City of Seattle, Decision 8562 (PECB, 2004)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
LABORERS INTERNATIONAL UNION	)	
LOCAL 1239	)	CASE 17882-E-03-02888
	)	
Involving certain employees of:	)	DECISION 8562 - PECB
	)	
CITY OF SEATTLE	)	ORDER OF DISMISSAL
	)	
	)	

John L. Masterjohn and *J. Bowen "Bo" Jeffers III*, for the union.

Thomas A. Carr, Seattle City Attorney, by *Jeffery M. Slayton*, Assistant City Attorney and *Pat LeMay*, Labor Negotiator, for the employer.

On October 1, 2003, Public Service and Industrial Employees Local 1239, Laborers International Union (union), filed a petition for investigation of a question concerning representation under Chapter 391-25 WAC, seeking certification as exclusive bargaining representative of certain employees of the City of Seattle (employer). Representation Coordinator Sally Iverson conducted an investigation conference on November 12, 2003. At that time, the parties agreed that the Commission has jurisdiction in this matter under Chapter 41.56 RCW, that the union was qualified for certification as an exclusive bargaining representative, that there was no issue as to the timeliness of the petition, and the description of the proposed bargaining unit. They disagreed about whether temporary cashiers should be included in the unit. Hearing Officer Sally B. Carpenter held a hearing on November 24, 2003. No briefs were filed.

Based upon the evidence, the applicable statutes and rules, and case precedents, the Executive Director rules that the appropriate bargaining unit is substantially larger than proposed by the union. Because the showing of interest supplied by the union is insufficient to support the appropriate unit, this petition is DISMISSED.

BACKGROUND

The Investigation Statement issued in this matter under WAC 391-25-220 on November 12, 2003, included:

> The City of Seattle and the Public Service & Industrial Employees agreed to the appropriateness of a bargaining unit including "All full-time and regular part-time cashiers and senior cashiers of the City of Seattle Parks and Recreation, excluding supervisors, confidential employees, casual employees and all other employees".
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> The parties disagreed on whether the temporary cashiers should be included in the unit or if some employees should be excluded as seasonal employees. Some employees meet the one-sixth test but their hours are often accumulated over a three month period with very little or no hours worked the remainder of the year.

The Parks Department cashiers work at sites scattered throughout Seattle. They work at fee-based recreation facilities, such as public swimming pools, the Japanese Gardens, and the Seattle Tennis Center.

The parties agree that 17 cashiers are to be included in the bargaining unit as full-time or regular part-time employees. The record indicates there are 40 or more employees who do not work more than one-sixth of full-time, and they are to be excluded from the bargaining unit as casual and/or temporary employees. At issue in this case are an additional 14 employees who were described by

the parties as "seasonal" or "intermittent" or "temporary" employees,[1] but work more than one-sixth of the hours worked by full-time employees.

ANALYSIS

The hearing in this case was unusual, in that the parties did not confront the issue framed in the Investigation Statement. As a result, most of the questioning was done by the Hearing Officer.

Can a Two-Stage Organizing Process be Used?

The union claims it has acted in good faith and in conformity with a past practice, so that it should be allowed to pursue organizing of the affected employees in two stages:

First, obtaining certification as exclusive bargaining representative of a bargaining unit limited to employees who hold "permanent" status under the employer's civil service system and rules,[2] and then

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[1] As used by the parties, the "temporary" and "seasonal" and "intermittent" terminology relates to categories of employees under the employer's civil service rules. The parties used those terms interchangeably in this case.

[2] Asked what its plan would be for the employees it would exclude from voting in the election (or being considered in a cross-check) in the first stage of the two-stage process it envisioned, the union indicated that it expected to negotiate some contract provisions that apply to them and that those employees would nevertheless be required to pay a service fee to the union for representation under any contract provisions that apply to them. The union also indicated that such employees are rarely initiated into union membership.

Second, later accreting the initially-excluded employees into the bargaining unit by a separate agreement or proceeding.[3]

The employer did not take a position on this issue.

Applicable Legal Standards -

The Legislature delegated the determination of appropriate bargaining units to the Commission. RCW 41.56.060 includes:

> The commission . . . shall decide . . . the unit appropriate for the purpose of collective bargaining. In determining, modifying, or combining the bargaining unit, the commission shall 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.

It has long been established that, while parties may agree on unit issues, their agreements are not binding on the Commission. *City of Richland,* Decision 279-A (PECB, 1978), *aff'd,* 29 Wn. App. 599 (1981), *review denied,* 96 Wn.2d 1004 (1981). Even if an employer and union agree on a unit description issue, the Commission has the legal duty to independently determine the propriety of the

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[3] The union indicated it would approach the employer at some point with a request for recognition based on a cross-check. The union provided testimony that temporary employees had been added to two existing bargaining units in that fashion. The union also stated its view that accretion could also be accomplished under a written agreement between the employer and a Joint Crafts Council, but was unclear as to whether that agreement would apply to the new bargaining unit proposed in this case. The union provided testimony that the ultimate inclusion of the temporary cashiers would leave no Parks Department employee stranded without collective bargaining representation.

bargaining unit. A very recent example applying this principle is *Central Washington University*, Decision 8127 (FCBA, 2003), rejecting a proposed stipulation that would have excluded a substantial number of part-time employees.

The Legislature also delegated the certification of exclusive bargaining representatives to the Commission. Beyond establishing the criteria for determining appropriate bargaining units, the statute provides:

> RCW 41.56.050 DISAGREEMENT IN SELECTION OF BARGAINING REPRESENTATIVE -- INTERVENTION BY COMMISSION. In the event that a public employer and public employees are in disagreement as to the selection of a bargaining representative the commission shall be invited to intervene as is provided in RCW 41.56.060 through 41.56.090.
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> RCW 41.56.060 . . . BARGAINING REPRESENTATIVE. . . . The commission shall determine the bargaining representative by (1) examination of organization membership rolls, (2) comparison of signatures on organization bargaining authorization cards, or (3) by conducting an election specifically therefor.
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> RCW 41.56.070 ELECTION TO ASCERTAIN BARGAINING REPRESENTATIVE. In the event the commission elects to conduct an election to ascertain the exclusive bargaining representative, and upon the request of a prospective bargaining representative showing written proof of at least thirty percent representation of the public employees within the unit, the commission shall hold an election by secret ballot to determine the issue. The ballot shall contain the name of such bargaining representative and of any other bargaining representative showing written proof of at least ten percent representation of the public employees within the unit, together with a choice for any public employee to designate that he does not desire to be represented by any bargaining agent. . . . No question concerning representation may be raised within one year of a certification or attempted certification. Where there is a valid collective bargaining agreement in effect, no question of representation may be raised except during the period not more

> than ninety nor less than sixty days prior to the expiration date of the agreement. Any agreement which contains a provision for automatic renewal or extension of the agreement shall not be a valid agreement; nor shall any agreement be valid if it provides for a term of existence for more than three years.
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> RCW 41.56.080 CERTIFICATION OF BARGAINING REPRESENTATIVE -- SCOPE OF REPRESENTATION. The bargaining representative which has been determined to represent *a majority of the employees in a bargaining unit* shall be certified by the commission as the exclusive bargaining representative of, and *shall be required to represent, all the public employees within the unit without regard to membership* in said bargaining representative: PROVIDED, That any public employee at any time may present his grievance to the public employer and have such grievance adjusted without the intervention of the exclusive bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect, and if the exclusive bargaining representative has been given reasonable opportunity to be present at any initial meeting called for the resolution of such grievance.

(emphasis added). Moreover, Commission precedents have long and consistently established that,

> Absent a change of circumstances warranting a change of the unit status of individuals or classifications, *the unit status of those previously included in or excluded from an appropriate unit* by agreement of the parties or by certification will not be disturbed.

City of Richland, Decision 279-A (PECB, 1978), *aff'd,* 29 Wn. App. 599 (1981), *review denied,* 96 Wn.2d 1004 (1981) (emphasis added). Thus, all of the employees who are to be represented by a union have the right to vote in a representation election conducted by the Commission, and there is no process for accreting initially-excluded employees to a bargaining unit at a later time.

Application of Standards -
The union's claim of a past practice is fundamentally flawed, for multiple reasons:

First, the limited evidence provided by the union on this issue discloses a variance between bargaining units of "craft" employees and other bargaining units, and even discloses the existence of permutations among the histories of units represented by this union.

Second, the union's claim of an ongoing practice is directly contradicted by *City of Seattle*, Decision 781 (PECB, 1978), which expressly rejected the previous practices of these parties. Rather than endorsing the voluntary and/or union-initiated two-stage process envisioned by the union in this case, that decision found a unit that had been structured to conform with the employer's civil service system to be inappropriate, and forced this employer and union to open the doors of that unit to include employees who had been excluded because of their "intermittent" status under the employer's civil service rules.

Accepting that there may have been a two-stage practice at one time, the Executive Director will not continue or revive that practice in this case.

The Exclusion of "Casual" and "Temporary" Employees

In the context of seasonal operation of many of the Parks Department facilities where cashiers work, the union would exclude a group of employees who have worked seasonally for more than one-sixth of the time worked by full-time employees in the proposed bargaining unit. Those 14 employees would constitute more than 45% of a bargaining unit that includes them, and compare as 82% of the 17 employees that the union seeks to organize.

The employer recognized the existence of an issue as to the eligibility of those employees, but did not take a clear position on the matter.[4]

Applicable Legal Standards -

The Commission has established a standard for determining whether an individual is a "regular part-time" employee included in a bargaining unit or a "casual" employee to be excluded from all bargaining units.

> WAC 391-35-350 UNIT PLACEMENT OF REGULAR PART-TIME EMPLOYEES--EXCLUSION OF CASUAL AND TEMPORARY EMPLOYEES.
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> (1) It shall be presumptively appropriate to include regular part-time employees in the same bargaining unit with full-time employees performing similar work, in order to avoid a potential for conflicting work jurisdiction claims which would otherwise exist in separate units. Employees who, *during the previous twelve months, have worked more than one-sixth* of the time normally worked by full-time employees, *and who remain available for work on the same basis,* shall be presumed to be regular part-time employees. . . . .
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> (2) It shall be presumptively appropriate to exclude casual and temporary employees from bargaining units.
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> (a) Casual employees who have not worked a sufficient amount of time to qualify as regular part-time employees are presumed to have had a series of separate and terminated employment relationships, so that they lack an expectation of continued employment and a

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[4] In his opening statement at the hearing, the Assistant City Attorney said,

> It seems clear that the decision before PERC is whether or not employees, who otherwise would meet the one-sixth rule, should not be included in the bargaining unit because of the fact that their hours are collected in a seasonal time and they don't work in other parts of the year. The city has no particular stake in how PERC rules and is here to answer questions, speak to prior precedent from PERC but it's not attempting to argue for one particular outcome.

> community of interest with full-time and regular part-time employees.
>
> (b) Temporary employees who have not worked a sufficient amount of time to qualify as regular part-time employees are presumed to lack an expectation of continued employment and a community of interest with full-time and regular part-time employees.

(emphasis added). One of the stated goals of that Commission rule is to avoid the potential for work jurisdiction conflicts which necessarily accompanies unnecessary fragmentation of bargaining units. *City of Seattle,* Decision 781. If the employees who work less than full-time share common duties, skills and working conditions with the full-time employees, they must be included in the same bargaining unit unless they qualify for exclusion as "casual" employees.

Application of Standards to This Bargaining Unit -
There is no evidence in the record to overcome the presumption in WAC 391-35-350(1) that employees who work more than one-sixth of the time in a work year are regular part-time employees to be included in a bargaining unit with full-time employees.

Contradicting any suggestion or inference that the cashiers who work on a "seasonal" basis are distinguishable from those sought by the union, the employer provided testimony that:

- The class specifications are the same for all cashier positions, regardless of seasonality;
- All Parks Department cashiers have common supervision and working conditions;
- The size of the cashier workforce in the Parks Department remains stable from year to year; and

- The number of individuals who work more than one-sixth of full-time (on an annual basis) also remains relatively stable from year to year.

Additionally, many of the employees who work seasonally return year after year.

Form of the Order

A representation petition seeking an inappropriate unit is subject to dismissal. Different from the situation which existed in *Central Washington University*, Decision 8127-A (FCBA, 2004), where the showing of interest already provided by that union was sufficient to support the larger bargaining unit that was found appropriate in that case, the showing of interest provided by Local 1239 in this case is not sufficient for a bargaining unit of 30 or 31 employees.

Because no election is being held and no certification is being issued, this order does not constitute a certification bar under WAC 391-25-030(2). Thus, this order of dismissal does not preclude the union from filing a new petition with a showing of interest sufficient for an appropriate bargaining unit of cashiers.

FINDINGS OF FACT

1. The City of Seattle is a municipal corporation and is a "public employer" within the meaning of RCW 41.46.030(1).

2. Public Service Employees Local 1239, Laborers International Union, a bargaining representative within the meaning of RCW 41.56.030(3), has filed a petition seeking certification as exclusive bargaining representative of cashiers employed by

the City of Seattle in its Parks Department, excluding seasonal employees.

3. All cashiers working for the City of Seattle in its Parks and Recreation Department have similar duties, skills, working conditions, and supervision.

4. A substantial number of cashiers work less than one-sixth of the time worked by full-time employees, and the parties agree that they should be excluded from the proposed bargaining unit as "casual" employees.

5. The employer has an ongoing practice of hiring cashiers to work seasonally and/or for holiday periods, and at least 14 individuals worked as cashiers for more than one-sixth of the time worked by full-time employees.

6. No evidence in this record distinguishes the employees described in paragraph 5 of these findings of fact from the employees the union seeks to represent.

CONCLUSION OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC.

2. The evidence in this record is insufficient to overcome the presumption of inclusion set forth in WAC 391-35-350.

3. Because of the union's proposed exclusion of employees who have worked more than one-sixth of full-time, the bargaining unit proposed by the union is inappropriate under RCW 41.56.060.

ORDERED

The petition for investigation of a question concerning filed by the union in the above-captioned proceeding is dismissed.

Issued at Olympia, Washington, on the 21st day of May, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-25-660.