

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
)
UNION GAP POLICE OFFICERS)
ASSOCIATION) CASE 17940-E-03-2897
)
Involving certain employees of:) DECISION 8619-A - PECB
)
CITY OF UNION GAP) ORDER DETERMINING
) ELIGIBILITY ISSUES
)
_____)

Garrettson Goldberg Fenrich & Makler, by Jaime B. Goldberg, Attorney at Law, for the union.

Menke Jackson Beyer Elofson Ehlis & Harper, by Anthony F. Menke, Attorney at Law, for the employer.

An interim certification was issued on June 24, 2004, naming the Union Gap Police Officers Association (union) as the exclusive bargaining representative of uniformed law enforcement employees of the City of Union Gap, excluding supervisors and confidential and non-uniformed employees. The case was held open to resolve issues concerning the eligibility of three sergeants, who the employer claimed to be supervisors. Hearing Officer Paul T. Schwendiman held a hearing on October 7, 2004. Based upon the record, applicable statutes, rules, and case law, the Executive Director rules that the sergeants are not supervisors, and are properly included in the bargaining unit.

ISSUE

Are the sergeants properly excluded, as supervisors, from the bargaining unit represented by the union?

ANALYSISApplicable Standards

The determination of appropriate bargaining units is a function delegated by the Legislature to the Commission. RCW 41.56.060. WAC 391-35-340 codifies a long line of Commission precedents exercising that authority, 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 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.

See also 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).

In the public sector context, where the "appointing authority" is often vested at a very high level in employer organizations, and in the absence of a definition of "supervisor" within Chapter 41.56 RCW, the Commission has looked to the Educational Employment Relations Act, at RCW 41.59.020(4)(d), which defines supervisor as:

[A]ny employee having authority, in the interest of an employer, to hire, assign, promote, transfer, layoff,

recall, suspend, discipline, or discharge other employees, or to adjust their grievances, or to recommend effectively such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment The term 'supervisor' shall include only those employees who perform a preponderance of the above-specified acts of authority.

Thus, it is the possession and exercise of employer authority over subordinate employees that warrants an exclusion.

The Commission has ruled on the status of police sergeants in a number of cases, including *Skamania County*, Decision 6511-A (PECB, 1999) and *Washington State Patrol*, Decision 2806-A (PECB, 1988). The rank title is not controlling. Sergeants have often been included in the same bargaining units with patrol officers;¹ sergeants have been excluded from bargaining units, however, where there has been specific evidence of exercise of authority creating a potential for intra-unit conflicts.²

The sergeants at issue in this case were in the same bargaining unit with the patrol officers while they were represented by another organization,³ but the filing of a representation petition under Chapter 391-25 WAC opened the door to taking a fresh look at

¹ See, e.g., *City of Moses Lake*, Decision 7008 (PECB, 2000); *Adams County*, Decision 6005-B (PECB, 1998); *City of Redmond*, Decision 2269-B (PECB, 1985).

² See, e.g., *City of Snohomish*, Decision 1557 (PECB, 1983); *City of Sunnyside*, Decision 1178 (PECB, 1981).

³ When the petition was filed in this case in October, 2003, the bargaining unit was represented by the Washington State Council of County and City Employees. That organization disclaimed the unit in June 2004.

the bargaining unit configuration. The "change of circumstances" requirement imposed on some "supervisor" issues in unit clarification cases under WAC 391-35-020(2) does not apply here, and the separation called for in WAC 391-35-340 can be implemented in this representation proceeding in the same manner as would be done with an issue preserved under WAC 391-35-020(2)(a).⁴

Application of Standards

At the time of the hearing, the commissioned personnel in the employer's police force consisted of a chief, the three sergeants, a lead detective, and eleven other employees (including two detectives who report to the lead detective, and nine patrol officers who report to the sergeants). A sergeant is in charge of the department when the chief is absent. One of the sergeants is in charge of training for the department, and another oversees reserve officers who are associated with the department but are not included in the bargaining unit.

The police chief was the employer's only witness in this case. Even though he is clearly the highest-ranking official within the police department, the chief testified even he cannot hire, fire, lay off, or recall personnel. That provides basis for an inference that such authority is vested at some administrative level above the chief.⁵ There is, however, no testimony in this record about

⁴ Even without a change of circumstances, a party can preserve a unit issue by filing a unit clarification petition in advance of signing a collective bargaining agreement.

⁵ Even police chiefs are not automatically excluded from bargaining rights. The decisions issued by the Executive Director and Commission in *City of Lynden*, Decision 7527, 7527-B (PECEB, 2002) were recently affirmed in an unpublished opinion of the Court of Appeals.

the employer's table of organization outside of the Police Department.

The chief testified that he wants to develop the sergeants into "possible future administrators," but that their inclusion in the bargaining unit prevents him from doing so. Numerous Commission precedents have stated and reiterated a need to focus on the current duties of claimed supervisors, and the chief's testimony inherently admits that the present duties of the sergeants do not match the chief's speculation as to the future. Different from the situations in *City of Snohomish*, Decision 1557, and *City of Sunnyside*, Decision 1178, where employers provided persuasive evidence that police sergeants who reported directly to the police chiefs in their respective departments had substantial independent authority, the record in this case only establishes that the current duties of the disputed sergeants are consistent with their classification as lead workers:

Hiring of subordinates cannot be imputed to the sergeants where the chief himself lacks that authority. Any exercise of authority over the reserve officers is irrelevant for the purposes of this case, because the reserve officers are not bargaining unit members.

Assigning of subordinates was a subject of testimony from witnesses for both parties in this case. The chief testified that the sergeants serve as coaches and counselors to the patrol officers, that they schedule the patrol officers and assign duties to them, and that they approve the requests of patrol officers for leave and compensatory time. On the other hand, the union provided testimony that a sergeant may be the only commissioned officer on duty on some shifts, which reduces the potential for mentoring or oversight of patrol officers.

Promotions of subordinates were only mentioned in the context of decisions on the retention of probationary employees. Although the chief testified that the sergeants make recommendations on such matters, those recommendations cannot be credited as "effective" when the chief himself lacks authority to act independently on hiring of employees.

Transfer, layoff, and recall of subordinates cannot be imputed to the sergeants where the chief himself lacks that authority.

Suspension, discipline, and discharge of subordinates was mentioned by the chief, who testified that the sergeants write performance evaluations on the patrol officers, and the employer particularly contends that a conflict of interest inheres in the sergeants writing negative evaluations that could produce hard feelings. On the other hand, both sergeants and patrol officers testified that no morale problems have been occasioned by performance evaluations written by the sergeants. Even accepting the chief's testimony that the sergeants can conduct internal investigations and can issue written reprimands, it is clear that they cannot suspend or discharge patrol officers. Again, the authority to make effective recommendations cannot be imputed to the sergeants when the chief himself lacks authority to act independently on these matters. As with the foregoing discussion of hiring, the potential for one of the sergeants to exercise authority in regard to the discipline or termination of a reserve officers is irrelevant, because that would not create a potential for conflicts within the bargaining unit.

Adjusting grievances of subordinates was only vaguely mentioned by the chief in testimony indicating that the sergeants have some participation in grievance processing at the first step. That evidence falls short, however, of establishing that the sergeants have authority to actually act on behalf of the employer.

Preponderance analysis does not support the employer's position in this case. The sergeants clearly do not have and exercise authority on a majority of the supervisor indicia. Witnesses called by the union (including all three sergeants and some of the patrol officers) convincingly testified that the sergeants regularly spend a substantial portion of their work time performing the same patrol duties as the patrol officers.

Conclusion

This record supports a conclusion that the sergeants in the Union Gap Police Department are more like patrol officers or leadworkers than like supervisors. The fact that they report directly to the police chief is undermined by the limited authority of the police chief in regard to critical aspects of the employment relationship. These sergeants particularly lack the distinguishing wages, working conditions (office space), hiring authority and disciplinary authority that were noted in *City of Snohomish*, Decision 1557. These sergeants similarly lack the separate working conditions (office space), disciplinary authority, and grievance authority noted in *City of Sunnyside*, Decision 1178. Accepting that the police chief would like to ease his administrative burdens by fostering the sergeants as an intermediate level of authority within the department, the employer has not provided those sergeants with sufficient authority to warrant their exclusion from the bargaining unit as supervisors.

The conclusion reached in this case is consistent with the conclusions reached in the numerous cases where the Commission has been called upon to decide whether police sergeants are supervisors. As in *Skamania County*, Decision 6511-A, the sergeants in Union Gap have no independent authority to hire, assign, transfer, layoff, recall, suspend, or discharge employees. They have only limited authority to discipline employees, and they spend the vast

majority of their work time performing patrol duties similar to other rank-and-file employees. As in *Washington State Patrol*, Decision 2806-A, the evidence does not warrant an exclusion where the actual authority in personnel matters is vested at a much higher level within the employer's organization.

FINDINGS OF FACT

1. The City of Union Gap is a municipality of the state of Washington, and is a public employer within the meaning of RCW 41.56.030(1). Among other services, the employer maintains and operates the Union Gap Police Department.
2. The Union Gap Police Officers Association, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of certain employees of the Union Gap Police Department.
3. Although the police chief is the highest-ranking official within the Union Gap Police Department, authority in personnel matters is vested at some higher level in the employer's table of organization.
4. The sergeants in the Union Gap Police Department report directly to the police chief, but have limited or no independent authority to make meaningful changes in the employment relationships within the department.
5. In the context of paragraph 3 of these findings of fact, the record in this case does not establish that these sergeants have or exercise authority to make effective recommendations or to make meaningful changes in the employment relationships within the department.

6. These sergeants routinely and regularly perform the same duties as the non-supervisory patrol officers in the bargaining unit represented by the union.
7. The administrative duties performed by these sergeants appear to be of a routine or clerical nature, or concern oversight of reserve personnel who are not in the bargaining unit represented by the union.

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. Based on paragraphs 3 through 7 of the foregoing findings of fact, the sergeants in the Union Gap Police Department are not supervisors whose exclusion from the bargaining unit is warranted under RCW 41.56.060 and WAC 391-35-340.

ORDER

The sergeants at issue in this matter are included in the bargaining unit represented by the Union Gap Police Officers Association.

Issued at Olympia, Washington, this 4th day of April, 2005.

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.