STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
WASHINGTON STATE COUNCIL OF CITY AND COUNTY EMPLOYEES, COUNCIL 2	)	CASE 14255-C-98-919
	)	
For clarification of an existing bargaining unit of employees of:	)	DECISION 6921 - PECB
	)	
	)	RULING ON MOTION
BENTON-FRANKLIN CRISIS RESPONSE	)	FOR DISMISSAL
	)	
	)	

Timothy L. Liddiard, Staff Representative, appeared on behalf of the union.

Menke, Jackson, Beyer & Elofson, by David A. Elofson, Attorney at Law, appeared on behalf of the employer.

On November 23, 1998, the Washington State Council of City and County Employees, Council 2, AFSCME, AFL-CIO (WSCCCE) filed a petition for clarification of an existing bargaining unit under Chapter 391-35 WAC, seeking a ruling concerning the eligibility of one position for inclusion in an existing bargaining unit represented by the union at the Benton-Franklin Crisis Response operation.

A hearing on the matter was opened on July 27, 1999, before Hearing Officer Rex L. Lacy. At the outset of the hearing, the employer requested that the petition be dismissed on the basis that it was not timely filed under WAC 391-35-020(b). The Hearing Officer took evidence on both the employer's motion and the underlying unit question. The parties submitted post-hearing briefs on the motion for dismissal of the petition.

After reviewing the evidence and legal arguments, the Executive Director concludes that the petition was not timely filed.

BACKGROUND

The Benton-Franklin Crisis Response operation is a joint venture of Benton County and Franklin County, providing responses to mental and substance abuse crises within the two counties. The operation is divided into two departments: One deals with drug abuse situations; the other deals with medical and emotional problems. Both of those departments have employees working under the title of "Office Assistant III" (OA III).

The WSCCCE is the exclusive bargaining representative of the employees working in the Benton-Franklin Crisis Response operation. The bargaining unit was described in the parties' 1995-1997 collective bargaining agreement, at Article 1 - RECOGNITION, as follows:

> The employer recognizes the union as the exclusive bargaining agent for certain Crisis Response Unit employees as certified by the Public Employment Relations Commission. The employer and the union agree the bargaining unit shall be defined as follows:
>
> INCLUDED: Full-time and regular part-time **employees of the Crisis Response Unit** example of which are Crisis Mental Health Nurse, Children's Resource Coordinator, County Designated Mental Health Professional, Crisis Counselor, Office Assistant III, Crisis Case Manager, ITA Coordinator, and Crisis Stabilization Aide. ...
>
> EXCLUDED: Crisis Response Manager. **Office Assistant III in any other unit** or department, Crisis Response Supervisor, Human Services

> Director, Human Services Manager, MIS Manager, Financial Administrator, Administrative Assistant, Human Services Planner, Program Monitor, Region Planner, Program Specialist, Prevention Specialist, QIP Specialist, Substance Abuse Specialist, Chemical Dependency Assessment Supervisor, CDA Counselor, Office Assistant IV, Senior Secretary, supervisors, confidential employees, temporary /seasonal employees and all other employees of the employer.

[Emphasis by **bold** supplied.]

In September of 1997, the parties entered into negotiations for a successor agreement. Negotiations and mediation continued until November of 1998, when the union notified the employer that it had ratified the employer's settlement proposal. The employer then ratified the contract proposal, and both parties signed the successor agreement on November 20, 1998.

On November 23, 1998, the union filed the petition to initiate this unit clarification proceeding. It seeks to have the OA III position in the substance abuse section included in the bargaining unit.

DISCUSSION

The Applicable Rule

The time for filing unit clarification petitions under Chapter 391-35 WAC is specifically regulated, as follows:

> WAC 391-35-020 PETITION--TIME FOR FILING. (1) Disputes concerning status as a "confidential employee" may be filed at any time.
>
> (2) **Where there is a valid written and signed collective bargaining agreement in**

> **effect,** a petition for clarification of the covered bargaining unit filed by a party to the collective bargaining agreement will be considered **timely only if:**
>
> **(a) The petitioner can demonstrate, by specific evidence, substantial changed circumstances during the term of the collective bargaining agreement** which warrant a modification of the bargaining unit by the inclusion or exclusion of a position or class; **or**
>
> (b) The petitioner can demonstrate that, although it signed the current collective bargaining agreement covering the position or class at issue in the unit clarification proceeding;
>
> (i) It **put the other party on notice during negotiations** that it would contest the inclusion or exclusion of the position or class via the unit clarification procedure; **and**
>
> (ii) **It filed the petition for unit clarification of the existing bargaining unit prior to signing the current collective bargaining agreement.**
>
> (3) Disputes concerning the allocation of employees or positions between two or more bargaining units may be filed at any time.

[Emphasis by **bold** supplied.]

The language in WAC 391-35-020(2) is a codification of long-established Commission precedent. See, Toppenish School District, Decision 1143-A (PECB, 1981).

Application of Standards

From the evidence presented, it appears that the OA III working in the substance abuse section (and thus excluded from the bargaining unit) has historically been paid at a higher rate than two similarly-titled employees working in the bargaining unit. Until the parties' last mediation session in 1998, the union's position

through more than a year of negotiations and mediation was centered upon standardizing the pay rate for the OA III class at the higher level. The employer rejected the union's proposals.

The evidence in this matter further indicates that inclusion of the OA III position assigned to the substance abuse section in the bargaining unit arose at the last mediation session, but was not a matter of agreement at that time. The union's officials may well have concluded that the only solution to the pay issue would be to file a unit clarification petition, but there in no evidence that the parties agreed to such a procedure, or even that the union notified the employer of its intent to put the matter before the Commission.

Finally, and conclusively, the evidence compels a conclusion that the union did not file its unit clarification petition prior to signing the successor agreement. In fact, the petition in this matter was filed three days after the parties signed their successor contract.

The union has not met its obligations under WAC 391-35-020(2). The Commission has strictly enforced the requirements of that rule, except when the parties sign an agreement referring the unit issue to the Commission. See, Sedro-Wooley School District, Decision 1351-B (PECB, 1982); City of Seattle, Decision 2286 (PECB, 1986). See, also, Stevens County, Decision 3347 (PECB, 1989); Clallam Transit, Decision 3831 (PERC, 1991).

Collateral Estoppel

The union argues that the doctrine of "equitable estoppel" precludes the employer from raising the timeliness issue in this

case. That doctrine is inapposite. It was discussed in Seattle School District, Decision 5237-B (PECB, 1996), as follows:

> Collateral estoppel may bar relitigation of issues determined by an administrative agency if (1) the agency, acting within its competence, has made a factual decision, and (2) application of the doctrine does not contravene public policy. Malland v. Retirement Systems, 103 Wn.2d 484 (1085). Each case is dependent upon a number of factors, and agency and court procedural differences are taken into consideration. State v. Dupard, 93 Wn.2d 268 (1980); Shoemaker v. Bremerton, 109 Wn.2d 504 (1987). The elements of collateral estoppel are as follows:
>
> * The issue decided in the first litigated case must be identical to the one raised in the later case,
> * The party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication,
> * The decision must be a final judgement on the merits, and
> * Application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.
>
> In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action. Shoemaker v. Bremerton, supra; Malland v. Retirement Systems, supra; Lutheran Day Care v. Snohomish County, 119 Wn.2d 91 (1992); Ecology v. Yakima Reservation Irrigation District, 121 Wn.2d 257 (1993); Barr v. Day, 124 Wn.2d 318 (1994).
>
> The Commission has unquestioned authority to rule on unfair labor practice complaints under collective bargaining laws that govern the relationships of a public employer with its unionized employees. City of Yakima v. International Association of Fire Fighters, Local 469, 117 Wn.2d 655 (1991). Upon application of the standards for collateral estoppel, we do not find the [teacher non-renewal] proceeding under Chapter 28A.405 to be a complete bar

to unfair labor practice proceedings before the Commission.

The focus in the Chapter 28A.405 proceeding was whether there was sufficient cause for [the complainant's] nonrenewal. The issue in the proceeding under Chapter 41.59 RCW was whether: (1) [The complainant's] union activities protected by Chapter 41.59 RCW were the real reason for his nonrenewal and his alleged teaching deficiencies were just a pretext, or whether (2) [The complainant's] union activities protected by Chapter 41.59 RCW were a substantial factor in his nonrenewal. Under the plain terms of the statutes, the hearing officer under RCW 28A.405.310 did not have the power to conduct an inquiry into whether there was an unfair labor practice under Chapter 41.59 RCW and to make the findings necessary to resolve that issue. Even if the issue of retaliation due to union activity may have been litigated in that proceeding, it is not determinative in this case, because the hearing officer was considering a different record and a different law. [footnote omitted] Therefore, we agree with the Examiner that collateral estoppel is inapplicable to the Chapter 28A.405 RCW hearing officer's decision.

The Commission recently addressed a similar jurisdictional challenge in Mansfield School District, Decision 5238-A and 5239-A (EDUC, 1996), where one of two complainants had initiated a challenge of his nonrenewal under Chapter 28A.405 RCW. The employer claimed a nonrenewal was subject to exclusive appeal remedies provided by Chapter 28A.405 RCW, and that the Commission lacks jurisdiction to resolve a complainant's claim for reinstatement. In that case, the employer contended the Commission must defer to the Chapter 28A.405 RCW administrative remedy under the "priority of action" rule as stated in Sherwin v. Arveson, 96 Wn.2d 77, 80 (1981), but we were unable to infer a requirement for the Commission to defer to the RCW 28A.405 procedure. Here, as in Mansfield, an adjudication

> of the Chapter 28A.405 case does not serve as a bar to proceedings before the Public Employment Relations Commission.

In the absence of any parallel judicial proceeding, arbitration, or administrative adjudication, the union's "collateral estoppel" argument would have to be based upon what transpired at the last mediation session, held in 1998.

Unit determination is a function delegated by the Legislature to the Commission in RCW 41.56.060, and unit determination is not even a mandatory subject of collective bargaining between employers and unions. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). The purpose of WAC 391-35-020(2) is to eliminate arguments, by establishing a procedure that clearly requires the filing of a unit clarification petition before a new contract is signed. The union has not met that obligation.

FINDINGS OF FACT

1. Benton-Franklin Crisis Response is a "public employer" within the meaning of RCW 41.56.030(1). The employer's workforce includes employees working under "office assistant III" titles in two departments of the employer's operation.

2. The Washington State Council of City and County Employees is the exclusive bargaining representative of a bargaining unit of Benton-Franklin Crisis Response employees. The bargaining unit has historically excluded the employee working under the "office assistant III" title in the substance abuse section, but has included other employees working under that title.

3. The employer and union were parties to a collective bargaining agreement that was effective from January 1, 1995 through December 31, 1997. They commenced negotiations for a successor contract in September of 1997. One of the hotly contested issues involved increasing the rate of pay for the bargaining unit employees working under the office assistant III title. At their last negotiations/mediation session, the parties discussed a change of the unit description to include the office assistant III historically excluded from the unit, but they did not reach agreement on that matter.

4. On November 20, 1998, the parties signed a successor agreement that is effective from January 1, 1998 to December 31, 2000. That contract does not expressly reserve, for subsequent determination by the Commission, an issue concerning the bargaining unit status of the "office assistant III" historically excluded from the bargaining unit.

5. On November 23, 1998, the union filed the unit clarification petition to initiate this proceeding. It seeks to have the office assistant III position in the substance abuse section included in the bargaining unit represented by the union. The union does not claim any change of circumstances since the parties' contract was signed on November 20, 1998.

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 petition for clarification of an existing bargaining unit filed in this matter was not timely under WAC 391-35-020.

ORDER

The petition filed in the above-captioned matter is DISMISSED on the basis that it was not timely filed.

Issued at Olympia, Washington, this 22nd day of December, 1999.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-35-210.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

603 EVERGREEN PLAZA BUILDING
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OLYMPIA, WA 98504-0919

RECORD OF SERVICE

THE ATTACHED DOCUMENT, IDENTIFIED AS: DECISION 6921-PECB HAS BEEN SERVED BY THE PUBLIC EMPLOYMENT RELATIONS COMMISSION BY DEPOSIT IN THE UNITED STATES MAIL, ON THE DATE ISSUED INDICATED BELOW, POSTAGE PREPAID, ADDRESSED TO THE PARTIES AND THEIR REPRESENTATIVES LISTED IN THE DOCKET RECORDS OF THE COMMISSION AS INDICATED BELOW:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ BETTY PASSMORE

CASE NUMBER: 14255-C-98-00919 FILED: 11/23/199 ISSUED: 12/22/1999

FILED BY: PARTY 2 DISPUTE: COMMUNITY INT DETAILS: Inclusion of Office Assistant III in Substance Abuse Div. in bargainng unit.

COMMENTS:

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