

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
INTERNATIONAL ASSOCIATION OF)
FIRE FIGHTERS, LOCAL 3390) CASE 9332-E-91-1547
Involving certain employees of:) DECISION 4047 - PECB
PIERCE COUNTY FIRE DISTRICT 5) DIRECTION OF ELECTION
_____)

James L. Hill, International Vice-President, appeared on behalf of the petitioner.

Vandeberg and Johnson, by Clifford Foster, Attorney at Law, appeared on behalf of the employer.

On August 26, 1991, International Association of Fire Fighters, Local 3390 (IAFF), filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission. The union seeks certification as exclusive bargaining representative of certain employees of Pierce County Fire District 5 (employer). A pre-hearing conference was conducted by telephone on October 17, 1991, at which time the parties stipulated that an appropriate bargaining unit can be described as:

All full-time and regular part-time uniformed fire fighters, excluding non-uniformed, supervisory, and confidential employees.

The parties disagreed as to whether employees holding the ranks of "captain" and "assistant chief" were properly included in the bargaining unit. A hearing was conducted on November 20, 1991, in Gig Harbor, Washington, before Hearing Officer Kenneth J. Latsch. At the outset of the hearing, the union withdrew its claim to the "assistant chief" position, and the parties stipulated that position to be excluded from the proposed bargaining unit. The

hearing was then limited to evidence concerning the eligibility of the "captain" rank for inclusion in the bargaining unit. The parties submitted post-hearing briefs on January 30, 1992.

BACKGROUND

Fire District Organization and History

Pierce County Fire District 5 provides fire suppression, fire prevention and emergency medical services to residents in and around Gig Harbor, Washington. As of the time of hearing, the employer's general fund budget was \$2.6 million per year, and its capital assets were valued at approximately \$6 million. A board consisting of three elected members sets policy for the fire district. Fire Chief Drew Wingard supervises daily operations.

The employer's operations and staff have grown substantially, in direct proportion to development in its service area and corresponding growth of the fire district's population. Approximately 20 years ago, the employer had only one paid fire fighter, and relied exclusively on volunteers to provide emergency services. It now has a paid workforce of 26, including professional fire fighters who are supplemented by approximately 85 volunteers.

Two assistant fire chiefs report to Chief Wingard. Assistant Chief Glenn Standbeck is responsible for operations and fire prevention activities. Standbeck's responsibilities include insuring that equipment is operational, insuring that the employer's buildings are kept in proper order, reviewing county fire marshal plans as they apply to the fire district, and providing fire prevention programs for local citizens. Assistant Chief Larry Clayborn is responsible for the training of the employer's personnel, as well as supervising the emergency medical service program. In the event that the fire chief is not available, Standbeck routinely serves as

acting fire chief. If Standbeck is also absent, Clayborn assumes command of the fire district. The regular work schedule for the assistant chiefs is Monday through Friday from 8 a.m. to 5 p.m.

Apart from the fire chief and the assistant chiefs, the employees providing fire suppression and emergency medical services include three employees titled "captain", eight employees titled "fire fighter / paramedic", and eight employees titled "fire fighter / emergency medical technician".¹ Those employees work 24-hour shifts. To provide continuous service, three platoons (designated as "A", "B", and "C") are used. Fire fighters are assigned to one of the platoons, and the captains stay with their assigned platoons through the rotation cycle.

Nine fire stations are located throughout the 54 square mile area served by the employer. The professional fire fighters work out of the headquarters station, located in Gig Harbor, Washington, and a nearby station at Swede Hill.² The remaining stations are staffed by volunteers, with volunteer captains assigned to those stations.

Different types of emergency equipment are stationed at the various fire stations. While each station has a pumper and a tanker, the headquarters and Swede Hill stations also have aid cars with advanced life support equipment. In addition, the headquarters station has a command vehicle, an equipment truck, and several other transport vehicles assigned to it.

The record indicates that the normal chain of command runs from the elected fire commissioners to the fire chief to the assistant

¹ The record reveals that the employer's remaining personnel work in administrative and support positions that are not subjects of the instant representation petition.

² The Swede Hill station was operated by volunteers until June of 1991, when professional fire fighters were assigned to that station.

chiefs to the captains. The volunteer captains report to the professional fire fighter captains. In emergency situations, the first-arriving officer acts as "incident commander", and has control of the emergency scene until relieved by a higher-ranking officer.

The Potential Intervenor

The employer and its professional fire fighters have engaged in some form of "negotiations" since at least 1982. They attempted to formalize their relationship in 1989, when a "contract" was executed covering a "bargaining group" consisting of:

[A]ll full-time employees covered by LEOFF I, LEOFF 2, PERS 1, and PERS 2 Retirement systems with the exception of management Personnel and the Administrative Secretary.

That "contract" between the employer and the "Pierce County Fire District No. 5 Employees' Bargaining Unit" covered the period from January 1, 1990 through December 31, 1991.

The existence of the "Pierce County Fire District No. 5 Employees' Bargaining Unit" was not disclosed in the petition, and was not raised by either the employer or the IAFF during the course of the pre-hearing conference held in this matter. The employer was supplied with notices for posting under WAC 391-25-140. No motion was made by or on behalf of the "Pierce County Fire District No. 5 Employees' Bargaining Unit" for intervention in the instant proceedings as the incumbent representative or otherwise.

The Disputed Positions

The captains at issue in this proceeding are responsible for operations during their shift, and they direct the work of the fire fighters assigned to their particular shift. The captains are

sponsible for the operation of the entire fire district, after the fire chief and assistant chiefs complete their shifts at 5 p.m. on weekdays, and they are in charge all day on weekends and holidays.

Captains make routine maintenance assignments, and have a wide range of discretion in determining how specific assignments are to be accomplished. Captains have authority to schedule overtime work, and can make minor changes in work schedules, but they do not have authority to make major changes in shift scheduling. The record indicates that "shift exchanges" are left to the individual fire fighters, and are not reviewed by the captains. The captains review vacation requests and determine whether conflicts with staffing levels exist, but then report their findings to Assistant Chief Standbeck, who retains final vacation scheduling approval.

The record reflects that the employer hires fire fighters from the ranks of its volunteer force. Applicants must pass a written test and an oral presentation. The fire chief retains ultimate hiring authority. Captains participate in the hiring procedure to the extent that they conduct physical agility drills for the applicants, but do not recommend hiring decisions to the chief.

The captains are assigned to the headquarters station, but make frequent trips to the Swede Hill station. The record indicates that the captains are provided a vehicle for their use while on duty, and that vehicle is not used by other personnel.

Captains routinely evaluate the fire fighters' work performance. The evaluations are forwarded to the assistant chiefs for independent review.³ In like manner, the captains are expected to collect information about alleged misconduct of fire fighters, and forward that information to the assistant chiefs for consideration of any

³ The assistant chiefs routinely evaluate the captains' work performance, while the fire chief evaluates the assistant chiefs.

disciplinary action. Only the chief and assistant chiefs have authority to issue written disciplinary warning letters. The record reflects that the employer has only had two disciplinary actions in the past 10 years, and that an assistant chief carried out the discipline in each of those cases.

The captains routinely attend monthly staff meetings with the fire chief and the assistant chiefs. The record indicates that personnel issues have been discussed during those meetings, and that captains are expected to deal with the fire fighters on particular subjects discussed at the meeting.

When an alarm is received, the captains review the situation and decide what type of equipment should be dispatched. Once at the emergency scene, the captains assume command of the situation and retain command unless relieved by an assistant chief or the fire chief. Traditionally, the captain reporting to an emergency scene has participated in the fire suppression or emergency medical procedure. Shortly before the hearing in the instant matter was scheduled, the captains were ordered not to participate in such activities, and to confine their work to the supervision of the emergency scene.

POSITIONS OF THE PARTIES

The employer maintains that the captain positions must be excluded from the proposed bargaining unit. It argues that the captains do not share a community of interests with fire fighters, and that the captains are expected to perform a wide range of supervisory activities. The employer contends that the captains have discretionary authority to supervise work assignments, and that they are in charge of all district operations after the close of regular business hours. The employer maintains that the earlier "contract" covering the captains should not be used as evidence that they

should be included in the proposed bargaining unit, and that it is not required to prove that a substantial change of circumstances has occurred. The employer also argues that the inclusion of captains in bargaining units in other fire departments is not controlling here, and that the instant case must be decided on the basis of the duties actually performed by the captains on behalf of the fire district. The employer compares the captains at issue in this case to the battalion chiefs excluded from bargaining units in City of Richland, Decision 279-A (PECB, 1978), aff. 29 Wn.2d (Division III, 1981), cert. denied 96 Wn.2d 1004 (1981); City of Bellingham, Decision 565 (PECB, 1979); and King County Fire District No. 39, Decision 2649 (PECB, 1987).

The IAFF argues that the captains should be included in the proposed bargaining unit. The IAFF notes that the captains were included in the informal negotiating process in existence prior to the filing of the instant representation case, and it contends that there have been no significant changes of circumstance requiring exclusion of the captains at this time. The IAFF contends that inclusion of captains is common in fire districts throughout the area, and notes that the Commission included captains (or similarly situated officers) in bargaining units in City of Redmond, Decision 1367-A (PECB, 1982); King County Fire District No. 16, Decision 2279 (PECB, 1986); and Cowlitz County Fire District No. 2, Decision 2836-A (PECB, 1988).

DISCUSSION

Status of the Existing "Contract"

The statute applicable to this case, the Public Employees' Collective Bargaining Act, creates a "contract bar" which precludes the processing of representation petitions at certain times. RCW 41.56.070 states, in pertinent part:

... Where there is a valid collective bargaining agreement in effect, no question concerning 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. Any agreement which contains a provision for automatic renewal or extension of the agreement shall not be a valid agreement; nor shall any agreement be valid if it provides for a term of existence for more than three years.

The petition in this case was filed in August of 1991. The "contract" admitted in evidence at the hearing expired on December 31, 1991. On its face, it appears that the petition in this case is untimely, and is subject to dismissal on that basis.⁴ Before such a finding can be made, however, the validity of the purported "contract" must be analyzed.

The existence of a bargaining relationship, or of an incumbent exclusive bargaining representative, was not disclosed on the petition filed in this matter, as required by WAC 391-25-070(3) and the petition form promulgated by the Commission.⁵ While the employer's response to the Commission's initial inquiry in this matter included a copy of the "contract", neither the employer nor the IAFF made any reference to that document or to any "contract bar" claims during the pre-hearing conference in this matter.

A review of Commission docket records fails to disclose any certification of the "Pierce County Fire District No. 5 Employees' Bargaining Unit" as exclusive bargaining representative of

⁴ The contract bar "window period" for a valid contract expiring on December 31, 1991 would fall within the period beginning in early October of 1991 and ending in early November of 1991.

⁵ The Commission's petition form was used by the IAFF in this case. A handwritten entry of "None" was inserted in the space provided for the name of any "Incumbent Representative".

employees of this employer, thus supporting a conclusion that any "bargaining" and the purported "contract" are the result of some form of voluntary recognition by the employer. Although the employer and the IAFF presented detailed testimony and documentary evidence concerning the existence of a "contract" covering the employees involved in this case, no motion for intervention has been made. The opportunity for intervention ended with the close of the hearing in this matter.⁶ It must be concluded that the former incumbent has abandoned its interest in the unit.

Even if the "Pierce County Fire District No. 5 Employees' Bargaining Unit" had moved for intervention as the incumbent exclusive bargaining representative of the employees at issue in this matter, the validity of the "contract" would need to be determined before issuance of an order of dismissal. Both the duty to bargain and the existence of a "valid" collective bargaining agreement depend on the existence of a bargaining relationship covering an "appropriate bargaining unit". South Kitsap School District, Decision 1541 (PECB, 1983). Thus, if the purported "contract" covers a unit that is inappropriate, no "contract bar" can exist.

In this case, the "employee group" covered by the "contract" mixed employees covered by the Law Enforcement Officers and Fire Fighters (LEOFF) retirement system with employees who are covered by the Public Employees Retirement System (PERS). The Public Employment Relations Commission is responsible for the determination of appropriate bargaining units. RCW 41.56.060 sets forth the Commission's unit determination authority, as follows:

The commission, after hearing upon reasonable notice, shall decide in each application for certification as an exclusive bargaining representative, the unit appropriate for the purpose of collective bargaining. In determining, modifying, or combining the bargaining

⁶ See, WAC 391-25-170 and 391-25-190.

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 the bargaining representatives; the extent of organization among public employees; and the desire of the public employees ...

Under the provisions of RCW 41.56.400 et seq., interest arbitration procedures are made available to resolve bargaining impasses for certain "uniformed personnel", and that difference of rights and procedure has been deemed by the Commission to require the creation of separate bargaining units. City of Yakima, Decision 837 (PECB, 1980); Benton County, Decision 2221 (PECB, 1985). As defined in RCW 41.56.030(7), the class of "uniformed personnel" is limited to employees covered by the LEOFF retirement system created by Chapter 41.26 RCW. It follows that the historical relationship between this employer and the "Pierce County Fire District No. 5 Employees' Bargaining Unit" covered an inappropriate bargaining unit, and that any contract resulting from that relationship could not constitute a bar to a representation petition under RCW 41.56.070.

Standards for Bargaining Unit Status of Supervisors

Chapter 41.56 RCW does not define "supervisors" or exclude them from collective bargaining rights. Municipality of Metropolitan Seattle v. Department of Labor and Industries, 88 Wn.2d 925 (1977). Implementation of the bargaining rights of supervisors arises as part of the Commission's unit determination responsibilities, and the Commission has been asked to decide the bargaining unit status of supervisors in numerous cases. METRO arose in the context of a separate bargaining unit of supervisors. An issue commonly presented to the Commission is whether supervisors should be excluded from bargaining units primarily composed of their rank-and-file subordinates. Traditionally, the Commission has held that supervisors should not be included in the same bargaining unit as the employees that they supervise. City of Richland, Decision 279-

A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). The concern in such situations is that inclusion of supervisors and their subordinates in the same unit creates inherent conflicts of interest which must be avoided.

The Richland decision also sets forth the criteria for determining "supervisory" status. In that and subsequent cases, the Commission has relied on the definition found in Section 2(11) of the National Labor Relations Act (NLRA), as follows:

The term "supervisor" means any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

A similar definition of "supervisor" is found in the Educational Employment Relations Act (EERA), at RCW 41.59.020(4)(d), which also permits supervisors to bargain in separate units.

The Richland case involved the bargaining unit status of uniformed personnel holding the title of "battalion chief", but the titles used are not themselves controlling. The principles enunciated in the Richland decision have been applied in a number of subsequent cases involving fire departments:

In City of Bellingham, Decision 565 (PECB, 1979), employees working under the title of "battalion chief" were excluded from the existing fire fighter bargaining unit because of their supervisory duties.⁷

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The Bellingham decision also discussed the battalion chiefs' confidential relationship with the employer. No confidentiality issue has been raised in this case.

In City of Redmond, Decision 1367 (PECB, 1982), affirmed Decision 1367-A (PECB, 1982), the employer desired to exclude employees working under titles of "supervisor" and "manager" from the fire fighter bargaining unit. The Redmond decision is instructive, because the "supervisors" occupied the same position in the Redmond Fire Department's chain of command that the disputed captains occupy in the instant case. The "supervisors" were responsible for the operation of a platoon of four or five fire fighters. The "supervisors" performed many routine firefighting and emergency medical functions, and had little authority to make effective recommendations in the areas of hiring, discipline, or work scheduling. Based upon their actual job duties, the disputed "supervisors" were included in the bargaining unit.

In King County Fire District No. 16, Decision 2279 (PECB, 1986), employees holding the rank of "lieutenant" were included in the rank-and-file bargaining unit. Analysis of the criteria originally set forth in Richland, supra, led to the conclusion that those lieutenants did not possess sufficient indicia of supervisory authority to require their exclusion from the bargaining unit.

In Cowlitz County Fire District No. 2, Decision 2836-A (PECB, 1988), employees working under titles of "fire marshall", "captain" and "lieutenant" were included in the bargaining unit. Again, the exercise of authority over subordinates was not found sufficient to create a potential for conflicts of interest.

Application of Precedent to the Disputed Positions

The captains at issue in this case perform some duties normally associated with "supervisor" status. Particularly, the captains schedule work assignments and overtime work, and they have some role in the evaluation and disciplinary processes. Detailed scrutiny of the record discloses, however, that their role is very minor in an administrative structure which provides for independent review of all substantial decisions at higher levels.

For the most part the captains are more aptly characterized as "working foremen" than as supervisors. The record indicates that the captains have historically been expected to do the same work as the fire fighters, and have only recently been directed to refrain from such activities. While the employer stressed that the captains were given a wide range of latitude in directing daily operations at the fire stations under their command, the captains' authority in such matters appears to be limited by the nature of the work performed. The IAFF presented credible evidence that the captains only insure that specific work assignments handed down by the assistant chiefs are properly carried out. The captains cannot impose, or even effectively recommend, discipline. They cannot approve vacation requests. Their only participation in the hiring process involves a physical agility test, and there is no indication that the captains have ever made recommendations about hiring decisions.

The assistant chiefs retain authority to approve vacations, to make evaluations of employees, and to take corrective action if problems arise. Given the command structure of the fire district, it is apparent that true supervisory authority rests with the fire chief and two assistant chiefs. The captains are properly included in the proposed bargaining unit.

FINDINGS OF FACT

1. Pierce County Fire District 5 is a "public employer" within the meaning of RCW 41.56.030(1). The fire district is under the policy direction of an elected board of commissioners. A fire chief is in charge of district-wide operations. Two assistant chiefs report to the fire chief. One assistant chief is responsible for operations and fire prevention activities. The other assistant chief is responsible for training programs for district personnel.

2. International Association of Fire Fighters, Local 3390, a "bargaining representative within the meaning of RCW 41.56.030 (3), has filed a timely and properly supported petition for investigation of a question concerning representation, seeking certification as exclusive bargaining representative of certain employees of Pierce County Fire District 5.
3. Prior to the filing of the petition in the instant case, the employer and some committee of its employees met in a series of discussions culminating in a written agreement setting wage rates and other details of the employment relationship. That committee has not moved for intervention in this proceeding. Further, the document signed as a result of that process covered both fire fighters who are "uniformed personnel" within the meaning of RCW 41.56.030(7) and employees who are not "uniformed personnel".
4. The parties to this proceeding stipulate that a bargaining unit consisting of:

All full-time and regular part-time uniformed fire fighters, excluding non-uniformed, supervisory and confidential employees

is an appropriate unit for the purposes of collective bargaining under Chapter 41.56 RCW.

5. The employer operates nine fire stations located throughout the area served. Two of those stations are staffed by professional fire fighters, while the remaining fire stations are staffed by volunteers.
6. Uniformed fire fighters working under the title of "captain" make routine assignments concerning the maintenance of fire fighting equipment and facilities, and are responsible for work being performed by the other fire fighters on their duty

shift. The captains can schedule overtime work, but cannot approve vacation requests. The captains are under the direct supervision of the assistant chiefs, who make independent review and decisions concerning evaluation and discipline of the fire fighters.

7. The captains routinely assume command of operations at emergency scenes if they are the first officer to respond to the emergency dispatch. Captains are relieved of command at emergency scenes upon the arrival of an assistant chief or the fire chief. Until recently, captains have performed emergency medical work as well as firefighting duties at fire scenes.
8. Captains participate in the hiring process only to the extent of monitoring physical fitness tests. The captains do not make effective recommendations concerning hiring decisions.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.
2. The document signed by the employer and the "Pierce County Fire District No. 5 Employees' Bargaining Unit" is not a valid collective bargaining agreement, and is not a bar to the instant proceedings under RCW 41.56.070.
3. In the absence of taking any steps to intervene in this proceeding under WAC 391-25-170 or 391-25-190, the "Pierce County Fire District No. 5 Employees' Bargaining Unit" is deemed to have abandoned its interest in representing the employees involved in this proceeding.
4. The employees working under the title of "captain" are not supervisory employees within the meaning of Commission

precedent, and their duties do not warrant their exclusion, pursuant to RCW 41.56.060, from the appropriate bargaining unit stipulated by the parties, as described in paragraph 4 of the foregoing findings of fact.

5. A question concerning representation currently exists in the appropriate bargaining unit described in paragraph 4 of the foregoing findings of fact, so that the conduct of a secret-ballot election under RCW 41.56.060 is necessary.

DIRECTION OF ELECTION

A representation election shall be conducted by secret ballot, under the direction of the Public Employment Relations Commission, in the appropriate bargaining unit described in paragraph 4 of the foregoing findings of fact, for the purpose of determining whether a majority of the employees in that unit desire to be represented for the purposes of collective bargaining by International Association of Fire Fighters, Local 3390.

Entered at Olympia, Washington, this 23rd day of April, 1992.

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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.