UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

PUGET SOUND LABOR AGENCY, AFL-CIO

Employer-Petitioner

and

Case 19-UC-84935

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 21

Union

DECISION AND ORDER

The above-captioned matter is before the National Labor Relations Board (the Board) upon a petition duly filed under §9(b) of the National Labor Relations Act (the Act), as amended. Pursuant to the provisions of §3(b) of the Act, the Board has delegated its authority in this proceeding to me. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

Puget Sound Labor Agency (the Employer) is a social service organization active in King and Snohomish Counties in the State of Washington, funded by labor organizations and other community members. UFCW Local 21 (the Union) represents a bargaining unit (Unit) of employees employed by the Employer at its King and Snohomish County offices. The parties have a longstanding collective bargaining relationship.

The Employer filed the instant Petition seeking to clarify the Unit by confirming the historical exclusion of the Director, Snohomish County position (Snohomish County Director). The Employer maintains the position is historically excluded and acknowledges the Petition is filed during the term of the parties' collective bargaining agreement, but argues the Petition is timely filed because the Union has filed suit to compel arbitration on a grievance filed by the former Snohomish County Director, Suzanne Moreau. The Employer further asserts that if successful this suit would constitute a *de facto* accretion of the historically excluded position to the Unit, in contradiction of established Board policy. The Employer further contends that the position is improperly placed in the unit because the Snohomish County Director is a manager, and lacks a community of interest with the employees in the Unit.

The Union contends the Director position has not been historically excluded, but to the contrary has been historically included in the Unit. The Union contends that the instant Petition is untimely, as it seeks to clarify the Unit midterm, absent any evidence of a recent, substantial change. The Union further contends the Board should not address the instant question because the Snohomish County Director position is vacant and therefore issues

regarding its unit placement are merely a hypothetical exercise.

I have carefully reviewed and considered the record evidence, and the arguments of the parties at both the hearing and in their post-hearing briefs.[1] As an initial matter I find the petition is timely. I further find, consistent with the Employer, the Snohomish County Director position has historically been excluded from the Unit, and I have ordered a clarification of the bargaining unit accordingly. In doing so, I have also addressed the issue, raised by the record evidence, of the Unit consisting of only one employee, and the impact of this for the parties going forward.

Below, I have set forth the record evidence that forms the basis for my decision, as well as the Board's policies regarding the timing and resolution of UC petitions. Following a review of this policy is a section applying it to the evidence. In conclusion, I have issued my Order and addressed the procedures for requesting review of this decision.

I. RECORD EVIDENCE[2]

A. Background

The Employer is a social services agency, operating a variety of programs including a food bank and utility assistance, which serve those in need in the greater Seattle metropolitan area. The Employer's main office, referred to in the record and by parties as the "King County Office," is located in Seattle. The Employer's Executive Director and most of its staff work out of this office. The Employer is partially funded by donations from labor organizations in the Seattle area, and its Board of Directors consists primarily of the leaders of these labor organizations. The Employer does not exclusively serve the members of these organizations, however, and has also received funds from the United Way and other groups to serve the community at large.

In the early 2000's several similar predecessor social service organizations combined to form the Employer, and shortly after coming into existence the Employer opened an office in Snohomish County. Suzanne Moreau was hired as the Employer's Snohomish County Director in 2004. When the Employer was created, it adopted the collective bargaining agreements in place between its predecessors and UFCW Local 1105, which represented the predecessors' employees. In December of 2004, the Employer and UFCW Local 1105 executed a contract effective from 2004 to 2007. In 2005 UFCW Local 1105 merged with the Union in this case, UFCW Local 21. The Employer and UFCW Local 21 negotiated successor agreements in 2007 and 2010, and the current contract is in effect until 2013.

In August of 2011, due to lack of funding, the Employer closed most of its operations, including the Snohomish County office, and laid off most of its employees, including Moreau. Presently the Employer employs only its Executive Director and one Unit employee, Executive Assistant Julie Sawyer, at the King County office.

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[1] The Union filed a timely brief.

[2] The Employer called former Board President Ron McGaha, former President of UFCW Local 1105 Sharon McCann, and Executive Director Steve Fox. The Union called former member of the Employer's Board of Directors Toni Bohan, and former Snohomish County Director Moreau.

After the closure of the Snohomish County office, Moreau filed a grievance seeking to exercise "bumping rights" under the parties' current collective bargaining agreement, which would allow her to be recalled from layoff and work in the remaining Unit position in the King County office. The Employer has taken the position that Moreau is not and never was a member of the Unit and as such is not entitled to exercise this contractual right. Accordingly, the Employer has declined to process the grievance.

Some of the Employer's witnesses at hearing speculated regarding the financial conditions that would have to exist for it to recall its staff and reopen the Snohomish County office, but there is no evidence in the record to suggest this is imminent or likely. There is no evidence in the record to suggest the reduction of the Unit to one employee is temporary or otherwise not permanent.

B. Snohomish County Director's Duties and Responsibilities

Moreau was the only employee employed at the Snohomish County office throughout her employment. The Employer's Executive Director and approximately 8 bargaining unit employees were employed at the King County office. As the only employee in the Snohomish County office, Moreau was responsible for a wide range of duties during her employment. From the limited evidence in the record it appears she was almost exclusively responsible for fundraising from sources in Snohomish County, and was the Employer's liaison with affiliated labor organizations in the County. As such, much of Moreau's time was spent in meetings and in contact with these entities, a function largely performed by the Executive Director and Executive Assistant in the King County office. As the only employee in the Snohomish County office, however, Moreau also answered the phones at the office and processed the requests for assistance that came to the office, the primary tasks of Unit employees in the King County office.

The Snohomish County office did not have a separate budget, and when Moreau processed a request for assistance, it was sent to the King County office where the bookkeeper issued all checks. Moreau did have the limited authority to incur costs. However, Executive Director Fox testified the authority only extended to expenses such as parking, office supplies, or an occasional business lunch, which would not require advance approval if the amount was under $100.

All employees, including the Executive Director, who all parties agree was excluded from the Unit, received health and pension benefits through the Union's plans. The Executive Director and Moreau were paid a salary and received a car allowance. Moreau was the only employee that set her own working hours, a unique trait of working as the lone employee at the Snohomish County office.

There is passing reference in the record to Moreau substituting for the Executive Director on one occasion, but the nature and extent of that substitution is not established.

C. Historical Treatment

The parties' dispute concerns whether, during her approximately 8 years of employment as Snohomish County Director, Moreau was inside or outside of the Unit. At hearing, both parties introduced a variety of evidence supporting their respective

contentions regarding the historical treatment of the position.

Moreau testified that it was her understanding at the time she was hired that she had been hired for a Unit position, and that she joined the Union as soon as she was hired. Moreau testified she did not recall having an explicit conversation about the bargaining unit status of the position during the interview process, however, and the Union did not introduce any membership paperwork or other documentary evidence of membership in the record. Former Board of Directors member Bohan agreed with Moreau, testifying that when she became a member of the Employer's Board, Bohan understood Moreau to be a member of the Unit.

In contrast, both former Board President McGaha and former UFCW Local 1105 President McCann testified it was their understanding at the time Moreau was hired, and at the time they negotiated the 2004-2007 contract for the Employer and the Union, respectively, that the Snohomish County Director position was not in the Unit.

Between 2004 and 2011, the issue appears to have been unaddressed. Not until Executive Director Fox sent a letter to Moreau in April of 2011 did a party document their position. Fox's letter, attached to a performance evaluation, stated, "I am reminding you that you are not part of a collective bargaining unit and you do not work under a union contract." Moreau sent a reply to Fox, but she did not specifically respond to his assertion regarding her exclusion from the Unit. Instead, she stated, "I strongly disagree to the entire content of your message," and while addressing other topics in detail, her reply does not specifically address his statement that she was outside the Unit.

Also included in the record is the Union's initial response to Moreau's request to file a grievance following her layoff. By this October 24, 2011 letter, the Union declined to file a grievance, stating, "Your position is not included in the bargaining unit..." Only after Moreau appealed to the Union's Executive Board did the Union reverse its position and file a grievance. The basis for the Union's Executive Board reversing its position was not submitted in the record.

As noted, McGaha and McCann negotiated the 2004-2007 collective bargaining agreement. The Recognition clause of the 2004-2007 agreement states:

> The Employer agrees to recognize and hereby does recognize the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, hours and all other terms and conditions of employment for the appropriate bargaining unit herein established and described as follows: All hired directors, liaisons, representatives and staff assistants.

The recognition clause does not contain any exclusions.

While the recognition clause references "directors" as a specific inclusion, both McGaha and McCann testified that this is a reference to a different position, not the Snohomish County Director. According to the witnesses, the use of this language was a legacy from the predecessor agreements, which had used the classification "director" to identify the head of a specific program: the food bank, for example. The witnesses also testified that by the time of the 2004 agreement, these positions were no longer filled, but

that the language persisted until the negotiation of the next collective bargaining agreement in 2007. At that time, without any discussion of Moreau, the Snohomish County Director Position, or that any change was taking place in the composition of the Unit, the final sentence in the recognition clause was changed to "All hired assistants, liaisons, representatives and staff assistants," as a matter of "housekeeping."

It is not disputed that during her employment as Snohomish County Director Moreau received the same health and retirement benefits as Unit employees and paid dues to the Union. Moreau asserts this is because she was in the Unit. The Employer, however, argues that all employees employed by the Employer were enrolled in the Union's health and retirement plans and pay dues as a result, even employees clearly excluded from the Unit, such as the Executive Director. McGaha further testified that as a matter of principle the Employer applied the terms of the collective bargaining agreement to all employees, even those outside of the Unit, in the interest of "fairness."

Moreau was paid a salary, and was the only employee who received a salary other than the Executive Director. While her salary is not set by the collective bargaining agreement, Moreau testified that she had received wage increases throughout her employment consistent with the scale set by the collective bargaining agreement. Neither the Union nor the Employer claim any negotiation took place, or was requested, regarding Moreau's lay off. The record does not indicate what, if any, bargaining took place regarding the Unit employees who were laid off.

The Executive Director and Snohomish County Director also received a car allowance as part of their compensation package. The details of this car allowance are contained in a letter of understanding attached to the 2004-2007 agreement. McCann was questioned at hearing regarding why the car allowance was included in the contract when the Employer maintains all the employees it applied to were ostensibly outside the bargaining unit. McCann stated it was an administrative convenience, because both the car allowance and contract had to be approved by the Board of Directors. Fox testified that the car allowances, while incorporated into the contract, had been unilaterally changed by the Executive Director in the past, without negotiation with the Union.

It is undisputed that Moreau was in arrears on her dues at one point in 2009. It is also undisputed that Executive Director Fox spoke to Board Member Bohan and asked her to speak about the matter to Moreau. Bohan testified Fox asked her to remind Moreau that if she didn't get current, Moreau "would be taken off the schedule and couldn't work anymore." Moreau testified she recalled Bohan specifically saying to her in the conversation that Moreau would be terminated. Fox also admitted receiving a letter from the Union notifying him that Moreau was in arrears and requested she be terminated if she did not become current in due payments. Fox testified that when he asked Bohan to speak to Moreau, it was because he was being "bothered" by the union about her non-payment of dues. He maintains he never said she would be terminated for non-payment.

Moreau claims she was treated as a member of the Unit by the Union during her employment. She does not claim she attended any regular Union meetings, but maintains she was involved in pre-contract planning meetings for bargaining. She also testified that on more than one occasion local Union representative Lorenzini contacted her to discuss her interests in upcoming bargaining. McCann testified Moreau was allowed to attend the

Union's presentation on the 2004-2007 contract because she received benefits, but that when it was time to vote on ratification, McCann asked Moreau to leave because Moreau was not in the Unit. Moreau denied this conversation occurred.

It is not disputed that when Fox had a meeting with Moreau in 2011 to notify Moreau she was being laid off, local Union representative Lorenzini attended. Moreau testified that Lorenzini was present because she had specifically requested her union representative be present for the meeting. Fox testified he believed Lorenzini was present merely as an "observer."

After the layoff, Moreau requested the Union file a grievance on her behalf. As mentioned above, the Union initially refused, stating, "Your position is not included in the bargaining unit...," but subsequently reversed position and filed a grievance. Since the filing, the Employer has denied the grievance on the basis that Moreau is not a member of the Unit. The Union has filed a suit in District Court to compel arbitration in light of the Employer's refusal. In response to that suit, the Employer has filed the instant Petition.

II. ANALYSIS

A. Timeliness

It is a well-established principle of Board law that the Board's authority to issue certifications under Section 9(c)(1) of the Act carries with it an implied authority to police such certifications, and to clarify them as a means of effectuating the policies of the Act. As such, the Board has developed procedures for a petition allowing clarification of a bargaining unit, a UC petition, to resolve ambiguities concerning the unit placement of individuals. *Union Electric Co.*, 217 NLRB 666, 667 (1975). The Board's procedures allow processing of a UC petition only where there is a certified or currently recognized bargaining representative and no question concerning representation exists. Section 102.60(b) of the Board's Rules and Regulations.

Applied in practice, the result is that the Board does not allow a party to accrete a historically excluded classification to the bargaining unit by a midterm UC petition absent a recent, substantial change, as this raises a potential question concerning representation. *Bethlehem Steel Corp.*, 329 NLRB 243, 244 (1999); *Robert Wood Johnson University Hospital*, 328 NLRB 912, 914 (1999). The Board has also enforced a corollary to this rule, and prohibited midterm UC petitions that seek to merely confirm a historical exclusion. *Bethlehem Steel* at 244.

The Board will apply this principle in regard to historical exclusions as long as there is a history of agreement regarding placement between the parties, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent. *Union Electric Co.*, 217 NLRB 666, 667 (1975). As the Board has stated, the circumstances surrounding the historical exclusion are not the deciding factor; it is the fact of historical exclusion that is determinative. *United Parcel Service*, 303 NLRB 326, 327 (1991).

Exceptions to the general prohibition on clarifying historically excluded classifications exist, however. In *Williams Transportation Co.*, 233 NLRB 837 (1977), a Union obtained an

arbitration award whereby a historically excluded shop office clerk position was accreted to an existing unit. The Employer filed a UC petition seeking to confirm the historically excluded status of the shop office clerk classification and prevent enforcement of the arbitrator's award. *Id.* In addressing the petition, the Board acknowledged that under normal circumstances it would dismiss a UC petition that merely sought to confirm a historical exclusion. *Id.* However, because substantively "[i]t is axiomatic that, where a classification has been historically excluded from a unit, it cannot be added by means of the accretion doctrine," and procedurally "questions regarding representation, accretion, and unit placement are not matters for arbitration, but rather, are matters within the exclusive province of the Board to resolve," the Board created an exception to its general prohibition in this regard. *Id.*

The Board expanded the *Williams Transportation* exception to cases where a pending grievance could ultimately result in an incongruous arbitration award in *Ziegler, Inc.,* 333 NLRB 949 (2001). In that case the employer's UC petition followed a grievance alleging the employer had failed to apply the parties' collective bargaining agreement to parts and warehouse employees. *Id.* The Regional Director had found the parts and warehouse employees were historically excluded from the bargaining unit and, as the case only involved a grievance and not an arbitration award as in *Williams Transportation*, dismissed the petition in accordance with *Bethlehem Steel.* However, the Board reversed the Regional Director, finding that requiring the employer to further litigate the matter only to file a UC petition once an arbitration award resulted would be a "wasteful exercise." *Ziegler* at 950. Thus, the Board expanded the *Williams Transportation* exception to cases where a pending grievance could result in an incongruous arbitration award. *Id.*

The instant case presents facts falling within the *Ziegler* exception. Specifically, the Employer filed the instant petition seeking to confirm the historical exclusion of the Snohomish County Director position, midterm, absent recent, substantial changes. Absent an exception, such a petition would properly be dismissed pursuant to *Bethlehem Steel.* Here, however, the Union has filed a grievance and a District Court suit to compel arbitration, seeking to enforce the contractual rights of a position the Employer asserts has been historically excluded. I agree with the Employer that, if the Snohomish County Director position is historically excluded, and the Union was ultimately successful in its suit and arbitration, the net result would be to accrete the Snohomish County Director position to the Unit, precisely the concern addressed in *Williams Transportation.* I find, therefore that the petition is timely in regard to the question of whether the Snohomish County Director position has been historically excluded from the Unit.

B. Vacancy

The Union argues that the instant Petition should be dismissed because the Snohomish County Director position is presently vacant, the Snohomish County office is closed, and the Employer has no plans to recall Moreau or hire a new Director. As such, the Union argues the instant Petition is unnecessary, as unless and until the Snohomish County Director position is reestablished and Moreau is recalled from layoff, determining the Unit placement of the Snohomish County Director is a hypothetical exercise and a determination is contrary to the Board's established practice in representation case matters. The Union's argument fails for two reasons.

First, the argument fails because it ignores that Moreau's grievance is not seeking to place Moreau back in her vacant position, but seeks to place her in the remaining Unit position. However, uncontested evidence in the record indicates one Unit employee, Sawyer, remains employed by the Employer, and Moreau is seeking to exercise "bumping" rights that would displace Sawyer. Accordingly, the instant determination is not hypothetical.

Second, the Union is attempting to compel arbitration; if I were to dismiss the petition on the basis the Snohomish County Director position is vacant, this unit placement issue would simply fall to the arbitrator. The Board has explicitly stated that placing a representation question like this before an arbitrator is appropriate only if the historical exclusion is *solely* a question of contract interpretation. *Boeing*, 349 NLRB 957 (2007). Here, neither party asserts the historical status of the Snohomish County Director is a question solely of contract interpretation. It is readily apparent from the sparse contract language that, in this case, a determination of historical exclusion based solely on contract interpretation would be impossible. To dismiss the Petition without addressing the historical inclusion or exclusion question, as the Union seeks, would constitute a *de facto* deferral of the type the Board rejected in *Boeing*.

In short, this case has critical factual differences that distinguish it from *Coca-Cola Bottling of Wisconsin*, 310 NLRB 844 (1993), and the other cases cited by Respondent in support of its vacancy argument on brief. For the reasons stated, I find the Employer's Petition is properly before me.

C. Managerial Status and Community of Interest Arguments

At hearing, the Employer argued that as Snohomish County Director Moreau was a Manager. The Employer has not filed a brief, and it is unclear from its arguments at hearing whether the Employer raises managerial status as the basis for the historical exclusion, or whether the Employer now is raising the managerial status of the position as a reason to exclude the position from the Unit. If the Employer raises managerial status for the former reason it is not relevant. The circumstances surrounding the historical exclusion are not the deciding factor; it is the fact of historical exclusion that is determinative. If the Employer raises the issue for the latter reason I dismiss this argument for two reasons.

First, procedurally, I find an argument of exclusion on the basis of managerial status is untimely raised. The Board has clarified units to exclude historically included positions where the Employer has established a statutory basis for the exclusion. *Bethlehem Steel*, at 243, 244 fn.5 (1999). Here, an analogy could be made based on the Board's well-established policy of excluding managerial employees. However, statutory exclusions are only considered when the petition is timely filed, not midterm. See *Shop Rite Foods*, 247 NLRB 883 (1980) (Board reversed Regional Director's dismissal of UC petition filed by Employer seeking to exclude as supervisors historically included assistant managers only because petition was filed 101 days prior to contract expiration and therefore not midterm).

Second, the Employer has failed to produce sufficient evidence showing the managerial status of the Snohomish County Director position. The Board defines managerial employees as those who represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

S. S. Joachim & Anne Residence, 314 NLRB 1191 (1994). Here, the Employer has introduced no such evidence. The record establishes that the Employer's Snohomish County office was merely an extension of the Seattle office. Moreau was not responsible for a separate budget and had little discretion to spend the Employer's funds. Approval of the Employer's management structure was required for Moreau to make any expenditure, beyond minimal expenditures such as parking and office supplies. She was the only employee at the location, and had no responsibility related to managing employees. To the extent Moreau ever substituted for the Executive Director this is undeveloped in the record, which at the most reveals isolated and *de minimus* substitution with no details regarding authority possessed and/or exercised during such substitution. Were it timely, I would additionally find there is no basis for finding Moreau to be a managerial employee.

The Employer at various points also argues that the Snohomish County Director lacks a community of interest with the Unit employees. As an initial matter I find that issue is not before me. To the extent the Employer argues against an accretion, where a community of interest analysis would be required, the Union makes no such argument. The question raised by this Petition is simply historical exclusion or inclusion.

D. Existence of a Historical Exclusion

Regarding historical exclusion, the Union essentially takes the position espoused by Moreau in her testimony: her historical inclusion is demonstrated by her being treated the same as a member of the Unit. Namely, she paid dues to the Union, the terms and conditions of her employment were almost identical to those in the collective bargaining agreement, and the Union treated her as a member of the Unit. The evidence relied upon in reaching this conclusion, however, is problematic. The record contains no application for membership, explicit discussion of her inclusion, nor any other affirmative act by Moreau that would have clarified whether she was in or out of the Unit during her employment. Moreau is not arguing facts then, but the validity of her assumption, that because she was paying dues to a Union and appeared to be covered by the terms of the collective bargaining agreement, she assumed she was in the Unit. While Moreau's assumption is perhaps understandable under the circumstances, a reasonable assumption is not evidence she was actually included. Bohan's testimony, similarly, is an assumption based on the same evidence.

McGaha and McCann's evidence addressing the understanding of the parties at the beginning of Moreau's employment, in contrast, establishes the actual positions of the parties at the start of Moreau's employment; her position was outside the Unit. There is no evidence of explicit conflict with this position during the term of Moreau's employment. The issue remained dormant and unexplored for years with the Employer and the Union considering her outside the Unit, and Moreau and perhaps some of her coworkers assuming she was in the Unit. When her status in the Unit became an issue in 2011, Fox's letter of April 14 was consistent with the Employer's earlier position, as he explicitly stated, "you are not part of a collective bargaining unit and you do not work under a union contract." Similarly, the Union's letter of October 24, 2011, states, "your position is not included in the bargaining unit..."

In regard to the contractual recognition clauses, I find they are not probative in regard to the historical status of the Snohomish County Director position. Ultimately, I

accept the explanation of McGaha and McCann that the "director" position referenced in the 2004-2007 agreement was an outdated reference and that "director" was removed during subsequent negotiation as mere housekeeping. Absent this reference, the clauses simply do not reference the position. I conclude, therefore, that the recognition clauses are not determinative on the issue before me.

There are some acknowledged differences between Moreau's terms and conditions of employment and those of Unit employees. Moreau was paid a salary, and was the only employee other than the Executive Director to be compensated in this manner. She also received a car allowance and was the only employee to receive this benefit other than the Executive Director. She also had a great deal more flexibility in her schedule than the Unit employees, as she essentially managed her schedule at the Snohomish County office as she saw fit to complete her work. While of some value, these differences are not particularly helpful in addressing the question of historical inclusion or exclusion. Moreau was the only employee employed at the Snohomish County office, and some of these differences, including receiving a car allowance and the hours of work, were a function of her work location.

The Union argues Moreau's terms and conditions of employment are of great importance in finding historical inclusion because Moreau received the same health and welfare benefits, through the same plans, as did Unit employees. Enrollment in these plans would appear to be a strong consideration in the Union's favor but for the Employer demonstrating that *all* employees were enrolled in these plans, including the Executive Director who is undisputed as being excluded from the Unit.

Similarly, the dues paid by Moreau would appear to be another strong consideration in the Union's favor, except that it follows from the above that they were in exchange for participation in the Union's health and welfare benefits, and all employees, including the Executive Director, paid dues as a function of participating in these plans. As such, the assumed connection between dues payment and membership is severed here, and the factor does not support the Union's contention. Again, the circumstances of Moreau's employment make it easy to see how she arrived at the conclusion that she was included in the Unit. The evidence in total, however, does not support her assumption.

The record incident regarding Moreau falling behind on her dues in 2009 is of little value in determining her historical status. The record establishes several points: the Union notified Executive Director Fox Moreau was behind on dues, and threatened application of the Union Security clause. In response, Fox asked Bohan to speak to Moreau about the late payment. Bohan spoke to Moreau, and shortly thereafter Moreau caught up on her dues, prior to any impact on her terms and conditions of employment. This alone does not support the position of either party, as dues payment was, for some employees, merely a function of enrollment in the Union's health and welfare plans. The testimony regarding the content of the 2009 conversations contradicts, and it is not appropriate to make a credibility determination in a representation case matter. The remaining undisputed facts tell me very little, as the actions of the parties are consistent with either Moreau falling behind on payments tied to her benefits and the Union attempting to collect, or a Unit member falling behind on the payments required under a union security clause. Because ultimately Moreau became current on her dues before action was taken, this factor is not helpful in making a determination regarding historical inclusion or exclusion.

I similarly cannot rely on the disputed conversation regarding McCann asking Moreau to leave a Union meeting at the time of the ratification vote on the 2004-2007 contract.

An analysis of Moreau's Union activities faces the same problems described in relation to other factors. What is undisputed is that she spoke to local union representative Lorenzini a number of times regarding pre-bargaining matters. This suggests that she was perceived as a member of the Unit, but Lorenzini also may have conceivably asked because she knew Moreau was covered by the plans, or, like Moreau, may have assumed she was in the Unit due to the similarities in their terms and conditions of employment. Moreau does not claim she ever attended a regular Union meeting or other event where a clearer cut distinction between benefit plan enrollee and Unit member would have been necessary.

Further, this argument only addresses the relationship between the Union and Moreau; there is no reason to believe the Employer would have any knowledge of these events and would be expected to correct the mistaken perception Moreau and Lorenzini shared. The exception to these events that did not involve the Employer is Lorenzini's attending the meeting where Moreau was laid off by Fox. It's clear that Moreau thought Lorenzini should be present because she was entitled to a Union representative. Although Lorenzini did not testify at the hearing her attendance presumably meant she agreed with Moreau. I find Fox's explanation for allowing Lorenzini to attend - that she was allowed to be present as an "observer" - unusual, and I would be inclined to disregard this explanation as unreasonable (and therefore find Fox's allowing a Union representative to attend supported the Union's position), except that Fox had documented his position in regard to inclusion in the October 24, 2011, letter. As such I do not assume Fox tacitly agreed with Moreau's inclusion simply by allowing a Union representative to be present.

I give the Union's initial refusal to process a grievance on behalf of Moreau following her lay off much greater weight than the action of a local representative attending a lay off meeting. As noted, the Union eventually reversed its position and did file a grievance, but the record contains no evidence regarding the basis for this reversal. In regard to the question of historical inclusion or exclusion, I find this weighs in favor of the Employer's position.

For the reasons detailed above, I find the Snohomish County Director position has been historically excluded from the Unit. Specifically, I find that the record evidence demonstrates that when the position was created, and Moreau was hired, the parties agreed to exclude the position, although this was not reflected in the recognition clause of the parties' initial or successor collective bargaining agreements due to the lack of explicit exclusions. The record contains no evidence that the parties changed their position in regard to this exclusion during Moreau's employment, although it is clear from the evidence that Moreau and others assumed Moreau was part of the Unit. Ultimately, when Moreau's employment came to an end, both parties' initial reactions were consistent with their earlier positions: that Snohomish County Director Moreau was not in the Unit. Although the Union ultimately changed its position after her employment came to an end, and filed a grievance and a District Court suit to compel arbitration on her behalf, this does not change the historical reality of the position: it has been excluded from the Unit.

E. One Person Unit

It is a well-established point of Board procedure that the Board will not certify or direct an election in a unit consisting of only one employee. *Specialty Healthcare*, 357 NLRB No. 183, slip op. at 16, fn. 24 (2011), citing *Mount St. Joseph Home for Girls*, 229 NLRB 251, 252 (1977). It is the permanent size of the unit, not the number of actual incumbents employed at any given time, that is controlling. *Copier Care Plus*, 324 NLRB 785 fn. 3 (1997). Where a unit previously found by the Board to be appropriate has been reduced to one employee, the Board has found that, in view of the changed circumstances, the unit is no longer appropriate, and has accordingly revoked the prior certification and dismissed the petition for an election. *Sonoma-Marin Publishing Company*, 172 NLRB 625, 626 (1968).

Here, the record evidence demonstrates the present permanent size of the Unit has been reduced to one employee, the Executive Assistant. The dispute regarding historical exclusion of the Snohomish County Director position is merely limited to who will hold that position. Regardless of who ultimately holds that position, the permanent reduction of the Unit to one employee has ended the Employer's obligation to recognize the Union. There is no record here of a prior Board certification; the record suggests at the time it was formed the Employer voluntarily recognized the Union's predecessors. As such, there is no prior certification to revoke, but in issuing my Order I recognize the Employer is not bound by its previous recognition going forward.

III. CONCLUSION

In the preceding sections I have addressed the timing and the substance of the Employer's UC petition, ultimately agreeing with the Employer that the Snohomish County Director position has been historically excluded from the Unit. Because this unit composition issue properly raised by the Petition is uniquely within the Board's purview, I will issue the Order below in order to avoid possible infringement of this exclusive responsibility. The record evidence, however, demonstrates that the Unit consists of only one employee and going forward the Employer has no obligation to recognize the Union as the collective bargaining representative of the Unit.

IV. ORDER

IT IS HEREBY ORDERED that the bargaining unit be clarified to exclude the Director, Snohomish County position.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20570. This request must be received by the Board in Washington by **5:00 p.m. (EDT) on October 11, 2012.** The request may be filed through E-Gov on the Board's web site,

http://www.nlrb.gov, but may not be filed by facsimile.[3]

DATED at Seattle, Washington on the 27th day of September, 2012.

Ronald Hooks, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

[3] To file a request for review electronically, go to www.nlrb.gov and select the "File Case Documents" option. Then click on the E-file tab and follow the instructions presented. Guidance for E-filing is contained in the attachment supplied with the Regional office's original correspondence in this matter, and is also available on www.nlrb.gov under the E-file tab.