STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: KING COUNTY POLICE OFFICERS GUILD Involving certain employees of: KING COUNTY	CASE 8852-E-90-1480 DECISION 3672 - PECB ORDER DENYING MOTION FOR DISMISSAL

On October 23, 1990, the King County Police Officers Guild filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission. The "showing of interest" submitted in support of the petition consisted of individual authorization cards taking the form:

> RE: BARGAINING REPRESENTATIVE OF KING COUNTY POLICE OFFICERS
>
> I _____, EMPLOYED BY KING COUNTY
> (PRINT YOUR NAME HERE)
> AS A COMMISSIONED POLICE OFFICER, HEREBY REQUEST THE " KING COUNTY POLICE OFFICERS GUILD " TO ACT AS MY EXCLUSIVE BARGAINING REPREEENTATIVE [sic] WITH KING COUNTY AND THAT THE PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCT AN ELECTION TO CERTIFY THE GUILD AS MY REPRESENTATIVE.
>
> SIGNED _____
>
> DATE _____

The petitioner named Public Safety Employees Local 519, SEIU, AFL-CIO, as the incumbent exclusive bargaining representative of commissioned law enforcement officers employed by King County, and it sought a representation election in that bargaining unit.

The Commission routinely obtained a list of employees from the employer. While the petition appeared to have the support of more than 30% of the employees in the petitioned-for bargaining unit, the incumbent organization raised issues concerning the solicitation, form, and contents of the "authorization cards" submitted to the Commission. The petitioner was invited to reply to the issues raised by the incumbent, and it did so in a letter filed on November 30, 1990.

Statute / Rules Background

The Commission processes representation cases under RCW 41.56.060, 41.56.070 and Chapter 391-25 WAC. As the Commission recently observed in City of Centralia, Decision 3495-A (PECB, 1990):

> Chapter 41.56 RCW draws many of its provisions from the federal Labor-Management Relations Act of 1947 (Taft-Hartley Act), but there are also numerous differences between the state and federal collective bargaining laws. One such difference is in the methodology for determining questions concerning representation.

The Commission then went on in Centralia to focus attention on the portion of RCW 41.56.060 which provides:

> RCW 41.56.060 DETERMINATION OF BARGAINING UNIT--BARGAINING REPRESENTATIVE. ... The commission shall determine the bargaining representative by (1) examination of organization membership rolls, (2) comparison of signatures on organization bargaining authorization cards, or (3) by conducting an election specifically therefor.

In distinct contrast to the powers delegated by our Legislature to the Commission, the National Labor Relations Board (NLRB) lacks

authority to resolve representation proceedings on the basis of authorization cards.[1]

The NLRB has adopted a requirement that representation petitions be supported by a "showing of interest" indicating that the petitioner has the support of at least 30% of the employees in the petitioned-for bargaining unit.[2] RCW 41.56.070 has embraced the notion of the "30% showing of interest" in our statute, as follows:

> RCW 41.56.070 ELECTION TO ASCERTAIN BARGAINING REPRESENTATIVE. **In the event the commission elects to conduct an election** to ascertain the exclusive bargaining representative, and upon the request of a prospective bargaining representative showing **written proof of at least thirty percent representation of the public employees within the unit,** the commission shall hold an election by secret ballot to determine the issue. The ballot shall contain the name of such bargaining representative and of any other bargaining representative showing written proof of at least ten percent representation of the public employees within the unit, together with a choice for any public employee to designate that he does not desire to be represented by any bargaining agent. ... [1975 1st ex.s. c 296 § 18; 1967 ex.s. c 108 §7.]

[Emphasis by **bold** supplied]

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1 The NLRB may use such cards as the basis for a bargaining order under NLRB v. Gissell Packing, 395 U.S. 515 (1969), but only in an unfair labor practice proceeding where there is a finding that serious violations of the law preclude the conduct of a fair election. Similarly, the Commission may certify on the basis of authorization cards under the Educational Employment Relations Act, Chapter 41.59 RCW, only in the context of serious unfair labor practices. See, RCW 41.59.070(2).

2 NLRB Rules & Regulations & Statements of Procedure, Series 8, Section 101.18, as last amended January 8, 1976. See, also, Esso Standard Oil Co., 124 NLRB 1383 (1959).

While it may have been arguable that no "showing of interest" was required to file a representation petition with the state agency, Department of Labor and Industries practice prior to 1976 had been to require a 30% showing as a condition precedent to processing of a representation petition.

The Commission has also adopted the NLRB's general approach in its rules concerning the "showing of interest", as follows:

> WAC 391-25-110 SUPPORTING EVIDENCE. The original petition shall be accompanied by a showing of interest indicating that the petitioner has the support of not less than thirty percent of the employees in the bargaining unit which the petitioner claims to be appropriate. The showing of interest must be timely filed under the same standards applicable to the petition, and **must consist of individual authorization cards or letters signed and dated by employees** in the bargaining unit claimed appropriate. Such authorization cards **shall not be valid unless signed and dated during the ninety-day period preceding the filing of the petition or the filing of such evidence with the agency, whichever is later.** [Statutory Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59.110, 41.56.070 and 41.59.070. 90-06-072, §391-25-110, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW 28B.52.080, 41.58.050, 41.56.090 and 41.59.110. 88-12-054 (Order 88-02), §391-25-110, filed 5/31/88. Statutory Authority: RCW 28B.52.080, 41.56.040, 41.58.050, 41.59.110 and 47.64.040. 81-02-034 (Order 81-01), §391-25-110, filed 1/6/81.]
>
> ...
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> WAC 391-25-210 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.** [Statutory Authority: RCW 41.58.050, 28B.52.080, 41.56.090, 41.59-.110, 41.56.070 and 41.59.070. 90-06-072, §391-25-210, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW 28B.52.080, 41.56-.040, 41.58.050, 41.59.110 and 47.64.040. 80-14-046 (Order 80-5), §391-25-210, filed 9/30/80, effective 11/1/80.]

[Emphasis by **bold** supplied]

The Commission's handling of "showing of interest" determinations as an administrative exercise exempt from litigation is consistent with NLRB practice. That approach was affirmed by the Court of Appeals in Evergreen General Hospital v. PERC, 24 Wn.App. 64, WPERR CD-52 (Division I, 1979), and was codified in statute by the new Administrative Procedures Act in 1988.[3]

The Commission's rules do reflect some deviations from NLRB practice, as highlighted above, that have been discussed and adopted in the context of the Commission's authority to routinely determine questions concerning representation by the "cross-check" methodology. For example, the NLRB does not refuse acceptance of multiple-signature documents for "showing of interest" purposes,[4] and it does not impose a specific "shelf life" on authorization cards. Both of those requirements were felt to be necessary by the

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[3] RCW 34.05.010(3)(b) excludes "determinations as to the sufficiency of a showing of interest filed in support of a representation petition" from the definition of "agency action" subject to the procedures for conduct of "adjudicative proceedings" and subject to judicial review.

[4] See, Rose Hill Water & Sewer District, Decision 2488-A (PECB, 1986), where the Commission applied the same principles to employer-filed petitions, saying, "[W]e deviate consciously from [National Labor Relations] Board precedent in this instance."

Commission in the context of there being a possibility of using the authorization cards for cross-check purposes.[5]

Schlossberg and Sherman, Organizing and the Law,[6] defines an authorization card as:

> ... one that signifies the desire of a worker to be represented by a union in collective bargaining. The signer authorizes the union to represent him with his employer.

Those authors describe and distinguish two types of authorization cards: A "pure" authorization card states that the signer has designated the union as his or her exclusive bargaining representative; a "dual purpose" card authorizes union representation, but also includes a statement to the effect that the card may be used to demand recognition or to obtain a representation election. The NLRB will accept a "dual purpose" authorization card for purposes of a "showing of interest".

In considering the issues raised in this case, NLRB practice and precedent has been reviewed by library research, as well as by discussion with NLRB officials at the NLRB Region 30 office in Seattle. While it is appropriate to refer to the rules, practices

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[5] The Commission's ongoing concern in that area is evidenced by a comment in the recent Centralia case:

> 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.

[6] Stephen I. Schlossberg and Fredrick E. Sherman, BNA Books, 1971, at pages 50-52.

and precedents of the NLRB, the distinctions between statutes and rules that are noted here suggest that slavish conformance to NLRB practice is not indicated.

Issues and Positions of Parties

Applying the definitions set forth by Schlossberg and Sherman, the showing of interest card used by the petitioner in the instant case would aptly be described as being of the "dual purpose" type. It clearly authorizes representation by the petitioner, and just as clearly mentions a representation election. The question at hand in the instant case is whether the Commission should differ from the NLRB practice of accepting "dual purpose" authorization cards for "showing of interest" purposes, in light of the availability of cross-checks as a routine procedure under Chapter 41.56 RCW, in light of the "proof" terminology of RCW 41.56.070, or for any other reason.

Local 519 asserts here that the authorization cards filed in support of the petition are rendered ambiguous by the terms used in the documents presented to employees and/or by the statements made in connection with their solicitation. The incumbent alleges, and the petitioner does not deny, that the authorization cards submitted to the Commission were originally presented to employees as part of a two-page document, as follows:

> [Page 1]
>
> TO ALL COMMISSIONED OFFICERS
>
> Under the provisions of RCW 41.56 and WAC 391-25 commissioned King County police officers currently represented by Local 519 of the SEIU have the opportunity to petition the Public Employment Relations Commission (PERC) to conduct a vote which would determine if Local 519 or a King County Police Officers Guild will represent them.

> The time frame for the petition to be submitted is very limited. The petition must be submitted prior to the end of October 1990.
>
> If 30% of the commissioned officers sign "show of intent" letters, PERC will conduct a secret ballot. This vote will determine if police officers will be represented by a Guild or Local 519.
>
> **Signing the "show of intent" letters <u>does not</u> constitute a final commitment; it only requests that a vote be held.** Your commitment would come when PERC conducts an election between the existing union, Local 519, and the proposed Guild. Prior to the final vote, Local 519 and the proposed Guild will have the opportunity to present their respective sides and answer questions. [emphasis supplied]
>
> If you need more information or want to become directly involved in forming a Guild, contact [names of individuals omitted].
>
> A letter of intent has been attached for your review and, if you desire, your signature.
>
> [Page 2]
>
> RE: BARGAINING REPRESENTATIVE OF KING COUNTY POLICE OFFICERS
>
> I _____, EMPLOYED BY KING COUNTY
> (PRINT YOUR NAME HERE)
> COUNTY AS A COMMISSIONED POLICE OFFICER, HEREBY REQUEST THE "KING COUNTY POLICE OFFICERS GUILD" TO ACT AS MY EXCLUSIVE BARGAINING REPREENTATIVE [<u>sic</u>] WITH KING COUNTY AND THAT THE PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCT AN ELECTION TO CERTIFY THE GUILD AS MY REPRESENTATIVE.
>
> SIGNED _____
>
> DATE _____

While the second page of the set appears to be clear and unambiguous standing alone, Local 519 claims that it was misleading, "because it did not have the portion of the document that specifically indicated that signing the document was not a commitment to a union but only a request for a vote."

Counsel for the petitioner seems to concede greater similarity between our statute and the federal law than is indicated above, stating:

> I understand PERC to hold elections as the primary means of compliance with the determination of majority requirements of RCW 41.56-.060, absent the commission of serious unfair labor practices.

The petitioner recognizes that the Commission deviates from NLRB practice in some areas, but urges that the authorization cards which it has submitted comply with WAC 391-25-110. The petitioner contends that the cover letter sent to employees with the authorization card should not be considered, pointing out both the absence of a "survey" here and the language of WAC 391-25-210 prohibiting litigation of issues concerning the showing of interest.[7] The petitioner contends that its "dual purpose" card should suffice in this case, based on NLRB practice and on the fact that only an election was actually sought by the petitioner in this case.

Discussion and Conclusions

The Commission has had occasion in the past to reject authorization cards that were ambiguous. In King County, Decision 2644 (PECB, 1987), the proponents of a "decertification" movement had solicited employee signatures on a three-part document. The portion signed by employees (and submitted to the Commission in support of a "decertification" petition) stated:

> I am in agreement with the request to hold an election (vote) pertaining to decertification of Teamster's Local 882.

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[7] The petitioner correctly points out that unfair labor practice proceedings under Chapter 391-45 WAC provide the forum for litigation of allegations of illegal tactics.

While that language arguably gave indication of support for the "decertification" attempt, another part of the document (which was not submitted to the Commission) had been a "straw vote" in which the incumbent union was one of the choices. Once the ambiguous nature of the support for "an election" language was discerned, the petition was dismissed for insufficiency of showing of interest. The petitioner aptly distinguishes King County, however. There is no indication here of a "survey", or of the document signed by employees having been dismantled in a manner which concealed the intent of employees who actually support the incumbent union.

There has been substantial debate about the legitimacy of using "dual purpose" authorization cards under the federal law, but that has arisen in "bargaining order" situations. There, authorization cards originally signed by employees for one purpose (i.e., the filing of a representation petition that is expected to lead to an election under NLRB representation case procedures) are ultimately used for a different purpose (i.e., a "bargaining order" remedy in an NLRB unfair labor practice case). The NLRB has been willing to use "dual purpose" cards as the basis for a "bargaining order", but the federal courts of appeal have split on the issue.[8] Both "pure" and "dual purpose" cards were discussed in NLRB v. Gissell Packing, supra,[9] but all of the cases consolidated for decision before the Supreme Court there involved "pure" cards. The Supreme Court acknowledged the existence of the split among the courts of appeal, but it declined to rule on the point.

The Commission quoted extensively in City of Centralia, supra, from City of Redmond, Decision 1367-A (PECB, 1982), as follows:

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[8] Some courts have held that dual-purpose cards are ambiguous, because they mention elections, and that they should be confined to use in establishing a showing of interest to get an election.

[9] No cases from the 9th Circuit were cited by Schlossberg and Sherman, or by the Supreme Court in Gissell.

> **RCW 41.56.060 clearly provides three methods for determining a bargaining representative, and does not suggest a legislative preference for any particular method. Contrary to the employer's suggestion, the statute does not prefer the election procedure to other methods.** RCW 41.56.070 sets forth election procedures to be used "in the event the commission elects to conduct an election..." (emphasis added). This again recognizes the options available to the commission, which have been left to the discretion of the agency to exercise.[2]
>
> **The cross-check has the advantage of being a more efficient procedure than an election, requiring less utilization of this agency's scarce resources. On the other hand, an election accurately reflects whether any employees who signed authorization cards have changed their minds between the time they signed the card and the election, and would also give the union time to garner further support. Our rule, WAC 391-25-391, weighs the advantages and disadvantages of the two approaches, and resolves the matter by allowing a cross-check when the showing of interest indicates that the union has been authorized as the bargaining representative by a "substantial majority of the employees".** It must also appear to the Executive Director that conducting an election would "unnecessarily and unduly delay the determination of the question concerning representation with little likelihood of altering the outcome".
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> 2 We recognize that the existence of these equally weighted options is different from the procedures available under the National Labor Relations Act. See: Gissell Packing Co., 395 U.S. 515 (1969).

[Emphasis by Commission in Centralia, supra.]

Our statute, the more stringent rules adopted by the Commission, and the precedents developed by the Commission all support a conclusion that "dual purpose" cards should not be accepted or used for "cross-check" purposes. Since cross-checks are inherently available under Chapter 41.56 RCW in representation cases, mention

of an "election" in an authorization card takes on much greater significance than under the federal law.

The conclusion that "dual purpose" cards should not be accepted or used for cross-check purposes does not directly resolve the issue raised in the instant case, but it does clear the way for addressing the issue raised here. With the cross-check alternative isolated from the debate, there is no evident reason to deviate from NLRB practice in representation proceedings where only an election is sought or available from the Commission.[10]

Public employees must be presumed to be reasonably intelligent adults who are competent to handle their business affairs. The Commission does not sit in judgment of every bit of puffery advanced by the parties to a representation campaign, instead confining itself under WAC 391-25-590(1) to scrutinizing for "forged documents ... and coercion or intimidation of or threat of reprisal or promise of reward to eligible voters". Indeed, any attempt to litigate issues concerning the solicitation of authorization cards in the context of a representation case would invite mischief. Delay would be unavoidable. Defeat of the legislative purpose of protecting employee freedom of choice would be an inevitable result.

Proceeding to an election in this case will give the employees the opportunity to express their views in the context of the secret

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[10] Cross-checks are not available under Commission rules in "decertification" situations (i.e., where employees seek to rid themselves of their exclusive bargaining representative so as to become unrepresented), in "raid" cases (i.e., where one union seeks to supplant another as the exclusive bargaining representative), or even where two or more labor organizations are competing for the same group of unrepresented employees. Where otherwise available, Commission policy dictates that cross-checks be directed only where the sole petitioning union has the support of more than 70% of the employees in the bargaining unit.

ballot election called for by the Commission's rules under the circumstances present.

NOW, THEREFORE, it is

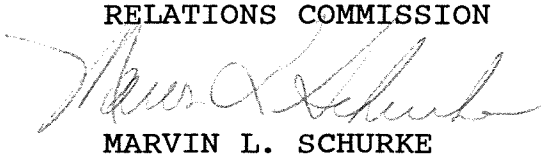
ORDERED

1. The motion for dismissal made by Public Safety Employees, Local 519, SEIU, AFL-CIO is DENIED.

2. The matter is remanded to Hearing Officer William A. Lang for further proceedings consistent with Chapter 391-25 WAC.

Dated at Olympia, Washington, the 21st day of December, 1990.

PUBLIC EMPLOYMENT
RELATIONS COMMISSION



MARVIN L. SCHURKE
Executive Director

This order may be appealed by filing timely objections with the Commission pursuant to WAC 391-25-590.