

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
PUBLIC SCHOOL EMPLOYEES OF)	CASE NO. 3140-C-80-146
OAK HARBOR)	
)	
For clarification of an existing)	DECISION NO. 1319 - PECB
bargaining unit of employees of:)	
)	
OAK HARBOR SCHOOL DISTRICT NO. 201)	ORDER CLARIFYING
)	BARGAINING UNIT
)	

Edward A. Hemphill, Attorney at Law, appeared on behalf
of Public School Employees of Oak Harbor.

Eugene C. Anderson, Attorney at Law, appeared on behalf
of Oak Harbor School District No. 201.

On October 30, 1980, Public School Employees of Oak Harbor filed a petition with the Public Employment Relations Commission, seeking clarification of an existing bargaining unit of employees of Oak Harbor School District No. 201 as to the status of three traffic safety education instructors. A hearing was held on January 15, 1981 before Jack T. Cowan, Hearing Officer.

BACKGROUND:

The parties have a collective bargaining relationship which predates 1978 and were parties to a collective bargaining agreement covering the period from September 1, 1978 through August 31, 1981. The recognition clause of that collective bargaining agreement states:

Section 1.3. The bargaining unit to which this Agreement is applicable shall consist of all classified employees in the following general job classifications: Secretarial-Clerical, Security, Accountant Assistants, Food Service, Custodial, Aides, Transportation, Maintenance and Grounds, in the Oak Harbor School District Number 201; EXCEPT: Secretary to the Superintendent, Business Office Secretary, Transportation Manager, Buildings and Grounds Manager, Business Manager, and Shop Foreman.

When negotiated, that unit description covered all "classified" employees of the employer, excepting only the stated confidential and supervisory exclusions and a limited number of retired military personnel employed in a "NJROTC" program jointly operated by the District with the U. S. Navy.

The District operates a Traffic Safety Education program. The classroom phase of the program is and always has been taught by certificated employees who are members of the District's professional teaching staff. Historically, the on-the-road "driver training" phase of the program was also taught by District certificated employees. Later, the function was contracted by the District to a commercial driver training firm. Still later, during the 1979-80 school year, the function was resumed by the District itself. A principal was designated as the District traffic safety education program coordinator, and three individuals holding "Consultant Special" certification were employed to handle the "on street instruction" phase of the program.

The three employees, who are regarded by the District as "classified" employees rather than "certificated" employees, have been assigned by the District to the Public Employees Retirement System, are paid at an hourly wage, and are provided fringe benefits generally similar to those provided by the District to its other "classified" employees. The bargaining unit status of the driver training instructors became a matter of dispute between the parties during their negotiations in 1980 on a salary opener. At that time, PSE asked to include the positions in the classified employee salary structure, but the District refused to do so.

PERTINENT STATUTES AND REGULATIONS:

Chapter 28A.70 RCW
CERTIFICATION OF PERSONNEL EMPLOYED IN
THE COMMON SCHOOLS

28A.70.005 Certification---State board duty---Rules and regulations---Superintendent of public instruction as administrator. The state board of education shall establish, publish and enforce rules and regulations determining eligibility for and certification of personnel employed in the common schools of this state, including certification for emergency or temporary, substitute or provisional duty and under such certificates or permits as the board shall deem proper or as otherwise prescribed by law. The superintendent of public instruction shall act as the administrator of any such rules and regulations and have the power to issue any certificates or permits and revoke the same in accordance with board rules and regulations.

Chapter 46.81 RCW
TRAFFIC SAFETY EDUCATION COURSES

46.81.005 Legislative declaration. It is the purpose of this 1977 amendatory act to provide the students of the state with an improved quality traffic safety education program and to develop in the youth of this state a knowledge of the motor vehicle laws, an acceptance of personal responsibility on the public highways, an understanding of the causes and consequences of traffic accidents, and to provide training in the skills necessary for the safe operation of motor vehicles;...

46.81.010 Definitions. The following words and phrases whenever used in chapter 46.81 RCW shall have the following meaning:

- (1) "Superintendent" or "state superintendent" shall mean the superintendent of public instruction.
- (2) "Traffic safety education course" shall mean an accredited course of instruction in traffic safety education which shall consist of two phases, classroom instruction, and laboratory experience. "Laboratory experience" shall include on-street, driving range, or simulator experience or some combination thereof. Each phase shall meet basic course requirements which shall be established by the superintendent of public instruction and each part of said course shall be taught by a qualified teacher of traffic safety education. Any portions of the course may be taught after regular school hours or on Saturdays as well as on regular school days or as a summer school course, at the option of the local school districts.
- (3) "Qualified teacher of traffic safety education" shall mean an instructor certificated under the provisions of chapter 28A.70 RCW and certificated by the superintendent of public instruction to teach either the classroom phase or the laboratory phase of the traffic safety education course, or both, under regulations promulgated by the superintendent: Provided, That the laboratory experience phase of the traffic safety education course may be taught by instructors certificated under rules promulgated by the superintendent of public instruction, exclusive of any requirement that the instructor be certificated under the provisions of chapter 28A.70 RCW. Professional instructors certificated under the provisions of chapter 46.82 RCW, and participating in this program, shall be subject to reasonable qualification requirements jointly adopted by the superintendent of public instruction and the director of licensing...." (Emphasis supplied)

CHAPTER 180-79 WAC PROFESSIONAL PREPARATION

WAC 180-79-230 Limited certificates. The following certificates are issued under specific circumstances for limited periods of service as outlined:

- (1) Consultant special certificate.
 - (a) The issuance of consultant special certificates is limited to:
 - (i) Persons highly qualified and experienced in fields of knowledge to be taught in the common or nonpublic schools;
 - (ii) Persons who qualify to instruct in the traffic safety program as paraprofessionals pursuant to WAC 392-153-020(2) and (3);
 - (iii) Persons who qualify to teach specific subjects in the adult education program;
 - (iv) Persons who under previous standards hold the band and orchestra certificate; and
 - (v) Persons who are assigned instructional responsibility for intramural/interscholastic activities which are part of the district approved program. (Emphasis supplied)

CHAPTER 392-153 WAC TRAFFIC SAFETY EDUCATION--DRIVER EDUCATION

WAC 392-153-020 Teacher and instructor qualifications.

- (1) A teacher certificated under provisions of chapter

28A.70 RCW shall be eligible to teach the classroom or laboratory phases of the traffic safety education program if he/she possesses the following qualifications in addition to those required under chapter 28A.70 RCW:

- (a) Possesses a valid Washington state driver's license.
- (b) Provides a record(s) from the Washington state department of licensing and/or other driver licensing jurisdiction for a five-year period showing:
 - (i) Not more than three moving traffic violations within the preceding 12 months or more than four moving traffic violations in the preceding 24 months;
 - (ii) No alcohol related traffic violation within the preceding three years;
 - (iii) No driver's license suspension, cancellation, revocation or denial within the preceding three years.
- (c) Has completed at least one 3-quarter credit hour course in general safety education and at least three courses consisting of 3-quarter credit hours each in traffic safety education as approved by the office of the superintendent of public instruction.
- (d) Possesses a valid traffic safety education endorsement issued by the superintendent of public instruction.
- (2) Any person endorsed by the superintendent of public instruction to teach traffic safety education in the state of Washington prior to May 27, 1969, and who possesses a consultant special certificate but does not hold a valid teaching certificate required by WAC 392-153-010(4) and (5), shall continue to be qualified to teach both classroom and laboratory phase of traffic safety education in this state on the condition that he or she renew such consultant special certificate on an annual basis and maintain a satisfactory driving record as set forth above in WAC 392-153-020(1)(a) and (1)(b).
- (3) The laboratory phase of the traffic safety education course may be taught by a commercial instructor licensed by the department of licensing pursuant to chapter 46.82 RCW or an instructor who, although not certificated pursuant to chapter 28A.70 RCW or chapter 46.82 RCW, serves under the supervision of the district traffic safety education program coordinator or his/her designee and who meets the following qualifications:
 - (a) Possesses a valid Washington state driver's license.
 - (b) Is at least 21 years of age.
 - (c) Has at least 5 years of driving experience.
 - (d) Holds a high school diploma or its equivalent.
 - (e) Provides a record(s) from the Washington state department of licensing and/or other driver licensing jurisdiction for a 5 year period showing a satisfactory driving record as set forth above in WAC 392-153-020(1)(b).
 - (f) Provides evidence of the following:
 - (i) Completion of at least sixty 60-minute clock hours of study in the field of driving instruction as required by RCW 46.82.130 RCW 46.82.330 and as approved by the office of the superintendent of public instruction and the department of licensing;
 - (ii) Completion of behind-the-wheel supervised practice in instructing;

- (iii) A recommendation for a certificate from a school district superintendent or from a commercial school approved by the office of the superintendent of public instruction.
- (g) Passes practical and knowledge examinations developed and administered by the department of licensing and required under provisions of chapter 46.82 RCW for commercial instructors.
- (h) Provides evidence to an agent approved by the office of the superintendent of public instruction of the following instructional competencies:
- (i) Uses teaching methods which allow for individual student driving abilities, reduces student anxieties, and involves backseat observers;
- (ii) Communicates clearly, using appropriate technical vocabulary;
- (iii) Select routes for on-street and on-site lessons and conducts student learning activities from simple to complex which correspond with the learner's mental, physical and emotional performance capabilities in coordination with classroom activities;
- (iv) Maintains a position within the vehicle for awareness of the traffic scene and utilizes control instruments to maintain safety and facilitate instruction;
- (v) Applies uniform evaluation criteria in assessing needs and progress of students during and after each lesson.
- (i) Persons desiring to teach in the simulator or on the multiple car driving range shall provide evidence of having completed an additional thirty clock hours of study which includes supervised practice in instructing in each area as approved by the office of the superintendent of public instruction and the department of licensing: Provided, That a person who holds a valid certificate under the provisions of chapter 28A.70 RCW and meets the requirements for traffic safety certification set forth under WAC 392-153-020(1) who is employed as a paraprofessional shall not be required to meet any of the requirements set forth above in WAC 392-153-020(3).
- (4) The superintendent of public instruction shall issue the consultant special certificate to any person who files an application, pays the appropriate fee(s), and meets the requirements set forth in WAC 392-153-020(2) or (3) for certification as an instructor of the laboratory phase of traffic safety education.
- (5) Certificates issued to teach the laboratory phase of traffic safety education under provisions of chapter 392-153 WAC shall be valid for one year. Reissuance of such certificates shall be subject to the following requirements:
 - (a) Verification of employment or intent to employ;
 - (b) Verification of a satisfactory driving record.
- (6) The fee for the consultant special certificate shall be \$1.00 which shall be remitted to an educational service district. (Emphasis supplied)

POSITIONS OF THE PARTIES:

PSE begins from the assumption that (because of the employer's categorization of the disputed employees) the driver training instructors are "classified" rather than "certificated" employees. It then argues that the disputed employees are within the "aides" general job classification within the meaning of the contractual recognition clause. In the alternative, PSE argues that if the District has created a new classification within its workforce, it should nevertheless be included in the bargaining unit consisting of every other classified employee of the district.

The District bases its categorization of the disputed employees as "classified" on their enrollment in the public employee retirement system created by Chapter 41.40 RCW. The employer contends, however, that the disputed individuals are not within the "aides" classification referred to in the collective bargaining agreement. In particular, the employer points to their special certification, to their "instructional" responsibilities, to their authority to grade students, and to their reporting relationships within the District. The employer would limit the bargaining unit to the specific classifications identified in the recognition clause of the collective bargaining agreement, and contends that substantial differences preclude accretion of the newly created classification to the existing bargaining unit.

DISCUSSION:Jurisdiction - Status as RCW 41.56 Employee

The function of the Executive Director under WAC 391-35-190, similar to that in WAC 391-25-230, -250 and -290, includes the task of creating bargaining units which are appropriate within the limitations of applicable statutes. Neither party has addressed, in statutory terms, the question of whether these disputed individuals are "public employees" within the meaning of RCW 41.56.030(2) or are "educational employees" within the meaning of RCW 41.59.020(4). The certificate form in evidence in this record is the same "Professional Education Certificate" form issued by the State Superintendent of Public Instruction to teachers certificated under RCW 28A.70, and the certificate issued to one of the disputed employees even uses the terminology "Consultant Special Elementary and Secondary Teacher" (emphasis supplied). If these persons are "certificated" within the meaning of RCW 41.59.020(4), it would necessarily follow from RCW 41.59.080(1) that they belong in a bargaining unit with the other non-supervisory educational employees of the district, and that any attempt to accrete them to the unit represented by PSE under RCW 41.56 would be statutorily inappropriate. Thus, whether or not addressed by the parties, a jurisdictional question lurks in these facts.

The sometimes fuzzy line between professional educators and paraprofessional or other employees has been at issue in previous cases. See: College Place School District, Decision 795 (EDUC, 1980); Olympia School District, Decision 799 (EDUC, 1980). In each of those cases, the position requirements have been the basis for decision. The disputed individuals in this case are not presently in any bargaining unit. From that fact, and from the fact that the work they perform was at one time within the jurisdiction of the teacher unit, it could be inferred that the organization which represents the non-supervisory educational employees of the District has not asserted any jurisdictional claim as to them. However, no organization of certificated employees has been joined as a party or otherwise formally notified of these proceedings. Recognizing that a decision in this case will not foreclose the possibility that such issues might be raised in the future, it will suffice for the purposes of this decision that there is a colorable basis to the claim of both parties that these are "classified" employees covered by RCW 41.56.

Turning, then, to the controlling statutes and regulations, it is concluded that, the form of their certification notwithstanding, there is at least a colorable claim that these employees belong under RCW 41.56. The "certificate" for traffic safety education stems from RCW 46.81 rather than from RCW 28A.70; WAC 180-79-230 specifically describes this class of persons as "paraprofessionals", the only such reference noted among the various categories of eligibility for certification; WAC 392-153-020 requires only a high school diploma and specific subject matter training for ongoing eligibility for certification, whereas those holding permanent teacher certification under RCW 28A.70 must possess five or more years of formal education beyond high school; and the consultant special certificate is renewable annually at a fee of \$1.00 per year, whereas other professional educator certificates are granted for longer periods or indefinitely at a fee of \$15.00.

Contract Waiver Arguments

The debate between the parties as to whether these employees are "aides" within the meaning of the recognition clause of their 1978-81 collective bargaining agreement is neither conclusive nor particularly helpful. The class in dispute did not exist among the employees of the school district in 1978, and there was no occasion for the parties to form or have an opinion or intent at that time as to whether the term "aides" covered this situation. The essence of the employer's argument is that the specificity used by the parties in their recognition clause constitutes a waiver by PSE of any jurisdictional claim to other types of employees. The first weakness with that argument is that waivers must be knowingly made. City of Kennewick, Decision 482-B (PECB, 1980). Further, the contract specifically contemplates, in Section 1.4, the creation of new job descriptions by the District during the life of the contract, and provides for PSE. Finally, it is well established that, while parties may agree on matters of unit

definition, their agreements are not binding on themselves or on the Commission in the face of changed circumstances. City of Richland, Decision 279-A (PECB, 1978); aff. Benton County Superior Court (1979); aff. Wash. State Court of Appeals (Division III, 1981); cert. den., Wash. State Supreme Court (1981).

Appropriate Unit Placement For Driver Training Instructors

Unit determinations are controlled by RCW 41.56.060 and are affected by the procedural requirements of RCW 41.56.070 and Chapters 391-25 and 391-35 WAC. Had the disputed class existed among the employees of the school district at the time the 1978-81 collective bargaining agreement was signed, the exclusion of an existing class of employees from the substantive provisions of the contract at that time would have dictated a conclusion here that a question concerning representation would exist as to the disputed employees, precluding accretion of the class to the unit in a unit clarification proceeding. See: City of Anacortes, Decision 452 (PECB, 1979). Since the class did not exist, accretion is at least theoretically available. See: City of Richland, supra. None of the four broad unit determination criteria set forth in RCW 41.56.060 can be viewed in isolation from the others. The evidence discloses some conflicting considerations.

The duties of the disputed individuals, when viewed in detail, are somewhat different than those of other employees in the PSE unit. No other classified employees grade students or have the instructional discretion which is given to the driver training instructors. Backing a half step away from the situation, however, it becomes clear that the employer cannot have it both ways. The employer has not treated them as certificated employees, and they do not have the scope of teaching responsibilities of certificated employees. The driver training instructors perform according to a very detailed program specified by the school district and, pursuant to WAC 392-153-020(3), they report to and serve under the supervision of a certificated employee: the Principal who serves as the district's traffic safety education coordinator. Their limited unique responsibilities must be kept in perspective with other factors.

To the extent that educational achievement or apprenticeship training is an indicator of skill level, it is difficult to distinguish the driver training instructors from other types of employees within the bargaining unit. Certainly, the "Administrative Secretary", "Lead Maintenance", "Cabinetmaker", "Painter", "Electronic Technician", "Carpenter", "Electrician", and "Mechanic" classification titles listed in Schedule B of the 1978-81 collective bargaining agreement suggest skill levels which equal or exceed a high school diploma plus sixty hours of additional formal training. The requirements of Chapter 180-20 WAC pertaining to the certification of school bus drivers include ongoing training requirements which in a relatively brief period of time accumulate to and then exceed the training requirements imposed on traffic safety education instructors under Chapter 392-153 WAC.

The employer concedes that the working conditions of the driver training instructors are relatively more similar to those of the employees in the PSE unit than to those of the district's professional teaching staff. The fact that wages are higher than those of aides appears to reflect the greater responsibilities placed on the driver training instructors. More significant are the facts that the disputed individuals are paid on an hourly basis and that their wage rate was within the range of hourly wage rates specified for members of the PSE unit.

The history of bargaining and the extent of organization both strongly suggest accretion of the driver training instructors to the existing unit. Regardless of the terminology used by the parties in their 1978-81 contract, the unit which that contract covered was, in fact, a wall-to-wall classified employee unit. From the limited evidence available in this record, it appears that the NJROTC program presents a joint employer situation such as that noted in City of Lacey, Decision 396 (PECB, 1978); Thurston County Fire District No. 9, Decision 461 (PECB, 1978); and Sno-Isle Vocational Skills Center, Decision 841 (EDUC, 1980). Were this an attempt to sever a three member bargaining unit of driver training instructors from a unit in which they had previously been included, previous decisions of the Commission in school district cases would strongly suggest rejection of the severance as inappropriate, as the Commission has endorsed the preservation of broad units of employees in an integrated support operation essential to the overall discharge by a school district of its primary educational function. Yelm School District, Decision 704-A (PECB, 1980). This is not a severance case on its face, but failure to accrete the disputed employees to the existing bargaining unit would in fact fragment what has been a single support unit inherently containing a broad diversity of employee types.

The employer has offered as evidence a statement signed by the disputed employees purporting to state their desires as to their unit status. The document does not comply with the requirements of WAC 391-25-110 as a showing of interest, and could not be used as a basis for decision even if it did. In order to protect the confidentiality of employee views and employee free choice, the rules of the Commission make provision for unit determination elections. See: WAC 391-25-530(1). However, a unit determination election (Globe election in NLRB parlance) is available only where a question concerning representation exists in two or more possible appropriate bargaining units. Clark County, Decision 290-A (PECB, 1977), applied in Mukilteo School District, Decisions 1008, 1008-A (PECB, 1980). The desires of employees are not, in and of themselves, a controlling or overriding factor. Bremerton School District, Decision 527 (PECB, 1978). On the basis of the foregoing, it is concluded that a separate unit of driver training instructors would not be appropriate in this context, and it follows that it would not be appropriate to conduct a unit determination election in this case.

FINDINGS OF FACT

1. Oak Harbor School District No. 201 is a school district of the State of Washington, organized pursuant to Title 28A RCW, and is a public employer within the meaning of RCW 41.56.020 and RCW 41.56.030(1).
2. Public School Employees of Oak Harbor is a labor organization within the meaning of RCW 41.56.010 which has been recognized as exclusive bargaining representative of classified employees of Oak Harbor School District No. 201, excluding confidential employees and supervisors.
3. The parties to this proceeding were parties to a collective bargaining agreement effective for the period 1978 - 1981. At the time said agreement was executed, the district did not have within its workforce employees performing on-street instruction in traffic safety education under Consultant Special certificates issued by the Washington State Superintendent of Public Instruction.
4. During or about the 1979-80 school year, the district employed three persons to perform on-street instruction in the district's traffic safety education program. Said persons, and their successors, are not certificated under Chapter 28A.70 RCW, but hold Consultant Special certificates issued by the Superintendent of Public Instruction pursuant to RCW 46.81.010(3), WAC 180-79-230(1)(a)(ii) and WAC 392-153-020(3). A dispute has arisen concerning the inclusion of said individuals in the bargaining unit represented by Public School Employees of Oak Harbor.
5. The driver training instructors are paraprofessional employees performing limited instructional assignments only in the on-street phase of the employer's traffic safety education program, under the supervision of a certificated employee designated as the district traffic safety education program coordinator and within detailed guidelines prescribed by the program coordinator in a curriculum guide containing 58 pages.
6. The driver training instructors are paid at hourly wage rates within the range of wage rates applicable to employees in the bargaining unit represented by Public School Employees of Oak Harbor, and are provided fringe benefits similar to those provided to employees in the existing bargaining unit.
7. At the time the 1978-81 collective bargaining agreement was signed by the parties, the bargaining unit covered by that agreement included all classified employees of the employer excluding only confidential and supervisory employees and persons jointly employed by the District and the U. S. Navy in a NJROTC program. No other organization is known to have asserted any claim to represent the driver training instructors.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56.
2. In light of the history of bargaining between the parties and in light of the evidence indicating that the extent of organization presently includes all of the employees in an integrated support operation essential to the overall discharge by the district of its primary educational function, separation of the driver training instructors into a separate bargaining unit would lead to undue fragmentation of bargaining units and would not be appropriate within the meaning of RCW 41.56.060.
3. A change of circumstances has occurred, by the creation of the new class of driver training instructors subsequent to the recognition agreement of the parties as it is stated in their 1978-81 collective bargaining agreement. The newly created class possesses skills, working conditions and some duties similar to those of employees within the existing bargaining unit, and the history of bargaining and extent of organization among the employees of the employer indicate that accretion of the newly created class to the existing bargaining unit is appropriate.

ORDER

The classification of employees performing on-street traffic safety education instruction under certificates issued pursuant to WAC 180-79-230(1)(a)(ii) and WAC 392-153-020(3) is accreted to the bargaining unit consisting of classified employees of Oak Harbor School District No. 201.

DATED at Olympia, Washington this 7th day of December, 1981.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARVIN L. SCHURKE, Executive Director