

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
)
SULTAN POLICE MANAGEMENT)
ASSOCIATION) CASE 15876-E-01-2638
)
Involving certain employees of:) DECISION 7722 - PECB
)
CITY OF SULTAN) ORDER OF DISMISSAL
)
)
_____)

J.C. Becker appeared for the petitioning union.

Foster, Pepper & Sheffelman, PLLC, by *P. Stephen DiJulio*, attorney at law, appeared for the employer.

On June 21, 2001, the Sultan Police Management Association (SPMA) 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 three supervisory law enforcement officers employed by the City of Sultan (employer). An investigation conference was conducted July 26, 2001, and certain issues were identified as being in dispute between the parties. A hearing was held October 10, 2001, before Hearing Officer Kenneth J. Latsch. The parties filed briefs on December 4, 2001.

As to an issue concerning the eligibility of the individuals holding the titles of "police chief" and "police commander" for inclusion in the proposed bargaining unit, the Executive Director rules that they are "confidential employees" excluded from collective bargaining rights. As to an issue concerning the

propriety of the proposed bargaining unit, the Executive Director rules that a bargaining unit limited to the sole employee remaining after the exclusion of confidential employees is not an appropriate unit.

BACKGROUND

The City of Sultan is located in Snohomish County. The employer's 2001 budget authorized 32 employee positions. At the time of the hearing, 26 positions were filled.

The employer currently has collective bargaining relationships with Teamsters Local 763 for two bargaining units:

1. A bargaining unit of non-supervisory law enforcement officers; and
2. A bargaining unit of non-uniformed employees.

Apart from the "police chief", "police commander", and "police sergeant" classifications involved in this proceeding (each with one incumbent), the employer's unrepresented employees include a clerk-treasurer, a grants coordinator, a public works director, a planning director, a building official, a public works supervisor, an administrative assistant, an executive assistant, and the city administrator.

POSITIONS OF THE PARTIES

The SPMA argues that the bargaining unit it proposes is appropriate, by reason of consisting of like full-time supervisory law

enforcement officers who perform the same or similar duties and who do not share a community of interest with the employer's rank-and-file police officers. It asserts that this is precisely the right type of atmosphere for collective bargaining so that a group of employees can negotiate their wages and have a uniform system (i.e., a collective bargaining agreement) for clearly defining rates of pay and job duties and responsibilities.

The employer argues that the chief and commander should be excluded from the bargaining unit for two reasons. First, it contends that their supervisory authority creates a potential for conflicts of interest between the chief and the commander, between the chief and the sergeant, and between the commander and the sergeant. Second, it claims that both the chief and the commander are confidential employees who play a role in the formulation and implementation of labor relations policies on behalf of the employer.

DISCUSSION

The Determination of Appropriate Bargaining Units

General Authority -

The legislature has delegated the authority to determine appropriate bargaining units to the Public Employment Relations Commission. RCW 41.56.060 provides:

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.

The Commission makes unit determinations on a case-by-case basis. Among the four factors listed in the statute, no one factor is overriding or controlling. *Bremerton School District*, Decision 527 (PECB, 1979). Additionally, all four factors need not arise in each and every case.

The purpose of unit determination is to group together employees who have sufficient similarities (community of interests) to indicate that they will be able to bargain collectively with their employer. Particular concern is applied to avoid stranding individual employees by unit configurations that preclude their exercise of their statutory collective bargaining rights. *City of Blaine*, Decision 6619 (PECB, 1999).¹

The Commission also seeks to avoid fragmentation of public employer workforces that result in a proliferation of bargaining structures and conflicting work jurisdiction claims. *City of Auburn*, Decision 4880-A (PECB, 1995); *Ben Franklin Transit*, Decision 2357-A (PECB, 1986).

Exclusion of "Confidential" Employees -

In *IAFF v. City of Yakima*, 91 Wn.2d 101 (1978), the Supreme Court of the State of Washington gave a narrow interpretation to the exclusion of "confidential employees" from the coverage of Chapter 41.56 RCW, concluding at page 107 with:

¹ *City of Blaine, supra*, demonstrates the concern about stranding that deprives individuals of their statutory rights. In that case a proposed bargaining unit of uniformed and non-uniformed supervisors was certified notwithstanding WAC 391-35-310, to avoid stranding a "uniformed" employee who could not constitute an appropriate bargaining unit by himself and thus could not invoke the interest arbitration process which gives rise to WAC 391-35-310.

We hold that in order for an employee to come within the exception of RCW 41.56.030(2), the duties which imply the confidential relationship must flow from an official intimate fiduciary relationship with the executive head of the bargaining unit or public official. The nature of this close association must concern the official and policy responsibilities of the public officer or executive head of the bargaining unit, including formulation of labor relations policy. General supervisory responsibility is insufficient to place an employee within the exclusion.

That "labor nexus" test has been applied by the Commission in numerous subsequent cases. In 2001, following a review of its representation case rules and unit clarification case rules with the assistance of a focus group consisting of labor representatives, management representatives, and agency staff members, the Commission adopted a rule codifying the line of precedents dating back to *City of Yakima, supra*, as follows:

WAC 391-35-320 Exclusion of confidential employees. Confidential employees excluded from all collective bargaining rights shall be limited to:

(1) Any person who participates directly on behalf of an employer in the formulation of labor relations policy, the preparation for or conduct of collective bargaining, or the administration of collective bargaining agreements, except that the role of such person is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment; and

(2) Any person who assists and acts in a confidential capacity to such person.

That rule was effective August 1, 2001. It is thus clear that an employer will be allowed some reasonable number of excluded personnel to perform the functions of the employer in the collec-

tive bargaining process. *Clover Park School District*, Decision 2243-A (PECB, 1987). Additionally, an excluded individual need not work exclusively, or even primarily, on "confidential" material, so long as the assignments can be described as "necessary", "regular" and "on-going". *Oak Harbor School District*, Decision 3581 (PECB, 1990). Because exclusion as a "confidential employee" altogether deprives the individual of collective bargaining rights under the Public Employees' Collective Bargaining Act, such exclusions are not lightly granted. A heavy evidentiary burden is placed on the party proposing a "confidential" exclusion. *City of Seattle*, Decision 689-A (PECB, 1979); *City of Seattle*, Decision 1797-A (PECB, 1985); and *Pateros School District*, Decision 3911-B (PECB, 1992).

Separate Units of Supervisors -

In another rule effective August 1, 2001, the Commission adopted WAC 391-35-340 to codify precedent endorsing the propriety of separate bargaining units of supervisors. Those precedents date back to *City of Tacoma*, Decision 95-A (PECB, 1977), *Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries*, 88 Wn.2d 925 (1977), and *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981). Thus, there is some general basis for the request of the SPMA for creation of a separate unit of supervisors in this case.

One-person Unit Inappropriate -

In a third rule effective August 1, 2002, the Commission adopted WAC 391-35-330 to codify precedent that a bargaining unit cannot be considered appropriate if it includes only one employee. If the employer prevails in this case on its claims concerning the chief and commander, the petition must be dismissed.

Application of Standards

Turning to the facts presented at the hearing, it is clear that the chief and commander are both confidential employees within the meaning of the statute, rule, and Commission precedent.

The Police Chief -

The current police chief is Fred Walser. He directs all full-time police officers and reserve officers, as well as the office staff in the Police Department. He prepares the annual operating budget for the department. He oversees the department's personnel practices, evaluates the police officers, responds to employee grievances, issues employee discipline, and makes recommendations for hiring of department personnel. While the mayor makes all final decisions on hiring and discharge, the chief can impose progressive discipline. Additionally, the chief works routine patrol duties and responds to police calls. The chief recently negotiated the creation of the "sergeant" position and its wage schedule with the mayor and city council.

The chief attends department head meetings with the mayor and the other non-represented employees.² Labor negotiations have been discussed at those meetings. The chief has represented the employer in dealing with the Teamsters on bargaining issues.

The chief attends city council meetings on a regular basis. If there is a personnel issue involving the police department, he attends the council's executive session to address that issue. In 1996, the chief sought to exclude his administrative assistant from

² At the time of the hearing, the city administrator position was vacant. Under the direction of the mayor, the chief and Clerk/Treasurer Laura Koenig have jointly managed the city.

the Teamster bargaining unit on the basis that she was a confidential employee. The chief's assistant is not now included in any bargaining unit.

The chief testified that there is no policy on how supervisors' wages are established. Every year, each of the supervisors negotiates their respective salaries with the mayor and city council.

The police chief is involved in all meaningful aspects of the department's personnel affairs, and his inclusion in the proposed bargaining unit would create inherent conflicts of interest that must be avoided. In light of his regular and ongoing involvement with sensitive personnel issues, and the expectation that he is to take part in discussions where the employer's labor relations policy is defined and modified, he is a "confidential employee" who must be excluded from the proposed bargaining unit.

The Police Commander -

Police Commander J. C. Becker is responsible for both formulating long-term plans for the Police Department and directing the day-to-day operations of the department.³ He serves as part of the command team with the police chief, and keeps the chief informed of all internal and external issues. The commander can act as the chief's designee in representing the department.

The commander trains employees; plans, assigns and directs their work; evaluates police employees and recommends discipline. He addresses citizen/officer complaints. He approves overtime and

³ The police policy manual outlines a chain of command, under which the commander supervises the sergeant, corporal, and police officer classifications, as well as reserve officers and others working in the department.

vacation requests. The commander also performs routine patrol duties and responds to police calls.

The commander has attended department head meetings. He also attends city council meetings, including executive sessions where labor negotiations and personnel issues are discussed. Becker represented the employer in the negotiations with the Teamsters for the most recent collective bargaining agreement covering the non-supervisory police officers.

The commander must also be excluded from the proposed unit as a confidential employee. His role as the employer's primary spokesperson in recent collective bargaining negotiations cannot be disregarded or minimized. In that capacity, the commander has learned intimate details of the employer's labor relations policies and strategies, ranging from bargaining priorities to fiscal analysis, and has used that information to represent the employer's interests at the bargaining table. Given his depth of knowledge about the employer's labor relations policy and practice, it would be inappropriate to include the commander in a bargaining unit.

The Police Sergeant -

With the conclusion that two of the three possible members of the proposed bargaining unit are confidential employees, the petition in this case must be dismissed. This does not constitute a ruling on the appropriate unit placement of the police sergeant,⁴ and this decision does not constitute a "certification bar" preventing the

⁴ While it is clear that the sergeant position is of recent origin and is currently excluded from the bargaining unit of rank-and-file law enforcement officers, there is no record or evidence of that exclusion being validated through proceedings before the Commission. It is not uncommon to find the "sergeant" rank in bargaining units with non-supervisory law enforcement officers.

accretion of that position to another bargaining unit. Indeed, the sergeant appears to be a public employee within the meaning and coverage of Chapter 41.56 RCW.

FINDINGS OF FACT

1. The City of Sultan is a "public employer" within the meaning and coverage of RCW 41.56.030(1).
2. Sultan Police Management Association, a "bargaining representative" within the meaning of RCW 41.56.030(3), filed a timely and properly supported petition for investigation of a question concerning representation, seeking certification as exclusive bargaining representative of a bargaining unit consisting of police chief, police commander, and police sergeant.
3. Police Chief Fred Walser directs the full-time police officers, the reserve officers, and the police department clerical staff. Walser prepares the annual operating budget for the department, and recommended the creation and wage level for the sergeant classification. He can impose progressive discipline, makes recommendations to the mayor on discharge of employees, and makes recommendations to the mayor on hiring of employees. The chief routinely attends department head meetings where the employer's personnel and labor relations policies are discussed in detail. The chief has represented the employer in collective bargaining negotiations with the union representing the bargaining unit of rank-and-file law enforcement officers.

4. Commander J.C. Becker reports directly to Chief Walser. Becker is responsible for daily operations in the Police Department, supervises the department's personnel, and evaluates the work of the law enforcement officers. Becker approves overtime and vacation requests. He takes part in long term planning projects concerning the department, routinely attends city council meetings, and attends executive sessions where personnel matters are discussed. Becker served as the employer's chief spokesperson in collective bargaining with the exclusive bargaining representative of the rank-and-file law enforcement officers.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC.
2. As presently constituted, the police chief position is held by a confidential employee within the meaning of RCW 41.56.030(2) and WAC 391-35-320, and therefore is not a "public employee" within the meaning of RCW 41.56.030(2).
3. As presently constituted, the police commander position is held by a confidential employee within the meaning of RCW 41.56.030(2) and WAC 391-35-320, and therefore is not a "public employee" within the meaning of RCW 41.56.030(2).
4. The bargaining unit proposed in this case is inappropriate under WAC 391-35-330 after the exclusions described in paragraphs 2 and 3 of these conclusions of law, because it contains only one employee.

ORDER

The petition for investigation of a question concerning representation in this case is DISMISSED.

ISSUED at Olympia, Washington, on the 17th day of May, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-25-660.