Okanogan School District, Decision 5394-A (PECB, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
OKANOGAN EDUCATION ASSOCIATION	)	CASE 12158-E-95-2013
	)	
Involving certain employees of:	)	DECISION 5394-A - PECB
	)	
OKANOGAN SCHOOL DISTRICT	)	DECISION OF COMMISSION
	)	
	)	

Faith Hanna, Attorney at Law, appeared on behalf of the union.

Robert Schwerdtfeger, Labor Relations Consultant, appeared on behalf of the employer.

This case comes before the Commission on objections filed by the employer, seeking review of a direction of cross-check issued by Executive Director Marvin L. Schurke on January 3, 1996.[1]

BACKGROUND

School districts organized and operated under Title 28A RCW bargain with their "certificated" employees under the Educational Employment Relations Act, Chapter 41.59 RCW, and bargain with all of their other employees under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Both collective bargaining statutes are administered by the Commission.

School districts typically offer co-curricular and extracurricular activities for their students. RCW 28A.320.500 and 28A.320.510 authorize the use of school facilities for such purposes; RCW 28A.600.200 authorizes school districts to conduct:

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[1] Okanogan School District, Decision 5394 (PECB, 1996).

> [I]nterschool athletic activities and other interschool extracurricular activities of an athletic, cultural, social or recreational nature for students of the district.

The Washington Interscholastic Activities Association (WIAA) mentioned in RCW 28A.600.200 is a voluntary organization of school districts, organized and operated to plan, supervise and administer interscholastic activities, including athletic competition at the high school level.

Prior to 1995, the general practice throughout the state was that the wages, hours and working conditions of persons who conducted extracurricular activities in school districts were established through negotiations between the particular school district and the exclusive bargaining representative of its certificated employees.[2] In the Okanogan School District, such matters had been controlled in the recent past by a collective bargaining agreement between the employer and the Okanogan Education Association.

In Castle Rock School District, Decision 4722-B (EDUC, 1995), the Commission ruled on a complaint in which a former athletics coach alleged that a school district and the exclusive bargaining representative of its certificated employees committed unfair labor practices by purporting to negotiate for extracurricular activities staff positions in the context of collective bargaining under Chapter 41.59 RCW. Finding that educator certification is not required under any statute or State Board of Education rule for work as an athletics coach, the Commission found violations in that case and concluded that any collective bargaining rights of such non-certificated jobs would be under Chapter 41.56 RCW. In an

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[2] From 1965 through 1975, such bargaining relationships were conducted under the "Professional Negotiations Act", Chapter 28A.72 RCW. That statute was repealed on January 1, 1976, and such bargaining was thereafter conducted under the Educational Employment Relations Act, Chapter 41.59 RCW.

emergency rule adopted in February of 1995, as WAC 391-45-560, the Commission directed each school district and exclusive bargaining representative of certificated employees to:

(1) Determine which, if any, extracurricular work historically bargained for under Chapter 41.59 RCW did not require certification as an educator under state law or local practice; and

(2) Post notices, by May 1, 1995, informing employees of the removal of all non-certificated work from the bargaining unit of certificated employees maintained under Chapter 41.59 RCW; and

(3) File a copy of their posted notice with the Commission.

On July 24, 1995, the Okanogan School District and Okanogan Education Association filed a notice in response to WAC 391-45-560. They agreed that all high school and junior high school athletics coaches fell into the non-certificated category, along with advisors for: Annual, journalism, drama, pep club/cheerleaders, service club, musical, knowledge bowl, science club, honor society, project proud, "four approved clubs"; and a senior class mother's tea.[3] The notices they posted on June 20, 1995 had included the following paragraphs required by the Commission's emergency rule:

> EMPLOYEES WHO ARE DISSATISFIED WITH THE BARGAINING UNIT ASSIGNMENTS LISTED [in the notice] should first contact this school district and/or the organization shown below, to try to resolve the matter. If the matter is not resolved, an employee holding a position listed [in the notice] may file a complaint with the Public Employment Relations Commission under Chapter 391-45 WAC. Any complaint must be filed within six months following the act or event being challenged.
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> EMPLOYEES HOLDING POSITIONS [excluded from the certificated employee bargaining unit] MAY HAVE RIGHTS UNDER THE PUBLIC EMPLOYEES' COLLECTIVE

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[3] The parties determined that educator certification was required for: Band/choral directors, junior class advisor, senior class advisor, senior graduation advisor, and Sixth Grade Camp Progress counselor.

> BARGAINING ACT, CHAPTER 41.56 RCW. It is the purpose of this notice to "clear the air" prior to any exercise of those rights. Any petition for investigation of a question concerning representation, bargaining authorization card, or voluntary recognition agreement that is signed or filed as to such employees prior to or on the date this notice is posted will be deemed void.

Review of the Commission's docket records fails to disclose any unfair labor practice charges filed by Okanogan School District employees to challenge the separation of non-certificated extracurricular staff from the Chapter 41.59 RCW bargaining process.

On November 9, 1995, the Okanogan Education Association filed a petition for investigation of a question concerning representation with the Commission under Chapter 391-25 WAC, seeking certification as exclusive bargaining representative of:

> All Co-Curricular employees whose position does not require a teaching certificate.

The bargaining unit sought by the union includes all of the employees who perform work that was excluded from the certificated bargaining unit by the notice filed on July 24, 1995. The union's showing of interest was sufficient to invoke WAC 391-25-391.

On January 3, 1996, the Executive Director ordered a cross-check of records for a bargaining unit described as:

> All extra-curricular positions of the Okanogan School District for which no certification is required.

On January 10, 1996, the employer filed objections to the direction of cross-check, asserting that "all extra-curricular positions of the Okanogan School District for which no certification is required", is not an appropriate bargaining unit.

The cross-check results indicated that the union had the support of a majority of the employees, and the employer's objections were considered by the Commission on January 23, 1996. The case was remanded for a hearing, which was held by Hearing Officer Rex L. Lacy on June 13, 1996. The parties filed briefs. The case is now before the Commission for a determination based on that record.

POSITIONS OF THE PARTIES

The employer asks the Commission to vacate the Executive Director's order, arguing that the description of the unit as "all extra-curricular positions" is too broad. It contends that a community of interest is lacking among the members of the proposed bargaining unit, that there is no common supervision, no standard qualifications or skills, no common evaluation standards, and no common wages, hours or terms and conditions of employment. It asserts the persons who conduct extracurricular activities have a high turnover rate, and have no expectation of continued employment. The employer urges the Commission to treat the extracurricular activities staff as seasonal and historically unrepresented part-time workers who would not be considered employees under RCW 41.56.030(2). If the Commission rules that the incumbents in the disputed positions qualify as "employees", then the employer suggests that a "one-sixth FTE" test be applied from a 1440 hours-per-year base to determine eligibility in the bargaining unit, so that only those employees who work at least 240 hours per year would be included in the petitioned-for bargaining unit.[4]

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[4] The employer also claimed error based on the fact that the tally of the cross-check lists nine more employees in the bargaining unit than does the statement of results of a prehearing conference held in this matter. We find that contention to be unfounded, however. The employer itself proposed the disputed changes to the eligibility list on January 18, 1996, due to staff changes after the issuance of the statement of results of prehearing conference.

The union argues that the bargaining unit meets community of interest standards in terms of similar duties, skills and working conditions, and that all of the positions in the proposed bargaining unit have in common a component of instructing and leading students. It asserts that there are similarities in supervision, and that there is substantial interchange of employees among the positions. It contends that these employees have a reasonable expectation of continued employment, and that most of the employees continue in the same position from year to year. The union acknowledged the "30 days per year" test applied to distinguish regular part-time employees from casual employees in other school district jobs,[5] and contends these are regular part-time employees.

DISCUSSION

Definition of "Employee"

The purpose of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is set forth in RCW 41.56.010, as follows:

> [T]o promote the continued improvement of the relationship between public employers and their **employees** by providing a uniform basis for implementing the right of public **employees** to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

[Emphasis by **bold** supplied.]

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[5] This case and objections to the Executive Director's direction of election in South Central School District, Decision 5670 (PECB, 1996) have been considered together by the Commission. The union proposed "10 days" and/or "20 days" tests early in the processing of both cases, but did not file objections when the Executive Director rejected such tests in South Central, and appears to have embraced the "30 days" test in its latest brief.

RCW 41.56.040 prohibits interference with or discrimination against "any public **employee** or **group of employees** in the free exercise of **their right to organize and designate representatives of their own choosing** ..." [emphasis by **bold** supplied].

RCW 41.56.030(2) defines "public employee" as:

> (2) "Public employee" means **any employee of a public employer** except any person (a) elected by popular vote, or (b) appointed to office pursuant to statute, ordinance or resolution for a specified term of office by the executive head or body of the public employer, or (c) whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit, or any person elected by popular vote or appointed to office pursuant to statute, ordinance or resolution for a specified term of office by the executive head or body of the public employer, or (d) who is a personal assistant to a district court judge, superior court judge, or court commissioner. For the purpose of (d) of this subsection, no more than one assistant for each judge or commissioner may be excluded from a bargaining unit.

[Emphasis by **bold** supplied.]

The Commission has interpreted the legislative intent of the term "employee" in collective bargaining statutes to apply only to persons who have a reasonable expectancy of an ongoing employment relationship with the particular employer, and not to persons paid by an employer "on a very brief or temporary basis":

> The fundamental test for being an "employee", ... is the parties' expectancy of a continued employment relationship, with the consequential mutual interest in wages, hours and conditions.

Columbia School District, Decision 1189-A (EDUC, 1982).

Only casual and temporary employees are completely excluded from bargaining units, however.[6] The Commission has been reluctant to exclude persons who work in part-time assignments that have an apparent potential for ongoing employment of the same nature,[7] and "regular part-time" employees are routinely included in the same bargaining unit with full-time employees performing similar work.[8] The Executive Director has summarized these holdings, as follows:

> [T]hese classifications thus implement a balancing of the rights and interests of public employees and public employers: Persons with an ongoing interest in the affairs of a bargaining unit are permitted to implement their statutory bargaining rights; at the same time, a union and employer who are properly concerned with employees having a clear community of interest are not burdened with bargaining for those who have had only a passing interaction with the employer and its workforce.

Kitsap County, Decision 4314 (PECB, 1993), at page 5.

The Commission noted in Castle Rock, supra, that the extracurricular activities work recurred for fixed periods on a seasonal basis from year to year, and involved substantial work hours, so as to appear to be "regular".

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[6] See, Everett School District, Decision 268 (EDUC, 1977); Tacoma School District, Decision 655 (PECB, 1979); and City of Auburn, Decision 4880-A (PECB, 1995) and cases cited therein. Consistent with the exclusion from bargaining units, casual and temporary employees do not have voting rights on long-term matters such as the certification and decertification of exclusive bargaining representatives and ratification of contracts.

[7] See, also, Green River Community College, Decision 4491 (CCOL, 1993), affirmed, Decision 4491-A (CCOL, 1994).

[8] See, e.g., Columbia School District, supra; Mount Vernon School District, Decision 2273-A (PECB, 1986); Municipality of Metropolitan Seattle (METRO), Decision 2986 (PECB, 1988); Skagit County, Decision 3828 (PECB, 1991); Lower Columbia College, Decision 3987-A (CCOL, 1991); City of Poulsbo, Decision 3737 (PECB, 1991).

The employer cites City of Auburn, Decision 4880-A (PECB, 1994), where the Commission concluded that temporary/seasonal workers in a parks department and a maintenance division were not "employees" under the statute, but close attention to the facts of that case is warranted. The employees at issue in Auburn held summer jobs which could seemingly have been eliminated at any time. Many of them were college students headed toward other careers; they rarely became permanent employees of the City of Auburn; only a minority of them even returned for a subsequent summer. Thus, they had little interest in or reasonable assurance of ongoing employment with that employer.[9]

That is not the case here, as we find the employer's claim that there is no ongoing expectation of continued employment among the employees at issue in this case is without merit. The record indicates that the extracurricular activities recur from year to year in the Okanogan School District, and that they involve substantial work hours. No evidence suggests that the employer will be discontinuing its extracurricular activities programs in the foreseeable future. There is evidence detailing the extracurricular work performed during the 1993-94, 1994-95, and the 1995-96 school years: A total of 23 employees served in certain coaching or other student activities capacities for each of those years;[10] nine others performed coaching or student activities duties for at

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[9] An alternate basis for the result in Auburn was that the duties, skills and working conditions were so different from those of the bargaining unit employees as to justify their exclusion under RCW 41.56.060.

[10] James Wood, Denny Neely, Larry Oty, Gordon Pitts, Chris Ferenz, Michelle Ferenz, Andy Knutson, Ron Cate, Rodger Nicholas, Steve Chamberlin, Pat Messinger, Kay Schrout, Patti Troutman, Dale Linklater, Norman Mandak, Mike Gilmore, Jim Strom, Dan Brown, Sherry Pitts, Connie Nearents, Carol Payne, Laurie Schmidt, and Scott Duncan.

least two of those three years.[11] Even though the employer may not have been under any obligation to offer extracurricular contracts to the people who worked in the preceding year, analysis of the evidence shows that more than 70% of the extracurricular activities staff returned to perform the same assignment or a closely related one for a second or third year in a row. Thus, the record strongly suggests that if someone does a satisfactory job in one year, it is likely that the individual will be hired back for the next year without the employer going through another recruitment process. In most cases, an employee is re-hired each subsequent year until advised he or she is released. We infer from this that incumbents reasonably anticipate such employment as a substantial source of income, and that they are an ongoing part of the workforce available to the employer for the accomplishment of its overall functions. Based on the facts presented in this record, we find no reason to deviate from the Castle Rock decision. Thus, persons could qualify as "employees" for the purposes of Chapter 41.56 RCW based on work as extracurricular activities staff members.[12]

Structuring Bargaining Units

In structuring bargaining units, the Commission is guided by RCW 41.56.060, which states:

> 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 or-**

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[11] Bob Sanborn, Dennis O'connor, Terri McGaha, B. McGaha, W. Christman, M. Gariano, Malcolm Townsend, Sterling Jones, and B. Bucsko.

[12] Where there is a certification requirement, the extra work of a certificated employee properly would remain within the work jurisdiction of the certificated employee bargaining unit under Chapter 41.59 RCW.

> **ganization** among the public employees; and the **desire of the public employees.**

The purpose is to group together employees who have a sufficient community of interest to indicate they will be able to bargain effectively with their employer.[13] The statute does not require determination of the "most" appropriate bargaining unit; it is only necessary that the petitioned-for unit be an appropriate unit.[14]

Unit determinations are made on a case-by-case basis. The Legislature did not prioritize the criteria set forth in RCW 41.56.060, and the Commission has never applied the four factors on a strictly mathematical basis. Not all of the four factors arise in every case. Where they do exist, one factor may be more important than another. Pasco School District, Decision 5016-A (PECB, 1995). For instance: The "history of bargaining" need only be considered where the petitioned-for employees are already represented for the purposes of collective bargaining; the "extent of organization" will not be at issue where an employer-wide unit is sought; the "desires of the employees" will only be significant if two or more appropriate bargaining unit configurations are being proposed by competing labor organizations. See, Puyallup School District, Decision 5053-A (PECB, 1995).

The starting point for any unit determination analysis is the configuration sought by the petitioning union. In this case, the union petitioned for a bargaining unit of "all co-curricular employees whose position does not require a teaching certificate". After an investigation conference, the Executive Director ordered a cross-check to determine a question concerning representation in

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[13] See, Quincy School District, Decision 3962-A (1993) and Ephrata School District, Decision 4675-A (1995).

[14] City of Winslow, Decision 3520-A (PECB, 1990). See, also, Ephrata School District, Decision 4675-A (1995).

an employer-wide unit of extracurricular activities staff. Having decided that such persons can meet the definition of "employee", we address the employer's claim that a community of interest is lacking among the employees in the unit of "all extra-curricular positions ... for which no certification is required" found appropriate by the Executive Director.

Duties, Skills and Working Conditions -
The extracurricular activities staff in the Okanogan School District all have some common duties involving instructing, leading, teaching, disciplining, advising, guiding and coordinating students and student activities. While the employer does not require any particular qualification or training for these jobs, we infer from the titles that individuals chosen to fill the positions would need to have some interest in working with young people on a personal and/or group level, and that it would be desirable for the employee to have knowledge of the rules and procedures of the particular sport or activity of the assignment.

Many of the skills required for extracurricular activities staff positions are interchangeable, and many of them overlap from position to position. Examples of long-term interchange among jobs found in this record include: (1) Alfred J. Strom was golf coach for seven years, football coach for 20 years, track coach for two years, and basketball coach for 11 years; (2) Gordon Pitts was a junior high assistant football coach, junior high head football coach, and a basketball coach; (3) James Wood was assistant high school softball coach for one year, high school head softball coach for three years, girls softball coach, and high school assistant football coach. During the three recent school years for which detailed records were provided, several employees served in multiple coaching capacities: Malcolm Townsend (high school assistant baseball and junior high assistant football); C. Ferenz (high school assistant track and high school head boys basketball); P. Messinger (junior high head football, 7th grade boys basketball

and high school head baseball); P. Troutman (high school assistant softball and 7th grade volleyball); W. Christman (high school assistant volleyball and high school C-team volleyball); Sterling Jones (high school assistant boys basketball and high school assistant football); Jeff Pope (high school assistant wrestling and high school assistant football); B. McGaha (high school assistant baseball and high school assistant football); and Dennis Neely (high school assistant football, junior high school head football, and high school head football). Many employees coached in more than one sport in the same year.

There is evidence of substantial interaction within the petitioned-for unit. Several employees may serve as assistant football coach at the same time, and would naturally need to work with one another in the performance of their duties. Others need to maintain contact with one another for scheduling of activities, scheduling of facilities, use of equipment, scheduling of students, coordination of student oversight, and discussion of student progress.

All of the extracurricular activities staff have their places of work within a school building or on an adjacent athletic field. All work is under the supervision of the principal, athletic director or other school official.

These positions are filled informally for the most part, with employees recruited from either the community or from the ranks of the employer's full-time employees. The employer may post job openings, advertise in the newspaper and/or screen applicants, but it appears the employer only uses formal advertisements or screening, if necessary. The record does not reflect any differences that arise between members of the community and individuals who are hired through their teaching duties, and we infer that the employer has the same expectations with regard to the duties to be performed, regardless of whether they come from the community or from the ranks of certificated teachers.

All extracurricular activities contracts are for part-time work, so there is no workforce of full-time employees performing similar work. There are no formal job descriptions. All employees in extracurricular positions have their choice of being paid on a periodic basis over 12 months, on a periodic basis for the duration of the season, or by one lump sum at the end of the season. None of the extracurricular activities staff receive any insurance benefits or other fringe benefits on account of that work, nor do any of them receive any paid holidays, vacations or leaves.

While they certainly do not need precisely the same skills and background as athletic coaches, individuals hired as cheerleader coordinators, yearbook or activity advisors, and persons working in projects at the elementary school level are still selected and paid to lead and coordinate group activities for students. We infer that, like the athletics coaches, they would need to be acquainted with the basic activity they are supervising. Differences in the age, size or interests of students are no more compelling than the differences of rules among the various sports; the fact remains that all of these positions are involved with activities that are not part of the planned academic day. The statute does not require the union to seek, and does not confine us to certifying, "the most appropriate unit". It is only necessary that the petitioned-for bargaining unit be an appropriate one. The fact that some other grouping of employees could also be appropriate, or even more appropriate, does not require rejecting a unit that is appropriate. City of Centralia, Decision 3495-A and 3496-A (PECB, 1990).[15]

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[15] A self-policing risk which weighs against unions that petition for excessively diverse units comes into play at the time of an election or cross-check: Employees who are at the fringe of a community of interest may vote against representation by that union.

History of Bargaining -
Citing the provision in RCW 41.56.060 which requires the Commission to consider the "history of bargaining" as one element of the community of interest test, along with the Commission's ruling that the inclusion of positions not requiring certification in a certificated bargaining unit was an unfair labor practice in Castle Rock, the employer urges the Commission to conclude here that the petitioned-for employees have no legitimate bargaining history or experience. According to the employer, the fact that this group has historically been unrepresented should persuade the Commission to leave the employees unrepresented.

Statutory interpretations made by administrative agencies established by the Legislature to administer specific statutes are accorded considerable weight by the courts, especially when the administrative agency has expertise in a highly specialized area of law,[16] but the employer would have us go far beyond interpretation. Carried to its logical extreme, the employer's argument would have the untoward result of precluding any organizing in the future by any group of historically-unrepresented employees. We decline to re-write the law to exclude employees who have heretofore exercised their statutory right to refrain from organizing.

If anything, the employer's community of interest arguments here are contradicted by the fact that the employer treated its extra-curricular activities staff as part of a bargaining unit in the past, and thereby acknowledged the existence of a community of interest among them. While the Commission found an unfair labor practice in Castle Rock based upon the inclusion of non-certificated positions in a bargaining unit of certificated employees

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[16] See, City of Yakima v. IAFF and YPPA, 117 Wn.2d 655 (1991); METRO v. PERC, 118 Wn.2d 621 (1992); City of Bellevue v. PERC, 119 Wn.2d 373 (1992); City of Pasco v. PERC, 119 Wn.2d 504 (1992); Community College v. Personnel Board, 107 Wn.2d 427 (1986); and Yakima v. Yakima Police, 29 Wn.App. 756 (1981).

organized under Chapter 41.59 RCW, that does not lead to the result sought by the employer in this case. Castle Rock and the emergency rule which followed merely held that the historical unit configuration could not continue in effect.

Extent of Organization -

When sought by a petitioning union, employer-wide bargaining units have been viewed as presumptively appropriate. All of the employees of an employer inherently share some community of interest in dealing with their common employer. A mutual interest in wages, hours and working conditions is a direct consequence of the parties' mutual expectancy of continued employment.[17] Occupationally-based unit configurations are also apt in cases where there is integration of duties or interaction among employees across either real or nominal departmental lines.[18]

Concerns about "extent of organization" and fragmentation generally relate to the number and complexity of contracts to be negotiated and administered within an employer's workforce. The Commission has a long-standing policy of avoiding unnecessary fragmentation of the workplace into multiple bargaining units. Ben Franklin Transit, Decision 2357-A (PECB, 1986); Municipality of Metropolitan Seattle, Decision 2358-A (PECB, 1986). Very small units are discouraged where the positions can fit appropriately into a broader bargaining unit.[19] Unit structures which bifurcate a workforce have been found inappropriate, or attempts to create such

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[17] See, Columbia School District, Decision 1189-A (EDUC, 1982).

[18] Where work locations, shift arrangements and supervision of employees are separate and distinct, the Commission has found integration of duties or interaction among the employees less significant. See, City of Centralia, Decisions 3495-A (PECB, 1990), and cases cited therein.

[19] See, e.g., City of Auburn, Decision 4880-A (PECB, 1995).

units have been rejected, where work jurisdiction conflicts are likely to arise on an ongoing basis.[20]

In Castle Rock, supra, the Commission specifically rejected a bifurcated format which separated those extracurricular activities staff members who had certification from those who lacked certification, because of the potential for work jurisdiction problems and complications in administering personnel functions. The Commission noted that extracurricular activities have changed over the years to the point where they are separate jobs which have different minimum qualifications from classroom teaching. The Commission has also stated concern about avoiding the stranding of employees:

> Concerns about "fragmentation" of bargaining units arise from time to time. **One very real concern is that employees not directly involved in an organizational effort will be deprived of their statutory bargaining rights by being left "stranded" alone or in a unit that is too small to bargain effectively.** Another concern is that the establishment of a bargaining relationship gives rise to a scope of "bargaining unit work", and a duty on the part of the employer to give notice to the exclusive bargaining representative and provide opportunity for bargaining prior to transfer of bargaining unit work to employees outside of the bargaining unit. Thus, **decisions have required that fringe groups be incorporated into the bargaining units to which they logically relate**, and have rejected unit configurations that Balkanize departments or occupational groups into units that can be explained only on the basis of "extent of organization."

City of Centralia, Decision 3495-A and 3496-A (PECB, 1990) [Emphasis by **bold** supplied].

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[20] South Kitsap School District, Decision 1541 (PECB, 1983), cited with approval in Ephrata School District, Decision 4675-A (PECB, 1995). See, also, City of Seattle, Decision 781 (PECB, 1979) and Skagit County, Decision 3828 (PECB, 1991).

In the case now before us, the proposed employer-wide bargaining unit of extracurricular positions for which no educator certification is required will avoid a potential for fragmentation or the stranding of a group of employees without the opportunity to exercise their collective bargaining rights.

Desires of the Employees -
The unit sought by the Okanogan Education Association is the only proposal before the Commission in this case. There is thus no need to consider a unit determination election to assess the desires of the employees. Clark County, Decision 290-A (PECB, 1977).

Conclusions on Community of Interest -
The unit sought in this case is occupationally-based, bringing together extracurricular staff who all have some common working conditions. As a result of an analysis of the statutory factors, we conclude that "All extra-curricular positions of the Okanogan School District for which no certification is required" have a sufficient community of interest to be included in a bargaining unit.

The Test for "Casual" Status

As was noted in Columbia School District, et al., supra, any threshold quantification is somewhat arbitrary, but some test is necessary to distinguish between "regular" and "casual" employees if unit determination matters are to be administered with order. The task remaining here is to formulate a test for extracurricular activities employees.

The employer argues that a "one-sixth FTE" test should be applied to 1440 hour-per-year base, which is equivalent to 180 days at 8

hours per day.[21] In conjunction with the "240 hours per year" test which results from that computation, the employer suggests that employee work hours and availability be reassessed annually.

The ongoing need of school districts for employees to staff their extracurricular activities programs is aptly compared to the ongoing need of school districts for a cadre of "substitute" employees to fill in when an employee normally scheduled for a particular assignment (i.e., teaching a class, driving a bus route, preparing lunches) is to be absent from work. Thus, Commission decisions dealing with substitutes in school districts are instructive here:

In Everett School District, Decision 268 (EDUC, 1977), it was determined that RCW 41.59.080(1) did not permit a categorical exclusion of substitute teachers from certificated bargaining units. Those who had been placed on the salary schedule after 20 consecutive days of work were included in the unit as "regular part-time" employees.

In Tacoma School District, Decision 655 (EDUC, 1979) it was concluded that persons who had worked for the same school district for 30 or more days in a one-year period and who continued to be available for work of the same type were also regular part-time employees to be included in the bargaining unit.[22]

In Columbia School District, et al., supra, the Commission affirmed the 20/30 day test announced in Tacoma as an equitable formula for determining employee status, while emphasizing that community of interest factors were less important in such cases:

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[21] That is the base work year for employees in positions scheduled to work on days when school is in session (e.g., cooks, bus drivers and teachers' aides.)

[22] The "30 days" test which originated in the Tacoma decision represents approximately one-sixth of the nominal 180-day work year for school teachers.

> The 20/30 day rule reflects our belief that if a substitute has been called back by a school district for 20 consecutive days or for 30 days in a one-year period, it is because he or she has demonstrated some desirable employee characteristic. Similarly, the employer develops an expectancy that the person who has been available for the 20 consecutive or 30 nonconsecutive day period will continue to be available as a substitute. This expectancy of a continuing relationship is not affected by the number of days of service required for higher daily pay, **nor are bargaining histories or variations in substitutes' duties relevant when determining who is or is not an "employee"**. Thus, unlike unit determinations where significant variations of fact make a "per se" rule inappropriate ... these same **fact variations become much less significant when determining who is or is not an employee**.

Decision 1189-A [emphasis by **bold** supplied].

In reaching that result, the Commission relied on National Labor Relations Board precedent and the decisions of labor relations agencies of other states.

In Sedro Woolley School District, Decision 1351-C (PECB, 1982), the Executive Director adapted the "30-days" test to school district classified employees. The Executive Director indicated concern about establishing a threshold which reflected the nature of the employment relationship and the industrial setting in which it occurs, and found that the 30-day test corresponded to school employment practices. The classified employees shared the 180 day yearly cycle of school district operations with the substitute teachers hired by those employers, so the 30-day test for bargaining unit inclusion was reasonably related to the work assignments and actual time worked by classified employees. In a context where many of the employees were scheduled to work less than "full time", emphasis was placed on the work shift of the employee being replaced. Thus, a substitute who worked the full shift of an employee

normally scheduled to work four hours would be credited with a "day" for purposes of the "30-days" test.

The "30 days" test developed in school districts was subsequently adapted as a "one-sixth test" applied in several other employment settings. See, King County, Decision 1675 (PECB, 1983); Green River Community College, Decision 4491-A (CCOL, 1994); Kitsap County, Decision 4314 (PECB, 1993); Lower Columbia College, Decision 3987-A (CCOL, 1992); Municipality of Metropolitan Seattle, Decision 2986 (PECB, 1988).

In South Central School District, Decision 5670 (PECB, 1996), the Executive Director used a "30-days" test for extracurricular activities staff members to be considered as regular part-time employees. We are affirming the Executive Director's South Central ruling today, and are satisfied that it is equally applicable based on the facts presented in this case. The "30-days" test has the advantage of being an accepted measure already in use in school districts. Rather than developing another test for employers to administer,[23] it is more straightforward to treat "public education" as the industrial setting, and to apply the general rule of "30 days in a one-year period" already in use in school districts for computing the bargaining unit eligibility of the extracurricular activities staffs. All of the incumbents at the time of the cross-check met the "30-days" test, based on our review of the limited record provided by the parties in this case.

We agree with the employer that it will be appropriate for it to make an assessment of its extracurricular staff payroll records each year, but we do not agree with the specific procedure suggested by the employer.

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[23] The employer's "240 hours" proposal would create such a situation, deviating from methods it should be using for both its certificated and classified substitutes.

Computation Methodology

An employee is to be credited for a "day" of work for each calendar day during which the individual performs compensated work on extracurricular activities, regardless of the number of hours worked and regardless of what non-extracurricular work is performed on the same day. Thus, a full-time teacher who is a football coach will receive a "day" of credit for each day on which football practice or games are held even if some of those are days when school is in session. The methodology should be as follows:

A. For an assessment made during the summer months: How many "days" of extracurricular activities work did the employee perform in the school year just ended (**YEAR 1**)?

(1) If the number is less than 30, the individual is a "casual employee", and will not be included in the extracurricular activities staff bargaining unit.

(2) If the number is 30 or more, the individual is a "regular part-time employee", and will be included in the extracurricular activities staff bargaining unit for the ensuing school year (**YEAR 2**), unless the individual resigns or refuses renewal of extracurricular activities employment.

B. For an assessment made during the school year: How may "days" has the individual completed, or is the individual expected to complete, within one year?

(1) If the number is less than 30, the individual is a "casual employee", and will not be included in the extracurricular activities staff bargaining unit.

(2) If work in **YEAR 2** will give an individual who worked less than 30 days in **YEAR 1** a total of more than 30 days within 12 consecutive months, he or she will be a "regular part-time employee" upon completing the 30 days, and will be included in the extracurricular activities staff bargaining unit for the balance of **YEAR 2**, unless the individual resigns or refuses renewal of extracurricular activities employment.[24]

(3) If an individual is contracted for 30 or more days of work in **YEAR 2**, he or she will be a "regular part-time employee" upon signing the contract and will be included in the extracurricular activities staff bargaining unit for the balance of **YEAR 2**, unless the individual resigns or refuses renewal of extracurricular activities employment.

Handling of Premature Objections

The employer filed objections after the statement of results of the prehearing conference was issued in this matter, and it requests that those objections be made part of the record without modification. The Commission did not formally acknowledge receipt of those objections, but a Commission staff member acknowledged the objections and responded to the employer's concerns in a telephone call. In particular, the employer was advised that an objection under WAC 391-25-590 was premature, and that the cross-check would be conducted pursuant to WAC 391-25-390(1) before the case was brought before the Commission. The advice given conforms to the terms and intent of the Commission's rules, which postpone consideration of

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[24] Employees who worked less than 30 days in a school year carry over those days to the following school year, but days worked are permanently "lost" on a rolling basis if 12 months pass without attaining "regular part-time" status.

"appeals" until after the votes of the affected employees have been preserved by conducting an election or cross-check. The employer's objections were delayed, not discarded, and are part of the official record in this proceeding. The objections filed by the employer on December 29, 1995 have been addressed through the hearing process and this decision.

New Argument After Hearing

The employer argued in its post-hearing brief that the unit sought by the union does not include all employees who perform work that does not require educator certification, and it now claims there are many other employees who work on an as-needed basis. The employer cites City of Seattle, Decision 781 (1979), for the proposition that petitions should be denied where they fail to include the entire spectrum of employees. We reject this argument.

The employer had the opportunity to provide evidence in support of its new assertion at the hearing, but did not do so. When evidence could have been admitted at a hearing, but was not offered, introduction of that evidence is not allowed at a later point in the proceedings.[25] We have no evidence in this record that any employees within the "extracurricular activities staff" occupational group that describes this bargaining unit have been left out of the unit. The union never sought a "residual" unit encompassing persons working outside of the extracurricular activities program, nor did the Executive Director's unit description broaden the petitioned-for unit. If the employer, in fact, has unrepresented employees in other programs, they are not affected by this proceeding.

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[25] See, Municipality of Metropolitan Seattle, Decision 2358-A (PECB, 1986); King County, Decision 3318-A (PECB, 1990); King County, Decision 4299-A (PECB, 1993); Island County, Decision 5147-D (PECB, 1996); and Chelan County, Decision 5559-A (PECB, 1996).

The Cross-Check

The employer did not object to the use of the cross-check procedure, or claim any errors in implementing that procedure. We have determined that the bargaining unit described in the Executive Director's order was appropriate, and so remand the case for issuance of a certification based on the tally of the cross-check.

NOW, THEREFORE, it is

ORDERED

1. The objections filed by the Okanogan School District are overruled.

2. This case is remanded to the Executive Director for issuance of a certification.

Issued at Olympia, Washington, on the 14th day of March, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner