Cowlitz County, Decision 6204 (PECB, 1998)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	
TEAMSTERS UNION, LOCAL 58	CASE 13213-E-97-2199
Involving certain employees of:	DECISION 6204 - PECB
COWLITZ COUNTY	ORDER OF DISMISSAL

Betty L. Firth, Business Representative, appeared on behalf of the petitioner.

Amburgey and Rubin, by Kent Pearson, Attorney at Law, appeared on behalf of the employer.

Cline & Emmal, by Patrick A. Emmal, Attorney at Law, appeared on behalf of the intervenor, Cowlitz Technical Services Employees Association.

On June 5, 1997, Teamsters Union, Local 58 filed a petition for investigation of a question concerning representation involving employees working in the Department of Emergency Management of Cowlitz County (employer). A telephonic investigation conference was conducted on July 23, 1997, with participation by Betty Firth on behalf of Local 58 and Director of Personnel Dick Anderson on behalf of the employer. Additionally, Patrick A. Emmal, attorney at law, participated on behalf of the Cowlitz Technical Services Employees Association (CTSEA). On July 28, 1997, Representation Coordinator Sally Iverson issued a statement of results of investigation conference to the parties, pursuant to WAC 10-08-130 and WAC 391-08-210, setting forth the stipulations made and the issues framed during the investigation conference. The investigation statement indicated that it would become a binding part of the record in the case, and would control the subsequent course of proceedings, unless objections were filed, in writing, within 10

days following the date of the statement. No objection to the statement was filed in timely fashion.

A notice of hearing was issued on August 8, 1997, setting a hearing for November 24, 1997. The sole issue remaining to be resolved after the investigation conference and issuance of the investigation statement was whether one employee, Cathleen Batchelor, was a regular part-time employee eligible for inclusion in the proposed bargaining unit. The propriety of the petitioned-for bargaining unit depended on the outcome of that issue, however, since the exclusion of the disputed employee would leave the bargaining unit with only one employee. Under Town of Fircrest, Decision 248 (PECB, 1977), a bargaining unit consisting of only one employee cannot be considered appropriate.

On November 18, 1997, counsel for the employer attempted to file a document with the Commission by telefacsimile transmission. That attempt was additionally defective by its apparent failure to serve a copy on either Local 58 or the CTSEA.[1]

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[1] In the document, the employer contended the one employee who had been stipulated as included in the petitioned-for bargaining unit, Lori Hendrickson, was actually covered by a certification issued by the Commission on May 12, 1997. Cowlitz County, Decision 5915 (PECB, 1997) had designated the Cowlitz Technical Services Employees Association as exclusive bargaining representative of a bargaining unit described as:

> All regularly scheduled full-time employees of the Cowlitz County Technical Services Center doing the work of dispatcher, records clerk, EMS planner, and office assistant, excluding supervisors, confidential employees, trainees, temporary employees, and all other employees.

The employer contended that the petition herein was untimely under WAC 391-25-030, and that the Statement of Results of Investigation Conference should be changed to reflect the foregoing.

The hearing in this matter was held on November 24, 1997, before Hearing Officer Vincent M. Helm.[2] At the outset of the hearing, the employer was advised that the document it sent to the Commission on November 18 was defective on multiple grounds:

- It was, in effect, a motion which could not be "filed" by telefacsimile transmission under the Commission's rules;[3]
- It was also noted that the motion had not been served on Local 58, as required by the Commission's rules;[4] and
- Finally, it was noted that the failure of the employer to file any timely objections to the investigation statement raised a question of whether the employer should be estopped from seeking consideration of this issue.

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2 The CTSEA did not appear at or otherwise participate in the hearing or briefing of this case.

3 See, Island County, Decision 5147-B (PECB, 1995), which applied a distinction created by the Administrative Procedure Act, Chapter 34.05 RCW. After it was concluded in Island County, Decision 5147-C (PECB, 1996) that the rules then in effect may have been sufficiently ambiguous to contribute to an error on the part of a practitioner who had attempted to "file" a document by telefacsimile transmission, the Commission amended WAC 391-08-120 to specifically state:

> Filing of documents with the agency for adjudicative proceedings under the Administrative Procedure Act (cases under chapters 391-25 ... WAC) shall be deemed complete upon actual receipt of the original document and any required copies during office hours at the agency office .... **Electronic telefacsimile transmissions shall not be accepted as filing for such documents ...**

[Emphasis by **bold** supplied.]

That rule became effective on April 20, 1996.

4 See, WAC 391-08-120(3).

The Hearing Officer informed the parties that a summary dismissal of the petition was precluded by the possibility that a change of circumstances since the certification might justify departure from the usual "one year certification bar" standard, which could only be determined on the basis of a full evidentiary record. The parties filed post-hearing briefs on January 20, 1998.

FACTUAL BACKGROUND

The historical evolution of the employer's Technical Service Center (TSC) is of significance in resolving the matter now before the Commission. By action of its Board of Commissioners on December 3, 1990, to be effective January 1, 1991, the employer established a TSC which was then composed of a communication center, an emergency management center, and a law enforcement records center. The communications and records units were the result of an agreement by which Cowlitz County and the City of Longview merged their dispatch and records operations.

The merger affected the collective bargaining relationships then in existence,[5] as follows:

- Teamsters Local 58 had represented communications and records employees in the past, and continued to represent those employees in the merged structure.

- AFSCME Local 1262 had represented two full-time planners and a secretary in the former Emergency Management Department, but agreed to disclaim those employees when the merger became effective, and they were thereafter represented by Local 58.

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[5] The employer has approximately 550 employees, of which about 400 are represented by 4 unions in 10 bargaining units.

The employer and Local 58 then negotiated a series of collective bargaining agreements covering the TSC employees in the three functional areas as a single bargaining unit.

In Cowlitz County, Decision 4960 (PECB, 1995), the Commission dismissed a petition filed by an organization which sought to sever the TSC dispatchers from the department-wide bargaining unit. Citing the history of bargaining on a single-unit basis since the creation of the TSC in 1991, the lack of skills requisite to qualify as craftsman, the common work location of all TSC employees, an integration of activities, a limited crossover of personnel and functions, a similarity of skills and abilities, common fringe benefits, a common application process, and a potential for career mobility, it was concluded that a severance was inappropriate.

On May 12, 1997, following a representation election conducted by the Commission, the Cowlitz Technical Services Employees Association was certified as exclusive bargaining representative of a bargaining unit which included TSC employees in all three functional areas that had been represented by Local 58 since the onset of TSC operations.[6] At that time, the management structure of the TSC was composed of a director (who reported directly to the employer's commissioners) and a subordinate supervisor in each of the three functional units (who reported to the TSC director).

On May 19, 1997, the employer's Board of Commissioners dissolved the TSC, and substituted three separate departments aligned with the three functional areas which had been merged into the TSC since 1991. As a part of that action, the former unit supervisors at TSC were re-designated as department directors reporting directly to the Board of Commissioners. With the exception of the change of

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[6] Cowlitz County, Decision 5915 (PECB, 1997). The full text of the unit description is set forth in footnote 1, above.

the management reporting relationships, however, there were no substantial changes affecting the former TSC employees.

The employees in the bargaining unit now represented by the CTSEA all work in the employer's Hall of Justice in Kelso, Washington. The Law Enforcement Records Department is located on the first floor, and has 13 bargaining unit employees. The Communications Department is located in the basement, and has 25 bargaining unit employees. The Department of Emergency Management is also located in the basement, in contiguous space separated from the Communications Department by a wall with a connecting door, and has only the two employees sought by Local 58 in this proceeding.

The records and communications employees are scheduled to provide coverage 24 hours per day, 7 days per week. The emergency management employees ordinarily work only on the day shift on Mondays through Fridays. During emergency situations, however, the employees in the Department of Emergency Management are called out and work closely with employees in the Communications Department to coordinate responses.

The two employees in the Department of Emergency Management have no unique job skills or training. There is limited opportunity for temporary interchange of employees between the three departments. There have also been at least two instances of permanent transfers by employees from one of those departments to another.

With the exception of the part-time planner, employees of the three departments have common fringe benefits.

Following opening statements and an off-the-record discussion at the hearing, the employer stipulated that Cathleen Batchelor qualified as a regular part-time employee under Commission precedent, and would properly be included in the bargaining unit represented by the CTSEA.

POSITIONS OF THE PARTIES

Local 58 contends that, with the reorganization effected by the employer just a week after the certification of the CTSEA, the Department of Emergency Management is now a separate entity for which a separate bargaining unit would be appropriate. It contends that the emergency management and communications employees work separately, and have distinct training and functions.

The employer contends that the petition in this case is untimely under the "certification bar" rule, that its failure to raise the issue during the investigation conference was due to inadvertence or lack of awareness by its representative at that procedure, and that there is good cause to excuse the employer from its stipulation that the petition was timely. As to the merits of the case, the employer contends that Local 58 has failed to sustain the "heavy burden" to justify a severance.

DISCUSSION

The Part-Time Employee

A hearing was set in this matter because of the existence of an appropriate bargaining unit depended on the outcome of the dispute concerning the eligibility of a part-time employee for inclusion in the petitioned-for unit. Notwithstanding its seeming concession at the hearing concerning the eligibility of that part-time employee, the employer reverted in its brief to arguing that the petitioned-for bargaining unit should be found inappropriate as a "one person" unit. Such an argument only makes sense if the employer is again contending that part-time employees should be categorically excluded from bargaining units. The union's brief included a statement, "Also, on a larger scope Cowlitz County does not have any part-time employees in any Bargaining Unit".

The determination of appropriate bargaining units is a function delegated by the Legislature to the Public Employment Relations Commission. RCW 41.56.060. Unit determination is not a subject for bargaining in the usual mandatory / permissive / illegal sense and, although parties may agree on unit issues, their agreements are not binding on the Commission. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). While the Commission has accepted stipulations establishing eligibility for inclusion in bargaining units on some practical/rational basis, decisions dating back to the initial years of the Commission's existence have routinely included regular part-time employees in bargaining units with full-time employees performing similar work.[7] In a series of decisions dating back to at least 1977,[8] the Commission has fashioned tests to determine the eligibility of "on call" employees in a variety of industrial settings, although those holdings generally boil down to making employees eligible for inclusion in a bargaining unit if they work at least one-sixth of the work hours of "full-time" employees performing similar work.[9] When a part-time employee filed an unfair labor practice complaint to challenge what was perceived to be an agreed exclusion of part-time employees from a bargaining unit, the Examiner in Othello School District, Decision 3037 (PECB, 1988) wrote:

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[7] See, Clark County, Decision 290 (PECB, 1977).

[8] See, Everett School District, Decision 268 (PECB, 1977); Sedro Woolley School District, Decision 1351-C (PECB, 1982).

[9] From its enactment in 1967 through December 31, 1975, Chapter 41.56 RCW was administered by the Department of Labor and Industries (L&I), which had a rule which categorically excluded "on call" employees from bargaining units. That policy was rejected by the Commission in Mount Vernon School District, Decision 2273-A (PECB, 1986). However, even the L&I rule had called for inclusion of "regular part-time" employees in bargaining units.

> In assigning the case for hearing, the Executive Director read the complaint as alleging that the complainant had been excluded from the bargaining unit represented by the union, and concluded that an unfair labor practice violation could be found if the employer and union made an agreement concerning bargaining unit status which "improperly deprives the complainant of her collective bargaining rights under the statute".

In Skagit County, Decision 3828 (PECB, 1991), an agreed exclusion of part-time employees was deemed null and void, because it created an inappropriate unit structure.

Having stated at the hearing in this case that the part-time employee "qualifies under Commission criteria to be considered as a regular part-time employee", and having truncated the hearing process by that concession, the employer is bound by its actions. The eligibility of the part-time employee and the related potential for a "one person" unit will not be revisited here.

The Proposed Severance

The task before the Commission under RCW 41.56.060 is to determine whether a proposed unit structure is "an" appropriate unit. It is not necessary that a unit be "the most appropriate" structure. Employer-wide units of non-uniformed personnel are presumptively appropriate, because all employees have some community of interests in dealing with their common employer. When working from a clean slate, communities of interest are often found to exist within horizontal units (grouping together all of the employees of a particular generic occupational type) and vertical units (grouping together all of the employees within a branch of the employer's table of organization). Where bargaining relationships are already in existence, however, each passing day adds to the "history of bargaining" which must be considered under RCW 41.56.060. Thus, a petitioner proposing to "sever" some group of employees from a unit

already in existence faces greater difficulties than a petitioner which has no history of bargaining to overcome.

In the instant case, we have in most significant respects a replay of the attempt to sever the dispatchers from the TSC bargaining unit that was rejected in 1995.[10] The only factual changes which have occurred may be summarized as follows:

- The history of bargaining in the combined records / emergency management / communications bargaining unit from which severance is sought here is now three years longer than it was in 1994-1995.[11] Testimony in this case concerning interchange of employees, commonality of work locations, commonality of benefits, and integration of work activities parallels that which was elicited in the previous case.

- There has been a change of management structure since 1994-1995, with the dissolution of the TSC and re-creation of the three departments reflecting the functional divisions which had existed within the TSC, but the removal of the TSC director and re-designation of the three supervisors as department heads reporting directly to the commissioners has had little or no actual effect on the bargaining unit employees. These changes are of form, rather than of substance.

The moving party bears the burden of showing changed circumstances warranting the disruption of long-standing bargaining relationships that is inherent in a severance of a bargaining unit. City of Bellingham, Decision 792 (PECB, 1979). Where there has been no showing of discrimination by the incumbent representative against the unit sought to be severed, nor a separate community of interest

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[10] Cowlitz County, Decision 4960 (PECB, 1995).

[11] Although there was a change of exclusive bargaining representatives, the unit itself remained intact.

clearly demonstrated, existing bargaining relationships will not be disrupted by the Commission. Okanogan County, Decision 2800 (PECB, 1987). Fragmentation of bargaining units is not favored by the Commission. Renton School District, Decision 3121 (PECB, 1989). Thus, it would require far more evidence of a substantive change in employee wages, hours or working conditions than has been demonstrated in this case before a severance of a segment of a bargaining unit would be warranted. Moreover, the existing bargaining unit has a multi-contract history of bargaining, with common working conditions and benefits, some interchange of personnel, and some integration of functions.

In this case, Local 58 seeks to rely on the testimony of an employee who was a steward and bargaining committee for Local 58 while it represented the bargaining unit, and who indicated a personal preference for the health insurance plan offered through Local 58. As was noted in the decision rejecting the severance of the dispatchers from the TSC bargaining unit, however, the desires of the employees will not be controlling where the unit configuration sought would be inappropriate under other aspects of the unit determination criteria set forth in RCW 41.56.060.[12]

The Certification Bar

The employer argued at the hearing and in its brief that the petition filed in this case on June 5, 1997 should be dismissed as untimely under the "certification bar" components of RCW 41.56.070 and WAC 391-25-030, based on the certification issued as Cowlitz County, Decision 5915 (PECB, May 12, 1997). At the investigation

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[12] Under Clark County, Decision 290-A (PECB, 1977), the "desires of employees" will be assessed by conducting a secret-ballot unit determination election, but no such election will offer employees a choice of a unit structure that would be inappropriate under other aspects of the RCW 41.56.060 unit determination criteria.

conference, however, the employer's representative stipulated to the inclusion of Lori Hendrickson in the proposed bargaining unit.

A stipulation made by a party during the course of a representation proceeding is ordinarily binding upon that party. Pike Place Market Preservation, Decision 3989 (PECB, 1992). In this case, the employer now states that its representative in the investigation conference was unaware of the effect of Hendrickson's inclusion in the bargaining unit certified by the Commission on May 12, 1997.[13] While ignorance of the law is not an excuse, the Commission is confronted here with violation of a statute and rule that protect the agency's interests and procedures. Whether viewed as the agency acting on its own motion or as releasing the employer from its stipulation, the fact that the petition is untimely under the "certification bar" principle provides an additional reason to dismiss the petition.

FINDINGS OF FACT

1. Cowlitz County is a public employer within the meaning of RCW 41.56.030(1).

2. Teamsters Union, Local 58, is a bargaining representative within the meaning of RCW 41.56.030(3).

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[13] Although no Commission precedent precisely on point is cited or found, it may theoretically be possible that a change of circumstances during a "certification bar" year could render a recently-certified bargaining unit inappropriate under RCW 41.56.060 and/or Commission rules or precedents. Thus, an alternate explanation for the employer's stipulation would be that it understood the unit certified in May of 1997 no longer made sense after the change of management structure adopted that month.

3. On June 5, 1997, Local 58 filed a petition for investigation of a question concerning representation, seeking severance of a separate bargaining unit of Department of Emergency Management employees from a bargaining unit of all full-time communications, law enforcement records and emergency management employees of Cowlitz County.

4. The Cowlitz Technical Services Employees Association, a bargaining representative within the meaning of RCW 41.56.030(3), is the incumbent exclusive bargaining representative of the employees petitioned-for in this proceeding, pursuant to a certification issued by the Commission on May 12, 1997.

5. The bargaining unit from which a severance is sought has been in existence since 1991, and was represented by Local 58 from 1991 until May 12, 1997. During that period, the employer and Local 58 negotiated and implemented three collective bargaining agreements covering that unit.

6. The petitioned-for employees and those who would remain in the historical bargaining unit have work locations in the same building, and there is interaction between them. There has been limited movement on a permanent basis between departments within the historical bargaining unit. With the exception of one employee who works part-time, all employees in the existing bargaining unit have common benefits. All employees are subject to uniform hiring procedures.

7. The petitioned-for employees do not have separate skills or training.

8. The petitioned-for employees have not been discriminated against by their incumbent bargaining representative.

9. A change in the employer's organizational structure which occurred on or after May 19, 1997, has not resulted in a significant change of circumstances affecting the wages, hours or working conditions of the petitioned-for employees.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25-WAC.

2. A bargaining unit limited to emergency management department employees of the employer would not be an appropriate bargaining unit under RCW 41.56.060.

3. The petition filed in this matter on June 5, 1997 was untimely under RCW 41.56.070 and WAC 391-25-030, based on the certification issued on May 12, 1997 as Cowlitz County, Decision 5915 (PECB, 1997).

ORDER OF DISMISSAL

The petition for investigation of a question concerning representation filed in this matter is DISMISSED.

Issued in Olympia, Washington, the 26th day of February, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, 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 391-25-390(2).