

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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

Elyse Maffeo, Attorney at Law, for the union.

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

On August 8, 2008, Public School Employees of Washington (union) filed a petition seeking to represent a bargaining unit of employees who counsel students at Central Washington University (employer). Representation Coordinator Sally J. Iverson held an investigation conference on September 11, 2008. During the investigation conference, the parties were unable to stipulate to the propriety of the bargaining unit. The employer claimed that the proposed bargaining unit was inappropriate and that, even if found appropriate, four positions proposed to be included in the unit should be excluded as supervisory. On October 21 and 22, 2008, Hearing Officer Guy Otilio Coss conducted a hearing on these issues. Both parties filed briefs.

ISSUES

1. Is the petitioned-for unit appropriate?

2. Are the positions of Director of Education Outreach Services and Educational Opportunity Center, the Assistant Director of the Educational Opportunity Center, the High School Equivalency Program Director, and the College Assistance Migrant Program Director supervisory positions and therefore excluded from the proposed bargaining unit?

Based upon the entire record, the Executive Director rules that the proposed bargaining unit sought by the union is not an appropriate unit for the purpose of collective bargaining, and dismisses the petition.

Because the proposed unit is found to be inappropriate, rulings on the eligibility issues raised by the employer are unnecessary.

ISSUE 1: Is the petitioned-for bargaining unit appropriate for purposes of collective bargaining?

APPLICABLE LEGAL STANDARDS

This case concerns the union's petition to represent a vertical unit of ten employees of Education Outreach Services at Central Washington University who are exempt from civil service pursuant to RCW 41.06.070(2)(b) which states, in pertinent part:

The governing board of each institution, and related boards, may also exempt from this chapter classifications involving research activities, *counseling of students*, extension or continuing education activities, graphic arts or publications activities requiring prescribed academic preparation or special training as determined by the board . . .

(emphasis supplied). The employees at issue in this case were exempted from Chapter 41.06 RCW because their duties were deter-

by RCW 41.56.021 which provides collective bargaining rights to certain "employees of institution of higher education who are exempted from civil service pursuant to RCW 41.06.070(2)."

The determination of appropriate bargaining units is a function delegated by the Legislature to the Commission. RCW 41.56.060. The Commission applies the community of interest criteria set forth in that statute, as follows:

RCW 41.56.060 DETERMINATION OF BARGAINING UNIT--
BARGAINING REPRESENTATIVE. The commission, after hearing upon reasonable notice, shall decide in each application for certification as an exclusive bargaining representative, the unit appropriate for the purpose of collective bargaining. In determining, modifying, or combining the bargaining units, 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.

None of the statutory criteria predominates to the exclusion of others, but they have varying weight depending on the factual settings of particular cases. *City of Centralia*, Decision 2940 (PECB, 1988).

The unit configuration proposed by a petitioning organization is always the starting point for any unit determination analysis. *King County*, Decision 5910-A (PECB, 1997). Any "appropriate" unit configuration can be certified; it is not necessary to find "the most appropriate" unit or the "only appropriate" unit. The Commission has described the purpose of the unit determination process as: "[T]o group together employees who have sufficient similarities (community of interest) to indicate that they will be

able to bargain collectively with their employer." *King County*, Decision 5910-A (PECB, 1997) and cases cited therein.

Duties, Skills, and Working Conditions

The unit sought in this case is a small vertical unit of ten employees of the Education Outreach Services. These employees are responsible for three programs: The Educational Opportunity Center; the College Assistance Migrant Program; and the High School Equivalency Program.

Duties: The Educational Opportunity Center staff recruit and provide admissions, career, financial aid, and other counseling services to low-income, disabled, and first generation university students. They do not counsel/recruit specifically for this university but instead provide information on opportunities to attend any of the state's universities.

The College Assistance Migrant Program staff recruit and provide admissions counseling, tutoring, basic skills instruction, financial aid, and other student counseling services to migratory or seasonal farm workers and their children during their first year of university.

The High School Equivalency Program assists migratory or seasonal farm workers, their children, and/or people from diverse backgrounds in completing high school or getting a General Equivalency Degree by providing counseling, basic skills instruction, and testing.

As part of her duties as the Assistant Vice President for Human Resources, Sherer Holter routinely reviews staff positions to determine which positions should be exempt under RCW 41.06.070(2)

and, if so, under what basis. During this process, Holter reviewed the positions held by the staff of the Education Outreach Services Department and determined that they were exempt under RCW 41.06.070(b) based on their duties involving the "counseling of students."

However, Holter also testified that in addition to the ten petitioned-for employees exempted under the "counseling of students" criteria, the employer has also exempted approximately 55 other employees under the same criteria in the departments of admissions, financial aid, career counseling, academic advising, student testing and assessment, international student advising, multi-cultural student advising, residential life counseling, student activities, and basic skills instruction. The employees in each of these other departments perform the same or similar duties to, and/or interact with, the petitioned-for employees in their responsibilities of recruiting, admissions counseling, financial aid counseling, career counseling, basic skills and other instruction, testing, student advising, and multi-cultural and international student advising.

Similarly, the Vice President of Student Affairs and Enrollment Management, Keith Champagne, testified that the Education Outreach Services employees perform duties that are similar and/or the same as those performed by the other exempt student counselor employees. Similar duties in both groups of employees include student recruitment, admissions counseling, financial aid counseling, academic advising, career counseling, student testing and assessment, basic skills instruction, and student retention.

None of the union's witnesses or evidence contradicted the evidence or testimony of Holter or Champagne. Rather, the union argued that

the Education Outreach Services counselors differed from other student counseling employees or departments because their mission and focus is restricted by the terms of the federal grant under which it receives funding. The union argues that the grant restricts their mission and duties because it limits their services to a specific population of students, *i.e.*, low-income, disabled and first generation university students, migratory or seasonal farm workers and their children, and/or people from diverse backgrounds.

This distinction is insufficient to distinguish the work of these student counselors from other student counselors at the university. Many, if not all, distinct departments of an employer will have distinct missions and, especially in higher education, may have distinct funding sources for that mission. The fact that the particular type of student they counsel may differ from that of another department is not a sufficient distinction for purposes of collective bargaining. Further, while Education Outreach Services employees are restricted to servicing the specific population identified in their funding grant, this restriction does not apply to other student counselors who are able, and in fact do, interact with the very same students that the petitioned-for employees serve. By way of example, the employees at issue may, in seeking to recruit a student, refer that student to the employer's financial aid office. Thus, the distinction raised by the union is not sufficient, in and of itself, to justify the creation of a separate unit where other employees perform the same or substantially similar duties.

Skills: The position descriptions for the Education Outreach Services employees, as well as a representative group of positions at the university that are also exempt under the "counseling of

students" criteria, were submitted into evidence. These positions are student counselors in the areas of academic advising, financial aid, career counseling and admissions. This evidence, as well as the testimony by Holter, shows that there are no significant differences in the required education, skills, or experience among student counselors within Education Outreach Services and those outside the department. A bachelor's or a master's degree is required for the majority of all such counselor positions. The positions all require or prefer experience with various types of student counseling services. Some employees of Education Outreach Services, as well as some outside of that office, have specifically required, or preferred skills, such as knowledge of specific programs, populations, and/or bilingual abilities.

Working Conditions: All employees in the Education Outreach Services work under the same personnel and compensation policies as do the other exempt student counseling staff at the university. All of the Education Outreach Services employees work at the main campus, at various university centers in office and/or field environments, and may travel to high schools for recruiting visits. The employer presented evidence that, like the employees of the Education Outreach Services, various other counseling employees work both at the main campus, at the various university centers, and also work in office and/or field environments. Education Outreach Services staff, as well as other exempt student counseling staff report to Champagne. Champagne testified that in the course of performing their student counseling duties, all exempt student counseling staff, both inside and outside of Education Outreach Services, interact and work closely with each other as well as with other employees at the university. Champagne further testified that all employees performing student counseling functions are required to follow the same policies and procedures.

History of Collective Bargaining

The history of bargaining need only be considered where there is a history of representation. *Pasco School District*, Decision 5016-A (PECB, 1995). The employer seeks to have the history of the "Exempt Employees Organization" considered under this criteria. However, the employer admits that this organization has never been, and is not now, a bargaining unit recognized or established by the Commission. It has long been held by the Commission that the history of bargaining is not binding upon it where the bargaining unit was not established by the Commission. *Renton School District*, Decision 379-A (EDUC, 1978), aff'd, *Renton Education Association v. Public Employment Relations Commission*, 101 Wn.2d 435 (1984).¹ The petitioned-for employees in this case have no history of representation.

Extent of Organization

The extent of organization factor looks at the extent to which the employer's workforce is organized and compares the employees involved in the proposed unit with the employer's overall workforce. The Commission has generally resisted fragmentation in applying the "extent of organization" component, particularly to avoid stranding employees without access to collective bargaining rights and/or in small units that are not conducive to effective collective bargaining. See, e.g., *Forks Community Hospital*, Decision 4187 (PECB, 1992) (proposed clerical/service/maintenance/technical unit in a relatively small facility would have stranded other technical positions within the facility); *City of Vancouver*, Decision 3160 (PECB, 1989) (proposed unit would have stranded other

¹ It should be noted that if the "Exempt Employees Organization" believed itself to be a labor organization, it could have intervened in this proceeding. The Commission received no indication of any intervention by any party.

employees in units too small for them to ever implement their statutory bargaining rights). The avoidance of fragmentation is often thought of as protecting employers from having to deal with multiple bargaining units whose interests are not that divergent. *Auburn School District*, Decision 2710-A (PECB, 1987).

The Commission has also been reluctant to establish multiple bargaining units among employees who perform similar functions due to the ongoing potential for work jurisdiction disputes in such circumstances. The reference to "work jurisdiction" grows out of a long line of precedents dating back to *South Kitsap School District*, Decision 472 (PECB, 1978), holding that the description of an appropriate bargaining unit outlines a body of work that the exclusive bargaining representative is entitled to protect (and concerning which employers have a duty to bargain) through the collective bargaining process. See also *South Central School District*, Decision 5670-A (PECB, 1997).

Here, the unit sought by the union would clearly lead to fragmentation and work jurisdiction disputes. *South Kitsap School District*, Decision 1541 (PECB, 1983), presented examples of conflicts that develop when the border between bargaining unit work is not clearly visible, distinct, or easy to apply. Just as two different units of office-clerical employees within the same school district collided in *South Kitsap School District*, there would be an ongoing potential here for separate units of exempt counseling employees to collide.

Examples of potential work jurisdiction disputes would exist, for example, in the area of financial aid counseling - counselors in Education Outreach Services answer questions and advise students concerning such matters as paying for university, obtaining

financial aid and filling out required forms. This would clearly be the work of designated financial aid counselors who, if organized, would be entitled to protect this work through the collective bargaining process. Another example is in the area of the Education Outreach Services' specifically targeted populations - part of the focus is on migrant farm workers and their children and/or people from diverse backgrounds. Evidence submitted by the employer shows that there are student counselors working in multi-cultural advising and that some admission counselors outside of the Education Outreach Services also have "a focus on Latino/a populations."

Should a part, or the remainder of, the exempt student counseling employees not be included in the unit, the potential for ongoing disputes about work jurisdiction between the bargaining units could be significant. Even if no additional units were ever organized in this workforce, the integrated nature of operations and overlapping of student counseling duties would still mean that creation of the petitioned-for unit could create ongoing jurisdictional disputes between represented and unrepresented employees.

CONCLUSION

Based upon the record as a whole, the Executive Director rules that the proposed bargaining unit sought by the union is not an appropriate unit for the purpose of collective bargaining. The petitioned-for employees perform duties that are the same or substantially similar to work performed by approximately 55 other exempt employees performing "student counseling;" the petitioned-for employees' duties, skills, and working conditions are the same and/or substantially similar to these other student counselor employees; the duties of the petitioned for employees are inte-

grated with those of the employer's other student counseling employees; and the petitioned-for employees work under the same personnel and compensation policies as do the other exempt student counselors. Finally, the unit of petitioned-for employees would unduly fragment the employer's student counseling workforce leading to work jurisdiction disputes between the unit and the remaining student counselor employees.

ISSUE 2: Are the positions of Director of Education Outreach Services and Educational Outreach Center, the Assistant Director of the Educational Outreach Center, the High School Equivalency Program Director, and the College Assistance Migrant Program Director supervisory, and therefore excluded from the proposed bargaining unit?

Because the Executive Director rules that the proposed bargaining unit sought by the union is not an appropriate unit for the purpose of collective bargaining, rulings on the eligibility issues are unnecessary.

FINDINGS OF FACT

1. Central Washington University is an institution of higher education within the meaning of RCW 41.56.030(8).
2. Public School Employees of Washington is an employee organization within the meaning of RCW 41.56.030(3).
3. The union has petitioned to represent a bargaining unit consisting of ten employees who counsel students in Education Outreach Services at Central Washington University.

4. The classifications included in the petitioned-for bargaining unit are exempt from Chapter 41.06 RCW under RCW 41.06.070(2)(b) based on their duties involving the counseling of students.
5. There are approximately 55 other employees in similar classifications who are also exempt from Chapter 41.06 RCW under RCW 41.06.070(2)(b), based on their duties involving the counseling of students.
6. The work performed by employees in the petitioned-for bargaining unit consists of various types of student counseling duties such as student recruitment, admissions counseling, financial aid counseling, academic advising, career counseling, student testing and assessment, basic skills instruction, and student retention.
7. The work performed by employees in the petitioned-for positions is the same or similar to, and in some cases integrated with, that of the approximately 55 other employees exempt under RCW 41.06.070(2)(b) who counsel students.
8. All of the petitioned-for employees share similar working conditions with approximately 55 other Central Washington University employees who are exempt under RCW 41.06.070(b) who counsel students.
9. All of the petitioned-for employees work under the same personnel and compensation policies as do the approximately 55 other student counseling employees exempt under RCW 41.06.070(2)(b).

10. The unit of petitioned-for employees would unduly fragment the employer's student counseling workforce.
11. Creation of the petitioned-for bargaining unit would create an ongoing potential for work jurisdiction disputes because of the integrated nature of student counseling operations and the similarity of work performed between and among the ten sought after employees and the approximately 55 other employees exempt under RCW 41.06.070(2)(b) who counsel students.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in these matters pursuant to Chapter 41.56 RCW.
2. The bargaining unit described in paragraph three of the foregoing Findings of Fact is not an appropriate unit for the purpose of collective bargaining.

ORDER

The petition filed in Case 21915-E-08-3388 for investigation of a question concerning representation is hereby DISMISSED.

Issued at Olympia, Washington, on this 27th day of March, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CATHLEEN CALLAHAN, 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.