying bargaining unit employees the opportunity to vote in the election. As a result, we must vacate the election and provide the employees affected by *Community College District 10 - Green River* a meaningful opportunity to vote in the representation election.

Our reasoning for vacating the election is as follows. WAC 391-25-230(1)(f) states the appropriate test for determining an employee's eligibility in a typical representation election conducted by the Commission:

Where an employer and all other parties agree on a representation election, they may enter into an election agreement.

(1) An election agreement shall include:

. . .
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 her 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.

Although these rules generally determine which employees are eligible to vote in an election, employees may still be eligible to vote by challenged ballot if they are the subject of litigation at the time of the election. For example, a discharge is presumed to be for cause unless a complaint concerning the discharge has been filed and is pending. *Dura Steel Co.*, 111 NLRB 590 (1955).⁴ This rule also applies with respect to pending grievances and other litigation where reinstatement of the employee in question is possible. *Machinist*, 159 NLRB 137 (1966). The ultimate effect of this standard provides the person whose discharge is being contested the right to vote by challenged ballot.

⁴ 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 System Reform Act of 2002, Chapter 41.80 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. See *Chelan PUD*, Decision 8496-B (PECB, 2006).

Here, the May 29, 2007, election agreement states that employees are eligible to vote in the representation election if they are employed in the bargaining unit on April 24, 2007. However, when the Examiner issued his May 21, 2007, remedial order in *Community College District 10 - Green River*, Decision 9676, the sixteen disputed employees at issue to be returned to their civil services positions also were directed to be returned to the bargaining unit as if they had never been removed from the bargaining unit by the employer. That order became effective on the date of issuance, and no appeal of that decision was filed.⁵ See RCW 34.05.473. Ten of those employees of the community college filed election objections under WAC 391-25-590(2) claiming that they were denied the right to vote.

Regardless of how many employees filed election objections, the fact remains that sixteen employees were denied the right to vote in the election. Prior to the conduct of the representation election, those sixteen employees should have been provided the opportunity to vote in the election by challenged ballot because their status as bargaining unit members was still in question. Neither the employer, the union, nor Commission staff took notice of the fact that the subject matter of Case 19806-U-05-5019 could have potentially impacted the status of the bargaining unit.⁶

At the June 15, 2007, tally of ballots, the union received fifty-two votes, and no representation received thirty-six votes. Three

⁵ Even if the employer appealed *Community College District 10 - Green River*, Decision 9676, the employees still should have been allowed to vote by challenged ballot.

⁶ Although the factual situations such as the one presented in this case that lead to the disenfranchisement of employees rarely occur, we nevertheless have instructed the Executive Director to implement procedures to ensure that situations such as this do not occur in the future.

challenged ballots were cast. Even without consideration of the three challenged ballots, the number of disenfranchised voters is significant enough to make the election inconclusive.

Commission policy strongly protects the rights of employees to freely choose whether they wish to be represented for the purposes of collective bargaining. The parties will not be allowed to stipulate that otherwise eligible voters are precluded from participation in a representation election.

NOW, THEREFORE, it is

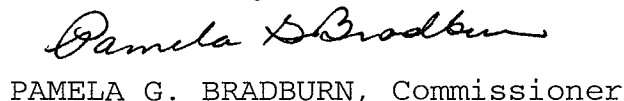
ORDERED

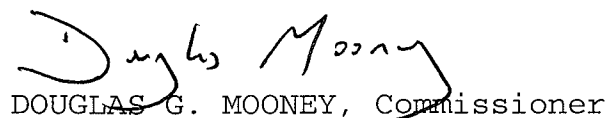
1. The results of the representation election conducted in the above-captioned matter are VACATED.
2. The case is remanded to the Executive Director for the conduct of a new election in the above-captioned matter.

Issued at Olympia, Washington, on the 14th day of August, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARILYN GLENN SAYAN, Chairperson


PAMELA G. BRADBURN, Commissioner


DOUGLAS G. MOONEY, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

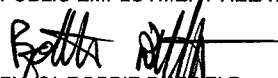
112 HENRY STREET NE
P. O. BOX 40919
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
PAMELA G. BRADBURN, COMMISSIONER
DOUGLAS G. MOONEY, COMMISSIONER
CATHLEEN CALLAHAN, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 08/14/2007

The attached document identified as: **DECISION 9835 - PSRA** has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION


BY US/ ROBBIE DUFFIELD

CASE NUMBER: 20980-E-07-03238 FILED: 03/21/2007 FILED BY: PARTY 2
DISPUTE: QCR DECERT
BAR UNIT: ALL EMPLOYEES
DETAILS: Non-Supervisory Unit
COMMENTS:

EMPLOYER: C COL DIST 10 - GREEN RIVER
ATTN: RICHARD RUTKOWSKI
GREEN RIVER COMM COLLEGE
12401 SE 320TH ST
AUBURN, WA 98092-3622
Ph1: 253-833-9111 Ph2: 253-288-3340

REP BY: LESLEY HOGAN
C COL DIST 10 - GREEN RIVER
12401 SE 320TH ST
AUBURN, WA 98092
Ph1: 253-833-9111

REP BY: TINA PETERSON
STATE - FINANCIAL MGMT
PO BOX 43113
OLYMPIA, WA 98504-3133
Ph1: 360-725-5169

PARTY 2:
ATTN: SANDRA MATHEWS
11828 SE 231 PL
KENT, WA 98031
Ph1: 253-852-1113

PARTY 3:
ATTN: WA FED OF STATE EMPLOYEES
GREG DEVEREUX
1212 JEFFERSON ST SE STE 300
OLYMPIA, WA 98501
Ph1: 800-562-6002 Ph2: 360-352-7603

REP BY: GLADYS BURBANK
WA FED OF STATE EMPLOYEES
1212 JEFFERSON ST SE STE 300
OLYMPIA, WA 98501
Ph1: 360-352-7603