Central Washington University, Decision 10336-A (PECB, 2009)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: PUBLIC SCHOOL EMPLOYEES OF WASHINGTON Involving certain employees of: CENTRAL WASHINGTON UNIVERSITY	CASE 21915-E-08-3388 DECISION 10336-A - PECB DECISION OF COMMISSION

Elyse Maffeo, Attorney at Law, for the union.

Attorney General Rob McKenna, by *Alan Smith*, Assistant Attorney General, for the employer.

Public School Employees of Washington (union) filed a petition seeking to represent a bargaining unit of certain employees who counsel students at Central Washington University (employer). The counselors are higher education employees who are exempt from the state Civil Service Law, Chapter 41.06 RCW, but have collective bargaining rights under the provisions of RCW 41.56.021 and Chapter 41.56 RCW.

The petitioned-for counselors work for Educational Outreach Services (EOS), which is part of the Division of Student Affairs and Enrollment Management at Central Washington University. Within the EOS are three separate programs, the Educational Opportunity Center (EOC), the College Assistance Migrant Program (CAMP), and the High School Equivalency Program (HEP). The EOC program provides counseling and information on college admission and financial aid to low-income, disabled, and first-generation college students. The CAMP program assists migrant workers and their families with counseling, advice and tutoring during their first year of college. The HEP program assists migrant students with obtaining the equivalent of a high school diploma as well as work in the job market, or how to commence post-secondary education. Each of these programs is funded by a different federal grant.

During the investigation conference held under WAC 391-25-220, the parties were unable to stipulate to the propriety of the bargaining unit. The employer challenged the appropriateness of the proposed unit based upon its belief that other employees who counsel students and who are also exempt from state civil service share a community of interest with the petitioned-for employees. The employer also challenged the inclusion of four employees that it claims are supervisory employees, should the petitioned-for unit be found appropriate.

Executive Director Cathleen Callahan ordered a hearing and, based upon the evidence and testimony submitted, found the petitioned-for unit inappropriate.[1] In reaching that conclusion, the Executive Director found that the duties, skills, and working conditions of the petitioned-for employees were substantially similar with other employees who counsel students but were not included in the proposed bargaining unit. Additionally, the Executive Director found that allowing the petitioned-for unit would unduly fragment the employer workforce. The union now appeals that decision.

ISSUE PRESENTED

Does substantial evidence support the Executive Director's findings and conclusions that the petitioned-for unit of counselors is inappropriate?

For the reasons set forth below, we affirm the Executive Director's decision in its entirety. This record demonstrates that the petitioned-for employees share a community of interest with other similarly situated employees.[2] The union's petition is dismissed.[3]

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[1] *Central Washington University*, Decision 10336 (PECB, 2009).

[2] This Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Executive Director's conclusions of law. *C-TRAN*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002). Unchallenged findings of fact are accepted as true on appeal. *C-TRAN*, Decision 7088-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

[3] Because we are affirming the decision to dismiss the union's, there is no need to discuss the employer's challenge to the supervisory status of certain employees.

DISCUSSION

The Higher Education Exempt Employee Bargaining Law

In *University of Washington*, Decision 10150-B (PECB, 2009), this Commission explained the legislative history of RCW 41.56.021, the statute that permits certain exempt employees at the higher education institutions to collectively bargain with their employers. We incorporate that discussion by reference, but note that when the Legislature extended collective bargaining rights to the exempt employees, it did not extinguish this Commission's statutory mandate to ensure that any proposed bargaining unit of exempt employees was an appropriate unit under RCW 41.56.060. Accordingly, precedents under Chapter 41.56 RCW establishing criteria for appropriate bargaining units are applicable to proposed bargaining units under RCW 41.56.021.

Determination of Bargaining Units

The determination of appropriate bargaining units is a function delegated by the Legislature to this agency. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd, IAFF Local 1052 v. Public Employment Relations Commission*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981). When making unit determinations under Chapter 41.56 RCW, the agency's goal is to group together employees who have sufficient similarities (community of interest) to indicate that they will be able to bargain effectively with their employer. *Quincy School District*, Decision 3962-A (PECB, 1993). In making such determinations, the agency must consider the duties, skills, and working conditions of the public employees; the history of collective bargaining by the public employees and their bargaining representatives; the extent of organization among the public employees; and the desire of the public employees. RCW 41.56.060. This agency has never applied the criteria on a strictly mathematical basis. *King County*, Decision 5910-A (PECB, 1997). Not all of the factors will arise in every case, and where they do exist, any one factor could be more important than another, depending on the factual situation.

Application of Standard – Duties, Skills, and Working Conditions

On appeal, the union argues that the petitioned-for employees do not share a community of interest with other exempt counselors in the employer's workforce. The union asserts that the

Executive Director relied upon a "gross generalization" of the definition of "counseling" in order to demonstrate that the petitioned-for counselors perform similar work as other counselors who work with students enrolled at the university. In the union's opinion, the petitioned-for counselors perform a unique function because their work is related to community outreach and providing information about access to higher educations, and the EOS programs are funded by certain federal grants that require the employer to dedicate a specific level of funding towards that program. The union also argues that allowing the proposed bargaining unit to be certified would not fragment the employer's workforce or potentially cause workforce jurisdictional issues. We disagree.

The union is correct that the work performed by the petitioned-for counselors is somewhat different from the work performed by other regular counselors in the employer's workforce. Unlike the regular counselors who advise students enrolled at the university, the petitioned-for employees counsel nontraditional students and nonstudents through EOS programs. Additionally, this record does support a finding that certain counselors at the EOS require certain skills that are not required by other counselors, such as speaking a second language.

Although there are differences in the program goals of the various departments where the counselors work, the similarities of the general duties, skills, and working conditions of all of the counselors demonstrate that they share a community of interest. For example, this record demonstrates that there is significant crossover in the basic duties that all exempt counselors in the employer's workforce perform, including counseling prospective students about admission and financial aid information. All exempt counselors, including those working in EOS, are required to have the same basic education and skills to perform their work, and the evidence demonstrates that all counselors are required to follow the same policies, and all counselors interact and work closely with one another in accomplishing their work.

Furthermore, counselors in the "BRIDGES" program primarily assist high school students in exploring post-secondary educational opportunities, and counselors in the "GEAR UP" program provide similar counseling to low income middle school students. Thus, it cannot be said that the petitioned-for counselors are the only group of counselors who advise nonstudents.

Recent Commission precedent supports the Executive Director's conclusion that the petitioned-for unit is inappropriate. In *State – Attorney General*, Decision 9951-A (PSRA, 2009), a union petitioned to represent two different bargaining units of legal assistants and paralegals, one in the Labor and Industries Division and another in the Consumer Protection Division. Although the petitioned-for employees worked in different substantive areas of the law, they nevertheless shared general duties, skills, and working conditions with other similarly situated employees.

The instant case is similar to *State – Attorney General.* The union's position focuses too much on the minute differences in clientele of the counselors to demonstrate a distinct community of interest, and completely ignores the similarities between the petitioned-for employees and the other exempt counselors in the employer's workforce. In sum, we agree with the Executive Director that the petitioned-for counselors share enough of a community of interest with other counselors as to make the stand alone unit inappropriate.

Application of Standard - Extent of Organization

The union argues that the petitioned-for unit would not excessively fragment the employer's workforce or cause any jurisdictional concerns because there are no other bargaining units of exempt employees. The union points to Commission precedent stating that, where a group of employees have been traditionally unrepresented, work jurisdiction concerns are less apt to be a concern. *See Community Transit*, Decision 8734-A (PECB, 2005). We disagree.

The union's reliance on *Community Transit* is misplaced. In *Community Transit*, a union petitioned for a small unit consisting of four service quality monitors in the employer's workforce, but the remainder of the employer's workforce remained unrepresented. The employer argued that certifying such a small bargaining unit would unnecessarily fragment the employer's workforce. The Executive Director disagreed, and the Commission affirmed. The difference between *Community Transit* and this case is that here the union's petition would carve out a select group of counselors from the larger group, whereas in *Community Transit*, the union petitioned for all of the employer's service quality monitors.

We agree with the Executive Director's conclusion that allowing the petitioned-for bargaining unit would lead to potential work jurisdiction conflicts and unnecessarily fragment the employer's workforce, particularly in light of the fact that the petitioned-for counselors share a community of interest with the other exempt counselors.[4]

NOW, THEREFORE, it is

ORDERED

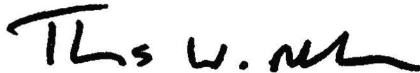
The Findings of Fact, Conclusions of Law, and Order issued by Executive Director Cathleen Callahan are AFFIRMED.

ISSUED at Olympia, Washington, this 17th day of November, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner



THOMAS W. McLANE, Commissioner

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4 In reaching our conclusion that the petitioned-for unit would unnecessarily fragment the employer's workforce, we reject the employer's argument that under RCW 41.56.021, a union must petition for all similarly situated employees to make a unit appropriate. Unit determinations are made on a case-by-case basis, and we decline to adopt a blanket rule stating otherwise.