Benton-Franklin Human Services, Decision 7847 (PECB, 2002)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, LOCAL 3962	)	CASE 15652-C-01-1010
	)	
For clarification of an existing bargaining unit of employees of:	)	DECISION 7847 - PECB
	)	ORDER CLARIFYING
BENTON-FRANKLIN DEPARTMENT OF HUMAN SERVICES	)	BARGAINING UNIT
	)	
	)	

David M. Kanigel, Legal Counsel, for the union.

Andy Miller, Benton County Prosecuting Attorney, by *Sarah B. Thornton*, Deputy Prosecuting Attorney, for the employer.

On February 20, 2001, the Washington State Council of County and City Employees filed a petition for clarification of an existing bargaining unit with the Public Employment Relations Commission under Chapter 391-35 WAC, seeking clarification of an existing bargaining unit of employees of the Benton-Franklin Department of Human Services. The employer stipulated that the petition, which concerns one employee in an "office assistant" classification, was timely filed. A hearing was conducted on October 23, 2001, before Hearing Officer Sharrell L. Ables. Both parties filed post-hearing briefs.

The Executive Director concludes that the disputed position should be included in the existing bargaining unit.

BACKGROUND

The Benton-Franklin Department of Human Services (employer) is jointly operated by Benton County and Franklin County. The department was created during or about 1992. It manages three state-funded human services programs: (1) mental health emergency services termed a "crisis response unit" (CRU); (2) substance abuse services termed a "substance abuse assessment center" (SAAC); and (3) assistance for developmentally disabled persons.

The Washington State Council of County and City Employees (union) is the exclusive bargaining representative of some, but not all, of the employees working for this employer. That bargaining unit was established soon after the joint operation was created, when the CRU was the employer's only functioning program and workforce. No evidence was offered with respect to the existence of any other bargaining units within the workforce of this employer.[1]

Dave Hopper, the director of the joint operation, gave testimony explaining its history: Prior to the creation of the joint operation, Benton County and Franklin County each received funds from the state Department of Social and Health Services for the care of mentally ill, chemically addicted, and developmentally disabled persons in their respective jurisdictions. The counties merely acted as a funding conduit, and contracted all direct care functions to private service provider firms. When the state changed to a regional network of mental health providers in the early 1990's, that provided impetus for the creation of the joint

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[1] Notice is taken of the docket records of the Commission. A computer-assisted search of those records fails to disclose the existence of any other union-represented employees of this employer.

operation. The joint operation has an administrative office staff, in addition to staff in its programmatic divisions.

Hopper also gave testimony concerning the operation: Depending on the program, the employer either administers services directly or contracts with private service providers for some or all of the services. While the initial intention had been for this employer to provide direct services to both mental health clients and substance abuse clients, that intention took some time to realize. The mental health (CRU) operation was fully implemented immediately, but the substance abuse (SAAC) operation grew by stages.

Two office assistant positions created at the inception of the joint operation supported the CRU when it was the employer's only direct-service operation. They were included in the bargaining unit when it was created. The employer's administrative staff continued to oversee contractors providing all other services.

The workload of the original office assistants grew when assessment counselors were added to the employer's workforce to provide SAAC services directly to clientele.[2] A third office assistant position was then added to the employer's workforce in about 1996. The additional position was housed in the same office area as the first two office assistants. The testimony indicates that the office assistants each have primary assignments, but assist and cover for one another as needed.

The collective bargaining agreement signed by the parties in 2001 includes the following at Article I: "The Union will file a Petition for Unit Clarification regarding the position of Office

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[2] The SAAC assessment counselors themselves were not accreted to the existing bargaining unit.

Assistant III for Substance Abuse claiming a community of interest." The union thus initiated this proceeding in February 2001.

POSITIONS OF THE PARTIES

The union argues that the three office assistants have a community of interest. The union's focus is on the work performed, and it notes that the three employees share more than a title: They all work in the same office space; they answer the same telephones; they share other office equipment; they schedule the same clients; they all greet and respond to customers at the window; they all have the same reporting/supervisory structure; and they perform work for one another as needed. The union also contends that some of the work now performed by the disputed position was bargaining unit work before the third position was created.

The employer's basic contention is that each of its three units is a separate organization, tracing sources of funding from three state DSHS divisions. The employer relies on the fact that each of those DSHS divisions imposes licensing, grant reporting and procedural requirements specific to that DSHS program. The employer also asserts that the disputed position is excluded by the language of the certification issued by the Commission in 1993, in which only the "crisis response unit" was mentioned. The employer also relies on the recognition clauses of the parties' collective bargaining agreements, which have both defined the bargaining unit in terms of the "crisis response unit" and excluded "office assistant III in any other unit or department" from the coverage of the contract. Finally, the employer argues that inclusion of the disputed position would distort the shape of the existing bargaining unit from a "vertical" unit (encompassing only positions in the CRU) to an "L-shaped" unit (reaching over into the SAAC).

DISCUSSION

The issue in this case is limited to whether the disputed position should be accreted to the existing bargaining unit. While accretion deprives the employee(s) involved of the right to vote on their representation, accretion is apt where creation of a separate unit would be inappropriate and there is only one existing bargaining unit in which the position(s) could properly be placed.

Unit Determination Standards

The determination and modification of appropriate bargaining units is a function delegated by the legislature to the Commission:

> RCW 41.56.060 DETERMINATION OF BARGAINING UNIT-BARGAINING REPRESENTATIVE. The commission, after hearing upon reasonable notice, shall decide in each application for certification as an exclusive bargaining representative, the unit appropriate for the purpose of collective bargaining. 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 collective bargaining by the public employees and their bargaining representatives; the extent of organization among the public employees; and the desire of the public employees.

Employees are grouped together to have an ongoing community of interest in bargaining their wages, hours and working conditions, *City of Pasco*, Decision 2636-B (PECB, 1987).

The Commission balances conflicting interests: Stability in bargaining relationships is favored; flexibility is necessary to accommodate the vagaries of real life. Thus,

> 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.

City of Richland, Decision 279-A (PECB, 1978), *aff'd* 29 Wn.App. 599 (Division III, 1981), *review denied* 96 Wn.2d 1004 (1981).

The "Source of Funding" Argument -

The employer relies heavily on the separate sources of its funding, and the evidence it produced at the hearing in this matter includes a "funding flow chart" (Exhibit 2) describing the funding of its operations. All of the state money goes to the administrative office of the joint operation, however, and some of that money is used to support the administrative office. Some money flows through to contracted service providers; some is used to provide direct service through the CRU and SAAC. Accepting that explanation, the problem faced by the employer in this case is that "source of funding" or words to that effect are nowhere to be found among the unit determination criteria set forth in RCW 41.56.060.

At the time the hearing was held and briefs were submitted in this case, the decision had not yet been issued in another case where the "source of funding" argument was addressed. That decision issued in the meantime included:

> The employer cites the multiple-jurisdiction funding of the interviewer as its basis for asserting it does not exercise sufficient control to be the employer for purposes of collective bargaining, but source of funds is not among the unit determination criteria set

> forth in RCW 41.56.060. Indeed, it is commonplace to find a mix of federally-funded, state-funded, grant-funded, and locally-funded positions commingled in local government bargaining units. *See Kitsap County*, Decision 4314 (PECB, 1993).

Benton County, Decision 7651 (PECB, 2002). The same holding is appropriate in this case.

In fact, the evidence fails to support a "source of funds" distinction among the office assistant positions. The employer caused a study to be made in 2000, in which the three office assistants were directed to keep records allocating their work time between the CRU and SAAC units. The results of that study are in evidence as Exhibit 11, but appear to be inconclusive: The total time recorded does not equal the work time of three full-time positions; the results clearly indicate that the employees in all three positions perform work for both units.

The "Certification Language" Argument -

The employer relies on specific language in the certification naming the union as exclusive bargaining representative, where the bargaining unit was described as follows:

> All full-time and regular part-time employees of the crisis response unit of the Benton and Franklin Counties Department of Human Services, excluding supervisors, confidential employees and all other employees of the employer.

Benton-Franklin County Decision 4371 (PECB, 1993). The specific mention of the "crisis response unit" is not conclusive, however:

- It is clear from the order itself that the proceedings were conducted based on stipulations by the parties, rather than from a decision made by the Commission on contested issues.

- The record in this case establishes that the CRU was the only unit being operated by the employer in 1993, so that the bargaining unit was actually an "all employees of the employer" or "wall-to-wall" unit at that time, notwithstanding the language stipulated by the parties in that case.

- The record in this case establishes that there have been changes of circumstances which permit the Commission to revisit the terms of the certification under its authority to "modify" units delegated in the first clause of RCW 41.56.060 and under *City of Richland*.

On the facts of this case, placement of the disputed office assistant in a separate bargaining unit could not have been (and is not) a possibility. There is no claim or evidence that the disputed office assistant is or shares duties with the substance abuse counselors, and WAC 391-35-330 precludes one-person bargaining units.

The Recognition Clause Argument -

The employer also relies on the language of the recognition clause of the parties' past and current collective bargaining agreements. That argument is completely unfounded.

The parties' initial collective bargaining agreement was signed in July of 1994. Article I of that agreement provided (emphasis added):

> INCLUDED Full-time and regular part-time employees of the Crisis Response Unit examples

> of which are Crisis Mental Health Nurse, Children's Resource Coordinator, County Designated Mental Health Professional, Crisis Counselor, *Office Assistant II*, Crisis Case Manager, ITA Coordinator and Crisis Stabilization Aide.
>
> EXCLUDED: Crisis Response Manager, *Office Assistant II 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.

Union official Kae Roan testified concerning the negotiations for that initial contract. She identified Anthony Menke as the employer's negotiator, and his signature appears on that agreement. She further testified that Menke specifically asked for exclusion of future office assistant positions in the recognition language, based upon an explanation in terms of a potential future need for an office assistant in the employer's administrative office. Roan testified that the parties agreed that an administrative office position would not be included in the bargaining unit. Menke was not called as a witness in this case, so Roan's testimony in this regard is uncontroverted.

The parties then executed successor contracts. The recognition clause of the collective bargaining agreement they signed in 1995, for the years 1995, 1996, and 1997, only slightly modified the relevant language to substitute "office assistant III" for "office assistant II" in both the inclusion and exclusion clauses. The relevant language was then carried forward without change in a

contract they signed in 1998, covering the years 1998, 1999, and 2000.[3]

The parties discussed the bargaining unit status of the third office assistant position during the negotiations for their current contract. Those discussions resulted in their agreement to put the dispute before the Commission.

The recognition clauses contained in the parties' collective bargaining agreements have been quite different from the unit description set forth in the certification issued by the Commission. Apart from a use of specific job titles that is contrary to Commission practice, the evidence supports a conclusion that the specific exclusion now cited by the employer related to a hypothetical situation that has never come to fruition. "Unit determination is not a subject for bargaining in the mandatory/permissive/illegal sense, and parties' agreements on unit matters are not binding on the Commission". *Whatcom County*, Decision 7399 (PECB, 2001), citing *Richland*.

Finally, the facts do not support the employer's argument. The office assistants are aptly compared to "plant clerical" employees under National Labor Relations Board (NLRB) precedents. When the the union was certified as exclusive bargaining representative in 1993, the bargaining unit included all of the plant clericals then employed by this employer. The subsequent agreement of the parties to exclude future additions of what would be termed office-clerical

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[3] After signing the 1998-2000 agreement, the union filed a unit clarification petition with the Commission, seeking to have the office assistant position at issue in this case included in the bargaining unit. That petition was dismissed as untimely. *Benton-Franklin Crisis Response*, Decision 6921 (PECB, 1999).

positions under NLRB precedents does not speak to the future addition of plant clerical employees. The employer provides no explanation for how or why the Commission should be precluded from applying its "accretion" precedents when the employer has expanded its plant clerical workforce beyond the two positions originally included in the unit.

Community of Interest

Application of the statutory criteria confirms the propriety of accreting the disputed position to the existing bargaining unit.

History of Bargaining and Extent of Organization -
There is no claim or evidence that the disputed employee has ever been included in any other bargaining unit or represented by any other organization. There is no evidence that any other bargaining unit exists which could include the disputed employee.

Desires of the Employees -
When appropriate, the desires of employees are exclusively ascertained by conducting a secret ballot unit determination election. The employer called the incumbent of the contested petition to testify in this case, but then violated WAC 391-25-420 by proceeding to ask that witness about whether she desired to be represented by the union. It is inherently coercive to require an employee to testify on such matters, under oath. The testimony should not have been received, and is now stricken.

Duties, Skills, and Working Conditions -
The record clearly establishes that the three office assistants have similar duties, skills, and working conditions. Employees in the original positions handled telephones, appointments, and computer entry tasks for both the CRU and SAAC. As the workload

grew, the employer added the third office assistant position. The testimony of the three incumbents shows that they all work in the same office space with a public reception window at one end of the room and three desks lined up behind one another facing that window. In that setting:

- The employee occupying the desk closest to the public window has primary responsibility for answering incoming telephone calls for both the CRU and SAAC, while the other two employees provide backup for that task.

- The employee occupying the desk closest to the public window also has primary responsibility to make appointments and to greet people who arrive at the facility for appointments in either the CRU or SAAC, while the other two employees provide backup for that task.

- The employee occupying the desk closest to the public window also has primary responsibility to send faxes and to receive and deliver faxes for both the CRU and SAAC, while the other two employees provide backup for that task.

- The employees occupying the second and third desks in the line enter data into a computer system that tracks information for both the CRU and SAAC.

- The employee occupying the third desk in the line has primary responsibility for handling court papers concerning involuntary commitments for both the CRU and SAAC, and for performing some other skilled tasks. Very few commitments involve SAAC clients, and CRU clients constitute the bulk of her work.[4]

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[4] The testimony concerning changes of this position over time is unclear. The position has been held by many individuals since its inception, including three different incumbents between the cost allocation study and the hearing in this case.

- All three office assistants report to an office administrator who is excluded from the bargaining unit. In turn, the office administrator reports directly to a resource manager. The employer's organization chart does not show any reporting relationship between the office assistants and either the CRU or SAAC staffs.[5]

- Although the employer provided evidence that it charges the costs of the disputed office assistant position to the SAAC funding source, there was no testimony that any of the office assistants are required to be familiar with the funding procedures or licensing provisions of the state fund grantors.

- The employer's claim that the office assistants work in separate and discretely funded units is also contradicted by its own cost allocation study, which definitively corroborates the testimony of the three incumbents as to their overlapping job duties.

Exclusion of the disputed office assistant from the existing bargaining unit would create an ongoing potential for work jurisdiction disputes under *South Kitsap School District*, Decision 472 (PECB, 1978) and subsequent decisions concerning "skimming" of bargaining unit work. Such situations are to be avoided in the unit determination process. *See City of Seattle*, Decision 781 (PECB, 1979); *South Kitsap School District*, Decision 1541 (PECB, 1983). The disputed position was not created until long after the unit was certified, and the union has established the existence of

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[5] The employer's own organization chart thus contradicts its contention that accretion of the disputed position to the existing bargaining unit will create an "L-shaped" unit. The three office assistant positions are set forth down the center of the chart, separating the two direct-service units shown along the outside edges of the chart.

a community of interest that encompasses all three of the office assistant positions.

FINDINGS OF FACT

1. Benton-Franklin Department of Human Services is a joint operation of Benton County and Franklin County, and is a "public employer" within the meaning of RCW 41.56.030(1).

2. Washington State Council of County and City Employees, Local 3962, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of certain employees of the Benton-Franklin Department of Human Services.

3. When the union was certified as exclusive bargaining representative in 1993, the stipulated bargaining unit described as "All full-time and regular part-time employees of the crisis response unit of the Benton and Franklin counties department of human services, excluding supervisors, confidential employees and all other employees of the employer" actually included all employees providing direct services to agency clients and clerical support for those services. At that time, those clerical support functions were performed by two employees working under "office assistant" job titles.

4. In 1994, the parties executed their initial collective bargaining agreement, covering calendar years 1993 and 1994. During the negotiations for that agreement, the employer sought and the parties agreed upon a purported limitation on the number of clerical support positions to be included in the bargaining unit. That purported limitation has been carried

forward in successor collective bargaining agreements signed by the parties.

5. During or about 1996, the employer added a third "office assistant" position which was co-located in the same office with the two existing positions.

6. The employees working in the three office assistant positions have shared equipment, duties, skills, and working conditions, including providing backup for one another, while providing support services for employer operations in both the crisis response unit and another direct-service unit which had been added to the employer's operation by 1996. All of the office assistants report to one supervisor, and to no one else on the employer's organization chart. The additional position has been held by many incumbents.

7. The addition of a third office assistant position, as described in paragraph 5 of these Findings of Fact, did not invoke the employer's earlier concerns about the potential for addition of office-clerical positions in the employer's administrative office, and did not invoke the union's concession that an office-clerical position added in the employer's administrative office would properly be excluded from the bargaining unit.

8. The failure of the parties to accrete the office assistant position described in paragraph 5 of these Findings of Fact to the existing bargaining unit has created a stranding of the employee(s) holding that position without access to statutory collective bargaining rights, in contravention of WAC 391-35-330.

9. The failure of the parties to accrete the office assistant position described in paragraph 5 of these Findings of Fact to the existing bargaining unit has created an ongoing potential for work jurisdiction disputes.

10. The parties' current collective bargaining agreement recites that the union would commence a unit clarification proceeding to establish the bargaining unit status of the office assistant position described in paragraph 5 of these findings of fact, and the parties have stipulated that the petition for unit clarification filed in this matter is timely.

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 agreement of the parties purporting to limit the number of office assistant positions to be included in the existing bargaining unit is, in regard to the position described in paragraph 5 of the foregoing Findings of Fact, contrary to the policies and authority of the Public Employment Relations Commission under RCW 41.56.060 and WAC 391-35-330, and is null and void for purposes of this proceeding.

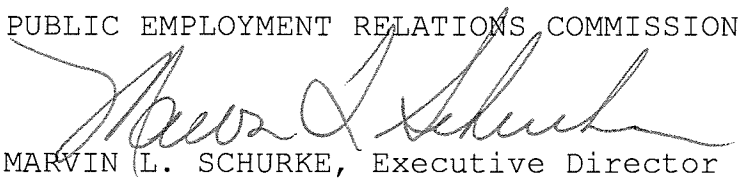
3. The employees in all of the office assistant positions utilized by the employer in support of its direct services share a community of interest among one another under RCW 41.56.060, so that the position added as described in paragraph 5 of the foregoing Findings of Fact is properly accreted to the existing bargaining unit represented by the Washington State Council of County and City Employees.

ORDER CLARIFYING BARGAINING UNIT

The office assistant position at issue in this proceeding shall be included in the existing bargaining unit represented by the Washington State Council of County and City Employees.

Issued at Olympia, Washington, the 24th day of September, 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.
cc: