

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: )  
)  
PUBLIC, PROFESSIONAL AND OFFICE ) CASE NO. 6225-E-86-1108  
CLERICAL EMPLOYEES AND DRIVERS )  
LOCAL 763, affiliated with the ) DECISION NO. 2617 PECB  
INTERNATIONAL BROTHERHOOD OF )  
TEAMSTERS, CHAUFFEURS, WAREHOUSE- )  
MEN AND HELPERS OF AMERICA )  
)  
Involving certain employees of: ) DIRECTION OF ELECTION  
)  
TOWN OF GRANITE FALLS )  
)  
)  
)  
\_\_\_\_\_ )

Davis, Roberts, Reid and Wacker, by Bruce E. Heller, Attorney at Law, appeared on behalf of the petitioner.

Fisher, Patterson, Metcalf and Simpson, by David G. Metcalf, Attorney at Law, appeared on behalf of the employer.

On February 7, 1986, Teamsters Local 763 (union) filed a petition with the Public Employment Relations Commission for investigation of a question concerning representation involving certain employees of the Town of Granite Falls (employer). The petitioner seeks to represent a bargaining unit of all full-time and regular part-time employees of the employer. A pre-hearing conference was conducted. A statement of results of the pre-hearing conference was issued on March 18, 1986. Disputes affecting 50 percent or more of the employees claimed by the union to be eligible to vote precluded conduct of an early election and issuance of an interim certification under "vote and impound" procedures. A hearing was convened on May 6, 1986, in Everett, Washington, before Hearing Officer

Frederick J. Rosenberry. The parties submitted post-hearing briefs.

### BACKGROUND

The Town of Granite Falls is a municipal corporation of the fourth class, organized under Chapter 35.27 RCW and located in rural Snohomish County, to the east of Everett, Washington. It is governed by a part-time mayor and part-time town council.

The employees of the Town of Granite Falls have heretofore not been represented for the purposes of collective bargaining. The union has filed a properly supported petition in which it seeks to represent a bargaining unit described as:

All full-time and regular part-time employees of the Town of Granite Falls excluding elected officials, officials appointed for fixed terms, supervisors and confidential employees.

The parties agreed at the pre-hearing conference on the existence of a question concerning representation and on the eligibility of three employees, including a full-time police officer and two (water/sewer) operations and maintenance employees, to vote in a representation election. The parties stipulated that reserve police officers are not to be included in the petitioned-for bargaining unit.

### DISCUSSION

#### The "Appointed Officials" Argument

RCW 41.56.030(2) provides, in relevant part:

(2) "Public employee" means any employee of a public employer except any person . . . (b) appointed to office pursuant to statute, ordinance or resolution for a specified term of office by the executive head or body of the public employer, . . .

The employer would have the description of the bargaining unit altered to specifically exclude the positions of "chief of police" (Eugene Hampel) and "town clerk" (Gerry James) from the bargaining unit. It contends that neither the chief of police nor the town clerk is a public employee as defined in RCW 41.56.030(2). The employer claims that the incumbents in these two positions are appointed to their offices pursuant to RCW 35.27.070 by the mayor, who is the executive head of the public employer, that they serve at the pleasure of the mayor, and that their appointments are for a specified term of office (that being the term of office of the mayor). Therefore, in the view of the employer, they are covered by the exclusion of "appointed officials" set forth in RCW 41.56.030(2)(b) and are not to be included in any bargaining unit.

It is the position of the union that the chief of police and the town clerk are public employees pursuant to RCW 41.56.030 and should be included in the petitioned-for bargaining unit.

The town marshal and town clerk are appointed by the mayor in accordance with RCW 35.27.070, which provides, in relevant part:

Town officers enumerated. The government of a town shall be vested in a mayor and a council consisting of five members and a treasurer, all elective; the mayor shall appoint a clerk, a marshal, and a police justice; and may appoint . . . such police and other subordinate officers as may be provided for by ordinance. All appointive

officers shall hold office at the pleasure of the mayor and shall not be subject to confirmation by the town council, . . .

Eugene Hampel came up through the ranks at Granite Falls as a reserve police officer and full-time police officer. He was appointed as acting chief of police on February 12, 1985, and was appointed to his current position as chief of police on March 13, 1986. The appointment was for an indefinite period of time.

Gerry James has been employed in the position of town clerk for three years. She was appointed to the position by the predecessor to the incumbent mayor. She continued in the position without a specific reappointment upon the transfer of authority to the present mayor.

Although the common law "employment at will" doctrine has been eroded in some cases involving an explicit or implicit promise of employment for a determinate period, the general rule has been and continues to be that (at least in the absence of "civil service" or similar procedures, a specific employment contract, or "job security" provisions in a collective bargaining agreement) all employees serve "at the pleasure" of their employers for an indeterminate period. It is clear that neither the chief of police nor the town clerk is appointed for a fixed term in the same sense that members of the Public Employment Relations Commission are appointed under RCW 41.58.010 for a specified number of years. Further distinguishing the situations, a governor could remove a duly appointed and confirmed member of the Commission prior to expiration of their fixed term only for "neglect of duty or malfeasance in office", whereas the mayor of Granite Falls could act at any time so long as there is no violation of other applicable laws. The employer's novel theory of an indirect

fixed term derivative from the term of the mayor is discredited by the facts of this case which indicate that the town clerk has survived a change of mayors without re-appointment. It is thus concluded that neither of these disputed individuals is an "appointed official" within the meaning of RCW 41.56.030(2)(b). See: Grays Harbor County, Decision 1948 (PECB, 1984).

#### The "Supervisor" Issue

The employer maintains that the chief of police acts in a "managerial capacity and/or as supervisor and is thus not an employee as defined by RCW 41.56.030". The argument would have the chief of police included in the RCW 41.56.030(1) definition of "public employer" as a person "acting on behalf of" the public body, because he is claimed to be responsible for discipline regarding the other full-time officer and making recommendations regarding the hiring for regular and reserve police officer positions.

The union counters that, because of the small size of the Town of Granite Falls, the chief of police is not a supervisor and should not be excluded from the proposed bargaining unit under the Public Employees Collective Bargaining Act (PECBA). The union claims that the chief of police performs the same duties and works under the same working conditions as the employer's one other full-time police officer and does not come in contact with labor relations matters. The union further maintains that the mayor is the supervisor of the police department, because she makes all of the final decisions with respect to hiring, firing, discipline, and other supervisory decisions.

The law is clear, and does not support the employer's position on this issue. As distinguished from its federal counterpart, the National Labor Relations Act, the PECBA does not deny

"supervisors" access to collective bargaining. Rejecting arguments very similar to those advanced by the employer here, the Supreme Court held in Municipality of Metropolitan Seattle v. Department of Labor and Industries, 88 Wn.2d 925 (1977) that "supervisors" are employees within the meaning and coverage of Chapter 41.56 RCW.

Supervisors will be excluded from a bargaining unit containing their rank and file subordinates under the unit determination criteria of RCW 41.56.060, where separation is warranted by a potential for conflict of interest with the bargaining unit arising from the exercise by the supervisor of authority on behalf of the employer. City of Richland, Decision 279-A (PECB, 1978); aff. 29 Wn.App. 599 (1982): cert. den., 96 Wn.2d 1004 (1981). The "supervisor" claims advanced by the employer in this case are examined under that line of precedent.

The duties of the disputed "chief of police" position are described in RCW 35.27.240 as follows:

Town marshal - Police department. The department of police in a town shall be under the direction and control of the marshal subject to the direction of the mayor. He shall prosecute before the police justice all violations of town ordinances which come to his knowledge. He shall have charge of the prison and prisoners. He may pursue and arrest violators of town ordinances beyond the town limits.

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

mayor, he may appoint additional policemen for one day only when necessary for the preservation of public order.

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

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

He shall perform such other services as the council by ordinance may require.

The employer's only other full-time police officer is stipulated to be an eligible voter in this case.

The employer does not have a written job description for its "chief of police". The general duties of the position are to enforce laws, complete required reports, issue traffic citations, screen and route department mail, and perform other "administrative" functions. The chief does not have a secretary, and so does his own typing and filing. He does not have a separate office, and so shares a common office area with the other full-time police officer and any reserve officers.

The chief and the full-time officer work alternately on day or night shifts. They coordinate their time off, because in one's absence the other is on-call. The mayor is responsible for approving the chief and the full-time officer's work schedules; any deviation must be similarly approved. Neither the chief nor the full-time officer is authorized to receive overtime pay.

The shift duties are generally the same for the chief and the other full-time officer except for reviewing reports and relaying them to the courts. The individual assigned to the day shift (i.e., during the business hours of the courts) takes responsibility for review of reports to see that they are properly filed in the courts. The investigating officer of an incident is the person in charge, and the chief does not intervene. Thus, the chief may spend his entire shift on patrol or may spend some of his work shift attending to administrative duties. The full-time officer spends about the same amount of time performing administrative duties. The chief is the town attorney's contact person for subpoenas, case status, quality of reports and evidence.

The authority to hire police officers is clearly vested by statute in the mayor and is, in fact, exercised by the mayor. The chief testified that he does not have the discretionary authority either to hire police officers or to determine how many regular or reserve officers will be employed. He may recommend candidates to the mayor for hiring into the full-time police officer position. Reserve police officer candidates are screened for suitability by an oral review board which is made up of a county reserve deputy, a citizen, the full-time police officer, and two town reserve officers. The chief may make suggestions on the composition of the oral board, but he does not participate in its formation (which is accomplished by the full-time police officer). The chief is not a member of the oral board. Some of the chief's recommendations have been accepted while others have not. He recommended that the incumbent full-time police officer be hired. On the other hand, the mayor rejected the chief's recommendation that two applicants who had been determined by the oral board to be acceptable for employment be sent to the reserve officer police academy (which is a prerequisite to hiring).



The chief and the full-time officer jointly schedule reserve officer work and training schedules. The reserve officers normally work on their own but, if there is a problem or they are new, the chief and the full-time officer share in training and supervision of the reserve officers.

The chief is paid \$200.00 per month more than the full-time officer, however, the record does not reflect if the basis for the higher rate is greater length of law enforcement service or for a different reason.

The chief has no special privileges that are not extended to the full-time officer. In 1982, the town council passed an ordinance identifying paid holidays, making provisions for paid vacations, and establishing sick leave benefits and bereavement leave. The ordinance is applicable to all of the town's full-time employees, including the chief of police.

The incumbent chief has only limited "oversight" responsibilities. He does not perform evaluations of the full-time or reserve officers. The chief has investigated citizen complaints against police officers and has spoken with the involved officer about the matter. If the complaint needed to be acted upon, the chief would bring the matter to the attention of the mayor. The chief has never imposed any form of discipline and is not aware of a predecessor chief doing so. In the event that the chief thought that discipline may be appropriate, he does not have the authority to act independently, but rather would discuss the matter with the mayor who would make a final decision. The chief has never received or processed an employee grievance. Any council or mayor directives to the police department are routed through the chief, but he does not attend any special executive session meetings with the mayor or town council.

The chief is required to obtain council authorization prior to obtaining police vehicle repairs, or for making expenditures for police equipment in excess of \$100.00, and may be required to explain the necessity for purchases in lesser amounts. The chief, with the assistance of the full-time officer and others, drafted a proposed police department budget for submission to the town council for the current year. The chief's initial budget proposal calling for the hiring of an additional full-time police officer was rejected by the town council.

Former mayors and town council members testified that the police department was operated in the past under the direction and control of the chief, that the chief's recommendations on hiring were honored, and that the chief had the authority to impose discipline. Based on the record developed in the instant case, it appears that the authority of the incumbent has been diminished from that of his predecessors, while the intervention and exercise of authority by the mayor has increased. Under the circumstances now existing, the title of "chief of police" is not indicative of substantial authority over other employees so as to create the potential for conflict that was of concern in the City of Richland case. On the contrary, it appears that the so-called "chief of police" has a community of interest with other employees of the employer.

#### The "Confidential" Claim

The employer contends that the town clerk is a confidential employee who acts as the alter ego of the mayor and the town council in processing all communications and inquiries to and from the elected officials, preparing and typing all of their correspondence, including any confidential labor relations matters.

The union claims that the duties of the town clerk do not warrant exclusion from the bargaining unit as either a confidential employee or a supervisor. The union claims that her duties of opening the mail, processing payroll and traffic violations, recording the minutes of city council and planning commission meetings, and performing various clerical functions do not have a "labor nexus", and that the union claims that the town clerk has a community of interest with the other members of the bargaining unit.

RCW 41.56.030(2)(c) excludes from the coverage of the Public Employees Collective Bargaining Act:

. . . any person . . . whose duties as deputy, administrative assistant, or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit . . .

The controlling interpretive precedent is City of Yakima v. IAFF, 91 Wn.2d 101 (1978), where the Supreme Court stated:

When the phrase confidential relationship is used in the collective bargaining act, we believe it is clear that the legislature was concerned with an employees potential misuse of confidential employer labor relations policy and a conflict of interest.

\* \* \*

We hold that in order for an employee to come within the exception of RCW 41.56-.030(2), the duties which imply the confidential relationship must flow from an official intimate fiduciary relationship with the executive head of the bargaining unit or public official. The nature of this close association must concern the official and policy responsibilities of the public officer or executive head of the bargaining unit, including formulation of

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

The party seeking exclusion of an employee on the grounds of confidentiality has a heavy burden of proof. City of Seattle, Decision 689-A (PECB, 1979); San Juan County, Decision 1690-A (PECB, 1984); City of Seattle, Decision 1797-A (PECB, 1985). To sustain that burden of proof, the moving party must present evidence that the affected employee has intimate contact with, and necessary knowledge of, the public employer's labor relations policies and practices.

The statutory duties of the town clerk are described in RCW 35.27.220, as follows:

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

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

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

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

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

The town clerk was trained by her predecessor. Her duties which are to: open, sort, and distribute mail, record, type and distribute minutes of planning commission and town council meetings, coordinate with the town council and attorney on the drafting and filing of city ordinances, account for expenditures, prepare annual budget and financial reports, prepare payroll checks, prepare periodic payroll reports and W-2 tax withholding statements, answer telephone inquiries, maintain radio contact with the police officer on duty, log traffic citations, collect traffic fines and forward relevant data to the appropriate court, draft and type correspondence for the mayor and council, and attempt to resolve citizen complaints or relay them on to the mayor. In the event of the unavailability of a female reserve police officer, the town clerk has infrequently served as police matron.

The clerk does not have a secretary or other office help. The incumbent clerk is not involved in hiring or firing and does not supervise any employees.

The town clerk's work station is located at the town hall, which also houses the police department and the offices of the part-time mayor (who is present at the town hall for one or two hours per day) and the part-time elected city treasurer.

The town clerk has attended some executive sessions of the town council, normally to answer financial questions. She has not been privy to or participated in discussions of "labor relations", but that must be taken in the context that none of the employees of this employer have been organized in the past.

The onset of collective bargaining activity among the employees of this employer will, in and of itself, constitute a change of circumstances affecting the operation of the municipality and,

in particular, creating a need for maintenance of "confidential" labor materials of the type which the Supreme Court sought to protect in its City of Yakima decision. As the only full-time clerical employee, and as the custodian of the employer's official records, the town clerk is the logical custodian of such "confidential" materials. In fact, in the absence of exclusion of the town clerk as a "confidential" employee, the part-time elected officials of this small municipality would be tempted, if not compelled, to engage in the questionable practice of keeping the official records of the employer at their homes or elsewhere away from the employer's premises, in order to maintain confidentiality. The employer will not be put in that position.

#### Other Eligibility Issues

The parties disagreed at the pre-hearing conference as to the voter eligibility of two other employees. While one of those issues was withdrawn at the outset of the hearing, a different issue was raised for the first time at the hearing.

The employer took the position that James Mirabella was not eligible to vote, because he had been notified prior to the pre-hearing conference of the termination of his employment and his last day of employment was to be March 21, 1986. The union has filed unfair labor practice charges against the employer, alleging that Mirabella's termination was discriminatory and in violation of RCW 41.56.140. Case No. 6344-U-86-1233. The unfair labor practice charges have been heard by an Examiner and are pending for decision. The union has, however, filed a request to proceed under WAC 391-25-370, so that the unfair labor practice case does not operate as a "blocking charge" in this representation case. Mirabella will be permitted to vote by challenged ballot in the representation election directed

herein, with the determination of his eligibility to be resolved in the unfair labor practice case.

The employer sought at the pre-hearing conference to include Mike Friese on the voter eligibility list, contending that he had been hired as an employee and was to work his first shift on March 24, 1986, replacing Mirabella. The union initially took the position that Friese was ineligible to vote because he had not reported for a work shift but changed its position at the hearing to concur that Friese is eligible to vote.

Immediately prior to the conclusion of the instant hearing, the parties presented evidence regarding the position of animal control officer. This position was not discussed at the pre-hearing conference and was not included on the eligibility roster stipulated at that time. The position has been in existence for an undisclosed period of time but was vacant from some time in 1984 until April 15, 1986. At the time the position was filled, the employee hired was advised that the appointment might be temporary, because pending litigation regarding the former incumbent could result in her reinstatement. It was the city's intention that the position remain filled for an indefinite period of time regardless of who fills the position. The position is part-time, calling for a total of eight hours of work per week, not necessarily in one consecutive work shift. Aside from raising the matter, neither party took a position on the record as to whether the animal control officer should be included in the bargaining unit. The determination of appropriate bargaining units is a function delegated by the Legislature to the Commission. City of Richland, supra. The inclusion of part-time employees in bargaining units, and the appropriate cut-off point for their inclusion, have been the subject of numerous disputes. The general rule has been to include "regular part-time" employees

in bargaining units with other employees of the employer, and the cut-off for eligibility has been established in a number of cases at approximately 1/6 of the full-time work schedule. See: King County, Decision 1675 (PECB, 1983); Community College District 12, Decision 2374 (PECB, 1986); Mount Vernon School District, Decision 2273-A (PECB, 1986). At Granite Falls, the position of animal control officer provides 1/5 of the normal 40-hour work week throughout the year, which is well above the threshold established in the cases cited.

#### Determining the Question Concerning Representation

WAC 391-25-391 authorizes, under certain circumstances, the direction of a cross-check to be conducted under WAC 391-25-410 for the purpose of determining a question concerning representation. The showing of interest submitted by the union in this case was substantial, and there is only the one union involved. Under such circumstances, a cross-check may be considered. See: City of Redmond, Decision 1367-A (PECB, 1982). However, the number of employees involved is small and each employee added to or deleted from the eligibility list constitutes a substantial percentage of the whole group. When the disputed turnover in the operations/maintenance workforce, the filling of the added animal control position, and the possibility of other turnover are all taken into account, it is no longer certain that the showing of interest now on file represents a substantial majority of the employees so as to indicate little likelihood that an election would alter the result. Thus, an election has been directed.

#### FINDINGS OF FACT

1. The Town of Granite Falls is a municipal corporation of the state of Washington organized under Chapter 35.27 RCW,



and is a "public employer" within the meaning of RCW 41.56.030(1).

2. Public, Professional and Office Clerical Employees and Drivers Local 763, a labor organization and "bargaining representative" within the meaning of RCW 41.56.030(3), has filed a timely and properly supported petition seeking certification as exclusive bargaining representative of certain employees of the Town of Granite Falls.
3. The town clerk is appointed by the mayor but does not have a specified term of office. The town clerk is the only full-time office clerical employee of the employer. She is the custodian of the official records of the employer, serves as secretary to the elected mayor and town council members who are responsible for the development and implementation of the employer's labor relations policy, and she advises the mayor and town council on the financial affairs of the employer.
4. The chief of police is appointed by the mayor under the statutory authority to appoint a town marshal, but does not have a specified term of office. The chief of police is one of two full-time police officers employed by the employer. No job description has been developed for the chief of police. The incumbent has a community of interest with the other full-time police officer in the performance of similar duties, applying similar skills, and working under similar working conditions. The employee holding the title of chief of police does not have access to confidential labor relations information of the employer and does not possess sufficient supervisory authority to preclude his inclusion in the same bargaining unit with the other full-time police officer.

5. The Town of Granite Falls maintains an animal control officer position on a part-time basis of at least eight hours of work per week. Although the position had been vacant for some time prior to the onset of these proceedings, it was filled during the course of these proceedings and was to remain in effect.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.
2. A bargaining unit described as:

All full-time and regular part-time employees of the Town of Granite Falls excluding elected officials, officials appointed for fixed terms, supervisors and confidential employees

is an appropriate unit for the purposes of collective bargaining within the meaning of RCW 41.56.060, and a question concerning representation presently exists in that unit.

3. The town clerk is a confidential employee within the meaning of RCW 41.56.030(2)(c) and is not a public employee eligible for inclusion in the bargaining unit described in paragraph 2 of these Conclusions of Law.
4. The chief of police is a public employee within the meaning of RCW 41.56.030(2) who is appropriately included in the bargaining unit described in paragraph 2 of these Conclusions of Law.

5. The animal control officer position, as described in paragraph 5 of the foregoing Findings of Fact, is a regular part-time position which is appropriately included in the bargaining unit described in paragraph 2 of these Conclusions of Law.

NOW, THEREFORE, it is

DIRECTED

An election by secret ballot shall be conducted under the direction of the Public Employment Relations Commission, among all employees who are within the bargaining unit described in paragraph 2 of the foregoing Conclusions of Law on the date of this order and who continue to be so employed on the date of determination of the question concerning representation, to determine whether the employees desire to be represented for the purposes of collective bargaining by Public, Professional and Office Clerical Employees and Drivers Local No. 763.

DATED at Olympia, Washington, this 3rd day of February, 1987.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This Order may be appealed  
by filing timely objections  
with the Commission pursuant  
to WAC 391-25-590.