STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of CITY OF RICHLAND For Clarification of an Existing Bargaining Unit of its Employees Represented by INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1052	CASE NO. 56-SK-1740 DECISION NO. 279-A, PECB DECISION ON APPEAL

APPEARANCES:

CRITCHLOW, WILLIAMS, RYALS & SCHUSTER, BY MR. MICHAEL E. DEGRASSE, Attorney at Law, for the Union.

PERKINS, COIE, STONE, OLSEN & WILLIAMS, BY MR. J. DAVID ANDREWS AND MR. OTTO G. KLEIN, Attorneys at Law; and CABOT DOW ASSOCIATES, BY MR. CABOT DOW, for the Employer.

Authorized Agent Alan R. Krebs issued a decision on August 24, 1977, wherein he found that the Commission has jurisdiction to issue an order clarifying bargaining unit in this matter and proceeded to issue an order excluding battalion chiefs from a bargaining unit previously composed primarily of rank and file fire fighters. The Union filed its notice of appeal on September 1, 1977, in which it makes seven assignments of error. Both parties filed briefs on appeal. The Union presents three issues in its brief on appeal. Those three issues encompass all of the assignments of error made in the notice of appeal and may be summarized as: When may a unit clarification petition be filed? When will a unit clarification petition be granted? Should the Employer's petition have been granted in this case? The Employer's brief is responsive to the issues advanced by the Union and we find the record before us sufficient to proceed without oral argument. Accordingly, the Union's request for oral argument is denied.

Jurisdiction

The parties to this proceeding were parties to proceedings before the Department of Labor and Industries [1/] which resulted in an order including the battalion chiefs in the rank and file fire fighter bargaining

---

1/ The predecessor to PERC in the administration of RCW 41.56.

unit. 2/ The parties thereafter entered into a two-year collective bargaining agreement containing a recognition clause which included the battalion chief rank in the bargaining unit. The petition was filed on May 20, 1975, shortly after the commencement of negotiations for a new collective bargaining agreement between the parties. A new agreement was signed thereafter containing the same recognition clause. Primarily, based on those recognition clauses, the Union has repeatedly asserted that there was no disagreement between the parties with respect to the unit placement of the battalion chief rank at the time the employer filed its unit clarification petition with the Department of Labor and Industries.

The Union first advanced its "contract bar" argument before the authorized agent of the Department of Labor and Industries, who rejected the argument and attempted to set the matter for hearing on the merits. The Union then advanced the argument before the Superior Court for Benton County, from which it obtained injunctive relief blocking administrative proceedings in the matter. Following the transfer of the administrative jurisdiction to this agency, the Court remanded the case for administrative proceedings. The Union next advanced the contract bar argument before Mr. Krebs, who reserved ruling on the argument and directed the parties to proceed with hearing on the merits of the case.

The essence of the Union's argument is that the collective bargaining agreements evidence the agreement of the parties on the unit placement of battalion chiefs, so that no disagreement exists warranting the assertion of Commission jurisdiction under WAC 391-20-151. The City asserts that a dispute does exist, in that it would have the battalion chiefs excluded from the bargaining unit while the Union opposes such an exclusion. The City contends that a contract and a past history of inclusion are not controlling; and that adoption of the Union's theory would nullify the unit clarification procedure and would make it impossible for an employer to raise issues of exclusions from bargaining units.

RCW 41.56.050 and WAC 391-20-151 authorize the Commission to assert jurisdiction where a disagreement exists. Neither the statute nor the rule establishes any time limits for the existence of such a disagreement. While a valid collective bargaining agreement covering an appropriate bargaining unit bars raising of a question concerning representation except during a specified timely window period, a situation which is appropriate for "unit clarification" is inherently one which does not raise a "question concerning representation". The Union states in its brief:

2/ It should be noted at the outset that the Department pursued a policy of identifying and excluding "managerial-type supervisors" from bargaining under RCW 41.56 and rejected the concept of a separate unit of supervisors on the basis that such individuals were altogether excluded from the coverage of the Act. In doing so, the Department apparently attempted to effect a labor/management dichotomy patterned after federal labor law in the private sector since 1947.

> "The employer plainly wishes to exclude the battalion chief position from the bargaining unit. To fulfill this wish the employer has petitioned for unit clarification. That the employer wishes to exclude a position does not cause a 'disagreement' as to the placement of a job vis-a-vis the bargaining unit." (Appeal Brief, Page 6)

At another point in the same brief, the Union headlines one of its arguments as follows:

> "THE BATTALION CHIEF POSITION SHOULD NOT BE EXCLUDED FROM THE COLLECTIVE BARGAINING UNIT ON THE GROUNDS THAT SUCH POSITION IS SUPERVISORY" (Appeal Brief, Page 9)

The foregoing clearly indicates the existence of a present disagreement between the parties which is recognized by the Union but for its "contract bar" arguments. The determination of appropriate bargaining units is a function delegated by the legislature to the Commission. 3/ Unit definition is not a subject for bargaining in the conventional "mandatory/permissive/illegal" sense, although parties may agree on units. 4/ Such agreement does not indicate that the unit is or will continue to be appropriate. In this case, we find the unit agreed to by the parties to be inappropriate under current policy. A recognition agreement or a collective bargaining agreement does not bar the filing of a unit clarification petition, and such petitions may be filed at any time a disagreement exists concerning unit definition in the absence of a question concerning representation.

Conditions for Granting of Unit Clarification

The ability of an employer or a Union to file a unit clarification petition under our rules at any time a disagreement arises in the absence of a question concerning representation does not assure such petitioners of their desired result.

Union Electric Company, 217 NLRB 666 (1975) set forth and applied the NLRB philosophy on unit clarification:

> "Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category - excluded or included - that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the

---

3/ RCW 41.56.060.

4/ Douds v. Longshoremen's Association. 241 F 2d 278,282 (CA2, 1957)

parties for what it claims to be mistaken reasons or the practice has become established by acquiesence and not express consent. X/

X/ Plough, Inc., and cases there cited. A possible exception to this broad statement would be a situation involving agreed inclusions of individuals who are not employees within the meaning of the Act." (Emphasis supplied).

The NLRB has had the luxury of a constant definition of covered employees since 1947 and of being a single administrative agency having jurisdiction over the Act since its inception in 1935. We are in a different situation, and that difference injects an additional factor never considered by the NLRB. The jurisdiction for administration of RCW 41.56 was transferred from the Department of Labor and Industries to this agency on January 1, 1976. In March, 1977, this Commission departed from the policies referenced in footnote 2, above, and concluded that "supervisors" are employees within the meaning of the Act. 5/ That decision was made in the context of a separate unit of supervisors, a fact which both indicates the reversal of previous policy and set the stage for the decision in this case. Only a few months thereafter, our Supreme Court also decided that supervisors are employees within the meaning of the Act. 6/ The Supreme Court was aware of the Commission's decision in Tacoma, supra, and relied upon Packard Motor Car Co. v. NLRB, 7/ in which the United States Supreme Court affirmed the creation of a separate unit of supervisors under the original provisions of the National Labor Relations Act. We recognize that these significant changes in the interpretation of RCW 41.56 may themselves give rise to doubts as to the appropriate unit placement of certain individuals or classifications.

Absent a change of circumstance warranting a change of the unit status of individuals or classifications, the unit status of those previously included in or excluded from an appropriate unit by agreement of the parties or by certification will not be disturbed. However, both accretions and exclusions can be accomplished through unit clarification in appropriate circumstances. If, as contended by the employer and found by the authorized agent, the agreed unit is found by intervening decisions of the Commission or the Courts to be inappropriate, it may be clarified at any time. This rule is consistent with the NLRB policies on the subject. The Union is correct that a unit clarification should not be the source of a disturbance in an established relationship, but the facts of this case do not fit the argument.

5/ City of Tacoma, Decision No. 95-A, PECB (1977).

6/ Municipality of Metro. Seattle v. Dept. of L. & I., 88 Wn. 2d 930 (1977).

7/ 330 U.S., 485 (1947).

Exclusion of Supervisors from Rank and File Unit

The Union contends that the remand order of the Superior Court precluded the Commission from consideration of the merits of the dispute. In alleged reliance on that order, the Union absented itself from the hearing after the authorized agent reserved ruling on the "contract bar" arguments and directed the parties to proceed with hearing on the merits of the case. The Union now asks for a remand of the case to the authorized agent for hearing on the merits. The authorized agent did conduct the hearing and the Employer concluded its presentation of evidence on the merits of the case. The Union goes on to contend that the authorized agent has engrafted a supervisory exclusion on the Act which is inconsistent with the policy of the Commission announced in City of Tacoma, supra. We disagree on both points.

This case did not go to the Superior Court until after there had been a ruling by an authorized agent of the Department of Labor and Industries that hearing should be held on the merits of the dispute. This Commission sought remand of the case to enable us to make our own interpretation of our rules and the extent of our jurisdiction. In making that remand, the Court expressly stated that its order was not to be construed as restraining the concerned administrative agency from taking "any action it deems appropriate." The case was set for hearing on the petition. There was no express or implied limitation of the scope of the hearing to the procedural arguments which had once previously been decided against the Union. Both the authorized agent and this Commission have reached and decided the "contract bar" arguments of the Union prior to reaching the merits of the case. The Union absented itself from the hearing on the merits at its peril. The case will not be remanded.

Upon review of the record, we find that the record demonstrates that the battalion chiefs in Richland have distinct duties, skills and working conditions which warrant their removal from the rank and file fire fighter unit. While a supervisor unit may be appropriate pursuant to our decision in Tacoma, it is unnecessary to decide that issue here. The decision of the authorized agent is affirmed.

Dated this 7th day of February, 1978.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Michael H. Beck

MICHAEL H. BECK, COMMISSIONER

Paul A. Roberts

PAUL A. ROBERTS, COMMISSIONER

The Chairman did not participate in the decision of this case.