Clark County, Decision 9654 (PECB, 2007)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
CLARK COUNTY DEPUTY SHERIFF'S GUILD	)	CASE 20673-C-06-1288
	)	
For clarification of an existing bargaining unit of employees of:	)	DECISION 9654 - PECB
	)	
CLARK COUNTY	)	ORDER OF DISMISSAL
	)	
	)	

Garrettson Goldberg Fenrich & Makler, by *Mark J. Makler*, Attorney at Law, appeared on behalf of the union.

Arthur D. Curtis, Prosecuting Attorney, by *Dennis M. Hunter*, Deputy Prosecuting Attorney, appeared on behalf of the employer.

On September 29, 2006, the Clark County Deputy Sheriff's Guild (union) filed a unit clarification petition with the Public Employment Relations Commission. The union represents a bargaining unit of deputy sheriffs employed by Clark County (employer). In its petition, the union asserted that the bargaining unit should be clarified by accreting to it a group of "reserve deputy sheriffs and reserve deputy sheriff sergeants" also employed by the county. It argued that the reserve deputy sheriffs and sergeants perform some of the same duties as the "regular" deputy sheriffs and sergeants and therefore should be part of the same bargaining unit.

The case was assigned to Walter M. Stuteville as Hearing Officer to undertake further proceedings. The matter was scheduled for hearing on January 10 and 11, 2007. On January 2, 2007, the

employer filed a motion for dismissal of the petition.[1] The employer put forward several arguments, but primarily asserted that the reserve deputies are not employees of the employer, but rather are employees of a nonprofit corporation.[2] The employer proposed that the parties and the Hearing Officer discuss its motion in a conference call. The conference call took place on January 3, 2007. During the conference call, the parties were asked by the Hearing Officer whether the reserve deputies are members of the Law Enforcement Officers and Fire Fighters Retirement Plan (LEOFF). Both parties agreed that they are not. The scheduled hearing was then indefinitely postponed to allow the parties to gather more information, and a second conference call was scheduled.

On January 30, 2007, the second conference call between the parties occurred. The matter was further discussed and the union's reply brief to the employer's motion was scheduled. The union's brief was received on February 23, 2007, and the employer's brief was received on March 9, 2007.

ISSUE

Should the reserve deputy sheriffs and reserve deputy sheriff sergeants be accreted into an existing bargaining unit of full time and regular part-time deputy sheriffs?

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[1] Actually the employer filed a motion for declaratory relief with the Hearing Officer. Under Commission rules, the Commission itself adjudicates petitions for declaratory relief. WAC 391-08-520. As the motion was addressed to the Hearing Officer, the motion was considered a motion to dismiss the unit clarification petition, and this decision reflects that assumption. There was no objection from the parties on this assumption.

[2] This defense by the employer is not discussed in this dismissal because the union's petition is found to be defective on its face.

Based upon Commission precedent, WAC 391-35-310, and the definitions of "uniformed personnel" eligible for interest arbitration found in RCW 41.56.030(7)(a)(PECB) and "Law Enforcement Officer" found in RCW 41.26.030(3)(b)(LEOFF), the petition is dismissed.

APPLICABLE LEGAL STANDARDS

Commission Precedent On Accretion

In *Pierce County*, Decision 6051 (PECB, 1997), the Executive Director discussed the long-standing position of the Commission concerning the accretion of employees into an existing bargaining unit.

> . . . accretions to bargaining units are an exception from the norm. The addition of job classifications to an existing bargaining unit necessarily infringes upon the rights of the affected employees to designate a bargaining representative of their own choosing. Thus, the Commission will only accrete positions to existing bargaining units if changed circumstances create a situation wherein the employees can only be appropriately placed in an existing bargaining unit and cannot stand alone as a separate unit or logically be accreted to any other existing bargaining unit. *King County*, Decision 5820 (PECB, 1997). Because accretions are such an exception, the party seeking the accretion does have the burden of proof. *Kiona-Benton School District*, Decision 3180 (PECB, 1989).

This was elaborated on more recently in *City of Vancouver*, Decision 9469 (PECB, 2006):

> The right of public employees to organize for the purpose 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:
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> > 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. . . .

. . . .

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.
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> . . . .
>
> (4) Employees or positions may be added to an existing bargaining unit in a unit clarification proceeding:
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> 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
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> (b) Where the existing bargaining unit is the only appropriate unit for the employees or positions.
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> (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:
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> . . . .

Washington Administrative Code

In addition and particularly relevant in the instant case, in 1996, WAC 391-35-310 was enacted:

> Due to the separate impasse resolution procedures established for them, employees occupying positions eligible for interest arbitration shall not be included in bargaining units which include employees who are not eligible for interest arbitration.

Statutory Definitions

RCW 41.56.030(7)(a) defines those employees eligible for interest arbitration:

> "Uniformed personnel" means: (a) Law enforcement officers as defined in RCW 41.26.030 employed by the governing body of any city or town with a population of two thousand five hundred or more and law enforcement

> officers employed by the governing body of any county with a population of ten thousand or more; . . .

And the above referenced RCW 41.26, the Law Enforcement Officers and Fire Fighters Retirement Plan at .030(3) states:

> "Law enforcement officer" beginning January 1, 1994, means any person who is commissioned and employed by an employer on a full time, fully compensated basis to enforce the criminal laws of the state of Washington generally, with the following qualifications: ...

Thus, to be eligible for interest arbitration, city and county law enforcement officers must be included in the definition of "uniformed personnel" in RCW 41.56.030(7)(a) and the definition of "law enforcement officer" in RCW 41.26.030.

ANALYSIS

On its face, the union's petition is defective and must be dismissed. It violates almost all of the standards for accretion as set forth above.

No Change of Circumstances

The union has not alleged that any change of circumstances has occurred. The union's petition states that its concerns arise out of ". . . several years of bargaining related to Guild work being performed by paid Reserves and bargaining about the encroachment into regular paid professional Deputy work . . . ." There has been no recent altering of the community of interest of the union's bargaining unit because, as stated by the union, the situation concerning these employees is one of long standing. Thus, WAC 391-35-020(4)(a) has not been complied with in the filing of this petition.

Existing Unit Only Appropriate Unit

WAC 391-35-02(4)(b) mandates that the existing unit be the only appropriate bargaining unit for the petitioned-for employees. However, both parties acknowledge that the reserve deputies are not uniformed personnel covered by the LEOFF retirement plan and are not eligible for interest arbitration. Therefore, a bargaining unit composed of employees eligible for interest arbitration is inherently inappropriate for the reserve deputies. The union did not advance any arguments as to why this group of reserve deputies could not stand alone as a bargaining unit, but rather focused only on the contention that the reserve deputies should have access to interest arbitration. The "only available bargaining unit" criteria for accretion is not fulfilled. *City of Vancouver*, Decision 9469.

THE UNION'S ARGUMENTS AND AUTHORITY

The union presented several arguments as to why the motion to dismiss its petition should not be granted.

Similar Responsibilities

The union asserts that the reserve officers perform paid work for the employer that is also part of the paid work of the uniformed deputies. It argues that the remedy for this situation should be accretion. Having found, however, that the Commission's rules and precedents do not allow accretion in the circumstances of this case, the union could address this issue of possible skimming of bargaining unit work by the more usual method of charging the employer with an unfair labor practice. Accretion, however, is not an appropriate remedy for an allegation of skimming.

Commission Precedent

The union argues that in *City of Wapato*, Decision 2619 (PECB, 1987), the Executive Director accreted a reserve police officer

into a bargaining unit of full-time and regular part-time police officers. The union asserts that *Wapato* was based upon an analysis of the work done by the reserve officer, a "community of interest" analysis, and that same analysis should be followed in this case.

On several points, the union's reliance on *Wapato* is misplaced. First, as asserted by the employer in *Wapato*, the analysis was based on hours of work. The Executive Director found that one of the two reserve officers worked enough hours to be classified as "regular part-time" and therefore should not be excluded from the bargaining unit. The decision specifically states that a "claim that all reserve police officers should . . . be included, as a class, in the unit . . . would not be successful." Proving that point, the remaining reserve officer was not placed into the existing bargaining unit.

Furthermore, at the time of the *Wapato* decision, the bargaining unit of full-time and regular part time police officers did not have access to interest arbitration. In 1990, the City of Wapato had a population of 3,795.[3] Over time, the threshold hours criterion for access to interest arbitration for city police officers and county deputy sheriffs has been statutorily reduced. But in 1990, RCW 41.56.030(7)(a) stated:

> Until July 1, 1995, "uniformed personnel" means: (i) Law enforcement officers as defined in RCW 41.56.030 of cities with a population of fifteen thousand or more . . . .

Thus the criterion of not allowing a mixed bargaining unit of interest-arbitration eligible employees and employees not eligible for interest arbitration did not apply in the *Wapato* case and appropriately was not considered. *Wapato* did not result in a mixed

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[3] United States Census, 1990.

bargaining unit of interest-arbitration eligible and non-interest arbitration eligible employees.

CONCLUSION

Therefore, following the criteria set forth in WAC 391-35-020(4)(a) and (b), Time for filing petition — Limitations on results of proceedings, have not been fulfilled and an order clarifying the existing bargaining unit cannot be issued. The union's petition is dismissed.

FINDINGS OF FACT

1. Clark County is a public employer within the meaning of RCW 41.56.020.

2. The Clark County Deputy Sheriff's Guild, a bargaining representative within the meaning of RCW 41.56.030, has filed a petition seeking accretion of certain personnel classified as reserve deputy sheriffs and reserve deputy sheriff sergeants to an existing bargaining unit of full-time and regular part-time deputy sheriffs that it represents.

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

4. The employees in the union's existing bargaining unit are "uniformed personnel" as defined in RCW 41.56.030(7), and are eligible for interest arbitration as provided for in RCW 41.56.430-470.

5. The reserve deputy sheriffs and reserve deputy sheriff sergeants are not "uniformed personnel" as defined by RCW 41.56.030(1), and are not eligible for interest arbitration.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-35 WAC.

2. The accretion proposed by the Clark County Deputy Sheriff's Guild contravenes WAC 391-35-310 and would include employees not eligible for interest arbitration in an existing bargaining unit of employees who are eligible for interest arbitration.

ORDER

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

Issued at Olympia, Washington, on this 30th day of April, 2007.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Cathleen Callahan

CATHLEEN CALLAHAN, Executive Director

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-35-210.