

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
)
PUBLIC SCHOOL EMPLOYEES OF)
WASHINGTON) CASE 10117-C-92-589
)
For clarification of an existing) DECISION 5053-A - PECB
bargaining unit of employees of:)
) DECISION OF COMMISSION
PUYALLUP SCHOOL DISTRICT 3)
)
)
)

Eric Nordlof, Attorney at Law, appeared for Public School Employees of Washington.

Lawrence Carney, Executive Director for Business and Financial Services, appeared on behalf of the employer.

Faith Hanna, Attorney at Law, appeared on behalf of the intervenor, Classified Public Employees Association/WEA.

This case comes before the Commission on a petition filed by the Public School Employees of Washington, seeking review of an order issued by Executive Director Marvin L. Schurke.¹

BACKGROUND

The Puyallup School District (employer) serves over 16,000 students attending 20 elementary schools, 6 junior high schools, 2 senior high schools, an alternative school, and a special services program. The employer has collective bargaining relationships with organizations representing seven classified employee bargaining units and two certificated employee bargaining units.

¹ Puyallup School District 3, Decision 5053 (PECB, 1995).

Public School Employees of Washington (PSE) represents the employer's office-clerical employees. PSE and the employer were parties to a collective bargaining agreement in effect from September 1, 1992 to August 31, 1995.

The Puyallup Paraprofessional Association (PPA) represents the employer's paraprofessional employees. PPA and the employer were parties to a collective bargaining agreement in effect from September 1, 1992 to August 31, 1995.

The employer's registered nurses are members of a certificated employees bargaining unit organized under Chapter 41.59 RCW. In 1990 or 1991, the employer created health assistant positions to provide support for the nurses, and placed the new positions in the paraprofessional bargaining unit.

On November 13, 1992, PSE filed a petition for clarification of existing bargaining unit, seeking placement of the health assistant positions in the office-clerical bargaining unit. Hearing Officer Rex L. Lacy held a hearing on October 18, 1994. In an order clarifying bargaining unit issued on April 10, 1995, Executive Director Marvin L. Schurke ordered the health assistant positions to remain in the bargaining unit of assistants and paraprofessional employees represented by PPA, based on their duties, skills and working conditions and their history of collective bargaining. PSE petitioned for review on April 28, 1995, thus bringing the matter before the Commission.

POSITIONS OF THE PARTIES

PSE argues that the disputed positions assumed duties performed by building secretaries, and that they share a greater community of interest with building secretaries than with any other employees. Contending that the health assistants are performing

work in support of the employer's administrative functions, PSE argues that the positions belong in the office-clerical bargaining unit it represents. PSE contends that the positions have little contact with other employees in the paraprofessional bargaining unit, so that their removal from the paraprofessional bargaining unit would not disrupt the purpose for which that unit was created. PSE argues the Executive Director has no statutory authority to ignore one of four statutory criteria in determining bargaining units, namely "desire of the employees".

The employer did not file a brief on the appeal.

PPA claims that the petition for clarification of existing bargaining unit was untimely and failed to comply with WAC 391-35-020. According to PPA, the disputed positions share a community of interest with other paraprofessional employees and support the employer's educational functions. Claiming there is no evidence the positions perform work historically part of the PSE bargaining unit, PPA argues that PSE has not shown any change in circumstances which would warrant a change in bargaining unit status. PPA argues that PSE failed to comply with WAC 391-35-020(2), and asks the Commission to dismiss PSE's petition or to clarify the paraprofessional bargaining unit to include the position.

DISCUSSION

The Legal Standard for Unit Determinations

The determination of appropriate bargaining units is a function delegated by the Legislature to the Commission. Jurisdictional disputes such as we have in this case are resolved through the

application of the community of interest criteria outlined in RCW 41.56.060,² which states:

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.

While parties may agree on unit determination matters, unit determinations are not "subjects for bargaining" in the usual sense. The criteria used in determining whether a subject is a mandatory subject of bargaining is not applicable to unit determination issues. City of Richland, Decision 279-A (PECB, 1978), affirmed, 29 Wn.App. 599 (Division III, 1981), review denied, 96 Wn.2d 1004 (1981).

A bargaining unit may be clarified at any time, but the Commission has long held that the status of job classifications historically included in or excluded from a bargaining unit will only be changed on the basis of changed circumstances. Quillayute Valley School District, Decision 2809-A (PECB, 1988); Toppenish School District, Decision 1143-A (PECB, 1981); City of Richland, supra. See, also, City of Auburn, Decision 4880-A (PECB, 1995).

Procedural Motion

PPA argues that PSE failed to comply with the requirements of WAC 391-35-020, which provides:

² See, King County, Decision 4569-A (PECB, 1994), and cases cited therein.

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

(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.

WAC 391-35-020 is a codification of the policy announced in Toppenish School District, Decision 1143-A (PECB, 1981). In that case the Commission rejected an attempt to remove positions from a bargaining unit mid-term in a collective bargaining agreement, absent a showing of changed circumstances. See, also, Camas School District, Decision 790 (PECB, 1979).

PPA claims that the disputed positions were created in the 1990-91 school year, during pendency of the PSE contract which expired August 31, 1992. It argues the health assistant position was not covered when PSE and the employer entered into a new collective bargaining agreement in August of 1992, and that there is no evidence that PSE raised this in negotiations or filed the petition prior to signing the agreement. PPA cites Toppenish School District, supra, and Pasco School District, Decision 4409

(PECB, 1993), for support of its position that the unit clarification petition filed November 13, 1992 was untimely. The cases relied upon by PPA did not involve disputes between two unions. In both cases, one of the parties to a collective bargaining agreement was petitioning for a unit clarification, and the requirements of the rule were not met.

The Toppenish rule is traditionally limited to disputes between an employer and a single union with which it has negotiated a collective bargaining agreement. In such situations, the affected parties are involved in negotiations for a contract that resolves position placement in the bargaining unit. Where there is a dispute between two or more unions, however, one of the unions is not involved in the contract negotiations that affect position placement.

WAC 391-35-020 does not cover disputes between two unions concerning the unit assignment of particular positions or classifications, because there is no contractual relationship to be protected between the two unions. The text of the rule is consistent with this approach. PPA's motion for dismissal on the basis that PSE has failed to comply with WAC 391-35-020 was properly denied.

Distinguishing "Office-Clerical" Positions

When faced with the issue of whether positions held by school district employees should be placed in an "office-clerical" bargaining unit, or in another bargaining unit, the Commission has drawn a distinction between employees "working in support of the administrative function" and those "working in support of the educational function". See, Omak School District, Decision 3973-B (PECB, 1994), affirmed, Public School Employees of Omak v. Washington State Public Employment Relations Commission, et al., WPERR, CD-745, Superior Court of Washington for Okanogan County,

Memorandum Decision No. 94-2-00143-6 (1994).³ In Omak, the Commission outlined eight factors that ideally should be considered in determining the primary function of a particular position. They are paraphrased as follows:

- a. The amount or proportion of the employee's work time that is spent instructing or assisting students;
- b. Information concerning who supervises the disputed position, since the level of supervision may indicate the primary purpose served by that position in the employer's organizational structure;
- c. The length of the employee's work day and year, since the work period may indicate similarities of schedules to other employees;
- d. Educational requirements to hold the position, which may indicate the basic nature of the contemplated role;
- e. The work location(s), since this may indicate the employer's perception of the primary function of the position;
- f. Interaction with other employees, since shared work duties may shed light on the predominant functions of a position;
- g. Wage and benefit data comparing the disputed position with other positions in the organization, and
- h. Relationships with positions whose unit status has been agreed upon by the parties.

In general, office-clerical employees in a school district indirectly support the overall goals and objectives of the educational process, but their primary responsibilities are to assure that the employer's operations work in a timely, adequate,

³ See, also, Quincy School District, Decision 3962-A (PECB, 1993), affirmed, Public School Employees of Quincy v. PERC, et al., ___ Wn. App. ___ (Division III, 1995), WPERR, CD-751; Longview School District, Decision 2551-A (PECB, 1987); and Shelton School District, Decision 2084 (PECB, 1984).

coordinated and businesslike manner. We consider the Omak factors in detail here.

Duties, Skills, and Working Conditions

Student Contact -

The health assistants spend the major portion of their time assisting students with health and first-aid matters in support of the employer's educational functions. Their rooms have a cot, a refrigerator containing ice, a lockable medications area, and a file cabinet with student health records. The health assistants help injured or ill students, administering minor first aid and contacting the nurse or parents when appropriate. They check students for head lice. They complete reports of injuries and accidents. They chart health screenings and immunizations. They maintain supplies and records, but any clerical work of the position is done in association with their contact with students.

Supervision -

The employer's executive director for business and financial services testified that the positions in the paraprofessional bargaining unit are:

[T]hose which assist the certificated or licensed staff. They are directed by a certificated staff person who prepares a plan to deal with students and then assigns tasks to that paraprofessional in the carrying out of that plan.

Transcript, p. 20.

The record indicates the primary purpose served by the health assistants is to assist employees with professional certification. Each health assistant reports to a licensed registered nurse, whose work involves considerable student contact. These school nurses report to a nursing coordinator. The nurses' primary function is health screening and first aid, but they may

also deliver instruction to students (e.g., as guest speakers in health classes). The duties performed by the health assistants developed from the work of the school nurses. The disputed positions thus support the educational functions of the employer.

Length of Work Day / Year -

The health assistants' 5.5 hour work day and 180-day work year is similar to paraprofessional employees, who work only during the school year, with varying schedules of one to eight hours a day. In contrast, the majority of office-clerical employees work a full-time schedule (eight hours a day) for the entire calendar year. The disputed positions thus relate more closely to the paraprofessional bargaining unit.

Educational Requirements -

Most positions in both bargaining units require a high school graduation or equivalent, and job-related experience. The record is inconclusive on this point and does not support allocation of the disputed positions to either bargaining unit.

Work Location -

By locating the health assistants near the main office of each school building, the employer has enabled the building secretaries and health assistants to substitute for each other in the performance of certain duties. The location of the health assistants tends to support PSE's arguments that the positions share a community of interest with the office-clerical bargaining unit.

Interaction With Others -

The health assistants are not required to interact with employees in the paraprofessional bargaining unit, but do interact routinely with members of the office-clerical bargaining unit to obtain student information or exchange coverage of minor work duties. Building secretaries provide substitute coverage for emergency first aid and student medications. The health assis-

tants substitute for the secretaries by answering the phone, taking messages, or general reception work. This limited interaction is, however, not decisive in this case. Interaction relating to the more important functions of the job is carried out with the nurses. The health assistants routinely interact by telephone or in writing with the registered nurses. The nurses leave instructions for the health assistants, and the health assistants provide the nurses with reports. The nurses and the nursing coordinator are available by telephone for consultation or for emergencies. Occasionally, the health assistants and nurses work together in person. On balance, we find the interaction with the nurses to weigh in favor of allocation to the PPA bargaining unit.

Wage and Benefit Data Comparisons -

The record developed by the parties was inconclusive as to any distinctions between the office-clerical and paraprofessional bargaining units.

Relationships With Positions Where Unit Status is Agreed -

The types of positions in the office-clerical bargaining unit include secretaries, receptionists, bookkeepers, payroll specialists, and accounts payable specialists, with the primary responsibilities clerical and secretarial in nature. The work involves using office machines, entering data, processing documents, and generally assisting the employer in operational functions.

The types of positions in the paraprofessional bargaining unit generally help with the delivery of instruction to students, or assist the certificated or licensed staff. Building duty assistants assist with clerical duties or correcting papers. Aides and assistants monitor lunch times and help provide for the safety of students on the playground or in bus zones. A vocational education career center assistant, curator assistant, and library media assistant work with inventories and record-keeping of materials. The primary focus of these positions is

the supervision of students, or specialized work in support of the employer's educational functions. Like positions in the paraprofessional bargaining unit, the health assistants perform specialized work to support certificated staff.

An evaluation of the Omak factors indicates that the disputed positions share a community of interest with both the office-clerical and the paraprofessional bargaining units.

History of Bargaining

PSE argues that work done by bargaining unit employees has been acknowledged to constitute bargaining unit work, and cites City of Kennewick, Decision 482-B (PECB, 1980). The cited case was an unfair labor practice case involving an employer's unlawful unilateral contracting out of work historically performed by members of the bargaining unit, however, and is inapplicable to this proceeding. In a unit clarification proceeding, the Commission takes the parties and facts as they are, at the time, and allocates positions to bargaining units.⁴

Under Richland, supra, the bargaining unit status of a position is not to be lightly disturbed. In severance cases under Yelm School District, Decision 704-A (PECB, 1980), the burden is on

⁴ PSE appears to be arguing that a cause of action exists as a result of the employer removing work from the office-clerical bargaining unit. PSE might have had a cause of action for a "refusal to bargain" unfair labor practice under RCW 41.56.140(4) when the employer placed the health assistant positions in the paraprofessional bargaining unit, but no such unfair labor practice complaint was filed. Since RCW 41.56.160 imposes a six-month statute of limitations, the time for filing an unfair labor practice complaint has passed. The fact that there may have been an opportunity to protest at an earlier time does not control the question of whether the disputed position should now be placed in the PSE or the PPA bargaining unit. See, Pasco School District, Decision 5016 (PECB, 1995), affirmed, Decision 5016-A (PECB, 1995).

the party seeking to disturb a history of bargaining to show the viability of a proposed severance.

In this case, the record contains no evidence that PSE objected to the placement of the health assistants in the paraprofessional bargaining unit in 1990. During the period between 1990 and PSE's filing of its petition to initiate this proceeding, there is no evidence of change in the health assistant classification. The apparent underlying purpose of the position, to assist the school nurses with tasks they would otherwise be doing, but that do not require professional certification, remains unchanged.

PSE argues that the Executive Director's decision in this case is inconsistent with Pasco School District, Decision 5016-A (PECB, 1995). A change of circumstances occurred there, however, when the employer assigned significant functions of positions to other already existing positions, resulting in a blurring of the lines between two bargaining units. In that case, key factors involved the extent to which the mail clerk's regular job duties intertwined with those of other classifications as a result of the changed circumstances.

The health assistants in this case certainly have some working conditions in common with the office-clerical bargaining unit. The Commission has previously encountered situations where positions could be appropriate in either of two bargaining units.⁵ In this case, enough of the criteria apply so that the disputed positions could have been appropriate in either unit. If the petition before us had been filed soon after the health assistants were created, the result might have been different. We do not have an initial petition, however, and we do have a history of bargaining which is entitled to be given effect.

⁵ See, Quincy School District, Decision 3962-A (1993). See, also, Kitsap Transit Authority, Decision 3104 (PECB, 1989).

Extent of Organization

Preserving the status quo in this proceeding will not alter the overall extent of organization in the employer's workforce, nor will it strand employees outside of the existing bargaining units.

Desire of Employees

PSE argues that the Executive Director ignored the desire of the employees, and that he has no statutory authority to ignore some of the factors described in RCW 41.56.060. RCW 41.56.060 requires the Commission to consider the desire of the employees as one of four factors, but the Legislature did not prioritize the criteria. Statutory interpretations made by administrative agencies established by the Legislature to administer specific statutes are accorded considerable weight by the courts, especially when the administrative agency has expertise in a highly specialized area of law.⁶ The "desire of employees" is a factor to be considered by the Commission, but is not the primary or an otherwise dominant factor. Bremerton School District, Decision 527 (PECB, 1978). Where application of the other statutory criteria indicates that more than one bargaining unit structure could be appropriate, the Commission uses the unit determination election procedure to assess the desires of employees. Clark County, Decision 290-A (PECB, 1977).⁷ In this case, however, the history of bargaining forecloses reaching a unit determination election.

⁶ See, City of Yakima, Decisions 3503-A and 3504-A (PECB, 1990), citing Community College v. Personnel Board, 107 Wn.2d 427 (1986); Yakima v. Yakima Police, 29 Wn.App. 756 (1981).

⁷ See, also, Pasco School District, Decision 5016-A (PECB, 1995).

Conclusions

Where positions may be appropriate in either bargaining unit, a change of circumstances is required to justify removing them from a bargaining unit in which they have already been placed. An analysis of the statutory factors indicates that the health assistant positions were placed in an appropriate bargaining unit when they were created. We find no subsequent change of circumstances that warrants a change in unit placement.

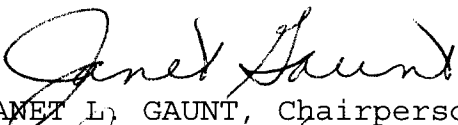
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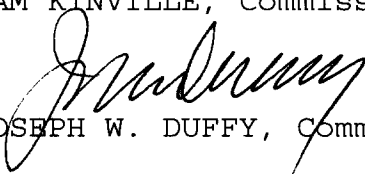
The Findings of Fact, Conclusions of Law and Order issued in this matter by Executive Director Marvin L. Schurke are affirmed and adopted as the Findings of Fact, Conclusions of Law and Order of the Commission.

Issued at Olympia, Washington, the 27th day of September, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


JANET L. GAUNT, Chairperson


SAM KINVILLE, Commissioner


JOSEPH W. DUFFY, Commissioner