STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AUTOMOTIVE AND SPECIAL SERVICES, TEAMSTERS LOCAL 461, Complainant, vs. PIERCE COUNTY, Respondent.	)	CASE NO. 3938-U-82-611 DECISION NO. 1845 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Frank and Rosen, by Steven B. Frank, Attorney at Law, appeared on behalf of the complainant.

Don Herron, Prosecuting Attorney of Pierce County, by Joseph F. Quinn, Deputy Prosecuting Attorney, appeared on behalf of the respondent.

On January 22, 1982, Automotive and Special Services, Teamsters Local 461, filed with the Public Employment Relations Commission (PERC) a complaint charging unfair labor practices against Pierce County. The complainant charges that the employer unilaterally transferred bargaining unit work to non-unit employees; altered the scope of the unit by the elimination of a bargaining unit position without bargaining; and refused to recognize and bargain with the unit over the creation of a new position which is alleged to be an accretion. A hearing was held May 10 and 11, 1982 before Katrina I. Boedecker, Examiner. The parties filed post-hearing briefs.

FACTS

The union has represented certain classifications in Pierce County, including employees of the office of the Clerk of the Superior Court, under a collective bargaining agreement effective January 1, 1980 through July 1, 1981. A successor agreement was negotiated for the period July 1, 1981 through December 31, 1982. Among the employees of the clerk's office are deputy clerks working in court rooms, vault clerks, file clerks, probation clerks, support clerks and court clerks. Effective May 1, 1981, Pierce County adopted a home rule charter which transformed the Clerk of the Superior Court from an elected official to an executive department head who reports to the County Executive.

Pierce County Superior Court has 13 trial departments; each department has an assigned judge. In addition, there is an arraignment division. Traditionally, each department was assigned a deputy clerk from the office of the clerk of the superior court. Each judge hired his/her own bailiff. Both functions are mandated by statute.[1/]

The duties of the deputy clerk in a courtroom include: keeping and affixing the seal of the court; recording the proceedings of the court in the courtroom journal and memo sheet; being responsible for all the exhibits during a trial; obtaining the files from the clerk's office; verifying the judge's signature on documents; filing documents in the clerk's office; attending court whenever it is in session; administering oaths; receiving the verdict of the jury; entering orders and decrees; recording the names of witnesses and jurors and their time of attendance and distance of travel; and entering all the papers filed in court in the journal of the clerk's office.

The bailiff's duties include: making coffee; screening the judge's phone calls; calling attorneys to determine trial standing; being in charge of the jury during jury trials; scheduling sentencing and revocation hearings; and attending to personal matters of the judge. It should be noted that these are the general duties. Each department judge varies the duties slightly.

In August, 1981, County Executive Booth Gardner met with Superior Court Judge Stanley W. Worswick to advise him of a fiscal problem being experienced by the county and to propose an "experiment" combining the duties of the deputy clerk and the bailiff in one person - a judicial assistant. The experiment was to run from January 1, 1982 through June 30, 1982 and affect eight of the trial departments.

On September 28, 1981, Judge Worswick speaking for the court wrote to Gardner and agreed to implement the experiment with certain points of clarification. Among them were:

> 4. Personnel reductions necessary to accommodate both the experiment and further implementation of the proposal, if the experiment is successful, are within your authority and responsibility, except for the judge's selection prerogrative.

1/ The duties of the clerk are detailed in RCW 2.32.050 and RCW 36.23 et seq. RCW 36.16.070 allows county officers to employ deputies who may then perform any act which the principal is authorized to perform. The duties and compensation of the bailiff are detailed in RCW 2.32.330; RCW 2.32.360 and RCW 2.32.370.

> 5. The employee to perform the combined functions in these departments will be selected by and under the control of the judge, except that as to clerical functions, the employee will be deputized by and will accept the direction of the county clerk acting in cooperation with the judge. (all emphasis added)

In September, 1981, Lew Hatfield, secretary/treasurer of Local 461, was informed by the shop steward in the clerk's office that Pierce County was contemplating combining the positions of deputy clerk and bailiff. On October 2, 1981, legal counsel for the union wrote the county:

* * *

> Local 461 has received no notice or opportunity to bargain with respect to this change. Importantly, Local 461 has never agreed to abandon its right to represent the employees of the Pierce County clerk including any such employees who are, or may become, clerks/bailiffs. [judicial assistants] Furthermore, Local 461 has never agreed to permit the work of the clerk to be performed by unrepresented employees of any description, including the clerk/bailiffs in question.
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> It therefore is the position of Local 461 that the merger of the clerk and the bailiff functions into the clerk/bailiff position does not remove the clerks who may be appointed as clerk/bailiff from the Local 461 bargaining unit; nor will the clerk/bailiff position be exempted from the existing bargaining unit.
>
> In view of the concerns of the employees in your office with respect to these matters, Local 461 would appreciate a letter from you agreeing that the clerk/bailiff position is part of our existing bargaining unit, and agreeing to bargain with respect to that position.
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> * * *

The county's response was to suggest PERC resolve the question of the appropriate bargaining unit status of the new position. The county also stated that its position was that if Local 461 were recognized as the exclusive bargaining representative for the new positions, the scope of bargaining would cover wages and fringe benefits only since the superior court judges would control the conditions of employment and decide who was to be employed. Indeed, on October 12, 1981 the clerk of the Pierce County Superior Court, Brian Sontag, wrote the judges in the experiment asking which of the judges would be hiring the deputy clerk for the position. Evidence in the record shows that the judges wrote back to Sontag and indicated four judges would hire the court clerk who had been assigned to the judicial department and four judges would hire the bailiff to fill the

judicial assistant position. When the bailiffs were changed to judicial assistants, the deputy clerks assigned to these departments "bumped back" into the clerk office. The reshuffling of personnel caused the layoff of an employee, John Merrell, from the clerk's office.

On November 17, 1981, Hatfield sent a package proposal to the personnel director for Pierce County to begin negotiations for the "newly created position of clerk/bailiff". The nine-point package included proposals for the judicial assistants' wages, seniority, overtime, vacation, sick leave, and the following:

> 6. Employee assigned to department number rather than individual judge.
>
> 7. All applicants for the clerk/bailiff position must be referred to the judges by the clerk from the pool of employees in the department of the clerk.
>
> 8. The county will recognize and bargain with Local 461 for clerk/bailiffs.
>
> 9. Local 461 and the clerk will continue to honor superior court judges' right to reject employees referred to the judges by the clerk for clerk/bailiff positions.

Hatfield testified that the union has never taken the position that a judge could not send a court clerk back to the pool or release the court clerk from assignment to a department without just cause. Hatfield testified that number 6, 7, and 8 above were new proposals. Number 9 was maintaining the status as in the previous contract and he had negotiated wages, seniority, bumping rights, overtime, vacation, and sick leave for deputy clerks under prior contracts.

A question that arose regarding accrual of vacation for the judicial assistants who were participating in the experiment was handled through the county's personnel department without bargaining with the unit.

The county responded to the package proposal November 30, 1981, to Hatfield, writing in part:

* * *

> The County does not believe it is appropriate to engage in collective bargaining at this time. The Public Employment Relations Commission (PERC) procedures allow your union an avenue to be recognized as the bargaining representative and allow the employees involved the right to vote on who will represent them. The positions and program will not begin until January 1, 1982. The County requests your local to follow PERC procedures.
>
> Several of the items listed in your November 17, 1981, letter would not be subject to collective bargaining under Zylstra vs. Piva, 85 Wn.2d 743, 539 P.2d 823 (1975)

A former deputy clerk estimated that since she had been hired as a judicial assistant, she spent 90% of her time doing clerk work in nonjury trials and 75% of her time doing clerk work in jury trials.[2/] The remaining time was spent performing bailiff functions.

A former bailiff, who is now a judicial assistant, estimated that he spends 50% of his time on clerk work on jury cases and 30% on nonjury cases. One of the judges involved testified that the judicial assistant overall performed 30% clerk functions and 70% bailiff functions. This was a judge who had hired his bailiff to fill the judicial assistant position.

The "experiment" has now become a permanent staffing pattern for Pierce County.

POSITIONS OF THE PARTIES

First the union argues that PERC has jurisdiction of this matter since the judicial assistants are "dual status" employees; thus for purposes of applicability of the collective bargaining act are considered county employees for negotiating all matters having to do with wages. The union concedes the judicial assistants are not covered by the act for purposes of hiring, firing or actions controlled by the superior court judges. The union goes on to argue that by creating the judicial assistant position and eliminating the court clerk position, Pierce County violated the duty to bargain since it unilaterally changed terms and conditions of employment. Additionally, the union contends that the employer unilaterally transferred work historically performed by the bargaining unit without bargaining the issue. The union urges that the appropriate remedy is to order the employer to bargain with the union over the wages, hours, and wage related items for the judicial assistants or alternatively Pierce County should be ordered to restore the status quo ante and bargain. In either case, the union argues that the remedy include an order directing Pierce County to reinstate any employee who has been laid off because of the expansion of the experiment and made whole for lost wages and fringe benefits during the period of the layoff.

The employer argues that Pierce County is not a public employer for all purposes for the judicial assistants because the judicial assistants are "dual status" employees and therefore it contends that the union should use

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2/ Generally there is more clerk work in a nonjury trial and there are more nonjury trials in the county.

PERC representation procedures to become the exclusive bargaining representative of a newly created position. Because of the dual status of the employees, the county contends that it would be statutorily inappropriate to accrete the newly created position to the existing bargaining unit.

DISCUSSION

In the complaint charging unfair labor practices, the union set out three allegations:

a. At all times material prior to January 1, 1982 complainant represented court clerk employees in an appropriate collective bargaining unit of employees of respondent.

b. Effective January 1, 1982 respondent, without affording the union notice or the opportunity to bargain, created a new position of clerk-bailiff in 8 out of 13 judicial departments of the Pierce County Superior Court.

c. Before and after January 1, 1982 respondent unilaterally transferred bargaining unit work to employees in the new clerk-bailiff position; eliminating the bargaining unit position of court clerk in each of the judicial departments here involved; and refused to recognize or bargain with complainant as the exclusive collective bargaining representative of the clerk-bailiffs, notwithstanding the fact that the clerk-bailiff position is an accretion to complainant's bargaining unit.

Appropriate Bargaining Unit

There is no controversy that a unit of employees in the court clerk's office is an appropriate bargaining unit. The union's demand that the newly created judicial assistant position (labeled clerk-bailiff in the complaint) be accreted to the bargaining unit is, however, a demand to represent an inappropriate unit. The judicial assistants are dual status employees. They work for joint-employers: Pierce County and the Superior Court of Pierce County. Superior Courts are constitutionally created entities of the state and outside the scope of RCW 41.56. In Zylstra v. Piva, 85 Wa.2d 743 (1975). the Washington State Supreme Court was presented with the question whether employees of a juvenile court were public employees of a county within the meaning of RCW 41.56.020 or whether they were employees of the judicial branch and outside the scope of the statute established by the legislative branch of the government. The court wrote:

> Thus plaintiffs are hired and fired by the juvenile court judges, and are compensated by the county. We

> conclude that for the purposes of the applicability of the collective bargaining act, plaintiffs may be classed as having a dual status: they're employees of the county for purposes of negotiating matters relating to wages including benefits relating directly to wages such as medical insurance. Thus wage negotiations with the Board of County Commissioners are appropriately controlled by the provisions of the bargaining act. However, for purposes of hiring, firing, working conditions, and other matters necessarily within the statutorily responsibility of the juvenile court judges, plaintiffs are employees of the court and thus of the state's judicial branch. Adhering to the doctrine of Roza Irrigation District v. State, 80 WA.2nd 633 (1972), these matters do not fall within the purview of the bargaining act.

The record in the present case establishes that judicial assistants are similarly situated. The superior court judges have the prerogative to hire or fire their own judicial assistants. The judges establish the working conditions in each judicial department or courtroom. But the judicial assistants are paid through funds from the county.[3/]

A bargaining unit which commingles employees who are exclusively under one employer with a group of employees who are partially under that employer and also under the jurisdiction and control of another employer has been held to be an inappropriate bargaining unit. City of Lacey, Decision No. 396 (PECB, 1978); Thurston County Fire Protection District No. 9, Decision No. 461, (PECB, 1978); Sno-Isle Vocational Skills Center, Decision No. 841 (EDUC, 1980). The union's October 2nd letter to the employer is basically a demand for voluntary recognition to represent the judicial assistants as part of the union's existing bargaining unit. Pierce County was correct in its October 14th response to deny voluntary recognition since the union was claiming an inappropriate unit.

Local 461 or any other union offering an appropriate showing of interest, is free to begin representation procedures for a unit of "judicial assistants" if it desires to represent the judicial assistants for purposes of collective bargaining.

Notice and Opportunity to Bargain

Although the union would first have to follow the representation procedures of RCW 41.56.070 and Chapter 391-25 WAC et seq in order to bargain for the

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3/ Judicial assistants of the Pierce County District Court have been found not to be dual status employees and under the sole control of one public employer. Pierce County, Decision No. 1039, (PECB, 1980).

judicial assistants, it does have the right to bargain the employer's decisions which impact the present unit's work or scope. South Kitsap School District, Decision No. 472 (PECB, 1978); Lakewood School District, Decision No. 755-A (PECB, 1980).

The county first approached the Superior Court in August. The county's lack of notice to the union at that time is distressing. However, the fact that the union had actual knowledge that the county was contemplating such an experiment within a short time of the county's approach to the Superior Court, and more than three months prior to the institution of the experiment, shows that the county's lack of direct notice had a de minimus impact on the union's opportunity to bargain. A union does not have to have formal notice of an intended change, if the union does in fact know of the plans and a formal announcement would be futile. U.S. Lingerie Corp., 170 NLRB 750, Love's Barbeque Restaurant, 245 NLRB 78. The entire reason for requiring notice to the union is to allow a meaningful opportunity for the union to offer suggestions and alternatives and to allow the employer a chance to consider the proposals in good faith. The three-month period between the time the union had actual notice and the implementation of the experiment was adequate time for the union to bargain for the rights of the employees whose employment status would be altered by the experiment.

The union complaint that it did not have an opportunity to bargain over the creation of the new position of judicial assistant is outside of the union's bargaining unit. The Commission has held previously that an employer is free to create positions outside a bargaining unit without bargaining with any union. Lakewood, supra.

Transfer of Unit Work and Elimination of a Bargaining Unit Position

The judicial assistant experiment was not presented to the union as a fait accompli, since the union did have actual notice of it with enough time for meaningful bargaining to occur. Therefore, to find for the complainant in this case, the union must have made a demand of the employer to bargain the impact and effects of the experiment on the present unit members and the employer must be found to have refused the demand.

Only the most generous reading of the union's October 2nd letter allows a slim request to bargain the impact of the experiment to emerge. The two-page letter includes one sentence which reads:

> Furthermore, Local 461 has never agreed to permit the work of the clerk to be performed by unrepresented employees of any description, including the clerk/bailiffs [judicial assistants] in question.

However, the thrust of the paragraph containing the quoted sentence, as well as the emphasis of the other seven paragraphs in the letter is a demand that the judicial assistants be accreted into the union's bargaining unit. The employer's October 14th response denying the request for voluntary recognition does not comment on bargaining about the effects of the experiment. The November 17th letter from the union is clearly a nine-point collective bargaining proposal for the judicial assistants. The letter begins:

> Following are items the Teamsters Union Local No. 461 wishes to negotiate for the newly created position of Clerk-Bailiff in the Pierce County Clerk's Office: ... (emphasis added)

The union was off on a tangent demanding bargaining for a group for which it had no right to do so. The union did not request the employer to bargain the impact of the experiment in a clear and coherent manner. Although two of the points might be read as an attempt to alleviate some of the experiment's impact on the unit members, the employer will not be held to have to ferret out veiled proposals. Nor did the union offer valid alternatives to the experiment for the employer to consider in good faith.

The Commission has been hesitant to find a waiver of bargaining rights and examines such cases in great detail. See: City of Centralia, Decision No. 1534-A (PECB, 1983), wherein the Commission wrote:

> In City of Yakima, Decision No. 1124-A (PECB, 1981) the transfer of inspection work from the fire department to another department was proposed for public discussion over a period of four months and included public hearings in which the union voiced its opposition to the proposal, yet the union never requested bargaining on the subject. We are reluctant to infer a waiver of bargaining rights, but did so in City of Yakima to prevent a party from bringing a failure-to-bargain unfair labor practice charge after having failed to seize upon any opportunity to bargain.

In the instant case, the union had enough advance notice of the experiment to be able to bargain effectively for its unit members. It chose instead to hammer away at an area in which it had no legal right to be.

FINDINGS OF FACT

1. Pierce County is a public employer within the meaning of RCW 41.56.030(1).

2. Pierce County Superior Court is not a public employer within the meaning of RCW 41.56.030(1)

3. Automotive and Special Services, Teamsters Local 461 is a bargaining representative within the meaning of RCW 41.56.130(3), and is the exclusive bargaining representative of an appropriate bargaining unit of employees of Pierce County.

4. In August, 1981, County Executive Booth Gardner met with Superior Court Judge Stanley W. Worswick to advise him of the economic problems of the county and to propose an "experiment" to have the duties of the deputy court clerk and the bailiff performed by one person - a judicial assistant.

5. The experiment was based purely on economic grounds, and there was no union animus involved.

6. The union had actual notice of the experiment by September, 1981.

7. In bargaining with the employer about the experiment, the union continually demanded the judicial assistants be accreted to its bargaining unit.

8. The union never made a clear and coherent demand of the employer to bargain the impact or effects of the experiment on its unit members.

9. The experiment started January 1, 1982; it has now become a permanent staffing pattern.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over Pierce County under RCW 41.56 et. seq.

2. Judicial assistants are employees of a joint employer: Pierce County and Pierce County Superior Court. A bargaining unit which would combine certain employees of the Pierce County Court Clerk and the judicial assistants would not be an appropriate bargaining unit for collective bargaining within the meaning of RCW 41.56.030(4).

3. Pierce County did not violate RCW 41.56.140(1) and (4) by creating the position of judical assistant without discussing the creation with the union since the position is outside the bargaining unit.

4. Since the complainant had adequate prior information and failed to timely request bargaining on the issues, it waived its right to bargain; therefore, Pierce County did not violate RCW 41.56.140(1) and (4) by its transfer of bargaining unit work outside the bargaining unit without the agreement of the union.

On the basis of the above findings of fact, conclusions of law and the record as a whole, the Examiner makes the following:

ORDER

The complaint charging unfair labor practices filed in the above-entitled matter is dismissed.

DATED at Olympia, Washington, this 6th day of February, 1984.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Katrina I. Boedecker

KATRINA I. BOEDECKER, Examiner