

The wording on this card meets the requirements of the Washington Public Employment Relations Commission (PERC) to seek a representation election.

Without revealing any actual cards, the Executive Director disclosed the wording of CPEA's card to the incumbent and employer, and the parties were invited to reply to the issues raised. The CPEA and PSE each filed written arguments, while the employer remained silent on the matter.

On December 21, 1990, the Executive Director issued an order dismissing the CPEA petition. Although the Executive Director ruled that dual purpose cards were acceptable for the purpose of obtaining an election, he concluded that the "meets requirements" statement quoted above violated Commission rules and policy prohibiting parties from improperly invoking the name of the Commission in a representation campaign. By the time the CPEA petition was dismissed on that basis, the contract bar "window" period for the timely refiling of a representation petition by CPEA had closed.

POSITIONS OF THE PARTIES ON REVIEW

The CPEA points out that its "dual purpose" card would suffice under NLRB practice. It contends that the wording on the card is not ambiguous, does not attribute any opinion to the Commission, does not involve the Commission in endorsing any party's position, is not false or deceptive, and could have no significant impact on the election. CPEA relies on a "history of acceptance" of similar authorization cards in a number of past cases, and contends that it would be a "manifest injustice" to reject the authorization cards in this case. CPEA asks the Commission to reverse the Executive Director's dismissal of the CPEA petition and order the direction of a representation election.

PSE asserts that the Executive Director's determination as to the sufficiency of CPEA's showing of interest is not subject to review. PSE argues that a per se approach to campaign practices involving the Commission is reasonable, and it asks that the order of dismissal be affirmed.

DISCUSSION

Availability of Review

The order of dismissal advised that review by the Commission was available pursuant to WAC 391-25-390(2).²

PSE argues that our rule on the adequacy of a showing of interest is more specific, and that it thus controls. PSE contends WAC 391-25-210 should be read as precluding further review of the Executive Director's determination that CPEA's showing of interest was

² WAC 391-25-390 reads, in relevant part:

PROCEEDINGS BEFORE THE EXECUTIVE DIRECTOR.
The executive director may proceed forthwith upon the record, after submission of briefs or after hearing, as may be appropriate. The executive director shall determine whether a question concerning representation exists, and shall issue a direction or election, dismiss the petition or make other disposition of the matter. ...

(2) An order of dismissal shall be subject to review ... at the request of any party ... Unless the matter is transferred to the commission for review, an order of dismissal issued by the executive director shall have the same force and effect as if issued by the commission.

insufficient.³ CPEA argues that the underlying rationale for the dismissal was based on WAC 391-25-590,⁴ and thus the review procedures for that section should be applicable.

WAC 391-25-210 is designed to ensure the confidentiality of a showing of interest. It specifies that the sufficiency of a showing of interest is a matter of determination by the "agency"; not just the Executive Director.⁵ The Commission has never interpreted WAC 391-25-210 as precluding Commission review of an order of dismissal, as provided in WAC 391-25-390(2).

WAC 391-25-390(2) applies to rulings of the Executive Director that result in dismissal of representation petitions. WAC 391-25-590, in comparison, applies to pre-election rulings by the Executive

³ WAC 391-25-210 reads:

SHOWING OF INTEREST CONFIDENTIAL. The question of whether a showing of interest requirement for a petition or for intervention has been satisfied is a matter for administrative determination by the agency and may not be litigated at any hearing. The agency shall not disclose the identities of employees whose authorization cards or letters are filed in support of a petition or motion for intervention. In order to preserve the confidentiality of the showing of interest and the right of employees freely to express their views on the selection of a bargaining representative, the agency shall not honor any attempt to withdraw or diminish a showing of interest.

⁴ WAC 391-25-590 reads, in relevant part:

FILING AND SERVICE OF OBJECTIONS. Within seven days after the tally has been served under WAC 391-25-410 or under WAC 391-25-550, any party may file objections with the commission. ...

⁵ WAC 391-08-007(1) defines the term "agency" as "the public employment relations commission, its officers and agents."

Director that do not preclude the holding of an election. In the latter situation, parties are required to wait until after the conduct of an election and service of a tally, and may then bring their objections to the Commission. We concur with the Executive Director's advice to the parties that review was available in this case under WAC 391-25-390(2).

Sufficiency of the Showing of Interest

Use of a Dual Purpose Card -

There is no dispute that the authorization card used by CPEA in this case is properly characterized as a "dual purpose" type of card. The use of such cards, NLRB precedent on the acceptance of them, and prior Commission precedent have been well-described by the Executive Director in the order of dismissal. We agree with his decision to accept dual purpose authorization cards when offered in representation proceedings for the purpose of seeking an election. We also concur with his conclusion that dual purpose cards should not be accepted or used for cross-checks authorized by Chapter 41.56 RCW.

Misuse of The Commission's Election Processes -

The Commission's rules identify misuse of the Commission's name and procedures as a basis for filing election objections:

WAC 391-25-590 FILING AND SERVICE OF OBJECTIONS. ... **Objections may consist of:**

(1) **Designation of specific conduct improperly affecting the results of the election, by violation of these rules, by the use of deceptive campaign practices improperly involving the commission and its processes, by the use of forged documents, or by coercion or intimidation of or threat of reprisal or promise of reward to eligible voters, ...**
[emphasis by bold supplied]

While the Commission has stated that "pre-petition conduct is not considered for purposes of election objections"⁶, the question of whether a showing of interest suffices for the scheduling of an election remains a matter of agency discretion. WAC 391-25-210. We agree with the Executive Director that the prohibitions of WAC 391-25-590(1) can be considered in determining the sufficiency of a showing of interest.

The basis for the order of dismissal was a portion of the CPEA authorization card form which stated:

The wording on this card meets the requirements of the Washington Public Employment Relations Commission (PERC) to seek a representation election.

Since we have held that a dual purpose authorization card can be used to demonstrate the "showing of interest" necessary for direction of an election, the disputed statement on the CPEA card is technically correct. The wording on the card does meet the requirements of the Commission for a representation election.

The Executive Director found fault with the CPEA's card, because he felt that the sentence in dispute was designed to suggest some relationship with or blessing by the Commission. We do not read any express or implied endorsement of CPEA, but we conclude that the language might suggest to a casual reader that the form of the card had been specifically authorized by the Commission.

The Executive Director's adoption of a per se rule against invoking the name of the Commission was based on the decision of the Commission in City of Tukwila, Decision 2434-A (PECB, 1987). In that case, employer representatives made patently false statements

⁶ City of Tukwila, Decision 2434-A (PECB, 1987), at footnote 10.

asserting that the Commission had approved a "captive audience" meeting which the employer held just prior to an election. The Commission found the statements had disrupted the laboratory conditions necessary for a representation election.

The Commission generally considers the context and impact of any statement in determining whether it should be found objectionable,⁷ but actual harm is not an absolute requirement. Thus, City of Tukwila, supra, indicates that false statements regarding Commission actions can constitute a per se violation of Commission rules, even without a showing of actual impact.

Special considerations apply in the case of authorization cards. Due to the confidentiality requirement for a showing of interest, employers and incumbent representatives are not shown the authorization cards submitted to the agency. The attention of the Commission staff is generally confined to the main purpose of a "showing of interest", i.e., verification that the names and dates inserted on such documents support a conclusion that the petition or motion for intervention meets the requirements of RCW 41.56.070.

Rather than try to judge context and/or impact in a vacuum, we find it appropriate to adopt a flat prohibition affecting documents utilized for a showing of interest. Such documents must not contain any reference to the Commission that could be read as suggesting Commission approval of a party's actions.⁸

⁷ Kitsap County, Decision 3293 (PECB, 1989).

⁸ The CPEA authorization card contained an additional reference to the Commission, which has not been questioned by either the Executive Director or PSE:

This card will be used in filing an election petition so that a secret ballot election may be conducted by PERC.

A statement of this sort is not deemed to fall within the rule being adopted.

Prospective Application of the Per Se Rule -

We also conclude that the per se interpretation of our rules that is adopted here should be applied prospectively, and not used to deprive CPEA of an election in this case.

The City of Tukwila decision put parties on notice that misleading or deceptive statements regarding Commission actions would themselves be considered grounds for vacating an election. We do not read that decision as placing parties on notice that any reference to the Commission would, in and of itself, constitute a deceptive campaign practice improperly involving the Commission and its processes.

CPEA has apparently utilized authorization cards with similar wording to support CPEA petitions filed with the Commission since 1984. The Commission staff has never before indicated that the cards were flawed. This "history of acceptance" does not preclude the Commission from adopting a stricter interpretation of its rule in this case, but it does suggest that strict application of the new interpretation would be inequitable under circumstances where the contract bar window period has closed.

The prior history of acceptance also suggests that the CPEA cards were used in good faith, without realization or intent that the disputed phrase might be construed as implying endorsement by the Commission, so that strict application of the new interpretation would also be inconsistent with a central purpose of Chapter 41.56 RCW, i.e., ensuring the right of public employees to be represented by labor organizations of their own choosing.

We have the authority to waive Commission rules when a waiver serves the purposes of Chapter 41.56 RCW and is not shown to

prejudice another party.⁹ The Commission did just that in City of Tukwila, supra, as to a late filing of election objections. The reason for doing so applies as well in the present case. Tukwila involved erroneous agency advice in response to a direct inquiry from the union. The Commission's acceptance of election objections filed one day late took into consideration that erroneous information from Commission staff had contributed to the late filing. In the case before us, CPEA does not claim that the Commission or its staff has ever been asked to rule upon the form of its authorization card, but we recognize that the CPEA relied, to its detriment, on the repeated prior acceptance by Commission staff members of authorization cards containing similar language.

There is no evidence in this case that anyone was actually misled by the CPEA authorization cards. Even PSE does not assert that the language of the cards implied that PERC supported the CPEA, or that the card was an official PERC document. We find, therefore, no evidence that any party would be prejudiced by the prospective, rather than a retroactive, application of the per se interpretation being adopted in this case.

⁹ WAC 391-08-003 reads:

POLICY--CONSTRUCTION--WAIVER. The policy of the state being primarily to promote peace in labor relations, these rules and all other rules adopted by the agency shall be liberally construed to effectuate the purposes and provisions of the statutes administered by the agency, and nothing in any rule shall be construed to prevent the commission and its authorized agents from using their best efforts to adjust any labor dispute. The commission and its authorized agents may waive any requirement of the rules unless a party shows that it would be prejudiced by such a waiver.

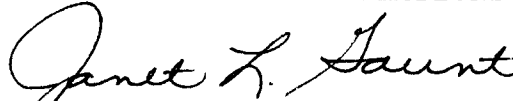
NOW, THEREFORE, it is

ORDERED

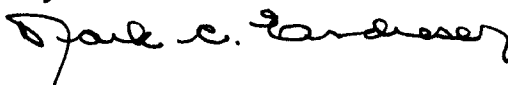
1. The order of dismissal issued by the Executive Director is vacated.
2. The matter is remanded to the Executive Director for further proceedings consistent with Chapter 391-25 WAC and this decision.

Issued at Olympia, Washington, the 24th day of April, 1991.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JANET L. GAUNT, Chairperson



MARK C. ENDRESEN, Commissioner



DUSTIN C. MCCREARY, Commissioner