

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
WASHINGTON FEDERATION OF TEACHERS,)
AFT, AFL-CIO) CASE NO. 2021-E-79-362
Involving certain employees of:)
KITSAP PENINSULA VOCATIONAL)
SKILLS CENTER) DECISION NO. 838-A EDUC
ORDER DENYING MOTION
FOR INTERVENTION

Roger Carlstrom, Representative, appeared on behalf of the petitioner.

Walgren, Secton and McCluskey, Inc. P.S., by James M. Riehl, Attorney at Law, appeared on behalf of the Bremerton School District.

Symone Scales, Attorney at Law, appeared on behalf of Bremerton Education Association/WEA.

PROCEDURAL BACKGROUND:

These proceedings were initiated by a petition for investigation of a question concerning representation filed by the Washington Federation of Teachers (WFT) and involving certain employees of the Kitsap Peninsula Vocational Skills Center. The Bremerton Education Association (BEA) moved for intervention. On March 24, 1980, following a hearing on the issue of the identity of the employer, the motion of BEA for incumbent intervenor status was denied. See: Kitsap Peninsula Vocational Skills Center, Decision 838 (EDUC, 1980). A pre-election conference was held May 2, 1980, attended by all the school superintendents whose districts comprise the Kitsap Peninsula Vocational Skills Center. Some of the superintendents who had not been at the previous hearing suggested that information was left out of the original record. On May 21, 1980, the BEA moved to reopen the hearing on the basis of additional information not available at the time of the first hearing. The following statement accompanied the order reopening the hearing:

"It is essential to administrative procedure that parties come forth, when given the opportunity for a hearing, with all the evidence available to them. ...This is an investigatory proceeding, non-adversary in nature, implementing public policy of maintaining labor peace in determining collective bargaining representation of employees; and the order sought to be modified is clearly not the final

order in the proceeding. A vindication of procedural rights with the result that a bargaining unit of employees be certified to the wrong employer could not be said to implement the public policy under which the proceedings are being conducted. This is not to suggest withdrawal of the previous determination or to invite abuses of PERC procedure in this or future PERC cases, but to recognize the preliminary stage of the proceedings and to correct any error or allow for any change of circumstances before the final order is issued."

Further hearing was conducted on September 12, 1980 by Katrina I. Boedecker, Hearing Officer.

POSITION OF THE PARTIES:

The BEA bases its motion to reopen on new testimony that came to its attention at the pre-election conference on May 2, 1980. In doing so, the BEA asserts that, since PERC rules do not provide for discovery, it was not possible for it to determine that some of the superintendents involved in the skills center would characterize the role of the administrative council differently than Ford, the Superintendent of Bremerton School District, who did testify. The BEA emphasizes that the superintendents of the school districts which comprise the Kitsap Peninsula Vocational Skills Center characterize Bremerton School District as the sole employer.

The WFT argues that the decision denying the BEA's motion for intervention as incumbent representative was correct and supported by the evidence, since the record proves that the administrative council of the Kitsap Peninsula Vocational Skills Center is a joint employer of the petitioned for employees. It urges that the hearing should not have been reopened.

The Bremerton School District has no objection to the motion to reopen the hearing. It offers corrections to some of the interpretations previously given Ford's testimony.

FACTS:

At the reopened hearing, the BEA subpoenaed the superintendent of each of the school districts which participate in the Kitsap Peninsula Vocational Skills Center. Five of the six superintendents testified; each was sequestered until he was called to the witness chair. The superintendent of South Kitsap School District, James Swick, testified that he meets once a month on an "administrative council" with the other

superintendents participating in the skills center, to "advise the superintendent of the Bremerton School District as to the concerns and needs and matters of the skills center." He testified that it was his understanding that the employees at the skills center were employees of the Bremerton School Board, since the administrative council does no screening of the individual applicants but rather leaves that task to the discretion of the Bremerton School District. In Swick's opinion, only one district holds official legal responsibility when a school district cooperative exists, and in this case Bremerton School District was named as the "legal guardian". In Swick's view, no school district had veto power over the actions of the Bremerton School District. Swick testified it was his understanding that if the Bremerton School District made a decision which the other districts participating in the skills center did not like, their recourse would be to "approach the state in terms of a replacement of that school board (Bremerton School Board) with some other agency to head up the skills center." Swick testified that the final budget for the skills center is adopted by the Bremerton School District and is not adopted by the South Kitsap School District.

The superintendent of the North Mason School District, Norman Sanders, testified that the administrative council hears reports regarding the staff of the skills center, but leaves hiring, firing, or setting of salaries to the Bremerton School District. He stated that he did not know of any veto power which the administrative council holds with respect to any action concerning an employee of the skills center which the Bremerton School District might make. Sanders testified that it was his belief that the ultimate control of the skills center rested with the Bremerton School Board. However, he felt that the North Mason School Board would have the right, if the Bremerton School Board unilaterally rearranged the programs offered by the skills center, to appeal the decision through the administrative council or directly to the Bremerton School Board.

Eugene Hertzke, superintendent of Central Kitsap School District, testified that, to his knowledge, the administrative council does not have any decision making power with respect to employee relations at the skills center. He also testified that, in his opinion, the ultimate authority with respect to employee relations, exclusive of the hiring of the skills center director, would be with the Bremerton School District. He considered a recommendation given by the administrative council to the Bremerton School District would be "an effective one but it wouldn't be a guaranteed one".

The superintendent of the Peninsula School District, Eugene Peters, testified that it was his understanding that Bremerton School District sets the salaries, hours and other terms and conditions of employment for the employees at the skills center.

Thornton Ford, superintendent of the Bremerton School District, testified that Bremerton administers the skills center just as though it was another school building within the Bremerton School District. Additionally, he stated that the administrative staff of the Bremerton School District deals with the director of the skills center as they would deal with a high school principal in the district. Ford testified that, in the past, the Bremerton School Board has acted in a formalizing function as to the decisions and developments of the administrative council. Ford testified that Bremerton acts unilaterally in regard to employee relations and Bremerton would also be in charge of the skills center in an emergency situation such as a fire, earthquake, or work stoppage. In such an instance, it would be the prerogative of the Bremerton School Board to make a decision appropriate to meet the emergency. Hypothetically speaking, Ford theorized that Bremerton School District would handle a work stoppage at the skills center on its own, and not necessarily follow a course of action recommended to it by the administrative council. Ford defined the council as being six colleagues gathered to advise the Bremerton School Board on the administration of the skills center. Ford testified that in his view the administrative council was an effort of cooperation; however, if the interests of the other districts were not able to be accommodated, Bremerton's interests would supersede. Ford added that the administrative council takes votes on formal and informal matters because it is "prudent" to do so but not mandatory.

Two new employees were hired at the skills center since the first hearing on this issue. One was hired from the Tacoma area. The other, Robert Shields, was employed by the Bremerton School District as a carpenter. The Bremerton School District did not transfer Shields to the skills center; he went through the same hiring process as the other applicants. Neither of the new personnel hired to teach were submitted to the administrative council for their approval or disapproval. The decision to employ those people was made by the Bremerton School District Personnel Office. The director of the skills center, Harvey Kaul, testified that, during the last year of operation, the administrative council did not take any action to set the salaries of the employees at the skills center or the hours or other terms and conditions of employment for those people. Rather all such matters were handled by the Bremerton Personnel Office.

During the last school year, the Bremerton School District was closed for two days due to snow. Other school districts participating in the skills center were also closed; some for more than two days. The Bremerton School District negotiated with the Bremerton Education Association concerning the make up days. That negotiated settlement applied to both the skills center and to the other schools solely within the Bremerton school district. The negotiations on make up days were not ratified by

the administrative council of the skills center. However, the council did discuss it at one of its meetings.

The Agreement for the Cooperative Operation of the Kitsap Peninsula Vocational Skills Center, which was received into evidence at the hearing, states under Section V Administration and Management:

"The center will be administered by a certificated vocational director who shall be responsible for staffing, budgeting and operating the facility.

The director will be an employee of the host district Bremerton and his appointment and continued employment will be subject to the recommendation of the administrative council and ratification by the host district school board.

The director will be responsible to the administrative council to be known as the Kitsap Peninsula Vocational Skills Center Administrative Council which shall consist of the superintendents of the participating districts. The council is charged with receiving, advising and acting upon recommendations from the school staff, participating districts and advisory committees. It is agreed that the administration of the program shall be vested in the council which shall be charged with the responsibility of conducting the vocational program in accordance with the annual agreement adopted by the boards of directors of all participating districts. The building facilities shall be under the supervision of and be maintained by the host school district." (all emphasis added)

The agreement contained the following procedure for resolving disputes, Section X Mediation:

"It is mutually agreed hereby that whenever an issue arises between participating member districts concerning the operation skills offerings (sic) of the vocational skills center, it shall be resolved in accordance with the following procedure:

The matter shall first be presented to the vocational skills center administrative council. In the event of failure to agree at that level, the matter shall be submitted to the boards of directors of all school districts party to this agreement. In the event that there is still no agreement at this level, the matter shall be submitted to an arbitrator selected by the Superintendent of Public Instruction." (all emphasis added)

Also admitted into evidence was Resolution No. 76/77-50 of the Bremerton School Board. Dated January 27, 1977 and signed by the president of the board and the superintendent, the resolution reads:

"EMPLOYMENT OF ADMINISTRATIVE ASSISTANT FOR VOCATIONAL EDUCATION"

Whereas, the Bremerton School District 100-C entered into a cooperative agreement with five other school districts in the Peninsula/Kitsap county area for the development of a vocational skills center; and

Whereas, the Bremerton School District 100-C was designated as the host district; and

Whereas, as host district the Bremerton School District 100-C is obligated to employ an administrative assistant for vocational education to perform certain administrative functions for the vocational skills center; and

Whereas, the administrative council of the Kitsap Peninsula Vocational Skills Center is desirous of employing Harvey A. Kaul as Administrative Assistant for Vocational Education for the Kitsap Peninsula Vocational Skills Center;

Now, therefore be it resolved that the Board of Directors hereby employs Harvey A. Kaul as a certificated administrative assistant for vocational education on the terms and conditions stated in the contract attached hereto as exhibit #1." (Emphasis added)

The above referenced contract was also accepted into evidence. The contract, titled "Certificated Administrative Assistant for Vocational Education" was also signed and dated January 27, 1977 by the president of the Bremerton board and by the superintendent. The document stated in Section 4:

"The Administrative Assistant for Vocational Education will be responsible to an administrative council to be known as the Kitsap Peninsula Vocational Skills Center Administrative Council which shall consist of the superintendents of those school districts who participated in the inter-district cooperative agreement for the Kitsap Peninsula Vocational Skills Center. The Administrative Assistant for Vocational Education shall be responsible for staffing, budgeting, and operating the Kitsap Peninsula Vocational Skills Center, subject to the policies, rules and regulations of the Kitsap Penninsula Vocational Skills Center Administrative Council and the Board of Directors of the Bremerton School District 100-C, the State Superintendent of Public Instruction and the State Board of Education. (Emphasis added)

Section 6 of the contract states:

"The Administrative Assistant for Vocational Education shall be provided with the same fringe benefits, including sick leave, as the central office administrators of Bremerton School District (the Director of Personnel, Director of Business, and Assistant Superintendent)."

The BEA also entered into evidence Resolution No. 79/80-34 of the Bremerton School District. This unsigned resolution dated June 12, 1980 reads:

"Whereas the superintendent deemed it necessary to close the Kitsap Peninsula Vocational Skills Center for four days due to hazardous roads caused by snow; and

Whereas it is required by law that school be in session 180 days each year; and

Whereas the Bremerton Education Association and the Bremerton School District have negotiated the make-up days and other calendar adjustments;

Now, therefore be it resolved that the Bremerton School District calendar for the Kitsap Peninsula Vocational Skills Center will be extended through June 16, 1980 for students and through June 18, 1980 for certificated staff members assigned to the skills center."

PERTINENT STATUTES:

RCW 28A.58.075 enacted in 1969, allows the formation of joint educational facilities. It reads in pertinent part:

28A.58.075 Joint educational facilities, services or programs -- Rules and regulations -- Apportionment of attendance credit. Any school district may cooperate with one or more school districts in the following:

* * *

(2) the joint maintenance and operation of educational programs or services (a) either as part of the operation of a joint facility or otherwise, (b) either on a full or part-time attendance basis (c) either on a regular 180 day school year or extended school year: Provided, That any such joint program or service must be operated pursuant to a written agreement approved by the superintendent of public instruction pursuant to rules and regulations promulgated therefor. In establishing rules and regulations the state superintendent shall consider, among such other factors as he deems appropriate, the economic feasibility of said services and programs, the educational and administrative scope of said agreement and the need for said programs or services.

* * *

RCW 41.59.080 states the standards for the determination of a bargaining unit of educational employees. It states in pertinent part:

"In determining, modifying or combining the bargaining unit, the Commission shall consider the duties, skills and working conditions of the educational employees; the history of collective

bargaining; the extent of the organization among the educational employees; and the desire of the educational employees; except that:

(1) a unit including non-supervisory educational employees shall not be considered appropriate unless it includes all such non-supervisory educational employees of the employer;

* * *

(6) a unit that includes only employees in vocational-technical institutes or occupational skills centers may be considered to constitute an appropriate bargaining unit if the history of bargaining in any such school district so justifies . . ."

DISCUSSION:

The parties stipulated that the only issue to be considered at the reopened hearing was the determination of who is the employer. The issue is made complex by divergent aspects of the evidence: the actual legal authority held by the administrative council; the way that authority has been interpreted by the participants in the administrative council; the actual practice of the administrative council; and a sporadic bargaining history concerning the employees at the skills center.

At the hearing, the superintendents who testified directed authority to the Bremerton School District. However, in many areas they were testifying as to legal conclusions, and their testimony on those conclusions is to be discounted. More weight must be given to the documented legal authority which the administrative council holds than to what the superintendents suppose the council to be able to exercise. The skills center exists pursuant to the authority granted to school districts to cooperate with one another for the joint maintenance and operation of educational programs provided there exists a written agreement for its operation. RCW 28A.58.075. Thus the skills center exists pursuant to the statutorily required "Agreement for the Cooperative Operation of the KPVSC" which was received into evidence at the hearing. If an action of the council was challenged as to its legality, a superior court of this state would not look at supposed authority, but rather would look at the cooperative agreement which enables the council to exist. The written agreement delegates only administrative and ministerial acts to the host district. To the extent that the council may have, in practice, allowed the host district to exercise broader authority, such practice is neither binding nor does it supersede the cooperative agreement. See: Noe v. Edmonds School District No. 15, 83 Wa. 2d 97 (1974) at 100, where the Supreme Court held:

"Where a statute, which is the source of a municipal or quasi-municipal corporation's power, confers specific functions to particular officers or boards, such functions may not be delegated to others unless the statute expressly authorizes such delegation to some other officer or body. School districts are no exception to the rule."

The mediation clause in the agreement, for example, eliminates unilateral binding action by Bremerton.

In its arguments that the Bremerton School District is the sole employer and its references to Bremerton's involvement in the procedural aspects of hiring employees for the skills center and adjusting the calendar days for those employees, the BEA overlooks the distinction between determination of policy and ratification of policy. Without a personnel department of its own, the skills center needs to have its personnel functions performed somewhere else. The Bremerton School District clearly administers the paperwork of hiring employees for the skills center. The cooperative agreement for the operation of the skills center vests the administrative council with authority to effectively recommend action on hiring the administrative assistant of the skills center (Kaul) and requires the Bremerton School Board to merely ratify the action. Kaul's contract holds him responsible to both the skills center administrative council and the Bremerton School District. The cooperative agreement also gives the administrative assistant responsibility for staffing, budgeting and operating the facility. Although Kaul uses the channels of the Bremerton Personnel Department, there is no documentation in the record that shows that Bremerton has the legal authority, on its own motion, to overturn Kaul's decisions. Ford's testimony regarding Bremerton School District's attitude of treating the skills center as another school in the district is in accordance with the cooperative agreement which states "the building facilities [of the skills center] shall be under the supervision of and be maintained by the host school district [Bremerton]." Having the authority to make sure the walls are standing and the roof does not leak does not make the Bremerton School District the sole employer of the vocational education staff within the building.

The BEA cites Barendregt vs. Walla Walla School District No. 140, 87 Wn.2d 154, 550 P.2d 525 (1976) as basis for its theory that the employer/employee relationship between a teacher and a school district is controlled by contract law. This is a misreading of the case. The Washington Supreme Court wrote in Barendregt:

"We hold that during the three academic years from 1970 to 1973 petitioner (Barendregt) was 'holding a position as a teacher with a school district' within the meaning of the continuing contract law".

It is important to note that the Supreme Court directly related the definition of "employee" to that contained in RCW 28A.67.070, otherwise known as the Continuing Contract Law. The court also wrote:

"The existence of a statutory definition indicates that the word 'employee' is not to be understood in its usual and ordinary sense."

The statute governing the instant case action, Chapter 41.59 RCW, contains its own definition of "employee". It is also noted that the Supreme Court ruled on Barendregt's situation based on a petition that he had filed two years before the Washington State Legislature passed RCW 41.59.

The AFT argues that the Bremerton School District does not have the sole right of control of the skills center, and therefore is not the sole employer. This argument is persuasive. Testimony at the hearing established that the administrative council can effectively recommend action. The effective influence of the administrative council as a whole on the actions taken by the Bremerton School District is controlling.

As to the snow day/extended calendar issue, Bremerton School District itself only lost two days due to the closures. However, the calendar for the skills center was changed to accommodate all the participating school districts and that change was for an additional four days added on to the calendar year. It is difficult to credit, as evidence of an employer/employee or employer/union relationship, evidence of initial and fragmentary bargaining conducted by Bremerton and the BEA at a time when a question concerning representation was pending before the Commission. See: Yelm School District, Decision 704-A (PECB, 1980).

A similar situation was considered in Snow Isle Vocational Skills Center, Decision No. 841 EDUC (1980). In that case the intervenor status of the Mukilteo Education Association was denied on the grounds that the skills center was a joint operation of the several participating school districts rather than a department or division of the host district under the cooperative agreement. In Snow Isle it was held:

"For collective bargaining to have any reasonable prospect for success, collective bargaining units must be structured and bargaining representatives certified so as to create relationships between employees and the employer having real authority over their wages, hours and working conditions. In this case Mukilteo School District No. 6 serves in a dual capacity (1) as one of the nine equal participants in the administrative council of the skills center and (2) as a functionary providing administrative services for compensation to the skills center ... It is not in a position in either role to independently engage in meaningful collective bargaining with an employee organization representing employees of the skills center."

In the Kitsap Peninsula Skills Center situation, the facts similarly point to a conclusion that there is no sole employer.

This holding does not bar the Bremerton Education Association from appearing on a representation ballot. It merely denies BEA automatic access to the ballot by means of incumbency. BEA may still appear under WAC 391-25-210 upon a showing of interest from ten percent of the employees in the bargaining unit.

FINDINGS OF FACT

1. The Kitsap Peninsula Vocational Skills Center is a joint educational facility operated pursuant to a written agreement among Bremerton School District No. 100-C, Central Kitsap School District No. 401, North Kitsap School District No. 400, North Mason School District No. 403, Peninsula School District No. 401, and South Kitsap School District No. 402. Each participating district's superintendent is a member of the Kitsap Peninsula Vocational Skills Center Administrative Council. The council makes effective recommendations regarding the wages, hours or working conditions of the non-supervisory certificated staff of the skills center. The Agreement for the Cooperative Operation of the Kitsap Peninsula Vocational Skills Center contains a mediation clause which gives each participating school district equal standing in resolving disputes among the participating districts.
2. The Kitsap Peninsula Vocational Skills Center is a distinct entity separate and apart from the K-12 academic program of any participating school district.
3. Washington Federation of Teachers, AFT, AFL-CIO, is an employee organization within the meaning of RCW 41.59.020(1) which has filed a properly supported petition for investigation of a question concerning representation of vocationally certificated educational employees of the Kitsap Peninsula Vocational Skills Center.
4. Bremerton Education Association is an employee organization within the meaning of RCW 41.59.020(1) which is the exclusive bargaining representative of certificated employees of Bremerton School District No. 100. The vocationally certificated educational employees of Kitsap Peninsula Vocational Skills Center are not under the coverage of any collective bargaining agreement between the Bremerton School District and the Bremerton Education Association.
5. Some school districts participating in the skills center have treated Bremerton School District as the sole employer of the teaching facility at the skills center.

6. Harvey Kaul, the Administrative Assistant for Vocational Education, is responsible to the Kitsap Peninsula Vocational Skills Center Administrative Council for staffing, budgeting, and operating the Kitsap Peninsula Vocational Skills Center, subject to the policies rules and regulations of the Kitsap Peninsula Vocational Skills Center Administrative Council and the Board of Directors of the Bremerton School district 100-C, the State Superintendent of Public Instruction and the State Board of Education.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.59 Revised Code of Washington.
2. The Kitsap Peninsula Vocational Skills Center Administrative Council is the joint employer of the non-supervisory certificated staff of the Kitsap Peninsula Vocational Skills Center within the meaning of RCW 41.59.020(5).
3. Bremerton Education Association is not the incumbent exclusive bargaining representative of the vocationally certificated educational employees of Kitsap Peninsula Vocational Skills Center and is not entitled to intervention in these proceedings under WAC 391-30-110, now WAC 391-25-170.

ORDER

The motion of Bremerton Education Association for intervention on the grounds of incumbency in the above-entitled matter is denied, subject to the right of Bremerton Education Association to file a timely and sufficient showing of interest for intervention pursuant to WAC 391-25-190, within seven (7) days following the date of this Order.

DATED at Olympia, Washington this 10th day of September, 1981.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARVIN L. SCHURKE, Executive Director