STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
OFFICE AND PROCESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 11	)	CASE 20281-C-06-1266
	)	
For clarification of an existing bargaining unit of employees of:	)	DECISION 9469 - PECB
	)	
CITY OF VANCOUVER	)	ORDER OF DISMISSAL

Tedesco and Wilson, by *Michael J. Tedesco*, Attorney at Law, and *Sarah K. Drescher*, Attorney at Law, for OPEIU Local 11.

Office of the City Attorney, by *Terry M. Weiner*, Assistant City Attorney, for the employer.

David Kanigel, Attorney at Law, for the intervenor, Washington State Council of County and City Employees.

On March 17, 2006, Office and Professional Employees International Union, Local 11 (OPEIU) filed a unit clarification petition with the Commission, seeking to have unrepresented employees and job classifications at the City of Vancouver (employer) accreted into an existing bargaining unit represented by that union. The Washington State Council of County and City Employees (WSCCCE) filed a motion for intervention on April 5, 2006, noting that it also represents employees of the employer and asserting that the bargaining unit represented by the OPEIU is not the only appropriate placement for the employees involved. The OPEIU filed an amended petition on April 6, 2006.

Hearing Officer J. Martin Smith held a prehearing conference on June 14, 2006, and issued a Statement of Results of Prehearing

Conference on July 3, 2006. The employer filed a response to that statement on July 15, 2006, and the Hearing Officer issued a revised Statement of Results of Prehearing Conference on July 31, 2006. The employer filed a response on August 21, 2006, in which it continued to object to the proposed accretions.

The Executive Director issued a deficiency notice on August 30, 2006, citing WAC 391-35-020(5)(c) as basis to dismiss the petition. Specifically, that letter noted that the OPEIU was seeking accretion of 200 positions to a bargaining unit of 164 employees, which inherently raised a question concerning representation. The parties were given a period of 21 days in which to respond.

The OPEIU filed a response on September 20, 2006, proposing to stipulate that about 50 of the positions it originally sought are confidential or supervisory employees, and asserting that it was thus only seeking accretion of about 94 employees. The employer filed a response on September 22, 2006, asserting that the positions still claimed by the OPEIU cover 146 employees. The WSCCCE did not file a response to the deficiency notice.

ISSUE

The sole issue before the Executive Director at this time is whether the petition filed by the OPEIU seeks relief available through unit clarification proceedings before the Commission. The Executive Director rules that the petition raises a question concerning representation, and must be dismissed.

APPLICABLE LEGAL PRINCIPLES

The right of public employees to organize for the purposes of collective bargaining is vested by statute in individual employees,

not in the unions that would seek to represent them or the public entities that employ them:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE. No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.

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.

The rights conferred upon employees by RCW 41.56.040 are exercised by majority vote of the employees in groupings established under statutory criteria. The determination and modification of appropriate bargaining units is a function delegated by the Legislature to the Commission. RCW 41.56.060. Long-standing Commission and judicial precedent includes:

> Unit definition is not a subject for bargaining in the conventional "mandatory/permissive/illegal" sense, although parties may agree on units. Such agreement does not indicate that the unit is or will continue to be appropriate.

City of Richland, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981). Thus, labor and management have limited capacity to control unit matters, and the agreements they reach are not binding on the Commission.

The same long-standing precedent limits changes of bargaining unit configurations:

> Absent a change of circumstances warranting a change of the unit status of individuals or classifications, the unit status of those previously included in or excluded from an appropriate unit by agreement of the parties or by certification will not be disturbed. However, both accretions and exclusions can be accomplished through unit clarification in appropriate circumstances. If, as contended by the employer and found by the authorized agent, the agreed unit is found by intervening decisions of the Commission or the Courts to be inappropriate, it may be clarified at any time.

City of Richland, Decision 279-A. Decisions rejecting proposed accretions that merely close historical loopholes date back to at least *City of Dayton*, Decision 1432 (PECB, 1982).

The limited circumstances where accretions are appropriate were explained in *Kitsap Transit Authority*, Decision 3104 (PECB, 1989). The policies enunciated in *Richland*, *City of Dayton*, *Kitsap Transit*, and numerous other Commission precedents were then codified in the Commission's rules, as follows:

> WAC 391-35-020 TIME FOR FILING PETITION -- LIMITATIONS ON RESULTS OF PROCEEDINGS.
>
> . . . .
>
> (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.
>
> (5) Except as provided under subsection (4) of this section, a question concerning representation will exist under chapter 391-25 WAC, and an order clarifying bargaining unit will not be issued under chapter 391-35 WAC:
>
> (a) Where a unit clarification petition is not filed within a reasonable time period after creation of new positions.

> (b) Where employees or positions have been excluded from a bargaining unit by agreement of the parties or by a certification, and a unit clarification petition is not filed within a reasonable time period after a change of circumstances.
>
> (c) Where addition of employees or positions to a bargaining unit would create a doubt as to the ongoing majority status of the exclusive bargaining representative.

Each passing day while employees or positions are excluded from a bargaining unit builds history that weighs heavily against their subsequent accretion to that bargaining unit. An employer that encourages (or at least tolerates) fragmentary organization of its workforce runs the risk of added expense of additional bargaining relationships if the stranded employees organize with a different union. *See City of Vancouver*, Decision 3160 (PECB, 1989). A union that limits its organizing focus to its extent of organization and/or fails to move on changed circumstances in a timely manner must use a two-step process to acquire representation rights for employees left out of the bargaining unit: First organizing a separate unit of the omitted employees; then seeking a merger of bargaining units under WAC 391-25-420.

ANALYSIS

Together with three other unions that have shown no interest in this proceeding, the OPEIU and WSCCCE are part of a joint labor coalition that negotiates with this employer. Both the OPEIU and WSCCCE were thus signatory parties to a collective bargaining agreement that was in effect from January 1, 2003, through December 31, 2005. Appendix A to that agreement listed numerous specific classification series or job titles, and allocated them among the five co-signatory unions. Extracting those assigned to the OPEIU produces the following list:

Class	Title	Range
160	Accounting Clerk I	22
170	Accounting Clerk II	28
174	Customer Service Representative	28
228	Engineering Specialist	44
224	Engineering Technician I	28
225	Engineering Technician II	36
297	Facilities Assistant	26
227	Lead Permits Specialist	39
142	Mail Room Assistant	22
301*	Maintenance Worker I	27
302*	Maintenance Worker II	31(P)
133	Meter Reader	30
251	Office Assistant I	18
252	Office Assistant II	22
323	Parking Enforcement Officer	31
242	Payroll Analyst	32
206	Permits Specialist I	28
210	Permits Specialist II	34
461	Police Service Technician	28
144	Print Shop Operator	30
148	Print Shop Operator Assistant	22
161	Sr. Accounting Clerk	30
172	Sr. Customer Service Rep.	35
226	Sr. Engineering Technician	40
254	Sr. Office Assistant	26
383	Staff Assistant	28
322	Storekeeper	26
135	Utility Service Inspector	34

Extracting those assigned to the WSCCCE produces the following list:

Class	Title	Range
336	Building Repair Specialist	39
369	Facilities and Maintenance Coordinator	43
264	Inspector	35
303	Lead Maintenance Worker	39(P)
301*	Maintenance Worker I	27
302*	Maintenance Worker II	31(P)
310	Operations Dispatcher	28
240	Public Works Supervisor	45(P)
236	Street Light Technician I	33
236	Street Light Technician II	36
217	Traffic Signal Lead	42

Class	Title	Range
214	Traffic Signal Technician	39
364	Utility Electrician	39
137	Utility Locator	31
176	Utility Maintenance Mechanic	35
304	Warehouse Worker	26
319	Water Quality Assistant	30
315	Water System Operator	34
316	Water Treatment Plant Operator	39

With the overlaps indicated by asterisks (*), neither of the units historically represented by the unions involved in this proceeding can be characterized as an "employer-wide" or "horizontal" unit. In *City of Vancouver*, Decision 8032-A (PECB, 2003), the unit represented by the OPEIU was characterized as encompassing "office-clerical and technical employees in five departments: Police, Parks and Recreation, Public Works, Finance and Administration, and Planning and Development" while the unit represented by the WSCCCE was characterized as encompassing "operations and maintenance employees of the Public Works Department" within a total workforce of 1700 employees divided among 14 departments.

In *City of Vancouver*, Decision 3160 (PECB, 1989), the employer's total workforce was described as numbering about 425 employees divided among seven departments. Of significance here, that decision contained the following statement:

> No new bargaining units have been organized within the employer's workforce since 1969. *Most of the employer's technical and professional employees are not represented for the purposes of collective bargaining*, and the employees involved in this proceeding are within that group.

(emphasis added). The employer resisted organization of a separate unit of building inspection personnel in that case, and argued that those historically unrepresented employees should be accreted into

the unit then (and now) represented by the OPEIU to avoid fragmentation of its workforce. The accretion proposed in that case was rejected, as follows:

> There can be no doubt that, for 20 years or more, the employer has enjoyed the freedom to deal with the petitioned-for employees (along with a few others within its Public Works Department) as unrepresented rank-and-file employees. Now, the employer would deprive them of the opportunity to vote on having union representation, by having the Commission include them in the existing bargaining unit represented by the OPEIU. The employer's support for accretion of the petitioned-for positions to the general bargaining unit represented by the OPEIU amounts, at the bottom line, to a condemnation of their unrepresented status for that entire period.
>
> Under most circumstances, public employees have the right to freely choose their own exclusive bargaining representative. RCW 41.56.040. As stated in *Kitsap Transit Authority*, Decision 3104 (PECB, 1989):
>
> > Accretions are an exception to the norm, and will be ordered only where changed circumstances lead to the presence of positions which logically belong only in an existing bargaining unit, so that those positions can neither stand on their own as a separate bargaining unit or be logically accreted to any other existing bargaining unit.
> >
> > . . . .
>
> The parameters of the existing OPEIU bargaining unit have not changed since 1969. [Footnote omitted.] The employer has never previously claimed that such bargaining unit was inappropriate due to its exclusion of building inspectors. *The long history of unrepresented status for the petitioned-for employees requires a conclusion that an attempt by the OPEIU to absorb them now would be rejected.*

City of Vancouver, Decision 3160. The shoes are on opposite feet in this case, where it is the OPEIU that would now absorb a large number of employees who, by its own admission, have existed outside of its bargaining unit for a long time.

The Executive Director rejects the OPEIU's claim of a previous "voluntary recognition" for multiple reasons:

First, the unit clarification proceeding cited by the OPEIU (Case 15962-C-01-1024) was closed as "withdrawn" by the union after a deficiency notice pointed out that the accretion of 40 employees to the unit historically represented by the OPEIU that was proposed in that case appeared to contravene WAC 391-35-020.

Second, the claim of an agreement to resolve that unit clarification proceeding and/or a change of the recognition clause of the parties' contract is not documented in this record. *State ex rel. Bain v. Clallam County*, 77 Wn.2d 542 (1970) requires that agreements made by employers and unions under Chapter 41.56 RCW be reduced to writing. If a written agreement to settle the previous unit clarification case was ever made, it was not put before the Commission in that proceeding or in this proceeding. The changed contract language cited by the OPEIU is vague, at best, in the face of an unchanged listing of covered classification in the appendix, and does not support finding a voluntary recognition of specific classes.

Even if the employer was once willing to agree to the proposed accretion (which it clearly opposes at this time), that would not be binding on the Commission. *City of Richland*, Decision 279-A; *University of Washington*, Decision 9466 (PSRA, 2006).

The OPEIU seeks to accrete a large number of employees who have been excluded from the unit it represents for a long time. Even with its recent effort to disclaim some of the positions it initially sought, the number sought by the OPEIU continues to be far in excess of 30 percent (and perhaps exceeding 50 percent) of the bargaining unit it has historically represented. Those numbers

indicate the proposed accretion would raise a question concerning representation.

There is no claim or evidence here of changed circumstances. The accretion proposed by the OPEIU 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 Auburn*, Decision 4880-A (PECB, 1995); *King County*, Decision 5820 (PECB, 1997). The Commission may dispense with a hearing when parties submit stipulations that do not contravene applicable statutes or rules. *Benton County*, Decision 2221 (PECB, 1985). The requested accretion must be denied and the petition must be dismissed.

FINDINGS OF FACT

1. The City of Vancouver is a municipal corporation of the state of Washington within the meaning of RCW 41.56.020.

2. Office and Professional Employees International Union, Local 11, a bargaining representative within the meaning of RCW 41.56.030, has filed a petition seeking accretion of certain City of Vancouver employees to an existing bargaining unit that it represents.

3. The Washington State Council of County and City Employees, a bargaining representative within the meaning of RCW 41.56.030, has been granted intervention in this proceeding based on its status as exclusive bargaining representative of certain City of Vancouver employees.

4. The employer's workforce has historically included a large number of unrepresented professional and technical employees.

5. The OPEIU has not claimed any change of circumstances that would warrant a change of bargaining unit status for the historically-unrepresented employees which are proposed for accretion in this case.

6. The number of employees proposed for accretion by the OPEIU exceeds 30 percent of the bargaining unit currently represented by the OPEIU, so that the proposed accretion would raise a question concerning representation.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.80 RCW and Chapter 391-35 WAC.

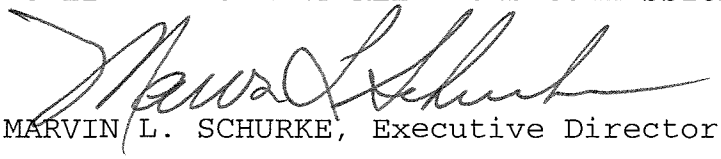
2. The accretion proposed by the OPEIU contravenes WAC 391-35-020 and would raise a question concerning representation.

ORDER

The petition for clarification of an existing bargaining unit filed in the above-captioned proceeding is DISMISSED.

Issued at Olympia, Washington, on this 27th day of October, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, 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.