

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
OFFICE AND PROFESSIONAL EMPLOYEES	)	CASE NO. 1544-E-78-306
INTERNATIONAL UNION, LOCAL 8,	)	
AFL-CIO	)	DECISION NO. 500-A PECB
Involving certain employees of:	)	
VALLEY GENERAL HOSPITAL (PUBLIC	)	ORDER DETERMINING
HOSPITAL DISTRICT NO. 1 OF	)	OBJECTIONS TO ELECTION
SNOHOMISH COUNTY)	)	
_____	)	

Darlene Sobieck, Business Representative, appeared for the union. Brief submitted by Finley Young.

Davis, Wright, Todd, Riese & Jones, by Janet L. Gaunt, Thomas A. Lemly and Richard Cassard, Attorneys-at-Law, appeared for the employer.

STATEMENT OF CASE:

On August 14, 1978, Office and Professional Employees Union, Local No. 8, AFL-CIO (the union), and Valley General Hospital, Public Hospital District No. 1 of Snohomish County (the hospital) signed a consent election agreement. As required by WAC 391-21-114,<sup>1/</sup> the agreement contained a stipulation of employees eligible to vote. The bargaining unit deemed appropriate by the union and hospital was:

All regular full and part-time office and clerical employees, and all other non-professional employees including, but not limited to, those employees working in the business office, housekeeping, dietary, surgery, maintenance and nursing departments, excluding supervisors, confidential employees, casual and temporary employees and students.

The tally of ballots from the September 15, 1978 election showed that 41 votes were cast for no representation, 37 votes were cast for the union, and there were no challenged ballots.

On September 22, 1978, the union filed timely objections to conduct affecting the election, pursuant to WAC 391-21-136(1). The union supplied additional information to clarify its objections on October 3,

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<sup>1/</sup> Chapter 391-21 WAC has subsequently been repealed. Chapter 391-25 WAC now controls representation proceedings before the Commission. The substantively similar provision to WAC 391-21-114 is WAC 391-25-230.

1978 and April 17, 1979. The union withdrew certain of its objections prior to hearing and at hearing. The union's remaining objections relate to the hospital's alleged 1) electioneering near the polling place, 2) threat of discharge made to an employee in order to discourage that employee's active support of the union, and 3) improper reclassification and misrepresentation when it informed five employees that they were ineligible to vote because they were confidential employees. After numerous delays requested by the parties, a hearing was held on October 3, 4, 18 and 19, 1979, before Hearing Officer Alan R. Krebs.

#### THE FACTS:

The hospital is staffed by 185 full and part-time employees, of which about 89 are in the bargaining unit. The Hospital District is governed by a three-member board of commissioners which vests in the hospital administrator, Ross Godard, the authority to operate and manage the hospital.

In practice most all hospital operations and personnel policy is made collectively by an administrative team which consists of Godard, Associate Administrator, Beverly Seese; Assistant Administrator, Lane Sasvitch; Director of Nursing, Alvina Hereth; and Comptroller and District Treasurer, Charlotte White. While the hospital has no personnel director or department, Seese does have primary responsibility for formulating personnel policies, and the payroll department does perform certain functions traditionally performed by a personnel department.

#### Alleged Confidential Employees

Genevieve Thorne was a hospital employee who was active in initiating and pursuing the organizational effort. She attended the initial meeting with the union organizer, signed an authorization card, and distributed authorization cards to other hospital employees. The representation petition was filed with PERC on June 27, 1978. On July 13, 1978, Thorne was called into Godard's office. There, in the presence of White and Hereth, Godard read a statement to Thorne which included questions which Thorne replied to. The statement was entered into evidence:

"Discussion with Gene Thorne:

Present: Alvina Hereth, Charlotte White, Ross Godard

9:30 A.M., July 13, 1978

I have just learned that you have been actively engaged in promoting interest on the part of employees to sign up for union representation. Is this true? If so, please explain in detail the extent of your activity.

1. Have you had any conversation with a union representative, who is not employed by the hospital?
2. Have you attended any employee meetings which were called either in the hospital or outside the hospital for the purpose of promoting union activity?
3. Have you provided any information from records available to you to any person or office which is promoting union representation?

I have been advised by our attorney that you are classified under the labor laws as a "confidential" employee because of your position, and such must refrain from any further union activity. You apparently believe that salaries and employment conditions could be better with union representation. You are entitled to believe what you wish; we believe that the employees are treated fair and paid a salary commensurate with their position and the salary ranges in Monroe and Snohomish. We do not believe that union representation will improve conditions for employees at Valley General Hospital, which are currently fair and equitable.

The employees have a right to consider the pro and con of union membership and be active in promoting their belief, either pro union or pro management. You do not have the privilege to actively engage in promoting union representation. If you do not have confidence in management so that you can speak in favor of non union representation, we must demand that you retain a neutral position, not reveal any confidences or confidential material or information which you are privy to by reason of your position. We must have your assurance, otherwise I must fire you here and now.

I must further warn you that if we discover evidence that you have betrayed the trust of confidentiality that is inherent to your position, you will be fired.

/s/ Ross E. Godard"

Thorne testified that she informed Godard that she had given some cards to dietary employees. When Godard asked how many, she replied "a couple."

A pre-hearing conference held by PERC on August 12, 1978, attended by representatives of the hospital and the union, resulted in a consent election agreement. The hospital submitted a list of employees in the proposed bargaining unit. The list did not contain the names of four employees who the hospital deemed to be confidential: Thorne, Myrth Berry, Myrna Jensen, and Rebecca Poole. All four had signed union authorization cards. While there was some discussion of the contents of that list, there was no mention of confidential employees.

Jonelle McCrorey was a hospital employee who had been involved in organizational activities on behalf of the union. Her name appeared on the August 12, 1979 eligibility list. On August 29, 1978, the hospital's attorney mailed a letter to the union, which indicated that McCrorey had, as a result of a transfer to a new assignment, become a confidential employee and it was the hospital's position that she was therefore ineligible to vote in the election. McCrorey had requested the transfer.

On September 5, 1978, Seese sent a memo to Berry, Thorne, Jensen, Poole, and McCrorey which stated: "Due to the confidential nature of work ... (you) are exempt from the bargaining unit vote..." On the same day, union representative Donald Olson mailed letters to the five employees, which informed them that although their names did not appear on the stipulated list of eligible voters, they could still vote in the election. On September 8, 1978, Olson sent a letter to the hospital's attorney indicating that the union's position was that the five employees were not confidential employees and should be permitted to vote.

The parties arranged to meet a half hour prior to the opening of the polls in order to discuss their differences. At that meeting the hospital agreed to permit the five employees to vote without being challenged. However, no one informed the five affected employees of that agreement and none of the five voted.

#### Genevieve Thorne

Thorne, the payroll/accounts payable clerk, is supervised by Comptroller White. Thorne performed the bookkeeping functions involved in the payment of hospital bills and the payroll. Thorne maintained the employee's personnel records and saw that salary changes, promotions, sick leave and vacation leave and other such matters were reflected in those records. She took care of employee insurance enrollments. Based on a written personnel policy and her custody of the personnel records, she would respond to employee questions on personnel related matters. While Thorne did not participate in the formulation of policy, she might be consulted regarding the practical difficulties of making a personnel policy change, and she may inform members of the administrative team of current wage and benefit levels. She supplied information directly to Godard and Seese, as well as her supervisor.

#### Myrth Berry

Berry is an accounting clerk for the hospital. She is designated as deputy district treasurer so that when the Treasurer, Charlotte White, is absent, she has the authority to sign warrants and conduct bank transactions on behalf of the hospital. Berry posted into the general

ledger the capital, revenue, expense and liability accounts. She typed various financial reports. She shared an office with Thorne, assisted Thorne with her work at times, and answered employees' personnel questions. She attended meetings at which supervisors discussed evaluations, and recorded the evaluations dictated to her by the evaluator. Berry was also responsible for slitting and disbursing the hospital mail. She does not remove the letters from the envelope.

Rebecca Poole and Jonelle McCrorey

Poole and McCrorey are computer operators, supervised by Elsi Maier, the data processing supervisor. Into the computer they post accounts payable, accounts receivable, payroll, and other financial information. Through the computer, they had access to district financial information, such as revenue and expenses.

Myrna Jensen

Jensen, the data analyst, usually worked three days per week. She was supervised by Godard and Seese and her work station was directly adjoining theirs. Jensen sent information to an out-of-house computer and received back financial reports which she used to prepare monthly revenue and expense reports. She kept track of the relationship between each department's budgeted and actual expenses, prepared monthly statistical reports of hospital operations, and prepared the hospital's budget submission to the Hospital Rate Commission. Godard testified that Jensen would be used to determine the cost of wage and benefit proposals. While Seese usually typed Godard's correspondence, Jensen also did so on occasion.

Electioneering

A few minutes prior to the opening of the polls, Godard and Seese helped the election officer rearrange the furniture in the polling room. Godard testified that when they left the room, two employees in the hall extended their hands to him and they shook hands, after which he told them that the voting had not yet commenced, had "a very short exchange of pleasantries" which lasted about 10 or 15 seconds, and then went their separate ways. Seese confirmed Godard's version of the events. Union Business Agent, William Domorotsky, testified that the conversation lasted from fifteen to thirty seconds and he heard them laughing.

POSITIONS OF THE PARTIES:

The union contends that the five alleged confidential employees were not, in fact, confidential employees within the meaning of RCW 41.56.030(2)(c). It asserts that its stipulation to the voter

eligibility list should not prevent it from raising objections (1) because the list should be final authority as to names included on it, and not as to names excluded; and (2) also because the union and the hospital effectively withdrew their stipulation regarding the five employees prior to the election. The union asserts that the hospital made a material misrepresentation when it told the five employees that they could not vote, and further, that the hospital improperly threatened key organizational employees. The union contends that the hospital improperly reclassified McCrorey in order to make her ineligible to vote. Finally, it asserts that Godard engaged in improper electioneering at the polling place.

The hospital argues that the union should be estopped from asserting objections to the confidential status of the employees in question because of its failure to raise the eligibility issue on a timely basis, that the five employees were confidential employees and they were properly informed that they were such and therefore ineligible to vote, that since Thorne was a confidential employee, it was within its rights in warning her to restrict her contacts with the union, that its threat against Thorne had no effect upon the other employees in question, and that it did not engage in electioneering at or near the polling area.

#### DISCUSSION:

##### Alleged Confidential Employees

Confidential employees are excluded from the coverage of the Public Employees Collective Bargaining Act, Chapter 41.56 RCW. Thus, unlike many other persons who work for public employers, confidential employees do not have the right to organize, to join labor organizations and, in the exercise of those rights, to be free of employer interference. RCW 41.56.030(2)(c) excludes those "...whose duties as deputy, administrative assistant, or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit..." This state's Supreme Court explained this in the following manner:

"We hold that in order for an employee to come within the exception of RCW 41.56.030(2) the duties which imply the confidential relationship must flow from an official intimate fiduciary relationship with the executive head of the bargaining unit or public official. The nature of this close association must concern the official and policy responsibilities of the public employer or executive head of the bargaining unit, including formulation of labor relations policy..."

IAFF v. City of Yakima, 91 Wn.2d 101 (1978).

Of the five employees in question, only Myrna Jensen appears to have an intimate fiduciary relationship involving the formulation of labor

relations policy. Jensen reports directly to Godard and will be used to compute the cost bargaining proposals. She is thus a confidential employee. West Valley School District, Decision 798 (PECB, 1979); Snoqualmie School District, Decision 658 (PECB, 1979); Wapato School District, Decision 788-A (PECB, 1980). With regard to Thorne and Berry, mere access to personnel files and current payroll data does not establish confidentiality within the meaning of the Act. City of Lacey, Decision 396 (PECB, 1978). Neither does the fact that they report to excluded administrators necessitate a finding of confidentiality on their part. Thorne and Berry lack relationships as "deputy, administrative assistant, or secretary" to their supervisors so as to "necessarily imply a confidential relationship." Poole and McCrorey are computer operators working under the supervision of a data processing supervisor who is not part of the management team which makes the principal management decisions for the employer. The record indicates that use of the computer to develop bargaining data for the employer will be done by Jensen. Access by Poole and McCrorey to payroll and financial information of this public employer is thus distinguishable from the situations noted in West Valley and Wapato, supra, and is not sufficient to support a finding that they have access to employer bargaining positions or other confidential information relating to the formulation of the employer's labor relations policies. See: Union Oil Company of California v. NLRB, 707 F.2d 852 (9th Cir., 1979).

#### Threats To Alleged Confidentials

A threat to discharge an employee for engaging in lawful union activities during an election campaign may constitute improper intimidation and coercion sufficient to warrant setting aside an election. See: Custom Recovery, 230 NLRB 247 (1977); Super Thrift Markets, Inc., 233 NLRB No. 66 (1977); and Dresser Industries, Inc., 231 NLRB 591 (1977). An employer that chooses to threaten an employee in this manner, believing that the employee does not enjoy collective bargaining rights, even though it confined its threats to a particular employee or class of employees, does so at its peril. In this case, the petition for certification was filed more than two weeks before Godard, White and Hereth confronted Thorne and interrogated her concerning her union activities. They threatened her with discharge if she failed to cease her support for the union, and she evidently complied. McCrorey's activities likewise ceased. This very well could have caused the union's organizational efforts to lose their momentum. We therefore believe that the employer's threats could have affected the outcome of the election, thereby requiring the election to be set aside. As to this incident, the employer's conduct is not protected by the stipulated voter eligibility lists, the first of which was signed one month after the threats were made. The stipulation is not material to the chilling effect the employer's threats had on the organizational efforts of the union.

Advice given by an employer to employees concerning their eligibility as voters is also given at the risk of the employer. American Sunroof Corporation, et. al., 248 NLRB No. 38 (1980). If incorrect, such advice necessarily constitutes an interference with the election procedures of this Commission, under which any person who presents themselves at the polls and asserts a desire to vote will be permitted to cast a challenged ballot under WAC 391-25-510, subject to a later determination of eligibility. The employer advised five employees to refrain from voting. Regardless of its basis for doing so at the time, or of its good faith in giving those instructions to the employees, the employer stipulated immediately prior to the opening of the polls that all five such employees would be eligible voters. Having previously advised those employees not to vote, it was the employer's responsibility affirmatively to advise the five employees of their eligibility to vote. The futility of the union making such an attempt is evident from the facts of this case. We note, in particular, that the union had corresponded with the disputed employees concerning their right to vote, but none of them trespassed on the employer's contrary orders.

#### Electioneering

The National Labor Relations Board enunciated its policy in electioneering in Michem, Inc., 170 NLRB 362 (1968), at 363:

"...conversations between a party and voters while the latter are in the polling area awaiting to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the content of the remarks. But this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We will be guided by the maxim that 'the law does not concern itself with trifles.'"

Such a rule is appropriate for PERC-conducted elections. Not only does it reflect the norm in private sector labor law, it also reflects the nature of the ban on electioneering at polling place which is enforced in political elections. Such a bar reduces the chances of coercion, insures that neither party obtains an unfair advantage over the other, and serves to maintain order at the polling place.

Applying this rule to the instant case, Godard's brief conversation with employees in the vicinity of the polling place does not, by itself, warrant setting aside the election. The incident occurred prior to the opening of the polls, as Godard was leaving a scheduled meeting with the PERC election officer. It was a very brief, friendly, noncoercive exchange which amounted to trifles.



Remedy

The union asserts that it should be declared the bargaining representative based on the number of cards which it had collected. However, there was considerable testimony to the effect that employees who signed cards were informed that the purpose of the cards was to show that the signer was interested in receiving information on what the union had to offer. That evidence undermines the claim that at one time a majority of the employees had actually authorized the union to represent them for the purposes of collective bargaining. We therefore conclude that neither a bargaining order (See: Gissel Packing Co., 395 U.S. 575 (1969) nor a cross-check under our rules, (See: WAC 391-25-410) should be ordered in this case.

FINDINGS OF FACT

1. Valley General Hospital, Public Hospital District No. 1 of Snohomish County is a public employer within the meaning of RCW 41.56.030(1).
2. Office and Professional Employees International Union Local No. 8, AFL-CIO, a bargaining representative, filed a petition with the Public Employment Relations Commission on June 27, 1978, seeking certification as exclusive bargaining representative of office, clerical, and other non-professional employees of the hospital.
3. Genevieve Thorne and Jonelle McCrorey were office and clerical employees of the hospital who were active in initiating and pursuing the organizational efforts.
4. On July 13, 1978, Hospital Administrator Ross Godard advised Thorne that the hospital considered her a confidential employee, that he was aware of her union activities, and threatened her with discharge if she continued to actively promote union representation.
5. On August 14, 1978, the hospital and the union signed a consent election agreement including a stipulation of employees eligible to vote. The list contained the name of McCrorey, but did not contain Thorne's name. The names of Myrth Berry, Rebecca Poole and Myrna Jensen also were not on the list. At the meeting which resulted in the stipulation, there was no discussion of the status of either Thorne or McCrorey.
6. In late August, McCrorey voluntarily transferred to a different position within the employer's office, and the employer thereafter asserted that she had become a confidential employee.

7. On September 5, 1978, the hospital sent a memo to Thorne, McCrorey, Berry, Poole and Jensen stating that they were "exempt from the bargaining unit vote" because of the confidential nature of their work.
8. On September 5, 1978, the union sent a letter to Thorne, McCrorey, Berry, Poole and Jensen stating they were entitled to vote in the election. The union sent a letter to the hospital's attorney stating it did not believe these five individuals were confidential employees on September 8, 1978.
9. Throughout this period, Thorne, McCrorey, Berry and Poole did not hold an intimate fiduciary relationship with the executive head of the employer involving matters of labor relations policy. Jensen, however, did.
10. The election was conducted on September 15, 1978. At a meeting between hospital and union representatives conducted a half hour prior to the opening of the polls, the hospital agreed to permit Thorne, McCrorey, Berry, Poole and Jensen to vote. No one informed those employees of this agreement. They did not vote.
11. Prior to the opening of the polls, Godard had a very brief casual conversation with several employees near the door leading into the room where the election was held.
12. The tally of ballots indicated that 41 votes were cast for no representation and 37 votes were cast for the union.

#### CONCLUSIONS OF LAW

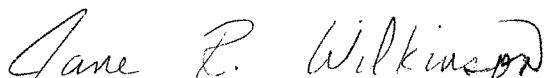
1. The Public Employment Relations Commission has jurisdiction over this matter pursuant to Chapter 41.56 RCW.
2. The events described in Finding of Fact 10 do not warrant setting aside the election.
3. The events described in findings of fact 4 through 8 insofar as it neutralized union organizers Thorne and McCrorey, and gave incorrect voter eligibility information to employees constituted conduct improperly affecting the results of the election and necessitates that a new election be held.

ORDER

A new election by secret ballot shall be held under the direction of the Public Employment Relations Commission among all regular full and part-time office and clerical employees, and all other non-professional employees including, but not limited to, those employees working in the business office, housekeeping, dietary, surgery, maintenance, and nursing departments, excluding supervisors, confidential employees, casual and temporary employees and students to determine whether a majority of the employees desire to be represented by Office and Professional Employees International Union Local No. 8, AFL-CIO, or by no representative for the purpose of collective bargaining with their employer.

DATED at Olympia, Washington, this 28th day of April, 1981.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
\_\_\_\_\_  
JANE R. WILKINSON, Chairman

  
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R. J. WILLIAMS, Commissioner

  
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MARK C. ENDRESEN, Commissioner