

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
)
CITY OF REDMOND) CASE 17432-C-03-1084
)
For clarification of an existing) DECISION 8486 - PECB
bargaining unit represented by:)
)
INTERNATIONAL ASSOCIATION OF) ORDER CLARIFYING
FIRE FIGHTERS, LOCAL 2829) BARGAINING UNIT
)
)
_____)

Ogden Murphy Wallace, by *Nick M. Beerman*, Attorney at Law, and *W. Scott Snyder*, Attorney at Law, for the employer.

Webster, Mraak & Blumberg, by *James M. Webster*, Attorney at Law, for the union.

On April 11, 2003, the City of Redmond (employer) filed a petition for clarification of an existing bargaining unit with the Public Employment Relations Commission under Chapter 391-35 WAC, seeking exclusion of two alleged supervisory classifications from a bargaining unit represented by International Association of Fire Fighters, Local 2829 (union). A hearing was held on July 11, 2003, and September 10, 2003, before Hearing Officer Christy Yoshitomi. Both parties submitted briefs.

Based on the evidence and arguments submitted, and acting under authority delegated by the Executive Director under WAC 391-35-190(2), the Hearing Officer concludes that the battalion chiefs and

fire marshal are correctly placed within the bargaining unit of nonsupervisory fire fighters employed by the employer.

BACKGROUND

In 1982, the Executive Director of the Commission directed a cross-check to determine whether the union was entitled to certification as exclusive bargaining representative of a bargaining unit of "Uniformed fire fighter employees, as defined in RCW 41.56.030(6), of the City of Redmond. . . ." *City of Redmond*, Decision 1367 (PECB, 1982). The employer filed timely objections, among which the employer appealed from rulings on the eligibility of alleged supervisors for inclusion in a bargaining unit that then had 30 employees. In *City of Redmond*, Decision 1367-A (PECB, 1982), the Commission denied the employer's request on the basis that neither party had requested the hearing in that case be reopened to address a reorganization of the department.¹

The staff of the Redmond Fire Department has grown substantially since 1982, and currently consists of about 100 employees. The department is organized on a paramilitary structure, with employees in six ranks. The fire chief who leads the department is followed in rank by three deputy chiefs, four battalion chiefs, and then company officers in the captain and lieutenant ranks. One of the three deputy chiefs oversees fire prevention operations, and is followed in rank by a fire marshal, two assistant fire marshals, and then inspectors. The employees in the "battalion chief" and

¹ The Commission additionally noted the right of an employer to file a unit clarification petition (at that time or any future time) based on any substantial change of circumstances. The employer did not pursue the unit clarification process at that time, however.

"fire marshal" ranks are currently included in the bargaining unit represented by the union, along with employees in "probationary fire fighter," "fire fighter," "driver operator," "fire inspector," "lieutenant," "captain," and "assistant fire marshal" classes. Only the battalion chiefs and fire marshal are at issue in this proceeding.

POSITION OF PARTIES

The employer contends that the battalion chiefs and fire marshal should be excluded from the bargaining unit on the basis of having supervisory duties. It notes there has been an increase in the population of Redmond and that a Medic One unit has been added. The employer voices concern about a potential for lower-ranked members of the bargaining unit to leverage the battalion chiefs and fire marshal.

The union asserts that the battalion chiefs and fire marshal do not have duties that rise to a supervisory level, and that they should remain in the existing bargaining unit. The union contends there has been no change in circumstance that would warrant the exclusion of five employees from the existing bargaining unit.

DISCUSSION

Applicable Legal Standards

The determination and modification of bargaining units is a function delegated by the Legislature to the Public Employment Relations Commission. RCW 41.56.060. Such issues can be resolved

in representation proceedings under Chapter 391-25 WAC (as were the issues decided by the Executive Director and Commission in 1982), or in unit clarification proceedings under Chapter 391-35 WAC. The statute sets forth four criteria for the Commission to consider, but those criteria are not all applicable in every case.

The "desires of employees" cannot be considered in this case (or in any other unit clarification under Chapter 391-35 WAC). That component of the statutory criteria is implemented only by conducting a unit determination election in a representation case under Chapter 391-25 WAC.

The "extent of organization" is only a factor in unit clarification cases if exclusion of an isolated supervisor from a bargaining unit would have the effect of depriving that individual of all collective bargaining rights under the statute. See WAC 391-35-330. That component is inapposite in this case involving five alleged supervisors.

The "history of bargaining" component is implemented by WAC 391-35-020(3), which states:

Employees or positions may be removed from an existing bargaining unit in a unit clarification proceeding filed within a reasonable time period after a change of circumstances altering the community of interest of the employees or positions.

The Commission has long held that the bargaining unit status of job classifications historically included in or excluded from a bargaining unit will only be modified on the basis of changed circumstances. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981).

The duties, skills and working conditions of employees are considered in nearly all unit clarification cases. The Commission

has long held that employees who exercise authority over other employees are to be routinely excluded from rank-and-file bargaining units. The principles enunciated in *City of Richland*, Decision 279-A are codified in WAC 391-35-340, which states:

(1) It shall be presumptively appropriate to exclude persons who exercise authority on behalf of the employer over subordinate employees (usually termed "supervisors") from bargaining units containing their rank-and-file subordinates, in order to avoid a potential for conflicts of interest which would otherwise exist in a combined bargaining unit.

(2) It shall be presumptively appropriate to include persons who exercise authority on behalf of the employer over subordinate employees (usually termed "supervisors") in separate bargaining units for the purposes of collective bargaining.

There is no basis to either revisit or deviate from those principles in this case, and any individuals excluded from the existing unit in this proceeding would be eligible for inclusion in a separate unit of supervisors.

The criteria commonly applied for determining "supervisor" claims under Chapter 41.56 RCW are the same types of authority listed in the Educational Employment Relations Act at RCW 41.59.020(4)(d), as follows:

[A]ny employee having authority, in the interest of an employer, to hire, assign, promote, transfer, layoff, recall, suspend, discipline, or discharge other employees, or to adjust their grievances, or to recommend effectively such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature but calls for the consistent exercise of independent judgement. . . . The term supervisor shall include only those employees who perform a preponderance of the above-specified acts of authority.

The titles and characterizations applied to positions by the parties are not controlling. The Commission has included positions with titles suggesting supervisory status in rank-and-file bargaining units in the absence of evidence demonstrating an actual potential for conflicts of interest. Conversely, the Commission has declined to exclude "lead workers" whose titles may overstate authority to direct subordinates in their daily job assignments without possessing authority to make meaningful changes in the employment relationship. It is thus necessary to determine whether the incumbent of a disputed position truly has independent authority to act or to effectively recommend personnel actions on behalf of the employer.

The potential for conflicts of interest exists "whenever supervisory authority exists, regardless of whether the particular type of authority has actually been exercised." *Granite Falls School District*, Decision 7719 (PECB, 2002). Therefore, an individual who has supervisory authority is excludable even if he or she has not actually exercised some or all of the authority conferred.

The mere existence of a para-military rank structure of the type found in many law enforcement agencies and fire departments clearly does not automatically warrant a determination that all persons holding a rank exercise supervisory authority over subordinate ranks. It is important to note Commission precedents holding that exclusion is not warranted where an individual merely makes recommendations in a highly-structured environment that uses predetermined rating systems and criteria based on objective standards, or where the actual decision making authority is vested at a higher level in the organization. Additionally, having evaluations made by employees who are in the best position to observe the performance of subordinate employees does not necessar-

ily pose sufficient conflict of interest to warrant a supervisor exclusion.

Having discretionary authority in administrative matters does not warrant exclusion from a bargaining unit as a supervisor. Where the authority exercised by an individual concerns the ministerial regulation of programs or functions, there is little potential for conflicts of interest within a bargaining unit and exclusion from the bargaining unit will not be warranted.

Application of Standards

History of Bargaining -

A substantial question arises here because of the employer's long delay between establishing the current structure and filing its petition in this case. The battalion chiefs and fire marshal had been in the existing unit for many years before the employer filed the petition to initiate this proceeding.

Although these parties have had a bargaining relationship since 1982, the testimony in this record indicates that the battalion chief and fire marshal classifications did not exist at the time of the hearing in the proceedings leading to the certification of the union as exclusive bargaining representative. There was then substantial growth in the community, particularly between 1982 and 1995, and it resulted in substantial growth of the Fire Department.

- This record suggests that the battalion chief and/or fire marshal classifications were created in 1982.
- The deputy chief rank has existed within the organizational structure since at least 1989.

- In 1992, the parties agreed to include the battalion chiefs and assistant fire marshals in the existing bargaining unit.²
- A Medic One unit was added in January 2003.

The period of growth continued after 1989, and even after 1992, but there was no testimony indicating that duties and authority of the deputy chiefs have been passed down to the battalion chiefs or fire marshal on an ongoing basis as a result of such continued growth.

The Hearing Officer concludes that the employer has failed to show any recent change of circumstances pertaining to the responsibilities of the positions at issue in this proceeding. Nothing in the history described in this record requires that the disputed positions be separated from the existing bargaining unit.

Duties Skills and Working Conditions -

The Hearing Officer has used the types of authority listed in RCW 41.59.020(4)(d) as the framework for analysis here:

The hiring process within the department begins with a screening of applicants by an outside firm. The department is provided with a list of applicants and their scores on a preliminary test, and then selects individuals from that list for interviews and oral examination administered by the chief examiner of the employer's

² The parties' agreement documenting that transaction includes:

The parties agree that [the inclusion of the Battalion chief and Fire Marshal in the bargaining unit] is intended to facilitate the process, and not as a stipulation as to the present or future confidential or supervisory status of such positions, or the appropriateness of the bargaining unit.

civil service system. The interview panel consists of a fire fighter and/or driver, a company officer (lieutenant or captain), and a battalion chief. Scores for the individual applicants are compiled and a "certified eligibility list" is created through the civil service process. The battalion chiefs' role up to this point is indistinguishable from that of the other bargaining unit employees involved, and does not provide any support for a finding that they exercise independent authority.

A deputy chief selects applicants from the certified eligibility list for a "chief's interview" and then conducts that interview under authority delegated by the chief. The deputy chief testified that he has used battalion chiefs "to assist in the chief's interview process" as "a representative . . . from suppression," so that the involvement of the battalion chiefs at this stage in the hiring process reflects the desire of the deputy chief rather than any inherent duty of the battalion chief rank. Although the battalion chief and deputy chief make recommendations to the chief on which applicant(s) to hire, the evidence does not support a finding that the battalion chiefs act independently. At best, those recommendation are made jointly. Further, all recommendations are by the deputy chief to the chief, and the chief retains the final authority on hiring decisions.

Offers of employment are made conditionally, subject to the applicant passing physical and psychological tests and performing satisfactorily during a probationary period. Evaluations during the probationary period are made by the company officers (lieutenants and captains) who work directly with the probationary employee. The battalion chiefs compile the evaluations of probationary employees, and forward them up through the chain of command. There is reference in the record to the battalion chiefs forwarding favorable recommendations if they do not find any reason

to believe otherwise, but there is minimal evidence as to how the battalion chief would form an independent opinion on such a matter. The battalion chief will conduct an investigation if concerns exist regarding a probationary employee, but the battalion chief then forwards the information received from the company officer(s) up the chain of command. If the battalion chief recommends the discharge of a probationary employee, the battalion chief and deputy chief meet to discuss the recommendation. No testimony indicates that a battalion chief ever makes any recommendation directly to the chief,³ and the final determination to discharge a probationary employee clearly rests with the chief. When a probationary employee is given permanent status, a required mutual action plan can be developed between the employee and his/her company officer without involvement of the battalion chief.

The assignment and direction of employees is shared by the battalion chiefs and fire marshal with the company officers, so as to make their roles indistinguishable for many purposes.

The battalion chiefs formulate work schedules and ensure that units are staffed at an appropriate level, but staffing is largely controlled by a seniority system which is articulated in the parties' collective bargaining agreement. The battalion chief must find employees to fill vacant positions in the event a station is understaffed, but that process is fully set forth in the department's standard operating guidelines. Thus, there is little room for exercise of any independent authority by the battalion chiefs regarding the work assignments of employees.

The battalion chiefs approve vacation leaves, but that does not involve any exercise of discretion. A deputy chief testified

³ As the organization is described through testimony and Exhibit 2, the battalion chiefs report to the deputy chiefs, who then report to the chief.

that the battalion chiefs must follow established procedures to determine whether an employee may receive a requested leave. There is even a procedure to resolve situations where two employees request leave for the same time period.

The battalion chiefs and fire marshal provide direction and insight on projects assigned to other employees, but those activities merely reflect the role of a lead worker. This activity does not provide discretion to make changes affecting the employment of the employees working on the projects.

The battalion chiefs have the authority to allocate training opportunities which could result in overtime compensation for employees. However, company officers also have the authority to initiate training for individuals. Company officers are included in the bargaining unit without any contention. The battalion chiefs here are merely performing the same work as other bargaining unit members and do not hold any distinctions that provide them with more authority which raise them to a supervisory level.

The fire marshal has authority to approve overtime to complete a task or project, but such determinations are driven by operational needs. There is little potential for conflicts of interest here, since the deputy chief testified that this overtime occurs on a rotational basis between the assistant fire marshals and the inspectors.

Evaluations of all permanent employees are performed by the officers next in rank above them, so that the battalion chiefs and fire marshal share their evaluation function with the company officers. The evaluations completed by subordinates are forwarded to the battalion chiefs or fire marshal for review as to whether they have been properly completed, but all evaluations are then forwarded to the deputy chief for archival.

The battalion chief in charge of training evaluates the administrative assistant position in the training department, and that evaluation can affect the wages of that individual, but the administrative position is not in the same bargaining unit as the fire marshal. Thus, no conflict of interest exists.

Promotions for permanent employees are regulated by the civil service system. There is a "chief's interview" process as described above for hiring, but the effective recommendation and decision are made above the battalion chiefs or fire marshal.

Transfers, layoffs, and recall of permanent employees are all controlled by the seniority system established within the parties' collective bargaining agreement. Neither the battalion chiefs nor the fire marshal have any independent authority to act on or make effective recommendations concerning those matters.

Suspension, discipline or discharge of permanent employees is also shared by the battalion chiefs and fire marshal with the company officers, so as to make their roles largely indistinguishable.

The battalion chiefs have some authority to initiate oral reprimands or warnings, and even written reprimands in some circumstances. However, the testimony of Deputy Chief Hail was that some of that authority is also exercised at a lower level:

The company officer has the ability to recognize that a violation of a particular rule of regulation policy occurred and has the ability to, you know, counsel the employee, provide an oral reprimand without having to go through the shift battalion chief. Anything beyond an oral reprimand needs to be taken to the battalion chief. The battalion chief has the responsibility to investigate, make a determination as to whether or not in fact a violation has occurred and inappropriate behavior has

taken place and has the ability to, you know, initiate discipline, oral reprimand, oral warning and in some circumstances a written reprimand.

Moreover, Deputy Chief Hail went on to limit the battalion chiefs to a narrow range before they must invoke the higher authority of a deputy chief:

The practice is that, before written reprimands typically are issued, that they would consult with the deputy chief and, you know, make a determination as to whether or not that was the appropriate action to take.

Transcript 89-90 (emphasis added). Thus, the battalion chiefs do not have *independent* authority to issue a written reprimand.

The employer's standard operating procedure concerning discipline, Exhibit 21 in this record, purports to authorize the battalion chiefs to "administer or initiate necessary disciplinary action and, when conditions warrant, order the temporary suspension for a member pending further disciplinary action." However, the testimony of a deputy chief was that a battalion chief would normally contact a deputy chief or the chief, who would make the decision on whether to suspend an employee. Thus, the authority of a battalion chief (or a company officer) to suspend an employee appears to be limited to circumstances where: (1) there is clearly a reason for immediate action; and (2) no higher-ranking officer is available. Even then, the exercise of authority does not have any impact on the wages of the employee who is temporarily suspended with full pay.

The fire marshal has the authority to orally reprimand an employee, but recommendations on any further discipline up to and including discharge must be made to the deputy chief. This is also

an authority that is shared with the assistant fire marshal rank, so that the role of the fire marshal is indistinguishable from that of bargaining unit employees who are not at issue here.

The limited ability of the battalion chiefs and fire marshal to act on behalf of the employer in the disciplinary arena is shared with the company officers, and the record supports a finding that the real exercise of authority in such matters is reserved to the deputy chiefs and the chief.

The adjustment of grievances was not raised by the employer as a duty of the battalion chiefs or fire marshal. The collective bargaining agreement, Exhibit 23, indicates the first step of the grievance procedure, after notification to the union, is that the grievance be brought to the attention of the immediate supervisor, which could be a company officer or battalion chief. There was no testimony establishing any authority for the battalion chief to settle a grievance. The grievance procedure contains several steps, next of which would be taking the grievance to the fire chief or his designee. Failure to settle the grievance at this next level results in the grievance being submitted to the mayor, and further mediation and arbitration if necessary.

The conclusion from the foregoing is that, under the historical and current practices within the department, the battalion chiefs and fire marshal do not perform a preponderance of the types of duties which would warrant their exclusion from the existing bargaining unit as supervisors. Employers are capable of delegating substantial authority to employees working under the "battalion chief" title, and Commission decisions excluding battalion chiefs who possess substantial supervisory authority date back to *City of Richland*, Decision 279-A. The facts examined in *Richland* did not include a deputy chief rank with multiple incumbents who exercise

substantial independent authority, and are thus clearly distinguishable from the facts in evidence here. The battalion chiefs and fire marshal at issue here are found to be at the "lead worker" level, exercising authority that is often the same as their own subordinates.

Other Duties Not Controlling -

The employer presented evidence on operational functions performed by the battalion chiefs and/or fire marshal, but those activities do not constitute a basis for excluding them as "supervisors" under the Commission's rule and precedents.

The administration of a budget is not an indicator of supervisory status. The battalion chiefs and the fire marshal each have responsibility for budgets pertaining to the functions, fire stations, or projects under their direction, and some of those budgets are quite substantial.⁴ Again, however, the evidence in this record indicates that employees in several classifications have the authority to sign off on expenditures.⁵

Processing of accident reports is an operational function that is shared by the disputed individuals with the company officers. Any officer has the authority to report an accident through the reporting procedure. Once an officer fills out the required form, it is passed up the chain of command with additional comments, as appropriate. A battalion chief who believes there is some discrepancy has the authority to conduct an interview to obtain

⁴ The budget administered by the fire marshal is in an amount of approximately \$1.3 million.

⁵ This includes positions outside the bargaining unit, such as secretaries, as well as medical service officers and captains included in the bargaining unit.

further information; a battalion chief who believes information has been falsified by an employee can request an investigation into the incident. An employee found guilty of making a false report could be subjected to discipline, but the investigation itself is somewhat remote from the possibility of discipline under the disciplinary procedure described above.

Attendance at meetings and committees include operations meetings with the deputy chiefs, but also include officers' meetings attended by the company officers. The fire marshal is involved in several committees external to the department,⁶ where he offers input on the formulation of city, county and state policies, but that falls far short of exercise of independent authority on policies which are binding on the employer, the fire department, or any bargaining unit employees. Thus, the involvement of the disputed individuals in committees and meetings does not create any conflict warranting their exclusion as supervisors.

Administrative leave is provided for the battalion chief in charge of training and for the fire marshal, as a result of collective bargaining between the employer and union.⁷ The fact that those employees are compensated for overtime work in a different fashion than other members of the bargaining unit does not, in and of itself, compel a conclusion that they should be excluded from the bargaining unit as supervisors.

⁶ These committees include that of the King County fire arson investigation team, Washington state fire marshals association, as well as others.

⁷ The record indicates the other battalion chiefs were provided administrative leave under a previous agreement between the parties, but do not have that privilege under the parties' current collective bargaining agreement. That provides basis for an inference that the deletion of the benefit was also a subject of collective bargaining between the parties.

Concerns About Undue Influence -

The employer voices a concern that it is "possible for members of the bargaining unit to leverage a battalion chief to not do or to do certain actions," but the same can be said for company officers who exercise much of the same authority. The employer has not produced evidence of distinguishing characteristics at the battalion chief or fire marshal level. The Executive Director has previously rejected the concept of multiple supervisory bargaining units within a paramilitary structure,⁸ so the employer's concern arises from its own choices in delegating authority.

FINDINGS OF FACT

1. The City of Redmond is a public employer within the meaning of RCW 41.56.030(1). The employer operates a fire department which is headed by a fire chief. A deputy chief classification has existed within the fire department since at least 1989, and there are presently three incumbents in that classification.
2. International Association of Fire Fighters, Local 2829, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of uniformed fire fighter employees of the City of Redmond.
3. The employer and union have been parties to a series of collective bargaining agreements. The battalion chief and fire marshal classifications have been included in the coverage of those collective bargaining agreements since at least 1992, when they were added to the existing bargaining unit by agreement of the parties.

⁸ See *City of Seattle*, Decision 1797-A (PECB, 1985).

4. During negotiations for a successor contract, the parties framed an issue concerning the bargaining unit status of the battalion chief and fire marshal classifications. The employer filed the petition to initiate this proceeding on April 11, 2003.
5. There have been no recent changes of circumstances affecting the organization within the fire department or the duties and authority of the battalion chiefs or fire marshal.
6. The battalion chiefs and fire marshal do not possess the authority to take independent action or to make effective recommendations with regard to hiring, assignment, promotion, transfer, layoff, recall, suspension, or discharge of employees in the bargaining unit represented by the union. Any exercise of authority by the battalion chiefs and fire marshal in those areas is tightly controlled by the parties' collective bargaining agreement or by established procedures, and is often similar to authority exercised by lieutenants and captains who are in the existing bargaining unit and are not at issue in this proceeding.
7. The independent authority of the battalion chiefs and fire marshal with regard to discipline is limited to counseling and the issuance of oral warnings.
8. The battalion chiefs and fire marshal perform ministerial and operations functions which are also performed by non-supervisory employees outside of the bargaining unit represented by the union and by other members of the existing bargaining unit who are not claimed by the employer to be supervisors.

9. The battalion chiefs and fire marshal are lead workers who act under the authority of, and at the direction of, the deputy chiefs and fire chief.

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. The battalion chiefs and fire marshal are not supervisors within the meaning of WAC 391-35-340, and are properly included under RCW 41.56.060 in the existing bargaining unit with other uniformed personnel.

ORDER CLARIFYING BARGAINING UNIT

The existing bargaining unit of City of Redmond employees represented by International Association of Fire Fighters, Local 2829, is clarified to continue to include the employees working the titles of "battalion chief" and "fire marshal" in the employer's fire department.

Issued at Olympia, Washington, on the 5th day of April, 2004

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CHRISTY L. YOSHITOMI, Hearing Officer

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