STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: OIL, CHEMICAL, AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 369 Involving certain employees of: WASHINGTON PUBLIC POWER SUPPLY SYSTEM	CASE NO. 3543-E-81-689 DECISION NO. 2065-A - PECB DECISION OF COMMISSION

Critchlow and Williams, by Kenneth J. Pederson, Attorney at Law, appeared on behalf of the union.

Albert E. Mouncer, Attorney at Law, appeared on behalf of the employer.

This proceeding was initiated by a petition filed with the Commission on July 23, 1981. The processing of the case did not move beyond conduct of a pre-hearing conference until February, 1984, when the Supreme Court of the State of Washington ruled in related litigation that the employer was a public employer subject to the jurisdiction of this Commission under Chapter 41.56 RCW. Additional proceedings were then conducted under Chapter 391-25 WAC. A pre-hearing conference was held, an election agreement was filed together with a supplemental agreement preserving certain challenges to employee eligibility status, and an election was conducted on June 5, 1984.

The tally of ballots issued on June 6, 1984 indicates that 63 votes were cast for the union and 62 votes were cast for no representation. There were five challenged ballots, one of which was subsequently voided on the stipulation of the parties.

On June 12, 1984, the union timely filed objections to conduct affecting the outcome of the election, pursuant to WAC 391-25-590(1). Those objections are summarized as follows:

1. The employer's observer was permitted to maintain a list of employees at the Hanford site for the purpose of determining who had voted. Those who voted were promised and received payment at the overtime rate for time spent voting. Maintenance of a separate list for the purpose of determining who has or has not voted violates the laboratory conditions required during an election. Further, paying employees for time spent voting has a designedly coercive effect on voters.

2. Six days prior to the election, the employer instituted changes to the group medical insurance plan which applied to members of the bargaining unit. The changes were employed as a propaganda device by the employer, which outlined the changes at a captive audience meeting where it urged employees to reject unionization.

3. The employer maintains a "Quality Circle" group composed of unit members and supervisors. During the period prior to the election, the group bargained over wages, hours, and working conditions of unit employees. Leon Howard is a member of the Quality Circle, and of the Security Force Employees Association, an organization which includes supervisory employees of the employer. Howard attempted to intervene in the election on behalf of the Security Force Employees Association. Howard wrote and distributed memoranda to security officers during the course of the election campaign. As a spokesman for two employer-dominated groups, his statements constituted a promise of reward and violated laboratory conditions.

4. The employer represented to unit employees at captive audience meetings that it was not required to negotiate over pensions, and would not do so. The employer further represented that the union had no right to strike or to compel binding arbitration. Such statements are coercive and a deceptive campaign practice.

5. The employer improperly refused to allow union representatives to inspect election notices posted on the employer's premises prior to the election, although union officials had requested this opportunity.

6. The employer allowed anti-union factions preferential use of employer equipment, and allowed anti-union materials to be prepared by unit members on company time. Literature posted by union adherents was defaced by the employer, or by employees with the employer's tacit approval. The employer's actions constitute a contribution of financial support to another labor organization.

Hearing was held on the objections at Richland, Washington, on August 20 and 21, 1984, before Martha M. Nicoloff, Hearing Officer.

The Executive Director conducted a separate hearing on the challenged ballots at Olympia, Washington, on June 28 and 29, 1984. On October 9, 1984, he issued Decision No. 2065 - PECB, wherein he concluded that the challenged voters were not eligible for inclusion in the bargaining unit under the particular circumstances here present, and that their ballots were void. The employer timely filed objections under WAC 391-25-590(2).

POSITION OF THE UNION

The union urges that the Executive Director's decision on the challenged ballots be sustained in all respects. It claims that the findings of fact made in that decision are amply supported by the record, and that the adverse inferences drawn by the Executive Director are unavoidable based upon the record. It argues further that the Commission, as an appellate body in the matter of the challenged ballots, should accord considerable deference to the Executive Director's findings. The union requests that its objections to the election be withdrawn if the decision of the Executive Director is upheld by the Commission.

In its formal objections and at hearing, the union put forth evidence and argument on all of the objections identified above. In its brief to the Commission, however, the union withdrew objections two through six, and presented no argument on those objections. With regard to its first objection, the union claims that the employer has admitted that its election observers at Hanford maintained a list and that it used that list to pay employees who voted. It argues that the National Labor Relations Board (NLRB) prohibits listkeeping, and urges the Commission to adopt that proscription. It cites Sound Refining, Inc., 267 NLRB No. 204 (1983) and Marathon Le Tourneau Co., 208 NLRB No. 39 (1974), enf. 5th Cir. (1974), in support of its argument. Thus it would have us set aside the election in the event the decision of the Executive Director is overturned.

POSITION OF THE EMPLOYER

The employer urges that the order of the Executive Director determining the issue of the challenged ballots be vacated and that the union's challenges be overruled. It argues that the Executive Director, acting as hearing officer, did not properly discharge his duty to inquire fully into all matters and obtain a clear and complete factual record. Specifically, it contends that the adverse inference drawn as to the employer's actions (in removing indicia of authority from the sergeants after the pre-hearing conference at which an issue was framed as to their eligibility) was improper. It claims that the Executive Director had the obligation to fully inquire into any suspicions of bad faith, but failed to do so and then drew adverse inferences based upon that failure. In addition, the employer claims that the record on the challenged ballots does not support a finding that the individuals in question were classified as sergeants or that they exercised authority over subordinate employees. It argues that the record clearly shows that the individuals in question were classified as security officers and did not perform as supervisors after January, 1984. It argues that the Executive Director relied heavily on the "perception" of authority by rank and file

employees, but that the statute and case law requires reliance upon actual duties, skills, and working conditions rather than perceptions.

With regard to the first objection filed by the union, the employer concedes that it is the policy of the NLRB to prohibit the keeping of lists of persons who have voted. However, it argues that where it is shown that few or no voters knew such a list was being kept, the NLRB will not set aside an election, finding that the effect of such a list was "de minimus". It claims that there is no evidence in this case that a significant number of employees were aware of the listkeeping. It argues further that because at least one union observer kept a list and used it to contact two employees, the union should be estopped from making this objection. It claims that no evidence was presented to support the union's allegation that payment for time spent voting had a coercive effect or spoiled laboratory conditions. Further, it states that employees had been informed they would be paid for voting, and that there was company precedent for paying employees who vote in a representation election.

The employer made argument on objections two through six; however, in view of the withdrawal of those objections, that argument is not presented here.

DISCUSSION

The Challenged Ballots

The facts concerning the challenged ballots are detailed in the decision issued by the Executive Director. A complete review of the record leads to the only possible conclusion regarding the challenged ballots: If a person looks like a sergeant, is paid like a sergeant, acts like a sergeant, drives a sergeant's vehicle and there is no clear announcement that the person is no longer a sergeant, then it must be determined that the person is a sergeant. The commission notes that the record objectively shows, or does not conclusively dispute, the following: There was no official general announcement concerning the demotion of sergeants prior to January 1; no loss of sergeants' pay, stripes or vehicles; no change in addressing the individuals as "sergeants" in person and in the log book; no change in sergeants sitting at the head of the briefing table; and, with few exceptions, no rotation of posts. The sole manager with sufficient insight to recognize the situation is Richard Telander, Security Program Manager, who stated that following the April 11th eligibility meeting:

> "Although they had reduced on paper, it was my understanding that they had been reduced in rank. That was not really so." TR 162

Changes that were made subsequent to the April 11th pre-hearing conference were not timely in making the sergeants eligible for voting in the representation election one and one-half months later. The Commission notes that the sergeants could blame the union organizing drive on their loss of rank and that the sergeants could look forward to resuming the rank if construction activity increased. Given the initially inept attempts to place the sergeants in the bargaining unit, the commission views the changes made on and after April 11th as being directed solely at influencing the outcome of the election.

The decision of the Executive Director concerning the challenges to the ballots cast by D. M. Casto, D. R. Moran, A. W. Sherman, and M. C. Ohlson is affirmed, and those ballots are deemed void.

The Conduct Objection

For the purposes of a representation election conducted by the Commission, WAC 391-25-490 provides in part:

> Each party may be represented by observers of its own choosing, subject to such limitations as the Executive Director may prescribe; PROVIDED, HOWEVER, That no management official having authority over bargaining unit employees nor any officer or paid employee of an organization shall serve as observer.

The Executive Director, with the approval of this Commission, has promulgated a form containing printed "Instructions to Observers" generally similar to NLRB Form 722 entitled "Instructions to Election Observers". If anything, the Commission's form is more specific in its proscriptions against keeping of lists of voters.

Copies of the "Instructions to Observers" are routinely sent to parties in conjunction with the mailing of official election notices. Examination of the case file in this case discloses a package of documents, stapled together, under the file copy of a letter dated May 14, 1984 addressed to the labor relations representative of the employer, as follows:

> Enclosed is a supply of copies of the notice of the election to be held by the Public Employment Relations Commission in the above-entitled matter. Please arrange to have this notice posted in conspicuous places on the employer's premises where notices to affected employees are usually posted.
>
> Also enclosed is a copy of the Commission's "Instructions for Observers" form, which contains information of interest to the parties to the proceeding. Each party is entitled to designate

> observers, and the enclosed instructions should be given to the observers in advance of the election so that they can familiarize themselves with its contents. The observers should meet with the election official at the polling place 15 minutes before the opening of the polls. (emphasis supplied)

A copy of that letter was directed to the union. One of the documents in the package is a copy of the "Instructions to Observers" form. The record does not reflect whether the election observers herein involved were provided copies of those instructions.

The notice of election issued on May 14, 1984 provided that the election to determine the question concerning representation of the security guards bargaining unit would be held on June 5, 1984, in three separate sessions each at the Hanford and Satsop sites.

Observers for the scheduled 6:15 AM to 8:00 AM voting session at Hanford were requested to report about 5:30 AM to assist in arranging the tables, etc. at the polling site. The morning session was held in what is denoted the "chalet", a building on the employer's nuclear reactor site, approximately 12 miles from the employer's headquarters. For that session, Carl Raymond, a bargaining unit employee, served as the union's observer, and Jeffrey Gloyn, a security training specialist who was not a bargaining unit member, served as the employer observer. Prior to the opening of the polls, Darryl Vorheis, captain of the security force at Hanford, was also present.

As employees entered the polling area during the morning session, they encountered the PERC election officer at a table placed to their right and at right angles to the door. After the election officer verified voter identity and checked the name on the official voter eligibility list, he gave the voter a ballot and the voter then could proceed to one of two privacy rooms (to the left of and some distance from the door) to mark the ballot. After marking the ballot, the voter dropped the ballot in the ballot box, which was placed on a table or chair against the outside wall of one of the privacy rooms, directly across from the election officer.

Raymond sat at the end of the table used by the election officer, at right angles to the election officer and facing the door through which voters entered. Raymond testified that he knew all unit members by sight, and that he kept no list of any kind. He testified that, prior to the opening of the polls, he heard Captain Vorheis ask Gloyn whether he had his list. He saw that Gloyn had a list of employees, but he did not ask questions about it. Because his sergeant had previously told him he would be paid for voting, and because he had seen a memorandum which stated that security officers would be paid for voting, Raymond "just assumed" that was the purpose for which Gloyn

was given the list. Raymond's testimony was that Gloyn was positioned directly behind him, standing in a doorway, during the time of polling, and that the list was kept on a cabinet inside the doorway, so that it was not visible to voters. Therefore, it was Raymond's belief that voters did not see Gloyn's list.

Gloyn testified that he received his list from Vorheis' office on the day preceding the election. He was instructed by Vorheis that the list was to be used for overtime purposes, to account for those who voted. He testified that he knew each officer by sight, and that he was, therefore, simply able to check each officers' name off on his list as they appeared at the polls. Gloyn's testimony was that his position at the polling site did not remain constant. At times he stood in the doorway behind Raymond, and when the stood there, he placed his list on a bookcase inside the doorway. He did not believe voters would have seen the list under those circumstances. Gloyn testified, however, that at other times, he sat next to Raymond and held the list in his lap. Gloyn believed voters could see that he had a list under those circumstances. He recalled no questions or discussion regarding the list at that session from any voter, from the union observer, or from the election officer. He made no effort to contact employees who had not voted.

The 12:00 noon to 1:00 p.m. voting session at Hanford was held in an auditorium in the employer's headquarters building known as the "multipurpose facility". Gloyn continued to serve as the employer's observer. Lonnie Dittemore, a member of the bargaining unit, served as the union observer at the noon voting session. At that session the election officer was seated at a table to the left of the auditorium door as the voters entered. Dittemore and Gloyn were at the right side of the doorway. Voters would come in the door, proceed to the election officer's table, be checked off by the election officer, and then proceed to a table behind the election officer to mark their ballots.

Dittemore testified that he noticed when he came to the election site that Gloyn had a list of employees, and that he conferred with Gloyn to find out who had voted at the morning session. Dittemore, on his own volition, had brought his own list with him and used Gloyn's list to update his own so that he would have a record as to all employees who had already voted. As voters came in, Gloyn and Dittemore checked their names off on their lists. Dittemore's belief was that voters could not avoid noticing that lists were being marked. He testified that perhaps two voters asked him why lists were being kept, and that he had responded it was "for accountability purposes". He did not ask Gloyn, nor did Gloyn volunteer, why Gloyn was keeping a list. Under cross-examination, Dittemore testified that he kept his list because he had "figured out to myself how the vote would go", and wanted to keep track of it. He was not asked by the union to keep the list, had no discussions with the union about the list, and took the list home with him

after the election. After the noontime vote, Dittemore contacted two officers who were on disability leave whose names did not appear on his list and who had not appeared to vote. One of the officers whom he contacted subsequently voted. 1/

The night voting session at Hanford took place at the "chalet", and the physical arrangement was similar to that used at the morning session. The employer's observer for the night session was Jill Hendricks, a security training specialist who is not a member of the bargaining unit. On the day prior to the election, Vorheis asked her to act as observer and told her that she would need to keep a list of those who appeared, in order to determine who was eligible for overtime pay. The union apparently designated Jim Houston to be its observer for the night voting session, but Dittemore also sat in as observer at that time. Houston was not called as a witness in this proceeding. Dittemore testified that Houston did not have a list of employees.

Hendricks received the list from Gloyn prior to going to the voting site. Her testimony was that she was either standing or sitting at the same table as the election officer, and that Dittemore stood to her right. She believed voters could see that she was keeping a list, as it was either on the table in front of her or on her lap. No voter or anyone else inquired about the list.

After the polls closed, Vorheis arrived and Hendricks gave her list to him. She testified that Dittemore, Houston, the election officer, and James Watts, a representative of the union, were present when she gave the list to Vorheis.

After the polls closed, Dittemore reported to his work station. At that time he was informed by his sergeant that he would be paid for one-half hour of overtime "for being down at the election".

Raymond testified that the memorandum was "read at briefing by the supervisors". That memorandum, dated June 4, 1984, was entered into evidence, and states in pertinent part:

> Personnel will be paid overtime for reporting early and/or late to vote.

Vorheis testified that "senior management" had decided to pay overtime to those individuals who voted. He, therefore, provided the employer's observers with a list of those individuals who were eligible to be paid

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1/ The employer did not file timely objections, pursuant to WAC 391-25-590, as to Dittemore's possession or use of this list, although it would now have any misconduct set off as against any misconduct of its own.

overtime. The list excluded eligible voters then on disability leave, because they were not deemed to be eligible for overtime pay. He testified under examination by union counsel that management had said individuals would not be paid if they did not vote, but gave different testimony under examination by the employer's counsel, to the effect that those who were not paid were those who did not appear at the polls, rather than specifically those who did not vote. Vorheis was not certain whether a list was kept at the Satsop site, but was certain that employees at Satsop were paid overtime in connection with the election.

Joseph Somolik, personnel manager at the Hanford site for approximately one year, testified that "the senior management meeting" discussed the means by which they could allow people to vote in this election, in that there was a problem in relieving people from shift assignments during the voting period. It was, therefore, agreed in the management meeting that employees would be paid "show-up" pay. He did not advise Vorheis to maintain a list in order to effectuate that decision, but rather believed that Vorheis issued those instructions "as a matter of efficiency". Somolik was aware that Vorheis planned to obtain a list of those who presented themselves at the polls, but did not see any harm in it or object to it. He claimed no expectation by management that payment would produce a better turnout.

Arthur Miller, the labor relations officer for the employer, testified that senior management had discussed the voting issue in meetings and had decided to pay people who appeared at the polls, whether they voted or not. He testified that the rationale for paying was two-fold: first, that management believed employees ought to be allowed to vote during working hours but that it was logistically difficult to relieve security officers and provide adequate substitution during their assigned shift; and, second, that management believed that a precedent for paying employees for elections had been established in a previous representation election held among the security officers in 1980. He claimed that getting a large turnout was not a factor in management's decision to pay employees.

Both Somolik and Miller testified as to their understanding of the practices followed during a representation election held among security officers in 1980. However, neither Somolik nor Miller was with the employer at the time of the 1980 election, and their testimony in this regard is entirely hearsay.

Following a full review of the record on the objections, the Commission is persuaded that union's objection No. 1 should be sustained. The usual procedure in such a situation would be to direct that the election be re-run with appropriate notice. See: Mason County, Decision 1699 (PECB, 1983). The objections to the election will not be determinative in the processing of this case as long as the Commission's ruling on the challenged ballots is upheld. The Commission retains jurisdiction to conduct an election, if appropriate and necessary.

FINDINGS OF FACT

1. The Washington Public Power Supply System, a municipal corporation of the State of Washington, maintains its own security force at Hanford and Satsop, Washington. The security workforce is under the direction of a manager based at Richland, Washington. The security workforce at the Satsop site is under the direction of a "captain" who operates with limited oversight and only occasional visits by the manager.

2. Oil, Chemical & Atomic Workers International Union, Local 1-369, a labor organization within the meaning of Chapter 41.56 RCW, filed a petition with the Public Employment Relations Commission seeking certification as exclusive bargaining representative of security employees below the rank of sergeant employed by the Washington Public Power Supply System.

3. On and prior to April 11, 1984, the employer had employees at Satsop in the classification of sergeant. Such employees exercised authority over subordinate employees in a para-military structure and had separate and distinct duties and working conditions from their subordinates in the security workforce.

4. At a pre-hearing conference held at 9:00 A.M. on April 11, 1984, the employer stipulated to the propriety of a bargaining unit of security employees below the rank of sergeant. At the same time, the employer represented that D. M. Casto, D. R. Moran, A. W. Sherman, and M. C. Ohlson had been demoted from the rank of sergeant and were eligible voters in the stipulated bargaining unit. The four disputed individuals suffered no reduction of pay because of their alleged demotion on or about January 1, 1984. Contrary to the position taken by the employer at the pre-hearing conference, the four disputed individuals had continued, through the time of the pre-hearing conference, to wear the insignia and perform distinct duties and enjoy separate working conditions associated with the rank of sergeant.

5. The four disputed individuals retained the insignia of the rank of sergeant and appearance of authority and distinct duties and working conditions after the date of their alleged demotion by reason of a determination made by the captain at the Satsop site that business reasons of the employer necessitated the continuation of the sergeant rank.

6. Following the conclusion of the pre-hearing conference, the employer ordered the four disputed individuals stripped of their insignia of rank and of their distinguishing duties and working conditions. The disputed individuals could reasonably have associated their loss of status and

privilege and their assignment to rotating posts to be associated with the union and its effort to organize the employees, and the changes were in fact implemented by the employer in order to affect the outcome of the representation proceedings in the captioned matter rather than for any legitimate business reason of the employer.

7. A representation election was conducted under the supervision of the Commission in a manner designed to afford the affected employees a free choice in the selection of their bargaining representative, if any; a tally of the results was previously furnished to the parties and is attached hereto.

8. Objections have been filed with respect to these proceedings, in connection with the employer's maintaining a list of employees who cast ballots. The employer maintained a list of the employees who cast ballots during the election.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. D. M. Casto, D. R. Moran, A. W. Sherman, and M. C. Ohlson were demoted by the employer on April 11, 1984 in derogation of its stipulations made in proceedings before the Public Employment Relations Commission concerning the exclusion of sergeants from the bargaining unit, and in order to affect the exercise of rights by its employees under Chapter 41.56 RCW, and did not thereby become eligible voters in the bargaining unit stipulated appropriate by the parties under RCW 41.56.060.

3. The unit described in finding of fact number 4 is an appropriate unit for the purposes of collective bargaining within the meaning of RCW 41.56.060; and all conditions precedent to a certification have been met.

4. If the individuals named in paragraph 2 of the conclusions of law were found to be eligible voters, then it would be necessary to set aside the results of the election and to conduct a new election based on the conduct of the employer described in paragraph 8 of the foregoing findings of fact. The Commission retains jurisdiction to conduct such an election, pursuant to RCW 41.56.070, if appropriate and necessary.

NOW, THEREFORE, it is

CERTIFIED

The majority of the employees of the above named employer employed in the appropriate collective bargaining unit described in finding of fact number 4 have chosen:

OIL, CHEMICAL, AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 369

as their representative for the purposes of collective bargaining with their employer with respect to wages, hours and conditions of employment.

DATED at Olympia, Washington, this 4th day of April, 1985.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R. Wilkinson

JANE R. WILKINSON, Chairman

Mark C. Endresen

MARK C. ENDRESEN, Commissioner

Commissioner Mary Ellen Krug did not take part in the consideration or decision of this case.