STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	
MONROE SCHOOL DISTRICT	CASE NO. 6433-C-86-329
Involving an existing bargaining unit of its employees represented by	DECISION NO. 2536 - EDUC
MONROE EDUCATION ASSOCIATION	ORDER OF DISMISSAL

Perkins Coie, by Lawrence B. Hannah, attorney at law, on behalf of the Monroe School District.

Harriet Strasburg, attorney at law, on behalf of the Monroe Education Association.

On June 6, 1986, the Monroe School District filed a petition with the Public Employment Relations Commission for clarification of an existing bargaining unit of non-supervisor certificated employees. The petitioner therein stated:

> The positions at issue are temporary teaching positions of 18 or fewer consecutive days per school year. In recent years several such positions have been utilized at the outset of the school year. The positions historically have not been included in the bargaining unit. In a recent arbitration award, however, two such positions were purportedly clarified into the bargaining unit; this was done notwithstanding (1) the exclusive jurisdiction of the Public Employment Relations Commission to determine the definition of "employees" under Chapter 41.59 RCW, and (2) compelling

legal precedent, including Columbia Education Association and Columbia School District, et. al., Dec. No. 1189-A EDUC (1982). The District submits that such temporary positions are not includable in the bargaining unit.

The petition acknowledges the existence of a collective bargaining agreement, and the employer subsequently supplied a copy of that collective bargaining agreement, which was signed on October 3, 1985 and is effective for the period from September 1, 1985 through August 31, 1988.[1]

On July 28, 1986, the Monroe Education Association filed a motion for dismissal of the unit clarification petition and an affidavit in support thereof claiming, in essence, that the petition was not timely filed. Acknowledging and relying upon the same collective bargaining agreement as supplied by the employer, the Association asserts that the recognition clause of the current collective bargaining agreement is identical to

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[1] On its face, the petition suggests the potential for disputes along at least two alternative lines. In addition to the question raised by the instant case as to whether the class of employees at issue should be included in an existing bargaining unit, there is the distinct possibility, as in Pierce County, Decision 1845 (PECB, 1984), of refusal to bargain unfair labor practice charges over "skimming of unit work" should the disputed class not be a part of that bargaining unit. At least to this point, the Association has not filed any unfair labor practice charges. To the extent that arbitration proceedings and an award have resulted in a conclusion that the hiring of 18-day temporary employees was prohibited by the current contract between the parties, a question would arise as to the propriety of deferral to arbitration in any such unfair labor practice case. The Commission normally defers to arbitration where employer conduct at issue in a "unilateral change" unfair labor practice case is arguably protected or prohibited by an existing collective bargaining agreement between the parties.

that contained in the 1983-85 collective bargaining agreement between the parties. The Association acknowledges the practice of the employer to offer "18-day temporary positions", but contests the claim that they have historically been excluded from the bargaining unit. To the contrary, the Association asserts that it filed a grievance on June 13, 1985 (i.e., under the terms of the 1983-85 collective bargaining agreement), claiming that employees holding such positions had rights under numerous articles of the collective bargaining agreement. The Association characterizes the arbitration result as eliminating the 18-day temporary class based on an interpretation of the contract.[2]

The employer responded by a letter filed on August 26, 1986. The employer does not take issue with the factual assertion by the Association that the recognition clauses of the current collective bargaining agreement are unchanged from the recognition provisions of the previous contract. Nor does it take issue with the Association's factual assertion that it had filed a grievance concerning the status of employees holding "18-day temporary positions" prior to the execution of the current collective bargaining agreement.

The Public Employment Relations Commission is empowered by RCW 41.59.080 to determine appropriate bargaining units under the Educational Employment Relations Act. Interpreting essentially

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[2] In the alternative, the Association urges that the Commission should stay the present proceedings while it pursues another grievance concerning a repeat performance by the school district in 1986. The Commission does not assert jurisdiction through the unfair labor practice provisions of the Act to enforce the agreement to accept arbitration awards as final and binding. Any claim that the previous arbitration award should preclude the employer from re-litigating the same contract interpretation issue would be for the courts to decide.

similar provisions in Chapter 41.56 RCW, the Commission held that:

> Unit definition is not a subject for bargaining in the conventional "mandatory"/"permissive"/"illegal" sense, although parties may agree on units. Such agreement does not indicate that the unit is or will continue to be appropriate.
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> City of Richland, Decision 279-A (PECB, 1978); aff. 29 Wa.2d 599 (Division III, 1981); cert. den. 96 Wn.2d 1004 (1981). (footnote omitted).

Thus, the Commission is not bound by the agreements made by parties on matters of unit determination. Similarly, the Commission does not "defer" unit determination matters to arbitration, since arbitrators are merely an outgrowth of the contract between the parties.

But the Commission honors collective bargaining agreements during their term, whenever possible. The Commission has set forth a standard for dealing with unit clarification petitions filed during the life of a collective bargaining agreement, as follows:

> A mid-term clarification is available to exclude individuals from a bargaining unit covered by an existing collective bargaining agreement if:
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> a) The petitioner can offer specific evidence of substantial changed circumstances that would warrant such an exclusion, or
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> 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.

Toppenish School District, Decision 1143-A (PECB, 1981) (emphasis added).

The same principles have been applied under Chapter 41.59 RCW. East Valley School District, Decision 2154-A (EDUC, 1985).

A copy of the arbitration award has been obtained from the employer and examined. In reviewing the history, the arbitrator stated that the temporary contract phenomenon "first came up in September, 1983", when the employer backed down and issued regular contracts following a protest by the Association. When the matter was discussed at a school board meeting in April of 1984, the superintendent informed the board of legal advice that the use of temporary contracts "might be a violation of the collective bargaining agreement". As recited by the arbitrator, the Association challenged the issuance of temporary contracts through the grievance procedure in 1984, but dropped the grievance as "moot" early in 1985 after it had become clear that all of the employees initially hired under so-called "temporary" contracts had subsequently been given regular teaching contracts. The specific conduct at issue in the arbitration proceedings referenced in the unit clarification petition was a posting of temporary positions in May, 1985. In his discussion of a "coverage of agreement" issue raised by the employer, the arbitrator stated:

> (T)he arbitrator is not determining the composition of the bargaining unit because that determination was made by the parties when they agreed on the unit description. However, he is being asked by the Association to interpret the recognition article the parties themselves negotiated, i.e., whether or not 18 day positions are excluded.

Turning to the merits of the grievance, the Arbitrator stated:

> The District violated the recognition article of the collective bargaining agreement by not according bargaining unit status to "certificated educational employees" hired in so-called 18 day positions at the beginning of the school year.

In the explanation which followed, the arbitrator went through the general rule of the contract recognition clause (finding that it was applicable) and the several exclusions contained in the contract recognition clause (finding that none of them were applicable). In summary, he held:

> The District attempts to avoid the rights that come with bargaining unit status by issuing what it characterizes as 18 day contracts conditioned on enrollment projections. This it cannot do for the simple reason that these positions, regardless of the name the District chooses to attach to them, fall within the scope of the recognition article. Moreover, the rights accorded all bargaining unit employees include continued employment based on a regular teaching contract, as described in more detail in other articles of the collective bargaining agreement.

The arbitrator closed with a reiteration of assurance that he was not attempting to determine the composition of the bargaining unit, but rather confining himself to interpretation of the recognition article negotiated by the parties.

The Executive Director is required to administer case processing in accordance with Commission policy. Without regard to whether there are specific procedures for same, the motion and affidavit filed by the Association, the response filed by the employer, the collective bargaining agreement supplied by the

employer and the arbitration award supplied by the employer collectively call to the attention of the Executive Director facts which warrant application of the Toppenish policy before expending additional resources on the processing of the employer's petition in this case.

The employer does not allege any change of factual circumstances during the life of the current collective bargaining agreement. To the contrary, it alleges (and the arbitration award tends to confirm) that the hiring of employees for "temporary teaching positions of 18 or fewer consecutive days per year" has been a practice at the outset of the school year "in recent years". The employer alleges a change in the interpretation of "statute", but only in relation to the decision of the arbitrator, who expressly confined himself to the interpretation of the recognition clause of the contract. Thus, the employer does not meet the requirements of the "changed circumstances" portion of the Toppenish test.

It is clear that the employer has not complied with the "filing" requirement of the Toppenish test. The petition in the instant case was filed more than 7 months after the current collective bargaining agreement was signed. Even if the "filing" requirement were not absolute, the employer does not allege that it notified the union during bargaining "that it would contest the inclusion via the unit clarification procedure". To the contrary, everything points to the employer having been satisfied in 1985 to contest the Association's claims through the grievance procedure of the collective bargaining agreement while signing a new contract containing unchanged recognition language.

The recognition clause of the current and previous collective bargaining agreements states:

The District recognizes the Association as the sole and exclusive representative for all employees included in the bargaining unit. The bargaining unit is comprised of all certificated educational employees, except the following:

A. The chief executive officer;

B. The chief administrative officers, including the superintendent, deputy superintendent, administrative assistants, assistant superintendents, and business manager;

C. All confidential employees including the Board negotiators;

D. All principals and assistant principals;

E. All supervisors including the Director of Special Education, Director of Athletics and Director of Vocational Education.

F. All casual employees who shall be defined as substitute certificated employees employed by the District sporadically on call as needed and who have not worked at least 30 days during a period of 12 months ending during the current or immediately preceding school year.

It is expressly understood and agreed that in addition to the certificated employees recognized to be in the bargaining unit by the foregoing, the following categories of employees shall also be included in said unit:

1. Part-time substitutes who shall be defined as substitute certificated employees employed by the District for more than 30 days of work within any 12 month period ending during the current or immediately preceding school year and who continue to be available for employment as substitute teachers, and

2. Long-term substitutes who shall be defined as substitute certificated employees employed by the District where it is anticipated or comes to pass that a member of the bargaining unit will be

> absent from his or her regular assignment and will be replaced in such assignment for a period in excess of 20 consecutive work days.
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> Prior to the appointment of any person filling a new position which does not exist on the date of this recognition, the Board or its representative will deliver to the Association the job designation and description and the Association may give its rationale for whether the position is supervisory or nonsupervisory. If the Board disagrees with the Association's rationale, the Association has the right to seek a determination from the Public Employment Relations Commission; provided that the Board may determine the job title, job description, and fill the position pending such determination.

(emphasis supplied).[3]

The language of the concluding paragraph does not preserve a pre-existing dispute for determination by the Commission, as was found to be the case in Sedro Woolley School District, Decision 1351-B (PECB, 1982). Rather, that language recites the right of either party under Toppenish (and thus independent of any contractual recitation) to file a unit clarification about things "new" after signing the contract. Thus, it can be inferred that the employer signed the current contract knowing that its claim of "no contract coverage" was disputed by the Association. It is now clear (by reason of the arbitration award) that the employer's interpretation of the 1983-85 contract was incorrect and that, by operation of unchanged

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[3] By its filing of the petition in this case, the employer inherently acknowledges (and the arbitrator also found) that the contract language concerning "casual" employees, "substitutes" and "absent"/ "replaced" does not fit the employees it has hired to fill "18-day temporary" positions.

contract language, the current contract would be violated as to any persons similarly situated.

Having fought the battle in the wrong forum and lost, the employer now asks the Commission for a second bite at the problem. In doing so, the employer asks the Commission to vitiate both the contract into which it entered while knowing that its position was disputed, and the contract interpretation procedure in which it participated.

There is a colorable claim that the persons at issue belong in the bargaining unit represented by the Association. The employer's agreement to include them in the bargaining unit can be made a subject for discussion in the negotiations for the next collective bargaining agreement between the parties. In the absence of agreement there, the employer will be in a position to preserve the issue for determination by the Commission by the filing, at that time, of a unit clarification petition in conformity with the Toppenish test.

NOW, THEREFORE, it is

ORDERED

The petition for clarification of an existing bargaining unit filed in this matter is dismissed as untimely.

DATED at Olympia, Washington, this 29th day of September, 1986.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-35-210.