STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
CLALLAM TRANSIT SYSTEM	)	CASE 8393-C-90-477
	)	
For clarification of an existing bargaining unit of employees represented by:	)	DECISION 3831 - PECB
	)	
AMALGAMATED TRANSIT UNION, LOCAL 587	)	ORDER OF DISMISSAL
	)	

Miller and Richardson, by Craig L. Miller, Attorney at Law, appeared for the employer.

Frank and Rosen, by Steven B. Frank, Attorney at Law, appeared for the union.

On January 30, 1990, Clallam Transit System, filed a petition for clarification of an existing bargaining unit with the Public Employment Relations Commission, pursuant to Chapter 391-35 WAC. The employer therein sought the exclusion of "service coordinators" from an existing bargaining unit on the basis that they are supervisors. A hearing was held before Hearing Officer Katrina I. Boedecker on January 10 and 14, 1991, at Port Angeles, Washington. Both parties filed post-hearing briefs to complete the record.

BACKGROUND

The Clallam Transit Authority Board organized the Clallam Transit System (CTS) in 1980, to offer bus service throughout Clallam County. The Clallam Transit Authority Board approves overall policies of CTS. The operation is administered by General Manager Tim Fredrickson.

On January 22, 1981, the Public Employment Relations Commission issued a "conditional" certification designating Amalgamated Transit Union, Local 587 (ATU), as the exclusive bargaining representative of a bargaining unit of all CTS full-time and regular part time employees, excluding the general manager, operations supervisor, administrative assistant/bookkeeper and confidential employees.[1] The "condition" reserved on the certification at that time related to the fact that employees working under the title of "dispatcher" had voted challenged ballots.[2]

At the time of the hearing on the challenged ballots, the employer had been in operation for less than six months, and there were only two full-time dispatchers in dispute. Prior to a decision by the Public Employment Relations Commission on the challenged ballots, the parties negotiated an agreement for the period June 1, 1981 through May 31, 1982, covering titles of: transit operator trainee, transit operator, and receptionist/office assistant.

On August 4, 1981, the Executive Director issued a decision on the challenged ballots, noting that:

> Dispatchers employed by the employer are primarily assigned to work of an administrative nature and have only limited supervisory authority concerning suspension of bus drivers for infractions of established employer rules and dress codes. Any recommendations or actions of a supervisory nature are subject to independent review and determination by the Operations Supervisor or Manager.
>
> Dispatchers have work hours and holiday rights similar to those of bus drivers employed by

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[1] Clallam Transit System, Decision 1079 (PECB, 1981). The certification resulted from a representation election conducted by the Commission.

[2] The "dispatcher" classification has evolved into the "service coordinator" classification which is the subject of the instant dispute.

> the employer and, when absent from work, are replaced by bus drivers who are not, because of their interchangability with the dispatchers, in dispute in these proceedings.

Clallam Transit System, Decision 1079-A (PECB, 1981).

The dispatchers were thus included in the bargaining unit represented by the ATU.

On May 25, 1982, the parties extended their collective bargaining agreement through December 31, 1982. At that time, two new articles were added: "Article XVIII - Maintenance Employees", and "Article XX - Dispatchers". The provisions relating to dispatchers stated, in part:

> It is recognized that as part of their responsibilities, dispatchers will be required to discipline transit operators for failure to comply with published rules and policies.
>
> ...
> In addition to the uniform, a supervisor's identification tag shall be worn.

The dispatchers thus continued to be included in the bargaining unit represented by the ATU.

During or about September, 1982, the employer decided not to fill a proposed "road supervisor" position. Instead, it hired an additional dispatcher and reclassified all of the dispatchers to the new title of: "service coordinator". The three individuals employed under the "service coordinator" title at that time were Lee Berg, Terry Weed, and Billie Hutchison.

On September 30, 1982, the employer sent a memo to all of its transit operators, explaining the role of the service coordinators. The memo assigned 11 transit operators to each of the service coordinators. The service coordinators were to evaluate the

performance of their assigned operators four times per year, and were to offer counseling and issue reprimands as necessary.

At a meeting held by employer and union officials on October 13, 1982, the union protested bargaining unit members disciplining other bargaining unit members.[3] As a result of that meeting, the employer issued a memo on November 12, 1982, stating that the service coordinators would not perform counseling, issue reprimands, or write performance evaluations. The language of the parties' collective bargaining agreement was not altered.

The parties executed a new collective bargaining agreement effective for the period from January 1, 1983 through December 31, 1985. Nothing in Article XX - Dispatchers was changed, although the service coordinators continued to be included in the bargaining unit under their new title.

In 1984, as a result of expanded service being offered by CTS, Fredrickson wanted to delegate more authority to the service coordinators. By this time, Terry Weed had been made "operations manager". In a Labor Relations Committee meeting held in September of 1984, Weed informed the union that the employer was developing a proposal to take the "operations service coordinator" position out of the bargaining unit, and to change the job description to include more disciplinary functions. Other testimony indicates that the service coordinators began exercising more disciplinary responsibilities during this time period.

By 1985, CTS had doubled its ridership from 300,000 to 600,000. The number of CTS employees holding the "service coordinator" title had grown from three to five.

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[3] At that time, the service coordinators had told the union that they desired to remain in the bargaining unit.

At a Labor Relations Committee meeting held in 1985, approximately one year after the meeting where the service coordinators had been discussed in 1984, the employer informed the union that the service coordinators had indicated a desire to be removed from the bargaining unit. The employer asked for concurrence from the union. President Dan Linville of ATU Local 587 stated that he would talk with the service coordinators, and would work for what they wanted, but that he did not intend to release them from the bargaining unit at that time.

On September 23, 1985, all five of the service coordinators signed a letter to Linville, asking to withdraw from the ATU due to "... probable job responsibility expansion and resulting conflicts with ATU represented operators". The service coordinators felt that their union membership and their disciplinary responsibilities placed them in a conflict of interest situation. The union declined the request, indicating that it would support the authority of the service coordinators to discipline the transit operators.

During the autumn of 1985, the parties were engaged in negotiations for what was to become their 1986-1988 collective bargaining agreement. The employer proposed in those negotiations that the service coordinators be removed from the bargaining unit. The union requested the opportunity to handle the "conflict" internally, and the negotiations concluded with the employer withdrawing its proposal to exclude the service coordinators. Linville testified that the employer "reserved the right" to file a unit clarification petition seeking removal of the service coordinators from the bargaining unit, but no petition was filed during, or even following, those negotiations.

Prior to ratifying the parties' 1986-1988 collective bargaining agreement, the employer revised its Employee Manual. In January of 1986, Fredrickson advised Linville, by letter, that the employer

intended to exercise the language in Article XX which required service coordinators to discipline transit operators for failure to comply with published rules and policies.

In mid-1986, as a result of the revisions of the Employee Manual, service coordinators were assigned to administer cautions and reprimands to transit operators, when warranted.

The services provided by CTS and its workforce expanded again in and following 1986, when voters approved annexing the western third of the county to the Clallam Transit System.

On September 21, 1988, the service coordinators again sent notice to the union of their desire to withdraw from the bargaining unit, due to conflicts of interest.

The employer and union were again involved in contract negotiations in the autumn of 1988. The employer again proposed removing the service coordinators from the bargaining unit, and the union again rejected the proposal. The union insisted that it could handle the conflict problem internally. No unit clarification petition was filed concerning the service coordinators during the negotiations. The parties' 1989-1991 collective bargaining agreement continued to cover the service coordinators.

On March 22, 1989, the service coordinators once again notified the union of their desire to withdraw from ATU Local 587, because of the conflict of interest that existed with the drivers.

In May of 1989, Linville wrote to International President James LaSala of the ATU, requesting information about the service coordinators' rights to withdraw from the local union. He explained that the employees were concerned that "they do not have a common interest with the drivers at CTS and that they are treated and referred to as management by their fellow union members".

LaSala replied in a letter to Linville dated May 30, 1989, noting that there were similar "management-type classifications" in other ATU bargaining units, "even though the relationship appears to be strained". LaSala called on the transit operators and maintenance employees to realize that the coordinators had a job to do and "if we do not represent them, someone else will".

During a Labor Relations Committee meeting held in July of 1989, the union informed the employer that it was seeking information from its international headquarters regarding the service coordinator situation. The employer was concerned that the issue had been around for too many years, and that it was affecting the morale of the service coordinators and others.

In August of 1989, the five service coordinators co-signed a letter to Fredrickson, asking the employer to petition for unit clarification concerning their positions. The letter stated, in part:

> During the most recent negotiations, when the subject was brought up, the union officials asked the service coordinator who was on the [union's] negotiation team to drop the request at this time and assured the negotiating team it would be handled after the contract was ratified. This was not followed through after negotiations closed.

In October, 1989, Fredrickson wrote to Linville, requesting that they initiate discussions as to the status of the service coordinators. The letter stated that if a solution was not achieved, the employer would pursue a unit clarification petition.

Linville responded that he would be willing to discuss a solution at the parties' Labor Relations Committee meeting in November of that year, but that the Commission had already ruled that the service coordinators should be in the bargaining unit. Linville

cited the decision issued by the Commission shortly after Local 587 was first certified as exclusive bargaining representative.

The matter was not resolved at the Labor Relations Committee meeting held by the parties in November of 1989, and the employer filed the instant unit clarification petition on January 30, 1990.

POSITIONS OF THE PARTIES

The union argues that the petition in this case was not timely filed, and that it should be dismissed on that basis. Additionally, the union contends that the service coordinators are not supervisors, since they continue the duties of the dispatchers with "only limited supervisory authority" as found in Clallam County Transit, Decision 1079-A (PECB, 1981).

The employer contends that the petition should be considered to be timely, because the union has not fulfilled its promise to resolve the problem internally. The employer cites the union's request during bargaining, and asserts that it relied to its detriment on the union's assurance that the problem would be handled away from the bargaining table. The employer thus argues that the union should be equitably estopped from arguing that the petition is now untimely. The employer points to the major expansion of its service to justify its claim that the service coordinators are now supervisors, and that they are not performing the same duties that the dispatchers performed in 1981.

DISCUSSION

The determination and modification of bargaining units is a matter delegated by the Legislature to the Public Employment Relations Commission. RCW 41.56.060 provides:

> **RCW 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 statute, the rules adopted by the Commission to implement that statute, and Commission precedent all reflect concern for the stability of collective bargaining relationships, as well as concern that the processes of the Commission not be abused. City of Fife, Decision 3397 (PECB, 1990).

Early in its history, the Commission held that the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, differs significantly from the National Labor Relations Act in its treatment of "supervisors", such that "supervisors" are "public employees" within the meaning and coverage of Chapter 41.56 RCW. City of Tacoma, Decision 95-A (PECB, 1977). The Commission's approach was adopted by the Supreme Court in Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977). Both of those cases arose in the context of separate bargaining units of supervisors.

Thereafter, the Commission addressed the potential for conflict of interest that is inherent in having both supervisors and their subordinates in the same bargaining unit, and it affirmed the exclusion of supervisors from the bargaining unit which included their subordinates. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). The same decision made it clear, however, that

the Commission was not creating a perpetual "open season" to disrupt bargaining units or to abuse Commission procedures:

> Absent a change of circumstances warranting a change of the unit status of individuals or classifications, the unit status of those previously included in or excluded from an appropriate unit by agreement of the parties or by certification will not be disturbed. [emphasis supplied]

In the Richland case, the recent substantial change of statutory interpretation made by the Commission in City of Tacoma, supra, and by the Supreme Court in METRO, supra, was deemed a sufficient basis to upset a long-standing inclusion of supervisors in the bargaining unit.[4] While the separation of supervisors from their subordinates is not an absolute requirement of the statute, the Commission has since responded favorably to timely requests that "supervisors" be excluded from the bargaining units containing their rank-and-file subordinates.[5]

As labor and management sought to implement the principles laid down in the Tacoma, METRO, and Richland decisions, the problem of "timeliness" continued to arise. The thrust of the Commission's concern was to give parties notice of any potential changes to the scope of the bargaining unit, so that bargaining would be realistic

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[4] The employer had filed its petition in that case during negotiations for a successor contract. The Commission (as well as the Department of Labor and Industries and a superior court) rejected the notion that the subsequent signing of a collective bargaining agreement by the parties vitiated the unit clarification petition. The sequence of dates is detailed in the Hearing Officer's decision in the case, City of Richland, Decision 279 (PECB, 1977) at paragraph 4.

[5] It should be noted that the Commission's policy concerning supervisors implements the discretion delegated to the Commission in matters of unit determination. City of Fife, supra.

in reflecting the actual situation between the employer and union. Toppenish School District, Decision 1143-A (PECB, 1981). For the notice to be deemed adequate, it must be delivered during bargaining and the unit clarification petition must be filed before the new collective bargaining agreement is ratified. This two-step approach was later codified in the Commission's rules, as follows:

> **WAC 391-35-020 PETITION--TIME FOR FILING.** (1) Disputes concerning status as a "confidential employee" may be filed at any time.
>
> (2) Except as provided in subsection (1) of this section, where there is a valid written and signed collective bargaining agreement in effect, a petition for clarification of the covered bargaining unit will be considered timely only if:
>
> (a) The petitioner can demonstrate, by specific evidence, substantial changed circumstances during the term of the collective bargaining agreement which warrant a modification of the bargaining unit by inclusion or exclusion of a position or class; or
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> (b) The petitioner can demonstrate that, although it signed the current collective bargaining agreement covering the position or class at issue in the unit clarification proceedings, (i) it put the other party on notice during negotiations that it would contest the inclusion or exclusion of the position or class via the unit clarification procedure, and (ii) it filed the petition for clarification of the existing bargaining unit prior to signing the current collective bargaining agreement.

When a party acknowledges that the unit clarification petition was not filed in accordance with the provisions of WAC 391-35-020, or does not provide evidence otherwise, the petition has been dismissed. Stevens County, Decision 3347 (PECB, 1989); King County, Decision 3534 (PECB, 1990).

Exceptions have been rare, and only where clearly indicated by the facts. In Sedro Woolley School District, Decision 1351-B (PECB,

1982), an order dismissing a post-contract petition under the Toppenish policy was withdrawn upon a finding that the employer and union had affirmatively agreed to submit the unit determination issue to the Commission. In City of Seattle, Decision 2286 (PECB, 1986), the unit clarification petition was not filed prior to the contract being ratified, but the parties had specifically preserved the unit determination issue in their contract language so it was held that the petition was timely. In Spokane County Fire District 1, Decision 3279 (PECB, 1989), the discussion of the issue in bargaining may have been less than desired, but it was clear that both the president of the local union and the head of the union's bargaining team had actual knowledge of the employer's request to exclude a supervisory position from the bargaining unit prior to the final contract settlement. The petition filed in advance of the contract being signed and was deemed timely. See, also, Benton County, Decision 3565 (PECB, 1990). An exception was allowed recently in Skagit County, Decision 3828 (PECB, 1991), where it was concluded that the unit to be clarified was fatally flawed by the agreement of the parties on a unit configuration that was not an appropriate unit under RCW 41.56.060.

Timeliness of the Instant Petition

Applying the foregoing pecedents to the facts of this case, it is concluded that the employer has not met the standards for the timely filing of a unit clarification petition as set out in WAC 391-35-020.

The "Confidential" Avenue -
The petition does not fall under WAC 391-35-020(1), because the parties stipulated at the hearing that the service coordinators were not "confidential" employees.

The "Changed Circumstances" Avenue -

The petition does not fall under WAC 391-35-020(2)(a), because the "changed circumstances" language of that rule (and of the Toppenish decision on which it was based) contemplates changes which occur during the life of the current collective bargaining agreement. The changed circumstances at CTS occurred in 1985 and 1986, one to two labor agreements prior to their current collective bargaining agreement.[6]

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[6] The bargaining unit now includes 35 transit operators, five maintenance workers, one clerk and four service coordinators. The employer seems to have had 33 transit operators by 1982, and the last major expansion of its service area was approved in 1986. The duties of the service coordinators now include: Scheduling transit operators; preparing runcuts (a quarterly packaging of the work to be bid on by the transit operators); determining level of service changes (depending on weather on a particular day, road conditions and/or unusual numbers of riders); and investigating problems and passenger complaints. The service coordinators ride on buses to check and evaluate the performance of the drivers. They determine the number of operators that can be on leave on any given day, and they investigate whether requested overtime is appropriate. Weed and the service coordinators screen and interview applicants for operator positions. The service coordinators are in charge of operator training, and can recommend whether to retain a trainee. The service coordinators have developed policies to handle problems CTS encounters, such as: Passengers who want to transport their bicycles on the bus; passengers who miss connections; safety switches on certain buses; service to elderly or handicapped passengers on charter buses; and cleaning procedure for the buses. The coordinators issue "Record of Disciplinary Action" forms to drivers, when necessary. The most frequent infractions relate to tardiness, being out of uniform and improper use of sick leave. CTS personnel policies state that the coordinators have the authority to relieve operators from duty, provided that they make no decision regarding loss of pay. The service coordinators receive $1.29 per hour more that the transit operators. Actions by the service coordinators have resulted in grievances being filed, and the employer has supported the actions and decisions of the service coordinators. The service coordinators work in a small office area within the employer's facility, and at least one of them is always on duty while the employer's facility is

The "Bargain and File" Avenue -
The petition does not meet the requirements of WAC 391-35-020(2)-(b), because it was not filed before the parties' 1989-1991 collective bargaining agreement was ratified.

The employer argument that the union should be "estopped" from asserting that the petition was untimely (i.e., because the union has not fulfilled its promise that it would take care of the conflict "internally") is interesting, but looses its punch when the record clearly shows that this employer has allowed itself to be lured away from filing the unit clarification petition during two successive rounds of contract negotiations.[7]

For reasons indicated above, it is concluded that the petition in this case must be dismissed.

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operating. They meet with the operations manager monthly to discuss changes in service, special charter requests and discipline, and they act in the place of the operations manager in his absence. While the responsibilities of the service coordinators may have changed significantly since 1980, however, there is little or no evidence of changes since the contract was signed in 1988.

[7] It is not the intention of the Executive Director to treat the employer's arguments in a trite manner, but the parties to business relationships (including collective bargaining matters) and administrative proceedings are expected to know and follow the rules applicable to them:

Fooled me once,
shame on you.
Fooled me twice,
shame on me.

The disposition of this case on "procedural" grounds will not resolve the operational problems which the record establishes that the employer and/or the service coordinators clearly perceive to exist. The parties should be entering contract negotiations in the near future to replace the current contract due to expire at the end of 1991, and should be prepared to implement the precedents and rule as described in this decision, lest lightning strike "thrice".

FINDINGS OF FACT

1. Clallam Transit System is a public employer within the meaning of RCW 41.56.030(1).

2. Amalgamated Transit Union, Local 587, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of transit operators, maintenance workers, clerk and service coordinators employed by the Clallam Transit System.

3. The bargaining relationship between the parties originated from a certification by the Public Employment Relations Commission in 1981. The inclusion of the service coordinators (formerly "dispatchers") in the bargaining unit was the subject of a formal ruling by the Commission in 1981.

4. The employer expanded its service area and operations between 1981 and 1986. While there may have been changes of circumstances affecting the service coordinators during that period, the record fails to disclose substantial changes of circumstance since that time period.

5. During negotiations which preceeded the parties' signing of collective bargaining agreements for 1985-1986, for 1986-1988, and for their present agreement, the employer informed the union that it believed that the service coordinators were supervisors who should be excluded from the bargaining unit. In each case, the union resisted removal of the service coordinators from the bargaining unit, but the employer did not file a unit clarification petition with the Commission.

6. The petition for clarification of an existing bargaining unit filed to initiate this proceeding was filed on January 30, 1990, mid-term in a collective bargaining agreement which will

remain in effect through December 31, 1991. That agreement was signed by all parties January 9, 1989.

7. The parties stipulate that the service coordinators are not "confidential" employees under RCW 41.56.030(2)(c).

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-35 WAC.

2. The petition for clarification of an existing bargaining unit in this matter was not filed within the time requirements of WAC 391-35-020.

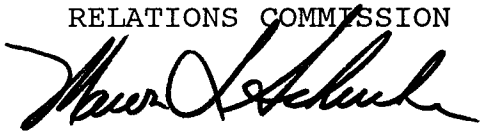
NOW, THEREFORE, it is

ORDERED

The petition for clarification of an existing bargaining unit filed in the above-captioned matter is DISMISSED as untimely.

Dated at Olympia, Washington, the 31st day of July, 1991.

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.