

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 21290-E-07-3304

DECISION 9963-B - PSRA

DECISION OF COMMISSION

Eric Nordlof, Attorney at Law, for the union.

Attorney General Rob McKenna, by *Lawson Dumbeck*, Assistant Attorney General, for the employer.

Public School Employees of Washington (union) filed a petition seeking to represent a bargaining unit of clerical and technical employees at Central Washington University (employer). Representation Coordinator Sally J. Iverson conducted an investigation conference during which the parties stipulated to the propriety of the petitioned-for bargaining unit. Although the employer agreed with most of the bargaining unit configuration proposed by the union, it challenged the inclusion of the preservation and museum specialist 5 (museum specialist) position in the proposed bargaining unit. In the employer's opinion, the museum specialist does not share a community of interest with the other petitioned-for employees.

An election was held and the union was selected by the employees as their exclusive bargaining representative. Executive Director Cathleen Callahan issued an interim certification and ordered further proceedings to determine the status of the museum specialist. Based upon the evidence and testimony submitted, the Executive Director found the museum specialist did not share a community of interest with the other petitioned-for employees.¹ In reaching that conclusion, she

¹ *Central Washington University, Decision 9963-A (PSRA, 2008).*

found that the duties, skills and working conditions of the museum specialist were substantially different from the duties, skills and working conditions of the other petitioned-for employees.

ISSUE PRESENTED

Does substantial evidence support the Executive Director's findings and conclusions that the museum specialist does not share a community of interest with the petitioned-for bargaining unit?

Based upon the record before us, substantial evidence supports the Executive Director's decision.² The duties, skills and working conditions of the museum specialist are distinct and different from those of other employees in the petitioned-for unit. Accordingly, we affirm.

DISCUSSION

Applicable Legal Standard

The determination of appropriate bargaining units is a function delegated by the Legislature to this agency. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, *IAFF Local 1052 v. Public Employment Relations Commission*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981). When making unit determinations under Chapter 41.56 RCW, the agency's goal is to group together employees who have sufficient similarities (community of interest) to indicate that they will be able to bargain effectively with their employer. *Quincy School District*, Decision 3962-A (PECB, 1993). In making such determinations, the agency must consider: the duties, skills and working conditions of the public employees; the history of collective bargaining by the public employees with their bargaining representative and the public employer;

² This Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Executive Director's conclusions of law. *C-TRAN*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002). Unchallenged findings of fact are accepted as true on appeal. *C-TRAN*, Decision 7088-B. The Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by the Executive Director. *See Cowlitz County*, Decision 7210-A (PECB, 2001).

the extent of organization among the public employees; the desire of the public employees, and the avoidance of excessive fragmentation. RCW 41.80.070. This agency has never applied the criteria on a strictly mathematical basis. *King County*, Decision 5910-A (PECB, 1997). Not all of the factors will arise in every case, and where they do exist, any one factor could be more important than another, depending on the factual situation.

Application of Standard

Post-Petition Evidence Will Not Be Accepted

On appeal, the union argues that the first question that this agency must ask in making a community of interest determination is whether the employees have sufficient similarities to bargain effectively with their employer. In the union's opinion, the Executive Director failed to apply this most basic test. Union's brief at 2, *citing Washington State University*, Decision 9631-A (PSRA, 2007). The union also asserts that it successfully negotiated a collective bargaining agreement for all the petitioned-for employees, including the museum preservation specialist, and therefore has demonstrated an ability to bargain on behalf of all employees. Union's Brief at 3. According to the union, it was clear error for the Executive Director to ignore evidence demonstrating this fact. We disagree.

The union is correct that the goal in making unit determinations is to ensure that employees share sufficient similarities to indicate that they will be able to bargain effectively with their employer. However, this Commission has consistently examined the duties, skills and working conditions of the petitioned-for employees as they existed at the *time the petition was filed*, and not after a period of bargaining. *See State – State Attorney General*, Decision 9951-A (PSRA, 2009) *citing Snohomish County Fire District 4*, Decision 8816-A (PECB, 2006)(only the current job duties of the employee or employees as they exist at the time that the representation petition is filed are to be considered).

Furthermore, the union's claim that the *Washington State University* decision stands for the proposition that a union only needs to demonstrate that it can "bargain effectively on behalf of

the employees” is misplaced.³ In *Washington State University*, the employer challenged the propriety of the petitioned-for bargaining unit, necessitating a hearing to resolve that issue before the employees even had the opportunity to vote on selection of a bargaining representative. The Commission’s statements about grouping employees with similar communities of interest so that they may “bargain effectively on behalf of the employees” was made in the context of analyzing whether the petitioned-for employees shared enough similarities to allow effective bargaining with their employer as a whole.

Finally, if we were to consider the fact that the union “successfully” bargained on behalf of the museum specialist, which we are not, we would effectively be overturning the aforementioned agency precedent precluding the introduction of evidence that comes into existence after the petition was filed, as well as existing precedent that precludes bargaining representatives from bargaining on behalf of employees that they do not represent.⁴ Under the facts of this case, we will not carve out an exception to our long standing rule of precluding parties from introducing evidence and testimony of post-petition changes to support a community of interest or eligibility argument.

Accordingly, this argument represents a substantial misstatement of the applicable law, and improperly seeks to introduce irrelevant evidence into the “community of interest” standard that is contrary to the plain reading of the statute and existing Commission interpretations of that statute.⁵ We continue to expect the Executive Director to make community of interest determinations based upon the factual situation existing at the time a petition is filed.

³ The union’s argument inappropriately seeks to take advantage of the Commission’s interim certification policy. That policy, codified at WAC 391-25-270, allows the Executive Director to conduct a representation election to determine the question concerning representation, provided the employer is not challenging the propriety of the unit but only a limited number of positions to be included in that unit. The disputed employees vote by challenged ballot, and if the remaining eligible employees vote for union representation, an interim certification is issued to allow the parties to commence their bargaining relationship. The eligibility issues will then be resolved through a hearing.

⁴ Because the employer lawfully challenged inclusion of the museum specialist position in the petitioned-for bargaining unit, the union does not currently represent that position. Accordingly, the union was not entitled to bargain on behalf of the employee holding that position until the resolution of these proceedings. See *Kitsap County Fire District 7*, Decision 2872-A (PECB, 1988).

⁵ Because testimony about bargaining on behalf of a challenged employee is not relevant evidence when making a community of interest argument, parties attempting to introduce such evidence should expect the hearing officer to prohibit the introduction of the non-relevant testimony.

Having disposed of this preliminary issue, we now turn to the Executive Director's examination of the RCW 41.80.070 criteria.

Duties, Skills and Working Conditions

The Executive Director compared the duties, skills and working conditions of the clerical and technical employees who are included in the bargaining unit with the duties, skills and working conditions of the museum specialist and found that although there were some similarities between the two, there were too many dissimilarities to find that the museum specialist shared a community of interest with the rest of the petitioned-for employees. We agree.

For example, the museum specialist performs specialized duties relating to her functions as gallery manager, including procuring art exhibits, preparing contracts for artists, and preserving and displaying art work in the gallery. The job position typically requires a master's degree, and the museum specialist reports directly to the department chairperson. The museum preservation specialist also supervises student workers and prepares and manages the art gallery's budget.

A significant group of petitioned-for employees perform clerical work, including general secretarial work such as proofreading, calendaring, and making travel arrangements. Most of these positions require no post-secondary education, and the work performed by these employees is generally in support of the university's administration. Additionally, the duties, skills and working conditions of the petitioned-for technical employees are also significantly different, as those employees mainly perform tasks associated with furthering the use of technology used by employees.

The union argues that the Executive Director ignored the fact that the museum specialist supports the art gallery in a manner similar to other administrative support personnel in the petitioned-for bargaining unit. The union also argues that while the work performed by the museum specialist may be "superficially different" from that performed by other petitioned-for employees, the "work performed by all members of the [union's] bargaining unit amounts to no less and no more than complex administrative support of the university's core mission of providing instruction to students." We disagree with both of these assertions.

In labor management relations, employees provide administrative support to other employees. Employees do not “support” buildings or other entities such as an art gallery. With respect to the union’s argument that all of the petitioned-for employees, including the museum specialist, support the university’s core mission, we reject this argument as an ill-advised attempt to engraft an overly broad test upon the community of interest analysis. All employees of any public employer in the state of Washington work in furtherance of their employer’s mission. If we were to accept this criteria, any petitioned-for bargaining unit could be found appropriate regardless of the RCW 41.80.070 criteria because all of the employees share a common goal, i.e., fulfilling that mission. Simply stated, we once again reject the union’s attempt to change the existing unit determination standards through this case.

History of Bargaining

As the Executive Director correctly pointed out, despite the union’s claim that it already bargained for the museum specialist, if indeed it occurred, such bargaining was not lawful. Therefore, there is no history of bargaining for the museum specialist.

Desires of the Employees

Testimony regarding desires of employees is not relevant in representation hearings. Rather, the desires of employees are ascertained through the election process.

Extent of Organization and Avoidance of Excessive Fragmentation

Where a question exists as to whether an employee or small group of employees share a community of interest with an otherwise appropriate bargaining unit, the analysis under the extent of organization and avoidance of excessive fragmentation components should be examined in conjunction with each other. The goal is to avoid stranding individuals through unit configurations that would not only preclude the excluded employee or employees from exercising their collective bargaining rights, but also ensure that, should the excluded employees be able to organize for purposes of collective bargaining, the resulting unit(s) would not excessively fragment the employer’s workforce.

Here, exclusion of the museum specialist would not preclude that employee from exercising her bargaining rights with other employees in the employer's workforce. The employer suggests that the museum specialist shares a community of interest with other "professional" employees in the employer's workforce, such as the state manager and program coordinator who work in the College of Arts and Humanities. Employer's Brief at 14. Although we are not "rubber stamping" a bargaining unit of the aforementioned employees, we do note that there is ample evidence in this record suggesting that the museum specialist may share a community of interest with other professional employees. Furthermore, there is no evidence suggesting that excluding the museum specialist from the bargaining unit would unduly fragment the employer's workforce.

NOW, THEREFORE, it is


ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Executive Director Cathleen Callahan are AFFIRMED.

ISSUED at Olympia, Washington, this 6th day of January, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARILYN GLENN SAYAN, Chairperson


PAMELA G. BRADBURN, Commissioner


THOMAS W. McLANE, Commissioner