

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
)
INTERNATIONAL ASSOCIATION OF)
FIRE FIGHTERS, LOCAL 2175) CASE 11551-E-95-1899
)
Involving certain employees of:) DECISION 5011-A - PECB
)
CENTRAL PIERCE FIRE AND RESCUE) ORDER CLARIFYING
) BARGAINING UNIT
)
_____)

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

Vandenberg Johnson & Gandara, by Jamie L. Siegel, Attorney at Law, appeared on behalf of the employer.

On January 25, 1995, International Association of Fire Fighters, Local 2175, filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission, seeking to represent certain employees of Central Pierce Fire and Rescue (employer). A telephonic prehearing conference in the matter was held on February 14, 1995, at which time the parties stipulated several matters.¹ The parties dis-

¹ The parties' stipulations included: That the Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW; that the union is a lawful labor organization qualified to act as bargaining representative pursuant to RCW 41.56.030(3); that a question concerning representation existed; that the petition was timely filed; that no blocking unfair labor practices had been filed; that an appropriate bargaining unit was described as

All uniformed battalion chiefs, deputy chiefs and assistant chiefs employed by Central Pierce Fire and Rescue, excluding confidential and all other employees;

that the cut-off date for eligibility was properly established as February 14, 1995; and that a cross-check was the appropriate method for determining the question concerning representation.

agreed about whether Deputy Chief Ron Hoyt was properly included in the bargaining unit, based on the employer's claim that he is a "confidential employee" under RCW 41.56.030(2).

The cross-check was conducted on February 16, 1995, and the tally showed that the union would be entitled to certification as exclusive bargaining representative regardless of the outcome of the dispute concerning the deputy chief position. An interim certification was issued on February 27, 1995, designating the union as the exclusive bargaining representative for this separate bargaining unit of supervisors.²

A hearing on the remaining eligibility issue was held at Tacoma, Washington, on October 10, 1995, before Hearing Officer Kathleen O. Erskine. The parties filed briefs on December 18, 1995.

BACKGROUND

The employer provides fire suppression and emergency rescue services within a specific geographic area of Pierce County. Just prior to the hearing, an election was held at which the voters decided to merge Pierce County Fire District 9 with two other county fire districts: Pierce County Fire District 6 and Pierce County Fire District 7. Although the merger had been discussed for some time prior to the election, and had been implemented operationally, the merger becomes final on February 15, 1996. The resulting fire district encompasses 88 square miles and provides services to 130,000 citizens. It staffs seven fire stations with approximately 73 professional fire fighters, as well as staffing three additional fire stations with a force numbering approximately 100 volunteer fire fighters.

² Central Pierce Fire and Rescue, Decision 5011 (PECB, 1995).

Duties and Responsibilities

Pursuant to its operational reorganization and its impending merger, the employer began developing and assigning administrative duties and responsibilities relating to the new organization. A June 8, 1993 memo from Executive Director Bill R. Williams of the joint districts to "all personnel" detailed revised duties and responsibilities of staff personnel:

* The first chart in the memo detailed the executive structure, beginning with the board at the top, immediately followed by the position of executive director. The position at issue here, the deputy director/operations, is shown immediately under the position of executive director.

* The employer's organization chart then spread out to show four divisions (training, emergency medical services, support services, and community services), and three commands (the A, B and C shifts). The officers in charge of the divisions and commands all report directly to the deputy director.

Following the charts were statements of "Duties and Responsibilities" for the executive director and the director of operations. The document for the disputed position contains the following:

- Shift Programs/Projects
- Administration and Coordination of Divisions
- Special Projects - Day Personnel/Suppression Personnel
- Administration of Testing and Hiring Process
- Scheduling of Major Projects
- S.O.P. and Rules and Regulations Creation
- Personnel Evaluation Programs
- Special Operations and Programs
- Run Cards and CAD Programs
- Fire Comm Representative
- DEM Representative
- Utilities Liaison - Hydrants, etc.
- Safety Programs
- User Groups Representative - Mako, Air 3, Bus, H.M.
- L.M.C. Members and Labor Relations Matters

Incident Reports - Continuous Quality Improvement
L & I Liaison/Department Safety Officer
Coordinate Purchasing with Support Services Division
Law Enforcement Liaison
Budget Input and Oversight of Divisions and Preparation
Pre-Incident Plans Program Administration
Maps Program Administration
Tactical Operations Manual Oversight
Supervise Volunteer/Resident Coordinator
Benefit Assessment Program (1994)
Personnel Evaluations of Staff Members

That list was supplemented by the following job description:

NATURE AND PURPOSE OF WORK:

The position is located in Pierce County Fire Protection District #9, said District being responsible to the Board of Fire Commissions for furnishing fire protection, fire prevention, life safety and emergency medical services to the people of the Fire District. The position provides for a Deputy Chief with certain duties and responsibilities within the Fire District.

The Deputy Chief shall be accountable and responsible for the administration of such areas as are assigned by the Chief, which may include but not be limited to Personnel, Training, Emergency Medical Services, Suppression, Fire Prevention, Public Education, Communication, Emergency Management Planning, Disaster Planning, Incident Investigation, Safety, Research and Development, etc.

The Deputy Chief shall be accountable to the Chief of the Fire District only and shall make written and verbal reports thereto as the Chief may require. The Deputy Chief shall be technically qualified by training and experience and shall be able to command personnel and hold their respect and confidence. The Deputy Chief shall be removed only for just cause and in accordance with the conditions contained within the current Employment Agreement between the Fire District and the Deputy Chief.

EXAMPLES OF DUTIES AND RESPONSIBILITIES:

The incumbent will normally work a 40 hour [sic] each week. Generally this requires maintaining

office hours between 0800 and 1700 Monday through Friday, except that hours may be adjusted to meet the needs of the Department. The position is staff in nature and will require weekend standby as well as nighttime recall for certain emergency incidents, and during such standby or recall he may, as circumstances require, supervise the extinguishment of fires and saving of lives and property until relieved by the Chief of the Department.

The functions of the position require the incumbent to provide staff support to the Chief of the Department. The position will assist in Department policy planning development and performance of related duties as assigned by the Chief of the Department. He will respond to multiple alarms of fire and/or disasters to supervise areas, or sections, as the situation demands or as assigned by the Chief. The incumbent has the responsibility for research, development, supervision, coordination and implementation of programs.

Typical tasks shall include but are not necessarily limited to research, development, administration, and coordination of public affairs and public education programs; research and development of equipment and techniques and training methods for utilization in the Departments suppression, emergency medical service and dispatch delivery systems; administration and coordination of purchases, requisition, distribution and maintenance of uniforms and protective equipment; administration and coordination of the volunteer program; provide and maintain technical reports; administer the Department's fire prevention, inspection and investigation programs; provide technical support to divisions within the Department and coordinate activities with outside agencies in the area of research and grant development; administer, coordinate and maintain the Department training program; coordinate and maintain the Department training program; coordinate with the central dispatch program; and accomplish appropriate budgetary functions to carry out approved programs. The incumbent will assist the Chief in the supervision and coordination of the work of the Battalion Chiefs and keep the Chief fully advised of the positions' areas of responsibility. The position may be required to assume command of the Department during the absence of the Chief.

CONTROLS OVER WORK:

The primary purpose of this position is to provide certain administrative and technical assistance to the Chief of the Department as well as the services of a chief officer. The Deputy Chief shall report directly to the Chief of the Department and is expected to have a confidential relationship with the Chief. The Deputy Chief shall receive supervision and guidance from the Chief and shall be responsible to him for the proper performance of his duties.

...

Hoyt testified that he and the executive director are the only management representatives on the labor-management committee. That committee originated in District 9, but was subsequently retained in the consolidated department. Although the committee usually discusses operational issues, and does not usually discuss mandatory subjects of collective bargaining, Hoyt stated that the committee has dealt with mandatory subjects, by joint agreement of the parties, in special circumstances. As a specific example, he cited the committee having discussed and resolved shift bidding.

Hoyt testified that he was directly involved as a member of the management team in collective bargaining only once during the past 12 years, in 1993. He described his role as:

[P]rimarily input, research, on items that were going to be discussed or being discussed and how that they [sic] would impact the daily operations of the district.

Hoyt indicated that the executive director made the ultimate decisions on strategy concerning proposals and counter-proposals.

POSITIONS OF THE PARTIES

The union argues that the deputy chief is a supervisory position, but not a confidential position. It asserts that the employer's

labor policy is formulated by its executive director and the elected board of fire commissioners. It acknowledges that the deputy chief once represented the employer at the bargaining table, but asserts that his involvement was strictly limited to an advisory capacity. Because the position is clearly supervisory, the union argues that the deputy chief should be in the bargaining unit with the assistant chiefs and the battalion chiefs.

The employer argues that the deputy chief does have a fiduciary confidential relationship concerning labor relations policy. It asserts that the deputy chief is responsible for the day-to-day operation of the fire district, so that he is closely involved in the implementation of the employer's labor policy. It also asserts that, by being a member of the employer's negotiating team and the labor-management committee, the deputy chief is consistently privy to confidential information concerning management negotiation positions and parameters.

DISCUSSION

Nature of the "Confidential" Exclusion

By statute and Commission precedent, some employees are excluded from bargaining rights to perform the functions of the employer in preparing for and fulfilling its duty to bargain collectively with the exclusive bargaining representatives of its employees. The statutory definition of "public employee" in RCW 41.56.030(2)(c) excludes employees:

[W]hose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit.

Interpreting that exclusion in IAFF, Local 469 v. City of Yakima, 91 Wn.2d 101 (1978), the Supreme Court of the State of Washington held:

When the phrase confidential relationship is used in the collective bargaining act, we believe it is clear that the legislature was concerned with an employee's 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 official 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.

[Emphasis by **bold** supplied.]

The Court took direction from the definition of "confidential employee" found in the Educational Employment Relations Act, Chapter 41.59 RCW, at RCW 41.59.020(4)(c):

- (c) Confidential employees, ... shall mean:
 - (i) Any person who participates directly on behalf of an employer in the formulation of labor relations policy, the preparation for or conduct of collective bargaining, or the administration of collective bargaining agreements, except that the role of such person is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment; and
 - (ii) Any person who assists and acts in a confidential capacity to such person.

The Court thus also approved Commission precedent which recognized that the confidential relationship with the head of the bargaining

unit or elected official could be achieved through an intermediary, giving rise to the concept of "derivative" confidential status.³ The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is remedial legislation,⁴ and exclusions from its coverage are narrowly construed.⁵ In compliance with that policy, the Commission generally imposes a heavy burden on the party seeking to exclude employees from a bargaining unit on the grounds they are "confidential". City of Seattle, Decision 689-A (PECB, 1979); Cape Flattery School District, Decision 1249-A (PECB, 1982). In making such determinations, the Commission seeks to balance the employee rights granted by the statute against the employer's need for exempt employees and its right to determine its own work flow. While the Commission cannot dictate the number of "confidential" exemptions an employer receives, the employer bears an obligation of reasonableness in assigning its confidential work.⁶ To justify a "confidential" exclusion, the involvement of an individual with sensitive labor relations material must be "necessary", "regular", and "ongoing". Incidental or occasional involvement in the collective bargaining process is not sufficient to warrant an exclusion. City of Cheney, Decision 3693 (PECB, 1991).

³ The Yakima court cited, with approval, the decision of the Executive Director in Edmonds School District, Decision 231 (PECB, 1977), where secretaries who assisted and acted in a confidential capacity to top managers in a school district were found to have a confidential relationship, through their managers, with the executive head of the school district.

⁴ Roza Irrigation District v. State, 80 Wn.2d 633 (1972).

⁵ See, Zylstra v. Piva, 85 Wn.2d 743 (1975) and Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977).

⁶ An attempt to enlarge a large list of "confidential" clerical was turned away in Clover Park School District, Decision 2243-B (PECB, 1987), with suggestion that assignment of the limited labor relations work handled by the contested employees to the agreed-upon confidential secretaries was a reasonable accommodation that would preserve the contested employees' representation rights.

Application of the Standards

Existence of Intimate Fiduciary Relationship -

Based on the record made in this proceeding, the deputy chief certainly fulfills the "... official intimate fiduciary relationship with the executive head of the bargaining unit" aspect of the Yakima definition. He is the only direct subordinate to the employer's executive director. As the employer's director of operations, he is responsible for the employer's day-to-day operations and for the supervision of the assistant and battalion chiefs. Even in his own direct testimony, the deputy chief stated that he participates in confidential discussions of budgetary and personnel matters. This role undoubtedly takes on greater significance in the context of the merged operation and soon-to-be merged corporate entity than it would have had in any of the three separate operations which existed before the merger.

Involvement With Labor Relations -

The fact that Hoyt may have had little or no involvement with labor relations matters in the past, while employed by one of the fire districts now in the process of merging, is not significant. Change of circumstances is a basis for changing the unit status of a position. WAC 391-35-020(2)(a); City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). This case must be decided on the basis of the much larger merged operation already put in place and soon to be formalized.

Executive Director Williams and Deputy Chief Hoyt testified at the hearing in this matter. Both of them acknowledged that the deputy chief was present as a management representative during collective bargaining negotiations between the employer and the union representing its rank-and-file employees. Williams described Hoyt's role as follows:

Mr. Hoyt was on the management team. He helped the team, our team, the management team. But he helped the management team develop strategy. He helped us write counter-proposals. He wrote some to the original proposals that we brought to the table. He was a participant in caucuses to get us in a position to accept, modify, or reject these three contracts.

...
I felt it was important to have him on the team because of the size and the depth of the organization. I needed Mr. Hoyt at the table -- his operation sheet -- he knows the issues. He knows what's going on in the stations. ...

So he was valuable because he knew what was going on out in the field.

Hoyt seemed to minimize his role on the negotiating team, describing it as:

[P]rimarily input, research, on items that were going to be discussed or being discussed and how that they would impact the daily operations of the district. ... Basically research of items within the department and outside with regard to matters such as use of sick leave, things like that. That, again, were going to be or had been submitted to the table for discussion. Gathering data and bringing that to Director Williams' attention.

It is nevertheless clear that he was recently involved in the development of the labor relations strategies of this greatly enlarged employer.

Hoyt denied involvement in the formulation of labor relations policy, and testified that the executive director made the "ultimate" decisions on strategy and planning concerning proposals and counter-proposals. The union argued that the executive director has the "ultimate" authority in negotiations and that all officers participate in the formulation of standard operating procedures (SOPs). But the exclusion is not limited to the

"executive head" of the bargaining unit. Yakima specifically discusses the fiduciary relationship between the executive head of a bargaining unit and his or her advisers and other confidants.

Comparing the deputy chief's own testimony with the definition quoted above from Chapter 41.59 RCW, the deputy chief clearly has responsibilities which fall within that definition of "confidential employee". He was involved in the preparation for and the conduct of collective bargaining; as director of operations, he is and will be directly involved on an ongoing basis in the administration of any collective bargaining agreements that are negotiated; he clearly assisted the executive director, even if he was not directly responsible for formulating the employer's policies.

Conclusions -

The role of the deputy chief position in this greatly enlarged operation clearly fulfills the "regular", "necessary" and "ongoing" requirements for confidential status. The employer has satisfied the burden of proof and reasonableness requirements to exclude the position from the rights and protection of collective bargaining.

Distinctions from Cited Cases

In what might be characterized as a "scattergun" approach, the union has cited a number of past decisions dealing with units of supervisors in the fire service. There is no question in this case that supervisors are allowed to form a separate bargaining unit, and the interim certification already issued in this matter attests to the propriety of such a unit. As to the confidentiality claim advanced by the employer concerning the deputy chief position, however, examination of the cited cases provides significant factual distinctions from the instant case.

* City of Bellingham, Decision 565 (PECB, 1979), removed battalion chiefs, a fire marshall and a medical services officer from the rank-and-file bargaining unit as supervisors, but rejected

the employer's claim that they were confidential employees. The occupants of the positions disputed in that case all reported to an assistant chief who was **not** included in the supervisors bargaining unit, and appears to have been more comparable to the deputy chief at issue in the instant case.

* City of Richland, Decision 1519 (PECB, 1982), involved the creation of a separate unit of supervisors for battalion chiefs who had previously been excluded from the rank-and-file bargaining unit in that department.⁷ It was concluded that the positions disputed in that case were not confidential, but the absence of an intervening rank between them and the executive head of the bargaining unit is not conclusive here. There was no mention in that case of any evidence of involvement by the battalion chiefs in collective bargaining, or of any special input by them in department or labor relations policies.

* City of Seattle, Decision 1997-A (PECB, 1985), involved a fire department substantially larger than even the merged operation involved in the instant case.⁸ The decision started from the premise that certain officers who occupied roles comparable to that of Deputy Chief Hoyt in the instant case (a deputy chief who acted as assistant to the fire chief, a deputy chief in charge of personnel, and an assistant chief in charge of operations) were all **excluded** from the supervisors unit because of their direct reporting relationships with the fire chief.⁹ The positions at issue in that case (four deputy chiefs who reported to the assistant chief and supervised platoons) did not participate in collective bargaining or the labor relations policies of the

⁷ That removal occurred in City of Richland, Decision 279-A, supra.

⁸ At the time of the hearing, approximately 944 "uniformed personnel" were employed by the Seattle Fire Department.

⁹ Those exclusions were by stipulation between the parties to that case.

assistant chief and supervised platoons) did not participate in collective bargaining or the labor relations policies of the employer, and were more comparable to persons already included in the supervisors unit in the instant case.

* King County Fire District 44, Decision 4928 (PECB, 1994) dealt with a department that went to the opposite extreme of being significantly smaller than the organization involved in the instant case. With only eight fire fighters, two assistant fire chiefs, and a chief, the assistant chiefs were more like the battalion chiefs in Richland and Bellingham. They were **not** regularly members of the employer's negotiating team, did **not** make substantive proposals for collective bargaining, and did **not** have an intimate fiduciary relationship with the chief or the elected board of commissioners. The assistant chiefs were found to have roles incidental to the collective bargaining process. They provided input, but were not directly involved.

* City of Bremerton, Decision 3176 (PECB, 1989), involved the recent addition to deputy chief positions in an otherwise unchanged department. Although the chief had requested that the deputy chiefs assist him in the preparation for upcoming negotiations, there had not been any "meaningful" participation by them at the time of the hearing. Thus, there were no facts there comparable to: (1) the actual growth of the organization following the merger of three fire department operations in the instant case; or (2) the actual involvement of Deputy Chief Hoyt in contract negotiations and the labor-management committee.

In this case, the organization resulting from the merger of three fire districts would not have adequate personnel to perform the functions of the employer in collective bargaining without the participation of the deputy chief. The board of commissioners serves as a policy making body, while the operative policy and bargaining strategy decisions are made between the executive director and the deputy chief. The deputy chief is thus a "confidential employee".

FINDINGS OF FACT

1. Central Pierce Fire and Rescue is a public employer within the meaning of RCW 41.56.030(1), in the process of being created by a merger of three fire districts: Pierce County Fire District 6, Pierce County Fire District 7, and Pierce County Fire District 9. As the result of an election held prior to the hearing in this matter, that merger is to become final and effective as of February 15, 1996. The merged operation employs approximately 73 full-time fire fighters and a complement of support staff. The employer also maintains a force of approximately 100 volunteer fire fighters.
2. International Association of Fire Fighters, Local 2175, a bargaining representative within the meaning of RCW 41.56.030-(3), has received interim certification as exclusive bargaining representative of a unit of seven supervisory employees of the employer, including battalion chiefs and assistant chiefs.
3. During the processing of the petition for investigation of a question concerning representation involving the bargaining unit of supervisory employees, the employer took the position that its deputy fire chief is a confidential employee. The incumbent in that position is Ron Hoyt.
4. A revision of the employer's organization chart and staff responsibilities was approved at a joint board meeting of the merging fire districts held on June 7, 1993. Under that reorganization, the deputy chief reports directly to the employer's executive director and is responsible for the coordination and direction of the employer's daily operations. The deputy chief administers, coordinates and supervises the training division, the emergency medical services division, the support services division, and the public education and fire prevention division, each of which is supervised by an

assistant fire chief. The assistant chiefs and the battalion chiefs all report directly to the deputy chief.

5. During collective bargaining negotiations in 1993, Hoyt and the executive director were the sole uniformed members of the employer's negotiating team. Hoyt provided research and input on operational issues being discussed during the negotiations and participated in strategy discussions.

CONCLUSIONS OF LAW

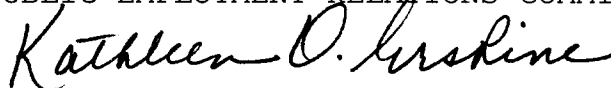
1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-25 WAC. Authority to decide this eligibility dispute is delegated to the Hearing Officer pursuant to WAC 391-25-390.
2. The position of deputy fire chief is a confidential employee within the meaning of RCW 4.56.030(2)(c), and is not a public employee within the meaning of RCW 41.56.030(2).

ORDER CLARIFYING BARGAINING UNIT

The position of deputy chief is excluded from the bargaining unit of supervisors involved in this proceeding.

Issued at Olympia, Washington, on the 25th day of January, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



KATHLEEN O. ERSKINE, Hearing Officer

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-25-390(2).