State - Liquor Control Board, Decision 7869 (PSRA, 2002)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
WASHINGTON FEDERATION OF STATE EMPLOYEES	)	CASE 16481-E-02-2733
	)	
Involving certain employees of:	)	DECISION 7869 - PSRA
	)	
WASHINGTON STATE LIQUOR CONTROL BOARD	)	RULING ON MOTION FOR SUMMARY JUDGMENT
	)	
	)	

Parr & Younglove, by *Edward Earl Younglove III*, Attorney at Law, for the union.

Barbara Vane, Human Resources Director, for the employer.

This case is before the Executive Director for rulings under WAC 10-08-135, based on legal arguments advanced by both parties. The Executive Director concludes that proceedings can go forward under one of two statutes cited by the parties, while the other cited statute requires that the results of this proceeding be for a limited term.

BACKGROUND

On February 28, 2002, the Washington Federation of State Employees (union) filed a petition with the Washington State Department of Personnel (DOP), requesting creation of a bargaining unit of:

> [E]mployees in the following WMS [Washington Management Service] positions within the Wash-

ington State Liquor Control Board: District Managers, Security and Loss Prevention Manager, Records Center Manager and Safety Program Manager.

Responding to a DOP request, the Washington State Liquor Control Board (employer) supplied a list of 14 names on March 14, 2002.

The Washington Personnel Resources Board (WPRB) approved the creation of the bargaining unit at an open, public meeting held on May 29, 2002.[1] The employer argued on that occasion that the proposed bargaining unit might not be appropriate, citing various grounds

---

[1] For the benefit of practitioners who may be unaware of or mystified by a difference of practices:

Under rules that have since been repealed, a union seeking to organize employees would first file a petition requesting that the WPRB create a bargaining unit. A case number would be assigned, and the matter would be placed on the agenda of a WPRB meeting. At the meeting, the WPRB would receive an oral report from the DOP staff and oral comments from the parties, after which it would act by a motion made and voted upon. The WPRB would issue a written order confirming its action. If the WPRB approved creation of a bargaining unit, the union could file a second petition requesting certification as exclusive bargaining representative. A different case number would be assigned, the DOP staff would conduct a representation election or the functional equivalent of a cross-check, and the Director of Personnel would certify the result.

A union seeking certification from the Commission under Chapter 391-25 WAC files a showing of interest and a petition describing the bargaining unit it proposes to represent. An investigation conference is conducted, where stipulations are solicited on all relevant issues, including the propriety and description of the bargaining unit. A formal adjudicative hearing is conducted on any contested issues, and the Executive Director issues a written decision on any such issues. The Commission staff then conducts an election or cross-check, if appropriate. The parties can appeal staff decisions and actions to the Commission, but such appeals are decided on the basis of the evidentiary record and briefs.

including provisions of the Personnel System Reform Act of 2002 (PSRA), which had been signed into law on April 3, 2002.[2] On June 12, 2002, the WPRB issued a written order holding "current law allows WMS employees to bargain collectively" and confirming creation of the bargaining unit.

Jurisdiction to conduct unit determination and representation proceedings involving state civil service employees shifted from the WPRB and DOP to the Commission on June 13, 2002. Although the union had filed a request for certification with the DOP on May 30, 2002, the DOP notified the parties that the proceedings involving the "District Managers and other Misc. WMS Positions" bargaining unit would be referred to the Commission because of the impending transfer of authority under the PSRA. The petition filed with the DOP on May 30, 2002, was thus re-docketed under the Commission case number indicated above.

On June 25, 2002, the employer was asked for a fresh list of the employees involved. The employer supplied a list of 13 names on July 10, 2002. Two of the names were marked to indicate that they held "non-supervisory staff" positions.

On July 16, 2002, the Commission staff issued notice of an investigation conference to be held by telephone conference call, and supplied the parties with a checklist of the matters to be discussed during the investigation conference. The investigation conference was later rescheduled for August 20, 2002.

---

[2] Chapter 354, Laws of 2002, amends numerous chapters of the Revised Code of Washington. The effective dates of that statute vary, by section. Some sections relevant to this controversy took effect on June 13, 2002; other sections relevant to this controversy will not take effect until July 1, 2004, July 1, 2005, and July 1, 2006.

In a letter filed on July 22, 2002, and during the investigation conference, the employer asserted that the "District Managers and other Misc. WMS Positions" bargaining unit is inappropriate on multiple grounds. The union responded to those arguments during the investigation conference and in a letter filed on August 26, 2002. Based on review of the documents on file, the Executive Director is satisfied that there is no issue as to any material fact in this case. The arguments advanced by the employer are thus deemed to be (and are processed as) a motion for summary judgment.

POSITIONS OF THE PARTIES

The employer asserts that: (1) WMS employees are excluded from collective bargaining by the PSRA; (2) Two of the 14 employees should not be included in a bargaining unit otherwise composed of supervisors, while three of the 14 employees have no community of interest with the remainder of the employees; and (3) Eleven of the 14 employees involved may be "confidential" employees.

The union responds that the WPRB decision finding the bargaining unit to be appropriate is res judicata on the parties, and should not be addressed by the Commission.

DISCUSSION

Exclusion of Washington Management Service Employees

When it advanced its "WMS excluded from bargaining rights" argument before the WPRB, the employer was relying upon statutory amendments that: (1) were not yet in effect; and (2) would be administered by an agency other than the WPRB once they took effect. When the WPRB

acted on the bargaining unit at issue in this case in May and early June 2002, it explicitly (and necessarily) interpreted and applied the law as it then existed. Given the statutory changes which have occurred since the WPRB ruled on the matter, the decision issued by the WPRB on the "WMS excluded from bargaining rights" claim is not binding on the parties or the Commission. Instead, resolution of that issue requires the Executive Director to take a fresh look at history dating back more than three decades, as well as to review and implement the recently-enacted legislation.

Historical Bargaining Rights of State Employees -

Different from the rights conferred on other public employees in the state of Washington,[3] the collective bargaining rights of state civil service employees have historically been part of (and limited by) state civil service laws. In *Ortblad v. State*, 85 Wn.2d 109 (1975), the Supreme Court of the State of Washington noted two legislative actions in 1969 that are precursors to this case:

- RCW 41.06.150 was amended to delete "wages" from the scope of collective bargaining under the state civil service law, resulting in there being only a "limited-scope" collective bargaining process for state civil service employees; and

---

[3] Local government employees and selected groups of state employees have collective bargaining rights concerning their wages, hours and working conditions ("full-scope") under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, first enacted in 1967. Certificated employees of school districts had a limited right to "meet, confer and negotiate" under a law enacted in 1965, but have had full-scope collective bargaining rights under the Educational Employment Relations Act, Chapter 41.59 RCW, since 1976. Academic faculty employees of community and technical colleges had a limited right to "meet, confer and negotiate" under a law enacted in 1969, but have had full-scope collective bargaining rights under Chapter 28B.52 RCW since 1987.

- RCW 41.06.340 was added to make the unfair labor practice provisions of Chapter 41.56 RCW applicable to state civil service employees, with administration by what was then called the State Personnel Board.

Thereafter, the closest that unions representing state civil service employees got to bargaining wages was when a union filed the *Ortblad* lawsuit seeking to compel the state budget director to negotiate wages. The Supreme Court reasoned that RCW 41.06.340 constituted a bridge to other rights conferred by Chapter 41.56 RCW, and then moved from the "refusal to bargain" unfair labor practice in RCW 41.56.140(4) to the definition of full-scope "collective bargaining" in RCW 41.56.030(4). While the Supreme Court thus gave unions representing state civil service employees a right to negotiate with the budget director about the wage increases to be included in executive budget requests, no final agreements were to be reached and no written and signed collective bargaining agreements were to result from that process.

Several proposals to expand the collective bargaining rights of state civil service employees were put before the legislature during the 1980's and into the early 1990's. In 1993, House Bill 2054 advanced by then-Governor Lowry as executive request legislation addressed multiple related subjects:

- Collective bargaining under a full-scope "wages, hours, and other terms and conditions of employment" definition;

- Overruling court precedents that prohibited contracting out of work historically performed by state civil service employees as an infringement on civil service rights;

- Merger of the separate civil service system then administered by a Higher Education Personnel Board into the state civil

service law administered by the DOP, and renaming of the state personnel board as the WPRB;

- Reform of the civil service system, including shifting rule-making authority to the director of personnel; and
- Creation of the Washington Management Service (WMS) within the civil service system.

Although that bill was passed by the House of Representatives, it stalled in the Senate. The collective bargaining, contracting out, and civil service reform portions were then carved out when the merger of systems and creation of the WMS were adopted in 1993.

When the WPRB considered the bargaining unit at issue in this case, the statutory provisions concerning the WMS were as follows (emphasis by *italics* added):

> RCW 41.06.500 MANAGERS--RULES--GOALS. (1) Except as provided in RCW 41.06.070, notwithstanding any other provisions of this chapter, *the director [of personnel] is authorized to adopt, . . . rules for managers as defined in RCW 41.06.022*. These rules shall not apply to managers employed by institutions of higher education or related boards or whose positions are exempt. The rules shall govern recruitment, appointment, classification and allocation of positions, examination, training and career development, hours of work, probation, certification, compensation, transfer, affirmative action, promotion, layoff, reemployment, performance appraisals, discipline, and any and all other personnel practices for managers. These rules shall be separate from rules adopted by the board for other employees, and to the extent that the rules adopted apply only to managers shall take precedence over rules adopted by the board, and are not subject to review by the board.
>
> (2) In establishing rules for managers, the director shall adhere to the following goals:

> (a) Development of a simplified classification system that facilitates movement of managers between agencies and promotes upward mobility;
>
> (b) Creation of a compensation system consistent with the policy set forth in RCW 41.06.150(17). The system shall provide flexibility in setting and changing salaries, and shall require review and approval by the director in the case of any salary changes greater than five percent proposed for any group of employees;
>
> (c) Establishment of a performance appraisal system that emphasizes individual accountability for program results and efficient management of resources; effective planning, organization, and communication skills; valuing and managing workplace diversity; development of leadership and interpersonal abilities; and employee development;
>
> (d) Strengthening management training and career development programs that build critical management knowledge, skills, and abilities; focusing on managing and valuing workplace diversity; empowering employees by enabling them to share in workplace decision making and to be innovative, willing to take risks, and able to accept and deal with change; promoting a workplace where the overall focus is on the recipient of the government services and how these services can be improved; and enhancing mobility and career advancement opportunities;
>
> (e) Permitting flexible recruitment and hiring procedures that enable agencies to compete effectively with other employers, both public and private, for managers with appropriate skills and training; allowing consideration of all qualified candidates for positions as managers; and achieving affirmative action goals and diversity in the workplace;
>
> (f) Providing that managers may only be reduced, dismissed, suspended, or demoted for cause; and
>
> (g) Facilitating decentralized and regional administration.

Both in May 2002 and at this time, the WMS rules adopted by the director of personnel have included (emphasis by *italics* added):

> WAC 356-56-010 APPLICATION OF RULES. (1) These rules shall be separate from rules adopted by the Washington personnel resources board for other classified employees, and to the extent that the rules adopted apply only to managers, shall take precedence over rules adopted by the board, and are not subject to review by the board.
>
> (2) *The intent of the director of personnel in adopting the rules in this chapter is to comprehensively cover the personnel matters relating to Washington management service positions*. Therefore, if a Washington management service issue is identified that the director has not specifically addressed by adopting rules, the Washington personnel resources board rules shall not be effective or take precedence in addressing the issue.
>
> (3) Except where specifically stated otherwise, the following WAC chapters do not apply to positions or employees included in the Washington management service:
>
> WAC 356-05 Definitions
> WAC 356-10 Classification
> WAC 356-14 Compensation
> WAC 356-15 Compensation plan appendix
> WAC 356-22 Recruitment--Examination
> WAC 356-26 Registers--Certification
> WAC 356-30 Appointments--Separation
> WAC 356-34 Disciplinary action--Appeals
> WAC 356-37 Hearings
> WAC 356-39 Human resource development
> WAC 356-49 Intersystem employment
>
> (4) Except where specifically stated otherwise, *the following WAC chapters do apply to positions or employees included in the Washington management service*:
>
> WAC 356-06 General provisions
> WAC 356-07 Operations and public records
> WAC 356-09 Affirmative action program
> WAC 356-18 Leave
> WAC 356-35 Disability--Separation . . .
> *WAC 356-42 Labor relations*
> WAC 356-46 Miscellaneous
> WAC 356-48 State internship program

The WPRB ruling that the WMS employees at issue in this case had the same collective bargaining rights as all other state civil

service employees was thus consistent with the cross-reference to Chapter 356-42 WAC in WAC 356-56-010(4).

The Transition to a New Collective Bargaining System - Although the PSRA signed into law by the Governor includes a new collective bargaining process, the limited-scope collective bargaining process within the state civil service law will continue to operate during a period of transition. As of June 13, 2002, Section 202 of the PSRA amended RCW 41.06.150 to read as follows (legislative format, emphasis by *italics* added):[4]

> The board shall adopt rules, consistent with the purposes and provisions of this chapter, as now or hereafter amended, and with the best standards of personnel administration, regarding the basis and procedures to be followed for:
>
> (1) The reduction . . . of an employee;
>
> . . .
>
> (11) ((~~Determination of appropriate bargaining units within any agency: PROVIDED, That in making such determination the board shall consider the duties, skills, and working conditions of the employees, the history of collective bargaining by the employees and their bargaining representatives, the extent of organization among the employees, and the desires of the employees;~~
>
> ~~(12) Certification and decertification of exclusive bargaining representatives: PROVIDED, That~~)) Collective bargaining procedures:
>
> (a) After certification of an exclusive bargaining representative and upon the representative's request, the director shall hold an election among employees in a bargaining unit to determine by a majority whether to require as a condition of employment membership in the certified exclusive bargaining representative on

---

[4] The format used by the Washington State Legislature for amendatory sections is to set forth new material underlined and to set forth ((~~deleted material by strikeout within double parenthesis~~)).

or after the thirtieth day following the beginning of employment or the date of such election, whichever is the later, and the failure of an employee to comply with such a condition of employment constitutes cause for dismissal: PROVIDED FURTHER, That no more often than once in each twelve-month period after expiration of twelve months following the date of the original election in a bargaining unit and upon petition of thirty percent of the members of a bargaining unit the director shall hold an election to determine whether a majority wish to rescind such condition of employment: PROVIDED FURTHER, That for purposes of this clause, membership in the certified exclusive bargaining representative is satisfied by the payment of monthly or other periodic dues and does not require payment of initiation, reinstatement, or any other fees or fines and includes full and complete membership rights: AND PROVIDED FURTHER, That in order to safeguard the right of nonassociation of public employees, based on bona fide religious tenets or teachings of a church or religious body of which such public employee is a member, such public employee shall pay to the union, for purposes within the program of the union as designated by such employee that would be in harmony with his or her individual conscience, an amount of money equivalent to regular union dues minus any included monthly premiums for union-sponsored insurance programs, and such employee shall not be a member of the union but is entitled to all the representation rights of a union member;

((~~(13)~~)) (b) *Agreements between agencies and certified exclusive bargaining representatives providing for grievance procedures and collective negotiations on all personnel matters over which the appointing authority of the appropriate bargaining unit of such agency may lawfully exercise discretion*;

((~~(14)~~)) (c) Written agreements may contain provisions for payroll deductions of employee organization dues upon authorization by the employee member and for the cancellation of such payroll deduction by the filing of a proper prior notice by the employee with the appointing authority and the employee organization: PROVIDED, That nothing contained herein permits

> or grants to any employee the right to strike or refuse to perform his or her official duties;
>
> ((~~(15)~~)) (d) A collective bargaining agreement entered into under this subsection before July 1, 2004, covering employees subject to sections 301 through 314 of this act, that expires after July 1, 2004, shall remain in full force during its duration, or until superseded by a collective bargaining agreement entered into by the parties under sections 301 through 314 of this act. However, an agreement entered into before July 1, 2004, may not be renewed or extended beyond July 1, 2005. This subsection (11) does not apply to collective bargaining negotiations or collective bargaining agreements entered into under sections 301 through 314 of this act;
>
> (12) Adoption and revision of a comprehensive classification plan . . . .

Thus, the WPRB and DOP continue to have authority with regard to union security elections, mediation of contract negotiations under the limited-scope process, and resolution of grievances.

In Section 232 of the PSRA, the legislature amended RCW 41.06.340 to read as follows (legislative format, emphasis by *italics* added):

> (1) With respect to collective bargaining as authorized by sections 301 through 314 of this act, *the public employment relations commission created by chapter 41.58 RCW shall have authority to adopt rules*, on and after the effective date of this section, *relating to determination of appropriate bargaining units* within any agency. In making such determination the commission shall consider the duties, skills, and working conditions of the employees, the history of collective bargaining by the employees and their bargaining representatives, the extent of organization among the employees, and the desires of the employees. *The public employment relations commission created in chapter 41.58 RCW shall adopt rules and make determinations relating to the certification and*

decertification of exclusive bargaining representatives.

(2) Each and every provision of RCW 41.56.140 through ((~~41.56.190~~)) 41.56.160 shall be applicable to this chapter as it relates to state civil service employees ((~~and the Washington personnel resources board, or its designee, whose final decision shall be appealable to the Washington personnel resources board, which is granted all powers and authority granted to the department of labor and industries by RCW 41.56.140 through 41.56.190~~)).

(3) A collective bargaining agreement entered into under RCW 41.06.150 before July 1, 2004, covering employees subject to sections 301 through 314 of this act that expires after July 1, 2004, shall remain in full force during its duration, or until superseded by a collective bargaining agreement entered into by the parties under sections 301 through 314 of this act. However, an agreement entered into before July 1, 2004, may not be renewed or extended beyond July 1, 2005, or until superseded by a collective bargaining agreement entered into under sections 301 through 314 of this act, whichever is later.

Thus, the Commission now has authority to administer that one section of the state civil service law, with respect to unit determination, representation, and unfair labor practice proceedings under the limited-scope collective bargaining process.[5]

The statutory basis for negotiating limited-scope collective bargaining agreements will cease to exist on July 1, 2004, when RCW 41.06.150 will be re-amended by Section 203 of the PSRA to read as follows (legislative format, emphasis by *italics* added):

---

[5] Because the Commission already administered RCW 41.56.140 through 41.56.160, simply deleting the WPRB authority over unfair labor practice cases was sufficient to give the Commission authority in such matters.

The ((~~board~~)) director shall adopt rules, consistent with the purposes and provisions of this chapter((~~, as now or hereafter amended,~~)) and with the best standards of personnel administration, regarding the basis and procedures to be followed for:

(1) ((~~The reduction, . . . of an employee;~~

~~. . .~~

~~((((11) Collective bargaining procedures:~~

~~(a) After certification of an exclusive bargaining representative and upon the representative's request, the director shall hold an election among employees in a bargaining unit to determine by a majority whether to require as a condition of employment membership in the certified exclusive bargaining representative on or after the thirtieth day following the beginning of employment or the date of such election, whichever is the later, and the failure of an employee to comply with such a condition of employment constitutes cause for dismissal: PROVIDED FURTHER, That no more often than once in each twelve-month period after expiration of twelve months following the date of the original election in a bargaining unit and upon petition of thirty percent of the members of a bargaining unit the director shall hold an election to determine whether a majority wish to rescind such condition of employment: PROVIDED FURTHER, That for purposes of this clause, membership in the certified exclusive bargaining representative is satisfied by the payment of monthly or other periodic dues and does not require payment of initiation, reinstatement, or any other fees or fines and includes full and complete membership rights: AND PROVIDED FURTHER, That in order to safeguard the right of nonassociation of public employees, based on bona fide religious tenets or teachings of a church or religious body of which such public employee is a member, such public employee shall pay to the union, for purposes within the program of the union as designated by such employee that would be in harmony with his or her individual conscience, an amount of money equivalent to regular union dues minus any included monthly premiums for union-sponsored insurance programs,~~

~~*and such employee shall not be a member of the union but is entitled to all the representation rights of a union member;*~~

~~(b) *Agreements between agencies and certified exclusive bargaining representatives providing for grievance procedures and collective negotiations on all personnel matters over which the appointing authority of the appropriate bargaining unit of such agency may lawfully exercise discretion;*~~

~~*(c) Written agreements may contain provisions for payroll deductions of employee organization dues upon authorization by the employee member and for the cancellation of such payroll deduction by the filing of a proper prior notice by the employee with the appointing authority and the employee organization: PROVIDED, That nothing contained herein permits or grants to any employee the right to strike or refuse to perform his or her official duties;*~~

~~*(d) A collective bargaining agreement entered into under this subsection before July 1, 2002, covering employees subject to sections 301 through 314 of this act, that expires after July 1, 2002, shall remain in full force during its duration, or until superseded by a collective bargaining agreement entered into by the parties under sections 301 through 314 of this act. However, an agreement entered into before July 1, 2002, may not be renewed or extended beyond July 1, 2003. This subsection (11) does not apply to collective bargaining negotiations or collective bargaining agreements entered into under sections 301 through 314 of this act.*~~

~~(12)~~)) (4) Adoption and revision of a comprehensive classification plan . . .

Until July 1, 2004, however, nothing in the PSRA precludes state civil service employees from organizing for the purposes of collective bargaining or negotiating collective bargaining agreements under the limited-scope collective bargaining process within the state civil service law. Indeed, two separate (but similar) provisions within the state civil service law confirm that the limited-scope collective bargaining process is to remain in

effect during the transition period: Section 202(11)(d) of the PSRA (as quoted above), and Section 232(4) of the PSRA (as also quoted above), both contemplate that collective bargaining agreements negotiated under the limited-scope system prior to July 1, 2004 will remain in effect up to July 1, 2005.

Section 207 of the PSRA, which took effect on June 13, 2002, amended the provision of the state civil service law that contains the definition of "manager" on which the WMS is founded, as follows (legislative style, emphasis by *italics* added):

> For purposes of this chapter, "manager" means any employee who:
> (1) Formulates statewide policy or directs the work of an agency or agency subdivision;
> (2) Is responsible to administer one or more statewide policies or programs of an agency or agency subdivision;
> (3) Manages, administers, and controls a local branch office of an agency or agency subdivision, including the physical, financial, or personnel resources;
> (4) Has substantial responsibility in personnel administration, legislative relations, public information, or the preparation and administration of budgets; or
> (5) Functionally is above the first level of supervision and exercises authority that is not merely routine or clerical in nature and requires the consistent use of independent judgment.
> *No employee who is a member of the Washington management service may be included in a collective bargaining unit established under sections 301 through 314 of this act.*

For the employer here, the problem presented by that language is that it is explicitly tied to the new collective bargaining system that will not begin to operate until 2004. Even if Section 207 supports the employer's "WMS excluded from bargaining rights"

argument for the long term, it does not address the rights of the WMS under the limited-scope collective bargaining process under the state civil service law and WMS rules that now exist.

In light of numerous decisions in which the Supreme Court of the State of Washington has narrowly construed exclusionary language in state collective bargaining laws, the Executive Director cannot infer a legislative intent to terminate the collective bargaining rights of the WMS in the short term. Those decisions include:

- In *Roza Irrigation District v. State*, 80 Wn.2d 633 (1972), the Court applied Chapter 41.56 RCW to all municipal corporations and political subdivisions, not just to cities and counties that had participated in the legislative debate prior to the enactment of that statute.

- In *Zylstra v. Piva*, 85 Wn.2d 743 (1975), the Court maximized the collective bargaining rights of persons employed jointly by (covered) county and (then uncovered) court entities.

- In *Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries*, 88 Wn.2d 925 (1977), the Court interpreted exclusionary language narrowly, rejected precedents of a predecessor administrative agency that had fashioned an excluded class of "managerial" employees, and extended collective bargaining rights to supervisors who would have been excluded from collective bargaining rights if they were working in the private sector under the National Labor Relations Act.

- In *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978), the Court interpreted the "confidential" exclusion narrowly.

- In *Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24 (1984), the majority and dissenting opinions each protected the collective

bargaining rights of the employees involved, differing mainly as to the route for getting to that ultimate conclusion.

- In *PUD of Clark County v. PERC*, 110 Wn.2d 114 (1988), the Court rejected a vacuum in administration of the collective bargaining rights of the employees involved in that case.

Section 232 of the PSRA does not even mention the WMS, and nothing in Section 232 of the PSRA supports a conclusion that the legislature has terminated the limited-scope collective bargaining rights of the WMS under the state civil service law. The conclusion that the WMS continue to have some bargaining rights is not altered by the existing statutory authority of the director of personnel to eradicate the existing collective bargaining rights of WMS employees by the stroke of a pen, or by the possibility that such a change could occur prior to July 1, 2004.

The New Collective Bargaining System -

As of July 1, 2004, a new full-scope collective bargaining process codified in a new chapter of the Revised Code of Washington will go into effect. Chapter 354, Laws of 2002, Sections 301 through 321, and Section 406; RCW 41.80.001 through 41.80.905. Under Section 301 of the PSRA (RCW 41.80.001), collective bargaining under the new system is to commence no later than July 1, 2004, and collective bargaining agreements negotiated under the new system are to become effective no earlier than July 1, 2005.

The employer's "WMS excluded from bargaining rights" argument conforms to some language found in Section 321 of the PSRA (RCW 41.80.005), which took effect on June 13, 2002, but contains definitions applicable under the new collective bargaining chapter. Specifically, the exclusion of the WMS from the definition of "employee" in RCW 41.80.005(6)(c) will exclude the WMS from all collective bargaining rights under Chapter 41.80 RCW:

> *DEFINITIONS. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.*
> (1) "Agency" means . . .
>
> . . .
> (6) *"Employee" means any employee . . . covered by chapter 41.06 RCW, except:*
> (a) Employees covered for collective bargaining by chapter 41.56 RCW;
> (b) Confidential employees;
> (c) *Members of the Washington management service;*
> (d) Internal auditors in any agency; or
> (e) Any employee of the commission, the office of financial management, or the department of personnel. . . .

Thus, it is abundantly clear that the Executive Director cannot, by issuance of a certification or any other means, confer upon Washington Management Service employees any rights under the new collective bargaining process created by Chapter 41.80 RCW.

Conclusions on WMS Exclusion -

The Commission has authority under two different chapters of the Revised Code of Washington, and that duality of jurisdiction must be acted upon in this case. Even though WMS employees will be excluded from the new full-scope collective bargaining process to be implemented under Chapter 41.80 RCW, their limited-scope collective bargaining rights under the state civil service law could continue until 2004 or 2005.

The Community of Interest Arguments

The WPRB had unit determination authority under RCW 41.06.150 when it considered and acted on the unit at issue in this case. The written decision issued by the WPRB touches on each of the unit determination criteria that were then set forth in RCW

41.06.150(11) and are now set forth without substantive change in RCW 41.06.340.

On July 22, 2002, the employer filed a letter setting forth several unit determination arguments in addition to its "WMS excluded from bargaining rights" argument. The employer stated:

> [A]ll of the positions included in the Petition for Determination of Exclusive Representative are Washington Management Service (WMS) positions. In addition, two of the fourteen positions are non-supervisory staff. Based upon these factors, the Liquor Control Board does not believe the requirements set forth in law have been met and therefore does not support the request for representation for the purposes of collective bargaining.
>
> In addition, as also presented to the Personnel Resources Board, the agency does not believe all the positions are appropriate for the bargaining unit for the following reasons:
>
> There is no history of bargaining for this group of positions. The agency does not believe that these positions perform similar duties, require similar knowledge and skills, and do not have similar working conditions. Specifically, the three miscellaneous positions of Safety Program Manager, located in Human Resources; and the Public Records Officer and Loss Prevention Manager, located in the Financial Division work in different divisions under different appointing authorities. Each position is involved in unique highly sensitive and confidential work of different scopes and nature.
>
> The eleven District Manager positions, located in the Retail Services Division do perform similar work under the same appointing authority, with similar working conditions. However, it should be noted that District Managers are directly involved in labor contract negotiations between Local 1001 representing Liquor Store Clerks and Liquor Store Assistant Managers, and Washington Public Employees Association (WPEA) representing Liquor Store Managers which may

> cause a conflict of interest. District Managers are also identified as a formal step of the grievance process responding to and resolving grievances filed by employees covered under these two bargaining agreements.
>
> The Liquor Control Board recognizes that these fourteen positions are included in WMS, however, again as presented to the Personnel Resources Board, these positions represent only about 28% of all WMS positions within the Liquor Control Board.

The employer needed to raise any such arguments before the WPRB, and the WPRB decision finding the unit to be appropriate is binding on the parties as to that issue. The employer is not entitled to re-litigate matters that were (or could have been) raised and decided before the agency that then had jurisdiction over the propriety of the bargaining unit.

Separation of Supervisors -

With the approval of the Washington courts,[6] the Commission has exercised the unit determination authority conferred upon it to separate supervisors from non-supervisory employees.[7] The Legislature embraced those Commission precedents in Section 308 of the PSRA (RCW 41.80.070), which went into effect on June 13, 2002:

> BARGAINING UNITS. (1) A bargaining unit of employees covered by this chapter existing on the effective date of this section shall be

---

[6] *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981).

[7] Under Commission precedents and WAC 391-35-340, separate units of supervisors are found appropriate. *See City of Tacoma*, Decision 95-A (PECB, 1977) and *Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries*, 88 Wn.2d 925 (1977), citing *Packard Motor Car Company v. NLRB*, 330 U.S. 485 (1947).

> considered an appropriate unit, unless the unit does not meet the requirements of (a) . . . of this subsection. The commission, after hearing upon reasonable notice to all interested parties, shall decide, in each application for certification as an exclusive bargaining representative, the unit appropriate for certification. In determining the new units or modifications of existing units, the commission shall consider: The duties, skills, and working conditions of the employees; the history of collective bargaining; the extent of organization among the employees; the desires of the employees; and the avoidance of excessive fragmentation. However, *a unit is not appropriate if it includes:*
>
> *(a) Both supervisors and nonsupervisory employees. A unit that includes only supervisors may be considered appropriate* if a majority of the supervisory employees indicates by vote that they desire to be included in such a unit; . . . .

(Emphasis added.) There are, however, two evident reasons for declining to address the employer's "supervisors" claim in this case at this time:

- The certification issued in this proceeding must be limited to rights and authority conferred by Section 232 of the PSRA (RCW 41.06.340), and cannot confer any rights under the new collective bargaining system, so that Section 308 of the PSRA (RCW 41.80.070) can be viewed as inapposite to the bargaining unit involved in this case.

- This bargaining unit was created prior to June 13, 2002, so that WAC 391-35-026 applies to it. Consistent with the transition period described above, that special rule gives parties until July 1, 2004, to "divide" mixed units that were created prior to June 13, 2002. Thus, even though both the Commission precedents and RCW 41.80.070 will weigh heavily against creation of any mixed units of supervisors and non-

> supervisory employees after June 13, 2002, the Commission stopped short of holding that mixed units created by the WPRB or its predecessors are inappropriate in the short term.

Under the circumstances of this case, the "supervisor" arguments advanced by the employer fail to state a basis for the Commission to revisit the unit determination decision made by the WPRB.

The "Confidential" Argument

The written decision issued by the WPRB contains no mention of a "confidential employee" argument of the type now being advanced by the employer, and it does not contain any ruling on a "confidential" issue. The WPRB order thus cannot be considered binding on the parties on a "confidential" issue. Moreover, "confidential" status can be raised at any time. WAC 391-35-020(1)(e).

Insufficiency of the Employer's Claim -

In *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978), the Supreme Court of the State of Washington limited the exclusion of confidential employees to persons who meet a "labor nexus" test. The Court explicitly ruled that general supervisory authority is insufficient to qualify for exclusion. In applying that precedent, the Commission has imposed a heavy burden on the party seeking such an exclusion, because status as a "confidential" employee deprives the individual of all collective bargaining rights. *City of Seattle*, Decision 689-A (PECB, 1979).

In the letter filed by the employer on July 22, 2002, the only references to a claim of "confidential" status are found buried within the employer's community of interest arguments. Even then, the only statements suggesting a "confidential" claim are limited to:

> Each position is involved in unique highly sensitive and confidential work of different scopes and nature. . . . [I]t should be noted that District Managers are directly involved in labor contract negotiations between Local 1001 representing Liquor Store Clerks and Liquor Store Assistant Managers, and Washington Public Employees Association (WPEA) representing Liquor Store Managers which may cause a conflict of interest. District Managers are also identified as a formal step of the grievance process responding to and resolving grievances filed by employees covered under these two bargaining agreements.

Such conclusionary statements fall far short of stating a claim under the "labor nexus" test, particularly where, in the context of the limited-scope collective bargaining process under the state civil service law, wages and wage-related benefits are excluded from the negotiations at the agency level. Although the employer reiterated its claim of "confidential" status during the investigation conference held on August 20, 2002, it did not add any facts that support the existence of labor nexus confidentiality.

Insufficiency of the Union's Concession -

For its part, the union made this a closer question by stating during the investigation conference that, "The employees in the unit deal with confidential issues within other units but not within their own unit." While Commission precedent clearly rejects "confidential for some purposes but not for others" arguments, the union did not volunteer or concede any specific facts sufficient to suggest that any of the district managers would or could meet the labor nexus test.

NOW, THEREFORE, it is

ORDERED

1. The employer's objections concerning the propriety of the bargaining unit are DENIED as barred by the decision and order issued by the Washington Personnel Resources Board.

2. The employer's claim of "confidential" status is DENIED as insufficient on its face to constitute a basis for relief.

3. The employer's objection based on Washington Management Service status is DENIED with respect to rights conferred by the state civil service law, Chapter 41.06 RCW, in light of Chapter 356-56 WAC with specific reference to the incorporation of Chapter 356-42 WAC by reference in WAC 356-56-010(4).

4. The employer's objection based on Washington Management Service status is GRANTED with respect to collective bargaining under Chapter 41.80 RCW, so that any certification issued in this proceeding shall:

   A. Be limited to rights under Chapter 41.06 RCW, and shall not confer any rights under Chapter 41.80 RCW; and

   B. Expire on June 30, 2004, with respect to the negotiation of collective bargaining agreements; and

   C. Expire on June 30, 2005, with respect to administration of any collective bargaining agreement negotiated under Chapter 41.06 RCW prior to July 1, 2004; and

   D. Expire on the effective date of any amendment to Chapter 356-56 WAC which terminates the collective bargaining

rights of Washington Management Service employees under Chapter 41.06 RCW and Chapter 356-42 WAC.

5. This matter is remanded to Representation Coordinator Sally Iverson for further proceedings under Chapter 391-25 WAC, consistent with this order.

Issued at Olympia, Washington, on the 9th day of October, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

This order may be appealed by filing timely objections with the Commission under WAC 391-25-590, following the issuance of a tally sheet.