

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
PUBLIC SCHOOL EMPLOYEES OF)
WASHINGTON) CASE 9826-E-92-1620
Involving certain employees of:) DECISION 4216 - PECB
TACOMA SCHOOL DISTRICT) ORDER ON OBJECTIONS
_____)

David Fleming, Staff Representative, and Eric T. Nordlof, Attorney at Law, appeared on behalf of the petitioner.

Susan Schreurs, Legal Assistant, appeared on behalf of the employer.

Robert McCauley, Staff Representative, and Audrey B. Eide, Attorney at Law, appeared on behalf of the incumbent intervenor, Washington State Council of County and City Employees.

This case comes before the Commission on objections filed by the incumbent intervenor, claiming the petitioner engaged in conduct improperly affecting the results of the election, under WAC 391-25-590(1), and claiming procedural error by the agency staff under WAC 391-25-590(2).

BACKGROUND

Washington State Council of County and City Employees, Local 120-SCH (WSCCCE), is the incumbent exclusive bargaining representative of approximately 240 food service employees of the Tacoma School District. The WSCCCE is affiliated with the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME). The WSCCCE and the employer were parties to a three-year collective bargaining agreement which expired on August 31, 1992.

On June 3, 1992, Public School Employees of Washington (PSE) filed a petition for investigation of a question concerning representation with the Commission, seeking to replace the WSCCCE as exclusive bargaining representative of the food service employees at the Tacoma School District.

A pre-hearing conference was held on July 7, 1992, at which the parties agreed on all matters other than the timing of the election.¹ After reviewing the positions of the parties, the Executive Director notified the parties on July 20, 1992, that the election would be conducted by mail ballots issued in August.

Ballot materials were mailed to eligible voters on August 14, 1992, and were due back to the Commission by September 4, 1992.² The ballots were tallied on September 4, with results as follows:

Approximate Number of Eligible Voters.....	240
Void Ballots.....	1
Votes Cast for "PSE".....	95
Votes Cast for "WSCCCE".....	93
Votes Cast for "No Representation".....	4

To have a conclusive result under RCW 41.56.070 and WAC 391-25-531, one of the choices would have had to have received 121 votes. A run-off election was thus necessary.

Ballot materials for the run-off election were mailed to eligible voters on September 15, 1992. Copies were again mailed on the same date to representatives of the employer, PSE and WSCCCE. The

¹ PSE suggested a mail ballot as quickly as possible, while the WSCCCE suggested a mail ballot conducted after the opening of school in the autumn. PSE countered that it preferred an "on site" procedure if the election was to be delayed until the autumn.

² Copies were mailed to representatives of the employer, PSE and WSCCCE on the same date, and the employer was provided with notices for posting on its premises. The materials mailed to each employee specified the September 4, 1992 due date for return of the ballot.

employer was again provided with notices for posting on its premises. September 25, 1992 was specified as the due date for return of the ballot to the Commission. When the ballots were tallied on September 25, the results were as follows:

Approximate Number of Eligible Voters.....	240
Void Ballots.....	1
Votes Cast for "PSE".....	116
Votes Cast for "WSCCCE".....	93

Thus, it appeared that PSE was entitled to certification as the exclusive bargaining representative of the bargaining unit.

The WSCCCE filed timely objections on October 2, 1992. PSE filed a written response to the objections on October 16, 1992. The matter is now before the Commission for disposition.

DISCUSSION

The first paragraph of the WSCCCE's objections is a summary of the proceedings to-date, and does not specify any particular misconduct or error. A second paragraph, identified as "Fact #1", describes the mailing of ballots for the initial election, and also does not specify any particular misconduct or error. Those materials are taken as background to the allegations which follow.

Alleged Deviation From "Agreed" Arrangements

In nine additional paragraphs, the WSCCCE objects to the procedure used by the Commission staff in conducting the run-off election:

FACT #2 -- On September 4, 1992, a meeting was held at the Public Employment Relations Commission office Present at the meeting were Marvin Schurke, Executive Director of PERC, Dan Barkley, Tacoma School District Labor Relations, David Fleming, Public School

Employees of Washington State [sic], and Robert McCauley, Washington State Council of County and City Employees. ...

FACT #3 -- At the meeting on September 4, 1992, it was agreed that a run-off election would be held to determine who would represent the Tacoma Public School District Food Service Employees bargaining unit. ...

FACT #4 -- Also at the September 4, 1992 meeting, it was agreed that ballots for the run-off election would be sent out by mail on September 15, 1992. ...

FACT #5 -- It was further agreed at the September 4, 1992 meeting that the ballots would be counted at PERC September 29, 1992. In calculating when the ballots would be counted, the length of the election period was taken into consideration. It was important to the parties to have the same number of weekends in each election period. ...

FACT #6 -- As a result of the September 4, 1992 meeting, Washington State Council of County and City Employees, AFSCME, AFL-CIO sent out a mailing to the bargaining unit members and voting membership telling them that the ballots would be counted on September 29, 1992. ...

FACT #7 -- At a general membership meeting of the bargaining unit and voting membership held on September 18, 1992, Mr. Robert McCauley, Labor Representative Washington State Council of County and City Employees, AFSCME, AFL-CIO, announced that the ballots would be counted on September 29, 1992, at PERC. ...

FACT #8 -- The Public Employment Relations Commission sent out a mailing to the membership that the ballots would be counted September 25, 1992. ...

FACT #9 -- Counting the ballots on the 25th of September rather than the 29th of September shortened the ballot time. It also created a situation where confusing and contradicting information about the election was disseminated to the voting membership. ...

FACT #10 -- Counting the ballots on the 25th rather than the 29th has potentially created late ballots. Out of a possible of approxi-

mately 240 votes. [sic] Only about 217 voting members voted by the 25th of September.

[Emphasis by **bold** supplied.]

PSE responds that the period allowed for return of the mail ballots in the run-off election was in conformity with the rules. Noting a date stamp which shows that the WSCCCE received notice of the due date for run-off election ballots by September 16, PSE contends that any mistaken statement made by McCauley on September 18 was due to his own negligence.

RCW 41.56.060 provides the Commission with discretion as to the methodology for determining questions concerning representation. RCW 41.56.070 makes the conduct of representation elections a state function, impartially administered by the Commission. The Commission has adopted WAC 391-25-430 to specify the requirements for giving the eligible employees notice of a representation election, and has adopted WAC 391-25-490 to specify election procedures.

The rights being implemented in a representation case are those of the employees, under RCW 41.56.040, to select a representative of their own choosing. The employer and participating unions have a voice, but no vote, in representation proceedings. It has long been clear that matters covered by the representation and unit clarification procedures are not mandatory subjects of collective bargaining, and that the agreements of parties on such matters are not binding on the Commission. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). The Commission's staff has recently encountered other cases in which procedural agreements reached by parties who were engaged in "nose counting" or "jockeying for position" were rejected as prejudicial to the statutory rights of the affected employees. See: City of Federal Way, Decision 4088 (PECB, 1992).

The Commission does solicit and consider the suggestions of the employer and participating unions as to election and cross-check arrangements. The rules for election agreements, at WAC 391-25-230(6), and the rules for cross-check agreements, at WAC 391-25-250(6), specifically call for the "suggestions" of the parties on arrangements. The responsibility for procedural arrangements ultimately lies, however, with the agency. In this case, the WSCCCE's "suggestions" on an earlier procedural controversy (*i.e.*, the timing of the initial election) had been overruled by the agency, and McCauley had no right or basis to believe that other arrangements suggested by any or all of the parties would be binding on the Commission.

The critical question here is whether the election was conducted in conformity with the Commission's rules. The 10-day period specified in WAC 391-25-490 was provided between the mailing of the ballots and the due date for their return. The Commission did not receive any late ballots. We find, therefore, that the WSCCCE's "procedure" objection is without merit.

The Allegedly Improper Campaign Mailing

In additional paragraphs, the WSCCCE goes on to object to a mailing sent out by PSE during the election campaign. That mailing was allegedly sent out on September 15-16, 1992. The WSCCCE alleges that the mailing was "fraudulent, false, inflammatory and misleading", that it relates to a different affiliate of AFSCME, and that it had nothing to do with the funds of the WSCCCE. The WSCCCE also alleges that it did not have a chance to respond to the mailing.

The disputed document is a newspaper article to which a header and footer have been added, replicated as follows:

AFSCME problems

* Seattle Post-Intelligencer, Tuesday, August 18, 1992 B3

FOUL-UP LEAVES UNION \$400,000 OUT OF BALANCE

By Ed Penhale P-I Reporter

Members of the largest state employees union are trying to understand how an old accounting error apparently led to depletion of about \$400,000 that union officials thought was in a reserve fund.

Gary Moore, president of the 20,000-member Washington Federation of State Employees, said yesterday that none of the money was stolen or missing and that "every penny" went to services provided by the union.

Larry Kenney, president of the Washington State Labor Council, said he had heard about "financial problems" in Moore's union but that he does not know of any move to oust its leadership.

The problem was discovered last month by a new financial officer hired by the union.

When directed to purchase a printing press with funds from the reserve account, the financial manager found the amount of money in the account was \$400,000 less than stated in the union's financial records.

Moore said he spent 160 hours going over the union's books and finally traced the problem to a budgeting change put into effect 14 years ago by a former financial officer, who died earlier this year.

Moore, who reported his findings to the union's executive board on Aug. 10, said the error occurred when the union, beginning in fiscal year 1978, started counting the union budget's year-end fund balance as cash.

That balance, however, was not just cash and represented the union's overall assets - including property and equipment, for example - minus liabilities.

For that reason, when union officials subsequently saw large annual fund balances, they presumed that books reflecting reserve account balances were accurate, Moore said.

"We thought we were in great shape, but we were not," Moore said.

Moore became president of the union in 1985. The accounting change that caused the problem occurred under his predecessor, George Masten, Moore said.

Moore said annual audits of the union's books failed to turn up the problem because they examined fund balances and not how the budget itself was structured.

Moore said he has asked the state union's international organization, the American Federation of State County and Municipal Employees, to audit its books in order to clear up any suspicions.

It is (was) your money!

PSE's response acknowledges that PSE sent out the disputed mailing to the eligible voters,³ but PSE contends on several grounds that the disputed mailing was not sufficient to overturn the election. In particular: (1) PSE alleges that the mailing was sent out on September 11, and should have been in the hands of the employees before the September 15 mailing of the ballots; (2) that the WSCCCE did have adequate opportunity to respond to the mailing; (3) that there is no per se prohibition against electioneering during the time when mail ballots are out to the employees; and (4) that the WSCCCE has actively sought to merge its identity with its larger affiliate, AFSCME, so that the mailing was not misleading.

PSE acknowledges that allegations of inappropriate electioneering are decided by the Commission on a case-by-case basis, taking into consideration the surrounding circumstances. Although the fact of the mailing is not in dispute here, several other factual issues are framed as to the timing of the mailing and the potential for confusion between the AFSCME affiliates. It thus appears that these "conduct" objections could be a basis for overturning the run-off election, and that a hearing is necessary.

NOW, THEREFORE, it is

ORDERED

1. The objections filed by the WSCCCE as to the scheduling of the run-off election, as set forth in the paragraphs identified as "Fact #2" through "Fact #10", are OVERRULED as insufficient on their face to constitute objectionable conduct.

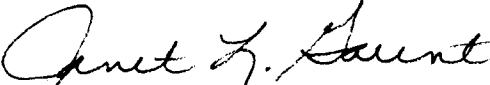
³ PSE's response indicates:

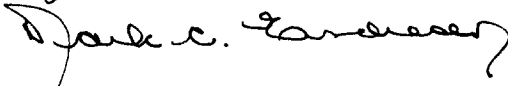
While petitioner, exercising hindsight, does not contend that sending out the mailing was the most intelligent act it has ever undertaken,

2. The objection filed by the WSCCCE as to PSE's conduct in mailing the document headed "AFSCME problems" to eligible voters is remanded to the Executive Director for an evidentiary hearing.

Issued at Olympia, Washington, the 17th day of November, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


JANET L. GAUNT, Chairperson


MARK C. ENDRESEN, Commissioner


DUSTIN C. MCCREARY, Commissioner