Ephrata School District, Decision 8700 (PECB, 2004)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
EPHRATA SCHOOL DISTRICT	)	CASE 18244-C-04-1172
	)	
For clarification of an existing bargaining unit represented by:	)	DECISION 8700 - PECB
	)	
PUBLIC SCHOOL EMPLOYEES OF WASHINGTON	)	ORDER CLARIFYING BARGAINING UNIT
	)	
	)	

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Eric Nordlof, Attorney at Law, for the union.

The Ephrata School District (employer) filed a petition for clarification of an existing bargaining unit with the Public Employment Relations Commission on February 19, 2004, seeking a ruling as to whether a position claimed by Public School Employees of Washington (PSE) should be included in a different bargaining unit.[1] Hearing Officer Carlos R. Carrión-Crespo held a hearing on March 24, 2004. The parties filed post-hearing briefs.

The Executive Director rules that the disputed position is properly included in the existing bargaining unit of classified employees represented by PSE.

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[1] PSE filed a request on January 22, 2004, seeking assignment of a member of the Commission staff to arbitrate a grievance related to this controversy (Case 18172-A-04-1397). The processing of that arbitration request was delayed until this case is resolved.

BACKGROUND

The employer and PSE are parties to a collective bargaining agreement effective from September 2003 through August 2006. The recognition clause in that contract describes the bargaining unit as follows:

> Section 1.3. The bargaining unit to which this Agreement is applicable shall consist of all classified employees in the following general job classifications: Secretarial/Clerical, Paraeducators, Custodial/Maintenance, Food Service, Transportation and Security. The Supervisors of Transportation, Food Service and Custodial/Maintenance; the Business Manager, Central Office Secretaries and substitute employees shall be exempt from the bargaining unit. . . . .

The history of that bargaining unit was summarized in *Ephrata School District*, Decision 4675 (PECB, 1994), as follows:

> PSE is the exclusive bargaining representative of a "wall-to-wall" unit of the employer's classified employees, excluding only four supervisors and two confidential secretaries. The bargaining relationship between the employer and PSE has existed for more than 20 years. The first contract between the employer and PSE described the bargaining unit as: "All classified employees in the following units, 1. Custodian, 2. Transportation, 3. Maintenance, 4. Secretaries, 5. Teacher Aides." A subsequent agreement between the employer and PSE altered the unit description somewhat, specifying that the contract was applicable to:
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> > [A]ll employees in the School District performing work as classified employees.
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> That generic description was used until the 1976-1978 contract . . . when the contract was amended to read:
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> > The bargaining unit to which this agreement is applicable shall consist of all classified employees in the general job classifications: secretarial/clerical, aides, custodial/maintenance, food service, and transportation.

That bargaining unit has never included employees who conduct co-curricular activities.

After *Castle Rock School District*, Decision 4722-B (EDUC, 1995) was issued and WAC 391-45-560 was promulgated as an emergency rule, a number of employees who conduct co-curricular activities were excluded from a bargaining unit of non-supervisory certificated employees maintained under Chapter 41.59 RCW. This employer then extended voluntary recognition to a local organization affiliated with the Washington Education Association (WEA) in 1996, for a separate unit of employees who conduct co-curricular activities.[2] The employer and the WEA are parties to a collective bargaining agreement effective from August 2002 through August 2005. The recognition clause of that contract describes the bargaining unit it covers, as follows:

> [A]ll co-curricular employees of the District whose job description does not require a certificate. The positions are described in Appendix 1. By August 31, 2003, a general description of the responsibilities for each co-curricular assignment will be developed by those staff currently holding such positions, principal, and athletic director. The description is a general guideline to assist new people in transitioning into co-curricular roles, however, such descriptions may not be inclusive of all the responsibilities, expectations, as other duties may be assigned with changing expectations and conditions. Co-curricular responsibilities will be maintained in the office at the building level and are not included within the co-curricular agreement.

Appendix 1 of that Agreement contains a list of covered positions, in the form of the notice that was posted under WAC 391-45-560:

> II. We agree that the following extracurricular activities jobs DO NOT require a professional education

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[2] *Ephrata School District*, Decision 5748 (PECB, 1996).

certificate. WE PROPOSE TO EXCLUDE THESE POSITIONS FROM OUR COLLECTIVE BARGAINING RELATIONSHIP UNDER CHAPTER 41.59 RCW:

Athletic Director	Senior Advisor
Junior Advisor	Sophomore Advisor
Freshman Advisor	Student Council Advisor
Cheerleader Advisor	Baseball Coach
Basketball Coach	Cross Country Coach
Knowledge Bowl Advisor	Math Team Advisor
Drama Director	Drill Team Advisor
Football Coach	Golf Coach
Music Director	School Patrol
Softball Coach	Tennis Coach
Track Coach	Volleyball Coach
Wrestling Coach	Soccer Coach
Annual Advisor	Middle School Intramurals
Athletic Trainer	Speech and Debate Coach
Driver Education	Spanish Club
	MECHA Club
	National Honor Society

(All positions include Head and Assistant Coach/Director/ Advisor/Trainer)

Members of that bargaining unit are compensated through a system of stipends. The WEA is not a party to this proceeding.

In 1997 or 1998, the employer opened Parkway Middle School to house sixth grade students and alleviate overcrowding in its original middle school. After transporting students for intramural activities for a time, the employer started an intramural program at Parkway. Later, the employer received a private grant and other contributions to help fund the intramural program at Parkway.

In 2000, the employer both expanded the intramural program at Parkway and created the "Building Lives After School Together" Program (B.L.A.S.T.) to assist high-risk students. B.L.A.S.T. offers free-of-charge athletic, handicraft and cultural activities to Parkway students between 2:40 p.m. and 4:00 p.m. daily, as well as between noon and 3:00 p.m. on early release days when teachers are not available. During the school year preceding the hearing in this case:

- Most of the 29 activities offered lasted three or four days;
- Five of the activities spanned two weeks;
- One activity took six weeks.
- Most B.L.A.S.T. activities were led by one-time instructors;
- Three instructors led two activities each; and
- Leeann Marie Stucky and another instructor led five activities together.

Attendance at B.L.A.S.T. activities is voluntary, but students are expected to observe the same discipline as in the classroom.

Stucky was employed as a paraeducator (within the bargaining unit represented by PSE) before B.L.A.S.T. was started, and was assigned the task of "directing" B.L.A.S.T. Since 2000, she has put in 315 hours per year on B.L.A.S.T. work. For the 2003-2004 school year, her B.L.A.S.T. work time was allocated as follows:

- About 60 hours directing and organizing B.L.A.S.T., contracting volunteers and setting up activities;
- About 230 hours supporting other employees who actually carry out B.L.A.S.T. activities; and
- About 25 hours leading five B.L.A.S.T. activities, including two sessions on early release days, a "child care basics" session, a "B.L.A.S.T. bonanza" session, and a "holiday gifts and goodies" session.

Through August 2003, the employer paid Stucky for all hours worked as a paraeducator under its collective bargaining agreement with PSE. Since September 2003, the employer has paid Stucky at the paraeducator rate for 6.25 hours per day, and has paid her at a co-curricular rate for the remaining 1.75 hours per day.

POSITIONS OF THE PARTIES

The employer acknowledges that Stucky is properly included in the bargaining unit represented by PSE for her work as a paraeducator, but asks that her B.L.A.S.T. work be shifted to the bargaining unit represented by the WEA. Regarding B.L.A.S.T., the employer argues that the program: involves duties performed after school hours, is "voluntary" and of a "not academic" nature, does not receive state funding, and was an outgrowth of its intramural program. The employer contends Stuckey was erroneously paid until a time and effort study uncovered the mistake. Finally, the employer claims Stucky has a community of interest with co-curricular employees for her B.L.A.S.T. duties.

PSE contends the B.L.A.S.T. tasks involve work historically performed by members of the bargaining unit it represents, and that the employer consistently treated Stucky as a member of its bargaining unit throughout her workdays until September 2003. It also notes that the WEA has never requested that the B.L.A.S.T. work be included in the co-curricular bargaining unit.

DISCUSSION

Applicable Standards

Bargaining Rights of Co-Curricular Employees -
Chapter 41.56 RCW regulates collective bargaining by all employees of school districts except "certificated" positions covered by Chapter 41.59 RCW. In the absence of a statute or State Board of Education rule requiring educator certification for such work, employees who coach athletics and conduct other co-curricular activities are covered by Chapter 41.56 RCW. *Castle Rock School District*, Decision 4722-B (EDUC, 1995). WAC 391-35-300 provides:

> SCHOOL DISTRICT EMPLOYEES. 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, a bargaining unit of co-curricular employees must be separate from a bargaining of certificated employees of a school district, even if those units share some members.

Determination of Appropriate Bargaining Units -

The Legislature has delegated the determination and modification of bargaining units under Chapter 41.56 RCW to the Commission. RCW 41.56.060. Agreements reached by employers and unions through the give and take of collective bargaining cannot bind the Commission. *City of Richland*, Decision 279-A (PECB, 1978); *aff'd*, 29 Wn. App. 599 (1981); *cert. den.*, 96 Wn.2d 1004 (1981).

The Commission carries out its unit determination responsibilities by grouping together employees according to communities of interest. The unit determination process was explained in a recent decision, *Concrete School District*, Decision 8131 (PECB, 2003), as follows:

> The Commission makes unit determinations on a case-by-case basis, with a purpose of grouping together employees who have sufficient similarities (community of interests) to indicate that they will be able to bargain collectively with their employer. *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). None of the four factors listed in the statute 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[.]
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> Analysis under the *"duties, skills and working conditions" component does not require separation of employees on a classification-by-classification basis*, . . . ;
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> Analysis under the *"history of bargaining" component* ranges from no inquiry for unrepresented employees to recognition to the history that *develops with each passing day*;
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> Analysis under the *"extent of organization" component avoids stranding of individuals* by unit configurations that would preclude their exercise of their statutory collective bargaining rights, as in *City of Blaine*, Decision 6619 (PECB, 1999), *and avoids fragmentation* of workforces resulting in a proliferation of bargaining units and conflicting work jurisdiction claims. *City of Auburn*, Decision 4880-A (PECB, 1995); *Ben Franklin Transit*, Decision 2357-A (PECB, 1986); and
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> Analysis under the *"desires of employees" component is by means of conducting a unit determination election*, but that is only done in representation proceedings under Chapter 391-25 WAC, and only where either of two or more unit configurations sought by employee organizations could be appropriate.
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> *Unit clarification proceedings under Chapter 391-35 WAC are apt for dealing with changes of circumstances* after a bargaining unit is created. That includes modification of bargaining unit descriptions to recognize the evolution of government services, technological advances, and the arrival of new generations of employees who perform such services.
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> Where new positions are added to a workforce in which some employees are already represented for the purposes of bargaining, the "accretion" standards set forth in Commission precedents such as *Kitsap Transit Authority*, Decision 3104 (PECB, 1989); and *Seattle School District*, Decision 4868 (PECB, 1984) are applicable. 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).

(emphasis added). There is no reason to modify that explanation in this case.

A concern for minimizing "dual status" employment situations was discussed in *Ephrata School District*, Decision 4675-A (PECB, 1995), where the Commission wrote:

> The Executive Director found that certain aide positions working closely with the secretaries had an interest in both of the potential bargaining units, and ordered that all employees assigned to perform office-clerical work on a full-time or regular part-time basis were properly included in a separate bargaining unit. . . . . Some of the multifunctional tasks performed by the aides are tied to time-sensitive functions, such as the arrival and departure of a school bus or the serving of lunches. *It appears that the historical bargaining relationship has accommodated the interest of employees in earning a sufficient wage, by grouping together two or more assignments that would individually constitute only limited part-time employment.* The Executive Director's ruling would cause the aide's job assignments to become "dual status" employees who would be bifurcated between two bargaining units.
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> For the individuals involved, the effect of being "dual status" employees would mean that their wages, hours and working conditions would be divided between two different collective bargaining agreements negotiated by two different exclusive bargaining representatives, that they could be obligated to join both unions and pay full dues to each under union security obligations, and that they would have voting rights in both bargaining units in the event of some future representation case. We find such a fragmentation of employee interests, loyalties, and obligations to be disruptive of stable labor relations.
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> For the employer, the effect of having "dual status" employees would be constant vigilance and concern about the work jurisdiction claims of the two bargaining units, along with complications in connection with the administration of hiring, transfer, promotion, demotion, layoff, recall, discipline and discharge of such employees. We find such an arrangement also to be disruptive of stable labor relations.
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> It is not the role of the Commission to direct how an employer should organize its workforce, but rather to determine appropriate bargaining units by applying the criteria set forth in RCW 41.56.060 and Commission precedent to existing facts. *While it may be necessary to occasionally deal with "dual status" problems when they arise, [cited precedents] weigh heavily against a*

> *Commission decision which has the effect of creating "dual status" situations.*

(emphasis added). The Commission thus concluded the customary presumption of propriety accorded to separate bargaining units of office-clerical employees was rebutted, and it reversed an order that allowed a severance.

Application of Standards

Duties, Skills and Working Conditions -

The employer claims discovery of an "error" on its part, but it has neither claimed nor proved a change of circumstances or intervention of any outside forces. It thus failed to meet the requirements of *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *rev. denied*, 96 Wn.2d 1004 (1981),[3] and WAC 391-35-020(3).

Stucky is not required to provide B.L.A.S.T. services directly to students. In fact, this record indicates she only devoted about 25 of 315 hours (less than eight percent) to direct services last year. Even then, two of the five incidents appear to have involved

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[3] "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. If, as contended by the employer and found by the authorized agent, the agreed unit is found by intervening decisions of the Commission or the Courts to be inappropriate, it may be clarified at any time. This rule is consistent with the NLRB policies on the subject. The Union is correct that a unit clarification should not be the source of a disturbance in an established relationship, but the facts of this case do not fit the argument."

supervision of students in the absence of teachers (much as she would normally do as a paraeducator), rather than developing and presenting a specific activity.

Stucky's B.L.A.S.T. work is primarily of an administrative support nature. Although Stucky testified that she is on both the paraeducator and co-curricular branches of the employer's organization, she has very little contact with the B.L.A.S.T. staff other than in inviting them to work for the program. Stucky performs B.L.A.S.T. support tasks every day she works, while the B.L.A.S.T. presenters only work a few days per year. This supporter vs. presenter distinction makes *South Central School District*, Decision 5670-A (PECB, 1997) inapposite here.[4] Additionally, the 25 hours of direct services performed by Stucky in the last year involved far less than the 30 days that would be required for inclusion in the co-curricular bargaining unit under *South Central*. Finally, administrative duties which include hiring of B.L.A.S.T. presenters also raise a question under WAC 391-35-340, and weigh against including Stucky in the same bargaining unit with the presenters.

The parties discussed whether Stuckey's B.L.A.S.T. work was "academic" in nature, but that term is not relevant. The unit that was preserved by the Commission in *Ephrata School District*, Decision 4675-A, is an integrated support operation underlying a variety of functions beyond the employer's academic programs. Any subdivision of administrative functions would create an ongoing potential for work jurisdiction disputes under *South Kitsap School District*, Decision 472 (PECB, 1978) and numerous subsequent decisions concerning "skimming" of bargaining unit work.

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[4] Employees performing a wide variety of co-curricular tasks were grouped together in one bargaining unit in *South Central*, but the positions at issue there were primarily involved with "guiding, leading, coaching and disciplining students" and lacked the administrative support role primarily performed by Stucky on B.L.A.S.T.

History of Bargaining -

The bargaining unit represented by the WEA had been in existence for more than 3 years when B.L.A.S.T. was created in 2000, but the employer put the B.L.A.S.T. work in the bargaining unit represented by PSE. Thus, the history pertinent to this case is that the B.L.A.S.T. work was within the jurisdiction of the bargaining unit represented by PSE for up to three years before the employer took action to compensate Stucky in a different manner, and that history weighs heavily against the employer.

Allowing that an inappropriate bargaining unit can be attacked at any time, the *Castle Rock School District* decision and WAC 391-35-300 do not support a conclusion that inclusion of the B.L.A.S.T. work in the bargaining unit represented by PSE was fatally defective from its outset. Rather than having any effect among the employees covered by Chapter 41.56 RCW, *Castle Rock* and WAC 391-35-300 only require exclusion of classified work from collective bargaining under the statute limited to certificated employees.

The employer has not expanded upon its claim of a "mistake" to show that it was more than a change of heart on its part. Even if its earlier placement of the B.L.A.S.T. duties could have been questioned at the time it was made, that does not provide basis to rule that the placement was fatally defective. Accretions of duties and/or employees to existing bargaining units can lawfully occur when an employer acquires or commences additional operations.[5] Because accretions are accomplished without giving

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[5] Accretions occur under the National Labor Relations Act: "If the additional facility is found to be an accretion to the existing operation, the preexisting contract may be extended to cover employees in the new operation and thus bar an election there." *The Developing Labor Law*, (P. Hardin & J. Higgins, ed., BNA Books, Fourth Edition, 2001) at 533.

the affected employees an opportunity to vote on their representation, the party proposing an accretion does have the burden to show that the conditions for an accretion are present, but the methods to challenge an accretion have limits: An offended party can file an unfair labor practice complaint, but if Stucky or the WEA had any basis to complain about the employer giving the B.L.A.S.T. work to the bargaining unit represented by PSE, the right to do so expired six months after that unit placement was made. RCW 41.56.160. A competing union can file a representation petition, but no such petition has been filed. The employer waited more than three years to attack its own action, and it cannot avoid the history it created by accreting the B.L.A.S.T. work to the bargaining unit represented by PSE.

Extent of Organization -

This case does not present a risk of stranding the B.L.A.S.T. position, but the action proposed by the employer would effectively turn Stucky into a "dual status" employee. As noted in *Ephrata School District*, Decision 4675-A, this employer has a longstanding practice of creating multi-functional positions. Nothing in this record justifies creation of exactly the type of "dual status" situation the Commission sought to avoid in its decision rejecting a severance of the employer's office-clerical (administrative support) employees from the unit represented by PSE.

Desires of Employees -

This component of the statutory unit determination criteria is generally inapposite in unit clarification cases under Chapter 391-35 WAC, and is particularly inapposite here in the absence of a competing claim from the WEA. The contract covering the co-curricular unit is very specific in listing the positions it covers, and the absence of any mention of the B.L.A.S.T. work in that contract supports an inference that those parties have not

bargained over the position in the past. Finally, the absence of either a claim or intervention by the WEA deprives the employer of any basis to advance this petition under WAC 391-35-020(1)(b).

FINDINGS OF FACT

1. The Ephrata School District is a school district operated under Title 28A RCW, and is a "public employer" within the meaning of RCW 41.56.020 and 41.56.030(1).

2. Public School Employees of Washington (PSE), a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of classified employees of Ephrata School District performing a variety of administrative and operational support functions. That bargaining relationship has been in existence approximately 30 years.

3. The employer and a Co-curricular Employees Association (WEA), are parties to a collective bargaining agreement signed on August 14, 2002, and effective from September 2002 through August 2005, covering classified employees performing co-curricular functions. That bargaining relationship has been in existence since approximately 1996.

4. In 2000, the employer created the "Building Lives After School Together" program (B.L.A.S.T.), which offered activities for at-risk students at the employer's Parkway Middle School. The employer assigned responsibility for providing administrative support for that program to Leann Stucky, who it already employed as a paraeducator within the bargaining unit represented by PSE. Stucky's work time has been apportioned as 6.5 hours per day as a paraeducator and 1.75 hours per day on B.L.A.S.T. work.

5. The B.L.A.S.T. work performed by Stucky primarily involves organizing the program, recruiting and selecting presenters, and supporting the presenters who actually provide direct services to students. Less than eight percent of the B.L.A.S.T. work performed by Stucky in the 2003-2004 school year involved providing direct services to students, and that work was apparently performed on less than 30 days.

6. Through August 2003, the employer compensated Stucky for all of her work at the rates specified for paraeducators in the collective bargaining agreements between the employer and PSE.

7. In September 2003, following discovery of a claimed mistake on its part, the employer changed the compensation of Stucky to limit her pay as a paraeducator to 6.5 hours per day, and to compensate her at a different rate for her B.L.A.S.T. work.

8. No change of circumstances occurred prior to the events described in paragraph 7 of these findings of fact.

9. The employer and PSE are parties to a collective bargaining agreement which was signed on October 23, 2003, and is effective from September 2003 through August 2004. No provision of that contract acknowledged or accepted the compensation of Stucky as described in paragraph 7 of these findings of fact.

10. The WEA has not asserted any claim to the B.L.A.S.T. work, and has not moved for intervention in this proceeding. The specific list of covered position titles included in the collective bargaining agreement between the employer and the WEA does not include any reference to the B.L.A.S.T. work.

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. Under "duties, skills, and working conditions" and "history of bargaining" criteria of RCW 41.56.060, the circumstances described in the foregoing findings of fact, and the absence of any meaningful change of circumstances, the B.L.A.S.T. work historically performed by Leann Stucky is properly included in the bargaining unit represented by Public School Employees of Washington.

ORDER

The B.L.A.S.T. tasks shall continue to be within the bargaining unit represented by Public School Employees of Washington.

Issued at Olympia, Washington, on the 31st day of August, 2004.

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.