

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES,
LOCAL 15

Involving certain employees of:

LAKE WASHINGTON SCHOOL DISTRICT

CASE 25307-E-12-3759

DECISION 11698 - PECB

DIRECTION OF ELECTION

Paul Bigman, Business Representative, for the petitioner, International Alliance of Theatrical Stage Employees, Local 15.

K&L Gates LLP, by *Mark S. Filipini* and *Ryan J. Groshong*, Attorneys at Law, for the employer.

On November 28, 2012, the International Alliance of Theatrical Stage Employees, Local 15 (union) filed a petition to represent all part-time stage technicians employed by Lake Washington School District (employer) who work 260 hours or more per year. During a November 28, 2012 investigation conference, the employer challenged the appropriateness of the petitioned-for bargaining unit on the basis that the stage technicians are casual employees who do not have a continued expectation of employment and should not be included in any bargaining unit. On December 14, 2012, Hearing Officer Stephen W. Irvin conducted a hearing to take testimony and evidence regarding the employer's challenge. On February 1, 2013, the parties filed post-hearing briefs for consideration.

For the reasons set forth below, the petitioned-for employees share a community of interest and have a reasonable expectation of a continued employment relationship with the employer. As such, the petitioned-for unit is an appropriate unit for the purposes of collective bargaining, and a representation election will be held. Employees will be considered regular part-time employees

eligible to vote in the representation election if they have worked 44 or more event shifts during the year preceding the date of the petition, and they continue to be available for the requisite number of assignments on a calendar-year basis thereafter.

BACKGROUND

The employer operates performing arts centers at three of its schools – Eastlake High School, Lake Washington High School, and Redmond High School. During the school year, the performing arts centers are used for student performances and activities, and the centers are also available for outside organizations to rent for performances. The performing arts centers are used throughout the year, with the vast majority of events held during the school year.

Each performing arts center has a theatre manager whose regular work schedule is 30 hours a week (1,560 hours annually). Theatre managers are represented by the union in a separate bargaining unit. *Lake Washington School District*, Decision 11607 (PECB, 2012). Theatre managers' duties include recruiting, hiring, and supervising stage technicians. The employer does not post technician job openings on its website, and potential employees do not apply in person at the district office for those positions.

Technicians prepare the performing arts centers for productions, in addition to operating the centers' sound, lighting and curtain systems during those productions, and returning the centers to their normal state. When theatre managers are unavailable, a technician is designated as the lead technician and is responsible for directing the production-related work of other technicians. In addition, technicians occasionally work alone on productions without theatre managers or other technicians. Some events held at the performing arts centers do not require any assistance from theatre managers or technicians.

When technicians are initially hired by theatre managers, they are not assured of a number of work hours, but they are told that their names will be placed on a list with those of other technicians. Theatre managers contact technicians on the list via e-mail or telephone to determine if they are

available for upcoming work assignments. The majority of technicians' work is assigned months in advance after the performing arts centers' production schedules are determined.

Technicians who accept work assignments are paid on an hourly basis and do not receive any benefits or compensation from the employer other than wages, as opposed to the theatre managers, who receive medical, dental, vision and disability benefits and are included in the Public Employees' Retirement System.

Technicians have variable lengths of work shifts based on the needs of the assignment. In fiscal year 2011-2012, for example, the record indicates that shifts ranged from one hour to as many as 14. At the end of the fiscal year, the hours worked by stage technicians ranged from 1.75 to 610.5, with an average of 121.06 hours worked for the 21 technicians who worked during the fiscal year.

Of the 21 technicians who worked during fiscal year 2011-2012, the number of events worked ranged from one to 104. Brandon White was the top earner, with 610.5 hours in 104 events, followed by Matthew Sage with 384 hours in 70 events, Troy Tompkins with 294.5 hours in 70 events, Britta Skotdal with 261 hours in 52 events, and Timothy Rasmussen with 232 hours in 44 events.

The employer's records indicate Sage, Tompkins and Skotdal worked as technicians in each of the three fiscal years prior to 2011-2012, while White and Rasmussen worked only during the 2011-2012 fiscal year. Of the 21 technicians who worked in 2011-2012, nine had worked in each of the three previous fiscal years.

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 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.” 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 identified 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 employee of a public employer except elected officials, individuals appointed to boards or commissions, or confidential employees. The Commission has interpreted the legislative intention of the term “employee” in RCW 41.56.030(11) to apply only to persons who have a reasonable expectation of an ongoing employment relationship with the employer. *Thurston County Fire District 8*, Decision 11524-A (PECB, 2013); *City of Auburn*, Decision 4880-A (PECB, 1995). 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 has 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).

In 2001, the Commission 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.*

(emphasis added).

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. For example, WAC 391-35-350(3) provides that the presumptions stated in WAC 391-35-350 may be modified by adjudication. The presumption that employees 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 employer. *City of Auburn*, Decision 4880-A.

City of Auburn involved seasonal employees who rarely met the minimum qualifications for regular positions and where approximately 30 percent 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 employer.

In contrast, *Okanogan School District*, Decision 5394-A (PECB, 1997), involved extracurricular employees who met the one-sixth standard and at least 70 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 extracurricular employees had a reasonable expectation of a continued employment relationship with the school district and included them in the bargaining unit.

Okanogan School District represents one of a number of Commission cases in which the method of determining which employees qualify as regular part-time employees under the one-sixth standard was at issue. The employer argued that the one-sixth test be applied from a 1,440-hours-per-year base that was derived from eight-hour days for a 180-day school year. The one-sixth test would result in a 240-hours-per-year standard. In accordance with decisions dealing with substitute employees in school districts, the Commission chose instead to apply the one-sixth test to the 180-day school year, which resulted in a standard of 30 days worked in a one-year period to determine employees eligible to be included in the bargaining unit. Employees were credited for a day of work for each calendar day during which they performed compensated work on extracurricular activities, regardless of the number of hours worked.

The Commission has adopted a similar methodology outside of public education, where a 2,080-hours-per-year base is derived from eight-hour days for a 260-day year. In *King County*, Decision 1675 (PECB, 1983), for example, a bargaining unit of part-time telescreen and sound

reinforcement operators at the Kingdome was found to be appropriate based upon the number of days worked in what had the potential to be a year-round operation.

The Kingdome event employees do not work a traditional eight-hour day. In *Sedro Woolley* [*Sedro Woolley School District*, Decision 1351-C (PECB, 1982)], a similar problem arose concerning the definition of a work day. At issue in that case was a group of substitute school bus drivers. In computing a “day” for the purposes of the test, it was recognized that some positions did not have a traditional eight-hour work day. The focus of attention was placed on the work shift specified by the employer, rather than the number of hours worked. The same approach is to be followed in this case. Employees who have worked an average of 11 or more event shifts per quarter during the four quarters preceding the date of this decision, and who continue to be available for such assignments, will be considered regular part-time employees eligible to vote in the representation election.

King County, Decision 1675.

Application of Standards

The evidence clearly demonstrates that the technicians in question share similar duties, skills, and working conditions. As a result, any technician who qualifies as a public employee under RCW 41.56.030(11) should be included in a bargaining unit of the employees in that job class. The key issue in this case is whether the petitioned-for employees have a reasonable expectation of a continued employment relationship with the employer to qualify as a public employee under RCW 41.56.030(11). If the answer is affirmative, the focus then turns to the most appropriate method of determining which employees are eligible to vote in a representation election.

The employer argues that the petitioned-for bargaining unit is improper on its face because it does not include full-time employees. The employer contends that if the Commission is willing to entertain the idea of a bargaining unit without full-time employees, the petitioned-for unit is still improper because the employees in question are casual employees as defined by WAC 391-35-350.

To bolster that argument, the employer claims that the technicians’ situation is analogous to *City of Auburn*, in that no technician in the last four fiscal years has become a full-time employee and only

nine of the 39 technicians who have worked during that period have worked at least one shift in each fiscal year. In addition, the employer asserts that the technicians are casual employees based on (a) the intermittent nature of the technicians' employment, as evidenced by the fluctuating availability of work for these employees; (b) the fact that many of the technicians have other employment and are not available for work on the same basis as the employer's other full-time employees; and (c) that the technicians do not share a community of interest with any of the district's full-time and regular part-time employees.

The employer's reliance on *City of Auburn* is misplaced. In *City of Auburn*, the seasonal employees the union wished to add to an existing bargaining unit rarely became full-time employees because they generally did not meet the minimum requirements for full-time employment. There are no full-time positions for technicians to attain in the instant case, and as such, it is more analogous to *King County*, in which a bargaining unit consisting exclusively of part-time employees was found appropriate.

In *King County*, the part-time employees in the petitioned-for bargaining unit were scheduled to work during events at the Kingdome after their initial hire. These employees were contacted in advance regarding their availability to work in the upcoming month, and future work opportunities were not jeopardized if an employee was unavailable to work during a given month. The employees did not work standard eight-hour shifts, and during 1982, the hours worked by the employees ranged from zero to 88.5 hours in the first quarter, zero to 115.3 hours in the second quarter, zero to 172.7 hours in the third quarter, and zero to 109.9 hours in the fourth quarter.

The employer in *King County* argued that the employees in question were casual employees, in part because they worked a small number of hours, had the option of accepting or rejecting offers of work, and earned significant wages from other employment. The Executive Director found the arguments unpersuasive, writing:

The ability to reject work opportunities is an indicator of "casual" employment, but is not a conclusive or universal bar to the exercise of collective bargaining rights. Persons employed without benefit of a fixed work schedule have been included in

bargaining units where there has been a showing of repeated work assignments within a specified period of time and the employees have a reasonable expectancy of continued employment on a similar basis. *Tacoma School District*, Decision 655 (EDUC, 1979); *Columbia School District, et. al.*, Decision 1189-A (EDUC, 1982); *Sedro Woolley School District*, Decision 1351-C (PECB, 1982). Just as having a workforce of substitute teachers or substitute school bus drivers is a functional necessity to the continued operation of a school district, everything points to a reasonable expectancy that the Kingdome will continue to need employees with the skills possessed by the employees petitioned-for in this case.

The evidence in this case leads to a similar conclusion that the petitioned-for employees have a reasonable expectation of a continued employment relationship with the employer, thus making the petitioned-for unit an appropriate unit for the purposes of collective bargaining.

Although their hours worked varied, 43 percent of the 21 technicians who were employed in the 2011-2012 fiscal year had worked in each of the previous three fiscal years. The theatre managers who testified at hearing identified the employees in the petitioned-for bargaining unit as part of a “core group” of technicians who are contacted first for assignments and most likely to garner the majority of the available technician hours. No evidence was presented that the employer planned to limit the number of productions held in its three performing arts centers or expand the regular work hours of its theatre managers, which indicates that the technicians will continue to be a necessary and important part of the employer’s operation in the future.

The conclusion that the petitioned-for employees share a community of interest, and certain of them have a reasonable expectation of continued employment, leads to the question of which employees in the unit are eligible to vote in a representation election. The union argues that the one-sixth standard should be applied to the theatre managers’ regularly scheduled 1,560 hours, which leads to the 260-hour figure in its petition. The employer argues that doing so would be inappropriate because the theatre managers are not part of the petitioned-for unit, and theatre managers and technicians do not perform similar work. Furthermore, the employer contends that the one-sixth standard should be based on the traditional 2,080-hour work year, which would exclude employees who worked fewer than 347 hours in fiscal year 2011-2012.

In this case, Commission precedent leads away from hours worked and toward days worked as the most appropriate measure for the one-sixth standard. The technicians' varied work hours are analogous to the non-traditional hours worked by extracurricular employees in *Okanogan School District* and substitute school bus drivers in *Sedro Woolley School District*. Unlike those cases, where the 30-day annual threshold was based on the 180-day school year, the employer in the instant case has the potential to operate its performing arts centers year-round, excluding holidays, similar to Kingdome operations detailed in *King County*. As such, the *King County* threshold is appropriately utilized for the petitioned-for bargaining unit.

Conclusion

For the reasons set forth above, the petitioned-for bargaining unit of part-time stage technicians is appropriate because such employees share a community of interest and have a reasonable expectation of a continued employment relationship with the employer. Employees will be considered regular part-time employees eligible to vote in the representation election if they have worked 44 or more event shifts during the year preceding the date of the petition, and they continue to be available for the requisite number of assignments on a calendar-year basis thereafter. It may be necessary for the employer to submit additional information to the Representation Case Administrator to determine the number of shifts worked between November 28, 2011, and November 28, 2012.

FINDINGS OF FACT

1. Lake Washington School District is a public employer within the meaning of RCW 41.56.030(12).
2. The International Alliance of Theatrical Stage Employees, Local 15, is a bargaining representative within the meaning of RCW 41.56.030(2).
3. On November 28, 2012, the International Alliance of Theatrical Stage Employees, Local 15, filed a petition to represent a bargaining unit comprised of all part-time stage

technicians employed by Lake Washington School District who work more than 260 hours in a year.

4. During a November 28, 2012 investigation conference, the employer challenged the appropriateness of the petitioned-for bargaining unit on the basis that the stage technicians are casual employees who do not have a continued expectation of employment and should not be included in any bargaining unit.
5. Lake Washington School District operates performing arts centers at three of its schools – Eastlake High School, Lake Washington High School, and Redmond High School.
6. During the school year, the performing arts centers are used for student performances and activities, and the centers are also available for outside organizations to rent for performances. The performing arts centers are used throughout the year, with the vast majority of events held during the school year.
7. Stage technicians are recruited, hired, scheduled, and supervised by a theatre manager at each of the employer's performing arts centers. The employer does not post technician job openings on its website, and potential employees do not apply in person at the district office for those positions.
8. Technicians prepare the performing arts centers for productions, in addition to operating the centers' sound, lighting and curtain systems during those productions, and returning the centers to their normal state.
9. When theatre managers are unavailable, a technician is designated as the lead technician and is responsible for directing the production-related work of other technicians. In addition, technicians occasionally work alone on productions without theatre managers or other technicians. Some events held at the performing arts centers do not require any assistance from theatre managers or technicians.

10. When technicians are initially hired by theatre managers, they are not assured of a number of work hours, but they are told that their names will be placed on a list with those of other technicians.
11. Theatre managers contact technicians on the list via e-mail or telephone to determine if they are available for upcoming work assignments. The majority of technicians' work is assigned months in advance after the performing arts centers' production schedules are determined.
12. Technicians who accept work assignments are paid on an hourly basis and do not receive any benefits or compensation from the employer other than wages, as opposed to the theatre managers, who receive medical, dental, vision and disability benefits and are included in the Public Employees' Retirement System.
13. Technicians have variable lengths of work shifts based on the needs of the assignment. In fiscal year 2011-2012, the record indicates shifts ranged from one hour to as many as 14.
14. At the end of fiscal year 2011-2012, the hours worked by stage technicians ranged from 1.75 to 610.5, with an average of 121.06 hours worked for the 21 technicians who worked during the fiscal year.
15. Of the 21 technicians who worked during fiscal year 2011-2012, the number of events worked ranged from one to 104.
16. Nine of the 21 technicians who worked during fiscal year 2011-2012 had worked in each of the three previous fiscal years.

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. Stage technicians described in Findings of Fact 5 through 14, who have worked 44 or more event shifts during the year preceding the date of the petition, are regular part-time employees of the Lake Washington School District and are public employees within the meaning of RCW 41.56.030(11).

3. A unit consisting of:

All regular part-time stage technicians employed by Lake Washington School District, excluding confidential employees, supervisors, and all other employees of the employer.

is an appropriate bargaining unit within the meaning of RCW 41.56.060.

ORDER

Processing of this case is remanded to the Representation Case Administrator for further action consistent with this Order.

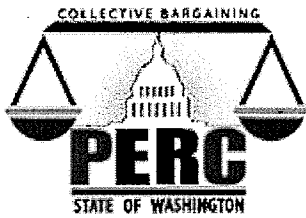
ISSUED at Olympia, Washington, this 27th day of March, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MICHAEL P. SELLARS, Executive Director

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



PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS
COMMISSION

BY:  ROBBIE DUFFIELD

CASE NUMBER: 25307-E-12-03759 FILED: 11/28/2012 FILED BY: PARTY 2
DISPUTE: QCR UNORGANIZED
BAR UNIT: MISCELLANEOUS
DETAILS: Stage Technicians
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