STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: VANCOUVER ASSOCIATION OF EDUCATIONAL SUPPORT PROFESSIONALS For clarification of an existing bargaining unit of employees of: VANCOUVER SCHOOL DISTRICT	CASE 22711-C-09-1417 DECISION 10804 - PECB ORDER OF DISMISSAL

Eric R. Hansen, Staff Attorney, for the union.

Vandeberg Johnson & Gandara, by *John Binns,* Attorney at Law, for the employer.

On September 11, 2009, the Vancouver Association of Educational Support Professionals (VAESP or union) filed a petition for clarification of an existing bargaining unit composed of secretarial, clerical, and paraeducator employees. The petitioner was seeking to incorporate 29 Pro-Tech positions filled by 30 employees into that bargaining unit. A hearing on the petition was scheduled for January 26, 27, 28 and 29, 2010.

On January 21, 2010, the union amended its petition seeking to add 60 additional Pro-Tech positions filled by 131 employees to its bargaining unit.

The scheduled hearing was continued; however, the parties met with Hearing Officer Katrina Boedecker on January 26, 2010, in Vancouver, Washington, for an investigation conference to determine if the placement of any of the 89 positions could be resolved by stipulation. At the investigation conference, the employer provided information about its Pro-Tech employees as well as its current two bargaining units of classified employees. The employer defined the composition of the three groups as follows:

Pro-Tech	129 FTE	151 employees
VAESP	440 FTE	675 employees
SEIU	340 FTE	483 employees

The employer advised that these numbers were accurate to within a possible 5% variation due to vacancies and recruitments. VAESP did not question these employer statistics. Service Employees International Union (SEIU) did not participate in the investigation conference.

Commission records show that SEIU, Local 9288 (as the successor to SEIU, Local 92) has represented classified employees of the Vancouver School District for over 30 years. The SEIU bargaining unit covers employees in various fiscal and building support functions. *See Vancouver School District*, Decision 4022 (PECB, 1992).[1]

Following the January 26, 2010 conference, an Investigation Statement was issued by Hearing Officer Boedecker pursuant to WAC 10-08-130. The statement recorded the stipulations made by the parties during the investigation conference:

a. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW.

b. The addresses of the parties as printed on the case docket sheets are correct.

c. The petitioner, Vancouver Association of Educational Support Professionals, is a lawful labor organization qualified to act as bargaining representative under RCW 41.56.030(3).

d. None of the parties claim that an unfair labor practice charge has been filed that should be treated as a blocking charge.

e. The parties stipulated that their current collective bargaining agreement describes the bargaining unit as:

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[1] The Commission affirmed the dismissal of a petition to sever certain positions out of the SEIU bargaining unit in *Vancouver School District*, Decision 4022-A (PECB, 1993).

> Article I, Section 1:
> The District recognizes the Vancouver Association of Educational Support Professionals (VAESP) as the exclusive bargaining representative for all full-time, regular part-time, and temporary secretarial, clerical, and Paraeducator employees, including those on approved leave of absence. Excluded from the unit are those positions included in the Pro-Tech schedule as of the date of this document, substitute employees and student workers. Any subsequent exclusion is subject to mutual agreement. Disputes will be resolved by the Public Employ[ment] Relations Commission.

No party filed objections to the stipulations set forth in the Investigation Statement. On February 3, 2010, the employer filed a Motion for Summary Dismissal of the unit clarification petition.

ANALYSIS

VAESP is petitioning to accrete Pro-Tech employees into its bargaining unit. At the investigation conference, the employer supplied the VAESP collective bargaining agreements since the 1999-2000 school year. The recognition language of each of the collective bargaining agreements has always specifically excluded "Pro-Tech" employees from the VAESP bargaining unit. (See the language of Article I, Section 1.)

The employer asserts that the positions the union is seeking to accrete to its present bargaining unit are all in Pro-Tech categories. The union does not offer any evidence to disprove this assertion; nor does the union contest it.

By seeking to add Pro-Tech employees by accretion, VAESP would deny the Pro-Tech employees any ability to express their own desires regarding union representation. Since accretions automatically deprive employees of their statutory right to vote on their representation, accretions are an exception to the Commission's usual representation procedures. *City of Vancouver*, Decision 9469 (PECB, 2006).

As written in *City of Vancouver*, "While unions and employers are the parties to representation and unit clarification proceedings, their rights and interests cannot prevail over the rights of affected employees." That decision further held that, "The accretion proposed by the [union] would thus ignore or negate the statutory rights of the employees involved. Accreting employees into an existing bargaining unit is an exception to the general rule of employee free choice." *City of Vancouver*, Decision 9469, citing *City of Auburn*, Decision 4880-A (PECB, 1995) and *King County*, Decision 5820 (PECB, 1985). PERC dismissed the union's petition.

WAC 391-35-020 sets out rules on accretions. Employees may be accreted to an existing bargaining unit if it is the only appropriate unit for the employees or positions. WAC 391-35-020(4)(b). However, if a petitioned-for group of employees could constitute a separate appropriate unit, that group cannot be added to an existing bargaining unit by accretion if the employees have been excluded from the bargaining unit by agreement of the parties or by a certification, and if a unit clarification petition is not filed within a reasonable time period after a change of circumstances. WAC 391-35-020(5)(b).

In *City of Vancouver*, Decision 3160 (PECB, 1989), the Commission's standards on accretions were reviewed. Among these standards was one which held that an accretion will not be ordered if the employees or positions subject to the accretion existed when the bargaining unit was created, but the parties left them out of the unit.

Uncontroverted records provided by the employer substantiate that VAESP has agreed to specifically exclude the Pro-Tech positions from its bargaining unit for at least the past ten years. If VAESP now wishes to represent Pro-Tech employees, it should do so by following the Commission's representation rules, Chapter 391-25 WAC. Unit clarification proceedings are not intended to be used as a substitute for organizing and VAESP cannot now cast a net over the Pro-Tech employees it has excluded for years, to gather them into its bargaining unit through a unit clarification without allowing the employees a right to vote to express their desires about union representation.

The union argues that the Pro-Tech employees are neither supervisory nor confidential, so that they should not be excluded from its bargaining unit. It also argues that its petition is timely because some of the petitioned-for positions were newly created, or the date of the creation of the positions is unclear. These arguments ignore the key issue. Even if the Pro-Tech employees were found not to hold status as supervisory or confidential employees, they still have been part of a group specifically excluded by the parties from the bargaining unit for a substantial period of time. Whether the positions were newly created is of no import when positions in those categories have been specifically excluded from the unit for years by agreement of the parties.

The petitioning union has not submitted any persuasive rationale for the Commission to ignore the recognition language that the parties have negotiated into their collective bargaining agreement. The employer's Motion for Summary Dismissal is granted.

ORDER

The petition of the Vancouver Association of Educational Support Professionals for clarification of an existing bargaining unit is DISMISSED.

ISSUED at Olympia, Washington, this 2nd day of July, 2010.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Cathleen Callahan

CATHLEEN CALLAHAN, Executive Director

This order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-35-210.