

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
CENTRAL KITSAP SCHOOL DISTRICT)	CASE NO. 3167-C-80-148
NO. 401)	
For clarification of an existing)	
bargaining unit of its employees)	
represented by:)	DECISION NO. 1296 - PECB
PUBLIC SCHOOL EMPLOYEES OF)	
CENTRAL KITSAP)	ORDER CLARIFYING
)	BARGAINING UNIT

Jerry Gates, Labor Specialist, appeared on behalf of the
Central Kitsap School District No. 401.

Edward A. Hemphill, Attorney at Law, appeared on behalf
of the Public School Employees of Central Kitsap.

On November 11, 1980, the Central Kitsap School District No. 401 filed a petition with the Public Employment Relations Commission, seeking clarification of an existing bargaining unit with respect to the position of "Food Service Manager". A hearing was held at Silverdale, Washington on May 26, 1981, before Katrina I. Boedecker, Hearing Officer. Briefs were filed July 20, 1981. By letter dated January 21, 1982, both parties were invited to comment on the application in this case of Toppenish School District, Decision 1143-A (PECB, 1981) issued September 16, 1981, and both parties responded in writing by January 29, 1982.

BACKGROUND:

The parties have had a collective bargaining relationship since at least 1975. Their 1975-77 collective bargaining agreement made provision for exclusion of a "Food Service Supervisor" from the bargaining unit. The highest ranking food service position for which a wage rate was specified in the 1975-77 contract was that of "Head Cook".

The 1977-79 collective bargaining agreement between the parties also provided for exclusion of a "Food Service Supervisor" from the bargaining unit, but made provision for a bargaining unit classification of "Manager" under the food service heading, with a wage rate more than 18% higher than that of "Cook". A position description for the "Food Service Manager" dated January 25, 1977 indicates responsibilities "in charge of all food service personnel in the absence of the food services supervisor" in addition to

production and recordkeeping responsibilities. On September 12, 1977, just a few days before the 1977-79 collective bargaining agreement was signed, another job description was issued for the same position, adding "supervises all cooks and food service helpers", "interviews all new job applicants; recommends...workers for each new position and assigns positions", and "evaluates all food service workers". Yet another job description for the same position, this one dated "4/78", adds: "maintains strictly confidential information regarding personnel, bidding and related school matters".

At the outset of collective bargaining negotiations in 1979, the district made a proposal that the Food Service Manager position be removed from the bargaining unit, based on increased supervisory workload following an increase in the district's enrollment. Interpreting the testimony of the Food Service Supervisor to reflect the situation as it existed at that time, it appears that most of the direct day-to-day supervision of approximately 50 food service workers in the school district had been shifted to the Food Service Manager. Also indicated was some discomfort with the circumstance that members of the bargaining unit would, by their votes on union affairs, affect the wages and working conditions of their supervisor. The union refused to bargain the unit determination issue, relying on the decision of the Commission in City of Richland, Decision 279-A (PECB, 1978), holding that unit determination is not a mandatory subject of bargaining. Thereafter, the employer withdrew the issue from the negotiations.

For reasons which are not in dispute, the Food Service Manager position became vacant during the summer of 1979. In August, 1979, the employer advertised for and filled an "Assistant Food Service Supervisor" position which supplanted the Food Service Manager position. The union filed a complaint with the Commission charging that it had demanded bargaining and that the employer had committed unfair labor practices by refusing to bargain on the change. (Case No. 2291-U-79-329). As relief, the union requested an order compelling bargaining on any transfer of work out of the PSE bargaining unit, as well as bargaining on the wages, hours and working conditions of the individual involved. On October 31, 1979, the employer filed a petition with the Commission seeking clarification of the bargaining unit and requesting exclusion of the Assistant Food Service Supervisor from the bargaining unit. (Case No. 2425-C-79-107).

On December 26, 1979, the parties executed a letter of agreement containing the results of their 1979 negotiations. Section 1.3 of the agreement was amended, thereby changing the provisions of the contract regarding creation of new positions. Section 1.4, the recognition clause of the agreement, was amended to add certain exclusions, but the Food Service Supervisor continued to be the only excluded food services position. A formal collective bargaining agreement containing the same provisions was signed by the parties on February 27, 1980. That agreement makes specific provision for wages of the Food Services "Manager" at a wage rate 20.8% higher than the "cook" rate.

An Examiner was appointed and notice of hearing was issued in the unfair labor practice case. Prior to hearing, however, the union withdrew the unfair labor practice complaint and the employer withdrew the petition for clarification of the bargaining unit. Orders were issued on August 25, 1980, closing the unfair labor practice case (Decision No. 965 - PECB) and on September 29, 1980, closing the unit clarification case (Decision NO. 988 - PECB). Evidently in connection with the settlement of that litigation, the employer vacated the "Assistant Food Service Supervisor" position and transferred the incumbent, Joan Fowler, to the "Food Service Manager" position. The employer also promulgated a new job description for "Food Service Manager" which was identical except for the position title to the "Assistant Food Service Supervisor" description which it had promulgated in August, 1979.

On November 20, 1980, the employer filed the petition for unit clarification in the instant case, asserting that the position of Food Service Manager is both supervisory and confidential, warranting its exclusion from the bargaining unit.

Except for her job title, Fowler's duties have been the same throughout her tenure with the district. She works an eight hour day, has her own office and shares a secretary with the Supervisor of Food Services. The district has a central kitchen, which supplies pre-packaged meals to the elementary schools in the district, and has four kitchens preparing food for on-site delivery in secondary schools. Fowler travels to the schools and supervises all of the food service employees except the three cooks in the central kitchen. In the absence of the Food Service Supervisor, she has authority over the entire food service operation. Fowler rarely engages in any sort of food preparation, except when a new menu item is introduced.

Fowler is responsible for the hiring of food service employees. She has the right and responsibility to assign, evaluate, discipline and terminate all of the food service employees except the three central kitchen cooks. Her decisions on such matters could be countermanded by the Food Service Supervisor but, to date, never have been. She has handled informal employee complaints and has the authority to hear grievances on behalf of the employer, although no grievance had been filed up to the time of the hearing in this matter. Fowler can grant or deny leave requests, and she is responsible for payroll reports for the food service department. Fowler has evaluated staffing needs and was responsible for the addition of a staff member. She is responsible for completion of State reports on the food service department. She has been consulted by the district for her evaluation of the effects of union proposals made in negotiations, but only as a secondary resource. Direct contacts between the district's administrator for personnel and the Food Service Supervisor are the procedure usually followed. Neither the Food Service Supervisor nor the Food Service Manager have represented the employer at the bargaining table in negotiations with the union.

POSITIONS OF THE PARTIES:

The district contends that the duties of the Food Service Manager imply a confidential relationship. Pointing to the evidence of access to personnel files and her participation, in conjunction with the Food Service Supervisor, in the evaluation of bargaining proposals, the employer contends that Fowler is a "confidential" employee excluded from the coverage of RCW 41.56.030(2)(c). Alternatively, based on her responsibilities in the areas of hiring, firing, disciplining, assigning and processing grievances of employees, the employer contends that Fowler should be excluded from the bargaining unit as a supervisor. In response to the invitation to comment on Toppenish, supra, the employer suggests that Toppenish "change of circumstances" test is satisfied in this case and that the filing requirement in Toppenish should not be applied retroactively.

The union argues that the 1979-81 and previous collective bargaining agreements between the parties contain essentially the same provisions with respect to the scope of the bargaining unit and salary schedules, that the positions of Food Service Manager and Assistant Food Service Supervisor are the same except as to title, that the district was unsuccessful in obtaining exclusion of the Food Service Manager position through negotiations in 1979, and that the organization of the food service operation and the duties of the disputed position have not changed since the 1979-81 agreement was signed. Further, the union contends that supervisory status is not an appropriate basis for exclusion in unit clarification proceedings conducted pursuant to RCW 41.56. It contends that this case is controlled by Toppenish, supra.

DISCUSSION:

The term "confidential", as used in RCW 41.56.030(2)(c), is defined in City of Yakima, 91 Wn.2d 101 (1978), to mean only persons having access to confidential information concerning the labor relations policies of the employer. The district's administrator for personnel testified that she receives labor relations policy goals and objectives from the district's board of school directors, and that she is responsible for carrying them out. The limited evaluative role of the disputed employee, working through the Food Service Supervisor, is too remote to justify a finding that the disputed employee has an "intimate fiduciary relationship" as deputy or administrative assistant to the district's superintendent or bargainers. Access to personnel files is not sufficient to establish a "confidential" relationship. City of Lacey, Decision 396 (PECB, 1978); West Valley School District, Decision 798 (PECB, 1979).

The case for exclusion as a "confidential" fails, so the analysis turns to the arguments concerning exclusion of the disputed individual as a "supervisor", and particularly to the union's arguments concerning the procedure followed here. In Toppenish School District, Decision 1143-A

(PECB, 1981), the Commission affirmed a decision which left supervisors in a rank-and-file bargaining unit where they had been placed by agreement, setting forth the following rule:

"A mid-term unit clarification is available to exclude individuals from a bargaining unit covered by an existing collective bargaining agreement if:

- a) The petitioner can offer specific evidence of substantial changed circumstances that would warrant such an exclusion, or
- b) The petitioner can demonstrate that, although it signed a collective bargaining agreement covering the disputed position, it put the other party on notice that it would contest the inclusion via the unit clarification procedure and filed a petition for unit clarification with the Commission prior to the conclusion of negotiations." (Emphasis supplied).

Application of that rule in Toppenish led to rejection of an employer effort to remove supervisors from a unit by petition for unit clarification, where the collective bargaining agreement covering the disputed positions was signed following the grant of supervisory duties but prior to the filing of the unit clarification petition.

In the case at hand, the evidence establishes assignment of "supervisor" duties to the Food Service Manager as early as the September, 1977 job description. No change of duties has occurred since Fowler's present job description was established in August, 1979. Any increase in supervisory responsibility since August, 1979 appears to be a matter of degree, rather than of kind. The change of title following settlement of the unfair labor practice case is a meaningless formality. There is no evidence whatever of a change of circumstances in the period following withdrawal of the previous cases and the filing of this case. The "change of circumstances" aspect of the Toppenish test is not met.

When the employer signed the 1979-81 collective bargaining agreement on February 27, 1980, it had on file a unit clarification petition questioning the status of the position in dispute in this case. The unfair labor practice charges then on file against the district contained allegations which, if proven, would have been the basis for finding a violation. See: Lakewood School District, Decision 755, 755-A (PECB, 1980); and City of Mercer Island, Decision 1026, 1026-A (PECB, 1981), where employers committed refusal to bargain violations by skimming lead worker positions from bargaining units, in the name of creating excluded positions. The parties represented to the Commission that they had settled their differences, and the employer withdrew its unit clarification petition concerning the position in dispute. Further, the employer placed Fowler in the bargaining unit, under the title specified in the collective bargaining agreement. A period of more than one month transpired during which there is neither

evidence of a continued dispute between the parties nor evidence of any change of circumstances. The employer's petition filed in this case seeks a ruling concerning the very same position, and on the same "supervisory" theory, as in the case withdrawn less than two months previously. The policy of the Commission giving effect to agreements placing "supervisors" in bargaining units is traced back to City of Buckley, Decision 287-A (PECB, 1977) and Camas School District, Decision 790 (PECB, 1979), both of which were relied upon in Toppenish School District, Decision 1143 (PECB, 1981) which was decided before the hearing in this matter. More importantly, both Buckley and Camas were decided long before the filing of the petition in this case. Any discomfort that refusal to consider the supervisor issues in this case exalts form over substance is mitigated by the fact that the employer offers no explanation whatever for the procedure followed or justification why the rule adopted by the Commission in Toppenish School District, Decision 1143-A (PECB, 1981) should be circumvented by the Commission staff in the first case presented for its application.

FINDINGS OF FACT

1. Central Kitsap School District No. 401 is, and at all times material herein has been, an employer within the meaning of RCW 41.59.020.
2. Public School Employees of Central Kitsap is, and at all times material herein has been, an employee organization within the meaning of RCW 41.56.020(3).
3. The collective bargaining agreement between the parties for the period September 1, 1979 through August 31, 1981 recognizes Public School Employees of Central Kitsap as the exclusive bargaining representative of all employees in the school district performing work as classified employees, except Food Service Supervisor, Transportation Supervisor, Maintenance Supervisor, Coordinator of Facility Planning, Community School Coordinators, Purchasing Agent, District Accounts Supervisor, Secretary to the Superintendent, Secretary to the Assistant Superintendent for Curriculum, Secretary to the Assistant Superintendent for Business and Secretary to the Administrative Assistant for Personnel. Said agreement makes specific provision for the "Food Service Manager" as a member of the bargaining unit.
4. A dispute has arisen between the Central Kitsap School District and Public School Employees of Central Kitsap as to whether the position of Food Service Manager is to be excluded from the bargaining unit.
5. Operating under a job description promulgated prior to the execution of the 1979-1981 collective bargaining agreement, the "Food Service Manager" hires food service employees, has the authority to discipline and terminate, evaluates 47 food service employees, hears complaints and has first step grievance responsibility. She schedules employees and evaluates staffing

needs, completes State reports and payroll reports, and has complete responsibility for the department in the absence of the Supervisor of Food Services.

6. Previous job descriptions for the Food Service Manager position issued in September, 1977 and in April, 1978 also indicated that the position had substantial supervisory authority. Both the 1977-79 and 1979-81 collective bargaining agreements between the parties included the Food Service Manager position in the bargaining unit at a substantial wage premium above that paid to subordinates.

7. The employer conducts its collective bargaining through an administrator for personnel who receives labor policy information directly from the district's board of directors and implements such policies. The Food Service Supervisor has been asked to comment on union proposals made in negotiations and some such inquiries have been referred to the Food Service Manager, but neither the Food Service Supervisor nor the Food Service Manager have represented the employer at the bargaining table or have an intimate fiduciary relationship with the Superintendent of Schools or the districts bargainers on matters of labor relations policy.

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 pursuant to RCW 41.56.060 and Chapter 391-35 WAC.

2. The Food Service Manager is a public employee within the meaning of RCW 41.56.030(2) who has been included in the existing bargaining unit by agreement of the parties. No change of circumstances has been shown which warrants her exclusion from the bargaining unit at this time.

ORDER

The Food Service Manager shall continue to be included in the bargaining unit described in paragraph 3 of the foregoing findings of fact.

DATED at Olympia, Washington this 22nd day of February, 1982.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARVIN L. SCHURKE, Executive Director