

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	CASE NO. 5735-C-85-285
CITY OF PASCO	)	
	)	
For clarification of an existing	)	DECISION NO. 2294 - PECB
bargaining unit of its employees	)	
represented by:	)	
	)	ORDER CLARIFYING
INTERNATIONAL ASSOCIATION OF	)	BARGAINING UNIT
FIRE FIGHTERS, LOCAL 1433	)	
	)	
	)	

Cabot Dow and Associates, by Lawrence J. Wittenberg, Labor Relations Specialist, appeared on behalf of the employer.

Critchlow and Williams, by Kenneth J. Pederson, Attorney at Law, appeared on behalf of the union.

On March 20, 1985, the City of Pasco filed a petition with the Public Employment Relations Commission, seeking clarification of an existing bargaining unit of its employees represented by International Association of Fire Fighters, Local 1433. At issue is the position of fire marshal/battalion chief. A hearing was conducted on May 29, 1985, before Hearing Officer Kenneth J. Latsch. The parties submitted post-hearing briefs.

BACKGROUND

The City of Pasco provides a number of municipal services to its residents. An elected city council establishes overall policy and retains final budget authority. The mayor is appointed from the council's membership. The city council also appoints members of the Pasco Civil Service Commission. The commission is responsible for classification of certain city employees. A

city manager directs daily operations among the city's various departments. Department heads are responsible for individual department functions.

The fire chief has overall responsibility for the operation of the fire department. In the chief's absence, the assistant fire chief assumes command of the city's firefighting force. Fire suppression services are provided through three platoons. Each platoon is composed of a captain, a lieutenant, two firefighter/paramedics and four firefighters. The department's fire inspection and prevention program is conducted by the fire marshal. Thus, although the fire marshal position at issue in these proceedings is the third-highest rank in the department, the fire marshal does not have any employees under his direct supervision in the normal course of operations.

The city has a collective bargaining relationship with International Association of Fire Fighters, Local 1433, which dates back to at least 1975. The bargaining unit was described in the parties' January 1, 1985 through December 31, 1985 collective bargaining agreement as:

. . . all full-time, permanent, provisional or temporary Fire Department employees in LEOFF classifications, with the exception of the Fire Chief and Assistant Fire Chief. Said employees shall be covered by Civil Service as provided by RCW 41.08.050.

At the time of hearing, there were approximately 25 employees in the bargaining unit. Although the fire marshal position has traditionally been included in the bargaining unit, the parties have previously had a disagreement concerning the bargaining unit status of that position.

In 1976, a fact finding panel created pursuant to RCW 41.56.440 (since amended) rejected the city's attempt to exclude the fire marshal from the bargaining unit as part of a "management team", but suggested that a vacant position titled "fire prevention officer" should be excluded from the unit if that vacancy was ever filled. The dispute was settled on that basis. The record indicates that the fire prevention position has never been filled.

From 1976 through September, 1984, the fire marshal position was filled and continued to be included in the existing bargaining unit. Typical work duties were set forth in the job description for the disputed position:

NATURE OF WORK

This is a responsible fire prevention, investigation, public education, pre-fire planning, personnel supervision, planning, and administrative work within the City of Pasco's Fire Department. The employee occupying the position of this class, although specializing in the fire code enforcement, fire presentation (sic) and investigation areas, will be responsible for overall department operations in the absence of the Assistant Fire Chief and the Fire Chief. Work will require that the employee exercise considerable initiative and judgement in the completion of fire prevention, investigation, and education programs to reduce the total number of fire incidents. Work is subject only to general supervisory review and State regulations. Work of this class will require frequent and responsible contact with a number of city departments, county offices, representatives of other municipal departments and fire districts, public and private officials, civic groups, state agencies, and the general public. Work will involve the proficient operation of a variety of equipment including projectors, tape recorders, cameras, telephones, combustible gas indicators, supportive fire investigation equipment, self-contained breathing apparatus, and motor vehicles such as the fire prevention van. The employee occupying the position of this class will, on a continuing basis, be responsible for supervising and administering a variety of programs within the City of Pasco Fire Department. Such administrative work will involve work planning, employee selection and assignment, administration of discipline, and all direct supervision needed to complete assignments. Considerable independent judgement is exercised subject to general review by the Fire Chief.

Work is performed in the station house, public and commercial buildings, and at fire scenes during inspections and investigations. Programs are presented in a variety of settings. The variety of work and responsibilities demand the ability to work flexible hours and at various locations, thus requiring travel.

SUPERVISION EXERCISED AND RECEIVED

Supervises and trains assigned employees including personnel in the Captain and Lieutenant classifications, in fire prevention, investigation, and pre-fire planning techniques and supervises all firefighting activities at the scene of a fire in the absence of the Assistant Fire Chief and Fire Chief, or until relieved by a chief officer. Represents management on the discipline review board, accident review board, and department grievance review board, where timely, effective, responsible decisions are made concerning these matters. Formulates solutions to problems and grievances requiring interpretation of standing orders, rules and regulations.

Evaluates and properly documents firefighters and officers, including chief officers, during annual performance evaluation in all areas of contact and expertise.

Work is performed under the general supervision of the Fire Chief. Work is reviewed for the adherence of assigned program areas, to local codes, fire department rules and regulations, state guidelines and for the minimum loss of life and property as a result of fire incidents.

EXAMPLES OF DUTIES

Plans and supervises public relations program for fire prevention; examines plans for construction or remodeling of buildings and works with the Building Department to determine compliance with building codes, fire codes, and life safety codes; supervises or conducts inspections of locations applying for Washington State Liquor License; directs program of outside fire inspections of weeks, trash, etc. Plans, develops, and carries out public relations for fire prevention, including public service announcements, news releases, public presentations, and demonstrations for civic groups, schools, hospitals, etc.

Supervises and participates in scheduled inspections of all commercial buildings, schools, nursing homes, hospitals, and other buildings as may be assigned.

Determines the cause (sic) of fires by conducting on-scene investigations, and follow-up investigations of suspicious and incendiary fires culminating in the arrest, prosecution, and conviction of arsonists. Works closely with Police Department on confidential matters regarding fire service and fire service problems.

Works with City Attorney when legal action is necessary to enforce fire codes; researches and prepares ordinances, resolutions, and reports for the City Manager and/or City Council regarding fire prevention and/or investigation activities and projects assigned.

Establishes working budget for fire prevention bureau by evaluating program needs and expenditure trends.

Supervises firefighting personnel when conducting various investigations and complaint follow-ups. Assigns, transfers, suspends, recalls, and discharges firefighting personnel assigned to fire personnel activity.

Supervises and conducts public education talks, demonstrations and displays, and coordinates pre-fire planning activities.

Directs firefighting activities at the scene of fires, in the absence of a superior fire officer. Acts in the capacity of chief officer in charge, regarding all personnel and department functions during an emergency.

The preceding examples are representative of the assignments performed by this class and are not intended to be all inclusive.

The record indicates that the fire marshal typically followed the provisions set forth in that job description until September, 1984, when the incumbent fire marshal was promoted to the position of assistant fire chief and the fire marshal position became vacant.

In November, 1984, the city entered into collective bargaining negotiations with the union. On December 3, 1984, the parties reached substantial agreement on the terms of a successor collective bargaining agreement. The tentative agreement did not modify the existing recognition clause, which included the fire marshal position in the bargaining unit. The respective ratifying bodies rejected the tentative agreement, and negotiations continued. The city later proposed that the fire marshal position should be excluded from the bargaining unit. The union resisted exclusion of the fire marshal position from the bargaining unit, relying, in part, on the fact finding report issued in 1976. On January 11, 1985, the city presented a

comprehensive offer to the union which included the following revision in the contract's recognition clause:

The City recognizes the Union as the exclusive bargaining representative for all full-time, permanent, provisional or temporary Fire Department employees in LEOFF classifications, with the exception of the Fire Chief, Assistant Fire Chief, and Fire Marshal. Said employees shall be covered by Civil Service as provided by RCW 41.08.050.

The union rejected the package offer and expressed particular concern about the city's proposed exclusion of the fire marshal. Negotiations were suspended awaiting the assignment of a mediator by the Public Employment Relations Commission. The parties made a joint request for the appointment of a mediator on January 21, 1985,<sup>1</sup> listing the dispute concerning the fire marshal position as one of the unresolved issues.

On February 5, 1985, Fire Chief Dickison sent a memorandum to the Pasco Civil Service Commission, wherein he expressed his desire to change the job description of the fire marshal position. Dickinson advanced the concept of a "management team" that was to consist of the fire marshal, assistant fire chief and the chief of the fire department, with all of them excluded from the bargaining unit.

On February 7, 1985, the civil service commission held its regular meeting. Webster Jackson, the city's personnel director and secretary for the civil service commission, had not notified the union of the meeting, or of the subjects which were to be covered. The union did not appear at the civil service commission meeting. A new job description and a change of the title of the position now in dispute (to "battalion chief/fire marshal") were discussed. The new description contained a number of changes:

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<sup>1</sup> The mediation case was docketed as Case No. 5644-M-85-2341.

NATURE OF WORK

This is responsible fire prevention, investigation, public education, pre-fire planning, personnel supervision, planning, and administrative work within the City of Pasco's Fire Department. The employee occupying (sic) the position of this class, although specializing in the fire code enforcement, fire prevention and investigation areas, will be responsible for overall department operations in the absence of the Assistant Fire Chief and the Fire Chief. Work will require that the employee exercise considerable initiative and judgement in the completion of fire prevention, investigation, and education programs to reduce the total number of fire incidents. Work is subject only to general supervisory review and State regulations. Work of this class will require frequent and responsible contact with a number of city departments, county offices, representatives of other municipal departments and fire districts, public and private officials, civic groups, state agencies, and the general public. Work will involve the proficient operation of a variety of equipment including projectors, tape recorders, cameras, telephones, combustible gas indicators, supportive fire investigation equipment, self-contained breathing apparatus, and motor vehicles such as the fire prevention van. The employee occupying (sic) the position of this class will, on a continuing basis, be responsible for supervising and administering a variety of programs within the City of Pasco Fire Department. Such administrative work will involve work planning, employee selection and assignment, administration of discipline, and all direct supervision needed to complete assignments. Considerable independent judgement is exercised subject to general review by the Fire Chief.

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SUPERVISION EXERCISED AND RECEIVED

Supervises and trains assigned employees including personnel in the Captain and Lieutenant classifications, in fire prevention, investigation, and pre-fire planning techniques and supervises all fire fighting activities at the scene of a fire in the absence of the Assistant Fire Chief and Fire Chief, or until relieved by a chief

officer. Represents management on the discipline review board, accident review board, and department grievance review board, where timely, effective, responsible decisions are made concerning these matters. Formulates solutions to problems and grievances requiring interpretation of standing orders, rules and regulations. Evaluates and properly documents firefighters and officers, including chief officers, during annual performance evaluation in all areas of contact and expertise.

Work is performed under the general supervision of the Fire Chief. Work is reviewed for the adherence of assigned program areas, to local codes, fire department rules and regulations, state guidelines and for the minimum loss of life and property as a result of fire incidents.

#### EXAMPLES OF DUTIES

Plans and supervises public relations program for fire prevention; examines plans for construction or remodeling of buildings and works with the Building Department to determine compliance with building codes, fire codes, and life safety codes; supervises or conducts inspections of locations applying for Washington State Liquor License; directs program of outside fire inspections of weeds, trash, etc. Plans, develops, and carries out public relations for fire prevention, including public service announcements, news releases, public presentations, and demonstrations for civic groups, schools, hospitals, etc.

Supervises and participates in scheduled inspections of all commercial buildings, schools, nursing homes, hospitals, and other buildings as may be assigned.

Determines and cause (sic) of fires by conducting on-scene investigations, and follow-up investigations of suspicious and incendiary fires culminating in the arrest, prosecution, and conviction of arsonists. works closely with Police Department on confidential matters regarding fire service and fire service problems.

Works with City Attorney when legal action is necessary to enforce fire codes; researches and prepares ordinances, resolutions, and reports for the City Manager and/or City Council regarding fire prevention and/or investigation activities and projects assigned.



Establishes working budget for fire prevention bureau by evaluating program needs and expenditure trends. Supervises firefighting personnel when conducting various investigations and complaint follow-ups. Assigns, transfers, suspends, recalls, and discharges firefighting personnel assigned to fire personnel activity. Supervises and conducts public education talks, demonstrations and displays, and coordinates pre-fire planning activities.

Directs firefighting activities at the scene of fires, in the absence of a superior fire officer. Acts in the capacity of chief officer in charge, regarding all personnel and department functions during an emergency.

The preceding examples are representative of the assignments performed by this class and are not intended to be all inclusive. (Emphasis supplied by city in presentation of new job description to civil service commission)

The civil service commission unanimously approved the new job description and title.

The union learned of the employer's intentions and, on February 7, 1985, local union president Alvie Covington wrote to City Manager Gary Crutchfield to protest the modification of the job description and to request a meeting to discuss the issue. The city responded by letter on February 11, 1985, stating that such matters were properly set forth before the civil service commission. The union did not receive that letter, however.

On February 14, and 26, 1985, the parties negotiated under the supervision of a mediator. During the course of mediation, the parties maintained their respective positions concerning the fire marshal position.

On March 4, 1985, the union sent another letter to Crutchfield, requesting to "meet and confer" about the fire marshal reclassification. The city responded on March 12, 1985, reminding the union that an earlier letter had been sent. In addition, the city sent the following letter on March 12, 1985:

This is to formally notify you that the City of Pasco intends to file a "Petition For Clarification Of Existing

Bargaining Unit" regarding the disputed "supervisor" status of the Fire Marshal position.

You will recall that during mediation, the City did not continue to demand amendment of Article I - Recognition, seeking the exclusion of the Fire Marshal from your bargaining unit. This was done in the interest of achieving an overall 1985 Collective Bargaining Agreement and with the understanding that the City retained the right to file a Petition with the Public Employment Relations Commission (PERC) to have the issue decided.

The Union will be served with a copy of the Petition when it is forwarded to the PERC.

The instant unit clarification petition was filed on March 20, 1985.

On April 4, 1985, the union sent another request to negotiate about the fire marshal job description. The city responded on April 10, 1985, asking for specific difficulties that the union had with the revised job description. The specific issues were detailed in a letter sent to the city on April 15, 1985. In that letter, the union maintained that it desired to negotiate:

. . . the substance of the contemplated job descriptions, the impact of the same on unit employees, the application of unit boundaries in the premises and the wages, hours of work and conditions of employment for those it represents which may be influenced and prejudiced by the City's contemplated course of actions. As heretofore noted, Local 1433 offers to meet and confer with the City forthwith for the purpose of bargaining collectively about these matters. Local Union 1433 will resist in every suitable forum any unilateral determination by the City with respect to the same. . .

While that exchange of correspondence took place, the parties continued to conduct mediated negotiations. In the course of those negotiations, the city reverted to the original recognition clause language, since the unit clarification petition had been filed. Gary Mills, the chief union spokesman, and Alvie Covington, the local union president, both understood that the issue had been "taken off the table" only because the unit clarification petition "reserved" determination of the dispute to the Public Employment Relations Commission. The parties subsequently reached tentative agreement on a

collective bargaining agreement, and a complete contract was prepared reflecting the original recognition clause language.

At the time of hearing, the fire marshal position had been vacant for more than eight months and recruitment was continuing. There has been no request for reopening of the hearing or otherwise to admit evidence that the position has ever been filled.

#### POSITIONS OF THE PARTIES

The employer maintains that the fire marshal position must be excluded from the existing bargaining unit, because the position is supervisory with a different community of interests from the rank and file bargaining unit members. The employer further maintains that continued inclusion of the disputed position would create an inherent conflict of interests because of the new duties expected of the fire marshal. The employer contends that the issue was properly raised in negotiations, and that the unit clarification petition was filed during the course of bargaining, following the standards set forth in Toppenish School District, Decision 1143-A (PECB, 1981). The employer further argues that it had the right to modify the fire marshal's job description in light of the changes in circumstance that took place.

The union contends that the unit clarification petition should be dismissed, arguing that the employer is improperly attempting to gain a concession that could not be gained at the bargaining table. The union also contends that the employer's unilateral revision of the fire marshal job description, and subsequent refusal to negotiate those changes, bars the unit clarification petition. The union maintains that changes in circumstances have not taken place, and that the fire marshal position should remain in the existing bargaining unit. The union alleges that the issue could have been submitted to interest arbitration if the city desired to initiate such changes in the bargaining unit structure.

DISCUSSION

The underlying disagreement in this case revolves around a bargaining unit determination. At several points in this record, both parties have discussed the possibility of submitting their disagreement concerning the fire marshal position to interest arbitration, as set forth in RCW 41.56.430, et seq. and WAC 391-55-200 through -260. They resolved their differences as to the position through "impasse" procedures in 1976, but the Commission has subsequently declined to submit unit determination issues to fact finders or interest arbitrators appointed pursuant to RCW 41.56.430 et. seq. Further, the Commission does not defer unit determination questions to grievance arbitrators. The authority to determine bargaining units is exclusively vested in the Commission by RCW 41.56.060. See: City of Richland, Decision 279-A (PECB, 1978); 29 Wa.App 599 (Div. III, 1981); cert. den. 96 Wn.2d 1004 (1981). Such issues are not mandatory subjects of collective bargaining. As such, a party insisting upon such an issue to the point of impasse could be found in violation of RCW 41.56.140(4) or 41.56.150(4), as refusing to negotiate in good faith. See: City of Tukwila, Decision 1975 (PECB, 1984).

The Commission has established procedures to be followed in unit clarification cases. See: Chapter 391-35 WAC. In Toppenish School District, Decision 1143-A (PECB, 1981), the Commission dealt with the problem of unit clarifications proposed while a contract is in effect:

A mid-term unit clarification is available to exclude individuals from a bargaining unit covered by an existing collective bargaining agreement if:

- a) The petitioner can offer specific evidence of substantial changed circumstances that would warrant such exclusion,
- b) The petitioner can demonstrate that, although it signed a collective bargaining agreement covering the disputed position, it put the other party on notice that it would contest the inclusion via the unit clarification procedure and filed a petition for unit clarification with the Commission prior to the conclusion of negotiations.

In the instant case, the fire chief's desire to realign the fire department's command structure may have first surfaced while a contract was in effect, but the matter was brought to the bargaining table during contract negotiations and the unit clarification petition was filed prior to signing of a new contract. The union was thus put on notice that the dispute concerning this unit determination issue would be decided by the Commission, rather than by negotiations between the parties. If the fire marshal position performs supervisory duties under the new job description, so that continued inclusion of the position in the existing bargaining unit would create inherent conflicts of interest, then an exclusion from the bargaining unit could be ordered under Chapter 391-35 WAC, without the agreement of the union.

The union has filed an unfair labor practice complaint<sup>2</sup> concerning this course of conduct. The specific unfair labor practice allegations will not be addressed in these proceedings. The union's argument that the instant unit clarification petition must be barred by the alleged unfair labor practices is not persuasive. Rather than being blocked by or subordinate to the unfair labor practice case, a unit determination is a condition precedent to framing the issue in the unfair labor practice case. A complaint of "unilateral changes of a bargaining unit position" will state a cause of action only if the position is in the bargaining unit.<sup>3</sup>

Having disposed of the numerous procedural arguments advanced by the parties, the merits of the case are anticlimactic. The employer does not offer argument or persuasive evidence that the fire marshal position was supervisory prior to September of 1984. Rather, the record demonstrates that the employer's proposed changes in the disputed position are entirely prospective and speculative in nature. Unit determinations must be based under RCW

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<sup>2</sup> Docketed separately as Case No. 5841-U-85-1092.

<sup>3</sup> This does not exclude the possibility that such a complaint could alternatively state (or be amended to state) a cause of action under Lakewood School District, Decision 755-A (PECB, 1980) and City of Mercer Island, Decision 1026-A, 1026-B (PECB, 1982) for unilateral transfer (skimming) of unit work to persons outside of the bargaining unit.

41.56.060 on actual duties, skills and working conditions, not on the number of times that the employer has written the term "supervisor" or words to that effect into a job description. There is no indication in this record that the fire department has been or will be enlarged in size, or that additional personnel will be assigned to the fire inspection function as subordinates to the fire marshal. On the contrary, it can be inferred that the fire marshal would continue to perform the fire inspection function. It is clear that the city desires a third excluded position in the fire department, but the position it has identified will be the third working an 8 to 5 shift, Monday through Friday, leaving no non-supervisory uniformed personnel working that shift. That would mean that the bargaining unit employees would work under three layers of supervision during 40 of the 168 hours each week and would work 128 hours each week (i.e. 76.2% of the total time) without a supervisor on duty. Given the uncertainties of the actual performance of the new job description without any real change of the size, functions or structure of the department, it is difficult even to assume that the employer's job description for the Fire Marshal/Battalion Chief will actually be implemented. The Commission cannot make unit clarification decisions based on such speculation. The disputed position will remain included in the existing bargaining unit.

#### FINDINGS OF FACT

1. The City of Pasco, located in Franklin County, Washington, is a "public employer" within the meaning of RCW 41.56.030(1).
2. International Association of Fire Fighters, Local 1433, a "bargaining representative" within the meaning of RCW 41.56.030(3), has been recognized since at least 1976 as exclusive bargaining representative of non-supervisory uniformed firefighter personnel of the City of Pasco. The classification of "fire marshal" has historically been included in the existing bargaining unit.

3. The position of fire marshall has been vacant since September, 1984, when the incumbent fire marshal was promoted to the position of assistant fire chief.
4. The city and the union were parties to a collective bargaining agreement due to expire on December 31, 1984. During the course of negotiations for a successor agreement, the city expressed its desire to exclude the fire marshal position from the bargaining unit. The union resisted exclusion of the fire marshal position from the bargaining unit.
5. On February 7, 1985, the Pasco Civil Service Commission approved a new job description for the fire marshal position and changed the title of the position to "fire marshal/batalion chief". The amended description detailed a wide range of duties that previously were not expected of the fire marshal.
6. Negotiations continued after the new job description was approved, but the position remained vacant. During the course of negotiations, the parties maintained their respective positions concerning the fire marshal position.
7. Prior to signing a new collective bargaining agreement, the city notified the union that it intended to file a unit clarification petition over the disputed position. The petition in this case was filed before the negotiations were concluded.
8. There is no evidence of substantial changes in the size of the fire department, the nature or scope of its operations, or the staffing of the fire inspection function.
9. The proposed job description for the fire marshal position indicates that the affected employee possesses additional personnel responsibilities, but the position has not been filled and there is no record of actual work performance under the new job description.

CONCLUSIONS OF LAW

1. No question concerning representation presently exists in the existing bargaining unit involved in this case, and the Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-35 WAC.
2. The employer has failed to establish that the fire marshal is or will be a supervisory employee whose continued inclusion in the bargaining unit would create a conflict of interest.

ORDER

The existing bargaining unit of employees is clarified to include the position of fire marshal.

DATED at Olympia, Washington, this 10th day of June, 1986.

PUBLIC EMPLOYMENT  
RELATIONS COMMISSION



MARVIN L. SCHURKE  
Executive Director

This Order may be appealed  
by filing a petition for review  
with the Commission pursuant  
to WAC 391-35-210.