STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES Involving certain employees of: CITY OF FEDERAL WAY	CASE 9655-E-92-1590 DECISION 4088 - PECB ORDER VACATING ELECTION AGREEMENT

Chris Dugovich, President, and Pamela G. Bradburn, General Counsel, filed statements for the petitioner.

Carolyn A. Lake, Acting City Attorney, filed a statement for the employer.

Paul Quarterman, Contactperson, filed a statement for the intervenor, Federal Way Employees Association.

On February 25, 1992, the Washington State Council of County and City Employees (WSCCCE) 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 Commission routinely verified the sufficiency of the showing of interest provided by the WSCCCE, and two pre-hearing conferences were held in the matter. On April 21, 1992, the WSCCCE and the employer filed an election agreement under WAC 391-25-230, stipulating the propriety of a bargaining unit described as:

> All full-time and regular part-time employees of the City of Federal Way, excluding supervisors (within the meaning of PERC precedent), and confidential employees.

The parties also purported to stipulate an April 3, 1992 eligibility cut-off date and a list of eligible voters.

The Federal Way Employees Association (FWEA) filed a timely motion for intervention on April 23, 1992, seeking the same bargaining unit previously stipulated by the WSCCCE and the employer.

The Executive Director accepted what purported and appeared to be a valid election agreement, and an election was conducted by the Commission on May 6, 1992. The results of the election were:

15 ballots cast for the WSCCCE
14 ballots cast for the FWEA
17 ballots cast for "No Representation"
5 challenged ballots[1]

The election was thus inconclusive under RCW 41.56.070 and WAC 391-25-531. Apart from the need to conduct a runoff election under WAC 391-25-570, the challenged ballots are sufficient in number to affect the choices to be on the ballot for the runoff election.

On May 11, 1992, the parties were directed to show cause why they should not be held to the stipulations made in the election agreement previously filed in the matter.

On May 12, 1992, the WSCCCE filed objections, under WAC 391-25-590(1), to conduct alleged to have improperly affected the outcome of the election. Six separate allegations are directed at the pre-election conduct of the employer. Allegations of deceptive campaign practices improperly involving the Commission and its processes include: Misrepresenting the rights of employees as deriving from federal law, rather than state law; issuance of a purported eligibility list and erroneous instructions to potential

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1 The ballot of a sixth employee was challenged during the voting process, on the basis that the individual's name did not appear on the stipulated eligibility list. That challenge was cleared prior to the tally of ballots, however, upon the stipulation of all parties that the individual had been hired before April 3, 1992 and was erroneously excluded from the eligibility list.

voters; and the making of false statements to the Commission during the preliminary processing of the case. Other allegations concern the timing of campaign statements made to employees and manipulation of employee hiring dates to affect their eligibility to vote in the election conducted by the Commission.

Each of the parties subsequently filed a written response to the "show cause" directive issued on May 11, 1992.

The case remains before the Executive Director at this time, for disposition of the challenged ballots under WAC 391-25-510. The challenged ballots are as follows:

Gary Norris	Not on stipulated eligibility list.
Jorge Perez	Not on stipulated eligibility list.
Amanda Grant	Not on stipulated eligibility list.
Gretchen Weigman	Not on stipulated eligibility list.
Jacquelyn Faludi	Not on stipulated eligibility list + challenged by WSCCCE as supervisor.

Although the WSCCCE has filed conduct objections, the WSCCCE would be entitled to a transfer of the case to the Commission under WAC 391-25-570 only if the disposition of the challenged ballots were to result in the exclusion of the WSCCCE from the runoff election.[2]

POSITIONS OF THE PARTIES

The WSCCCE contended at the election that Norris, Perez, Grant, and Weigman had become bargaining unit employees, so that their ballots should be counted. The WSCCCE contended at the election that

2 That is not to say that the objections are dismissed or are lost forever. The period protected by the "objections" procedure commences with the filing of a petition and continues through the conduct of a determinative election. Nothing precludes a party listed on ballot of a runoff election from filing objections on conduct dating back to the filing of the petition.

Faludi was properly excluded from the unit as a "supervisor". The WSCCCE offered an alternative position in its response to the "show cause" directive, acknowledging there is ample precedent for holding all parties to the stipulations they make in election agreements, and stating that it would withdraw its objections if the challenges to all of the disputed ballots were to be sustained.

The employer seeks to distinguish these challenged ballots into two categories. As to Norris, Perez, Grant, and Weigman, the employer contends that the challenges to their ballots should be sustained, based on the stipulated cut-off date and stipulated eligibility list. The employer contends, however, that Faludi was erroneously omitted from the original eligibility list which it supplied, and that there was no discussion of or stipulation concerning her eligibility. The employer contends, further, that Faludi was hired prior to April 3, 1992, and that she is not a supervisor, so that the challenge to her ballot should be overruled.

At the election, the FWEA contended that Norris, Perez, Grant, and Weigman are ineligible to vote, based on the stipulated eligibility list. The FWEA contends in its response to the "show cause" directive that Faludi was inadvertently omitted from the eligibility list, that she is not a supervisor, and is eligible to vote.

DISCUSSION

The employer aptly cites the decision of the undersigned Executive Director in City of Selah, Decision 1931 (PECB, 1984), in making reference to the long-term effects of representation proceedings on the employees and organizations involved:

> Representation proceedings produce a description of a bargaining unit, which is an ongoing listing of classifications or types of employees which are grouped together and distin-

> guished from others for the purposes of collective bargaining.

In enacting statutes providing for the determination of bargaining units and resolution of questions concerning representation by impartial administrative agencies, Congress and various state legislatures have recognized that employers, unions and employees have historically had substantial difficulties in structuring their relationships. A certain amount of "nose counting" and "jockeying for position" by the parties is to be expected.

RCW 41.56.040 provides employees a right to bargain collectively through representatives of their own choosing. RCW 41.56.060 empowers the Commission to determine bargaining units, and unit determination is not a mandatory subject of bargaining in the traditional "mandatory/permissive/illegal" sense. While parties may agree on units, their agreements are not binding on the Commission. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981).[3] RCW 41.56.060 further empowers the Commission to determine questions concerning representation, using procedures set forth in RCW 41.56.070 where an election is held. Like the National Labor Relations Board in its administration of the federal law, the Public Employment Relations Commission seeks to maintain "laboratory conditions" under which employees may exercise their free choice on the selection of a bargaining representative. Lake Stevens-Granite Falls Transportation Cooperative, Decision 2462

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[3] The "recognition strike" was a more common tool in the private sector prior to the adoption by Congress of the National Labor Relations Act of 1935 and the Labor-Management Relations Act of 1947 than it is today. The Public Employment Relations Commission has taken an even firmer hand in assuring the peaceful resolution of such "relationships" questions. Under Spokane School District, Decision 718 (EDUC, 1979), it is an unfair labor practice for a party to go to impasse on such matters.

(PECB, 1986), citing Snohomish County, Decision 2234 (PECB, 1985) and Mason County, Decision 1699 (PECB, 1983).

The Commission seeks to implement the public interest under statutes which transcend the short-term interests of the parties:

> The representation case process establishes long-term relationships. Even though it may seem large to the immediate parties at the time, a delay of bargaining during the orderly resolution of a question concerning representation will tend to soon fade in memory as a minor event in a relationship of many years' duration.

Stevens Memorial Hospital, Decision 3373 (PECB, 1990).

Thus, the Commission has taken steps in the past to protect the rights of employees. See, for example, City of Vancouver, Decision 3160 (PECB, 1989), where a proposed unit structure was rejected, because it would have "stranded" certain employees without the possibility of implementing their statutory bargaining rights.

The processing of the instant case must be considered against the statutory and policy background set forth above:

1. The petition filed by the WSCCCE in this case estimated that there were 51 employees in the petitioned-for bargaining unit.

2. The first action by the Commission was to direct a routine letter to the employer on March 2, 1992. That letter supplied copies of the notice required by WAC 391-25-140 and requested a list of employees, as follows:

   > Please supply the undersigned with a list of all persons currently on the employer's payroll who occupy positions or classifications of the type described in the attached petition. The submission of such a list is required by WAC 391-25-130. [The list should be as complete and accurate as possi-

> ble, but will be subject to change. Persons which the employer will desire to have excluded from the bargaining unit (as confidential employees, supervisors, or otherwise) should be listed, with indication of the basis for their proposed exclusion. After we have verified the sufficiency of the showing of interest filed in support of the showing of interest filed in support of the petition, the list will be used as the base of information from which the parties will be asked to make stipulations concerning the employees to be included in or as the result of a formal hearing. You will be contacted by a member of the Commission staff concerning the scheduling of meetings and hearings.]

The letter requested that the list be provided "within seven (7) days following the date of this letter".[4]

3. It appears that Jacquelyn Faludi's first day of employment with the City of Federal Way was March 19, 1992.

4. The employer responded to the Commission's March 3 inquiry in a letter dated March 19, 1992, and filed on March 20, 1992. The employer indicated some concern that the petitioned-for employer-wide unit might be inappropriate, and asserted that there were as many as 70 employees affected by the petition. Accompanying that letter was what appears to be a computer-generated list titled: "Birthday List - City of Federal Way Employees", containing a total of 82 names. Of those, 14 names were highlighted in yellow and noted as "confidential and/or supervisory employees". None of the persons who cast challenged ballots were named on that list.

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[4] Due to an error in the Commission's office, an obsolete address then contained in the Commission's computer system was used in the March 2 letter, rather than the current employer address listed on the petition filed by the WSCCCE. A similar letter was directed to a different employer official on March 3, 1992, also using the obsolete address. The employer did not receive the March 3 letter until March 12, whereupon it requested and was granted an extension of the time for its response.

5. It appears that Travis Vancil's first day of employment with the City of Federal Way was March 23, 1992.

6. On March 23, 1992, the Commission directed a letter to the parties, advising that the showing of interest supplied by the WSCCCE had been administratively determined to be sufficient, and that a pre-hearing conference was scheduled for April 3.

7. On March 25, 1992, the employer mailed a revised list of employees, again using the computer-generated "Birthday List" format. Filed on March 30, that list contained a total of 77 names, of which 25 were highlighted in yellow and noted as "confidential and/or supervisory employees". Notwithstanding that at least Faludi and Vancil were already on the employer's payroll by that time, none of the individuals who cast challenged ballots were named on that list.

8. It is inferred from the materials now on file that at least Amanda Grant and Jorge Perez actually commenced employment with the City of Federal Way on or before April 1, 1992.[5]

9. A pre-hearing conference was conducted by Hearing Officer Kenneth J. Latsch on April 3, 1992. The proceedings were conducted by means of a telephone conference call. The parties failed to resolve all of the issues necessary to the conduct of an election.

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[5] The objections filed by the WSCCCE allege that the same holds true for Gretchen Weigman. It is clear that Grant, Perez and Weigman were working as "temporary" employees for some period, after which they were offered full-time employment retroactive to April 1, 1992. See items 12 and 13, below. Although nothing now on file establishes the exact dates on which they commenced work with the City of Federal Way, it is presumed that the employer would not have violated the prohibition on gifts of public funds found in the Washington State Constitution, so that they must have been at work by April 1.

10. The employer's response to the "show cause" directive acknowledges that Gary Norris was hired as of April 6, 1992.[6]

11. Together with a letter dated April 8, the WSCCCE submitted its own list containing the names of 53 employees. Filed with the Commission on April 10, 1992, that letter raised specific issues about seven individuals, as follows:

    Kurt Reuter, Recreation Manager - This name had been on both of the lists supplied by the employer, without indication that he was to be excluded from the unit. The WSCCCE letter stated he, "was inadvertently list as eligible and in a challenged position. The correct listing is that he is filling a challenge position." The name was not on the WSCCCE's list.

    Amanda Grant, Jorge Perez, Gretchen Weigman - None of these names had been on the lists previously supplied by the employer. The WSCCCE letter stated, "It is my understanding that the City his [sic] week hired into full-time positions in the Parks & Recreation Department".

    Vicki Norris, Parks Maintenance Worker and Elizabeth Snyder, Permit Specialist - These names were on both of the lists supplied by the employer, without indication that the employer claimed either of them should be excluded from the bargaining unit. The WSCCCE letter stated, "should be included".

    Gary Norris, Inspector - This name had not been on the lists previously supplied by the employer. The WSCCCE letter stated, "Should be included".

12. Another telephonic pre-hearing conference was conducted by Hearing Officer Latsch on April 10, 1992. According to the employer's response to the "show cause" directive, the parties went through the entire eligibility list on that occasion, using as a base the list supplied by the union. The employ-

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6 The objections filed by the WSCCCE allege that Norris was at one time offered employment commencing April 1, 1992.

er's response to the "show cause" directive acknowledges that both parties knew that Grant, Perez and Weigman were applicants for permanent employment. The employer's contention that the union agreed to the exclusion of Grant, Perez and Weigman is not contested, but the WSCCCE alleges that the stipulation was based on the employer's assertion that they were temporary employees with no expectancy of continued employment. The employer indicates that the union desired an April 13 cut-off date, but that the employer prevailed on use of April 3 as the cut-off date. The eligibility list then contained 48 names. After the conference was completed, Hearing Officer Latsch prepared an election agreement form and mailed it to the parties for signature.

13. From documents supplied to the Commission at the election, it appears that the city manager issued letters on April 15, 1992, offering employment to Amanda Grant and Jorge Perez. Those letters include:

> This letter is to offer you employment with the City of Federal Way as Maintenance Worker I. **Your employment will start on April 1, 1992** at a salary level 20 step A which equates to $2,185 per month. This is a regular full time position and classified as non-exempt. [Emphasis by **bold** supplied.]

A similar letter submitted with the WSCCCE's objections has been altered to obliterate the name of the employee, but is distinguished from the other two letters by the handwritten date on a line provided for acceptance of the job offer.

14. A WSCCCE official signed the election agreement under date of April 15, 1992.

15. It appears that Amanda Grant communicated her acceptance of the offered full-time position to the employer as early as April 16, 1992.

16. An employer official signed the election agreement under date of April 17, 1992, but the document was not mailed to the Commission until April 20, 1992. It was received by (filed with) the Commission as of April 21, 1992.

17. The election agreement was approved by the Executive Director on the basis of what then appeared to be the facts, and election materials were mailed out by the Commission on April 23, 1992.

The Commission's rules delegate authority to the Executive Director to process representation cases. WAC 391-25-390. Other Commission staff members operate under the authority of the Executive Director in such matters. Election agreements submitted by parties are subject to acceptance or rejection by the Executive Director. For a number of reasons, as indicated below, the previous approval of the election agreement filed in this matter must be withdrawn.

The Erroneous Omissions From the List

The letters and employee lists filed by the employer on March 20 and March 30, 1992 gave every indication that it was attempting to respond properly to the Commission's request for a complete list of employees and proposed exclusions. It is now clear that the lists provided by the employer omitted the names of two recently-hired employees. Assuming that the omissions were inadvertent,[7] the fact of those omissions nevertheless casts doubt on the sufficiency of later discussions and stipulations made in this case.

The parties were able to clear the challenge to Vancil's ballot, but a substantial question may exist concerning whether Faludi

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[7] Indeed, the first list was mailed out on the day that Faludi commenced her employment. The second list was mailed out only six days later, which was only two days after Vancil commenced his employment.

should be excluded from the bargaining unit as a "supervisor". Chapter 41.56 RCW does not define "supervisor", but traditional definitions of that term under other state laws and the federal law encompass persons who exercise authority, on behalf of the employer, to **hire**, assign, promote, transfer, layoff, recall, suspend, discipline or discharge subordinate employees, or to adjust their grievances, or the making of effective recommendations on such matters. Supervisors have the right to bargain collectively under Chapter 41.56 RCW. Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977). At the same time, Commission precedent generally requires the exclusion of supervisors from the bargaining units containing their rank-and-file subordinates. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). Consistent with the applicable precedents, the election agreement filed in this case described the bargaining unit as excluding supervisors. Apart from surprise at having an employee not on the eligibility list present herself to vote, the challenge to Faludi's ballot could well relate to the memo Faludi presented to the Commission's election officer. That memo speaks of her duties concerning "hiring" of subordinates.[8]

Had the omission of at least two potential voters been known, the election agreement could have been rejected by the Executive Director. The strong preference is to obtain complete stipulations, or to use the Supplemental Agreement procedure, WAC 391-25-290, to clearly identify and reserve issues for later hearings.

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[8] A memo supplied by Faludi at the election states:

> I am currently initiating the process for hiring one or two program analysts that would assist me with the implementation of solid waste programs. I will be supervising these individuals and although these individuals will most likely be hired as interns, the position(s) could revert to permanent positions.
>
> During the execution of my duties, I will be chairing selection committees for the hiring of consultants. I will be the agency lead contact with the selected consultants and will be directing their work efforts.

Expanding Unit

The City of Federal Way is a relatively new municipal entity. The FWEA's response to the "show cause" directive states:

> The City of Federal Way is a growing city with a rapidly growing staff. We can easily see how several people were inadvertently left off the eligibility list.

A substantial concern to the Commission, if not to the parties, is that long-term relationships should not be determined on the basis of disenfranchisement of employees by inadvertence or by reliance on procedures which fail to take account of dynamic situations.

The National Labor Relations Board (NLRB) has encountered a variety of "expanding unit" situations its administration of the federal law. The Guide for Hearing Officers in NLRB Representation Proceedings[9] lists a number of inquiries, at pages 61 through 67, appropriate for cases where a plant or operation is in the process of "staffing up". Among those, items o. through w. look to similarities of wages, hours and working conditions between existing employees and anticipated additional employees. Item b. looks to the future in 30-day segments, and one of the options clearly available to the administrative agency is to postpone an election for a reasonable period until a representative workforce has been hired.

In the case at hand, it appears that at least six employees have been hired into new (i.e., "expanding" rather than "turnover") positions since the petition in this case was filed. Amounting to 12.5% of the stipulated eligibility list and 11.11% of an expanded unit which includes them, the six employees omitted from the stipulated eligibility list are theoretically sufficient in number

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[9] Office of General Counsel of the NLRB, June, 1975.

to form their own organization and have it intervene as a choice on the ballot in this proceeding!

Under WAC 391-25-230, the "default" cut-off date for voter eligibility is the date on which the election agreement is filed with the Commission. Had the facts which now appear to exist been known when the election agreement was filed in this case, the Executive Director would have needed specific justification from the parties to approve disenfranchising more than 10% of the bargaining unit.

Artificiality of the April 3, 1992 Cut-off Date

An "eligibility cut-off date" is set in advance of a representation election, to provide stability for the list of eligible voters to be used in the election. The Commission's rules make provision for such a "cut-off date" in WAC 391-25-230, as follows:

> Such election agreement shall contain:
>
> ...
>
> (6) A list, attached to the election agreement as an appendix, containing the names of the employees eligible to vote in the election and the eligibility cut off date for the election. ... If no eligibility cut off date is specified by the parties, the eligibility cut off date shall be the date on which the election agreement is filed.

Clearly, the establishment of an eligibility cut-off date will tend to preclude tactics such as an employer's artificial hiring of large numbers of new employees on the day before an election. Just as clearly, the establishment of an eligibility cut-off date is not a device for employers and unions to disenfranchise otherwise eligible voters.

The election agreement filed by the parties on April 21, 1992 specified an April 3, 1992 cut-off date for voter eligibility. The

employer acknowledges that it pushed for the April 3 cut-off date, and that it opposed the union's proposed April 13 cut-off date as "a date which had no relationship to any election event". Without impugning the employer's motives in any way, a fundamental weakness with its argument is that April 3 also lacks significance as an "event" in the processing of this case. The parties did participate in a telephonic pre-hearing conference on April 3, but they clearly did not resolve all of the eligibility issues on that date.

The employer acknowledges that the parties engaged in a complete review of the eligibility list on April 10, 1992, using a union-generated list that apparently did not exist until April 8. The employer further acknowledges that Gary Norris had been hired by April 6, 1992, yet it offers no justification for disenfranchising that potential voter except that it was able to get the WSCCCE to agree to an April 3 cut-off date.

Had the facts which now appear to exist been known when the election agreement in this case was filed, the Executive Director would not have approved the April 3 eligibility cut-off date. The right to select representatives belongs to employees, not to their employers or the unions seeking to represent them. No justification has been shown for a stipulation by which the parties knowingly deprived Norris of his rights under the statute.

<u>Hiring Notices at Odds With Purported Stipulation</u>

Accepting that Grant, Perez and Weigman were only "temporary" employees at the time of the April 10 pre-hearing conference, the documents now on file provide substantial basis to infer that their status had changed by the April 17 date on which the election agreement was signed on behalf of the employer, and certainly by the April 21 filing of the election agreement with the Commission.

It appears that at least Grant and Perez had been offered full-time employment on April 15, and there is some basis to infer that the same offer was also extended to Weigman. Furthermore, it appears that the city manager had back-dated their hiring to "April 1, 1992", thus converting their "temporary" status to "full-time" as of a date that would have made them eligible to vote even under an April 3 eligibility cut-off date.

Had the facts which now appear to exist been known when the election agreement in this case was filed, the Executive Director would not have approved a stipulated eligibility list which excluded Grant, Perez and Weigman. No justification has been shown for a stipulated exclusion of those individuals where the employer knew or should have known when it signed the election agreement that the circumstances had changed since the April 10, 1992 pre-hearing conference.

NOW, THEREFORE, it is

ORDERED

1. The Executive Director's approval of the election agreement filed in this matter on April 21, 1992 is WITHDRAWN, insofar as it relates to the stipulations of the parties concerning an eligibility cut-off date and an eligibility list.

2. The results of the election conducted on the basis of the election agreement filed in this matter on April 21, 1992 are VACATED, and the matter is remanded for such further pre-hearing conferences and/or hearings as may be necessary to the proper processing of the petition filed in this matter.

3. The parties are directed to present themselves at the office of the Public Employment Relations Commission, Room 603,

Evergreen Plaza Building, 711 Capitol Way, Olympia, Washington, on Wednesday, June 10, 1992, at 10:00 a.m., for the purpose of attending a pre-hearing conference in the above-captioned matter. The employer shall at that time provide an updated list of employees accurate as of the close of business on the previous business day, and all parties shall be prepared at that time to discuss and make stipulations on the eligibility of employees to vote in a representation election in this proceeding.

Entered at Olympia, Washington, on the 1st day of June, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director