

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

UW POSTDOCS  
UNITED/INTERNATIONAL UNION,  
UNITED AUTOMOBILE, AEROSPACE  
AND AGRICULTUREAL IMPLEMENT  
WORKERS OF AMERICA, LOCAL  
UNION 4121

Involving certain employees of:

UNIVERSITY OF WASHINGTON

CASE 129731-E-17

DECISION 12838-C - PECB

DECISION OF COMMISSION

*Jacob Metzger and Paul Drachler*, Attorneys at Law, Douglas Drachler McKee & Gilbrough LLP, for the UW Postdocs United/International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union 4121.

*Henry Farber and John Hodges-Howell*, Attorneys at Law, Davis Wright Tremain LLP, for the University of Washington.

*Paul M. Ostroff*, Attorney at Law, Lane Powell PC, for the Fred Hutchinson Cancer Research Center.

This case comes before the Commission on appeal by the Fred Hutchinson Cancer Research Center (FHCRC) to overturn a decision of the Executive Director denying the FHCRC's motion to intervene. The FHCRC moved to intervene in a representation petition filed by the UW Postdocs United/International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 4121 (union). The Executive Director denied FHCRC's motion, but allowed the FHCRC to "specially appear." *University of Washington*, Decision 12838-B (PECB, 2018). The parties waived briefs in this matter.

The issue before the Commission is whether the FHCRC should be allowed to intervene. We reverse the Executive Director's decision and grant the FHCRC's motion to intervene.

BACKGROUND

The union filed a petition to represent postdoctoral employees at the University of Washington (UW). The UW and the union disagreed about who should be included in the bargaining unit. Representation Case Administrator Dario de la Rosa conducted a hearing. The Executive Director concluded that the senior fellows, senior fellow trainees, research associates, and research associate trainees are postdoctoral positions that would be appropriately included in a bargaining unit of postdoctoral employees. *University of Washington*, Decision 12838 (PECB, 2018). The Executive Director remanded the case to the Representation Case Administrator for further processing. Neither the union nor the UW filed objections to the order.

Mr. de la Rosa conducted an investigation conference. The union and the UW disagreed about the eligibility of certain employees. The agency conducted an election. The Executive Director certified the union as the exclusive bargaining representative. *University of Washington*, Decision 12838-A (PECB, 2018). The Executive Director remanded the case for further proceedings on the eligibility issues.

On September 21, 2018, the FHCRC moved to intervene. The FHCRC alleges that certain employees in the bargaining unit are employed by the FHCRC, not the UW. Specifically, the FHCRC asserts that 28 employees on the eligibility lists are or were employed by the FHCRC. Since the FHCRC is a private employer, FHCRC employees should not be included in the bargaining unit. The FHCRC further asserts that, as the employer, it has a material interest in the proceedings and should therefore be allowed to intervene.

The union opposes the FHCRC's motion for intervention and advocates that at most, the FHCRC should be allowed to specially appear. The union asserted that neither Chapter 391-25 WAC nor Chapter 34.05 RCW provided a basis for the FHCRC to intervene. The union asserts that the FHCRC cannot challenge the agency's jurisdiction over employees the union and the UW agreed to include in the bargaining unit.

## ANALYSIS

### Applicable Legal Standards

Under the Administrative Procedures Act, Chapter 34.05 RCW, the presiding officer may grant “intervention at any time, upon determining that the petitioner qualifies as an intervenor under any provision of law and that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.” RCW 34.05.443(1). The presiding officer may impose conditions on the intervenor’s participation including limiting participation to designated issues, limiting the use of cross-examination or other procedures to promote the orderly conduct of the proceeding. RCW 34.05.443(2)(a)-(b). The Commission notes that there are two parts to this test: (1) whether the petitioner qualifies as an intervenor under any provision of law; and (2) whether intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

The first part of the test (“any provision of law”) presents a challenging issue as there is no applicable rule contemplating intervention by an employer and the Commission has not squarely addressed this issue in any prior decision. The union correctly observes that the Commission’s representation case rules contemplate intervention under only two scenarios. The first, WAC 391-25-170, allows intervention by an employee organization that submits a required showing of interest. The second, WAC 391-25-190, allows intervention by organizations other than the incumbent. These rules apply to bargaining representatives not to employers. The Commission’s rules are silent on intervention for employers, and the Commission has not previously held that an employer may intervene as a party to a representation proceeding. For the reasons explained below, the Commission holds that “any provision of law” should be read broadly and, despite the absence of a specific Commission rule or regulation, it is appropriate in certain limited circumstances to grant intervention to an employer in a representation proceeding. Those circumstances exist in this case.

Application of Legal Standards

When the Legislature enacted Chapter 41.58 RCW, it expressed its intent that the Commission achieve efficient and expert administration of public labor relations. RCW 41.58.005(1). To achieve this goal, it granted the Commission the authority to determine bargaining units. RCW 41.56.060. Accordingly, the Commission is empowered to determine whether intervention of an employer is appropriate, even in the absence of a specific rule. This conclusion is strengthened by Washington Civil Rule 24. While not directly applicable, Civil Rule 24(b)(2) contemplates permissive intervention when an applicant's "claim or defense and the main action have a question of law or fact in common." This is the situation facing the Commission here.

Public Employment Relations Commission's (PERC) authority to grant intervention to an employer in a representation case is further supported by its jurisprudence, *see Tacoma School District*, Decision 3314 (PECB, 1989), as well as the NLRB's case law. *Roesch Lines, Inc.*, 224 NLRB 203 (1976)<sup>1</sup> (allowing a second employer to intervene after the employer named in the petition lost its contract to provide bus services. The Board granted the motion for intervention only insofar as it related to the petitioner's request to represent employees at a school district).

In its motion for intervention, the FHCRC asserts that it employs 28 of the petitioned-for employees. The Commission has jurisdiction over public employees and public employers. RCW 41.56.030(11) and (12). Public employees include postdoctoral employees at the University of Washington. RCW 41.56.513. Public employers do not include private entities. *See* RCW 41.56.030(12). The Commission does not have jurisdiction over postdoctoral employees who are employed by FHCRC. Accordingly, resolution of this matter requires a determination as to which entity employs certain petitioned-for employees. Allowing the FHCRC to intervene is in the interests of justice and will allow the Executive Director to determine whether the agency has jurisdiction over the employees.

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<sup>1</sup> Decisions construing the National Labor Relations Act (NLRA) are persuasive in interpreting state labor acts which are similar to the NLRA. *Nucleonics Alliance v. Washington Public Power Supply System*, 101 Wn.2d 24 (1984).

Moreover, intervention will not impair the orderly and prompt conduct of the proceedings. FHCRC's participation in the hearing is likely to lead to a more just and final resolution of the disputed issues because of its knowledge of the 28 positions. In this way, permitting FHCRC to intervene may also avoid unnecessary future proceedings. These factors serve to advance labor relations, which is at the core of the Commission's statutory charge.

Under RCW 34.05.443, the presiding officer may impose conditions upon the FHCRC's participation in the proceedings. RCW 34.05.443(2). In its briefing to the Executive Director and correspondence with the Hearing Officer, the FHCRC has raised issues it believes must be resolved in the hearing. The FHCRC asserted that the agency does not have jurisdiction over it because it is a private employer. We urge the parties to explore a stipulation that FHCRC is a private employer to avoid the need to take evidence on that issue and to allow the parties to focus their evidence on who employs the disputed employees.

In response to the motion for intervention, the union asserted that the FHCRC should not be allowed to challenge the inclusion of employees that the union and the UW stipulated were employed by the UW. The FHCRC asserted that the UW agreed to include employees in the bargaining unit who were employed by the FHCRC and are not public employees. While the union and the UW agreed to include those employees in the bargaining unit, the question of who is the employer remains. We cannot include employees who are not employed by the UW in the bargaining unit. Therefore, the parties must present evidence about who employs those employees.

Finally, the parties shall not relitigate issues resolved previously, *e.g.*, the appropriateness of the bargaining unit.

### CONCLUSION

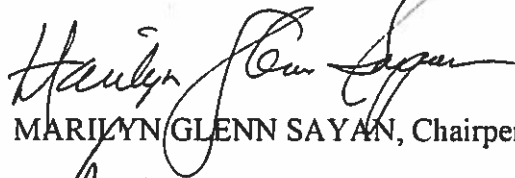
We reverse the Executive Director and grant the FHCRC's motion for intervention. Intervention is appropriate because it will ensure the Commission properly exercises its jurisdiction over public employees and does not include private employees in bargaining units with public employees.

ORDER

The order issued by Executive Director Michael P. Sellars is REVERSED. The Fred Hutchinson Cancer Research Center's motion to intervene is GRANTED.

ISSUED at Olympia, Washington, this 10th day of December, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson



MARK BUSTO, Commissioner



SPENCER NATHAN THAL, Commissioner



# RECORD OF SERVICE

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ISSUED ON 12/10/2018

DECISION 12838-C - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

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