STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	
WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, AFSCME, AFL-CIO	CASE 8100-C-89-447
	DECISION 3828 - PECB
For clarification of an existing bargaining unit of employees of:	
SKAGIT COUNTY	ORDER CLARIFYING BARGAINING UNIT

Pamela G. Bradburn, Attorney at Law, appeared on behalf of the union.

Heller, Ehrman, White & McAuliffe, by Bruce L. Schroeder, Attorney at Law, appeared on behalf of the employer.

On July 26, 1989, the Washington State Council of County and City Employees, AFSCME, AFL-CIO (WSCCCE), filed a petition for clarification of an existing bargaining unit with the Public Employment Relations Commission, relating to a bargaining unit of Skagit County public works employees represented by the union. After a delay of the proceedings at the request of the parties, they waived an evidentiary hearing, and submitted the matter for decision on the basis of an agreed statement of facts filed on February 7, 1991. Briefs were submitted on February 15, 1991.

BACKGROUND

The WSCCCE is the exclusive bargaining representative of a bargaining unit of "full-time" public works employees of Skagit County. The bargaining relationship originated from a voluntary recognition during or about 1959, prior to the enactment of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, in 1967.

The bargaining unit presently consists of approximately 96 employees who meet the definition of "full-time" contained in the parties' contract, of which 71 are "permanent" employees and 25 are "temporary" employees[1]

The employer has divided its geographic area into three districts, each of which has a public works crew. A fourth crew performs "special operations" work such as ditching and diking on a county-wide basis. Each of the crews is headed by a foreman who is not a member of the bargaining unit.

To insure the safety of both workers and motorists, the employer assigns employees to control traffic moving past road improvement projects. Such employees hold flags or traffic control signs, move barriers, and direct the traffic and the construction vehicles. On rare occasions, they may drive pilot vehicles.

In approximately 1978, the employer made a policy decision to establish two-person flagging crews. Existing "full-time" public works employees were assigned to perform such duties, and the parties' collective bargaining agreements since that time have provided for a pay rate for a "flagger" classification. Shortly after the policy was adopted, however, the employer imposed a directive to cut back personnel through attrition, thus affecting the implementation of the new flag crew policy.

In approximately 1980 or 1981, the remaining "full-time" employees indicated to both the employer and the union that they did not want to do the flagging work. As a result of negotiations concerning the subject at that time, the flagging work formerly performed by bargaining unit "full-time" employees was transferred to new part-

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[1] The contract defines "full-time" employees as those who regularly work 32 or more hours per week. Temporary employees are defined as employees who work no longer than five continuous months.

time employees working under the title of "flagger". The seven or eight new employees worked on-call. They did not work the 32 hours per week required for permanent status, and were not included in the bargaining unit. No issue arose in contract negotiations as to their unit placement, and the parties have never negotiated wages, benefits or any other matters for the on-call "flagger" employees.

In April of 1988, the parties signed a collective bargaining agreement covering the period from January 1, 1988 through December 31, 1990. That contract made provision for a "flagperson" class with typical duties listed as "seasonal part-time flagman", but the on-call "flagger" employees were not covered by that contract.

The Onset of This Dispute

In 1989, the union approached the employer with signed authorization cards, requesting voluntary recognition as exclusive bargaining representative of the on-call "flagger" employees. The union proposed at the same time that the employer establish 12 full-time flagger positions. The employer responded that some full-time flaggers might be acceptable if details could be worked out, but that 12 was an excessive number. The union then countered with a suggestion of six full-time flagger positions and two to four part-time positions. At a subsequent meeting, the employer announced that the Board of Commissioners had rejected the union's proposal. The union then filed this unit clarification petition.

Counsel for the employer responded to the petition in a letter filed on August 21, 1989, contending that the petition was untimely under the policy enunciated in Toppenish School District, Decision 1143-A (PECB, 1981).[2] Counsel for the union offered alleged distinctions from the Toppenish situation in a letter filed on

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[2] No reference was made to WAC 391-35-020, which was adopted in 1988 to codify the Toppenish policy.

September 19, 1989, and therein suggested an election for a separate bargaining unit of flaggers as an alternative to pursuit of an "accretion" to the existing bargaining unit. Next, the extent of the existing bargaining unit was disputed by counsel for the employer in a letter dated September 25, 1989. Arguments relying on the Toppenish decision were reiterated as a basis for asking dismissal of this unit clarification petition, but there was no explicit response to the union's suggestion of an election for a separate bargaining unit of flaggers.

The case was assigned to a Hearing Officer in April of 1990. In subsequent telephone conversations and correspondence, the Hearing Officer was advised that the parties would submit the dispute on stipulated facts. Stipulations were not forthcoming, however, and the Hearing Officer issued a notice setting February 7, 1991 as the date for a hearing in the matter. On the date set for a hearing, the parties delivered their stipulated facts.[3]

Hiring Procedures

Job notices for bargaining unit positions within the Public Works Department are posted and circulated throughout the county, and applications are screened by department supervisors. The final hiring decision rests with the superintendent of the operations division. Each person hired is assigned an employee number which is retained throughout the duration of their employment with Skagit County. Such employees receive pay and benefits as prescribed in the collective bargaining agreement. The foremen evaluate the work of the crew members who are included in the bargaining unit, subject to oversight by the superintendent.

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[3] In the meantime, the parties have negotiated a successor contract with a duration of January 1, 1991 through December 31, 1993.

In contrast to the procedure for hiring full-time employees, no formalized procedures are followed for hiring part-time flaggers. A need for flaggers is generally made known by word of mouth, and persons who have an interest in such work leave a copy of their flagger's certification and license with the district shop. There is no screening process, as the shop foremen merely place the names of such persons on their flagger lists. An employment confirmation letter is sent to a new "flagger", but that letter is different from the letter distributed to bargaining unit employees. A new "flagger" is assigned an employee number which is retained for as long as they work for Skagit County, but such employees are paid according to the Skagit County Classification and Salary Plan and receive only those benefits which are statutorily mandated. There is no formal evaluation of flagger's work performance by a supervisor. If the work is deemed unacceptable, the flagger's name is simply removed from the list.

The Utilization of "Flaggers"

The amount and assignment of flagging work varies significantly from time to time over course of the year:

Bargaining unit employees are sometimes assigned to perform flagging duties in cases of emergency, or for projects of short duration. Such flagging assignments may amount to between 5% and 10% of the work time for employees in the bargaining unit class titled "maintenance technician I", but amounts to less than 1% of the work time for all other bargaining unit employees.

During the summer months, particularly since 1988, the employer has hired a substantial number of seasonal "maintenance aides" who are assigned to perform flagging duties. These are temporary employees as defined by the collective bargaining agreement. They work at least 32 hours per week for up to five consecutive months, generally during school vacations. Their compensation is set forth in the collective bargaining agreement, and they pay a union service fee.

During the remainder of the year, the employees at issue in this proceeding perform the bulk of the flagging duties. The disputed employees apparently performed flagging tasks during the summer months in the past, and their total work opportunities have gone down because of the recent hiring of the student help during the summer months.[4] When projects call for use of part-time flaggers, road supervisors go down the lists on file and attempt to reach the flaggers at their homes. An attempt is made to rotate available work among the names on the list, but differences in availability may affect the amount of hours of work which an individual flagger may receive. Although there are between 12 and 16 employees on the employer's "flagger" lists in any given year, no more than six to eight of them work regularly. The employer stops calling a part-time flagger when the employee approaches 32 hours in one week or 90 hours in one month, regardless of whether the employee is available for additional work.

POSITIONS OF THE PARTIES

The WSCCCE alleges the part-time, on-call "flagger" employees should be accreted to the existing bargaining unit within the Public Works Department. Believing the disputed employees to have interaction, common supervision, and some functional/physical/ administrative integration with the existing bargaining unit, the union does not now see the "flagger" employees as constituting an appropriate separate bargaining unit. The WSCCCE asserts that the disputed employees desire to be represented, and that they should be permitted to acquire representation by accretion to the existing bargaining unit. The union contends that its petition was timely, that it does not undermine the integrity of the parties' contract, and that it follows a sufficient change in circumstances.

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[4] Prior to 1989, part-time flaggers assisted the crew by washing down equipment, but that is not current practice.

The employer argues that accretion of the part-time "flagger" employees to the existing bargaining unit would deprive employees of their right to vote on union representation. The employer further argues that the part-time "flagger" positions have existed outside of the bargaining unit for more than 10 years, by agreement with the union, and that there has been no recent change in circumstances affecting them. The employer now argues that the disputed flagger positions could stand alone as a separate bargaining unit, and that the possibility of such separate status precludes the accretion of the disputed positions to the existing unit.

DISCUSSION

The Authority to Determine Bargaining Units

The determination and modification of bargaining units is a function delegated by the Legislature to the Public Employment Relations Commission. RCW 41.56.060. Parties can negotiate about bargaining units, but they are not entitled to take a unit determination issue to "impasse". Spokane School District, Decision 718 (EDUC, 1979). Where the parties do agree on a unit determination issue, such agreement does not indicate that the unit is or will continue to be appropriate. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). The same case stated the general rule that, absent a change of circumstances warranting a change of the unit status of individuals or classifications, the unit status of those previously included in or excluded from an "appropriate" bargaining unit by agreement of the parties or by certification will not be disturbed.

Beginning with one of its very earliest decisions in the unit determination area, the Commission has found it necessary, from

time to time, to reject agreements made by parties on unit determination matters. Kent School District, Decision 127 (PECB, 1976). See, also, City of Seattle, Decision 781 (PECB, 1979), where an agreed-upon barrier to bargaining unit membership was rejected; South Kitsap School District, Decision 1541 (PECB, 1983), where two units that split up an employer's clerical workforce in a manner destined to cause ongoing work jurisdiction disputes were both found inappropriate; and Pasco School District, Decision 3217 (PECB, 1989), where an agreed accretion of a new group to an existing bargaining unit was found insufficient to invoke "severance" criteria in the face of a timely representation petition.

What is clear about the situation presented by the parties in the instant case is that a group of public employees having no history of bargaining now seek to exercise their statutory right under RCW 41.56.040 to organize for the purposes of collective bargaining. What remains to be determined is the proper mechanism by which to implement those statutory rights.

Duties, Skills and Working Conditions

The union proposes an accretion of the "flagger" employees to the existing bargaining unit which it represents. Although an exception to the usual rule of conducting a representation election or cross-check under Chapter 391-25 WAC, accretions have been ordered where employees in a newly created classification possess duties, skills and working conditions similar to those of bargaining unit employees, and the creation of a separate unit would lead to undue fragmentation. Oak Harbor School District, Decision 1319 (PECB, 1981). A necessary inquiry in any case where an "accretion" is proposed is whether the employees involved could stand alone as a separate bargaining unit. If they are able to do so, or if there are two or more existing bargaining units which have colorable claim to the employees at issue, then a "question concerning representation" is raised and no accretion would be appropriate.

Kitsap Transit Authority, Decision 3104 (PECB, 1989).[5] Analysis of this case thus begins with the duties, skills and working conditions of the disputed employees.

The work of the "flagger" appears to be a necessary and ongoing part of the employer's road construction and maintenance operation, aggressively advocated more than ten years ago by the employer's traffic and safety engineer. There is no indication that the union contested the employer's conclusion that two-person flagging crews were needed at that time, or at any time since.

When considering actual job tasks performed, the specific job duties and skills of the flagger employees, as a group, appear to be somewhat less than those of the maintenance mechanics/ technicians who are included in the bargaining unit. The flagger employees do, however, work on the same projects and under the same supervision as the bargaining unit employees.

There was some change of circumstances when the subject classification was created in 1980-81,[6] but Skagit County continued to be the employer of the persons who performed the flagging task. Thus, the change in circumstances which occurred at that time was limited to moving some, but not all, of the flagging work previously performed by bargaining unit employees to the new cadre of part-time, on-call flaggers.

A potential for "work jurisdiction" disputes has existed since the creation of the part-time "flagger" workforce, and will likely

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[5] Accretion will be ordered where the group of employees cannot stand alone as an appropriate bargaining unit. Tacoma School District, Decision 1908 (PECB, 1984); Lake Washington School District, Decision 1020-A (EDUC, 1980).

[6] One can speculate that the task of flagging could have been the subject of a "contracting out" proposal at that time, but that was not done.

continue to exist in the future. There was some indication that the "flagger" employees were formerly assigned to perform other types of work clearly belonging to the bargaining unit. At the same time, there is indication of bargaining unit employees performing "flagger" work in emergency situations. More important, the employment of the "flagger" workforce is severely curtailed in the summer months, when students hired in bargaining unit positions are assigned to perform those functions. Additionally, while this is not a "discrimination" unfair labor practice case, one must look with some doubt on an employment practice which denies further work opportunities to employees in the disputed "flagger" workforce at such time as they are about to acquire sufficient work time to bring them under the coverage of the existing bargaining unit.

History of Bargaining

There is some appeal to the procedural arguments advanced here by the employer. Long-standing Commission precedent precludes a union from using the unit clarification procedures of Chapter 391-35 WAC to "pick up" a group that was historically excluded from the bargaining unit. City of Dayton, Decision 1432 (PECB, 1982). Further, the timeliness policy adopted by the Commission in Toppenish, supra, and later codified in WAC 391-35-020, was designed to avoid abuses of the collective bargaining process, by holding parties to the contracts they sign. It is clear that the "flagger" employees had been outside of the existing bargaining unit for several years prior to the date when the union first raised this matter with the employer, and that the union's attempt to raise this unit determination issue in 1989 came mid-term in the parties' 1988-90 collective bargaining agreement.

On the other hand, the application of the foregoing precedents must be founded on the existence of a bargaining unit that is itself "appropriate" under RCW 41.56.060. When that inquiry is pursued, it appears that both of the parties have contributed to the

entanglements presented in this case, as well as to the delay in its resolution.

The roots of the current problem are readily traced to the agreement of the parties in the 1980-81 time period on a unit configuration that was **not** appropriate under RCW 41.56.060. By that time, the decision in City of Seattle, supra, had put labor and management on notice that an agreement to categorically exclude part-time employees from a bargaining unit will not be honored by the Commission, if it has the effect of creating another workforce with competing work jurisdiction claims. In the same time period, or soon thereafter, a separate unit of on-call "substitute" employees was found to be inappropriate, where the substitutes shared a community of interest with the regular employees. Sedro Woolley School District, Decision 1351-C (PECB, 1981). Nevertheless, the new "flagger" employees were not placed in the Skagit County Public Works bargaining unit at that time. The parties apparently relied on the fact that those employees did not work the weekly minimum of 32 hours agreed upon by the parties to qualify as "full-time" employees.[7]

When the union raised the issue in 1989, it leaped beyond the "recognition" request in an apparent attempt to dictate the number of employees and/or positions to be maintained by the employer.[8]

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[7] Nothing in the statute or Commission precedent precludes parties from making differentiations among otherwise legitimate sub-groups within a bargaining unit. Rather than planting the seeds for future unit determination and work jurisdiction conflicts by maintaining an artificially high "full-time" test to exclude the "flagger" employees from the bargaining unit, the parties should have devoted their energies to negotiating wages and benefits commensurate with the skill level and frequency of the work to be performed.

[8] The union's demands took on the appearance of a "minimum manning" proposal outside of the scope of mandatory collective bargaining under cases such as Pierce County, Decision 1710 (PECB, 1983).

This is not the first occasion in which a union has been found out ahead of itself in making such dual demands. In Pierce County, Decision 1845 (PECB, 1984), an unfair labor practice complaint was dismissed where the union's substantive bargaining demands concerned a group for which it had never obtained status as exclusive bargaining representative.

In its haste to assert procedural defenses which turn out to have been built on a foundation of quicksand, the employer seemed to deliberately duck the "separate unit" suggested by the union.[9] Casual employees who lack a continuing expectation of employment are generally excluded from collective bargaining units. Glynn Campbell d/b/a/ Piggly Wiggly El Dorado Co., 154 NLRB 445 (1965); Everett School District, Decision 268 (EDUC, 1977); Tacoma School District, Decision 655 (EDUC, 1979). But, part-time employees who have an ongoing expectancy of work are included in bargaining units. Mount Vernon School District, Decision 2273-A (PECB, 1986), affirmed (Division I, 1989). A separate unit is possible, where the part-time workforce stands alone, as in King County, Decision 1675 (PECB, 1983).

The evidence here strongly indicates that there have been "flagger" employees from time to time who met the test for "regular part-time" status outlined in the King County case. Unlike the unique situation of "event" personnel working in the Kingdome, the evidence here further indicates that there has been an ongoing potential for "work jurisdiction" disputes. The claims of the "flagger" and "full-time" groups operated in both directions prior to 1989, with the "flagger" employees doing equipment washing work that would properly be claimed by the existing bargaining unit and the "maintenance aide" employees doing flagging work that would be

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[9] The union could have "forced the issue" of a separate bargaining unit back in 1989, by filing a petition for investigation of a question concerning representation under Chapter 391-25 WAC.

claimed by a separate "flagger" unit. At least the latter of those situations continues down to the present time, in addition to the occasional use of bargaining unit employees to perform flagging tasks in "emergency" and "short duration" situations. The creation of a separate bargaining unit would not be appropriate.

Timeliness of the Petition

The agreement made by these parties in the 1980-81 time period on a unit determination subject is not binding on the Commission. In a collision between the unit determination authority of the Commission under the statute and the policy of support for contracts, giving full effect to the procedural requirements of Toppenish School District, supra, would yield the effect of making the parties' agreement prevail over the statute. It is thus concluded that the correction of the error committed by the parties in 1980-81 was a matter that could be brought to the Commission at any time.

Unit clarification proceedings take the situation and parties as it finds them, and specify the relationships which are to exist in the future. The parties operated from 1980-81 until at least 1989 under the mutual understanding that the "flagger" workforce was not included in the bargaining unit. Unit clarification proceedings do not have "retroactive" effect, and the ruling in this case does not reverse the waiver of bargaining rights by the union which operated from 1980-81 up to the date of this decision. The parties will need to sit down at the bargaining table to commence negotiations on the future wages, hours and working conditions of the class of employees at issue here.

FINDINGS OF FACT

1. Skagit County is political subdivision of the State of Washington, and is a "public employer" within the meaning of

RCW 41.56.030(2). Among other operations, the employer operates a Public Works Department.

2. Washington State Council of County and City Employees, AFSCME, AFL/CIO, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of full-time employees in the Public Works Department of Skagit County.

3. The bargaining relationship between the employer and union predates the adoption of the applicable statute. The parties have negotiated a series of collective bargaining agreements, and had a contract in effect for the calendar years 1988 through 1990. Their latest contract is effective from January 1, 1991 through December 31, 1993.

4. The employer has an ongoing need for "flagging" in connection with its road projects, for which employees are assigned to control traffic that moves past projects. Such employees hold flags, watch traffic and move barriers.

5. In 1980-81, the parties made an agreement to transfer certain flagging work formerly performed by bargaining unit employees to a new cadre of part-time, on-call employees who were not included in the bargaining unit. Some flagging work has been performed since that time by bargaining unit employees, including temporary employees hired during summer seasons since 1989.

6. When a need for flagging work arises, members of the on-call, part-time "flagger" workforce may be selected for work by supervisors who check the list on file and attempt to reach the flagger at home. An attempt is made to rotate the available work among the names on the list. There is no formal evaluation of a flagger's work performance by a supervisor.

If the work is deemed unacceptable, the flagger's name is simply removed from the list. The employer declines to call a flagger if the additional work hours would cause that employee to attain the status of a full-time employee within the existing bargaining unit.

7. At least some of the "flagger" employees utilized by the employer have worked an average of 11 or more shifts per calendar quarter during the four quarters preceding the date of this decision, and continue to be available for such assignments.

8. In 1989, the union approached the employer with signed authorization cards for the flaggers, requesting voluntary recognition. The union coupled its recognition request with proposals concerning the number of flagger positions to be established and maintained by the employer, and the employer's responses to the recognition request appear to have been affected by the additional proposals. After some discussion, the union's proposals were rejected by the employer.

9. The petition for clarification of an existing bargaining unit was filed by the union in 1989, following rejection of its "accretion" and "separate unit" requests by the employer.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-35 WAC.

2. Since 1980-81, Skagit County has maintained a workforce of "flagger" employees who perform work of a nature that is a regular and ongoing part of the work of the Skagit County

Public Works Department. At least some such employees have worked sufficient hours to qualify as "regular part-time" employees within the meaning of Commission precedent, so as to qualify as "public employees" within the meaning of RCW 41.56.020.

3. The agreement of the parties in 1980-81 to categorically exclude part-time, on-call "flagger" employees from the existing bargaining unit, and the subsequent implementation of that agreement to prevent part-time, on-call employees from acquiring status as members of the existing bargaining unit have resulted in the creation of a workforce of public employees with claims of work jurisdiction that conflict with the existing bargaining unit, such that the arrangement agreed upon by the parties is not an appropriate configuration of bargaining units under RCW 41.56.060.

4. The creation of a separate bargaining unit limited to on-call, part-time "flagger" employees would formalize and perpetuate claims of work jurisdiction that conflict with the existing bargaining unit, so that such a bargaining unit would not be an appropriate bargaining unit under RCW 41.56.060.

ORDER CLARIFYING BARGAINING UNIT

1. The agreement of Skagit County and the Washington State Council of County and City Employees, AFSCME, AFL-CIO, to create a separate workforce of part-time, on-call employees outside of the existing bargaining is null and void after the date of this decision.

2. Employees performing "flagger" work for Skagit County shall be included in the existing bargaining unit after the date of this decision, if they attain the level of employment commen-

surate with status as "regular part-time" employees, as described in paragraph 7 of the foregoing findings of fact.

Dated at Olympia, Washington, the 29th day of July, 1991.

PUBLIC EMPLOYMENT
RELATIONS COMMISSION

MARVIN L. SCHURKE
Executive Director

This order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-35-210.