

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
OLYMPIA EDUCATION ASSOCIATION)	CASE NO. 1870-C-78-88
)	
For clarification of an existing bargaining unit of employees of:)	DECISION NO. 799 EDUC
)	
OLYMPIA SCHOOL DISTRICT NO. 111)	ORDER CLARIFYING BARGAINING UNIT

Symone Scales, attorney at law, appeared on behalf of the petitioner.

Perkins, Coie, Stone, Olsen and Williams, by Thomas E. Platt, attorney at law, appeared on behalf of the employer.

Leslee Bailey appeared on behalf of intervenor Olympia Educational Aides Association.

The Olympia Education Association (OEA) filed a petition with the Public Employment Relations Commission on December 4, 1978 seeking a ruling on the question of whether individuals employed by Olympia School District No. 111 as "Tutor-Counselor" in the "English as a Second Language Program" are properly included in the non-supervisory educational employee bargaining unit represented by the OEA. The Olympia Educational Aides Association (OEAA) intervened in the proceedings as the current bargaining representative for the disputed classification. A pre-hearing conference was held on April 19, 1979. A formal hearing was held on June 7, 1979 before Katrina I. Boedecker, Hearing Officer. The employer and the OEA filed post-hearing briefs.

POSITIONS OF THE PARTIES

As originally filed, the petition made reference to only one employee. At the pre-hearing conference and at the hearing, the OEA acknowledged the existence of two incumbents in the disputed classification, and altered its position to seek the transfer of both of those employees to the bargaining unit which it represents. The OEA relies on the fact that both employees hold valid teaching certificates, and on the definition of "employee" under RCW 41.59. It also contends that the disputed individuals perform the same tasks as other certificated employees of the district. It asks, therefore, for an order transferring the disputed positions from the "Aides" unit where they are presently represented for the purposes of collective bargaining

under RCW 41.56 to its non-supervisory educational employee unit created pursuant to RCW 41.59.080(1).

The employer moves for dismissal of the petition, claiming that a unit clarification would disturb existing bargaining relationships and under both PERC and National Labor Relations Board precedent should not be made absent a change of circumstances. The employer contends that the disputed positions are and always have been "classified" positions, that the positions do not require, and the incumbents do not act, under certification as is required for employee status under RCW 41.59, and that the possession of teaching certificates by the incumbents is merely coincidental in the absence of a job requirement for certification.

A representative of the Olympia Educational Aides Association appeared at both the pre-hearing conference and at the formal hearing in this case. While that organization did not take a significant role in the presentation of evidence or argument, it has never disclaimed the disputed positions.

BACKGROUND

The District has, at all times pertinent hereto, recognized the Olympia Education Association as the exclusive bargaining representative of its non-supervisory educational employees. The District has, since 1975, recognized the Olympia Educational Aides Association as the exclusive bargaining representative of its "aide" employees. Both organizations have collective bargaining agreements with the District. In addition to differing salary schedules, those contracts contain different grievance procedures, different evaluation procedures, different reduction-in-force provisions, different leave provisions and different vacation benefits.

The "English as a Second Language" (ESL) program was established by the District during the summer of 1975 in response to advice from the Office of the Governor that a number of Indo-Chinese students, not fluent in the use of English, would be moving into the Olympia area. The District employed Xuan Le Vu as a classified employee to supervise the ESL program and to act as a tutor. The District initially also hired students and recent graduates of The Evergreen State College to act as tutor-counselors in the ESL program. None of those persons held Washington teaching certificates.

Xuan Le Vu recommended that the District hire Grace Hannah, and she had been employed by the District as a tutor-counselor for three years at the time of the hearing. The District did not require a teaching certificate for the ESL tutor-counselor position at the time Hannah was hired. Xuan Le Vu continued her work with the program as a classified employee as of the time of the hearing. Both Hannah and the third employee in the program, Pat McCann,

held valid Washington teaching certificates, but both were included in the "aides" bargaining unit and were treated as classified employees from the time of their hire through the time of the hearing in this matter.

During the period immediately preceding the hearing, Hannah's assignment had been at the elementary school and junior high school level, while McCann worked at the high school level. Hannah testified at the hearing in this matter; but McCann was not called as a witness. Hannah testified that as near as she knew, both she and McCann performed the same type of duties. The ESL program is not a regular grade level class. There is no formal curriculum. Students in need of tutoring in the ESL program are referred after a determination made by the regular classroom teachers, the building principal and the reading specialist. The work of the program involves provision of extra help to students in connection with their transition between their native Indo-Chinese languages and the English language.

DISCUSSION

The Employer's Motion to Dismiss

The employer has made what appears to be a procedural motion for dismissal, but that motion turns on the substantive result on the merits of the case. A unit clarification petition may be filed at any time a dispute exists concerning unit definition. City of Richland, Decision 279-A (PECB, 1978) (aff. Benton County Superior Court, 1979).

Were the Olympia Educational Aides Association more active in this case, it would have the trappings of a jurisdictional dispute between the two employee organizations. Such a dispute could also be raised at any time, especially where, as here, the jurisdictional dividing line between the bargaining units is also the jurisdictional dividing line between RCW 41.56 and RCW 41.59. Both units were recognized prior to the creation of the Public Employment Relations Commission, and there is no indication that either unit description was the product of an administrative determination.

The employer's argument is primarily based on the portions of the Richland decision which directs that substantial changes in the duties and responsibilities of a position must occur before an existing bargaining unit will be altered through unit clarification proceedings. The disputed positions have existed since 1975, and the OEA acknowledged there had been no significant changes of circumstances. While that has a significant impact on the outcome of the case, it is not conclusive. The possibility of an initial unit determination which is defective on grounds of statutory jurisdiction must be explored.

Possession of a Certificate

It is undisputed that Grace Hannah and Pat McCann each hold some form of valid "certificate" under the education laws of this State, and that they are both employees of Olympia School District No. 111. From those two facts, the OEA makes a quantum leap to the conclusion that both are "educational employees" under RCW 41.59.020(4). The employer opposes any such interpretation, pointing to the existence of "classified" positions within school districts and the anomalous results under the OEA's theory should the district ever employ as food service worker or janitor an individual who happens to hold a valid Washington teaching certificate.

The position of the employer is well taken. It is an economic reality of the late 1970's that there is no shortage of "certificated" persons in the work force. Unit determinations must be based upon position requirements, and cannot be guided by incumbent qualifications. Simply because the incumbents possess credentials which make them over-qualified for their position does not mean that they can boot-strap themselves into the highest category for which they are qualified.

Position Requirements For ESL Tutor-Counselor

The educator certification process is regulated by Title 28A RCW and administered by the superintendent of public instruction. RCW 28A.01.130 defines "certificated employee" for certain purposes including RCW 41.59 as those persons who hold certificates as authorized by rule or regulation of the state board of education or the superintendent of public instruction. Similarly, RCW 28A.67.070 uses the defined word as its own definition when establishing that persons employed as "teacher, principal, supervisor, superintendent or other certificated employee" must hold the certificate required by law or the state board of education for the position for which the employee is employed. The rules and regulations adopted pursuant to RCW 28A.01.130 establish the various certificates which must be held as a condition of employment in the State's school system. No certification is required for employment as an "aide". However, no party or research discloses the existence of established administrative procedures of the superintendent of public instruction or the state board of education to which the Public Employment Relations Commission could defer its jurisdiction to determine whether the disputed position should be placed under RCW 41.56 or RCW 41.59 for bargaining purposes.

The OEA's simplistic "she has a certificate, ergo she is certificated" argument has already been disposed of, and the employer's simplistic "we did not call it a certificated position, ergo it is classified" argument must meet a similar fate. Extension of the district's argument to its logical extremes could leave to the anomalous result whereby employee bargaining

rights under RCW 41.59 would be prejudiced without meaningful review. The disposition of this case must be based on analysis of what the tutor-counselors are called upon to do as the job content of their position.

The record does not sustain the OEA's argument that the district has made the disputed positions de facto teaching positions by the imposition of job requirements. Classroom teachers participate in establishing learning goals and objectives for their students; they monitor the students' progress toward these goals; and they are statutorily required to make periodic reports on progress to the parents of the district's students. (See: RCW 28A.58.760 (2)(g). The district's teachers do in fact prepare and maintain daily lesson plans which are reviewed by the building principal, they make out report cards, and they confer personally with parents to report progress. There is no evidence that similar duties are required of the tutor-counselors. Hannah maintains a daily record of her activities in books supplied to her by Xuan Le Vu, but those books are not reviewed by the building principal and are not the same type of planning books supplied by the district to its certificated staff. The ESL tutor-counselors, like other classroom aides, make reports to the regular classroom teachers concerning the performance of the students referred to the ESL program. Such aide reports are kept by teachers in their advisory folders. They may be made available to a student's parents by the teacher, but do not become a part of the student's permanent record and do not move with the student. At the request of the ESL coordinator, Hannah has compiled a report card each quarter for her junior high school students; but this was not done at the request of certificated teachers, and there is no similar procedure for elementary school students. The fact that Hannah has chosen to prepare what she describes as "lesson plans" and individualized reports is commendatory. The sincerity of her desire to be a fine tutor-counselor is obvious from this record. However, the voluntary assumption of additional tasks does not make the added tasks conditions of employment. Even if recognition were given for the "lesson planning" and "report card" activities, the record fails to disclose a requirement for conducting parent-teacher conferences.

Numerous additional facts are noted which distinguish the conditions of ESL tutor-counselors from those of certificated employees of the district. Hannah and McCann are both supervised by Xuan Le Vu, a classified employee, as well as by certificated teachers in their respective buildings. No other instance is noted where members of the district's certificated staff are supervised by classified employees. The tutor-counselors work six hours per day for 180 days annually, while the certificated employees have a 7½ hour work day for 183 days per year. The tutor-counselors have a work day which both starts and ends at times different from the certificated staff. The tutor-counselors are paid on an hourly basis whereas the certificated staff is salaried. The tutor-counselors have three to seven students at a time,

whereas the average class size for the district's certificated staff is in the 25 to 30 range. The tutor-counselors have no responsibilities with respect to faculty or grade level meetings, non-instructional duties and the supervision of extra-curricular activities, while all of those requirements are imposed on the certificated staff. The tutor-counselors, unlike certificated staff, have no authority to initiate suspension or other formal disciplinary action against a student. Tutor-counselors have none of the responsibilities imposed on classroom teachers for the preparation of a "check-out" list at the end of each school year.

Finally, when a member of the district's certificated staff is absent, the district hires a certificated substitute from a list of "substitute teachers" maintained for that purpose. This is not done when a tutor-counselor is absent.

FINDINGS OF FACT

1. Olympia School District No. 111 is a public employer within the meaning of RCW 41.56.020 and RCW 41.56.030(1) and a school district within the meaning of RCW 41.59.020(5). Among other programs, the district operates and employs tutor-counselors in the "English as a Second Language" program.

2. Olympia Educational Aides Association 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). Olympia Educational Aides Association has been recognized as the exclusive bargaining representative of all regularly employed classified educational aides employed by Olympia School District No. 111. The classification of "tutor-counselor" in the English as a Second Language program has been included since its inception in that bargaining unit.

3. Olympia Education Association is an employee organization within the meaning of RCW 41.59.020(1) which has been recognized as the exclusive bargaining representative of all non-supervisory educational employees employed by Olympia School District No. 111.

4. Certification under the education laws of the State of Washington was not made a condition of employment at the time Xuan Le Vu, Grace Hannah and Pat McCann were hired as tutor-counselors for the English as a Second Language program.

5. There is no evidence in this record of a substantial change of the requirements for employment as, or in the duties and responsibilities of, tutor-counselors in the English as a Second Language program from the time of their placement in the "aides" bargaining unit up to the time of the hearing in this matter.

6. Substantial differences exist between the duties, skills and working conditions of the tutor-counselors in the English as a Second Language program and the certificated employees of the district, extending to rates of pay, hours of work, length of work day and year, lesson planning, progress reporting, non-instructional duties, supervision, reporting within the district, student discipline, faculty meetings, and replacement during absences.

CONCLUSIONS OF LAW

1. No question concerning representation presently exists and the Public Employment Relations Commission has jurisdiction pursuant to RCW 41.56 and RCW 41.59 to issue an order in this matter clarifying existing bargaining units.

2. The record does not establish that Grace Hannah and/or Pat McCann are educational employees within the meaning of RCW 41.59 or that they have a community of interest with the employees in the bargaining unit described in paragraph 3 of the foregoing findings of fact.

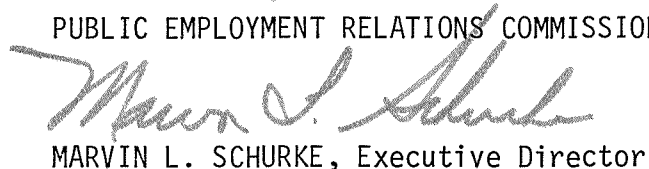
3. Tutor-counselors in the English as a Second Language are public employees within the meaning of RCW 41.56.030(2).

ORDER

The bargaining unit referred to in paragraph 2 of the foregoing findings of fact is clarified to continue its inclusion of the classification of tutor-counselor in the English as a Second Language program; and that classification is not within the bargaining unit of non-supervisory educational employees referred to in paragraph 3 of the foregoing findings of fact.

DATED at Olympia, Washington this 3rd day of January, 1980.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARVIN L. SCHURKE, Executive Director