

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: )  
INTERNATIONAL ASSOCIATION OF FIRE ) CASE 10984-E-94-1815  
FIGHTERS, LOCAL 3186 )  
Involving certain employees of: ) DECISION 4928 - PECB  
KING COUNTY FIRE DISTRICT 44 ) DIRECTION OF CROSS-CHECK  
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James L. Hill, Vice President, International Association of Fire Fighters, appeared on behalf of the petitioner.

Snure Law Office, by Brian K. Snure, Attorney at Law, appeared on behalf of the employer.

On February 22, 1994, International Association of Fire Fighters, Local 3186, filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission, seeking certification as exclusive bargaining representative of the employer's uniformed supervisory employees. The parties stipulated several matters at a pre-hearing conference held on March 22, 1994, but framed an issue as to whether the assistant chiefs are confidential employees. A hearing was held at Auburn, Washington, on June 17, 1994, before Hearing Officer Frederick J. Rosenberry. The parties filed briefs.

BACKGROUND

King County Fire District 44 serves an area of approximately 27 square miles, located in the southern part of King County. The employer operates four fire stations to serve a population of approximately 20,000. A three member board of elected commissioners oversee the employer's operations and business affairs.

The employer uses a traditional fire department organization, with a chain of command that passes from the board of commissioners through the ranks of fire chief and assistant chief to fire fighters. Gregory M. Smith has been employed as the department's chief since November, 1992. The employer's workforce currently includes two full-time assistant chiefs, eight full-time career fire fighters, and two secretaries. Additionally, approximately 80 volunteer fire fighters are used in the employer's operations.

International Association of Fire Fighters, Local 3186, is the exclusive bargaining representative of the employer's non-supervisory career fire fighters. That bargaining relationship dates back to February 13, 1989, when the Commission certified the union as the exclusive bargaining representative.<sup>1</sup> In this proceeding, the same organization seeks to organize a separate bargaining unit of supervisors, currently including the two assistant chiefs.

#### Assistant Chiefs' Duties

The personnel policies published by the employer describe the duties of an assistant chief, as follows:

The Assistant Chiefs' duties are outlined as follows:

1. In the absence of the Chief, the appointed Assistant Chief shall command King County Fire District #44 and be held responsible therefore, in all respects, with the full powers and authorities of the chief.
2. The Assistant Chiefs shall carry out any additional duties delegated to them by the Chief.

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<sup>1</sup> King County Fire District 44, Decision 3118 (PECB, 1989). The certification resulted from an election conducted by the Commission pursuant to an election agreement signed by the parties.

3. He shall be held responsible to perform all duties required of the Chief when acting as the Chief Officer in charge at the scene of an emergency.
4. He shall as promptly as possible answer any questions by a member of the Fire District relating to the interpretation of the Policies and Procedures.
5. He shall abide by all Policies and Procedures and see they are enforced.
6. He shall carry out any additional duties delegated to him by the Chief.

The assistant chiefs are called upon to assist in evaluating applicants for employment, and have access to employee personnel records. They supervise the full-time fire fighters in accordance with the employer's policies and the terms of a collective bargaining agreement, including conducting periodic fire fighter evaluations which may be used as evidence supporting personnel actions. They have limited authority to impose discipline. They are designated in the collective bargaining agreement as the employer representative at the first step of the grievance procedure covering the non-supervisory fire fighters.

Assistant Chief Wayne Kier has served in his current position since January of 1989. Kier is regularly assigned to supervise the full-time staff, and he also performs administrative functions involving maintenance, purchasing, facilities, apparatus, and volunteers. He has been temporarily appointed to serve as acting chief on at least one occasion.

Assistant Chief Robert Young is regularly assigned to supervise the department's "wild land" division. He is also the person in charge of inspection, training, and emergency medical services.

The assistant chiefs are required to submit budget information to the board of commissioners each year. The board also turns to the

assistant chiefs as a resource for information regarding budgetary items and the bidding process for capital expenditures.

#### The Employer's Collective Bargaining Procedures

The board of commissioners takes responsibility for formulating the employer's labor relations policies. The board sometimes consults with the chief, the assistant chiefs, and even the fire fighters prior to adopting personnel policies, determining positions regarding collective bargaining matters or implementing personnel actions. Assistant chiefs are occasionally called upon to provide information in order for the board to intelligently evaluate the merits of contemplated personnel actions and collective bargaining positions.

The employer considers some of its collective bargaining objectives and negotiations goals to be confidential. Consequently, they are discussed in executive sessions rather than at public meetings. The assistant chiefs do not normally attend the board's executive sessions, but there have been limited occasions when an assistant chief has been called upon to attend an executive session to provide information and opinion regarding collective bargaining issues.

When the employer's non-supervisory employees first organized, the employer had a part-time fire chief whose principal employment was elsewhere. The employer thus hired a labor relations consulting firm in 1989 to represent it in negotiating the initial collective bargaining agreement for the non-supervisory employees.<sup>2</sup> The chief's other employment prevented him from attending the bargaining sessions, so Assistant Chief Kier was assigned to accompany and assist the employer's labor relations consultant. Kier attended

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<sup>2</sup> The employer contracted for the services of Barbara Revo through Cabot Dow Associates.

the first three or four bargaining sessions, but then discontinued his participation in order to allow him to direct full-time attention to other requirements of his job.

Subsequent to the completion of negotiations on the first collective bargaining agreement, the board of commissioners undertook a more active role in the collective bargaining process. In 1992, the commissioners designated themselves as the employer's bargaining team for negotiating a successor agreement. Those negotiations resulted in an agreement for the period from January 1, 1993 to December 31, 1994.

The 1993-94 agreement contained a mid-term opener for the purpose of negotiating the fire fighters salaries for 1994. Those negotiations were also conducted by the three members of the board of fire commissioners, who were accompanied on occasion by the fire chief.

#### POSITIONS OF THE PARTIES

The employer contends that employees holding the title of "assistant chief" are confidential employees within the meaning of RCW 41.56.030(2)(c), who should therefore be excluded from the proposed supervisory bargaining unit. The employer maintains that the assistant chiefs are called upon on a regular and ongoing basis to assist in the formulation of labor relations policy, preparation for conducting collective bargaining, and the administration of collective bargaining agreements. According to the employer, the assistant chiefs are looked to as a resource for developing and formulating its labor relations policy, and are privy to confidential labor relations policy.

The union contends that the assistant chiefs are not sufficiently involved in the formulation, implementation or effectuation of the employer's labor relations policies and practices to warrant a

"confidential" exclusion. According to the union, the assistant chiefs are public employees who have the right to organize for the purpose of collective bargaining under Chapter 41.56 RCW.

#### DISCUSSION

Collective bargaining contemplates a flexible exercise in which an employer and an employee representative bargain at arm's length, with the goal of achieving an agreement regarding employment-related matters. Such agreements are expected to result from mutual good faith commitments, which may include compromises and concessions. While the process is designed to deal with conflicts that inevitably arise between employers and employees, it protects the institutional interests of both employers and labor organizations against internal conflicts. The prohibition of employer domination of unions found in RCW 41.56.140(2) and the exclusion of "confidential employees" found in RCW 41.56.030(2) thus operate in harmony to protect the independence of both parties to the process.

The law regarding "confidential" exclusions is well developed under Chapter 41.56 RCW. Employers are allowed a reasonable number of personnel who are exempt from the rights of the collective bargaining statute, in order to perform the functions of the employer in the collective bargaining process. Clover Park School District, Decision 2243-A (PECB, 1987). The Supreme Court of the State of Washington has given RCW 41.56.030(2)(c) a narrow interpretation, limiting it to those having a "labor nexus":

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.

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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 this exclusion.

City of Yakima v. IAFF, 91 Wn.2d 101 (1978).

In Yakima, supra, the Supreme 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 Supreme Court indicated a desire in Yakima to fashion a similar test for confidentiality under Chapter 41.56 RCW.

Status as a "confidential" employee deprives the individual of access to all collective bargaining rights. Even though the conferral of confidential status may stem from an association with only one bargaining unit in an environment of multiple bargaining units, such status results in the complete exclusion of the individual from all bargaining units. King County, Decision 3338

(PECB, 1990). Accordingly, the party proposing a "confidential" exclusion bears the heavy burden of proving the necessity for excluding the employee from the rights of the collective bargaining statute. City of Seattle, Decision 689-A (PECB, 1979).

The Public Employment Relations Commission cannot dictate the distribution of functions within an employer's organization, but the employer must demonstrate that it is being reasonable in making assignments of what usually amounts to a finite amount of truly "confidential" materials and information. Clover Park School District, supra. The potential for serving as a "backup" to a confidential employee is not a sufficient basis for exclusion. Olympia School District, Decision 4736-A (PECB, 1994). Where the facts offered in support of a "confidential" claim are ambiguous or contradictory, the exclusion will be denied. Pateros School District, Decision 3911-B (PECB, 1992).

To warrant a "confidential" exclusion, the involvement of an individual with sensitive labor relations material must be "necessary", "regular", and "ongoing". Occasional or incidental involvement in the collective bargaining process is insufficient to warrant a "confidential" exclusion. City of Cheney, Decision 3693 (PECB, 1991).

#### Application of the Standards

It is clear that the assistant chiefs are supervisors who are properly excluded from the rank-and-file fire fighter bargaining unit under RCW 41.56.060 and well-established precedent. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). The union seeks a separate bargaining unit of supervisors in this case, consistent with City of Tacoma, Decision 95-A (PECB, 1977) and Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977).



Under Yakima, supra, the supervisory authority of the assistant chiefs is not a basis for their exclusion as "confidential employees". General supervisory functions include making contract interpretations, disciplining subordinates, and administering grievance procedures, so those functions are not inherently confidential. City of Seattle, Decision 1797-A (PECB, 1985). Similarly, supervisory access to personnel files is not inherently "confidential". Snohomish County, Decision 346 (PECB, 1981); City of Lacey, Decision 369 (PECB, 1978).

Supervisory employees who provide input to the employer's labor policy body or negotiating team concerning the impact of various bargaining proposals are not necessarily regarded as confidential employees. King County, Decision 4004-A (PECB, 1992); Snohomish County, Decision 4027 (PECB, 1992). In King County, Decision 3338 (PECB, 1990), the disputed supervisors attended some collective bargaining sessions and provided some operational information to the employer's negotiators, but did not have authority to make substantive decisions concerning the course of negotiations.

Commission precedent does not support the position of the employer in this case. As historically and presently structured, the employer has adequate personnel to perform the employer function in collective bargaining, without depriving the assistant chiefs of their statutory bargaining rights. The board of commissioners maintains a high degree of control over the management of the operation, which strongly suggests that the operative policy and strategy decisions are made at that level. The chief would not be included in the supervisory bargaining unit. The employer has sufficient secretarial staff to provide support services for collective bargaining.

The record reflects that the solicitation of information by the board of commissioners has not been limited to the ranks of

assistant chief and above.<sup>3</sup> There is no evidence to suggest that the assistant chiefs exercise substantive influence over core economic matters such as wages or benefits. Consultation by the board with first line supervisors is a reasonable practice, inasmuch as the assistant chiefs are likely to be the most familiar with the actual situation at the workplace, but that familiarity growing out of their general supervisory responsibilities is not a basis for the exclusion of the supervisors under Yakima. The limited advisory role of the assistant chiefs in collective bargaining is too remote to justify a finding that there is an intimate fiduciary relationship between the assistant chiefs and the employer's bargainers. There is no evidence that the assistant chiefs participate in executive-level discussions regarding management strategy or bargaining positions on a regular, and ongoing basis.

With the exception of an isolated incident involving Assistant Chief Kier in 1989, the assistant chiefs have not been members of the employer's negotiating team, and do not have advance knowledge of potential proposals, compromises, or "bottom line" bargaining positions. In the absence of evidence that they are included in the substantive decision making process and privy to confidential information that affects the course of collective bargaining, the record is insufficient to justify a finding that they are confidential employees.

#### Determining the Question Concerning Representation

WAC 391-25-391 authorizes the direction of a cross-check, under certain circumstances, to determine a question concerning representation. City of Winslow, Decision 3520-A, (PECB, 1990). There is only one union involved in this case, and the showing of interest

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<sup>3</sup> Even rank-and-file fire fighters have been consulted for input regarding personnel policies and procedures.

submitted by the union is in excess of the "70 percent" guideline followed by the Commission in previous cases. Under such circumstances a cross-check is warranted.<sup>4</sup>

#### FINDINGS OF FACT

1. King County Fire District 44 is a public employer within the meaning of RCW 41.56.020 and RCW 41.56.030(1). The employer's non-supervisory employees are organized for the purposes of collective bargaining.
2. International Association of Fire Fighters, Local 3186, a 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 a separate bargaining unit of supervisors presently consisting of assistant chiefs.
3. The petitioned for supervisors have duties and responsibilities which include the exercise of authority, in the name of and interest of the employer, to prepare and administer performance evaluations, assign staff work duties, impose verbal warnings, initiate written warnings and reprimands, and recommend suspension or termination of employees.
4. Labor relations policy for King County Fire District 44 is established by a three member elected board of commissioners. Such policy is implemented in collective bargaining negotia-

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<sup>4</sup> Employee turnover can affect the outcome of a cross-check. Accordingly, pursuant to WAC 391-25-410, the petitioning organization may request that the question concerning representation be determined by a secret ballot election.

tions. The employer is represented at these negotiations by members of the elected board of commissioners.

5. The assistant chiefs have limited participation in the collective bargaining process on behalf of the employer. Such activities are related to their role as first line supervisors and to their administration of the operation of the department in conformity with the terms of a collective bargaining agreement.
6. Assistant fire chiefs do not have an intimate fiduciary relationship with the district's elected board of commissioners or their bargaining representatives on matters of labor relations policy, they do not have authority to make substantive proposals in collective bargaining, and they do not have authority to change the labor relations policy of the employer.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56.RCW, and a question concerning representation exists.
2. Employees of King County Fire District 44 in the classification of assistant chief are public employees within the meaning of RCW 41.56.030(2), and are not confidential employees within the meaning of RCW 41.56.030(2)(c).
3. Employees of King County Fire District 44 in the classification of assistant chief are public employees within the meaning of RCW 41.56.030(2), so that a bargaining unit described as:

All full-time and regular part-time supervisors excluding elected officials, officials appointed for fixed terms of office, confidential employees and all non-supervisory employees.

is an appropriate unit for the purposes of collective bargaining within the meaning of RCW 41.56.060.

4. A question concerning representation presently exists in the bargaining unit described in paragraph 3 of the foregoing conclusion of law, and all conditions have been met for the conduct of a cross-check pursuant to RCW 41.56.060 and WAC 391-25-410.

DIRECTION OF CROSS-CHECK

A cross-check of records shall be made under the direction of the Public Employment Relations Commission in the bargaining unit described in paragraph 3 of the foregoing findings of fact, to determine whether a majority of the employees in that bargaining unit have authorized International Association of Fire Fighters, Local 3186 to represent them for purposes of collective bargaining.

Entered at Olympia, Washington, on the 8th day of December, 1994.

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.