

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
INTERNATIONAL ASSOCIATION OF	)	CASE 18827-E-04-2985
FIRE FIGHTERS, LOCAL 46	)	
	)	DECISION 9058 - PECB
Involving certain employees of:	)	
	)	DIRECTION OF ELECTION
CITY OF EVERETT	)	
_____	)	

Webster, Mrak & Blumberg, by *James H. Webster*, Attorney at Law, for the union.

Perkins Coie, by *Lawrence B. Hannah*, Attorney at Law, for the employer.

On September 13, 2004, International Association of Fire Fighters, Local 46 (union), filed a representation petition with the Public Employment Relations Commission, seeking certification as exclusive bargaining representative of supervisory fire fighter employees of the City of Everett (employer). The proposed bargaining unit was then limited to four employees holding the "deputy chief" rank.

At an investigation conference in October 2004, the parties stipulated to the jurisdiction of the Commission under Chapter 41.56 RCW and to some other matters that were conditions precedent to determining a question concerning representation, but the employer claimed all four of the employees involved were "confidential" employees. A hearing was scheduled for November 30, 2004. The union amended its petition on November 22, 2004, adding the "fire marshal" to the proposed bargaining unit. The employer responded by claiming the fire marshal is also a "confidential"

employee. The hearing was rescheduled to allow the employer to prepare regarding the fire marshal.

Hearing Officer Katrina I. Boedecker held a hearing on December 9, 2004, and on January 18 and 19, 2005. The parties filed post-hearing briefs. The employer filed a motion for corrections in the transcript, and the record was complete on May 18, 2005, when the union informed the Hearing Officer that it did not object to the employer's motion.

#### ISSUE PRESENTED

The sole issue presented for decision at this time is: Are the fire marshal and four deputy chiefs "confidential" employees under the applicable statute, rule, and precedents?

The Executive Director rules that only Deputy Chief Art White, is a "confidential employee" excluded from the coverage of Chapter 41.56 RCW. An election is directed to resolve the question concerning representation as to the remaining employees.

#### APPLICABLE LEGAL STANDARD

The bargaining relationship between these parties is regulated by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. The determination of appropriate bargaining units under that statute is a function delegated by the Legislature to the Commission in RCW 41.56.060.

RCW 41.56.030(2)(c) excludes from the coverage of Chapter 41.56 RCW any person "whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit" from the

class of public employees covered by Chapter 41.56 RCW. In *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978), the Supreme Court of the State of Washington adopted the "labor nexus" test for status as a confidential employee, stating:

When the phrase confidential relationship is used in the collective bargaining act, we believe it is clear that the legislature was concerned with an employee's potential misuse of confidential employer labor relations policy and a conflict of interest.

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.*

(emphasis added). Three years later, the Supreme Court of the United States embraced "labor nexus" as the test for exclusion of confidential employees from the coverage of the National Labor Relations Act. *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981).

In 2001, the Commission promulgated a rule codifying the "labor nexus" test for "confidential" status, as follows:

WAC 391-35-320 EXCLUSION OF CONFIDENTIAL EMPLOYEES. Confidential employees excluded from all 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.

(emphasis added). The rule reflects the definition in RCW 41.59.020(4)(c), which was cited with approval by the state Supreme Court in *IAFF v. City of Yakima*, 91 Wn.2d 101.

The Commission and courts impose a heavy burden on the party that seeks a "confidential" exclusion. *City of Seattle*, Decision 689-A (PECB, 1979). The exclusion depends on particular relationships and actual duties, rather than on titles, locations on organization charts, or job descriptions. *Shelton School District*, Decision 1609-B (PECB, 1984). Sporadic contacts and limited back-up work fail to meet the "consistent exercise" requirement, and are not sufficient to meet the test for exclusion. *Clover Park School District*, Decision 2243-A (PECB, 1987). Exclusions are not a lifelong proposition, and the validity of any exclusion depends on the position having regular and ongoing labor nexus work. *Richland School District*, Decision 2208 (PECB, 1985).<sup>1</sup>

In this case, the Executive Director is mindful that: *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101, concerned fire department officials who had the word "chief" in their titles; supervisors have full collective bargaining rights under Chapter 41.56 RCW, per *Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries*, 88 Wn.2d 925 (1977); and all of the individuals at

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<sup>1</sup> An unfair labor practice complaint filed by a former confidential employee to protest her re-inclusion in the bargaining unit was dismissed, because the employee no longer qualified for confidential status. The basis for her exclusion had evaporated when her supervisor ceased to have direct involvement in labor nexus activities.

issue in this case are clearly supervisors. Supervisors within a fire department who were excluded from the bargaining unit that included their subordinates in *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981) (battalion chiefs in that case),<sup>2</sup> were allowed to organize a separate unit in *City of Richland*, Decision 2647 (PECB, 1987).<sup>3</sup> In 2001, the Commission codified those precedents in WAC 391-35-340, which requires the exclusion of supervisors from the bargaining units containing their subordinates and affirms the propriety of separate units of supervisors. *City of Redmond*, Decision 7814-B (PECB, 2003) involved a separate unit of supervisors, and included:

[T]he "labor nexus" test does not include general personnel functions that are common indicia of supervisory authority, such as contract interpretation, taking disciplinary actions that could be subjects of grievances, and processing grievances. Similarly, *occasional or incidental involvement of supervisors who merely provide input to an employer's labor policy makers concerning the impact of various contract proposals is not sufficient.*

(emphasis added).<sup>4</sup> The fact that the battalion chiefs in the Everett Fire Department are included in the rank-and-file unit

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<sup>2</sup> A similar result was reached in *City of Bellingham*, Decision 565 (PECB, 1979) (as to battalion chiefs).

<sup>3</sup> A similar result was reached in *City of Puyallup*, Decision 5460 (PECB, 1996) (as to assistant chiefs).

<sup>4</sup> The consistent involvement in labor relations needed for confidential status was only demonstrated as to a police operations commander who served on the employer's bargaining team and attended its strategy discussions. By contrast, an administrative commander who took part in periodic labor-management committee meetings was allowed to exercise his statutory collective bargaining rights.

provides basis for an inference that the employer has concentrated the supervisory authority in its chief, assistant chief, and the five employees at issue in this case.

#### ANALYSIS

Fire Chief Murray Gordon heads the Everett Fire Department, which operates seven fire stations, has an annual operating budget of \$20.5 million (of which about 96 percent is spent on personnel), and has a workforce of about 189 persons. Assistant Fire Chief Ed Oas is second in command, and is not at issue in this case. About 174 of the employees in the department are in a bargaining unit of rank-and-file fire fighters up to and including battalion chiefs, and six are in a non-uniformed bargaining unit.

#### The Disputed Positions

Deputy Chief Art White, Deputy Chief Jack Robinson, Deputy Chief David DeHaan, Deputy Chief John Gage, and Fire Marshal Warren Burns all hold their present positions by appointments made outside of the employer's civil service system. Some facts common to all disputed positions are followed by a separate analysis as to each disputed individual.

Administrative staff meetings are held by the chief on a regular basis, and the deputy chiefs and fire marshal are expected to attend those meetings. Members of the rank-and-file bargaining unit (usually one or more battalion chiefs) are also present at those meetings, so they do not provide a basis for finding that any of the participants are confidential employees.

Executive sessions can be called during administrative meetings, and members of the rank-and-file bargaining unit are then excluded. Participation in such meetings would still only qualify an

individual for the confidential exclusion if the employer's labor relations policies or strategies were actually discussed.

Informal meetings are convened by the chief on issues that involve the rank-and-file bargaining unit. This typically involves asking one or more of the disputed individuals to come into an office, closing the door, and asking those present for their opinions on how to address the issue. Again, participation in such meetings would only qualify an individual for the confidential exclusion if the employer's labor relations policies or strategies were the actual subjects of discussion.

Deputy Chief Art White

White is responsible for training, and for managing special operations for the department. White was the Fire Department representative on the employer's bargaining team for the 2003-2005 collective bargaining agreement covering the rank-and-file fire fighter bargaining unit. While Human Resources Director Sharon DeHaan was the employer's lead negotiator,<sup>5</sup> White attended all of the bargaining sessions, provided expertise on operational issues, and was the employer's spokesperson on operational issues at the bargaining table. White attended the Association of Washington Cities' labor relations conference (which is limited to labor relations personnel of employers) in two of the past four years, and nothing in this record indicates that his assignment as the employer's negotiator has been or will be terminated.<sup>6</sup> White's direct involvement in labor relations matters clearly qualifies him for exclusion under WAC 391-35-320(1).

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<sup>5</sup> Other members of the employer's bargaining team were a "numbers" person and a secretary/recorder.

<sup>6</sup> White was rated as a "highly effective" negotiator in his performance review for 2003.

White's current role culminates a long history of his involvement with the employer's collective bargaining affairs:

- In the previous two rounds of contract negotiations, White was on an informal team which was led by Sharon DeHaan and spent four to five months preparing for the contract negotiations. White particularly advised that team on training issues for contract negotiations in 1999.
- White regularly attends formal labor-management meetings held on a monthly basis. The chief and assistant chief also attend those meetings on a regular basis, while the others in dispute here are only asked to attend for discussion of issues specific to the divisions they head. The minutes of those meetings reflect that contract interpretations are discussed, and some actual negotiations occur. For example: Those parties agreed on a pay rate for "rescue tech" training as the result of negotiations on various aspects of the rescue tech program that went on for four years.<sup>7</sup>
- White was on the management team for labor-management discussions about mutual aid and callback. Over a period of time, the parties reached an agreement that: (1) allowed the employer to immediately call in mutual aid resources from fire departments in the surrounding area to enhance safety on a fire scene with additional personnel; (2) provided for the employer to call out off-duty Everett fire fighters after

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<sup>7</sup> White had issued an information bulletin about training available for rescue tech work. After the union voiced concern about scheduling, White agreed to work with a department employee to provide alternate training to avoid particular scheduling conflicts. Those parties also discussed and agreed on whether to send on-duty personnel to the training and whether to backfill resulting vacancies.



mutual aid units are called in; and then (3) provided for the called-out Everett personnel to relieve the mutual aid units.<sup>8</sup>

- White was on the management team for labor-management discussions leading to development of a letter of understanding regarding continuing medical education.
- White participated (together with the chief and assistant chief) in negotiations with the union concerning the rank-and-file unit, and eventually reached an agreement, concerning a "Rapid Intervention Team" process for rescuing fire fighters in hazardous environments. Those negotiations went on from March 2003 through the autumn of 2003, and the resulting agreement entailed joint training with fire fighters from nearby jurisdictions such as the City of Marysville, the City of Arlington and the Everett Naval Station.
- White had a key role in the labor-management meetings concerning paramedic services in the nearby City of Mukilteo. Those negotiations took place from 2001 to 2003, and involved overtime pay, continuing education, and employee discipline.

Those activities supporting the chief in labor-management relations support White's exclusion under WAC 391-35-320(2), and may even constitute further evidence of direct involvement qualifying White for exclusion under WAC 391-35-320(1).

The conclusion as to White is that he is properly excluded as a confidential employee under RCW 41.56.030(2) and WAC 391-35-320. Uncontroverted testimony establishes that his participation in collective bargaining for the employer is regular and ongoing.

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<sup>8</sup> The mutual aid units would then go back to their own communities once the called-out Everett personnel arrived.

Deputy Chief Jack Robinson

Robinson is responsible for managing and directing all of the activities of the emergency medical services division. In the past, Robinson participated in some negotiations with the union representing the rank-and-file bargaining unit:

- In 2001, Robinson participated (along with the chief and former assistant chief) in negotiations about continuing medical education for the rank-and-file unit.<sup>9</sup>
- From late 2001 until April 2003, Robinson participated (along with the chief and former assistant chief and White) in negotiations about Mukilteo paramedic program changes affecting the rank-and-file unit.
- From late 2003 through 2004, Robinson was involved in negotiations about a fee for transports done by fire department aid and medic employees in the rank-and-file unit.<sup>10</sup>
- In the summer of 2003, Robinson was the employer's lead negotiator in negotiations concerning lowering the eligibility requirement for promotional Civil Service examinations.

The problem with these examples is, however, that they all involve special projects or issues (rather than contract negotiations conducted on a regular basis) and they are all in the past (rather than ongoing negotiations). It is clear that White is now the employer's point man for negotiations with the union about the rank-and-file unit. The evidence thus fails to establish that Robinson has consistent involvement in labor nexus work.

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<sup>9</sup> These were face-to-face negotiations about the effects and changes of working conditions of a new requirement that paramedics receive 30 hours of continuing medical education training in Everett.

<sup>10</sup> The plan required substantial additions to personnel.

The conclusion on Robinson is that this record does not warrant his exclusion as a confidential employee at this time.<sup>11</sup>

Deputy Chief David DeHaan

DeHaan was formerly the deputy chief in charge of special operations, and has served as the deputy chief for emergency management (reporting directly to the chief) since 2002. In his current role, he manages an employer-wide program to prepare for both response and recovery following natural disasters.

Before becoming a deputy chief, DeHaan represented the rank-and-file unit as both the president of the union and as its chief negotiator. The chief testified that he considers DeHaan a major contributor and confidant on labor relations issues, because of that union leadership background.<sup>12</sup> Similar testimony was not sufficient in *City of Seattle*, Decision 1797-A (PECB, 1985), where deputy chiefs provided valuable information on the mood of the fire fighters and helped to identify what issues had a high priority with employees in the non-supervisory fire fighter bargaining unit.

This record supports a conclusion that DeHaan has actually had only occasional or incidental involvement in labor relations matters as a deputy chief. He does attend the weekly administrative staff meetings, but he has not attended any labor-management meetings in his current position and he only attended a few such meetings in his prior deputy chief position. The chief did not identify DeHaan as having been responsible for negotiating any issues with a union.

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<sup>11</sup> This does not foreclose the employer from filing a new petition at some future time, if it actually gives Robinson continuous labor nexus duties.

<sup>12</sup> In May 2004, DeHaan advised the mayor on how the union might view a change of health care plans.

DeHaan testified he only provided technical information regarding the Technical Rescue Program and the callback issue. He provided a job description based on his previous deputy chief position for a "Battalion Chief of Special Operations" proposed by the employer, but the union rejected that proposal. DeHaan functions very similarly to the administrative commander for which a confidential exclusion was rejected in *City of Redmond*, Decision 7814-B. The chief testified that experience DeHaan acquired as a union official has been valuable to the chief, and to the overall success of the administration's relationship with the union, but that does not establish confidential status.

The conclusion as to DeHaan is that he does not have regular and ongoing labor nexus duties that would qualify him for exclusion as a confidential employee.

Deputy Chief John Gage

Gage is the deputy chief for services. He has held that position since 2001, and assists the chief with managing current fire apparatus and stations, as well as with planning for new apparatus and stations. Gage oversaw construction of a new Station Five and remodeling of Station Six. He has written specifications for new fire engines, and has overseen construction of two ladder platforms. Gage supervises two shop mechanics and a maintenance mechanic, who are in the non-uniformed bargaining unit.

The chief did not identify Gage as having been responsible for negotiating any issue with a union. Gage testified that he attended as a technical adviser at one labor-management meeting concerning the rank-and-file unit, but the president of that union could not remember Gage attending any specific labor-management meeting. Gage testified that he has been present at administrative staff meetings where battalion chiefs have been in attendance, and

that issues concerning the rank-and-file unit have even been discussed at those times.

Gage is another former member of the rank-and-file bargaining unit, and he has been called upon to give advice based on his union background. Gage attended the meeting with the mayor to discuss possible changes of the employer's healthcare plans, where his role was to predict what the union's positions might be on those issues. He also attended a meeting called by the mayor's office regarding the paramedic strategic budget and Station Three, but again seemingly more to predict what union positions might be on those matters than to actually negotiate with any union.<sup>13</sup>

The most that can be said for the employer's case is that it has given little bits of labor nexus work to Gage. While an employer will be allowed a reasonable number of confidential exclusions, "An employer may not obtain an excessive number of 'confidential' exclusions by giving little bits of confidential duties to a large number of employees." *City of Auburn*, Decision 5775 (PECB, 1996), citing *Clover Park School District*, Decision 2243 (PECB, 1987). Applying the heavy burden placed on a party seeking confidential exclusions, *City of Mountlake Terrace*, Decision 3832-A (PECB, 1992), *Olympia School District*, Decision 4736-A (PECB, 1994), and *Colville School District*, Decision 5319-A (PECB, 1996), require a

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<sup>13</sup> Station Three is located on Port of Everett property, in an area that entity has indicated a desire to renovate. One purpose of the meeting was to provide the mayor, the city council, and the city administration with information about concerns the Fire Department predicted would be expressed by the union representing the rank-and-file unit. Those included: Potential for a loss of equipment and personnel resulting if the station were to be closed, and potential for layoffs if staff from Station Three were to be transferred to other stations.

decision against exclusion in a case such as this, where the evidence offered in support of a confidential claim is ambiguous or contradictory.

The conclusion on Gage is that his involvement with labor nexus work is no more than the occasional or incidental involvement of a supervisor who provides input to an employer's labor policy makers, so that his exclusion is not warranted on this record.

Fire Marshal Warren Burns

Burns holds the "assistant fire chief" rank, and he stands in for the chief and/or assistant chief in their absence, but has been working as the employer's fire marshal for the past five years. Burns has been a management representative in labor-management meetings where changes of employee wages, hours or working conditions have been negotiated with a union. For example:

- In 2001, Burns participated in a meeting concerning compensation for employees from the rank-and-file unit who perform a "public educator" role.
- In 2003, Burns participated (along with the chief, the former assistant chief, one of the deputy chiefs, and the employer's human resources manager) in negotiations concerning a Letter of Understanding about standby pay for on-call fire inspectors. An agreement to clarify Article 33 of the collective bargaining agreement was reached, and it allowed the employer to place inspectors on-call on a rotational basis and detailed how inspectors would be compensated for that assignment.
- Later in 2003, Burns negotiated with a union and reached an agreement about having paramedics in the rank-and-file bargaining unit work at the new Everett Events Center. The agreement detailed the staffing level for employees working at

the Center and authorized application of a fixed "instructor" rate already established in the collective bargaining agreement covering that bargaining unit.<sup>14</sup>

As with the situation of Deputy Chief Robinson, discussed above, the problem with these examples is that they all involve special projects or issues (rather than contract negotiations conducted on a regular basis) and are all in the past (rather than ongoing negotiations). It is clear that White is now the employer's point man for negotiations with the union representing the rank-and-file unit. The Executive Director cannot speculate that issues within Burns' area of expertise will arise in the future, or that Burns will be assigned to negotiate for the employer in the future.

The conclusion on Burns is that this record does not warrant his exclusion as a confidential employee at the present time.<sup>15</sup>

#### FINDINGS OF FACT

1. The City of Everett is a "public employer" within the meaning of RCW 41.56.030(1).
2. International Association of Fire Fighters, Local 46, a "bargaining representative" within the meaning of RCW 41.56.030(3), has filed a petition for investigation of a question concerning representation seeking certification as

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<sup>14</sup> The Events Center was interested in having paramedics present during scheduled events when there would be a large audience, and the employer wanted to use its own paramedics to avoid the work going to a private contractor.

<sup>15</sup> As with Robinson, the employer will be free to file a new petition if it actually resumes giving Burns labor nexus duties.

exclusive bargaining representative of a bargaining unit of supervisory fire fighter personnel of the City of Everett.

3. Deputy Chief Art White has regular and ongoing responsibility for and involvement with the employer's confidential labor relations policies, and representing the employer in collective bargaining. His role calls for consistent exercise of judgment, and is not merely routine or clerical in nature.
4. Deputy Chief Jack Robinson has directly participated in the past in representing the employer in collective bargaining on specific issues, but the evidence in this record fails to establish that Robinson has consistent involvement with the employer's labor relations policies or collective bargaining on behalf of the employer.
5. Deputy Chief David DeHaan does not necessarily assist or act in a confidential capacity to any person who participates directly in the formulation of labor relations policy, the preparation for or conduct of collective bargaining on behalf of the employer.
6. Deputy Chief John Gage does not necessarily assist or act in a confidential capacity to any person who participates directly in the formulation of labor relations policy, the preparation for or conduct of collective bargaining on behalf of the employer.
7. Fire Marshal Warren Burns has directly participated in the past in representing the employer in collective bargaining on specific issues, but the evidence in this record fails to establish that Burns has consistent involvement with the



employer's labor relations policies or collective bargaining on behalf of the employer.

8. The employees described in paragraphs four through seven of these findings of fact are supervisory employees.

#### 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 described in paragraph 3 of the foregoing findings of fact, Deputy Chief Art White is a confidential employee within the meaning of RCW 41.56.030(2)(c) and WAC 391-35-320, and is not a public employee within the meaning of RCW 41.56.030(2).
3. As described in paragraphs 4 through 7 of the foregoing findings of fact, Deputy Chief Jack Robinson, Deputy Chief David DeHaan, Deputy Chief John Gage, and Fire Marshal Warren Burns are public employees within the meaning of RCW 41.56.030(2).
4. A bargaining unit limited to supervisory fire fighter employees of the City of Everett is an appropriate bargaining unit within the meaning of RCW 41.56.060 and WAC 391-35-340, and a question concerning representation currently exists in the bargaining unit composed of the individuals described in paragraphs 4 through 8 of the foregoing findings of fact.

#### DIRECTION OF ELECTION

A representation election shall be conducted by secret ballot, under the direction of the Public Employment Relations Commission,

in the appropriate bargaining unit described in paragraph 4 of the foregoing conclusions of law, for the purpose of determining whether a majority of the employees in that unit desire to be represented for the purposes of collective bargaining by International Association of Fire Fighters, Local 46, or by no representative.

ISSUED at Olympia, Washington, this 17<sup>th</sup> day of August, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order may be appealed by filing timely objections with the Commission under WAC 391-25-590.