STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

RON NILSON, Complainant, vs. CASTLE ROCK EDUCATION ASSOCIATION, Respondent.	)	CASE 9970-U-92-2278 DECISION 4722-B - EDUC
RON NILSON, Complainant, vs. CASTLE ROCK SCHOOL DISTRICT, Respondent.	)	CASE 9971-U-92-2279 DECISION 4723-B - EDUC DECISION OF COMMISSION

Ron Nilson appeared pro se.

Harriet Strasberg, Attorney at Law, appeared on behalf of the union.

This case comes before the Commission on a petition for review filed by the Castle Rock Education Association, seeking to overturn a decision issued by Examiner William A. Lang.[1]

BACKGROUND

The pertinent facts are set forth in the Examiner's decision, and are not substantially disputed. To summarize: Ron Nilson's only

[1] Castle Rock School District, Decisions 4722, 4723 (EDUC, 1994), as corrected by Castle Rock School District, Decisions 4722-A, 4723-A (EDUC, 1994).

employment with the Castle Rock School District (employer) was as its head basketball coach.[2] Nilson held a teaching certificate, and he was employed as a teacher in another school district, but educator certification was not a requirement for his coaching job.

The Castle Rock Education Association (union) is the exclusive bargaining representative of the employer's non-supervisory certificated employees, under Chapter 41.59 RCW. The employer and union were parties to a collective bargaining agreement which established wages and other working conditions for the position of head basketball coach. That contract included provisions concerning job security protections for employees holding extracurricular activities jobs, including the head basketball coach position.[3]

When the employer terminated Nilson's employment, he sought to invoke the grievance procedure and substantive provisions of the collective bargaining agreement.[4] First the employer, and later the union, declined to process Nilson's grievance, each eventually asserting that he was not a member of the bargaining unit represented by the union.

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[2] This particular dispute arose out of Nilson's employment as a coach for interscholastic athletics, and the terms "coach" and "coaching" are used here in that context. We recognize that the work affected by this decision may not be limited to interscholastic athletics.

[3] Any job security rights of persons holding extracurricular activities jobs are only as negotiated through a collective bargaining process. In contrast, certificated employees of Washington school districts have "continuing contract" rights and procedures under Chapter 28A.405 RCW, with respect to their teaching contracts.

[4] For reasons indicated below, the question of whether this grievance was filed with or without the advance support of the union does not affect the ultimate outcome of this case. We amend the findings of fact to omit an irrelevant portion.

Nilson filed unfair labor practice charges against both the employer and union, claiming that he was improperly deprived of his rights as a member of the bargaining unit represented by the union. After a hearing, Examiner Lang ruled that Nilson was not included in the certificated employee bargaining unit, inasmuch as his coaching job was not a position for which educator certification was required.

The Examiner found both the employer and union guilty of unfair labor practices for purporting to maintain a collective bargaining relationship covering work not properly included in a bargaining unit under Chapter 41.59 RCW. The Examiner awarded Nilson access to a job security process, on principles of equitable estoppel.

The union filed a petition for review, together with requests for a stay of the Examiner's order and for a delay in the filing of its appeal brief. The union's requests were considered at an open, public meeting of the Commission held on July 25, 1994. On July 29, 1994, the Commission's Executive Director notified the parties of the Commission's actions to stay the Examiner's decision and to set a due date for the union's brief.[5]

POSITIONS OF THE PARTIES

The union contends the Examiner erred in his finding of fact relating to the initial filing of Nilson's grievance. It argues that the Examiner misapplied the law by concluding that the union (and employer) improperly bargained concerning extracurricular activities jobs, that extracurricular contracts are a mandatory subject of collective bargaining under Chapter 41.59 RCW, and that the Examiner's result will disrupt collective bargaining throughout

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[5] The deadline for filing of Nilson's brief in opposition to the petition for review was later extended, with the union's concurrence.

the state. Citing RCW 28A.400.200(4), the union urges that "supplemental" contracts are to be bargained under Chapter 41.59 RCW, and it claims that at least some additional compensation is provided for work that is substantially integrated with teaching duties. The union contends that the Examiner's decision also conflicts with precedent outside of Washington. The union argues that certificated employees who hold extracurricular activities jobs have a separate community of interest from persons whose only employment relationship is an extracurricular contract. It urges a statutory interpretation whereby persons who are certificated employees within a school district would be represented for purposes of any extracurricular jobs in that school district as a part of the certificated bargaining unit under Chapter 41.59 RCW. The union would leave other coaches separately represented or unrepresented. Finally, the union takes issue with both the reasoning and terms of the Examiner's remedial order.

Nilson takes issue with the union's factual assertions concerning the processing of the grievance. Nilson argued before the Examiner that the union held itself out as the exclusive bargaining representative for all employees holding extracurricular jobs, and that he was entitled to the protections of the collective bargaining agreement because his salary, hours and working conditions were governed by that contract. Nilson now argues, in the alternative, that all coaches should be placed under Chapter 41.56 RCW, together with other public school employees whose jobs do not require a teaching certificate. Nilson contends that certification is not required for coaching, that more and more coaching positions are being filled by non-certificated employees, that coaches who lack teaching certificates perform the same duties as those who hold teaching certificates, and that all extracurricular employees have a far greater community of interest among themselves than they do with the certificated teachers. In either event, Nilson contends that the union owed him a duty of fair representation here, because of the past negotiations between the union and employer, and

because of alleged collusion between those parties during the hearing in this case. Nilson supports the Examiner's remedial order, and asks that it be affirmed.

The employer did not petition for review, and it has not filed a brief or otherwise taken a position on the Commission's review in this case. It has tendered compliance with the Examiner's order.

DISCUSSION

The Applicable Statutes

The Educational Employment Relations Act, Chapter 41.59 RCW, is a statute of limited jurisdiction. Narrower even than might be inferred from the chapter title, that statute covers **only** the "certificated" employees of common school districts operated pursuant to Title 28A RCW.[6] The term "certificated" refers to the licensure of teachers and other school professional employees by the state Office of the Superintendent of Public Instruction (SPI), under the purview of the State Board of Education and Chapter 28A.410 RCW.

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is a statute of broad jurisdiction, generally applicable to local government employers and employees. Although not universally applicable to all public employees in the state, it clearly covers all employees of common school districts other than those covered by Chapter 41.59 RCW.[7] Chapter 41.56 RCW even covers teachers and other professionals employed by regional educational agencies, including those who provide services within common school districts. Cf. Educational Service District 114, Decision 4361-A

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[6] RCW 41.59.020(4).

[7] RCW 41.56.020.

(PECB, 1994); Kent School District and Educational Service District 121, Decision 2215 (PECB, 1985).

While chapters 41.56 and 41.59 RCW are both patterned generally after the federal National Labor Relations Act (NLRA), as amended by the Labor-Management Relations Act of 1947 (LMRA), and now bear many similarities, the collective bargaining processes for teachers and other school district employees developed separately. In 1965, the certificated employees were given a right to "meet, confer and negotiate" with their employers under Chapter 28A.72 RCW, but that process lacked many of the features of collective bargaining under the federal model.[8] Other school employees waited until Chapter 41.56 RCW was enacted in 1967,[9] but then unfair labor practice, grievance arbitration and union security provisions were soon added to round out a process reflecting the federal model. Chapter 41.59 RCW is a complete replacement for the certificated employees' "meet and confer" system, but it did not take effect until 1976.

Since 1976, both statutes have been administered by the Public Employment Relations Commission, under a charter to be "uniform and impartial ... efficient and expert" in the administration of public sector labor relations.[10] Since at least 1980, the Commission has applied a uniform set of rules, procedures and precedents to both statutes, differing only where specifically required by provisions of the statutes.

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[8] The statute was originally codified as Chapter 28.72 RCW. Although there was reference to an "election", no state administrative agency was designated to determine bargaining units, conduct elections, or certify representatives for what was termed "professional negotiations".

[9] A precursor to Chapter 41.56 RCW was vetoed by Governor Evans in 1965. The veto message was based on a potential intrusion on the civil service system governing state employees.

[10] RCW 41.58.005.

When a question arises as to whether particular school district positions are covered by Chapter 41.59 RCW or Chapter 41.56 RCW, the actual requirements for the particular position have been the determining factor. In College Place School District, Decision 795 (EDUC, 1980), an employee who was nominally hired as an "aide", but who was required to have a teaching certificate and was assigned duties comparable to those of teachers in that school district, was included in a certificated employee bargaining unit under Chapter 41.59 RCW. In Olympia School District, Decision 799 (EDUC, 1980), an employee who happened to hold a teaching certificate and who assumed the appearance of being a teacher, but who had only been hired as and assigned duties comparable to those of an aide, was allocated to an aides bargaining unit under Chapter 41.56 RCW. Thus, the holding of a certificate does not affect the status of a position which does not require educator certification.[11]

The Commission's Jurisdiction

As noted in Washington State Patrol, Decision 2900 (PECB, 1988), one of the primary objects of the NLRA was to protect employees against unlawfully-created bargaining relationships. An employee who feels that he or she has been improperly included in or excluded from a bargaining unit by agreement of an employer and union has a right to seek relief by filing unfair labor practice charges against those parties.

Ron Nilson has invoked the jurisdiction of the Commission to obtain scrutiny of what he claims was an improper bargaining relationship

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[11] The same principles have been applied in determining whether positions qualify for the preferred status of "uniformed personnel" under RCW 41.56.030(7) and the interest arbitration procedures of RCW 41.56.430, et seq. In King County Fire District 39, Decision 2638 (PECB, 1987), firefighters assigned to a dispatching function where they were mixed with non-firefighters were excluded from the definition of "uniformed personnel" for periods when they were performing dispatcher duties.

affecting his employment as a coach with the Castle Rock School District. If the Commission finds nothing awry, these complaints must be dismissed and the union and employer will be permitted to continue their relationship in its traditional scope. On the other hand, if the Commission finds that the union and employer have maintained an improper bargaining relationship, they must be found guilty of unfair labor practices under the counterparts to Sections 8(a)(1), 8(a)(2) and 8(b)(1) of the LMRA,[12] and must be ordered to rectify the situation for Nilson and future employees.

The "Certificated Employee" / "Public Employee" Issue

There may have been a time when all extracurricular activities jobs in school districts were performed by persons who were regularly employed as certificated employees within the same school district. Even then, the SPI rules on "salary compliance" in effect prior to 1990 drew a clear distinction between the salaries for teaching employment and extracurricular activities jobs:

> WAC 392-126-225 DEFINITION--CERTIFICATED STAFF SALARIES. As used in this chapter, "certificated staff salaries" means those moneys which a school district has agreed to pay all certificated staff who are employed as of October 1 of each school year under terms of basic or regular employment contracts between the district and certificated staff, **exclusive of those moneys which are to be paid for a certificated employee's** additional days or duties including summer school and **extra-curricular duties** on supplemental employment contracts, ... [Emphasis by **bold** supplied.]

Understanding of the historical situation is aided by reference to a still-effective SPI rule defining "certificated employee" as:

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[12] RCW 41.56.140(1) and (2), and RCW 41.59.140(1)(a) and (b), parallel Sections 8(a)(1) and (2) of the LMRA. RCW 41.56.150(1) and RCW 41.59.140(2)(a) parallel Section 8(b)(1) of the LMRA.

> [A] person who **holds a professional education certificate** issued by the superintendent of public instruction **and** who is employed by a school district **in a position for which such certificate is required by statute, rule of the state board of education, or written policy or practice of the employing school district.**
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> [WAC 392-121-200, emphasis by **bold** supplied.]

Nothing is cited or found which indicates that any current statute or State Board of Education rule requires educator certification for coaching positions.

The Washington Interscholastic Activities Association (WIAA) at one time required that all coaches be certificated employees,[13] but the record establishes that SPI now takes the position that educator certification is **not required** for employment as a coach of an interscholastic athletics team. We accord deference to the view expressed by SPI officials, inasmuch as that agency has responsi-

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[13] Title 28A RCW deals with interschool athletics and other extracurricular activities for students. RCW 28A.600.200 now provides:

> Each school district board of directors is hereby granted and shall exercise the authority to control, supervise and regulate the conduct of interschool athletic activities and other interschool extracurricular activities of an athletic, cultural, social or recreational nature for students of the district. A board of directors may delegate control, supervision and regulation of any such activity to the Washington Interscholastic Activities Association or any other voluntary nonprofit entity and compensate such entity for services provided, subject to the following conditions:
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> (1) The voluntary nonprofit entity shall submit an annual report to the state board of education ... at such time and in such detail as the state board shall establish by rule;
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> ...
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> (3) Any rules and policies applied by the voluntary nonprofit entity ... shall be subject to the annual review and approval of the state board of education at such times as it shall establish; ... [1990 c 33 Sec. 502; 1975-76 2nd ex.s. c 32 Sec. 1.]

That provision is now codified in a separate chapter dealing with students. It originated as RCW 28A.58.125, within a chapter delegating authority (including salary setting authority) to school districts.

bility for administering the statutes and rules concerning educator certification.

This employer and union may well have begun bargaining for the salaries and working conditions of extracurricular activities jobs in a context where certification was required. Even if not imposed by higher authority, the existence of local certification requirements or practices would be a basis for including extracurricular activities jobs in collective bargaining relationships under Chapter 41.59 RCW. But those are not the facts before us. For reasons which need not be explored or determined here, employment as a certificated employee is no longer an industry-wide prerequisite to holding certain extracurricular activities jobs.

Nilson's employment as head basketball coach demonstrates that at least some extracurricular activities jobs at Castle Rock are being filled by persons outside of the employer's certificated workforce. The employer and union nevertheless continued to bargain the salaries and working conditions for all extracurricular activities jobs, regardless of their requisite qualifications or who filled them. Their actions led Nilson to believe that he was represented by the union as part of the certificated employee bargaining unit created under RCW 41.59.080(1), until he attempted to invoke the job security protections of the collective bargaining agreement through its grievance procedure.

We have considered four alternative formats for dealing with the wages, hours and other terms and conditions of employment of persons holding extracurricular activities jobs in the Castle Rock School District. None of the suggested approaches avoids all problems. Our task has been to decide which format is the most consistent with the statutory framework and creates the fewest work jurisdiction conflicts. Those formats are set forth under the subheadings which follow:

The "Mixed" Format -

The format which Nilson initially sought to invoke would have the wages, hours and working conditions for all extracurricular activities jobs bargained for by this employer and union under Chapter 41.59 RCW, regardless of whether educator certification is actually required. This format would allow the potential inclusion in one bargaining unit of: (1) individuals who only hold certificated positions with the school district; (2) individuals who hold certificated positions with the school district and also perform extracurricular tasks for that school district; (3) individuals who hold a teaching certificate but perform only extracurricular tasks for the school district; and (4) individuals who are not certificated at all but who perform extracurricular tasks for the school district.

Whether viewed from a state-wide or local perspective, the absence of a "certification" requirement raises serious doubt as to whether many extracurricular activities jobs traditionally bargained for by this employer and union properly fall under Chapter 41.59 RCW. For the purposes of Chapter 41.59 RCW, the term "employee" or "educational employee" is defined to mean "any certificated employee of a school district". RCW 41.59.020(4). The statute governing the qualifications of certificated employees pointedly states:

> RCW 28A.405.010 QUALIFICATIONS. No person shall be accounted as a qualified teacher within the meaning of the school law who is not the holder of a valid teacher's certificate or permit issued by lawful authority of this state.

If employees are being hired for extracurricular activities jobs without any requirement for certification under the school laws, it would be an anomaly for us to treat those persons as "certificated employees" under the parallel provisions of Chapter 41.59 RCW. Even in the case of individuals who hold teaching certificates, it would be a departure from established precedent, as noted above,

for the Commission to view Chapter 41.59 RCW as applying to work for which no certification is required.[14] We concur with the Examiner that it is not appropriate to extend the coverage of Chapter 41.59 RCW to work and employees that do not meet the "certificated" qualification for coverage under that statute.

Coverage under a separate statute protects school district certificated employees from being commingled against their will with other employees. The one exception in this regard is in an obscure section in Chapter 41.59 RCW which has not been cited or relied upon by any party. It provides:

> RCW 41.59.180 EMPLOYEES IN SPECIALIZED JOB CATEGORY MAY BE EXCLUDED, WHEN. Notwithstanding the definition of "employee" in RCW 41.59.020, the commission may exclude from the coverage of this chapter any specialized job category of an employer where a majority of the persons employed in that job category consists of noncertificated employees. At such time as a majority of such employees are certificated, the job category may be considered an appropriate unit under this chapter.

The intent of that section is not clear, and our own research discloses only one ambiguous reference to it in the legislative archives. We are not aware of any Commission or court decision interpreting it, and leave application of RCW 41.59.180 for some potential future case.

An employer and union cannot create coverage for non-certificated work under Chapter 41.59 RCW by agreement, any more than this Commission can extend the coverage of that statute by a rule or a decision in an adjudicative proceeding. One of the burdens of

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[14] Thus, the fact that Nilson held a teaching certificate for his unrelated employment with another school district has no effect on his employment with the Castle Rock School District.

having a separate statute is that certificated employees **cannot** be combined with other groups, even if they would desire to do so. We therefore reject the "mixed" bargaining format.

The "Not Employees" Format -

One of the alternatives suggested by the union is that persons who hold extracurricular activities jobs, but not teaching jobs, are not entitled to any collective bargaining rights. From the limited information available, it appears that none of the employer's extracurricular activities jobs constitute full-time employment for any individual. Precedent developed by the National Labor Relations Board and by this agency establishes that "casual" employees will be excluded from bargaining rights, due to their lacking a community of interest with other employees and their lack of an ongoing employment relationship with the employer. We find those precedents inapplicable to the situation before us.

The Commission has been reluctant to apply "casual" status to persons who have a history of part-time work assignments with a particular employer and an apparent potential for ongoing employment of the same nature. Columbia School District, et al., Decision 1189-A (EDUC, 1982); Mount Vernon School District, Decision 2273-A (PECB, 1986). The work at issue here recurs for fixed periods on a seasonal basis from year to year, and involves substantial work hours. The employees are paid substantial compensation for their efforts, with Nilson receiving nearly $3000 for his work as head basketball coach in the 1991-92 school year. The degree of control exercised by the employer under RCW 28A.600-.200 precludes his categorization as an independent contractor. We decline to exclude work that is so regular and substantial from all bargaining rights.

The "Bifurcated Bargaining" Format -

The union's other proposed format would have it continue to bargain the coaching salaries for persons who happen to hold "certificated"

positions within the school district, while leaving Nilson and others similarly situated to go their own way. This format is a deviation from traditional bargaining relationships, and we reject it on multiple grounds.

In a series of decisions over nearly the entire history of this agency, the Commission and its staff have dealt with difficult problems relating to work jurisdiction claims closely tied to the descriptions of appropriate bargaining units. The first of those cases, South Kitsap School District, Decision 472 (PECB, 1978), established the principle that an employer must give notice and provide opportunity for collective bargaining before transferring work historically performed within one bargaining unit to employees outside of that bargaining unit.[15] Hence, an employer and all unions representing its employees need to pay close attention to the work jurisdiction borderlines between bargaining units.[16]

In a subsequent case, South Kitsap School District, Decision 1541 (PECB, 1983), a bargaining unit structure which bifurcated that employer's office-clerical workforce was found inappropriate, due to conflicting work jurisdiction claims which had arisen (and were likely to arise on an ongoing basis) in such an environment. Other unit configurations rejected on the basis of historical or potential fragmentation of work jurisdiction include City of Seattle, Decision 781 (PECB, 1979) and Skagit County, Decision 3828

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[15] The situation in South Kitsap has come to be called "skimming" of unit work. The interests and legal principles in such a situation are fundamentally the same as when bargaining unit work is "contracted out" to employees of another employer. See, also, Fibreboard Paper Products, 379 U.S. 203 (1964).

[16] There may have been a potential for unfair labor practice charges when the certification requirement was first eliminated for coaches in the Castle Rock School District and/or when extracurricular activities jobs were first assigned to non-certificated employees, but those are not the issues before us in this case.

(PECB, 1991), where separate units of part-time employees were found inappropriate because of conflicts with bargaining units of full-time employees performing similar work.

The union's proposal to combine all of one body of work (i.e., that for which educator certification is required under RCW 28A.405.010 and WAC 392-121-200, supra) with only part of the second body of work (i.e., extracurricular activities jobs which do not require educator certification) is based on the identities of the current personnel. It suffers from artificially dividing that second body of work. Moreover, a circumstance present here that was not operative in Seattle or Skagit County, supra, is that the union's proposed format would divide bargaining for that second body of work between chapters 41.56 and 41.59 RCW.

For individuals who would seek employment in an extracurricular activities job not requiring educator certification, the effect of the union's proposed formats would be to deprive them of all collective bargaining rights, or to require that they organize separate bargaining units in which their bargaining power would almost certainly be compromised. There would be an ongoing potential for claims of employer "favoritism" toward one or the other of the competing units, and there would be an ongoing potential for "work jurisdiction" disputes at the borderline between the units.

For the employer, the effect of the union's bifurcated format would be to have two different employment relationships within the ranks of its extracurricular activities employees, with the possibility of having two separate bargaining units in competition for that body of work. Constant vigilance would need to exist about the work jurisdiction claims of the two bargaining units, along with complications in connection with the administration of hiring, transfer, promotion, demotion, layoff, recall, discipline and discharge of such employees.

The Commission has considered that portion of RCW 28A.400.200 which reads:

> (4) Salaries and benefits for certificated instructional staff may exceed the limitations in subsection (3) of this section only by separate contract for additional time, additional responsibilities, or incentives. Supplemental contracts shall not cause the state to incur any present or future funding obligation. Supplemental contracts shall be subject to the collective bargaining provisions of chapter 41.59 RCW and the provisions of RCW 28A.405.240, shall not exceed one year, and if not renewed shall not constitute adverse change in accordance with RCW 28A.405-.300 through 28A.405.380. No district may enter into a supplemental contract under this subsection for the provision of services which are a part of the basic education program required by Article IX, section 3 of the state Constitution.

We find the union's reliance on that provision to be misplaced. It deals with supplemental contracts for additional time, responsibility or incentive (TRI) as certificated employees, and we understand its history to relate to state control of teacher salaries. In 1981, the Legislature amended both the school laws and Chapter 41.59 RCW, to limit the bargaining of "wages",[17] but we find no indication that those limits ever encompassed the pay for extracurricular activities jobs of the type at issue in this proceeding.[18] The language of RCW 28A.400.200 originated in legislation which made an exception to the salary limitations imposed by House Bill 166. While the TRI concept may affect

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[17] 1981 c 16 originated as House Bill 166. Part of that legislation was RCW 41.59.935, which states:

> Nothing in this chapter shall be construed to grant employers or employees the right to reach agreements regarding salary or compensation increases in excess of those authorized in accordance with RCW 28A.150.410 and RCW 28A.400.200.

[18] See, repealed WAC 392-126-226, quoted at page 8, above.

certificated employees' extracurricular activities jobs which require educator certification, we conclude that the Legislature did not intend RCW 28A.400.200 to enlarge the definition of "employee" under Chapter 41.59 RCW or to otherwise guarantee that jobs not requiring educator certification would be bargained for under the Educational Employment Relations Act.

The description of a bargaining unit operates on an ongoing basis to determine its work jurisdiction, so unit descriptions based on bodies of work are generally preferred. The Commission has a general responsibility under RCW 41.58.020 to prevent or minimize labor disputes. We find a bifurcated arrangement would be disruptive of stable labor relations, and we reject it on that basis.

The "Public Employees" Format -

In the alternative to coverage under the certificated employees' bargaining process and contract, Nilson supports giving coaches bargaining rights under the statute applicable to other school district employees. Between them, chapters 41.56 and 41.59 RCW establish a seamless set of bargaining rights and procedures for employees of common school districts, such that Chapter 41.56 RCW automatically covers any employees who are not "certificated employees" under the coverage of Chapter 41.59 RCW. Thus, employees working on a regular part-time basis in extracurricular activities jobs not requiring educator certification would be entitled to organize for the purposes of collective bargaining under Chapter 41.56 RCW.[19]

We must deal with the current situation as we find it. Even if teaching may have been a prerequisite for coaching in the past, the evidence here indicates that teaching school and extracurricular

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[19] As with the overall class of substitute employees under Columbia and Mt. Vernon, supra, employees performing the affected work only sporadically might be excluded as "casual".

activities jobs are now separate employments with different minimum qualifications. A complete separation of the jobs not requiring certification from the bargaining process under Chapter 41.59 RCW has a number of theoretical and practical advantages:

* The effect would be to formalize what has apparently been a growing separation between two bodies of work within the employer's overall operations.

* All employees performing extracurricular jobs that do not require educator certification have a community of interest involving that separate body of work, and could have equal voice and vote under Chapter 41.56 RCW on any question concerning representation which might arise among them.

* This format would avoid problems arising from competing work jurisdiction claims of two or more bargaining units.

* While individual employees who choose to "moonlight" in extracurricular activities jobs could find themselves in two separate bargaining units represented by two separate organizations,[20] such a voluntary "dual status employee" situation does not undermine the propriety of either bargaining unit.

We do not share the union's alarm about an effect of this decision on "all supplemental contracts". This case concerns extracurricular activities jobs for which educator certification is not required. We recognize that certificated employees may receive compensation above and beyond the teacher salary schedule for some tasks that are directly related to their functions as classroom teacher. For example, a premium paid to a music teacher for conducting a pep band performance at a basketball game could be quite different from Nilson's status as basketball coach at the same game. Where there is a state or local certification require-

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[20] This could be a teacher working as a coach, a school classified employee or administrator working as a coach, or a coach who has regular employment elsewhere.

ment, the extra work properly would remain within the work jurisdiction of the certificated employee bargaining unit under Chapter 41.59 RCW.

We also find no merit in the union's concern about a potential disruption of bargaining on a state-wide basis. Bargaining units are not fixed and immutable. The Commission has long recognized the propriety of unit clarifications upon a change of circumstances. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). Any change of bargaining relationships resulting from this case would be attributable to the underlying change of practice concerning certification requirements for the affected work, rather than to any change of policy by this Commission.

For the reasons indicated, we conclude that bargaining under Chapter 41.56 RCW is the most viable format for employees performing extracurricular activities jobs not requiring educator certification. This format results in two different bargaining units which perform extracurricular activities jobs, but the same jobs will not be split between those units.

Remedy

The employer and union violated Ron Nilson's rights by purporting to maintain a collective bargaining relationship under Chapter 41.59 RCW with respect to jobs for which educator certification is not required. The remedies for such a violation must be designed to restore the affected employees to the status they would have enjoyed in the absence of a violation, and to preclude the employer and union from maintaining an improper relationship in the future.

Separation of Units -
The Examiner did not detail a procedure for the employer and union to absolve themselves of their past misconduct or to clear the air

for the future. This case concerns only tasks for which educator certification is not required by either SPI or local practice within the Castle Rock School District. The record is clear that the head basketball job falls into that category, and it is inferred that other athletic coaching jobs could fall into that category. The same may be true for other jobs traditionally bargained for by the employer and union, but the record now before us is insufficient to make a precise determination on all potentially affected positions. Accordingly, we are sending this problem back to the parties with directions as to how it is to be resolved.[21] The Commission anticipates that the procedure outlined here will fully restore the rights of all affected employees.[22]

The employer and union will be required to sort out the situation within a specified time, and to post notices advising the employees of their result. If the employer and union are unable to agree, one or both of those parties will need to file a unit clarification petition with the Commission, to obtain a ruling on the unit allocation(s) remaining in dispute. Any employee dissatisfied with the bargaining unit assignment of their position will be entitled to file an unfair labor practice complaint, subject to the six month statute of limitations following the posting of the notice.[23]

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[21] This should be a serious matter for the parties, inasmuch as no duty to bargain exists and no contract bar is effective in an inappropriate bargaining unit. South Kitsap School District, Decision 1541, supra.

[22] We recognize that other school districts in the state and the organizations representing their employees could have unwittingly committed similar violations. We are thus considering the adoption of a rule which will require a division of extracurricular positions in all school districts, and an exclusion from Chapter 41.59 RCW of jobs which do not require certification as an educator.

[23] This does not limit the rights of employees who question any future inclusion of positions in the bargaining unit under Chapter 41.59 RCW. Such employees could file an unfair labor practice complaint within six months after the act or event giving rise to the dispute.

Under the bargaining format adopted by the Commission, a separation of positions from the historical bargaining relationship between the employer and union will clear the way for the exercise of collective bargaining rights by the affected employees. To avoid any prejudice to those rights by anticipatory moves, the Commission will not entertain any actions (e.g., representation petitions, authorization cards or voluntary recognition agreements) taken on or prior to the date the joint notice is posted.

Make Whole Relief -

We understand the Examiner's desire to provide some direct remedy to Nilson, but we prefer to start from a "make whole" approach rather than the "equitable estoppel" basis used by the Examiner. We draw a parallel to the remedies customarily ordered where an employer makes unilateral changes of employee wages, hours or working conditions during the pendency of a representation petition.

Nilson and all others similarly situated have suffered prejudice to their collective bargaining rights, because of the union and employer actions which appeared to cover them under the certificated employees' contract. Those actions forestalled the exercise of a right to collective bargaining under Chapter 41.56 RCW. This latter right will now be put off for an additional period, because of the separation process described above.

When employees take steps to organize, their wages, hours and working conditions are normally frozen at the status quo in effect on the date the petition is filed. Given the circumstances of this case, where steps to organize were not taken because of unfair labor practices by the union and employer, we find the affected employees should be made whole through maintenance of the status quo until they have a chance to exercise their bargaining rights under the correct statute. The conditions to be maintained are those marked by individual contracts and employer policies in

effect on May 20, 1992, (i.e., the date that Nilson sought to invoke the contractual grievance procedure), together with the collective bargaining agreements in effect at and since that time.[24] The employer will be obligated to maintain the foregoing wages, hours and working conditions until the separation notice is posted under our order, and for at least 30 days thereafter.[25]

Nilson will be entitled to exercise his rights under the status quo described in the preceding paragraph. Those rights included the right to process a grievance protesting his removal from the head basketball coach position, under a process comparable to that set forth in Article III, 2E of the collective bargaining agreement.

ORDER

1. The findings of fact issued by Examiner William A. Lang in these matters are affirmed and adopted as the findings of fact of the Commission, with the exception of paragraph 6, which is amended to read as follows:

> 6. On June 5, 1992, Nilson filed a grievance challenging the nonrenewal. The Castle Rock School District expressed concern that Nilson was not entitled to the protection of the collective bargaining agreement because he was not a member of the bargaining unit.

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[24] Absent evidence to the contrary, it is reasonable to assume that the wages, hours and working conditions that the employer would have unilaterally applied to the affected positions would have paralleled the terms of the collective bargaining agreement(s).

[25] This 30-day period replicates the contract bar "window" period which the Legislature deemed sufficient for organizing in RCW 41.56.070.

2. The conclusions of law issued by Examiner William A. Lang in these matters are affirmed and adopted as the conclusions of law of the Commission, with the exception of paragraph 2, which is amended to read as follows:

> 2. The bargaining unit historically represented by the Castle Rock Education Association as described in the foregoing findings of fact is not an appropriate bargaining unit within the meaning of RCW 41.59.080, to the extent that it includes extracurricular positions for which certification as an educator is not required by the Office of the Superintendent of Public Instruction or local practice within the Castle Rock School District.

3. The orders issued by Examiner William A. Lang in these matters are VACATED.

4. The Castle Rock Education Association, the Castle Rock School District, and their respective officers and agents, shall immediately take the following steps to remedy their unfair labor practices:

(a) CEASE AND DESIST from:

(1) Maintaining or purporting to maintain any collective bargaining relationship under Chapter 41.59 RCW with respect to employees performing any work for which certification as an educator is not required by the Office of the Superintendent of Public Instruction or local practice.

(2) In any other manner interfering with, restraining or coercing employees in the exercise of their

collective bargaining rights secured by the laws of the state of Washington.

(b) TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.59 RCW:

(1) Immediately meet and review all tasks for which extra compensation is provided under their collective bargaining agreement, to distinguish between:

(i) jobs where there is a requirement of educator certification under Chapter 28A.410 RCW or local practice within the Castle Rock School District, and

(ii) jobs where certification as an educator is not required under Chapter 28A.410 RCW or local practice within the Castle Rock School District.

(2) For those positions identified in subparagraph (ii) of the preceding paragraph, restore the wages, hours and working conditions which were in effect in the Castle Rock School District as of May 20, 1992, as modified by the collective bargaining agreements in effect at and since that time. Said conditions shall remain in effect for at least 30 days following the posting of the notice required in paragraph (5), below.

(3) Process the grievance of Ron Nilson in accordance with the restored working conditions, which include an appeal process comparable to that described in Article III, 2E of the collective bargaining agreement, except that Nilson shall be entitled to appoint the panel member that would have been appointed by the union under the contract.

(4) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix A". Such notices shall be duly signed by authorized representatives of the above-named respondents, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondents to ensure that such notices are not removed, altered, defaced, or covered by other material.

(5) Within 60 days following the date of this order, post notice to all employees of the Castle Rock School District in the format specified in the attached sample marked "Appendix B", identifying all extra compensation tasks which they propose to retain in their bargaining relationship under Chapter 41.59 RCW, and further identifying all extra compensation tasks which they propose to eliminate from their bargaining relationship under Chapter 41.59 RCW. Such notices shall be posted in conspicuous places on the employer's premises where notices to all employees are usually posted, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondents to ensure that such notices are not removed, altered, defaced, or covered by other material.

(6) As to extracurricular positions to be excluded from the bargaining relationship historically maintained by the Castle Rock School District and the Castle Rock Education Association under Chapter 41.59 RCW, any petition for investigation of a question concerning representation, any bargaining authorization card, or any voluntary recognition agreement

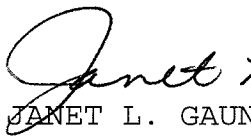
that is made or filed prior to or on the date of posting of the notice required by the preceding paragraph of this order shall be deemed to have been prejudiced by the employer and union conduct found unlawful in this proceeding, and shall be deemed void.

(7) Notify the above-named complainant, in writing, within 60 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with signed copies of the notices required by this order.

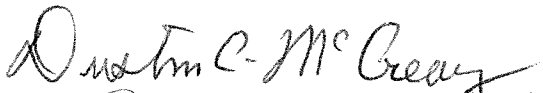
(8) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 60 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with signed copies of the notices required by this order.

Issued at Olympia, Washington, the 10th day of January, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JANET L. GAUNT, Chairperson



DUSTIN C. McCREARY, Commissioner

SAM KINVILLE, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE WILL NOT maintain or purport to maintain a bargaining relationship under the Educational Employment Relations Act, Chapter 41.59 RCW, with respect to employees performing work for which educator certification is not required by the Office of the Superintendent of Public Instruction or by local practice in effect within the Castle Rock School District.

WE WILL NOT, in any other manner, interfere with, restrain or coerce employees in the exercise of their collective bargaining rights secured by the laws of the state of Washington.

WE WILL restore and maintain the wages, hours and working conditions for employees performing work for which educator certification is not required, as marked by the practices in effect when Ron Nilson filed his grievance as subsequently modified by collective bargaining agreements.

WE WILL process the grievance of Ron Nilson under the wages, hours and working conditions in effect for athletics coaches as of the date on which Nilson sought to invoke the contractual grievance procedure.

WE WILL immediately meet to review all tasks for which extra compensation has been provided under our collective bargaining agreement, to distinguish between:

(i) jobs where certification as an educator is required, under Chapter 28A.410 RCW or local practice in effect within the Castle Rock School District, and

(ii) jobs where certification as an educator is not required under Chapter 28A.410 RCW or local practice in effect within the Castle Rock School District.

WE WILL, within 60 days following the date of the Commission's order, post notice to inform all employees of the positions which we propose to retain in and exclude from our bargaining relationship under Chapter 41.59 RCW, in order to clear the air prior to any exercise of collective bargaining rights by employees holding positions to be excluded from our bargaining relationship.

As to extracurricular positions to be excluded from our bargaining relationship, the Commission has directed that, in order to be given effect, any representation petition, bargaining authorization card or voluntary recognition agreement must be signed after the date on which notice is posted pursuant to the preceding paragraph.

DATE POSTED: _____

CASTLE ROCK SCHOOL DISTRICT

BY: _____
Authorized Representative

CASTLE ROCK EDUCATION ASSOCIATION

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (206) 753-3444.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

1. We believe the following extracurricular and/or supplemental positions require certification under Chapter 28A.410 RCW or local practice in effect within the Castle Rock School District, and **WE PROPOSE TO RETAIN THESE POSITIONS WITHIN OUR BARGAINING RELATIONSHIP UNDER CHAPTER 41.59 RCW:**

[Add space as needed to list positions individually, by title]

2. We acknowledge that the following extracurricular and/or supplemental positions traditionally bargained for as part of our bargaining relationship DO NOT require certification as an educator under Chapter 28A.410 RCW or local practice within the Castle Rock School District, and **WE PROPOSE TO EXCLUDE THESE POSITIONS FROM OUR BARGAINING RELATIONSHIP UNDER CHAPTER 41.59 RCW:**

[Add space as needed to list positions individually, by title]

3. Any employee who occupies a position listed in paragraphs 1 or 2, above, and who objects to the allocation set forth in this notice, has a right to file a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC.

4. Employees holding positions listed in paragraph 2, above, may have collective bargaining rights under Chapter 41.56 RCW. It is the purpose of this notice to "clear the air" prior to any exercise of those rights. The Commission has ruled that any petition for investigation of a question concerning representation, any bargaining authorization card or any voluntary recognition agreement that is signed prior to or on the date this notice is posted will be deemed to have been prejudiced by our unlawful conduct, and will be void.

DATE POSTED: _____

CASTLE ROCK SCHOOL DISTRICT

BY: _____
Authorized Representative

CASTLE ROCK EDUCATION ASSOCIATION

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

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