

unit.² On January 16, 2007, the parties jointly filed stipulations regarding the summer food service delivery workers, agreeing to exclude them from the unit. Executive Director Cathleen Callahan declined to make a ruling based only on the stipulations. Hearing Officer Emily Martin conducted an evidentiary hearing on May 14, 2007. On June 28, 2007, the employer supplemented the record with information that was not available at the hearing. The parties did not file post-hearing briefs.

ISSUE PRESENTED

The issue before the Executive Director is whether the summer food service workers should be excluded from the certified bargaining unit of delivery workers?

The Executive Director finds the food service worker positions are excluded because they do not have a reasonable expectancy of ongoing employment with this employer.

APPLICABLE LEGAL PRINCIPLES

The Legislature has delegated the determination of bargaining units to the Commission. RCW 41.56.060. Even if an employer and a union agree on unit description issues, this agreement is not binding and the Commission has the legal duty to independently determine the propriety of the proposed bargaining unit. *City of Seattle*, Decision 8562 (PECB, 2004). The Commission does not knowingly certify a bargaining unit that inappropriately excludes eligible employees. For example, in *City of Seattle*, the parties would have agreed to exclude seasonal employees from a proposed bargaining

² *City of Seattle*, Decision 9385 (PECB, 2006).

unit, but the Executive Director dismissed the petition for representation because the seasonal employees should have been included in the unit as they were indistinguishable from the other unit employees.

The Commission has interpreted the legislative intention of the term "employee" in collective bargaining statutes to apply only to persons who have a reasonable expectancy of an ongoing employment relationship with the particular employer. *City of Auburn*, Decision 4880-A (PECB, 1995). Students can fall within this definition when the purpose of their work is to earn wages, rather than a purpose that is directly related to their academic studies. *METRO*, Decision 2986 (PECB, 1988). However, even students who are working to earn wages can be excluded from bargaining units if they are temporary or casual employees. Excluding temporary employees from bargaining units is presumably appropriate under WAC 391-35-350.

Typically, employees who work less than one-sixth of the amount of time normally worked by full-time employees are considered to be casual employees. WAC 391-35-350(1). This rule is known as the "one-sixth test." In a prehearing conference, the parties in this case notified the Hearing Officer that the food service delivery workers worked more than one-sixth of the hours of full-time employees and so the summer food service delivery workers are not casual employees under the one-sixth test.

While the Commission's rules generally exclude temporary and casual employees from bargaining units under WAC 391-35-350, seasonal employees have been included when they have an expectancy of continuing employment. *City of Seattle*, Decision 8562. That expectancy is determined by considering factors such as the rate of return of the employees from year to year, and whether the seasonal

employees are distinguishable from the other employees in the bargaining unit. *City of Seattle*, Decision 8562; *City of Auburn*, Decision 4880-A.

In two cases which determined whether seasonal employees are excluded from bargaining units, similar standards were considered. In *City of Seattle*, Decision 8562, Executive Director Marvin Schurke found a proposed unit of cashiers in a parks department to be inappropriate because it excluded seasonal cashiers who worked more than one-sixth of the time of full-time employees. The Executive Director found that the class specifications were the same for cashiers regardless of seasonality, all of the cashiers had common supervision and working conditions, the workforce of the parks department and the number of cashiers who met the one-sixth test remained stable year to year, and many of the seasonal cashiers returned from year to year.

In *City of Auburn*, Decision 4880-A, the Commission applied similar standards in evaluating students who worked seasonally. The Commission determined that high school students who worked summer jobs in a city's parks department did not fit within the definition of employees. The Commission's analysis relied on the facts that the students did not possess the requisite skills for full-time work, the students did not become regular full-time employees of the employer, and a substantial majority of the students did not work more than one employment cycle.

APPLICATION OF THE STANDARDS

The employer's summer food service program is a local component of the United States Department of Agriculture's program that funds summertime meals for children who qualify for free or reduced price

school lunches. The Seattle School District administered the local program until some years ago when this employer agreed to assume its administration. Currently, the meals are prepared by the school district and the employer's role includes providing the staff and vehicles to transport the meals to locations such as summer schools and day camps where the meals are served to the children.

The food service program is a part of the employer's Human Service Department. The program has one full-time, year-round supervisor and a summer seasonal staff. The seasonal staff includes an assistant supervisor, site managers and delivery workers. The employer fills the site manager and delivery worker positions with college students whom the employer recruits through the financial aid offices of local colleges. Each year, all of the positions are filled through this recruitment process and prior food service delivery workers must reapply if they would like to return for a second summer. The positions are offered as summer jobs for students who have work study awards. Work study awards are given to college students who qualify for financial aid for their tuition and expenses. Local colleges allow the employer to use the work study awards to subsidize about eighty percent of the wages for work study students who work in the summer food service program. Beverly Yapp of the employer's Human Service Department testified that in order to reduce costs, the employer only hires college students with work study awards.

Yapp testified that the food service delivery workers are hired knowing that in the final weeks of August, their hours may be reduced from a full-time schedule to a part-time schedule because of an annual reduction in the delivery schedule. Yapp also testified that the food service delivery workers are hired knowing

that the last day of the delivery work can vary from year to year but the delivery work will end completely near the end of August. Yapp's testimony demonstrates that the food service delivery workers would have the expectation that they were hired for summer jobs, and not year-round positions.

Purpose of the Work

All of the food service delivery workers are students and students can be properly excluded from bargaining units because of the purpose of their work. If the students' primary purpose of doing the work is their academic studies, rather than wages, then the students should be excluded from the bargaining unit. *METRO*, Decision 2986 (PECB, 1988). Yapp testified that the food service delivery workers have several purposes for doing the work. She testified that the work study program is a "training" program that provides work experience for college students. The record does not show that Yapp is knowledgeable about the overall purpose of the work study program and so Yapp's assertion that the purpose of work study is to provide training is not persuasive evidence. Yapp also testified that the food service delivery workers could have chosen higher paying summer jobs instead of the food service program. The delivery work starts later and ends earlier than other summer work study opportunities and so the delivery worker position had comparatively fewer hours. Yapp testified that the delivery workers' decision to do the work involved non-monetary considerations. No testimony was introduced from students that would support Yapp's assertions.

In considering these points, the Executive Director concludes that the record, including Yapp's testimony, is insufficient to show that the summer food service delivery workers should be excluded from the bargaining unit on the basis that the students are

primarily doing the work as part of their education. The connection between their studies and the work is too remote.

Temporary Employment

The food service delivery workers can be excluded from the bargaining unit if they are temporary employees. Under WAC 391-35-350, excluding temporary employees from the bargaining unit is presumptively appropriate. The employer argued that the food service delivery workers should be considered temporary employees as their employment is terminated when work study grants no longer subsidize their salaries.

Marion White of the employer's Personnel Department testified about the restrictions of the work study grants. College students' ability to receive work study awards depends on their financial aid status. This status can change and a grant can be revoked. Also, work study grants have limitations. For example, the grant can only be used for work performed during a set award period, such as a semester or a summer, and the size of the grant is limited to a specific dollar amount. The employer argued that the food service delivery workers who are partially paid with work study grants should be excluded from the collective bargaining units because of the limits of the grants and because the work study grants expire or can be revoked.

The Commission typically does not consider grant funding as a basis for excluding individuals from having collective bargaining rights. An individual's expectancy of an ongoing employment relationship is not necessarily precluded because the individual is working in a position partially funded with a work study grant, because even if an employee is hired as part of a work study program, the overall employment circumstances might lead to an expectation of continuing

employment. Therefore, the Executive Director does not adopt the employer's rationale in excluding the food service delivery workers from the unit on the basis that they are temporary employees.

Seasonal Employment

In a case where some students returned for more than one season of work, the Commission has applied more of a seasonal employment analysis than a temporary employee analysis. *City of Auburn*, Decision 4880-A. In the *City of Auburn* decision, the Commission ruled that high school students working summer jobs in a city's parks department were excluded from a bargaining unit because they did not have a continuing expectancy of employment. The students in *City of Auburn* lacked a continuing expectancy of employment because they did not have the necessary skills for full-time work, they did not become regular full-time employees of the employer, and a substantial majority did not work more than one summer.

Like *City of Auburn*, this employer's food service delivery workers do not later become regular full-time employees of the employer. In *City of Auburn*, the students were found not to have the necessary skills for full-time regular work. In the present case, a comparison of the job qualifications show that a person hired to do food service delivery work would not necessarily qualify for the other delivery positions. The regular delivery workers must be able to lift fifty pound packages and have a year of work experience. In contrast, the food service delivery workers only need to be able to lift ten pounds and they are not required to have prior work experience. The food service delivery workers have a higher return rate than the students who worked in the summer jobs discussed in the *City of Auburn* decision but, like those students, less than a majority returned for more than one summer. In *City of Auburn*, thirty percent of the students returned for a second or

third summer; here, fifty percent return.³ However, this difference in the rate of return is not significant enough to lead to a different result than the result in *City of Auburn*. In general, the number of food service delivery worker positions has been declining from year to year and so it is problematic to place a heavy reliance on the rate of return. The rate of return might have been lower than if the number of positions had remained steady.

More recently than the *City of Auburn* decision, seasonal employees were analyzed in *City of Seattle*, Decision 8562. In finding that a proposed unit of cashiers was inappropriate, the Executive Director explained that the class specifications were the same regardless of seasonality, all of the cashiers had the common supervision and working conditions, the workforce remained stable, and many of the seasonal cashiers returned from year to year. In the present case, many of these factors are different. The work of the food service delivery workers is very different from the other delivery workers employed by this employer. The food service delivery workers package and deliver meals to summer youth programs throughout King County. The other delivery workers deliver mail, office supplies, copy orders, and records to city departments. The food service workers are part of a team working to provide a specific social service, while the employer's other delivery workers support various departments of the employer.

³ This percentage is based on information provided in a document submitted by the employer into the record after the hearing. In this document, four of the eight food service delivery workers, who worked during the summer of 2003, 2004, and 2005, worked more than one summer. One of these individuals worked for three summers.

The job qualifications also demonstrate differences in the two kinds of delivery work. As stated above, the regular delivery workers are required to lift heavier packages and have more work experience. In contrast, food service delivery workers' job qualifications include having a summer work study grant, experience with record keeping and working with diverse populations, and the ability to work as part of a team and to communicate effectively. The food service delivery workers are supervised by the supervisor of the food service program and so they have different supervision from the employer's other delivery workers. The number of food service delivery workers has not remained stable from year to year, as the food service program decreased the number of delivery workers because of fiscal constraints. Also, the food service delivery workers do not have a high rate of return from year to year. Approximately half of the food service delivery workers have worked for more than one summer, but the other half of these workers have only worked a single summer.

CONCLUSION

In total, the record supports a finding that the food service delivery workers do not have a reasonable expectancy of continued employment with this employer, have different requirements and working conditions than other delivery workers, and thus they are appropriately excluded from the bargaining unit.

FINDINGS OF FACT

1. The City of Seattle is a "public employer" within the meaning of RCW 41.56.030(1).

2. The Laborers Union, Local 1239, a "bargaining representative" within the meaning of RCW 41.56.030(2), is the exclusive bargaining representative of certain employees of the employer.
3. On July 14, 2006, the Public Employment Relations Commission issued an interim certification, in the following bargaining unit:

All full-time and regular part-time delivery workers of the City of Seattle, excluding supervisors, confidential employees and all other employees.
4. The employer administers a summer food service program that provides meals for children who qualify for free or reduced school lunches.
5. The employer employs college students with work study grants to deliver these meals to schools and summer programs within the community.
6. The summer food delivery positions have different qualifications, supervision, and working conditions than the other delivery workers in the bargaining unit.
7. The employer's other delivery workers are employed year-round to deliver mail, office supplies, copy orders, and records to city departments.
8. The food service delivery workers only work during the summer months and the length of employment periods varies from year to year.

9. Approximately half of the food service delivery workers have worked for more than one summer, but the other half of these workers have only worked a single summer.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-35 WAC.
2. The summer food service delivery workers lack the expectancy of a continued employment relationship necessary to be considered "public employees" under RCW 41.56.030(2), and so are therefore appropriately excluded from the bargaining unit represented by Laborers Union, Local 1239.

ORDER

The summer food service delivery workers are excluded from the bargaining unit of delivery workers represented by Laborers Union, Local 1239.

Issued at Olympia, Washington, this 14th day of September, 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.