

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

PUBLIC SCHOOL EMPLOYEES OF
WASHINGTON

Involving certain employees of:

CENTRAL WASHINGTON UNIVERSITY

CASE 22787-E-09-3506

DECISION 10765 - PECB

ORDER OF DISMISSAL

Eric T. Nordlof, Attorney at Law, for the union.

Attorney General Robert M. McKenna, by *Alan Smith*, Assistant Attorney General,
for the employer.

On October 15, 2009, Public School Employees of Washington (union) filed a petition seeking to represent a bargaining unit of 11 employees who are exempt from Chapter 41.06 RCW and are “assigned as counselors or advisors” in the Departments of International Studies and TRIO Student Support Services at Central Washington University (employer). Representation Coordinator Sally J. Iverson held an investigation conference on November 20, 2009. During the investigation conference, the parties were unable to stipulate to the propriety of the bargaining unit due to the employer’s position that the petitioned-for unit was inappropriate.

On November 20, 2009, the union amended its petition to change TRIO to Academic Achievement as the correct name of the administrative office, and to include coordinators along with counselors or advisors in the petitioned-for bargaining unit. The amendment added one employee to the petitioned-for unit for a total of 12 employees.

A second amendment to the petition was filed on January 26, 2010, which expanded the petitioned-for bargaining unit to “counselors, advisors, coordinators, or recruiters in the Departments of International Studies, Academic Achievement, and Academic Advising on the

main campus of the university.” The petition indicates there are 22 employees in the petitioned-for unit. Iverson held an investigation conference on the second amended petition on March 2, 2010, at which time the employer re-stated its position that the petitioned-for bargaining unit was inappropriate.¹

On April 5, 6, and 9, 2010, Hearing Officer Robin Romeo conducted a hearing on the proposed bargaining unit, and during the hearing the union moved to amend its petition a third time to describe the proposed unit as all employees who are exempt from Chapter 41.06 RCW who are assigned as “counselors, advisors, coordinators, or recruiters in the Departments of International Studies, Academic Achievement, Academic Advising, the College Assistance Migrant Program (CAMP), and the Student Transitions and Academic Resources (STAR) program.” The union filed its third amended petition for the 22-employee unit with the Commission on April 12, 2010.² Both parties filed briefs which were considered.

ISSUES PRESENTED

1. Should the union’s third amended petition be allowed?
2. If not, is the bargaining unit described in the union’s second amended petition appropriate?

Based upon the record, the Executive Director finds that the union’s third amended petition deprived the employer of due process and is not accepted. The Executive Director also rules that the bargaining unit proposed in the union’s second amended petition is not an appropriate unit for the purpose of collective bargaining.

¹ Although not fatal in this case, petitioners are advised to exercise care when drafting language regarding proposed bargaining units. Use of “or” rather than “and” could have serious consequences, as could the use of other non-specific terms such as “etc.”

² The petition sought to add several employees in the CAMP and STAR programs although the number on the face of the petition remained at 22.

APPLICABLE LEGAL STANDARDS

The determination of appropriate bargaining units under Chapter 41.56 RCW, the Public Employees' Collective Bargaining Act, is a function delegated to the Commission by the Legislature:

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.

The unit configuration proposed by a petitioning organization is always the starting point for any unit determination analysis. *King County*, Decision 5910-A (PECB, 1997). The representation petition in this case is governed by RCW 41.56.021, which provides collective bargaining rights to employees of institutions of higher education who are exempted from civil service pursuant to RCW 41.06.070(2). The employees covered by the petition are exempt from civil service pursuant to RCW 41.06.070(2)(b) because their duties were determined by the employer to involve counseling of students.

None of the statutory criteria set forth in RCW 41.56.060 predominates to the exclusion of others, but have varying weight depending on the factual settings of particular cases. *City of Centralia*, Decision 2940 (PECB, 1988). Not all of the criteria will arise in every case and, where they do exist, any one criteria could be more important than another, depending on the factual situation. *Central Washington University*, Decision 10336-A (PECB, 2009).

ANALYSIS

ISSUE 1: During the course of the hearing, the union moved to amend its petition a third time. The amendment expanded its second amended petition to cover employees in two additional programs:

CAMP and STAR. The union filed a third amended petition with the Commission on April 12, 2010, after the conclusion of the April 9, 2010 hearing.

Amendment of a representation petition is subject to the following rule:

WAC 391-25-150 Amendment and withdrawal. Any petition may be amended or withdrawn by the petitioner under such conditions as the executive director or the commission may impose.

In this case, the union argues that the four additional positions covered in the third amended petition share a community of interest with the rest of the employees proposed in its second amended petition. The employer argues that the union's mid-hearing amendment deprived it of timely notice that the scope of the hearing would be expanded to cover additional positions.

In *City of Seattle*, Decision 2610 (PECB, 1987), the Executive Director stated:

Where a petitioner moves to amend its petition to seek a broader unit, and the employer and incumbent have adequate notice, the amendment will be allowed. *Kitsap County*, Decision 2116 (PECB, 1984).

In *Kitsap County*, Decision 2116, the employer and incumbent union had notice of a proposed amendment by a petitioning organization "well in advance of the hearing."

Conditions for the amendment of a representation petition were discussed in *Washington State University*, Decision 10115 (PSRA, 2008). The union originally filed separate petitions for three distinct bargaining units. During the first day of hearing, the employer presented evidence and made compelling arguments highlighting the community of interest shared by the employees in two of the petitioned-for units. At the beginning of the second day of the hearing, the union moved to amend two of the petitions to combine those proposed units. The Executive Director allowed the amendment of the petitions; however, the amended petitions involved the exact same employees who were covered by the two separate petitions, and did not broaden the scope of the hearing.

In this case, the union's third amended petition broadened the scope of its proposed unit. The employer had inadequate notice of that amendment, which occurred mid-hearing. The Executive Director finds that the union's proposed amendment amounts to a "late hit" that deprived the employer of its due process rights, and as a result does not accept the third amended petition.

ISSUE 2: The union's second amended petition seeks a vertical unit consisting of 22 employees who perform student counseling and advising duties in the Departments of International Studies, Academic Achievement, and Academic Advising at the employer's main campus in Ellensburg.³

Of the aforementioned criteria the Commission uses to determine community of interest, only the duties, skills, and working conditions of the employees and the extent of organization among the employees are applicable to this case. As stated in *Pasco School District*, Decision 5016-A (PECB, 1995), the history of bargaining need only be considered where there is a history of representation, and there is no history of representation for the petitioned-for unit. The exclusive method of determining the desire of the employees in a representation case is by election. Chapter 391-25 WAC.

Duties, Skills, and Working Conditions: The Department of International Studies at the university consists of the Study Abroad and Exchange Program, and the Asia University American Program (AUAP). Employees in this department recruit international students to attend the university and assist them in the admissions process, in addition to advising these students once they are admitted. Employees also provide support services for university students who wish to study abroad.

Staff in the Department of Academic Achievement work with low-income, disabled, or first-generation college students and provide services that include assistance with admissions and financial aid, academic advising, tutoring, and career counseling.

Employees in the Department of Academic Advising work with freshmen and undergraduates at the university, assisting them in scheduling their courses and advising them of their general education requirements.

³ Although each amended petition seeks to add employees, the numbers on the face of the amended petitions do not appear to accurately reflect the actual number of petitioned-for employees.

The work performed by employees in the petitioned-for unit consists of various types of student counseling duties such as student recruitment, admissions counseling, financial aid counseling, academic advising, career counseling, student testing and assessment, basic skills instruction, and student retention.

The university's Human Resources Department routinely reviews staff positions to determine which positions should be exempt under RCW 41.06.070(2). The most recent review found some 60 non-supervisory employees exempt because their duties involved counseling of students. These employees included the 18 petitioned-for bargaining unit members in addition to staff who worked in the Departments of Admissions, Career Services, Disability Support Services, Diversity and Leadership, Educational Outreach Services, Financial Aid, Health and Counseling, University Housing, and the Wellness Center at the main campus and university centers in Des Moines, Lynnwood, and Pierce County.

The union argues that the employees in its proposed bargaining unit have a distinct community of interest based upon the similarity of the types of duties they perform, in addition to similarities in wages, hours, qualifications, and general working conditions. The employer counters that the similarities extend to its other exempt employees who are involved in counseling of students, a fact borne out by the witnesses and evidence from the hearing.

For the most part, counseling employees in and out of the proposed bargaining unit interact with current and prospective students on a daily basis as part of their jobs, either by advising the student directly or by assessing the student's needs and then referring the student to other departments within the university in order to receive further guidance. The majority of these employees are required to have a bachelor's or a master's degree, and their salary ranges are similar based upon the educational requirements of their positions. Their normal work day is 8:00 a.m. to 5:00 p.m., with some weekend work and travel required, and the vast majority work in an office setting at the main campus or at one of the university centers. The personnel policies and procedures these employees work under are also similar.

As a result of these similarities, the employer argues that this decision should follow the lead of *Central Washington University*, Decision 10336-A, which held that a petitioned-for unit of 10

Educational Outreach Services counselors was inappropriate because such employees shared a community of interest with other counselors at the university. As was the case then, the union in the present case has been unable to justify a stand-alone unit based upon significant distinctions in duties, skills, and working conditions between the petitioned-for bargaining unit members and other exempt employees who counsel students.

Extent of Organization: The extent of organization factor compares the petitioned-for unit with the employer's workforce as a whole in an effort to avoid fragmentation of an employer's workforce into multiple units that create the potential for ongoing work jurisdiction disputes.

The union argues that there has been little or no work jurisdiction conflict between the employees in the petitioned-for unit and the rest of the university's exempt employees who counsel students. Testimony received from union and employer witnesses supports this argument, painting a picture of an environment in which these employees work cohesively while helping students make their way through the university system. It cannot be ignored, however, that the potential for work jurisdiction disputes exists when a group of employees with similar duties contains represented and unrepresented employees.

In *South Kitsap School District*, Decision 472 (PECB, 1978), the Examiner stated that one of the critical considerations in unit determination is that certification of an exclusive bargaining representative creates a right to protect the work jurisdiction of the bargaining unit. Before transferring work historically performed in a bargaining unit to employees outside of the bargaining unit, the employer must give notice to the exclusive bargaining representative and provide opportunity for bargaining in order to avoid a finding that unit work was unlawfully transferred.

Conflicts surrounding the right to protect work jurisdiction would be all but unavoidable if the unit sought by the union were approved. For example, counselors in the Department of Academic Achievement, who are part of the petitioned-for unit, provide assistance with admissions and financial aid during the course of their work with low-income, disabled or first-generation college students. This is the same work done by exempt counselors in the Departments of Admissions and Financial Aid, which could easily lead to disputes regarding what is and is not bargaining unit work.

A desire to avoid similar disputes and fragmentation was part of the Commission's rationale in affirming the Executive Director's dismissal order in *Central Washington University*, Decision 10336-A, and that rationale is equally applicable to the case at hand.

CONCLUSION

Based upon the record, the Executive Director rules that the proposed bargaining unit sought by the union is not an appropriate unit for the purpose of collective bargaining. The petitioned-for employees have the same or substantially similar duties, skills, and working conditions as the employer's approximately 40 other exempt counseling employees. Allowing the petitioned-for unit would unnecessarily fragment the employer's student counseling workforce and create work jurisdiction disputes.

FINDINGS OF FACT

1. Central Washington University is an institution of higher education within the meaning of RCW 41.56.030(8).
2. Public School Employees of Washington is a bargaining representative within the meaning of RCW 41.56.030(3).
3. On October 15, 2009, the union filed a petition seeking to represent a bargaining unit of 11 exempt employees who are employed as counselors or advisors in the Departments of International Studies and TRIO Student Support Services at Central Washington University.
4. On November 20, 2009, the union amended its petition to change TRIO to Academic Achievement as the correct name of the administrative office, and to include coordinators along with counselors and advisors in the petitioned-for bargaining unit. The amendment added one employee to the petitioned-for unit for a total of 12 employees.

5. On January 26, 2010, the union filed a second amended petition which expanded the petitioned-for bargaining unit to counselors, advisors, coordinators, or recruiters in the Departments of International Studies, Academic Achievement, and Academic Advising on the main campus of the university.
6. On April 12, 2010, the union filed a third amended petition that sought to represent employees assigned as counselors, advisors, coordinators, or recruiters in the Departments of International Studies, Academic Achievement, Academic Advising, the College Assistance Migrant Program (CAMP), and the Student Transitions and Academic Resources (STAR) program.
7. The union's third amended petition described in Finding of Fact 6 deprived the employer of due process, and is not accepted.
8. The classifications included in the petitioned-for bargaining unit described in Finding of Fact 5 are exempt from Chapter 41.06 RCW under RCW 41.06.070(2)(b), based on their duties involving the counseling of students.
9. There are approximately 40 other employees in similar classifications who are also exempt from Chapter 41.06 RCW under RCW 41.06.070(2)(b), based on their duties involving the counseling of students.
10. The work performed by employees in the petitioned-for unit described in Finding of Fact 5 consists of various types of student counseling duties such as student recruitment, admissions counseling, financial aid counseling, academic advising, career counseling, student testing and assessment, basic skills instruction, and student retention.
11. The petitioned-for employees described in Finding of Fact 5 have the same or substantially similar duties, skills, and working conditions as the employer's approximately 40 other employees exempt under RCW 41.06.070(2)(b) who counsel students.
12. The petitioned-for employees described in Finding of Fact 5 work under similar personnel policies and procedures as do the employer's approximately 40 other employees exempt under RCW 41.06.070(2)(b) who counsel students.

13. The unit of petitioned-for employees described in Finding of Fact 5 would unnecessarily fragment the employer's student counseling workforce.
14. Creation of the petitioned-for bargaining unit described in Finding of Fact 5 would create the ongoing potential for work jurisdiction disputes because of the similarity of work performed between and among the 20 approximate sought-after employees and the employer's approximately 40 other employees exempt under RCW 41.06.070(2)(b) who counsel students.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-25 WAC.
2. The bargaining unit described in Finding of Fact 5 is not an appropriate bargaining unit for the purpose of collective bargaining.

ORDER

The petition filed in Case 22787-E-09-3506 for investigation of a question concerning representation is hereby DISMISSED.

ISSUED at Olympia, Washington, this 20th day of May, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CATHLEEN CALLAHAN, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-25-660.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

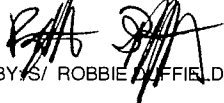
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PUBLIC EMPLOYMENT RELATIONS COMMISSION


BY: S/ ROBBIE DUFFIELD

CASE NUMBER: 22787-E-09-03506 FILED: 10/15/2009 FILED BY: PARTY 2
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BAR UNIT: PROFESSIONAL
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