STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
UNITED FACULTY OF WESTERN WASHINGTON/UNITED FACULTY OF WASHINGTON STATE	)	CASE 19049-E-04-03022
	)	DECISION 8871-A - FCBA
	)	
Involving certain employees of:	)	
	)	DIRECTION OF ELECTION
WESTERN WASHINGTON UNIVERSITY	)	
	)	

Eric R. Hansen, Attorney at Law, for the union.

Attorney General Rob McKenna, by *Wendy Bohlke*, Assistant Attorney General, for the employer.

This case filed by United Faculty of Western Washington / United Faculty of Washington State (union) in December 2004 involves the faculty of Western Washington University (employer). Description of the initial processing of the case in *Western Washington University*, Decision 8871 (FCBA, 2005),[1] is incorporated here by reference. Hearing Officer David Gedrose held a hearing on April 20, 21, 28, 29, and May 5 and 6, 2005. The parties filed briefs.

ISSUES

1. Should persons who perform faculty duties between one-sixth and one-half of full-time be excluded from the bargaining unit as casual employees and/or as temporary employees?

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[1] Assistant deans were excluded from the bargaining unit by summary judgment, but a hearing was ordered on issues concerning part-time employees and managers/supervisors.

2. Should persons working under "department chair" and/or "director" titles and be excluded from the bargaining unit as administrators?

The Executive Director rules that the bargaining unit properly includes the disputed persons, and directs an election.

THE EMPLOYMENT SETTING

Western Washington University is a state institution of higher education located in Bellingham, Washington. It is operated under the direction of a board of trustees appointed by the Governor, and is headed by a president appointed by the board of trustees. Its academic affairs division is headed by an individual holding dual titles as provost and vice president for academic affairs, and is organized into seven colleges, the university libraries, and a graduate school. Each college is headed by a dean and has faculty members associated with it. The library system is headed by the university librarian, and has faculty members associated with it. The graduate school is headed by a dean, but draws its faculty from the colleges. Some colleges are further divided into departments, where one of the faculty members associated with the department will be designated as department chair. Ten interdisciplinary programs headed by directors (ranging from Canadian-American Studies to the Honors Program) utilize faculty associated with other colleges or departments, so that the program director may be the only faculty member directly associated with the program.

ISSUE 1 - INDIVIDUALS WORKING LESS THAN FULL-TIME

The union seeks certification for a bargaining unit encompassing all persons who hold faculty status or perform faculty duties for more than one-sixth of full-time within an academic year. The

employer acknowledges that faculty who work half-time or more are eligible for inclusion in the bargaining unit, but would have persons who work between one-sixth of full-time and half-time excluded as "casual" and/or "temporary" employees.

The Applicable Legal Standards

This case arises under the Faculty Collective Bargaining Act, Chapter 41.76 RCW (FCBA). Definitions in that statute include:

> RCW 41.76.005 DEFINITIONS. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.
>
> (1) "Faculty governance system" means the internal organization that serves as the faculty advisory body and is charged with the responsibility for recommending policies, regulations, and rules for the college or university.
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> . . .
>
> (5) "Faculty" means employees who, at a public four-year institution of higher education, *are designated with faculty status or who perform faculty duties* as defined through policies established by the faculty governance system, *excluding casual or temporary employees*, administrators, confidential employees, graduate student employees, postdoctoral and clinical employees, and employees subject to chapter 41.06 or 41.56 RCW.
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> . . .
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> (11) *"Bargaining unit" includes all faculty members of all campuses of each of the colleges and universities.* Only one bargaining unit is allowable for faculty of each employer, and that unit must contain all faculty members from all schools, colleges, and campuses of the employer.

(emphasis added). A Commission rule (which pre-existed the FCBA and codified precedents developed from a wide variety of employment settings) addresses this issue, as follows:

> WAC 391-35-350 UNIT PLACEMENT OF REGULAR PART-TIME EMPLOYEES--EXCLUSION OF CASUAL AND TEMPORARY EMPLOYEES. (1) It shall be presumptively appropriate to include

> regular part-time employees in the same bargaining unit with full-time employees performing similar work, in order to avoid a potential for conflicting work jurisdiction claims which would otherwise exist in separate units. Employees who, during the previous twelve months, have worked more than one-sixth of the time normally worked by full-time employees, and who remain available for work on the same basis, shall be presumed to be regular part-time employees. For employees of school districts and educational institutions, the term "time normally worked by full-time employees" shall be based on the number of days in the normal academic year.
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> (2) It shall be presumptively appropriate to exclude casual and temporary employees from bargaining units.
>
> (a) Casual employees who have not worked a sufficient amount of time to qualify as regular part-time employees are presumed to have had a series of separate and terminated employment relationships, so that they lack an expectation of continued employment and a community of interest with full-time and regular part-time employees.
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> (b) Temporary employees who have not worked a sufficient amount of time to qualify as regular part-time employees are presumed to lack an expectation of continued employment and a community of interest with full-time and regular part-time employees.
>
> (3) The presumptions set forth in this section shall be subject to modification by adjudication.

Both the statute and WAC 391-35-350 were interpreted and applied in *Central Washington University*, Decision 8127-A (FCBA, 2003) and *Eastern Washington University*, Decision 8678 (FCBA, 2004).

Analysis of Issue 1

The employer's workforce includes tenured and probationary faculty who work half-time or more, the disputed employees, and persons who the parties stipulate to exclude from the bargaining unit (because they teach less than one-sixth of full-time). The disputed employees are in several categories, including:

- Employees who teach one or more regular courses, or are employed solely for special courses. Many of the lecturers

return to teach for the employer year after year; some of them also teach courses at other institutions of higher education.

- Emeritus faculty, who may have been tenured faculty prior to retirement and who teach limited numbers of courses.
- Visiting professors, who may retain permanent employment at other institutions while teaching at this institution for a specific period of time.

The employer relies heavily on disputed employees to fulfill its mission.

The Form of Contracts Signed by Part-Time Employees

Early in the processing of this case, the employer appeared to argue that having fixed expiration dates in individual contracts was a basis to exclude the disputed employees from the bargaining unit. On March 31, 2005, after the notice of hearing was issued, the employer's attorney filed a letter in which she wrote:

> I write to ensure that the scope of the hearing . . . will include those matters referenced by Executive Director Marvin L. Schurke in [Decision 8871]. *In particular, I wish to ensure that I am able to put on evidence pertaining to faculty employed pursuant to contracts which place them* in categories under PERC rules as being *ineligible to vote*, i.e., casual or temporary status under WAC 391-35-350, *due to the type of contract they held*. . . .

(emphasis added.) The employer's principal brief notes testimony establishing that the contracts for the disputed employees are "prepared on a single form that can be used for all limited term faculty types . . ."[2]

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[2] Employer's post-hearing brief at page 5, citing Exhibit 3 and pages 40-47 of the transcript.

Consistent with the foregoing, the union's principal brief addressed "whether employees who have contracts with an explicit date of termination" should be excluded from the bargaining unit.[3]

Contradicting its earlier indications, the employer's reply brief accuses the union of proffering a rebuttal to an argument the employer "simply did not make" and states that the employer "is not arguing that temporary and limited term employees whose contracts contain a specific termination date should be excluded from the unit . . . ." The employer is thus understood to have abandoned any claim that the presence of an explicit termination date in the contracts signed by disputed employees is a basis to exclude them from the bargaining unit. Accordingly, the Executive Director has not decided the issue here.[4]

Faculty Governance System Does Not Equate With Bargaining Unit

The employer mistakenly equates inclusion in the bargaining unit with rights under its faculty governance system. The union properly maintains its focus in this case on the provisions of the FCBA.

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[3] Union's post-hearing brief at page 47.

[4] Omission of analysis of this issue here should not be interpreted as accepting that the terms of individual employment contracts signed outside of a collective bargaining context could ever have the effect earlier ascribed to them by the employer, or as condoning continuation of individual contracting as an employment practice if the employees select an exclusive bargaining representative for the purposes of collective bargaining under the FCBA. *See Ridgefield School District*, Decision 102-B (EERA, 1977), citing *NLRB v. General Electric Co.*, 418 F.2d 736 (2nd Circuit, 1969), cert. den. 397 U.S. 965 (1970) in pointing out the inherent conflict between the collective bargaining process and any attempt to have bargaining unit members sign individual employment contracts.

The employer has a faculty governance system, as described in a faculty constitution which has been in effect since 1979,[5] and a comprehensive faculty handbook. Employees who work half-time or more are eligible to participate in the faculty governance system by voting, serving in the faculty senate, and generally having a voice in faculty matters. With artful vetoes of provisions that had been amended to force a choice between faculty governance and collective bargaining, the FCBA signed into law by former Governor Gary Locke permits the faculty governance and collective bargaining systems to co-exist at the six covered institutions.

A reallocation of functions will occur if the faculty selects an exclusive bargaining representative under the FCBA. The faculty senate has acted in the past on a wide range of matters that included faculty salaries along with curriculum, academic programs, status, and scholarly activities, but that scope of activity would need to be divided:

- All debate concerning wages, hours and other terms and conditions of employment of bargaining unit members would be shifted to the collective bargaining forum, where the employer and union would have a duty to bargain in good faith.
- The faculty governance system and faculty senate can continue to exist, and can continue to deal with matters that are not mandatory subjects of bargaining under the FCBA.

The employer's attempt to distinguish the *Central Washington* case on the basis that its faculty governance system and faculty voting rights predate enactment of the FCBA, is not persuasive. The FCBA acknowledged the existence of faculty governance systems among the institutions it covers, but created a new set of rights and

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[5] Contrary to the employer's reply brief, the Commission was created by Chapter 41.58 RCW in 1975.

obligations that go beyond historical systems. Much as it might wish it were otherwise, this employer cannot overrule or negate the statute passed by the Legislature and signed by the Governor.

Symmetry of membership need not exist between faculty governance systems and FCBA bargaining units at the covered institutions:

- Presidents, vice-presidents, and other administrators who may have voting rights in the faculty governance system must nevertheless be excluded from FCBA bargaining units under RCW 41.76.005(9).
- Persons that lack voting rights in the faculty governance system at a covered institution must nevertheless be included in the FCBA bargaining unit if they have collective bargaining rights under the FCBA under RCW 41.76.005(5).

The task at hand is to determine eligibility for inclusion in the FCBA bargaining unit. The Executive Director does not thereby alter eligibility for the employer's faculty governance system.

Community of Interest Criteria Inapposite -
The employer contends the disputed employees lack a community of interest with faculty members who work half-time or more, but it merely circles back to argue that its faculty governance system would be negatively altered by the inclusion of the disputed employees in the bargaining unit. Moreover, the employer cites no statutory basis for it to assert (or for the Commission to consider) a community of interest issue under the FCBA.

The "community of interest" refers to the unit determination criteria set forth in the Public Employees' Collective Bargaining Act applicable to local government and in the Personnel System Reform Act applicable to state civil service employees, as follows:

> RCW 41.56.060 DETERMINATION OF BARGAINING UNIT — BARGAINING REPRESENTATIVE. (1) The commission, after hearing upon reasonable notice, shall decide in each application for certification as an exclusive bargaining representative, the unit appropriate for the purpose of collective bargaining. 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. . . .*
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> RCW 41.80.070 BARGAINING UNITS — CERTIFICATION. (1) . . . The commission, after hearing upon reasonable notice to all interested parties, shall decide, in each application for certification as an exclusive bargaining representative, the unit appropriate for certification. In determining the new units or modifications of existing units, the commission shall consider: *The duties, skills, and working conditions of the employees; the history of collective bargaining; the extent of organization among the employees; the desires of the employees; and the avoidance of excessive fragmentation.*

(emphasis added). Importantly, no such provisions exist within the FCBA. To the contrary (and consistent with statutes that require employer-wide units in the common schools,[6] and in the community colleges),[7] RCW 41.76.005(11) requires employer-wide units under the FCBA. Thus, the statute itself preempts any "community of interest" analysis under the FCBA.

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[6] In the first sentence of RCW 41.59.080, the Legislature appeared to give the Commission authority to apply traditional "community of interest" considerations, but it then negated that authority by requiring employer-wide units in RCW 41.59.080(1).

[7] RCW 28B.52.030 contains singular language, and has been interpreted as requiring employer-wide units. *Community College 10 (Green River)*, Decision 4491-A (CCOL, 1994); *Community College 13 (Lower Columbia)*, Decision 3987-A (CCOL, 1992).

Application of "Performs Faculty Duties" Language

The employer does not address the "perform faculty duties" language of RCW 41.76.005(5), but that language was key to the earlier interpretations of the FCBA:

> The definition of "faculty" in RCW 41.76.005(5) contains three components, as follows:
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> First, any individuals "designated with faculty status" are included in "faculty" (and hence must be included in any bargaining unit created under the FCBA);
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> Second, *any individuals "who perform faculty duties as defined through policies established by the faculty governance system" are included in "faculty" (and hence must be included in any bargaining unit created under the FCBA)*; and
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> Third, any individuals who are "casual or temporary employees, administrators, . . ." are excluded from "faculty" (and hence must be excluded from any bargaining unit created under the FCBA).
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> . . .
>
> Both Parties ... Improperly Nullify Words of the Statute
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> The union's position must ... be rejected because it would render the first component of the FCBA definition of "faculty" meaningless. *The employer's position must also be rejected because it would deprive the second component of any independent operation.*
>
> Conclusions as to "Faculty" -
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> The improper attempts of both parties to add to or negate the words of the statute do not render it ambiguous. ... [Footnote included: The Legislature used "or" between the phrases "... are designated with faculty status" and "who perform faculty duties ... " in RCW 41.76.005(5). Courts presume "or" is used disjunctively unless there is clear legislative intent to the contrary. *State v. Weed*, 91 Wa.App. 810 (1998), (citing *State v. Bolar*, 129 Wn.2d 361 (1996)), review denied, 137 Wn.2d 1010 (1999). Nothing is cited or found in the FCBA that evidences a clear legislative intent that the "or" in RCW 41.76.005(5) was to be given a meaning other than the normal disjunctive. Reading the section disjunctively requires a conclusion that the Legislature did NOT intend to give faculty governance systems the sole discretion and authority to make determinations as to the make-up of bargaining units and did NOT intend to give the employers sole discretion as to the make-up of bargaining units. Just as the

> phrase on the left side of the "or" does not contain any reference to faculty governance systems, the phrase on the right side of the "or" does not contain any reference to board approval of the definitions created by a faculty governance system.]
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> Giving meaning to all of the words used in the statute (and only the words used in the statute), the Executive Director concludes:
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> First, there is nothing a Faculty Senate can do to negate the FCBA eligibility of an individual who is "designated with faculty status" by the employer's board of trustees or by some other source of authority; and
>
> Second, there is *nothing* an employer's board of trustees *can* do to *negate the FCBA eligibility of individuals who perform "faculty duties"* as defined by the Faculty [governance process].

Central Washington University, Decision 8127-A (emphasis added).

Similarly, rejection of a bargaining unit structure agreed upon by an employer and union as part of an ad hoc relationship included:

> [H]istory is not binding upon the Commission in this proceeding. It has long been established that:
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> > Unit definition is not a subject for bargaining in the conventional mandatory/permissive/illegal sense, although parties may agree on units. Such agreement does not indicate that the unit is or will continue to be appropriate. [footnotes omitted]
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> *City of Richland*, Decision 279-A (PECB, 1978), aff'd, 29 Wn. App. 599 (1981), review denied, 96 Wn.2d 1004 (1981). *The FCBA is now in effect, and this case must be decided under that statute. The FCBA does not contain any "grandfather" provision carrying over* collective bargaining *relationships that existed prior to the effective date of the new law.* [Footnote omitted]
>
> Conformity with Chapter 41.76 RCW
>
> Inclusion of Regular Part-Time Employees -
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> *The proposed unit description goes beyond the full-time employees covered by the historical* unit description to include regular part-time employees, yet excludes casual

> and temporary employees as defined in WAC 391-35-350. That is consistent with the interpretation of the FCBA in *Central Washington University*, Decision 8127-A . . . .
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> Inclusion of Faculty Status Employees -
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> *The proposed unit description goes beyond the "regularly contracted" employees* . . . to include all employees designated with faculty status. That is also consistent with the *Central* decision . . . .

Eastern Washington University, Decision 8678 (FCBA, 2004) (emphasis added). The FCBA must be enforced here according to its terms.

The faculty duties defined by the faculty governance system place teaching first and foremost, consistent with the very nature of the institution in which this case arises. The employees who work half-time or more are also eligible to participate (or may even be expected/required to participate) in related functions such as being a program director or department chair, working on committees, advising students, and conducting research.

The disputed employees teach and/or research in the vast majority of situations described in this record. Even if they do not serve as program directors or department chairs, work on committees, or advise students, they clearly perform work within the faculty duties described in the faculty governance documents.

The employer has an ongoing need for the teaching provided by disputed employees, if it is to provide the course offerings demanded by its students. This situation compares closely with that of the community colleges in this state, which maintain cadres of part-time employees to fill assignments beyond the capacity of their full-time faculty on a course-by-course basis. *See Community College District 12*, Decision 2374 (CCOL, 1986). This situation also has some fundamental resemblance to the situations of common

school districts, which maintain cadres of part-time employees to fill out assignments beyond the capacity of their full-time faculty on a day-by-day basis. *See Columbia School District, et al.*, Decision 1189-A (EDUC, 1981). Employees who teach one-sixth of full-time are included in the same bargaining units with full-time employees at Central Washington University, at Eastern Washington University, in the community colleges, and in the common schools, and there is no evidence warranting a different result here.

Computation of the one-sixth standard under WAC 391-35-350 must be based on the practices in the particular employment setting. In this case, the rule requires that the computation be based on the normal academic year. Although the testimony described variances of practices among the employer's various departments and academic units,[8] that does not present an insurmountable problem. This employer has managed to measure eligibility for participation in its faculty governance system in the past, so there is every reason to expect that it is capable of re-doing the one-half math it has historically used at the one-sixth level.[9]

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[8] The employer's human relations department defines full-time as teaching 12 credits per quarter (36 credits in an academic year), while some of the academic units use a "six courses per year" or a "seven courses per year" or a "30 credits per year" standard.

[9] In the departments that compute full-time status on the basis of six or seven courses per year, part-time employees may attain bargaining unit status upon being hired to teach one class each in one or two quarters. If the credits-based standard used in the employer's human resources department were to be applied, an employee would attain the one-sixth threshold upon being hired to teach two credits per quarter for three quarters, or three credits per quarter for two quarters, or six credits within one quarter. Similar computations would apply to the graduate school and university libraries, to the extent they might now, or in the future, hire employees to work less than half-time.

ISSUE 2 - THE DEPARTMENT CHAIRS AND PROGRAM DIRECTORS

The employer seeks exclusion of all department chairs and program directors from the bargaining unit, claiming they come within the definition of "administrator" in the FCBA. The union contends the department chairs and program directors lack sufficient authority to justify their exclusion from this bargaining unit, which would exclude them from all rights conferred by the FCBA.

Applicable Legal Principles

The FCBA contains definitions and terms which must be interpreted and applied to resolve this issue:

> RCW 41.76.005 DEFINITIONS. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.
>
> . . .
>
> (5) "Faculty" means employees who, at a public four-year institution of higher education, are designated with faculty status or who perform faculty duties as defined through policies established by the faculty governance system, *excluding* casual or temporary employees, *administrators*, confidential employees, graduate student employees, postdoctoral and clinical employees, and employees subject to chapter 41.06 or 41.56 RCW.
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> . . .
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> (9) "Administrator" means deans, associate and assistant deans, vice-provosts, vice-presidents, the provost, chancellors, vice-chancellors, the president, and *faculty members who exercise managerial or supervisory authority over other faculty members*. . . .

(emphasis added). There is no claim or evidence that any of the department chairs or program directors have the "labor nexus" that would be necessary to exclude them as a "confidential" employee.

The "managerial" and "supervisory" in the FCBA are familiar terms in labor-management relations:

- The Supreme Court of the United States affirmed an exclusion of managerial employees in *NLRB v. Bell Aerospace Co. Division, Textron*, 416 U.S. 267 (1974), but that exclusion is variously limited to "persons who formulate and effectuate management policies by expressing and making operative the decisions of their employer" or "who have discretion in the performance of their jobs independent of their employer's established policy" or who "represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy." Hardin and Higgins, *Developing Labor Law, 4th Edition* (BNA Books, 2001) at 2121.

- The National Labor Relations Act excludes "supervisors" from all bargaining rights, Chapter 41.80 RCW limits "supervisors" to bargaining in separate bargaining units, Chapter 41.59 RCW effectively limits "supervisors" to bargaining in separate bargaining units, and Chapter 41.56 RCW has been applied to require separation of supervisors to avoid the potential for conflicts of interest that would otherwise occur in mixed units. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981).

The employer cites multiple decisions of the Michigan Employment Relations Commission, as well as decisions from labor relations agencies in Illinois, California, and New York, but those decisions are not binding precedent. Moreover, the persuasiveness of those decisions cannot be evaluated because the employer failed to set forth the statutory language on which they are based.

The absence of definitions of "managerial" and "supervisory" within the FCBA makes that statute similar to Chapter 41.56 RCW. When "supervisor" issues arise under Chapter 41.56 RCW, the Commission looks to the definition of "supervisor" in Chapter 41.59 RCW as

indicating the types of authority that have the potential to create conflicts of interest:

> . . . [S]upervisor . . . means any employee having authority, in the interest of an employer, to hire, assign, promote, transfer, layoff, recall, suspend, discipline, or discharge other employees, or to adjust their grievances, or to recommend effectively such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment, and shall not include any persons solely by reason of their membership on a faculty tenure or other governance committee or body. The term "supervisor" shall include only those employees who perform a preponderance of the above-specified acts of authority.

RCW 41.59.020(4)(d).[10] Thus, even though the employer correctly points out the absence of Commission precedents concerning department chairs and program directors in institutions of higher education awarding baccalaureate and higher degrees, there are abundant Commission precedents going back to *City of Richland,* Decision 279-A, which provide guidance for distinguishing between rank-and-file employees and their excludable supervisors.

Federal precedents on higher education are inapposite in this case. The Supreme Court of the United States ruled that faculty members at a private university were all managerial and/or supervisory in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), but that does not provide basis to apply similar reasoning in this case. Our Legislature must be presumed to have been aware of the *Yeshiva* decision handed down in 1980 when it went in exactly the opposite

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[10] That definition resembles the definitions of "supervisor" in the National Labor Relations Act and Chapter 41.80 RCW, apart from the "preponderance" test which adjusts for the centralization of decision-making authority in the public sector.

direction by enacting collective bargaining rights for higher education faculty members in 2002. Enactment of the FCBA thus overruled the *Yeshiva* precedent for the six state higher education institutions covered by the FCBA.

Analysis of Department Chairs

Review of the evidence in this record fails to establish that the department chairs either exercise sufficient independent discretion to be categorized as "managerial" or exercise sufficient authority over subordinates to be categorized as "supervisory" personnel.

Department chairs are recommended by the faculty members in their respective departments for specific terms, rather than being selected by the employer. Although their appointments are formalized by a senior administrator, there is no evidence that any senior administrator could appoint a department chair who had not been recommended by his/her colleagues within the department. This seriously erodes any suggestion that the department chairs are the supervisors of the employees who put them in office.

Department chairs are conduits for upbound information between the faculty members in their respective departments and the employer's administration. The record indicates that department chairs forward recommendations to the employer's administration on matters within traditional "supervisor" definitions (including hiring, evaluations,[11] promotions and assignments), but that only occurs after full consultation with and collaboration among the faculty members in their respective departments. Department chairs also consult with faculty members in their respective departments concerning budget, curriculum, course schedules, workloads, and

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[11] Sometimes, the department chairs are, themselves, evaluated by the faculty members in their departments.

space needs. The hiring and evaluation of part-time employees is usually done by the department chairs in consultation with other faculty members in their respective departments.[12] The record shows that department chairs would never consider overruling faculty decisions.

Department chairs lack authority on key matters within traditional "supervisor" definitions (including transfer, suspension, layoff, recall, and discharge of faculty members). Department chairs do not adjust the grievances of other faculty members.

Department chairs are comparable to leadworkers, who have been included, under innumerable Commission precedents, in the same bargaining units with the employees they lead. Testimony of several witnesses called by both parties was consistent in establishing that the department chairs facilitate collaboration, rather than exercising authority. It is clear that they continue to teach, to counsel students, and to conduct research. Department chairs consider themselves faculty members, they are so considered by other faculty members, and they are defined as faculty in the faculty handbook.

Department chairs lack authority to manage on behalf of the employer. The record is clear that the employer's faculty system

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[12] Some departments select lecturers for inclusion in a pool of potential lecturers, and department faculty are part of the process for that selection. In some cases, students evaluate lecturers. In some departments, either the entire department faculty, or a committee of the faculty, evaluates lecturers. Some lecturers evaluate themselves. Lecturers do not evaluate the department chairs. Based on the record, inclusion of lecturers in the same bargaining unit as department chairs would not create a conflict of interest that outweighs the benefit of bargaining unit membership.

is geared toward achieving consensus in determining matters of interest to faculty members. Testimony given by the employer's provost under cross-examination is fatal to any suggestion that the department chairs exercise managerial discretion:

> Q. [By Mr. Hansen] Now, at some point though isn't it provided by university policy that the faculty -- if a department chair wishes to continue in that capacity at the end of their term that the faculty in the department have to indicate whether or not they would approve that individual from serving again as a chair of their department?
>
> A. [By Mr. Bodman] I think the specifics of that vary from place to place in the university but it's certainly the case that if you wanted -- and I think any dean or any provost would say this -- *if you have a chair who does not support the majority of his or her department it is extremely unlikely you would want him or her to continue.*

Transcript, pages 78-79 (emphasis added).[13] Against that background, the fact that recommendations forwarded by department heads are rarely rejected by the employer's administration is more attributable to the consultation and collaboration process within the respective departments, than to any authority inherent to the department head role or delegated by the employer. The convincing evidence supports a conclusion that the department chairs primarily act in the interest of the faculty members in their respective departments, rather than primarily acting in the interest of the employer.

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[13] Notwithstanding this significant admission against interest by the senior employer witness in this case on the first day of the hearing, the employer continued to call witnesses for its case-in-chief through three additional days of hearing (608 additional pages of transcript, constituting 59% of the entire transcript).

Department chairs do not equate with assistant deans, notwithstanding the employer's claim that they share some characteristics. The FCBA specifically excludes assistant deans from its coverage, but leaves department chairs (where they exist) subject to the "exercise managerial or supervisory authority over other faculty members" test. As with the rejection of parties' attempts to add to or ignore the FCBA in *Central Washington University*, Decision 8127-A, the Executive Director declines to write a categorical exclusion of department chairs into the statute.

Analysis of Program Directors

The employer appoints faculty members to the disputed director positions, and it contends they should be excluded from the bargaining unit as administrators. The union contends the program directors are faculty members who should be included in the bargaining unit.

A "supervisory" classification is inapt where no other faculty members are directly associated with the programs headed by the disputed directors. Although the absence of faculty consensus for appointment/reappointment distinguishes the program directors from the department chairs in a manner that weighs in favor of the employer, the fact that the program directors do not supervise any other faculty members is fatal to any claim of supervisory status under the FCBA. Accepting that program directors may supervise non-faculty employees who work on their projects or programs, the "exercise managerial or supervisory authority" exclusion in RCW 41.76.005(9) is expressly limited to interactions with other faculty members. At most, program directors provide evaluation input to the departments from which program faculty are drawn, which merely puts the information into the collaborative processes within those departments and certainly falls far short of the "effective recommendation" required for supervisor status.

A "managerial" classification is not established in this record, for multiple reasons. At a minimum, any managerial authority exercised by the disputed program directors is not "exercised . . . over other faculty members" so as to invoke RCW 41.76.005(9). The disputed directors engage in planning activities, they oversee the budgets for their respective programs, and they coordinate with outside entities, but the employer has not provided evidence sufficient to show that any of those activities are significantly different from matters on which other faculty members collaborate in the settings of their respective departments. At least the program director in an Institute of Environmental Toxicology considers part of his role to include teaching graduate and undergraduate students who work in the program and receive academic credit for their work, and the program director in an Institute for Watershed Studies sees her primary job as providing research support for students, faculty and staff in that subject area. The heavy interaction between the disputed directors and students is a production function, and weighs against depicting them as "managers" of the type described in federal precedents such as *Bell Aerospace*, 416 U.S. 267, and its progeny. Moreover, the evidence provided by this employer suggests the deans and provost exercise substantial oversight, and so falls far short of establishing that the disputed program directors formulate and effectuate management policies, have discretion in the performance of their jobs independent of their employer's established policy, or take and recommend discretionary actions that effectively control or implement employer policy.

Conclusion on Department Chairs and Program Directors

On the record made in this case, the department chairs and program directors are faculty members who are eligible for inclusion in the bargaining unit proposed for creation under the FCBA.

FINDINGS OF FACT

1. Western Washington University (employer) is a state institution of higher education, and is an employer under RCW 41.76.005(7).

2. United Faculty of Western Washington / United Faculty of Washington State (union), a bargaining representative within the meaning of RCW 41.76.015, has filed a properly supported petition seeking certification as exclusive bargaining representative for faculty employees of the employer.

3. The employer and union disagreed as to the propriety of including employees who teach between one-sixth and one-half of full-time in the bargaining unit, and a hearing was held in this case under WAC 391-35-350(3), to afford the employer an opportunity to provide evidence warranting application of a test for casual status different from WAC 391-35-350(1). The evidence produced at the hearing establishes that teaching has been, and continues to be, the first and foremost duty outlined for faculty members in the employer's faculty governance documents, that the disputed part-time employees are primarily employed to teach classes for the employer, and that the employer has an ongoing need for a cadre of part-time faculty to teach courses that cannot be covered by faculty members who work half-time or more.

4. The employer and union disagreed as to the propriety of including department chairs in the bargaining unit, and a hearing was held in this case to afford the employer an opportunity to provide evidence warranting their exclusion under RCW 41.76.005(9). The evidence produced at the hearing establishes that the department chairs are only appointed with

the consent (by election or consensus) of the faculty members in the respective departments, that they are subject to reappointment only with the consent (by election or consensus) of the faculty members in the respective departments, that they lead or facilitate collaborative decision-making processes within their respective departments, and that they convey information to the employer's administration from their respective departments.

5. The employer and union disagreed as to the propriety of including program directors in the bargaining unit, and a hearing was held in this case to afford the employer an opportunity to provide evidence warranting their exclusion under RCW 41.76.005(9). The evidence produced at the hearing establishes that the program directors are appointed by the employer's administration, but that they do not exercise independent authority or make effective recommendations on the employment status or conditions of other faculty members. The employer failed to establish that the ministerial activities conducted by the program directors with respect to planning, budgets or relations with outside entities predominate over providing instruction or research support to students or staff. The employer failed to establish that the program directors formulate and effectuate management policies, have discretion in the performance of their jobs independent of the employer's policy, or take and recommend discretionary actions that effectively control or implement employer policy.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under RCW 41.76.020 and Chapter 391-25 WAC.

2. Persons who teach or perform other faculty duties (as defined by the employer's faculty governance documents) for one-sixth or more of the full-time workload in their respective department or program, as described in paragraph 3 of the foregoing findings of fact, are faculty members within the meaning of RCW 41.76.005(5) and WAC 391-35-350, and are properly included in any bargaining unit created under Chapter 41.76 RCW.

3. As described in paragraph 4 of the foregoing findings of fact, the department chairs at Western Washington University are faculty members within the meaning of RCW 41.76.005(5), and are not administrators within the meaning of RCW 41.76.005(9), so that they are properly included in any bargaining unit created under Chapter 41.76 RCW.

4. As described in paragraph 5 of the foregoing findings of fact, the program directors at Western Washington University are faculty members within the meaning of RCW 41.76.005(5), and are not administrators within the meaning of RCW 41.76.005(9), so that they are properly included in any bargaining unit created under Chapter 41.76 RCW.

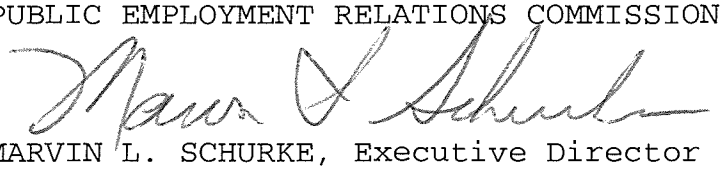
5. A bargaining unit consisting of all full-time and regular part-time employees of Western Washington University who are either designated with faculty status or perform faculty duties as defined in the faculty governance documents of the employer, excluding casual or temporary employees (as defined in WAC 391-35-350(2)), administrators, confidential employees, graduate student employees, postdoctoral and clinical employees, and all other employees of the employer, is the only appropriate bargaining unit under RCW 41.76.005(11) and 41.76.025, and a question concerning representation currently exists under RCW 41.76.020, in that unit.

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 5 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 United Faculty of Western Washington / United Faculty of Washington or by no representative.

Issued at Olympia, Washington, on the 5th day of December, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

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