STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
COUPEVILLE EDUCATIONAL SUPPORT ASSOCIATION / WEA	)	CASE 15769-C-01-1017
	)	
For clarification of an existing bargaining unit of employees of:	)	DECISION 7652 - PECB
	)	
	)	ORDER CLARIFYING
COUPEVILLE SCHOOL DISTRICT	)	BARGAINING UNIT
	)	
	)	

Nancy Conard, Business Manager, for the employer

Philip Becker, UniServ Representative, and *Mary Hendricks*, UniServ Representative, for the union.

On April 18, 2001, the Coupeville Educational Support Association (union) filed a unit clarification petition with the Commission under Chapter 391-35 WAC, seeking to have two newly-created positions included in a bargaining unit the union represents, encompassing classified employees of the Coupeville School District (employer). A hearing was held on September 11, 2001,[1] before Hearing Officer J. Martin Smith. The parties filed briefs.

BACKGROUND

The Coupeville School District operates common schools for approximately 1150 students on Whidbey Island in Island County,

[1] IN MEMORIAM: The hearing was interrupted several times to hear the news and contemplate about the tragic events then unfolding in New York City and Washington, D.C.

including the community of Coupeville and the Ebey Prairie and Keystone Landing areas.[2] The employer operates a high school, a middle school, and an elementary school. Dr. Suzanne Bond is the superintendent; Nancy Conard is the business manager.

The union, which is affiliated with the Washington Education Association / NEA, has represented several bargaining units of classified employees at Coupeville since 1993. In *Coupeville School District*, Decision 4586 (PECB, 1993), the union was certified as exclusive bargaining representative of a bargaining unit of instructional assistants. Later the same year, in *Coupeville School District*, Decision 4623 (PECB, 1993), the union was certified as exclusive bargaining representative of a bargaining unit of custodians, maintenance, and grounds employees. In *Coupeville School District*, Decision 5069 (PECB, 1995), the union was certified as exclusive bargaining representative of a bargaining unit of office-clerical employees, excluding two employees who were confidential employees.

In preparation for negotiating a collective bargaining agreement covering 1999 to 2002, the employer and union apparently agreed to consolidate the three separately-certified bargaining units into one unit, to be described as follows:

> The District recognizes the Coupeville Educational Support Association/Washington Education Association/National Education Association as the exclusive bargaining agent for all regularly employed full-time and part-time instructional assistants; custodians, maintenance and grounds personnel; and office and clerical employees who are employed by the

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[2] Island County has three school districts: The Oak Harbor School District lies to the north; the South Whidbey School District lies to the south.

> Coupeville School District excluding confidential employees, supervisors, and all other employees of the District.

That unit description was then set forth in the recognition clause of the parties' 1999-2002 agreement. The rates of pay for 1999 under that contract ranged from $8.76 per hour to $12.72 per hour.

The employer operates "Learning Partners" as a special instruction program. It dates back to a pilot project in 1998-1999 school year, which was begun to see whether tutoring-mentoring for certain students would be feasible. Margie Parker and the site councils for some school buildings had proposed ways of bringing in older students, adults, or tutors to assist middle school pupils who needed special attention, and limited private funding was provided through a Central Whidbey Youth Coalition and other charitable organizations. Parker was encouraged to write a grant proposal.

The employer hired Parker in September of 1998, under a "Tutoring Program Coordinator" title. She was issued a supplemental contract under RCW 28.67.074 in the amount of $2500.

In December of 1998, it became clear that Parker would essentially work half-time for the remainder of the 1998-1999 school year. Her stipend amount was thereupon increased to $8080 for the year, for about 570 hours of service.

The learning program for the sixth grade through high school serves students aged 12-18. Parker recruits volunteers from among members of the community, particularly through service clubs, the local senior center, and other groups. She then trains the volunteers, and matches them with students who would most benefit from mentoring with those adults. The learning program also enlists

older students to serve in the mentor/tutor role. On the day of hearing in this matter, Parker met with high school students in Honor Society, who were volunteering to mentor middle school students.

Vivian Marie Rogers-Rusinko is currently the learning program coordinator for elementary school students in grades one through five. Rogers-Rusinko was hired for that position in January of 2001, and signed a supplemental contract for the remainder of the 2000-2001 school year.[3] That contract mentioned that its first 104 days were funded by a grant from the Discuren Foundation.

Rogers-Rusinko and Parker are the only two employees involved in the new program, as of the 2001-2002 school year. The employer has resisted the union's claim that they should be included in the bargaining unit it represents.

POSITIONS OF THE PARTIES

The employer contends the petition in this matter is untimely under WAC 391-35-020, because it was filed during the existing collective bargaining agreement without an identifiable change of circumstances that would allow review of the two positions. The employer also contends that the learning partner coordinators are similar to a volunteer coordinator and a community education supervisor who have never been included in the bargaining unit.

The union contends that the positions did not exist in their present form until the 2000-2001 school year, as they had been

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[3] Rogers-Rusinko had previously worked for the employer as a substitute para-educator.

compensated under supplemental contracts prior to that time. Hence, the union urges that its petition is timely under the rule. The union contends that the disputed employees share a community of interests with the instructional assistants in the bargaining unit, even though they do not report to a building principal.

DISCUSSION

The issue in this case is limited to whether the disputed employees should be accreted to the existing bargaining unit that includes para-educators (formerly "classroom aides" or "educational assistants"). The disputed individuals are clearly part-time employees of the employer, and there is no claim or evidence that either of them is a "confidential employee" under the labor nexus test codified in WAC 391-35-320, or a "supervisor" under the precedents codified in WAC 391-35-340.[4]

The Determination of Appropriate Bargaining Units

The authority to determine appropriate bargaining units has been delegated by the legislature to the Public Employment Relations Commission. RCW 41.56.060 provides:

> In determining, modifying, or combining the bargaining unit, the commission shall consider the duties, skills, and working conditions of the public employees; the history of collec-

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[4] The volunteers who provide tutoring/mentoring in the program are clearly not public employees with collective bargaining rights under Chapter 41.56 RCW. *See Battle Ground School District*, Decision 2449-A (PECB, 1986). Thus, oversight of such volunteers does not create a potential for the type of conflicts of interest that are of concern in WAC 391-35-340.

> tive bargaining by the public employees and their bargaining representatives; the extent of organization among the public employees; and the desire of the public employees.

The Commission makes unit determinations on a case-by-case basis. Among the four factors listed in the statute, no one factor is overriding or controlling. *Bremerton School District*, Decision 527 (PECB, 1979). Additionally, all four factors need not arise in each and every unit determination case.

The purpose of unit determination is to group together employees who have sufficient similarities (community of interests) to indicate that they will be able to bargain collectively with their employer. Particular concern is applied to avoid stranding individual employees by unit configurations that preclude their exercise of their statutory collective bargaining rights. *City of Blaine*, Decision 6619 (PECB, 1999).[5] The Commission also seeks to avoid fragmentation of public employer workforces resulting in a proliferation of multiple bargaining structures and conflicting work jurisdiction claims. *City of Auburn*, Decision 4880-A (PECB, 1995); *Ben Franklin Transit*, Decision 2357-A (PECB, 1986).

There is no requirement that the Commission determine or certify the *most appropriate* bargaining unit configuration in any case. *City of Winslow*, Decision 3520-A (PECB, 1990). Employer-wide

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[5] *City of Blaine, supra*, demonstrates the degree of concern for inappropriate stranding and consequent deprivation of individual collective bargaining rights. In that case a proposed bargaining unit of uniformed and non-uniformed supervisors was granted certification notwithstanding claims of a lack of community of interest and WAC 391-35-310 (which normally requires placement of employees eligible for interest arbitration into separate bargaining units) to avoid stranding an employee.

bargaining units can be found appropriate, as can "vertical" units encompassing all of the employees in some separate branch of an employer's table or organization or "horizontal" units encompassing all of the employees in one or more generic occupational types. *See City of Winslow, supra*. Unit clarification proceedings under Chapter 391-35 WAC are then apt for dealing with subsequent changes of circumstances, including modification of bargaining unit descriptions to recognize the effects of evolution of government services, technological advances, and the arrival of new generations of employees who perform such services.

Differences between duties, hours of work, and method of computing compensation can be a basis for allocating positions among separate bargaining units within an employer's workforce, but do not necessarily compel separation of employees into different bargaining units on a classification-by-classification basis. Although Chapter 41.59 RCW makes separate provision for the certificated employees of school districts and the federal National Labor Relations Act (NLRA) makes special provisions for "professional" employees,[6] there are no such provisions in Chapter 41.56 RCW. Differences can only be evaluated under the "duties, skills and working conditions" component of the statutory criteria. *See City of Vancouver*, Decision 440-A (PECB, 1978).[7]

The status of new positions is evaluated under the "accretion" standards set forth in Commission precedents such as *Kitsap Transit*

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[6] The NLRA both defines "professional" in Section 2(12) and then assures professional employees an opportunity to be in separate units, in Section 9(b).

[7] Professional employees have been commingled with other employees, to avoid fragmentation of workforces. *Ritzville Memorial Hospital*, Decision 3607 (PECB, 1990); *City of Moses Lake*, Decision 3322 (PECB, 1989).

Authority, Decision 3104 (PECB, 1989), *Seattle School District*, Decision 4868 (PECB, 1984), and:

> An accretion will be ordered where a newly created position is logically aligned with only one existing bargaining unit and creation of a new separate bargaining unit would not be appropriate under the unit determination provisions of the statute. See: *Oak Harbor School District*, Decision 1319 (PECB, 1981).

City of Port Angeles, Decision 1701 (PECB, 1983).

Thus, accretion will not be ordered if the affected employees could stand on their own or be claimed by any other bargaining unit.

Timeliness of Petition

The employer urges dismissal of this petition as untimely, contending that any change of circumstances occurred in 1998. The argument is not persuasive.

WAC 391-35-020 establishes three separate windows of opportunity for parties to file unit clarification petitions:

> WAC 391-35-020 PETITION--TIME FOR FILING. (1) Disputes concerning status as a "confidential employee" may be filed at any time.
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> (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:
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> (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 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 proceedings:
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> (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
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> (ii) It filed the petition for clarification of the existing bargaining unit prior to signing the current collective bargaining agreement.
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> (3) Disputes concerning the allocation of employees or positions between two or more bargaining units may be filed at any time.

A substantive requirement above and beyond the procedural concerns addressed in WAC 391-35-020 was set forth by the Commission in *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981), as follows:

> Absent a change of circumstance warranting a change of the unit status of individuals or classifications, the unit status of those previously included in or excluded from an appropriate unit by agreement of the parties or by certification will not be disturbed. However, both accretions and exclusions can be accomplished through unit clarification in appropriate circumstances.

That principle is addressed in the second portion of WAC 391-35-020 titled "Limitations on Results of Proceedings", which includes:

> (4) Employees or positions may be added to an existing bargaining unit in a unit clarification proceeding:
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> (a) Where a petition is filed within a reasonable time period after a change of circumstances altering the community of interest of the employees or positions; or

> (b) *Where the existing bargaining unit is the only appropriate unit for the employees or positions.*
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> (5) Except as provided under subsection (4) of this section, a question concerning representation will exist under chapter 391-25 WAC, and an order clarifying bargaining unit will not be issued under chapter 391-35 WAC:
>
> (a) Where a *unit clarification petition is not filed within a reasonable time* period after creation of new positions. . . .

(emphasis added.)

Here, the employer would effectively hold the union to petitioning on the basis of what the employer itself termed a "pilot" program in 1998, and which it substantially modified during the 1998-1999 school year. There is no evidence that the union was given notice of the first of the positions now at issue, or that the exclusion of that position from the bargaining unit was agreed upon by the parties when they signed their collective bargaining agreement with an effective date of September 1, 1999.[8] That contract is silent on the subject; hiding a new position under a cloak of silence will not be rewarded with a strict application of WAC 391-35-020.

The union moved promptly after a second position was created and an individual who may have been a bargaining unit employee was hired into that second position. The petition was timely filed.

Community of Interests

Duties, Skills and Working Conditions -

The employer has used some grant funding to pay for the positions now at issue in the past, but source of funds is not among the unit

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[8] The copy of that collective bargaining agreement which is in evidence neither contains space for nor ad hoc entry of the date(s) when the contract was actually signed.

determination criteria set forth in RCW 41.56.060. Moreover, the evidence suggests that the disputed positions are now paid for out of the employer's budget.

The employer has not demonstrated any special degree requirements or other factors which would distinguish the disputed positions from the wide range of positions now included in the bargaining unit represented by the union. As noted in *Yelm School District*, Decision 704-A (PECB, 1980), the bargaining unit at issue here is aptly described as an "integrated support operation essential to the overall discharge by the District of its educational function, and therefore more appropriately dealt with as a unit."

History of Bargaining -
There is no claim or evidence that the employees now at issue have ever been included in any other bargaining unit or represented by any other organization.

Extent of Organization -
The employer has made a general assertion that the disputed employees have a community of interest with two unrepresented employees in its workforce, but it has not provided any clear evidence or agreement justifying the exclusion of the "volunteer coordinator" or the "community education supervisor" from the bargaining unit.[9] Thus, the exclusion sought by the employer would tend to strand the disputed individuals and prejudice their access to the collective bargaining rights conferred by the statute.

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[9] If the community education supervisor actually exercises authority over other employees of the school district, an exclusion of that position from the existing bargaining unit might be appropriate under WAC 391-35-340. However, the same rule would then preclude finding a community of interests to exist between that supervisor and the two disputed employees, who have no supervisory authority.

FINDINGS OF FACT

1. The Coupeville School District is a municipal corporation of the state of Washington operating common schools under Title 28A RCW, and is a public employer under Chapter 41.56 RCW.

2. The Coupeville Educational Support Association, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of classified employees of the Coupeville School District. The existing bargaining unit represented by the union is an integrated support operation essential to the overall discharge by the employer of its primary educational function.

3. The employer first created a "learning partners" program in 1998, as a pilot project. Funding to train tutors and mentors was attained from private sources. The part-time employment of the first employee hired for that program was increased during the pilot project. There is no evidence that the existence of the project or position was called to the attention of the union at that time.

4. The employer and union are parties to a collective bargaining agreement effective for the period from September 1, 1999 through August 31, 2002. While that contract is silent as to the learning partners employees, there is neither claim or evidence that the union agreed to exclude that program from the bargaining unit, nor evidence justifying such an exclusion under Commission policy and precedent.

5. During or about the 2000-2001 school year, the employer added a second learning partners position. Although the employer initially used grant funding from a private source, the

funding of that position was thereafter impliedly taken over out of the employer's budget.

6. The employees working in the learning partners program work in support of the primary educational functions of the employer, seeking out and assigning volunteers to work with students having special needs.

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 "learning program coordinator" classification has evolved into an ongoing educational program managed by the employer, so that the incumbents of that classification have a community of interests, under RCW 41.56.060, with the employees in the existing bargaining unit represented by the union.

ORDER

The existing bargaining unit of classified employees of the Coupeville School District is clarified to include the employees in the learning partners program.

ISSUED at Olympia, Washington, on the 22nd day of February, 2002.

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.