

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: )  
 )  
UNITED FACULTY OF CENTRAL / UNITED ) CASE 17439-E-03-2833  
FACULTY OF WASHINGTON STATE )  
 ) DECISION 8127 - FCBA  
Involving certain employees of: )  
 ) ORDER REJECTING  
CENTRAL WASHINGTON UNIVERSITY ) PROPOSED STIPULATION  
 )  
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\_\_\_\_\_ )

This case comes before the Executive Director for acceptance or rejection of a proposed stipulation concerning the description of the bargaining unit. The Executive Director concludes that the proposed unit description growing out of an action by a faculty governance body is not in conformity with the applicable statute.

BACKGROUND

On April 16, 2003, United Faculty of Central / United Faculty of Washington State (union) filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission under Chapter 391-25 WAC, seeking certification as exclusive bargaining representative of the faculty of Central Washington University (employer). On May 2, 2003, the union filed an amended petition in which it altered the description of the bargaining unit claimed to be appropriate to read as:

Tenured, tenure-track, other full-time non-tenure track, and adjunct faculty whose instructional load average for the most recent 3 academic year quarters (fall, winter,

and spring) equals or exceeds .50 of full time. (% full time is to be determined based on an instruction load of 45 contact hours and will include both instructional assignments and non-teaching academic assignments w/ equivalent instructional load specific to the individual contract of employment.

The change from the original petition to the amended petition was by exclusion of "phased retiree faculty" from the unit in the amended petition.

A list of employees was obtained from the employer, and the showing of interest provided by the union was administratively determined to be sufficient under WAC 391-25-110, as against that list. An investigation conference was scheduled under WAC 391-25-220.

During the investigation conference, the Commission's Representation Coordinator offered a unit description more in keeping with the Commission's practices. The employer and union both resisted the suggested language. The Executive Director joined the investigation conference,<sup>1</sup> and the parties were asked to state their respective positions. During the ensuing conversation, the Executive Director was told that a faculty governance body had adopted the unit description urged by the employer and union, that the Board of Trustees had not adopted the same definition of faculty status, and that the faculty governance documents of the institution were ambiguous and/or internally inconsistent with respect to defining faculty status. The parties also indicated during the investigation conference that the proposed stipulation did not necessarily include all persons holding faculty status at the institution. The Executive Director thereupon directed the

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<sup>1</sup> As is common under Commission practice, the Investigation Conference in this case was conducted by telephone conference call from the Commission's Olympia office.

employer and union to file a copy of the faculty governance documents of the institution, together with statements of their respective positions on the matter.

On May 22, 2003, the union filed a notebook containing faculty governance documents of the institution measuring 1-3/4" in thickness and not numbered in a single sequence. Pages were marked with tabs to indicate both: (1) divisions within the materials; and (2) various highlighted provisions defining or applying faculty status at the institution.

On May 22, 2003, counsel for the union filed a written argument in support of acceptance of the unit description as proposed in the amended petition.

On May 30, 2003, counsel for the employer filed a letter pointing out and urging reliance upon Section 2.10 of the faculty governance documents.

On May 30, 2003, the union filed an additional letter, making reference to and supplying a copy of both a collective bargaining agreement from Eastern Washington University and a faculty governance document from Western Washington University.

#### DISCUSSION

The Faculty Collective Bargaining Act (FCBA), Chapter 41.76 RCW, was passed by the Legislature in its 2002 Regular Session, and signed into law by the Governor in April of 2002, with an effective date of October 1, 2002. Administration of the statute was delegated to the Commission, which was created by Chapter 41.58 RCW in 1975, and which administers several other state statutes

regulating collective bargaining by employers and employees in Washington.<sup>2</sup>

Some state collective bargaining laws delegate to the Commission the authority to determine appropriate bargaining units within broad criteria. In particular, RCW 41.56.060 sets forth a set of four criteria commonly referred to as "community of interest" factors; RCW 41.80.070 contains the same four criteria, but adds an admonition against fragmentation and a requirement for separation of supervisors from non-supervisory employees. Statutes of that type leave room for exercise of discretion by the Commission, both as to accepting stipulations of parties and as to deciding between alternatives where two or more unit configurations could possibly be appropriate.

Chapter 41.76 RCW differs significantly from Chapters 41.56 and 41.80 RCW, with respect to the determination of bargaining units. Rather than delegating broad unit determination authority to the Commission, several provisions of the FCBA combine to indicate that

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<sup>2</sup> Along with some jurisdiction in the private sector, the Commission has jurisdiction over nearly all state and local government public employers and employees in the state. Specifically:

- Chapter 41.56 RCW (first enacted in 1967 and amended several times since) covers local government employees and selected employees of state agencies and state institutions of higher education;
- Chapter 28B.52 RCW (enacted in 1969 and amended in 1987) covers academic employees (faculty) of community colleges;
- Chapter 41.59 RCW (enacted in 1975) covers certificated employees (faculty) of common schools;
- Chapter 41.80 RCW (enacted in 2002) covers civil service employees of state agencies and state institutions of higher education.

the Legislature has occupied the field with respect to unit determination:

RCW 41.76.001 FINDINGS -- DECLARATIONS -- INTENT.  
The legislature finds and declares that:

(1) The people of the state of Washington have a fundamental interest in developing harmonious and cooperative labor relations within the public four-year institutions of higher education.

(2) Teachers in the public school system and instructors in the community colleges in the state have been granted the opportunity to bargain collectively. It is desirable to expand the jurisdiction of the public employment relations commission to cover faculty in the state's public four-year institutions of higher education.

(3) It is the purpose of this chapter to provide the means by which relations between the boards of regents and trustees of the public four-year institutions of higher education of the state of Washington and their faculty may assure that the responsibilities and authorities granted to these institutions are carried out in an atmosphere that permits the fullest participation by faculty in determining the conditions of employment which affect them. *It is the intent of the legislature to accomplish this purpose by providing a uniform structure for recognizing the right of faculty of the public four-year institutions of higher education to engage in collective bargaining as provided in this chapter, if they should so choose.*

(4) It is the further purpose of this chapter to *provide orderly and clearly defined procedures for collective bargaining and dispute resolution*, and to define and prohibit certain practices that are contrary to the public interest.

RCW 41.76.005 DEFINITIONS. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Faculty governance system" means the internal organization that serves as the faculty advisory body and is charged with the responsibility for recommending policies, regulations, and rules for the college or university.

. . .

(3) "Collective bargaining" and "bargaining" mean the performance of the mutual obligation of the representatives of the employer and *the exclusive bargaining representative* to meet at reasonable times to bargain in good faith in an effort to reach agreement with respect to wages, hours, and other terms and conditions of employment. . . .

(4) "Commission" means the public employment relations commission established pursuant to RCW 41.58.010.

(5) "*Faculty*" means employees who, at a public four-year institution of higher education, are designated with faculty status or who perform faculty duties as defined through policies established by the faculty governance system, excluding casual or temporary employees, administrators, confidential employees, graduate student employees, postdoctoral and clinical employees, and employees subject to chapter 41.06 or 41.56 RCW.

(6) "Employee organization" means any organization that includes as its members faculty of the employer and that has as one of its purposes representation of faculty under this chapter. *A faculty governance system is not an employee organization as defined in this subsection.*

(7) "Employer" means the board of regents or the board of trustees of a public four-year institution of higher education.

(8) "*Exclusive bargaining representative*" means any employee organization that has been *determined by the commission to represent all of the faculty members of the bargaining unit* as required in RCW 41.76.015.

(9) "Administrator" means deans, associate and assistant deans, vice-provosts, vice-presidents, the provost, chancellors, vice-chancellors, the president, and faculty members who exercise managerial or supervisory authority over other faculty members.

(10) "Confidential employee" means (a) a person who participates directly on behalf of an employer in the formulation of labor relations policy, the preparation for or conduct of collective bargaining, or the administration of a collective bargaining agreement, if the role of the person is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment; and (b) a person who assists and acts in a confidential capacity to a person in (a) of this subsection.

(11) "*Bargaining unit*" includes all faculty members of all campuses of each of the colleges and universities. *Only one bargaining unit is allowable for faculty of each*

*employer, and that unit must contain all faculty members from all schools, colleges, and campuses of the employer.*

. . . .  
RCW 41.76.015 EXCLUSIVE BARGAINING REPRESENTATIVES -- DUTY OF REPRESENTATION. The employee organization which has been determined by the commission to be the *exclusive bargaining representative of a bargaining unit shall be required to represent all the faculty members within the bargaining unit* without regard to membership in that employee organization: PROVIDED, That any faculty member may at any time present his or her complaints or concerns to the employer and have such complaints or concerns adjusted without intervention of the exclusive bargaining representative, as long as the exclusive bargaining representative has been given an opportunity to be present at the adjustment and to make its views known, and as long as the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect.

RCW 41.76.020 EXCLUSIVE BARGAINING REPRESENTATIVES -- PROCEDURES FOR CERTIFICATION -- CHALLENGES -- ELECTIONS. The commission shall certify exclusive bargaining representatives in accordance with the procedures specified in this section.

. . . .  
(3) An employee organization seeking certification as exclusive bargaining representative of a bargaining unit, or faculty members seeking decertification of their exclusive bargaining representative, must make a confidential showing to the commission of credible evidence demonstrating that *at least thirty percent of the faculty in the bargaining unit* are in support of the petition. The petition must indicate the name, address, and telephone number of any employee organization known to claim an interest in the bargaining unit.

. . . .  
(8) The commission shall certify as the exclusive bargaining representative the employee organization that has been *determined to represent a majority of faculty members in a bargaining unit.*

RCW 41.76.025 BARGAINING UNIT DETERMINATION -- HEARINGS. In any dispute concerning membership in the bargaining unit or the allocation of employees or

positions to a bargaining unit, the commission, after a hearing or hearings, shall determine the dispute.

(emphasis added). The FCBA thus evidences a "one unit per employer" approach which precludes either a fragmentary unit structure or stranding employees in loopholes within an employer's workforce.

The Executive Director is mindful that two other state collective bargaining laws applicable to "faculty" at various levels of the educational establishment place significant constraints on the unit determination process:

- In the Educational Employment Relations Act applicable to certificated employees of K-12 schools, RCW 41.59.080(1) states, "A unit that includes non-supervisory educational employees shall not be considered appropriate unless it includes all such non-supervisory educational employees of the employer." That "one unit per employer" standard effectively negates the community of interest criteria set forth in the first paragraph of that section. When presented with a group of unrepresented certificated employees that had slipped between cracks in an unusual situation since eliminated by statute, the conclusion was that the employees had to be included in an employer-wide bargaining unit. *Lake Washington School District*, Decision 1550 (PECB, 1982). Similarly, when the bargaining unit status of "substitute" teachers was called into question, the conclusion was that all of them qualifying as "regular part-time" employees had to be included in employer-wide bargaining units. *Columbia School District, et al.*, Decision 1189-A (EDUC, 1982). Importantly, the substitute teachers excluded from bargaining units as "casual" in that proceeding were found to lack ongoing employment relationships with the employers involved.



- In the collective bargaining statute applicable to academic faculty of community colleges, RCW 28B.52.030 imposes a "one unit per employer" standard. When a question arose as to the bargaining units status of part-time faculty, the conclusion was that all of them qualifying as "regular part-time" employees had to be included in district-wide bargaining units, and only those deemed to lack employee status were excludable as "casual" employees. *Community College District 12*, Decision 2374 (CCOL, 1986).<sup>3</sup> When a question arose as to the bargaining unit status of community education teachers who worked at the fringe of an institution's course offerings, they were included in the district-wide bargaining unit. *Lower Columbia College*, Decision 3987-A (CCOL, 1991). When a question arose as to the bargaining unit status of employees teaching in a separate program associated with a large private employer, they were included in the district-wide bargaining unit. *Green River Community College*, Decision 4491-A (CCOL, 1994).

Given the mission of "uniform" dispute resolution assigned to the Commission in RCW 41.58.005, the Executive Director concludes that the "one unit per employer" standard in Chapter 41.76 RCW should be

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<sup>3</sup> The analysis thereupon turned to formulating a test to differentiate between "regular part-time" employees who were eligible for inclusion in the bargaining unit and "casual" employees to be excluded from the bargaining unit. It was noted that the community college district "has both a long-standing practice of using part-time employees, and an ongoing need for such employees as part of its workforce". The Commission had to rise above the extreme positions taken by the two unions involved in that case, and a "one sixth of full-time" test was fashioned as the line of demarcation between "regular part-time" and "casual" status. *Community College District 12*, Decision 2374, at 20.

interpreted in a manner consistent with the "one unit per employer" precedents developed under Chapters 41.59 and 28B.52 RCW.

Faculty governance systems and practices may differ among the six institutions covered by the FCBA, and differences among institutional documents (taken as a whole) may lead to variances as to inclusions in and exclusions from bargaining units under Chapter 41.76 RCW. While this employer and union were willing to go along with what a faculty body had purported to decide about the scope of the bargaining unit in this proceeding, the employer was quick to point out that its board of trustees had not adopted the purported decision (or recommendation). The possibility of some divergence does not empower one component of a system (or any combination of components short of the complete set) to interpose itself/themselves to countermand the directive of the Legislature or to supplant the statutory responsibility of the Commission to administer the statute as it is written.

#### Analysis of Documents Provided by Parties

The large notebook supplied to the Commission contains numerous entries which may bear on the question of whether the stipulation tendered by the parties contravenes the statute.

#### Cover Sheet -

The first page in the notebook appears to be a printout of a web site homepage. It does not contain any marks supplied by the parties, and appears to have no actual value in this case.

#### Part 1 -

The first tab in the notebook delimits a table of contents and 26 pages of text dealing with the employer's board of trustees. References to "faculty members" are noted at paragraphs following

1-5.2, but there is no definition of the term in those paragraphs concerning academic freedom. References to "faculty" are noted at paragraphs following 1-8.1, but there is no definition of the term in those paragraphs concerning appointing authority. This portion does not contain any marks supplied by the parties, and appears to have no actual value in this case.

Part 2 -

The second tab in the notebook (marked "partial") delimits a table of contents and numerous pages of text dealing with general university policies and organization. There are un-counted references to "faculty" in this portion, but the only one called to the attention of the Commission is a definition of "academic employees" within a section concerning disability accommodations. This portion appears to have no actual value in this case.

Part 3 -

The third tab in the notebook delimits a table of contents and 16 pages of text dealing with administrative officers. There are some references to "faculty" in this portion, but it does not contain any marks supplied by the parties. It appears to have no actual value in this case.

Part 4 -

The fourth tab in the notebook delimits a table of contents headed "Faculty Code of Personnel Policy and Procedure" and numerous pages of text divided into 15 sections. Of potential significance in this proceeding, there is no claim or indication that any of these provisions were adopted by the employer's Board of Trustees in contravention of the recommendation(s) of the faculty governance system. Several provisions have been called to the attention of the Commission by highlighting, and some additional provisions have been noted in review of the document.

Section 2.10 appears to contain the first substantive provision that is of interest here. It states:

2.10 Faculty - Defined

- A. As used in this Faculty Code, the word "faculty" shall mean *only those individuals employed full time* by the university:
1. Who teach, coach, supervise, research or engage in similar *academic endeavors in which students receive credit or academic benefit* and who hold one (1) of the following academic ranks: *professor, associate professor or assistant professor*, or hold the professional designation: *lecturer or coach*; [BT Motion 6330, 6/15/90] [BT Motion 92:57, 6/12/92] [BT Motion 00:46, 6/9/00]
  - . . .
  3. Who serve as *librarians and/or professional media specialists or who serve as members of the counseling and testing services* and who hold one (1) of the academic ranks or professional designations listed in Section 2.10 A 1. [BT Motion 92:57, 6/12/92]
- B. The word "faculty" as used in this Code does not apply to any other employees of the university, including but not limited to *adjunct faculty, part-time faculty* (less than full-time assignment, by academic year or by quarterly assignment), *emeriti on phased retirement* notwithstanding Section 9.92 F. of the Faculty Code . . . . Such employees are not entitled to the rights and privileges of this Code unless specific Code provisions make such allowances. [BT Motion 92:57, 6/12/92]

(emphasis added). Section 2.10 addresses the first clause of the FCBA definition, where "faculty" is defined as, "employees who . . . are designated with faculty status" at the university. There is no doubt that full-time faculty should be in the bargaining unit. Limiting "faculty" to the Section 2.10 definition would,

however, conflict with the proposed stipulation to include in the bargaining unit employees teaching half-time or more.

The employer relies on Section 2.10 as an alternative to the proposed stipulation, while the union aptly points out that the provided documents contain a number of inconsistencies and contradictions. Two further comments are warranted here:

First, it is evident upon even cursory review of the documents that limiting "faculty" to the Section 2.10 definition would improperly negate or ignore the second clause of the FCBA definition which reads, "or who perform faculty duties as defined through policies established by the faculty governance system" of the university. The words used by the Legislature must be given effect, and they prevail over the desires of both the faculty and the board of trustees.

Second, the faculty code document provides basis for an inference that there are or could be numerous employees who perform faculty duties within the "teach, coach, supervise, research or engage in similar academic endeavors in which students receive credit or academic benefit" scope defined in Section 2.10, while working as a "lecturer" within the meaning of the last clause of Section 2.10 A 1, or while working as "adjunct faculty" or as "part-time faculty" or "emeriti on phased retirement" within the meaning of Section 2.10 B of the faculty code document.

The foregoing calls the proposed stipulation into question, because it may exclude from the bargaining unit all "lecturers" and would categorically exclude from the bargaining unit "phased retirees" and employees teaching less than half-time.

The parties to this case will need to recognize and deal with the statutory exclusion of "casual or temporary" employees from the

coverage of the FCBA. The proposed stipulation uses a "half-time" test for inclusion in the bargaining unit. The presumptions set forth in WAC 391-35-350 are based upon Commission precedents developed in a variety of employment settings, including the educational establishment. Those presumptions are subject to modification by adjudication, but no valid basis is cited or found in the provided documents for the relatively high "half-time" line of demarcation.<sup>4</sup> The best that can be said for the proposed stipulation is that this order does not foreclose the possibility of the parties coming up with rationale sufficient to deprive employees working more than one-sixth of full-time but less than half-time of their rights under the FCBA.

Other Provisions -

The Executive Director has reviewed all of the faculty code provisions highlighted by the union, and has even identified some other provisions that might ultimately have some bearing on this case, but has not had the benefit of arguments from both parties on the meaning or effect of any provisions other than Section 2.10. Inasmuch as the references to lecturers, adjunct faculty, part-time faculty, and phased retirees in Section 2.10 provide sufficient basis to reject the proposed stipulation, any discussion or decision concerning the applicability of other provisions is reserved for the hearing process that will be necessary unless the parties are able to stipulate a unit description which conforms, on its face, to the applicable statute.

The remand of this case to the Representation Coordinator will permit the re-convening of the investigation conference process.

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<sup>4</sup> Eligibility for insurance benefits is mentioned in the documents provided, but that subject matter is understood to be actually controlled by Chapter 41.05 RCW, outside of the university.

Given the opportunity to re-assess their respective positions, the parties may be able to resolve this matter informally without the expense and delays inherent in a hearing process.

NOW, THEREFORE, it is

ORDERED

1. The stipulated bargaining unit description proposed by the parties is rejected as inconsistent, on its face, with Chapter 41.76 RCW.
2. The matter is remanded to the Representation Coordinator to conduct further proceedings under WAC 391-25-220.
3. In the absence of a timely stipulation on a bargaining unit description which conforms, on its face, to the applicable statute, a Hearing Officer will be assigned to conduct a formal hearing under Chapter 391-25 WAC.

Issued at Olympia, Washington, on the 26<sup>th</sup> day of June, 2003.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director