STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| In the matter of the petition of: | ) | |
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| INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE 751 | ) | CASE 8043-E-89-1361 |
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| | ) | DECISION 3520-A - PECB |
| Involving certain employees of: | ) | |
| | ) | |
| CITY OF WINSLOW | ) | DECISION OF COMMISSION AND CERTIFICATION |
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| | ) | |

Hafer, Price, Rinehart and Schwerin, by Cheryl A. French, Attorney at Law, appeared on behalf of the petitioner.

Inslee, Best, Doezie & Ryder, P.S., by Thomas H. Grimm, Attorney at Law, appeared on behalf of the employer.

This case comes before the Commission on timely objections filed by the City of Winslow, pursuant to WAC 391-25-590(2), to challenge rulings made by Executive Director Marvin L. Schurke.

## BACKGROUND

International Association of Machinists, District Lodge 751 (IAM) filed a representation petition with the Commission on June 16, 1989. It sought certification as exclusive bargaining representative of a city-wide bargaining unit of employees of the City of Winslow. The parties disagreed regarding a description of the appropriate bargaining unit(s), and regarding the list(s) of employees eligible for inclusion in such unit(s).

After a hearing before Hearing Officer Katrina I. Boedecker on September 15, 1989, and the filing of post-hearing briefs, the Executive Director issued an order on June 26, 1990, directing a cross-check in the petitioned-for employer-wide bargaining unit and

denying certain "supervisor" and "confidential" exclusions sought by the employer.

A cross-check was conducted and a tally was issued pursuant to WAC 391-25-410 on July 10, 1990, indicating that the union had the support of 24 of the 28 employees in the bargaining unit.

The employer filed objections on July 16, 1990. Both parties filed briefs on the objections.

## POSITIONS OF THE PARTIES

The employer contends the Executive Director erred in finding an employer-wide bargaining unit to be appropriate, and it argues that three separate bargaining units would be appropriate. The employer contends that unit determination elections were required to permit the employees to express their views on the unit configuration. The employer contends that the "public works leadman" should have been excluded from any bargaining unit as a supervisor, and that the "police matron" and "public works clerk" should have been excluded as confidential employees.

The union supports the Executive Director's decision on all points raised by the employer, and asks that a certification be issued on the basis of the cross-check already conducted. The union contends that the employer-wide unit is presumptively appropriate under the law, and is particularly appropriate where the employer has only a small workforce. The union argues that the employer has not met the heavy burden imposed on a party proposing exclusion of employees as "confidential", and questions whether the supervisors of the disputed clerical employees would be excludable as "confidential". The union argues that the Executive Director properly found the "public works leadman" to be a working foreman eligible for inclusion in the bargaining unit.

DISCUSSION

The Unit Determination Issue

The only petition before the Commission at this time seeks an employer-wide bargaining unit consisting of less than 25 employees. The employer has proposed division of that small workforce into three separate units, i.e., a "Public Works Department" unit, a "Police Department" unit and a "residual" unit. The Executive Director rejected the employer's arguments, and found the petitioned-for bargaining unit to be appropriate. For the reasons indicated herein, we affirm that finding.

RCW 41.56.060 sets forth the standards that this Commission is to follow in determining appropriate bargaining units.[1] As we noted in City of Pasco, Decision 2636-B (PECB, 1987), the purpose is to 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.

When sought by a petitioning union, an employer-wide bargaining unit has generally been viewed as presumptively appropriate. Smaller units may also be appropriate; especially in larger workforces. In cases involving a small workforce, the presumptive

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[1] In determining, modifying, or combining the bargaining unit, the Commission is directed to consider (1) the duties, skills, and working conditions of the public employees; (2) the history of collective bargaining; (3) the extent of organization among the public employees; and (4) the desire of the public employees.

propriety of petitioned-for employer-wide units seems particularly justified. There may be occasions when an employer can demonstrate unique circumstances that require smaller units. This is not such a case.

One of the rare mandatory exceptions to the presumptive propriety of a petitioned-for employer-wide bargaining unit occurs where a "wall-to-wall" unit would mix employees qualifying as "uniformed personnel" under RCW 41.56.030(7) with persons who are not "uniformed personnel". Together with paid fire fighters, the law enforcement officers employed by the state's larger cities and counties come within the definition of "uniformed personnel". Those employees are placed in separate bargaining units, because the "interest arbitration" procedures of RCW 41.56.430 et seq. are applicable to them. In smaller communities, such as Winslow, there is nothing in the statute or Commission precedent which precludes mixing law enforcement personnel in the same bargaining unit with other employees of the employer.[2]

When sought by a petitioning union, Commission precedent has allowed the creation of separate bargaining units of office-clerical employees, and has even permitted the severance of office-clerical groups from larger bargaining units. Nevertheless, nothing in the statute or Commission precedent precludes office-

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[2] At the time of the hearing, Winslow clearly had a population of less than 15,000. The employer's brief to the Commission suggests that situation may change, if a pending annexation proposal is approved and implemented. We decide this case on the record as we find it. If the population of Winslow actually increases as the result of annexation or otherwise, that change of circumstances may warrant a unit clarification petition to separate only those who qualify as "uniformed personnel" from the bargaining unit. Such a unit clarification could result from a hearing and decision, as in City of Yakima, Decision 853 (PECB, 1980), or from a stipulation of the parties, as in Cowlitz County, Decision 2067 (PECB, 1984) and Benton County, Decision 2221 (PECB, 1985).

clerical employees from being included in the same bargaining unit with other employees of the employer, when the extent of organization is employer-wide.

In this case, the petitioner has filed a properly supported petition seeking an appropriate employer-wide bargaining unit of employees that have no history of bargaining. The record supports the Executive Director's conclusion that there is a sufficient interaction and community of interest among the petitioned-for employees to find that they constitute an appropriate unit for the purposes of collective bargaining. Differences certainly exist in the duties, skills and working conditions of classifications within the proposed bargaining unit, but those differences are not so great that separation into smaller units is required.

No other organization or group of employees has intervened or otherwise presented the Commission with any indication of employee interest in a different unit configuration. We find, therefore, the union was entitled to have the question concerning representation determined in the petitioned-for bargaining unit.

## The Cross-Check Issue

Chapter 41.56 RCW draws many of its provisions from the federal Labor-Management Relations Act of 1947 (Taft-Hartley Act), but there are also numerous differences between the state and federal collective bargaining laws. One such difference is in the methodology for determining questions concerning representation. The statute we administer provides:

> **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 deter-

> mining, 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 shall determine the bargaining representative by (1) examination of organization membership rolls, (2) comparison of signatures on organization bargaining authorization cards, or (3) by conducting an election specifically therefor. [emphasis supplied]

The Commission has adopted standards for the use of the cross-check method, as follows:

> **WAC 391-25-391 SPECIAL PROVISION--PUBLIC EMPLOYEES.** Where only one organization is seeking certification as the representative of unrepresented employees, and the showing of interest submitted in support of the petition indicates that such organization has been authorized by a substantial majority of the employees to act as their representative for the purposes of collective bargaining, and the executive director finds that the conduct of an election would unnecessarily and unduly delay the determination of the question concerning representation with little likelihood of altering the outcome, the executive director may issue a direction of cross-check. The direction of cross-check and any accompanying rulings shall not be subject to review by the commission except upon objections timely filed under WAC 391-25-590.
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> **WAC 391-25-410 CROSS-CHECK OF RECORDS.** Where a cross-check of records is to be conducted to determine a question concerning representation, the organization shall submit to the agency original individual cards or letters signed and dated by employees in the bargaining unit not more than ninety days prior to the filing of the petition and indicating that such employees authorize the named organization to represent them for the purposes of collective bargaining, or shall submit

> to the agency membership records maintained by the organization as a part of its business records containing the names of employees and indicating those employees currently members in good standing. The employer shall make available to the agency original employment records maintained as a part of its business records containing the names and signatures of the employees in the bargaining unit. Prior to the commencement of the cross-check, the organization may file a request that the question concerning representation be determined by a representation election and such requests shall be honored. Where the organization files a disclaimer or a request for election after the commencement of the cross-check, the cross-check shall be terminated and the organization shall not seek to be certified in the bargaining unit for a period of at least one year thereafter. All cross-checks shall be by actual comparison of records submitted by the parties. The agency shall not disclose the names of employees giving representation authorization in favor of or appearing on the membership rolls of the organization. Upon the conclusion of the comparison of records, the agency officer conducting the cross-check shall prepare and furnish to the parties a tally sheet containing the number of employees in the bargaining unit, the number of employee records examined and the number of employee records counted as valid evidence of representation.

Our rules were developed on the basis of history dating back to the administration of Chapter 41.56 RCW by the Department of Labor and Industries (L&I), which had administrative rules providing for the use of the cross-check method to determine questions concerning representation.[3] Until 1978, the Commission operated under rules similar to the L&I rules.[4] The precursors to our current rules

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[3] Chapter 296-132 WAC, since repealed by L&I.

[4] Chapter 391-20 WAC. Those rules were permitted to expire after several re-adoptions as emergency rules.

went into effect in 1978.[5] Our current "consolidated" rules were adopted in 1980 on the basis of clientele input and comment, as well as experience during the period since the Commission commenced operations in 1976. Since the adoption of our current rules, evidence of 70% support has been required as a precondition to the direction of any cross-check. Because of that requirement, directed cross-checks have been infrequent.[6]

RCW 41.56.070 makes it abundantly clear that use of the cross-check is discretionary with the Commission:

> **RCW 41.56.070 ELECTION TO ASCERTAIN BARGAINING REPRESENTATIVE.** In the event the commission elects to conduct an election to ascertain the exclusive bargaining representative, and upon the request of a prospective bargaining representative showing written proof of at least thirty percent representation of the public employees within the unit, the commission shall hold an election by secret ballot to determine the issue. ... [emphasis supplied]

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[5] Chapter 391-21 WAC. Those rules were repealed upon the adoption of the Commission's "consolidated rules", below.

[6] The Commission has processed more than 8900 cases since 1976. Among those, our docket records show:

* Only 120 (1.35% of all PERC cases) have resulted in certification of exclusive bargaining representatives by cross-checks;
* Cross-checks were conducted in 34 cases filed while the L&I-pattern rules remained in effect (0.38% of all PERC cases; 28.33% of all cross-checks);
* Cross-checks were conducted by "consent" in 82 cases filed since the Commission-pattern rules on the subject (0.92% of all PERC cases; 68.33% of all cross-checks);
* Cross-checks were "directed" in **only 4 cases** filed since the Commission adopted rules on the subject (0.045% of all PERC cases; 3.33% of all cross-checks).

Arguably, our authority to use the cross-check methodology is broader than we have actually utilized.

The use of the cross-check procedure was affirmed by the courts in judicial review proceedings resulting from Evergreen General Hospital, Decision 58-A (PECB, 1977).[7]

The use of the cross-check was endorsed by the Commission in City of Redmond, Decision 1367-A (PECB, 1982), where the Commission stated:

> Our conclusion is based on the language of the statute, RCW 41.56.060, as well as considerations of efficiency. **RCW 41.56.060 clearly provides three methods for determining a bargaining representative, and does not suggest a legislative preference for any particular method. Contrary to the employer's suggestion, the statute does not prefer the election procedure to other methods.** RCW 41.56.070 sets forth election procedures to be used "in the event the commission elects to conduct an election..." (emphasis added). This again recognizes the options available to the commission, which have been left to the discretion of the agency to exercise.[2]
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> **The cross-check has the advantage of being a more efficient procedure than an election, requiring less utilization of this agency's scarce resources. On the other hand, an election accurately reflects whether any employees who signed authorization cards have changed their minds between the time they signed the card and the election, and would also give the union time to garner further support. Our rule, WAC 391-25-391, weighs the advantages and disadvantages of the two approaches, and resolves the matter by allowing a cross-check when the showing of interest indicates that the union has been authorized**

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[7] The decision of the King County Superior Court is published in WPERR at CD-47. The decision of the Court of Appeals is published in WPERR at CD-52.

> **as the bargaining representative by a "substantial majority of the employees".** It must also appear to the Executive Director that conducting an election would "unnecessarily and unduly delay the determination of the question concerning representation with little likelihood of altering the outcome".
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> 2 We recognize that the existence of these equally weighted options is different from the procedures available under the National Labor Relations Act. See: Gissell Packing Co., 395 U.S. 515 (1969).

[emphasis by **bold** supplied]

Applying those tests, the Commission made reference to the fact that the union had the support of more than 70% of the employees involved, and affirmed the direction of the cross-check, stating:

> Under such circumstances, holding an election, at any time either before or after the eligibility determination - would cause an undue and unnecessary delay precisely because, given the overwhelming support the union enjoyed, an election would be unlikely to alter the outcome. Consequently, considerations of efficiency should prevail under these circumstances, and the Executive Director should have ordered a cross-check within a reasonable time after the showing of interest was assessed and the description of the bargaining unit was established.

There was no issue in Redmond as to the scope of the bargaining unit. The Commission's only concern about the handling of the Redmond case was the delay caused by the hearing and decisionmaking process on the "eligibility" issues.[8] Here, the scope of the

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8 The Commission held that the Executive Director should have conducted a cross-check before the hearing on the "eligibility" issues. When available, summary determinations of questions concerning representation are now used, together with later determination of "eligibility" issues, in such situations. See, Chehalis School District, Decision 2019 (PECB, 1984).

bargaining unit was at issue, and the Executive Director properly waited until a ruling was made on the unit determination dispute before directing determination of the question concerning representation by cross-check.

The employer argues that, since other potential bargaining unit structures could also be appropriate, the Executive Director erred in directing a cross-check. The employer contends that the cross-check deprived employees of the right to choose their desired unit configuration. A unit determination election was directed in City of Prosser, Decision 3283 (PECB, 1989), where a union petitioned to commingle commissioned officers and non-commissioned employees of a small city's police department. In that case, the commissioned officers had an established "history of bargaining" in a separate unit bargaining unit. No such prior history exists in the case before us.[9]

A secret-ballot unit determination election is required where two or more unions have cross-petitioned for appropriate bargaining units that are different. Tumwater School District, Decision 1388 (PECB, 1983). Commission precedent does not require a unit determination election, however, where only one petition is pending and the unit sought by that petition is appropriate.

The employer's arguments in this case do not directly attack the cross-check that was conducted, or even the existence of the cross-check methodology. Rather, the employer would have us require the conduct of a unit determination election in any case where an

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[9] In other cases cited by the employer, unit determination elections were not directed. In Oak Harbor School District, Decision 1319 (PECB, 1981), three traffic safety education instructors were accreted to a unit of classified employees without an election. In King County Fire District 39, Decision 2638 (PECB, 1987), a mixed unit of uniformed fire fighters and civilian dispatchers was severed into two units without an election.

employer suggests the potential existence of any unit configuration other than the one sought by the petitioner. The effect of the procedure supported by the employer would be to impose yet another substantial restriction on the use of the cross-check authority conferred by the statute. We do not find such a procedure to be required, either by the terms of the statute or by the facts of this case. "The rules of the Commission ... provide for unit determination elections under appropriate circumstances." City of Everett, Decision 1883 (PECB, 1984) [emphasis supplied]. We have described some of the circumstances where such elections have properly been required. Comparable circumstances do not exist in the present case. We particularly see no reason to deviate in this case from the principles espoused in Redmond; not in light of actual cross-check results showing that the union had the support of 85.7% of the employees in the employer-wide bargaining unit.

## The Eligibility Issues

Public Works Leadman -

The exclusion of "supervisors" from bargaining units containing their subordinates has been addressed by the Commission on numerous occasions, most recently in King County, Decision 3245-B, 3351-A (PECB, 1990). The term "supervisor" includes only those employees who have or exercise certain types of authority, such as the authority to hire, assign, promote, transfer, lay off, recall, suspend, discipline or discharge employees or adjust their grievances.

A distinction has been drawn between individuals with sufficient authority to qualify as "supervisors" and those with authority akin to working foremen. The latter have authority to direct subordinates in their job assignments, without possessing authority to make meaningful changes in the employment relationship. In this case, the record indicates that Ken Yette falls into the "working foreman" category.

A tradition of excluding "supervisors" from the units containing their subordinates is based on the potential for conflicts of interest within the bargaining unit. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wa.2d 1004 (1981). Employees who exercise substantial authority over rank-and-file employees on bargainable subjects will normally be excluded; those who do not exercise such authority may remain in the rank-and-file bargaining unit.

The employer's brief emphasizes that Yette assigns work to other employees, and follows up to be certain that the work is completed. The employer claims that Yette has been delegated authority to discipline employees, but he has never exercised such authority. There is little else to indicate that Yette's presence in the bargaining unit at this time will present an ongoing potential for conflicts of interest. Yette does not hire, fire, promote, evaluate, transfer, lay off, or recall employees, nor does he have authority to adjust formal grievances. Should the situation change in the future, that may be the basis for a unit clarification under Chapter 391-35 WAC.

The "Confidential" Claims -

"Confidential" employees are excluded from the coverage of the statute by RCW 41.56.030(2)(c). The narrow definition of that exclusion adopted by the Supreme Court in International Association of Fire Fighters v. City of Yakima, 91 Wa.2d 101 (1978), is known as the "labor nexus" test. The focus is on an "intimate fiduciary relationship" which must relate to the "formulation of labor relations policy". The party proposing exclusion of an individual as a "confidential" bears a heavy burden. That burden is not met by speculative evidence regarding the role an employee might play in the future. Benton County, Decision 2719-B (PECB, 1989).

In this case, the individuals for which a "confidential" exclusion is sought were shown to be significantly relied on by their

department heads, but a sufficient nexus between their actual job duties and the formulation of labor relations policy was not shown. As was noted in City of Chewelah, Decision 3103-B (PECB, 1989):

> The "confidential" exclusion specifically protects the collective bargaining process, protecting the employer (and the process as a whole) from conflicts of interest and divided loyalties in an area where improper disclosure could damage the collective bargaining process. Possession of other types of information that are to be kept from public disclosure is not a threat to the collective bargaining process, and **a showing that an employee holds a position of general responsibility and trust does not establish a relationship warranting exclusion from collective bargaining rights, where the individual is not privy to labor relations material, strategies, or planning sessions.** Bellingham Housing Authority, Decision 2140-B (PECB, 1985); Benton County, Decision 2719 (PECB, 1989). [emphasis by **bold** supplied]

There has been no occasion for the police clerk to prepare or deal with confidential "labor relations policy" materials, because the employees of the Winslow Police Department have not been organized for the purposes of collective bargaining up to this time. The disciplinary materials handled by the police clerk in the past fall more in the area of implementing the responsibilities of the police chief as a "supervisor". The budget of a public agency is a matter of public record, and so is not inherently within the "labor nexus" applied in determining "confidential" exclusions.

The employer argues that there is no one in the department who could prepare collective bargaining and labor relations documents other than the police clerk. That argument is premised on assumptions that (1) the police chief will be involved in labor relations policy matters, and (2) that collective bargaining and labor relations documents will be prepared in the police department. It may be reasonable to make the first of those assumptions,

but the second one is too speculative to meet the employer's heavy burden of proof. We reach the same conclusion with regard to the public works clerk. There, too, the required labor relations nexus is speculative, at best.

An employer will be entitled to have exclusions of "confidential" employees whose duties necessarily imply contact with sensitive labor relations materials and information. At the same time, an employer must make reasonable accommodations to secure its confidential materials. In Clover Park School District, Decision 2243-B (PECB, 1987), the Commission stated:

> With [a number of secretaries] excluded by mutual agreement ..., we believe that the limited amount of labor relations work handled in the past by the contested employees can be assigned in the future to the agreed-upon confidential secretaries. We do not believe that a slight rearrangement in assigning this work will unduly burden the employer or its administrators.

With the stipulated exclusion of Susan Kasper in the city clerk's office, we are unwilling to deprive the employees at issue of all rights under Chapter 41.56 RCW, on speculation that the employer will "necessarily" use them in a "confidential" role in the future. Unit clarification procedures will be available to the employer if circumstances concerning the quantity and handling of sensitive labor relations materials change in the future.

NOW, THEREFORE, it is:

ORDERED

1. The findings of fact, conclusions of law and directions of cross-check issued by the Executive Director are AFFIRMED.

2. On the basis of the findings of fact and conclusions of law, and the results of the cross-check conducted in this matter, it is:

CERTIFIED

The employees in the appropriate bargaining unit consisting of:

> All full-time and regular part-time non-supervisory employees of the City of Winslow, excluding elected officials, officials appointed for a fixed term, confidential employees, supervisors, and all other employees of the employer,

have chosen INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE 751, as their exclusive bargaining representative for the purposes of collective bargaining with their employer with respect to wages, hours and conditions of employment.

Issued at Olympia, Washington, the 17th day of December, 1990.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Janet L. Gaunt

JANET L. GAUNT, Chairperson

Mark C. Endresen

MARK C. ENDRESEN, Commissioner

Joseph F. Quinn

JOSEPH F. QUINN, Commissioner