

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
PUBLIC SCHOOL EMPLOYEES OF)	CASE 17961-C-03-1113
WASHINGTON)	
)	DECISION 8784 - PECB
For clarification of an existing)	
bargaining unit of employees of:)	
)	ORDER CLARIFYING
CONCRETE SCHOOL DISTRICT)	BARGAINING UNIT
_____)	

Elyse Maffeo, Attorney at Law, for the union.

Vandenberg Johnson Gandara, by *William Coats*, Attorney at Law, for the employer.

On November 3, 2003, Public School Employees of Washington (union) filed a petition for clarification of an existing bargaining unit with the Public Employment Relations Commission, concerning a bargaining unit of employees of the Concrete School District (employer). The parties have had a bargaining relationship since a voluntary recognition during or about 1969, and they were parties to a collective bargaining agreement effective from September 2001 through August 2003.¹ A classroom aide working in a preschool program for developmentally disabled children was in that bargaining unit from 1985 until June of 2003. This controversy arose in the 2003-2004 school year, when the employer claimed that classroom aide should be excluded from the bargaining unit represented. Hearing Officer Carlos R. Carrión-Crespo held a hearing on the matter on June 9, 2004. The parties filed briefs.

¹ The parties had not signed a successor agreement when the union filed the petition to initiate this proceeding.

ISSUES

The parties have produced evidence and advanced arguments on two issues in this case:

1. Is the Concrete School District currently the employer of the classroom aide at issue in this proceeding?
2. Does the disputed classroom aide have a community of interest with the classified bargaining unit?

The Executive Director rules that the Concrete School District is no longer the employer of the disputed classroom aide. That ruling eliminates the need for a ruling on the second issue.

ANALYSIS

The "identity of employer" issue presents a threshold question in this case.

Applicable Legal Standards -

Review of what the Concrete School District must/can do indicates:

- WAC 392-172-030(1) obligates school districts to provide "every eligible special education student between the age of three and 21 years, a free appropriate public education program, including special education for students who have been suspended or expelled from school."
- RCW 28A.400.300 empowers school districts to hire classified employees.
- RCW 28A.155.060 authorizes school districts to "contract with agencies approved by the state board of education for operat-

ing special education programs for students with disabilities." Under the same statute, the "[a]pproval standards for such agencies shall conform substantially with those promulgated for approval of special education aid programs in the common schools."

The potential contractors available to school districts under RCW 28A.155.060 include Head Start, a national program providing free, comprehensive, developmental services for low-income children aged three to five, and social services for their families. Head Start seeks to provide a safe, healthy, nurturing environment so that each family, child, and staff member may reach their potential within the community.

Skagit Valley College is a state institution of higher education operated under Title 28B RCW,² and any collective bargaining rights of its employees are established by Chapter 28B.52 RCW or Chapter 41.80 RCW. A "Skagit/Islands Head Start of Skagit Valley College" program (S/I Head Start) serves children through centers in Skagit County, Island County, and San Juan County.³ Its classrooms operate on Mondays through Thursdays for nine months of the year, with a 3.5-hour daily schedule. It offers developmental and health screening, nutritional snacks and meals, educational experiences, and support and referrals for families working to establish and reach their goals. The S/I Head Start website indicates, "[l]ocal school districts provide one-way transportation in most centers." That website also advertises employment opportunities for Head

² As described in RCW 28B.50.040(4), Community College District 4 encompasses the counties of San Juan, Skagit and Island.

³ S/I Head Start is not a party to this proceeding.

Start center "teacher" and "assistant teacher" positions, directing potential applicants to contact Skagit Valley College.

The bargaining relationship between the union and the Concrete School District is regulated by Chapter 41.56 RCW, which applies to "any county or municipal corporation, or any political subdivision of the state of Washington." RCW 41.56.020.

Commission precedents concerning "identity of employer" focus on the ability to control the terms of employment. *Benton County*, Decision 7651-A (PECB, 2003); *Snohomish County Fire District 1*, Decision 6008-A (PECB, 1998); *Tacoma School District*, Decision 3314-A (PECB, 1990). Thus:

- When a question arises as to whether a person works for a public employer or a private employer, the Commission has looked to whether the public agency exerts "such retained control as would be equal to a veto power, or a final say" over most of the subjects of bargaining; such limitations on the private contractor "would trigger sufficient control to explode the private contractor's independent status and target the public entity as the true employer" because it is the party that can effectively bargain over the terms and conditions of employment. *Broadway Center for the Performing Arts*, Decision 7488-B (PECB, 2003).
- The Commission's focus is on the actual duties of the employees involved. *Port of Bellingham*, Decision 6017 (PECB, 1997); *City of Deer Park*, Decision 4237-C (PECB, 1993).
- The source of funding is not a basis to identify an employer. An employer cannot evade the responsibilities of having control over the working conditions of an employee by creating the position through politically expedient means, such as an

inter-local agreement. *Benton County*, Decision 7651-A. In *Kent School District*, Decision 2215 (PECB, 1985), the school districts who funded a joint operation argued that the Educational Service District for that region was the employer of employees working in a Head Start Program, but it was found that the "host" school district had effective control of the wages, hours and working conditions of those employees.

The determination of who is the employer is thus based on the actual facts taken as a whole, not on theories or labels.

Application of Standards -

Analysis of the "identity of employer" issue in this case benefits from review of what the Concrete School District has done:

- Beginning in the 1990's, the Concrete School District developed a cooperative relationship with S/I Head Start. The specifics varied from year to year: some years they shared breakfast or lunch, and others they would integrate, intermingle one to three hours every day, do groups or play centers together, come to each other's room or even keep the doors open and go back and forth between rooms.
- In 2003, S/I Head Start received a private donation which led to "weeks of conversations" between the Concrete School District and S/I Head Start.⁴
- The Concrete School District cut approximately \$185,000 from its operating budget, and entered into a new agreement with S/I Head Start on October 3, 2003. Under that agreement,

⁴ Although details concerning that donation are not established in this record, there is sufficient evidence to support an inference that the donation triggered the discussion and change that followed.

Concrete houses, transports and feeds Head Start students, as well as providing one special education teacher. S/I Head Start equips a preschool program providing 14 listed services, as well as providing one assistant teacher, custodial aides, and one classroom aide "to work directly with" the special education teacher provided by Concrete.

Examination of the details clearly indicates that S/I Head Start is now the employer of the classroom aide:

- S/I Head Start issued a job description for the position. In addition to detailing the desired and required qualifications, responsibilities, duties, physical requirements, environmental conditions and wages, the words "Skagit Valley College is an Equal Opportunity Employer" appear on that form.⁵
- S/I Head Start hired Ranae Watson to work 19 hours per week as the classroom aide in the Concrete Early Learning Center.
- Josie Hedgepath from S/I Head Start supervises both the classroom aide and the teacher she works with.
- S/I Head Start issues the paychecks to the classroom aide, and the employee does not receive any compensation directly from the Concrete School District.

Against that strong evidence, the only evidence suggesting exercise of control by the Concrete School District is that the classroom aide presently works on a schedule set by the Concrete School District. Under Commission precedents, that limited authority reserved to Concrete under the terms of the agreement between

⁵ The relationship continues. On May 10, 2004, the Concrete School District and S/I Head Start renewed their agreement for the 2004-05 school year.

Concrete and S/I Head Start is insufficient to label the Concrete School District as the employer (or even as a co-employer) of the classroom aide.

Although the cooperative agreement indicates the disputed classroom aide is to work directly with the teacher provided by the Concrete School District, the record does not support a finding that the Concrete School District exercises any control through its teacher. In particular, there is no evidence suggesting the teacher can discipline or otherwise meaningfully affect the employment situation of the disputed classroom aide.

The fact that the classroom aide function was performed by a member of the bargaining unit for 18 years prior to 2003 does not provide any basis to rule in favor of the union in this unit clarification proceeding under Chapter 391-35 WAC. The Executive Director must take the parties and the employee(s) as he finds them, and must rule on the current and future status of the disputed individual(s). Even if the Concrete School District had a duty to bargain concerning a decision to contract out bargaining unit work under *South Kitsap School District*, Decision 472 (PECB, 1978) and its progeny, the union would have needed to enforce that duty to bargain through unfair labor practice proceedings under Chapter 391-45 WAC.⁶

The union correctly notes that the State Board of Education must approve all agencies that contract with school districts, and that

⁶ Review of the Commission's docket records fails to disclose any unfair labor practice proceeding between these parties during or since 2003. The six-month period for filing an unfair labor practice complaint under RCW 41.56.160 would have expired early in 2004.

they must conform substantially with set standards,⁷ but the standards described in the union's brief do not address the determination of who is the employer in this case.

The Conclusion on Identity of Employer -

The evidence shows that S/I Head Start is now the employer of the disputed classroom aide, exercising control over major aspects of employment that include recruitment, hiring, setting wages and benefits, and supervision (including the authority to discipline and discharge).⁸

ANALYSIS OF COMMUNITY OF INTEREST UNNECESSARY

Because of the conclusion that the Concrete School District is not the employer of the disputed classroom aide, there is no need to reach or decide the parties' arguments concerning the propriety of placing the employee in the bargaining unit represented by the union.

FINDINGS OF FACT

1. Concrete School District is a public employer within the meaning of RCW 41.56.030(1).
2. Public School Employees of Washington is an employee organization within the meaning of RCW 41.56.030(3).

⁷ One of the statutes that PSE cites, RCW 28A.155.120, was repealed in 1991.

⁸ Superintendent Michael Parker of the Concrete School District testified that Laurenson "would work with the lead teacher and with Head Start in terms of that discipline" if there was an issue.

3. Public School Employees of Washington represents a bargaining unit of classified employees of Concrete School District.
4. On October 3, 2003, Concrete School District entered into a cooperative agreement with the Skagit/Islands Head Start of Skagit Valley College (S/I Head Start) for the 2003-2004 school year. The same parties later signed a similar agreement for the 2004-2005 school year.
5. Under the terms of the agreement described in paragraph 4 of these findings of fact, S/I Head Start named Ranae Watson as a classroom aide. Head Start sets the wages and benefits for the classroom aide, and holds the power to discipline and discharge her. Head Start's preschool teacher evaluates the classroom aide's performance.
6. Under the terms of the agreement described in paragraph 4 of these findings of fact, Concrete School District sets the preschool program hours. That effectively becomes the work schedule of the classroom aide, by virtue of her employment with S/I Head Start.

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 Head Start Classroom Aide position occupied by Ranae Watson is employed by Skagit/Islands Head Start, a separate and distinct entity from the Concrete School District under RCW 41.56.030(1).


3. In the absence of the Concrete School District holding status as the employer of the disputed classroom aide under RCW 41.56.020 and RCW 41.56.030, there is no need or occasion to apply the unit determination criteria set forth in RCW 41.56.060 in this proceeding.

ORDER

The petition for clarification of an existing bargaining unit filed in the above-captioned proceeding is DISMISSED.

Issued at Olympia, Washington, this 23rd day of November, 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.