

Klickitat Public Hospital District 2, Decision 7172 (PECB, 2000)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
WASHINGTON STATE NURSES	)	
ASSOCIATION	)	CASE 15147-E-00-2529
	)	
Involving certain employees of:	)	DECISION 7172 - PECB
	)	
Klickitat County Public Hospital	)	AMENDED TALLY
District 2	)	OF BALLOTS
	)	
	)	

Mike Sanderson, Labor Representative, represented the petitioner.

Foster, Pepper & Shefelman, by P. Stephen DiJulio, Attorney at Law, represented the employer.

Delores Predeek, Union Representative, represented the intervener, Skyline Nursing Negotiating Committee.

On April 18, 2000, the Washington State Nurses Association (WSNA) filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission under Chapter 391-25 WAC, seeking certification as exclusive bargaining representative of certain employees of Klickitat County Public Hospital District 2 (employer). The Skyline Nursing Negotiating Committee (SNNC) was granted intervention in the proceedings as the incumbent exclusive bargaining representative of the petitioned-for employees.

Three questions are presented in this case, including: (1) whether a particular individual should be excluded from the bargaining unit as a supervisor; (2) the appropriate threshold for exclusion of

employees from the bargaining unit as "casual" employees; and (3) whether the conditions are appropriate for issuance of an interim certification. Based on review of the documents on file, the Executive Director concludes that issuance of an amended tally of ballots is appropriate at this time. The issues concerning the supervisor and test for casual exclusions will be the subject of a hearing and further proceedings in this matter.

PROCEDURAL BACKGROUND

An investigation conference was conducted in this case on June 1, 2000, by telephone conference call. The parties stipulated all matters except the supervisory status of one individual and the threshold for inclusion of per diem employees in the bargaining unit.¹ The parties agreed, however, that the Commission should proceed with an election in which 11 disputed employees could vote by challenged ballot.

On June 5, 2000, the employer filed a letter in which it asserted that the employment of two of the challenged voters had been terminated in March of 2000. Because those persons were already on the list persons to vote by challenged ballot, no determination on their eligibility was made at that time.

An election was conducted by mail ballot. The tally of ballots issued on June 22, 2000, indicated results as follows:

¹The WSNA wanted all "per diem" employees to be included in the bargaining unit, regardless of the number of hours worked. The employer indicated that it would abide by the "one-sixth of full time" test used elsewhere, and opposed inclusion of employees who did not meet that standard in the bargaining unit. The SNNC did not take a position on that issue.

Approximate number of eligible voters.....	32
Votes cast for Washington State Nurses Association....	14
Votes cast for Skyline Nursing Negotiating Committee.	2
Votes cast for "no representation".....	0
Valid ballots counted.....	16
Challenged ballots.....	5

Thus, the challenged ballots appeared to be sufficient in number to affect the outcome of the election.²

The elimination of as few as 5 of the 11 disputed employees from the eligibility list would have obviated the need for a run-off election,³ and the Commission requested that the employer supply the hours worked by each of the disputed per diem employees in the last four quarters. The employer responded with such a list on June 23, 2000.

A letter sent to the parties on July 10, 2000, reviewing long-standing Commission precedents excluding "casual" employees from bargaining units, and noting that "11 work shifts per quarter" is the most inclusive test ever applied by the Commission for "casual" status.⁴ Applying those precedents and the employee hours data supplied by the employer, it appeared that 9 of the 11 disputed employees were likely excludable as casual employees. The parties were asked to file and serve written comments. The WSNA filed a

²While the WSNA clearly received the majority of the valid ballots cast, RCW 41.56.070 differs from the National Labor Relations Act and even from other state laws, by requiring: "Where more than one organization is on the ballot and neither of the three or more choices receives a **majority vote of the public employees within the bargaining unit**, a runoff election shall be held." [Emphasis by bold supplied.]

³Under such circumstances, the 14 votes cast for the WSNA would be a majority of the remaining 27 employees.

⁴See, King County, Decision 1675 (PECB, 1983).

response on July 25, 2000, continuing to claim that all of the challenged voters should be included in the bargaining unit; the employer filed comments on July 26, 2000, continuing to claim that none of the challenged voters were eligible for inclusion in the bargaining unit; the SNNC did not respond. That exchange of correspondence did not alter the situation, so it continued to appear that a hearing and formal decision would be necessary to determine whether a run-off election should be held or an interim certification should be issued.

On August 16, 2000, the WSNA filed a letter in which it conceded that the two employees identified as "terminated" in the employer's June 5 letter, along with the three employees who had averaged 6.19 hours per quarter or less, were properly excluded from the bargaining unit. The WSNA thus requested issuance of an interim certification. The employer responded by letter filed on September 5, 2000, objecting on several grounds and asking that the hearing process be concluded before any certification is issued.

DISCUSSION

Unit Determination Authority and Policies

The determination of appropriate bargaining units is a function delegated by the legislature to the Commission in RCW 41.56.060. The criteria set forth in RCW 41.56.060 are as follows:

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.

Employers and labor organizations may agree on unit issues, but such agreements do not indicate that the unit configuration they agree upon 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). Neither employers nor labor organizations have the ability to bind the Commission by their agreements or desires.

Regular Part-Time Employees -

In numerous decisions over the past 2+ decades, the Commission has included "regular part-time" employees in the same bargaining units with full-time employees performing similar work. See, Columbia School District et al., Decision 1189-A (EDUC, 1981); Tacoma School District, Decision 655 (EDUC, 1979). At the same time, the Commission has rejected unit configurations which would have separate bargaining units of part-time and full-time employees, with conflicting work jurisdiction claims. See, City of Seattle Decision 781 (PECB, 1979); Skagit County, Decision 3828 (PECB, 1991). Those precedents are consistent with National Labor Relations Board (NLRB) precedents concerning inclusion of part-time employees in bargaining units. See, Farmers Insurance Group, 143 NLRB 240, 244-245 (1963). Employees who perform work of the type performed by other bargaining unit employees on a regular basis are deemed to have a substantial and ongoing interest in the wages, hours and working conditions in the bargaining unit.

Persons employed without benefit of a fixed work schedule have nevertheless been included in bargaining units as "regular part-time" employees, where there has been a showing of repeated work assignments within a specified time period (e.g., a week, month,

quarter, year or other appropriate time period) and the employees have a reasonable expectancy of continued employment on a similar basis. Tacoma, supra. The Commission explicitly rejected the policy by which a predecessor agency categorically excluded "on call" employees from bargaining units under the statute. Mount Vernon School District, Decision 2273-A (PECB, 1986).

Casual Employees -

In numerous other decisions over the same period, the Commission has excluded "casual employees" from bargaining units. See, Everett School District, Decision 268 (EDUC, 1977); Tacoma School District, supra; Columbia School District et al., supra. Also consistent with NLRB precedent, the exclusion of casual employees deems such persons to have had a series of separate and terminated employment relationships with the employer, so that they lack a substantial and ongoing interest in the wages, hours and working conditions in the bargaining unit.⁵

Application of Unit Determination Principles

The Proposed "Supervisor" Exclusion -

Under City of Richland, supra, the Commission routinely excludes supervisors from the bargaining units which include their subordinates, to avoid a potential for conflicts of interest which would otherwise exist within the bargaining unit. A substantial issue has been framed in this case as to whether Christopher Duniphin is a supervisor. That issue will be referred to a Hearing Officer for further proceedings under Chapter 391-25 WAC.

⁵From the perspective of the persons so categorized, one protection stemming from their status as "casual" employees is that they are excluded from any union security obligations applicable in the bargaining unit.

The "Regular Part-Time" Issue -

A substantial issue has been framed in this case as to whether certain employees of this employer should be classified as "regular part-time" or "casual" under Commission precedent.⁶ During the Investigation Conference, the employer was understood to accept the "one-sixth of full-time" test applied under Commission precedent in a variety of employment settings. In his letter filed on September 5, 2000, counsel for the employer wrote: "It remains the position of the Hospital ... that per diem personnel, including all employees [voting by challenged ballot] are not appropriate for inclusion in the bargaining unit."

The petition filed by the WSNA in this case indicated that the SNNC was the incumbent exclusive bargaining representative of the petitioned-for employees and, as called for by WAC 391-25-070-(4)(b), the WSNA supplied a copy of a collective bargaining agreement between the SNNC and the employer.⁷ That contract included two provisions which have a bearing on the "regular part-time" issue in this case:

ARTICLE TWO: RECOGNITION

2.01 The Hospital recognizes the Skyline Nursing Negotiating Committee as the exclusive bargaining representative over wages, hours, and conditions of employment for **all Licensed Nursing Staff**.

...
ARTICLE FIVE: DEFINITIONS

⁶The hospital jargon term "per diem" is not used in Commission precedent, or in this analysis.

⁷The contract filed by the WSNA is undated, but purports to have been made effective retroactively for the period from July 1, 1994 through June 30, 1996. The employer was asked to supply a copy of any existing contract, but neither did so nor objected to the contract filed by the WSNA.

...

5.04 Full Time Nurse

- C. A full-time nurse is defined as a nurse who is regularly scheduled to work thirty-two (32) hours or more hours in one week.

5.05 Part-Time Nurse

- A. A part-time nurse is defined as a nurse who is regularly scheduled to work an average of twenty-four (24) to thirty-one (31) hours in one week.

5.06 Temporary Nurse

- A. A temporary nurse is defined as a nurse hired to work for a period of time not to exceed 120 calendar days. Temporary nurses are eligible for holiday pay. If a temporary nurse is hired as a regular employee without a break in service, the time worked as a temporary nurse shall count as time worked in the accrual of benefits and seniority. An additional thirty (30) calendar days newly hired probationary period may be added at the Hospital's option for purposes of performance evaluation.

5.07 Per Diem Nurse

- A. **A Per Diem nurse is defined as a nurse who is regularly scheduled to work zero (0) to twenty-three (23) hours per week.** A per diem nurse shall receive a five percent (5%) differential in lieu of all benefits except that one and one-half (1-1/2) times the hourly rate will be paid for hours worked on a recognized holiday.

[Emphasis by **bold** supplied.]

There is thus some basis for an inference that the WSNA's original position in this case (i.e., to include all per diem employees in the bargaining unit regardless of the number of hours they work) was consistent with practices of this employer and the SNNC.

That issue will be referred to a Hearing Officer for further proceedings under Chapter 391-25 WAC. Having now conceded that all employees working an average of 6.19 hours per quarter or less are excludable as "casual" employees, the WSNA will not be heard to revert to its previous "include all per diem employees in the unit" position in this case.

Propriety of an Interim Certification

In City of Redmond, Decision 1367-A (PECB, 1982), the Commission provided direction for its staff to get on with the early determination of questions concerning representation whenever possible, and to defer hearings and determinations on issues which do not necessarily affect the outcome of the question concerning representation. Thus, issuance of an "interim certification" is appropriate whenever it appears that a particular organization will be entitled to certification as exclusive bargaining representative. Eligibility issues can be worked out separately, while the parties proceed with negotiations on a collective bargaining agreement.

The WSNA requested issuance of an interim certification in its letter filed on July 25, 2000, but it held to its previous position that all 11 of the per diem employees should be included in the bargaining unit. Regardless of whether such a position would pass a "straight face" test under the Commission precedents described above, the taking of that position by the WSNA precluded the issuance of an interim certification at that time.

With its letter filed on August 16, 2000, the WSNA has accepted the employer's arguments as to five of the employees at issue in the "regular part-time" versus "casual" debate in this case. The employer had previously listed two of those (Eileen Leslie and Colleen Wahto) as terminated; if the union had agreed to those

exclusions prior to the election, the number on the top line of the tally sheet would have been "30" instead of "32". The others are among the remaining nine employees that the employer would have the Commission exclude from the bargaining unit as "casual".

Removal of three additional names (O.J. Hecomovich, Shirley Landgren, and Jill Morgan) from the "approximate number of eligible voters" will provide basis to convert one of the challenged ballots cast in this case to "void", but will not compromise the secrecy of that or any other challenged ballot. More important, the removal of those employees from the case will eliminate the need for a run-off election by reducing the number on the top line of the tally sheet to "27".

The employer would have no basis to object if the WSNA had made the same concessions in response to its position during the Investigation Conference, prior to or at the tally of ballots, promptly upon seeing the hours data provided by the employer, or promptly upon receipt of the letter pointing out the Commission precedents on the subject. Further, any shift of position by the WSNA during the processing of this case must be evaluated in the context of the inclusive language found in the collective bargaining agreement between the SNNC and the employer, and of the apparent shift of position by the employer during the processing of this case.

In keeping with the direction provided in City of Redmond, supra, the Executive Director deems it appropriate to issue an amended tally and proceed toward issuance of an interim certification in this case.

NOW, THEREFORE, it is

ORDERED

1. The tally of ballots issued in this matter on June 22, 2000, is amended to read as follows:

Approximate number of eligible voters.....27
Void ballots..... 1
Votes cast for Washington State Nurses Association.....14
Votes cast for Skyline Nursing Negotiating Committee.. 2
Votes cast for "no representation"..... 0
Valid ballots counted.....16
Challenged ballots..... 4
Valid ballots counted plus challenged ballots.....20
Number of valid ballots needed to determine election..14
Challenged ballots DO NOT affect the outcome of the election.

The results of the election appear to be CONCLUSIVE, favoring the Washington State Nurses Association.

2. The issues concerning the claimed supervisor exclusion and concerning the test for "casual" exclusions from this bargaining unit shall be a subject of further proceedings under Chapter 391-25 WAC.

Issued at Olympia, Washington, on the 15th day of September, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARVIN L. SCHURKE, Executive Director

Paragraph 1 of order may be appealed to the Commission by filing objections under WAC 391-25-590.