STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
AMERICAN FEDERATION OF TEACHERS OF WASHINGTON	)	CASE 21807-E-08-3374
	)	
Involving certain employees of:	)	DECISION 10157-B - PECB
	)	
COMMUNITY COLLEGE DISTRICT 29 (CLOVER PARK TECHNICAL COLLEGE)	)	DECISION OF COMMISSION
	)	

Robert M. McKenna, Attorney General, by *Terrance J. Ryan*, Assistant Attorney General, for the employer.

Schwerin Campbell Barnard & Iglitzin LLP, by *Terrance M. Costello*, Attorney at Law, for the union.

This case comes before the Commission on a timely appeal filed by Clover Park Technical College (employer) seeking review and reversal of an Order Directing Further Proceedings issued by Executive Director Cathleen Callahan.[1] The American Federation of Teachers of Washington (union) supports the Executive Director's order. We affirm the Executive Director's decision and direct further proceedings consistent with this decision.

PROCEDURAL HISTORY

On June 27, 2008, the union filed a representation petition with this agency seeking certification as the exclusive bargaining representative of "all full-time and regular part-time exempt employees of the [employer] excepting those excluded by statute."

[1] *Community College District 29 (Clover Park Technical College)*, Decision 10157-A (PECB, 2008).

Following two investigation conferences held on July 30 and August 5, the employer contested this Commission's jurisdiction over the union's petition. The union asserted that this Commission has jurisdiction over the petitioned-for employees under RCW 41.56.021. The employer claimed that although RCW 41.56.024 provides collective bargaining rights for classified employees at technical colleges, the provision of RCW 41.56.021 do not apply to exempt employees at the technical colleges. On August 8, 2008, the Executive Director issued an Order to Show Cause asking for the parties' positions as to why she should not dismiss the union's petition.[2]

Both parties filed responses to the Executive Director's request. The union argued that when the Legislature enacted RCW 41.56.021, it intended to grant all higher education employees, including those at the state's technical colleges, collective bargaining rights with certain statutory exceptions. The employer continued to assert that the Legislature failed to include exempt employees at technical colleges under the provisions of RCW 41.56.021, and therefore those employees do not have collective bargaining rights.

On October 22, 2008, the Executive Director issued her decision finding that the exempt employees at the technical colleges have collective bargaining rights, and ordered further proceedings to determine the scope of the proposed bargaining unit and eligibility of employees. Specifically, the Executive Director held that with respect to non-faculty at the technical colleges, all employees may collectively bargain under the general provisions of Chapter 41.56 RCW, regardless of whether the employee was exempt from civil service under RCW 41.06.070(2). Additionally, she held that under

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[2] *Community College District 29 (Clover Park Technical College)*, Decision 10157 (PECB, 2008).

RCW 28B.50.874, the technical colleges were not allowed to strip any classified employee of the right to be represented for purposes of collective bargaining. The employer now appeals that decision.

DISCUSSION

The history of collective bargaining at the technical colleges in the State of Washington is unique and important to the decision in this case. Prior to 1991, administration of the technical colleges was under the common schools which were governed by the Office of the Superintendent of Public Instruction. The collective bargaining relationships for the certificated and classified employees of the technical colleges were governed by Chapter 41.59 RCW and Chapter 41.56 RCW, respectively.

The 1991 Community and Technical College Act

In 1991, the Legislature passed the Community and Technical College Act, Laws of 1991 ch. 238, which amended the existing laws applicable to the vocational-technical colleges. The 1991 act transferred jurisdiction over those institutions to the newly created State Board for Community and Technical Colleges. *See Lake Washington Technical College*, Decision 4391 (CCOL, 1993). Administration of the classified employees' basic employment rights would be governed by Chapter 28B.16 RCW, the State Higher Education Personnel Law, and administered by the Higher Education Personnel Board (HEPB). The HEPB assigned the technical colleges district numbers in the same manner as the community colleges.

Although the Community and Technical College Act transferred administration of the personnel laws for the technical colleges to the state, the Act preserved the existing collective bargaining rights and relationships for all technical college employees. Collective bargaining rights for the "certificated" teachers at

those institutions was transferred from Chapter 41.59 RCW to the coverage of Chapter 28B.52 RCW, the existing collective bargaining law for "academic employees" of the state community college system.

To clarify the existing rights of the technical college classified employees, the Legislature adopted RCW 41.56.024 as part of the Community and Technical College Act. That law guaranteed that classified employees continued collective bargaining rights under Chapter 41.56 RCW, and also cross-referenced RCW 28B.50.874, which preserved existing collective bargaining relationships. RCW 28B.50.874 provides, in part:

> An exclusive bargaining representative certified to represent a bargaining unit covering employees of a vocational technical institute on September 1, 1991, shall remain the exclusive representative of such employees thereafter until and unless such representative is replaced or decertified in accordance with state law.
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> Any collective bargaining agreement in effect on June 30, 1991, shall remain in effect as it applies to employees of vocational technical institutes until its expiration or renewal date or until renegotiated or renewed in accordance with chapter 28B.52 or 41.56 RCW. After the expiration date of a collective bargaining agreement, all of the terms and conditions specified in the collective bargaining agreement, as it applies to employees of vocational-technical institutes, shall remain in effect until the effective date of a subsequent agreement, not to exceed one year from the termination date stated in the agreement. The board of trustees and the employees may mutually agree to continue the terms and conditions of the agreement beyond the one year extension. *However, nothing in this section shall be construed to deny any employee right granted under chapter 28B.52 or 41.56 RCW.* Labor relations processes and agreements covering faculty members of vocational technical institutes after September 1, 1991, shall be governed by chapter 28B.52 RCW. *Labor relations processes and agreements covering classified employees of vocational technical institutes after September 1, 1991, shall continue to be governed by chapter 41.56 RCW.*

(emphasis added). Accordingly, RCW 28B.50.874 specifically ensures that any existing collective bargaining relationships between the classified employees and the newly formed community college districts are to be maintained following the enactment and implementation of the Community and Technical College Act.

The fact that the Community and Technical College Act ensured that the classified employees continued to enjoy Chapter 41.56 RCW collective bargaining rights is of extreme importance. The classified employees at the technical colleges enjoyed full-scope collective bargaining rights while under the jurisdiction of the common schools, including the right to collectively bargain wages, hours, and working conditions with their employer. RCW 28B.50.874 ensured that no classified technical college employee would lose such rights, even though other similarly situated civil service employees at the community colleges were not permitted to bargain over certain matters, such as wages, and enjoyed only limited collective bargaining rights.[3]

The 1993 State Civil Service System Merger

In 1993, the Legislature once again amended the higher education law by merging the Higher Education Civil Service System with the General Government Civil Service System under Chapter 41.06 RCW. The Washington Personnel Resources Board administered that law. However, nothing in the 1994 amendments changed RCW 41.56.024 or RCW 28B.50.874, so the classified technical college employees still maintained Chapter 41.56 RCW collective bargaining rights.

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[3] For discussion of the difference between full-scope and limited scope collective bargaining rights, *see State - Liquor Control Board*, Decision 7869 (PSRA, 2002).

2002 Personnel System Reform Act

In 2002, the Legislature enacted the Personnel System Reform Act 2002, which granted state civil service employees, including those at the community colleges, full-scope collective bargaining rights. Codified at Chapter 41.80 RCW, the 2002 law permitted state employees to bargain over wages for the first time, although under different circumstances than their local government counterparts.[4] However, collective bargaining rights for state civil service employees is predicated on employees being covered by Chapter 41.06 RCW. RCW 41.80.005(6); *see also University of Washington*, Decision 9410 (PSRA, 2006). Thus, if a general government employer or higher education institutions exercised its authority under RCW 41.06.070(2) to "exempt" certain employees from coverage of the Chapter 41.06 RCW, those employees would also lose their Chapter 41.80 RCW collective bargaining rights, and could not be included in any bargaining unit of employees. *University of Washington*, Decision 9410; *Green River Community College*, Decision 8751-A (PSRA, 2005).

Because RCW 41.06.070(2) grants the higher education institutions broad authority to exempt employees from their civil service and collective bargaining rights, a coalition of bargaining representatives successfully lobbied the Legislature to enact RCW 41.56.021. Laws of 2007 ch. 136. That law provides certain employees exempt from the Chapter 41.06 RCW civil service law at higher education institutions the opportunity to organize and collectively bargain under the provisions of Chapter 41.56 RCW, and states, in part:

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[4] The minor differences include the bargaining process, where exclusive bargaining representatives bargain for one master agreement covering all of their employees. These differences are not material to this case.

> (1) In addition to the entities listed in RCW 41.56.020, this chapter applies to employees of institutions of higher education who are exempted from civil service pursuant to RCW 41.06.070(2), with the following exceptions:
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> (a) Executive employees . . . , including executive heads of major administrative or academic divisions;
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> (b) Managers who perform any of the following functions:
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> (i) Formulate, develop, or establish institutional policy, or direct the work of an administrative unit;
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> (ii) Manage, administer, and control a program, including its physical, financial, or personnel resources;
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> (iii) Have substantial responsibility for human resources administration, legislative relations, public information, internal audits and investigations, or the preparation and administration of budgets;
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> (iv) Functionally is above the first level of supervision and exercises authority that is not merely routine or clerical in nature and requires the consistent use of independent judgment;
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> (c) Employees who, in the regular course of their duties, act as a principal assistant, administrative assistant, or personal assistant to employees as defined by (a) of this subsection;
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> (d) Confidential employees;
>
> (e) Employees who assist assistant attorneys general who advise and represent managers or confidential employees in personnel or labor relations matters, or who advise or represent the state in tort actions.
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> (2) Employees subject to this section shall not be included in any unit of employees certified under RCW 41.56.022, 41.56.024, or 41.56.203, chapter 41.76 RCW, or chapter 41.80 RCW. Employees whose eligibility for collective bargaining is covered by chapter 28B.52, 41.76, or 41.80 RCW are exempt from the provisions of this chapter.
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> . . .

The question now before us is how the above-mentioned provisions of the Revised Code of Washington interact.

Application of Legal Standards

The Executive Director concluded that employees exempt from Chapter 41.06 RCW at the technical colleges always had collective bargain-

ing rights under Chapter 41.56 RCW, regardless of their status under civil service as exempt. The employer claims this ruling to be in error, and points to the plain language of RCW 41.56.030(8), which defines the "institutions of higher education" as the four-year universities and the community college, but is silent as to the technical colleges. Thus, the employer asserts that because the technical colleges are not specifically listed in RCW 41.56.030(8), exempt employees at the technical colleges are not granted collective bargaining rights because RCW 41.56.021 is limited to the exempt employees at the "institutions of higher education." The union continues to argue that the intent of RCW 41.56.021 was to grant all remaining higher education employees collective bargaining rights. Both the employer and union have misunderstood the Executive Director's decision as to the operation of Chapter 41.56 RCW with respect to the technical colleges.

In questioning the appropriateness of the Executive Director's decision, the employer incorrectly assumes that the Executive Director ruled that no exempt employees could exist at the technical colleges. This interpretation of the Executive Director's decision and the existing statutory scheme is incorrect.

Intent of the 1991 Community and Technical College Act

The Legislature's use of the term "classified" as opposed to "civil service" when describing which employees are eligible for collective bargaining rights in RCW 41.56.024 is an important one. Prior to 1991, when the common schools operated the technical colleges, there was no such thing as an "exempt" employee as known in the state civil service system. Rather, all "classified" employees had collective bargaining rights, with the exception of employees determined by this Commission to be confidential employees for purposes of collective bargaining. Although the HEPB, and later the Department of Personnel, may have used the terms "classified"

and "civil service" interchangeably, each term has a distinct definition within the statutory scheme.

As the Executive Director explained, unlike Chapter 41.80 RCW, where collective bargaining rights for civil service employees are predicated upon being covered by Chapter 41.06 RCW, Chapter 41.56 RCW has no such statutory prerequisite. Thus, there may very well be employees at the technical colleges who are "exempt" from the provisions of Chapter 41.06 RCW, but their civil service status has no impact on their right to collectively bargain. When the technical colleges were merged into the community college system, there is no indication that the Legislature intended to remove collective bargaining rights from employees who became exempt from civil service. Simply put, a civil service technical college employee who is "exempt" from civil service is not "excepted" from exercising his or her Chapter 41.56 RCW collective bargaining rights.

In fact, as the Executive Director pointed out, RCW 28B.50.874 specifically preserved the rights of all employees transferring from the jurisdiction of the common schools to the community and technical college system. The employer incorrectly interprets the Executive Director's decision as stating that RCW 28B.50.874 extended collective bargaining rights to the exempt employees. Such is not the case. Rather, RCW 28B.50.874 demonstrates a clear legislative intent for the preservation of collective bargaining rights that the classified staff of the technical colleges enjoyed when the common school operated the technical colleges, including the existing bargaining unit certification issued by this Commission.

Although the employer disagrees with this interpretation, it certainly has not pointed to any authority demonstrating that a

non-academic employee at a technical college exempted from civil service loses his or her Chapter 41.56 RCW collective bargaining rights. Accordingly, all non-academic technical college employees, civil service or otherwise, continue to exercise collective bargaining rights under Chapter 41.56 RCW.

The Executive Director Shall Continue Processing of This Case

On appeal, the employer requests that, in the event we uphold the Executive Director's decision, we issue an order to stay processing of the union's petition and certify our decision as the final agency order for purposes of administrative appeal under the Administrative Procedure Act, Chapter 34.05 RCW. The employer claims that if it is forced to continue with this representation proceeding, it will result in the waste of significant public resources and effort.

In *Renton Education Association v. Public Employment Relations Commission*, 24 Wn. App. 476 (1979), *review denied*, 93 Wn.2d 1025 (1980), the Court of Appeals of Washington, Division 1, held that an order directing an election was not a final order for purposes of judicial review under the Administrative Procedure Act. Rather, the final order in representation cases is the order which fixes some legal relationship as a consummation of the administrative process. In representation cases, the final order is the final certification of the results of the representation election as issued by the Executive Director.

This Commission recently reiterated this standard in *State - Ecology*, Decision 9034-B (PSRA, 2005), and noted that the *Renton Education Association* decision provides Commission staff with clear and precise guidance that a direction of election is not a final order of the agency and may not be appealed to the superior courts at the time it is issued. Our order today is the equivalent to a

direction of election, and the employer's stated objections to the continued processing of this case at this time presents no compelling argument as to why we should issue an order contrary to the *Renton Education Association* decision and established Commission precedent.

NOW, THEREFORE, it is

ORDERED

The Order Directing Further Proceedings issued by Executive Director Cathleen Callahan in the above-captioned case is AFFIRMED, and this case is remanded to the Executive Director for further processing consistent with this order.

Issued at Olympia, Washington, the 20th day of February, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner