STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES	)	CASE 10659-C-93-629
	)	
For clarification of an existing bargaining unit of employees of:	)	DECISION 5147-D - PECB
	)	
ISLAND COUNTY	)	DECISION OF COMMISSION
	)	

Lori Province, Representative, Washington State Council of County and City Employees, appeared for the union at the hearing; Jon Stables, Representative, filed the brief in opposition to the petition for review.

Braun Consulting Group, by Robert R. Braun, Jr., represented the employer.

This case comes before the Commission on a petition for review of an order clarifying bargaining unit issued by Executive Director Marvin L. Schurke.[1]

BACKGROUND

Island County (employer) and Washington State Council of County and City Employees Local 176-C (union) have had a bargaining relationship since 1986. Their collective bargaining agreement in effect from 1993 through 1995 described the covered bargaining unit as:

> [A]ll full-time and regular part-time clerical and technical employees of the Employer excluding, elected officials, officials appointed for fixed terms, confidential employees, supervisors, superior court employees, sher-

[1] Island County, Decision 5147 (PECB, 1995).

> iff's department employees, road and engineering department employees, deputy prosecutors and county extension service employees.

The union initially sought to accrete two positions in the Treasurer's Office, two positions in the Assessor's Office, a position in the District Court, two human service administrators, and two community development positions.

On September 1, 1993, the union filed a unit clarification petition with the Commission. Hearing Officer J. Martin Smith held a hearing on July 11, 1994. By that time, the disputed positions were: Two chief deputies in the Treasurer's Office, the chief deputy and chief appraiser in the Assessor's Office, two human service administrators in the Health Department, and two office managers in Planning and Community Development. By mutual agreement, the parties' presentations at the hearing were limited to submittal of documents and oral clarifications made by the parties' representatives, without testimony from others.

On June 8, 1995, the Executive Director issued an order clarifying bargaining unit which rejected the union's effort to accrete the chief deputy positions in the Treasurer's Office and the chief deputy and chief appraiser positions in the Assessor's Office. The two human resource administrator positions and the two office manager positions were included in the existing bargaining unit.

The employer sought Commission review of the Executive Director's decision. A petition submitted by telefacsimile on June 28, 1995 was found insufficient.[2] The Commission later waived the time limit, and accepted the original petition for review filed one day late, based on substantial compliance and a lack of prejudice.[3] The case is now before the Commission for a decision on the merits.

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[2] Island County, Decision 5147-B (PECB, 1995).

[3] Island County, Decision 5147-C (PECB, 1996).

POSITIONS OF THE PARTIES

The employer appeals the inclusion of the human service administrators in the bargaining unit, on the basis that they are professionals who are key members of the management team. The employer appeals the inclusion of the office manager positions, based on a claim that they are first-line supervisors whose duties create a potential for conflicts of interest within the bargaining unit. The employer supplied new evidence and arguments in support of its contentions.

The union contends the employer is attempting to bring in facts on appeal that were not argued at the hearing. It asserts the new material still does not form a valid basis for unit exclusions, and asks the Commission to affirm the Executive Director's decision.

DISCUSSION

The Legal Standard on Supervisory Exclusions

This case arises under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Supervisors may organize for the purpose of collective bargaining under that statute. Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977), citing, with approval, City of Tacoma, Decision 95-A (PECB, 1977). That distinguishes Chapter 41.56 RCW from the National Labor Relations Act (NLRA).

The Legislature has delegated authority to the Commission to determine appropriate bargaining units under Chapter 41.56 RCW:

> RCW 41.56.060 Determination of bargaining unit--Bargaining representative. The Commission, after hearing upon reasonable notice, shall decide in each application ...

> 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. ...

In the exercise of that authority, the Commission will generally exclude supervisors from bargaining units which contain their subordinates, in order to avoid a potential for conflicts of interest which might otherwise occur within the bargaining unit. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981).

Chapter 41.56 RCW does not contain a definition of "supervisor". The Educational Employment Relations Act (EERA), Chapter 41.59 RCW, contains a definition of "supervisor" that is generally patterned after the exclusionary definition found in Section 2(11) of the NLRA,[4] except for the "preponderance" test highlighted below:

> [S]upervisor, ... means any employee having authority, in the interest of an employer, to hire, assign, promote, transfer, layoff, recall, suspend, discipline, or discharge other employees, or to adjust their grievances, or to recommend effectively such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment, and shall not include any persons solely by reason of their membership on a faculty tenure or other governance committee or body. **The term "supervisor" shall include only those**

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[4] Supervisors are excluded from the definition of employee under Chapter 41.59 RCW, unless they affirmatively vote to organize a bargaining unit under conditional provisions of that statute.

> **employees who perform a preponderance of the above-specified acts of authority.**
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> RCW 41.59.020(4) [emphasis by **bold** supplied].

The Commission has looked to the EERA definition as suggesting the types of authority which tend to generate conflicts of interest. See, Snohomish Health District, Decision 4735-A (PECB, 1995).

In Morton General Hospital, Decision 3521-B (PECB, 1991), the Commission observed a distinction between "supervisors" and "lead workers" who have authority to direct subordinates' job assignments, but do not have authority to make meaningful changes in the employment relationship. Lead workers are properly bargaining unit positions where they have no independent authority and do not exercise independent judgment in fundamental personnel matters.

Aside from the potential for conflicts of interest, the Commission considers historical relationships in determining whether a position should be excluded from a bargaining unit as supervisory. Absent a change of circumstance warranting a change of the unit status of individuals or classifications, the unit status of those previously included in or excluded from an appropriate unit by agreement of the parties or by certification will usually not be disturbed. City of Richland, supra; Snohomish Health District, supra. On the other hand, actions and agreements of parties on unit determination matters are not binding on the Commission, if in conflict with the statute or the Commission's unit determination policies. City of Richland, supra.

Application of Precedent

Office Managers -

A review of the record indicates that the office managers in the Planning and Community Development departments oversee the work of about four bargaining unit employees in office support activities,

granting time off to those employees and evaluating their work. But the record also indicates that the office managers themselves provide administrative and secretarial support to their superiors. The incumbents of the disputed positions prepare and maintain various documents, they prepare and distribute meeting agendas and documents, and they coordinate with staff members.

Based on the record made at the hearing, the supervisory functions of the two office managers are limited to lead responsibilities. The incumbents do not exercise independent judgment in fundamental personnel matters, as required by Morton, supra. They clearly do not perform a preponderance of acts of authority on behalf of the employer (i.e., to hire, assign, promote, transfer, layoff, recall, suspend, discipline or discharge employees, or adjust their grievances, or to effectively recommend such action).

In its petition for review, the employer contends the office managers are directly involved in recommending promotions and in the hiring process. The employer now states that neither the office managers nor the department director have seen the job descriptions admitted into evidence at the hearing, and that those job descriptions are incomplete or incorrect in light of the actual duties that the incumbents perform.

WAC 391-35-170 assigns to hearing officers the task to obtain a factual record. Under WAC 391-35-190, the Executive Director makes a determination based on that record. WAC 391-35-250 requires the Commission to determine the status of positions covered by a petition for review based on the record. When evidence could have been admitted at a hearing, but was not offered, the Commission does not allow the introduction of that evidence at a later point in the proceedings. See, Municipality of Metropolitan Seattle, Decision 2358-A (PECB, 1986); King County, Decision 3318-A (PECB, 1990); and King County, Decision 4299-A (PECB, 1993). WAC 391-35-170, as recently amended, even precludes reopening of a hearing to

receive evidence which could, with due diligence, have been produced at the hearing.

The role of the Commission under WAC 391-35-250 is comparable to that of an appellate court. Additional evidence will not be accepted by an appellate court unless, inter alia, it is equitable to excuse a party's failure to present the evidence to the trial court. See, State of Washington v. Ziegler, 114 Wn.2d 533 (1990); and Schreiner v. Spokane, 74 Wn.App. 617 (1994). No equitable relief is available to the employer here, where the employer made no effort at the hearing to provide information regarding the office managers' involvement in hiring decisions. Since the union had no opportunity to challenge this material, it would be inequitable for us to accept the employer's new assertions.[5]

Human Service Administrators -
These positions coordinate and administer health programs for the employer. One deals with mental health and alcoholism or substance abuse; the other deals with developmental disabilities. They are the lead policy persons in their program areas. A review of the record indicates that the incumbents deal with contracted agencies. Their responsibilities include: Coordination of information; community liaison work; planning, prioritizing, and monitoring results; representing the department at meetings; coordinating program delivery; and providing staff support for advisory boards. The incumbent who deals with mental health and substance abuse matters also oversees a "mental health area resource coordinator" position which is included in the bargaining unit, assigning day-to-day work activities, approving vacation and sick leaves, and making reports to a superior on the employee's work progress.

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[5] Even if we were to consider the new evidence, we would find it unpersuasive. The actual involvement of the office managers in hiring and promotion is not made clear. In the face of insufficient facts, we could not justify a ruling that the positions are supervisory.

Based on the record established at the hearing, we conclude that the human service administrators do not have authority to act on behalf of the employer in a preponderance of the critical areas detailed in the traditional definitions of "supervisor" (e.g., to hire, assign, promote, transfer, layoff, recall, suspend, discipline, or discharge other employees, or to adjust their grievances, or to recommend effectively such action). Under Morton, supra, the record does not support a conclusion that there is a sufficient potential for conflicts of interest to warrant their exclusion from the unit. We find the inclusion of the human resource administrator positions in the bargaining unit is appropriate.

The evidence produced by the parties at the hearing does not disclose any agreement of the parties or other historical basis that may have existed for the exclusion of these positions from this wall-to-wall "courthouse" unit.[6] We thus also agree with the Executive Director that nothing in the record warrants their continued exclusion from that unit.

Attached to the employer's petition for review is a memorandum from the employer's health services director, which was neither offered nor admitted in evidence at the hearing in this matter.[7] Again, the employer is essentially attempting to supplement the record

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[6] In contrast, the record disclosed a clear history of exclusion for the positions in the Treasurer's Office and the Assessor's Office.

[7] The director claims there would be conflicts in the recruitment and selection process, if the positions were in the bargaining unit. He appears to claim the incumbents' input as primary policy advisers to the Board of County Commissioners would be tainted by conflicts with bargaining unit roles, and that negotiations for contracts between the employer and service providers might be negatively influenced. He asserts that, as part of a six-member management team, the incumbents develop policy and act in roles in opposition to bargaining unit positions.

with new evidence on review. We are not inclined to accept such evidence, for the reasons stated above.[8]

Finally, even if the human service administrators are "professional" employees, Chapter 41.56 RCW contains no exclusion or special provision for professionals. An employee with advanced training and duties associated with "professional" standing may nevertheless be included in a bargaining unit under Chapter 41.56 RCW. City of Vancouver, Decision 440-A (PECB, 1978).

NOW, THEREFORE, it is

ORDERED

The findings of fact, conclusions of law and order issued in this matter by Marvin L. Schurke are affirmed and adopted as findings of fact, conclusions of law and order of the Commission.

Issued at Olympia, Washington, the 5th day of June, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

JOSEPH W. DUFFY, Commissioner

SAM KINVILLE, Commissioner

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[8] Even if we were to consider the director's statement, we would find it unpersuasive. The suggested conflicts are pure conjecture. The incumbents had been with the employer for a long time as of the hearing (one for 19+ years, the other for 3+ years), yet no specific instances of past activities where their inclusion in the bargaining unit would have posed a clear conflict of interest were mentioned.