Port of Seattle, Decision 6181 (PORT, 1997)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	
PORT OF SEATTLE	CASE 12560-C-96-783
For clarification of existing bargaining units represented by:	DECISION 6181 - PORT
INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 9	
and	ORDER CLARIFYING BARGAINING UNIT
SEATTLE/KING COUNTY BUILDING AND CONSTRUCTION TRADES COUNCIL AND HOD CARRIERS AND GENERAL LABORERS, LOCAL 242	

Herman L. Wacker, Attorney at Law, appeared on behalf of the employer.

Schwerin Campbell Barnard, LLP, by Demitri Iglitzin, appeared on behalf of the International Longshore & Warehouse Union, Local 9.

Rinehart, Robblee & Hannah, by Richard H. Robblee, appeared on behalf of the Seattle/King County Building and Construction Trades Council and Hod Carriers and General Laborers, Local 242.

On June 20, 1996, the Port of Seattle (employer) filed a petition for clarification of an existing bargaining unit with the Public Employment Relations Commission under Chapter 391-35 WAC. The employer requested that the Commission decide the appropriate bargaining unit placement (if any) for a "harbor specialist" position at the employer's Pier 66 facility. The employer indicated that the position had been claimed both by International Longshore & Warehouse Union, Local 9, and by the Seattle/King County Building and Construction Trades Council on behalf of Hod Carriers and General laborers, Local 242. A hearing was held on

July 14 and July 29, 1997, before Hearing Officer Walter M. Stuteville. The parties filed briefs.

BACKGROUND

The employer operates the fifth-largest container port in North America, a major international airport, an ocean fishing terminal, and a large pleasure boat marina. The employer has approximately 1,350 employees, of which about one-half are represented for the purposes of collective bargaining. The employer and 16 unions, representing 30 bargaining units, are parties to 28 collective bargaining agreements. Represented employees work in various occupations, including law enforcement, fire protection, electrical maintenance, crane maintenance, warehousing operations, cleaning, airport security, and operations.

Within the last several years, the employer has embarked upon a major redevelopment of its properties on the downtown Seattle waterfront. This included demolition of structures on Pier 66 (Bell Street Pier) which had contained the employer's administrative offices and a cruise ship terminal, the construction of a parking garage connected by two footbridges over or near the Alaskan Way viaduct, and construction of several new buildings containing multi-purpose and tourist-destination facilities:

- The north end of Pier 66 now contains a passenger transit shed for cruise ship operations, a fish processing operation, offices, a fish market, exhibit space, and space for a future transit terminal;
- Moving south along the pier, one finds a conference center, a museum, and retail operations;
- Still further south are a public plaza and a building which houses several restaurants;

- At the far south end of Pier 66 are a small office and a short-stay recreational boat marina.

With the exception of the short-stay marina, which the employer itself operates, all of the activities on Pier 66 are conducted by independent businesses who contract with the employer for space.

Port of Seattle employees perform a variety of functions in relation to the newly-developed Pier 66 facilities. Some of their responsibilities reflect job duties that have existed for many years, involving functions which were previously housed on the pier but have now been transferred to the new facilities; some reflect new functions which are the result of new tenants and new uses of the employer's premises. One of the historical responsibilities which continues to exist relates to the cleaning and maintenance of the property.

The employer historically assigned the cleaning and sweeping of the apron and transit shed, as well as "set up" work relating to cruise ship operations, to members of Local 9. Those same responsibilities were carried over to the new Pier 66 facilities.

The employer assigned the landscaping and heavy-duty cleaning of the new parking areas, the new footbridges and the new public plaza to members of Local 242.

When it opened the new short-stay marina facility in June of 1996, the employer assigned the customer service responsibilities, the maintenance of the marina floats, and the basic cleaning of that area to a "harbor specialist" classification.

Harbor Specialists

While new to Pier 66, the "harbor specialist" classification has historically been utilized by the employer at its Shilshole Bay

marina, at its Marine Industrial Center, and at its Fishermen's Terminal facilities.

The harbor specialists at Pier 66 are housed in the small office building referred to above. The employer's job description for the entry-level position in the class series includes:

> **Harbor Specialist I** (Min. $1,834; Mid.$2,292) Central Waterfront Piers & Properties, Bell Street Pier (One Position)
>
> This position will be headquartered at Bell Street Pier and Bell Harbor Marina. Duties will include but not be limited to promoting excellent customer service, assisting with moorage of boats, conducting boat checks, administering and collecting fees for services, and maintaining a clean, welcoming and safe environment for the boaters and general public at Bell Harbor Marina. Duties will include but not be limited to promoting excellent customer service, assisting with vessel berth arrangements, conducting boat and operations checks, gathering billing information, and administering and monitoring vessel activities related to commercial vessels using Bell Street Pier, and Piers 48 and 69. Duties include but are not limited to promoting excellent customer service, monitoring building and site conditions, **monitoring security, and addressing tenant and general public use of the buildings or sites** (Bell Street and Pier 48) during routine or special events. **Will perform variety of duties such as routine site walk-through and condition assessments, trash pickup and transport, light building maintenance** and building systems operations (Bell Street & Pier 48). Will perform a variety of administrative tasks including answering phones, billing, preparing work requests/requisitions, and maintaining log books. Must be able to recognize and respond appropriately to potential and/or real emergency situations and environmental concerns. Requires the ability to keyboard at 45 wpm, familiarity with computers and software such as Word for Windows, Excel, Access date base, electronic mail and calendar systems. Must possess the ability to operate various hand

> and power tools, such as water pumps, fire extinguishers. Must be able to learn building systems equipment, such as fire monitoring, HVAC monitoring, lighting controls, etc. Requires high school graduation/GED and knowledge of recreational boating, commercial fishing, commercial work boats, facility maintenance, security and general office procedures. Experience at a marina or commercial pier, especially for a Public Port is preferred. Requires the ability to work outdoors in all weather conditions. Requires the willingness to work any shift, willingness to work alone, and willingness to assist when needed at other marina facilities: Shilshole Bay Marina, Fishermens Terminal and MIC. . . .
>
> [Emphasis by **bold** supplied]

A "harbor specialist II" class handles inbound and outbound vessel documentation for customs and the U.S. Department of Agriculture, and is responsible for a cash fund and a cash journal. The responsibilities of a "harbor specialist III" class include sales and marketing, disaster planning, maintaining inventories and pollution control equipment. Employees may advance from the "harbor specialist I" class to the higher classes upon fulfilling the qualifications for the advanced positions.

At the hearing in this matter, it was explained that harbor specialists are expected to sweep the marina floats, to empty garbage dumpsters for the restaurants on the pier, and to sweep and maintain the areas around the public fountain, the public walkway and the observation decks. They are not assigned any clean-up work in the transit sheds assigned to members of Local 9 or in the areas assigned to members of Local 242.

Onset of This Controversy

On June 11, 1996, Gary Hix the business manager for Local 242, sent a letter to John Swanson, the employer's director of labor relations, as follows:

> It has been brought to my attention that specific work at Pier 66 and Pier 91 consisting of maintenance cleaning, garbage removal, high pressure washing and sweeping is in dispute.
>
> The Port has agreed that maintenance work will continue to be done by the Building Trades where that work has historically come under our jurisdiction.
>
> There is a strong precedent both at Shilshole, Fisherman's Terminal and other Port areas including the Marine Industrial Center establishing the Laborers jurisdiction.
>
> This is notice to the Port of Seattle that the Unions intend to protect their established jurisdiction. We do not intend to infringe on the jurisdiction of others nor will we allow them to infringe on our jurisdiction.
>
> I understand there is a question of clarification of the work. We do not understand this question. There is no misunderstanding on the part of the Laborers as to their jurisdiction nor do I or they believe there can be any issue on the part of the Port or any other union. ...

[Emphasis by underline in original.]

Local 9 sent the employer a similar letter on July 25, 1996:

> Re: Class Action Grievance/Clean-up Work/Port Property Bell Street Facility (Pier 66) Jurisdiction.
>
> ILWU Local 9 has historically performed all sweeping and cleaning and related work of all transit sheds, warehouse, aprons, yard areas, and so forth located on Port of Seattle piers and property in the Central Waterfront area. Specifically, Local 9 was the exclusive labor source for this type of work on the property now occupied by the Bell Street Convention Center (Pier 66). Local 9's performance of this work extended so far as to encompass parking area cleanup and maintenance of the (former) Lenora street bridge east of the pier.
>
> This historically exclusive relationship between Local 9 and the Port regarding "ware-

house work," including cleanup work on all Port property, was most recently memorialized in the 1994-1997 Agreement between the Port of Seattle and ILWU Local 9, in which the Port agrees, among other things, "that warehouse work defined in this agreement under Port of Seattle management which is physically in a Port-operated warehouse shall be done by the Union." Agreement, Section I. That Agreement also provides that Local 9 has exclusive jurisdiction over "Sweeping and cleaning of all transit sheds, warehouses, aprons, yard areas, etc.

The Port has now and is currently violating the Agreement by contracting with Laborers Local 242, among others, to perform cleanup work on the apron located east of the Bell Street facility and on other portions of that property, work consisting specifically of at least one shift per week of cleanup work. The Port contracted out this work without giving the Union any notice of its intent to do so, even though this decision is clearly inconsistent with the Local's right to sweep and clean "all aprons, yard areas, etc." Pursuant to the Grievance Procedure set forth in Section XI of the Agreement, therefore, the Union hereby protests and grieves this Port action.

The Port's actions in contracting with Laborers Local 242 to perform cleanup work on the premises of the Bell Street facility, without even giving the Union any notice of its intent to do so, violate, at a minimum, the following provisions of the Agreement between the Port and the Union.

1. Section I (requiring warehouse work in a Port-operated warehouse to be done by the Union);

2. Section III (precluding the Port from changing or altering past practices and working conditions);

3. Section XXIV (Port required to deal with the Union in good faith); and

4. Appendix C (Local 9 job duties and jurisdiction include "Sweeping and cleaning of all transit sheds, warehouses, aprons, yard areas, etc.)" ...

[Emphasis by underlining in original.]

The parties were unable to resolve their differences and, in the absence of any indication of their agreement to resolve this controversy by some other method or procedure, the employer filed the petition to initiate this proceeding under Chapter 391-35 WAC.

POSITIONS OF THE PARTIES

The employer argues that the harbor specialists have a distinct community of interest and job responsibilities which are separate from either the employees represented by Local 9 or the employees represented by Local 242. It asserts that the classification is utilized in four different locations in the Seattle area, and that the responsibilities are essentially similar except for location. Of 13 job functions listed in its collective bargaining agreement with Local 9, the employer asserts that only one ("sweeping and cleaning of all transit sheds, warehouses, aprons, yard areas, etc.") is similar to duties of the harbor specialist class or to some of the work assigned to employees covered by its collective bargaining agreement with Local 242.[1]

Local 9 argues that the issue in the instant case is not a matter for unit clarification, and asserts that it has never argued that the harbor specialists should be included in the bargaining unit it represents. Its focus is on a "skimming of unit work" theory (i.e., that work belonging to the bargaining unit it represents has been assigned to the harbor specialists), and it asserts that the employer's unit clarification petition is an "end run" around the grievance machinery in its contract with the employer.

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[1] The employer's brief concerned itself with a perceived work jurisdiction conflict between Local 9 and Local 242 (i.e., that Local 9 was arguing that some of its historical work had been assigned to Local 242). However, as neither union filed an independent petition for clarification on that issue, the focus of this decision is limited to the harbor specialists.

Local 242 asserts that its members have historically performed general cleaning functions throughout the employer's facilities, and have had sole responsibility for heavy cleaning in the public areas of the employer's properties. It particularly argues that it has jurisdiction over the cleaning responsibilities for public areas such as sidewalks and parking areas, and therefore should have the cleaning work now being performed by the harbor specialists at Pier 66.

DISCUSSION

The Jurisdiction of the Commission

The Public Employment Relations Commission was created by the Legislature in 1975, with a charter to be "uniform and impartial ... efficient and expert" in the administration of public sector collective bargaining. RCW 41.58.005. On January 1, 1976, the Commission began administering two statutes which now have application to these parties. Chapter 53.18 RCW now contains the following provisions of interest in this case:

> RCW 53.18.010 Definitions.
>
> "Port district" shall mean a municipal corporation of the state of Washington created pursuant to Title 53 RCW. Said port districts may also be hereinafter referred to as the "employer."
>
> "Employee" shall include all port employees except managerial, professional, and administrative personnel, and their confidential assistants.
>
> "Employee organization" means any lawful association, labor organization, union, federation, council, or brotherhood, having as its primary purpose the representation of employees on matters of employment relations.
>
> "Employment relations" includes, but is not limited to, matters concerning wages, salaries, hours, vacation, sick leave, holiday pay and grievance procedures.

RCW 53.18.015 Application of public employees' collective bargaining act. Port districts and their employees shall be covered by the provisions of chapter 41.56 RCW except as provided otherwise in this chapter.

RCW 53.18.020 Agreements authorized. Port districts may enter into labor agreements or contracts with employee organizations on matters of employment relations: PROVIDED, That **nothing in this chapter shall be construed to authorize any employee, or any employee organization to cause or engage in a strike or stoppage of work or slowdown or similar activity against any port district.**

RCW 53.18.030 Criteria for choice of employee organization--Procedures for resolution of controversy. In determining which employee organization will represent them, employees shall have maximum freedom in exercising their right of self-organization.

Controversies as to the choice of employee organization within a port shall be submitted to the public employment relations commission. Employee organizations may agree with the port district to independently resolve jurisdictional disputes: PROVIDED, That when no other procedure is available the procedures of RCW 49.08.010 shall be followed in resolving such disputes. In such case the chairman of the public employment relations commission shall, at the request of any employee organization, arbitrate any dispute between employee organizations and enter a binding award in such dispute.

RCW 53.18.040 Incidental powers of district. **Port districts exercising the authority granted by RCW 53.18.020 may** take any of the following actions as incidental thereto: Make necessary expenditures; act jointly with other ports or employers; engage technical assistance; **make appearances before and utilize the services of state or federal agencies, boards, courts, or commissions;** make retroactive payments of wages where provided by agreements; and exercise all other necessary powers to carry this chapter into effect, including the promulgation of rules and regulations to effectuate the purposes of this chapter.

> RCW 53.18.050 Agreements--Authorized provisions. **A labor agreement** signed by a port district **may contain:**
> ...
> (3) **Provisions providing for binding arbitration,** the expenses being equally borne by the parties, **in** matters of contract interpretation and **the settlement of jurisdictional disputes.**
>
> RCW 53.18.060 Restraints on agreement. No labor agreement or contract entered into by a port district shall:
> ...
> (3) Include within the same agreements: (a) Port security personnel, or (b) port supervisory personnel.

[Emphasis by **bold** supplied.]

Chapter 41.56 RCW now contains the following provisions of interest in this case:

> RCW 41.56.020 Application of chapter. **This chapter shall apply to any** county or **municipal corporation,** or any political subdivision **of the state of Washington,** including district courts and superior courts, **except as otherwise provided by** RCW 54.04.170, 54.04.180, and chapters 41.59, 47.64, and **53.18 RCW. ...**
>
> ...
> RCW 41.56.030 Definitions. As used in this chapter:
> ...
> (2) **"Public employee" means any employee of a public employer** except any person (a) elected by popular vote, or (b) appointed to office pursuant to statute, ordinance or resolution for a specified term of office by the executive head or body of the public employer, or (c) whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit, or any person elected by popular vote or appointed to office pursuant to statute, ordinance or resolution for a

specified term of office by the executive head or body of the public employer, ...

(3) "Bargaining representative" means any lawful organization which has as one of its primary purposes the representation of employees in their employment relations with employers.

...

(5) **"Commission" means the public employment relations commission. ...**

RCW 41.56.040 Right of employees to organize and designate representatives without interference. No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate 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 for the purpose of collective bargaining**, or in the free exercise of any other right under this chapter.

RCW 41.56.050 Disagreement in selection of bargaining representative--Intervention by commission. **In the event that a public employer and public employees are in disagreement as to the selection of a bargaining representative the commission shall be invited to intervene as is provided in RCW 41.56.060 through 41.56.090.**

RCW 41.56.060 Determination of bargaining unit--Bargaining representative. **The commission**, after hearing upon reasonable notice, **shall decide** in each application for certification as an exclusive bargaining representative, **the unit appropriate for the purpose of collective bargaining. In** determining, **modifying**, or combining **the bargaining unit, the commission shall consider the duties, skills, and working conditions of the public employees; the history of collective bargaining by the public employees and their bargaining representatives; the extent of organization among the public employees; and the desire of the public employees. ...**

RCW 41.56.070 Election to ascertain bargaining representative. In the event the commission elects to conduct an election to ascertain the exclusive bargaining representa-

> tive, and upon the request of a prospective bargaining representative showing written proof of at least thirty percent representation of the public employees within the unit, the commission shall hold an election by secret ballot to determine the issue. The ballot shall contain the name of such bargaining representative and of any other bargaining representative showing written proof of at least ten percent representation of the public employees within the unit, together with a choice for any public employee to designate that he does not desire to be represented by any bargaining agent. ... Where there is a valid collective bargaining agreement in effect, no question of representation may be raised except during the period not more than ninety nor less than sixty days prior to the expiration date of the agreement. Any agreement which contains a provision for automatic renewal or extension of the agreement shall not be a valid agreement; nor shall any agreement be valid if it provides for a term of existence for more than three years.
>
> RCW 41.56.080 Certification of bargaining representative--Scope of representation. The bargaining representative which has been determined to represent a majority of the employees in a bargaining unit shall be certified by the commission as the exclusive bargaining representative of, and shall be required to represent, all the public employees within the unit without regard to membership in said bargaining representative: ...
>
> RCW 41.56.090 Rules and regulations. **The commission shall promulgate**, revise or rescind such **rules and regulations** as it may deem necessary or appropriate to administer the provisions of this chapter in conformity with the intent and purpose of this chapter and **consistent with the best standards of labor-management relations.**
>
> ...
>
> RCW 41.56.120 Right to strike not granted. Nothing contained in this chapter shall permit or grant any public employee the right to strike or refuse to perform his official duties.

[Emphasis by **bold** supplied.]

Throughout its history, including long before the Legislature "dovetailed" Chapters 53.18 and 41.56 RCW by enactment of RCW 53.18.015 in 1983, the Commission has exercised a firm hand in the resolution of disputes concerning the scope of bargaining units and the allocation of positions to bargaining units. This policy is particularly apt in the context of statutes which do not protect or authorize any strikes or work stoppages:

- In City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981), the Commission noted that the Legislature delegated unit determination authority to the Commission in RCW 41.56.060, and ruled that unit determination is not a subject of bargaining in the usual mandatory/permissive/illegal sense.

- In Spokane School District, Decision 718 (EDUC, 1979), the Richland decision was cited as precedent for holding that an unfair labor practice violation could be found on allegations that a party had taken unit determination issues to "impasse", and/or engaged in a strike or lockout to enforce its demands on unit determination issues.

- In King County, Decision 4569 (PECB, 1993), the Richland and Spokane decisions were cited as precedent for denying a union motion to dismiss a unit clarification petition in which an employer had requested that the Commission determine the appropriate unit placement for positions claimed by two different unions.

- The Commission has long identified a close interrelationship between the description of a bargaining unit and the work jurisdiction claims of that bargaining unit:

> In a series of decisions over nearly the entire history of this agency, the Commission and its staff have dealt with difficult prob-

> lems 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.
>
> 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 (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.
>
> 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).

Castle Rock School District, Decision 4722-B (EDUC, 1994).

The Commission thus rejected an argument that would have bifurcated a particular body of work, out of concern for creating a potential for future work jurisdiction disputes.

- The language of Chapter 41.56 RCW was closely examined in Seattle School District, Decision 5220 (PECB, 1995):

> [T]he Public Employees' Collective Bargaining Act, Chapter 41.56 RCW ... is generally patterned after the federal National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947 (LMRA), but there are many differences between the state and federal laws. Several of those differences are of particular importance in analysis of the issues presented in this case:
>
> * Unlike sections 7 and 13 of the LMRA, Chapter 41.56 RCW does not confer or protect a right to strike. RCW 41.56.120 was enacted in the context of a holding by the Supreme Court of the State of Washington that strikes by public employees are unlawful under the common law. Port of Seattle v. International Longshoremen's and Warehousemen's Union, 52 Wn.2d 317 (1958). Thus, Washington state law does not tolerate "recognition strikes" in a manner comparable to the 30-day period allowed by Section 8(b)(7)(C) of the LMRA. In the event of any dispute concerning the representation of employees, RCW 41.56.050 directs that the matter be submitted to the Commission for a peaceful resolution through administrative adjudication.
>
> * Chapter 41.56 RCW does not contain language comparable to Section 10(k) of the LMRA, under which the National Labor Relations Board (NLRB) is directed to withhold processing of unfair labor practice charges alleging violation of Section 8(b)(4)(D) of the LMRA, if the parties resolve (or take timely steps to resolve) a work assignment dispute. That must be considered in the context that Section 8(b)(4) is a limitation on the right to strike otherwise granted by the federal law. There was no need for our Legislature to write provisions duplicating strike-limiting provisions of the federal law, when it never granted any right to strike.

The Richland, Spokane, King County and Castle Rock decisions were all cited, after which the discussion in Seattle School District continued with an observation that any reluctance on the part of the National Labor Relations Board (NLRB) to use its unit clarification procedures for work jurisdiction disputes appears to be directly related to the NLRB's specific

(and limited) authority under Section 10(k), and that the federal law is inapposite to parties and issues arising under Chapter 41.56 RCW.

- In 1996, the Commission adopted an amendment to WAC 391-35-020 which evidences an intent to codify the precedents discussed here:

> WAC 391-35-020 Petition--Time for filing. (1) Disputes concerning status as a "confidential employee" may be filed at any time.
>
> (2) Where there is a valid written and signed collective bargaining agreement in effect, a petition for clarification of the covered bargaining unit filed by a party to the collective bargaining agreement will be considered timely only if:
>
> (a) The petitioner can demonstrate, by specific evidence, substantial changed circumstances during the term of the collective bargaining agreement which warrant a modification of the bargaining unit by inclusion or exclusion of a position or class; or
>
> (b) The petitioner can demonstrate that, although it signed the current collective bargaining agreement covering the position or class at issue in the unit clarification proceedings:
>
> (i) It put the other party on notice during negotiations that it would contest the inclusion or exclusion of the position or class via the unit clarification procedure; and
>
> (ii) It filed the petition for clarification of the existing bargaining unit prior to signing the current collective bargaining agreement.
>
> (3) **Disputes concerning the allocation of employees or positions between two or more bargaining units may be filed at any time.**

Administrative adjudication of unit determination and unit placement issues under statutory standards is consistent with the policy stated in RCW 41.58.005, and inevitably contributes to the overall maintenance of labor peace.

Availability of Arbitration

Local 9 nevertheless argues that the Commission should allow an arbitrator to resolve, based upon the language of its collective bargaining agreement with the employer, whether the cleaning work performed by the harbor specialists is work that belongs to the bargaining unit it represents. The fundamental problem with that argument is that, even if the dispute involves some "assignment of work" issue, it also involves the scope of appropriate bargaining units under RCW 41.56.060.

Arbitrators only draw their authority from the agreements of parties. In this case, there is no evidence that the employer and both of the competing unions have agreed to submit any work jurisdiction disputes to arbitration, so as to invoke the second sentence of the un-numbered second paragraph of RCW 53.18.030. In light of the first sentence of that paragraph, and in light of the "dovetailing" subsequently-enacted in RCW 53.18.015, the proviso referring to arbitration proceedings under Chapter 49.08 RCW is effectively supplanted by the "other procedure" available under Chapter 391-35 WAC.

Under its "deferral to arbitration" policy reviewed and restated in City of Yakima, Decision 3564-A (PECB, 1991), the Commission does not defer "unit" matters to arbitrators or give weight to decisions issued by arbitrators on such matters. That principle was applied in an earlier case where ILWU Local 9 and another union both claimed the right to represent certain employees of this employer:

> Grievance arbitration procedures and arbitration awards are no more than an outgrowth of the bargaining relationship and contract between an employer and a particular union. ... [T]he Commission has "deferred" to contractual grievance and arbitration machinery in "unilateral change" unfair labor practice

> cases, where the arbitrator's interpretation of an existing contract will often resolve "waiver by contract" defenses that might be asserted in the unfair labor practice case. The Commission does not "defer" to arbitrators on "interference" allegations, [footnote omitted] or "refusal to bargain" allegations involving breach of the "good faith" obligation [footnote omitted] as those types of allegations are directly within the exclusive jurisdiction of the Commission to prevent unfair labor practices. RCW 41.56.160. Consistent with the Richland precedent, and with the authority conferred by RCW 41.56.060, the Commission does not "defer" to arbitrators on matters involving questions concerning representation or unit determination.
>
> Applying the foregoing principles to the facts of this case, it is clear that **the arbitration award ... cannot be accorded any weight or value in this proceeding.** Although the ILWU was involved in an earlier representation case before the Commission involving the ramp controllers, the arbitration proceedings were not conducted as a "jurisdictional dispute" between the ILWU and the Teamsters. Rather, the arbitrator dealt only with arguments advanced by the Teamsters and the employer. Further, it is clear that the arbitrator sought to decide "representation" issues, applying the unit determination provisions of the statute and Commission precedent.

Port of Seattle, Decision 3421 (PECB, 1990).

A similar result was reached in Seattle School District, Decision 3979 (PECB, 1991), which denied a motion for dismissal of a union's unfair labor practice charge on the basis of an arbitration award which had embraced a settlement in which the complainant union and another union had divided the disputed work between themselves. See, also, City of Seattle, Decision 781 (PECB, 1979) and South Kitsap School District, Decision 1541, supra. The arguments for resolution of this controversy by arbitration or other arrangements agreed upon by some or all of the parties are thus without merit.

Application of Unit Determination Criteria

The Commission makes unit determination rulings in the context of representation cases under Chapter 391-25 WAC, but has also adopted Chapter 391-35 WAC as a streamlined set of rules for "modifying" bargaining units where no question concerning representation exists. Unit determinations are made on a case-by-case basis. South Central School District, Decision 5670-A (PECB, 1997).

The Commission described the unit determination function in City of Winslow, Decision 3520-A (PECB, 1990), as follows:

> [T]he purpose [of unit determination] is to group together employees who have sufficient similarities (community of interest) to indicate that they will be able to bargain collectively with their employer. The statute does not require determination of the "most" appropriate bargaining unit. It is only necessary that the petition-for unit be an appropriate unit. Thus, the fact that there may be other groupings of employees which would also be appropriate, or even more appropriate, does not require setting aside a unit determination.

[Emphasis by underline in original.]

The Commission has found units consisting of "all of the employees of the employer" to be appropriate, as in Winslow, supra. It has also affirmed the propriety of dividing an employer's workforce into two or more bargaining units:

> Units smaller than employer-wide may also be appropriate, especially in larger work forces. The employees in a separate department or division may share a community of interest separate and apart from other employees of the employer, based upon their commonality of function, duties, skills and supervision. Consequently, departmental (vertical) units have sometimes been found appropriate when sought by a petitioning union. [Footnote

> omitted.] Alternately, employees of a separate occupational type may share a community of interest based on their commonality of duties and skills, without regard to the employer's organizational structure. Thus, occupational (horizontal) bargaining units have also been found appropriate, on occasion, when sought by a petitioning union. ...

City of Centralia, Decision 3495-A (PECB, 1990).

None of the statutory unit determination criteria predominates to the exclusion of others. City of Centralia, Decision 2940 (PECB, 1988). The criteria have varying weight and application, however, depending on the factual settings of particular cases.

Duties, Skills and Working Conditions -
As detailed in the job description set forth above, the responsibilities assigned the harbor specialists are largely in the area of customer service. The employer has harbor specialists working in four different locations, with similar job duties at each work site. Furthermore, the harbor specialists have worked somewhat interchangeably between the four locations. Three of the harbor specialists working at the new Pier 66 facility were transferred from the Fisherman's Terminal worksite.

The cleaning work done by the harbor specialists at Pier 66 is comparable to work done by the harbor specialists at other Port of Seattle locations: They sweep marina floats, empty garbage dumpsters at restaurants, and sweep public walkways and decks. The only distinction at Pier 66 is that organized employees perform cleaning work in other parts of the facility.

The cleaning work performed by the harbor specialists is comparable to the incidental cleaning work done by members of Local 9 in the transit shed and on the apron of the pier; it is not a primary responsibility of the employees represented by Local 9, but rather is practical because they are on-site and immediately available to

clean up the area where they perform the cruise ship "setup" and passenger (customer) service work that appears to be their primary function at Pier 66. There is reference to a "mechanical sweeper" in the collective bargaining agreement between the employer and Local 9, but there is no evidence that harbor specialists ever have occasion to use such equipment.

The "light" cleaning work done by the both the harbor specialists and members of the Local 9 bargaining unit is also easily distinguished from the "heavy" cleaning and maintenance work historically performed by employees in the bargaining unit represented by Local 242.[2] To perform these functions, these employees use two power washers, a vacuum truck, a small power sweeper, and a hand sweeper, none of which are used by the harbor specialists. Conversely, there is no evidence suggesting any "customer service" component to the job responsibilities usually assigned to employees represented by Local 242.

The fact that the four groups of harbor specialists employed by the Port of Seattle are under different site managers would get in the way of a "vertical" unit structure,[3] but does not defeat the possibility of a "horizontal" unit structure. Moreover, the fact of separate supervision does not compel a conclusion that the harbor specialists belong only in one of the other of the bargaining units represented by the unions involved in this case.

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[2] "Heavy" is the term used by Local 242 to describe its cleaning responsibilities. Such work includes power-washing of piers, floats and parking lots.

[3] The harbor specialists at Pier 66 are supervised by Jon Erik Johnson, an operations manager; those at Fishermen's Terminal are supervised by the Marina Maintenance Supervisor Elijah Washington or by MIC Supervisor Shelley Beery; those at Shilshole Bay Marina are supervised by Marina Maintenance Supervisor Tim Wheeler.

History of Bargaining -
Each of the unions involved in this proceeding has an established history of bargaining with this employer:

Longshore Local 9 represents approximately 100 of the 1,350 or so persons employed by the Port of Seattle. Most of those employees are warehouse workers or seasonal employees. Their responsibilities generally include the loading and unloading of cargo vessels and the warehousing of cargo. The incidental sweeping and cleanup work performed by these employees are reflected in the collective bargaining agreement which covers their jobs, as follows:

> SECTION I PURPOSE AND RECOGNITION
>
> ...
> The Port agrees that warehouse work defined in this agreement under Port of Seattle management which is physically in a Port-operated warehouse shall be done by the Union.
>
> ...
> APPENDIX "C" - JOB DUTIES AND JURISDICTION
>
> ...
> 10. **Sweeping and cleaning of all transit sheds, warehouses, aprons, yard areas, etc.**

[Emphasis by **bold** supplied.]

So far as it appears from this record, however, Local 9 has never claimed the work performed by harbor specialists at other Port of Seattle facilities.

Laborers Local 242 represents the employees who have historically performed "heavy" cleaning tasks at the employer's facilities. Included among those are the Fishermen's Terminal and the Shilshole Bay Marina, where harbor specialists have historically performed the light sweeping work and Local 9 does not represent any employees that have any cleaning responsibilities whatsoever. In similar fashion, Local 9 and Local 242 have historically co-existed

at Pier 66, where the employees represented by Local 242 perform a variety of tasks such as repairing fencing, landscaping, cleaning and power washing, and assist other crafts such as electricians, carpenters, and plumbers, while employees represented by Local 9 have done cleaning work inside facilities such as the transit shed.

The claims of both unions have a "geographical" component: They were each content to co-exist with the harbor specialists at other Port of Seattle facilities, but spoke up when harbor specialists were moved onto the central waterfront at Pier 66. However, a strictly geographical focus overlooks the significant changes and new functions at Pier 66. In particular, it appears that the short-stay marina is an entirely new venture. Neither of these unions has claim to new work which has never been done in the past. None of the harbor specialists at other Port of Seattle locations have ever been represented for the purpose of collective bargaining. Thus, there is no bargaining history for the classification generally or for the positions at Pier 66.

Extent of Organization -

This aspect of the statutory unit determination criteria compares the group at issue with the employer's overall workforce. A representation petition was dismissed in Bremerton School District, Decision 527 (PECB, 1978), upon a conclusion that a proposed unit which cut across supervisory lines, cut across lines of generic employee types, was not limited to skilled craftsmen, and did not include all employees performing skilled or similar work, was only capable of description along lines of the petitioning union's extent of organization. Some of those same objections exist in this case. Both Local 242 and Local 9 argue that the cleaning work done by the harbor specialists belongs to their respective bargaining units, but to so hold would cut across generic employee types and fragment the harbor specialist classifications. The employer has seemingly made several groups of employees responsible for incidental cleaning and maintaining of their immediate work

areas. Thus, just as the cleaning responsibilities of employees represented by Local 242 overlap somewhat with the duties performed by employees represented by Local 9 in their own work area, there is nothing inherently wrong with an overlap between the cleaning responsibilities of employees represented by Local 242 and the duties performed by the harbor specialists in their own work areas. It is clear from this record that the harbor specialists at Pier 66 perform the same basic duties and have generally the same responsibilities as other harbor specialists employed by the employer, and that they are distinguishable from the employees represented by the two unions involved here. Thus, the existence of the harbor specialists as a separate group does not constitute an excessive fragmentation of the employer's workforce.[4]

Desires of Employees -

Where any of two or more different bargaining unit configurations could be appropriate, the Commission implements the "desires of

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[4] Commission precedents indicating a policy against unnecessary fragmentation of workforces include:

- In City of Auburn, Decision 4880-A (PECB, 1995), two "technician" positions were accreted to an existing bargaining unit, rather than risk creation of another (fragmentary) bargaining unit.
- In Forks Community Hospital, Decision 4187 (PECB, 1992), a proposed clerical/service/maintenance/technical unit that would have stranded other "technical" positions outside the unit was found inappropriate.
- In Skagit County, Decision 3828 (PECB, 1991), an agreed exclusion of certain employees from a unit was deemed null and void, based on a conclusion that it created a work jurisdiction conflict.
- In City of Vancouver, Decision 3160 (PECB, 1989), a stranding of employees too few to ever implement their statutory bargaining rights was deemed inappropriate.
- In Port of Seattle, Decision 890 (PECB, 1980), an artificial division of the employer's office-clerical workforce into two or more units was rejected.

employees" aspect of the statutory unit determination criteria by conducting a unit determination election. See, WAC 391- 25-530(1); City of McCleary, Decision 4503 (PECB, 1994); Globe Machine and Stamping, 3 NLRB 294 (1937). There is no occasion to conduct a unit determination election in a case that is truly appropriate for processing under Chapter 391-35 WAC, because that process is not available where a question concerning representation exists.

Although the possibility of an "accretion" exists under Commission precedents, such transactions are always an exception to the general rule of employee free choice in the selection of their exclusive bargaining representative. RCW 53.18.030; 41.56.040. An accretion will not be ordered if the disputed employees could stand alone as a separate bargaining unit, or if two or more existing bargaining units each have colorable claims to the work or positions involved. Kitsap Transit, Decision 3104 (PECB, 1989). In such situations, the employees involved retain their right to select their representative (if any) through representation proceedings under Chapter 391-25 WAC.

Conclusion

The primary work of the harbor specialists, and more specifically that of the harbor specialists assigned to the short-stay marina facility recently added at Pier 66, is significantly different from the primary work of the employees represented by Local 9 and Local 242, such that an accretion of this work to either of those bargaining units would violate the unit determination standards of the statute. The cleaning work at Pier 66 has been divided along discernable and functional lines, such that the harbor specialists and the employees represented by Local 9 perform incidental cleaning in their immediate work areas, while the employees represented by Local 242 provide "heavy cleaning" of those areas and maintain other facilities. The harbor specialist classifications exist in other Port of Seattle facilities, and have not been

represented for the purposes of collective bargaining, so that the circumstances are not present for an accretion of the harbor specialists at Pier 66 to either of the existing bargaining units.

FINDINGS OF FACT

1. The Port of Seattle is a "public employer" within the meaning of RCW 41.56.030(1).

2. International Longshore & Warehouse Union, Local 9, a "bargaining representative" within the meaning of RCW 41.56.030-(3), is the exclusive bargaining representative of certain employees of the Port of Seattle, some of whom work at Pier 66 on the downtown Seattle waterfront. Local 9 and the employer are parties to a collective bargaining agreement which covers specific kinds of work and responsibilities.

3. Seattle/King County Building and Construction Trades Council on behalf of Hod Carriers and General Laborers, Local 242, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of certain employees of the Port of Seattle, some of whom work at Pier 66 on the downtown Seattle waterfront. Local 242 and the employer are parties to a collective bargaining agreement which covers specific kinds of work and responsibilities.

4. Cleaning responsibilities have historically been assigned to employees in both of the bargaining units described in paragraphs 2 and 3 of these Findings of Fact. The responsibilities of employees represented by Local 9 include light maintenance cleaning and some minimal power washing in the areas at Pier 66 where they perform their primary function of setup for cruise ship arrivals and departures. The responsibilities of employees represented by Local 242 include

cleaning of footbridges and areas outside the area served by employees represented by Local 9, as well as heavy cleaning and power washing throughout the Pier 66 facilities.

5. The employer has historically assigned employees in "harbor specialist" classifications to provide customer service, security and incidental cleanup at its marina facilities. None of those employees have ever been represented for the purposes of collective bargaining. Employees represented by Local 242 have historically provided heavy cleaning and power washing at the facilities staffed by the harbor specialists.

6. In 1996, the employer completed a major renovation and redevelopment of its facilities on Pier 66 on the central waterfront in Seattle, including the construction of a new short-stay marina for recreational boaters. When it opened the new venture, the employer assigned customer service, security and incidental cleaning responsibilities at that facility to employees in the harbor specialist classifications, and transferred some employees from harbor specialist positions at its other marina facilities.

7. Within a detailed job description of the harbor specialists assigned to Pier 66, cleaning and maintenance responsibilities are only an adjunct to their primary responsibility of administration of the small boat moorage facility and monitoring public use of the pier's facilities. Those duties are comparable to the incidental cleaning responsibilities of the employees represented by Local 9, within their work areas, and are distinguishable from the cleaning responsibilities historically assigned to employees represented by Local 242.

8. On June 11, 1996, Local 242 notified the employer that it was asserting work jurisdiction over the cleaning duties assigned to harbor specialists at Pier 66.

9. On or before July 25, 1996, Local 9 notified the employer that it was asserting work jurisdiction over the cleaning duties assigned to harbor specialists at Pier 66.

10. The employer filed the petition to initiate this proceeding on June 20, 1996, seeking resolution of a dispute concerning the allocation of the employees or positions between two or more bargaining units.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapters 41.56 and 53.18 RCW and Chapter 391-35 WAC.

2. The evidence does not support a conclusion that the harbor specialists employed by the Port of Seattle in the new short-stay marina at Pier 66 are properly allocated under RCW 41.56.060 only to the bargaining unit represented by Local 9 or only to the bargaining unit represented by Local 242, so that a question concerning representation would exist as to those employees.

3. Under the circumstances described in paragraph 2 of these Conclusions of Law, accretion of the harbor specialists employed by the Port of Seattle in the new short-stay marina at Pier 66 to either the bargaining unit represented by Local 9 or the bargaining unit represented by Local 242 would deprive them of their right, under RCW 41.56.040 and 53.18.030, to select a representative of their own choosing.

ORDER

1. The claim of Local 242 for allocation of the cleaning work performed by employees in the harbor specialist classifica-

tions incidental to their primary customer service and security duties at the short-stay marina at Pier 66 is DENIED.

2. The claim of Local 9 for allocation of the cleaning work performed by employees in the harbor specialist classifications incidental to their primary customer service and security duties at the short-stay marina at Pier 66 is DENIED.

ISSUED at Olympia, Washington, on the 9th day of February, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-35-210.