

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
TEAMSTERS LOCAL 763) CASE 11105-E-94-1830
Involving certain employees of:) DECISION 4898 - PECB
CITY OF FEDERAL WAY) DIRECTION OF
CROSS-CHECK
_____)

Davies, Roberts & Reid, by Michael R. McCarthy, Attorney at Law, appeared on behalf of the union.

Perkins Coie, by Valerie L. Hughes, Attorney at Law, and Londi Lindell, City Attorney, appeared on behalf of the employer.

On May 9, 1994, Teamsters Local 763 filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission, seeking certification as exclusive bargaining representative of certain employees of the City of Federal Way. The processing of this case was held up, because of the pendency of a previous representation petition involving the same employees.¹ After disposition of the previous case, the parties to this proceeding participated in a pre-hearing conference conducted telephonically by a member of the Commission staff on October 19, 1994. A statement of the results of that conference was issued by the Hearing Officer on the same date, requiring the

¹ The Washington State Council of County and City Employees (WSCCCE) had filed a representation petition in 1992, seeking a city-wide bargaining unit. Two employees were discharged during the election campaign. Both election objections and unfair labor practice charges were dismissed by the Commission in City of Federal Way, Decision 4088-B (PECB, July 25, 1994). The WSCCCE subsequently acceded to the employer's claim that a particular challenged voter was a supervisor, which resulted in closure of that case on September 29, 1994, on a basis of "no representation".

parties to make any objections known within 10 days, and an on-site representation election was scheduled for November 1, 1994. In a telephone call to the Hearing Officer immediately after the pre-hearing conference, and in a letter filed on October 25, 1994, the union requested that the Commission search for a missing authorization card and/or re-evaluate the sufficiency of the showing of interest it had filed in support of the petition, both questioning the position taken by the Hearing Officer regarding the non-availability of the cross-check procedure.

Review of the file by the Executive Director and members of the Commission staff has disclosed that multiple errors affected the processing of the case during the pre-hearing conference. The Hearing Officer then conducted two additional telephone conference calls with representatives of the parties on October 26, 1994. During the first of those, the parties were informed of the errors which had been detected; during the second, the parties made arguments on the matter.

The Executive Director has considered the matter and the arguments advanced by the parties, and concludes that the notice of election issued as the result of error must be withdrawn. Further, it now appears that the union is entitled to have the question concerning representation determined by means of a cross-check under WAC 391-25-391 and WAC 391-25-410.

The Processing Errors

The errors affecting the processing of this case relate to the evaluation and utilization of the showing of interest that Local 763 filed in support of its petition. Showing of interest determinations are excluded from the definition of "agency action" under the Administrative Procedure Act;² the requirements for a

² RCW 34.05.010(3)(b).

showing of interest are set forth in WAC 391-25-110; the confidentiality of a showing of interest is protected by WAC 391-08-810(1) and WAC 391-25-210.³ Those considerations necessarily affected the statements which could be made by the Hearing Officer during the pre-hearing conferences, and continue to affect what can be said by the Executive Director in this decision. In particular, any detailed explication of the facts would improperly compromise the confidentiality of the showing of interest.

RCW 41.56.060 sets forth the methods for determining a question concerning representation:

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. [1975 1st ex.s. c 296 §17; 1967 ex.s. c 108 §6.]

The Commission's rules limit the availability of the "cross-check" procedure:

WAC 391-25-391 SPECIAL PROVISION--PUBLIC EMPLOYEES. Where only one organization is seeking certification as the representative of unrepresented employees, and the showing of interest submitted in support of the petition indicates that such organization has been authorized by a substantial majority of the employees to act as their representative for the purposes of collective bargaining, and the executive director finds that the conduct of an election would unnecessarily and unduly delay the determination of the question concerning representation with little likelihood of altering the outcome, the executive director may issue a direction of cross-check. The

³ All of these protections of employee confidentiality are consistent with the decision in Public Hospital District 2 of King County (Evergreen General Hospital), 24 Wn.App. 64 (Division I, 1979).

direction of cross-check and any accompanying rulings shall not be subject to review by the commission except upon objections timely filed under WAC 391-25-590. [Statutory Authority: RCW 41.58.050, ... 41.56.090, ... and 41.56-.060. 90-06-072, §391-25-391, filed 3/7/90, effective 4/7/90. Statutory Authority: RCW ... 41.56.040 ... 80-14-046 (Order 80-5), §391-25-391, filed 9/30/80, effective 11/1/80.]

WAC 391-25-410 CROSS-CHECK OF RECORDS.

Where a cross-check of records is to be conducted to determine a question concerning representation, the organization shall submit to the agency original individual cards or letters signed and dated by employees in the bargaining unit not more than ninety days prior to the filing of the petition and indicating that such employees authorize the named organization to represent them for the purposes of collective bargaining, or shall submit to the agency membership records maintained by the organization as a part of its business records containing the names of employees and indicating those employees currently members in good standing. The employer shall make available to the agency original employment records maintained as a part of its business records containing the names and signatures of the employees in the bargaining unit. Prior to the commencement of the cross-check, the organization may file a request that the question concerning representation be determined by a representation election and such requests shall be honored. Where the organization files a disclaimer or a request for election after the commencement of the cross-check, the cross-check shall be terminated and the organization shall not seek to be certified in the bargaining unit for a period of at least one year thereafter. All cross-checks shall be by actual comparison of records submitted by the parties. The agency shall not disclose the names of employees giving representation authorization in favor of or appearing on the membership rolls of the organization. Upon the conclusion of the comparison of records, the agency officer conducting the cross-check shall prepare and furnish to the parties a tally sheet containing the number of employees in the bargaining unit, the number of employee records examined

and the number of employee records counted as valid evidence of representation. [Statutory Authority: RCW 41.58.050, ... 41.56.090, ... 41.56.060. 90-06-072, §391-25-410, filed 3/7/90, effective 4/7/90. Statutory Authority: ... 41.56.040, 41.58.050, 80-14-046 (Order 80-5), §391-25-410, filed 9/30/80, effective 11/1/80.]

Although cross-checks have been authorized by the statute since its inception in 1967, and the Commission's rules on cross-checks have been in place for more than a dozen years, employers often oppose their use. In City of Redmond, Decision 1367-A (PECB, 1982), the Commission endorsed a "70%" test for the "substantial majority" warranting a cross-check, and it endorsed deferral of eligibility issues until after the cross-check to avoid undue delay. Employer objections on various grounds were rejected in a trilogy of cases decided by the Commission in 1990. Port of Pasco, Decision 3398-A (PECB, 1990); City of Centralia, Decision 3495-A (PECB, 1990); City of Winslow, Decision 3520-A (PECB, 1990). Clearly, the employer's preference is not a basis to deny use of the cross-check procedure. Pike Place Market, Decision 3989 (PECB, 1992).

A routine letter was sent to the employer in this case on May 19, 1994, requesting a list of the employees in the bargaining unit within seven days. A response by (former) City Attorney Carolyn A. Lake was filed on June 20, 1994. The list of 15 employees provided by the employer at that time appears to have omitted one long-time employee.⁴ This led to assessment of the union's showing of interest at a lower percentage than it should have been.

⁴ Giving the employer the benefit of the doubt, this is taken to be the result of inadvertence. It is noted, however, that mischief by this employer with regard to a list of employees resulted in vacating an election agreement and an election result in the previous proceeding. City of Federal Way, Decision 4088 (PECB, 1992). Repetitive misconduct could be a basis for sanctions against a representative under WAC 391-08-020.

During the pre-hearing conference held on October 19, 1994, the parties used a revised list of 14 employees which did not include persons the employer had identified as "supervisors" on the earlier list. The parties framed an issue concerning whether two individuals who had been identified as "lead" workers on the employer's original list were properly excluded from the bargaining unit as supervisors. The union sought determination of the question concerning representation by the cross-check procedure, but the employer demanded an election. The employer particularly cited the long delay in the processing of the case, and it asserted that the issue concerning the two disputed employees was a "unit" issue which precluded the direction of a cross-check. Compounding the error of the low showing of interest percentage, the Hearing Officer applied the "70% test" to the full list of 14 employees rather than to the 12 undisputed employees, and took the position that a directed cross-check was not warranted. The union agreed to an election on that basis.

The review of the case file made subsequent to the pre-hearing conference disclosed that the union's actual showing of interest percentage is higher than was initially assessed. Further, it is clear that the union would have been entitled to a directed cross-check during the pre-hearing conference, had the lower percentage been properly applied to the list of undisputed employees. Past decisions of the Commission make it abundantly clear that errors by the agency staff in the processing of a representation case will be the basis for overturning an election on objections timely filed. This is true whether the error is merely of a clerical nature,⁵ is

⁵ In University Place School District, Decision 4152-A (PECB, 1992), the Commission overturned the results of a mail ballot election where it was discovered that the ballot materials sent to some employees were not in conformity with the instructions they were supplied.

committed or condoned by the Executive Director,⁶ or is committed by some other member of the Commission's professional staff.⁷

Having been apprised of errors which prejudiced the rights and positions of Local 763 at the pre-hearing conference conducted on October 19, 1994, it makes little sense to go ahead with conducting election that is known to be defective even before the polling is commenced. The Executive Director thus deems it appropriate to act on the matter immediately.

The Cross-Check

It is clear that there is no statutory preference for the election procedure. It suffices to say that the cross-check remains a viable alternative, and it is not necessary to rule here on the union's claim that cross-checks were actually given a preference or priority by the Legislature.

The requirements for use of the cross-check procedure are clearly met in this case:

* Teamsters Local 763 is the only labor organization currently seeking status as exclusive bargaining representative of the petitioned-for unrepresented employees;

* The showing of interest presented by the union indicates it has the support of more than 70% of the undisputed employees, and that showing of interest would also constitute a majority of the bargaining unit if the disputed employees are included;

⁶ In Municipality of Metropolitan Seattle, Decision 131-A (PECB, 1977), the Executive Director had participated in implementing a stipulated procedure for absentee ballots, but the election was overturned due to insufficient notice to the employees involved.

⁷ In Pierce College, Decision 4215 (CCOL, 1992), the Commission overturned an election where a staff member had given inconsistent advice to the parties.

* The scheduling of a representation election, the period of notice required in advance of such an election, and the conduct of the election itself would take substantially greater time than the conduct of a cross-check;⁸ and

* The Commission has not received any evidence or indication that employees have withdrawn their support for the union, so that there is no basis to infer a likelihood of a changed result.

NOW, THEREFORE, it is

ORDERED

1. The representation election previously scheduled for November 1, 1994 is CANCELED.
2. A cross-check of records shall be made under the direction of the Public Employment Relations Commission in the bargaining unit described in the bargaining unit consisting of:

All full-time and regular part-time maintenance and operations employees within the public works and park departments of the City of Federal Way, excluding supervisors and confidential employees,

to determine whether a majority of the employees in that bargaining unit have authorized Teamsters Local 763 to represent them for the purposes of collective bargaining.


3. For the purpose of the cross-check directed in the previous paragraph, the employer shall immediately supply to the Commission copies of documents from its employment records

⁸ The fact that an election was once scheduled for a date only a few days hence is irrelevant. For reasons already set forth above, the cancellation of that election was necessary due to the errors noted. A new election date would necessarily be at least two weeks away, while a cross-check could be conducted within a few days.

which bear the signatures of the employees on the eligibility list stipulated by the parties.

Issued at Olympia, Washington, on the 27th day of October, 1994.

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.