STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
LOWER COLUMBIA COLLEGE INDEPENDENT FACULTY ASSOCIATION	)	CASE 9138-E-91-1513
	)	
Involving certain employees of:	)	DECISION 3987 - CCOL
	)	
LOWER COLUMBIA COLLEGE	)	DIRECTION OF ELECTION
	)	

Paul R. Roesch, Jr., Attorney at Law, appeared for the petitioner.

Ken Eikenberry, Attorney General, by Bonnie Y. Terada, Assistant Attorney General, appeared for the employer.

Eric R. Hansen, Attorney at Law, appeared for the intervenor, Lower Columbia College Faculty Association for Higher Education.

On April 26, 1991, the Lower Columbia College Independent Faculty Association filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission. The petitioner seeks certification as exclusive bargaining representative of employees of Lower Columbia College. The Commission made a routine request for a list of employees and a copy of any existing collective bargaining agreement, and such documents were provided by the employer. The Lower Columbia College Faculty Association for Higher Education moved for intervention in the proceedings under WAC 391-25-170, claiming status as the incumbent exclusive bargaining representative of employees in the petitioned-for bargaining unit. A pre-hearing conference was held on June 21, 1991, at which time the parties framed issues concerning the scope of the bargaining unit and the list of employees eligible for inclusion in that bargaining unit. A hearing was held on August 29, 1991, before Hearing Officer Kenneth J. Latsch. The parties filed post-hearing briefs.

BACKGROUND

Lower Columbia College (employer) is a community college of the state of Washington, operated under Chapter 28B.50 RCW. The employer's main campus and administrative headquarters are located in Longview, Washington.

The employer and the Lower Columbia College Faculty Association for Higher Education (AHE) signed two collective bargaining agreements on or about February 26, 1991. The first of those agreements was effective for the period from February 26, 1991 through June 30, 1991,[1] while the second (Exhibit 1 in this record) is effective for the period from July 1, 1991 through June 30, 1994. Both of those contracts describe the covered bargaining unit as:

> 102 EXCLUSIVE RECOGNITION
>
> The District recognizes the LCCFAHE as the exclusive bargaining agent per RCW 28B.52, as now or hereafter amended, for all academic employees employed by the District.

The relationship between the employer and the AHE appears to be of relatively brief duration.[2] There is no claim or evidence that the AHE acquired status as exclusive bargaining representative by means

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[1] A copy of that contract was provided to the Commission by the employer on May 28, 1991, in response to the Commission's request for a list of employees and a copy of any existing contract.

[2] Notice is taken of the docket records of the Public Employment Relations Commission for Case 8899-M-90-3442, filed November 13, 1990. Mediation services were provided, and that case was closed on March 8, 1991, on the basis of "agreement reached". The only previous Commission case involving this employer was Case 7128-M-87-2839, filed November 10, 1987. That case listed the union involved as "Lower Columbia College Faculty Association". Mediation services were provided for a strike situation, and that case was closed on February 25, 1988, on the basis of "agreement reached".

of an "election" conducted by the Commission between 1988 and 1990, pursuant to Chapter 391-25 WAC.[3]

The representation petition filed by the Lower Columbia College Independent Faculty Association (IFA) in this case asserted that there are 80 full-time employees and 76 regular part-time employees in the unit the petitioner claims appropriate. The employer provided five separate lists of employees in response to the Commission's inquiry: (1) A list containing the names of 80 full-time employees; (2) a list containing the names of approximately 105 "current" part-time employees; (3) a list containing names of former part-time employees who are no longer available for work; (4) a list naming 28 part-time employees who had worked less than .1667 FTE; and a list of approximately 60 persons who teach "community education" classes.

POSITIONS OF THE PARTIES

Early in the processing of the case, the parties stipulated that the decision in Community College District 12, Decision 2374 (CCOL, 1986) should be applied as precedent in this case.

The IFA would have the community service teachers excluded, as a class, from the petitioned-for bargaining unit. The petitioner claims that those persons lack a community of interest with the petitioned-for employees, pointing to the pay-as-you-go funding of community education classes, the absence of grades and credits in

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[3] Apart from the instant case and the two mediation cases referred to in the previous footnote, the only case processed by the Commission concerning this employer was a representation petition in Case 9023-E-91-1493, filed February 14, 1991. In that case, the "Lower Columbia College Independent Faculty Association" sought a unit limited to "full-time" employees of the employer. That case was closed on February 28, 1991, on the basis of having been withdrawn by the petitioner.

those classes, differences in hiring procedures, the lack of interaction between the community education teachers and other faculty members, the unavailability of "tenure" for community education teachers, the absence of campus office space and facility use for community education teachers, and differences between the two groups for evaluation of teaching and course content.[4] The IFA points out that the community education teachers have never been included in the bargaining unit, which it describes as having existed "for years", and it would have the Commission direct an election in the historical bargaining unit.

The employer also opposes the inclusion of the community education teachers in the bargaining unit. Contending that the Commission should evaluate this dispute under "community of interest" principles, the employer cites a number federal precedents applying community of interest principles in cases involving institutions of higher education. It contends that the community education teachers have different responsibilities than the "regular" faculty, that the skills required of the two groups are different, and that the working conditions (particularly wages, job security, hours, work location, and supervision) and history of bargaining of the two groups are different.

The AHE contends that community education teachers have collective bargaining rights under Chapter 28B.52 RCW, because they are "teachers" employed by a community college district. It contends that the basic duties and skills (i.e., teaching) are the same as other employees, and that the statute prohibits creation of a second bargaining unit within a community college district.

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[4] Arguments purporting to demonstrate the "desires of employees" based on the testimony of witnesses are not considered in this decision. Where it is appropriate and necessary to assess the "desires of employees" concerning two or more potentially appropriate unit configurations, the Commission conducts a secret-ballot unit determination election under WAC 391-25-530(1).

DISCUSSION

General Unit Determination Policies

Public sector collective bargaining statutes patterned after the National Labor Relations Act (NLRA) typically call for employers to bargain collectively with an organization selected by the majority of its employees in **an appropriate bargaining unit.**[5] Such statutes typically designate an administrative agency which, like the National Labor Relations Board (NLRB) under Section 9 of the NLRA, is authorized to determine the unit(s) appropriate for collective bargaining among the employees of any covered employer.[6] In making such unit determinations, the NLRB and state labor relations agencies typically seek to discern a "community of interest" among the employees, and to structure bargaining units accordingly.[7]

In creating this state's system of community colleges, the Legislature set forth multiple purposes:

> RCW 28B.50.020 Purpose. The purpose of this chapter is to provide for the dramatically increasing number of students requiring high standards of education either as a part of the continuing higher education program or for occupational training, by creating a new, independent system of community colleges which will:

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[5] Examples of such statutes within this state include the Public Employees' Collective Bargaining Act (Chapter 41.56 RCW) and the Educational Employment Relations Act (Chapter 41.59 RCW).

[6] Examples of statutes delegating such authority within this state include RCW 41.56.060 and RCW 41.59.080.

[7] See, Kalamazoo Paper Box Corp., 136 NLRB 134 (1962). Examples of such unit determinations within this state include City of Centralia, Decision 3495-A (PECB, 1990) and City of Winslow, Decision 3520-A (PECB, 1990), both decided by the Commission under RCW 41.56.060.

> ...
> (2) Ensure that each community college district **shall offer thoroughly comprehensive educational, training and service programs** to meet the needs of both the communities and students served by combining **with equal emphasis**, high standards of excellence in **academic transfer courses**; realistic and practical courses in **occupational education**, both graded and ungraded; **community services of an educational, cultural, and recreational nature**; and adult education; ... [emphasis by **bold** supplied]

The evidence indicates that this employer has provided its "community services of an educational, cultural and recreational nature" by means of a separate workforce than is used in providing its other services.

Exhibit 4 in this record is a copy of the "Class Schedule" of Lower Columbia College for the autumn quarter of 1991. Pages 8 through 39 of that document describe specific courses offered on and off the main campus during the quarter, listing something in excess of 250 numbered courses within approximately 64 subject areas ranging from "Accounting" to "Welding". Buried among six pages of administrative information, procedures, and requirements at the beginning of that document is the following:

> **COMMUNITY EDUCATION**
> Many special classes, seminars and workshops are offered as a service to the community. The State of Washington requires that these offerings be self-supporting, so costs for enrollment vary.
> Community Education course listings begin on page 40 of this schedule.
> For additional information on Community Education courses, or to enroll for one of these classes, call [a different telephone number than is given for the "registration", "entry center", "student services", "financial aid" or "cooperative education" offices].

Pages 42 through 45 of the document list 48 "community education classes", some of which involve only a single session or a few sessions over only a portion of the autumn quarter.

From the record made, it is clear that the employees who teach the credit-granting courses listed in pages 8 through 39 of the employer's class schedule are compensated by salary and benefits, under contract, on an entirely different basis than are the persons who teach "community education classes" at a flat rate of $18.00 per hour. It is also clear that the teachers of the community education classes have only occasional contact with matriculated students of the college, and even then have no role in counseling such students or in their progress towards graduation. It appears that the teachers of community education classes are further distinguished as to working conditions (i.e., absence of on-campus offices or preparation of materials through college facilities).

There can be little doubt that there would be some basis, under conventional "community of interest" principles, to exclude the persons who teach "community education classes" from a bargaining unit composed primarily of the employees engaged in teaching the employer's credit-granting courses. There are substantial differences of wages, hours, working conditions, and history of bargaining, all of which would be entitled to consideration under statutes such as RCW 41.56.060 and RCW 41.59.080.

Statutory Unit Determination Criteria

A key issue in this case is whether Chapter 28B.52 RCW authorizes the making of a unit determination which excludes the community education teachers from the petitioned-for bargaining unit, as a class, on "community of interests" principles. Put another way, the statute must be interpreted to ascertain whether it tolerates the existence of a bargaining relationship that fails to encompass **ALL** of the "teachers" employed by the community college district.

The K-12 "Meet and Confer" Law -

The earliest Washington statute providing for collective negotiations for "teachers" was Chapter 28.72 RCW (later, Chapter 28A.72 RCW), adopted by the Legislature in 1965. Listed in the statute books under the title: "Negotiations by Certificated Personnel", and sometimes referred to as the "Professional Negotiations Act", that statute would be characterized today in the literature on public sector collective bargaining as having been a "meet and confer" law. The language of that statute did not closely parallel the language of the NLRA. Of particular interest in the instant case, Chapter 28A.72 RCW had only minimal reference to the creation of bargaining relationships.[8] RCW 28A.72.030 provided:

> 28A.72.030 Negotiation by representatives of employee organization--Authorized--Subject matter. Representatives of **an employee organization**, which organization shall by secret ballot have won a majority in an election **to represent the certificated employees within its school district**, shall have the right, after using established administrative channels, **to meet, confer and negotiate with the board of directors of the school district** or a committee thereof to communicate the considered professional judgment of the certificated staff prior to the final adoption by the board of proposed **school district policies** ...
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> [emphasis by **bold** supplied]

No administrative agency was delegated authority to make unit determinations, or to conduct representation elections. No details

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[8] Other variances from the NLRA model include: (1) There was a prohibition on discrimination for union activity or lack thereof in RCW 28A.72.070, but there were no unfair labor practice provisions or administrative remedy; and (2) there was provision in RCW 28A.72.060 for resolution of "impasses" under procedures administered by the Superintendent of Public Instruction, but there was no endorsement of mediation as a dispute-resolving process.

were set forth concerning the conduct of the secret ballot "election" referred to in the statute.

The language used in RCW 28A.72.030 provides strong support for a conclusion that a "one unit per district" standard was to apply to negotiating relationships under that statute. The reference to **"an employee organization"** is subject to the interpretation that only one organization could hold such status at a time, precluding the possibility of using "proportional representation" or other multiple-organization schemes that were a subject of experimentation in public sector collective bargaining in the 1960's. The authority "to represent **the certificated employees within its** school **district"** similarly tends to preclude multiple units broken out by departments, divisions, grade levels, etc. The organization was to interact with **"the board of directors of the school district"**, not with officials of some department or division of the whole. Finally, the object of the process was discussion of **"school district policies"**, not the policies of some component within the employer's overall structure. Further, no situation has been cited, or is known to have existed, where there were two or more negotiations relationships within a particular school district under that law.

Emergence of Community Colleges and Chapter 28B.52 RCW -
The state's community and technical colleges, as they are now known, came into being by means of the Community College Act of 1967, and are now operated under Chapter 28B.50 RCW. Chapter 28B.52 RCW was enacted by the Legislature in 1971, as a separate "meet and confer" law to regulate collective negotiations in those institutions. The original provisions of Chapter 28B.52 RCW closely paralleled those of Chapter 28A.72 RCW, however:

> 28B.52.030 Negotiation by representatives of employee organization--Authorized--Subject matter. Representatives of **an employee organization**, which organization shall by

> secret ballot have won a majority in an election **to represent the academic employees within its community college district**, shall have the right, after using established administrative channels, **to meet, confer and negotiate with the board of trustees of the community college district** or its delegated representative(s) to communicate the considered professional judgment of the academic staff prior to the final adoption by the board of proposed **community college district policies** ...

[emphasis by **bold** supplied]

Again, no details were set forth concerning the secret ballot "election" referred to in the statute, although RCW 28B.52.080 authorized the employers to request assistance from the Department of Labor and Industries for the "conduction" [sic] of elections.[9] Other provisions were similar to those of Chapter 28A.72 RCW, except that the State Board for Community College Education was substituted for the Superintendent of Public Instruction in the impasse resolution procedure.

Of interest in this case, the language used in RCW 28B.52.030 was identical, in all substantive respects, to the language of RCW 28A.72.030. Several of the community college districts then in existence had multiple campuses.[10] As was the case in the K-12 schools, however, no situation has been cited, or is known to have

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[9] By that time, the Department of Labor and Industries was performing labor dispute resolution functions, including representation proceedings, under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, enacted by the Legislature in 1967.

[10] District 5 then operated both Everett Community College and Edmonds Community College; District 6 operates North Seattle Community College, Seattle Central Community College and South Seattle Community College; District 12 then operated both Centralia College and Olympia Vocational-Technical Institute; and District 17 operates both Spokane Community College and Spokane Falls Community College.

existed, where two or more negotiations relationships existed concurrently within a particular community college district. Thus, there is strong support for an inference that a "one unit per district" standard was to apply in structuring the relationships under that statute.

Early Commission Administration of Chapter 28B.52 RCW -
The Legislature created the Public Employment Relations Commission in 1975, to provide "more uniform and impartial ... efficient and expert" administration of several public sector collective bargaining laws. RCW 41.58.005(1). Chapter 28B.52 RCW was among the statutes transferred to the Commission for administration. RCW 41.58.005(3) provided, however:

> (3) Nothing in this 1975 amendatory act shall be construed to alter any power or authority regarding the scope of collective bargaining in the employment areas affected by this 1975 amendatory act, but this amendatory act shall be construed as transferring existing jurisdiction and authority to the public employment relations commission.

Thus, the name of the Commission was substituted for that of the State Board for Community College Education and the Department of Labor and Industries, but there was no new grant of unit determination authority. In a series of early cases, the Commission continued to enforce the "one unit per district" policy which predated the Commission's administration of Chapter 28B.52 RCW.

In 1976, the Commission conducted a representation election for a district-wide bargaining unit in Community College District 12.[11] Organizations affiliated with the American Federation of Teachers, AFL-CIO (AFT) and with the Washington Education Association (WEA) were on the ballot. The Centralia College/OVTI Association for

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[11] Notice is taken of the docket records of the Commission for Case 270-E-76-48, filed on May 1, 1976.

Higher Education was certified as exclusive representative of "all full-time and regular part-time academic employees" of the district, excluding only "administrators". Community College District 12, Decision 72 (CCOL, 1976).

In March of 1977, the Commission adopted Chapter 391-50 WAC, setting forth procedural rules for resolving labor-management disputes in the community college system. The representation case procedures in those rules were generally similar to those now contained in Chapter 391-25 WAC.

The Commission's first rulings on a contested case under Chapter 28B.52 RCW were made in a dispute involving Yakima Valley College (Community College District 16).[12] A WEA affiliate petitioned for a unit represented by an AFT incumbent. The AFT objected to the Commission's assertion of jurisdiction in the matter, but those objections were overruled with citation to Chapter 28B.52 RCW and Chapter 391-50 WAC and rulings were made on a "contract bar" issue.[13] An election was conducted at polling places as widespread as Ellensburg, Yakima, Sunnyside, and Goldendale, but the resulting certification of the AFT was for a district-wide unit. Yakima Valley College, Decision 280-B (CCOL, 1978).[14]

In June of 1977, affiliates of the WEA and AFT banded together to file a representation petition involving employees of Green River Community College (Community College District 10).[15] An election

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[12] Notice is taken of the docket records of the Commission for Case 811-E-77-149, filed on March 7, 1977.

[13] See, Yakima Valley College, Decision 280 (CCOL, 1977).

[14] Eligibility rulings were made concerning a number of claimed "administrators" in Yakima Valley College, Decision 280-A (PECB, 1978).

[15] Notice is taken of the docket records of the Commission for Case 939-E-77-186, filed on June 7, 1977.

was conducted pursuant to an election agreement signed by the parties, and the resulting certification named a single entity, the "Green River United Faculty Coalition" as representative of "all full and part-time faculty members ...". Green River Community College, Decision 273 (CCOL, 1977).[16]

In 1978, the Commission conducted a representation election for a district-wide bargaining unit in Community College District 5, which then operated multiple institutions.[17] Organizations affiliated with the AFT and the WEA were on the ballot. The Snohomish County Community College Federation of Teachers, AFT, was certified as exclusive representative of the district-wide unit. Community College District 5, Decision 448-A (CCOL, 1978).

Conversion of K-12 to the NLRA Model -

Chapter 28A.72 RCW was repealed on the January 1, 1976 effective date of the Educational Employment Relations Act (EERA), Chapter 41.59 RCW. The new statute closely parallels both the language and procedures of the NLRA, including the naming of a state administrative agency to perform dispute resolution functions,[18] and in specifying representation case procedures. The EERA included the

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[16] The Commission's acceptance of a stipulated exclusion of "instructors of community service classes" in that case may need to be re-examined by those parties, based on the outcome of the instant proceedings.

[17] Notice is taken of the docket records of the Commission for Case 1374-E-78-273, filed on January 30, 1978.

[18] The "Educational Employment Relations Commission" originally specified in the EERA was stillborn, as the legislation creating the Public Employment Relations Commission was enacted at the same time under Chapter 41.58 RCW. Jurisdiction to administer Chapter 41.59 RCW passed directly to the Commission as the agency "comprehensively assuming administrative responsibilities for labor relations or collective bargaining in the public sector" within the state of Washington.

type of unit determination language on which "community of interest" decisions are traditionally based:

> RCW 41.59.080 DETERMINATION OF BARGAINING UNIT--STANDARDS. **The commission**, upon proper application for certification as an exclusive bargaining representative or upon petition for change of unit definition by the employer or any employee organization within the time limits specified in RCW 41.59.070(3), and after hearing upon reasonable notice, **shall determine the unit appropriate for the purpose of collective bargaining.** In determining, modifying or combining the bargaining unit, the commission **shall consider** the **duties, skills, and working conditions** of the educational employees; the **history of collective bargaining**; the **extent of organization** among the educational employees; and the **desire of the** educational **employees**;

But it then departed from the federal model a series of provisions which severely limit the Commission's authority:

> RCW 41.59.080 DETERMINATION OF BARGAINING UNIT--STANDARDS.
>
> ...
> **except that:**
> (1) **A unit including nonsupervisory educational employees shall not be considered appropriate unless it includes all such nonsupervisory educational employees of the employer;**
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> ...
> (6) A unit that includes only employees in vocational-technical institutes or occupational skill centers may be considered to constitute an appropriate bargaining unit if the history of bargaining in any such school district so justifies. ...[19]

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[19] Other limiting exceptions dealt with supervisors, principals and assistant principals.

Thus, the appearance of broad unit determination authority was overruled, and the general rule of "one unit per district" was continued under Chapter 41.59 RCW. A series of case decisions then enforced the "one unit per district" policy.

The Everett School District and the WEA took extreme positions concerning the status of "substitute" teachers in a case filed with the Commission in 1976.[20] The union contended that all substitute teachers should be included in its bargaining unit, because they held teaching certificates. The employer argued for exclusion of the substitutes, as a class, because they lacked continuing contracts and other indicia of "community of interest". Rejecting the "all-or-nothing" approach of both parties, it was concluded that RCW 41.59.080(1) did not permit an exclusion of substitutes **as a class**, but that certain of the substitutes should be excluded under NLRB precedent distinguishing "regular" from "casual" employees. Everett School District, Decision 268 (EDUC, 1977).

The principles applied in the Everett case were further refined in Tacoma School District, Decision 655 (EDUC, 1979), where it was concluded that persons who had worked for the same school district for 20 consecutive days in the same assignment, or for 30 or more days in a one-year period (i.e., one-sixth or more of the 180 day school year) and who continue to be available for work of the same type were "regular part-time" employees eligible for inclusion in the bargaining unit.

The case law on "substitutes" came to full fruition in Columbia School District, et al., Decision 1189-A (EDUC, 1982). Interpreting RCW 41.59.080(1), the Commission concluded that:

> Any substitute who is determined to be an "employee" within the meaning of the statute

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[20] Notice is taken of the docket records of the Commission for Case 262-C-76-9, filed April 28, 1976.

> must, according to RCW 41.59.080(1), be placed in the same bargaining unit with all other non-supervisory educational employees, i.e., with contracted full-time teachers.

The Commission then went on to consider the appropriate threshold for "employee" status, relying on NLRB precedent and the decisions of other state agencies. The Commission affirmed the test first announced in Tacoma, supra, saying:

> The 20/30 day rule reflects our belief that if a substitute has been called back by a school district for 20 consecutive days or for 30 days in a one-year period, it is because he or she has demonstrated some desireable employee characteristic. Similarly, the employer develops an expectancy that the person who has been available for the 20 consecutive or 30 nonconsecutive day period will continue to be available as a substitute. This expectancy of a continuing relationship is not affected by the number of days of service required for higher daily pay, **nor are bargaining histories or variations in substitutes' duties relevant when determining who is or is not an "employee".** Thus, unlike unit determinations where significant variations of fact make a "per se" rule inappropriate ... these same **fact variations become much less significant when determining who is or is not an employee.**

Decision 1189-A at page 10 [emphasis by **bold** supplied].

The Commission thus endorsed the 20/30 day rule as a definition of "employee" status with state-wide applicability.

The Lake Washington School District is one of the few school districts in the state which retained control of a "vocational-technical institute" for a time after the creation of the community college system.[21] A WEA affiliate was the exclusive bargaining

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[21] Those institutes were transferred to the community college system by legislation enacted in 1991.

representative of the employer's K-12 teachers under RCW 41.59.080 (1), while an AFT affiliate was certified as exclusive bargaining representative of a separate bargaining unit of teachers at the vocational-technical institute under RCW 41.59.080(6).[22] When an unrepresented group of "adult education" teachers was later discovered within the employer's workforce, the employer and the two unions entered into a stipulation giving those employees a vote, but only as between the two existing bargaining units. That stipulation was accepted with the following comments:

> RCW 41.59.080(1) effectively prohibits the creation of a separate bargaining unit for the employees involved in this case.
>
> ...
> Close analysis of the statute indicates that the adult education employees cannot stand alone as a separate bargaining unit. They are non-supervisory employees and must be included in one of the existing units. ... In that the present situation is inappropriate and cannot be continued, there will be no choice on the ballot for a "status quo" or "no representation" possibility ...

Lake Washington School District, Decision 1020 (EDUC, 1980).

A year and a day later, that employer and the AFT affiliate were before the Commission again, with a dispute about "community service instructors" who received a flat hourly rate and no other benefits for providing "a variety of classes to residents" of that community. The employer advanced "community of interest" and "source of funds" arguments in opposition to inclusion of the community service instructors in either of the bargaining units already in existence within that school district. In responding to those arguments, RCW 41.59.080(1) and (6) were set forth, with emphasis, and the employer's arguments were rejected:

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[22] Lake Washington School District, Decision 484-A (EDUC, 1978).

> It is immaterial that funds for the classes in question are derived from tuition payments. A "source of funding" argument does not affect unit determination or clarification matters under RCW 41.59. Similarly, the employer's contention that community services instructors have a distinct community of interests is not persuasive given the restrictions of RCW 41.59.080.

Lake Washington School District, Decision 1550 (EDUC, 1982).

While the exclusion of community service instructors, as a class, was rejected, a threshold was established to distinguish "regular part-time employees" from "casual" employees, using the 20/30 day test endorsed by the Commission in Columbia, supra.

Later Commission Administration of Chapter 28B.52 RCW -
In 1985, an AFT affiliate filed another representation petition seeking certification for the district-wide bargaining unit at Community College District 12.[23] Those proceedings led to the decision which the parties purported to stipulate as controlling in this case, Community College District 12, Decision 2374 (CCOL, 1986).

While a "showing of interest" problem was identified based on the list of employees provided to the Commission by the employer, the parties to that proceeding quickly avoided the issue that is before the Commission in the instant case. Decision 2374 noted:

> All of the parties in the instant case agree that "community service" instructors **have been and should continue to be excluded from the bargaining unit.** Such persons are described in the most recent collective bargaining agreement as "non-faculty", although there is

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[23] Notice is taken of the docket records of the Commission for Case 5804-E-85-1037, filed on May 1, 1985. The unit had been represented by a WEA affiliate since the representation proceedings conducted by the Commission in 1976. See, footnote 11, above.

> indication that they teach a variety of recreational and other courses funded exclusively from student tuition. RCW 28B.52.020 defines "academic employee" as including "any teacher, counselor, librarian, or department head, who is employed by any community college district". **The exclusionary stipulation of the parties is accepted for the purposes of the instant case in the absence of any information to contraindicate its propriety. ...**

Decision 2374 at footnote 2 [emphasis by **bold** supplied].

The fact is, of course, that there is no such stipulation in the instant case, and a decision on the point is required.

The AFT affiliate sought a narrow eligibility list in Community College District 12, including only those who were active as full-time or part-time employees when the petition was filed, or were on authorized leave as of that date. The WEA affiliate sought a broad eligibility list, including anybody who had taught a course in the previous three years. Citing RCW 28B.52.030, the decision stated:

> The references to the employees covered by Chapter 28B.52 RCW as a single group in each district, and the singular reference to "district" are interpreted as requiring a single, district-wide bargaining unit of academic employees in each district. It follows that there is no room in the scheme of this statute for a separate unit of part-time employees.

Decision 2374 at page 12.

The analysis thereupon turned to formulating a test to differentiate between "regular part-time" employees who were eligible for inclusion in the bargaining unit and "casual" employees to be excluded from the bargaining unit. It was noted that the community college district "has both a long-standing practice of using part-time employees, and an ongoing need for such employees as part of its workforce". The extreme positions taken by the two labor organizations in that case were likened to the extreme positions

taken by the employer and union in Everett, supra, and were similarly rejected. After review of precedent developed in other employment settings, it was concluded:

> Those part-time faculty members who have worked a total of at least one-sixth of the full-time-equivalent work year (.1667 FTE) ... and who remain available to return to teach that course when it is next offered or to teach other [classes], shall be considered to be regular part-time employees included in the bargaining unit ...

Decision 2374 at page 20.

The work records of part-time employees were to be evaluated over a one-year period ending with the quarter in which the representation petition was filed with the Commission.

For all of the reasons stated in Decision 2374, supra, and previous cases, there does not appear that the statutes and precedents as they existed through 1986 provide any basis on which to rule against the position advanced by the AHE in the instant case. Indeed, the community education teachers appear to be "teachers" employed by the community college district in performing a portion of its statutory mission.

The "Collective Bargaining" Amendments to Chapter 28B.52 - Chapter 28B.52 RCW was substantially amended by Chapter 314, Laws of 1987. That is not to say that a new law sprang from the desks of legislators. Rather, a long and involved legislative history preceded those amendments.

There had been an effort in 1975 to give community college teachers full collective bargaining rights in a bill with provisions similar to those adopted for K-12 teachers,[24] but that effort failed.

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[24] 1975 Senate Bill 2263.

In 1977, the 45th Legislature considered House Bill 59 ("AN ACT relating to labor relations"), which would have provided full collective bargaining rights to employees of both the community colleges and the state's four-year institutions of higher education. As filed, that bill would have covered:

> ... faculty members, professional employees, academic employees but not chief executive or administrative officers, confidential employees or supervisors.
>
> HB 59 Sectional Digest, Prepared by Office of Program Research, House of Representatives, 12/28/76.

The bill provided for administration of dispute resolution procedures by the Public Employment Relations Commission. Of particular importance here, it authorized the Commission to make bargaining unit determinations based on traditional "community of interest" criteria, subject to an admonition that "unnecessary fragmentation shall be avoided".[25] Numerous amendments were offered up by the "management" side,[26] and the Senate Labor Committee developed a Committee Amendment (striking amendment) which was adopted by the full Senate in June of 1977. The definition of "employee" remained broad in the striking amendment, as "any employee of an employer", and the Commission's unit

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[25] Engrossed House Bill No. 59, Section 5.

[26] There seemingly was awareness of the issue now before the Commission. The Commission's files on the legislation include a copy of a February 22, 1977 letter from Assistant to the Provost Stephen G. Olswang of the University of Washington to Dr. Joseph A. Malik, the president of Grays Harbor Community College, transmitting proposed amendments to House Bill 59. Among the items discussed:

> Section 3(2). We agree with the inclusion of the words "part-time continuing education or community instructor" as an excluded category of employee.

The effect of such an amendment would have been to eliminate the question presented in this case.

determination authority remained as proposed in the original bill. Clearly, the effect of either the original bill or the striking amendment would have been to leave the Commission with authority to decide this case on "community of interest" principles. That legislation failed of passage, however.

Little happened during the next five years. The Legislature did not have a session in 1978. Although various "higher education collective bargaining" bills were debated in the legislative sessions held in 1979, 1980, 1981, and 1982, none of those measures advanced to the brink of final passage.

In 1983, the 48th Legislature considered Senate Bill 3042 ("AN ACT relating to labor relations in institutions of higher education"). Both the community colleges and the "four-year" institutions were covered by that measure. The definition of "employee" in the original bill included "any employee of an employer", but the Commission was authorized to make unit determinations on traditional "community of interest" criteria, subject to an admonition that "unnecessary fragmentation shall be avoided". Numerous proposed amendments were debated. After the bill passed the Senate, Engrossed Substitute Senate Bill No. 3042 contained the same definition of "employee", but other relevant changes had been made: (1) The definitions had been amended to specify that an "institution of higher education" meant a "community college district"; and (2) a sentence had been added to the unit determination provision, limiting the Commission's authority as follows:

> All employees who are tenured or eligible to seek or be awarded tenure shall be included in the same bargaining unit at each institution of higher education.[27]

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[27] After this amendment was adopted, the Commission filed an amended fiscal note commenting that the required "tenure-track unit" would reduce, but not eliminate, the potential for complex unit determination disputes.

Again, the effect of either the original bill or the engrossed bill would have been to leave the Commission with authority to decide this case on "community of interest" principles. More than one unit could have been found appropriate under such language, but the lack "tenure" rights could well have supported the exclusion of community education teachers from the "tenure-track" unit. That legislation passed both houses of the Legislature, but was vetoed by Governor John Spellman.

In the 1984 Regular Session of the 48th Legislature, the collective bargaining rights of community college teachers were debated separately, as House Bill No. 1219 (AN ACT Relating to labor relations in community colleges). The definition of "employee" was again worded broadly, including "any employee of an employer". The definitions made clear that an "institution of higher education" meant a "community college district". The bill authorized the Commission to make unit determinations on traditional "community of interest" criteria, subject to an admonition that "unnecessary fragmentation shall be avoided". While the "all tenured in one unit" limitation of Engrossed Substitute Senate Bill No. 3042 had been dropped, the effect of the bill would still have been to leave the Commission with authority to decide this case on "community of interest" principles. More than one unit could have been found appropriate under such language, and the fact that the community education teachers have different wages, hours and working conditions from other employees could well have supported their exclusion from the unit containing full-time employees. That legislation passed both houses of the Legislature, but it also was vetoed by Governor John Spellman.

The 49th Legislature considered House Bill No. 32 (AN ACT Relating to labor relations in institutions of higher education), during both the 1985 and 1986 sessions. Both the community colleges and the "four-year" institutions were covered by that measure, which was generally similar to Senate Bill 3042 and House Bill 1219 of

the previous two sessions. The definition of "employee" was broad, while an "institution" was again defined as a community college district. The bill again authorized the Commission to make unit determinations on traditional "community of interest" criteria, subject to admonitions that: (1) "unnecessary fragmentation shall be avoided"; and (2) "All employees who are tenured or eligible to seek or be awarded tenure shall be included in the same bargaining unit at each institution of higher education". Numerous amendments offered by the "management" were debated, and an amendment limiting the coverage of the measure to "full-time" employees was defeated. That legislation passed the House of Representatives, but died in the Senate on the last day of the legislative session. Had it been adopted, it would have left the Commission with authority to decide this case on "community of interest" principles. Although a single, district-wide "tenure track" unit would have been required in each community college district, there would have been room for one or more other units as well. Once in a "community of interest" mode, the fact that the community education teachers lack "tenure" rights and the fact of separate wages, hours and working conditions could both have supported their exclusion from the "tenured" unit.

Although it did not receive active consideration in the 49th Legislature, House Bill No. 283 (AN ACT Relating to community college negotiations by academic personnel) is worthy of note for its overall place in this history. The sponsorship of that measure was as follows:

> by Representatives Wang, Patrick, Fisher, Somers and Cole; **by State Board for Community College Education request**

[emphasis by **bold** supplied]

Close examination reveals that the "management" side of the ten year old debate on collective bargaining rights had proposed a series of amendments to the existing "meet and confer" law which picked up many of the terms and trappings of the NLRA and its

public sector progeny. Thus, "collective bargaining" and many other familiar terms were used: (1) Section 2 of that bill used "good faith" and the wages/hours/conditions scope of bargaining found in Section 8(d) of the NLRA;[28] (2) Section 4 of that bill endorsed "arbitration" of grievance disputes, using the same "interpretation or application" language found in Section 203(d) of the federal law;[29] and (3) Sections 8 and 9 of the bill empowered the Commission to prevent "unfair labor practices" which paralleled Sections 8(a) and (b) of the NLRA.[30] There were no "unit determination" provisions in that bill, however. Section 2 of the measure retained the key portions of the historical language:

> 28B.52.030 Negotiation by representatives of employee organization--Authorized--Subject matter. Representatives of **an employee organization**, which organization shall by secret ballot have won a majority in an election **to represent the academic employees within its community college district**, shall have the right [[the balance of the section was deleted, and the duty to bargain in good faith was substituted]].

[emphasis by **bold** supplied]

Nothing was left to chance, or to the discretion of the Public Employment Relations Commission, in the unit determination area.

In 1987, the 50th Legislature considered Senate Bill No. 5225 (AN ACT Relating to community college negotiations by academic personnel). This time, the proponents of full collective bargaining rights for community college teachers appear to have taken their cue from the bill filed at the request of the State Board for

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[28] See, also, RCW 41.56.030(4) and RCW 41.59.020(4).

[29] See, also, RCW 41.58.020(4), RCW 41.56.122(2), RCW 41.56.125 and RCW 41.59.130.

[30] See, also, RCW 41.56.140 through .150 and RCW 41.59.140.

Community College Education in 1985.[31] The bill was structured as a series of amendments to Chapter 28B.52 RCW, but: (1) Section 2 of that bill added definitions of "collective bargaining", "exclusive bargaining representative" and "union security" in harmony with usage of those terms under the NLRA;[32] (2) Section 4 of that bill secured the rights of employees in terms familiar under Section 7 of the NLRA;[33] (3) Section 5 of the bill endorsed "arbitration" of grievance disputes, using the same "interpretation or application" language found in Section 203(d) of the federal law;[34] and (4) Sections 9 and 10 of the bill empowered the Commission to prevent "unfair labor practices" similar to Sections 8(a) and (b) of the NLRA.[35] As with the agency request measure filed as House Bill No. 283 in 1985, there were no "unit determination" provisions in 1987 Senate Bill No. 5225. Instead, Section 3 of the bill retained the key portions of the historical language:

> 28B.52.030 Negotiation by representatives of employee organization--Authorized--Subject matter. Representatives of **an employee organization**, which organization shall by secret ballot have won a majority in an election **to represent the academic employees within its community college district**, shall have the right [balance of section deleted] to bargain as defined in RCW 28B.52.020(8).

[emphasis by **bold** supplied]

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31 In written testimony submitted to the Senate Ways and Means Committee on March 2, 1987, WEA lobbyist Bob Fisher described Substitute Senate Bill 5225 as "an agreed bill" worked out by representatives of the WEA, the AFT and the community college managements. House Bill 283 from the 1985 legislative session was specifically mentioned as the historical antecedent of those "agreements".

32 See, Section 2 of the NLRA, RCW 41.56.030 and RCW 41.59.020.

33 See, also, RCW 41.56.040 and RCW 41.59.040.

34 See, also, RCW 41.58.020(4), RCW 41.56.122(2), RCW 41.56.125 and RCW 41.59.130.

35 See, also, RCW 41.56.140 through .150 and RCW 41.59.140.

Again, nothing in the unit determination area was left to chance, or to the discretion of the Public Employment Relations Commission. That was, of course, the legislation which became law. There have been no relevant amendments to Chapter 28B.52 RCW since 1987.

The conclusion reached from the foregoing is that the Legislature left the "old law" in place when it adopted the amendments in 1987. In other words, the "one unit per district" requirement remained absolute.

Recent Precedent Under Chapter 28B.52 RCW -

The continued existence of the "one unit per district" standard was affirmed in the one Commission decision on the subject since the amendments to Chapter 28B.52 RCW enacted in 1987. In Edmonds Community College, Decision 3698 (CCOL, 1991), the employer had opened a branch campus in Japan, and a dispute arose as to whether the teachers working in Japan were within the bargaining unit composed primarily of employees at the Edmonds campus. Rejecting the claim of unit inclusion that had been advanced by the union in that case, the Examiner stated:

> The statutory definition of the bargaining unit is the keystone for deciding ... these unfair labor practice cases. From the time of its original enactment in 1969, RCW 28B.52.030 has provided: [first three clauses of section set forth with emphasis on "within its community college district"]
>
> That section of the statute formerly went on to detail a "meet and confer" process for discussion of issues between community college districts and organizations representing their academic employees. Amendments to Chapter 28B.52 RCW in 1987 substituted the duty to bargain in good faith, added unfair labor practice provisions and other "collective bargaining" features, and abbreviated the balance of RCW 28B.52.030 to conclude with "to bargain as defined in RCW 28B.52.020(8)", but the quoted language remains as the only "unit

> determination" criteria to be found in Chapter 28B.52 RCW.
>
> ...
> ... the statutes themselves suggest a less expansive view of the bargaining relationship than that asserted by the union. The community college districts of Washington are state entities with territorial limits specifically set forth by the Legislature. In the case of this employer: [RCW 28B.50.040(23) set forth]
>
> By the plain and consistent language of RCW 28B.52.040 and RCW 28B.52.030, **the bargaining unit represented by the union in this case is limited to those persons employed by Community College District 23, within its geographic boundaries,** ... [emphasis by **bold** supplied]

While the unfair labor practice allegations were dismissed in Edmonds, the clear implication of the Examiner's conclusion in that case was that the "one unit per district" standard would continue to apply within the geographic boundaries of community college districts.

Conclusions on Unit Determination Authority -
The amendments to Chapter 28B.52 RCW adopted in 1987 did not enlarge the authority of the Commission or change the basic unit determination policy applied under that statute since its original enactment. Neither the petitioner nor the employer has offered any statutory basis for their arguments that "community of interest" principles ought be applied in this case. The standard was, and remains, "one unit per district".

Eligibility for "Employee" Status

The persons at issue in this case are "teachers" who are employed by the community college district. In Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977), the Supreme Court of the State of Washington rejected the exclusion of "supervisors" from collective bargaining rights **as a**

class, in the absence of express statutory language excluding them from the coverage of Chapter 41.56 RCW; it mattered not that there was federal precedent for their exclusion as a class and potential for conflicts of interest if they had bargaining rights.[36] In Columbia School District, et al., supra, the Commission rejected the exclusion of "substitutes" from collective bargaining rights **as a class.** Applying the same principles in this case, the community education teachers must be regarded as "employees". The analysis then turns to whether they are "casual" or "regular" employees.

The parties have already stipulated the propriety of the test used in Community College District 12, supra, to distinguish "regular" from "casual" employees. The employees at issue in that case were the part-time teachers of "transfer credit" and/or "occupational" courses apparently comparable to the courses listed at page 8 through 39 of the class schedule in evidence in this case. The "one-sixth of full time" test was adapted from other employment settings. There is no evident reason to apply a higher standard to the teachers of "community education" classes at issue in this case. It will be so ordered.

The facts of record in the instant case suggest a possibility, albeit slim, of a different factual situation existing here. At least some of the community education classes last for less than a full academic quarter. The "20 work days" aspect of the "20/30 test" endorsed by the Commission in Columbia, supra, translates to four full weeks of work, and thus closely parallels the "30 day" period after which union security obligations become effective under the NLRA. To the extent that examination of the work records of community education teachers should disclose that one or more

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[36] See, City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981), where the Commission and the courts took the METRO analysis a step farther, and excluded the "supervisors" from a rank-and-file unit under community of interest principles.

particular individuals have worked for this employer for 20 or more consecutive days during the measurement period, they also shall be included in the bargaining unit.

The Need for an Election

An "election" would be needed in this case to clear the air concerning the status of the AHE, even if the showing of interest filed in support of the IFA were to fall short of the 30% needed to initiate a representation proceeding. The IFA will be entitled to a place on the ballot if its showing of interest equals at least 10% of the employees deemed eligible under the tests set forth above.

FINDINGS OF FACT

1. Lower Columbia College is a community college of the state of Washington, operated under Chapter 28B.50 RCW. Under the provisions of RCW 28B.52.020, the employer offers academic transfer courses, occupational education and community services of an educational, cultural and recreational nature.

2. The Lower Columbia College Faculty Association for Higher Education (AHE) is an "employee organization" within the meaning of RCW 28B.52.020. Since an unspecified date after 1987, the AHE has claimed status as exclusive bargaining representative of certain academic employees of Lower Columbia College. Such claim of status has been without benefit of an election conducted by the Public Employment Relations Commission under RCW 28B.52.030.

3. The bargaining relationship between the AHE and Lower Columbia College has excluded, as a class, persons who teach community education classes.

4. On or about February 26, 1991, Lower Columbia College and the AHE signed a collective bargaining agreement effective for the period from February 26, 1991 through June 30, 1991.

5. On April 26, 1991, the Lower Columbia College Independent Faculty Association, an "employee organization" within the meaning of RCW 28B.52.020, filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission, seeking certification as exclusive bargaining representative of academic employees of Lower Columbia College.

6. On and after July 1, 1991, Lower Columbia College and the AHE purported to have in effect a collective bargaining agreement which was signed on or about February 26, 1991 for the period from July 1, 1991 through June 30, 1994.

7. Lower Columbia College hires both full-time and part-time employees to teach in its programs.

8. The employees who teach community education classes "of an educational, cultural and recreational nature" have different wages, hours, working conditions, and history of bargaining from the full-time and regular part-time employees who teach in the employer's other programs. Community education classes are canceled if there is insufficient student enrollment to pay the costs of operating the class.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 28B.52 RCW.

2. Persons employed by Lower Columbia College to teach community education classes are academic employees within the meaning of

RCW 28B.52.020(2) and have collective bargaining rights under Chapter 28B.52 RCW if they have a sufficient continuity of employment to be regarded as regular part-time employees.

3. The bargaining unit for which the AHE claims status as exclusive bargaining representative is inappropriate under RCW 28B.52.030, by reason of the exclusion, as a class, of persons employed by Lower Columbia College to teach community education classes.

4. The collective bargaining agreement signed by Lower Columbia College and the AHE for the period from July 1, 1991 through June 30, 1994 does not bar the instant representation proceedings under WAC 391-25-030, by reason of: (1) The contract covers an inappropriate bargaining unit; and (2) the contract was a premature extension executed prior to the timely filing period for the contract between the same parties which expired on June 30, 1991.

5. A question concerning representation presently exists, under RCW 28B.52.030, concerning the full-time and regular part-time academic employees of Lower Columbia College.

6. Part-time employees who have worked 20 consecutive days in the same assignment, or who have worked more than one-sixth of a full-time equivalent work year (.1667 FTE), during the year preceding the filing of the petition in this matter, and who continue to be available to return to teach the same course(s) when next offered or to teach other curriculum, are regular part-time academic employees of Lower Columbia College under RCW 28B.52.020(2), and shall be eligible voters in the election conducted in this proceeding. For purposes of computation of eligibility, the academic quarter in which the petition was filed and the three preceding academic quarters shall constitute the one-year measurement period.

7. Part-time employees who have neither worked 20 consecutive days in the same assignment, nor who have worked more than one-sixth of a full-time equivalent work year (.1667 FTE), during the year preceding the filing of the petition in this matter, are casual employees who lack an ongoing employment relationship with Lower Columbia College, and shall not be eligible voters in the election conducted in this proceeding.

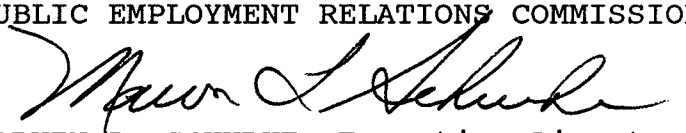
DIRECTION OF ELECTION

1. Lower Columbia College is directed to prepare and submit a new list of its full-time and regular part-time employees, conforming to the threshold delineated in paragraph 6 of the foregoing conclusions of law.

2. A representation election shall be conducted by secret ballot, under the direction of the Public Employment Relations Commission, in the appropriate bargaining unit consisting of all full-time and regular part-time academic employees of Lower Columbia College, for the purpose of determining whether a majority of the employees in that unit desire to be represented for the purposes of collective bargaining by the Lower Columbia College Faculty Association for Higher Education, WEA, NEA, or by the Lower Columbia College Independent Faculty Association, or by no representative.

Issued at Olympia, Washington, the 5th day of February, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order may be appealed by filing timely objections with the Commission pursuant to WAC 391-25-590.