

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

STATE - CORRECTIONS

For clarification of an existing bargaining
unit represented by:

WASHINGTON FEDERATION OF
STATE EMPLOYEES

CASE 25740-C-13-1554

DECISION 12005 - PSRA

ORDER OF DISMISSAL

Younglove & Coker, P.L.L.C., by *Edward E. Younglove, III*, Attorney at Law, for
the union.

Robert W. Ferguson, Attorney General, by *Kari Hanson*, Assistant Attorney
General, and *Denise Pruitt*, Assistant Attorney General, for the employer.

Since at least 2000, the Washington State Department of Corrections (employer or DOC) has provided training to its newly hired and existing employees. The employer's Administrative Services Division and its successor, the Organizational Development Unit (ODU), performed some training for DOC employees. The employees in the ODU were employed by DOC. Some, but not all, of the employees providing training through the ODU were included in the Washington Federation of State Employee's (WFSE) Community Corrections bargaining unit. Other training was performed by Peninsula Community College. The trainers at Peninsula Community College were not DOC employees.

Starting in 2009, the employer began to consolidate its training activities into a single entity and created a Training and Development Unit (Training Unit) within its Human Resources Department. At the time the Training Unit was created, a majority of positions in the Training Unit were historically unrepresented. However, seven of the positions working in the unit were included in the WFSE's Community Corrections bargaining unit.

On June 3, 2013, the employer filed a unit clarification petition involving certain employees who are currently included in the WFSE Community Corrections bargaining unit. The employer's petition seeks to remove the seven WFSE-represented positions from the Training and Development Unit. On June 6, 2013, the WFSE filed a motion to dismiss the employer's petition on the basis that it was not timely under WAC 391-35-020(3). The WFSE's motion was denied and the matter was set for hearing. The WFSE was informed that it would not be precluded from presenting evidence and argument that the employer's petition was not timely. Hearing Officer Dario de la Rosa conducted a hearing on August 28 and 29, 2013. The parties submitted post-hearing briefs.

The issues in this case are: 1) whether the employer's unit clarification petition is timely under WAC 391-35-020(3) and, if so, 2) whether the WFSE represented employees in the employer's Training Unit should be removed from the WFSE's Community Corrections bargaining unit because the employees no longer share a community of interest with that bargaining unit.

The employer's petition is not timely under WAC 391-35-020(3). The facts do not show any recent change of circumstances that warrants review of the continued appropriateness of the at-issue employees or the WFSE's Community Corrections bargaining unit. Because the employer's unit clarification petition is not timely, it is unnecessary to examine the community of interest and the petition is dismissed.

BACKGROUND

Between 2000 and 2009, employee training at DOC was decentralized. The majority of training services were provided by employees located within the specific divisions of the employer's workforce. For example, the Prisons Division, which operates the correctional institutions, provided in-service training for the employees working at those facilities. Similarly, the employees in the Community Corrections Division, who monitor offenders on probation or parole, received training from the other employees in the Community Corrections Division.

Employees selected as trainers performed training for a two-year rotation and were assigned to the ODU. However, employees selected as trainers remained in their pre-existing job class. Trainers from the Prison Division were in the Corrections Specialist job class, and trainers from the Community Corrections Division were in the Community Corrections Specialist job class.

Although DOC provided in-service training to its employees, the employer also contracted with Peninsula Community College to instruct the Correctional Worker Academy (CORE). CORE is a six week training program that all DOC Prison Division employees are required to attend to teach the employees the basic skills needed to perform their jobs. DOC trainers from both the Prison Division and Community Corrections Division assisted with the CORE training. The training employees from the Community Corrections Division were included in the WFSE's Community Corrections bargaining unit. That bargaining unit is currently described as follows:

All nonsupervisory civil service employees of the Washington State Department of Corrections performing community corrections functions, excluding confidential employees, internal auditors, supervisors, Washington Management Service employees (on and after July 1, 2004) employees in other bargaining units and employees historically excluded from the unit by orders of the Washington Personnel Board or its predecessors.

State – Corrections, Decision 10429 (PSRA, 2009). The WFSE has represented this bargaining unit since at least 1982.

In 2009, the employer began consolidating training programs within the agency. The employer created the new Training Unit to create and implement training across DOC in a uniform manner. The programs the Training Unit teaches include New Employee Orientation, CORE Academy, Community Corrections Academy, and in-service training at the DOC Headquarters, regional offices and prisons. The employees in the Training Unit taught many of these courses when the ODU administered training, albeit in a non-standardized fashion.

The Training Unit is comprised of employees from the former ODU who were performing the more limited and decentralized training services for DOC employees, as well as new employees. Additional, the Training Unit includes employees hired from Peninsula Community College who

had previously conducted DOC training. Six positions are from positions that are historically included in the WFSE's Community Corrections bargaining unit.

Curriculum Development positions were hired to write training modules. Some of these employees were hired from Peninsula Community College, and others were existing DOC employees who had previously been developing training programs. One position in the Human Resources Consultant 4 job class, Kari Cummings (Cummings), was also included in the WFSE's Community Corrections bargaining unit.

When the employer formally created the Training Unit, the transferred employees were still in their original job classes. The Training Unit employees from the Prisons Division were in the Corrections Specialist job class and the Training Unit employees from the Community Corrections Division were in the Community Corrections Specialist job classes. Because the employees were in different job classes, they were paid at different rates. Additionally, the Corrections Specialist and Community Corrections Specialists job classes had different skill requirements. Despite these differences, the positions in the Training Unit share similar duties and working conditions.

On June 16, 2010, the employer reallocated the Training Unit positions represented by the WFSE to the Human Resource Consultant 3 job class and informed the WFSE that those positions, as well as the position occupied by Cummings, would be removed from the Community Corrections bargaining unit. On June 29, 2010, the WFSE filed an unfair labor practice complaint alleging the employer unilaterally reallocated the WFSE-represented positions without first providing notice and an opportunity for bargaining. Case 23411-U-10-5966. The complaint also alleged that the employer unilaterally removed bargaining unit positions from its Community Corrections bargaining unit without first providing notice and an opportunity for bargaining.

The WFSE also filed a "defensive" unit clarification petition to reaffirm its position as the exclusive bargaining representative of the positions that it historically represented in the Training Unit. Case 23412-C-10-1446. Processing of the unit clarification petition was held in abeyance pending the outcome of the unfair labor practice complaint.

The WFSE's unfair labor practice complaint was dismissed following a hearing on the merits. *State – Corrections*, Decision 10842-A (PSRA, 2011). First, the employer had the right to unilaterally reallocate a position from one job class to another. *State – Corrections*, Decision 10842-A, citing *University of Washington*, Decision 10490-C (PSRA, 2011). Second, the facts demonstrated that the employer had not in fact removed any positions from the WFSE's bargaining unit so unilateral change had occurred. *State – Corrections*, Decision 10842-A. The Commission affirmed the Examiner's decision to dismiss the complaint. *State – Corrections*, Decision 10842-B (PSRA, 2012).

Following the June 2010 reallocation of job classes described above, certain positions in the Training Unit which were included in the WFSE Community Corrections bargaining unit became vacant. Those positions were then filled by DOC employees who did not originate from the Community Corrections bargaining unit. In June 2010, Corrections Specialist Scott Svoboda (Svoboda) was reallocated to a Human Resources Consultant 3 and placed into a training position that originated from the Community Corrections bargaining unit. Two other employees experienced the same transitions – Tina Rosemore in mid-2011 and Juline Norris in August 2012. Although new employees occupied these positions, the employer kept the positions in the Community Corrections bargaining unit.

On February 7, 2013, the WFSE informed the agency that it was withdrawing its unit clarification petition. The employer opposed the move to withdraw the petition. The employer argued that there were still unresolved community of interest issues that needed to be addressed and the WFSE's unit clarification petition was the proper vehicle to address those concerns. The withdrawal was accepted and the case was closed on February 22, 2013. The employer filed the instant unit clarification petition on June 3, 2013.

ISSUE 1 – Timeliness

Did the employer file its unit clarification petition within a reasonable time period of the alleged change in circumstances to warrant review of the continued appropriateness of the WFSE's Community Corrections bargaining unit under WAC 391-35-020(3)?

Conclusion

The facts do not show that any recent change in circumstances exists for the WFSE represented employees in the employer's Training Unit that warrants review of the WFSE's Community Corrections bargaining unit. Therefore, the employer's petition is not timely.

Analysis

Applicable Legal Standard –

The authority to determine and certify appropriate bargaining units is a function the Legislature delegated to this Commission. RCW 41.80.070; *Central Washington University*, Decision 10215-B (PSRA, 2010). Included with this authority is the power to, upon request, modify that unit through a unit clarification proceeding. *See Pierce County*, Decision 7018-A (PECB, 2001). When this Commission certifies a bargaining unit as appropriate, the work performed by the employees in that bargaining unit becomes the historic work jurisdiction of that unit. *See, e.g., Washington State University*, Decision 11498 (PSRA, 2012)(bargaining unit work is defined as “work that bargaining unit employees have historically performed”). If an employer assigns new work to employees in a bargaining unit, that work becomes part of the bargaining unit's historical work jurisdiction unless there is a prior agreement between the employer and exclusive bargaining representative to make the transfer of work temporary. *City of Snoqualmie*, Decision 9892-A (PECB, 2009); *see also State – Social and Health Services*, Decision 9551-A (PSRA, 2008).

In order to capture the historical work jurisdiction of a bargaining unit in the bargaining unit description, this Commission traditionally describes new bargaining units by the work that the employees in the unit perform, as opposed to the job classes within that unit. In *University of Washington*, Decision 8392, the Executive Director explained that the reason for defining bargaining units by the work the employees perform was to ensure that the duty to bargain is enforced if an attempt is made to transfer the work performed by the employees outside of the bargaining unit. The Executive Director also explained that the use of generic terms also avoids the need to revisit and revise the bargaining unit description should a job title be changed or a new job title added within the occupational type.

Even where this Commission defines a bargaining unit by job class, the work being performed by the employees in the bargaining unit still becomes the historical work jurisdiction of the bargaining unit. A change in title or reallocation does not presumptively or automatically result in an employee's removal from a bargaining unit if that employee continues to perform the same work. *Central Washington University*, Decision 10215-B; *see also City of Tacoma*, Decision 6780 (PECB, 1999)(an employer's civil service system and classifications cannot overrule this Commission's authority to place employees in appropriate bargaining units). Any attempt to remove historical bargaining unit work is still subject to collective bargaining. *See Snohomish County*, Decision 9540-A (PECB, 2007).

The Unit Clarification Process –

Generally, the process of modifying a bargaining unit is accomplished through unit clarification cases. Unit clarification cases are governed by the provisions of Chapter 391-35 WAC.

The general purpose of the unit clarification process is to provide this agency as well as the parties to a collective bargaining relationship a mechanism to make changes to an appropriate bargaining unit based upon a change in circumstances. *See, e.g., Toppenish School District*, Decision 1143-A (PECB, 1981)(outlining the procedures to remove supervisors from existing bargaining units). Because unit clarifications alter the composition of a bargaining unit, the Commission adopted WAC 391-35-020 to govern the time frames during which unit clarifications may be filed so as to minimize the disruptions on the parties as well as the employees. That pertinent part of that rule states:

Time for filing petition — Limitations on results of proceedings.

TIMELINESS OF PETITION

...

LIMITATIONS ON RESULTS OF PROCEEDINGS

(3) Employees or positions may be removed from an existing bargaining unit in a unit clarification proceeding filed within a reasonable time period after a change of circumstances altering the community of interest of the employees or positions.

(4) Employees or positions may be added to an existing bargaining unit in a unit clarification proceeding:

(a) Where a petition is filed within a reasonable time period after a change of circumstances altering the community of interest of the employees or positions; or

(b) Where the existing bargaining unit is the only appropriate unit for the employees or positions.

.....

Here, the employer is seeking to remove employees from the WFSE's Community Corrections bargaining unit and make those positions unrepresented. Therefore, the appropriate inquiry is whether the employer's petition was filed within a reasonable period from the change in circumstances that altered the community of interest.

The change in circumstance that triggers a unit clarification petition under WAC 391-35-020(3) and (4) must be a meaningful change in an employee's duties and responsibilities. *University of Washington*, Decision 10496-A (PSRA, 2011), *citing City of Richland*, Decision 279-A (PECB, 1978). A mere change in job titles is not necessarily a material change in working conditions that would qualify under Chapter 391-35 WAC to alter the composition of a bargaining unit through the unit clarification process. *See University of Washington*, Decision 10496-A. Other types of changes to the workplace environment, such as a reorganization of an employer's workforce, are occurrences that could trigger a unit clarification petition. *See Lewis County*, Decision 6750 (PECB, 1999). Absent a recent change in circumstances, a unit clarification petition will be dismissed as untimely. *See Island County*, Decision 2572 (PECB, 1986).

The Commission's rules only state that the clarification petition must be filed within a reasonable time of the changes and do not set forth a particular timeframe in which the change must have occurred. Timeliness is determined by the factual circumstances of each particular case. Reorganization and the reassignment of duties are events that do not occur overnight, and some deference must be granted to allow an employer to make changes mid-stream to any reorganization that might be occurring. Furthermore, if employees are being reallocated to a new job classification based upon a recent change in duties, it may be necessary for the reallocation process to be completed so that a proper unit determination can be made. *See University of Washington*, Decision 10263.

Application of Standards –

The first question that must be answered is whether there has been a recent change in circumstances that altered the community of interest for the employees or positions, thereby supporting removal of the seven WFSE represented positions and making those positions unrepresented. If there has been a change in circumstances, the question shifts to whether the filing of the instant petition occurred within a reasonable time of the change in circumstances.

The employer asserts that its unit clarification petition is timely. The employer points to the recent reassignment of personnel in the positions that WFSE historically represents and asserts this was a change of circumstances that makes its petition timely. The employer points out that the individual occupying the WFSE-represented positions, such as Svoboda, did not originate from the Community Corrections Division. The employer claims that the duties for all seven positions have changed in such a manner that those positions no longer share a community of interest with the WFSE's Community Corrections bargaining unit.

The WFSE argues that the employer's petition is not timely. The WFSE asserts that there has been no recent change in circumstances that would warrant this agency's review of its Community Corrections bargaining unit. The WFSE points to the fact that the Training Unit was created in 2009, but the employer did not file its petition until June 2013. In the WFSE's opinion, this delay is not reasonable and therefore the employer's petition should be dismissed.

The Employer's Petition is not Timely –

The facts demonstrate that the seven WFSE-represented positions performed Training Unit work prior to 2009 and the work performed by the WFSE-represented employees attached to the Community Corrections bargaining unit.

When the employer created the Training Unit in 2009-10, that event was the change in circumstances that would have warranted review of the Community Corrections bargaining unit. However, the employer did not file its unit clarification petition until June 3, 2013, at least three years after the change in circumstance. The employer did not file its unit clarification petition within a reasonable time of the change in circumstances.

Existing precedent supports the conclusion that the employer's petition is not timely. In *University of Washington*, Decision 11833 (PSRA, 2013), the university consolidated its medical registration and scheduling operation into a new telephone contact center. The university filed a unit clarification petition to remove the telephone contact center employees from their existing bargaining units and to make those employees unrepresented. Although the employer's petition was filed more than two years after the employer started planning its reorganization, and almost one year after the employer actually implemented the reorganization and opened the telephone contact center, the petition was found to be timely. The facts demonstrated that the employer continued to make change changes to the reorganization process, such as adding new job classes to the operation, well beyond the opening of the telephone contact center that warranted review of the affected bargaining units.

The facts of this case closely align with the facts in *University of Washington*, Decision 11590, *aff'd*, Decision 11590-A. In that case, an employer's unit clarification petition was found to be untimely because no recent change in circumstances existed. The evidence demonstrated that the employees had been working under almost identical conditions for at least nine years and no organizational changes had occurred that warranted review of the existing bargaining units.

The employer nevertheless argues that changes to the Training Unit have continued to occur since the reorganization. The employer points out that the incumbents to the WFSE representation position have changed and that the occupants of those positions did not originate from the WFSE's Community Corrections bargaining unit.

The change to the incumbent employees in the WFSE-represented positions did not create the type of change that warrants review of a bargaining unit through the unit clarification process. While the new incumbents may have originated from someplace other than the WFSE's Community Corrections bargaining unit, this fact is immaterial to the analysis. Rather, the analysis focuses on the training work performed by the WFSE-represented positions in the Training Unit and whether that work attached to the Community Corrections bargaining unit. Once the work performed by the WFSE-represented employees attached to the Community Corrections bargaining unit, the origins or skill sets of the individual occupying those positions became irrelevant.

The Employer Needed to File Its Own Unit Clarification Petition to Preserve Its Rights –

The employer also argues that the delay between the creation of the Training Unit, which occurred in June 2010, and the filing of its unit clarification petition was caused by circumstances beyond the employer's control. The employer claim that the WFSE's unit clarification petition, which was filed on June 29, 2010, was delayed pending the outcome of the WFSE's unfair labor practice complaint. Because the WFSE already had a unit clarification petition filed, the employer asserts that there was no reason for it to file a competing unit clarification petition. The employer also argues that when the WFSE attempted to withdraw its unit clarification petition, the employer objected to the withdrawal and argued that there were still bargaining unit issues to be resolved through that petition.¹ These arguments are rejected.

In *University of Washington*, Decision 11490-C (PECB, March 1, 2011), the Commission explained that unions who represented employees covered by Chapter 41.80 RCW retain the right to preserve the employees' historical work jurisdiction, including any newly assigned work. The Commission also explained that even when an employer assigns new duties to a bargaining unit position and then reallocates that position to a new classification, the position still remains in the historical bargaining unit. *University of Washington*, Decision 10490-C. An employer may not unilaterally remove employees from a bargaining unit nor may it move those employees to a different bargaining unit after attempting to negotiate with a union to impasse. *University of Washington*, Decision 10490-C. Rather, an employer that believes a bargaining unit should be clarified to remove employees impacted by a recent change in circumstances may file a timely unit clarification petition to seek review of the continued appropriateness of the bargaining unit. *University of Washington*, Decision 10490-C.

The employer was on notice as early as March 2011 that it needed to file its own unit clarification petition to affirmatively request review of the continued appropriateness of the WFSE's Community Corrections bargaining unit following the reorganization. Had the employer done so,

¹ The WFSE filed its unit clarification based upon the employer's statement that it was going to remove the positions that it historically represented and are included in the Training Unit from the WFSE's Community Corrections bargaining unit. The WFSE's petition did not seek to add or remove any positions from its bargaining unit and was strictly seeking to defend its historical work jurisdiction and had only that narrow purpose. While it is understandable that the WFSE sought to protect its work jurisdiction through the unit clarification process, the WFSE's unit clarification petition was in fact unnecessary.

it would have protected its own position by making its own unit clarification request that differed from the WFSE's unit clarification petition.² Instead, the employer incorrectly assumes that the result it sought could be accomplished through the WFSE's unit clarification petition.

Because no recent change of circumstances has occurred as required by WAC 391-35-030, the WFSE's Community Corrections bargaining unit cannot be modified through this proceeding. This employer is left in the unenviable position of having the employees in the Training Unit in both represented and unrepresented positions. While the reality of this conundrum is recognized, the outcome of this case is constrained by existing rules and recent precedent that squarely apply to the facts presented.

FINDINGS OF FACT

1. The Washington State Department of Corrections (employer or DOC) is an employer within the meaning of RCW 41.80.005(8).
2. The Washington Federation of State Employees (WFSE) is an exclusive bargaining representative within the meaning of RCW 41.80.005(9).
3. Since at least 1982, the WFSE has represented a bargaining unit of employees within the employer's workforce described as follows:

All nonsupervisory civil service employees of the Washington State Department of Corrections performing community corrections functions, excluding confidential employees, internal auditors, supervisors, Washington Management Service employees (on and after July 1, 2004), employees in other bargaining units and employees historically excluded from the unit by orders of the Washington Personnel Board or its predecessors.

State – Corrections, Decision 10429 (PSRA, 2009).

² Whether a petition filed in March 2011 would have been timely still needed to be addressed.

4. Between 2000 and 2009, employee training at DOC was decentralized. The majority of training services were provided by employees located within the specific divisions of the employer's workforce.
5. Employees selected as trainers performed training for a two-year rotation and were assigned to the ODU. However, employees selected as trainers remained in their pre-existing job class. Trainers from the Prisons Division were in the Corrections Specialist job class, and trainers from the Community Corrections Division were in the Community Corrections Specialist job class.
6. Although DOC provided in-service training to its employees, the employer also contracted with Peninsula Community College to instruct the Correctional Worker Academy (CORE). CORE is a six week training program that all DOC Prisons Division employees are required to attend to teach the employees the basic skills needed to perform their jobs. DOC trainers from both the Prisons Division and the Community Corrections Division assisted with the CORE training.
7. In 2009, the employer began consolidating training programs within the agency. The employer created the new Training Unit to create and implement training across DOC in a uniform manner. The programs the Training Unit teaches include New Employee Orientation, CORE Academy, Community Corrections Academy, and in-service training at the DOC Headquarters, regional offices and prisons. Six positions are from positions that are historically included in the WFSE's Community Corrections bargaining unit.
8. Curriculum Development positions were hired to write training modules. Some of these employees were hired from Peninsula Community College, and others were existing DOC employees who had previously been developing training programs. One position in the Human Resources Consultant 4 job class was also included in the WFSE's Community Corrections bargaining unit.

9. On June 16, 2010, the employer reallocated the Training Unit positions represented by the WFSE to the Human Resource Consultant 3 job class and informed the WFSE that those positions, as well as the position occupied by Cummings, would be removed from the Community Corrections bargaining unit.
10. On June 29, 2010, the WFSE filed an unfair labor practice complaint alleging the employer unilaterally reallocated the WFSE-represented positions without first providing notice and an opportunity for bargaining. Case 23411-U-10-5966. The complaint also alleged that the employer unilaterally removed bargaining unit positions from its Community Corrections bargaining unit without first providing notice and an opportunity for bargaining.
11. The WFSE also filed a “defensive” unit clarification petition to reaffirm its position as the exclusive bargaining representative of the positions that it historically represented in the Training Unit. Case 23412-C-10-1446. Processing of the unit clarification petition was held in abeyance pending the outcome of the unfair labor practice complaint.
12. The WFSE’s unfair labor practice complaint was dismissed following a hearing on the merits. *State – Corrections*, Decision 10842-A (PSRA, 2011), *aff’d*, Decision 10842-B (PSRA, 2012).
13. On February 7, 2013, the WFSE informed the agency that it was withdrawing its unit clarification petition. The employer opposed the move to withdraw the petition. The withdrawal was accepted and the case was closed on February 22, 2013.
14. The employer filed the instant unit clarification petition on June 3, 2013.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter pursuant to Chapter 41.80 RCW and Chapter 391-35 WAC.

2. Based upon Findings of Fact 7 through 14, the employer's petition was not filed within a reasonable time of the change in circumstances.

ORDER

The unit clarification petition filed by the Washington State Department of Corrections in the above-captioned matter is DISMISSED.

ISSUED at Olympia, Washington, this 7th day of March, 2014.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MICHAEL P. SELLARS, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-35-210.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

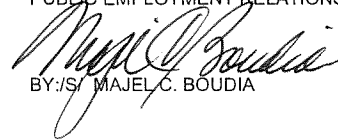
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PUBLIC EMPLOYMENT RELATIONS COMMISSION


BY: /s/ MAJEL C. BOUDIA

CASE NUMBER: 25740-C-13-01554 FILED: 06/03/2013 FILED BY: EMPLOYER
DISPUTE: COMMUNITY INT
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