



separate bargaining unit of supervisors who are "uniformed personnel," that the administrative clerk is properly excluded from that bargaining unit as a non-supervisory and non-uniformed employee, and that a cross-check is the appropriate method to determine the question concerning representation.

#### BACKGROUND

The employer has a population of approximately 9,285, and operates under a mayor-council form of government. The employer's overall operations are under the direction of a city administrator.<sup>1</sup> The employer provides customary municipal services, including fire prevention and suppression. Fire Chief John Warren Gay reports to the city administrator.

The Lynden Fire Department operates one fire station. It has a workforce consisting of three regular full-time employees (the chief, an assistant chief, and an administrative clerk) supplemented by a cadre of volunteers (approximately 27 fire fighters, six lieutenants and three captains. The volunteers are not represented for purposes of collective bargaining.<sup>2</sup>

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<sup>1</sup> For a period of time in 2001 the city administrator's position was vacant. Jerald L. Osterman was appointed to fill the position on an interim basis, from March 28, 2001, until August 20, 2001.

<sup>2</sup> In the absence of any indication to the contrary, the individuals in this group are presumed to be of the type typically covered by the "Volunteer Fire Fighters' and Reserve Officers' Relief and Pensions" statute, Chapter 41.24 RCW. The evidence suggests they are paid at an hourly rate for responding to alarms and other activities associated with the employer's Fire Department, but they are clearly not regular full-time employees.

### The Fire Chief Position

The parties stipulate the chief is a supervisor for the purposes of Chapter 41.56 RCW. The chief is paid a monthly salary, and is enrolled in the Law Enforcement and Fire Fighters Retirement System under Chapter 41.26 RCW, so that the chief's position is within the definition of "uniformed personnel" contained in RCW 41.56.030(7)-(e).

### The Assistant Chief Position

The parties stipulate the assistant chief is a supervisor for the purposes of Chapter 41.56 RCW, and is not a "confidential employee" within the meaning of RCW 41.56.030(2)(c). The assistant chief is enrolled in the Law Enforcement and Fire Fighters Retirement System under Chapter 41.26 RCW, so that the assistant chief's position is also within the definition of "uniformed personnel" contained in RCW 41.56.030(7)(e).

### The Administrative Clerk Position

The employer had an administrative support position in its Fire Department for an undisclosed period of time. The position was filled by an individual who had been recruited from the ranks of the volunteer fire fighters and continued to serve as a volunteer fire fighter while working less than 20 hours per week in the administrative role. That position was eliminated, however, prior to the events giving rise to this case.

Chief Gay created a new support position during or about January 2001. In drafting a job description for the new position, the chief looked to a similar position in the police department. The

position is paid on an hourly basis, and normally provides 40 hours of work per week. Sandra Dalessandro is the first incumbent of the new position. There is no claim or evidence that Dalessandro is a supervisor, a confidential employee, or that she meets the definition of "uniformed personnel" contained in RCW 41.56.030(7).

The Employer's Collective Bargaining Procedures

The petitioning union is the exclusive bargaining representative of four other bargaining units of City of Lynden employees. The employer and union have collective bargaining agreements for all of those units. They are:

- A unit of full-time and regular part-time operations and maintenance employees in the Public Works Department, excluding office-clerical employees;<sup>3</sup>
- A unit of commissioned law enforcement officers, excluding the chief of police;<sup>4</sup>
- A unit of full-time and regular part-time office-clerical employees of the employer's Police Department, excluding commissioned officers, supervisors, confidential employees, and all other employees;<sup>5</sup> and
- A unit of full-time and regular part-time office-clerical employees in finance, court, planning and public works

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<sup>3</sup> Review of the Commission's docket records fails to disclose a certification for this unit, but cases involving the unit date back to 1976.

<sup>4</sup> The union was certified as exclusive bargaining representative in *City of Lynden*, Decision 76 (PECB, 1976).

<sup>5</sup> The union was certified as exclusive bargaining representative in *City of Lynden*, Decision 6537 (PECB, 1999).

departments, excluding supervisors, confidential employees, and all other employees;<sup>6</sup>

Steve Thorp has been employed by this union since 1992, and has been responsible for the union's dealings with this employer. According to Thorp, the city administrator position has been the employer official responsible for the employer's dealings with the union. The employer has not had a history of using committees, or of bringing elected officials or department heads into the collective bargaining process.<sup>7</sup>

#### POSITIONS OF THE PARTIES

The union seeks a "vertical" bargaining unit encompassing all full-time employees in the Fire Department. The union disputes the employer's categorization of the chief as a confidential employee, contending that the employer has limited access to its labor relations to elected officials and the city administrator, while excluding department heads from the process. The union acknowledges that the chief and assistant chief are supervisors, but contends that the remaining regular employee in the department should be included in the petitioned-for bargaining unit to avoid an inappropriate stranding of the administrative clerk without access to collective bargaining. The union argues that there is sufficient community of interest between the three employees to

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<sup>6</sup> The union was certified as exclusive bargaining representative in *City of Lynden*, Decision 6896 (PECB, 1999).

<sup>7</sup> Stephan Jilk served as the city administrator for an undisclosed period of time, but impliedly for a period of several years. He left the position for undisclosed reasons, and was replaced by the interim city administrator in early 2001.

commingle them in a bargaining unit, notwithstanding that the administrative clerk is neither a supervisor or a "uniformed" employee.<sup>8</sup>

Acknowledging that the fire chief and assistant fire chief are supervisors, the employer maintains that the chief is a confidential employee who would be called upon on a regular and ongoing basis to assist in the formulation of labor relations policy, preparation for collective bargaining, and the administration of collective bargaining agreements. Accordingly, the employer maintains that the chief should not have access to statutory collective bargaining rights. The employer points out that the assistant chief is both a supervisor and a "uniformed" employee,<sup>9</sup> and it contends that a bargaining unit commingling the assistant chief and the administrative clerk would not be appropriate, because the administrative clerk is neither a supervisor nor a "uniformed" employee. The employer contends the administrative clerk position does not fall within a narrow band of exceptions that have commingled uniformed and non-uniformed employees in the same bargaining unit. The employer further maintains there is no community of interest between the chief, the assistant chief and the administrative clerk, so that a union's argument supporting an exception to prevent a stranding of the administrative clerk is without merit.

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<sup>8</sup> After setting forth this argument in its brief, the union for the first time raised the possibility of placing the administrative clerk in one of the existing bargaining units of office-clerical employees. That possibility would need to be pursued in a separate representation or unit clarification proceeding in a unit which claims the position, and cannot be addressed in this proceeding.

<sup>9</sup> The employer initially claimed that the assistant chief is also a confidential employee, but it later withdrew that claim.

DISCUSSIONThe Standards to be AppliedThe Exclusion of "Confidential Employees" -

The law regarding the exclusion of "confidential employees" is well developed under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. The Supreme Court of the State of Washington gave RCW 41.56.030(2)(c) a narrow interpretation, limiting it to those having a "labor nexus":

When the phrase confidential relationship is used in the collective bargaining act, we believe it's 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 officials. . . . The nature of this close association must concern the official and policy responsibilities of the public official or executive head of the bargaining unit, including formulation of labor relations policy. General supervisory responsibility is insufficient to place an employee within this exclusion.

*City of Yakima v. IAFF*, 91 Wn.2d 101 (1978).

In *Yakima, supra*, the Supreme Court took direction from the definition of "confidential employee" found in the Educational Employment Relations Act, Chapter 41.59 RCW, at RCW 41.59.020(4)-(c), and expressed a preference for maintaining consistency in the interpretation of the two statutes.

After the *Yakima* precedent stood for more than two decades without change, or even serious challenge, the Commission adopted a rule to implement the expressed preference of the Supreme Court:

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 codification of precedent affirms the fundamental principle that status as a "confidential" employee deprives the individual of access to all collective bargaining rights. Accordingly, the party proposing a "confidential" exclusion continues to have a heavy burden of proving the necessity for excluding the employee from the rights of the collective bargaining statute. See *City of Seattle*, Decision 689-A (PECB, 1979).

In the context of this case where the fire chief is stipulated as a supervisor. it is important to reiterate that having or exercising supervisory authority does not constitute a basis for exclusion as a "confidential employee." General supervisory functions include making contract interpretations, disciplining subordinates, and processing contractual grievances. *City of Seattle*, Decision 1797-A (PECB, 1985). Similarly, access to personnel files is not inherently an indicator of "confidential" status. *Snohomish County*, Decision 346 (PECB, 1981).



Supervisors who provide input to the employer's negotiators concerning the impact of various bargaining proposals can present close questions, but even those who serve in an advisory role are not necessarily regarded as confidential employees. *King County*, Decision 4004-A (PECB, 1992); *Snohomish County*, Decision 4027 (PECB, 1992). A confidential exclusion will not be based upon participation in the budget process, unless there is indication that labor relations confidences are part of the role. *Kitsap County*, Decision 3227 (PECB, 1989). Occasional or incidental involvement in the collective bargaining process is insufficient to warrant a "confidential" exclusion. *City of Cheney*, Decision 3693 (PECB, 1991); *City of Puyallup*, Decision 5460 (PECB, 1996). Similarly, speculation about future involvement in the collective bargaining process has not been accepted by the Commission as a basis for a confidential exclusion. *City of Winslow*, Decision 3520-A (PECB, 1990). Where the facts offered in support of a "confidential" claim are ambiguous or contradictory, the exclusion will be denied. *Pateros School District*, Decision 3911-B (PECB, 1992).<sup>10</sup>

The Rights and Treatment of Supervisors -

Under the unanimous decision of the Supreme Court of the State of Washington in *Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries*, 88 Wn.2d 925 (1977), persons who would be excluded from the coverage of the National Labor Relations Act (NLRA) as "supervisors" have full bargaining rights under Chapter 41.56 RCW. Recognizing the potential for conflicts of interest that is inherent in having both supervisors and their

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<sup>10</sup> A ruling at one point in time does not preclude revisiting the status of a particular person or position at a later point in time. Unit clarification proceedings under Chapter 391-35 WAC are available to an employer or union following a change of circumstances.

subordinates in the same bargaining unit, the Commission has routinely excluded supervisors from such units. *City of Richland*, Decision 279-A (PECB, 1978), affirmed 29 Wn. App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981).<sup>11</sup>

After the *METRO* and *Richland* precedents stood for two decades without change, or even serious challenge, the Commission adopted a rule on the subject, as follows:

WAC 391-35-340 UNIT PLACEMENT OF SUPERVISORS-BARGAINING RIGHTS OF SUPERVISORS. (1) It shall be presumptively appropriate to exclude persons who exercise authority on behalf of the employer over subordinate employees (usually termed "supervisors") from the bargaining units containing their rank-and-file subordinates, in order to avoid a potential for conflicts of interest which would otherwise exist in a combined bargaining unit.

(2) It shall be presumptively appropriate to include persons who exercise authority on behalf of the employer over subordinate employees (usually termed "supervisors") in separate bargaining units for the purposes of collective bargaining.

(3) The presumptions set forth in this section shall be subject to modification by adjudication.

Thus, the Commission codified precedents which look to the authority possessed, rather than to the titles of positions.

The Rights and Treatment of "Uniformed Personnel" -

The legislature has established an "interest arbitration" procedure for resolving bargaining impasses involving certain types of public

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<sup>11</sup> Both *METRO* and *City of Tacoma*, Decision 95-A (PECB, 1977), cited by the Supreme Court with approval in *METRO*, concerned separate bargaining units of supervisors.

employees. Although the definition of "uniformed personnel" first adopted in 1973 (when it was limited to fire fighters and certain law enforcement officers) has been expanded several times, the interest arbitration process still covers only a portion of the public employees covered by Chapter 41.56 RCW. The Commission adopted a rule as follows:

WAC 391-35-310 EMPLOYEES ELIGIBLE FOR INTEREST ARBITRATION. Due to the separate impasse resolution procedures established for them, employees occupying positions eligible for interest arbitration shall not be included in bargaining units which include employees who are not eligible for interest arbitration.

That rule also codified a long line of case precedents by which mixed units were divided into separate units along lines of eligibility for statutory interest arbitration. See, for example, *City of Yakima*, Decision 837 (PECB, 1980).

Determination of Appropriate Bargaining Units -

The legislature has delegated the determination and modification of appropriate bargaining units to the Commission. RCW 41.56.060 sets forth standards commonly referred to as the "community of interest criteria," as follows:

RCW 41.56.060 DETERMINATION OF BARGAINING UNIT-BARGAINING REPRESENTATIVE. The commission, after hearing upon reasonable notice, shall decide in each application for certification as an exclusive bargaining representative, the unit appropriate for the purpose of collective bargaining. In determining, modifying, or combining the bargaining unit, the commission shall consider the duties, skills, and working conditions of the public employees; the history of collective bargaining by the public employees and their bargaining

representatives; the extent of organization among the public employees; and the desire of the public employees. . . .

The unit determination process does not require crafting the most appropriate bargaining unit. *Tukwila School District*, Decision 7287-A (PECB, February 14, 2001). Various unit configurations have been found to be appropriate, including "wall to wall" units (encompassing all of the employees of the employer), "vertical" units (encompassing all of the employees in some department or branch of the employer's organization), and "horizontal" units (cutting across departmental lines to encompass all employees of a generic occupational type).

One ever-present concern in the unit determination process is the avoidance of stranding employees by a unit configuration that precludes their exercise of statutory collective bargaining rights. Yet another Commission rule provides:

WAC 391-35-330 ONE-PERSON BARGAINING UNIT  
INAPPROPRIATE. A bargaining unit cannot be considered appropriate if it includes only one person.

That rule also codified long-standing case precedents. See *Town of Fircrest*, Decision 248-A (PECB, 1977). Although the Commission has expressed concern about units too small to effectively bargain, units consisting of two employees have been certified. *Puyallup, supra*; *King County Fire District 44*, Decision 4928 (PECB, 1994).

#### Application of the Standards

##### Employer Claim of Confidential Status Fails -

Applying the Commission's rule and precedents to this record does not support the "confidential" exclusion proposed by the employer.

The employer's position description for the fire chief contains extensive, but almost entirely irrelevant, terms:

General Purpose

Performs a variety of technical, administrative, and supervisory work in planning, organizing, directing and implementing fire prevention, fire code, compliance including construction plan review inspection, fire investigation, fire suppression, hazardous material response and emergency medical services to minimize the loss of life and property by fire and emergency medical conditions in the City of Lynden.

SUPERVISION RECEIVED

Works under the direction of the City Administrator.

SUPERVISION EXERCISED

Supervises the fire department staff, officers, firefighters, directly, or indirectly, through subordinate officers.

ESSENTIAL DUTIES AND RESPONSIBILITIES

Establishes policies and procedures for Fire and EMS Operations in order to implement directives from the Mayor and City Administrator.

Plans and implements Fire and EMS programs for the City of Lynden in order to better carry out the policies and goals including those set forth in the City's Affirmative action Plan; reviews Departmental performance and effectiveness; formulates programs or policies to alleviate deficiencies.

Supervises and coordinates the preparation and presentation of an annual budget for Fire and EMS operations; directs the implementation of the Departments' budgets; plans for and reviews specifications for new or replaced equipment and facilities.

Responds to alarms and may direct activities at the scene of major emergencies, as required.

*Establishes and enforces personnel policies for the selection of paid and volunteer positions within the Department.*

Plans and directs appropriate programs for fire prevention and inspection.

Determines appropriate level of Fire Code Compliance and recommends service programs to meet this compliance level.

Provides plan review and construction inspection on buildings and other properties to enforce fire protection codes and city ordinances.

Provides Supervision to manage building construction permit review, issuance and inspection program.

*Manage operations of the Fire department to insure that all Fire Department personnel continue to collaborate and cooperate in carrying out the functions of the department.*

*Establishes training and educational training programs for department personnel.*

Controls the expenditure of departmental appropriations.

*Handles grievances, maintains Departmental discipline and the conduct and general behavior of assigned personnel.*

Prepares and submits monthly reports to the City Administrator regarding the Departments' activities and prepares a variety of other reports as appropriate including the annual report of activities.

Plans departmental operations with respect to equipment, apparatus, and personnel; supervises the implementation of such plans.

*Assigns personnel and equipment to such duties and uses as the service requires; evaluates the need for and recommends the purchase of new equipment, supplies and facilities.*

Works with other County Fire departments and districts to maintain working relationships with them to support fire and emergency (sic) medical services.

Meets with elected or appointed officials, other Fire/EMS officials, community and business representatives and the public on all aspects of the Departments' activities.

Works with the Public Works Department to insure water supply and maintenance and repair of Department equipment is adequate to complement fire service in the community.

Works with other City Department Directors to ensure the coordination of all matters relating to the operations of the Fire Department, especially the Police Department.

Attends City staff meetings, Council subcommittees, and City Council meetings as directed and as appropriate.

**Peripheral Duties:**

Attends conferences and meetings to keep abreast of current trends in the fire administration field; represents the Fire Department in a variety of local, county, state and other meetings.

Performs the duties of command personnel as needed.

Serves as a member of various City employee committees as directed by the City Administrator.

(emphasis added).

There is no evidence that the chief has any meaningful role in the formulation or implementation of the employer's labor relations policies. The most that can be said is that the paragraphs in the job description concerning "personnel policies," "employee collaboration," "training," "grievances and discipline" and "assignment" all speak to classic supervisory functions. According to the chief, he only attends city council meetings when matters relevant to the Fire Department come up, and he does not attend executive sessions. The chief testified that collective bargaining

has never come up in any of those meetings, or in department head meetings he has attended.

As presently structured, there is little or no potential for creation of a bargaining unit of rank-and-file fire fighters in this department. The employer has adequate personnel to perform the employer function in collective bargaining relating to other departments, without depriving the fire chief of statutory bargaining rights. Even police chiefs have been included in bargaining units in some small communities. See *City of Winlock*, Decision 4056-B (PECB, 1993). The city administrator maintains a high degree of control, which strongly suggests that labor policy and strategy decisions will continue to be made at that level.

Community of Interest -

The employer aptly objects to placing the administrative clerk and the "uniformed personnel" in the same bargaining unit, but its arguments against the existence of a community of interest between the chief and assistant chief fail.

The employer's published job descriptions for the chief and assistant chief are very similar. Both positions function as the managerial and administrative arm of a department which relies on volunteers. Both require use of interpersonal and technical skills in overseeing the volunteers, responses to emergency calls, and serving as the "duty officer" in charge. The chief described the assistant chief position as being a "clone" of his own position.

The administrative clerk is not required to have fire prevention or fire suppression skills, does not have the same duties or responsibilities as the chief and assistant chief, does not have the same technical/supervisory relationship with the volunteer fire fighters



as the chief and assistant chief, and cannot be described as a "clone" of the "uniformed personnel." The fact that the creation of an appropriate separate unit of supervisors in the Fire Department would leave the administrative clerk without union representation does not warrant disregard of either WAC 391-35-310 (prohibiting mixed units of "uniformed personnel" and employees who are not "uniformed personnel") or WAC 391-35-340 (prohibiting mixed units of supervisors).

The union's desire to include the administrative clerk in the unit proposed in this case is properly evaluated under the same standards as an "accretion," which is only ordered where circumstances lead to the presence of a position which logically belongs only in a particular bargaining unit. See *Kitsap Transit Authority*, Decision 3104 (PECB, 1989); *Seattle School District*, Decision 4868 (PECB, 1994). Accretion will be denied if the employee(s) could stand on their own as a separate bargaining unit, or if they could be claimed by any other existing bargaining unit. The fact that the office-clerical position in the Fire Department is of relatively recent creation inherently creates a potential for accretion claims from either the office-clerical unit in the employer's Police Department (expanding that unit to a "public safety support" unit) or the multi-departmental office-clerical unit already in existence. Thus, inclusion of the administrative clerk in the same unit with the supervisory fire fighters is not the only available option.

#### FINDING OF FACT

1. The City of Lynden, a public employer within the meaning of RCW 41.56.020 and RCW 41.56.030(1), operates under the direction of an elected city council and an appointed city administrator.

2. Teamsters Union, Local 231, a bargaining representative within the meaning of RCW 41.56.030(3), has filed a timely and properly supported petition seeking certification as exclusive bargaining representative of a bargaining unit consisting of all full-time and regular part-time employees of the employer's Fire Department.
3. The employer primarily provides fire prevention and suppression services through a cadre of volunteer fire fighters under the management and supervision of a regular full-time fire chief and assistant fire chief. One office-clerical position currently exists in the employer's Fire Department.
4. The employer and union have collective bargaining relationships covering four other bargaining units within the employer's overall workforce. Access to confidential information concerning the formulation and implementation of the employer's labor relations policies has historically been limited to the elected members of the city council and the city administrator.
5. The fire chief is a salaried employee working in excess of 40 hours per week, who performs a variety of technical, administrative, and supervisory work in planning, organizing, directing and implementing fire prevention, fire code compliance, inspection, fire investigation, fire suppression, hazardous material responses and emergency medical services. The chief is covered by the Law Enforcement Officers' and Fire Fighters Retirement System, and is stipulated by the parties to be a supervisor.
6. The assistant fire chief is a salaried employee working in excess of 40 hours per week, who performs a variety of

technical, administrative, and supervisory work in assisting the fire chief with planning, organizing, directing and implementing fire prevention, suppression and emergency medical condition. The assistant chief acts as chief in the chief's extended absence, and at the direction of the mayor. The assistant chief is covered by the Law Enforcement Officers' and Fire Fighters Retirement System, and is stipulated by the parties to be a supervisor.

7. The administrative clerk is an hourly employee, normally scheduled to work 40 hours per week, who performs a variety of office-clerical, administrative and technical work in the administration of the Fire Department. The administrative clerk generally does not exercise supervision of other employees, and is not covered by the Law Enforcement Officers' and Fire Fighters Retirement System.
8. The fire chief has not been directly or indirectly involved in the collective bargaining process on behalf of the employer, and does not have access to confidential information concerning the employer's labor relations policies.

#### 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 fire chief position in the Lynden Fire Department is a public employee within the meaning of RCW 41.56.020(2), and is not a "confidential employee" under RCW 41.56.030(2)(c).
3. A bargaining unit consisting of:

All supervisory fire fighters employed by the City of Lynden who are uniformed personnel as described by RCW 41.26.030(7)(e), excluding elected officials, officials appointed for fixed terms of office, confidential employees, and all non-supervisory employees.

is an appropriate unit for the purposes of collective bargaining under RCW 41.56.060.

4. The administrative clerk in the Fire Department is neither a supervisor nor a "uniformed personnel" position under RCW 41.56.030(7), and is not eligible for inclusion in the bargaining unit described in Conclusion of Law 3.
5. A question concerning representation presently exists in the bargaining unit described in paragraph 3 of these Conclusions of Law, and all conditions have been met for the conduct of a cross-check pursuant to RCW 41.56.060 and WAC 391-25-410.

DIRECTION OF CROSS-CHECK

A cross-check of records shall be made under the direction of the Public Employment Relations Commission in the bargaining unit described in paragraph 4 of the foregoing findings of fact, to determine whether a majority of the employees in that bargaining unit have authorized Teamsters Union, Local 231 to represent them for purposes of collective bargaining.

Entered at Olympia, Washington, on the 19<sup>th</sup> day of September, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
MARVIN L. SCHURKE, Executive Director

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