

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

WASHINGTON STATE ENERGY
FACILITY SITE EVALUATION COUNCIL

and

WASHINGTON FEDERATION OF STATE
EMPLOYEES

For clarification of an existing bargaining unit.

CASE 135778-C-22

DECISION 13626 - PSRA

ORDER CLARIFYING BARGAINING
UNIT

Herb Harris, Coordinator of PERC Activities, for the Washington Federation of State Employees.

Ann Green, Labor Relations Manager, Office of Financial Management, for the Washington State Energy Facility Site Evaluation Council.

The Washington Federation of State Employees (union) and the Washington State Energy Facility Site Evaluation Council (Council) seek to clarify a bargaining unit following the enactment of legislation that established the Council as a separate state agency. The legislation transferred employees from the Washington State Utilities and Transportation Commission (UTC) to the Council. A number of the transferred employees were represented by the union in a bargaining unit at the UTC. The legislation specified that those UTC employees would be transferred to the Council without a loss of rights. The parties assert that clarifying the represented employees into a bargaining unit at the Council is necessary to prevent them from suffering a loss of rights. Failure to grant the petition would render the employees unrepresented and would result in a tangible loss of rights and benefits. The parties' clarification request is granted.

BACKGROUND

In 2022, the legislature established the Council as a separate state agency. Laws of 2022, ch. 183. The Council previously existed within the UTC, and the staff working with the Council were UTC employees. Laws of 2022, ch. 183, section 3. The legislation transferred the staff and positions providing support for the Council from the UTC to the Council. Laws of 2022, ch. 183, Section 17. Section 17(6) of the legislation provides the following protections regarding employees transferred to the Council:

All employees classified under chapter 41.06 RCW, the state civil service law, assigned to the council shall continue to perform their usual duties upon the same terms as formerly, *without any loss of rights*, subject to any action that may be appropriate thereafter in accordance with the laws and rules governing state civil service law.

Laws of 2022, ch. 183, Section 17(6) (emphasis added).

Approximately 13 positions were transferred to the Council, effective June 30, 2022. Eight of those positions were covered by chapter 41.06 RCW and eligible to collectively bargain under chapter 41.80 RCW. The union represented the eight positions in an agency-wide bargaining unit of employees at UTC.¹ *State – Utilities and Transportation Commission, Decision 8546-A (PSRA, 2004)*.

A collective bargaining agreement, effective July 1, 2021, through June 30, 2023, covers the bargaining unit. Among its provisions, the agreement provides that, on January 1, 2023, the state will deposit \$250 in a flexible spending account for all bargaining unit employees making less than \$50,000.04 annually. The agreement further provides bargaining unit employees a personal holiday each fiscal year of the agreement. This is in addition to the personal holiday that all state

¹ The remaining positions transferred were a combination of positions exempt from chapter 41.06 RCW and some were in the Washington Management Service which is subject to chapter 41.06 RCW but ineligible to collectively bargain pursuant to RCW 41.80.005(6).

employees receive on an annual basis. Finally, the agreement provides that bargaining unit employees making less than \$99,000 in base salary and who were hired before July 1, 2021, and still employed on July 1, 2022, will receive a lump sum payment. The amount of the payment ranges between \$850 and \$3400 depending on the employee's base rate. Unrepresented employees, who are subject to chapter 357 WAC and agency policy, are not entitled to these benefits.

On September 2, 2022, the parties filed this petition. The parties seek to clarify only those represented employees or positions that transferred from the UTC to the Council.

ANALYSIS

Applicable Legal Standards

The determination of appropriate bargaining units is a function delegated to this agency by the legislature. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981). The purpose of this function is to ensure there is a community of interest among the employees sufficient to enable them to bargain effectively with their employer. *Quincy School District*, Decision 3962-A (PECB, 1993).

Included in this agency's authority to determine an appropriate bargaining unit is the power to modify that unit, upon request, through a unit clarification proceeding. *University of Washington*, Decision 11590 (PSRA, 2012), *aff'd*, Decision 11590-A (PSRA, 2013); *see also Pierce County*, Decision 7018-A (PECB, 2001). 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 of circumstances. *See, e.g., Toppenish School District*, Decision 1143-A (PECB, 1981). Unit clarification proceedings can be used to determine the bargaining unit placement of newly created positions. WAC 391-35-020(1)(a).

Application of Legal Standards

The joint petition is granted. To ensure that the transferred employees do not suffer any loss of rights by virtue of their transfer from the UTC, the bargaining unit must be clarified.

This agency has considered language similar to that in section 17(6) in one other instance. *State – Early Learning*, Decision 9880 (PSRA, 2007). That case involved the transfer of employees from the state Department of Social and Health Services (DSHS) and Community, Trade, and Economic Development (CTED) into the newly created Department of Early Learning. *Id.* The Executive Director dismissed the employer and union joint request to clarify a supervisory and nonsupervisory bargaining unit of employees transferred to the newly created agency. The employees who transferred from DSHS and CTED did not comprise the entirety of the bargaining units in those agencies. The petition also sought to add unrepresented employees working in newly created positions. *Id.*

The parties filed their petition relying upon the statutory language that created the Department of Early Learning, which provided:

(1) . . . All employees classified under chapter 41.06 RCW, the state civil service law, are assigned to the department of early learning to perform their usual duties upon the same terms as formerly, without any loss of rights, subject to any action that may be appropriate thereafter in accordance with the laws and rules governing state civil service.

(2) Nothing contained in this section may be construed to alter any existing collective bargaining unit or the provisions of any collective bargaining agreement until the agreement has expired or until the bargaining unit has been modified by action of the public employment relations commission as provided by law.

Laws of 2006, ch. 265, Section 504.

The Executive Director held that a unit clarification was the improper proceeding to create a new bargaining unit, even when the new units contained pieces of pre-existing bargaining units from different agencies. *Id.* The Executive Director dismissed the parties' reliance upon the "without the loss of rights" language in the legislation as "strained and fail(ing) to provide a sound policy

that could be uniformly applied in similar circumstances.” *Id.* The Executive Director concluded that there was no indication that the legislature intended to provide any exception to this agency’s rules or processes. *Id.*

On appeal, the Commission affirmed the Executive Director. *State-Early Learning*, Decision 9880-A (PRSA, 2008). The Commission held that without an existing certification, PERC lacks a starting point to begin the unit clarification proceedings. Rather, a representation proceeding and conclusive election under chapter 391-25 WAC would first be required. *Id.*

The Commission dismissed the parties’ assertion that the legislation preserved the represented status of the represented employees who transferred to the Department of Early Learning. The Commission held that the plain meaning of the legislation did not preserve the represented status of the employees. The Commission held that the legislation was an agency enabling statute not a collective bargaining statute, so the meaning to terms used in collective bargaining did not apply. The Commission also held that the lack of any reference in section 504(1) to chapter 41.80 RCW meant that “without loss of rights” only applied to those rights provided for in chapter 41.06 RCW. *Id.*

With respect to Section 504(2), the Commission held that the language only prevented PERC from taking any action to modify the bargaining units that remained at DSHS and CTED. The Commission further held that since there were no existing bargaining units at the Department of Early Learning, Section 504(2) did not apply. *Id.*

The Commission’s decision was not unanimous. The dissent opinion argued that the majority ignored the historical context of the language used in Section 504(1). The dissent stated that the phrase “loss of rights” had routinely been used by the legislature involving transfers prior to the enactment of chapter 41.80 RCW. The Personnel Resources Board regularly held that the language meant that the transferred employees should transfer with all their rights as represented employees. *Id.*

Neither the Executive Director nor the Commission's decision analyzes the impacts of concluding that the represented employees became unrepresented upon transfer. The failure to do so risks rendering the language in Section 504 superfluous or a nullity. However, statutes must be interpreted and construed so that all the language used is given effect and no portion is rendered a nullity, meaningless, or superfluous. *See e.g., John H. Sellen Constr. Co. v. State*, 87 Wn.2d 878 (1976); *Whatcom County v. City of Bellingham*, 128 Wn.2d 537 (1996).

Regardless of the result in the Early Learning cases, we must still apply the plain meaning of the language of "without loss of rights" and not render the language a nullity, meaningless, or superfluous. In this case, the facts mandate a different result.

In the Department of Early Learning case, the parties sought to commingle employees from two different agencies who were in bargaining units at their respective agencies as well as unrepresented employees in newly created positions. In this case, the transferred employees all came from one agency. The employees at-issue were in one bargaining unit at UTC with other UTC employees and are now proposed to be in one bargaining unit at the Council. The petition does not seek to add any unrepresented petitions. Also, the legislation creating the Council does not contain provisions similar to Section 504(2) in the Department of Early Learning cases. Finally, and more importantly, the transferred employees will lose certain benefits under their collective bargaining agreement if they lose their represented status by virtue of their transfer.

This last distinction reveals the flaw in the prior decision's analysis and conclusion regarding the meaning of "without loss of rights." Among the rights afforded to employees covered under chapter 41.06 RCW is the right to collectively bargain under chapter 41.80 RCW. The employees at-issue had availed themselves of that right. They were members of a bargaining unit at UTC and their terms and conditions were governed by the applicable collective bargaining agreement. If one were to conclude that these employees became unrepresented on June 30, 2022. Their terms and conditions of employment would no longer be governed by the bargaining agreement but by the civil service rules, chapter 357 WAC, promulgated pursuant to chapter 41.06 RCW.

The record reflects that moving from being covered by the terms of the current collective bargaining agreement to being solely covered by the terms of chapter 357 WAC would result in the loss of at least three rights or benefits. The agreement provides that, on January 1, 2023, the state will deposit \$250 in a flexible spending account for all bargaining unit employees making less than \$50,000.04 annually. Bargaining unit employees receive a personal holiday each fiscal year of the agreement. This is in addition to the personal holiday that all state employees receive on an annual basis. Finally, the agreement provides that bargaining unit employees making less than \$99,000 in base salary and who were hired before July 1, 2021, and still employed on July 1, 2022, will receive a lump sum payment. The amount of the payment ranges between \$850 and \$3400 depending on the employee's base rate.

It is readily clear that the Council employees would suffer a tangible loss of rights and benefits under the reasoning of the *State – Early Learning* decisions. Such a result would render the language of Section 17(6) a nullity. Rather, the plain meaning of the “without loss of rights” in this instance is to maintain the transferred employees’ representational status and grant the petition clarifying the bargaining unit. The employees continued to be represented upon their transfer to the Council on June 30, 2022.

The union’s bargaining unit at the Council will be described as:

All civil service employees of the Energy Facility Site Evaluation Council under RCW 41.80, excluding supervisors, confidential employees, WMS employees, and employees in existing bargaining units.

FINDINGS OF FACT

1. The Washington State Energy Facility Site Evaluation Council (Council) is an employer within the meaning of RCW 41.80.005(10).
2. The Washington State Utilities and Transportation Commission (UTC) is an employer within the meaning of RCW 41.80.005(10).

3. The Washington Federation of State Employees (union) is an employee organization within the meaning of RCW 41.80.005(7).
4. In 2022, the legislature established the Council as a separate state agency. Laws of 2022, ch. 183. The Council previously existed within the UTC, and the staff working with the Council were UTC employees. Laws of 2022, ch. 183, section 3. The legislation transferred the staff and positions providing support for the Council from the UTC to the Council. Laws of 2022, ch. 183, Section 17.
5. Section 17(6) of the legislation provides the following protections regarding employees transferred to the Council:

All employees classified under chapter 41.06 RCW, the state civil service law, assigned to the council shall continue to perform their usual duties upon the same terms as formerly, *without any loss of rights*, subject to any action that may be appropriate thereafter in accordance with the laws and rules governing state civil service law.

Laws of 2022, ch. 183, Section 17(6) (emphasis added).

6. Approximately 13 positions were transferred to the Council, effective June 30, 2022. Eight of those positions were covered by chapter 41.06 RCW and eligible to collectively bargain under chapter 41.80 RCW. The union represented the eight positions in an agency-wide bargaining unit of employees at UTC.² *State – Utilities and Transportation Commission, Decision 8546-A (PSRA, 2004)*. The parties seek to clarify only those represented employees or positions that transferred from the UTC to the Council.

² The remaining positions transferred were a combination of positions exempt from chapter 41.06 RCW and some were in the Washington Management Service which is subject to chapter 41.06 RCW but ineligible to collectively bargain pursuant to RCW 41.80.005(6).

7. A collective bargaining agreement, effective July 1, 2021, through June 30, 2023, covers the bargaining unit. Among its provisions, the agreement provides that, on January 1, 2023, the state will deposit \$250 in a flexible spending account for all bargaining unit employees making less than \$50,000.04 annually. The agreement further provides bargaining unit employees a personal holiday each fiscal year of the agreement. This is in addition to the personal holiday that all state employees receive on an annual basis. Finally, the agreement provides that bargaining unit employees making less than \$99,000 in base salary and who were hired before July 1, 2021, and still employed on July 1, 2022, will receive a lump sum payment. The amount of the payment ranges between \$850 and \$3400 depending on the employee's base rate. Unrepresented employees, who are subject to chapter 357 WAC and agency policy, are not entitled to these benefits.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under chapter 41.80 RCW and chapter 391-35 WAC.
2. Based on findings of fact 4 through 7, employees continue to share a community of interest, continue to maintain representational status, and should be clarified into a bargaining unit at the Council.

ORDER

1. The bargaining unit at the Council is described as follows:

All civil service employees of the Energy Facility Site Evaluation Council under RCW 41.80, excluding supervisors, confidential employees, WMS employees, and employees in existing bargaining units.

2. The Washington Federation of State Employees will continue to represent the bargaining unit described in paragraph 1 of this order as of the transfer on June 30, 2022.

ISSUED at Olympia, Washington, this 31st day of January, 2023.

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.



RECORD OF SERVICE

ISSUED ON 01/31/2023

DECISION 13626 - PSRA has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: DEBBIE BATES

CASE 135778-C-22

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