STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
AMALGAMATED TRANSIT UNION	)	CASE NO. 4147-E-82-776
	)	
	)	DECISION NO. 1642 - PECB
Involving certain employees of:	)	
	)	
SPOKANE TRANSIT AUTHORITY	)	DIRECTION OF ELECTION
	)	
	)	

Crumb & Casey, P.S., by Steven A. Crumb, attorney at law, appeared on behalf of the petitioner.

Preston, Thorgrimson, Ellis & Holman, by Thomas F. Kingen, attorney at law, appeared on behalf of the employer.

Amalgamated Transit Union filed a petition with the Public Employment Relations Commission on July 6, 1982 pursuant to Chapter 391-25 WAC. The union seeks certification as exclusive bargaining representative for a unit comprised of all supervisors and dispatchers employed by the Spokane Transit Authority. A pre-hearing conference was held on October 11, 1982, at which time contested issues were framed. A hearing was held on March 4, 1983 before Marvin L. Schurke, Executive Director. A bench decision was rendered on certain issues. Both parties filed post-hearing briefs on the remaining issues as to whether the petitioner was disqualified from representing the petitioned-for bargaining unit.

BACKGROUND

The Spokane Transit Authority is a public transportation benefit area operating pursuant to Chapter 36.57A RCW in Spokane County, Washington. There is no dispute that the employer is now a public employer subject to the jurisdiction of the Public Employment Relations Commission under Chapter 41.56 RCW. Some of the service now provided by the employer was formerly operated by the City of Spokane under a management contract with Washington Transit Management, Inc. The employees of Washington Transit Management, Inc. were regarded as private sector employees subject to the National Labor Relations Act, and they were represented for the purposes of collective bargaining by Amalgamated Transit Union Local 1015. In connection with the creation of Spokane Transit Authority, Washington Transit Management, Inc. has dropped out of the picture, and its employees became employees of the public employer.

ATU Local 1015 and Washington Transit Management, Inc. had a collective bargaining agreement due to expire on or about September 30, 1981, and those parties entered into negotiations for a successor agreement. The exclusion of certain "supervisors" from the bargaining unit became a subject of discussion between the parties. At some point during those negotiations, probably during the month of September, 1981, a poll was taken by a union steward among the affected supervisors, with the result that they approved their exclusion from the bargaining unit. On another occasion, a meeting was held by the union and management with all but one of the supervisors in attendance. The proposal to exclude the supervisors from the bargaining unit was discussed, and no opposition was voiced by any of the supervisors in attendance. On November 15, 1981, Local 1015 and Washington Transit Management, Inc. signed a collective bargaining agreement effective for the period from October 1, 1981 through September 30, 1984. The supervisors and dispatchers were excluded from the bargaining unit covered by the collective bargaining agreement. The Spokane Transit Authority was created thereafter, but has honored that collective bargaining agreement as successor to Washington Transit Management, Inc.

The petition in the instant case was signed by Mel Schoppert, who is identified on the petition as International Vice-President of the Amalgamated Transit Union. The petitioning organization is identified as "Amalgamated Transit Union". Testimony adduced at hearing indicates that ATU Local 1015 is <u>not</u> the petitioner. Rather, the petition was filed by Local 1015's parent union, with the expectation that the supervisor unit would be represented through a local organization separate and apart from Local 1015.

The individuals in the petitioned-for bargaining unit are all of the employer's first-line supervisors. They each have substantial authority, on behalf of the management, to effect personnel actions including hiring, assignment, transfer, discipline and discharge. They exercise their supervisory authority over groups ranging in size from 16 to 26 non-supervisory employees, most of whom are in the bargaining unit represented by Local 1015. None of the petitioned-for supervisors have been involved with the development of, or made privy to confidential information concerning, the labor relations policies of the employer. The employer has not formulated its procedures or designated its representatives for future negotiations with labor organizations representing its employees.

The constitution and general laws of the Amalgamated Transit Union were placed in evidence, and International Vice-President Schoppert testified as to the interpretation of various provisions thereof.

POSITIONS OF THE PARTIES

The employer raised four issues in opposition to the petition. First, the employer contended that the petitioned-for individuals were not public employees within the meaning of RCW 41.56.030(2). Next the employer asserted that the petition in the instant case was untimely for two reasons, claiming an "election bar" and a "contract bar" under RCW 41.56.070. Finally, the employer contends that the petitioner is disqualified from representing the petitioned-for bargaining unit of supervisors because its Local 1015 is exclusive bargaining representative of the non-supervisory employees of the employer who are the subordinates of the petitioned-for supervisors. In particular, the employer relies on the oath or "obligation" undertaken by each member of the Amalgamated Transit Union, the provisions of the constitution dealing with discipline of local union officers or local union members for violation of the laws and policies of the union, the provisions of the constitution permitting the international union to place a local union in trusteeship, the provisions of the constitution limiting the membership rights of management personnel, supervisors and other employer officials, the provisions of the constitution directing that where members of the ATU belong to different locals and are employed by the same company, such local unions "shall" form joint councils for bargaining purposes, and the provisions of the constitution requiring the approval of the international union for certain contracts entered into by local unions. The employer thus contends that there is a clear and present danger that the affairs of the supervisor unit would be co-mingled with the affairs of Local 1015, in violation of both state and federal labor policy.

The union acknowledged that the petitioned-for employees are "supervisors", and that ATU Local 1015 agreed to their exclusion from the rank-and-file unit for that reason; but it contends that they are nevertheless public employees within the meaning of Chapter 41.56 RCW. Responding to the motion for dismissal of the petition on timeliness grounds, the union pointed out that there had been no election conducted by the Commission and there was no contract in effect covering the petitioned-for employees. The union acknowledged that the right of employees to select a labor organization as their exclusive bargaining representative is not unqualified, but asserts that the burden of proof lies with the employer to establish a disqualification. The union contends that the burden has not been met in this case, particularly in light of the testimony of the International Vice-President of the union that it would not seek to have joint negotiations between the petitioned-for unit and the unit represented by Local 1015, and in light of the acknowledgements by both parties that the union could not bind the employer by or to the provisions of the union's constitution and general laws.

DISCUSSION

Confidentiality Issue

Confirming the bench decision rendered at the close of the hearing, the evidence clearly establishes that the petitioned-for individuals are supervisors who exercise substantial authority, on behalf of the employer, over other employees. Their exclusion from the rank-and-file bargaining unit represented by ATU Local 1015 appears to be entirely appropriate under the standards of City of Richland, Decision 279-A (PECB, 1978), aff. 29 Wa.App. 599 (Division III, 1981), cert. den., 96 Wn2d 1004 (1981). However, supervisors are public employees within the meaning of the Public Employees Collective Bargaining Act. City of Tacoma, Decision 95-A (Pecb, 1977); Municipality of Metropolitan Seattle v. L&I, 88 Wn2d 925 (1977). In City of Yakima v. IAFF, 91 Wn.2d 101 (1978), the Supreme Court laid out a very high standard for exclusion of an individual from the coverage of RCW 41.56 under the "confidential" exclusion contained in RCW 41.56.030(2)(c). Thus, confidential exclusion requires a direct access to the labor relations policies of the employer. General supervisory authority is not sufficient for exclusion. In NLRB v. Hendricks County Rural Electric Membership Corporation, ____ U.S. ____, 108 LRRM 3105 (1981), the Supreme Court of the United States adopted a similar "labor nexus" test for confidential employee status. The latter development indicates that state labor policy in this regard is completely consistent with federal labor policy under the National Labor Relations Act. When those tests are applied to the evidence of record in this case, it is abundantly clear that the supervisors at issue are not excludable as "confidential" employees. They have never been involved with the development of the employer's labor relations policies or the preparation or implementation of its collective bargaining strategies. On the contrary, they were included in the rank-and-file bargaining unit at a time when they might well have qualified for exclusion from that unit under the "supervisor" exclusion contained in Section 2(11) of the NLRA. For the future, the evidence is clear that the employer has not even formulated its process or designated its personnel for the bargaining of its next contract, making it impossible to exclude any particular person from the coverage of RCW 41.56 at this point in time.

Certification Bar Issue

Confirming the bench decision rendered at the close of the hearing, the motion for dismissal under "certification bar" principles is denied. Two pieces of evidence bear on this issue. The first is evidence of the polling of the supervisors by a union steward. The second is the evidence of joint polling by (or silence in the face of an opportunity to object before) both the union and the employer. Such polling is an inherently coercive exercise. The public policy of this State, as expressed in RCW 41.56.060, is to assure

public employees that a question concerning representation will be determined by a secret ballot election or confidential cross-check conducted by the Public Employment Relations Commission. Only representation determinations conducted pursuant to the statute are entitled to the one-year "bar" specified in RCW 41.56.070.

Contract Bar Issue

RCW 41.56.070 states, in part:

> ... Where there is a valid collective bargaining agreement in effect, no question of representation may be raised except during the period not more than ninety nor less than sixty days prior to the expiration date of the agreement. ...

The employer acknowledges that the petitioned-for supervisors have no collective bargaining agreement currently in effect covering their employment, but urges that the three-year contract signed by the employer with ATU Local 1015 should be considered a bar to the petition in this case, since it incorporates the agreement of those parties to terminate the ATU's representation rights as to the supervisors.

Confirming the bench decision rendered at the close of the hearing, the motion for dismissal under "contract bar" principles is denied. Unit determination is not a mandatory subject of collective bargaining under Chapter 41.56 RCW. City of Richland, supra. Parties may agree on matters of unit determination, but they may not bargain to impasse on such matters. Spokane School District, Decision 718 (EDUC, 1979). If permitted to operate as urged by the employer in this case, the collective bargaining agreement between two parties would prejudice the statutory rights of other parties, i.e., the supervisors, to organize for the purposes of collective bargaining. For the Commission to honor and indeed enforce such an agreement would be inconsistent with the statute. Further, the contract bar argument asserted by the employer is defective in that it calls for a selective application for which no support is found in the language of the statute. If a contract bar exists under the statute, it bars all representation petitions until the "window period" near the end of the contract. The theory espoused in this case by the employer would bar only ATU Local 1015 and its affiliates.

Disqualification Issue

The briefs filed by the parties are limited to the issue of whether the Amalgamated Transit Union is disqualified from being certified as exclusive bargaining representative of the supervisors and dispatchers. The decision of the Executive Director in City of Richland, Decision 1519 (PECB, issued

November 8, 1982) was available to the parties at the time of the hearing. The affirming decision of the Commission, Decision 1519-A, was issued on March 25, 1983, after the hearing in the instant matter.

The position of the employer is entirely based on what might happen if certain provisions of the ATU's constitution and general laws were interpreted and applied in a certain way. Neither the employer nor the Public Employment Relations Commission are in a position to authoritatively interpret (or even to demand from the union that it authoritatively interpret or enforce) the constitution and general laws of the Amalgamated Transit Union. Although the provisions cited by the employer have been carefully reviewed, and even though provisions cited by the employer appear to be susceptible to the interpretations suggested by the employer, it is concluded that the entire exercise is one of speculation and lacking in probative value with respect to determining the dispute now before the Commission. Agreeing with the union, the decisions in City of Richland, Decisions 1519 and 1519-A, and the cases cited therein require a showing that there is a clear and present danger of a conflict of interest in order to disqualify a labor organization from representing a bargaining unit of employees. The situation at the present time discloses that the Amalgamated Transit Union, which is a labor organization and bargaining representative within the meaning of RCW 41.56.030(3), has petitioned to represent a separate unit of supervisors. The evidence indicates that the local union which represents non-supervisory employees of the employer is not the petitioner and is not seeking to represent the supervisors. There is no evidence that Local 1015 is presently influenced in any way by the supervisors in the petitioned-for group.

The employer urges that both Richland Decision 1519 and cited NLRB cases rule out the possibility of issuance of a "conditional" certification and preclude a certification based on the representations made by the petitioner through its International Vice-President at the hearing. The concern would be valid if the Commission were being asked in this case to certify the union conditioned on the occurrence of some future change of circumstances. In this case, the situation is the other way around! The union is presently qualified for certification. Certification of the ATU for the petitioned-for bargaining unit would create a bargaining relationship and unit separate and apart from the non-supervisory unit represented by Local 1015. One of the perquisites devolving to an employer and to an exclusive bargaining representative as the result of the definition of their bargaining unit is the right of each to demand from the other that negotiations take place and a collective bargaining agreement be signed covering that bargaining unit. RCW 41.56.030(4); Mount Vernon School District, Decision 1629 (PECB, 1983). A union is not entitled to demand negotiations for a unit larger than that for which it is certified. See: New York Shipbuilding Assoc., 118 NLRB 1481 (1957). If the union should at some time in the future act to change the

current situation, whether by seeking to bargain through a joint council or by permitting supervisors to influence the affairs of Local 1015 or otherwise, that will be soon enough for the employer to file a petition with the Commission questioning the certifications in one or both of the bargaining units. The employer's concern that Lewis County, Decision No. 556-A (PECB, 1979) would preclude it from raising such an issue at a later time is unfounded. The issues considered in this case and in the recent Richland decisions had not come to light when the Lewis County decision was issued. Leaving open the question of whether a refusal to bargain would or would not be justified, it is clear that the employer would have the right to question the qualifications of the union where a possible violation of RCW 41.56.140(2) or the principles decided in the recent Richland decisions were involved. Finally, both at hearing and in its brief, the union has acknowledged the limitations imposed upon it by the recent Richland decisions. It follows that the union would not be in a position to preclude, upon a change of circumstances, the employer's petition to test a breach of those limitations.

FINDINGS OF FACT

1. Spokane Transit Authority is a public transportation benefit area operating pursuant to Chapter 36.57A RCW in Spokane County, Washington, and is a public employer within the meaning of Chapter 41.56 RCW.

2. Amalgamated Transit Union is a labor organization and a bargaining representative within the meaning of RCW 41.56.030(3). Melvin Schoppert is International Vice-President.

3. By a petition filed by Schoppert on July 6, 1982, Amalgamated Transit Union has initiated proceedings pursuant to Chapter 391-25 WAC for investigation of a question concerning representation in a bargaining unit comprised of all full-time and regular part-time supervisors and dispatchers employed by Spokane Transit Authority.

4. The petitioned-for supervisors and dispatchers were formerly included in a bargaining unit together with other employees of the employer. Local 1015 of Amalgamated Transit Union is recognized as exclusive collective bargaining representative of that bargaining unit. As the result of collective bargaining in 1981, the petitioned-for supervisors and dispatchers were removed from that bargaining unit. There is currently no collective bargaining agreement in effect covering the petitioned-for supervisors and dispatchers. Local 1015 is not the petitioner in this proceeding and does not seek to represent the employees in the petitioned-for separate bargaining unit.

5. There has been no certification or attempted certification involving the petitioned-for supervisors in proceedings before the Public Employment Relations Commission or any other impartial agency statutorily charged with jurisdiction to administer representation proceedings under a collective bargaining statute similar in scope and structure to Chapter 41.56 RCW.

6. The petitioned-for supervisors and dispatchers exercise general supervisory authority as the first-line supervisors of employees of the employer. None of them has a fiduciary relationship with the employer on matters involving the confidential labor relations policies of the employer. The employer has not established its procedures or designated its personnel for future conduct of its labor relations.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. The petition filed to initiate the captioned representation proceeding was timely filed under RCW 41.56.070 and WAC 391-25-030.

3. The petitioned-for employees are public employees within the meaning of RCW 41.56.030(2).

4. Based on the circumstances now in existence, there is currently no clear and present danger of a conflict of interest sufficient to disqualify the petitioner from certification as exclusive bargaining representative of the petitioned-for employees under RCW 41.56.080.

5. The bargaining unit described as:

> All full-time and regular part-time supervisors and dispatchers employed by Spokane Transit Authority, excluding confidential employees, and non-supervisory employees.

is an appropriate unit for the purposes of collective bargaining under RCW 41.56.060. A question concerning representation presently exists in such unit.

DIRECTION OF ELECTION

A representation election by secret ballot shall be held under the direction of the Public Employment Relations Commission among all full-time and

regular part-time supervisors and dispatchers employed by Spokane Transit Authority, excluding confidential employees, and non-supervisory employees, to determine whether a majority of those employees desire to be represented for the purpose of collective bargaining by Amalgamated Transit Union or by no representation.

DATED at Olympia, Washington, this 24th day of May, 1983.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director