

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
INTERNATIONAL UNION OF OPERATING)	CASE 15680-C-01-1011
ENGINEERS, LOCAL 609-A)	
)	
For clarification of an existing)	DECISION 7564 - PECB
bargaining unit of employees of:)	
)	ORDER CLARIFYING
SEATTLE SCHOOL DISTRICT)	BARGAINING UNIT
)	
)	

Schwerin Campbell Barnard, by *Kathleen Phair Barnard*, for the union.

John M. Cerqui, Assistant General Counsel, for the employer.

On February 28, 2001, International Union of Operating Engineers, Local 609-A (union), filed a petition for clarification of an existing bargaining unit with the Public Employment Relations Commission under Chapter 391-35 WAC, concerning a bargaining unit of classified employees of the Seattle School District (employer). Specifically, the union claimed that a the "resource conversation specialist" position should be included in a bargaining unit of custodial and maintenance employees represented by the union. Hearing Officer Jack T. Cowan conducted a hearing on April 20, 2001. The parties submitted briefs.

The Executive Director concludes that, as presently constituted, the position claimed by the union has a community of interest with the existing bargaining unit represented by the union. The unit is clarified to include the disputed position.

BACKGROUNDThe Parties and Bargaining Unit

The employer operates schools in Seattle, Washington, for students in kindergarten through the 12th grade. Mike DeMonbrun is the manager responsible for custodial and groundskeeping services, and utilities functions within a Logistics Department.

The union is the exclusive bargaining representative of the employer's custodial and grounds employees. Approximately 300 custodians in the bargaining unit have varying levels of boiler licenses and report to building principals or custodial supervisors. The bargaining unit also includes employees working under a "mechanical coordinator" (MC) job title, who are required to have at least high school diploma, a 3rd grade steam engineer license, and a refrigeration license.¹

The employer and union were parties to a collective bargaining agreement effective from September 1, 1998, through August 31, 2001.

The Disputed Position

The disputed "resource conservation specialist" (RCS) position is in the Logistics Department under the direction of DeMonbrun. The position was created in the 1996-1997 timeframe, and was funded initially by various utilities serving the employer's facilities. The job description for the position calls for a "bachelor" degree (in environmental studies, business administration, science

¹ Two separate levels of "MC" classifications existed at one time, but the lower-paid of those classifications has not been used in several years.

education or related field) plus at least three years of related experience.²

From about 1997 to 2000, the disputed position was occupied by an individual who had both "bachelor" and "master" degrees, and it was excluded from the bargaining unit represented by the union.

After the initial incumbent departed, the position was offered to and accepted by one of the employees who had held the "MC" title within the bargaining unit. That individual does not hold a "bachelor" degree. From the time that vacancy was filled through the hearing held in this matter some four months later, the employee working under the RCS title continued to perform duties of the MC classification.

POSITIONS OF THE PARTIES

The union contends the RCS and MC classifications interrelate and substantially overlap. It claims the RCS grew out of and assumed many of the duties and functions of the MC, and that both classifications provide support to custodians at the employer's facilities. The union argues that the employer's categorizations of the MC as "blue collar" and of the RCS as "professional" are arbitrary, and are belied by the actual duties of the jobs. The union urges that review of the duties, skills and working conditions clearly supports inclusion of the RCS in the bargaining unit it represents.

The employer responds that the Commission should decline the requested accretion because the RCS does not share a community of

² The job description allowed for substitution of added experience for the "bachelor" degree.

interest with the employees performing manual labor and operational functions in the existing bargaining unit. The employer also asserts that no specific evidence of a substantial change of circumstance has been presented, and that the RCS position has not changed substantially since it was created. The employer describes the events following promotion of the current RCS as a "temporary overlap" of job duties until the vacant MC position can be filled, and it asserts that temporary situation does not warrant a change of the bargaining unit status of the RCS position.

DISCUSSION

The determination *and modification* of appropriate bargaining units is a function delegated by the legislature to the Commission, in RCW 41.56.060:

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.

The Commission has promulgated two sets of rules to regulate the resolution of "relationships" issues: Chapter 391-25 WAC regulates the certification and decertification of exclusive bargaining representatives; Chapter 391-35 WAC contains a simplified subset of the representation case rules for modifying existing bargaining

units in situations where no question concerning representation exists.

The employer correctly quotes the general rule as being that, absent a change of circumstances warranting a change of the unit status of individuals or classifications, the unit status of those previously included or excluded from an appropriate unit by agreement of the parties or by certification will not be disturbed. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App 599 (1981), *review denied*, 96 Wn.2d 1001 (1981). See also WAC 391-35-020(4)(a), (5), (5)(a) and (5)(b). That general rule exists, however, in the context of another statement found within *City of Richland*, *supra*:

Unit definition is not a subject for bargaining in the conventional "mandatory/permissive/illegal" sense, although parties may agree on units. Such agreement does not indicate that the unit is or will continue to be appropriate.

Hence, an accretion is also available under WAC 391-35-020(4)(b), if the Commission concludes that a position has improperly been excluded from a bargaining unit by action, agreement, or inaction of the employer and union involved.

Initial Unit Placement of the RCS Position

The RCS position was properly excluded from the custodial/grounds bargaining unit when the position was created in 1996-1997, although perhaps not for the reasons given to the union at that time.

The employer created a "recycling coordinator" position outside of the bargaining unit during or about 1992, and the incumbent in that position testified that she was a participant in the creation of the

RCS position.³ An inference is available that the RCS position and its unit placement were patterned after the recycling position.⁴

Comparison of "Duties" of RCS and MC positions -

The RCS position is responsible for energy and water conservation programs at the employer's facilities, for developing and marketing strategies to promote conservation, for analysis of data on program effectiveness, and for reducing financial expenditures through conservation. The job posting for the RCS position included:

Description: The Seattle School District is accepting applications for a Resource Conservation Specialist at the District Logistics Center. *Individual must have BA Degree in environment studies, business administration, science education or related field and three years experience including program planning, development and implementation of conservation plans, training, budget and analysis. Additional qualifying work experience may substitute for educational requirement.* Ability to develop and implement marketing strategies, seek out funding opportunities; able to work with different agencies, staff, students and the public in a multi-cultural environment; communicate effectively in writing and orally; have knowledge of energy and water conservation regulations, research and analysis techniques, collaborative problem solving, development and presentation techniques; ability to operate personal computer; have valid WA St. driver's license or evidence of equivalent mobility.

(emphasis added).

³ The position is held by Mary Jo DeBeck, who now works under a "waste management and recycling coordinator" title.

⁴ There is no issue in this case as to whether DeBeck's position should be included in the bargaining unit.

The qualifications and activities of the first incumbent in the RCS classification aligned with or exceeded that job description.

The MC classification was created in 1990, and was placed in the bargaining unit at or about that time. The MC positions are aptly characterized as "technical" positions, supporting the networked heating and cooling systems in newly-constructed schools, and resolving both mechanical and electronic problems with those systems. The MC job description includes:

Description: The Seattle Public Schools has an opening for a HVAC Technician (Mechanical Coordinator II) in the Custodial Services & Grounds Department. *Individual must be high school graduate/GED; AA degree preferred in related field; completion of IUOE Apprentice Program or equivalent vocational/technical program and three years journey level stationary engineer experience or ten years journey level experience operating building mechanical and electrical system and equipment. College course work in mechanical/electrical engineering may substitute for work experience on year to year basis. Skill in electrical and mechanical system design; knowledge of energy management, plant testing, refrigeration pneumatic and electric systems; pneumatic & low voltage temperature controls; high and low pressure vessels, mechanical & electrical codes; ability to read, revise, correct & interpret schematics, blueprints & technical manuals; work independently, operate personal computer, trouble shoot & implement solutions, train others in operation of heating system; construct, operate & evaluate programs designed to test new, current & replacement equipment, supplies and materials; relate effectively in a multi-cultural environment. Must possess a current City of Seattle 3rd Grade Steam Engineer's and Refrigeration Operating Engineer's License. Desirable: CFC Certificate.*

(emphasis added).

Comparison of those job descriptions supports a conclusion that the RCS position was designed and intended to serve a different function than the already-existing MC positions.

Comparison of "Skills" -

The initial incumbent of the RCS position was David Broustis, who held both "bachelor" and "master" degrees. While the "master" can be deemed an irrelevant over-qualification under *Olympia School District*, Decision 799 (PECB, 1980), the requirement for a "bachelor" degree could have constituted a valid basis for exclusion of the RCS position from the bargaining unit composed primarily of custodians and groundskeepers.

Source of Funds Irrelevant -

The employer now correctly argues that the funding source for a position is irrelevant for unit determination purposes,⁵ but the evidence suggests the employer took an opposite stance in 1997. In rejecting a union request for inclusion of the RCS position in the bargaining unit at that time, the employer emphasized that the position was to be grant-funded and asserted that it should be excluded from the bargaining unit on that basis.

"Temporary" Status Irrelevant -

The evidence suggests that the employer asserted the RCW position was "temporary" when it rejected the union's request for inclusion of the RCS position in the bargaining unit in 1997. However, an exclusion of the RCS from a bargaining unit based upon a status that was to last for two years was erroneous: WAC 391-35-350 calls for positions to be included in bargaining units with as little as 30 days of work in a one-year period.

⁵ Source of funds is not among the unit determination criteria set forth in RCW 41.56.060.

Moreover, the RCS position was never limited to the initial two-year period. It was understood from the outset that the employer would assume responsibility for funding the position if it functioned successfully for the initial period. Thus, there would have been every reason for the first incumbent of the RCS position to have an expectancy of continued employment if he or she performed in a satisfactory manner. This is clearly distinguished from the situation in *City of Auburn*, Decision 4880-A (PECB, 1995), where summer help employees that had little expectancy of returning for a subsequent summer and no expectancy of ongoing employment were excluded from bargaining rights as "temporary" employees.

Union's Inaction Not Abhorrent to Statute -

In 1997, after the employer hired Broustis, the union's representative, David Westberg, learned that the employer had filled the RCS position and he formed a belief that the RCS job was very similar to the MC positions within the custodian/grounds bargaining unit. Westberg wrote a letter to the employer in 1997, requesting that the RCS position be added to the bargaining unit. The unit status of the RCS position was discussed during negotiations for a successor collective bargaining agreement, but the employer declined to place the RCS position in the bargaining unit. Although it is clear that the union did not pursue the matter at that time, the mix of valid for its exclusion from the unit (e.g., the requirement for a "bachelor" degree) and invalid reasons asserted by the employer at that time (e.g., the source of funds and the "temporary" status) provides basis for a conclusion that the union should not be precluded from re-asserting its claim in this proceeding. Indeed, if the union was misled to an agreement with the employer that was abhorrent to the purposes and policies of the statute, *City of Richland* makes it clear that the Commission is not bound to honor that agreement or the resulting unit placement.

Appearance or Existence of Changed Circumstances

The RCS position was left vacant for a time after Broustis resigned to accept employment elsewhere. Westberg assumed that the RCS position was no longer in existence, since Broustis was gone and the program he had been hired to oversee was substantially complete.

In November of 2000, Westberg learned from DeMonbrun that a bargaining unit employee in the MC classification, Frank Griffin, was going to be given the RCS position. Westberg next spoke to the employer's labor relations manager, Everett Rosmith, to explore the possibility of accreting the RCS position into the bargaining unit. That discussion was unsuccessful.

Degree Requirement Abandoned -

The employer has contributed significantly to the current controversy by promoting a bargaining unit member who lacks the academic degree called for in the RCS job description. The de facto elimination of the requirement for a "bachelor" degree undermines the basis for the exclusion of the RCS position from the bargaining unit in 1997, and warrants a re-evaluation of the situation. Thus, a full review of the RCS position, and fresh application of the "community of interest" criteria set forth in RCW 41.56.060 is warranted here.

Assignment of Bargaining Unit Work -

The employer has further contributed to the current controversy by "skimming" bargaining unit work in contravention of its duty to bargain under *South Kitsap School District*, Decision 472 (PECB, 1978). It is undisputed that the employer assigned (or at least permitted) Griffin to continue performing the duties of his former MC position for at least four months through the time of the hearing

in this matter, while purporting to exclude Griffin from the bargaining unit based on his promotion to the RCS position. Even if it were not subject to criticism as vague, the employer's explanation that it was conducting a recruitment to fill the MC position does not eradicate either the employer's duty to bargain or the facts demonstrating a complete overlap of the MC and RCS functions. These facts also warrant a full review of the RCS position, and a fresh application of the "community of interest" criteria set forth in RCW 41.56.060.

The Current Community of Interest

The evidence supports a conclusion that whatever differences once existed between the MC and RCS classes have largely disappeared. While the evidence suggests that Broustis did not have the training and skills needed to perform the MC duties, the current activities of Frank Griffin in the RCS position are substantially similar to the duties of the MC classification. Looking beyond the hiring of some other employee(s) to fill the MC position(s), when Griffin might turn his full attention to the RCS position, the hiring of Griffin for the RCS position diminished any possible claim of "professional" status for that position,⁶ so that the "technical" categorization applicable for the MC classification is equally applicable to the RCS position.

The evidence that the "development" phase of the project was largely, if not entirely, completed before Broustis moved on to work

⁶ Different from Section 9(c) of the National Labor Relations Act, Chapter 41.56 RCW does not contain a definition of (or provide any special rights for) "professional" employees. A degree requirement can, however, be given weight under the "duties, skills and working conditions" component of the unit determination criteria set forth in RCW 41.56.060.

for another employer supports an inference that Griffin took over a position that has gravitated toward an implementation or "maintenance" phase. That inference is consistent with the employer's selection of Griffin and its disregard of the academic degree requirements. All of this provides further support for a conclusion that the MC and RCS jobs have moved toward one another, and that they now share a community of interests.

There is no claim or evidence that Griffin is excludable as either a "confidential" employee under WAC 391-35-320 or a "supervisor" under WAC 391-35-340. With abandonment of the degree requirement that might arguably have created a community of interests with the "recycling" position on which it was patterned or any others not mentioned in this record, a substantial concern arises that failure to accrete the RCS position to the bargaining unit represented by Local 609 would have the effect of stranding the RCS without any way to exercise the collective bargaining rights secured by Chapter 41.56 RCW. A one-person bargaining unit limited to the RCS would be inappropriate under WAC 391-35-330, and the employer has not come forth with any evidence showing that the RCS has a community of interest with any other group of represented or unrepresented employees within its workforce. An accretion is thus appropriate.

FINDINGS OF FACT

1. The Seattle School District is operated under Title 28A RCW, and is a public employer within the meaning and coverage of RCW 41.56.020 and 41.56.030(1).
2. International Union of Operating Engineers, Local 609, is a bargaining representative within the meaning of RCW 41.56.030(3). Local 609 is the exclusive bargaining represen-

tative of a an appropriate bargaining unit consisting of Seattle School District employees who perform custodian duties and related functions, including operation and maintenance of heating, ventilating and air condition equipment in the employer's facilities.

3. The employer and union have been parties to a series of collective bargaining agreements, the latest of which described in this record was effective through August 31, 2001.
4. In 1996, the employer created a position titled "resource conservation specialist" (RCS) using funds provided by others. The job description for the RCS position required a "bachelor" degree. The employer unilaterally excluded the RCS position from the bargaining unit described in paragraph 3 of these Findings of Fact.
5. In 1996 or 1997, David Broustis was hired to fill the RCS position. He had academic qualifications in excess of the "bachelor" degree required in the job description for that position.
6. In 1997, the union became aware of the RCS position, and made inquiry about it. The bargaining unit status of the RCS position was also discussed in negotiations between the employer and union for a successor collective bargaining agreement. During those communications, the employer asserted irrelevant and erroneous reasons for exclusion of the RCS position from the bargaining unit, including that it was funded by others, and that it was of a temporary nature. After receiving those assertions, the union did not pursue the matter.

7. After the two-year period when the RCS position was funded by others, the employer took over and continued the funding of the RCS position. Nothing in this record establishes that the employer gave the union timely notice that either of the "grant funded" or "temporary" characterizations previously applied by the employer to the RCS position had been changed.
8. Broustis resigned the RCS position during or about June of 2000, to take employment elsewhere. The position was left vacant for a time thereafter.
9. At least one member of the bargaining unit described in these Findings of Fact applied for the RCS position. During or about November 2000, bargaining unit member Frank Griffin was given the RCS position notwithstanding the fact that Griffin lacks the "bachelor" degree required by the job description for the RCS position.
10. Upon learning that the employer had given the RCS position to Griffin, the union requested that the RCS position be accreted to the bargaining unit described in these Findings of Fact. The employer rejected the union's request, and the union filed the petition to initiate this unit clarification proceeding.
11. For a period beginning with announcement of his promotion to the RCS position and continuing through the date of the hearing in this matter, Griffin performed the duties of the RCS position while continuing to perform the duties of his former position as a "mechanical coordinator" within the bargaining unit represented by the union.
12. With assignment of Griffin and an apparent change of the focus of the RCS position toward maintenance of the conservation

programs initiated while Broustis held the RCS position, substantial similarities now exist between the duties, skills and working conditions of the RCS position and the duties, skills and working conditions of the MC positions within the bargaining unit represented by the union.

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. As presently constituted, the RCS position shares duties, skills and working conditions, and a substantial community of interest, with the employees in the bargaining unit represented by International Union of Operating Engineers, Local 609, so that an accretion of the RCS position to that bargaining unit is appropriate under RCW 41.56.060.

ORDER

The bargaining unit of custodian employees of the Seattle School District represented by International Union of Operating Engineers, Local 609, is clarified to include the "resource conservation specialist" position.

ISSUED at Olympia, Washington, the 14th day of December, 2001.

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.