King County Public Hospital District 2 (Evergreen), Decision 9205-D (PECB, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
ANDREA SHEAHAN	)	CASE 18802-E-04-2983
	)	
Involving certain employees of:	)	DECISION 9205-D - PECB
	)	
KING COUNTY PUBLIC HOSPITAL DISTRICT 2	)	
	)	
In the matter of the petition of:	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1199NW	)	CASE 19842-E-05-3106
	)	
Involving certain employees of:	)	DECISION 9206-D - PECB
	)	
KING COUNTY PUBLIC HOSPITAL DISTRICT 2	)	ORDER ON CHALLENGED BALLOTS

Margaret Cary, Attorney at Law, for Service Employees International Union, Local 1199NW.

Davis Wright Tremaine, LLP, by *Mark A. Hutcheson*, Attorney at Law, for the employer.

Andrea Sheahan and *Phil Cortese*, for the intervenor, Kirkland Public Employees Association.

On August 5, 2004, Andrea Sheahan (Sheahan) filed a representation petition with the Public Employment Relations Commission involving certain employees of King County Public Hospital District 2 d/b/a Evergreen Hospital (employer). The petition sought to maintain Service Employees International Union, Local 6 (Local 6) as the representative of a bargaining unit of the employer's nonsupervisory employees. At that time, Service Employees

International Union, Local 1199NW (Local 1199) was replacing Local 6. The petition was dismissed as procedurally defective since a group of employees cannot force a union to represent them if that union no longer wants to represent the bargaining unit. *King County Public Hospital District 2 (Evergreen)*, Decision 8702 (PECB, 2004).[1]

On August 31, 2004, Sheahan filed a new petition seeking to decertify Local 6. The petition was docketed by the Commission as Case 18802-E-04-2983. This case is the subject matter of this proceeding. The filing of this petition required the employer to suspend bargaining with Local 6. WAC 391-25-140.

On September 10, 2004, Local 6 filed a motion seeking dismissal of the petition, alleging both a lack of timely service and a "misleading" showing of interest. This motion was denied since service was found to have been timely under WAC 391-08-120, and WAC 391-25-110(2)(b) precludes litigation of showing of interest issues.

Local 6 filed a second unfair labor practice complaint on September 28, 2004, alleging that the employer provided support and assistance to certain bargaining unit employees in their efforts to file a decertification petition. The facts of the complaint were insufficient to conclude that an unfair labor practice violation could be found.[2]

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[1] On August 25, 2004, Local 6 filed an unfair labor practice complaint (Case 18798-U-04-4775), naming the employer as respondent and asserting both "interference" and "refusal to bargain" claims. However, the page footers on the statement of facts identified Local 1199 as the complainant.

[2] Case 18861-U-04-4791.

On October 5, 2004, Sheahan filed an unfair labor practice complaint naming Local 6 as respondent.[3] The facts of this complaint were also found insufficient to conclude that an unfair labor practice violation could be found.

On July 25, 2005, the Kirkland Public Employees Association (KPEA) filed a motion for intervention in the representation proceeding accompanied by a showing of interest.

On October 7, 2005, Local 1199 filed a petition to represent the same bargaining unit that was the subject of Sheahan's decertification petition. The petition was supported by at least 30% of unit employees.[4]

On October 10, 2005, Local 6, the complainant in all remaining unfair labor practices cases with this employer, filed a request to proceed with Case 18802-E-04-2983.

Because the two pending petitions involved the same bargaining unit, the cases were consolidated. An election was held by mail ballot listing three choices: Local 1199, KPEA and "no representation".[5] The ballots were tallied on December 6, 2005. Local 1199 and KPEA received the highest and second-highest numbers of votes in the initial election. They appeared to be eligible to continue as choices on the run-off election ballot. The run-off election was delayed, however, due to the employer filing timely election

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[3] Case 18876-U-04-4797.

[4] Case 19842-E-05-3106.

[5] Local 6 did not disclaim the bargaining unit, but declined to be a ballot choice in the consolidated proceedings.

objections with the Commission. The employer later withdrew its objections. The employer and the two SEIU locals subsequently joined in an agreement to clear the way for conducting a run-off election. The run-off election was conducted on June 21, 2006.

The tally of the run-off election shows the following results:

Approximate number of eligible voters	507
Number of void ballots	6
Votes cast for Kirkland Public Employees Association	158
Votes cast for SEIU, Local 1199 NW	164
Valid ballots counted	322
Challenged ballots cast	12
Valid ballots counted plus challenged ballots	334
Number of ballots needed to determine election	168

The 12 challenged ballots are sufficient to affect the outcome of the run-off election. Two ballots were challenged by Local 1199 on the basis that the voters were no longer employees as of the date of the run-off tally. The other 10 ballots were challenged by the Commission because of questions concerning whether the voters qualified as regular part-time employees.

A hearing was held on the challenged ballots on September 27, 2006.[6] The sole focus of this decision is to resolve the chal-

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[6] The former Executive Director issued an Interim Order in this matter on October 31, 2006. The employer filed various objections to the Interim Order on November 3, 2006. Inasmuch as the current Executive Director has afforded no weight to the October 31st Interim Order, and is basing her decision solely upon the factual evidence in the record and legal precedent, the Interim Order is, in essence, vacated. Accordingly, it is not necessary to rule on the employer's objections to the Interim Order.

lenges to the 12 ballots cast by voters in the June 21, 2006, run-off election between the KPEA and Local 1199.

APPLICABLE LEGAL PRINCIPLES

Employment status -

In a run-off election, a voter is required to have status as an employee on the date of the tally. WAC 391-25-430(3). Local 1199 challenged the ballots of Janet Lewellen and Katherine Norman on the basis that neither voter was an employee of the hospital as of June 21, 2006.

The employer's personnel action request form (PAR) for Lewellen indicates that her termination date was June 22, 2006. Norman's PAR shows a termination date of June 24, 2006. After reviewing the PARs at the hearing, Local 1199 withdrew its challenges to the ballots cast by Lewellen and Norman. "Any party may withdraw a challenge previously made and, unless the eligibility of the voter is challenged by another party or by the election officer, the challenge shall be resolved." WAC 391-25-510. Because both of these voters held status as employees on the date of the run-off tally, their ballots are valid.

Regular part-time employees -

These parties are covered by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. With respect to the bargaining rights and bargaining unit status of employees who work less than full-time, the Commission's rules provide:

> WAC 391-35-350 UNIT PLACEMENT OF REGULAR PART-TIME EMPLOYEES -- EXCLUSION OF CASUAL AND TEMPORARY EMPLOYEES. (1) *It shall be presumptively appropriate to include regular part-time employees in the same bargaining unit with full-time employees performing similar work*, in order to avoid a potential for conflicting work jurisdic-

> tion claims which would otherwise exist in separate units. Employees who, during the previous twelve months, have worked more than one-sixth of the time normally worked by full-time employees, and who remain available for work on the same basis, shall be presumed to be regular part-time employees. . . .
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> (2) *It shall be presumptively appropriate to exclude* casual and temporary employees from bargaining units.
>
> (a) *Casual employees who have not worked a sufficient amount of time to qualify as regular part-time employees* are presumed to have had a series of separate and terminated employment relationships, so that they lack an expectation of continued employment and a community of interest with full-time and regular part-time employees.
>
> (b) *Temporary employees who have not worked a sufficient amount of time to qualify as regular part-time employees* are presumed to lack an expectation of continued employment and a community of interest with full-time and regular part-time employees.
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> (3) *The presumptions set forth in this section shall be subject to modification by adjudication.*

(emphasis added). One of the stated goals of that Commission rule is to avoid the potential for work jurisdiction conflicts which can accompany unnecessary fragmentation of bargaining units. *City of Seattle*, Decision 781 (PECB, 1979). If the employees who work less than full-time share common duties, skills and working conditions with the full-time employees, they must be included in the same bargaining unit unless they qualify for exclusion as "casual" or "temporary" employees.

Application of Standards to This Bargaining Unit -

There is no evidence in the record to overcome the presumption in WAC 391-35-350(1) that employees who work more than one-sixth of the time in a work year are regular part-time employees to be included in a bargaining unit with full-time employees. Therefore, the hours worked by each challenged employee in the relevant time period must be examined. One-sixth of full-time employment in this

bargaining unit translates to 16.67% of full-time hours or 346 hours per year.

The employer labels these challenged voters as "per diem" employees. There is no definition of a "per diem" employee in Chapter 41.56 RCW or the accompanying Washington Administrative Code. Commission precedent consistently speaks to regular part-time employees. Exclusion of regular part-time employees would lead to fragmentation, in contravention of well-established Commission precedent. *City of Auburn*, Decision 5775 (PECB, 1996); *Port of Seattle,* Decision 6672 (PECB, 1999); *Port of Vancouver,* Decision 6979 (PECB, 2000). Moreover, the Executive Director clearly expressed that although the term "per diem" had been accepted in stipulated unit descriptions in the past, "it is now the policy of this office to avoid use of that potentially-ambiguous term in directing elections or cross-checks." *Snohomish County Public Hospital District 2 (Stevens)*, Decision 6687 (PECB, 1999).

Eligibility Period -

The employer correctly argues that the 12-month period prior to the investigation conference is the appropriate period for eligibility determinations in this case. That investigation conference concluded on October 26, 2005. Pursuant to WAC 391-25-430, the parties were notified of this eligibility period in the Commission's May 25, 2006, Notice of Run-off Representation Election. No objections were raised at that time concerning the eligibility period.

Historical Bargaining Unit -

The recognition provision in the prior collective bargaining agreement between the employer and Local 6 provides:

> The Employer recognizes the Union as the sole and exclusive bargaining representative for all regularly scheduled full-time and regularly scheduled part-time clerical and service employees working in the classifications set forth in the wage schedule (Appendix A), excluding supervisors, confidential employees, temporary and on-call employees, students and other employees.

Thus, the historical bargaining unit includes regular part-time employees.

The employer advances that the above language has been interpreted by the parties as excluding "per diem" employees even though they might meet the Commission test for regular part-time employment. The employer further argues that the Commission, in accepting "settlement" language that cleared the way for the run-off election, essentially agreed that "per diem" employees were excluded. This assertion lacks validity as the language in that "settlement" agreement merely defines the unit as that historically represented by Local 6. Both the "settlement agreement" and the language in the collective bargaining agreement are silent with respect to "per diem" employees. Moreover, the parties' interpretation does not bind the Commission. It has long been established that, while parties may agree on unit issues, their agreements are not binding on the Commission.

Even if an employer and union agree on a unit description, the Commission has the legal duty to independently determine the propriety of the bargaining unit. In fact, on July 7, 2000, Local 6 filed a petition with the Commission seeking clarification of an existing unit of emergency room technicians employed by this employer. Echoing its position in the instant case, this employer and Local 6 proposed a stipulation that "per diem" and temporary employees had no community of interest with the bargaining unit,

had historically been excluded under the collective bargaining agreement covering the "service" unit, and therefore should be excluded from the bargaining unit.[7] The Executive Director rejected the parties' stipulation, stating: "Persons employed without benefit of a fixed work schedule have nevertheless been included in bargaining units as 'regular part-time' employees, where there has been a showing of repeated work assignments within a specified time period (*e.g.*, a week, month, quarter, year or other appropriate time period) and the employees have a reasonable expectancy of continued employment on a similar basis." *King County Public Hospital District 2 (Evergreen)*, Decision 7182 (PECB, 2000). The Executive Director properly applied the one-sixth full-time standard finding that "per diem" employees should be considered as "regular part-time" employees, thus specifically and soundly rejecting the parties' proposed stipulation to exclude "per diem" employees because it was contrary to Commission policy and precedent. Recent application of this principle can be found in *Central Washington University*, Decision 8127 (FCBA, 2003), where the Commission rejected a proposed stipulation that would have excluded a substantial number of part-time employees. *See also City of Seattle*, Decision 8562 (PECB, 2004). The Commission's one-sixth test is codified in WAC 391-35-350.

The employer further argues that WAC 391-25-210 precludes holding a decertification election in a unit that differs from the historical unit, as the parties are not statutorily permitted to

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[7] It should be noted that the recognition language in the parties' collective bargaining unit covered "all regularly scheduled full time and regularly scheduled part-time clerical and service employees..." Again, the unit description was silent with respect to per diem employees. Thus, this language is virtually identical to the language in the unit at issue.

remove positions from or add positions to the existing unit. As stated above, the employer's assertion that "per diem" employees were historically excluded from the bargaining unit is not supported by contractual language, but even *assuming arguendo* that such employees were historically excluded, such exclusion would not have been consistent with Commission precedent or law. Both parties were put on clear notice of that when they were prevented in 2000 from excluding "per diem" employees from a similar unit in *King County Public Hospital District 2 (Evergreen)*, Decision 7182. Furthermore, we are now confronted with a decertification petition and a petition for representation that were properly consolidated for election. It is incumbent upon the Commission to ensure that the bargaining unit is consistent with extant law. Thus, for eligibility purposes, it is proper that the one-sixth rule apply and those employees at issue who meet that test are eligible to vote.

Resolving the Challenges to the Part-Time Voters' Ballots - The ballot of any challenged voter who meets the definition of a regular part-time employee under WAC 391-35-350 during the eligibility period, and who remained employed by the employer on the day of the tally of the run-off election, shall be opened and tallied.

Kathleen Wandler worked 162 hours during the eligibility period; Marjorie B. West worked 241.25 hours during the eligibility period. Neither of these two voters meet the one-sixth test during the relevant time period and their ballots will not be counted.

Zainab Gaal, Aurora Pearson, and Michelle Wagner were unchallenged on the eligibility list for the original election. If they

continued to be employed by the employer on the day of the tally of the run-off election, their ballots will be opened and tallied.

The remaining five voters worked the following hours in the 12 months preceding October 26, 2005:

Name	Hours	%.of Full-time[8]
Juanita Aguilar	839	40%
Kyle W. Bailey	1232.5	59%
Crystal Larson	1121.5	54%
Bonnie Olvera	399.75	19%
Suzanne Robbins	446	21%

These five voters meet the test to be classified as regular part-time employees.

The employer is directed to submit employment records to establish whether Aguilar, Bailey, Gaal, Larson, Olvera, Pearson, Robbins, and/or Wagner were employed on June 21, 2006, the day of the tally.

NOW, THEREFORE, it is

ORDERED

1. The challenges to the ballots of Janet Lewellen and Katherine Norman are resolved and their ballots will be opened and counted.

2. The employer is ordered to produce, within 14 days of the date of this decision, payroll records for the date of June 21,

[8] For the purposes of this calculation, one-sixth of full-time employment (2080 hours) is 16.7% or 346 hours.

2006, setting forth the employment status of Juanita Aguilar, Kyle W. Bailey, Zainab Gaal, Crystal Larson, Bonnie Olvera, Aurora Pearson, Suzanne Robbins, and Michelle Wagner.

3. Kathleen Wandler and Marjorie B. West did not work one-sixth of full-time hours during the eligibility period. Neither of their ballots will be tallied.

4. The ballots where the challenges are resolved shall be opened and counted on Tuesday, February 20, 2007, at the Commission's Olympia, Washington office, and an amended tally shall be issued to the parties.

Issued at Olympia, Washington, on the 2nd day of February, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

CATHLEEN CALLAHAN, Executive Director

This order may be appealed by filing timely objections with the Commission under WAC 391-25-590.