STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 1-369	)	CASE NO. 3543-E-81-689
	)	
Involving certain employees of:	)	DECISION NO. 2065 - PECB
	)	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM	)	ORDER DETERMINING CHALLENGED BALLOTS
	)	

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

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

On July 23, 1981, Oil, Chemical and Atomic Workers International Union, Local 1-369 (union) filed a petition with the Public Employment Relations Commission (PERC) for investigation of a question concerning representation. The union sought certification as exclusive bargaining representative of security officers below the rank of sergeant employed by the Washington Public Power Supply System (WPPSS). Following a pre-hearing conference at which the parties were unable to stipulate issues including the jurisdiction of the Commission, both parties initiated lawsuits in the courts. The case before the Commission was held in abeyance. The court litigation came to its conclusion with a decision of the Supreme Court issued on February 2, 1984.[1/] PERC then resumed its processing of the case. A pre-hearing conference was conducted on April 11, 1984. The parties thereafter filed an election agreement pursuant to WAC 391-25-230 and a supplemental agreement pursuant to WAC 391-25-270. The Commission conducted a representation election on June 5, 1984. The tally of ballots indicates that 63 ballots were cast in favor of the union, 62 ballots were cast for no representation, and there were five challenged ballots. A hearing was held on the challenged ballots on June 28 and 29, 1984, before Marvin L. Schurke, Executive Director. Four of the five challenged ballots were cast by persons listed on the supplemental agreement. During the course of the hearing the parties stipulated that the fifth challenged ballot was cast by an individual no longer employed by WPPSS, and that the challenge to that ballot should be sustained. Both parties filed post-hearing briefs.

1/ Nucleonics Alliance v. Washington Public Power Supply System, 101 Wn.2d 24 (1984).

POSITIONS OF THE PARTIES

The employer contends that the four challenged voters, all of whom were formerly sergeants in the WPPSS security force, were demoted effective January 1, 1984 in connection with expenditure reductions and a curtailment of the employer's operations. While acknowledging that the affected individuals did not suffer any loss of pay, and that they continued to perform assignments different from rank-and-file security employees, the employer contends that they were no longer supervisors. The employer contends that it acted on April 11, 1984 "to satisfy any perceived concerns the union may have had", by eliminating insignia of rank and distinguishing duties theretofore performed by the challenged voters. The employer contends that, at and after the stated May 10, 1984 eligibility date for the election, the challenged individuals were employed within the bargaining unit and were eligible voters.

The union contends that the challenges to the four ballots cast by former sergeants should be sustained. It contends that the four individuals involved were not demoted, as claimed by the employer, and that they continued to be supervisors after January 1, 1984. The union would have the employer held to the stipulations entered into at the pre-hearing conference held on the morning of April 11, 1984, including that persons then employed as sergeants were excluded from the bargaining unit. Additionally, the union contends that the employer acted in bad faith when it demoted the four affected individuals following the conclusion of the April 11, 1984 pre-hearing conference. Finally, the union contends that the four affected individuals lack a community of interest with the rank-and-file security employees in the petitioned-for bargaining unit, warranting their exclusion from the bargaining unit.

DISCUSSION

The Washington Public Power Supply System is a municipal corporation of the State of Washington, created as a joint operating agency pursuant to Chapter 43.52 RCW. WPPSS embarked on a construction program, including three nuclear powered electric generating facilities on the Hanford reservation near Richland, Washington, and two nuclear powered electric generating facilities near Satsop, Washington. The employer is headquartered at Richland. Since at least 1978, the employer has maintained its own security forces at both Hanford and Satsop. The security operation is headed by a manager based in Richland. A para-military rank structure is utilized, with officers holding the rank of "captain" in charge at both Hanford and Satsop. The captain at Satsop held the rank of colonel in the armed forces. The manager makes only occasional visits to the Satsop site.

The security workforce at the Satsop site is organized into four platoons. Each platoon is headed by an officer holding the rank of "lieutenant". Prior to April 11, 1984, the employer had four employees working at the Satsop site under the title and insignia of "sergeant". The sergeants, one assigned to each platoon, sat with the lieutenant at the front of the room during briefings, and they had distinct duties including patrol of the site in a vehicle used exclusively by the sergeants.

The employer defaulted on its bonds on two of its nuclear projects, bringing it nationwide notoriety. Its sources of revenue were severely curtailed as the result of litigation which ended with yet another decision of the Supreme Court of the State of Washington. Chemical Bank v. Washington Public Power Supply System, 99 Wn.2d 772 (1983). WPPSS has terminated one of the nuclear projects at Hanford and one at Satsop. It has mothballed one of the nuclear projects at Hanford and the remaining project at Satsop. It proceeded with a "ramp-down" of its operations, cutting back gradually on the level of activity at its construction sites. There is, however, continuing contractor traffic at the Satsop site. Some con-struction work continues for preservation of the mothballed facility. The captain in charge of the security operation at Satsop made and announced plans during the summer and autumn of 1983 for reductions in the security workforce. Among the changes initially announced was that the sergeant positions would be eliminated, effective January 1, 1984. The employer produced personnel office documentation reflecting a "title change" for the four disputed employees, effective January 1, 1984.

On its face, there would seem to have been some clear basis for the employer to reduce its expenditures, including its expenditures on security. On close examination, however, the present dispute and its development are very troubling. One might speculate whether the "changes" implemented in the WPPSS personnel office at Richland as to the sergeants at the Satsop site were for the consumption of the employer's creditors, the press and the public outside of the system. In fact, there was no financial savings at all. The allegedly demoted sergeants continued to be paid at the same rate of pay they enjoyed prior to January 1, 1984. More important for the purposes of this determination, they continued to possess the uniform stripes and indicia of the rank of sergeant. The effort to organize the WPPSS security workforce had been a dormant issue for some time as of January 1, 1984. The litigation had been pending in the courts for more than two years at that time. Whatever the motivation actually was, nothing in the record of this case suggests that the paper transaction which occurred in the employer's personnel office at or about January 1, 1984 was motivated in any way towards influencing this proceeding or the organizational effort. The record amply demonstrates that the lieutenants at Satsop desired, for operational reasons including their appearance of authority for purposes of

dealing with contractors and visitors at the Satsop site, to continue having sergeants. The sergeants retained the indicia of rank and the appearance of authority as the result of a conscious decision made by the captain in charge of security at the Satsop site, after receiving input from his lieutenants and sergeants. This leads to the conclusion that the structure which existed after January 1, 1984 was based on business reasons unrelated to the exercise of rights protected by Chapter 41.56 RCW.

Employer and union witnesses alike testified to the existence of a fluid situation during the latter part of 1983. Changes of direction were occuring almost daily, and an active rumor mill was in existence at all times. Amidst all of the rumors and change, there was no written communication or formal briefing at or around January 1, 1984 to announce that the sergeants had been demoted. During or about the same time frame the employer reduced the number of, but did not altogether eliminate, sergeants at the Hanford site. The sergeants at Satsop continued to wear the insignia of the rank and they continued to perform distinct tasks in a manner virtually indistinguishable from that which they pursued prior to January 1, 1984, and they maintained the appearance of authority for purposes of dealing with the non-supervisory security employees in the petitioned-for bargaining unit. In the absence of an announcement that the chain of command had been altered, and in the absence of any visible change, the subordinate employees could reasonably have concluded that the previously announced changes had been abandoned. There is credible testimony of rank-and-file security employees that they continued, after January 1, 1984, to accord the sergeants the respect due persons of superior rank to themselves.

The Supreme Court's February 2, 1984 decision opened the way for further proceedings in this case. The parties were advised by PERC, in a letter dated February 6, 1984, that a pre-hearing conference was to be held on February 16, 1984. The employer was reqested at the same time to produce a current list of employees. The pre-hearing conference was postponed at the request of the union. The employer responded to the request for a list of employees with a letter dated February 16, 1984 and received by PERC on February 21, 1984. The names of the four persons then wearing sergeant's stripes at the Satsop site were included on that list, with no indication of any special circumstances relating to them. After another delay while a "blocking charge" was discussed and cleared from the path of progress, a letter was issued to the parties on March 29, 1984, setting a pre-hearing conference for April 11, 1984 at the employer's headquarters in Richland.

When the PERC hearing officer convened the pre-hearing conference at 9:00 AM on April 11, 1984, the security sergeants at the Satsop site were still wearing their indicia of rank and were acting with the distinct duties and appearance of authority of sergeant, as described above. During the course

of the pre-hearing conference, the parties stipulated the exclusion of sergeants from the bargaining unit and the union questioned the inclusion of the four disputed individuals on the eligibility list. The employer contended that the sergeants had been demoted, and that they were eligible voters. The eligibility dispute was then identified as an issue for hearing.

Following the conclusion of the pre-hearing conference, the employer's security manager contacted the captain at the Satsop site and ordered the removal of the sergeants stripes and the cessation of their separate and distinct assignments. That order was implemented with each oncoming shift until all of the sergeants were stripped of their stripes and distinguishing duties. Thereafter the disputed employees performed rotating assignments generally similar to those of rank-and-file security employees, although there is some indication that some assignment preferences have been accorded to the disputed employees.

An eligibility date is used in both National Labor Relations Board (NLRB) and PERC representation case procedures, to reduce or eliminate mischief in the period immediately preceding a representation election. Normally, an individual must be an employee on both the eligibility date and on the date of the election in order to be eligible to vote. There are, however, exceptions. One such circumstance, pointed out in the union's brief by citation to Macy's Missouri-Kansas Division, 173 NLRB 1500 (1969), is where a strike occurs between the eligibility date and the date of the election. Another such circumstance is that a dischargee who was off the payroll on the date of an election will be deemed to have been an eligible voter if a discrimination unfair labor practice violation is found. Tampa Sand and Material Co., 137 NLRB 1549 (1962). The situation at hand is the mirror image of the discriminatory discharge situation. The employer has not merely implemented a previously announced personnel change. Contravening its own identified business reasons, it has attempted to place the four disputed employees within the scope of a bargaining unit and representation proceeding which had never (even at the time of their paper demotion) involved them. In doing so, it has deprived them of the privileges of rank in a para-military structure, including insignia, the courtesies extended by persons of lower rank, office space, vehicle assignment, and the separate and distinct duties. Based on the testimony of the disputed individuals, and my observation of their demeanor as witnesses, it is clear that they associate their loss of rank, privilege and authority with the union and its organizing effort. The effects on the employees, and on their attitudes towards the union, are much more substantial than was the case in King County, Decision 1957 (PECB, 1984), where the elimination of police commissions had no actual effect on the duties or daily activities of the employees involved. The employer's constant focus on the eligibility date in this case must be evaluated in light of any mischief affecting the eligibility list.

Arthur G. Miller, a WPPSS labor relations official, wrote the letter forwarding the February 16, 1984 list of employees to the Commission, and he represented the employer at the pre-hearing conference held on April 11, 1984. Miller was present at the opening of the hearing on the challenged ballots and throughout the first day of the hearing. A motion to sequester witnesses was made and granted, but Miller remained in the hearing room, participating with the attorney for WPPSS at the counsel table. At the close of the union's case-in-chief on the challenged ballots, WPPSS made a motion to dismiss the challenges. The ruling on that motion was:

> We have a motion before us to dismiss the challenges. In my view, in the way of (a) ruling on that motion, the status of the disputed persons at and before 9:00 AM on April 11, 1984, the positions which were taken at the pre-hearing conference held at that time and the good faith or lack of good faith of those positions is a (sic) very relevant consideration in this case.

Transcript of hearing, pages 128 - 129. (emphasis added)

The employer and its representative were thus put on notice that the propriety of their actions was under scrutiny in this case. A pre-hearing conference is conducted by the Commission under the Administrative Procedures Act, Chapter 34.04 RCW, and under WAC 10-08-130 and WAC 391-08-210, and is an official proceeding before the agency. Taking a knowingly false position in such an official proceeding constitutes an abuse of the processes of the Commission and misconduct for which the contumacious individual is subject to being barred from practice. WAC 391-08-020. Without any advance notice that he was withdrawing from participation in the hearing, Miller absented himself on the second day of the hearing. The employer has never come forth with a full explanation of what happened previous to and on April 11th. Looked at in the light most favorable to Miller and to the employer, one would start from the premise that WPPSS officials at Richland were completely unaware of local practices implemented by the captain at Satsop (within the apparent scope of his authority) and, upon discovering that the disputed individuals were still wearing the uniform of and acting as sergeants, took steps to overrule the operating official's assessment of the business reasons for keeping the sergeants. The logical extension of that possibility is, however, that the operating official was overruled in order to bolster the eligibility arguments previously advanced in error, without Miller or any other representative of the employer ever coming back to the union or to the Commission to correct statements made in error on April 11th or to explain the actions taken as being corrective of some previous misdirection by the local officials at Satsop. Looked at in the light most damaging to Miller and to the employer, one would start from the premise that WPPSS officials at Richland were aware of the situation existing at Satsop, yet falsely included the names of the four disputed individuals on the eligibility list provided to the

Commission, without calling attention to the discrepancy between personnel records and actual practice. The logical extension of that possibility is that the employer's officials, having been challenged on this by the union, took steps to change the situation in order to bolster the eligibility argument. Neither extreme places the employer in a particularly good light. Having been advised that Miller's conduct was in question, the employer's failure to fully explain its actions warrants an adverse inference against the employer.

At the time the pre-hearing conference was held in this matter on April 11, 1984, the parties stipulated to exclude "sergeants" from the bargaining unit and the four disputed individuals were most assuredly "sergeants" in the eyes of their subordinates and the union. The employer's arguments seeking to focus on varying levels of supervisory authority at different points in time are not persuasive. For the reasons indicated, it is concluded that the challenged ballots were cast by persons whose status was changed by the employer on and after April 11, 1984 expressly for the purpose of attempting to influence the outcome of this case. The employer's changes of their uniform and assignments are found to be mischief of a type which the law will not protect or sustain. Just as a discriminatory dischargee does not lose voter eligibility because of the improperly motivated action taken against him, the four persons in dispute here did not become eligible voters because of the employer's improperly motivated demotion.

The employer's reliance on the definition of "supervisor" in RCW 41.59.020(4)(d) and on the decision in Wellpinit School District, Decision 1427 (EDUC, 1982) is entirely misplaced. The Wellpinit case involved an alleged "principal". Principals are a limited and separately licensed class under Title 28A RCW who are accorded special treatment under the Educational Employment Relations Act, Chapter 41.59 RCW. The individual involved in Wellpinit did not meet the qualifications for treatment as a principal. Under the limiting provisions of RCW 41.59.080(1) there was no place for the disputed person in the schema of the statute except in the employer-wide non-supervisory certificated employee bargaining unit. This case arises under Chapter 41.56 RCW rather than under Chapter 41.59 RCW. Supervisors are employees within the meaning of Chapter 41.56 RCW. METRO v. L&I, 88 Wn.2d 925 (1977). Supervisors are generally placed in bargaining units separate and apart from their subordinates due to the potential for conflicts of interest within a bargaining unit which included both types of employees. City of Richland, Decision 279-A (PECB, 1978), aff. 29 Wn.App. 599 (Division III, 1981), cert. den., 96 Wn.2d 1004 (1981). Thus, beyond any definitional problem as to whether an individual or members of a class are "supervisors", PERC deals with such situations as unit determination questions under RCW 41.56.060.

The challenges to the ballots will be sustained, and the four disputed individuals are not deemed to be included in the petitioned-for bargaining unit at the present time. Should the employer fail, within a reasonable time following the conclusion of these proceedings, to restore their previous indicia of rank and authority, they will be deemed to have become non-supervisory employees and will then be included in the bargaining unit.

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.

CONCLUSIONS OF LAW

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

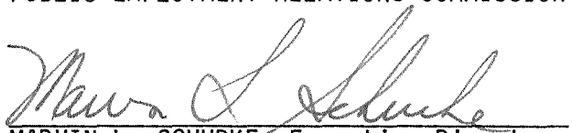
2. D. M. Casto, D. R. Moran, A. W. Sherman, and M. C. Ohlson were demoted by the employer on April 11, 1984 in derogation of its stipulations made in proceedings before the Public Employment Relations Commission concerning the exclusion of sergeants from the bargaining unit, and in order to affect the 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.

ORDER

The challenges to the ballots cast by D. M. Casto, D. R. Moran, A. W. Sherman, and M. C. Ohlson are sustained and those ballots are deemed void. An amended tally of ballots is attached.

DATED at Olympia, Washington, this 9th day of October, 1984.

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(2).

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMENDED

TALLY SHEET

NAME OF EMPLOYER: WASHINGTON PUBLIC POWER SUPPLY SYSTEM

CASE NUMBER: 3543-E-81-689

PART 1 - CROSS-CHECK OF RECORDS

The undersigned agent of the Public Employment Relations Commission certifies that he/she has conducted a cross-check of records in the above case, and that the results were as follows:

Number of Employees in Bargaining Unit.....

Number of Employee Records Examined.....

Number of Employee Records Counted as Valid Evidence of Representation...

PART 2 - SECRET BALLOT ELECTION

The undersigned agent of the Public Employment Relations Commission certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated below, were as follows:

1. Approximate number of eligible voters..... 137
2. Void Ballots..... 5
3. Votes Cast For: OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION... 63
4. Votes Cast For: ... --
5. Votes Cast For: ... --
6. Votes Cast For: NO REPRESENTATION..... 62
7. Valid Ballots Counted.(total of 3, 4, 5, and 6)..... 125
8. Challenged Ballots..... 0
9. Valid Ballots Counted plus Challenged Ballots (total of 7 and 8)..... 125
10. Number of Valid Ballots Needed to Determine Election..... 63

Challenges [ ] are [X] are not sufficient in number to affect the results of the election.

The results of the election appear to be [ ] inconclusive. [X] conclusive favoring choice on line 3

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DATE ISSUED October 9, 1984

By _____

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For _____ For _____

For _____ For _____