

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
PUBLIC SCHOOL EMPLOYEES)	CASE 16197-C-02-1040
OF WASHINGTON)	
)	DECISION 8302 - PECB
For clarification of an existing)	
bargaining unit of employees of:)	CORRECTED
)	ORDER CLARIFYING
LAKE CHELAN SCHOOL DISTRICT)	BARGAINING UNIT
)	
)	

Elyse B. Waldman, Attorney at Law, for Public School Employees of Washington.

James Busey, Superintendent of Schools, for the employer.

Faith Hanna, Attorney at Law, for the Lake Chelan Education Association.

On January 28, 2002, Public School Employees of Washington (PSE) filed a petition for clarification of an existing bargaining unit with the Public Employment Relations Commission under Chapter 391-35 WAC, seeking a ruling as to the appropriate bargaining unit placement of an employee of the Lake Chelan School District (employer) who is engaged in the operation of a computerized instruction laboratory at the elementary school level. The Lake Chelan Education Association (LCEA) intervened in the proceedings, claiming the position involved is properly included in a bargaining unit of "certificated" employees represented by that organization under Chapter 41.59 RCW. A hearing was conducted on October 18, 2002, by Hearing Officer Sally B. Carpenter. PSE and the LCEA each filed a post-hearing brief.

The Executive Director concludes that, although the disputed position was properly included in the bargaining unit represented by PSE while it was categorized as a "classified" position during the 2001-2002 school year, it is now properly included in the bargaining unit represented by the LCEA based on being categorized by the employer as a "certificated" position.

BACKGROUND

The employer operates an elementary school, a remote and necessary school, and a third facility combining both a middle school and a high school.

The employer has bargaining relationships with unions representing two separate bargaining units:

- The LCEA represents all of the employer's non-supervisory "certificated" employees (teachers) under the provisions of the Educational Employment Relations Act, Chapter 41.59 RCW.
- PSE represents all of the employer's "classified" employees under the provisions of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Approximately 58 employees in that unit work in transportation, food service, custodial/maintenance, paraprofessional, office-clerical, and nursing functions.

For several years, the employer has had a computer lab classroom at its elementary school. Students in kindergarten through fifth grade attend that school, and are rotated through the computer laboratory (along with music, library and physical education programs) on a pre-scheduled basis.

Through the 2000-2001 school year, the employer assigned a certificated employee to the computer lab. The employee holding that assignment submitted his resignation on the last day of the 2000-2001 school year.

The 2001-2002 Classified Position -

The employer found itself with an unexpected vacancy to fill,¹ at a time when it was also facing the budgetary problems associated with having a declining enrollment.² Superintendent James Busey and Principal Jeffrey Peck discussed how the computer lab might be operated in the future, and decided to make the computer lab assignment a classified position. Flyers announcing the vacancy were mailed to paraprofessional employees in the bargaining unit represented by PSE. No such notices were sent to certificated employees in the bargaining unit represented by the LCEA.

The employer selected Bev Cady to fill the computer lab position. Cady had been a paraprofessional employee in the bargaining unit represented by PSE,³ but had not worked in the computer lab. Cady approached the job with energy, consulting with her brother (who was then a teacher and technical person for another school

¹ The certificated employee who had held the position had mentioned the possibility of retirement during the previous winter, but had not given any formal indication of a surrender of his continuing contract rights until the last day of the 2000-2001 school year.

² The superintendent testified that the employer's current enrollment is about 1,350 students, and that enrollment has declined for the past six years. He also mentioned problems with the local economy.

³ Cady worked for this employer as a "migrant math aide" from 1979 to 1982. She returned in 1990, and worked as an instructional aide in several different subject areas. She thus had a broad exposure to varied subjects and teaching styles.

district), her husband (who is a data analyst), and her son (who is a computer programmer). She redesigned the curriculum for the computer lab and prepared lesson plans in consultation with Principal Peck, and he visited the computer lab in the capacity of being the supervising teacher for that classroom. Cady consulted the school librarian to learn how to do grades for her classes, and she recorded grades on a daily basis for each student's participation and effort in the computer lab.

Each day, seven groups of students would come to the computer lab for periods lasting 35 to 40 minutes. Each class would be in the computer lab about 11 times in each school quarter. Students would work on age-appropriate computerized instruction programs, although the classroom teachers might have specific requests for the students to work on.⁴ In consultation with the principal, Cady helped decide the grade to be placed on students' report cards for "Effort/Achievement" each quarter. Her grading system was similar to that used by the librarian, the music specialist, and the physical education specialist.

Besides redesigning the curriculum and overseeing students in the computer lab, Cady was responsible for maintaining the equipment in the computer lab.⁵ An additional job duty performed by Cady separate and apart from any interaction with students was the maintenance of a Doppler weather kit station from KING Five News of Seattle. During the 2001-2002 school year, Cady was paid at the paraprofessional rate under the contract between the employer and PSE, and was a member of the bargaining unit represented by PSE.

⁴ Classroom teachers would return to their own classrooms while their students were in the computer lab.

⁵ She performed this task as needed, sometimes with the assistance of her family.

All witnesses described Cady's skills and performance in her various roles as outstanding.

The LCEA Grievance -

In September 2001, after Cady had begun working in the computer lab, the LCEA filed a grievance protesting the hiring of a classified employee to fill a position formerly held by a certificated employee. That grievance was resolved on October 22, 2001, by an agreement stating as follows: "The Association and the District agree to a re-posting of the position of computer lab specialist at [the elementary school] to a full-time certificated person, who will be a member of the bargaining unit of the LCEA." That agreement was signed by the superintendent and by the president of the LCEA. PSE was not notified of the grievance, and was not involved in its discussion or resolution.

Implementation of the grievance resolution proved to be difficult. The employer interviewed certificated teachers for the position in November of 2001, but the teacher selected for the job could not decide if she wanted the job. An issue also arose as to whether the vocation education position then held by the selected teacher could be filled mid-year. Discussions were held about the possibility of having Cady continue working in the computer lab, while assigning the selected teacher to supervise Cady on a half-time basis, but those discussions did not resolve how to get a certificated employee into the computer lab. In December, the employer posted the certificated computer lab position with colleges and placement centers. A temporary compromise was reached by the end of December, as follows: The LCEA agreed that the employer could retain Cady in the computer lab as a paraprofessional for the balance of the 2001-2002 school year. Further meetings in January of 2002 reaffirmed that compromise, but

produced a promise by the employer to fill the computer lab position with a certificated employee for the 2002-2003 school year.

PSE filed the petition to initiate this proceeding in January 2002. It asked the Commission to decide whether the computer lab position is a classified position or a certificated position.

The employer offered the computer lab position to a certificated teacher for the 2002-2003 year. She accepted the job, but then became medically unable to fill the position just prior to the beginning of the 2002-2003 school year.

The employer again found itself with an unexpected vacancy to fill, and it again assigned Cady to work in the computer lab. On the same day that the employer learned the assigned teacher would not be able to fill the computer lab assignment, the employer applied to the Office of the Superintendent of Public Instruction (OSPI) to have Cady certified under state laws and regulations governing educator certification. While that application was pending during September of 2002, the employer assigned a certificated substitute to be in the computer lab with Cady.

On October 2, 2002, the OSPI issued a "conditional teacher permit" authorizing Cady to "be a K-5 technology educator at Lake Chelan School District" through March 31, 2003. Thereafter Cady worked alone in the computer lab with students. The record does not contain any clear evidence as to whether Cady was issued an individual employment contract as a certificated employee, or as to the rate of pay provided to Cady after October 2, 2002. Limited testimony suggests she was not made a member of the bargaining unit represented by the LCEA.

POSITIONS OF THE PARTIES

PSE argues that a "computer lab technician" job was newly-created in 2001, and that the new job has a community of interest with other classified positions. It asserts that the computer lab position shares duties, skills, and working conditions with several other classified positions, particularly citing that classified employees working as middle school librarian, as head instructor in an early childhood education program, and as a paraprofessional in the special education department have duties and responsibilities very similar to those of the computer lab technician. PSE argues that the LCEA's grievance was an inappropriate forum and that, having chosen the grievance forum, the LCEA cannot appear or argue in this forum for inclusion of the position in its bargaining unit.

The employer did not take a position on the proper unit placement of the computer lab position.

The LCEA argues that the computer lab position belongs in the bargaining unit it represents. It argues that the position should be in the certificated employee bargaining unit because: (1) the employer requires a teaching certificate for the computer lab job; and (2) the position shares a community of interest with the certificated bargaining unit. The LCEA also notes that the position was held by a certificated teacher for most of its history, and it asserts that the exception for one year was as a result of a good-faith settlement of their grievance.

DISCUSSION

Both unions acknowledge that the Public Employment Relations Commission does not, and will not, determine whether a position in

a school district requires educator certification. Nevertheless, both unions argue that "Common School Provisions" in Title 28A RCW require a result here that determines whether the disputed position is (or is not) a certificated position.⁶

Applicable Legal Principles

Both of the unions involved here represent employees of Washington school districts, but they operate under two different state laws:

The collective bargaining rights of "classified" employees are regulated by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. That statute defines an employee as "any employee of a public employer" in RCW 41.56.030(2), with several exclusions not relevant to this discussion.

The collective bargaining rights of "certificated" employees are regulated by the Educational Employment Relations Act, Chapter 41.59 RCW. That statute defines an "employee" as "any certificated employee of a school district" in RCW 41.59.020, again with several exclusions not relevant here.

Of even greater importance to this proceeding, RCW 41.59.080(1) requires inclusion of all nonsupervisory educational employees of an employer in a single bargaining unit. That specific language effectively takes away most of the unit determination authority conferred by recitation of the traditional "community of interest" criteria in the lead paragraph of RCW 41.59.080.

⁶ For example, PSE contends technology is not an essential subject matter under the Basic Education Act, at RCW 28A.655.060 ff., so that certification is not required for work in a computer lab; the LCEA contends WAC 180-44-010 requires placement in the "certificated" category if a position involves primary responsibility for planning, conducting and evaluating instructional activities.

The Commission has addressed the distinction between Chapter 41.59 RCW and Chapter 41.56 RCW, even in their application to teachers moonlighting as coaches or in other positions that do not require educator certification. *Castle Rock School District*, Decision 4722-B (EDUC, 1995). The holding of the *Castle Rock* case was then codified in WAC 391-35-300, which provides:

A collective bargaining relationship cannot lawfully be maintained under the Educational Employment Relations Act, chapter 41.59 RCW, with respect to school district jobs for which a professional education certificate is not required by chapter 28A.410 RCW, as implemented through rules adopted by the state board of education and the office of the superintendent of public instruction, or by established practice or written policy of the employing school district. Any collective bargaining rights of employees performing school district jobs not requiring a professional education certificate are regulated by the Public Employees' Collective Bargaining Act, chapter 41.56 RCW.

Thus, regardless of what any or all of these parties might desire or prefer, a "classified" position cannot be included in the bargaining unit represented by the LCEA, and a "certificated" position both: (1) cannot be included in the bargaining unit represented by PSE; and (2) must be included in the bargaining unit represented by the LCEA.

The term "certificated" appears in (and is sometimes defined in) a number of state statutes and regulations. RCW 28A.410.120 provides:

The state board of education shall establish, publish, and enforce rules and regulations determining eligibility for and certification of personnel employed in the common schools of this state, including certification for emergency or temporary, substitute or provisional duty and under such certificates or permits as the board shall deem proper or as otherwise prescribed by law.

RCW 28A.150.060 includes,

The term 'certificated employee' . . . shall include those persons who hold certificates as authorized by rule or regulation of the state board of education or the superintendent of public instruction.

The Superintendent of Public Instruction has adopted a rule in which the term "certificated" is further defined:

WAC 392-121-200 DEFINITION - CERTIFICATED EMPLOYEE. As used in this chapter, a person who holds a professional education certificate issued by the superintendent of public instruction and who is employed by a school district in a position for which such certificate is required by statute, rule of the state board of education, or written policy or practice of the employing school district.

The existence of those definitions has not, however, avoided all debates about the placement of positions in school districts.

The Public Employment Relations Commission has sought to avoid invading the responsibilities of the Superintendent of Public Instruction with educator certification, but the Commission must also discharge its responsibilities concerning the determination of appropriate bargaining units under Chapters 41.56 and 41.59 RCW. An employer may not use the certified/classified employee distinction to avoid other requirements of law. For instance:

In *College Place School District*, Decision 795 (PECB, 1980), the employer hired a person who held educator certification for a position it titled as a "Title I-Migrant Tutor" and expected the employee to attend teachers' meetings and participate in other teachers' activities, but attempted to categorize the job as a "classified" position outside of the bargaining unit created under Chapter 41.59 RCW. The decision notes, "It appears that the

decision to call the position 'classified' was based largely on the complications posed for the employer by employee coverage under the continuing contract law applicable to certificated employees." The employee at issue in *College Place* was found to be an educational employee under Chapter 41.59 RCW.

In *Olympia School District*, Decision 799 (PECB, 1980), another employee who held a teaching certificate was placed in a classified position but took on the appearance of a certificated teacher. That decision notes, "Unit determinations must be based upon position requirements, and cannot be guided by incumbent qualifications. In other words, if the position is truly a classified position, the incumbent's teaching certificate does not make the job a certificated position."

Thus, the statutory rights and unit placement of school employees depend on the requirements and assignments imposed by the employer and by the Office of the Superintendent of Public Instruction.

Application of the Law to the Facts

Previous Allocation Irrelevant -

The evident "certificated" status of the computer lab position during and prior to the 2000-2001 school year is irrelevant for the purposes of this unit clarification case. Even if the LCEA might have had a "skimming" cause of action under *South Kitsap School District*, Decision 472 (PECB, 1978) and numerous subsequent decisions citing that precedent, it does not appear that the LCEA filed or processed an unfair labor practice complaint within the six month period allowed by RCW 41.59.150. The Commission must take the parties and disputed positions as it finds them in a unit clarification case under Chapter 391-35 WAC. The computer lab job was, in fact, a classified position when the petition was filed to initiate this proceeding in January of 2002.

Grievance Settlement Irrelevant -

The agreement reached by the employer and the LCEA through the grievance machinery of their collective bargaining agreement is also irrelevant for the purposes of this unit clarification case. Unit determination is not a subject for bargaining in the usual "mandatory/permissive/illegal" sense and, while parties may agree on unit issues, their agreements are not binding on the Commission or on other parties. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981). Either a grievance settlement or an arbitration award issued under a contract is merely an outgrowth of the parties' agreement, and the Commission does not consider or defer to them. *Port of Seattle*, Decision 3421 (PECB, 1990).

The Situation During the 2001-2002 School Year -

PSE aptly relies on the decision of employer officials to post the computer lab job as a classified position for the 2001-2002 school year. There is no evidence of any motive other than the judgment of the two administrators about what skills were needed in the context of budget constraints. The historical position was significantly modified by involving the building principal in day-to-day details previously accomplished by a certificated teacher. As so modified, the position was performed by a classified employee as a paraprofessional for that school year. In the absence of a requirement for educator certification, it would have been inappropriate to include that position in the certificated employee bargaining unit. *Castle Rock School District*, Decision 4722-B; WAC 391-35-300.

The Situation During the 2002-2003 School Year -

The LCEA aptly relies on the decision of employer officials to post the computer lab job as a certificated position for the 2002-2003 school year. The employer's actions during August, September, and

October of 2002 were entirely consistent with categorization of the computer lab job as a certificated position:

First, the employer hired a certificated employee for the position;

Second, the employer applied to OSPI for a conditional teaching certificate for Cady, upon learning that the certificated employee was medically unable to perform the job;

Third, the employer assigned a certificated employee (albeit a substitute) to be in the computer lab with Cady; and

Fourth, the employer had Cady work alone in the computer lab only after OSPI had issued her a conditional teaching certificate.

Now that the employer requires the employee holding that position to have educator certification, RCW 41.59.080(1) requires that it be included in the certificated employee bargaining unit.⁷ Even if PSE might have had a "skimming" cause of action under *South Kitsap School District*, Decision 472 and numerous subsequent decisions citing that precedent, it does not appear that PSE filed or processed an unfair labor practice complaint within the six month period allowed by RCW 41.56.160.

FINDINGS OF FACT

1. Lake Chelan School District operates common schools under Title 28A RCW, and is both an employer within the meaning of RCW 41.56.030(1) and an employer within the meaning of RCW 41.59.020(5).

⁷ There was some suggestion in the evidence that the LCEA and/or the employer had resisted (or might resist) placing Cady in the certificated employee unit, but they had no choice once the OSPI issued a certificate to Cady.

2. Public School Employees of Washington, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of classified employees of Lake Chelan School District.
3. Lake Chelan Education Association, an employee organization within the meaning of RCW 41.59.020(1), is the exclusive bargaining representative of certificated employees of Lake Chelan School District.
4. In the summer of 2001, the employer decided that educator certification would not be required for the position assigned to a computer lab at its elementary school, and advertised for applicants for a classified position.
5. A classified employee, Bev Cady, applied for and was awarded the computer lab position. Cady began her duties in the computer lab at the beginning of the 2001-2002 school year. Cady's work in the computer lab was supervised and assisted by the building principal, who is a certificated employee.
6. Notwithstanding objection from the LCEA, Cady continued to perform the tasks of the computer lab position throughout the 2001-2002 school year, and was paid as a classified employee under the collective bargaining agreement between the employer and PSE.
7. PSE filed a timely petition to initiate this proceeding, seeking a ruling concerning the bargaining unit status of the computer lab position claimed by both PSE and the LCEA.
8. For the 2002-2003 school year, the employer decided to require educator certification for the computer position at its

elementary school, and advertised for applicants for a certificated position. A certificated employee applied for and was awarded the computer lab position.

9. Shortly before the start of the 2002-2003 school year, the certificated employee who had been hired for the computer lab position as described in paragraph 8 of these findings of fact became medically unable to perform the duties of the position.
10. Responding to the vacancy created as described in paragraph 9 of these findings of fact, the employer both: (a) assigned Bev Cady to work in the computer lab; and (b) applied with Cady to the Office of the Superintendent of Public Instruction (OSPI) for a conditional teaching permit.
11. From the beginning of the 2002-2003 school year through October 2, 2002, the employer assigned a certificated employee from its list of substitute teachers to be present in the computer lab while Cady worked in that facility.
12. On October 2, 2002, the OSPI issued a conditional teaching permit authorizing Cady to work as a certificated employee in the computer lab. The employer thereafter discontinued assigning a substitute teacher to work in that facility.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW, Chapter 41.59 RCW and Chapter 391-35 WAC.
2. On the basis of the foregoing findings of fact, the computer lab work at issue in this proceeding was a classified position

during the 2001-2002 school year, under the coverage of Chapter 41.56 RCW.

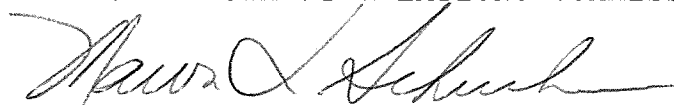
3. On the basis of the foregoing findings of fact, the computer lab work was a certificated position beginning with the 2002-2003 school year, under the coverage of Chapter 41.59 RCW and properly included in the bargaining unit represented by the LCEA.

ORDER

1. The computer lab position was properly included in the bargaining unit represented by PSE for the 2001-2002 school year.
2. The computer lab position was properly included in the bargaining unit represented by the LCEA from the beginning of the 2002-2003 school year at least through the date of the hearing in this matter.

Issued at Olympia, Washington, on the 25th day of November, 2003.

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.