South Central School District, Decision 5670 (PECB, 1996)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| In the matter of the petition of: | ) | |
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| SOUTH CENTRAL EDUCATION ASSOCIATION | ) | CASE 11924-E-95-1955 |
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| Involving certain employees of: | ) | DECISION 5670 - PECB |
| | ) | |
| SOUTH CENTRAL SCHOOL DISTRICT | ) | DIRECTION OF ELECTION |
| | ) | |
| | ) | |

Faith Hanna, Attorney at Law, appeared on behalf of the petitioner.

Dionne & Rorick, by Lester Porter, Jr., Attorney at Law, appeared on behalf of the employer.

On July 21, 1995, the South Central Education Association (union) filed a letter with the Public Employment Relations Commission, suggesting that a question concerning representation existed among employees of the South Central School District who conduct extracurricular activities. The union filed a formal petition under Chapter 391-25 WAC on August 10, 1995. During a telephonic pre-hearing conference conducted on September 7, 1995, the parties stipulated to: (1) The jurisdiction of the Commission; (2) the identification of the parties; (3) the qualification of the union to act as an exclusive bargaining representative; (4) the existence of a question concerning representation; (5) the description of an appropriate bargaining unit; and (6) the eligibility of persons working as athletic coaches at the middle school and high school levels for inclusion in the petitioned-for bargaining unit. The parties disagreed as to whether persons performing various tasks at the elementary school level and those performing ancillary tasks at high school athletic events should be eligible voters. A hearing was held on February 15, 1996, before Hearing Officer Martha M. Nicoloff. The parties filed post-hearing briefs on April 15, 1996.

BACKGROUND

School districts organized and operated under Title 28A RCW bargain with their "certificated" employees under the Educational Employment Relations Act, Chapter 41.59 RCW, and bargain with all of their other employees under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. School districts typically offer co-curricular and extracurricular activities for their students. RCW 28A.320.500 and 28A.320.510 authorize the use of school facilities for such purposes; RCW 28A.600.200 authorizes school districts to conduct "interschool athletic activities and other interschool extracurricular activities of an athletic, cultural, social or recreational nature for students of the district". The Washington Interscholastic Activities Association (WIAA) named in RCW 28A.600.200 is a voluntary organization of school districts, organized and operated to plan, supervise and administer interscholastic activities, including athletic competition at the high school level.

For uncounted years prior to 1995, the wages, hours and working conditions of persons who conducted extracurricular activities in school districts throughout the state were generally established through negotiations between the particular school district and the organization recognized or certified as the representative of its certificated employees.[1] In the recent past, such matters were controlled in the South Central School District by a collective bargaining agreement between the employer and the South Central Education Association.

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[1] From 1965 through 1975, such bargaining relationships were conducted under the so-called "Professional Negotiations Act", Chapter 28A.72 RCW. That statute was repealed on January 1, 1976, and such bargaining relationships were thereafter conducted under the Educational Employment Relations Act, Chapter 41.59 RCW.

Upon a finding that certification as an educator is not required under any statute or State Board of Education rule for work as an athletics coach or for conducting other extracurricular activities, the Public Employment Relations Commission ruled in Castle Rock School District, Decision 4722-B (EDUC, January 10, 1995), that a public school district and the exclusive bargaining representative of its certificated employees committed an unfair labor practice by purporting to negotiate for such positions in the context of collective bargaining under Chapter 41.59 RCW. The Commission concluded that any collective bargaining rights of such persons would be regulated by the Chapter 41.56 RCW.

In an emergency rule adopted in February of 1995, as WAC 391-45-560, the Commission directed each school district and exclusive bargaining representative of certificated employees to: (1) Determine which, if any, extracurricular work historically bargained for under Chapter 41.59 RCW did not require certification as an educator under state law or local practice; and (2) Post notices, by May 1, 1995, informing employees of the removal of all non-certificated work from the bargaining unit of certificated employees maintained under Chapter 41.59 RCW.[2]

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[2] The Executive Director has been made aware of issues being raised concerning the applicability of the federal Fair Labor Standards Act (FLSA) to employees performing non-certificated tasks involving extracurricular activities. Those issues include: (1) Whether the pay of such persons must be computed on an hourly or other periodic basis, instead of fixed "contract" amounts common in collective bargaining agreements negotiated under Chapter 41.59 RCW; and (2) whether an employer is obligated to pay "overtime" if the total hours worked by an individual employee covered by the FLSA (i.e., combining "extracurricular" work with other work for the same employer) exceeds 40 hours per week. Such issues are not a direct result of the Castle Rock decision, although awareness of real or potential FLSA violations may have been triggered by the Castle Rock decision and the emergency rule. The Commission does not administer the FLSA, and nothing in this decision constitutes an interpretation or enforcement of that statute.

The South Central School District and the South Central Education Association met and made the separation required by WAC 391-45-560. They agreed that all high school and middle school athletics coaches fell into the non-certificated category, along with: "Elementary school positions", "Elem. Young Writer's Day Comm.", "High School Announcer", "High School Timekeeper", "High School Ticket Taker", and "High School Events Supervisor". The notices they posted on April 25, 1995, included the following paragraphs required by the Commission's emergency rule:

> EMPLOYEES WHO ARE DISSATISFIED WITH THE BARGAINING UNIT ASSIGNMENTS LISTED [in the notice] should first contact this school district and/or the organizations shown below, to try to resolve the matter. If the matter is not resolved, an employee holding a position listed [in the notice] may file a complaint with the Public Employment Relations Commission under Chapter 391-45 WAC. Any complaint must be filed within six months following the act or event being challenged.
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> EMPLOYEES HOLDING POSITIONS [excluded from the certificated employee bargaining unit] MAY HAVE RIGHTS UNDER THE PUBLIC EMPLOYEES' COLLECTIVE BARGAINING ACT, CHAPTER 41.56 RCW. It is the purpose of this notice to "clear the air" prior to any exercise of those rights. Any petition for investigation of a question concerning representation, bargaining authorization card, or voluntary recognition agreement that is signed or filed as to such employees prior to or on the date this notice is posted will be deemed void.

Review of the Commission's docket records fails to disclose any unfair labor practice charges filed by South Central School District employees to challenge the separation of non-certificated extracurricular jobs from the certificated bargaining process.

The union seeks a bargaining unit encompassing all of the employees who perform work that was excluded from the certificated employee bargaining unit by the notice posted on April 25, 1995.

POSITIONS OF THE PARTIES

The union acknowledges that Commission precedent draws a distinction among employees working less than full-time, such that "regular part-time" employees are included in bargaining units while "casual" employees are excluded from exercising the rights conferred by the collective bargaining statutes. While the union acknowledges that a "30 days in a one-year period" test has been applied in past decisions to measure the status of school district employees, it urges that a "10 days in a one-year period" test or a "20 days in a one-year period" test should be adopted on the facts of this case. The union contends that all days worked by individuals in various extracurricular assignments should be accumulated for purposes of those computations.

The employer relies on the same Commission precedents concerning the distinction between "regular part-time" and "casual" employees, but argues for application of the "30 days in a one-year period" test on a position-by-position basis. It thus contends that the employees performing ancillary tasks at athletic events should be excluded from the eligibility list (on the basis that none of those positions are scheduled for 30 or more days in a year, even if the football and basketball seasons are added together), and that the employees conducting elementary school activities should be excluded from the eligibility list (on the basis that no single activity lasts more than 20 days).

DISCUSSION

The Rights of Employees

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, was enacted "to promote the continued improvement of the relationship between public employers and their **employees** ..." RCW

41.56.040 prohibits interference with or discrimination against "any public **employee** or **group of public employees** in the free exercise of **their right to organize and designate representatives of their own choosing** ..." [emphasis by **bold** supplied]. In that light, the employer's focus on "positions" is unfounded. A job title on a table of organization or a position number on a budget may connote a particular body of work to be performed by one or more employees, but job titles and positions do not themselves have rights under the collective bargaining statutes.

In making determinations on the bargaining unit status of employees in school districts, the Commission looks to the duties, skills and working conditions of the **employees**. RCW 41.56.060. That includes the overall body of similar work to be performed, not just specific jobs or positions. The "30 days in a one-year period" test cited by both parties clearly does not require that all of those days be accumulated working in the same assignment.[3] The question here is whether **employees** have an expectancy of continued employment. An individual who is hired for multiple part-time jobs can acquire an expectancy of continued employment on the same basis.

Numerous decisions have reiterated that the starting point for any unit determination analysis is the configuration sought by the petitioning union. In this case, the union has not petitioned for a separate unit of football coaches, or even a separate unit of athletics coaches. Instead, the generic work jurisdiction of the

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[3] A "20 **consecutive days in the same assignment**" test was adopted in Everett School District, Decision 231 (PECB, 1978), based on evidence showing a significant change in the treatment of the individual employee after that milestone was passed. While that became an alternative test for substitute certificated employees in Tacoma School District, Decision 655 (EDUC, 1979) and Columbia School District, et al., Decision 1189-A (EDUC, 1981), based on similar facts in those records, no similar facts have been presented in this case. No "consecutive days" test has ever been adopted for non-certificated employees of school districts.

petitioned-for bargaining unit is "extracurricular activities". As would be the case for assessing the bargaining unit status of part-time teachers, bus drivers, food service workers, etc. in the South Central School District, the computation of days worked for purposes of eligibility to vote in this bargaining unit must accumulate all days for which an individual is compensated for work within the work jurisdiction of the petitioned-for bargaining unit.

Employee Work Records

The parties presented evidence detailing the extracurricular work in the 1993-1994 and 1994-1995 school years, and for the portion of the 1995-1996 school year up to the date of the hearing in this matter. Although a recomputation will be necessary based on the actual data through the end of the 1995-1996 school year, certain of the exhibits admitted in evidence at the hearing provide a "sample" year for analysis of the employment pattern:

* The 1995-1996 columns on Exhibit 1 (titled "H.S. & M.S. Non-certificated Extra-curricular Positions - 1993-1996"), except to the extent necessary to use the 1994-1995 columns for representative data for winter and spring sports that were incomplete when the hearing was held;

* The 1995-1996 columns on Exhibit 2 (titled "Non-certificated Extra-curricular H.S. 'Game' Positions - 1993-1996"), except to the extent necessary to use the 1994-1995 columns for representative data for a basketball season that was still in progress when the hearing was held; and

* The 1994-1995 portion of Exhibit 3 (titled "Elementary Extra-curricular Supplemental Contracts"), which appeared to provide representative data for a full year.[4]

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[4] There is no consolidated list of 1995-1996 elementary activities in the record. Exhibit 3 has only 3 1995-1996 entries, while Exhibit 5 lists 25 entries for the same school in 1995-1996. Exhibit 4 was an incomplete list of activities at Thorndyke School. No exhibit listed 1995-1996 activities at the third elementary school.

The Secondary School Athletics Coaches (Exhibit 1) -
Notwithstanding its support for a "30 days" test, the employer has been willing to stipulate that all of the persons coaching athletics at the middle school and high school levels were regular part-time employees eligible to vote in the petitioned-for bargaining unit. As pointed out by the union, however, certain of those coaching situations warrant particular attention.

Karen Kimmel was head coach for girls basketball at the middle school on a "job share" basis. That team has 24 days per year, which would be less than the threshold supported by the employer. Kimmel was also the coach for soccer at the middle school (36 days) and was the coach for girls track at the middle school (39 days), for an aggregate of up to 99 extracurricular turnouts in a year. She would clearly have an interest in the wages, hours and working conditions associated with all of those roles.[5]

Rene Boaglio was the other head coach for girls basketball at the middle school on a "job share" basis. The 24 days per year for that role would be less than the threshold supported by the employer, but Boaglio was also the coach for girls basketball at Tukwila Elementary School for 10 days per year. With an aggregate of up to 34 extracurricular turnouts in a year, she would clearly have an interest in the wages, hours and working conditions associated with both roles.[6]

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[5] Kimmel would be a "dual status" employee under Longview School District, Decision 2551-A (PECB, 1987); Longview School District, Decision 3109 (PECB, 1989); and Ephrata School District, Decision 4675-A (PECB, 1995). A footnote on Exhibit 1 indicates that she is a certificated employee with the South Central School District, but this extracurricular work was clearly excluded by the parties from the certificated bargaining unit.

[6] Boaglio would be a "dual status" employee. A footnote on Exhibit 1 indicates that she is a certificated employee, but this extracurricular work was clearly excluded by the parties from the certificated bargaining unit.

Angie Gill was assistant coach for girls basketball at the middle school on a "job share" basis for 22 days per year. That would be less than the threshold supported by the employer, but Gill was also the assistant coach for volleyball at the middle school for 38 days per year. With an aggregate of up to 60 extracurricular turnouts in a year, she would clearly have an interest in the wages, hours and working conditions associated with both roles.[7]

Susan Brandt was the other assistant coach for girls basketball at the middle school on a "job share" basis. Her 22 days per year in that role would be less than the threshold supported by the employer, and her name does not appear elsewhere on the exhibits listing extracurricular activities. Thus, Brandt's maximum contact with the petitioned-for bargaining unit appears to be a share of 22 turnouts in a year.

High School "Events" Employees (Exhibit 2) -
Kathy Felt and Sue Ness took tickets at high school football and basketball games. While a footnote on Exhibit 2 indicates they have other non-certificated employment with this employer, the ticket taking work is not claimed to be part of their other jobs. Their names do not appear elsewhere on the exhibits listing extracurricular activities. For each of them, their maximum contact with the petitioned-for bargaining unit was about 15 turnouts in the sample year, spread over two calendar quarters.

Bill Weiland retired after serving as athletic director for the South Central School District, but status as a retiree does not equate with status as an employee.[8] He has returned to work as

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[7] Gill would be a "dual status" employee. A footnote on Exhibit 1 indicates that she is a certificated employee, but this extracurricular work was clearly excluded by the parties from the certificated bargaining unit.

[8] Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

timekeeper at high school football and basketball games, but his name does not appear elsewhere on the exhibits listing extracurricular activities. His maximum contact with the petitioned-for bargaining unit was thus about 17 turnouts in the sample year, spread over two calendar quarters.

Kermit Escame was announcer at high school football games, and was announcer at high school basketball games during the last full season detailed in the exhibits. Escame was also the coach for boys tennis at the high school (78 days), the coach for girls tennis at the high school (78 days), and the coach for wrestling at the high school (90 days). With an aggregate of 259 extracurricular turnouts in the sample year, he would clearly have an interest in the wages, hours and working conditions associated with all of those roles.

Larry Green was facilities supervisor at high school football games, and was scorekeeper at high school basketball games during the last full season detailed in the exhibits.[9] His name does not appear elsewhere on the exhibits, so his maximum contact with the petitioned-for bargaining unit appears to have been about nine turnouts spread over two calendar quarters.

Damon Hunter was facilities supervisor at one high school football game in 1995, and was security person at one high school football game in 1995. Hunter was also the coach for boys basketball at the high school (96 days), for a total of 98 extracurricular turnouts in the sample year.[10] He would clearly have an interest in the

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[9] Green would be a "dual status" employee. A footnote on Exhibit 2 indicates he is a certificated employee, but this extracurricular work was clearly excluded by the parties from the certificated bargaining unit.

[10] Hunter would be a "dual status" employee. A footnote on Exhibit 2 indicates he is a certificated employee, but this extracurricular work was clearly excluded by the parties from the certificated bargaining unit.

wages, hours and working conditions associated with all of those extracurricular roles.

Jack Oreweiler operated the 30-second clock for nine high school basketball games in the 1994-1995 season, and for two games in the 1995-1996 season prior to the hearing. He was also an assistant coach for football at the high school (98 days), for an aggregate of up to 109 extracurricular turnouts during the sample year. He would clearly have an interest in the wages, hours and working conditions associated with all of those extracurricular roles.

Scott Powers operated the 30-second clock for one high school basketball game in the last full season prior to the hearing. He was also an assistant coach for football at the high school (98 days) and an academic coach at the high school (180 days), for an aggregate of 269 extracurricular turnouts during the sample year. He would clearly have an interest in the wages, hours and working conditions associated with all of those extracurricular roles.

Tony Miranda was scorekeeper at two high school basketball games during the 1994-1995 season, and was announcer at three high school basketball games in the 1995-1996 season prior to the hearing. He was also the coach for volleyball at the high school (78 days), for an aggregate of 83 extracurricular turnouts during the sample year. He would clearly have an interest in the wages, hours and working conditions associated with all of those roles.

Other names appearing on the lists would not even arguably meet the "10 days in a one year period" test proposed by the union:

* Don Garnand was scorekeeper at one high school basketball game in the 1994-1995 season. His name does not appear elsewhere on the lists of extracurricular work.

* Brian Sleight was announcer for one high school basketball game in the 1995-1996 season prior to the hearing. His name does not appear elsewhere on the lists of extracurricular work.

* Andre Jones was security person at two high school football games in 1995, and was security person at three high school basketball games in 1995-1996. A footnote on Exhibit 2 indicates that he has other non-certificated employment with this employer, and the testimony indicated that he is the security official at the high school, but this security work was not claimed to be part of his other job with the employer. His name does not appear elsewhere on the exhibits, so his maximum contact with the petitioned-for bargaining unit appears to have been about five extracurricular turnouts spread over two calendar quarters.

* Patrick Hoban serves in a recently-created role of athletic trainer. His name does not appear elsewhere on the exhibits, and he was credited with only six turnouts during the 1995-1996 year up to the date of the hearing.

Elementary Activities Employees -
Although it was noted that activities are added and deleted each year at the elementary school level, the weight of the evidence establishes that the employer budgets for an ongoing (and growing) program which produces employment opportunities for at least some employees on a recurrent basis.

Lorraine Anderson conducted five programs ranging from 3 to 10 days each, for an aggregate of 35 extracurricular turnouts during the sample year. She would clearly have an interest in the wages, hours and working conditions associated with all of those roles.

Larry Compton conducted eight programs ranging from 5 to 15 days each, for an aggregate of 77 extracurricular turnouts during the sample year. He would clearly have an interest in the wages, hours and working conditions associated with all of those roles.

Kristin Jaquish conducted three programs ranging from 9 to 12 days each, for a total of 33 extracurricular turnouts during the sample year. She would clearly have an interest in the wages, hours and

working conditions associated with all of those extracurricular roles.

The accumulated extracurricular turnouts of six other employees fell within the gap between the "10 days" test supported by the union and the "30 days" test acceptable to the employer:

1 employee with 10 turnouts
2 employees with 12 turnouts
2 employees with 18 turnouts
1 employee with 20 turnouts

Other names on the lists worked less than the minimum "10 days" test supported by the union.[11]

The Appropriate Test for Regular Part-Time Status

As noted by the Commission in Columbia School District, et al., supra, any test used to distinguish "regular part-time" employees from "casual" employees is somewhat arbitrary. The "30 days in a one-year period" test supported by the employer has the distinct advantage of being an accepted measure that is already in use for both certificated and non-certificated employees in the South Central School District.

The union's focus on the particular facts of this case is premised upon the notion that the industrial setting to be considered is limited to "extracurricular activities" in the school district. It correctly notes that the "30 days" test is an imperfect approximation of "one-sixth of full-time" even within school districts, and that there is no "full-time" workforce performing extracurricular activities. Adoption of the "10 days" or "20 days" test supported by the union would, however, obligate this employer to administer three different tests within its payroll system:

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[11] One employee had 3 turnouts, 4 employees had 4 turnouts, 1 employee had 6 turnouts and 1 employee had 8 turnouts.

* The general rule of "30 days in a one-year period" for substitute teachers and non-certificated employees working in functions other than extracurricular activities;

* The special rule of "20 consecutive days in the same assignment" for substitute teachers; and

* A new "10 days in a one-year period" or "20 days in a one-year period" test for extracurricular activities which would apply to: (1) Employees who are also certificated employees of the school district; (2) employees who also have other non-certificated jobs with the school district; and (3) employees who have no other current employment with the school district.

It will be far more straightforward to treat "public education" as the industrial setting referred to in Commission precedent, and to apply the general rule of "30 days in a one-year period" already in use in the school district as the test for computing the bargaining unit eligibility of the employees conducting extracurricular activities.[12]

## FINDINGS OF FACT

1. The South Central School District is organized and operated pursuant to Title 28A RCW, and is a public employer within the meaning of Chapter 41.56.030(1).

2. The South Central Education Association, a bargaining representative within the meaning of RCW 41.56.030(3), has filed a timely and properly supported petition, seeking to represent a bargaining unit of employees who conduct extracurricular

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[12] Over the years since the Everett, Tacoma, Sedro Woolley and Columbia, et al. cases were decided, the Commission staff has responded to numerous inquiries about the proper computation of the "30 days in a one-year period" test. That could only be exacerbated by adding another test for school districts to administer.

activities in the South Central School District for which certification as an educator is not required.

3. The employer operates a program of extracurricular activities for students at the elementary, middle school, and high school levels, and has an ongoing need to provide a complement of personnel by which to carry out those activities.

4. A dispute has arisen concerning whether certain employees performing ancillary tasks at high school athletic events and various activities at the elementary school level should appropriately be considered "regular part-time" employees and included in the petitioned-for bargaining unit.

5. Persons who are employed to conduct extracurricular activities and perform related assignments for an aggregate of more than 30 days within any 12-month period ending during the current or immediately preceding school year have an expectancy of continued employment on the same basis and are regular part-time employees of the South Central School District, except where the employment relationship regarding the overall body of extracurricular work has been expressly terminated.

6. Persons who have not been employed to conduct extracurricular activities or perform related assignments for an aggregate of more than 30 days within any 12-month period ending during the current or immediately preceding school year lack an expectancy of regular employment with the South Central School District, and are casual employees.

## CONCLUSIONS OF LAW

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

2. A bargaining unit consisting of all employees who conduct extracurricular activities and perform related assignments in the South Central School District for which no certification is required, excluding certificated employees, supervisors, confidential employees, casual employees, and all other employees of the employer, is an appropriate unit for the purposes of collective bargaining under RCW 41.56.060.

3. A question concerning representation currently exists under RCW 41.56.060 and 41.56.070 in the bargaining unit described in paragraph 2 of these conclusions of law.

4. Casual employees, as described in paragraph 6 of the foregoing findings of fact, are to be excluded from the bargaining unit under RCW 41.56.060, but regular employees, as described in paragraph 5 of the foregoing findings of fact, are to be included in the bargaining unit.

## DIRECTION OF ELECTION

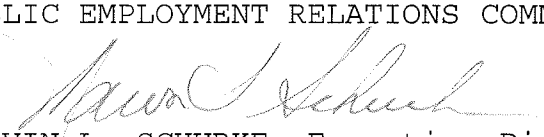
1. A representation election shall be conducted by secret ballot, under the direction of the Public Employment Relations Commission, in the appropriate bargaining unit described in paragraph 2 of the foregoing conclusions of law, for the purpose of determining whether a majority of the employees in that unit desire to be represented for the purposes of collective bargaining by the South Central Education Association or by no representative.

2. For the purposes of determining the list of persons eligible to vote in the election directed in the preceding paragraph, the South Central School District shall immediately file and serve an updated list showing all employees who were compensated for extracurricular activities work during the 1995-1996

school year, together with the number of days for which compensation was paid to each such employee.

Issued at Olympia, Washington, on the 11th day of September, 1996.

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.