STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	
ROBERT P. DONOVAN	CASE 7670-E-88-1315
Involving certain employees of:	DECISION 3247 - PECB
PORT OF SEATTLE	DIRECTION OF ELECTION

Gretchen H. Lumbley, Attorney at Law, appeared on behalf of the petitioner.

Preston, Thorgrimson, Ellis and Holman, by J. Markham Marshall, Attorney at Law, appeared on behalf of the employer.

Davis, Roberts and Reid, by Kenneth J. Pedersen, Attorney at Law, appeared on behalf of the incumbent exclusive bargaining representative, Teamsters Union Local 882.

On November 14, 1988, Robert P. Donovan, an employee of the Port of Seattle, filed a petition with the Public Employment Relations Commission for investigation of a question concerning representation, seeking decertification of Teamsters Local 882 as the exclusive bargaining representative of marina attendants employed by the Port of Seattle.

BACKGROUND

In early 1988, Patrick M. Clark, a business representative for Local 882, obtained written authorization from several marina attendants to represent them for the purpose of collective bargaining with their employer, the Port of Seattle. At that time,

the employer had 11 marina attendants, including Robert Donovan. The authorization cards were in the following form:

> AUTHORIZATION CARD FOR UNION
> to act as
> BARGAINING AGENT WITH EMPLOYER
>
> I declare that, through my own VOLUNTARY ACT, CHOICE AND DESIRE, I hereby give exclusive authorization to Teamster Local 882, to represent me in collective bargaining and to negotiate terms and conditions of my employment and enter into agreements to fix and secure the same. I understand, if a majority of employees, in an appropriate bargaining unit, sign these cards, an election may be rendered unnecessary and these cards may serve as affirmative Union votes in lieu thereof.

In June of 1988, Clark advised the employer's director of labor relations, John Swanson, that the union represented a majority of the marina attendants, and requested voluntary recognition.[1] As evidence of the union's majority status, Clark presented the authorization cards to Swanson for inspection. Swanson confirmed the substance of the meeting by letter dated June 20, 1988, stating:

> This letter will confirm our meeting, at which you presented me with authorization cards indicating that your union represents a majority of employees in the classification of Marina Attendant.
>
> I understand that you have a majority of employees in that classification.
>
> The only question that remains to be determined is the appropriateness of the unit and whether the Marina Attendants as such are appropriate.

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[1] Clark testified that he was not aware of any other union attempting to organize the marina attendants, and there was no assertion to the contrary.

Clark testified, without contradiction, that the reference to the propriety of the bargaining unit dealt with a tangential matter.[2] The employer subsequently extended voluntary recognition to the union for the marina attendants.

The parties commenced negotiations for a collective bargaining agreement, and Clark and two bargaining unit employees met with the employer in a series of meetings over a four month period. The parties arrived at a tentative agreement on October 31, 1988.

The union held membership meetings on November 4 and 7, 1988,[3] at which the tentative agreement was ratified by a secret ballot vote of 11 to 1.[4] The union advised the employer on November 7 of its ratification of the tentative agreement.

Employer negotiators planned to present the tentative agreement to the employer's executive director and commissioners, for acceptance or rejection, at a meeting schedule for November 22, 1988.

On November 14, 1988, Robert P. Donovan filed the petition for investigation of a question concerning representation in the instant case. The petitioner described the bargaining unit as

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2 The union had claimed jurisdiction over a new employee classification titled "ramp controller" at the employer's Seattle-Tacoma International Airport facility, where the union has other labor agreements with the employer. The union initially sought to commingle the marina attendants and the ramp controllers into a single unit.

3 Two meetings were held in order to accommodate the restricted availability of the swing shift and graveyard shift personnel.

4 There were 11 employees at the time that voluntary recognition was granted. The employer had hired one additional employee prior to the collective bargaining agreement being ratified by the union. The union allowed that individual to vote on acceptance or rejection of the tentative agreement.

simply: "Port of Seattle Marina Attendants". He indicated on the petition form that the number of employees involved was "12".

Pursuant to WAC 391-08-210, a pre-hearing conference was conducted on January 17, 1989. Donovan attended without legal counsel. The union and the employer were both represented by counsel. The union declined to stipulate that a question concerning representation existed, and maintained that the petition was not timely filed. Specifically, it moved for its dismissal on the basis that the employer's voluntary recognition of the union constituted an election bar and that the tentative agreement arrived at in good faith by the parties constituted a contract bar.[5] The petitioner, employer and union stipulated, however, to a description of the bargaining unit as:

> All full-time and regular part-time marina attendants, excluding confidential employees, supervisors and all other employees of the employer.

The parties also stipulated a roster of 12 names identified as eligible voters. The parties discussed potential dates for a formal hearing to resolve the disputed issues.

Pursuant to WAC 391-08-220, a "Statement of Results of Pre-Hearing Conference" was issued on January 18, 1989.

By letter dated January 25, 1989, counsel filed a notice of appearance on behalf of Donovan, and objected to the stipulation describing the bargaining unit. Withdrawal from the stipulation was

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[5] In a related matter, the union filed a complaint of unfair labor practice on November 30, 1988, against the employer alleging that it had improperly failed to ratify the tentative agreement. The complaint was dismissed for failing to state a cause of action. Port of Seattle, Decision 3123 (PECB, February 17, 1989).

sought on the basis that the petitioner was disadvantaged because he lacked counsel at the pre-hearing conference, and on the basis that the bargaining unit was inappropriate. Further, it was alleged that there may have been some misrepresentation about the purpose of the union authorization cards.

By letter dated February 17, 1989, the parties were notified by the Executive Director that a decertification petitioner must take the bargaining unit as it exists on the date the petition is filed, and that none of the parties were in a position to have the unit modified, so that the propriety of the bargaining unit did not appear to be an appropriate issue for hearing. It was noted that claims concerning the circumstances of the signing of the union authorization cards would have to be tested in an unfair labor practice proceeding, and was not properly an issue in a representation proceeding. The parties were asked to comment on whether summary judgment procedures might be applicable in this situation.

The employer responded by letter dated February 22, 1989, taking the position that there were no factual issues requiring a hearing. The employer asserted that only a question of law remained, and that the petition was not time-barred.

The union responded on February 22, 1989, asserting that a hearing should be held to establish the facts of: (1) The existence of a voluntary recognition, its timing, and whether it serves as a bar to further proceedings; and (2) The existence of a contract bar.

In a February 27, 1989 letter, the petitioner stated agreement with the union that a factual record should be developed concerning the issues of the case. It was observed that the petitioner was not privy to the facts developed in the unfair labor practice case. It was claimed that the marina attendants do not constitute an appropriate unit without the moorage attendants, because of compelling community of interest factors, so that the "propriety of

bargaining unit" issue which the petitioner now sought to raise was interrelated to the voluntary recognition.

In a supplemental letter filed March 6, 1989, the petitioner reiterated a position that a hearing should be held unless an election was directed.

A hearing was held in the matter on March 28, 1989, before Hearing Officer Frederick J. Rosenberry. The union withdrew its "contract bar" claim at the hearing.

DISCUSSION

Voluntary Recognition as a Bar to the Petition

RCW 41.56.070 and WAC 391-25-030 each specifically recognize two types of situations where a representation petition is barred. Each operates from an easily ascertainable event or transaction.

The "certification bar" is a paraphrase of the provisions of the National Labor Relations Act. A "certification bar" is computed in relation to a date-certain when an order is issued by the Public Employment Relations Commission.

The "contract bar" is a codification by our Legislature of National Labor Relations Board (NLRB) precedent on the subject. In order for there to be a "contract bar", however, the employer must have come to an agreement with the incumbent exclusive bargaining representative of its employees, and both parties to the negotiations must have completed their customary ratification processes. A tentative agreement is not a bar, Kennewick School District, Decision 1950 (PERC, 1984), even when ratified by one of the parties, City of Port Orchard, Decision 483 (PECB, 1978).

Although voluntary recognition is contemplated by RCW 41.56.050 and the Commission's rules, and can be perfectly legal, Pasco School District, Decision 3217 (PECB, 1989), the Legislature has not chosen to accord "voluntary recognition" the same status under Chapter 41.56 RCW as is given to a "certification". Although the NLRB has barred representation petitions for varying periods based upon voluntary recognitions, our Legislature did not choose to codify that precedent in Chapter 41.56 RCW. By contrast, the Legislature adopted at least part of the NLRB's concept in the Educational Employment Relations Act, where RCW 41.59.070(2)(c) recognizes "voluntary recognition" as a bar to a representation petition for a fixed period. It is concluded that the voluntary recognition agreement made by the employer and union does not bar the petition in this case.

The Propriety of Bargaining Unit Issue

The petitioner claims a right to litigate the propriety of the bargaining unit, which he claims should include the moorage attendants as well as the marina attendants. The claim is without merit and, given the disposition of the "recognition bar" issue, fails to raise an issue material to the disposition of this case.

As a bargaining unit employee, the petitioner would not have had standing to file or process a unit clarification petition under Chapter 391-35 WAC. Access to that process is limited to the employer and the incumbent exclusive bargaining representative of the bargaining unit involved. WAC 391-35-010.

A bargaining unit employee has standing to file and process a representation petition under Chapter 391-25 WAC, but that access to the Commission's processes is conditioned upon compliance with the requirement of RCW 41.56.060 and WAC 391-25-110 that the petitioner show the support of 30% of the employees in the bargaining unit. In both the petition and the pre-hearing conference, the

petitioner took the position that the bargaining unit involved was limited to the marina attendants.

The Commission has repeatedly held that the description of the bargaining unit cannot be changed during the processing of a decertification petition. In City of Seattle, Decision 2611 (PECB, 1987), it was stated:

> A decertification petitioner does not have the prerogative to fashion a new bargaining unit or voting group, however. Rather, employees who seek to be rid of their union must take the existing unit as they find it and must move to decertify in the context of the existing bargaining unit.

The Commission had earlier affirmed the decision in City of Seattle, Decision 1229 (PECB, 1982), where the matters of "severance" and "decertification" were addressed in relation to NLRB precedent:

> [I]n a decertification petition, the petitioner does not have the prerogative of claiming an appropriate unit, but rather must decertify in the context of "the bargaining unit", i.e., the existing bargaining unit. This conforms to the long standing policy of the National Labor Relations Board that "a decertification election will be directed only in the recognized or certified unit". Oakwood Tool & Engineering Co., 122 NLRB 812 (1958).

This petitioner is not entitled to have the foregoing precedents ignored in this representation case.

Withdrawal from Stipulations

For reasons that should already be clear, it is also unnecessary to the result of this case to determine whether Donovan had

sufficient cause to withdraw from the stipulations he made at the pre-hearing conference. In a sense, the issue of unit description was available to him only to the extent that he was assuring that the election on his decertification petition would be conducted in the existing bargaining unit.[6]

FINDINGS OF FACT

1. The Port of Seattle is a port district operated pursuant to Title 53 RCW, located in King County, and is a public employer within the meaning of RCW 41.56.030 and 53.18.010.

2. Teamsters Union, Local 882, is a labor organization within the meaning of RCW 41.56.030 and 53.18.010.

3. In June, 1988, Teamsters Local 882 requested voluntary recognition for the purposes of collective bargaining concerning marina attendants employed by the Port of Seattle. A representative of the employer inspected written authorization cards indicating that a majority of the marina attendants had authorized the union to represent them, and the employer subsequently extended voluntary recognition to the union.

4. The employer and the union met in a series of bargaining sessions, and reached a tentative agreement on October 31,

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[6] It can be noted, in passing, that the matter of representation by counsel was addressed in King County, Decision 2704-A (PECB, 1987), where the Commission stated:

> Parties are not required to be represented by counsel in proceedings before the Commission, but parties who choose to appear pro se are not thereby excused from compliance with the rules duly promulgated by the Commission and published in the Washington Administrative Code (WAC).

1988. The agreement was ratified by the union at meetings held on November 4 and 7, 1989, and was scheduled to be presented to the employer's executive director and commissioners on November 22, 1988, for acceptance or rejection.

5. On November 14, 1988, Robert P. Donovan, a marina attendant employed within the bargaining unit described in paragraph 3 of these findings of fact, filed a petition with the Public Employment Relations Commission, seeking decertification of the union. Donovan described the bargaining unit as: "Port of Seattle Marina Attendants", and indicated that there were 12 employees involved.

6. Teamsters Local 882 has intervened in this matter on the basis that it remains the incumbent exclusive bargaining representative of the petitioned-for employees.

7. At a pre-hearing conference conducted on January 17, 1989, the union declined to stipulate that a question concerning representation existed. The petitioner, employer and union stipulated to a description of the bargaining unit as:

> All full-time and regular part-time marina attendants, excluding confidential employees, supervisors and all other employees of the employer.

The parties also stipulated to a roster of 12 names identified as eligible voters.

8. The petitioner subsequently sought to withdraw from the stipulation describing the bargaining unit, on the basis that the petitioner lacked legal counsel at the pre-hearing conference, and on the basis that the bargaining unit was inappropriate. The petitioner sought to have the bargaining unit enlarged to include the classification of "moorage attendant"

and to have the decertification question determined in such expanded bargaining unit.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapters 41.56 and 53.18 RCW.

2. The voluntary recognition extended by the employer to the union does not give rise to a bar to these proceedings under RCW 41.56.070 or WAC 391-25-030.

3. The voluntarily recognized bargaining unit described as:

   > All full-time and regular part-time marina attendants, excluding confidential employees, supervisors and all other employees of the employer

   is the only group of employees properly before the Commission in this decertification proceeding conducted pursuant to RCW 41.56.070 and WAC 391-25-070(2).

4. A question concerning representation presently exists in the bargaining unit described in paragraph 3 of these conclusions of law.

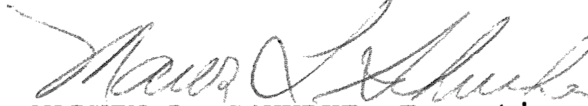
DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction of the Public Employment Relations Commission among all employees who are within the bargaining unit described in paragraph 2 of the foregoing conclusions of law on the date of this order and who continue to be so employed on the date of determination of the question concerning representation, to determine whether the

employees desire to be represented for the purposes of collective bargaining by Teamsters Local 882.

DATED at Olympia, Washington, this 18th day of July, 1989.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order may be appealed by filing objections with the Commission pursuant to WAC 391-25-590.