

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
PIERCE COUNTY CAPTAINS ASSOCIATION	)	CASE 18681-E-04-2970
	)	
Involving certain employees of:	)	DECISION 8892 - PECB
	)	
PIERCE COUNTY	)	DIRECTION OF CROSS-CHECK
_____	)	

Patrick Kelly for the Pierce County Captains Association.

Joe Carillo, Labor Relations Manager, for the employer.

On July 6, 2004, the Pierce County Captains Association filed a petition for investigation of question concerning representation with the Public Employment Relations Commission, seeking certification as the exclusive bargaining representative of certain employees of Pierce County. An investigation conference was held on July 24, 2004, at which time the employer disputed the propriety of the petitioned-for bargaining unit and the eligibility of the employees involved. Hearing Officer Starr Knutson held a hearing on October 13, 2004. The parties filed post-hearing briefs.

The Executive Director concludes the petitioned-for employees share a community of interest and orders a cross-check.

ISSUES

1. Is a bargaining unit encompassing both law enforcement captains and corrections captains an appropriate unit for the purposes of collective bargaining?

2. Should some or all of the corrections captains be excluded from bargaining rights as "confidential" employees?

The Executive Director does not address a "status as labor organization" issue that was framed in the investigation statement (by reason of the employer's refusal to stipulate that the Pierce County Captains Association was an organization qualified for certification), because the employer stipulated that matter at the outset of the hearing.

### ANALYSIS

#### ISSUE 1: The Propriety of the Proposed Unit Structure

The determination of appropriate bargaining units is a function delegated by the Legislature to the Public Employment Relations Commission. RCW 41.56.060 sets forth the applicable criteria:

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 . . .

In applying the standard, the Commission groups together employees who have a community of interests in their wages, hours, and working conditions. As summarized in *City of Puyallup*, Decision 5639-B (PECB, 1997), factors considered by the Commission in determining whether a community of interest exists among petitioned-for employees include:

1. Similarities/differences in method of wages or compensation;
2. Similarities/differences in hours of work;
3. Similarities/differences in employment benefits;
4. Existence of common/separate supervision;
5. Similarities/differences of qualifications, training and skills;
6. Similarities/differences of job functions and amounts of time spent working away from the employment or plant site under state and federal regulations;
7. Frequency/infrequency of contact with other employees;
8. Whether work functions are integrated with the work functions of other employees, or there is interchange with them; and
9. The history of bargaining.

The wages, hours and working conditions of employees do not have to be identical, but a reasonable person must be able to perceive a common essence among them.

The bargaining unit proposed in this case is of a "horizontal" nature, drawing its community of interest from commonalities of "duties and skills" among employees performing related functions at the same level in a para-military rank structure. The Pierce County Sheriff's Department is divided into three bureaus (operations, services, and corrections),<sup>1</sup> each of which is headed by a bureau chief reporting to Sheriff Paul Pastor. The organization

---

<sup>1</sup> The parties referred to the operations and services bureaus as "the law enforcement side" and the corrections bureau as the "corrections side."

chart presented by the employer shows one captain in the operations bureau, one vacant captain position in the services bureau and three captains in the corrections bureau.

Factor 1: Wages -

The employer asserts that differences of wages between the law enforcement captains and the corrections captains should prevent putting those two groups in the same bargaining unit. The current salaries for the two classifications are \$1,000 per year apart. Some of the evidence provided by the employer contradicts its argument on this factor, however.

According to a document presented by the employer, the captain classifications are assigned the same number of evaluation points as part of an outside salary study. Human Resources Director Betsy Sawyers explained the employer contracted for an internal equity study that included a recommendation of banding a number of county positions, and that the employer had not decided whether to implement the study at the time of the hearing. The proposed method of computing the wages of each classification appears to be identical. Based on the evidence presented in this case, I do not find the wage differential to have any meaningful impact on bargaining unit determination.

Factor 1, continued: Benefits -

The employer argued the coverage of the law enforcement captains under the Law Enforcement and Fire Fighters Retirement System established in Chapter 41.26 RCW (LEOFF) provides a basis to keep those employees separate from the corrections captains covered under the Public Employees Retirement System established in Chapter 41.40 RCW. The employer asserted that different contribution rates and different retirement benefits divide the bargaining interests of the two classifications, and it envisioned being faced with

catch-up proposals from whichever classification lagged behind the other. The argument is without merit, however.

Inclusion of public employees in a particular retirement system is a matter of statute, not of collective bargaining, and the benefits provided by the LEOFF system are completely excluded from bargaining by *City of Seattle*, Decision 4687-B and 4688-B (PECB, 1997), aff'd 93 Wn. App. 235 (1998). The usual reason for concern about coverage under LEOFF is to effect the separation of employees who are eligible for interest arbitration from those who are not eligible for that process,<sup>2</sup> but that is not applicable in this case where both the law enforcement personnel of Pierce County and the corrections personnel of Pierce County are eligible for interest arbitration. Based on the evidence presented in this case, I do not find any meaningful impact on bargaining unit determination because of the difference of retirement benefits.

Factor 2: Hours of Work -

No evidence was presented to show that the actual work hours or working environments of the two classifications differ significantly. The job descriptions indicate that both types of "captain" spend a majority of their work time in an office environment, and may have frequent travel. The job description for the corrections captains merely modifies the office environment to indicate that those jobs are located in a correctional facility.

Factor 3: Supervision -

The evidence in this case establishes that all of the captains are supervised by bureau chiefs who report to the sheriff. It is the sheriff that ultimately makes the hiring, firing, and budget decisions for all three bureaus in the department.

---

<sup>2</sup> See WAC 391-35-310.

Factor 4: Qualifications, Training, and Skills -

The employer argues that the law enforcement captains do not share a community of interest with the three correctional captains. It asserts that differences exist as to: Career path; amount of training; assignment of county-owned vehicles on a take-home basis; type of commission; and requirements for carrying a weapon. There are undoubtedly some differences, but review of the evidence also discloses many similarities.

The department manual for the Pierce County Sheriff's Department (Rev 9-95) includes:

2.02.20 *Definitions/Glossary*Commanding Officer

An officer holding the rank of Lieutenant or higher with functional command of a division, section, or unit. A commanding officer has supervision and control of over all members and employees of the Department assigned to his command.

. . . .

2.06.14 Captains

Captains are next in command and have responsibility and accountability for their divisions. They are appointed by the Sheriff from a certified Civil Service list. Captains may supervise the divisions, sections or unit of another commander, and they may supervise a bureau in the absence of a Chief.

*Captains are equal in rank with each other, unless otherwise designated. Captains are subordinate to the sheriff, the Bureau Chiefs, and the Majors, and are superior to all other ranks.*

(emphasis added). The employer cannot easily escape the fact that it allocated all of the petitioned-for positions to the "captain" rank, and that its own manual equates the captains on the "law

enforcement side" with those on the "corrections side" of the department. The minimum qualifications for the two captain classifications contain many similarities. The document concerning the correctional classification includes:

Current status as a Pierce County Correctional Lieutenant and must have successfully completed a one-year probationary period and two additional years in continuous service as a Correctional Lieutenant for a total of three years prior to the closing date of the promotional examination. Must meet good standing requirements of Civil service Rules and Regulations. A valid Washington State driver's license is required.

The document concerning the law enforcement classification includes:

Three years experience at the rank of Lieutenant including the probationary year prior to the date the promotional announcement closes. Must meet good standing requirements of Civil service Rules and Regulations. A valid Washington State driver's license is required.

Additionally, Corrections Bureau Chief Eileen Bisson testified that the classifications have similar, if not identical, testing processes, background checks, oral board exams, polygraph tests, psychological tests, and physical standards.

There are some significant differences as to the nature and extent of basic training attended by employees in both groups at the Washington State Law Enforcement Academy. On the one hand, the basic training for corrections employees extends over four weeks, while the basic training for law enforcement officers extends over five months. On the other hand, upper level classes at the academy are the same for law enforcement and corrections employees. A question arises here as to the relevance of the differences in basic training, however, because the advanced training takes on

greater importance in this case. None of the captains at issue in this case spend any appreciable amount of time directly performing either law enforcement or corrections work.

The employer cites differences between the two groups in regard to their commissions, but close analysis reveals that the differences primarily affect off-duty time. Bisson testified that the law enforcement officers may act in the name and authority of the sheriff on a twenty-four hours per day, seven days per week basis, while the corrections officers may only act in the name and authority of the sheriff at times when they are on duty performing job-related tasks. A similar limitation exists as to carrying weapons, so that correctional personnel must have a personal permit to carry a weapon during their off-duty hours. Thus, rather than directly affecting the employees' wages, hours and working conditions, these distinctions are somewhat remote from the subjects of collective bargaining.

To summarize, the two classifications at issue in this case have some dissimilarity in qualifications, training, and skills for the jobs from which they came, but those differences are not meaningful in their current roles. Under RCW 41.56.060, it is the current roles of employees that are important in determining the units appropriate for the purposes of collective bargaining.

Factor 6: Job Functions and Time Away From the Worksite -

All of the employees proposed for inclusion in the bargaining unit at issue in this case perform administrative functions. The job description promulgated by the employer for the law enforcement captain includes the following general functions:

[T]his is highly responsible supervisory and division management work performed for the Pierce County Sheriff's



Department. Guidelines for performing the work can be broad or of a specific nature, and are in the form of general administrative policies and procedures. Division assignments include Investigations, Administrative Services or other assignments that may be developed; assignments rotate.

The job description for the corrections captain contains similar general functions:

[T]his is highly responsible supervisory and division management work performed for the Pierce County Sheriff's Department *Corrections Bureau*. *This position typically reports to the Corrections Bureau Chief*. Guidelines for performing the work can be broad or of a specific nature, and are in the form of general administrative policies and procedures. Division assignments include Operations, Support Services or Programs, or other assignments that may be developed; assignments rotate.

(emphasis added). Thus, the main difference between the job descriptions relates to where a captain works, rather than to what the captain does. Bisson testified the essential functions of the classifications are similar, and that employees in both classifications are evaluated on the same criteria. Additionally, Bisson testified that the department manual would allow the sheriff to shift employees between the two "sides" of the department, so that the definitive separation of the two classes asserted by the employer exists or evaporates at the discretion of the sheriff.

Going beyond the general functions, the job descriptions also list similar working conditions for the two groups:

[M]ay be exposed to physically confrontive and combative situations, personal danger and biohazardous materials. The position has a wide range of physical requirements of varying degrees based on multiple differing work circumstances. Required physical activities include, but are not limited to, walking, standing, sitting, digital

dexterity, talking, hearing including ability to discriminate electronic, mechanical and human sounds, and seeing including ability to clearly distinguish and identify colors.

Apart from the possibility of being "boilerplate" that may appear in most or all of the job descriptions promulgated by the employer for the sheriff's department, the classifications at issue in this case appear to be primarily desk-bound.

The employer would attach significance to the fact that the law enforcement captains are provided with a take-home vehicle, while the corrections captains are not provided with vehicles. However, as noted in *Pierce County*, Decision 1710 (PECB, 1983), take-home vehicles are a bargainable subject rather than an inherent right.

While there are undoubtedly some differences as to details, I find the captains share many fundamental similarities as to their job functions and working conditions. The employer's own department manual defines all the captains as equal in rank, and its job descriptions contain virtually identical terms. The Commission has routinely placed employees in broad occupational groupings without regard to minor differences as to details.

Factors 7 and 8: Interactions and Integration of Functions -

The employees at issue in this case all work as managers in a single law enforcement agency and, while they have different first-level supervisors, they all ultimately report to the same second-level supervisor.

Factor 9: History of Bargaining -

The history of bargaining component of the statutory unit determination criteria has little or no effect where, as here, the

employees seeking to organize for the purposes of collective bargaining have never had union representation in the past.

Other bargaining units already exist among employees in the employer's sheriff's department. Regardless of whether those other units originated as "vertical" units (drawing their essence and propriety from encompassing all of the employees in a separate branch of the employer's table of organization) or as "horizontal" units (cutting across the employer's table of organization to group together employees based on occupational considerations), their respective histories of excluding captains are not binding here. The decision in *METRO v. Department of Labor and Industries*, 88 Wn.2d 925 (1977), made it clear that there is no categorical exclusion of "managerial" employees from the coverage of Chapter 41.56 RCW.

The petitioned-for unit is of a "horizontal" nature, encompassing historically-unrepresented employees in the Pierce County Sheriff's Department. Such a unit can be found appropriate, lest the employees be deprived of their rights under Chapter 41.56 RCW.

#### ISSUE 2: Confidential Status

The exclusion of "confidential employees" is rooted in the statute. The definition of "public employee" in RCW 41.56.030 includes:

[A]ny employee of a public employer *except any person . . . (c) whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit.*

(emphasis added). The Supreme Court of the State of Washington gave that exclusion a narrow interpretation in *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978), concluding:

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). Thus, a showing that a person holds a position of general responsibility and trust does not warrant exclusion from collective bargaining rights. An excluded individual must have access to confidential labor relations material.

After many years of citing and quoting extensively from the *City of Yakima* decision, the Commission codified the test embraced by the Supreme Court in WAC 391-35-320, as follows:

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.

Numerous decisions before and since that codification have imposed a high burden of proof on the party that proposes a confidential exclusion.

#### Analysis of "Confidential" Claim -

In its opening statement, the employer asserted that the corrections captains all have labor nexus responsibilities on a regular

and on-going basis. The focus of the evidence presented was on the position held by Corrections Captain Michael Larsen, however, and the employer provided no specific evidence concerning the other corrections captains.

Bisson testified generally that she looks to Larsen to provide information during negotiations with the unions representing various bargaining units in the sheriff's department. The employer did not provide any specific evidence that Larsen is privy to the employer's wage proposals before they are presented to the unions, or that he is privy to the formulation of the employer's labor relations policies. Additionally, the uncontroverted testimony only establishes that Bisson passes along information provided by Larsen to an individual in the human resources office who was the employer's chief negotiator.

In the context that Larsen did not participate directly in the negotiations with unions, or even in discussions concerning the employer's positions or policy in collective bargaining, his recommendations to senior employer officials are understood to be an outgrowth of his role as a supervisor. The evidence presented in this case is insufficient to warrant the exclusion of Larsen (or any of the other captains) as a "confidential" employee.

#### CONCLUSION

This record supports a conclusion that the two "captain" classifications proposed for inclusion in the unit have a community of interest in dealing with their employer, and that a bargaining unit which encompasses both classifications is appropriate under RCW 41.56.060. A horizontal unit encompassing the supervisory personnel excluded from other bargaining units avoids both the prospect of stranding either group of employees in a unit too small

to effectively implement their statutory bargaining rights, or of unduly fragmenting the employer's workforce. The fact that the bureau chief for corrections places great trust in the captains is not sufficient to support a finding of confidential status. Given the substantial showing of interest filed in support of the petition in this case, a cross-check directed under WAC 391-25-391 is the appropriate method for determining the question concerning representation in this case.

#### FINDINGS OF FACT

1. Pierce County is a political subdivision of the state of Washington, and is a public employer within the meaning of RCW 41.56.030(1). The Pierce County Sheriff's Department operates under the direction of an elected official, Paul Pastor.
2. The Pierce County Captains Association, a bargaining representative within the meaning of RCW 41.56.030(3), filed a timely and properly supported petition for investigation of a question concerning representation, seeking certification as exclusive bargaining representative of all employees working as captains in the Pierce County Sheriff's Department.
3. The Pierce County Sheriff's Department is operated as a separate branch of the employer's table of organization, with little interchange of functions or employees with other departments.
4. The bargaining unit configuration proposed by the union is of a "horizontal" nature, encompassing all of the captains within a single department of the employer. Although the captains may work in any of three divisions within the department, and

although they have or had separate duties and skills in their former roles as law enforcement officers or corrections personnel, all of the employees in the proposed unit now work under bureau chiefs who report to the elected sheriff and perform administrative work of the same general type.

5. The employees in the bargaining unit proposed by the union have no history of collective bargaining. Other supervisors in the sheriff's department are already represented for the purposes of collective bargaining by organizations which are not parties to this proceeding, and have separate histories of bargaining in those bargaining units.
6. The addition of the bargaining unit proposed by the union in this case will neither unduly fragment the employer's workforce nor have the effect of stranding employees in groupings too small to exercise their statutory rights.
7. One captain in the corrections bureau provides information to the corrections bureau chief related to bargaining, but that captain does not participate directly in collective bargaining on behalf of the employer nor does he have necessary, regular and ongoing direct involvement in labor-management relations work on behalf of the employer.
8. There is no evidence that the captain in the operations bureau, the captain position in the services bureau (currently vacant), or the other captains in the corrections bureau have any established and ongoing role in labor-management relations on behalf of the employer.

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. A bargaining unit consisting of all full-time law enforcement and corrections employees with the rank of captain in the Pierce County Sheriff's Department is an appropriate unit for purposes of collective bargaining under RCW 41.56.060.
3. On the record made in this case, all of the employees working as law enforcement or corrections employees with the rank of captain are public employees within the meaning of RCW 41.56.030(2), and are not "confidential" employees with the meaning of RCW 41.56.030(2)©.

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 2 of the conclusions of law, to determine whether a majority of the employees in that bargaining unit have authorized Pierce County Captains Association to represent them for the purposes of collective bargaining.

ISSUED at Olympia, Washington, on the 21<sup>st</sup> day of March, 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.