

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
WASHINGTON FEDERATION OF	)	CASE 20605-C-06-1282
STATE EMPLOYEES)	
	)	DECISION 9880 - PSRA
For clarification of an existing)	
bargaining unit of employees of:	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
WASHINGTON STATE - EARLY LEARNING	)	AND ORDER
_____)	
)	
In the matter of the petition of:)	
)	
WASHINGTON FEDERATION OF	)	CASE 20606-C-06-1283
STATE EMPLOYEES)	
	)	DECISION 9881 - PSRA
For clarification of an existing)	
bargaining unit of employees of:	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
WASHINGTON STATE - EARLY LEARNING	)	AND ORDER
_____)	

Younglove, Lyman & Coker, by *Edward Earl Younglove*,
Attorney at Law, for the union.

Robert McKenna, Attorney General, by *Robert W. Kosin*,
Assistant Attorney General, for the employer.

On August 18, 2007, the Washington Federation of State Employees (union) filed two petitions for clarification of existing bargaining units with the Public Employment Relations Commission concerning supervisory and nonsupervisory employees at the Washington State Department of Early Learning (DEL). On January 17, 2007, the undersigned issued a deficiency notice to the union on the grounds that the petitions failed to present an issue within the definition of a unit clarification proceeding. The union supplied written argument in support of its petitions and on July

17, 2007, an evidentiary hearing was conducted before Hearing Officer Robin A. Romeo. The union filed a post-hearing memorandum on September 10, 2007. No memorandum was filed on behalf of DEL. Based upon the findings of fact and conclusions of law herein, the petitions are dismissed.

ISSUES PRESENTED

1. Where the union seeks to represent two new bargaining units at DEL, is a petition for clarification of existing bargaining units the correct procedure?
2. If a clarification petition is the correct procedure, what is the definition of the bargaining units at issue?

The petitions must be dismissed. The union's clarification petitions cannot accomplish what the union seeks. A clarification petition is not the proper forum to create new bargaining units. This is true even where the new units contain pieces of pre-existing bargaining units from different agencies. The proposed bargaining units include approximately 128 employees previously employed by two separate agencies and 17 employees who have never been represented for purposes of collective bargaining. Thus, if the union wishes to represent employees of DEL, it must file a petition concerning representation pursuant to WAC 391-25.

Because the petitions are dismissed, there is no need to address the definition of the bargaining units at issue.

ANALYSIS

Applicable Legal Standards

The Personnel System Reform Act of 2002 (PSRA) was signed into law in 2002, enacting a new collective bargaining system for state

civil service workers, codified in RCW 41.80 RCW. Included within the PSRA is the delegation of the determination and modification of bargaining units of state civil service employees to the Public Employment Relations Commission. RCW 41.80.070.

When clarifying or modifying an existing unit, the Commission considers the duties, skills, and working conditions of the employees, the history of collective bargaining, the extent of organization among the employees, the desires of the employees and the avoidance of excessive fragmentation. RCW 41.80.070(1). The Commission has promulgated rules and regulations for processing representation petitions. Those rules and regulations are codified in WAC 391-25. Rules and regulations concerning the clarification or modification of existing bargaining units are embodied in WAC 391-35.

A petition filed pursuant to WAC 391-25 may be filed by a bargaining representative seeking to represent a new bargaining unit of employees. See, e.g., *Washington State University*, Decision 9613-A (PSRA, 2007). A petition filed pursuant to WAC 391-35 may be filed by an employer or bargaining representative seeking to add or subtract employees from an existing bargaining unit usually based upon confidential or supervisory status, *Evergreen State College*, Decision 9218 (PSRA-2006); or seeking to merge existing bargaining units, *State - Transportation*, Decision 9859 (PSRA, 2007); *King County*, Decision 7397-A (PECB, 2001); or seeking to split an existing unit into two units, *Yakima County*, Decision 5566 (PECB, 1996). A question concerning representation cannot be resolved by a clarification petition, *Pierce County*, Decision 7018-A (PECB, 2001), *aff'd*, Decision 7018-C (PECB, 2002).

Application of Standards

The Legislature created the Department of Early Learning in 2006:

- to coordinate and consolidate state activities relating to child care and early learning programs;
- to safeguard and promote the health, safety and well-being of children receiving child care and early learning assistance;
- to promote linkages and alignment between early learning programs and elementary schools and support the transition of children and families from pre-kindergarten environments to kindergarten;
- to promote the development of a sufficient number and variety of adequate child care and early learning facilities both public and private; and
- to license agencies and to assure the users of such agencies that adequate minimum standards are maintained.

Laws of 2006, ch. 265, section 103.

The legislation established DEL as an executive branch agency. The executive head is appointed by the Governor and may employ staff members as necessary who may be exempt from RCW 41.06.070. The legislation also provides that:

(1) . . . All employees classified under chapter 41.06 RCW, the state civil service law, are assigned to the department of early learning to perform their usual duties upon the same terms as formerly, without any loss of rights, subject to any action that may be appropriate thereafter in accordance with the laws and rules governing state civil service.

(2) Nothing contained in this section may be construed to alter any existing collective bargaining unit or the provisions of any collective bargaining agreement until the agreement has expired or until the bargaining unit has been modified by action of the public employment relations commission as provided by law.

Thus, upon its creation, a number of state employees were transferred to the new agency from both the Department of Community,

Trade and Economic Development (CTED) and the Department of Social and Health Services (DSHS). Prior to the transfer, most of the transferred state employees were in bargaining units in their respective agencies and were represented by this union. The employees transferred to DEL represented only a portion of the bargaining units from which they came and therefore did not constitute entire units.

DEL is headquartered in Olympia with regional offices in Tacoma, Tumwater, Seattle, Everett, Kent, Mt. Vernon, Yakima, Spokane, Bellevue, Bellingham, Wenatchee, Moses Lake, and Kennewick. The agency currently has 210 full-time employees in a variety of job titles: Social and Health Program Consultant; Social Worker; CTED Specialist; IT Specialist; Info Tech S/A; Fiscal Analyst; Sec-Admin; Sec-Sr; Admin Assistant; Office Manager; Contract Specialist; Public Health Advocate; and Office Trainee. Employees filling these newly created positions have been treated as non-represented even if they hold the same job title as employees previously represented by the union at their former agencies.

In 2006, the union and DEL entered into a memorandum of understanding that the previously represented employees transferring from DSHS and CTED into DEL would be covered by their then current collective bargaining agreement until it expired in 2007. They agreed to grant employees any rights that attached to employment in their former agency, such as lay-off or promotional rights, for a period of three months. They also agreed to the designation of lay-off units for DEL and to a grievance process.

The union filed the instant petitions seeking to create, and represent, two new bargaining units in DEL: one for supervisors and one for nonsupervisors. It also seeks to place the newly-created, but previously non-represented, positions in its proposed units.

In support of its petition for clarification, the union asserts that the creation of the petitioned-for bargaining units is appropriate pursuant to the provisions of the legislation that created DEL. The union argues that the Legislature intended that transferring employees to DEL "without the loss of any rights" means that the Commission should automatically certify brand new bargaining units with the same bargaining representative and then accrete the formerly unrepresented employees to the new units. This logic is strained and fails to provide a sound policy that could be uniformly applied in similar circumstances. For example, if employees represented by different labor organizations are combined when a new agency is formed, which union would "win"?

The legislation does not give the union the right to create new bargaining units by filing a unit clarification petition. No entity has that right, except through the statutory representation procedures. The union does have the right to file a petition concerning representation and by doing so, employees will not "suffer any loss of rights." Employees will be afforded their full rights to determine whether they wish to be represented by a labor organization.

The significant procedural difference between a petition concerning representation and a petition for unit clarification is that the union must submit a showing of interest in the former. In other words, a union must show that at least 30 percent of employees support the union's petition. Once it has submitted an adequate showing of interest in an appropriate unit, employees are afforded their full rights to vote on representation.¹ This basic tenet of

¹ Pursuant to WAC 391-25-391, the Commission may issue a certification of representation without an election, if a union is the only union seeking representation and if its petition is supported by in excess of 70 percent of unit employees.

collective bargaining ensures that employees do not "suffer any loss of rights" because they are afforded the opportunity to determine whether they wish to be represented and to choose their bargaining representative. This is equally important where the employees experience a change in the actual agency they work for, the personnel they work with, and other changes to their terms and conditions of employment. To allow this union or any union to represent new bargaining units without providing employees a voice in the matter would truly result in employees suffering "a loss of rights." There is no exception to this rule in any statute, nor should the rights of employees be comprised in this manner. Finally, there is no indication that the Legislature intended the result advanced by the union and the union did not offer any evidence such as legislative history that would indicate otherwise.

What the union fails to recognize is that the right to organize and choose to be represented by a labor organization for the purposes of collective bargaining attaches to employees . . . not to unions. The Commission jealously guards the rights of employees to determine whether they wish to be represented and to that end, has codified representation procedures in WAC 391-25. That is the route that must be taken by any and all unions seeking to represent employees.

The union has argued that prior decisions by the Department of Personnel are controlling. Those decisions, however, do not interpret WAC 391-35 and do not involve unit clarification petitions. The union has not offered any justification for the Commission to deviate from the stated purpose of WAC 391-35 which is to clarify or modify an existing bargaining unit.

In the event that a petition(s) is filed pursuant to WAC 391-25, evidence introduced in this proceeding, including documents,

exhibits and stipulations may be used to assist in the determination of the appropriate bargaining unit, thus expediting the process.

Because the instant petitions are dismissed, further discussion of the bargaining unit definitions is not warranted.

FINDINGS OF FACT

1. The Washington State Department of Early Learning is an employer within the meaning of RCW 41.80.005(8).
2. The Washington Federation of State Employees is an employee organization within the meaning of RCW 41.80.005(7).
3. The Legislature created the Department of Early Learning (DEL) in 2006. Upon the creation of the agency, a number of state employees were transferred to the new agency from the Department of Community, Trade and Economic Development (CTED) and from the Department of Social and Health Services (DSHS). Most of the employees were previously in bargaining units represented by the union.
4. DEL is headquartered in Olympia with regional offices in Tacoma, Tumwater, Seattle, Everett, Kent, Mt. Vernon, Yakima, Spokane, Bellevue, Bellingham, Wenatchee, Moses Lake, and Kennewick.
5. DEL currently has 210 full-time employees in a variety of job titles: Social and Health Program Consultant; Social Worker; CTED Specialist; IT Specialist; Info Tech S/A; Fiscal Analyst; Sec-Admin; Sec-Sr; Admin Assistant; Office Manager; Contract Specialist; Public Health Advocate; and Office Trainee.

Sec-Admin; Sec-Sr; Admin Assistant; Office Manager; Contract Specialist; Public Health Advocate; and Office Trainee.

6. Newly created positions were treated as non-represented even if they were the same job title as represented employees.
7. In 2006, the union and DEL entered into a memorandum of understanding that the employees transferring from DSHS and CTED into DEL would be covered by their then current collective bargaining agreement until it expired in 2007.
8. On August 18, 2007, the Washington Federation of State Employees (union) filed two petitions for clarification of existing bargaining units with the Public Employment Relations Commission concerning supervisory and nonsupervisory employees at DEL.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.80 RCW.
2. The union's petitions for unit clarification pursuant to WAC 391-35 frame issues which must be resolved in representation proceedings pursuant to WAC 391-25.

ORDER

1. The petition filed in case 20605-C-06-1282 for clarification of an existing bargaining unit is hereby DISMISSED.

2. The petition filed in case 20606-C-06-1283 for clarification of an existing bargaining unit is hereby DISMISSED.

ISSUED at Olympia, Washington, on the 24th day of October, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CATHLEEN CALLAHAN, 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.