STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	
PUBLIC SCHOOL EMPLOYEES OF MOUNT VERNON, an affiliate of PUBLIC SCHOOL EMPLOYEES OF WASHINGTON	CASE NO. 3681-C-81-175 DECISION NO. 1629 - PECB
For clarification of an existing bargaining unit of employees of:	
MOUNT VERNON SCHOOL DISTRICT NO. 320	ORDER OF DISMISSAL

Edward A. Hemphill, Attorney at Law, appeared on behalf of the union.

Perkins, Coie, Stone, Olsen & Williams, by Peter D. Sloane, Attorney at Law, appeared on behalf of the employer.

On September 16, 1981, Public School Employees of Mount Vernon, an affiliate of Public School Employees of Washington (PSE), filed a petition with the Public Employment Relations Commission, seeking a unit clarification order combining three separate existing bargaining units represented by PSE into one bargaining unit. A hearing was held at Mount Vernon, Washington, on September 29, 1982, before Alan R. Krebs, Hearing Officer. Both parties filed post-hearing briefs.

BACKGROUND

Mount Vernon School District No. 320 serves appproximately 3,225 students in its K-12 educational program. The district operates six school buildings and three support facilities. The district employs approximately 173 certificated employees and approximately 90 classified employees.

In 1968, the American Federation of State, County and Municipal Employees (AFSCME) was certified as the exclusive bargaining representative of a bargaining unit consisting of the district's custodians, maintenance workers, mechanics and food service employees. The first collective bargaining agreement covering those employees was implemented in 1968.

In 1975, PSE initiated representation proceedings and was certified to replace AFSCME as the exclusive bargaining representative of the custodians, maintenance workers, mechanics and food service employees bargaining unit. Since 1975, the district and PSE have entered into several collective bargaining agreements covering that bargaining unit. The composition of that bargaining unit has remained unchanged since 1968.

On February 27, 1981, PSE notified the district that a majority of the district's school bus drivers had authorized PSE to represent them for the purposes of collective bargaining. PSE requested that the district recognize the union on the basis of the authorization cards. The district declined to extend voluntary recognition to PSE for that bargaining unit, and PSE thereafter filed a representation petition with the Public Employment Relations Commission seeking an election in the school bus driver unit.

On March 25, 1981, PSE informed the district that a majority of the district's employees in the "aide" job classification had authorized PSE to represent them for the purposes of collective bargaining. PSE also requested that the district recognize the union for that unit. The district refused and PSE filed a separate representation petition with the Public Employment Relations Commission seeking an election in the aide unit.

The Public Employment Relations Commission docketed the representation petitions as two separate cases. On April 30, 1981, a member of the Commission staff conducted separate pre-hearing conferences on the representation petitions. The parties executed and filed separate election agreements covering two separate bargaining units. The election in the bus driver unit was conducted on June 1, 1981. The election in the aide unit was conducted on June 9, 1981. A certification was issued in the aide unit on June 17, 1981. See: Mount Vernon School District, Decision No. 1188 (PECB, 1981). A separate certification was issued in the school bus driver unit on August 14, 1981. See: Mount Veron School District, Decision No. 1139-A (PECB, 1981). During the Autumn of 1981, the parties engaged in collective bargaining for a successor agreement in the custodial/maintenance/mechanic/food service unit and for initial agreements in the school bus driver and aide units. In the course of those negotiations, PSE presented the district with a proposal to merge the three bargaining units into one unit. The district declined to agree to the union's unit merger proposal, and PSE filed the unit clarification petition in the instant case. Thereafter, the parties reached agreement on three separate collective bargaining agreements.

The custodial/maintenance/mechanic/food service bargaining unit includes approximately 25 employees, the school bus driver bargaining unit includes approximately 15 employees and the aide bargaining unit includes

approximately 35 employees. The only other classified employees of the district are in office/clerical and related occupations.

POSITIONS OF THE PARTIES

PSE contends that a unit clarification proceeding under Chapter 391-35 WAC is an appropriate method for combining existing bargaining units, where no question concerning representation exists. It points out that it presently represents all three of the bargaining units involved in this case, and that there is no evidence or claim that a question concerning representation exists. The union contends that it has done in this case what it is directed to do by Commission precedent, first raising the issue of merger at the bargaining table, then withdrawing the issue from bargaining in the face of employer resistance on a "unit determination" matter and filing the unit clarification petition in this case prior to signing the collective bargaining agreements. Acknowledging that a merger of bargaining units was accomplished in Tumwater School District, Decision 1388 (PECB, 1982), in the context of a representation case, the union urges that the merger can also be accomplished through unit clarification procedures, relying on Libby-Owens-Ford Co., 169 NLRB 126 (1968). The union contends that its petition in this case is not barred by "certification bar" principles, relying in part on the fact that hearing on the matter was delayed for more than a year after the petition was filed. Finally, the union argues that the proposed combined unit would be an appropriate unit under PERC precedent, and that the employees should be permitted to express their desires through a unit determination election in this case.

The employer contends that a "certification bar" exists in this case. The district next contends that PSE seeks in this case to bend the unit clarification procedure to a purpose for which it has never been intended, and that PSE is, without explanation, seeking to abandon the stipulations which it made leading to the creation of the three separate units. Citing Libby-Owens-Ford Co., 189 NLRA 689 (1971), the employer contends that the NLRB has pulled back from its initial experiment with mergers of bargaining units through unit clarification procedure, and that the NLRB has persisted in its current policy even in the face of judicial opinion that the experiment had validity. The employer contends that PSE is merely attempting to protect itself from rival unions, in contrast with its own actions in organizing three separate units. The employer asserts that the union should have proceeded in the Mount Vernon situation as it did in the Tumwater case, to seek merger through representation proceedings. The district would evidently still oppose merger in a representation case, contending that a merger of the bargaining units would disrupt the long and stable relationship enjoyed by the parties in the custodial/maintenance/mechanic/food service unit, so that the existing unit structure is more appropriate than the proposed combined unit.

PERTINENT STATUTORY PROVISIONS

41.56.050 Disagreement in selection of bargaining representative--Intervention by commission. In the event that a public employer and public employees are in disagreement as to the selection of a bargaining representative the commission shall be invited to intervene as is provided in RCW 41.56.060 through 41.56.090.

41.56.060 Determination of bargaining unit--Bargaining representative. 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. The commission shall determine the bargaining representative by (1) examination of organization membership rolls, (2) comparison of signatures on organization bargaining authorization cards, or (3) by conducting an election specifically therefor.

41.56.070 Election to ascertain bargaining representative. In the event the commission elects to conduct an election to ascertain the exclusive bargaining representative, and upon the request of a prospective bargaining representative showing written proof of at least thirty percent representation of the public employees within the unit, the commission shall hold an election by secret ballot to determine the issue. The ballot shall contain the name of such bargaining representative and of any other bargaining representative showing written proof of at least ten percent representation of the public employees within the unit, together with a choice for any public employee to designate that he does not desire to be represented by any bargaining agent. Where more than one organization is on the ballot and neither of the three or more choices receives a majority vote of the public employees within the bargaining unit, a run-off election shall be held. The run-off ballot shall contain the two choices which received the largest and second-largest number of votes. No question concerning representation may be raised within one year of a certification or attempted certification. Where there is a valid collective bargaining agreement in effect, no question of representation may be raised except during the period not more than ninety nor less than sixty days prior to the expiration date of the agreement. Any agreement which contains a provision for automatic renewal or extension of the agreement shall not be a valid agreement; nor shall any agreement be valid if it provides for a term of existence for more than three years.

DISCUSSION

The Context

This is a case of first impression on many of the issues raised. Additional insight can be gained by review of the context in which this case arose. In March, 1981, PSE filed a petition with the Commission for a declaratory ruling, seeking direction from the Commission as to the appropriate procedure to be followed to accomplish the consolidation of historically separate bargaining units. No particular employer or bargaining units were identified. The matter was docketed as Case No. 3332-D-81-27, and was placed on the agenda of the Commission for public hearing under WAC 391-08-500. After hearing and considering the arguments, the Commission declined to enter a declaratory ruling. The declaratory ruling case was closed on April 10, 1981. By that time, PSE had already made its recognition demands on the Mount Vernon School District for the school bus driver and aide bargaining units and had initiated both of the representation cases which led to certifications in those bargaining units. In June, 1981, an affiliate of PSE filed the petition to initiate the proceedings which led to the decision in Tumwater School District, Decision 1388 (PECB, 1982). The unit clarification petition in the instant case was filed on September 16, 1981, one week prior to the hearing in the Tumwater case. On September 25, 1981, the employer filed a letter asserting its "certification bar" claim. The employer's letter was treated as a motion for dismissal, and PSE was directed to file a written response. A letter filed by PSE on October 21, 1981 prompted an additional letter from the employer in which it restated its "certification bar" claim and added a claim that unit clarification is not the appropriate method for accomplishing a merger of bargaining units. In December, 1981, the parties to this case executed the three separate collective bargaining agreements for the period September 1, 1981 through August 31, 1983. In February, 1982, the instant case was assigned to a Hearing Officer with instructions to make a full record on all issues, and the parties were advised that a ruling on the certification bar argument would be reserved for decision on a full record. The Tumwater decision was issued on March 8, 1982. By that time, of course, re-filing of the unit merger question raised by this case as a representation case was barred by "contract bar" principles until the "window" period which will occur approximately during the month of June, 1983.

Availability of Unit Clarification Procedure

Many approaches are possible to the multiple issues raised in this case. Regardless of the approach, the central issue is whether the incumbent exclusive bargaining representative of separate bargaining units can obtain a merger or consolidation of those bargaining units through the unit clarification procedures of Chapter 391-35 WAC. The public policy behind

Chapter 41.56 RCW is the goal of maintaining labor peace. RCW 41.56.010; RCW 41.58.005. An implementing procedure which actually undermines the fundamental policy of the statute would have to be rejected, just as a procedure which accomplishes nothing would have to be looked at with great suspicion. For reasons which follow, it is concluded that merger of bargaining units through unit clarification procedures would not serve the purpose of reducing or eliminating disputes, and could, in fact, be counter-productive to the extent of creating disputes.

The employer indicates a concern that stable bargaining relationships of long standing would be upset by the merger of units. That, however, really goes more to the unit determination question itself. The employer concedes, nay urges, that unit mergers can be accomplished through representation cases as was done in Tumwater, where the employees in each of three historically separate units in effect over-ruled their separate histories of bargaining when they voted to merge their units into one appropriate unit.

The union argues that its members are precluded, as public employees, from striking to enforce a union demand for a merger of bargaining units, but it does not address either the legality or the practicality of such a strike under the National Labor Relations Act. Consider: New York Shipping Association, 118 NLRB 1481 (1957).

The employer touches on the heart of the matter when it suggests that the union is seeking to protect itself from rival organizations. Certainly, the decision of the Commission in Yelm School District, Decision 704-A (PECB, 1980), and numerous other decisions of the Commission denying severance petitions in school district "operations and maintenance" bargaining units would suggest that the combined unit sought by PSE in this case would be less vulnerable than any of the existing separate units. On the other hand, the employer does not point out why PSE's attempt to secure its own stability is improper or unlawful.

One of the perquisites devolving to an employer and to an exclusive bargaining representative as the result of the definition of their bargaining unit is the right of each to demand from the other that negotiations take place and a collective bargaining agreement be signed covering all of the employees in that bargaining unit. RCW 41.56.080; RCW 41.56.030(4). In the situation at hand, the parties have signed three separate collective bargaining agreements conforming to the three separate bargaining units. The predictable consequences of an order combining the three units into one would be negotiations between the parties for a single contract. But what of the existing contracts? The unit clarification order does not stem from those contracts, but from the statute under which the contracts were negotiated. If a unit clarification order issued mid-term in

a collective bargaining agreement were to have the effect of entitling either party to demand from the other an immediate re-opening of negotiations to supplant separately negotiated collective bargaining agreements with a single agreement covering the merged unit, then the unit clarification proceedings would have merely been the vehicle to disrupt a settled situation. Were that the evident purpose of the union in this case, it would be very easy to dismiss the petitions as being at odds with the overall purposes of the statute.

Finding nothing improper in the union's quest to re-organize the units into a larger and more secure unit (as a general proposition), and allowing that the union's purpose is to achieve a long-term rather short-term benefit, so that negotiation of a consolidated contract would not take place until the next normal bargaining cycle, the question inherently follows: Why should merger be accomplished at mid-contract when its effect as between the immediate parties would not be seen until the negotiation of the next contract? Put another way: Would any improper advantage be gained or any harm be done by merger through "unit clarification" procedures rather than "representation" procedures? The concern about a future "raid" is the starting point for the analysis which ultimately discloses the fatal defect in the attempt to use unit clarification procedures for unit mergers.

The unit clarification procedures of Chapter 391-35 WAC do not impose a showing of interest requirement, and there is theoretically a risk that the procedures of the Commission might be abused or its limited resources wasted by conducting hearings and unit determination elections in a unit clarification case without a preliminary determination that the union has a running chance at success in each of the units or even in the overall unit. Any such fear is unfounded when pragmatic considerations are taken into account. Unit determination elections conducted by the Commission require the affirmative votes of the majority of the employees eligible to vote in each voting group. WAC 391-25-530(1). Knowing that it would face such a test in each of the units proposed for merger, an organization which lacked consistent support among the units would be foolhardy to expose its weakness in an election procedure doomed to failure. Accordingly, it is unlikely that a merger proceeding would be initiated unless the exclusive bargaining representative were confident of its success at the ballot box.

The unit clarification procedures of Chapter 391-35 are available only to the employer and to the exclusive bargaining representative. There are no provisions for intervention, or for a showing of interest by a competing labor organization holding a minority interest in one of the existing bargaining units. Therein lies the defect which brings down the house of cards! Assuming, arguendo, that the union's arguments were accepted in this case, and that employees voted in favor of merger of units, the result would

be an order merging the units. As noted above, the real effect of that order would not be felt by the employer and the exclusive bargaining representative until they commenced their negotiations on the next collective bargaining agreement. The real effect of that order would not be felt by the employees until they started working under a new consolidated collective bargaining agreement. In the meantime, the "window" period specified in the contract bar rule of RCW 41.56.070 and WAC 391-25-030(1) will have come and gone. If there is no representation petition during that first "window" period after merger, the history of bargaining generated by the merger vote, the negotiations of the consolidated contract and the one to three years of actually working under a consolidated contract would become formidable evidence in opposition to a severance petition filed by a rival union at the end of that first consolidated contract or at some later time. But if there is a petition for decertification or a petition by a rival organization during the contract bar window immediately following the unit clarification order, what then? RCW 41.56.070 affirms the right of rival organizations or dissident groups of employees to petition with a 30% showing of interest for a change of bargaining representative or for decertification. Neither the rival union nor the decertification petitioners would have had standing to be parties in the unit clarification proceedings between the employer and the incumbent representative. To hold such a rival union to "severance" standards, or to dismiss such decertification petitioners as seeking an improper "severance-decertification", would exhalt form over substance, giving credence on the one hand to a merger order not yet implemented while on the other hand denying the rival union or decertification petitioners an opportunity to be heard in the merger proceedings. Under such circumstances, considerations of due process would require the employer and the incumbent (and the Commission) to re-litigate the issues purportedly decided in the unit clarification proceedings. New elections would be necessary in order to give decertification petitioners or rival unions an opportunity to campaign and to have their alternative choices on the ballot submitted to the employees. The bottom line is that the unit clarification proceedings leading to the abortive merger of bargaining units would be an expensive waste of time for all concerned without really accomplishing anything.

Representation proceedings obviate the problems noted in the preceding paragraph. An incumbent exclusive bargaining representative situated as is PSE in this case is in a position to lawfully demand uniform expiration dates for all of its contracts. See: U.S. Pipe and Foundry v. NLRB, 298 F.2d 873 (CA5, 1962). Then it would be in a position during the usual contract bar "window" period to file a representation petition to "re-organize" its existing units. It would need to supply a showing of interest demonstrating that it had the support of 30% of the employees in the proposed consolidated unit. Dissident employees seeking decertification or any rival organization which did exist would have the opportunity to exercise at that

time the rights provided by the statute and Commission rules to intervene, present a showing of interest and make unit determination arguments within the scope of its showing of interest. The question before the Commission is whether the consolidated unit is an appropriate bargaining unit within the meaning of RCW 41.56.060. If the proposed consolidated unit is found to be inappropriate based on criteria other than the desires of employees, the petition seeking the consolidated unit would have to be dismissed. If, as in Tumwater, the proposed consolidated bargaining unit is found to be an appropriate unit, the employees would be permitted to express their desires through a unit determination election. In the pre-election period, all interests qualifying under RCW 41.56.070 would have official participation. Similarly, all such parties would have rights to object to procedural errors or misconduct of other parties, and would have the right to appeal from unit determination decisions made. The certification resulting from such a procedure would be enforced under the "certification bar" principle for one year following its issuance, giving the employer and exclusive bargaining representative time to negotiate their first consolidated contract with consolidation of units actually in effect (as opposed to a future phenomenon not yet experienced).

With the substantial benefits of the "representation" procedure in mind, its few defects pale in insignificance. Aye, there would be some risk to the incumbent exclusive bargaining representative, both at the level of one of the units voting against consolidation and at the level of the entire unit rejecting representation or turning to a rival union, but those risks are no greater or different than the incumbent would have faced at the same "window" period. The organization seeking merger would have to evaluate those risks against the gain from having a more secure unit if successful. There would be the seemingly needless exercise of a representation election, but therein the union gets ahead of itself. If the proposed combined unit is found to constitute an appropriate unit under RCW 41.56.060, and there is no timely decertification or "raid" petition, and the incumbent's petition to re-organize multiple bargaining units into one does not draw out a timely and sufficiently supported motion for intervention, and the employer does not come forth with affidavits or other documentation pursuant to WAC 391-25-090 to demonstrate a good faith doubt concerning the representation of its employees, then a question of unit determination would exist but no question concerning representation would exist. It would suffice under such circumstances to conduct only the unit determination elections.

In reaching this conclusion the policies of the Commission would be consistent with the current practices of the NLRB. See: Libby-Owens-Ford Company, 189 NLRB 869 (1971) and 189 NLRB 871 (1971).

Certification Bar

The employer's arguments on the availability of unit clarification procedures in this situation include "lack of change of circumstances". Those arguments are fully supported by the facts in this case. There was little time for any change of circumstances to take place between the issuance of the certifications for the school bus driver and aide units and the filing of the unit clarification petition, and in fact no change of circumstances was shown. The absence of a change of circumstances imposes on the union a more substantial test even than the statutory "certification bar" asserted by the employer. The certifications issued by the Public Employment Relations Commission are final administrative orders under the Administrative Procedures Act. Unless appealed, they are not subject to collateral attack in subsequent proceedings. Lewis County, __ Wn App __ (Div II, 1982). The res judicata effect of a certification is not limited to the one-year period immediately following certification, but continues until and unless there is a change of circumstances. PSE's petition in this case would have to be dismissed on this basis even if it had been concluded that a merger of units was available through unit clarification procedures.

FINDINGS OF FACT

1. Mount Vernon School District No. 320 is an employer within the meaning of RCW 41.56.030(1).

2. Public School Employees of Mount Vernon, an affiliate of Public School Employees of Washington, is a bargaining representative within the meaning of RCW 41.56.030(3).

3. Public School Employees of Mount Vernon is the certified bargaining representative for an appropriate bargaining unit of classified employees described as:

> The bargaining unit to which this Agreement is applicable shall consist of all classified employees in the following general job classifications: Custodial-Maintenance, Food Service, and Transportation Mechanics. Excluding supervisors and all other employees.

   The certification was issued in 1975.

4. Public School Employees of Mount Vernon is the certified bargaining representative for a second appropriate bargaining unit of classified employees described as:

> The bargaining unit to which this Agreement is applicable shall consist of all classified employees in the following general job classification: AIDES: Excluding supervisors and all other employees.

The certification was issued on June 17, 1981.

5. Public School Employees of Mount Vernon is the certified bargaining representative for a third appropriate bargaining unit of classified employees described as:

> The bargaining unit to which this Agreement is applicable shall consist of all classified employees in the following general job classification: BUS DRIVERS: Excluding supervisors and all other employees.

The certification was issued on August 14, 1981.

6. There was no substantial change of circumstances between the issuance of the certifications in the aide and bus driver units and the filing of the petition in this case.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56.

2. All three bargaining units represented by Public School Employees of Mount Vernon, an affiliate of Public School Employees of Washington, are appropriate bargaining units for the purpose of collective bargaining within the meaning of RCW 41.56.060.

3. The unit clarification procedures of Chapter 391-35 WAC are not available to the petitioner in this case in the absence of a change in circumstances since the establishment of the bargaining units.

4. A merger of bargaining units previously created by separate recognition or certification transactions raises a question concerning representation, and the procedures of Chapter 391-35 WAC are inappropriate for such purposes.

ORDER

The petition for clarification of bargaining unit filed in the above entitled matter is dismissed.

DATED at Olympia, Washington, this 4th day of May, 1983

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director