

STATE OF WASHINGTON  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
TOPPENISH SCHOOL DISTRICT	)	CASE NO. 2165-C-79-99
	)	
For clarification of an existing bargaining unit of its employees represented by:	)	DECISION NO. 1143-A PECB
	)	
PUBLIC SCHOOL EMPLOYEES OF WASHINGTON	)	DECISION ON REVIEW
	)	

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Robert Schwerdtfeger, Labor Consultant, Washington State School Directors' Association, appeared on behalf of the employer.

G. P. Sessions, Attorney at Law, appeared on behalf of the union.

The issue before us is whether the petition of the employer, Toppenish School District, for an order clarifying a bargaining unit, was filed at the proper time and was the proper method to obtain the removal of alleged supervisors from the bargaining unit. The Executive Director ruled, on the basis of stipulated job descriptions, that the individuals in question may be "supervisors", whose exclusion from the bargaining unit of non-supervisory employees might be based on their separate and distinct duties, skills and working conditions. He refused, however, to grant the exclusion requested by the employer because he concluded that the disputed positions had been negotiated by the parties to place them under the coverage of an existing collective bargaining agreement, and because there was no evidence of changed circumstances that would warrant their exclusion from the bargaining unit at this time.

The employer contends that its prior negotiations with the union, i.e., all bargaining history, is irrelevant. It maintains that exclusion of supervisors from a bargaining unit should be available to the employer by unit clarification at any time a disagreement exists. The union's apparent position is that once employees have been included in a bargaining unit under a collective bargaining agreement, they cannot be excluded during the term of that agreement regardless of whatever else transpires. Rather, it would be the union's view that an exclusion could only be obtained by raising a question concerning representation during the contract's

"window" period, and that an election should be conducted. The Executive Director's ruling reflects neither of these extremes.

This case involves a unit determination under RCW 41.56.060. Neither party raises a "question concerning representation" which could disturb the status of the union as exclusive bargaining representative of the bargaining unit or invoke the contract bar time periods of RCW 41.56.070. We cannot ignore "history of bargaining", one of the specific unit determination criteria spelled out by the Legislature in RCW 41.56.060. On the other hand, we cannot ignore actual changes of circumstances which modify the duties, skills and working conditions of an employee or position so as to give rise to a potential for conflicts of interest should the changed position continue to be included in a bargaining unit of persons over which supervisory authority is to be exercised. The Executive Director has identified a middle ground, and we are in agreement with his decision.

A synthesis of decisions in our prior cases, with special emphasis on the decision of the Court of Appeals reviewing our City of Richland, Decision 279-A (PECB, 1978) in International Association of Firefighters, Local 1052 v. PERC, 29 Wn.App. 599 (1981), and consideration of NLRB precedent, point to the rule that follows:

A mid-term unit clarification is available to exclude individuals from a bargaining unit covered by an existing collective bargaining agreement if:

- a) The petitioner can offer specific evidence of substantial changed circumstances that would warrant such an exclusion,

or

- 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.

The "changed circumstances" criterion appears in a previous Commission decision. White Pass School District, Decision 573-A (PECB, 1979), cf., City of Seattle, Decision 689-A (PECB, 1979). As the Executive Director suggests in his decision in this case, it exists in the context of "supervisors" to allow for new management arrangements.

The second criterion is demonstrated in Richland, supra. There, the Court of Appeals relied on two NLRB cases, WNYS-TV (WIXT) and National Association of Broadcast Employees, 239 NLRB No. 170 (1978) and Massey Ferguson, Inc., and UAW, 202 NLRB No. 193 (1973). The Court of Appeals attached particular importance to the fact that the petitioner in both NLRB cases, as well as in the case before it, had asked for unit clarification during

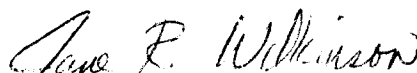
negotiations, and had not waived that request during the bargaining process. Our two-step "discuss and file" requirement is in keeping with the particular problems of the public sector and with the provisions of RCW 41.56.050. There is no such thing as a "recognition" or "unfair labor practice" strike. RCW 41.56.050 suggests that parties must at least talk to one another about recognition and unit issues in order to frame the existence of a disagreement prior to invoking the jurisdiction of the Commission. When there is a disagreement, submission of the dispute to this Commission for determination is mandatory. Unit determination is not a mandatory subject for collective bargaining in the conventional "mandatory/permissive/illegal" sense, City of Richland, Decision 279-A, supra. It would be improper for parties to permit a unit determination dispute to become part of an impasse in negotiations, and there should be no impediment to removing such issues from the bargaining table by filing of a unit clarification petition. The requirement for filing prior to the conclusion of negotiations will also serve the purpose of avoidance of issues concerning whether the unit issue was waived or settled at the bargaining table. Once a petition has been filed, the opposite party will be clearly on notice that any further bargaining concessions made or received relating to the unit status of disputed individuals would be subject to being lost through the results of the ensuing unit clarification proceedings.

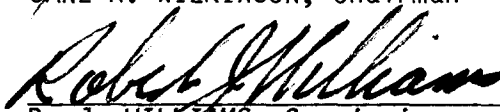
In the instant case, no petition for unit clarification was filed with us prior to signing the collective bargaining agreement, nor is there any evidence that the employer put the union on notice during the collective bargaining process that it would dispute the inclusion of the alleged supervisory positions during the term of the contract. Further, there is no evidence of any changed circumstances subsequent to signing the contract that would justify a unit clarification at this time.

Accordingly, the findings of fact, conclusions of law and order of the Executive Director are affirmed.

DATED this 16th day of September, 1981.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
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JANE R. WILKINSON, Chairman

  
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R. J. WILLIAMS, Commissioner

  
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MARK C. ENDRESEN, Commissioner