

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:

EASTERN WASHINGTON UNIVERSITY

CASE 23829-E-11-3635

DECISION 11124 - PECB

ORDER ON ELECTION OBJECTIONS

*Eric T. Nordlof*, Attorney at Law, and *Jason K. MacKay*, Attorney at Law, for the petitioner.

Attorney General Robert M. McKenna, by *Deborah Danner*, Assistant Attorney General, for the employer.

On March 2, 2011, Public School Employees of Washington (union) filed a petition with this agency seeking to represent certain employees at Eastern Washington University (employer) who are eligible to collectively bargain with their employer under RCW 41.56.021. The petitioned-for employees included full-time and part-time exempt employees assigned to work in specific departments, including: General Undergraduate Advising; Student Life - Division of Educational Outreach; International Student Program; Chicano Education Studies; Urban and Regional Planning; American Indian Studies; Undergraduate Studies Office; Honors Program; and Counseling and Psychological Services.

On March 31, 2011, Representation Coordinator Sally Iverson, acting on behalf of the Executive Director, held an investigation conference after which the parties remained in dispute about the appropriateness of the petitioned-for unit, the correctness of the eligibility list, the supervisory status of one employee, and the eligibility of two other employees under RCW 41.56.021(1)(b). A hearing was scheduled to take evidence to resolve the disputed matters.

On May 2, 2011, the union filed an amended petition to represent only those employees assigned to provide “student counseling” and employees assigned to “extension/continuing education.” The parties stipulated to the propriety of the newly proposed bargaining unit and there were no eligibility challenges, and therefore no hearing was conducted.

On May 19, 2011, the Representation Coordinator, in keeping with standard agency practice, issued a Notice of Mail Ballot Election that is posted in the employer’s workplace and a ballot package that is sent to each employee. The ballot package includes the actual ballot, a security envelope, and the ballot return envelope with a pre-printed label with the employee’s name and address. The package also includes instructions clearly informing eligible voters that the marked ballot is to be placed in the security envelope, which in turn is placed in the ballot return envelope and mailed to the agency by a certain due date. The instructions also inform eligible voters that their name printed on the ballot return envelope is “. . . USED TO VERIFY ELIGIBILITY.” (emphasis in original). The instructions also state that “**Your ballot will not be counted if you remove your name or return it in some other envelope!**” (emphasis in original). Ballots were due at the agency’s Olympia headquarters by close of business June 8, 2011.

On June 9, 2011, the Representation Coordinator counted the ballots and issued a tally with the following result:

Approximate Number of Eligible Voters	72
Void Ballots	1
Votes Cast for PSE of Washington	30
Votes Cast for No Representation	30
Challenged Ballots Cast	0
Valid Ballots Counted Plus Challenged Ballots	60
Number of Valid Ballots Needed to Determine Election	31

The Representation Coordinator voided the single ballot because the name and address on the return ballot envelope were blacked out so as to make the voter’s identity unrecognizable.

Based upon the failure of a majority of employees to vote in favor of representation, the Representation Coordinator correctly determined that the election conclusively demonstrated that the employees favored “No Representation.” See RCW 41.56.080 (the bargaining representative which has been determined to represent a *majority* of the employees shall be certified by the Commission as the exclusive bargaining representative); see also WAC 391-25-530(2) (where there are only two choices on the ballot, a tie vote shall result in a certification of no representation). Deborah Mayo-Kelly, the union’s organizing director, observed the ballot count and signed the tally of ballots.

On June 14, 2011, the union filed timely objections to the election under WAC 391-25-590 challenging the Representation Coordinator’s decision to void one ballot based upon the blacked out name and address on the return envelope. The union argues that because the identity of the voter was only blacked out, and not completely removed, the agency should use all reasonable efforts to attempt to identify the voter before voiding the ballot. The union asks the Commission to instruct the Executive Director to conduct a forensic analysis of the return ballot envelope to attempt to ascertain the identity of the voter. The union also alleged that the employer allowed certain employees to use its facilities and e-mail system to communicate with employees voting in the election while at the same time precluding the union from utilizing the same facilities and system to contact and communicate with voters.

In responding to the union’s allegations, the employer supports the Representation Coordinator’s decision to void the ballot and points out that WAC 391-25-470 grants the Executive Director the discretion to ensure that the election process remains secret. The employer also notes that the Commission’s standard ballot instructions clearly inform voters that they are not to obscure their name on the return ballot envelope. Finally, the employer refuted the union’s claims that it precluded the union from using its facilities and e-mail system while allowing employees who opposed unionization the ability to use them.

#### Decision to Void the Ballot

RCW 41.56.070 directs this Commission to hold secret ballot elections to determine whether a labor organization will serve as the representative of employees for purposes of collective

bargaining. To achieve this directive, the Commission has utilized its rulemaking authority to adopt administrative rules that govern the conduct of representation elections. *See* RCW 41.56.090 and 41.58.050. Those rules are codified in Chapter 391-25 WAC.

WAC 391-25-470 governs the processing of mail ballot elections and states in part:

The executive director shall have discretion to conduct elections by mail ballot procedures designed to preserve the secrecy of employee voting. Multiple questions, including unit determination elections, may be submitted to employees at the same time on separate ballots. A notice and ballot materials shall be mailed by the agency to each eligible voter, and no less than fourteen days shall be provided between the date on which ballot materials are mailed to eligible employees and the deadline for return of the ballots.

The union argues that because the agency has not promulgated a rule that specifies the circumstances when a ballot is to be voided, the Representation Coordinator's reliance upon internal agency policy to void the ballot amounted to rulemaking in violation of Chapter 34.05 RCW. We disagree.

Consistent with the discretionary authority this Commission has granted the Executive Director to conduct elections in a manner that preserves the secrecy of the vote, the longstanding process used by the agency for mail ballot elections requires that a ballot package be sent to each eligible employee. As noted above, the instructions clearly inform eligible voters that they must use the pre-printed return ballot envelope as this is what is used to identify who voted and to ensure that only eligible employees cast ballots. The obvious conclusion is that the pre-printed label must be legible to serve this function.

When ballots are actually counted, the Representation Coordinator or another employee designated to conduct the count compares the list of eligible voters with the names on the return ballot envelopes. In the event a label is removed, or altered to make it unreadable, so that the identity of the voter cannot be ascertained, agency policy dictates that the ballot be declared void. The void ballot envelope is then set aside unopened, and the valid return ballot envelopes

are opened and the ballot security envelopes are removed. The ballot security envelopes are then opened, and the valid ballots are counted.

In this regard, elections conducted by this agency do not differ significantly from general elections conducted in local or state elections. In elections in Washington State, voters are instructed to sign the outer ballot envelope. See WAC 434-250-040 (Secretary of State's administrative rule on instructions to voters). A failure to do so negates the ballot and it is not counted. The fact that the Commission's rules do not expressly state that the agency employee conducting the election has the express authority to void any unidentifiable ballots does not change the fact that it is paramount to the election process to ensure that only eligible voters vote. Thus, when the ballot return envelope is defaced in a manner as to make the name and address unreadable, it is the responsibility of the Representation Coordinator or the employee opening the ballots to void any ballot that cannot be verified as being sent from an employee who is eligible to vote in the election.

Finally, the fact that the election results in this case were close does not render the agency's longstanding practices invalid, does not relieve the voter of his or her responsibility to comply with the clear voting instructions, and does not bring about a need for a forensic test to ascertain the identity of a voter who disobeyed the clearly written instructions. Finding no basis for the union's claim, we reject this challenge to the election.

#### Use of Employer's E-mail and Facilities

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:

(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.

(b) The use of deceptive campaign practices improperly involving the commission and its processes is prohibited.

(c) The use of forged documents is prohibited.

- (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.

The union's second allegation is that Patrick Harris, an eligible voter "who was a vocal opponent of the union's organizing attempts," was permitted by the employer to use the employer's e-mail system and facilities while at the same time the union was precluded from using those same systems and facilities. Other than making this general claim, the union did not submit any facts demonstrating instances where the employer precluded union supporters from using its systems and facilities and did not allege that Harris's actions were made on behalf of the employer. However, the union claims that this disparate treatment nevertheless negatively affected the outcome of the election because it demonstrated that the employer favored employees who opposed unionization. We disagree.

The gravamen of this objection is not sufficient under WAC 391-25-470 to set aside the election. The objection does not concern the reproduction of a document that suggests that this agency endorsed a particular choice (WAC 391-25-470(1)(a)); the objection does not concern deceptive campaign practices improperly involving the Commission and its processes (WAC 391-25-470(1)(b)); the objection does not concern the use of forged documents (WAC 391-25-470(1)(c)); the objection does not concern coercion or intimidation of eligible voters, and does not allege that the employer made a promise of benefit to employees (WAC 391-25-470(1)(d)); the objection does not allege that the employer has unilaterally changed employee wages, hours

and working conditions in violation of WAC 391-25-140 (WAC 391-25-470(1)(e)); the objection does not allege that a misrepresentation of fact or law has occurred, and the union provided no information indicating that the alleged communications were sent at a time that precluded the union responding to such comments (WAC 391-25-470(1)(f)); and the objection has not alleged that election speeches on the employer's time to massed assemblies of employees occurred (WAC 391-25-470(1)(g)).

Conclusion

Simply stated, even if proven true, the employer's conduct is not objectionable conduct under the existing rule. The objections are dismissed.

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 certification.

ISSUED at Olympia, Washington, this 10<sup>th</sup> day of August, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
MARILYN GLENN SAYAN, Chairperson



PAMELA G. BRADBURN, Commissioner

  
THOMAS W. McLANE, Commissioner



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PUBLIC EMPLOYMENT RELATIONS  
COMMISSION

  
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