

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
)
WASHINGTON STATE COUNCIL OF) CASE 13428-C-97-848
COUNTY AND CITY EMPLOYEES)
) DECISION 6545 - PECB
Involving certain employees of:)
) ORDER CLARIFYING
CITY OF WENATCHEE) BARGAINING UNIT
)
)
_____)

John F. Cole, Director for Staff Services, appeared on behalf of the union.

Mark Cassidy, Labor Relations Representative, appeared on behalf of the employer.

On September 25, 1997, the Washington State Council of County and City Employees (union) filed a petition for clarification of an existing bargaining unit under Chapter 391-35 WAC, involving a bargaining unit at the City of Wenatchee (employer). Hearing Officer J. Martin Smith held a hearing on March 27, 1998, and the parties filed briefs to complete the record. Authority to determine this "eligibility" issue has been delegated by the Executive Director to the Hearing Officer under WAC 391-35-190(2).

The union represents all engineering employees in the City's street and public works department. It sought a determination by the Commission that the new position of "associate engineer" was an eligible non-supervisory job to be represented in the bargaining unit. Based on the evidence and arguments, including testimony by the employee ultimately hired, we conclude that the position is appropriate for inclusion within the bargaining unit.

BACKGROUNDThe Parties and Their Bargaining History

The City of Wenatchee (employer) has collective bargaining relationships with two unions representing "uniformed personnel" employees within the meaning of RCW 41.56.030(7):

- A bargaining unit of law enforcement officers is represented by the Wenatchee Police Guild; and
- A bargaining unit of fire fighters is represented by a local union of the International Association of Fire Fighters.¹

The Washington State Council of County and City Employees, Local 846W (union) represents a bargaining unit described in the parties' collective bargaining agreement for the period from January 1, 1996 through December 31, 1998, as follows:

The Employer recognizes the Union as the sole and exclusive Bargaining Agent for the purpose of establishing wages, benefits and other conditions of employment for all of its permanent **outside employees employed in the Street, Water, Sewer, Parks, Cemetery, Sanitation and Shop Departments** as certified by the Department of Labor and Industries in work classifications set forth in Appendix "A", and all permanent **inside employees** as certified by the Department of Labor and Industries and employed **in the Police, Finance, Fire and Public Works Departments** in work classifications set forth in Appendix "A".

[Emphasis by **bold** supplied.]²

¹ Notice is taken of the Commission's docket records.

² The Department of Labor and Industries administered Chapter 41.56 RCW from 1967 through 1975.

The history of this bargaining unit was discussed at length in City of Wenatchee, Decisions 6099, 6099-A (1997), where the unit status of a recreation specialist was at issue. Although referred to by the parties as the "public works" unit, their collective bargaining agreement also covers museum curators, gallery coordinators, engineering, and clerical employees who work in various departments. Hence, "non-uniformed" is a more accurate characterization of this bargaining unit.

This case involves the engineering division in the employer's Public Works Department. Chief Engineer Chic Worthing is the division manager. He supervises Don McGahuey, the assistant city engineer for traffic matters, an office engineer, an associate engineer, two traffic technicians, and three engineering technicians. The record shows a history of bargaining for the technicians. The division manager, the assistant engineer, and the office engineer have historically been excluded from the bargaining unit as supervisors.³ Elsewhere in the Public Works Department, an environmental coordinator and a wastewater supervisor are excluded from the bargaining unit.

The Associate Engineer Position

In July of 1997, the employer prepared a new job description and published an employment opportunity bulletin seeking a civil engineer with four years of experience, to:

³ Under the employer's "1998 Management/Administrative Group Pay Plan", the City Engineer is listed at \$5594 per month (top step), the Assistant Engineer at \$5074, the Office Engineer at \$4060, and the Associate Engineer at \$3879. Engineering technicians are paid \$3455 under the labor agreement at the five-year (initial "longevity") step, and \$3592 at the highest (25 years) step.

[A]dminister and coordinate the design and construction of City capital improvement projects.... Provide design and construction training to technicians as needed.

The classification for the position was listed as "To be determined".

Two different documents are in evidence, both bearing dates of July 22, 1997. The version supplied by the employer to the union (**plus language omitted from the posted version in bold italics**) described the position as follows:

Essential Job Functions

Oversees and coordinates public works construction projects in progress to ensure the work is completed in accordance with plans and specifications and regulations. Leads and participates in the work of department staff on specific projects to ensure time and accurate completion of projects.

Provides assistance in the administration of major maintenance and construction projects by preparing costs and contracts, calculating pay estimates for contractors, and writing change orders, revisions and other project-related correspondence.

Inspects construction by contractors for City projects to ensure the work is performed according to standards and regulations. ...

Prepares plans, assists in preparation of specifications and estimates for construction projects involving roads and streets, drainage systems, and water and sewer systems under the direct supervision and guidance of the City Engineer or Assistant City Engineer. Gathers and collects information and relevant data to prepare plans and designs.

Supervises, trains and directs the work of Engineering Technicians.

Coordinates assignments for survey crews to ensure data gathered for project planning or construction is accurate and on time. Provides technical assistance to the crews in surveying and staking projects.

...

Minimum Qualifications

...

Knowledge of

- Principles, practices and techniques of civil engineering and surveying. ...

Ability to

- Plan and coordinate the work of staff.
- Estimate and analyze costs.
- Plan, design ... construction projects.
- Conduct inspections ...
- Read and interpret ... blueprints
- Communicate effectively ...
- Prepare recommendations ...
- Physically perform the essential functions of the job. ...

Interviews were completed by October 31, 1997, and Margie Wilson had been hired as the new associate engineer by December 15, 1997. Wilson had been the associate engineer at the City of Pasco prior to her hire at Wenatchee.

The employer's current table of organization places the office engineer and the associate engineer at the same staff level, although the employer's pay plan indicates the associate engineer is paid about 4.5% less than the office engineer. The employer presented evidence that it reorganized its engineering operation in the summer of 1997, made its office engineer an "administrator" at that time, and shifted the technical and supervisory duties of the office engineer to the new associate engineer position. In particular, Human Resources Director Sandra Smeller testified that the associate engineer position was created to assist the re-

organization of the engineering department, and to allow the office engineer to delete technical responsibilities in favor of managerial, administrative duties. Smeller testified that the successful candidate for the position - Wilson - showed background in both public and private sectors supervising technical, surveying and drafting employees in road engineering projects. Division manager Worthing testified that the revamping of the department began in February of 1997, when his predecessor left the city. Actual street maintenance was shifted to the Facilities Division and Don McGahuey became the traffic engineer, and Worthing planned to make the associate engineer a supervisor in charge of the engineering technicians, beginning with an unusually long list of summer projects in 1997 and 1998.

The union presented evidence that the engineering technicians and utility workers in street and road maintenance have received their work instructions from supervisors other than the associate engineer, at least during Wilson's brief tenure up to the time of the hearing in this matter. The union also provided evidence that the reorganization plans of 1997 were not well known or explained to lead workers on the projects, even though they attend management meetings along with supervisors. Union witnesses testified that Wilson was a supervisor in name only, and that she had not approved overtime or made early morning assignments that affected the work hours or working conditions of bargaining unit employees.

POSITIONS OF THE PARTIES

The union argues that the associate engineer must remain in the bargaining unit, because the responsibilities of the position are consistent with other bargaining unit positions. The union

contends the disputed job retains "lead" or "coordinating" responsibilities, but lacks substantial independent authority to grant leaves, discipline employees, or assign their work.

The employer asserts that this new position was intended as a mid-management position with independent authority to direct the work of engineering technicians and other employees. It urges that the incumbent has been granted supervisory authority, and has exercised that authority towards employees in the engineering division.

DISCUSSION

Appropriate Bargaining Units

The Legislature has delegated authority to the Commission to determine appropriate units for collective bargaining:

RCW 41.56.060. DETERMINATION OF BARGAINING UNIT -- BARGAINING REPRESENTATIVE. 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. ...

The Commission has described the purpose of the unit determination function in the following terms:

[T]o group together employees who have sufficient similarities (community of interest) to indicate that they will be able to bargain collectively with their employer. The statute does not require determination of the "most" appropriate bargaining unit. It is only necessary that the petitioned-for unit be an appropriate unit. Thus, the fact that there may be other groupings of employees which would also be appropriate, or even more appropriate, does not require setting aside a unit determination.

City of Winslow, Decision 3520-A (PECB, 1990), citing City of Pasco, Decision 2636-B (PECB, 1987).

In City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981), the Commission established the principle that the unit determination authority conferred by RCW 41.56.060 will be exercised to exclude supervisors from bargaining units containing their subordinates, in order to avoid a potential for conflicts of interest which would otherwise arise, and to recognize the fundamentally different communities of interest between supervisors and their subordinates. That precedent and principle have been reiterated in numerous subsequent decisions in a variety of industrial settings. See, for example, Seattle School District, Decision 2830-A (PECB, 1988).

Status as "Supervisors"

While supervisors are excluded from the coverage and rights of the National Labor Relations Act (NLRA), supervisors are covered by and have full collective bargaining rights under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977), citing Packard Motor Car Co. v. NLRB, 330 U.S.

485 (1947).⁴ The Educational Employment Relations Act (EERA), Chapter 41.59 RCW, contains a definition of "supervisor", at RCW 41.59.020(4)(d), and the Commission has used that definition in implementing unit determinations in City of Richland, supra.

In Yakima County, Decision 4672 (PECB, 1994), a Hearing Officer stated:

In evaluating a claim of supervisory status, the scope of the disputed individual's employment relationships with other employees is taken into consideration. Factors such as hiring, discharge, evaluation, the approval of leave requests, and the authority to recommend actions affecting subordinate employees are pivotal in assessing the existence of supervisory status.

The task before the Hearing Officer in this case is, therefore, to apply well-established principles.

Application of Standards

The supervision of engineering tasks involves a combination of "field" and "office" work, (e.g., road maintenance operations involving heavy equipment one day, and drafting on a computer under laboratory conditions the next). Similar positions were at issue in City of Puyallup, Decision 5639-B (PECB, 1997), where it was determined that a supervisory exclusion was not justified, based on: Evidence that participation in hiring decisions merely involved being a member of interview teams; the city engineer

⁴ See, also, City of Tacoma, Decision 95-A (PECB, 1977), which is the Commission decision setting forth the reasoning referred to in a footnote to the Supreme Court decision.

claimed sole hiring and discipline responsibility; the disputed employees participated in a "team function", rather than a supervisory capacity; and "overseeing" language in the job description was not borne out in the record of the proceeding. By contrast, a "traffic safety coordinator" was excluded as a supervisor in City of Yakima, supra, based on evidence that the individual was delegated, and routinely exercised, authority to hire, fire, and discipline subordinate employees.

One of the features of the instant case is highlighted in City of Blaine, Decision 6122 (PECB, 1997), where the disputed employee had only held the position two months at the time of hearing, and had not actually disciplined or hired employees. There is clearly no evidence here that any supervisory authority which may have been delegated to Wilson has actually been exercised in her four months covered by this record.

Although the evidence falls short of establishing that the employer acted in bad faith, the employer's testimony regarding the discrepancy between two job descriptions is unconvincing.

- It is clear that the employer sent a job description dated July 22, 1997 to the union on July 31, 1997, by telefacsimile transmission. Exhibit 2. That version did not contain the paragraph which reads: "Supervises, trains and directs the work of Engineering Technicians."
- It is clear that the job description actually posted by the employer on or about August 19, 1997 (with a closing date of September 5, 1997) was also dated July 22, 1997, but contains the paragraph which reads: "Supervises, trains and directs the work of Engineering Technicians." Exhibit 13.

While the employer contends that the final version of the job description was prepared around August 19, 1997, and was used during the interviews in October and November, it was never made clear how the posted job description which added terms supportive of the employer's claim in this proceeding could have the same date as the different version provided to the union. We have said in other cases that an employer is obligated to give notice to the exclusive bargaining representative of the bargaining unit(s) most likely to be appropriate for a newly-created job classification. Yelm School District, Decision 2543 (PECB, 1986); City of Spokane, Decision 6232 (PECB, 1998). The notice given by the employer in this case clearly fell short of the employer's obligations. The union obtained the necessary information, however.⁵

The employer's planning for the disputed position seems to have been concluded only with regard to the issue of pay, which was placed somewhat above that of the highest-paid engineering technician classification within the historical bargaining unit. Such a salary placement was somewhat predicable, inasmuch as the new position was to require qualifications almost equal to those of the city engineer, but a higher rate of pay is not necessarily

⁵ The union's petition filed a month before the interviews for the new position were concluded (and hence before the identity of the successful candidate was known) included the following statement in the space provided for identification of issues:

Associate Engineer: New position in City.
Presently declared non-union by employer.
Union believes position should be in
bargaining unit because [sic] non-supervisory
or confidential status.

Attached to the petition was a copy of the two-page job description which had been provided to the union, and which contained no entry on the form for the classification for the associate engineer position.

indicative of supervisory status. It is one's authority over subordinates, not one's pay grade, which is controlling under the Commission's decisions following City of Richland, supra.

The union notes, and the employer does not contest, that the "associate engineer" position is a new one. Hence, we have a different situation from that in King County, Decision 5820 (PECB, 1997), where it was concluded that the disputed position was not new (as that employer had alleged), but had existed by another name for over twenty years. In King County, the employer couldn't decide which department the plans examiner should operate from, and hence was not entitled to an exclusion on the basis of a consistent assignment.⁶ There is certainly no history of the union having waived its claim to this position, when it filed a unit clarification petition even before the announced position was filled. The union is permitted to file a petition on the basis of an employer statement or declaration, especially where it is at odds with confusing statements in posted job descriptions.

The accretion analysis which the employer advanced in this case for the first time in its brief, is inapposite. There is neither an argument or a factual basis for an argument that the associate engineer should be included in some other bargaining unit if she is a non-supervisory employee.

Most of the job requirements for the associate engineer appear to have been copied from the city engineer and office engineer classifications. Such a practice is to be expected, but only up-scales the job classification without up-scaling the work involved.

⁶ On other grounds, it was determined that this position did NOT accrete to the IFPTE engineer's bargaining unit, because a question concerning representation was raised.

In Mason County, Decision 5261 (PECB, 1995) an elected official who wanted to be divested of supervisory duties assigned them to the disputed individual, and the disputed individual had clearly exercised those new duties (including to hire, fire, discipline, train and direct the work of other employees) prior to the hearing in that case. The Commission has been understandably reluctant to separate out supervisors on the basis of estimates or promises of what they might eventually have the opportunity to do in the workplace. What is important is what they are doing. Snohomish Health District, Decision 4735-A (PECB, 1995) The employer's evidence in this case was simply too replete with the future tense: The associate engineer *will* exercise her judgment to discipline employees; a performance evaluation system *is being planned*; the associate engineer *will approve* overtime in the future. As for the present, however, the engineering technicians still report to the same supervisors as before the disputed position was filled. The employer has used one of the pre-existing supervisors, not the associate engineer, in the processing of grievances. Indeed, Wilson's own testimony was that Director Ajax and Division Manager Worthing would continue to make most final decisions, especially regarding training standards.

Taken together, the record is persuasive that there is insufficient potential for conflict of interest to warrant separation of the associate engineer from the bargaining unit which includes the engineering technicians and utility workers working in the same division. At present, the associate engineer is not a supervisor.

FINDINGS OF FACT

1. The City of Wenatchee is a public employer within the meaning of RCW 41.56.020 and RCW 41.56.030(1).

2. The Washington State Council of County and City Employees, and its Local 846, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of non-uniformed employees of the City of Wenatchee. That bargaining unit includes non-supervisory employees who perform engineering and technical functions.
3. In the summer of 1997, the employer decided to create a new position in the engineering division, to be titled "associate engineer", and to supplant several assignments from the city engineer and office engineer.
4. The employer initially provided notice to the union of a new job description which did not specify supervisory duties or status.
5. The employer subsequently altered the content of the job description to specify supervisory duties and status, and posted the amended job description without change of date from the version provided to the union.
6. The employer conducted interviews and, in December of 1997, hired a new employee to fill the associate engineer position.
7. At the time of the hearing in this case, Margie Wilson had held the disputed position for only four months. During her brief tenure, she had not exercised any authority concerning hiring, firing, discipline, or evaluation of subordinates, and had not been involved in approving sick leave or annual leave. Her involvement in some computer training was consistent with her training and experience as a technical expert.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-35 WAC.

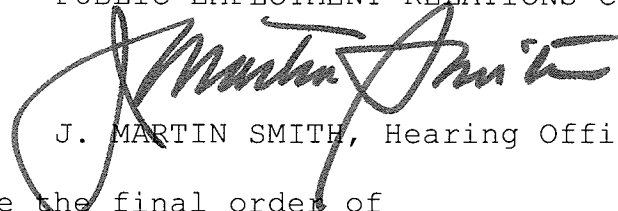
2. As constituted according to the evidence in this proceeding, the associate engineer is a non-supervisory employee who does not consistently exercise supervisory responsibilities sufficient to create a potential for conflicts of interest with other employees, so that the position is properly allocated to the existing bargaining unit under RCW 41.56.060.

ORDER

The bargaining unit is clarified to include the position of associate engineer.

Issued at Olympia, Washington, on the 7th day of January, 1999.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



J. MARTIN SMITH, Hearing Officer

This order will be the final order of the agency unless appealed by filing a notice of appeal with the Commission under WAC 391-35-210.