Washington State University, Decision 9613 (PSRA, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
WASHINGTON FEDERATION OF STATE EMPLOYEES	)	CASE 20349-E-06-3145
	)	
Involving certain employees of:	)	DECISION 9613 - PSRA
	)	
WASHINGTON STATE UNIVERSITY	)	ORDER DETERMINING ELIGIBILITY ISSUES
	)	

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

Rob McKenna, Attorney General by *Patricia A. Thompson*, Assistant Attorney General, for the employer.

On April 20, 2006, the Washington Federation of State Employees (union) filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission (Commission), seeking certification as the exclusive bargaining representative of a newly established bargaining unit at Washington State University (employer). The petitioned-for bargaining unit would be comprised of nonsupervisory employees of the Dining Services Department. A formal hearing on the matter was held on October 10, 2006, before Hearing Officer Terry N. Wilson, and the parties filed post-hearing briefs on December 29, 2006.

ISSUES PRESENTED

The issues before the Executive Director are as follows:

1. Whether the petitioned-for unit is an appropriate unit in conformity with RCW 41.80.070?

2. Whether two employees identified as Bessie Hull and Sindy Zerbe should be excluded from the proposed unit on the basis that they are supervisors?

3. Whether there exists any part-time employees who have worked more than 350 hours in the last twelve months who can be included in the proposed bargaining unit?

On the basis of the record as a whole, the Executive Director finds that the petitioned-for bargaining unit is appropriate under RCW 41.80.070. The Executive Director also finds that the inclusion of Bessie Hull and Sindy Zerbe in the proposed bargaining unit is appropriate because they do not supervise any rank-and-file employees. There is not sufficient evidence, however, to determine if any part-time employees exist who should be included in the petitioned-for bargaining unit. Within 10 days of the issuance of this decision, the Executive Director orders the employer to produce payroll records for John Crotteau, Chris Herdering, Jakob Sommerfield, Fred Beddingfield, and all other part-time employees in the Dining Services Department, showing the hours worked for the 12-month period immediately preceding the date this decision is issued.

APPLICABLE LEGAL PRINCIPLES

The Personnel System Reform Act of 2002 (PSRA) was passed by the Washington State Legislature and signed into law in 2002, with various effective dates. RCW 41.80.050 protects the right of state civil service employees to select their representation for the purposes of collective bargaining. The authority to determine bargaining units and the authority to certify exclusive bargaining representatives was transferred to the Public Employment Relations

Commission by amendments to RCW 41.06.340 that took effect on June 13, 2002. RCW 41.80.070, which gives the Commission the authority to determine appropriate bargaining units, took effect on July 1, 2004, and provides, in part:

> RCW 41.80.070. BARGAINING UNITS — CERTIFICATION. (1) A bargaining unit of employees covered by this chapter existing on June 13, 2002, shall be considered an appropriate unit, unless the unit does not meet the requirements of (a) and (b) 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.

Under the PSRA, a bargaining unit is not considered appropriate if that unit includes both supervisors and nonsupervisors. RCW 41.80.070(1)(a). The PSRA defines "supervisor" as an employee who has the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, or to adjust employee grievances, or effectively to recommend such action, if the exercise of the authority is not of a merely routine nature but requires the consistent exercise of individual judgment. RCW 41.80.005(13). When interpreting and administering the provisions of the PSRA, interpretations of similar statutory language in other statutory schemes administered by the Commission, such as the Public Employees' Collective Bargaining Act, are persuasive. *State - Natural Resources*, Decision 8458-B (PSRA, 2005).

Supervisor determinations are based on the actual duties and authority exercised by the individual. *Morton General Hospital*, Decision 3521-B (PECB, 1991). An important factor in determining such issues is whether the position has independence and authority to perform, in the interest of an employer, a preponderance of the supervisory tasks listed in RCW 41.59.020(4)(d). *Seattle School District*, Decision 2380-A (PECB, 1988). Job descriptions and job titles do not necessarily indicate actual duties or authority. *Snohomish Health District*, Decision 4735-A (PECB, 1995).

WAC 391-35-356 articulates which part-time employees are eligible for inclusion in a bargaining unit. That rule reads as follows:

> WAC 391-35-356 SPECIAL PROVISION -- STATE CIVIL SERVICE EMPLOYEES. (1) For employees covered by chapter 41.06 RCW who work less than full-time, it shall be presumptively appropriate to include those employees in the same bargaining unit with full-time employees performing similar work.
>
> (2) The presumption set forth in this section is intended to avoid excessive fragmentation and a potential for conflicting work jurisdiction claims which would otherwise exist in separate units of full-time and less than full-time employees.
>
> (3) The presumption set forth in this section shall be subject to modification by adjudication.

Under the *University of Washington*, Decision 8392 (PSRA, 2004), the Commission recognized this inclusion to include part-time workers who worked more than 350 hours in a consecutive twelve month period. *See also* WAC 357-04-045.

The Commission has the authority to certify exclusive bargaining representatives under RCW 41.80.080, which took effect on July 1, 2004, and provides:

> RCW 41.80.080 REPRESENTATION -- ELECTIONS -- RULES. (1) The commission shall determine all questions pertaining to representation and shall administer all elections and be responsible for the processing and adjudication of all disputes that arise as a consequence of elections.

ISSUE ONE: APPROPRIATENESS OF BARGAINING UNIT

At the beginning of 2004, the union and the employer were in contract negotiations for a collective bargaining agreement that was to take effect July 2005 through June 2007. At the time of negotiations, the union represented seven different bargaining units at the university, including Bargaining Unit 2 nonsupervisors (Unit 2), Bargaining Unit 9 (Unit 9), and Bargaining Unit 10 (Unit 10). The community of interest among bargaining unit members in Unit 2 was that unit members provided direct services to students. Accordingly, Unit 2 was comprised of diverse positions, including food service workers, custodians, groundsmen, locker room attendants, and cooks. Unit 9, in comparison, was comprised of clerical workers while Unit 10 was comprised of miscellaneous supervisors and administrative assistants.

By September 2004, the union and the employer had reached agreement at the table regarding a successor collective bargaining agreement. Membership, however, failed to ratify the agreement. Eventually, two bargaining units represented by the union ratified the agreement while Unit 2, Unit 9, and Unit 10 petitioned the Commission to decertify the union as its exclusive bargaining representative. The union disclaimed interest in representing the bargaining units, and the Commission granted the decertification in April 2005.

The union now petitions the Commission to represent all full-time and regular part-time nonsupervisory classified employees in the

Dining Services Department of the university. The petition also specifically requests the inclusion of all hourly employees who work over 350 hours in any 12 consecutive months. It is noted that many, if not most, of the positions listed in the petitioned-for unit, were included in Unit 2 while a few of the positions listed were a part of Unit 9 and Unit 10. Two job classes listed in the petition did not have prior representation by the union: retail clerks and snack bar leads. None of the employees or job classes listed in the petition currently have union representation.

Community of Interest: Duties, Skills, and Working Conditions

The employer asserts that the proposed unit is not appropriate because it does not meet the "community of interest" criteria established by Commission precedent. Those criteria include duties, skills, and working conditions of unit members; history of collective bargaining; the extent of organization among the employees; and the desires of the employees. In terms of duties, skills, and working conditions, the employer states that the proposed bargaining unit, which would only represent employees involved in dining services for students, is too narrow in scope. Commission precedent, the employer argues, has determined that employees should be placed in broader occupational groupings without regard to particular details of the work performed or customers served. Thus, dining services should be placed in a bargaining unit that also includes job classifications which generally provide direct services to students such as the Housing Services Department and the Facility Services Department. In essence, the employer argues that a horizontal unit, which encompasses employees in a specific occupational type, is more appropriate than the vertical unit proposed by the union.

The employer misconstrues the scope of prior Commission rulings which determined that it is appropriate to look at broader

similarities among workers in a bargaining unit. Commission precedent has deemed that the Commission may, in certain circumstances, look to broad similarities among job classifications when making unit determinations. The Commission has not ruled, however, that a bargaining unit must always have the broadest similarities possible among job classes. The bargaining unit does not have to be the most appropriate unit. Where appropriate, a bargaining unit can include employees with a more narrow band of similarities. In making unit determinations, the Commission seeks to group together employees who have sufficient similarities (community of interest) to indicate that they will be able to bargain collectively with their employer. *King County*, Decision 5910-A (PECB, 1997). The law does not require a determination of the most appropriate bargaining unit. It is only necessary that the petitioned-for unit be an appropriate unit. *City of Winslow*, Decision 3520-A (PECB, 1990). In addition, Commission precedent supports the creation of vertical units, where all the employees in a specific department or branch of an employer's organization form a bargaining unit. *Grant County Public Hospital District 2*, Decision 7558 (PECB, 2001).

In the present case, the Executive Director finds that the job classifications in the proposed bargaining unit share similar duties, skills, and working conditions. The job classifications not only fall under the same general direction of the vice president for business affairs, but they work in similar settings and have similar skill sets. In addition, the job classes share the common goal of providing dining services to students.

Community of Interest: Extent of Organization

Concerns about "extent of organization" generally relate to the number and complexity of contracts to be negotiated and administered within an employer's workforce. The Commission has a long-standing policy of avoiding unnecessary fragmentation of the

workplace into multiple bargaining units, and very small units are discouraged where the positions can properly be included in broader bargaining units. Unit structures have also been found inappropriate when they bifurcate an employer's workforce in a manner that creates a potential for work jurisdiction conflicts. *King County*, Decision 5910-A (PECB, 1997).

The employer in the present case argues that the extent of organization does not support the bargaining unit proposed by the union. According to Steve DeSoer, director of Human Resources for the employer, the proposed bargaining unit would consist of less than 50 members. Certifying a unit of this size could have a ripple effect. With approximately 1800 nonrepresented classified employees, the employer could find itself negotiating with a multitude of units in the future. Dueling or competing classification systems, differentiated pay scales, and different rates of overtime among the Housing Services Department, Dining Services Department, and Facilities Services Department could result.

The Executive Director finds that the extent of organization supports the bargaining unit as proposed by the union. The union seeks to establish an all-inclusive bargaining unit in the Dining Services Department. There is no evidence that the unit as proposed would result in any work jurisdiction conflicts between Dining Services employees and employees from other departments. Moreover, the record does not support that by establishing the proposed unit labor-management relations would unravel or employees would be stranded or left without bargaining rights.

The Executive Director notes that there is a potential for other vertical or departmental bargaining units. The record does not establish that excessive fragmentation or excessive costs for the employer would occur as a result of granting dining room employees

their rights to be represented. Moreover, this concern must be weighed against the right of employees to freely form a bargaining unit and choose representation of their choice. The Commission places a high regard on this right. If one were to follow the employer's logic, members of the proposed bargaining unit would be left without representation until they organized as dictated by the employer.

Community of Interest: History of Bargaining

Historically, Unit 2 consisted of employees who provided direct services to students from an array of departments such as Dining Services, Facility Services, and Housing Services. The bargaining unit proposed by the unit reflects a more narrow community of interest, those classifications which provide dining services. The history of bargaining, the employer argues, does not support the certification of the proposed bargaining unit. The employer also argues that the union should not be allowed to represent a smaller unit carved out of a bargaining unit in which it disclaimed interest.

As noted by the union, unit descriptions cease to exist following decertifications. Different bargaining unit configurations can later be found to be appropriate. The Executive Director finds that the history of bargaining does not present a bar to the proposed unit.

Community of Interest: Desires of Employees

The "desires of employees" is only significant if two or more appropriate bargaining unit configurations are being proposed by competing labor organizations. Because the "desires" of employees concerning the configuration of bargaining units can be closely aligned with the employees' views on representation, and because employees have a statutory right to the protections of a secret

ballot election or a confidential cross-check with regard to their choice of a bargaining representative, the Commission does not take testimony or subject employees to cross-examination on such matters. WAC 391-25-420. Thus, the Commission only assesses "desires of employees" by conducting unit determination elections under the laboratory conditions associated with secret ballot elections. *Pierce County*, Decision 7018-A (PECB, 2001).

Community of Interest: Summary

There are sufficient similarities in the duties, skills, and working conditions among the employees in the petitioned-for unit to indicate that they will be able to bargain effectively. The extent of organization and history of bargaining will not adversely impact future labor-management relations. Therefore, the Executive Director finds that there exists a sufficient community of interest among the job classifications to deem the petitioned-for unit appropriate under RCW 41.80.070.

ISSUE TWO: EXCLUSION OF ZERBE AND HULL

Bessie Hull is an office support supervisor in the Dining Services Department. As part of her job duties, she supervises a number of students in the cashiering program. Hull testified that she directs students, recommends hiring specific students, and advises disciplinary actions against students. She also provided testimony that she coordinates the functions of student cashiers, student managers, and the student office staff person. Presently, she does not supervise any classified staff. The last time Hull supervised a classified employee was at least five years ago.

Sindy Zerbe is a program support supervisor I at the Dining Services Department. Although she was issued a subpoena, Zerbe did

not appear for the hearing or provide any testimony. The record, however, reflects that her job duties include the following:

> With delegated authority, interview and recommend selection of applicants, train new employees, assign and schedule work, act upon leave requests, conduct annual performance evaluations and recommend disciplinary action.

In addition, the job description of her position states that, as a program support supervisor I, Zerbe trains and directs students. The record does not indicate she has any supervisory authority over classified employees.

The employer asserts that the duties of Hull and Zerbe conform to the statutory definition of supervisor as stated RCW 41.80.005(13):

> "Supervisor" means an employee who has the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, or to adjust employee grievances, or effectively to recommend such action, if the exercise of the authority is not of a merely routine nature but requires the consistent exercise of individual judgment.

Hull and Zerbe, the employer argues, should be excluded from the proposed bargaining unit in conformity with RCW 41.80.070(a), which states that a bargaining unit is not appropriate if it includes both supervisors and rank-and-file employees.

The intent behind keeping supervisors in separate bargaining units from rank-and-file employees is to promote and foster smooth labor-management relations. Having supervisors and those they supervise in the same bargaining unit creates a definite potential for conflict among bargaining unit members. For example, rank-and-file employees may feel stifled in expressing themselves or advocating

for their rights in the bargaining process when they are in the same bargaining units as their supervisors. Such conflict is adverse to harmonious and fruitful labor relations.

Preservation of employee collective bargaining rights, including the right to representation, is a concept the Commission highly values. Taking away collective bargaining rights is not done lightly. *International Association of Fire Fighters v. City of Yakima*, 91 Wn.2d 101 (1978); *Zylstra v. Piva*, 85 Wn.2d 743 (1975). The Commission imposes a heavy burden of proof on a party proposing an exclusion where that exclusion deprives an individual of collective bargaining rights. *City of Seattle*, Decision 689-A (PECB, 1979).

In the present case, the Executive Director finds that employer has not met its burden of proof to establish that the inclusion of Hull and Zerbe within the proposed bargaining unit is inappropriate. The record reflects that Hull and Zerbe only supervise students. The proposed bargaining unit would not include students. RCW 41.80.005 specifically pertains to only those employees who are covered by Chapter 41.06 RCW. RCW 41.06.070 specifically excludes students. Thus, by including Hull and Zerbe within the proposed unit, no potential conflict would result. Employees in the proposed bargaining unit, it is noted, are currently supervised by the vice president for business affairs.

It is also noted that Hull, according to her job description, may supervise the office assistant II position. Hull, however, testified that she has not supervised a classified employee in at least five years. She presently supervises students. In making unit determinations, the Commission evaluates each position as it presently is. *Morton General Hospital*, Decision 3521-B (PECB, 1991). The Commission does not evaluate the position on the basis of what job duties the position may acquire in the future.

ISSUE THREE: INCLUSION OF PART-TIME EMPLOYEES

Bessie Hull, who is responsible for payroll, testified that there are four hourly employees in the Dining Services Department who worked more than 350 hours in the last 12 months. These employees include: John Crotteau, Chris Herdering, Jakob Sommerfield, and Fred Beddingfield. The union asserts that these employees should be included in the bargaining unit because they meet the statutory criteria concerning the inclusion of hourly employees in bargaining units.

The employer asserts that there is no sufficient evidence that the employees listed worked more than 350 hours in the last year. To date, payroll records were not made available. The Commission, the employer avers, cannot make a reasonable determination regarding the status of hourly employees without accurate and detailed evidence. The Executive Director finds that, to date, there is not sufficient evidence regarding which hourly employees should be included in the proposed bargaining unit. The Executive Director orders that the employer produce, within 10 days of the issuance of this decision, payroll records for John Crotteau, Chris Herdering, Jakob Sommerfield, Fred Beddingfield, and all other part-time employees in the Dining Services Department, showing the hours worked for the 12-month period immediately preceding the date this decision is issued.

FINDINGS OF FACT

1. Washington State University (employer) is a state institution of higher education within the meaning of RCW 41.80.005(10).

2. Washington Federation of State Employees (union) is an employee organization within the meaning of RCW 41.80.005(7).

Before April 2005, the union represented seven different bargaining units at the university, including Bargaining Unit 2 nonsupervisors (Unit 2), Bargaining Unit 9 (Unit 9), and Bargaining Unit 10 (Unit 10).

3. The union claimed disinterest in Unit 2, Unit 9, and Unit 10 in April 2005.

4. The union filed a petition in April 2006 with the Public Employment Relations Commission to represent all full-time and regular part-time nonsupervisory classified employees in the Dining Services Department of the university. Most of the positions listed were previously in Unit 2, Unit 9, and Unit 10.

5. Under RCW 41.80.070, when determining new bargaining 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.

6. There are sufficient similarities in the duties, skills, and working conditions among the employees in the proposed unit to indicate that they will be able to bargain effectively. The extent of organization and history of bargaining will not adversely impact future labor-management relations.

7. RCW 41.80.070(1)(a) states a bargaining unit is not considered appropriate if that unit includes both supervisors and non-supervisors.

8. Bessie Hull is an office support supervisor in the Dining Services Department. Sindy Zerbe is a program support supervisor I in the Dining Services Department. Hull and Zerbe supervise students and do not presently supervise classified employees.

9. Students are excluded from the proposed bargaining unit.

10. Under WAC 391-35-356 and WAC 357-04-045, it is appropriate to include part-time employees who work more than 350 hours in a consecutive 12-month period within a bargaining unit.

11. Bessie Hull, who is responsible for payroll, testified that she knew of four employees who worked more than 350 hours in a consecutive 12-month period. Specific documents including payroll were not provided as evidence to indicate which part-time employees were eligible to join the proposed unit under WAC 391-35-356 and WAC 347-04-045.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under RCW 41.80.080 and Chapter 391-35 WAC.

2. The proposed unit, comprised of full-time employees in the Dining Services Department and regular part-time employees at the university, is appropriate under RCW 41.80.070.

3. The inclusion of Hull and Zerbe within the proposed bargaining unit is appropriate under RCW 41.80.070(1)(a).

4. There is not sufficient evidence to determine whether there are part-time employees eligible to be included in the

proposed bargaining unit in accordance to WAC 391-35-356 and WAC 347-04-045.

ORDER

1. The bargaining unit shall be comprised of nonsupervisory employees of the Dining Services Department, including regular part-time employees who have worked more than 350 hours in a consecutive 12-month period.

2. The employer is ordered to produce, within 10 days of the date of this decision, payroll records for John Crotteau, Chris Herdering, Jakob Sommerfield, Fred Beddingfield, and all other part-time employees in the Dining Services Department, showing the hours worked for the 12-month period immediately preceding the date this decision is issued.

Issued at Olympia, Washington, this 21st day of March, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Cathleen Callahan

CATHLEEN CALLAHAN, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-25-660.