STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: CAMAS SCHOOL DISTRICT NO. 117 For clarification of an existing bargaining unit of employees represented by: PUBLIC SCHOOL EMPLOYEES OF WASHINGTON	CASE NO. 1783-C-78-83 DECISION NO. 790 PECB ORDER CLARIFYING BARGAINING UNIT

Taisto A. Pesola, WSSDA Labor Relations Consultant, appeared on behalf of the employer.

Gail P. Sessions, attorney at law, appeared on behalf of the exclusive bargaining representative.

By a petition filed on October 16, 1978, the above-named employer requested that the Public Employment Relations Commission clarify an existing bargaining unit with respect to the positions of "Supervisor of Maintenance and Operations" and "Supervisor of Transportation". A hearing was held on February 23, 1979 before Ronald L. Meeker, Hearing Officer. Both parties filed post-hearing briefs.

BACKGROUND

The parties have had a bargaining relationship which dates back to a voluntary recognition agreement some five and one half years prior to the hearing (computed as circa the autumn of 1973). The current job descriptions for the disputed positions had been in effect for at least three years prior to the hearing (computed as circa the winter of 1976). The parties to this proceeding were parties to a collective bargaining agreement signed on January 13, 1978 and effective for the period September 1, 1977 through August 31, 1979. That agreement contains the following provisions:

> Section 1.1. The School Board and the Superintendent of the District recognize the Association as the exclusive bargaining representative of all the classified employees in the following job classifications: Transportation, Custodial, Maintenance, Food Service, and Aides, for the purpose of consulting and negotiating on appropriate matters applicable to any and all employees within the bargaining unit. EXCEPT: An Administrative Assistant, and/or Board Clerk whose duties imply a confidential relationship to the School Board and/or Superintendent.

> Section 1.1.1. Nothing in this contractual agreement shall preclude the supervisors of Transportation and Maintenance from fulfilling their usual and customary managerial responsibilities.

That agreement provided for annual "wage reopeners", and was in fact reopened for negotiations for 1978-79. A letter of agreement dated December 5, 1978 was signed by the parties on January 3, 1979 which specifically establishes the wage rates for the disputed positions.

The employer's administration is headed by its superintendent of schools. The disputed individuals, along with several others, report to a director of business services. The employer conducts its collective bargaining negotiations through an outside consultant.

POSITIONS OF THE PARTIES

The employer seeks exclusion of the disputed positions from the existing bargaining unit, citing the growth of the community served by the District, their status as members of an administrative council established by the superintendent, confidential access to labor relations policies of the employer, conflicts of interest between the exercise of supervisory authority and unit membership, and their role in the continuity of District operations in the event of a strike. The employer relies heavily on the decision of the Commission in City of Richland, Decision 279-A (PECB, 1978).

The union moved early in the proceedings for dismissal of the petition, claiming a lack of jurisdiction to deal with the issue at this time. The union contends that the disputed individuals are not "confidential" employees within the meaning of RCW 41.56. Relying heavily on the decision of the Commission in City of Buckley, Decision 287-A (PECB, 1977), the union takes issue generally with the Commission's unit determination practices and contends that these employees should not be removed from the bargaining unit in which they have historically been placed.

DISCUSSION

Timeliness of the Petition

The petition was filed by the employer while the parties were in negotiations on a limited reopener of a two-year agreement. The definition of the bargaining unit was not one of the "Reopener" issues, and the union contends that the employer is barred from filing a unit clarification petition under such conditions.

A unit clarification may be made only in the absence of a question concerning representation. See: WAC 391-21-300. Many of the same arguments

advanced by the union in this case were considered and rejected previously by the Commission when it concluded that the "contract bar" principles applicable to questions concerning representation are inapplicable to unit clarification cases.

> "The determination of appropriate bargaining units is a function delegated by the legislature to the Commission.[3/] Unit definition is not a subject for bargaining in the conventional "mandatory/permissive/illegal" sense, although parties may agree on units.[4/] Such agreement does not indicate that the unit is or will continue to be appropriate. In this case, we find the unit agreed to by the parties to be inappropriate under current policy. A recognition agreement or a collective bargaining agreement does not bar the filing of a unit clarification petition, and such petitions may be filed at any time a disagreement exists concerning unit definition in the absence of a question concerning representation.
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> 3/ RCW 41.56.060
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> 4/ Douds v. Longshoremen's Association, 241 F.2d 278, 282 (CA2, 1957)."
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> City of Richland, Decision 279-A (PECB, 1978); aff. Benton County Superior Court, 1979. (Emphasis in original)

As noted in Richland, supra, the conditions for disturbing an existing unit definition involve factors in addition to the timing of the petition.

Some additional observations are noted: First, to the extent that "confidential" exclusions are claimed, the dispute involves the question of whether the individuals involved are employees within the meaning of the Act. It is elementary that "jurisdiction" may be raised at any time, and that "employee" status is jurisdictional to the assertion of any and all rights under RCW 41.56. Second, the contract relied upon by the union as a "bar" has long since expired, and one or more "window" periods have been available during which a timely petition could have been filed even if the "contract bar" time rules were made applicable. Finally, some distinction between PERC practices and the practices and precedents under the National Labor Relations Act is necessitated by the omission of the right to strike, including the "recognition strike" and "unfair labor practice strike" concepts, in the context of the public sector. Acceptance of a contract bar theory such as that urged by the union would encourage employers to tie up bargaining over the negotiation of unit issues or to seek a hiatus between contracts in order to assure their access to unit clarification procedures. The injection of any such motivating force into the public sector bargaining environment would be counter-productive to the overall statutory purpose by encouraging or increasing the risk of unlawful strikes by public employees.

Exclusion as "Confidential"

The "confidential" claims advanced by the employer present a difficult question on this record. It was the uncontroverted testimony of the superintendent of schools that:

> "The men will serve and have served as a member of the district committee which establishes negotiation parameters and strategies. I am responsible as a designate of the Board -- designated member of the administration for negotiations. These men are consulted and are participant in that area." (Tr. p. 14).

Most of the employer's evidence concerning "confidential" related to information concerning business activities of the school district other than its collective bargaining/labor relations policies. Such information is not of the type protected by the "confidential" exclusion of RCW 41.56.030(2)(c), and it is concluded that the superintendent's isolated statement, standing alone, is insufficient to sustain the heavy burden imposed by the Supreme Court in IAFF v. City of Yakima, 91 Wn.2d 101 (1978) and by the Commission in City of Seattle, Decision 689-A (PECB, 1979) on those who would exclude public employees from collective bargaining rights as "confidential" employees. In particular, there has been no showing by the employer of the need for access to confidential information in the context of its overall management structure, nor of the intimate and fiduciary relationship which justifies exclusion.

Exclusion Under Unit Determination Principles

There is absolutely no question from this record that the disputed individuals are now and for some time have been "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act. They are involved in hiring, evaluation, discharge, assignment, transfer and grievance administration. However, they have been included in the bargaining unit by the voluntary recognition agreement of the parties since the onset of the relationship, they have worked under an unchanged job description for the last four years, and they were specifically acknowledged to be and bargained for as supervisors when the 1977-79 collective bargaining agreement between the parties was consumated. A change of circumstances involving the addition of supervisory duties would clearly justify exclusion from the bargaining unit. White Pass School District, Decision 573-A (PECB, 1979); Eatonville School District, Decision 793 (PECB, 1979). However, the evidence indicates that even a developing "evaluation" program merely represented a codification or formalization of practices which have been going on in the District for some time.

The union discerns a conflict between the decisions of the Commission in City of Buckley, Decision 287-A (PECB, 1977), where supervisors voluntarily

included by the parties in a rank-and-file unit were left in that unit absent a change of circumstances, and City of Richland, supra, where supervisors were removed from a bargaining unit upon a conclusion that their continued inclusion was inconsistent with then-current unit determination standards. The Richland decision, issued in February, 1978, limited the Buckley decision issued three months earlier, by recognizing the need to undo faulty unit determinations imposed under a previous but erroneous interpretation of the law. The Commission has never expressly reversed its Buckley decision, and in fact distinguished that decision in its decision in White Pass, supra. If the Buckley decision remains viable, the instant case has to be one in which Buckley is controlling. Unlike the situation in Richland, where the unit description written into the parties' collective bargaining agreement had been imposed on the parties by the Department of Labor and Industries under its now-rejected employee definition and unit determination practices, there is no evidence here of an administrative certification of the bargaining unit involved. The disputed individuals were acknowledged by the parties to be supervisors when the 1977-79 contract was signed some 9 months after the Commission decided in City of Tacoma, Decision 95-A (PECB, 1977) that supervisors are employees within the meaning of the Act and, more than 4 months after the Supreme Court had reached the same conclusion in METRO v. Department of Labor and Industries, 88 Wn.2d 930 (1977). At the time these individuals were first included in the unit, and at the time their current job descriptions were written, the decisions of the Department of Labor and Industries would have suggested the possibility of exclusion from the coverage of the Act. As indicated in Buckley, supra, the employer's change of heart about a voluntary recognition is clearly not a sufficient basis for disturbing the established bargaining unit. The employer's concerns in this case about the possibility of an unlawful strike are subject to remedy without disturbing a long-standing unit description. See: Clark County, Decision 290-A (PECB, 1977).

FINDINGS OF FACT

1. Camas School District No. 117 is a public employer within the meaning of RCW 41.56.020 and RCW 41.56.030(1).

2. Public School Employees of Camas, an affiliate of Public School Employees of Washington, is a labor organization within the meaning of RCW 41.56.010 and a bargaining representative within the meaning of RCW 41.56.030(3).

3. Public School Employees of Camas has been recognized as the exclusive bargaining representative of classified employees of Camas School District No. 117 excluding confidential employees. A dispute has arisen as to whether the supervisor of maintenance and operations and the supervisor of transportation should be excluded from that bargaining unit.

4. The supervisor of maintenance and operations and the supervisor of transportation each work under job descriptions which had been in effect for a substantial period of time without change. The disputed individuals have authority, in the interest of the employer to act or effectively recommend action on hiring, discharge, evaluation, assignment and grievance disposition.

5. The record in this proceeding does not disclose that the disputed individuals necessarily have an intimate fiduciary relationship with the superintendent of schools of the employer on matters involving the labor relations policies of the employer.

6. The 1977-79 collective bargaining agreement between the parties expressly covered the disputed positions and made provision to avoid precluding their fulfilling their usual and customary responsibilities as supervisors.

CONCLUSIONS OF LAW

1. No question concerning representation presently exists in the bargaining unit described in paragraph 3 of the foregoing findings of fact, and the Public Employment Relations Commission has jurisdiction in this matter to issue an order clarifying bargaining unit.

2. The supervisor of maintenance and operations and the supervisor of transportation are public employees within the meaning of RCW 41.56.030(2).

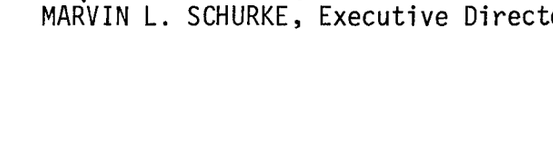
3. The supervisor of maintenance and operations and the supervisor of transportation have been included in the existing bargaining unit by agreement of the parties and no change of circumstances has been shown which warrants a conclusion that their continued inclusion in that unit is inappropriate.

ORDER

The bargaining unit described in paragraph 3 of the foregoing findings of fact is clarified to continue the inclusion of the supervisor of maintenance and operations and the supervisor of transportation.

DATED at Olympia, Washington this 28th day of December, 19 79.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director