

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
KITSAP TRANSIT)	CASE 21629-C-08-1331
)	
For clarification of an existing)	DECISION 10234-A- PECB
bargaining unit represented by:)	
)	
AMALGAMATED TRANSIT UNION,)	DECISION OF COMMISSION
LOCAL 1384)	
_____)	
)	
In the matter of the petition of:)	
)	
AMALGAMATED TRANSIT UNION,)	CASE 21775-E-08-3370
LOCAL 1384)	
)	DECISION 10235-A- PECB
Involving certain employees of:)	
)	
KITSAP TRANSIT)	DECISION OF COMMISSION
_____)	

Summit Law Group, by *Shannon E. Phillips*, Attorney at Law, for the employer.

Rita DiIenno, Business Agent, for the union.

These cases come before the Commission on a timely appeal filed by Amalgamated Transit Union, Local 1384 (union) and a timely cross-appeal filed by Kitsap Transit (employer) each seeking review and reversal of certain Findings of Fact, Conclusions of Law, and Order issued by Executive Director Cathleen Callahan.¹ The employer opposes the union's appeal on procedural and substantive grounds, and the union opposes the employer's cross-appeal on procedural and substantive grounds.

¹ *Kitsap Transit*, Decision 10234 (PECB, 2008).

ISSUES PRESENTED

1. Are the union's and employer's appeals procedurally defective?
2. If the union's appeal is properly before this Commission, did the Executive Director commit reversible error by dismissing the union's merger petition because the union sought to merge an inappropriate bargaining unit with an appropriate bargaining unit?
3. If the employer's appeal is properly before this Commission, did the Executive Director commit reversible error by dismissing the employer's unit clarification petition?

For the reasons set forth below, we hold that the union's appeal is properly before this Commission, but its effectiveness on appeal is limited based upon the union's failure to specifically cite to those portions of the record that, in the union's opinion, do not support the Executive Director's findings of fact and conclusions of law.

With respect to the substantive portions of the union's appeal, we affirm the Executive Director's decision in all aspects. This record supports a finding that the ROUTED bargaining unit is inappropriate because the worker/drivers are included in the existing bargaining unit.

Because the ROUTED unit is inappropriate, it is unnecessary to consider whether the employer's cross-appeal is appropriately before this Commission or whether the Executive Director's decision to dismiss the employer's unit clarification petition was appropriate.

ISSUE 1 - Appellate Procedure***Ad Hominem* Attacks are Unacceptable in Filings With This Agency**

This Commission has previously reminded parties that although they may disagree with the legal arguments of the opposing party, *ad Hominem* attacks are not persuasive, and parties would be better to limit their arguments to the law. *King County*, Decision 8630-A (PECB, 2005). We once again remind parties that such attacks are unacceptable practice before this agency, and parties and

representatives should exhibit a same respect that they would if they were arguing before the Commission in person.

Employer's Challenge to the Union's Appeal

The employer challenges the appropriateness of the union's appeal. Specifically, the employer argues that the union's notice of appeal does not conform with WAC 391-25-660 because it does not identify in separately numbered paragraphs each specific ruling, finding of fact, conclusion of the law and order claimed to be in error. The employer also argues that the union's appeal fails to cite specific portions of the record that do not support the Executive Director's decision.

WAC 391-25-660(3) states, in part:

A notice of appeal or notice of cross-appeal shall identify, in *separate numbered paragraphs*, the specific rulings, findings of fact, conclusions of law, or orders claimed to be in error.

(emphasis added). We agree with the employer that the union's appeal does not conform to the strict letter of the rule, nor does it cite the specific portions of the record demonstrating how the Executive Director's decision is not supported by substantial evidence. Nevertheless, the union's notice of appeal claims certain findings of fact, conclusions of law, and order are in error.

The union's notice of appeal generally states its arguments on appeal. Nothing in the Commission's rules requires an appealing party to file a brief. A party that does not file a brief with specific citations to the record demonstrating how the decision on appeal is in error, does so at its own peril. To the extent that the union's notice of appeal provides this Commission with insight regarding what findings and conclusions the union contends are unsupported by the record, we will utilize the union's notice of appeal accordingly.² *See Clark County, Decision 9127-A (PECB, 2007).*

² Although it is unnecessary to address the employer's cross-appeal of the Executive Director's decision to dismiss the unit clarification case, we quickly comment upon two arguments raised by the union about the appropriateness of the employer's appeal. When the employer e-mailed the union a copy of its notice of appeal, it failed to perfect its notice of appeal under WAC 391-08-120 because it

ISSUE 2 - Union's Merger Petition**Applicable Legal Standards****Determination of Bargaining Units**

The determination of appropriate bargaining units is a function delegated by the Legislature to the Commission. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981). When making unit determinations under Chapter 41.56 RCW, the Commission's goal is to group together employees who have sufficient similarities (community of interest) to indicate that they will be able to bargain effectively with their employer. *See Quincy School District*, Decision 3962-A (PECB, 1993). In making such determinations, the Commission must consider the duties, skills, and working conditions of the public employees; the history of collective bargaining by the public employees and their bargaining representatives; the extent of organization among the public employees; and the desire of the public employees. RCW41.56.060. This Commission has never applied the criteria on a strictly mathematical basis. *King County*, Decision 5910-A (PECB, 1997). Not all of the factors will arise in every case, and where they do exist, any one factor could be more important than another, depending on the factual situation.

The Commission has codified the procedure for merging separately-organized bargaining units in WAC 391-25-420(2). The proposed unit must be stipulated or found appropriate under the criteria in RCW 41.56.060 other than the "desires of employees" component. *Everett School District*, Decision 9230 (PECB, 2006). If the proposed merged unit is found appropriate, the Commission

mailed the hard copy of its filing to an incorrect address. However, the union did receive a timely copy of the notice of the employer's cross-appeal via e-mail, and the union has not claimed that it was prejudiced by the employer's oversight. *See Pierce County*, Decision 10225 (PECB, 2008)(waiving the certificate of service requirement because the incumbent union actually received a copy of a decertification petition and the incumbent union could not demonstrate prejudice). Additionally, the union also argued that the employer should have been required to file an appeal in its own case, rather than a cross-appeal of the union's case. When this Commission consolidates cases for processing, we treat any decision issued in consolidated cases as a single entity. *See, also*, Rule of Appellate Procedure 3.3 (if two or more cases have been consolidated for hearing, the cases are consolidated for the purpose of review).

will conduct unit determination elections in each of the units involved to assess the desires of the employees.³ The units will be merged if the employees in both units favor the merger. *Pierce County*, Decision 7018-B (PECB, 2001).

Application of Standards

The employer provides public transportation to the residents of Kitsap County. At one time, public transportation services were privately operated. In 1983, Kitsap Transit assumed operational control of the services. The union represents two bargaining units of employees, the ACCESS unit and the ROUTED unit. The ACCESS operators provide "door-to-door or curb-to-curb" services for the elderly and disabled and the vehicles they operate are designed to meet Americans with Disabilities Act requirements. ACCESS services are provided by appointment and are generally not regularly scheduled, nor do they generally have pre-determined stops. The ROUTED operators provide transportation along fixed routes that are regularly scheduled with fixed time points and stops. This agency did not certify either of the bargaining units at issue. Rather, the collective bargaining relationship was created by a voluntary recognition during the time that transit services were provided by the private entity that preceded Kitsap Transit.

Included in the ROUTED unit are a group of employees classified as worker/drivers. The worker/drivers are not primarily employed by the employer but by the Puget Sound Naval Shipyard (PSNS). The worker/drivers drive their PSNS co-workers from their residences to work at the shipyard using buses provided to them by Kitsap Transit.

The Executive Director dismissed the union's merger petition because the worker/drivers do not share a community of interest with the fixed route operator employees who comprise the bulk of the ROUTED unit. Therefore, the ROUTED unit is inappropriate, and consequently a merged ROUTED and ACCESS unit would also be inappropriate. The union challenges this ruling, and asserts that the worker/drivers share enough common duties with the other employees in the ROUTED unit to

³ The desires of the public employees are only ascertained through a representation election.

make that unit appropriate. We agree with the Executive Director that the worker/drivers do not share a community of interest with the employees in the ROUTED unit.⁴

Duties, Skills and Working Conditions

The union is correct that the worker/drivers and fixed route operators share some duties, skills, and working conditions. Both drive buses and need commercial drivers licenses to operate those vehicles. Additionally, there is evidence that the worker/drivers will occasionally pick up riders who do not work at PSNS and transport them along the route selected by the worker/driver.

However, the record supports the Executive Director's findings and conclusions that the worker/drivers have other unique skills and working conditions that preclude them from sharing a community of interest with the fixed route operators. The worker/drivers do not generally provide transportation service to the public at large in furtherance of the employer's primary mission. Rather, the worker/drivers essentially operate as a highly specialized car pool. Unlike the fixed route operators, the worker/drivers are trained by PSNS, and are subject to the security measures instituted by PSNS. Many of the worker/drivers take the buses they operate home once they drop off their co-workers, while the ROUTED drivers return their assigned vehicles to a Kitsap Transit facility. The worker/drivers have little interaction with the fixed ROUTED drivers or any other employee of the employer, and there is no indication that the worker/drivers coordinate any of their duties with the fixed route operators.

The hours of work for the worker/drivers are also substantially different than the fixed route operators. The worker/drivers only work before and after their shifts at PSNS, and there is no obligation on the part of the worker/drivers to work days when the PSNS is not operating. Finally, if a worker/driver separates his or her employment with PSNS or if PSNS withdraws the worker/driver's security clearance, that work/driver also loses employment with Kitsap Transit.

⁴ It is unclear from this record that the worker/drivers are actually public employees within the meaning of Chapter 41.56 RCW. We take administrative notice of case 22447-E-09-3466 (filed May 5, 2009), a petition filed by Teamsters Local 589 to represent the worker/drivers, and anticipate the Executive Director will determine, as part of that proceeding, whether the worker/drivers are public employees within the meaning of the act.

History of Bargaining

This record also supports the Executive Director's decision that the history of bargaining between the employer and the worker/drivers is distinct from the fixed route drivers. Although the worker/drivers were included in the ROUTED unit and shared some common collective bargaining provisions, they bargained their terms and conditions of employment separately with Kitsap Transit, and provisions governing their employment relationship differed from the fixed route operators.

The worker/drivers do not share a community of interest with the fixed route drivers. The Executive Director therefore properly dismissed the union's merger petition.

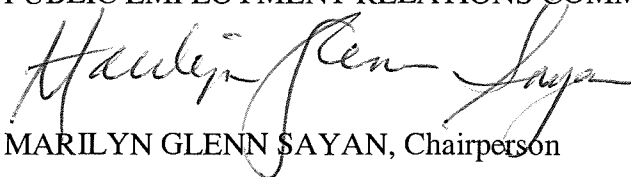
NOW, THEREFORE, it is

ORDERED

The Findings of Facts, Conclusions of Law, and Order in the above-captioned cases are AFFIRMED and adopted as the Findings of Facts, Conclusions of Law, and Order of the Commission.

Issued at Olympia, Washington, the 12th day of August, 2009.

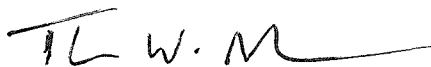
PUBLIC EMPLOYMENT RELATIONS COMMISSION



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PAMELA G. BRADBURN, Commissioner



THOMAS W. McLANE, Commissioner