Central Washington University, Decision 10938 (PECB, 2010)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: PUBLIC SCHOOL EMPLOYEES OF WASHINGTON Involving certain employees of: CENTRAL WASHINGTON UNIVERSITY	CASE 23266-E-10-3561 DECISION 10938 - PECB ORDER DISMISSING ELECTION OBJECTIONS

Eric Nordlof, General Counsel, on behalf of the union.

Attorney General Robert M. McKenna, by *Alan Smith*, Assistant Attorney General, for the employer.

On September 30, 2010, Public School Employees of Washington (union) filed timely objections alleging that Central Washington University (employer) violated WAC 391-25-470 by unilaterally changing the terms and conditions of certain petitioned-for employees in violation of WAC 391-25-140 and by sending out an e-mail to all eligible voters, thereby unlawfully communicating with them. Executive Director Cathleen Callahan directed the employer to respond to the union's allegations. Having reviewed the union's objections and the employer's response, we dismiss the objections.

PROCEDURAL HISTORY

A detailed explanation of how the instant petition came before this Commission is necessary in order to place the facts of this case in proper context. On October 15, 2009, the union filed a petition for questions concerning representation (Case 22787-E-09-3506) seeking to represent certain exempt "counselors and advisors."

Representation Coordinator Sally Iverson held an investigation conference where the parties were unable to stipulate to the propriety of the petitioned-for bargaining unit. Prior to the hearing, the union amended its petition three times to add additional counselors and advisors to the petitioned-for unit. On May 20, 2010, the Executive Director ruled that the petitioned-for unit was inappropriate because other exempt employees in the employer's workforce performed the same work. *Central Washington University*, Decision 10765 (PECB, 2010). The union filed a timely appeal of that decision.

On June 3, 2010, the union filed a complaint charging unfair labor practices (Case 23263-U-10-5930) alleging that the employer unilaterally changed the terms and conditions of employment for certain named employees who were subject to the petition in case 22787-E-09-3506. Specifically, the complaint alleged that on May 24, 2010, the employer announced that it unilaterally decided to reduce the amount of hours those employees worked in a year, which was the equivalent to an involuntary furlough. A preliminary ruling was issued and the matter was set for hearing.

On June 4, 2010, the union withdrew its petition in case 22787-E-09-3506, including the appeal that had been pending before the Commission. Also on June 4, 2010, the union filed the petition currently before us (Case 23266-E-10-3561) to represent all of the exempt advisors and counselors in the employer's workforce. This new petition included employees who had been petitioned for in the earlier referenced representation case and who were also the subject of the complaint in case 23263-U-10-5930. Because of the pending unfair labor practice case, the blocking charge rule was invoked pursuant to WAC 391-25-370, and processing of case 23266-E-10-3561 was suspended.

On August 20, 2010, the union filed a request to proceed with the representation petition as provided for by WAC 391-25-370(2). In that letter, the union waived "its right to object to the election pursuant to the provisions of WAC 391-25-590 based upon conduct which underlies the charges in case number 23263-U-10-5930." The Representation Coordinator resumed processing case 23266-E-10-3561.

On September 10, 2010, Kirk Eslinger, the employer's director of labor and employment relations, sent an e-mail to eligible voters: 1) reminding them that the ballots had been mailed; 2) informing them the ballots were due September 23, 2010; 3) informing them the tally of ballots would occur on September 24, 2010; 4) providing a description of the bargaining unit; and 5) informing them that official notices were posted in the workplace. The e-mail also informed the petitioned-for employees that the employer recognized the employees' right to their confidential vote and that the employer did not intend to interfere with the election process. Finally, the e-mail stated that if employees had any questions, they could contact a representative from this agency, a union representative, or the employer.

On September 24, 2010, the tally of ballots demonstrated that of the 57 eligible voters, 31 cast ballots for "No Representation" and 16 cast ballots for the union. The employees conclusively voted not to be represented for purposes of collective bargaining. The union then filed the objections presently before the Commission.

DISCUSSION

The employer and employees involved in this proceeding are covered by Chapter 41.56 RCW. The Legislature delegated the conduct of representation elections to this Commission and directed this Commission to adopt rules consistent with the best standards of labor-management relations. RCW 41.56.070; RCW 41.58.050. WAC 391-25-470(1) outlines the types of prohibited conduct that could form the basis for setting aside a representation election conducted by mail ballot. Those provisions include:

> (1) The following prohibitions apply to assure appropriate conditions for employees to cast their ballots:
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> (a) The reproduction of any document purporting to suggest, either directly or indirectly, that the agency endorses a particular choice in an election is prohibited.
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> (b) The use of deceptive campaign practices improperly involving the commission and its processes is prohibited.
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> (c) The use of forged documents is prohibited.
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> (d) Coercion or intimidation of eligible voters, or any threat of reprisal or force or promise of benefit to eligible voters, is prohibited.

(e) Conduct in violation of WAC 391-25-140 is prohibited.

(f) Misrepresentations of fact or law are prohibited. To set aside an election, a misrepresentation must:

(i) Be a substantial misrepresentation of fact or law regarding a salient issue;

(ii) Be made by a person having intimate knowledge of the subject matter, so that employees may be expected to attach added significance to the assertion;

(iii) Occurring at a time which prevents others from effectively responding; and

(iv) Reasonably viewed as having had a significant impact on the election, whether a deliberate misrepresentation or not.

(g) Election speeches on the employer's time to massed assemblies of employees are prohibited during the period beginning on the scheduled date for the issuance of ballots to employees and continuing through the tally of ballots. Other electioneering allowed under (a) through (f) of this subsection is permitted during that period.

Unilateral Change Allegation

One basis for setting aside an election includes employer violations of WAC 391-25-140(2). That rule prohibits an employer from making changes to the existing wages, hours, or other terms and conditions of employment while a representation petition is pending before this agency. *See Readan-Edwall School District,* Decision 6205 (PECB, 1999).

The union argues that its objections are properly before the Commission because the unilateral change objected to by the unfair labor practice complaint only applies to certain named employees who were part of its petition in case 22787-E-09-3506, and the subject matter of the election objections involves the unilateral change as applied to different employees. Thus, the union argues that this distinction demonstrates that it did not waive its right to file objections as to these new allegations when it asked to lift the blocking charges. We disagree.

When the union filed its request to proceed, it affirmatively waived its right to file election objections to certain conduct that the employer may have committed in violation of WAC 391-25-470. The conduct that is the subject of the union's unfair labor practice complaint was the employer's alleged unilateral reduction of work through the imposition of mandatory furloughs. At the time the employer announced the reduction of work, the impact of that decision would have applied to all employees who performed counseling work, and not just the petitioned-for

employees, a fact the employer admits.[1] Thus, it is readily apparent that the conduct at issue was a singular event, and we find it disingenuous for the union to attempt to circumvent its waiver of the blocking charge rule by attempting to parse the employer's conduct into separate events that are solely dependent on the timing of the two representation petitions. The proper forum for this allegation is the pending unfair labor practice proceeding, and any remedy awarded to the petitioned-for employees shall be derived from that proceedings. *See State – Labor and Industries*, Decision 9052 (PSRA, 2005)(discussing the possibility of providing a remedial order in situations where an underlying representation petition has been dismissed).

Improper Communication Allegations

WAC 391-25-470(1)(g) prohibits an employer from making election speeches to massed assemblies of employees "during the period beginning on the scheduled date for the issuance of ballots to employees and continuing through the tally of ballots." Existing Commission precedent can readily dispose of the union's allegation. In *Tacoma School District*, Decision 4216-A (PECB, 1993), the Commission held that in order for a massed assemblies of employees violation to be found, an actual meeting must have occurred. The Commission specifically rejected the notion that mass mailings to employees constituted a captive audience meeting. Here, the employer never held a captive audience meeting; rather, it simply e-mailed a reminder to employees to vote in the election in a manner similar to mailing campaign materials. Accordingly, WAC 391-25-470(1)(g) does not apply to this case.

Finally, although the union does not allege that the employer misrepresented any material fact within its e-mail, it nevertheless asserts that it was precluded from effectively responding to the employer's e-mail because the employer has continuously precluded the union from communicating with employees regarding organizing. In order for an election to be set aside under WAC 391-25-470(1)(f) all four parts of the test must be met. *South Kitsap School District*, Decision 5676-A (PECB, 1997). While the union attempts to assign a nefarious motive to the employer's communication, a plain reading of the employer's statement shows the

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[1] See Employer's Response to election objections, page 3, footnote 2, where the employer asks this Commission to take administrative notice of Case 23263-U-10-5930 and points out that exhibit 30 indicates that the work reduction was applicable to all of the petitioned for employees in this case, and not just those originally petitioned-for in case 22787-E-09-3506.

employer's e-mail did not misstate the terms under which the representation election occurred. Accordingly, this allegation does not form a basis for setting aside the election.

NOW, THEREFORE it is

ORDERED

The election objections filed by Public School Employees of Washington in the above-captioned case are DISMISSED and this case is remanded to the Executive Director for final processing.

ISSUED at Olympia, Washington, this 15th day of December, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	23266-E-10-03561	FILED:	06/04/2010	FILED BY:	PARTY 2
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DETAILS:					
COMMENTS:					

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