



The Executive Director concludes that the police chief is not a "confidential" employee, and that he has a community of interest with the lieutenants in an appropriate separate bargaining unit of supervisors who are "uniformed personnel" under the statute. A cross-check is the appropriate method to determine the question concerning representation in this case.

#### BACKGROUND

The City of Lynden provides customary municipal services to residents in a portion of Whatcom County, under the direction of Interim City Administrator Jerry Osterman. The employer provides law enforcement services through the Lynden Police Department, which is headed by Chief of Police Jack Foster.

The employer's non-supervisory law enforcement officers are represented for the purposes of collective bargaining by General Teamsters Union, Local 231. The employer and Local 231 are parties to a collective bargaining agreement covering that bargaining unit, and it will remain in effect through December 31, 2001.

#### POSITION OF THE PARTIES

The union seeks a separate bargaining unit of supervisors in the employer's police department, consisting of the police chief and two lieutenants. The union asserts that none of those individuals have "confidential" duties and responsibilities.

The employer contends that the police chief is a "confidential employee" within the meaning of RCW 41.56.030(2)(c) who should not

be included in any bargaining unit. Further, citing *City of Moses Lake*, Decision 7008 (PECB, 2000), the employer asserted for the first time in its brief that the two lieutenants should be included in the rank-and-file bargaining unit as "leadmen" having limited supervisory authority.

## DISCUSSION

### The Standards to be Applied

#### The 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. In the context of this case where the police chief is clearly a supervisor, it is important to reiterate the companion holding of *City of Yakima, supra*, that having or exercising supervisory authority does not constitute a basis for exclusion as a "confidential" employee.

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). 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>1</sup>

General supervisory functions include making contract interpretations, disciplining subordinates, and processing contractual grievances. *City of Seattle*, Decision 1797-A (PECB, 1985). Access to personnel files is not inherently an indicator of "confidential" status. *Snohomish County*, Decision 346 (PECB, 1981). Similarly, 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).

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). 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 exclusion. *City of Winslow*, Decision 3520-A (PECB, 1990).

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<sup>1</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.

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. However, recognizing the potential for conflicts of interest that is inherent in having both supervisors and their subordinates in the same bargaining unit, the Commission has routinely excluded supervisors from such units. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd* 29 Wn. App. 599 (Division III, 1981), *review denied* 96 Wn.2d 1004 (1981).<sup>2</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.

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<sup>2</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.

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

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). Moreover, the "history of bargaining" which accumulates with each passing day after a bargaining unit is recognized or certified generally precludes a later accretion of positions left out of the bargaining unit when it was created:

WAC 391-35-020 TIME FOR FILING PETITION-  
-LIMITATIONS ON RESULTS OF PROCEEDINGS.

. . . .  
LIMITATIONS ON RESULTS OF PROCEEDINGS

. . . .  
(4) Employees or positions may be added to an existing bargaining unit in a unit clarification proceeding:

(a) Where a petition is filed within a *reasonable time period after a change of circumstances* altering the community of interest of the employees or positions; or

(b) Where the existing bargaining unit is the *only appropriate unit* for the employees or positions.

(5) Except as provided under subsection (4) of this section, a question concerning representation will exist under chapter 391-25 WAC, and an order clarifying bargaining unit will not be issued under chapter 391-35 WAC:

(a) Where a unit clarification petition is not filed within a reasonable time period after creation of new positions.

(b) Where employees or positions have been excluded from a bargaining unit by agreement of the parties or by a certification, and a unit clarification petition is not filed within a reasonable time period after a change of circumstances.

(c) Where addition of employees or positions to a bargaining unit would create a doubt as to the ongoing majority status of the exclusive bargaining representative.

Thus, it also behooves parties to take a "long-term" view of their rights and interests when creating bargaining units.

Application of the Standards

Employer's 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 chief of police is appointed to his position by the mayor subject to approval by the city council, but that appointment is for an indefinite term. He can be removed from the position in the same manner. The chief of police clearly supervises both the commissioned and non-commissioned employees of the department. He can recommend the hiring of employees, he schedules employees, he can recommend promotions to the mayor, and he can discipline the employees under his supervision. The chief is responsible for the department's finances, and advises the city administrator about departmental matters.

No "labor nexus" duties are set forth in the employer's otherwise extensive and detailed job description for the chief of police position, which reads as follows:

GENERAL PURPOSE

Performs a variety of complex administrative, supervisory and professional work in planning, coordinating and directing the activities of the Police Department.

SUPERVISION RECEIVED:

Works under the general guidance and direction of the City Administrator.

SUPERVISION EXERCISED

Exercises supervision over all police department staff directly or through subordinate supervisors.

ESSENTIAL DUTIES AND RESPONSIBILITIES

Plans, coordinates, supervises and evaluates police department operations.

Develops policies and procedures for the Department in order to implement directives from the City Council or Manager.

Plans and implements a law enforcement program for the City in order to better carry out the policies and goals of City Management and

Council; reviews Department performance and effectiveness, formulates programs or policies to alleviate deficiencies.

Coordinates the information gathered and work accomplished by various officers; assigns officers to special investigations or assignments as the needs arise for their specific skills.

Assures that personnel are assigned to shifts or working units which provide optimum effectiveness in terms of current situations and circumstances governing deployment.

Evaluates evidence, witnesses, and suspects in criminal cases to correlate all aspects and to assess for trends, similarities, or for associations with other cases.

Supervises and coordinates the preparation and presentation of an annual budget for the Department; directs the implementation of the department's budget; plans for and reviews specifications for new or replaced equipment, Departmental purchases and inventory control.

Directs the development and maintenance of systems, records and legal documents that provide for the proper evaluation, control and documentation of police department operations.

Trains and develops Department personnel.

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

Prepares and submits periodic reports to the City Manager regarding the Department's activities, and prepares a variety of other reports as appropriate.

Meets with elected or appointed officials, other law enforcement officials, community and business representatives and the public on all aspects of the Department's activities.

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

Cooperates with County, State and Federal law enforcement officers as appropriate where activities of the police department are involved.

Ensures that laws and ordinances are enforced and that the public peace and safety is maintained.

PERIPHERAL DUTIES

Directs investigation of major crime scenes.

Performs the duties of subordinate personnel as needed.

Analyzes and recommends improvements to equipment and facilities, as needed.

Of importance in this case, the chief of police does not participate in collective bargaining on behalf of the employer. Instead, the city administrator conducts contract negotiations with the union officials representing various bargaining units. Foster's only involvement has been to merely provide some input regarding union proposals.

Unit Placement of the Lieutenants

The employer has not met the procedural requirements to propose accretion of the lieutenants in the bargaining unit of rank-and-file law enforcement officers, and that employer argument cannot be dealt with in this case.

The lieutenants have historically been excluded from the bargaining unit of rank-and-file law enforcement officers, and that history is entitled to consideration. Additionally, the union which represents the bargaining unit of rank-and-file law enforcement officers would have been entitled to notice of any representation or unit clarification proceeding which might affect the scope of that bargaining unit. See WAC 391-25-050; 391-35-030; 391-35-050(3).

Teamsters Local 231 was not named as an interested party in the petition filed to initiate this proceeding, and was not listed on the docket for this case. The employer could have raised its accretion proposal during the investigation conference in this case, which would have permitted giving notice of this proceeding to Local 231, but it did not do so. Indeed, the employer's position during the investigation conference was that the lieutenants should be excluded from all bargaining rights as "confidential" employees. While the employer dropped its claim of "confidential" status at the hearing in this case, it did not even substitute its accretion claim at that time. Even then, an accretion claim advanced for the first time at the hearing would have been subject to rejection as untimely, or would have at least required a continuance of the hearing to give notice to Local 231. The accretion claim advanced for the first time in the employer's post-hearing brief was clearly untimely.

#### FINDINGS OF FACT

1. The City of Lynden, a public employer within the meaning of RCW 41.56.030(1), is governed by an elected city council and an appointed city administrator. The employer maintains and operates a police department under the supervision of Chief of Police Jack W. Foster.
2. International Association of Machinists and Aerospace Workers, District Lodge 160, a bargaining representative within the meaning of RCW 41.56.030(3), filed a representation petition seeking certification as exclusive bargaining of a bargaining unit limited to supervisory "uniformed personnel" employees of the employer's police department.

3. The workforce in the employer's police department includes the chief, two lieutenants, and other law enforcement officers in ranks up to and including sergeant.
4. The law enforcement officers up to and including the rank of sergeant are represented for the purposes of collective bargaining by Teamsters Union, Local 231. The recognition clause of the collective bargaining agreement between the employer and the Teamsters Union excludes the police chief and the two lieutenants as supervisory employees.
5. The city administrator has historically been responsible, with the permission of the city council, for conducting the employer's labor relations affairs. Persons holding the city administrator position have negotiated collective bargaining agreements with unions representing city employees, and have made decisions on all collective bargaining issues. Department heads have merely been asked for their views on issues raised in collective bargaining, and have not been privy to confidential information concerning the employer's labor relations policies and practices.
6. The chief of police performs routine duties normally associated with the position, and is responsible for performing all normal supervisory duties concerning other employees of the department. The chief does not have any responsibilities for collective bargaining matters beyond advising the city administrator of any concerns he might have about union proposals, and has not been directly or indirectly involved in the collective bargaining process on behalf of the employer. The chief does not have access to confidential information concerning the employer's labor relations policies.

7. The union's petition in this case is sufficient to invoke the cross-check procedure of WAC 391-25-391.

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 in the Lynden Police Department is a public employee within the meaning of RCW 41.56.020(2), and is not a confidential employee within the meaning of RCW 41.56.030(2)(c).
3. A bargaining unit consisting of:

All supervisory law enforcement officers employed by the City of Lynden who are uniformed personnel as defined in RCW 41.26.030(7)(e), excluding elected officials, officials appointed for a fixed term of office, confidential employees, and all non-supervisory employees

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

4. A question concerning representation presently exists in the bargaining unit described in paragraph 4 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 the foregoing conclusions of law, to determine whether a majority of the employees in that bargaining unit have authorized International Association of Machinists and Aerospace Workers, District Lodge 160, to represent them for the purposes of collective bargaining.

Entered at Olympia, Washington, on the 17<sup>th</sup> day of October, 2001.

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.