STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
CITY OF VANCOUVER	)	CASE 13113-C-97-825
	)	
For clarification of an existing bargaining unit represented by:	)	DECISION 6179 - PECB
	)	
OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 11	)	ORDER CLARIFYING BARGAINING UNIT
	)	
	)	

Perkins Coie, by Bruce M. Cross, Attorney at Law, appeared on behalf of the employer.

Victor Calzaretta, Attorney at Law, appeared on behalf of the union.

On April 24, 1997, the City of Vancouver filed a petition for the clarification of existing bargaining unit with the Public Employment Relations Commission under Chapter 391-35 WAC, seeking a ruling as to whether four positions transferred into its workforce should be accreted to an existing bargaining unit represented by Office and Professional Employees International Union, Local 11. A hearing was held in Vancouver, Washington, on October 14, 1997, before Hearing Officer William A. Lang. The parties made closing arguments on the record.

BACKGROUND

The City of Vancouver (employer) is located in Clark County, and has approximately 800 employees in nine departments. In addition,

from 1972 through 1997, the City of Vancouver and Clark County were parties to an interlocal agreement which created a Joint Office of Information Technology (JOIT).

This controversy concerns four "Micro Computer LAN Technician" (MLT) positions that were transferred from the JOIT to the City of Vancouver workforce in mid-1997. Other MLT positions were transferred to the Clark County workforce at the same time. A transfer of the remaining JOIT employees to the Clark County workforce was announced later in 1997.[1]

Historical Bargaining Relationships

The City of Vancouver has historically negotiated collective bargaining agreements with 10 labor organizations. One of those contracts was negotiated with a coalition of five labor unions, and covered almost 300 employees for the period from January 1, 1995 through December 31, 1997.

Office and Professional Employees International Union, Local 11, was one of the unions participating in the coalition agreement. It

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[1] Review of the Commission's docket records discloses other proceedings in 1997 concerning the JOIT workforce:

- Case 13403-E-97-2237 was a representation petition involving the JOIT workforce. After a transfer of all JOIT employees to Clark County was announced, this petition was amended to include the six MLTS positions and a representation election was held.
- Case 13431-E-97-2237 was a representation petition seeking a separate unit for the six MLTS' positions. It was withdrawn after the employees were re-included in the unit with the other JOIT employees transferred to Clark County.

has historically represented a bargaining unit which encompasses a mix of about 156 professional, technical and support employees in various City of Vancouver departments.

Local 11 also historically represented the JOIT employees as a separate bargaining unit of professional and clerical employees. A collective bargaining agreement covering the JOIT unit expired on June 30, 1997.

Transfer and Initial Conditions

For reasons not at issue here, plans were announced to transfer employees in the MLT classification from the JOIT to the separate City of Vancouver and Clark County workforces. Representatives of the City of Vancouver, Clark County, and Local 11 engaged in "effects" bargaining under Chapter 41.56 RCW, and negotiated a memorandum of understanding to cover the personnel impacts of the transfer of the MLT positions to the separate city and county workforces. Footnote 1 of that memorandum provided:

> With respect to the transfer of the MLT's, and except as otherwise provided herein, the city and the county intend to extend to them the same benefits and personnel practices as those applicable to the current city and county employees represented by Local 11 and will recognize Local 11 as their representative for disciplinary matters or grievance handling. However, they will not be considered formally accreted to the O&P bargaining units until and unless so determined by the Public Employment Relations Commission. Additionally, the employers will continue to collect and remit membership dues to Local 11.

That agreement, which was to be effective from April 30, 1997 through December 31, 2000, was duly signed by representatives of the respective human resources departments and Local 11.

New Working Conditions of MLT Employees

The MLT positions were placed in the Information Technology Services Division of the employer's Department of Information Services. None of the employees in that division were historically included in the bargaining unit represented by Local 11.
The division is supervised by an information technology services manager, and also includes a project coordinator position and a telecommunications technician position. The employees in the MLT class provide technical support, servicing micro-computers and local area networks for departments to which they are assigned. They generally work independently, troubleshooting personal computer and network administration problems and obtaining technical assistance from the project coordinator, when needed.

Two different salary levels are associated with the MLT positions. The first is an entry level paid at range 34, while the second is a journey level at range 42. The senior MLT position provides advanced levels of complex, technical support for personal computers, department microcomputers and servers, and local area networks. The senior MLT also assists in coordinating the work of the other MLT employees.

The project coordinator is paid at range 46, and services information technology activities such as voice, video, and data. This person acts as project lead on technical conversions, installation and moves. This person also reviews hardware and software purchase requests, provides training on software, and performs "first level"

trouble-shooting for peripheral hardware such as printers, CD-rom drives, pointing devices, LAN cards and modems.

The telecommunications technician maintains telecommunication equipment and systems, including the installation of telephones and wireless devices, and performs inside wiring to accommodate moves of equipment or personnel. This position requires at least three years of experience in electronics or telecommunications.

Other Employees of Department

The employer's Department of Information Services contains three other divisions, each of which is supervised by a manager:

- In an Administrative Services Division, Local 11 represents various office assistant classifications, print shop operators and a mail room clerk.

- In a Video Services Division and in a Publication Services Division, none of the employees have historically been represented by any labor organization.

POSITIONS OF THE PARTIES

While the employer apparently agreed to include the disputed employees in a "general unit" represented by Local 11, the employer's petition stated that "The most appropriate unit within the existing City workforce would appear to be the Office and Professional Employees unit which is also represented by Local 11 OPEIU". By the time of the hearing, the employer argued that the desires of the employees should be paramount in unit determina-

tions, and it objected to a ruling by the Hearing Officer which excluded affidavits and testimony from the affected employees on their desires. The employer also asks whether the employees should be preserved as a stand-alone bargaining unit under a successorship doctrine, including retaining the agreement they had under the joint office, or should be considered a new unit and afforded a representation election.

Local 11 argued that the situation is governed by the memorandum of understanding entered into between the city, county, and Local 11. The union also observed that the employer did not call any of the disputed employees as witnesses.

DISCUSSION

Ruling Excluding Evidence of Employee Desires

The employer notes that RCW 41.56.060 specifically lists the "desires of the public employees" as a factor to be considered by the Commission in making unit determinations.[2] It follows,

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[2] RCW 41.56.060 states:

> 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

according to the employer, that affidavits and testimony concerning the desires of affected employees should be admissible evidence in representation proceedings.

The employer's arguments concerning implementation of the "desires of employees" aspect of the RCW 41.56.060 unit determination criteria take that clause out of context, both in relation to the statute and in relation to the Commission's procedures:

- The overall context of the statute indicates a Legislative intent to have employee views on sensitive representation issues assessed by secret ballot or cross-check procedures which will protect employees from excessive (and potentially coercive) scrutiny from their employers and any labor organizations involved. These principles are rooted in, and are consistent with, the National Labor Relations Act of 1935. Thus, neither the showing of interest required by RCW 41.56.070 and WAC 391-25-110 in support of a representation petition, nor the testimony of individual employees, is relied upon to assess the "desires of employees". City of Seattle, Decision 781 (PECB, 1979). The solicitation of such testimony, and subjecting employees to cross-examination, would be improper and could be considered an interference with the right of employees to select representatives by secret ballot, free from intimidation or disclosure.

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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. [1975 1st ex.s. c 296 § 17; 1967 ex.s. c 108 § 6.]

- The Commission's procedures protect the confidentiality of employee views on such sensitive matters by conducting secret ballot unit determination elections, when appropriate. Oak Harbor School District, Decision 1319 (PECB, 1981). The integrity of the ballot is of great concern to the Commission.[3] Moreover, the unit determination election procedure affords all affected employees an equal voice on the unit determination issue, rather than placing reliance on the views of the limited few who may be called as witnesses or who may be more articulate or persuasive than others.

The employer's arguments also disregard the limited nature of the unit clarification proceeding which the employer itself initiated here. The focus is limited to the existing bargaining unit, and there is no provision for conducting any elections under Chapter 391-35 WAC.

The authority to determine bargaining units has been delegated by the Legislature to the Commission. RCW 41.56.060. Unit determination is not a subject for bargaining in the usual mandatory/permissive/illegal sense, and the Commission is not bound by the agreements made by employers and unions on unit issues. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). Once placed within a bargaining unit under RCW 41.56.060, individual employees have a right to vote on any question concerning representation in that unit. The employees in a portion of an appropriate bargaining unit do not, however, have a right to vote separately on representation. They

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[3] See, City of Tukwila, Decision 2434-A (PECB, 1986).

clearly do not have any right to veto the Commission's decision including them in a bargaining unit.

Accretion To An Existing Bargaining Unit

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is most often encountered in its regulation of relationships between unions and employers, but it is founded on the right of employees to be represented by organizations of their own choosing. RCW 41.56.040. Unions are certified as exclusive bargaining representatives under RCW 41.56.080 on the basis of "majority rule" in elections conducted by the Commission under RCW 41.56.070 within bargaining units which have been found appropriate by the Commission under RCW 41.56.060.

Accretions to bargaining units are an exception from the norm. The addition of job classifications to an existing bargaining unit without an election necessarily infringes upon the right of the affected employees to designate a bargaining representative of their own choosing. Thus, the Commission will only accrete positions to existing bargaining units if changed circumstances create a situation wherein the employees can only be appropriately placed in that one existing bargaining unit, and cannot stand alone as a separate unit or logically be accreted to any other existing bargaining unit. King County, Decision 5820 (PECB, 1997). Because accretions are such an exception, the party seeking the accretion does have the burden of proof. Kiona-Benton School District, Decision 3180 (PECB, 1989).

Existence of Changed Circumstances -

The transfer of MLT functions from the JOIT to this employer's Department of Information Services clearly constituted a signifi-

cant change of circumstances of the type which can give rise to clarification of a bargaining unit under Chapter 391-35 WAC.

Timeliness of City's Request -

A common theme running through decisions where accretions have been ordered is that the accretion issue must be raised immediately upon or soon following a change of circumstances. See, Oak Harbor School District, Decision 1319 (PECB, 1981). In the absence of timely action, each passing hour or day accumulates as history of bargaining weighing against an accretion. In this case, the City of Vancouver appears to have moved with dispatch upon the transfer of the disputed employees.

Community of Interest -

For an accretion to be ordered, it must be established that the recent change of circumstances has created a compelling "community of interest" between the existing bargaining unit and the positions proposed for accretion. Such determinations are guided by the unit determination criteria set forth in RCW 41.56.060.

The "duties, skills and working conditions" of employees are a factor in almost every unit determination analysis. While the statute does not prioritize the four unit determination criteria, a pragmatic consideration is that there will be no evidence or issue in many cases concerning the "history of bargaining" or "extent of organization", and the "desires of employees" need only be assessed where there are two or more viable unit configurations under consideration.[4]

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[4] Clark County, Decision 290-A (PECB, 1977).

The MLT job title suggests that the disputed employees are within the office-clerical and/or technical generic occupational types. If the inquiry in this case were to be limited to comparison of the disputed employees with the similar job titles of the other employees in the division to which they are now assigned, there would be some basis to conclude that a community of interest exists. If the inquiry is broadened, however, to consider all of the employees currently represented by Local 11 (and their job titles implying a wide range of generic occupational types) or to all of the employees of the employer, then the existence of a community of interest is far less evident.

The union relies here upon the weight of numbers provided by the 156 or so employees it represents employer-wide. Under the union's view of the case, the disputed employees constitute less than 5% of the employees in the enlarged unit, and certainly would not constitute a sufficient addition to call the union's majority status into question. Serious questions arise, however, about the propriety of counting all of the employees represented by Local 11 for this purpose. Review of the classification appendix to the 1995-1997 coalition collective bargaining agreement discloses that classifications are set forth by job title, and then by the union which represents that job classification:[5]

- Local 11 represents some engineering technicians, but there is no evidence of any similarities with the disputed employees.

- Local 11 represents a "police records technician" at pay range 22 ($1718/month base) and a "senior police records technician" at pay range 26 ($1895/month), but the record does not suggest

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[5] Precise numbers of employees by-classification are not established in this record.

or indicate that those "technician" titles involves servicing microcomputers or computer networks. Moreover, the relatively low pay rates for those classes provides basis for an inference that they do not function at the level of the disputed employees, who are paid 35% to 48% more.

- The record supports a conclusion that Local 11 otherwise represents employees who mostly fall into the office-clerical and accounting generic occupational types.

The weight of numbers relied upon by the union is largely based on widely-dissimilar employees. Thus, no evidence supports backing into a conclusion that an accretion is the only appropriate way to proceed in this case.

The history of bargaining and extent of organization also weigh against an accretion in this case:

- The employer has been willing to treat the employees who transferred from the JOIT as being represented by Local 11, but the analysis neither ends with, nor is bound by, the agreement by which they were transferred. The evidence in this record establishes that persons previously employed by the City of Vancouver are performing essentially the same functions, utilizing the same skills, sharing the same immediate and ultimate supervision, occupying the same general work area, and receiving the same benefits as the disputed employees. All of this suggests a high potential for an ongoing legacy of work jurisdiction disputes in the Information Technology Division if the MLT positions were to be regarded as a separate bargaining unit. While the creation of a separate unit limited to the disputed employees would also

be inappropriate, because it would strand at least two other Information Technology Division employees without a meaningful way in which to exercise their statutory collective bargaining rights, that does not support a conclusion that the general unit represented by Local 11 is the only appropriate unit placement for the transferred employees.

- This employer and this union were previously put on notice of the risks of leaving unrepresented loopholes within the employer's workforce. In City of Vancouver, Decision 3160 (PECB, 1989), the employer asserted concerns about "fragmentation" as basis for arguing that some historically unrepresented employees should be accreted to the general employee unit represented by Local 11. The argument was rejected, however, and the employees at issue in that case were permitted to vote on representation by another organization in a separate bargaining unit. Nevertheless, it now appears that none of the employees in three of the four divisions of the employer's Department of Information Services have been included in any bargaining unit, and only some of the employees in the fourth division have historically been union-represented. As in the earlier case, the record now before the Executive Director provides ample basis for a conclusion that the employees in the MLT classification could band together with other historically unrepresented professional and technical employees in their department to select a representative of their own choosing. The possibility of such a bargaining unit defeats the proposed accretion.

The impropriety of the current situation may come as a surprise to both of the parties to this case, but that does not negate the existence of a problem. Nor does the historical representation of

the MLT classification by Local 11 preclude or mitigate a conclusion that the transfer of the four MLT employees into a City of Vancouver workforce and organization containing similar employees had the effect of extinguishing the former bargaining relationship and raised a question of representation. The union will, of course, be free to organize the employees in the affected department, and those employees will be free to choose an exclusive bargaining representative if they so desire.

FINDINGS OF FACT

1. City of Vancouver is a "public employer" within the meaning of RCW 41.56.030(1).

2. Office and Professional Employees International Union, Local 11, a "bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of certain employees of the City of Vancouver. The union represents mostly accounting, engineering technician and office-clerical classifications, in various departments or divisions. Local 11 did not, however, represent any employees in the Information Technology Services Division, Video Services Division or Publication Services Division, and it represented only office-clerical, print shop and mail room employees in the Administrative Services Division, of the employer's Department of Information Services.

3. The employer and union were parties, together with four other labor organizations, to a "coalition" collective bargaining agreement effective from 1995 through 1997. While that contract covered all City of Vancouver employees represented

by Local 11, the history by which those employees came to be covered under one contract is not precisely established in the record.

4. The employer and Clark County were parties to an interlocal agreement for the creation of a Joint Office of Information Technology. Local 11 represented employees of the joint office in a separate bargaining unit and relationship, and a separate collective bargaining agreement was signed for that unit. The separate unit historically included employees in the Micro Computer LAN Technician (MLT) classification.

5. In anticipation of a transfer of employees in the MLT classification from the joint office to the separate workforces of the City of Vancouver and Clark County, the parties to the interlocal agreement and Local 11 negotiated and signed a memorandum of agreement calling for the continued representation of transferred employees by Local 11.

6. Four MLT employees were transferred to the City of Vancouver workforce on or about April 30, 1997, and were assigned to the Information Technology Services Division of the employer's Department of Information Services. The transferred employees provide technical support for microcomputers and local area networks for the departments to which they are assigned, including trouble-shooting of computer problems and network administration. That division was one in which none of the employees have historically been represented for the purpose of collective bargaining, and its workforce includes at least a project coordinator position and a telecommunications technician position who have some duties, skills and working conditions similar to those of the transferred employees.

7. There is no evidence that the MLT employees have duties, skills or working conditions similar to those of engineering technicians represented by Local 11.

8. Although the word "technician" appears in their job titles, the record does not support a conclusion that the employees in "police records technician" classifications represented by Local 11 perform functions dealing with the purchase, installation or maintenance of micro-computers or computer networks.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission had jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-35 WAC.

2. Because of the existence of historically unrepresented employees performing similar work in the same division, and the ongoing potential for work jurisdiction conflicts, a separate bargaining unit limited to the transferred MLT employees is not, and would not be, an appropriate unit for the purposes of collective bargaining under RCW 41.56.060.

3. Because the general employees bargaining unit historically represented by Local 11 has not encompassed all of the employees of the division to which they have been assigned, and because of the potential for a question concerning representation encompassing the transferred employees and other employees of the division, a question concerning representation would exist as to the disputed MLT employees, so that their accretion to the existing unit would improperly

infringe upon their right, under RCW 41.56.040, to vote upon their representation.

ORDER

The accretion of the Micro Computer LAN Technician positions into the bargaining unit represented by Office and Professional Employees International Union, Local 11 is DENIED.

Issued at Olympia, Washington, this 7th day of January, 1998.

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.