STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	
UNITED PROFESSIONAL SOCIAL WORKERS	CASE 27098-E-15
	DECISION 12542-B - PSRA
Involving certain employees of:	
STATE – SOCIAL AND HEALTH SERVICES	DECISION OF COMMISSION

Rhonda J. Fenrich, Attorney at Law, Fenrich & Gallagher, P.C., for the petitioner, United Professional Social Workers.

Cheryl L. Wolfe, Assistant Attorney General, and *Albert H. Wang*, Assistant Attorney General, Attorney General Robert W. Ferguson, for the employer, Washington State Department of Social and Health Services.

Edward Earl Younglove III, Attorney at Law, Younglove & Coker, P.L.L.C., for the incumbent, Washington Federation of State Employees.

The Washington Federation of State Employees (WFSE) represents employees working for the Washington State Department of Social and Health Services (employer) in the Institutions bargaining unit. Employees in the Psychiatric Social Worker 3 (PSW3) job classification work at Western State Hospital (WSH), Eastern State Hospital (ESH), and the Child Study and Treatment Center (CSTC). The PSW3 job classification is included in the Institutions bargaining unit. The United Professional Social Workers (UPSW) filed a petition to represent employees in the PSW3 classification. For employees in the PSW3 classification to vote on whether they want to be represented by the UPSW, the PSW3 job classification would need to be severed from the Institutions bargaining unit.

After a hearing, the Executive Director concluded that severance was not appropriate. *State – Social and Health Services*, Decision 12542 (PSRA, 2016). The UPSW filed a timely appeal identifying the findings of fact and conclusions of law it found to be in error.

None of the parties filed appeal briefs. A party is not required to file a brief. However, parties are afforded an opportunity to file appeal briefs to direct the Commission to any error that may exist in the decision below or to explain why the decision should be sustained. Appeal briefs may also be used by the parties to point to any relevant portion of the record or legal precedent that supports their positions on appeal.

In this case, the Executive Director applied *Yelm School District*, Decision 704-A (PECB, 1980), in the context of the unit determination standards to determine whether the petitioned-for employees continued to share a community of interest with the existing bargaining unit. He concluded that severance was not appropriate because (1) the PSW3s continued to share a community of interest with the larger bargaining unit; (2) the PSW3s worked with other employees to perform their jobs; (3) the history of bargaining did not establish a basis for severing the employees; and (4) the PSW3s' duties, although unique, did not demonstrate that the overall community of interest had been altered.

The issue before the Commission is whether the PSW3 job classification should be severed from the Institutions bargaining unit. Historically, the Commission has applied factors from *Yelm School District*, Decision 704-A, in severance cases. Those factors are based upon *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966). Many of the *Yelm School District* factors assess whether a community of interest continues to exist between the petitioned-for employees and the existing bargaining unit. We affirm the Executive Director's conclusion that severance is not appropriate in this case. While doing so, we find it necessary to clarify the standard for determining whether severance is appropriate.

BACKGROUND

The employer operates three psychiatric hospitals. WSH and ESH are adult facilities. The CSTC houses children between the ages of 5 and 18. All three facilities are accredited by the Centers for Medicare and Medicaid Services, the federal agency that administers the Medicare and Medicaid programs. Approximately 86 PSW3s work at the hospitals.

Since 1972, the WFSE has represented a bargaining unit of "Institutions" employees in the employer's workforce. The Institutions bargaining unit comprises a variety of job classes working inside and outside of WSH, ESH, and the CSTC. Employees working in the PSW3 job classification were initially included in that bargaining unit. RU-38 (1972). In 1975, the PSW3 job classification was excluded from the bargaining unit. Amendment to RU-38 (1975). Since 1989, the PSW3 classification has been included in the bargaining unit. RU-277 (1991).

At the hospitals, the PSW3s are assigned to hospital wards and are responsible for evaluating the needs of the patients in their respective areas. They perform a majority of their work at the hospitals but occasionally work outside of the hospital setting.

The PSW3s serve as the primary liaisons with patients' families and community providers who assist patients in transitioning back into society. They are responsible for patient treatment planning, psychosocial assessments, psychotherapy, psychoeducational groups, discharge planning, and interventions on patients exhibiting complications. The PSW3s are the only employees at the hospitals licensed to perform social work duties as required by federal law.

There are differences in the duties of the PSW3 employees at WSH, ESH, and the CSTC. For example, the PSW3s at ESH and WSH work as part of interdisciplinary teams responsible for the overall treatment of each patient. The interdisciplinary teams consist of a PSW3, a psychologist, a registered nurse, a psychiatric associate, and a member of the rehabilitation department. The teams may also include a physician. Each team member provides input about a patient's care based upon his or her specific expertise and the team works in a collaborative fashion to ensure the patient is receiving the best care possible.

The psychiatrists, psychiatric associates, and the employees in the rehabilitation department are all included in the WFSE's Institutions bargaining unit. The registered nurses and physicians are included in separate bargaining units represented by different unions.

At the CSTC, the PSW3s focus on the admission, discharge, and coordination of mental health treatment plan services for patients. Certain PSW3 duties may only be performed by a licensed social worker, such as weekly chart notes, treatment plan review meetings, and intake and discharge documentation. Each PSW3 is supervised by a psychologist who signs off on all plans of care. The duties of the PSW3s at the CSTC overlap with other employees working at the facility, such as the Psychiatric Child Care Counselors who regularly perform similar tasks to the PSW3s. However, the Psychiatric Child Care Counselors are not qualified to sign off on patient treatment plans. The Psychiatric Child Care Counselor positions are included in the Institutions bargaining unit.

ANALYSIS

Applicable Legal Standards

Standard of Review

The Commission reviews conclusions of law, as well as applications 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 (Amalgamated Transit Union, Local 757)*, Decision 7087-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. *Id.*

Standard for Determining Whether Severance Is Appropriate

For any severance petition to be successful, the resulting bargaining units must be appropriate under RCW 41.80.070. The unit determination depends initially upon a showing that the employees seeking severance enjoy a community of interest among themselves. *Quincy School District*, Decision 3962-A (PECB, 1993). If either of the resulting bargaining units would be inappropriate under the statute, then severance shall not be granted and the original unit shall be maintained.

A bargaining unit of all employees of an employer is an inherently appropriate unit because all employees share a community of interest in dealing with their common employer. *Federal Way Water and Sewer District*, Decision 3228 (PECB, 1989). A "wall-to-wall" unit is normally thought of as an appropriate, if not the most appropriate, bargaining unit structure. *Raymond School District*, Decision 3202 (PECB, 1989). The determination of what is an appropriate bargaining unit is a function delegated by the Legislature to the Commission. RCW 41.80.070(1).

Even when the resulting bargaining units are appropriate under RCW 41.80.070, severance is not presumed. Rather, a labor organization petitioning to become the representative of a group of employees who are already part of a larger existing bargaining unit bears a significant burden to demonstrate that severance is appropriate. The Commission imposes a stricter scrutiny on severance petitions than may be applied in initial organization cases. *Cowlitz County*, Decision 4960 (PECB, 1995).

In *Yelm School District*, Decision 704-A, the Commission first applied a six-part test to determine whether severance was appropriate:

1. Whether or not the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen performing the functions of their craft on a nonrepetitive basis, or of employees constituting a functionally distinct department, working in trades or occupations for which a tradition of separate representation exists.

2. The history of collective bargaining of the employees sought and at the plant involved, and at other plants of the employer, with emphasis on whether the existing patterns of bargaining are productive of stability in labor relations, and whether such stability will be unduly disrupted by the destruction of the existing patterns of representation.

3. The extent to which the employees in the proposed unit have established and maintained their separate identity during the period of inclusion in a broader unit, and the extent of their participation or lack of participation in the establishment and maintenance of the existing pattern of representation and the prior opportunities, if any, afforded them to obtain separate representation.

4. The history and pattern of collective bargaining in the industry involved.

5. The degree of integration of the employer's production processes, including the extent to which the continued normal operation of the production processes is dependent upon the performance of the assigned functions of the employees in the proposed unit.

6. The qualifications of the union seeking to "carve out" a separate unit, including that union's experience in representing employees like those involved in the severance action.

Since *Yelm School District*, those six factors have not exclusively been the considerations used to make unit determinations in severance situations. Other factors worthy of consideration may appear during the course of litigation. *City of Lynnwood*, Decision 10668 (PECB, 2010).

In *Yelm School District*, the Commission applied the criteria set forth in *Mallinckrodt Chemical Works*, 162 NLRB 387, to determine whether severance was appropriate. The Commission borrowed *Mallinckrodt Chemical Works* from the private sector. When the National Labor Relations Board adopted the *Mallinckrodt Chemical Works* criteria, it cautioned that the criteria "should not be taken as a hard and fast definition or an inclusive or exclusive listing of the various considerations involved in making unit determinations . . . ." *Id.* at 398. The *Mallinckrodt Chemical Works* criteria have been repeatedly used as a mechanical test and have not been easy to apply in cases involving public-sector employees.

After reviewing the existing standard to determine whether a petition to sever employees from an existing bargaining unit should be granted, we find that the current standard determines whether a community of interest exists but does so in a way that obfuscates the issue. A mechanical test, such as that set forth in *Yelm School District*, does not allow for full consideration of the facts presented in each case. After much deliberation, we clarify the test to present it in more comprehensible language.

Clarified Standard for Determining Whether Severance Is Appropriate

The Legislature delegated to the Commission the authority to determine appropriate bargaining units. RCW 41.80.070(1). When the Commission certifies a bargaining unit, a presumption that the bargaining unit is appropriate attaches. *Cowlitz County*, Decision 12115 (PECB, 2014). That

other groupings of employees may also be appropriate, or more appropriate, does not render a bargaining unit certified by the Commission inappropriate. The Commission is required to certify *an* appropriate bargaining unit, not the *most* appropriate bargaining unit. We decline to use severance as a means to create a more perfect unit.

A petition to sever employees from an existing bargaining unit seeks to disrupt the status quo of the existing bargaining unit. To obtain severance, the petitioner must overcome the stability and maturity of relationships usually present in established bargaining units that lead to sound labor relations. To do so, the petitioner must establish either that (1) the petitioned-for employees no longer share a community of interest with the existing bargaining unit or (2) the incumbent bargaining representative has inadequately represented the petitioned-for employees.

The petitioner must show that a change in the community of interest has occurred to make the existing bargaining unit inappropriate. This is usually demonstrated by substantial changes to the job duties or working conditions of the petitioned-for employees or substantial changes in the employer's operations. *King County*, Decision 11441-A (PECB, 2013).

To show inadequate representation, the petitioner must demonstrate more than a short-term inability of the incumbent union to achieve the bargaining goals of the petitioned-for employees or the employees' dissatisfaction with their bargaining representative's accomplishments. Inadequate representation may be shown by factors such as lack of opportunities to participate in union affairs, lack of collective bargaining agreement provisions addressing specific concerns of the employees at issue, lack of involvement by the petitioned-for employees in negotiation processes, and lack of any formal or informal efforts by the incumbent union to resolve issues of concern to the employees at issue. Where a bargaining relationship has been in existence, the "history of bargaining" weighs against its disruption by severing the unit into two or more components. *Cowlitz County*, Decision 4960. These considerations should not be read as a mechanical test, as each case is fact dependent and may present different variables worthy of consideration.

If the petitioner meets its burden of proof and the conditions for severance are met, the Commission will evaluate the appropriateness of the petitioned-for bargaining unit and whether the residual unit would maintain its appropriateness. If either of the resulting bargaining units would be inappropriate under the statute, then severance shall not be granted and the original unit shall be maintained. If severance is appropriate and the petitioned-for bargaining unit is an appropriate unit, an election—which includes the incumbent union on the ballot—must be conducted among the petitioned-for employees.

Application of Standards

The UPSW appealed Findings of Fact 8, 11, 12, and 14. After reviewing the record, we conclude that substantial evidence supports those findings of fact. We affirm those findings of fact. We have applied the revised standard to the findings of fact to determine whether the petitioned-for employees should be severed from the Institutions bargaining unit. We affirm the Executive Director's conclusion that the petitioned-for employees maintain a community of interest with the existing bargaining unit.

The UPSW bears the burden of proving that the PSW3s no longer share a community of interest with the Institutions bargaining unit or that the WFSE has inadequately represented the PSW3s, and that the petitioned-for bargaining unit is appropriate. The UPSW has failed to meet its burden of proof.

The Institutions bargaining unit is presumptively appropriate because the Washington State Personnel Board certified it in 1972, and when the Legislature passed the Personnel System Reform Act in 2002, all existing bargaining units were presumed to be appropriate. RCW 41.80.070(2). In 1972, the Personnel Board included the PSW job classification, with the exception of the PSW4s, in the bargaining unit. The PSW job classification remained in the bargaining unit until 1975. In 1991, the PSW job classification was accreted back into the bargaining unit. Since then, the WFSE has represented the PSW job classification. While the PSW job classification was excluded from the bargaining unit from 1975 until 1991, that period of exclusion neither overcomes the presumption that the certified bargaining unit is appropriate

nor establishes that the petitioned-for PSW3s no longer share a community of interest with the bargaining unit.

The UPSW has failed to show the existence of any changes in the petitioned-for employees' working conditions that would have resulted in a change in circumstances and disrupted the community of interest between the petitioned-for employees and the existing bargaining unit. There is no evidence that the PSW3s' job duties or working conditions have changed. The only change found is that at one time the employer employed Forensic Therapists to perform social work duties. However, to comply with the Centers for Medicaid and Medicare Services' standards, the employer began hiring only licensed social workers to perform social work duties. This change in delivery of services did not change the duties, skills, or working conditions of the PSW3s.

The PSW3s work as part of interdisciplinary teams to provide services to clients. While the PSW3s may be the only employees who can perform their job duties, this alone is not enough to establish that a community of interest no longer exists with the Institutions bargaining unit. The UPSW has failed to demonstrate that the petitioned-for employees no longer share a community of interest with the existing bargaining unit.

The Institutions bargaining unit is a large bargaining unit. Large bargaining units are appropriate and prevent the fragmentation of an employer's workforce. Whether creating additional bargaining units would fragment the employer's workforce is a criteria the Commission must examine in determining whether severance is appropriate. RCW 41.80.070(1). While the employer's workforce includes other smaller bargaining units of classification-specific employees, such as nurses and physicians, severing the PSW3s from the existing bargaining unit would add an additional bargaining unit and begin the process of fragmenting the employer's workforce.

The PSW3s are a small portion of the Institutions bargaining unit. Accordingly, the PSW3s may not feel as though they have a voice in the bargaining unit. However, PSW3s have taken a role in union affairs. Employees in the PSW3 job classification have served as shop stewards. At the time of the hearing, one PSW3 was serving as a shop steward. This demonstrates that the WFSE

has not excluded PSW3s from participating in union activities and having an active role in representing employees.

In a severance petition, the history of bargaining weighs heavily against severance. A long history of bargaining exists between the employer and the WFSE. The history of bargaining includes evidence of the WFSE's representation of the PSW3s. The WFSE has processed grievances on behalf of PSW3s. This is evidence that the WFSE has attempted to resolve issues on behalf of the PSW3s and has not ignored them.

One of the main complaints of the PSW3s is that they are not adequately compensated. It is important to note that until the passage of the Personnel System Reform Act in 2002, unions representing state employees could not negotiate wages. The record contains evidence that the WFSE has negotiated for and obtained general wage increases for all bargaining unit employees. Additionally, the WFSE negotiated for and obtained a class-specific wage increase for the PSW3s. While the amounts of the increases may or may not be to the satisfaction of the employees, the WFSE has successfully negotiated on behalf of the PSW3s. The petitioned-for employees' inability to achieve their bargaining goals or their dissatisfaction with the WFSE's accomplishments is insufficient to establish a failure to represent that would warrant severance.

CONCLUSION

Severance is appropriate in limited circumstances. A severance petition will not be used to make a bargaining unit more perfect. Severance will not be granted because employees are dissatisfied with their current representative. For a severance petition to be successful, the petitioner must show that the petitioned-for employees no longer share a community of interest with the existing bargaining unit or that the incumbent bargaining representative has inadequately represented the petitioned-for employees. If the conditions for severance are met, then the Commission will determine whether the petitioned-for bargaining unit is appropriate and whether the residual bargaining unit remains appropriate. If so, then the Commission will conduct an election.

The UPSW has not met its burden of proving that the petitioned-for employees no longer share a community of interest with the existing bargaining unit. There is no evidence of changes to the PSW3s' job duties or working conditions that disrupted the community of interest. Further, there is no evidence of substantial changes in the employer's operations that would make the existing bargaining unit inappropriate. The UPSW has not met its burden to prove that the WFSE has not adequately represented the PSW3s. Rather, PSW3s have participated in union affairs and the WFSE has successfully negotiated on their behalf. We affirm the Executive Director's decision denying severance.

ORDER

The Findings of Fact, Conclusions of Law, and Order issued by Executive Director Michael P. Sellars are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 22nd day of June, 2016.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

MARK E. BRENNAN, Commissioner

Commissioner McLane did not participate in the consideration or decision of this case.

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DECISION 12542-B - PSRA has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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