

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
BREMERTON ASSOCIATION OF)	CASE NO. 3917-C-82-184
EDUCATIONAL SECRETARIES AND AIDES,)	
an affiliate of PUBLIC SCHOOL)	DECISION NO. 1620 - PECB
EMPLOYEES OF WASHINGTON)	
For clarification of an existing)	
bargaining unit of employees of:)	ORDER CLARIFYING
BREMERTON SCHOOL DISTRICT NO. 100C)	BARGAINING UNIT
_____)	

Donald Payne, Chief Negotiator, appeared on behalf of the petitioner at hearing. Edward A. Hemphill, Legal Counsel, Public School Employees of Washington, represented the petitioner in connection with the motion for intervention.

Raaen & Dionne, by James J. Dionne, Attorney at Law, appeared on behalf of the employer.

Faith Hanna, Staff Attorney, Washington Education Association, appeared on behalf of the intervenor: Bremerton Education Association.

Bremerton Association of Educational Secretaries and Aides (BAESA) filed a petition with the Public Employment Relations Commission on January 11, 1982, seeking a ruling with respect to whether the position of "Vocational/Special Needs Coordinator" should be included in the bargaining unit of employees of Bremerton School District No. 100C (district) represented by BAESA. A hearing was held on April 14, 1982, before Ronald L. Meeker, Hearing Officer. Both the petitioner and the employer filed post-hearing briefs.

Based on the position taken by the employer in the proceedings, an inquiry was directed, under date of December 2, 1982, to the Bremerton Education Association (BEA), to determine whether that organization claimed a right to represent the position in question. On December 17, 1982, the Bremerton Education Association filed a motion for intervention and also for re-opening of the hearing in the matter. The original parties were directed to file written statements of position on the motion. Both the petitioner and the employer filed responses asserting that the Bremerton Education Association had actual notice of the hearing in the instant matter, and that

a representative of the Bremerton Education Association attended the hearing in the instant matter. They each opposed granting of the motion for intervention, but particularly objected to reopening of the hearing under the circumstances indicated. By letter dated March 9, 1983, the motion for intervention was granted. The motion for reopening of the hearing was denied, and the Bremerton Education Association was afforded a period of time in which to file a brief in the matter.

BACKGROUND

The district and the BAESA have had a collective bargaining relationship for a number of years. Those parties have a collective bargaining agreement dated September 24, 1981 and effective for the period from September 1, 1981 through August 31, 1983. The bargaining unit is described in Article I, Section A of that collective bargaining agreement as:

All aides, clerk typists; leave clerks; accounts payable clerk; cashier; receptionist/centrex operator; secretaries to principals, assistant principals, counselors, librarians; secretaries to supervisors of special education, maintenance, special services, transportation, vocational education, federal projects; secretaries to director of curriculum, director of business, director of Kitsap Peninsula Vocational Skills Center; payroll clerk; print room technician, purchasing co-ordinator; food services coordinator; computer specialist/secretary.

Article I, Section C provides for notice by the employer to the union of the establishment of any new position, negotiations between the parties prior to filling new positions and advertising for applicants for new positions under the contractual procedures for position vacancies.

The bargaining unit described above includes essentially all of the office clerical and program support employees of the district. Specifically excluded from the unit are the secretaries to the superintendent and the director of employee relations. Historically, some of the persons holding "aide" jobs and included in the BAESA bargaining unit have held certification as educators under Title 28A RCW. The district, however, identifies certain positions which it claims to be "professional" in nature and excluded from the BAESA bargaining unit. They are: Tutor Counselor, Indian Education Program; Coordinator of Indian Student Affairs; Infant Care Center Operator and Accountant.

During the 1980-81 school year, Joyce Montgomery was employed as an instructional aide at Bremerton High School, working in the pre-vocational special education department. In that position she provided services to approximately 70 students. She was occasionally asked for input on

development of the individualized educational programs (IEP's) for students, she tutored students and she worked on community job placement for handicapped vocational students.

While the details are not clear, it appears from the record that the employer made application for and received a grant for funding for a special project in the area of vocational education for handicapped students. Under date of October 23, 1981, the employer posted a "Notice of Position Opening" for a full-time position entitled "Vocational/Special Needs Coordinator" at Bremerton High School. The notice indicated: "This is an exempt position not represented by any bargaining unit." The notice did not declare the position to be "certificated", but specified:

Qualifications Preferred (But Not Required):

- 1) Hold or be able to qualify for vocational certification
- 2) Degree in Special Education.

Numerous applications were received, including applications from persons holding certification as educators under Title 28A RCW. Montgomery was one of the applicants. Although she has completed substantial college study, there is conflicting evidence in the record as to whether she has actually received the Bachelor of Science degree towards which she has been working. It is clear from the record that she does not hold educator certification under Title 28A RCW. In making its hiring decision, the employer was influenced, according to the testimony of its director of employment relations at page 89 of the transcript, by a lack of time for a training period, so that whoever was selected for this position would have to be able to conduct immediately all functions involved. The period for applications closed on Friday, October 30, 1981, and Joyce Montgomery was appointed to the new position effective November, 1981. Testimony of an employer witness established that, in making its decision to hire Montgomery, the district passed over applicants with certification in both vocational and special education as well as some with far greater experience than Montgomery.

Montgomery's duties in her new position represented some expansion of her duties as an aide in the BAESA bargaining unit. Her basic responsibilities are described in the position announcement as:

- 1) Help select those handicapped students for Vocational Education enrollment who show potential for successful employment.
- 2) Coordinate the handicapped student's IEP development.
- 3) Monitor the handicapped students' progress at least weekly.
- 4) Assist the Vocational Education teachers with individualized instruction for the handicapped students as needed.

- 5) Work closely with the Pre-Vocational job placement staff in placing handicapped students on the job.
- 6) Help monitor handicapped student work progress and work with the students to overcome any weak areas.
- 7) Prepare on-going evaluation reports to measure the effectiveness of the coordinated program.

Testimony indicates that the foregoing list of seven items can be summarized into three areas of responsibility: Classroom activity (mainstreaming), pre-vocational activity (tutoring) and the job (community placement). The duties performed by Montgomery in her new position differ from her old job least in the area of "the job", as she continued to make contacts with employers in the community concerning jobs for handicapped vocational students. She continues to do some tutoring under the more formalized structure of her new job description. Her involvement with the development of IEP's has been increased from occasional consultation to carrying a share of the development responsibilities, and this "mainstreaming" of students thus appears to be the greatest area of change. She continues to work with about 70 students. The position appears to constitute a bridge between the district's special education and vocational education departments. The Vocational/Special Needs Coordinator thus works somewhat independently under the collective supervision of the building principal, the supervisor of vocational education and the supervisor of special education. Those, however, are the same officials who supervised Montgomery in her former aide position.

The employer did not consult with the BAESA concerning the salary for the new position. Instead, the district converted the base salary for a beginning certificated teacher to an hourly rate and used the resulting \$11.48 per hour amount as the pay rate for the new position. That rate is \$1.00 per hour higher than the highest rate available to an aide under the BAESA collective bargaining agreement. When the position was advertised as "exempt", the BAESA claimed the position as a part of the BAESA bargaining unit. The BAESA's claim was denied by the employer, leading to the filing of the petition for unit clarification in the instant case.

Four present members of the BAESA bargaining unit testified, without contradiction, concerning past or present assignments within the BAESA bargaining unit involving: testing of students, testing for vocational aptitude, placement of students with employers, interviewing of students, monitoring student progress, tutoring, and otherwise assisting certificated personnel with individualized instruction of students. The district did not exercise its opportunity to cross-examine those witnesses, and did not directly contradict their testimony. In response, a district witness characterized those activities as differing in terms of the subjective decision-making called for by the position in dispute.

The "Accountant" position pointed out by the employer reports directly to the district's Director of Business. The position has been in existence for some time, and has evidently never been claimed by or included in the unit represented by the BAESA. A bachelor of arts degree and substantial experience are required. The job description placed in evidence suggests responsibility as the supervisor of business office clerical personnel included in the BAESA bargaining unit, and the employer's director of employee relations characterized the position as "confidential". The position is paid at a rate of \$11.65 per hour for year-around employment, implying an annual compensation of approximately \$24,230.

The Coordinator of Indian Student Affairs position pointed out by the district reports directly to the district's Assistant Superintendent for Instruction. The position has been in existence since at least 1974, and has never been included in the bargaining unit represented by the BAESA. The individual must be an Indian. The position is paid at a rate of \$14.63 per hour for 6 hours a day on 180 days per year, implying an annual compensation of \$15,800.

The announcement for the "Infant Care Center Operator" position pointed out by the employer is dated September 9, 1981. The position requires 45 college quarter hours of credit in early childhood education and experience with infants and toddlers, but does not require a college degree or certification. The district's director of employee relations denied that the position had ever been a subject of discussion between the district and the BAESA. The position is paid at a rate of \$7.79 per hour for 7 hours per day, 182 days per year. The annual compensation at those rates would be approximately \$9925. That is within the range of compensation rates provided in the BAESA contract, but was established by the district in comparison to the market for similar services in the community.

The announcement for the "Tutor/Counselor, Indian Education Program" position pointed out by the district is dated December, 1981. By its terms, the position was to exist for the 1981-82 school year only, and specifically for the period from January 11, 1982 to June 30, 1982. A college degree or credits, especially in education, was listed as desirable but not required. The position was scheduled for 8 hours per day of work during the indicated limited period. Converted to the normal 180-day student school year called for in Title 28A RCW, the \$8.29 hourly rate paid during the limited period would have converted to an annualized income of \$11,937.

POSITION OF THE PARTIES

BAESA contends the Vocational/Special Needs Coordinator should be included in its bargaining unit based on four theories: first, that the position is a

classified position and BAESA represents all classified employees in clerical and teaching support classifications, excluding only the secretaries to the superintendent and to the director of employee relations; Second, that the basic responsibilities of this position are no different from those performed by teacher aides, secretaries, or coordinators employed in the BAESA bargaining unit; Third, that the level of expertise required of the position is no higher than that required for other aides, secretaries and coordinators; and Fourth, that the position is not confidential, supervisory or an administrative assistant.

The district contends the Vocational/Special Needs Coordinator should be excluded from the BAESA bargaining unit, and that the disputed position has a more natural community of interest with the four other classified positions in the district that are not BAESA unit members. The district further contends the disputed position was designed to be independent of daily supervision and that self-motivation was to be an important factor. The district considers the employee holding the position to be a "professional employee" as defined under Section 2(12) of the National Labor Relations Act. Although RCW 41.56 does not, by its terms, have the same provisions for "professional" employees as the NLRA, the district contends the lack of community of interest with the BAESA bargaining unit positions should suffice to exclude this coordinator position from the bargaining unit. In response to the motion for intervention, the district restates a position taken at hearing, to the effect that RCW 41.59.180 should be interpreted so as to create a class of employees in this case "in limbo" between the two collective bargaining laws applicable to school districts, such that the employees would be neither "educational employees" under Chapter 41.59 RCW nor "public employees" under Chapter 41.56 RCW. In the alternative, the district asserted in response to the motion for intervention that the only possible bargaining unit for the disputed position would be a classified employee bargaining unit.

In its motion for intervention, the Bremerton Education Association alleged that the record made in this case gave it a colorable claim that the Vocational/Special Needs Coordinator should be placed in the non-supervisory educational employee bargaining unit represented by the BEA under Chapter 41.59 RCW. In particular, the BEA relied on testimony and employer statements of position to the effect that the employer would have preferred a certificated employee in the disputed position, that a successful applicant holding teacher certification would have been placed on the teacher salary schedule, and that the employer would not have disputed placement of such an employee in the BEA bargaining unit. The BEA directed attention to the duties now performed by the person holding the disputed position, and to previous decisions of the Commission holding that job content is the crucial determinant of employee status under the collective bargaining laws of this

state. Following grant of its motion for intervention, the BEA advised the Commission, in writing, that it desired to withdraw from further participation in the matter. In that correspondence, counsel for the BEA stated: "Although the Association is still very concerned about the District's assignment of certificated responsibilities to a non-certified employee, the Association has decided to pursue these questions through other legal avenues." (emphasis added). The letter goes on to suggest discussion, and possible litigation, between the employer and the BEA concerning transfer of bargaining unit work from the BEA bargaining unit.

STATUTORY AUTHORITY

RCW 41.56.020

This chapter shall apply to any county or municipal corporation, or any political subdivision of the state of Washington except as otherwise provided by RCW 47.64.030, 47.64.040, 54.04.170, 54.04.180, 28.72.010 through 28.72.090, and chapter 53.18 RCW.

RCW 41.56.030

(2) "Public employee" means any employee of a public employer except any person (a) elected by popular vote, or (b) appointed to office pursuant to statute, ordinance or resolution for a specified term of office by the executive head or body of the public employer, or (c) whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit, or any person elected by popular vote or appointed to office pursuant to statute, ordinance or resolution for a specified term of office by the executive head or body of the public employer.

* * *

RCW 41.56.060

The commission, after hearing upon reasonable notice, shall decide in each application for certification as an exclusive bargaining representative, the unit appropriate for the purpose of collective bargaining. In determining, modifying, or combining the bargaining unit, the commission shall consider the duties, skills, and working conditions of the public employees; the history of collective bargaining by the public employees and their bargaining representatives; the extent of organization among the public employees; and the desire of the public employees.

DISCUSSION

Jurisdiction

The position of Vocational/Special Needs Coordinator is a classified position in the Bremerton School District. The line between "certificated"

and "classified" employment under Chapter 28A.67 RCW is sometimes indistinct, suffering from a use of defined terms as their own definition. See: Olympia School District, Decision 799 (EDUC, 1980); College Place School District, Decision 795 (EDUC, 1980); Oak Harbor School District, Decision 1319 (PECB, 1981). In this case, the employer and the BAESA both urge that the position is classified, and the BEA appears to have conceded the point in its letter withdrawing from further participation in the case. The facts support the conclusion. Montgomery lacks the academic degree and certification required for "certificated" employment. The position never required either an academic degree or educator certification.

At the hearing, the district stipulated to the jurisdiction of the Public Employment Relations Commission in this matter. The district does not contend that the position in dispute is "confidential" within the meaning of established precedent interpreting RCW 41.56.030(2), and it quickly backed off from a suggestion that the disputed position held such supervisory authority over other district employees as to be excluded from the BAESA bargaining unit as a supervisor. Were it not for the employer's arguments concerning application of RCW 41.59.180, it would be in order to regard the disputed individual as a "public employee" within the meaning of Chapter 41.56 RCW and to proceed directly with the determination of the substantial, but relatively straightforward, unit determination question arising under RCW 41.56.060. At the very least, the employer's argument concerning a "limbo" between bargaining laws requires a detour to examine the jurisdiction of the Commission in this matter.

RCW 41.59.180 provides:

Notwithstanding the definition of "employee" in RCW 41.59.020, the commission may exclude from the coverage of this chapter any specialized job category of an employer where a majority of the persons employed in that job category consists of noncertificated employees. At such time as a majority of such employees are certificated, the job category may be considered an appropriate unit under this chapter.

The precise legislative concern or purpose is not evident from the language of the section, and the employer has not put forth any evidence or argument concerning the legislative history or intent of the section. Although Chapter 41.59 has been in effect for more than seven years, no previous case is recalled, cited or found in which the Public Employment Relations Commission or the courts have been called upon to directly interpret or apply RCW 41.59.180. While one could speculate wildly as to its meaning and proper application, the context of the section in the total statutory scheme and the facts of this case make such an exercise unnecessary. Within the context of Chapter 41.59 RCW, RCW 41.59.180 stands out as a significant departure from norm. RCW 41.59.080(1) limits the unit determination authority of the

Commission, and that anti-fragmentation principle has been strictly enforced by the Commission. Thus, separate bargaining units for "substitute" teachers, "community service" teachers or "adult education" teachers have been viewed as precluded by RCW 41.59.080(1). Any unit to be created under the last sentence of RCW 41.59.180 would be a substantial departure from the unit determination practices heretofore applied under Chapter 41.59 RCW. Looked at in the broader context of Washington State collective bargaining statutes, Chapter 41.59 deals with a limited class of public employees, but does not stand in isolation. Chapter 41.56 RCW is a statute of general jurisdiction. In two significant decision, Roza Irrigation District v. State, 80 Wn.2d 633 (1972) and Zylstra v. Piva, 85 Wn.2d 743 (1975), the Supreme Court of this State has extended the coverage of Chapter 41.56 RCW into every available nook and cranny of public employment in units of government subordinate to the State. Only the exceptions specifically listed in Chapter 41.56 RCW have been recognized. The employer's argument in this case can be taken to suggest that there has been a constitutionally impermissible amendment of RCW 41.56 by reference in RCW 41.59. We need not go that far on the facts of this case. We are not confronted here with a specialized job category of employees wherein a majority of the incumbents now hold certification as educators, and there is no need for the Commission to consider either an accretion or creation of a separate unit to implement RCW 41.59.180. The interpretation and application of RCW 41.59.180 can thus be left to another day and another case. In the absence of obtaining coverage under Chapter 41.59 RCW, the employee or class of employees involved in this case remain where they have always been, as public employees under Chapter 41.56 RCW.

Professional Status

The employer's arguments concerning a separate appropriate unit of classified "professional" employees based, in substantial part, on the definition of "professional" in the National Labor Relations Act (NLRA). Section 2(12) of the NLRA defines "professional" as:

(a) Any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital as distinguishable from an apprenticeship or from training in the performance of routine, mental, manual or physical processes or (b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) performing related work under the supervision of a professional employee as described in paragraph (a).

Professional employees are employees within the meaning of the NLRA, and are eligible to organize for the purposes of collective bargaining, but are merely entitled by Section 9(b) of the Act to a unit determination election among the professionals prior to their inclusion in a common bargaining unit with non-professional employees. The NLRA definition of "professional" is written and applied in the conjunctive, such that an individual must meet all of the elements of the test to be classified as a professional. Application of that test in the case of the Vocational/Special Needs Coordinator does not lead to a conclusion favoring the employer's argument. Much of the work performed by Montgomery under her new job description is of a nature similar to that which she performed during the previous school year as an aide. Montgomery's own testimony indicates that she has not completed work on a Bachelor of Science degree. The employer's oft-repeated testimony is that she is working independently, and not under direct supervision, and that she was not "in training". Even if she had the college degree, possession of a baccalaureate degree is not automatically or universally an indicator of "professional" status. The employer's past employment of certificated individuals as classified aides is a prime example of such a situation. Further, although the positions are not directly before the Public Employment Relations Commission in this case, the evidence concerning the Tutor/Counselor, the Coordinator of Indian Student Affairs and the Infant Care Center Operator falls short in each case of compelling a conclusion that those individuals would qualify as "professional" under the NLRA.

Community of Interest

The evidence discloses a wide range of skills, duties and independence of function within the BAESA bargaining unit. In a perhaps unintended manner, the employer's arguments tend to demean the capabilities of the wide range of its personnel within the BAESA bargaining unit. The absence of a teaching certificate does not equate with the absence of the ability to think and function independently. The long list of specific job titles recited in the unit description certainly implies that many bargaining unit employees hold highly responsible positions in the school district. The Commission has long favored broad, generic bargaining units among the employees engaged in support of the educational programs of school districts. See: Yelm School District, Decision 704-A (PECB, 1980). Bargaining units are not created on a classification-by-classification or title-by-title basis. Looked at in the larger context of the school district operations, the position in dispute is one of many engaged in support of the educational program of the district.

Of the four positions pointed out by the employer as the core of its suggested separate unit of professional employees, the accountant and coordinator of indian affairs positions appear to have been in existence for a substantial period without claim by the BAESA. Both of those positions

have hourly rates and reporting relationships at or above the highest levels attainable in the BAESA unit. The employer's own witness suggested that any attempt to organize a unit which included the accountant would be met with a "confidential" claim as to that position. The two remaining positions were created at about the same time as the position in dispute in this case. While there is suggestion in the form of questions propounded by the representative of the BAESA that the union had or might claim the positions, those positions are not directly before the Commission in this case and no other case is found in which they have been put at issue before the Commission. One of those positions was stated at the time of its creation to be of limited nature, and may no longer exist. The hourly and annual rates of compensation for those positions are well below the position in dispute and fall well within the range specified in the BAESA contract. The evidence fails to establish that a separate community of interest exists sufficient to conclude that a potential question concerning representation would exist in an appropriate separate bargaining unit in which the Vocational/Special Needs Coordinator should be included.

Finally, the evidence in this record strongly suggests that the position in dispute is merely a revision of the aide position formerly held by its present incumbent. When the position was created in response to a grant applied for by the district, the supervisor resisted imposition of college degree or certification requirements which the incumbent aide could not meet. The employer received applications for only a one week period. The employer passed over candidates acknowledged by the supervisor to have greater qualifications in terms of education, certification and experience. The testimony of the director of employee relations strongly suggests that the employer's real interest in making its hiring decision was an immediacy of function which could logically be achieved only by the incumbent aide or somebody very close to the unchanged portions of the job.

The new position is found to constitute an appropriate accretion to the existing bargaining unit within which many of the duties of the Vocational/Special Needs Coordinator were performed prior to the creation of the new position. See: Oak Harbor, supra.

FINDINGS OF FACT

1. Bremerton School District No. 100C is a school district organized under Title 28A RCW and is a public employer within the meaning of RCW 41.56.030(1).
2. Bremerton Association of Educational Secretaries and Aides (BAESA) is a labor organization and bargaining representative within the meaning of RCW 41.56.030(3).

3. Bremerton School District has recognized BAESA as the exclusive bargaining representative of all classified employees of the district in office clerical and program support (aide) occupations except the secretaries to the superintendent and director of employee relations.
4. Joyce Montgomery holds the newly-created position of Vocational/Special Needs Coordinator. The district, without agreement of the exclusive bargaining representative, purported to create the Vocational/Special Needs Coordinator position as an exempt position excluded from the bargaining unit described in paragraph 3 of these findings of fact. The position does not require certification or a college degree.
5. Montgomery formerly was an instructional aide within the BAESA bargaining unit. In that capacity she performed many of the same duties which she performs in her present position.
6. The hours, duties, skills and working conditions of the Vocational/Special Needs Coordinator are generally within the range established by the collective bargaining agreement between the district and the exclusive bargaining representative for the aides and clerical bargaining unit. The wage rate unilaterally established by the district for the Vocational/Special Needs Coordinator was extrapolated from the minimum salary paid by the district to certificated employees, but was not consistent with the salary schedule practices applied to certificated employees.

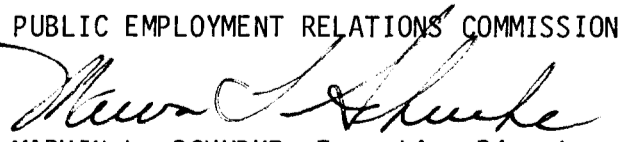
CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56 and no question concerning representation presently exists.
2. The Vocational/Special Needs Coordinator is a public employee within the meaning of RCW 41.56.030(2) who is appropriately accreted to the existing bargaining unit under RCW 41.56.060.

ORDER

The position of Vocational/Special Needs Coordinator is included in the bargaining unit described in Finding of Fact No. 3.

DATED at Olympia, Washington, this 29th day of April, 1983.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director