STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
INLANDBOATMEN'S UNION OF THE PACIFIC	)	CASE 10365-E-93-1715
	)	
	)	DECISION 4624 - PORT
Involving certain employees of:	)	
	)	
PORT OF BELLINGHAM	)	DIRECTION OF ELECTION
	)	
	)	

Schwerin, Burns, Campbell & French, by Lawrence Schwerin, Attorney at Law, appeared on behalf of the union.

Davis Wright Tremaine, by Larry E. Halvorson, Attorney at Law, appeared on behalf of the employer.

On March 30, 1993, Inlandboatmen's Union of the Pacific (IBU) filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission, seeking certification as exclusive bargaining representative of certain employees of the Port of Bellingham (employer). The employer asserted that the petition was untimely, because the affected employees were covered by a collective bargaining agreement having an expiration date of December 31, 1994. During a prehearing conference conducted by telephone conference call on June 22, 1993, the parties stipulated the description of an appropriate bargaining unit and the list of six eligible voters, and further agreed that the only issue for hearing concerned the timeliness of the petition. On July 13, 1993, the Commission received a letter signed by five of the eligible voters under date of May 4, 1993, and purporting to be a disclaimer by the "Bellingham Cruise Terminal Employees Association". A hearing was held on August 24 and September 16, 1993, before Hearing Officer Kenneth J. Latsch. The parties filed post-hearing briefs to complete the record.

BACKGROUND

The Port of Bellingham is located in Whatcom County, in the northern portion of western Washington. In approximately 1989, the employer was selected by the Alaska Marine Highway System as the southern terminal for the Alaska State Ferries. A three-member elected board is responsible for overall port operations. Don Fleming is executive director of the Port of Bellingham.

Six employees were hired by the employer during approximately the autumn of 1989, to provide reservation, ticket-taking, loading, administrative support, and janitorial functions at the Bellingham Cruise Terminal operated by the employer.

Late in 1989, when other employees of the employer were considering union representation by the International Longshoremen's and Warehousemen's Union (ILWU) and the International Association of Fire Fighters (IAFF), the employees at the Bellingham Cruise Terminal also discussed union representation with the ILWU and the IBU. At approximately this same time, Director Fleming initiated a meeting with the Cruise Terminal employees, and told them they could represent themselves without a union.

At an unspecified time, employee Patrick Daharsh and then-employee Kate Mauro volunteered to meet with Fleming.[1] During two or three meetings with Fleming, the employer quickly accepted the initial wage proposal made by Daharsh and Mauro, which increased the wages for the Cruise Terminal employees from approximately $1,100 per month to a range of $32,000 to $34,000 per year. It was also agreed that other employment conditions for the Cruise Terminal employees would be governed by an existing employee handbook that had been published by the employer in 1989.

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[1] The record is clear that Daharsh and Mauro were not elected to that role by the other employees.

The employer produced a document titled "Agreement between the Port of Bellingham and the Bellingham Cruise Terminal Employees" (1990 agreement) which specified wage increases, incorporated the 1989 handbook for all other terms of employment, and provided for a term of May 1, 1990 to May 1, 1992. The employer sent the 1990 Agreement to the Cruise Terminal employees' work place and asked them all to sign it. Once the Cruise Terminal employees had passed it among themselves and signed individually, the port commissioners also signed the agreement.

Before the 1990 Agreement expired, the employer approached Daharsh and Mauro with a suggestion that the term of the 1990 agreement should be adjusted to match the calendar year. This time, the employer was represented by Human Resources Administrator Reed Gillig, Director of Operations Jim Darling, and Bellingham Cruise Terminal Manager Lani Calkins. Daharsh proposed some new provisions, while Mauro proposed others. The employees' initial wage proposal was rejected by the employer, but agreement was reached, after three to four meetings, on wage increases of 5 percent for 1992, 4 percent for 1993, and 3 percent for 1994,[2] along with new provisions concerning work hours, overtime, and holidays.

The preparation and signing process described above was used in February of 1992, to produce a document that was to be effective for the period from January 1, 1992 to December 31, 1994 (1992 agreement). Some of the language of the 1992 agreement was changed, at the employer's request, late in the process. Conflicting testimony indicates that this may have occurred after the negotiations had concluded, but before the document was fully executed.

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[2] These wage rates were more favorable than those received by other bargaining units of Port of Bellingham employees at that time. Although the total percentage over three years was the same (12 percent), this group received a higher percentage the first year.

At an unspecified time after the 1992 agreement was signed, the employer reduced the workweek of the Cruise Terminal employees from the 40-hour week specified in the 1989 handbook, to 32 hours per week. The 1992 agreement includes a provision that specifies:

> If the Employer amends the Handbook it shall meet with the Employees to discuss in good faith the changes and any impact on this Agreement.

Gillig testified that the employer approached unspecified employees to propose that vacation would continue to be accrued as if the employees were still working a 40-hour week. Daharsh testified that he asked to meet with Darling and Gillig about the work week reduction. Daharsh further testified, without contradiction, that Calkins told him that his request was refused, because the decision was final.

On July 2, 1992, Daharsh initiated a grievance under the 1989 handbook, because he had not received a requested transfer to an open ticketing agent position. The procedure specified in the 1989 handbook included discussion with the immediate supervisor, submission of a written grievance to the immediate supervisor, and a final determination by either the employer's executive director or a panel of three volunteers from among all of the employer's employees. Daharsh's grievance was considered by a panel comprised of three "exempt" employees, who denied the grievance. On two occasions during that two-month process, Daharsh was advised by supervisors to abandon his grievance, because it was a waste of time and would not change the employer's decision.

The employees were dissatisfied with the employer's refusal to discuss the changed workweek, and with what they regarded as the unenforceability of the 1992 agreement. The employees contacted the IBU, which filed its petition March 30, 1993.

The employer issued a new employee handbook (1993 handbook) under cover of a letter from Fleming dated April 21, 1993.[3] Major changes from the 1989 handbook include: Replacement of a progressive discipline and cause-oriented dismissal policy with employment-at-will status; replacement of the face-to-face grievance process with a completely written grievance process; replacement of the three-member panel or executive director as the final grievance step with the director of the grievant's division.[4]

During the hearing, the union proposed two variances from the previously stipulated eligibility list:

First, the union sought exclusion of one of the eligible employees, Greg McHenry, as a "confidential" employee. McHenry performs administrative support duties for Cruise Terminal Manager Calkins, as well as typical ticketing duties. There was no indication that his duties had changed since the prehearing conference.

Second, the union sought to add Rod Decker as an eligible employee. Decker has worked an undetermined amount per week during several summers, and is on-call the remainder of the year. There was no indication that his employment status had changed since the prehearing conference, although there was some indication in the record that the employer was contemplating termination of Decker's employment due to a lack of work.

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[3] The record indicates that Gillig met with almost all of the Cruise Terminal employees during an unspecified period "while the 1993 handbook was in draft form", and asked for their comments on extensive changes from the 1989 handbook. Gillig testified that three or four employee suggestions were incorporated into the 1993 handbook, but he could not recall specifics.

[4] Individual policies within the 1993 handbook indicated that they were to be effective May 1, 1993.

POSITIONS OF THE PARTIES

The employer argues the 1992 agreement must be recognized as a bar to the union's petition, in order to achieve a statutory goal of assuring stable labor relations. The employer contends that it is a "valid collective bargaining agreement", because it is a written agreement containing substantial terms and conditions of employment, covers an appropriate bargaining unit, resulted from good faith bargaining, and has a fixed duration. The employer asserts the Bellingham Cruise Terminal Association existed to represent these employees in collective bargaining, that its lack of formal structure is irrelevant, that the purported disclaimer was executed through collusion with the IBU, and that the Bellingham Cruise Terminal Employees Association is not defunct. The employer contends that McHenry lacks the "labor nexus" to be considered a confidential employee, but did not address Decker's status.

The IBU contends its petition cannot be foreclosed by the 1992 agreement, because no organization exists which could be the exclusive bargaining representative of these employees, and a collection of individuals is not able to enter into a collective bargaining agreement. Further, the IBU suggests the 1992 agreement is too brief, and too subject to the employer's unilateral control, to function as a collective bargaining agreement. Finally, the union argues that the bargaining unit covered by the 1992 agreement inappropriately includes a confidential employee (McHenry) and excludes a regular part-time employee (Decker).

DISCUSSION

Request to Withdraw From Eligibility Stipulation

Except for good cause shown, stipulations made by parties during the prehearing conference process are binding. Pike Place Market

Preservation, Decision 3989 (PECB, 1992); WAC 10-08-130(3). In this case, the eligibility list stipulated during the prehearing conference included the name of Greg McHenry, and did not mention Rod Decker.

Examples of good cause for withdrawal from a stipulation include that the stipulation was made inadvertently, or under a bona fide factual mistake,[5] a change of duties or circumstances subsequent to the stipulation,[6] or discovery of facts indicating the existence of an expanding unit.[7] Although the union introduced evidence in this case on McHenry's duties, and on Decker's work experience, it did not present any evidence or argument to justify excusing it from its previous stipulation to the eligibility list. Accordingly, the eligibility list stipulated at the prehearing conference will stand for the purposes of this case.

Existence of a Contract Bar

Collective bargaining relations between port districts and their employees are regulated by two statutes. Chapter 41.56 RCW applies "except as provided otherwise" in Chapter 53.18 RCW.[8] Chapter 53.18 RCW does not detail the process for determining questions concerning representation, so Chapter 41.56 RCW governs this issue.

RCW 41.56.070 sets forth election procedures and the so-called "contract bar" rule, providing in pertinent part:

> ... Where there is a valid collective bargaining agreement in effect, no question concern-

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5 See, e.g., Community College District 5, Decision 448 (CCOL, 1978).

6 Pacific County, Decision 861 (PECB, 1980).

7 City of Federal Way, Decision 4088 (PECB, 1992).

8 RCW 53.18.015.

> ing representation may be raised except during the period not more than ninety nor less than sixty days prior to the expiration date of the agreement. ...

The Commission has recognized that the purpose of the contract bar policy is to protect the stability of collective bargaining relationships, thereby contributing to the development of sound labor relations. Washington State Ferries, Decision 763 (MRNE, 1979). The party asserting a contract bar to a representation petition must prove its existence. West Valley School District 208, Decision 2913 (PECB, 1988).

If the 1992 agreement relied upon by the employer in this case is "a valid collective bargaining agreement" within the meaning of RCW 41.56.070, the petition must be dismissed. The "window" period of that agreement will not occur until approximately October of 1994, and the IBU's petition was concededly not filed in that time frame.

Written and Executed Document -
A document must meet certain requirements to be considered a valid collective bargaining agreement. It must be written. State ex. rel. Bain v. Clallam County, 77 Wn.2d 542 (1970). It must be signed. RCW 41.56.030(4); Kiona-Benton School District, Decision 4312 (PECB, 1993).

The 1992 Agreement was in writing, was executed by the three port commissioners, and was executed by the affected employees.

Negotiated by an Exclusive Bargaining Representative -
By definition, collective bargaining is an exercise engaged in by an employer and an organization which has been certified or recognized as the exclusive bargaining representative of its employees in an appropriate bargaining unit. RCW 41.56.080; 41.56.030(4). Even if written and signed, a document cannot be a "collective bargaining agreement" unless it is negotiated on behalf

of employees by an exclusive bargaining representative. Quillayute Valley School District, Decision 2809 (PECB, 1989).

A body of Commission precedent interpreting Chapter 41.56 RCW has given wide latitude to employees in the formation and structure of their organizations. That statute defines "bargaining representative" as:

> ... any lawful organization which has as **one of its primary purposes** the representation of employees in their employment relations with employers.
>
> RCW 41.56.030(4) [emphasis by **bold** supplied].

Nascent organizations have been permitted to file representation petitions, so long as their structure has crystallized by the date of the hearing. Kitsap County, Decision 2116 (PECB, 1984). Chapter 53.18 RCW goes a half-step farther, defining "employee organization" as:

> [A]ny lawful association, labor organization, union, federation, council, or brotherhood, **having as its primary purpose** the representation of employees on matters of employment relations.
>
> RCW 53.18.010 [emphasis by **bold** supplied].

Any entity which would fail to meet the requirements developed under Chapter 41.56 RCW would certainly fail to qualify as an employee organization under Chapter 53.18 RCW.

Although Commission precedent does not dictate any particular form an organization must take, it does require a showing that there is an organization in existence which has an identity separate and apart from the individual employees. A constitution and/or bylaws constitute the contract among members of an organization controlling how the organization is to be operated, and so will be a

helpful piece of evidence where the existence of an organization is questioned, even if not absolutely necessary. Ultimately, the Commission must be able to determine from the evidence presented that an entity seeking to acquire the privileged status of an "exclusive bargaining representative" actually exists, and is structured in a manner which will not preclude lawful exercise of its statutory responsibilities. King County, Decision 4253 (PECB, 1992).

In this case, there is no persuasive documentary or testimonial evidence demonstrating that an organization ever existed, much less operated as the exclusive bargaining representative of the petitioned-for employees. The 1990 and 1992 agreements were both prepared by the employer. Both documents recite that they are:

> entered into by and between the Port of Bellingham ... and all the non-exempt Bellingham Cruise Terminal employees, hereinafter 'Employees'. ...

Both documents note that "the employer has agreed to recognize the non-exempt employees at the Bellingham Cruise Terminal as an independent bargaining unit," but neither contains any clause recognizing a named organization as the exclusive bargaining representative for that bargaining unit.

Consistent with a conclusion that the 1990 and 1992 documents were not signed by or on behalf of any organization representing the employees, each of the six persons then employed at the Bellingham Cruise Terminal individually signed the documents. Further, both documents provide that discussion of changes to the employee handbook will be held "with the Employees", rather than with an organization as their representative. The 1990 document committed "the Employees", not their representative, to forego strike actions. Both documents state "[t]he Employer and the Employees have jointly participated in the drafting of this Agreement". The

term "Bellingham Cruise Terminal employees" is as likely to be a descriptive term as the name of an entity.

Daharsh testified that no organization, constitution, by-laws, dues, or elected officers exist. No regular meetings of the employees occurred. At the most, proposals, Daharsh's grievance, and the employer's changes of policies or practices were discussed by the employees over lunch, or in passing during the work day. When Daharsh used the grievance procedure of the 1989 handbook, he represented himself without reference to or assistance of any organization, and there is no indication that the employer gave notice to an exclusive bargaining representative as would be required by the proviso to RCW 41.56.080. The process leading to the 1992 agreement was commenced when the employer contacted Daharsh and Mauro, who again served as volunteers without benefit of election or other acts of authorization from the remaining employees.

In this entire record, the only reference to something specifically identified as the "Bellingham Cruise Terminal Employees Association" is found in the purported disclaimer dated May 4, 1993, and received by the Commission on July 13, 1993. That document, which is on the letterhead of the IBU, states:

> As members of the **Bellingham Cruise Terminal Employees Association**, we no longer wish to continue to negotiate our wages and conditions with the employer. We have contacted the Inlandboatmen's Union to represent us as our collective bargaining agent.

Despite the reference there to an "association", that letter addressed to the Hearing Officer is individually signed by nearly all of the petitioned-for employees, just as had been the two documents relied upon by the employer. This sole reference to an association does not override the substantial evidence to the contrary, as discussed above.

Conclusions

The 1992 agreement relied upon by the employer does not constitute a contract bar.[9] All other conditions precedent to the direction of an election have been met in this case.

FINDINGS OF FACT

1. The Port of Bellingham, a public employer within the meaning of RCW 53.18.010 and RCW 41.56.030(1), operates the Bellingham Cruise Terminal.

2. Inlandboatmen's Union of the Pacific, an employee organization within the meaning of RCW 53.18.010 and a bargaining representative within the meaning of RCW 41.56.030(3), filed a properly supported petition for investigation of a question concerning representation, seeking certification as the exclusive bargaining representative of certain employees working at the Bellingham Cruise Terminal.

3. During a prehearing conference held in this proceeding, the employer and union stipulated to the propriety of a bargaining unit and to a list of the employees then eligible to vote on the determination of any question concerning representation in this proceeding.

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[9] Even if the "Bellingham Cruise Terminal Employees Association" were found to exist, a substantial question would arise in this case as to whether such an organization was unlawfully controlled or dominated by the employer. In Quillayute Valley School District, Decisions 2809 (PECB, 1987) and 2809-A (PECB, 1988), an employer advanced a contract bar claim based upon a history and document that bear many resemblances to the situation portrayed in this record. Citing the condemnation of company unions in the legislative history of the National Labor Relations Act, the Commission ruled that no contract bar could exist there.

4. At the hearing in this proceeding, the union sought to delete one of the named individuals from the stipulated eligibility list, and to add another name to the eligibility list. The union did not present evidence of changed circumstances since the stipulation was made, or that its stipulation to the eligibility list described in paragraph three of these findings of fact was affected by any mistake, deception, or other good cause to withdraw from the stipulation.

5. The evidence fails to establish the existence of an organization using the name "Bellingham Cruise Terminal Employees Association" which is separate and apart from the petitioned-for employees. The evidence indicates that the petitioned-for employees have not adopted any constitution or bylaws, elected any officers, paid any dues, or held regularly scheduled meetings for the purpose of organizing or maintaining an organization having collective bargaining as its primary purpose.

6. The document titled "Agreement Between the Port of Bellingham and the Bellingham Cruise Terminal employees" dated 1992 was signed individually by each of the employees affected and refers throughout to "Employees", rather than to an exclusive bargaining representative acting on the behalf of employees.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapters 53.18 and 41.56 RCW and Chapter 391-25 WAC.

2. No good cause having been shown to withdraw from the stipulations made by the parties during a prehearing conference in this proceeding, the eligibility list described in paragraph

3 of the foregoing findings of fact is binding on the parties pursuant to WAC 10-08-130(3).

3. The 1992 agreement is not a valid collective bargaining agreement within the meaning of RCW 41.56.070, so that no contract bar exists in this proceeding.

4. A question concerning representation currently exists in the appropriate bargaining unit described as:

> All employees of the Port of Bellingham employed at the Bellingham Cruise Terminal.

DIRECTION OF ELECTION

A representation election shall be conducted by secret ballot, under the direction of the Public Employment Relations Commission, in the appropriate bargaining unit described in paragraph 4 of the foregoing conclusions of law, for the purpose of determining whether a majority of the employees in that unit desire to be represented for the purposes of collective bargaining by Inland-boatmen's Union of the Pacific or by no representative.

Issued at Olympia, Washington, the 18th day of February, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

This order may be appealed by filing timely objections with the Commission pursuant to WAC 391-25-590(2).