STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: SNOHOMISH COUNTY JUVENILE AND FAMILY COURT PROFESSIONAL ASSOCIATION For clarification of an existing bargaining unit of employees of: SNOHOMISH COUNTY	CASE NO. 3613-C-81-171
In the matter of the petition of: SNOHOMISH COUNTY For clarification of an existing bargaining unit of employees represented by: SNOHOMISH COUNTY JUVENILE AND FAMILY COURT PROFESSIONAL ASSOCIATION	CASE NO. 3973-C-82-190 DECISION NO. 1645 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

W. Mitchell Cogdill, attorney at law, appeared on behalf of the union.

Cabot J. Dow, labor relations consultant, appeared on behalf of the employer.

On August 21, 1982, Snohomish County Juvenile and Family Court Professional Association (union) filed a petition with the Public Employment Relations Commission seeking clarification of an existing bargaining unit with respect to the position of "detention supervisor". On February 22, 1982, Snohomish County (employer) filed a petition seeking clarification of the same bargaining unit with respect to the position of "probation counselor supervisor". The proceedings were consolidated, and a hearing was conducted on May 26 and 27, 1982, before Hearing Officer Martha M. Nicoloff. The parties submitted post-hearing briefs.

BACKGROUND

The Juvenile Court-Family Court Division of Snohomish County (division) provides services, ranging from counseling to detention, to juveniles who

enter the Superior Court system. The judges of the Superior Court establish general operating policies and have overall supervision of the division pursuant to RCW 13.04.035 and 13.04.040. The juvenile court administrator directs the division's daily operations. The Board of Snohomish County Commissioners administers only financial matters.

Division employees are represented for purposes of collective bargaining by Snohomish County Juvenile and Family Court Professional Association. The union was certified in Snohomish County, Decision No. 587-A (PECB, 1979) as exclusive bargaining representative of a bargaining unit described as:

> All deputized probation officers and family court investigators of the Snohomish County juvenile and family court, including the supervisory probation officers; excluding the administrator, the assistant administrator, and all other employees.

In the course of the representation proceedings which led to that certification, the county contested the inclusion of the supervisors in the bargaining unit. Based on the limited scope of bargaining available to all of the employees, it was concluded that the supervisors shared a community of interest with their subordinates, and that the usual reasons for separation of supervisors from rank-and-file units (See: City of Richland, Decision 279, 279-A (PECB, 1978) did not exist in this situation.

Michael Sullivan was then and is now the juvenile court administrator. At the time of the certification, Esther McChesney was the assistant administrator. McChesney acted as liaison between the administrator and probation counselor supervisors, who, in turn, directed units within the division. The assistant administrator reviewed leave requests and disciplinary matters forwarded by the supervisors. In addition, McChesney handled training courses for probation officers, maintained the division personnel files and held meetings with other agencies dealing with juvenile offenders. In the event of hiring new probation officers, McChesney would contact the county personnel department and arrange interviews for finalists.

At the time of the certification, the probation counselor supervisors directed the operation of four units: "intake", "community supervision", "diversion" and "intensive supervision". Each unit was staffed by probation counselors, who have authority to arrest, and some units had family court investigators, who have limited authority to investigate juvenile cases. The supervisors carried a caseload in addition to their administrative duties. They received the same benefits, worked approximately the same hours and performed their duties in the same location as did the probation counselors. The supervisors evaluated probation counselors, scheduled

overtime and approved leave requests. In the event of disciplinary problems, the supervisor could recommend corrective action. As a matter of form, disciplinary and leave matters were routinely reviewed by the assistant administrator. Supervisors took part in interviews for new employees, with the final decision resting with the administrator. The supervisors met monthly with the administrator and assistant administrator to discuss office policy, but labor relations matters were not mentioned. The supervisors did not have formal contact with the Superior Court judges or the county commissioners with respect to policy matters. The supervisors did not play any part in the selection of personnel for promotion or layoff. While they were free to make recommendations, the administrator had final authority in such matters. The supervisors had authority to make budget recommendations to the administrator, who in turn made budget recommendations to the Board of Snohomish County Commissioners. The supervisors had authority to make purchases within their respective budgets and units.

A "detention supervisor" position existed at the time the bargaining unit was certified, but was not included in the unit. Shortly thereafter, Sullivan undertook a revision of the supervisory structure of the division, by instituting an upgrade of the position of "detention supervisor". In charge of the county's Youth Center, where juveniles are incarcerated while awaiting court appearances, the detention supervisor directs approximately 13 full time staff members. The detention supervisor now evaluates employees and schedules work assignments. In the event of employee misconduct problems, the supervisor can impose discipline, subject to review by the administrator. The supervisor "counsels" employees and helps in the orientation of new employees. The supervisor does not carry a case load. With the upgrade of position, the detention supervisor now receives the same wage and benefits as the probation counselor supervisors. The detention supervisor works the same hours as the probation counselor supervisors and performs duties in the same general physical location. Like the probation counselor supervisors, the detention supervisor makes budget requests and approves purchase orders.

After the detention supervisor position was upgraded, Sullivan initiated a "rotation" plan whereby all five supervisors, including the detention supervisor, would be transferred among the supervisory positions. Designed to give supervisors a broader range of experience in the juvenile court system, the plan called for a complete rotation of positions every two years. The initial rotation occurred in March, 1980, and a second rotation occurred prior to the date of the hearing in this matter.

The status of the union as exclusive bargaining representative of the bargaining unit was challenged in a "decertification" proceeding before the

Public Employment Relations Commission in Case No. 2666-E-80-513, filed on March 10, 1980. The parties filed an election agreement in that proceeding in which all of the supervisors, including the detention supervisor, were listed as eligible to vote. A majority of the employees supported the union and it was re-certified in Decision 862 (PECB, 1980), issued on May 1, 1980.

On June 10, 1980, Esther McChesney retired. Instead of refilling the Assistant Administrator position, Sullivan distributed McChesney's duties among the supervisors. The record indicates that certain elements of McChesney's responsibilities were permanently assigned to specific supervisors, who were to be responsible for those duties in addition to rotating among the different supervisory positions. Thus, one of the supervisors became liaison to the county personnel department, and thereafter made requests for applicants when a position within the division was to be filled. Another of the supervisors assumed responsibility for the division's computer operation. A third supervisor thereafter coordinated interagency meetings and information exchange, as well as orienting new employees. A fourth supervisor assumed information officer duties. The record does not indicate whether the supervisor then assigned as detention supervisor assumed any specific additional duties after McChesney retired.

Apart from assuming additional responsibilities, the supervisors gained freer access to Sullivan following McChesney's retirement. Instead of reviewing disciplinary matters and other personnel concerns with McChesney, the supervisors would deal directly with Sullivan. In addition, the supervisors had more direct access to the employees' personnel files. However, many aspects of the supervision of the division did not change. The screening process for hiring of new employees was unaffected by McChesney's departure. A three member interview team composed of supervisors would still meet with the applicant and make a recommendation to Sullivan, who held a separate interview and made the final decision. Sullivan retained final authority to discharge employees. The supervisors' authority to evaluate employees and to establish work schedules was not changed. Sullivan did not expand the supervisors' responsibilities dealing with collective bargaining. The supervisors still do not deal with labor relations policy, nor do they prepare any information dealing with collective bargaining negotiations.

POSITIONS OF THE PARTIES

The union maintains that the detention supervisor shares a substantial community of interest with probation counselor supervisors, and should be included in the existing bargaining unit. The union argues that it would be inappropriate to exclude the position in light of the rotation system

instituted by the administrator and the fact that the person then holding the detention supervisor position was included on the stipulated eligibility list in the decertification election conducted by the Commission in 1980. Responding to the employer's petition, the union contends that the probation counselor supervisors are not confidential within the meaning of RCW 41.56.030(2)(c), and that the reorganization following the assistant administrator's retirement changed only routine administrative assignments.

The employer maintains that a significant change of circumstances has occurred since the bargaining unit was certified in 1979. It claims that sensitive personnel duties were transferred to the probation counselor supervisors when the assistant administrator retired. The employer argues that the supervisors must be excluded on the basis of confidentiality. The employer further argues that continued inclusion of probation counselor supervisors in the unit would create an inherent conflict of interest. The employer resists the inclusion of the detention supervisor in the unit, based in part on the circumstance that the union made no effort to include that position during the initial representation proceedings.

DISCUSSION:

Three general issues are presented in this case: First, whether the detention supervisor should be included in the bargaining unit; Second, whether all of the supervisors should be excluded from the coverage of Chapter 41.56 RCW as "confidential" employees within the meaning of RCW 41.56.030(2)(c); and Third, whether the supervisors should now be excluded from the bargaining unit which includes their subordinates because of the potential for or existence of conflicts of interest.

The Accretion Issue

When determining whether a particular position should be accreted to an existing bargaining unit, the duties, skills and working conditions of the affected employee must be compared to the duties, skills and working conditions of the bargaining unit employees. In this case, the detention supervisor rotates among assignments, receives the same wages, receives the same benefits, works the same hours and works in the same general physical location as the other supervisors. The record does not reflect any special qualifications or additional duties which would distinguish the detention supervisor from the other supervisors already included in the bargaining unit.

The second line of inquiry in an accretion situation concerns the history of the bargaining unit and the particular position. An exclusive bargaining

representative is not entitled to use the unit clarification procedures of Chapter 391-35 WAC to pick up positions which were in existence but deliberately excluded from the bargaining unit at the time of its creation. City of Dayton, Decision 1432 (PECB, 1982), citing Lufkin Foundry & Machine, 174 NLRB 556 (1969). On the other hand, unit clarification is available to deal with a newly created position or a change of circumstances. Oak Harbor School District, Decision 1319 (PECB, 1981); Toppenish School District, Decision 1143-A (PECB, 1981). There was a "detention supervisor" in existence at the time the bargaining unit was created, and the position was, as asserted by the county, left out of the bargaining unit at that time. But the evidence clearly establishes changes of circumstances! First, the detention supervisor was upgraded to a level equivalent to the probation counselor supervisors. Second, and importantly, the detention supervisor has been placed in the same "rotation" with the probation counselor supervisors. Finally, the employer's position in this proceeding is, without explanation, at odds with its stipulations in the intervening decertification proceedings, at which time the employer (along with all other parties) stipulated that the supervisor then working in the detention position was eligible to vote in the election conducted by the Commission. The changes of circumstances since the original certification are of such magnitude as to require that the detention supervisor position which exists today be viewed as a quite different position than that which was in existence and left out in the original proceedings. Although the title remains similar, the detention supervisor which exists today is subject to the same accretion standards as would be applied to a new position with a new title. The actions of the parties during the intervening representation proceedings confirm the logic of including the detention supervisor position in the bargaining unit.

A third consideration in accretion situations (as well as in many other types of unit clarification cases) is whether the disputed position could be placed in some other appropriate bargaining unit, so that a question concerning representation exists. In light of the rotation program now in existence, acceptance of the employer's argument in this case would have the effect of excluding one of the probation counselor supervisors from the unit during each phase of the rotation cycle. In the absence of any evidence of other employees (or supervisors) with which that individual could be grouped for collective bargaining purposes, the rotation would strand the affected employee from all collective bargaining rights under the statute for the period of the assignment. Previous decisions of the Commission clearly establish that such a result must be avoided. See: Town of Fircrest, Decision 248-A (PECB, 1977); Lake Washington School District, Decision 1550 (EDUC, 1982). In the circumstances of this case, the Commission could no more tolerate a fragmentation of the "supervisors" group under the "extent of

organization" unit determination criteria than it could tolerate a fragmentation of a clerical workforce in South Kitsap School District, Decision 1541 (PECB, 1983).

The Confidentiality Issue

The employer maintains that all of the supervisors must be excluded from the bargaining unit because they are "confidential" within the meaning of RCW 41.56.030(2). The statute provides:

> "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. (Emphasis supplied)

While recognizing that the disputed positions were originally included in the bargaining unit, the employer maintains that the assistant administrator's retirement caused confidential duties to be distributed to the probation counselor supervisors.

Exclusion on the basis of confidentiality necessarily removes the affected employee from the coverage of the Act, and therefore must be narrowly construed. See: City of Yakima, 91 Wn2d 101 (1978). On the evidence presented in this case, the supervisors are not confidential. The assistant administrator's retirement resulted in the distribution of a number of administrative duties, and gave the supervisors more access to the juvenile court administrator. However, the retirement did not put probation counselor supervisors within reach of the county's labor relations policies or materials. The record does not reflect a single instance where a supervisor had anything to do with the preparation of materials to be used in collective bargaining or the employer's decision making process relating to labor relations matters. Absent a clear showing that the disputed positions somehow have a "labor nexus" to the employer's collective bargaining policy or negotiations, exclusion on the basis of confidentiality cannot be forthcoming. City of Seattle, Decision 689-A (PECB, 1979).

The Conflict of Interest Issue

The potential for a conflict of interest was carefully examined in 1979, when the employer resisted inclusion of the probation counselor supervisors in

the bargaining unit. The employer's arguments were rejected in a direction of election issued on February 2, 1979. An election was held on February 28, 1979, and a tally of ballots was issued on the same date. The employer did not exercise its opportunity to file objections under the equivalent to WAC 391-25-590(2) which was then in effect. The certification issued on March 8, 1979 (Decision 587-A, PECB) thus became the final order of the agency under the equivalent to WAC 391-25-610 which was then in effect. The employer did not take any steps to petition for judicial review under Chapter 34.04 RCW. The final orders of the Commission in representation cases are not subject to collateral attack in subsequent proceedings. Lewis County v. PERC, ___Wn.App.___ (Division II, 1982). It would be necessary in this proceeding for the employer to establish the existence of a significant change of circumstances. These proceedings are not the vehicle for re-litigation of the issues determined in Decision 587-PECB.

The employer maintains that the retirement of the assistant administrator has resulted in an increase of the supervisors' duties with respect to personnel matters, thereby inherently creating conflicts of interest with the employees they direct. The retirement and the changes of assignments are clearly a change of circumstances, but after review of the law and the evidence, the change is not deemed to be sufficient change to warrant an alteration of the supervisors' unit status. Many of the duties transferred following the retirement were "administrative" (e.g., oversight of computer operations, inter-agency meetings and information functions) rather than "supervisory". Final authority on most matters within the scope of their authority over other employees remains with the juvenile court administrator or with the court itself. Zylstra v. Piva, 95 Wa.2d 743 (1975) continues to establish the law of this State with respect to the "joint employer" relationship between Snohomish County and the Superior Court of Snohomish County. There is no evidence that those entities have exercised their options under RCW 13.04.035 and RCW 13.20.060 to transfer administration of the juvenile court (and the employees) to the exclusive jurisdiction of Snohomish County. Accordingly, the retirement did not expand the supervisors' responsibilities as to matters within the scope of collective bargaining available to them and to their subordinates. The determination made in Snohomish County, Decision 587 (PECB, 1979) is still applicable.

FINDINGS OF FACT

1. Snohomish County is a "public employer" within the meaning of RCW 41.56.030(1). The county has established a division within the Superior Court system to deal with juvenile offenders. Judges of the Superior Court establish policy matters and the Board of Snohomish County Commissioners approve budget items for the division. The division's daily operation is directed by the juvenile court administrator.

2. Snohomish County Juvenile and Family Court Professional Association is a bargaining representative within the meaning of RCW 41.56.030(3). The union was certified, in Snohomish County, Decision No. 587-A (PECB, 1979), as the exclusive bargaining representative of a bargaining unit described as:

> All deputized probation officers and family court investigators of the Snohomish County juvenile and family court, including the supervisory probation officers; excluding the administrator, the assistant administrator, and all other employees.

At the time of certification, there were four probation counselor supervisors holding positions titled intake supervisor, diversion supervisor, community supervision and family court supervisor, and intensive supervision supervisor.

3. Shortly after certification, a position titled detention supervisor was administratively upgraded to be on the same level as the probation counselor supervisors listed above. The detention supervisor thereafter received the same rate of pay and the same benefits as other probation counselor supervisors. In addition, the detention supervisor worked in the same general location as other supervisors and shared similar hours of work.

4. In March, 1979, the juvenile court administrator initiated a rotation program whereby probation counselor supervisors would change assignments on a two year cycle. The rotation system included the detention supervisor. At the time of hearing, two rotations had been completed.

5. In the course of representation proceedings conducted by the Public Employment Relations Commission on a petition filed March 10, 1980, all parties stipulated that all of the supervisors, including the detention supervisor, were eligible to vote. Those proceedings resulted in re-certification of the Association in Snohomish County, Decision 862 (PECB, 1980).

6. On June 10, 1980, the assistant administrator, Esther McChesney, retired. The position was not filled, and certain of the assistant administrator's duties were delegated to the probation counselor supervisors. The retirement gave the supervisors more access to, and greater authority on matters subject to the authority of the juvenile court administrator, but the supervisors were not given any responsibilities dealing with the county's labor relations policy decisions or negotiations materials. Final personnel authority remained with the Superior Court Judges after review with the administrator.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW, and no question concerning representation presently exists in the bargaining unit described in paragraph 2 of the foregoing findings of fact.

2. The "detention supervisor", as presently constituted, shares a community of interest with other supervisors, and all of those positions are appropriately assigned together under RCW 41.56.060 to the same bargaining unit.

3. The probation counselor supervisors are public employees of Snohomish County, within the meaning of RCW 41.56.030(2), with respect to wages and wage related matters, and are not confidential employees within the meaning of RCW 41.56.030(2)(c).

4. The inclusion of probation counselor supervisors in the same collective bargaining unit with the employees they supervise continues to be appropriate for the reasons set forth in Snohomish County, Decision 587 (PECB, 1979), and there has been no change of circumstances warranting a change of the unit determination made therein under RCW 41.56.060.

ORDER

1. The position of detention supervisor is included in the appropriate bargaining unit described in paragraph 2 of the foregoing findings of fact.

2. The position of probation counselor supervisor is included in the appropriate bargaining unit described in paragraph 2 of the foregoing findings of fact.

DATED at Olympia, Washington, this 6th day of June, 1983.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director