STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 2903	CASE 24769-E-12-3714
	DECISION 11524 - PECB
Involving certain employees of:	
THURSTON COUNTY FIRE DISTRICT 8	ORDER OF DISMISSAL

Ricky Walsh, International Association of Fire Fighters 7th District Vice-President, for the petitioner.

McGavick Graves P.S., by *Dave Luxemburg*, Attorney at Law, for the employer.

On May 3, 2012, the International Association of Fire Fighters, Local 2903 (union) filed a petition to represent six fire fighters employed by Thurston County Fire District 8 (employer). Three of the petitioned-for employees are in the Assistant Chiefs classification, and three are in the Internship Program Temporary Trainee Fire Fighter classification.

During a June 4, 2012, investigation conference, the employer challenged the appropriateness of the petitioned-for bargaining unit on the basis that participants in the Internship Program are temporary employees who should not be included in any bargaining unit. The employer also challenged the unit on the basis that the three Assistant Chiefs are supervisors. Finally, the employer claimed that if any bargaining unit configuration was found appropriate, at least one Assistant Chief should be excluded as a confidential employee. On July 10, 2012, Hearing Officer Dario de la Rosa conducted a hearing to take testimony and evidence regarding the employer's challenges.

For the reasons set forth below, the participants in the Internship Program are temporary employees who are not eligible for collective bargaining rights under Chapter 41.56 RCW.

Accordingly, the union's petition must be dismissed because the petitioned seeks an inappropriate unit configuration that would include individuals not eligible to exercise collective bargaining rights under Chapter 41.56 RCW.

BACKGROUND

The employer operates a rural fire district that employs both full-time and volunteer fire fighters. The employer employs seven full-time fire fighters, including the Fire Chief, and utilizes approximately sixty volunteer fire fighters. Three of the full-time fire fighters are Assistant Chiefs and three are Temporary Trainees who participate in the Internship Program. Brian Van Camp is the Fire Chief.

The Fire Chief is responsible for the day-to-day operations of the district. The three Assistant Chiefs are assigned different divisions within the district. Brandon LeMay is the Assistant Chief for Training and Safety, Volunteer Recruitment, and is responsible for running the employer's Internship Program. Brent McBride is the Assistant Chief for Volunteer Management and Operations, and is responsible for supervising the volunteer fire fighters. Greg Kessel is the Assistant Chief for Facilities and Equipment, and is responsible for the operation and maintenance of the District's equipment as well as the operational and strategic planning of the District's facilities.

The employer's Internship Program, which was started in 2008, provides up to three individuals the opportunity to obtain additional training and experience to enable them to be competitive when seeking employment as a career fire fighter with other departments. The participants in the program, who hold the Temporary Trainee classification, are paid a salary, receive medical benefits, and are enrolled in the Law Enforcement Officers' and Fire Fighters' (LEOFF) retirement system.

Although the Temporary Trainees are paid a salary and benefits, their employment expectations differ from the other full-time fire fighters employed by the employer. The Temporary Trainees

each sign an agreement that states the date on which their employment term begins and ends. The employment agreement states, in part:

> Section I: Temporary Employment
> A) The District hereby employs the Intern on a temporary basis, and Intern accepts employment pursuant to the terms and conditions of this Agreement.
>
> Section II: Term
> A) The term of this Agreement shall begin on the date signed and shall continue no longer than twenty-four (24) calendar months or until otherwise sooner terminated, as provided in Section X. Nothing herein shall be construed as a guarantee of continued employment by the District after expiration or termination of the term of this Agreement.

In addition to the written employment agreement, the testimony demonstrates that the employer and the Temporary Trainees both understand that the positions in the Internship Program are temporary in nature. For example, the employer would assist the Temporary Trainees with securing full-time employment at other departments while still employed with the employer. Van Camp testified that the employer would adjust the schedules of the Temporary Trainees to allow them to interview at other departments. Some, but not all of the participants in the Internship Program, completed the 24-month period. If a Temporary Trainee successfully secured permanent employment with another department, the employee was allowed to leave the program early without penalty. Finally, the employer cited to only one instance where a Temporary Trainee was allowed to work beyond the 24-month period, and there has never an instance where a Temporary Trainee has been hired on a permanent basis by the employer.

DISCUSSION

Applicable Legal Standards

The Washington State Legislature delegated to this Commission the authority to determine appropriate bargaining units for purposes of collective bargaining. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981). When determining new units or modifying existing units, this Commission shall consider "the duties, skills, and working conditions of public employees; the history of collective bargaining by

the public employees and their bargaining representative; the extent of organization among the public employees; and the desires of the employees." RCW 41.56.060(1). The purpose of this examination is to discern whether a sufficient community of interest exists among employees to enable them to bargain effectively with their employer. *Quincy School District*, Decision 3962-A (PECB, 1993), *aff'd*, 77 Wn. App. 741 (1995), *review denied*, 127 Wn.2d 1019 (1995).

All the factors indentified in RCW 41.56.060(1) are to be considered in each case, but no one factor dominates the others. *See Washington State University*, Decision 9613-A (PSRA, 2007). When analyzing proposed and existing bargaining units, this agency must be mindful that the unit determination does not require a certification of the most appropriate unit. Rather, the fact that other groupings of employees may also be appropriate, or even more appropriate, does not require setting aside a unit previously determined to be appropriate. *City of Winslow*, Decision 3520-A (PECB, 1990). When confronted with an inappropriate bargaining unit that cannot be rehabilitated by a minor adjustment, any petition associated with that unit must be dismissed. *City of Marysville*, Decision 4854 (PECB, 1994).

Temporary Employees

RCW 41.56.030(11) broadly defines "public employee" as any employees of the state of Washington except for elected officials, individuals appointed to boards or commissions for a fixed term, or confidential employees. The Commission has interpreted the legislative intention of the term "public employee" in RCW 41.56.030(11) to apply only to those individuals with a reasonable expectation of continued employment with a particular employer. *City of Auburn*, Decision 4880-A (PECB, 1995); *Columbia School District*, Decision 1189-A (EDUC, 1982). In applying a "reasonable expectation" standard, the Commission excluded temporary and casual employees from the bargaining unit. *Kitsap County*, Decision 4314 (PECB, 1993). By excluding "temporary" employees, employers and unions are relieved of the burden of bargaining for those individuals who have only a passing interaction with the employer and its workforce, and can instead focus on those employees who have a clear connection and community of interest. *Kitsap County*. The Commission consistently concluded that employees who work more than one-sixth of the time normally worked by a full-time employee are presumed to be "regular

part-time" employees and included within the bargaining unit. *Kitsap County*, Decision 4314; *City of Seattle*, Decision 1142 (PECB, 1981).

The Commission eventually codified a standard for determining whether an individual is a "regular part-time" employee included in a bargaining unit or a "casual" employee to be excluded from all bargaining units. WAC 391-35-350 states:

> (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.
> (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.
> (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.

The presumption stated in WAC 391-35-350(1) that employees who work more than one-sixth of the time normally worked by full-time employees are "regular part-time" employees is not absolute. As WAC 391-35-350(3) states, the presumptions stated in WAC 391-35-350 may be modified by adjudication. The presumption that employee who work more than one-sixth of the time normally worked by full-time employees are "regular part-time" employees may be rebutted by evidence showing that the employees lack a reasonable expectation of a continued employment relationship with that employee. *City of Auburn*, Decision 4880-A. *City of Auburn* involved seasonal employees who rarely met the minimum qualifications for regular positions and where

only a minority of the seasonal employees ever returned for a subsequent season. Accordingly, even though those employees worked more than one-sixth the time normally worked by full-time employees, the Commission concluded that the employees were temporary or casual employees and excluded from the bargaining unit because the employees did not have a reasonable expectation of a continued employment relationship with the city.

In contrast, *Okanagan School District*, Decision 5394-A (PECB, 1997), involved extra-curricular employees who met the one-sixth standard and at least seventy percent of whom returned to the same position in the same school in subsequent years without the need for a recruitment process. Therefore, the Commission concluded that the incumbent extra-curricular employees had a reasonable expectation of a continued employment relationship with the school district and included them in the bargaining unit.

Application of Standards

The evidence in this case demonstrates that the Temporary Trainees in the Internship Program do not have a reasonable expectation of a continued employment relationship with the employer. The employer designed the Internship Program to provide the participants experience so that the participants could gain employment at other fire departments. The participants in the Internship program enter the program knowing that their employment will last no more than twenty-four months. The employer assists the Temporary Trainees in finding employment by allowing them flexible scheduling to attend employment interviews and by providing employment recommendations. No Temporary Trainee in the Internship Program has become a permanent employee with the employer.

Based upon this evidence, the participants have full knowledge that their employment will end on a specific date, do not have a reasonable expectation of continued employment with the employer, and are temporary employees who lack a community of interest with the full-time employees. In this case, the twenty-four month employment term creates a regular, continuing cycle of turnover among fifty percent of the employees in the proposed bargaining unit. This turnover is not speculative or uncertain. Accordingly, the participants in the Internship program are precluded from exercising collective bargaining rights under Chapter 41.56 RCW.

In its brief, the union also argues that the Temporary Trainees qualification for the LEOFF retirement systems automatically qualifies the participants as uniformed employees under RCW 41.56.030(13)(e). The union's assertion is incorrect.

In order for an employee to enjoy collective bargaining rights under Chapter 41.56 RCW, an employee must first be considered a public employee under RCW 41.56.030(11) and a full-time or regular part-time employee as defined by WAC 391-35-350(1). Casual and temporary employees as defined by WAC 391-35-350(2)(a) and (b) are precluded from exercising collective bargaining rights and excluded from bargaining units. Thus, although an employee's qualification for the LEOFF retirement plan determines whether the employee qualifies as a uniformed employees under RCW 41.56.030(13)(e), eligibility in the LEOFF program does not answer the initial question of whether the employee should be excluded from a bargaining unit as a casual or temporary employees. Stated another way, employees enrolled in the LEOFF retirement plan may still be excluded from exercising collective bargaining rights if they are determined to be casual or temporary employees.

Conclusion

The Temporary Trainees in the employer's Internship Program are not employees as defined by RCW 41.56.030(11) because their employment is temporary in nature. Because the bargaining unit configuration sought by the union's petition includes employees not eligible to exercise collective bargaining rights under Chapter 41.56 RCW, the union's petition must be dismissed, and it is unnecessary to rule upon the employer's supervisory and confidential challenges.

FINDINGS OF FACT

1. Thurston County Fire District 8 is a public employer within the meaning of RCW 41.56.030(12).

2. The International Association of Fire Fighters, Local 2903 is a bargaining representative within the meaning of RCW 41.56.030(2).

3. Thurston County Fire District 8 employees three Assistant Chiefs, Brandon LeMay, Brent McBride, and Greg Kessel, who are permanent full-time employees.

4. In 2008, Thurston County Fire District 8 started an Internship Program as an opportunity to provide three participants the opportunity to obtain additional training and experience to enable them to be competitive when seeking employment as a career fire fighter with other departments.

5. The participants in the Internship Program are in the Temporary Trainee classification and are paid a salary, receive medical benefits, and are enrolled in the Law Enforcement Officers' and Fire Fighters' (LEOFF) retirement system.

6. The employees in the Internship Program are employed for no more than twenty-four months.

7. The employees in the Internship Program are not offered permanent employment with Thurston County Fire District 8 at the end of the twenty-four month period.

8. On May 3, 2012, the International Association of Fire Fighters, Local 2903, filed a petition to represent a bargaining unit comprised of the three employees in the Assistant Chiefs classification and the three employees in the Internship Program.

9. During a June 4, 2012, investigation conference, the employer challenged the appropriateness of the petitioned-for bargaining unit on the basis that three of the petitioned-for employees who are in the Internship Program are temporary employees who should not be included in any bargaining unit.

CONCLUSIONS OF LAW

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

2. The employees in the Internship Program described in Findings of Fact 4 through 7 are temporary employees who do not have a reasonable expectation of continued employment with the employer and whose employment ends on a certain date.

3. The bargaining unit described in Finding of Fact 8 is an inappropriate bargaining unit that seeks to include temporary employees in violation of WAC 391-35-350.

ORDERED

The petition for investigation of a question concerning representation filed in the above-captioned matter is DISMISSED.

ISSUED at Olympia, Washington, this 24th day of October, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MICHAEL P. SELLARS, Executive Director

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	24769-E-12-03714	FILED:	05/03/2012	FILED BY:	PARTY 2
DISPUTE:	QCR UNORGANIZED				
BAR UNIT:	FIREFIGHTERS				
DETAILS:	-				
COMMENTS:					

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