STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
TEAMSTERS UNION, LOCAL 763	)	CASE 11662-E-95-1915
	)	
Involving certain employees of:	)	DECISION 5272 - PECB
	)	
MEYDENBAUER CENTER	)	INTERIM CERTIFICATION
	)	
	)	

Thomas Krett, Representative, and Michael R. McCarthy, Attorney at Law, appeared on behalf of the petitioner.

Lewis L. Ellsworth, Attorney at Law, appeared on behalf of the employer.

This case comes before the Commission on objections to a cross-check, filed by the Meydenbauer Center pursuant to WAC 391-25-590.

BACKGROUND

On March 24, 1995, Teamsters Union, Local 763 (union) filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission, seeking certification as exclusive bargaining representative of cooks and stewards employed in the food and beverage department of the Meydenbauer Center (employer).

A pre-hearing conference was conducted on April 25, 1995. At that time, the parties agreed on an eligibility cut-off date of April 25, 1995, and agreed on the description of an appropriate bargaining unit, as follows:

> All full-time and regular part-time cooks and stewards, excluding supervisors, confidential and all other employees.

The parties disagreed on whether certain positions were eligible for inclusion in the bargaining unit. The method for determining the question concerning representation was left open in the statement of results of pre-hearing conference issued on April 25, 1995, and neither party filed any objection to that statement.

A stipulated eligibility list was filed on July 31, 1995, reserving a dispute concerning two lead cooks and a lead supervisor. In a letter covering transmittal of that eligibility list, counsel for the union requested use of the cross-check procedure to determine the question concerning representation.

On August 2, 1995, counsel for the employer filed a letter in which he acknowledged the stipulated eligibility list filed on July 31, 1995. He went on to assert that a majority of the employees on the stipulated eligibility list were furloughed on approximately July 10, 1995, and that the furlough would last until approximately September 1, 1995. The employer requested that the cross-check be delayed until September, to allow time for normal operations to resume. On August 29, 1995, the union responded that the furlough issue should not stand in the way of an immediate cross-check.

On September 8, 1995, the employer submitted copies of employment records containing the signatures of the employees named on the stipulated eligibility list. It pointed out that there had been 21 eligible employees at the time of the agreement between the parties, and that the number was down to 13. It did not assert that any new employees had actually been hired, but did contend that it was not appropriate to conduct a cross-check where less than 70% of the eligible employees were left. The employer requested that a secret ballot election be conducted.

The Commission staff conducted a cross-check on September 26, 1995. The tally issued on that date indicated:

Number of employees in bargaining unit.....13

Number of valid authorizations needed to determine representation.....9

Number of cards/records accepted as valid evidence of representation.....11

On October 2, 1995, the Commission received a telefacsimile transmission jointly signed by six employees of the Meydenbauer Center kitchen staff. The letter advised of their desire to discontinue all connections with union activities or memberships.

On October 3, 1995, the employer filed objections to the cross-check. The employer argues that the following constituted objectionable conduct:

> (1) As noted in the employer's letter to the Commission, dated September 8, 1995, hiring of new unit employees was imminent. In fact, five employees were hired on September 18, and one was hired on September 26th. All were hired on or before the date of the cross-check. Reliance on only eleven authorization cards in a unit of nineteen employees does not constitute a substantial majority (seventy percent) of the bargaining unit.
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> (2) The tally was conducted on September 26, 1995, without advance notice to the employer of denial of its request to delay the tally. At the time the tally was conducted, six new employees had already been hired, bringing the total employees in the bargaining unit on the date of the tally to nineteen. Relying on authorization cards instead of conducting a secret ballot election disenfranchised the newly hired employees.
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> (3) The Employer believes that one or more members of the bargaining unit contacted PERC prior to September 26, 1995, on behalf of themselves and others similarly situated, seeking to learn how their authorization cards might be withdrawn for cross-check purposes. The Commission failed to advise these employees of their right to have their authorization cards not considered for this limited purpose.

On October 10, 1995, the employer filed a motion for extension of time to file a brief, and stated its desire for a factual inquiry with request to objection 3. The employer appeared to be alleging the revocations would have occurred prior to the cross-check if the employees had been advised properly by the Commission staff.

The employer's assertions, without more, provided no basis to reach conclusions on objectionable conduct, so the Commission directed that the requested extension of time be granted. The parties filed materials in support of their positions regarding objection 3, and the case is again before the Commission.

POSITIONS OF THE PARTIES

The employer claims an un-named member of the Commission staff told a bargaining unit employee there was nothing the employee could do with respect to his authorization card, and failed to tell the employee that he could request that his card not be counted for cross-check purposes. The employer contends the employee was calling on behalf of four other employees, and that if those five cards had not been counted, the union would not have met the 70% test for a cross-check. The employer's contentions are supported by the affidavit of one employee.

The union argues that there is no evidentiary basis for inferring that employees sought to withdraw their authorization cards. Even if there was a factual basis, the union contends that the purported withdrawals should be disregarded. It cites National Labor Relations Board (NLRB) precedent for the proposition that authorization cards cannot be revoked absent notification to the union prior to the demand for recognition, and claims that the union's business agent was not informed of the employees' desire to revoke their authorization cards in this case.

DISCUSSION

The Stipulated Eligibility Cut-Off Date

In its objections 1 and 2, the employer urges that recently-hired employees should be included as eligible voters. We note, however, that the parties stipulated to use the date of the pre-hearing conference, April 25, 1995, as the eligibility cut-off date for this proceeding.

A stipulated voter eligibility list was filed on July 31, 1995, reserving a dispute concerning two lead cooks and a lead supervisor who had been discussed during the pre-hearing conference. The two-month delay is not explained, except by the fact that the parties undertook to have further discussions of the eligibility list. They did not offer a new stipulated eligibility cut-off date.

Stipulations made by parties during the processing of representation cases are binding, except for good cause shown. Community College District 5, Decision 448 (CCOL, 1978). Eligibility cut-off dates have been part of the NLRB's representation case procedures for many years, and have been a part of Chapter 391-25 WAC since the original adoption of those rules in 1980. The purpose of both stipulations and eligibility cut-offs are to speed the determination of questions concerning representation, and to reduce opportunities and incentives for delay. When parties stipulate to an eligibility cut-off date, they should understand that subsequently-hired individuals will not be eligible to participate in the determination of the question concerning representation.

The employer's attempts to reopen the eligibility cut-off date and eligibility list in this case came after substantial delay, and even after the employer acknowledged the propriety of the eligibility list filed on July 31, 1995. Objections 1 and 2 are insufficient on their face, and we dismiss those objections.

The Cross-Check Procedure

RCW 41.56.060 specifically authorizes the use of the cross-check procedure to determine questions concerning representation. The Commission has adopted WAC 391-25-391 and WAC 391-25-410 to implement that statutory procedure.

Employers often oppose the use of the cross-check method, but an employer's opposition alone is not a sufficient basis to deny a cross-check. The use of the procedure in the face of employer opposition was affirmed by the court in Evergreen General Hospital v. PERC, 24 Wn.App. 64 (Division I, 1979), affirming Evergreen General Hospital, Decision 58-A (PECB, 1976). The Commission has consistently rejected objections filed by employers based on a general preference for secret-ballot elections. See, Port of Pasco, Decision 3398-A (PECB, 1990); City of Centralia, Decision 3495-A (PECB, 1990); City of Winslow, Decision 3520-A (PECB, 1990).

Dating back to at least City of Redmond, Decision 1367-A (PECB, 1981), the Commission and Executive Director have directed cross-checks where a union has supplied a showing of interest indicating it has the support of more than 70% of the employees involved.[1] The union need only have the support of a majority of the employees to be entitled to certification based on a cross-check, although cross-check results showing a union has overwhelming support further justify using the method. See, Port of Pasco, supra.

The Commission has been comfortable with the cross-check procedure, in part, because of safeguards which allow for employee self-determination. The Commission has recognized that employees may change their minds, stating:

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[1] The reasons for this measure include that with more than a 70% showing of support, the remaining employees would constitute less than the 30% required under RCW 41.56.070 to initiate a "decertification" petition in the unit.

> We recognize there may be occasions when employees sign authorization cards, and then change their minds regarding union representation. **WAC 391-25-210** precludes withdrawal of authorization cards for the purpose of diminishing a "showing of interest", but **we do not read that rule as precluding individual employees from withdrawing their authorization cards for purposes of a cross-check.** WAC 391-25-410 contemplates the possibility of turnover or withdrawals of support, by permitting a union faced with losing a cross-check to opt for the conduct of a representation election. In this case, no bargaining unit employee sought to withdraw their authorization card. The mere possibility that employees could have had second thoughts does not provide justification for finding the direction of a cross-check to have been in error.

City of Centralia, Decision 3495-A (PECB, 1990), at page 15 [emphasis by **bold** supplied]. See, also, Skagit County, Decision 5082 (PECB, 1995).

The Commission vacated a cross-check in Seattle Housing Authority, supra, based on a finding that withdrawals of authorization cards submitted within 10 days following the issuance of a statement of results of the pre-hearing conference were sufficient in number to reduce the union's support below the 70% necessary to direct a cross-check.

In this case, the employer has provided the affidavit of Rodolfo Sandoval, which states in part:

> On September 8, 1995, I called the Public Employment Relations Commission's Office in Olympia. The reason for the call was that I wanted to get information about authorization cards. I had previously asked my supervisor about them and he'd told me it wouldn't be proper for him to answer my question and that I should call PERC. I told the woman who answered the phone at PERC's office that I worked at Meydenbauer Center and I wanted to know how to withdraw my authorization card. She said there was no one there at the time

> who could answer my question and I should call back later.
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> On September 15, 1995, I again called PERC. This time I spoke with a man whose name I don't recall but he said he worked for PERC and could answer my question. I told him I worked for Meydenbauer Center and he took down my name and phone number. I told him I wanted to "pull" my authorization card. He said "it was too late." I asked him if "there was anything else I could do because I'd changed my mind about the union." He said there was nothing I could do. I asked if there was some other person I could talk to and he said no. That was the end of the conversation. He didn't tell me I could ask to have my card not counted for cross-check purposes.
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> Both times I called PERC it was at the request of other Meydenbauer Center employees in addition to myself. Four other non-lead employees who work with me and don't speak English well asked me to call on their behalf because they also had changed their mind about the union and wanted to pull their cards.

The employer claims the union would not have met the requirements for a cross-check without the cards of the five individuals who changed their minds. We do not find the affidavit or argument sufficient to sustain the objection, however.

The Commission has considered it critical for employees to act individually in connection with authorization cards, even where employees have a change of heart. WAC 391-25-110 requires a showing of interest to consist of "**individual** cards or letters" [emphasis by **bold** supplied] signed and dated by the employees in the appropriate bargaining unit. The intent of the requirement for individual documents is to avoid any appearance of unfairness or pressuring employees to sign one way or another. Consistent with the policy of requiring individual documents in support of employee-filed or union-filed petitions, the Commission rejected a multi-signature document as a basis for an employer-filed petition in Rose Hill Water and Sewer District, Decision 2488-A (PECB,

1986), stating that such a policy "diminishes the possibility of coercion having taken place". In this case, the Commission received one withdrawal document signed by six employees. This does not meet the intent of the Commission's rule and precedents, since it does not show that withdrawal was a purely individual decision on the part of each employee. The withdrawal of authorization was received after the cross-check, and so also arrived too late to be acted upon, even if it had been in an acceptable form.

The affidavit does not suffice as evidence of intent to withdraw for anyone else but Sandoval. Assuming we credited his affidavit, he is only one person. Removal of one authorization card from the showing of interest would not have been sufficient to reduce the union's support below the majority required for certification. Were we to allow a telephone call from one employee to express the intent of others, we would be opening the door to the possibility of abuse of the sort that WAC 391-25-110, and the collective bargaining laws in general, were designed to prevent.

By early August of 1995, the employer knew that the union was requesting use of the cross-check procedure to determine the question concerning representation. There was plenty of time thereafter to notify eligible employees of their right to withdraw their authorization cards for purposes of a cross-check, so as to ensure an election. The record indicates that only one employee (Sandoval) arguably took action to do so during the period when withdrawals of authorization cards could have occurred. Assertions that other employees had the same subjective intent do not suffice for the Commission to retroactively overturn the results of a cross-check tally.

Based on the foregoing, we also conclude that the employer's objection 3 is also insufficient, and we dismiss that objection.

NOW, THEREFORE, it is

ORDERED

1. The objections filed by the employer are OVERRULED.

2. Subject to further proceedings concerning the eligibility issues reserved by the parties, it is hereby certified that the employees in the bargaining unit stipulated by the parties have chosen Teamsters Union, Local 763 as their representative for the purposes of collective bargaining with their employer with respect to wages, hours and conditions of employment.

Issued at Olympia, Washington, the 31st day of January, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner