STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	
WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES	CASE 9655-E-92-1590
Involving certain employees of:	DECISION 4088-B - PECB
CITY OF FEDERAL WAY	ORDER ON OBJECTIONS
WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, and NORMAN BRAY, Complainants,	CASE 9889-U-92-2258
vs.	DECISION 4495-A - PECB
CITY OF FEDERAL WAY, Respondent.	DECISION OF COMMISSION
WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, and ELIZABETH SNYDER, Complainants,	CASE 9890-U-92-2259
vs.	DECISION 4496-A - PECB
CITY OF FEDERAL WAY, Respondent.	DECISION OF COMMISSION

Audrey B. Eide, Legal Counsel, appeared on behalf of the Washington State Council of County and City Employees and the individual complainants.

Carolyn A. Lake, City Attorney, and Perkins Coie, by Valerie L. Hughes, Attorney at Law, appeared on behalf of the employer.

This case comes before the Commission on a petition for review filed by the Washington State Council of County and City Employees

and individual complainants Norman Bray and Elizabeth Snyder, seeking to overturn a recommended order on objections, and findings of fact, conclusions of law and order issued by Examiner Walter M. Stuteville.[1]

BACKGROUND

On February 25, 1992, the Washington State Council of County and City Employees AFSCME, AFL-CIO (WSCCCE), filed a petition for investigation of a question concerning representation with the Commission. The union sought certification as exclusive bargaining representative of all full-time and regular part-time employees of the City of Federal Way (employer), excluding confidential employees and commissioned employees of the police and fire departments.

The employer commenced an active campaign against the selection of an exclusive bargaining representative by its employees. In a March 25, 1992 letter to bargaining unit members, City Manager J. Brent McFall suggested that union representation would not be in the best interest of the city. The employer used a "SPIRIT" meeting held on March 27, 1992 as a forum for discussing the union organizing campaign with its employees.[2] On April 1, 1992, McFall sent a letter to all city employees, detailing answers to questions presented at the SPIRIT meeting.

On April 23, 1992, the City of Federal Way Employees Association (CFWEA) filed a timely motion for intervention in the representa-

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[1] City of Federal Way, Decisions 4088-A, 4495 and 4496 (PECB, 1993).

[2] The term "SPIRIT" is an acronym for "Service, Pride, Integrity, Responsibility, Innovation, Teamwork". The city manager testified that city employees had been invited to such meetings since April of 1990. Tr. 584.

tion case initiated by the WSCCCE. The CFWEA sought representation rights for the same bargaining unit petitioned for by the WSCCCE.

An election held on May 6, 1992 was inconclusive, and challenged ballots were sufficient in number to affect the outcome. On May 11, 1992, Executive Director Marvin L. Schurke issued a proposal for summary disposition of the challenged ballots. On May 12, 1992, the union filed objections to the election, alleging that the employer made misleading statements in the letter sent to employees on March 25, 1992;[3] that the employer discussed the attributes of "non unionism" at length during the "SPIRIT" meetings; that the employer did not provide the union equal access to the employees; that an eligibility list distributed to all employees less than 24 hours prior to the election misrepresented who was able to vote; that the employer's mailing of handwritten notes signed by the city manager on the day before the election was in violation of the "24 hour rule"; that the employer improperly affected the eligibility of three employees by false statements it made during the pre-election processing of the case; and that the employer manipulated the hiring date of an inspector so that he would not be eligible to vote in the election.

On June 1, 1992, the Executive Director entered an order withdrawing approval of the election agreement filed on April 21, 1992, vacating the results of the election, remanding the matter for further action, and directing the parties to appear at a new pre-hearing conference.[4] That order was based upon disclosure of previously unknown facts that would have precluded acceptance of the parties' earlier stipulations. The Executive Director did not

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[3] Specifically, the union alleged that the employer made statements inferring that if the union won, employees would have to become members of the union "even prior to employment", and that employees were protected by federal law rather than by state law.

[4] City of Federal Way, Decision 4088 (PECB, 1992).

address nor decide the union's "misrepresentation" claims. A new election agreement was signed on June 10, 1992, and a new election was scheduled for July 1, 1992.

While the campaign was going on during June of 1992, the employer received information that two of its employees responsible for building inspection and/or code enforcement functions had received gifts from a local building contractor.[5] The employer commenced an investigation which included the hiring of a private detective, Roger Dunn, to investigate the information.

Dunn's investigation disclosed that bargaining unit employee Elizabeth Snyder was involved in a romantic relationship with a contractor whose projects were subject to approval and inspection by the department in which she worked. Dunn learned that Snyder had been invited to go on a fishing trip with the contractor in June of 1991, and that she had made inquiries about scheduling time off for June of 1991 before deciding not to go on the trip.[6] Dunn's investigation further disclosed that the contractor had offered bargaining unit employee Norman Bray airline tickets for the same fishing trip, and that Bray initially accepted them from the contractor.[7] Neither Snyder nor Bray had informed the employer of the offered trip.

Bray and Snyder were interviewed separately. At her interview, Snyder agreed not to discuss the subject with anyone, but she soon discussed the interview with the contractor, with Bray, and with

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[5] The information was received from an official of a neighboring municipality.

[6] The Examiner based these findings on the contractor's affidavit (at pp. 20-21 of the Examiner's decision), and the investigator's report (at p. 27 of the Examiner's decision).

[7] Bray returned the tickets some time later, and did not participate in the trip.

another co-worker. On June 30, 1992, several employer officials recommended that Bray and Snyder be discharged.

Immediately prior to July 1, 1992, the employer distributed a handwritten memo to all of the employees eligible to vote, reminding them of the importance of the election. The results of the election held on July 1, 1992 were inconclusive. Bray and Snyder were discharged the same day, after the balloting was concluded. The next day, July 2, 1992, McFall sent a letter to all employees, informing them that Bray and Snyder had been discharged for violations of city standards.[8]

Dunn made his report to the employer in a memo dated July 8, 1992. He reported finding no evidence of the contractor soliciting any special consideration or favors from the two employees, and he concluded only that Bray and Snyder had used poor judgment in the handling of their employment responsibilities.

On July 10, 1992, the union filed separate complaints charging unfair labor practices on behalf of Bray and Snyder. Both complaints alleged that it was well-known that Bray and Snyder supported the union.

On July 14, 1992, McFall sent a memo to the employees eligible to vote in the runoff election, advising them of a SPIRIT meeting on the subject of "Election Spirit". Responding to statements attributed to the union and to a letter authored by another bargaining unit employee,[9] McFall reviewed the events concerning the discharg-

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[8] The "background" portion of the Examiner's decision details the campaign materials issued by the employer and union, as well as the correspondence regarding the discharges of Bray and Snyder. Those portions of the Examiner's decision are incorporated herein by reference.

[9] Matt Bodhaine wrote a July 13, 1992 letter addressed to "fellow employees", in which he was highly critical of the employer's treatment of Bray and Snyder.

es of Bray and Snyder, asked employees to consider the long-term effect of the election, and asked employees to use their best judgment. In another memo, apparently delivered on July 15, 1992 in response to a union mailing, McFall cautioned employees that their votes would have "long-range impacts".

A runoff election was conducted on July 16, 1992, with 26 ballots cast for "no representation" and 24 ballots cast for WSCCCE. Five challenged ballots were sufficient in number to affect the results of the election.[10]

On July 23, 1992, the union filed objections to the election, alleging misconduct and violation of election rules by the employer during the pre-election period. The employer answered both the election objections and the unfair labor practice complaints. The unfair labor practice charges and election objections were consolidated before Examiner Walter M. Stuteville. A hearing was held on January 6, 8, and 14, and February 11 and 12, 1993. Examiner Stuteville issued an order on September 15, 1993, dismissing the unfair labor practice complaints and recommending that the election objections be overruled.

The union filed its petition for review of the Examiner's decision on October 5, 1993, and the employer filed its brief in response to that petition on October 19, 1993.

POSITION OF THE PARTIES

The union argues that the employer has threatened and intimidated bargaining unit employees into fearing for their jobs if they supported the union. The union takes issue with the employer's statements in meetings and mailings during the campaign. It

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[10] Bray and Snyder were among the challenged voters.

contends that Bray and Snyder were both model employees whose support for the union was known to the employer, and that their union sympathies were the real reason for their discharges. The union contends that the grounds asserted by the employer for the discharges were a pretext, and that any errors by Bray or Snyder were not serious enough to justify termination of their employment. The union requests that Bray and Snyder be reinstated with full back pay and benefits. The union also requests that it be certified as exclusive bargaining representative automatically, or that the election be declared void and a new election held. If the case is decided against it, the union seeks clarification as to the period when the "certification bar" will be operative, and urges that the bar period should run from the date of the last election.

The employer supports the Examiner's decision, and asks that it be affirmed by the Commission.

DISCUSSION

The Discharges of Snyder and Bray

As the Examiner correctly noted, if the discharges of Bray and Snyder are found to be unlawfully motivated, those unfair labor practices would, by themselves, serve as a basis for sustaining the union's election objections. We thus turn our attention first to the alleged discrimination against Bray and Snyder.

The Applicable Legal Standard -

For many years, the Commission applied a two-stage analysis in "discrimination" cases. The burden of proof was initially on the complainant, to establish a prima facie case that protected activity could have been a basis for the disputed employer action. If that initial burden was met, the burden of proof was shifted to the employer, to establish valid reasons for its action. City of

Olympia, Decision 1208-A (PECB, 1982), citing with approval Wright Line, 251 NLRB 1083 (1980).[11]

As noted by the Examiner in this case, our Supreme Court recently adopted a different test to determine causation under two discrimination statutes that parallel Chapter 41.56 RCW. In Wilmot v. Kaiser Aluminum, 118 Wn.2d 46 (1991), and Allison v. Seattle Housing Authority, 118 Wn.2d 79 (1991), the Court ruled that the charging party retains the burden of proof at all times, but now need only establish that discriminatory animus was a "substantial motivating factor" in the employer's decision to take adverse action against the employee.[12] The Examiner applied the "substantial motivating factor" standard in this case.

We considered the Wilmot and Allison decisions in Educational Service District 114, Decision 4361-A (PECB, 1994), in the context of an appeal asserting that the test we formerly applied should be modified. We concluded there that the "substantial motivating factor" test should also be applied by this agency, and we thus concur with the Examiner's use of that test in this case. The Examiner's description of the standards necessary to determine whether participation in protected activities formed the basis for an employer's action is incorporated herein by reference.[13]

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[11] Examiner's decision at p. 40, and cases cited therein.

[12] The Court discussed the "but for" test adopted in Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), on which Wright Line was based. While it acknowledged that neither test was perfect, the Court expressly disavowed Mt. Healthy as a correct application of state law, and concluded that the "substantial motivating factor" test was more consistent with the language and policies contained in this state's anti-discrimination laws.

[13] Examiner's decision at pp. 39-43.

Union Activities of Bray and Snyder

The Examiner's conclusion that the union had made a prima facie case was based largely on the timing of the discharges in relation to the employer's anti-union election campaigning. He did not find convincing proof that Bray was particularly visible in the organizing effort, and he found that Snyder was even less identified with the union organizing campaign than was Bray.

The union takes the position that both Bray and Snyder were active union adherents who had signed authorization cards, that they attended the union's first organizational meeting, that they were members of the "core group of organizers", and that Bray attended union "strategy meetings". The union contends that Bray and Snyder both spoke in favor of the union in conversations with their fellow employees, and that their fellow employees knew they were pro-union. The union also asserts that their immediate supervisor, Bruce Lorentzen, was aware of their union activity.

The employer argues that the union's witnesses, including Bray and Snyder, greatly exaggerated the extent of those employees' union activities. It contends that the management persons involved in the discharge decisions had no knowledge of their union activity or views, and no knowledge of "how, or if" they voted in either of the first two elections.

Apart from some controverted and weak testimony regarding Lorentzen,[14] there is no evidence that those recommending or approving the discharges knew that Bray and Snyder supported the union. There was no evidence that either dischargee had acted in a "representative capacity to management" or that the "city management" had identified them as union leaders. Although both employees clearly supported the union's effort, we concur with the Examiner that this

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[14] Snyder testified that she "believed" she talked to Lorentzen about the fact that she had signed a union authorization card.

is a case where the level of union activity by the dischargees was relatively low. We likewise agree that the level of protected activity still sufficed to make a prima facie case, when viewed **in combination with** the timing of the discharges and the employer's vigorous opposition to the union organizing effort.

The Examiner's Conclusions on the Alleged Discrimination

Applying the standards of Wilmot and Allison, the Examiner shifted the **burden of production** to the employer, to articulate legitimate and non-discriminatory reasons for its actions. The employer took the position that Bray was discharged because of improper dealings with a contractor whose construction projects Bray frequently inspected, and that Snyder was discharged because of her willful violation of a direct order not to discuss the employer's investigation of alleged bribes of building department employees. The Examiner then considered the rebuttal evidence produced by the union, to determine whether the union had sustained the ultimate **burden of proof** that: (1) the reasons advanced by the employer were pretextual; or (2) discriminatory animus was nevertheless a substantial motivating factor in the employer's actions.

The Examiner found that Bray had initially accepted airline tickets from the contractor for travel to Alaska, and that he even took steps to request leave from the employer for the period of the planned trip. Although Bray later returned the tickets unused, the Examiner found that Bray failed to inform his employer of the "offer, acceptance or return of the airline tickets". The union's argument that Bray never accepted the airline tickets for his personal use, but only held onto them because he didn't know what to do in a "surprising and overwhelming situation", was contradicted by Bray's actions in applying for leave for the work days covered by the period of the planned fishing trip. We do not view Bray's actions as a harmless coincidence. The Examiner found that Snyder did not inform her employer of the contractor's invitation that she participate in the same fishing trip, and that she had

continued to process and approve building permits for projects built by the contractor's firm without informing her employer of her romantic relationship with the contractor. The Examiner further found that Snyder was admonished not to discuss the investigative interviews with anyone, but that she discussed the interview with a co-worker and with the contractor in question.

The union's challenge to the Examiner's finding that Snyder discussed the investigation with other persons is based on Snyder's initial denials at the hearing. When confronted with her sworn testimony at a Department of Employment Security hearing, however, Snyder admitted that she told the contractor about the investigation.[15] As the Examiner pointed out, this was **NOT** a case where Bray and Snyder were communicating details about the investigation in the "capacity of union representatives and employee", which would be a protected activity under Chapter 41.56 RCW.

We find the record supports the Examiner's findings. As the Examiner noted:

> A public employer has a legitimate interest in protecting its reputation with the public. Regulatory agencies are aptly criticized if they become a puppet of the industry they are supposed to regulate. Both Bray and Snyder were called upon to treat Fineline Design and its owner at arm's length.

Decisions 4088-A, 4495 and 4496 (PECB, 1993), at p. 47.

The Examiner concluded that the reasons advanced by the employer were not pretextual. We concur.

Based on the limited involvement of Bray and Snyder with the union organizing effort, the Examiner also rejected the possibility that protected activities were more likely a substantial motivating factor in the employer's action. The Examiner continued:

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[15] Tr. pp. 285-86; Ex. 63 (pp. 9-11).

> The fact that the employees had a parallel involvement in protected union activities does not excuse or defend them from their misconduct on the job. There is no basis for a "disparate treatment" argument based on a history of past personnel actions, in that the entire employer entity is of recent origin.

Decisions 4088-A, 4495 and 4496 (PECB, 1993), at p. 47.

The union's attempt to portray Bray and Snyder as relatively blameless victims of employer discrimination was not persuasive to the Examiner, and has not persuaded the Commission.

The union otherwise takes the position that Bray and Snyder were "exemplary employees" who were discharged without warning or progressive discipline. In doing so, it advances theories that would be more apt to arbitration under a contractual "just cause" standard than to sustaining the burden of proof in a statutory discrimination case under either the Wilmot / Allison test or the earlier Wright Line approach. For example:

* The union would at least partially excuse Snyder's failure to report her relationship with the contractor, because she didn't really have the authority to approve building permits. The fact remains, however, that Snyder was "processing" building permits. At the very least, she was in a position to give priority to applications from her "significant other".

* The union contends it was unrealistic for the employer to expect that Snyder would withhold information from the contractor, in light of their romantic relationship. If she felt obligated to talk to her "significant other", however, she should not have agreed to the employer's request that she maintain the confidentiality of the investigation. The fact remains that Snyder also disclosed information about the investigation to a co-worker. The record supports the conclusion that the employer's pique with her on this subject was unrelated to any protected union activity.

We affirm the Examiner's decision as to the alleged discriminatory discharges of Bray and Snyder. Accordingly, the union's election objections based on the discharges of Bray and Snyder must also be overruled.

The Election Objections

The City of Federal Way and its employees are subject to the Public Employees' Collective bargaining Act, Chapter 41.56 RCW. That statute includes:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE. No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

Procedures for certification of an "exclusive bargaining representative" are set forth in RCW 41.56.050 through 41.56.080. The Commission's processing of representation cases under Chapter 391-25 WAC includes maintaining "laboratory conditions" for employees to freely exercise their rights under the statute. Lake Stevens, Decision 2461 (PECB, 1986). Parties to a representation case may file objections to improper conduct under WAC 391-25-590.[16]

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[16] The text of the cited rule is as follows:

> WAC 391-25-590 FILING AND SERVICE OF OBJECTIONS. Within seven days after the tally has been served under WAC 391-25-410 or under WAC 391-25-550, any party may file objections with the commission. Objections may consist of:
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> (1) Designation of specific conduct improperly affecting the results of the election, by violation of these rules, by the use of deceptive campaign practices improperly involving the commission and its processes, by the use of forged documents, or by coercion or intimidation of or threat of reprisal or promise of reward to eligible voters.

The "Loss of Support"/"Per se" Claim -

The WSCCCE contends that it started its campaign with interest from **well over** one-half of the employees involved. Because the vote counts do not reflect that level of continuing support, the union argues that the election results, in and of themselves, are per se evidence of employer intimidation.

Unions often start out with more support than is ultimately evidenced at the ballot box. The Examiner analyzed the results of the three elections, and found the union progressively improved its position, receiving an increasing number of votes in each election. The law, the "laboratory conditions" precedents, and our rule do not completely preclude employers from advancing arguments during election campaigns. We thus find no basis for adopting the per se approach suggested by the union.[17]

Application of the "24-Hour Rule" -

Among the rules adopted by the Commission to regulate the election process is WAC 391-25-470:

> WAC 391-25-470 ELECTIONEERING. (1) Employers and organizations are prohibited from making election speeches on the employer's time to massed assemblies of employees:
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> (a) Within twenty-four hours before the scheduled time for the opening of the polls for an election conducted under "in person" voting procedures; or
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> (b) Within the period beginning with the issuance of ballots to employees for an election conducted under "mail ballot" voting procedures and the tally of ballots.
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> (2) There shall be no electioneering at or about the polling place during the hours of voting.

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[17] As discussed later in this decision, employer statements that are coercive, intimidating or threatening would provide a basis for finding objectionable election conduct.

> Violations of this rule shall be grounds for setting aside an election upon objections properly filed.

The union argues that memos sent by the employer on the days preceding the three elections were knowing and flagrant violations of Commission rules restricting campaigning within 24 hours prior to an election, while the employer argues that the so-called "24 hour rule" does not prohibit mailings.

The pre-election mailings made by the employer in this case did not violate WAC 391-25-470. That rule prohibits only election **speeches** on the employer's time **to massed assemblies of employees** within the 24 hours before the scheduled opening of the polls. As stated by the Examiner, neither Peerless Plywood, 107 NLRB 427 (1953), nor the Commission's rule "specifically limits or prohibits the distribution of written materials within the 24-hour period." See, City of Tukwila, Decision 2434 (PECB, 1986); affirmed Decision 2434-A (PECB, 1987). See, also, General Time Corporation, 195 NLRB 1126 (1980). Substantial misrepresentations made in a last-minute campaign flyer may be a basis for overturning an election. Tacoma School District, Decision 4216-A (PECB, 1993) and Decision 4216-B (PECB, 1993). However, the distribution of written materials within the 24-hour period before an on-site election is not completely prohibited by the cited rule. The Examiner properly found no violation of WAC 391-25-470.

Allegations of Employer Threats and Intimidation -
To find either an "interference" unfair labor practice or objectionable conduct, the Commission must have sufficient evidence to conclude that bargaining unit employees reasonably perceived the employer's actions as threats of reprisal or force or promises of benefit to employees in an election campaign. The Examiner considered several allegations, but was not persuaded by them. We concur.

The union argues that the employer engaged in a "union-busting" campaign, beginning with its March 25, 1992 letter to members of the bargaining unit and continuing through the memos sent by the city manager to the employees in July of 1992. Union witnesses who were members of the bargaining unit testified generally that "a lot of people were intimidated" by the employer's July 16, 1993 memo to eligible voters, that employees did not want their union affiliation known because "they were in fear they would lose their jobs", and that there was an element of fear "permeating through City Hall at Federal Way...". Much of that testimony was contradicted,[18] or was based on employee suppositions about what the employer might do.[19] The union's witnesses failed to mention specific incidents or statements by employer officials which prompted them to feel uneasy or to fear for their jobs. Standing alone, subjective feelings among employees are not sufficient to sustain the union's burden of proof.

The correspondence and memos distributed to prospective voters are set forth in detail in the Examiner's decision. They include the following:[20]

> The City wishes to emphasize that it is not necessary for you to belong to any union to

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[18] The union president testified that Paul Quarterman, an employee from England on a work visa, "was obviously very careful for not only his employment but his ability to stay in this country..." Quarterman, on the other hand, testified that he was **not fearful** of losing his job if he became affiliated with the union.

[19] When asked if she had evidence that the employer would fire somebody for organizing, employee Mary Barnes answered:

> Well, I guess I don't have evidence but that was one of the things that concerned me about Elizabeth and Norm.

[20] Statements relied upon by the union's objections and its brief are marked by **bold**.

> work for the City of Federal Way. Employees who might join or belong to a union will not get any preferred treatment over those who do not. You should also know that federal law preserves your right to refrain from union activities and that it protects you from union coercion or harassment.
>
> It is my sincere belief that union representation will not be in the best interests of you or the City. Between now and the election, we will answer any questions you have and further explain the issues that you must decide before you vote.
>
> **At this exciting time in the development of this new city, I want to preserve all opportunity of joint efforts in developing proper values and in continuing the establishment of a winning team. We can do so without union intervention. Please give this matter your most serious consideration.**

McFall letter dated March 25, 1992.

> **I want to thank you for your past support in developing an atmosphere of City SPIRIT and teamwork. I ask for your continued support by voting May 6, to maintain your opportunity to independently influence City policies.**

McFall handwritten note sent prior to May 6, 1992 election.

> The Management Team and I want to thank you for your patience and **support** throughout this campaign period. You are important to us and to the City's development. **How you vote will greatly impact the City's and your future.** Make sure your voice is heard. Please vote on July 1!

McFall handwritten note sent prior to July 1, 1992 election.

> **You are all urged** to consider the **long-term effect of your decision**, and to use your best judgment as you cast your ballot.
>
> ...
> The union's attempt to copy the City's theme of "SPIRIT" is the union's admission that to all City employees, this theme has true meaning, and is working, even despite temporary

> setbacks at times. To the City, integrity means keeping silent when the City is questioned about confidential personnel matters, even when we are unjustly accused of wrongdoing. **To the City, teamwork means employees of all types and categories enjoying open dialogue, and not being segregated into "us versus them".**
>
> Your vote on Thursday is your choice of the voice, the style, and the attitude that will represent you in the years to come. **Please consider carefully which "SPIRIT" reflects your values when you cast your ballot.** Thank you.

McFall memo to employees dated July 14, 1992.

> Your vote tomorrow has long-range impacts. I trust you will not allow one recent unrelated and unfortunate event and the union's fanning of the flame to be your sole basis for that vote.
>
> Please continue to work with me to make this City organization one that reflects your values - not those of outside third parties.

McFall memo to employees delivered July 15, 1993.

Some of the employer's statements are ambiguous, and could conceivably be read as conveying a threat. That is not the most reasonable interpretation, however, judged in the overall context. Chapter 41.56 RCW does not require employers to maintain a posture of strict neutrality. We find the employer's statements are reasonably construed as factual in nature, and simply evidencing the employer's preference to deal with its employees without the intervention of an exclusive bargaining representative.

We agree with the Examiner's reliance upon the Commission's decision in Spokane County Health District, Decision 3516-A (PERC, 1991), and with his conclusion that the pre-election propaganda issued by the employer in this case is of the kind that is typically tolerated. As in Spokane County Health District, the employer in this case was entitled, within limits, to communicate

its views on union representation. We conclude that the employer's conduct fell within the range of "acceptable" conduct permitted by the Commission's rules and precedents.[21]

Misstatements and Inaccuracies in Employer Mailings

The Examiner correctly noted that the employer's memos were not error-free. Its March 25, 1992 memo referred to federal law, rather than to the state law actually applicable. Its April 1, 1992 memo contained an incomplete description of the Commission's unit determination procedures. Its May 5, 1992 memo incorrectly stated the polling hours and the voting procedures for persons not on the stipulated eligibility list. The Examiner found, however, that those errors are insufficient to warrant a new election. Again, we concur.

The March 25 and April 1 memos occurred far in advance of the elections, so that the union had ample opportunity to respond and correct any misstatements under Tacoma, supra. The May 5 memo was issued on the day before the first election, but there is no evidence that those misstatements had any adverse effect on the outcome of that election. Moreover, there were two subsequent elections, the last of which was held more than two months after the latest of the three memos in question. By then, the union clearly had sufficient time to clarify any misstatements made by the employer.

Manipulation of Hiring Dates and Voter Eligibility

The union argues that the employer deliberately manipulated the hire dates of three employees in an attempt to adversely affect their eligibility to vote in the May 6 election. When the union challenged the same conduct in its objections filed after that

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[21] We also conclude that the employer's conduct and statements to employees did not involve the Commission or its processes or involve the use of forged documents in violation of WAC 391-25-590(1).

election, it requested that the Commission order a new election giving the affected employees an opportunity to vote. The results of the May 6, 1992 election were, in fact, vacated by the Executive Director, and two subsequent elections have been held. There is no evidence that the affected individuals were denied the opportunity to vote in the subsequent elections. It would appear, therefore, that any misconduct in connection with the three individuals was fully remedied, and cannot form the basis for overturning the results of the objection held on July 16, 1992.

Conclusion on Election Objections

The Examiner correctly recommended dismissal of the union's objections to the election.

Challenged Ballots

Five employees, including Bray and Snyder, cast challenged ballots at the runoff election held on July 16, 1992. With only two votes separating the choices on the ballot, the challenged ballots were sufficient in number to affect the outcome. Even with sustaining the challenges to the ballots cast by Bray and Snyder, based on our decision regarding the unfair labor practice complaints, the challenges to the ballots cast by employees other than Bray and Snyder are still sufficient in number to affect the outcome of the election.

The Executive Director and Examiner proceeded with hearing limited to the unfair labor practice charges and election objections. The case will now be remanded to the Executive Director for determinations on the remaining challenged ballots, and issuance of a certification in the absence of objections to his rulings. This determination will be given high priority, because of the length of time this case has already been pending.

The "Certification Bar" Period

The union has asked for clarification of the "certification bar year" as applied to these circumstances. The statute provides:

> RCW 41.56.070. ELECTION TO ASCERTAIN BARGAINING REPRESENTATIVE. ... No question concerning representation may be raised within one year of a **certification or attempted certification**.
>
> [Emphasis by **bold** supplied.]

The employer suggests that the period should be computed from the date of the order to be issued based on the outcome of the challenged ballots.

Where employees have chosen to be represented for the purposes of collective bargaining but there has been some delay in getting the employer and union to the bargaining table, we have extended the "certification bar year" to assure that the employees and their chosen union will enjoy the benefit of at least one year of good faith collective bargaining before being subject to challenge. Lewis County, Decision 1123-A (PECB, 1982). If the union ultimately prevails on the basis of the disposition of the challenged ballots in Case 9655-E-92-1590, it will be entitled to a "certification bar year" commencing on the day it is certified.

In the context of the purpose declared by the Legislature in RCW 41.56.010 and the rights conferred on employees by RCW 41.56.040, we interpret the Legislature's use of "attempted certification" in RCW 41.56.070 to relate to situations where employees have voted against union representation. While it is clear that the bargaining rights of such employees will be suspended for a one-year period, nothing in the statute suggests that litigation arising out of one election should be permitted to prejudice their subsequent exercise of bargaining rights. Accordingly, we count the "certifi-

cation bar year" as the one year period immediately following an election in which the employees failed to select a bargaining representative.

Our interpretation gives operative effect to the vote of the employees. It also protects the employer's interest in not having one campaign on top of another, and protects the taxpayers' interest in not having the Commission expending resources on multiple representation cases in quick succession. Further, our interpretation avoids any mischief or prejudice associated with litigation delays. The employees involved in this case last voted on representation in mid-1992. If the WSCCCE is not certified on the basis of the disposition of the challenged ballots in Case 9655-E-92-1590, the "certification bar year" will have already passed due to the protracted litigation of the cases addressed in this decision.

NOW, THEREFORE, it is

ORDERED

1. DECISION 4088-B - PECB [Case 9655-E-92-1590]:

   a. The objections filed by the Washington State Council of County and City Employees are OVERRULED.

   b. The challenges to the ballots cast by Norman Bray and Elizabeth Snyder are SUSTAINED.

   c. The matter is remanded to the Executive Director, to resolve the challenges to the ballots cast by Mary Barnes, Jacqueline Faludi, and Susan Floyd, and to issue an appropriate certification of the results of the election.

2. DECISION 4495-A - PECB [Case 9889-U-92-2258]: The findings of fact, conclusions of law and order of dismissal issued by Examiner Walter M. Stuteville are hereby affirmed and adopted as the findings of fact, conclusions of law and order of the Commission.

3. DECISION 4496-A - PECB [Case 9890-U-92-2259]: The findings of fact, conclusions of law and order of dismissal issued by Examiner Walter M. Stuteville are hereby affirmed and adopted as the findings of fact, conclusions of law and order of the Commission.

Issued at Olympia, Washington, the 25th day of July, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

DUSTIN C. McCREARY, Commissioner

Commissioner Sam Kinville did not take part in the consideration or decision of this case.