STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 11	)	CASE 9944-E-92-1632
	)	DECISION 4314 - PECB
Involving certain employees of:	)	
	)	
KITSAP COUNTY	)	DIRECTION OF ELECTION
	)	

Jeff Edmiston, Organizer, appeared for petitioning union.

C. Danny Clem, Prosecuting Attorney, by Karin L. Nyrop, Deputy Prosecuting Attorney, appeared for the employer.

On August 3, 1992, Office and Professional Employees International Union, Local 11, filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission, seeking certification as exclusive bargaining representative of certain employees of Kitsap County, Washington. A telephonic pre-hearing was held on the matter on September 30, 1992, at which time the parties framed an issue concerning the scope of an appropriate bargaining unit. A hearing was held on October 14, 1992, before Hearing Officer Katrina I. Boedecker. The parties filed post-hearing briefs.

BACKGROUND

Kitsap County and the Kitsap County Superior Court operate the Kitsap County Juvenile Department. The department is accountable for the supervision and control of a juvenile detention facility. For that facility to operate in accordance with its responsibilities, there must be at least two employees on duty at all times, 24 hours per day.

At the time of the hearing in this matter, the workforce used by the employer to staff the juvenile detention facility included 10 full-time and part-time employees who held "permanent" status under the employer's personnel procedures.[1] For an unspecified time prior to the hearing, the employer has supplemented its "permanent" employees by calling in employees from a list of "extra help / relief workers". Of names appearing on that list as of September 17, 1992, five individuals were listed as having been "terminated" prior to the filing of the petition, and three others had worked "zero" hours in the preceding year. The remaining individuals named on the "extra help / relief" list have hire dates ranging from February of 1982 to September of 1992. During the one year period preceding September 1, 1992, the 14 individuals had "extra help / relief" work ranging from 12 hours (0.6% of the full-time work year) to 1286.5 hours (61.8% of the full-time work year).

The union's petition described the proposed bargaining unit as including: "Juvenile detention specialists, on-call juvenile detention specialists and lead worker detention specialists". In response to a routine inquiry from the Commission, the employer did not raise any objection to a bargaining unit which included its "permanent" employees, but it objected to the inclusion of any of the on-call employees in the proposed bargaining unit.[2]

POSITIONS OF THE PARTIES

The union argues that the "extra help / relief workers" are regular part-time employees, and are not casual employees. The union

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[1] An 11th "permanent" position was vacant at the time of the hearing.

[2] In its initial response and during the pre-hearing conference, the employer also objected to inclusion of the "lead worker detention specialist" in the bargaining unit. The employer withdrew that issue at the hearing.

contends that such employees have an ongoing interest in the wages, hours and working conditions of the bargaining unit, and should be included in the bargaining unit along with the uncontested employees holding "permanent" status.

The employer contends that its "permanent" employees are sufficient to maintain the minimum staffing required at the juvenile detention facility and that the "extra help / relief workers" are not necessary to the proper functioning of the department. It further urges that the "extra help / relief workers" should not be included in the bargaining unit because they are not funded in the same manner as the "permanent" employees; because they lack a community of interest with the "permanent" employees; because they work on a sporadic schedule; because they have the ability to decline work without penalty; and because they have no expectation of continued employment.

DISCUSSION

Controlling Legal Principles

The determination of appropriate bargaining units is a function delegated by the Legislature to the Public Employment Relations Commission. RCW 41.56.060; City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). The unit determination criteria to be considered by the Commission are set forth in RCW 41.56.060:

> In determining, modifying or combining the bargaining unit, the commission shall 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** .... [Emphasis by **bold** supplied]

A primary concern in the structuring of bargaining units is to group together employees who have a substantial "community of interest". City of Seattle, Decision 781 (PECB, 1979).

By both its title and terms, the focus of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is on the rights of "public employees". The Supreme Court of the State of Washington has repeatedly given broad interpretation to the statute as "remedial" legislation. The definition of "public employee" in RCW 41.56.030(2) has particularly been given the broadest possible meaning, in order to grant collective bargaining rights to the largest possible number of employees. Thus, in Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977), coverage was extended to "supervisors" in the absence of an expressed statutory exclusion. In International Association of Fire Fighters v. City of Yakima, 91 Wn.2d 101 (1978), the statutory exclusion of "confidential" employees was narrowly limited to those having a "labor nexus". Previously, in Roza Irrigation District v. State, 80 Wn.2d 633 (1972), the court had ruled that the statute covers all types of local government entities. In Zylstra v. Piva, 85 Wn.2d 743 (1975), coverage of the statute was specifically extended to the employees of juvenile detention facilities.[3]

Neither Chapter 41.56 RCW nor Commission precedent recognizes or provides for a categorical exclusion of "on call" employees from collective bargaining rights. At best, the term "on call" is inherently ambiguous.[4] The Commission's predecessor agency did

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[3] Superior Courts became "public employers" by an amendment to RCW 41.56.020 enacted in 1992, overcoming an absence of coverage noted by the Supreme Court in Zylstra.

[4] Apart from usage in connection with individuals who work only occasionally, the "on call" terminology might also refer to a full-time, fully compensated employee assigned to respond "on call" to either routine or emergency calls during what would otherwise be off-duty hours.

choose to adopt a Washington Administrative Code rule purporting to impose a complete exclusion of "on call" employees from bargaining units,[5] but the Commission has firmly rejected that approach. Mount Vernon School District, Decision 2273-A (PECB, 1986),[6] affirmed, Skagit County Superior Court (1987).

For purposes of unit determination, the Commission exclusively uses the terms "casual" and "regular part-time" as antonyms to distinguish two types of individuals working less than full-time. Commission precedent excludes "casual" employees from bargaining rights, but calls for the inclusion of "regular part-time" employees in the same bargaining unit with full-time employees performing similar work.[7] These classifications thus implement a balancing of the rights and interests of public employees and public employers: Persons with an ongoing interest in the affairs of a bargaining unit are permitted to implement their statutory bargaining rights; at the same time, a union and employer who are properly concerned with employees having a clear community of interest are not burdened with bargaining for those who have had only a passing interaction with the employer and its workforce.

Over the years, the Commission has addressed the test for what is a "regular part-time" employee in a variety of employment settings. In Columbia School District, et al., Decision 1189-A (PECB, 1982),

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[5] See: Repealed WAC 296-132-150. The Department of Labor and Industries administered Chapter 41.56 RCW from the time of its enactment in 1967 until the transfer of jurisdiction to the Public Employment Relations Commission, effective January 1, 1976.

[6] In Mount Vernon, the Commission wrote "an obituary" of an emergency rule, WAC 391-20-150, which it had adopted upon the transfer of jurisdiction in 1976. The Commission had previously permitted WAC 391-20-150 to expire.

[7] Decisions to that effect date back to at least Lake Washington School District, Decision 484 (EDUC, 1978).

the Commission acknowledged that "any quantification is somewhat arbitrary", but then wrote:

> The fundamental test for being an "employee" ... is the parties' expectancy of a continuing employment relationship, with the consequential mutual interest in wages, hours and conditions.

The Commission has consistently concluded that employees who work more than one-sixth of the normal full-time work year are "regular part-time" employees. See, Everett School District, Decision 268 (EDUC, 1977); Tacoma School District, Decision 655 (EDUC, 1979); City of Seattle, Decision 1142 (PECB, 1981); King County (Kingdome), Decision 1675 (PECB, 1983). The "one sixth" rule reflects a conclusion that an employer who has hired (and re-hired) an individual so often must have accepted the individual as demonstrating some desirable employee characteristic. Additionally, an employee who has been given so many work opportunities is justified in developing an interest in the wages, hours and terms and conditions of the position. Columbia, supra.

Kitsap County asserts that its "extra help / relief" workers have only a transitory expectation of continued employment, and that they are not guaranteed any number of work hours. As was noted in Tumwater School District, Decision 2043 (PECB, 1985), the lack of permanency in the employment relationship does not control. The test for inclusion is not whether the part-time employee seeks "permanent" employment,[8] but whether the circumstances of his or her present employment gives rise to a community of interest with others. Grubers Supermarket, Inc., 201 NLRB 612 (1973).

The employer suggests that the Commission's test for "regular part-time" status has, over the years, included a requirement that the

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[8] I.e., without regard to whatever "permanent" connotes under the personnel policies of the particular employer.

employees are "necessary" for the proper functioning of the facility, and it appears to contend that it could get along without its "extra help / relief" personnel. The decision on "regular part-time" status is based on what has actually transpired, and is not contingent upon the existence of a "need" component. Kitsap County and the Kitsap County Superior Court have found it appropriate, convenient, worthwhile, and/or necessary to maintain a list of "extra help / relief" employees, and to call in persons from that list to work in the juvenile detention facility from time to time. That practice appears to date back at least 10 years. Kitsap County and the Kitsap County Superior Court will be presumed to have acted in a rational manner. Further, it is presumed that the disputed individuals have performed useful work for the employer, so that the wages paid to them were not a gift of public funds in violation of the state constitution.

Existence of a "Community of Interest"

Duties, Skills and Working Conditions -
There are some differences of benefits and working conditions between the "permanent" and "extra help / relief" employees within the employer's workforce:

* The employees in the "permanent" positions go through an application review, testing and qualification process established by the Kitsap County Personnel Department, leading to hiring decisions based on merit. For employment as an "extra help / relief" worker, an applicant merely submits a resume to the county personnel office, which forwards it to the Juvenile Department for inclusion of the individual on the call-in list.

* The "permanent" employees are entitled to medical benefits and coverage under a retirement plan, as well as sick leave and annual leave. The "extra help / relief" workers do not receive any benefits or leave rights.

* Criminal justice training is required for the employees holding the "permanent" positions. The "extra help / relief"

employees must pass a criminal records background check, but no criminal justice training is required.

* The "permanent" positions are sufficient in number for the employer to meet its minimum staffing requirements if all "permanent" positions are filled, but one "permanent" position was vacant at the time of the hearing. The "extra help / relief" workers are neither guaranteed a specific shift nor promised a certain number of hours of work, but the record indicates that there was some use of "extra help / relief" employees in each month during the year preceding the hearing.

The employer's argument that the "extra help / relief" workers lack a "community of interest" with the rest of the bargaining unit fails, when the overall situation is considered. The work performed by the "extra help / relief" workers is not separate, or even distinguishable, from the work performed by the "permanent" employees. Inasmuch as any individuals who qualify as "regular part-time" employees have a statutory right to organize and bargain, the consequence of their exclusion from the petitioned-for bargaining unit would be a potential for their separate organization, for thus having two bargaining units performing similar work in the same workplace. Such an arrangement would leave the parties with a legacy of work-jurisdiction and "skimming of unit work" arguments that would not be conducive to stable or productive labor relations. See, City of Seattle, Decision 781 (PECB, 1979).

The "substitute" employees at issue in Tumwater, supra, bear a great deal of similarity to the "extra help / relief" employees at the Kitsap County juvenile detention facility. With few exceptions, the full-time and substitute employees at Tumwater all had similar skills, met similar job requirements, performed parallel duties, and were subject to common supervision. Like the employees at issue here, the substitutes at Tumwater were paid at a lower rate of pay, did not enjoy the fringe benefits received by the full-time employees, were "on call", and could refuse assignments

without penalty. Nevertheless, the substitutes in Tumwater were fully integrated into the workforce on the days when they did work, as are the employees at issue here. The employees at issue in Tumwater were included in the bargaining unit, and the same conclusion is reached here.

The ongoing nature of the "extra help / relief" work at the Kitsap County juvenile detention facility distinguishes this case from the situation in City of Bellingham, Decision 792 (PECB, 1979). The employments at issue in Bellingham were of a short term, irregular and temporary nature, leading to a conclusion that "extra help" clerical employees, together with a most interesting "dog quarry" position,[9] were properly excluded from a bargaining unit.

There are some differences of funding between the "permanent" positions and the "extra help / relief" employees. Funds are budgeted separately for "permanent" employee salaries and benefits, so approval from the county budget office and county commissioners would be needed if there was a desire to use that money for another purpose. The "extra help / relief" workers are paid from a lump sum allocation that could be diverted to other purposes without the approval of the county budget office or county commissioners. The employer cites no Commission precedent in support of its budget-based argument, however, and no case is known or found which supports the making of a unit determination on a "source of funds" basis. No aspect of the statutory unit determination criteria set forth in RCW 41.56.060 is tied, either directly or indirectly, to the source of funds. In fact, it is common to find state-funded and even federally-funded employees in school districts mixed in the same bargaining units with locally-funded positions that have similar duties, skills and working conditions.

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[9] The duties of the position involved the training of police dogs.

Determination of Employee Eligibility to Vote

Questions arise from time to time about the period and method for calculating the "one-sixth of full time" threshold for status as a regular part-time employee. As was noted in Tacoma, supra:

> One traditional argument against the use of a fixed threshold for "regularity" is a concern that employers would limit assignments so as to prevent [individual employees] from obtaining the necessary number of days of work for bargaining unit status. In the context of a law ... which clearly makes it an unfair labor practice for an employer to discriminate "in regard to hire, tenure of employment, or any term or condition of employment" to encourage or discourage membership in an employee organization, and in the context of a record showing substantial employment histories of persons ... over [a substantial] period, any such concerns are deemed an insufficient reason for blocking application of an otherwise reasonable test for determining regularity in employment.

Although the Tacoma case was decided under the Educational Employment Relations Act, Chapter 41.59 RCW, similar protections exist for employees under the unfair labor practice provisions of Chapter 41.56 RCW. Naturally, a person whose employment is lawfully terminated, or who is no longer available for work from the "extra help / relief" list, will cease to be a member of the bargaining unit on that basis.

For the purpose of determining eligibility to vote in the election directed herein, the period for measurement is the 12 months immediately preceding the filing of the petition in this case. Those who will be deemed to be eligible voters, and who will be members of the bargaining unit for the first year of a bargaining relationship if the employees vote to unionize, will include:

(1) Individuals who were on the "extra help / relief" list throughout that period who: (a) worked at least 347 hours in that

period (1/6 of 2080 hours), and (b) remain available for work from the "extra help / relief" list procedure; and

(2) Individuals who were on the "extra help / relief" list for less than the entire 12 month period who: (a) worked an average of 87 hours per calendar quarter for the quarters in which they worked, and (b) remain available for work from the "extra help / relief" list.

For the future, the employer will need to re-assess employee work hours and availability annually, if the employees in this bargaining unit choose an exclusive bargaining representative. If an employee does not work sufficient hours on an annual or quarterly basis to meet the "one-sixth" test, the individual would cease to be a member of the bargaining unit. Additional employees would be included in the bargaining unit by application of the standards set forth for making the current eligibility determination.

FINDINGS OF FACT

1. Kitsap County and the Kitsap County Superior Court operate Kitsap County Juvenile Department, and are public employers within the meaning of RCW 41.56.030(1).

2. Office and Professional Employees International Union, Local 11, a bargaining representative within the meaning of RCW 41.56.030(3), has filed a timely petition for investigation of a question concerning representation, seeking certification as exclusive bargaining representative of a bargaining unit comprised of all full-time and regular part-time juvenile detention specialists and lead worker detention specialists employed by the Kitsap County Juvenile Department. The petition was supported by a showing of interest which was sufficient for representation proceedings in a bargaining unit of the size claimed.

3. The staff of the Kitsap County juvenile detention facility includes employees who hold "permanent" positions under the employer's personnel policies.

4. The employer maintains a list of persons available for work at the Kitsap County juvenile detention facility as "extra help/ relief" workers. Hiring of employees from that list dates back to at least 1982. The individuals hired from that list do not receive the same benefits or enjoy all of the same rights as the "permanent" employees, but they generally perform duties similar to those of the "permanent" employees and are subject to common supervision with the "permanent" employees.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. A bargaining unit consisting of all full-time and regular part-time juvenile detention specialists and lead worker detention specialists employed at the Kitsap County Juvenile Department is an appropriate unit for the purposes of collective bargaining within the meaning of RCW 41.56.060, and a question concerning representation presently exists in that bargaining unit.

3. Extra help/relief workers who have worked less than one-sixth of the full-time work schedule are "casual" employees, and are excluded as such from the bargaining unit.

4. Extra help/relief workers who have worked more than one-sixth of the full-time work schedule are "regular part-time" employees, and are included in the bargaining unit.

DIRECTION OF ELECTION

1. A representation election shall be conducted under the direction of the Public Employment Relations Commission, in the appropriate bargaining unit described in paragraph 2 of the foregoing conclusions of law, 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 Office and Professional Employees International Union, Local 11, or by no representative.

ISSUED at Olympia, Washington, on the 9th day of March, 1993.

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.