Mead School District, Decision 7183 (PECB, 2000)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
MEAD EDUCATIONAL SUPPORT PERSONNEL	)	CASE 14574-C-99-936
	)	
For clarification of an existing bargaining unit of employees of:	)	DECISION 7183 - PECB
	)	ORDER CLARIFYING
MEAD SCHOOL DISTRICT	)	BARGAINING UNIT
	)	
	)	

Richard Torchio, President, appeared for Mead School District Educational Support Personnel.

Gary Ferney, Assistant Superintendent, appeared for the employer.

Cathy Fayant, President, appeared for the Mead Classified Public Employees Association/WEA.

On May 14, 1999, Mead Educational Support Personnel #1 / WEA (MESP) filed a petition with the Public Employment Relations Commission under Chapter 391-35 WAC, seeking clarification of an existing bargaining unit of classified employees it represents at the Mead School District. The petition indicated that Mead Classified Public Employees Association / WEA (CPEA) also claimed the position at issue, and that organization was granted intervention in the proceedings. A hearing was held on December 14, 1999, before Hearing Officer J. Martin Smith. The parties' representatives stipulated documents and stated their positions at the hearing, but did not offer any sworn testimony and did not file briefs.

Based on the evidence and arguments presented, the Executive Director concludes that this dispute is the result of a unilateral

bifurcation of a bargaining unit certified by the Commission. That bifurcated bargaining unit configuration is invalidated.

BACKGROUND

The Mead School District operates common schools serving about 8000 students in an area immediately north of Spokane, Washington. The employer operates two high schools, two middle schools and seven elementary schools. Bill Mester is the superintendent of schools; Gary Ferney is assistant superintendent for personnel.

The employer now maintains a warehouse on Market Street, near former administrative offices which were vacated in 1998-99. Foods and commodities received from vendors at the warehouse, as well as mail and packages, are distributed to the various schools by a school district employee, using an employer-owned vehicle. The food delivery function dates back to 1994; the mail and package delivery function dates back to at least 1978. Under a posting issued in June of 1999, Jeff Dailing is responsible for both the delivery tasks and custodian duties at the employer's administrative office.[1]

The Existing Bargaining Units

In Mead School District, Decision 3301 (PECB, 1989), the CPEA had prevailed over an incumbent exclusive bargaining representative in an election and run-off election,[2] and was certified as exclusive

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[1] That posting indicated the bargaining unit status of the position was at issue in a unit clarification proceeding.

[2] The Washington State Council of City and County Employees, AFSCME, AFL-CIO had represented the unit.

bargaining representative of a bargaining unit described as follows:

> All full-time and regular part-time custodial, maintenance and mechanic employees of Mead School District; excluding supervisors, confidential employees, and all other employees of the district.

The record in this proceeding includes a document prepared on the letterhead of the CPEA dated May 19, 1995, and addressed to Superintendent Mester, stating:

> Subject: Changes in Union Representation
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> The MCPEA wishes to inform the Mead School District that the current membership groups represented by MCPEA will change as of the closing date of the current contract, which is Aug. 31, 1995. Starting Sept. 1, 1995 the maintenance, mechanics and warehouse workers will be represented by the Mead Educational Support Personnel #1 (MESP #1). The custodians will continue to be represented by the MCPEA. In order to prepare for this change, both groups are actively altering their internal representation structure. The district will be contacted by bargaining representatives from both groups by June 1, 1995 so that the negotiating process can begin for the next contract. We look forward to beginning the process necessary to accomplish this task.
>
> Sincerely, MCPEA Executive Board
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> | | |
> |---|---|
> | /s/ Walter H J..... | /s/ Terence Geyer |
> | /s/ Jeff ... Dailing | /s/ Richard J. Torchio |
> | /s/ How... Brown | /s/ David M. ..... |
> | | /s/ Virginia Nieman |

The most that can be said of that transaction is that employer tolerance of the situation can be inferred. There is no evidence that the employer proposed, or even affirmatively agreed to, the

severance; it is clear that the transaction occurred without any Commission intervention.

Since September 1, 1995, two separate local organizations affiliated with the Washington Education Association have purported to represent separate bargaining units under Chapter 41.56 RCW, as follows:

- A bargaining unit of mechanics, maintenance, computer, and warehouse employees, represented by the MESP;[3] and
- A bargaining unit of custodians is represented by the CPEA.[4]

The delivery tasks at issue in this proceeding were left in the unit represented by the CPEA.

POSITIONS OF THE PARTIES

The MESP argues that the delivery position is properly included in the bargaining unit which it represents. It notes that it has represented the warehouse employees since 1995, that the disputed position is currently assigned to the warehouse department, that the disputed position has been paid at "maintenance" rates since 1994, and that the CPEA did not object to the reorganization by which the position was placed under the supervision of the warehouse supervisors in 1994.

The CPEA argues that the delivery position is appropriately included in the bargaining unit with the employer's custodial

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[3] During the 1999-2000 school year, Terry Geyer and Rich Torchio were leaders of this local organization.

[4] During the 1999-2000 school year, Cathy Fayant and Paul Laing were leaders of this local organization.

employees. It notes that the disputed position was historically paid at "custodian" rates, and has been part of a regular building "custodian" position for many years.

The employer did not take a position on the issue to be determined in this case.

DISCUSSION

Two unions have sought a ruling as to which of the bargaining units they now claim to represent is the appropriate resting place for work. The problem is ultimately rooted in their attempt to bifurcate the bargaining unit certified by the Commission.[5]

Authority to Determine Bargaining Units

The determination of appropriate bargaining units is a function delegated by the Legislature to the Public Employment Relations Commission. RCW 41.56.060 directs the Commission as follows:

> 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. . . .

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[5] Although the disputed work involves handling food and commodities, and involves driving a vehicle, the petition in this case did not indicate that any union representing the employer's food service or transportation employees has claimed any interest in the disputed position. Accordingly, no notice of this proceeding has been given to any such organization(s), and it/they would not be bound by the result reached here.

Unit determinations are made on a case-by-case basis, under analysis which starts from the unit proposed by a petitioning organization in a representation case under Chapter 391-25 WAC. The Commission described the purpose of the unit determination process, as follows:

> The purpose is to group together employees who have sufficient similarities (community of interest) to indicate that they will be able to bargain collectively with their employer. See, City of Pasco, Decision 2636-B (PECB, 1987); City of Centralia, Decision 3495-A (PECB, 1990); Quincy School District, Decision 3962-A (PECB, 1993), affirmed 77 Wn.App. 741 (Division III, 1995); and Ephrata School District, Decision 4675-A (PECB, 1995).

King County, Decision 5910-A (PECB, 1997).

Any "appropriate" unit configuration can be certified; it need not be the most appropriate unit. At the same time, substantial care is warranted, because bargaining unit configurations often outlast the individuals who participate in their creation.

As stated in City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981), the general rule is that:

> Absent a change of circumstances warranting a change of the unit status of individuals or classifications, the unit status of those previously included in or excluded from an appropriate bargaining unit by agreement of the parties or by certification will not be disturbed.

However, the Commission recognized the need to alter unit configurations on the basis of changed circumstances, and Chapter 391-35 WAC establishes procedures for such situations.

Of particular importance in this case, WAC 391-35-020(3) provides: "Disputes concerning the allocation of employees or positions between two or more bargaining units may be filed at any time." See, Grant County, Decision 6704 (PECB, 1999), where mechanic positions were consolidated into one bargaining unit following the opening of a new shop facility, and Pasco School District, Decision 5016-A (PECB, 1995), where delivery positions were consolidated into one bargaining unit following a combining of two historically separate delivery operations.

Application of Statutory Standards

Historical Community of Interest -

Review of the history of the delivery function is vital to reaching any conclusion in this case:

- In 1978, the employer staffed a warehouse facility four hours per day.[6] A custodian named Rosell was assigned those tasks following a bidding process, and was paid for his warehouse work at the rate specified for a "custodian II" classification under the collective bargaining agreement then in effect.[7]

- In the early 1980's, an employee named Mike Nelms replaced Rosell in the warehouse assignment, at the pay rate for the "custodian II" classification.

- In 1983, the wage for the warehouse/delivery assignment was upgraded to the pay rate for the "custodian III" classification. Nelms retained the assignment at the higher wage level.

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[6] The employer's warehouse was then seemingly a makeshift operation housed in a former school building.

[7] There is no indication in this record as to whether a separate wage rate for the warehouse work was discussed by those parties at that time.

- In 1986, an employee named Osterbeck was assigned warehouse duties on a full-time basis. The delivery tasks were grafted onto a part-time custodian assignment at Whitworth Elementary School, to create a full-time position on the day shift.

- The delivery/Whitworth combination remained in effect in 1989, when the CPEA was certified as exclusive bargaining representative of both the maintenance and custodian personnel.

- The delivery/Whitworth combination also remained in effect as of December of 1992, when Virginia (Ginger) Nieman began performing those assignments. Nieman was then paid at the rate for the "custodian II" classification.

- The warehouse and delivery functions were placed under a warehouse supervisor some time after the CPEA became exclusive bargaining representative. Nieman continued to perform the delivery tasks under the delivery/Whitworth combination.

- The delivery function was expanded in 1994, under a request which originated from the employer's food service operation. Nieman was thereafter dispatched to deliver food items to various schools, to supplement the lunch programs at those schools. Typically, Nieman made this "food run" between 9:30 a.m. and 11:00 a.m. Acting through a labor-management committee process, Nieman requested that the higher pay rate for the "maintenance II" classification be applied to her for the 1.5 hours per day that she drove the food van. The employer apparently agreed to pay Nieman at a higher level -- initially equivalent to the "maintenance II" classification and later equivalent to the "maintenance III" classification -- for the hours she spent delivering food.

- The CPEA and employer updated several job descriptions in May of 1994, including a "Warehouse Person" classification under

the warehouse supervisor. The delivery/Whitworth combination remained in effect.

- Later in 1994, the employer reunited warehouse and delivery tasks in one full-time position. It was announced on May 31, 1994, that several job descriptions were being changed, including the warehouse position. It was made clear that the mail delivery and food delivery duties were to be managed by the warehouse supervisor on a daily basis. The CPEA signed-off on those new job descriptions.

- As recently as the posting in June of 1999, while this case was already pending before the Commission, the delivery assignment was still combined with custodian tasks to yield a full-time job on the day shift, albeit that the custodian assignment was at the employer's new administration building, rather than at Whitworth Elementary School.

- Throughout this history, when a substitute was needed for the delivery tasks, the person was drawn from the employer's pool of substitute custodians.

Thus, there has been no recent change of circumstances such as the significant events that triggered alterations of the bargaining unit configurations in Grant County, supra, and Pasco School District, supra.

Propriety of the Existing Bargaining Unit(s)

Having easily-discernable borders is an important attribute in any unit description, because recognition or certification of an exclusive bargaining representative for a bargaining unit inherently gives rise to a right of that organization to protect the work jurisdiction of the bargaining unit it represents. South

Kitsap School District, Decision 472 (PECB, 1978), established the proposition that an employer has a duty to give notice to the exclusive bargaining representative of its employees, and to bargain in good faith if requested to do so, prior to transferring work historically done within a bargaining unit to employees of another employer ("contracting out") or to other employees of the same employer ("skimming").

Richland, supra, makes clear that unit determination is not a mandatory subject of collective bargaining, and that parties cannot bind the Commission by their agreements on unit matters. From time to time, the Commission has found it necessary to reject unit configurations created by agreement or consent of parties, particularly where those unit configurations give rise to (or are likely to give rise to) a legacy of work jurisdiction disputes:

- In City of Seattle, Decision 781 (PECB, 1979), an independent union filed a representation petition seeking to organize a bargaining unit limited to part-time employees. In rejecting that unit configuration on grounds that it would give rise to a potential for work jurisdiction conflicts, exclusions of part-time employees agreed upon by that employer with other unions representing its full-time employees were invalidated, and the part-time employees were included in the same bargaining units with full-time employees performing similar work.

- In Skagit County, Decision 3828 (PECB, 1991), a union filed a representation petition seeking to organize a unit limited to part-time employees that it had formerly represented, but had agreed to exclude from its existing bargaining unit. That petition was dismissed, and the agreement made 10 years earlier was invalidated, so that those part-time employees were restored to the bargaining unit from which they had been excluded.

In both of those cases, the alternative to rejection of a separate unit would have been to deprive the employees at issue of their statutory collective bargaining rights under Chapter 41.56 RCW.

In South Kitsap School District, Decision 1541 (PECB, 1983), the existence of conflicting work jurisdiction claims of two bargaining units did not come to the attention of the Commission until two units had co-existed for a time. When one of the unions then filed a unit clarification petition seeking a position historically included in the other bargaining unit, and the second union responded with a unit clarification petition concerning another allegedly-misplaced position,[8] both units were found inappropriate. They artificially divided that employer's office-clerical workforce into two units with conflicting work jurisdiction claims. The case now before the Commission presents a similar situation, and is dealt with in the same manner.

When the half-time warehouse position was created in 1978, it was logical to include it in an existing bargaining unit with which it had something in common. Warehouse tasks are clearly distinguishable from the work of classroom aides, food service workers, bus drivers, or office-clerical employees, so putting the warehouse work in the same bargaining unit with occupations such as maintenance workers, mechanics and custodians appears to have been appropriate.

The compensation of the warehouse assignment at the same rate applied to the "custodian II" classification can also be accepted as a logical, or at least permissible, outgrowth of the collective bargaining process. Similarly, variations between the "custodian

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[8] One of the bargaining units involved had earlier pursued a "skimming" claim in South Kitsap, Decision 472, supra.

II" and "custodian III" rate at various subsequent times can be accepted as normal operation of the collective bargaining process over time.

The combining of two part-time assignments to create a full-time position on the usually-preferred day shift can also be accepted as logical, particularly in the context of both assignments being included in the same bargaining unit. It is inferred that there was not enough day shift work to keep a full-time custodian busy at Whitworth Elementary School; the food delivery work only required about 1.5 hours per day; the mail run to the same buildings was impliedly of about the same duration.

Separate and apart from the question of whether the employer would have had any duty to bargain a reorganization of management responsibilities, there is no basis to fault CPEA for its lack of objection when the supervision of the warehouse operation was changed. Both the warehouse and delivery assignments were within the bargaining unit that CPEA represented at that time, so the change did not give rise to any "skimming" implications. Similarly, the disappearance of the separate wage rates and seniority list for the warehouse can be accepted as a normal result of the collective bargaining process over time.

The new job description promulgated for the "warehouse" position in 1994 includes:

> General Duties:
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> 1. **Loading and unloading of district delivery truck** on a daily basis.
> 2. **Delivery of food, films, requested warehouse items, and inter-district mail,** as outlined in the delivery schedule.
> 3. Delivery of bank deposits . . . .
> 4. Pick up of local purchases . . . .

5. Unloading of semi-trucks . . . .
6. Assists in receiving and stocking the warehouse . . . .
7. Assists in filling requested orders . . . .
8. **Perform custodial duties** as needed **to maintain a clean, safe environment both inside and outside of warehouse.**
9. Assist with all other duties . . . .
10. Works cooperatively in a positive manner with all staff members.
11. **Other Maintenance II duties** as workload permits.
12. Performs other duties as directed . . . .

[Emphasis by **bold** supplied.]

That job description points out the fallacy of the purported severance which occurred a year later: The full-time warehouse person and Nieman (who then held the delivery/Whitman combination of assignments) had overlapping responsibilities regarding the loading/unloading of the delivery truck and the delivery of food and mail; the warehouse person shared "custodian" duties, skills and working conditions with Nieman and all of the other custodians.

There is no evidence of material changes of those work assignments since 1994. The substitution of the central office custodian assignment for the Whitworth custodian assignment is a matter of detail, not of kind, and does not constitute a material change. The inevitable conclusion is that this case is only before the Commission because the CPEA executive board made an apparently-unilateral decision in 1995 to bifurcate the bargaining unit certified by the Commission in 1989, and the MESP is now trying to revisit that bifurcation decision.

The employer's tolerance or acceptance of the bifurcation during and since 1995 is not conclusive. The change would not have been

binding upon the Commission, even if the employer, the CPEA and the MESP had all affirmatively agreed to it.

Dual Status Employment Considered and Rejected

The Executive Director has considered the possibility that the existing bifurcated unit configuration could be preserved by putting Dailing in the MESP bargaining unit for the part of the day he spends on delivery tasks, while leaving him in the CPEA bargaining unit for the part of the day he spends as a custodian. From time to time, situations arise where one employee who actually has two or more different jobs with the same employer is properly included in two or more different bargaining units.[9] Such situations are inevitably difficult, however, as they expose the employee to union security obligations to each of the unions, create a potential for conflicting proceedings and results on discharge grievances, and expose the employer to extraordinary risks of "skimming" charges. Compare Longview School District, Decision 2551-A (PECB, 1987) and Longview School District, Decision 3109 (PECB, 1989). Accordingly, the Commission has strongly discouraged the creation or acceptance of dual status situations. See, Ephrata School District, Decision 4675-A (PECB, 1995). That policy has been followed in the recent decisions in Pierce County Rural Library District, Decision 7035 (PECB, 2000) and Riverside School District, Decision 7098 (PECB, 2000), and there is no evident reason to deviate from that policy to salvage the home-grown bifurcation of a certified bargaining unit in this case.

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[9] Examples date back to at least Clover Park School District, Decision 683 (PECB, 1979), where persons who worked for the employer as certificated teachers held second jobs at a public television station operated by the same school district.

FINDINGS OF FACT

1. The Mead School District is operated under Title 28A RCW, and is a public employer within the meaning of RCW 41.56.030(2).

2. Following a representation election and runoff election conducted by the Commission in 1989, the Classified Public Employees Association / WEA was certified as exclusive bargaining representative of a bargaining unit which included all employees of the Mead School District performing maintenance, mechanic, warehouse and custodian functions. That certification and the proceedings leading to it provide basis for an inference that the CPEA was then a bargaining representative within the meaning of RCW 41.56.030(3).

3. In May of 1995, the CPEA notified the Mead School District that it was bifurcating the bargaining unit for which it had been certified in 1989, that it would henceforth only represent the custodian employees of the Mead School District, and that "Mead Educational Support Personnel #1" would henceforth represent the maintenance, mechanic and warehouse employees of the Mead School District. The limited evidence in this record provides basis for an inference that the bifurcation of the certified bargaining unit was a unilateral action of the CPEA.

4. Since September 1, 1995, Mead Educational Support Personnel #1 has purported to be the exclusive bargaining representative of a bargaining unit limited to employees of the Mead School District performing maintenance, mechanic and warehouse functions. The evidence in this proceeding is insufficient to base a finding of fact that the MESP is a bargaining representative within the meaning of RCW 41.56.030(3).

5. Since September 1, 1995, the CPEA has purported to be the exclusive bargaining representative of a bargaining unit limited to employees of the Mead School District performing custodian functions. The evidence in this proceedings is insufficient to base a finding of fact that the CPEA continues to be a bargaining representative within the meaning of RCW 41.56.030(3).

6. Since at least 1978, the Mead School District has assigned employees to deliver mail and packages among its various school buildings, and has assigned employees to staff a warehouse operated by the employer. The first incumbent of the warehouse assignment transferred from a custodian position by means of a bidding process, and was paid at the rate applied to the "custodian II" classification. From 1978 until 1986, the pay for the warehouse/delivery assignment was at the the rate applied to the "custodian II" classification or at the rate applied to the "custodian III" classification.

7. From 1986 to 1994, the employer has maintained a full-time warehouse position while the delivery task was combined with a custodian position to provide a full-time position on the day shift.

8. Prior to 1994, supervision of the warehouse and delivery functions was transferred to a warehouse supervisor.

9. In 1994, the employee holding the combined delivery/custodian position began delivering food items from the employer's warehouse to the various school buildings. The rate of pay for the time spent on food delivery was later increased to the rate applied to maintenance positions.

10. In 1994, the employer and the CPEA signed a new job description which specifically assigned responsibility to the full-time warehouse person to load/unload the employer's delivery vehicle, to make deliveries, and to perform custodian functions.

11. When the CPEA purported to bifurcate the bargaining unit in 1995, the full-time warehouse person was allocated to the bargaining unit represented by the MESP and, notwithstanding the delivery functions which overlapped with the full-time warehouse person, the combined delivery/custodian position was entirely allocated to the bargaining unit represented by the CPEA.

12. A change of the building in which custodian tasks are performed is not a material change of duties or skills.

13. There has been no material change of circumstances affecting the combined delivery/custodian position since the unilateral bifurcation in 1995 of the bargaining unit found appropriate by the Commission in 1989.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC.

2. The action of the certified exclusive bargaining representative, with or without the agreement or consent of the employer, to bifurcate the certified bargaining unit effective September 1, 1995, has resulted in the creation of bargaining units with conflicting claims of work jurisdiction, and that

is not an appropriate configuration of bargaining units under RCW 41.56.060.

ORDER

The bifurcation of the appropriate bargaining unit certified by the Commission in Mead School District, Decision 3301 (PECB, 1989) is null and void after the date of this decision.

Dated at Olympia, Washington, the 22nd day of September, 2000.

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.