

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
TOWN OF GRANGER	)	CASE NO. 6283-C-86-316
For clarification of an existing bargaining unit of its employees represented by:	)	DECISION 2634 - PECB
GENERAL TEAMSTERS, LOCAL 524	)	ORDER CLARIFYING BARGAINING UNIT
	)	
	)	
	)	

Menke & Jackson, by Rocky Jackson, Attorney at Law, appeared for the employer.

Davies, Roberts, Reid & Wacker, by Bruce Heller, Attorney at Law, appeared for the union.

On March 13, 1986, the Town of Granger filed a petition with the Public Employment Relations Commission, seeking clarification of an existing bargaining unit of employees represented by General Teamsters, Local 524. The employer seeks to have its chief of police and its clerk-treasurer excluded from the existing bargaining unit. A hearing was held at Yakima, Washington, on September 16, 1986, before Hearing Officer Rex L. Lacy. The parties filed post-hearing briefs.

BACKGROUND

The Town of Granger is a municipality of the fourth-class operated under Chapter 35.21 RCW and located in Yakima County. The town is governed by an elected mayor and five-member town

council. Dennis Harris is mayor. The town has seven full-time employees and three to six part-time employees. Three are in its police department; two are in its clerk-treasurer's office.

General Teamsters, Local 524 is a bargaining representative within the meaning of RCW 41.56.030(2). The union was certified as the exclusive bargaining representative of the existing bargaining unit on May 14, 1985. The bargaining unit is described in Town of Granger, Decision 2226 (PECB, 1985) as follows:

All full-time and regular part-time employees of the Town of Granger, excluding the mayor.

The parties commenced collective bargaining negotiations, but had not reached an agreement by the time of the hearing in the instant case.

The March 13, 1986 petition in this unit clarification case was followed on April 9, 1986 by a complaint charging unfair labor practices in which the union alleged that the employer was committing a violation of RCW 41.56.140(4) by refusing to bargain concerning the chief of police and town clerk.<sup>1</sup>

The hiring process utilized by this employer is common among small public employers. Employment opportunities are advertised, applications are screened, and lists of potentially qualified applicants are submitted to the mayor, who has the final authority to hire employees.

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<sup>1</sup> Case No. 6344-U-86-1233. The outcome of the unfair labor practice proceedings depends on whether the disputed positions are in the bargaining unit represented by the union, and that case was held in abeyance pending the disposition of this matter.

The budget process followed by this employer is also typical for a small municipality. The town clerk notifies other "department heads" to submit their budget requests for the forthcoming year prior to the beginning of October. Public hearings are then conducted to develop a preliminary budget proposal which is submitted to the governing body for finalization and adoption. The official budget must be approved by December 31st each year.

#### POSITIONS OF THE PARTIES

The employer contends that the chief of police and the clerk-treasurer are appointed officials under RCW 41.56.030(2)(b) or confidential employees within the meaning of RCW 41.56.030(2)(c) who should be excluded from the bargaining unit. It also argues that the chief of police is excludable as a supervisor. Anticipating a union argument challenging the timeliness and/or propriety of the petition, the employer would also attack the underlying certification of the bargaining unit, claiming that the mayor was without authority to enter into stipulations on behalf of the employer in the representation proceedings which led to that certification.

The union first contends that the employer is bound by the recent certification, or at least has a duty to show a change of circumstances since the issuance of the certification. On the merits, it contends that neither the chief of police nor the clerk-treasurer is involved in the formulation, effectuation, or implementation of the employer's labor relations policies and practices so as to be excludable as "confidential" employees within the meaning of RCW 41.56.030(2)(c). It also contends that neither of the affected employees has sufficient responsibility to warrant their exclusion as "supervisors".

DISCUSSION

RCW 41.56.030(2) both defines "public employee" and provides for the exclusion from the coverage of the Public Employees Collective Bargaining Act of those who are:

. . . (a) elected by popular vote, or (b) appointed to office pursuant to a statute, ordinance or resolution for a specified term of office by the executive head or body of the public employer, or (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 supplied)

The Clerk/Treasurer Position

The duties of a town treasurer are set forth in RCW 35.27.170:

35.27.170 TOWN TREASURER--DUTIES. The town treasurer shall receive and safely keep all money which comes into his hands as treasurer, for all of which he shall give duplicate receipts, one of which shall be filed with the clerk. He shall pay out the money on warrants signed by the mayor and countersigned by the clerk and not otherwise. He shall make monthly settlements with the clerk.

The duties of a town clerk are set forth by statute as:

35.27.220 TOWN CLERK--DUTIES. The town clerk shall be custodian of the seal of the town. He may appoint a deputy for whose acts he and his bondsmen shall be responsible; he and his deputy may administer oaths or affirmations and certify to them, and may take affidavits and depositions to be used in court or proceeding in the state.

He shall make a quarterly statement in writing showing the receipts and expenditures of the town for the preceding quarter and the amount remaining in the treasury.

At the end of every fiscal year he shall make a full and detailed statement of receipts and expenditures of the preceding year and a full financial statement of the financial condition of the town which shall be published.

He shall perform such other services as may be required by statute or by ordinances of the town council.

He shall keep a full and true account of all the proceedings of the council.

The treasurer and clerk positions may be combined as follows:

35.27.180 Treasurer and clerk may be combined. The council of every town may provide by ordinance that the office of treasurer be combined with that of clerk or that the office of clerk be combined with that of treasurer ... This ordinance shall not be voted upon until the next regular meeting after its introduction and shall require a vote of at least two-thirds of the council. The ordinance shall provide the date when the consolidation shall take place which date shall be not less than three months from the date the ordinance goes into effect.

Earlene Basset, the current clerk-treasurer, was hired by the current mayor. Throughout her tenure with the employer, she has kept records for the town council, including accounting records such as general town accounts, a marshal's account, a treasurer's account, licenses, and a book marked "demands and warrants". She performs routine clerical tasks, accumulates budget requests, holds public budget meetings, attends and takes minutes at council meetings and provides clerical services for the mayor and town council. Most important, as regards this case, she prepares financial information used by

the mayor and town council and their labor relations consultants in collective bargaining negotiations.

The clerk-treasurer is assisted by a deputy clerk-treasurer. The deputy clerk-treasurer in fact prepared some financial data for the employer's current negotiations with Local 524, but it appears that was her only contact with confidential labor relations matters. The employer does not claim the deputy is a confidential employee.

#### The Chief of Police Position

The duties of the head of the law enforcement department of a fourth-class municipality are set forth in RCW 35.27.240:

35.27.240 TOWN MARSHAL--POLICE DEPARTMENT. The department of police in a small town shall be under the direction and control of the marshal subject to the direction of the mayor. He shall prosecute before the police justice all violations of town ordinances which come to his knowledge. He may pursue and arrest violators of town ordinances beyond the town limits.

His lawful orders shall be promptly executed by deputies, police officers and watchmen. Every citizen shall lend him aid, when required, for the arrest of offenders and maintenance of public order. He may appoint, subject to the approval of the mayor, one or more deputies, for whose acts he and his bondsmen shall be responsible, whose compensation shall be fixed by the council. With the concurrence of the mayor, he may appoint additional policemen for one day only when necessary for the preservation of public order.

He shall have the same authority as that conferred upon sheriffs for the suppression of any riot, public tumult, disturbance of the peace, or resistance against the laws or public authorities in the lawful exercise of their functions and shall be entitled to the same protection.

He shall execute and return all process issued and directed to him by any legal authority and for his services shall receive the same fees as are paid to constables. He shall perform such other services as the council by ordinance shall require.

The Town of Granger does not use the "marshal" nomenclature for the head of its police department. Instead, Valdomero Valenzuella carries the title of "Chief of Police". Other employees in the police department are a sergeant and a part-time patrolman.

Valenzuella, a civil service employee, was hired in 1980 as a police officer and was appointed chief of police in June, 1982. In addition to administrative functions, such as maintaining departmental records, developing preliminary budget requests, and counseling police department employees about decisions and policies involving the police department, Valenzuella performs routine police patrol duties and transports prisoners to the county jail at Yakima. The employer acknowledges that, in the context that "the entire police force in the Town of Granger is two and three quarters (2-3/4) persons . . . , many of the formalities associated with traditional lines of authority become less formal". Thus, while the chief of police does background checks and makes recommendations on hiring, any hiring is subject to the approval of the mayor. Discipline is similarly under the independent review authority of the mayor.

Mayor Harris testified that the chief of police does not participate in any executive meetings of the town council where labor relations matters are discussed, and that he is not involved in the formulation, effectuation, or implementation of the town's labor relations policies. Additionally, he does not participate in negotiations with Local 524.

Controlling precedent and Its Application

The "Appointed Official" Argument -

The employer acknowledges that neither the town clerk/treasurer nor the chief of police has been appointed to office for a fixed term of office. Rather, the employer theorizes that the disputed individuals can be imputed to have a "fixed term" derivatively from the fact that the mayor is elected for a fixed term of office. A similar argument was considered and rejected in Town of Granite Falls, Decision 2617 (PECB, 1987), where it was noted:

Although the common law "employment at will" doctrine has been eroded in some cases involving an explicit or implicit promise of employment for a determinate period, the general rule has been and continues to be that . . . all employees serve "at the pleasure" of their employers for an indeterminate period.

The disputed individuals serve "at the pleasure of" the mayor, which inherently contradicts the notion of a "fixed" term. They could serve into, through or beyond the terms of one or more successors to the incumbent mayor, so long as they did not fall from grace. The more crucial distinction would seem to be in their absence of job security for a fixed period. Their situation must be distinguished from those appointed officials who, like the members of the Public Employment Relations Commission under the terms of RCW 41.58.010(1) or of a city police civil service board created under the terms of Chapter 41.12 RCW, are subject to removal during their fixed term only upon a showing of good cause. The employer's arguments based on RCW 41.56.030(2)(b) are without merit.



The "Confidential" Argument -

The Supreme Court held in IAFF v. City of Yakima, 91 Wn.2d 101 (1978):

. . . 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 the formulation of labor relations policy. General supervisory responsibility is insufficient to place an employee within the exclusion.

Thus, the key factor in establishing that an employee is a "confidential" under RCW 41.56.030(2)(c) is the existence of a "labor nexus", i.e., the possession of confidential information concerning the labor relations policies of the employer which, if improperly disclosed to the exclusive bargaining representative, would damage the collective bargaining relationship. Town of Granite Falls, Decision 2617 (PECB, 1987); Bellingham Housing Authority, Decision 2140-B (PECB, 1985).<sup>2</sup> It is also well settled that employees may have responsibilities which would be considered "confidential" in other contexts, but still do not come within the meaning of the term as it is used in labor relations:

Public officials in a variety of settings have solemn responsibilities and fiduciary obligations which are enforced by other

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See also: NLRB v. Hendricks County Electric Membership Corp., 454 U.S. 170, 108 LRRM 3105 (1981), where the Supreme Court of the United States affirmed that the "confidential" exclusion under the National Labor Relations Act is limited to a "labor nexus" test.

statutes, but "confidential" as those may be vis-a-vis the public, competitors in business or even other public employees, they are not disqualifying for purposes of exercising the rights conferred by the collective bargaining law. A position of responsibility and the ability of the employee to maintain the trust of the employer do not necessarily imply the type of confidentiality addressed by the Act.

Bellingham Housing Authority, supra.

See, Richland School District, Decision 2208 (PECB, 1985).

Because classification of an employee as "confidential" denies that individual all of the rights to collective bargaining which are generally guaranteed to public employees under Chapter 41.56 RCW, the exemption is narrowly construed. The party seeking a "confidential" exclusion carries a heavy burden of proof. City of Seattle, Decision 689-A (PECB, 1979); San Juan County, Decision 1690-A (PECB, 1984); Cape Flattery School District No. 402, Decision 1249-A (PECB, 1982); City of Mercer Island, Decision 1026-A (PECB, 1981). Under the explicit terms of the statute and Commission precedent, contact with confidential labor relations materials must also be both "necessary" and "regular". Sporadic contact or limited back-up work for another confidential employee will generally not be sufficient to meet the test for exclusion. Crescent School District, supra; Manson School District, Decision 1198 (PECB, 1985); Clover Park School District, Decision 2243-A (PECB, 1987).

In evaluating the employer's claims in this case regarding the confidential status of the disputed employees, the general labor relations practices of the employer need to be taken into consideration. Granger is a small municipality. None of its elected officials serve on a full-time basis. None of its employees were organized for the purposes of collective

bargaining prior to the creation of the "wall-to-wall" bargaining unit in which this case arises. The existing unit includes all of the full-time employees of the employer, with no supervisory or confidential exclusions.

The certification and the onset of collective bargaining themselves constitute a change of circumstances. There is now an ongoing operational need for the employer to formulate, effectuate, and implement labor relations policies. Of necessity, those functions have been in the hands of the employer's part-time elected officials and their labor relations consultants.

The clerk-treasurer is, by statute, the custodian of the employer's official records. Lest the employer's elected officials be compelled by concerns for confidentiality to keep official public records elsewhere than at the official employer office, the clerk-treasurer is also the logical person to be the custodian of papers and other records concerning the labor relations policies of the employer. Were that conclusion not indicated because of her statutory duties, the history of the clerk-treasurer's actual involvement with the employer's financial data involving employee pay and benefits, her actual access to the employer's confidential personnel files, and her actual performance of work in preparation for bargaining would warrant a conclusion that the clerk-treasurer is a confidential employee within the meaning of RCW 41.56.030(2)(c).

The chief of police presents a quite different situation. The most that could be said of the chief of police is that he has some general supervisory responsibilities which do not meet the "confidential" test required by the RCW 41.56.030(2)(c) and the decision of the Supreme Court in City of Yakima, supra. There is no evidence of necessity for, let alone actual involvement

with, confidential information concerning the labor relations policies and strategies of the employer.

The employer's petition in this matter sought the exclusion of the chief of police on grounds that this was "a management/administrative classification . . . involved in carrying out normal management functions". It has been clear since Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977), that Chapter 41.56 RCW makes no provision for an exclusion of "managerial" employees from its coverage.

The employer went on in its petition in this matter to suggest a potential for "conflict of interest with the bargaining unit membership supervised" by the chief of police. The terminology used is familiar in the context of City of Richland, Decision 279, 279-A (PECB, 1978), aff. 29 Wn.App. 599 (Division III, 1981), cert. den. 96 Wn.2d 1004 (1981). During the course of the proceedings, counsel for the union vigorously opposed what the union perceived to be an "expansion" of the case by the employer to put forth a "supervisor" exclusion in addition to the "confidential" theory identified by the employer in the petition and at the outset of the hearing. The dispute can be resolved on the evidence and on considerations of burden of proof, without becoming embroiled in procedural arguments. It is the duty of the Commission to administer the statute in conformity with interpreting precedent. Granger's top law enforcement official has some administrative functions which, in and of themselves, are not a basis for finding potential for a conflict of interest. The chief of police has very limited supervisory authority, such as counseling with employees about their problems and complaints, but that must be taken in its context. The chief of police works a regular patrol shift, and so is seldom on duty at the same hours as his subordinates.

His recommendations on key personnel actions such as hiring and discipline are all subject to independent review by the mayor. On the facts presented, the chief of police is not excludable as a supervisor. The police chief in this case is comparable to the working foremen in City of Buckley, Decisions 287, 287-A (PECB, 1977), and the individual who held the chief of police title in Town of Granite Falls, supra.

#### The Attack on the Certification

The representation proceedings which gave rise to the bargaining unit at issue in this proceeding were closed by the issuance of the certification on May 14, 1985. That final order of the Public Employment Relations Commission was subject to judicial review under Chapter 34.04 RCW by a petition for review filed within thirty days after the issuance of the administrative order. No such petition for judicial review was filed, and the order became res judicata. The employer is no longer in a position to attack that certification.

Had the employer resisted the inclusion of the chief of police and the clerk-treasurer in the bargaining unit during the representation proceedings, it would have been entitled to a hearing and a determination on the merits of those issues by the Public Employment Relations Commission. Regardless of what may or may not have been wrong with the procedures which led to the certification, the employer has had the opportunity in this unit clarification proceeding to present and have its various arguments for exclusion determined on their merits. In the case of the clerk-treasurer, the passage of time and the onset of collective bargaining have strengthened the employer's case for exclusion, and exclusion is granted in this proceeding. In the case of the chief of police, it appears that the exclusionary claim would have been decided against the employer prior to

the certification, just as it is decided against the employer here.

FINDINGS OF FACT

1. The Town of Granger, Washington, is a fourth-class municipality created pursuant to Chapter 35.27 RCW and is a public employer within the meaning of Chapter 41.56 RCW. The town is governed by an elected mayor and five-member town council. Dennis Harris is mayor.
2. General Teamsters, Local 524, a bargaining representative within the meaning of Chapter 41.56 RCW, is the certified exclusive bargaining representative of an appropriate bargaining unit consisting of:

All full-time and regular part-time employees of the Town of Granger, excluding the mayor.

The bargaining relationship originated with a certification issued by the Public Employment Relations Commission on May 14, 1985.

3. A dispute has arisen as to the exclusion of the chief of police and clerk-treasurer from the bargaining unit described in Finding of Fact 2, above.
4. The police department of the Town of Granger has two full-time employees and one part-time employee. The chief of police performs duties similar to other employees in the police department, including routine police patrol and transporting prisoners to the county jail. The chief of police receives a salary approximately \$100 per month greater than that of the only other full-time police

officer, who holds the title of "sergeant". The chief of police has administrative responsibilities concerning the police department budget and records, and has limited authority to act on behalf of the mayor in personnel matters affecting the other employees of the police department. The chief of police is not involved in the formulation, effectuation, or implementation of the employer's labor relations policies or practices.

5. The clerk-treasurer performs routine clerical tasks, prepares the town budget, attends and takes minutes at town council meeting, maintains the official records of the employer, disburses town monies, keeps required financial records, supervises the deputy clerk-treasurer in the absence of the mayor, and prepares financial information which can be used in the course of the employer's labor relations policies and practices.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.
2. No question concerning representation presently exists in the bargaining unit described in Finding of Fact 2.
3. The chief of police is a public employee who is not an appointed official within the meaning of RCW 41.56.030 (2)(b) or a confidential employee within the meaning RCW 41.56.030(2)(c). The chief of police has duties, skills and working conditions generally similar to other employees within the bargaining unit described in Finding of Fact 2, and his limited supervisory responsibilities are

insufficient to warrant exclusion of the chief of police from that unit under RCW 41.56.060.

4. The clerk-treasurer is a confidential employee within the meaning of RCW 41.56.030(2)(c).

ORDER

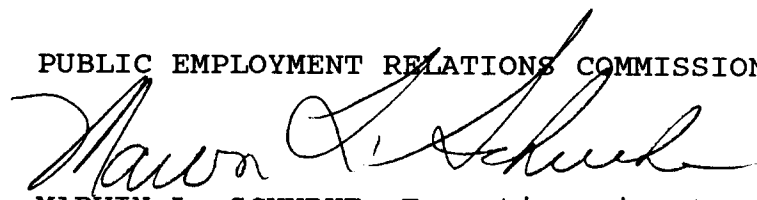
1. The description of bargaining unit set forth in Finding of Fact 2 is amended as follows:

All full-time and regular part-time employees of the Town of Granger, excluding elected officials and confidential employees.

2. The position of clerk-treasurer is excluded from the bargaining unit.
3. The position of chief of police is included in the bargaining unit.

DATED at Olympia, Washington, this 5th day of March, 1987.

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.