STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	
INTERMITTENT WORKERS FEDERATION	Case No. 1034-E-77-201
Involving certain employees of:	DECISION NO. 781 PECB
CITY OF SEATTLE	ORDER OF DISMISSAL

Robert Fiedler, Negotiations Coordinator, and John Scannell, Field Secretary, appeared on behalf of the petitioner.

Douglas N. Jewett, City Attorney, by P. Stephen DiJulio, Assistant City Attorney, appeared on behalf of the employer.

Vance Davis, Robert & Reid, by Russell J. Reid, attorney at law, appeared on behalf of intervenor Joint Crafts Council.

By petition filed on August 4, 1977 and amended on December 8, 1977, December 22, 1977 and April 9, 1979, the Intermittent Workers Federation (hereinafter called "petitioner") has requested that the Public Employment Relations Commission investigate a question concerning representation of certain employees of the City of Seattle. The hearing in the matter was opened on December 9, 1977; but further proceedings were then delayed due to the pendence of unfair labor practice allegations involving the same parties and bargaining unit. The hearing was concluded on March 28 and April 2, 1979 before Marvin L. Schurke, Executive Director, and Jack T. Cowan and Alan R. Krebs, Hearing Officers. The Joint Crafts Council was granted intervention in these proceedings based on its status as exclusive bargaining representative of full time employees in the same occupational groupings as are covered by the petition.

POSITION OF THE PETITIONER

The petitioner seeks a separate bargaining unit of janitors, laborers, matrons and busboys employed on an "intermittent" basis at the Seattle Center, and all janitors and laborers working on a "temporary, part-time, intermittent or seasonal" basis in other City departments. Petitioner proposes a minimum work requirement of fifteen (15) days in the last three months, and asserts that such employees fall within the statutory definition of public employees. The petitioner further asserts that a separate unit of such "intermittent" employees is appropriate, and that such employees should not be included in existing bargaining units, because the organizations representing those

existing units would not represent intermittent employee interests. Petitioner also maintains that existing collective bargaining agreements have no bearing on unit determination because intermittent employees had no role in the underlying negotiations.

POSITION OF THE EMPLOYER

The employer argues that the proposed unit is inappropriate, and that the individuals involved are casual employees not includable in any unit. If a unit including intermittent employees is deemed to be appropriate through this proceeding, the employer asserts that such employees should be included in existing bargaining units covering similar occupational groupings. The employer also asserts that if a separate unit of intermittent employees is found to be appropriate, it should be a city-wide unit encompassing all departments using intermittent employees.

POSITION OF THE INTERVENOR

The intervenor asserts that the employees covered by the petition should be included in the existing bargaining units covering similar occupational groupings.

BACKGROUND

The City's Personnel Systems:

Up until January 10, 1979, the City had a "civil service" system. The term "intermittent" employee seems to be traceable to the rules and practices of that civil service system, under which certain employees (generally full time) acquired "permanent" status and civil service rights while others who were called in to supplement the "permanent" work force were denominated "intermittent" and acquired no civil service status or rights.

On January 10, 1979, the City gave effect to a new personnel ordinance which replaced the civil service system and its criteria with a Personnel Director and an emphasis on "merit" principles for employment and promotion. The new ordinance did away with the previous "intermittent" terminology, and substituted "regular part-time" language with reference to employees working less than full-time.

Under both personnel systems, the City has maintained a list of persons who are available to supplement the full-time work force. Individual departments may select such employees (hereinafter referred to under either personnel system as "intermittents") from registers prepared by the City's personnel department, or they may use referrals from the City's Temporary Employment Service (TES), which is primarily responsible for the placement of temporary

janitors, laborers and clerical employees.[1/] Departments are not obligated to use TES referrals, and several departments such as the Seattle Center and the Parks Department request TES assistance to fill certain temporary positions while selecting intermittent employees directly from Personnel Department employment registers for other positions. TES handles payroll matters on intermittent employees which it refers, while employees hired directly by departments are paid by those departments.

Intermittent employees are scheduled on the basis of employer need, and they may refuse work assignments. Whether selected through TES or employed by the departments directly, intermittent employees receive wages and no other benefits. The new personnel ordinance does not clearly distinguish intermittent employees from "provisional" employees, who are hired on an emergency basis without the use of temporary employment registers. Provisional employees work only for the duration of the assignment for which they are hired, and do not have access to the City's grievance procedure for unrepresented employees. The new personnel ordinance limits temporary employment to 1040 hours in a twelve month period, and intermittent employees who attain the 1040 hour maximum are removed from their assignments and are ineligible for other assignments for the remainder of the twelve month period.

The City negotiates 20 separate collective bargaining agreements covering 36 separate bargaining units. The Joint Crafts Council represents 13 bargaining units in negotiations for a master agreement accompanied by appendices which address the unique problems of the individual units. Council units operate within strict jurisdictional lines, and the only significant overlap of occupational groupings exists between Public Service and Industrial Employees, Local 1239, and Washington State Council of County and City Employees, Local 21. Local 1239 represents laborers in all City departments and janitors employed at the Seattle Center, while Local 21 represents janitors in all other departments. Council units were originally recognized by the City on the basis of job description, and no distinction existed because of "time" status. From 1969 through 1975, the master agreements included "regular part-time" employees, but excluded "intermittent" personnel. There is evidence which indicates that the negotiators for the parties then believed that intermittent employees should be excluded under Department of Labor and Industries rules which prohibited "on call" employees from participation in collective bargaining units. See: Repealed WAC 296-132-150. In 1975, the regular part-time language was removed from the contract.

1/ Neither "intermittent" clerical employees nor other types of intermittent employees are represented or claimed in these proceedings.

Attention was called to the plight of the intermittent employees in 1976, when John Scannell, now an officer of the petitioner, approached Local 1239 for representation in a grievance matter. Although Scannell had been required earlier to pay union dues, the union informed him at that time he had been improperly included in the unit and it refunded his dues payments. The representation of intermittent employees then became a subject for discussion in the negotiations for the 1977 Joint Crafts Council master agreement. Since intermittent employees then sometimes worked more than 1200 hours a year, Local 1239 expressed concern that bargaining unit work was being lost, and argued that intermittent employees should be represented by existing bargaining units. The representation petition in this case was filed before the issue could be decided, and a letter of understanding was attached to the Joint Crafts Council contract holding the recognition question open pending determination of this case.

Prior to the negotiations for the 1978 Joint Crafts Council master agreement, a union not affiliated with the Joint Crafts Council, Professional and Technical Engineers, Local 17, negotiated, as part of its collective bargaining agreement with the City, a 520 hour limit on temporary employment. After 520 hours of service, intermittent clerical employees become part of the bargaining unit and receive a ten percent (10%) wage increase in lieu of fringe benefits or were returned to employment registers for re-assignment. The Joint Crafts Council sought similar language in its 1978 contract with the City, and the 520 hour limitation was added to the contract in a footnote which gave effect to the provision pending determination that intermittent employees should be represented in the existing Council bargaining units. Intermittent employees were not consulted concerning the imposition of the 520 hour limit on temporary employment.

When they are employed, intermittent employees work subject to recommendations of departmental supervisors and the suggestions of departmental foremen as to their placement. Once assigned, intermittent employees perform the same duties expected of the full-time work force, and there was testimony to the effect that they worked directly with and were indistinguishable from full-time employees while on the job. Intermittent janitors are responsible for maintenance of restrooms and perform other custodial duties. Intermittent laborers perform manual labor in the maintenance of public buildings and grounds, and they help with preparation for special events staged in public facilities. Busboys work in the Food Circus Court at the Seattle Center, where they are responsible for the maintenance of the food service area. Intermittent employees are subject to the same disciplinary procedures which apply to full-time personnel. Foremen do not have authority to suspend intermittent employees, but may issue warnings about prohibited conduct or unsatisfactory performance. Supervisors may terminate intermittent employees in emergency situations involving conduct endangering

fellow employees. In all other situations, only the head of the department may suspend or terminate intermittent employees. Disciplinary actions may include exclusion from further employment with the City.

Some intermittent employees have occupied that status for considerable periods of time, occasionally in excess of one year. Some intermittent employees with good work records have been hired by City departments on a full-time basis, and in such cases they are expected to join the bargaining representative which represents the full time employees in that occupational grouping. Such employees are then removed from the temporary employment registers. However, intermittent employees are not required to accept offers of full-time employment, and may retain intermittent status without prejudice to future work assignments.

The City recognizes one bargaining unit composed entirely of intermittent employees. That unit, represented at the time of the hearing by Public Service Employees, Local 674, is comprised of head ushers, assistant head ushers, ushers, ticket takers, ticket splitters and security officers employed at the Seattle Center. The occupational groupings represented are unique to that bargaining unit. Employees join that union after completion of 30 days of service.

DISCUSSION

Exclusion as "Casual" Employees:

The National Labor Relations Board (NLRB) generally excludes from collective bargaining units "casual" employees who do not have a continuing expectation of employment. Glynn Campbell d/b/a/ Piggly Wiggly El Dorado Co., 154 NLRB 445 (1965). "On Call" work scheduling is sometimes an indicator of "casual" employment, but the Department of Labor and Industries chose to frame its rule exclusively in terms of "on call". The Public Employment Relations Commission initially adopted the rules of the Department of Labor and Industries as its emergency rules for the administration of RCW 41.56 (See: Repealed Chapter 391-20 WAC). PERC permitted those rules to expire upon the February 1, 1978 effective date of Chapter 391-21 WAC, adopted by the Commission as permanent rules for the administration of RCW 41.56. Chapter 391-21 WAC contains no substantive rules for bargaining unit determination, but contains procedural rules for the conduct of administrative hearings and the issuance of administrative decisions on unit determination disputes. Consistent with NLRB precedent, casual employees have been excluded from bargaining units in unit determination proceedings before the Commission. Everett School District, Decision 268 (EDUC, 1977); Tacoma School District, Decision 655 (EDUC, 1979). At the same time, persons employed without benefit of a fixed work schedule have been included in bargaining units where there has been a showing of repeated work assignments within a

specified time period, and the employees have a reasonable expectancy of continued employment on a similar basis. Tacoma, supra. The evidence here indicates that many "intermittent" employment relationships have continued for some time and are subject to continuation without limitation. The "15 days in the preceeding three months" test proposed by the petitioner equals the test applied by the NLRB to retail store employees in Scoa, Inc., 140 NLRB 1379 (1963). The employer's imposition, through its personal ordinance, of a maximum hours limitation at approximately "half time" does not lead to a conclusion that all affected employees are "casual" and precluded from inclusion in bargaining units.

The Claims of Existing Bargaining Units:

The determination of bargaining units is a function delegated by the legislature to the Commission in RCW 41.56.060. Employer and labor organizations may agree on units, but such agreements do not indicate that the unit is or will continue to be appropriate. City of Richland, Decision 279-A (PECB, 1978); aff. Benton County Superior Court, 1979. Neither employers nor labor organizations have the ability to bind the Commission by their agreements or desires. The criteria for unit determination are set forth in RCW 41.56.060 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."

The status and rights afforded by a civil service system may be one of the conditions of employment to be considered in the placement of employees into bargaining units; but civil service status is not the sole condition of employment to be considered. To the extent that the negotiated exclusion of "intermittent" employees from the existing City bargaining units was based on the civil service status of such intermittent employees under the now-defunct civil service system, the continued exclusion of those employees on that basis is inappropriate and makes the units themselves inappropriate.

Regular part time employees having a substantial and continuing interest in wages, hours and working conditions are normally included by the NLRB in the same unit with full time employees of the employer in the same occupational grouping. Farmers Insurance Group, 143 NLRB 240, 244-245 (1963). The primary concern in structuring of bargaining units is to group together employees who have substantial mutual interests. When the creation of a new unit is to be considered apart from those units already in existence, the special and distinct interests of the proposed group must be weighed against the community of interests shared with employees in existing units and the conflicts which may arise from the creation of additional units. See: NLRB v. Campbell Sons' Corp., 407 F.2d 969 (1969).

Intermittent employees do not possess sufficiently distinct interests to require the creation of a separate bargaining unit. Intermittent employees have a distinct scheduling procedure and receive less compensation than that provided for regular full-time employees; but once assigned to a City department they perform the same duties that are expected of full-time personnel and in fact work side-by-side with full time personnel. Thus, although some distinctions are recognized, it is concluded that intermittent employees are assimilated into the regular full time work force as to the bulk of their duties, skills and working conditions.

One of the underlying purposes for the existence of RCW 41.56 is improvement of relationships between public employers and their employees. See RCW 41.56.010. The creation of a bargaining unit structure destined to conflict because of the structure itself would be counter-productive to the overall purpose of obtaining stable and peaceful labor relations. The existing bargaining structure has encountered difficulty in dealing with intermittent employees. The record indicates a history of mistrust and "unit work" claims by representatives of existing units which would not be alleviated by the creation of a separate unit composed solely of intermittent employees. Creation of such a unit would exacerbate the situation by leading to jurisdictional disputes between two separate organizations concerning the borderline between units within the same occupational groupings.

The City's present collective bargaining relationships are so extensive that there are few employees who do not participate in collective bargaining. A "residual" unit composed of all excluded employees may be found to be appropriate under NLRB precedent, but the petitioner has not requested such a unit here. The extent of organization of employees in the involved occupational groupings, and the absence of a showing of a true residual unit, dictate a conclusion that the creation of the separate unit sought by the petitioner would lead to fragmentation of bargaining units, while inclusion of the petitioned-for employees in existing units on the basis of their occupational groupings would avert such fragmentation.

The petitioner has furnished the Commission with a showing of interest. The desires of employees are a factor to be considered in unit determination, but are not the primary or an otherwise dominant factor. Bremerton School District, Decision 527 (PECB, 1978). There is no basis for the conduct of a "Globe" election (See: Globe Mfg., 3 NLRB 294) where one of the choices is for an inappropriate unit. Clark County, Decision 290-A (PECB, 1977).

FINDINGS OF FACT

1. City of Seattle is a municipal corporation of the State of Washington, located in King County.

2. Intermittent Workers Federation, a labor organization and a bargaining representative within the meaning of RCW 41.56, timely filed a petition for investigation of a question concerning representation of certain employees of City of Seattle in a bargaining unit described as: "janitors, laborers, matrons and busboys employed on an intermittent basis at the Seattle Center and all janitors and laborers working on a temporary, part-time, intermittent or seasonal basis". The bargaining unit claimed appropriate consists of sixty employees.

3. Joint Crafts Council, a labor organization and a bargaining representative within the meaning of RCW 41.56, timely moved for intervention in the matter on the basis of its status as the recognized exclusive bargaining representative of full-time employees in the same occupational groupings as are covered by the petition.

4. The bargaining unit proposed by the petitioner includes intermittent employees selected from Temporary Employment Service (TES) referrals or by individual city departments, and there is no common supervision of the employees in the proposed unit.

5. The bargaining unit proposed by the petitioner includes non-skilled employees working on an intermittent basis. Said unit does not include all of the intermittent employees of the employer engaged in the performance of non-skilled work.

6. The employees in the bargaining unit proposed by the petitioner are scheduled on the basis of need in the various city departments. Once assigned to a position, intermittent employees have historically had similar working conditions to those enjoyed by full-time employees.

7. There has been no history of separate representation of the petitioner-for employees, nor has there been any showing of a tradition of separate representation for the type of employees in the proposed unit.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56.

2. The petitioned-for bargaining unit of janitors, laborers, matrons and busboys employed on an intermittent basis at the Seattle Center and all janitors and laborers working on a temporary, intermittent or seasonal basis in other City of Seattle departments is not an appropriate unit for the purposes of collective bargaining within the meaning of RCW 41.56.060, and no question concerning representation presently exists.

ORDER

The petition for investigation of a question concerning representation filed by Intermittent Workers Federation shall be, and hereby is, dismissed.

DATED at Olympia, Washington this 5th day of December, 1979.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director