

Dupont is in the infancy of its development as a municipality. The current population is approximately 600 persons, but the employer's comprehensive plan suggests that population will climb to approximately 9,100 residents in a period of some 20 years.¹ While its history is not fully detailed in the record,² it is known that the Weyerhaeuser Company (which owns most of the property in the city) is a primary participant in the Northwest Landing development design currently in process. An insurance company will soon move into a large new office building being built in the city.

The petition in this matter indicated there were seven employees in the proposed city-wide bargaining unit. The employer's initial response to the petition described a total workforce of nine positions, as follows:

Administrator.....	Roy Bysegger
Clerk/Treasurer.....	Catherine Harstad-Everett
Utility Billing/Court Clerk.....	Christine Owens
Planner.....	Dennis Clarke
Building Inspector/Plans Examiner.	Craig Leonard
Maintenance Supervisor.....	Frederick Foreman
Maintenance Worker.....	Jeff Jenison
Police Chief.....	Michael Pohl
Police Patrolman.....	Mark Bentler

Granting of the employer's proposed "confidential" exclusions for the administrator and clerk/treasurer would have left seven employees in consideration. The employer also proposed supervisory exclusions, however, so that exclusion of the planner, the building inspector, the maintenance supervisor, and the police chief, would have left only three employees in the bargaining unit.

¹ Other opinions suggest a more accelerated growth pattern, rising to perhaps 12,000 residents at an unspecified time when the Northwest Landing development is completed.

² The name derives from Dupont Chemical, which apparently had or has a facility in the area.

Participants on behalf of the employer in the telephonic pre-hearing conference held on April 22, 1994, included then-Mayor Gorgensen and the employer's attorney, James J. Mason. Mark Bentler represented the union. The parties entered into stipulations on a number of issues at that time, but framed an issue as to whether there should be one or two bargaining units. With respect to the eligibility of employees for inclusion in a bargaining unit, the statement of results of the pre-hearing conference identifies only the maintenance supervisor and police chief as being in dispute. No objections to the statement of results of pre-hearing conference were filed with the Hearing Officer.

POSITIONS OF THE PARTIES

Contending that its resident population will likely rise from 600 to possibly 12,000, the employer has consistently opposed the "wall-to-wall" unit sought by the union, and has consistently sought exclusion of the police chief and maintenance supervisor on the basis that they are supervisors and/or confidential employees. At the hearing and in its brief, the employer has taken positions on other issues which differ from those taken by its representatives during the pre-hearing conference. The employer first questions whether the petitioner is an "organization" within the meaning of RCW 41.56.030(3). Next, the employer seeks to exclude additional positions from the proposed bargaining unit. Where it appeared to support a three-unit structure during the pre-hearing conference, the employer now suggests there should be a separate bargaining unit for each department.

The union emphasizes the agreements of the parties at the pre-hearing conference, and would confine this dispute to the issues which were remaining at that time: (1) Whether there should be one bargaining unit or three; (2) whether the police chief should be excluded as a supervisor; and (3) whether the maintenance supervi-

sor should be excluded as a supervisor. The union contends there should be one wall-to-wall bargaining unit of city employees, based on the current population rather than any expectation of possible growth. The union contends the police chief and maintenance supervisor are not supervisors, and that they should be included in the petitioned-for bargaining unit.

DISCUSSION

Pre-Hearing Stipulations are Binding

Pre-hearing conferences are authorized by the Administrative Procedure Act (APA), at RCW 34.05.431, and by the Model Rules of Procedure adopted by the Chief Administrative Law Judge of the state of Washington, at WAC 10-08-130. The pre-hearing conference was held in this case by telephone conference call, consistent with recent Commission practice. The statements of results of pre-hearing conference issued thereafter read as follows:

This statement is issued pursuant to WAC 10-08-130 to state the stipulations made by the parties at the pre-hearing conference and **to control the subsequent course of the proceeding.**

1. The following matters were resolved during the course of the conference:
 - a. The parties stipulate that the Commission has Jurisdiction in this matter pursuant to Chapter 41.56 RCW.
 - b. The parties stipulated that the Commission has the correct names and addresses of the parties in the Commission docket records.
 - c. The parties stipulated that a question concerning representation currently exists in the above-captioned matter.
 - d. **The parties stipulated that the union is qualified to act as a "representative" within the meaning of the statute.**

- e. The parties stipulated that the petition was filed in a timely manner.
 - f. The parties stipulated there are no "blocking charges" filed as of the date of the pre-hearing conference.
2. The following matters remain in dispute between the parties:
- a. The parties disagree over the scope of the proposed bargaining unit. The employer argues that there should be separate bargaining units for police, administrative personnel and for maintenance. While recognizing that the City of Dupont is a small employer, the employer maintains that the city is growing rapidly, and the three separate units are needed. The union argues that a single bargaining unit is appropriate in this case.
 - b. The parties **disagree over the bargaining unit status of the police chief and the maintenance supervisor**. The employer argues that these positions are supervisory, and should be excluded. The union argues that the positions should be included in the bargaining unit, and are not supervisory.

Any objections to the foregoing must be filed, in writing, with the Hearing Officer within ten (10) days following the date hereof and shall, at the same time, be served upon each of the other participants named above. This statement becomes a part of the record in this matter as **binding stipulations of the parties, unless modified for good cause by a subsequent order.**

[Emphasis by **bold** supplied.]

The employer was represented during the pre-hearing conference by its then-mayor and its attorney. The employer's brief offers no explanation why it should be relieved from the stipulations made by those persons. In the absence of timely objections, within the customary 10-day period allowed, the stipulations set forth in the statement of results of prehearing conference became binding. Community College District 5, Decision 448 (CCOL, 1978).

Identity of the Petitioner

At the hearing, the employer raised a question as to the union's status, seeking to determine whether there is a legal entity with whom the employer could negotiate and that is capable of entering into contracts. Although the union's qualification for certification was stipulated in the pre-hearing conference, the employer appears to frame this as if it were a jurisdictional issue that can be raised at any time. It is addressed here on that basis only.

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, contains the following provisions pertinent to this matter:

RCW 41.56.030 DEFINITIONS (as amended by 1993 c 379).

As used in this chapter:

...
(3) "Bargaining representative" means any lawful organization which has as one of its primary purposes the representation of employees in their employment relations with employers.

Thus, there is no requirement for incorporation, so long as the union is a "lawful" organization.

In the context of provisions in RCW 41.56.010 and 41.56.040 which emphasize the right of employees to be represented by organizations of "their own choosing", and consistent with the expansive definition in RCW 41.56.030(3), WAC 391-25-010 provides, in part:

A petition for investigation of a question concerning representation of employees ... may be filed by **any** employee, group of employees, employee **organization**, employer or their agents.

[Emphasis by **bold** supplied.]

Again, there is no requirement for incorporation. No case citations were provided by the employer in support of its assertion

that incorporation is required for an organization serving as an exclusive bargaining representative, and none are found.³ The stipulation made at the prehearing conference will stand.

Eligibility Issues

A list of employees provided by the employer at the hearing was slightly different than it provided earlier:

Administrator.....	Roy Bysegger
Clerk/Treasurer.....	[vacant]
Clerk.....	Christine Owens
Planner.....	Dennis Clarke
Building Inspector/Plans Examiner.	Craig Leonard
Maintenance Supervisor.....	Frederick Foreman
Maintenance Worker.....	Jeff Jenison
Police Chief.....	Michael Pohl
Police Patrolman.....	Mark Bentler
Fire Chief.....	Lee Chase

The evidence indicated that the clerk-treasurer position had been vacant for a week at that time. The evidence indicated that the fire chief works about 30 hours per month heading an all-volunteer fire department in Dupont, and has a full-time job elsewhere.

Confidential Exclusions -

The issue of confidentiality has been visited by the Commission in numerous cases controlled by IAFF, Local 469 v. City of Yakima, 91 Wn.2d 101 (1978). It is clear that an employer will be allowed some reasonable number of excluded personnel to perform the functions of "employer" in the collective bargaining process. Clover Park School District, Decision 2243-A (PECB, 1987). At the same time, because status as a "confidential" employee deprives the

³ Indeed, Commission precedent has been liberal in accepting informal organizational structures. See, Southwest Washington Health District, Decision 1304 (PECB, 1981).

individual of all rights under the statute, the party that seeks exclusion of an employee as "confidential" has a heavy burden of proof. City of Seattle, Decision 689-A (PECB, 1979).

In this case, the city administrator is the highest-ranking non-elected official in the employer's table of organization, and has authority over all of the employees in the petitioned-for unit. A clerk-treasurer is commonly the principal financial officer in a small municipality, and persons holding such positions are often involved in the employer's preparations for collective bargaining.

The petitioner in this case is an independent organization, formed in-house by the employees of this employer. It is inferred that the leaders of the organization were intimately familiar with the employer's workforce when they prepared the petition form. While they used general terms "Police, Public Works, Planning/Building, Administrative" to describe the bargaining unit, they inserted the number "7" in the space on the petition form calling for the number of employees involved. With nine positions in the employer's regular workforce, exclusive of elected officials, that number only makes sense if the union intended to exclude both the "administrator" and "clerk-treasurer" positions from the bargaining unit.

The evidence also supports exclusion of the "administrator" as a confidential employee, if not the executive head of the public employer, under RCW 41.56.030(2)(c).

The vacancy in the clerk/treasurer position was the subject of some testimony at the hearing. Mayor Shenkel testified that the former utility/court clerk was functioning "at the present time in a temporary status and it's by necessity", performing both her former duties and the clerk-treasurer duties until the latter position could be filled on a permanent basis. She was typing letters for the mayor and for the administrator, and handling financial matters which would ordinarily be handled by a clerk-treasurer. In

response to a question concerning the clerk's responsibility for preparation of the budget, the mayor responded, "The person holding the position of clerk-treasurer is responsible for working with and then helping prepare that budget". The record does not indicate whether, or when, the clerk-treasurer position was filled. The evidence would not support exclusion of more than one clerk as a confidential employee, however. If the clerk-treasurer position has been filled, the employee now holding the second clerk position would be eligible for inclusion in the bargaining unit.

Supervisors -

Different from the situation existing in the private sector under the National Labor Relations Act, "supervisors" are public employees within the meaning and coverage of Chapter 41.56 RCW. Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977). Supervisors will be excluded from bargaining units containing their rank-and-file subordinates under City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981), but that is done as an exercise of the Commission's unit determination authority under RCW 41.56.060, in order to avoid a potential for conflicts that would otherwise exist within the bargaining unit.

The employer claimed the planner and building inspector were supervisors in its initial response to the petition, but it is clear that neither of those individuals has any supervisory authority over subordinate employees.⁴ Its abandonment of "supervisor" claims as to those positions during the pre-hearing conference is thus completely consistent with well-established precedent under Chapter 41.56 RCW. Those stipulations are binding,

⁴ The planner performs research and studies, and advises the mayor and city council on projects deemed controversial. The building inspector appears to perform routine plans examination and building code enforcement functions.

and the employer will not be heard at this late date to argue for "supervisor" exclusions for those positions.

The maintenance supervisor reports to the administrator and is responsible for the employer's public works functions, including roads, sewer system, water system, and parks. He assigns work to the maintenance worker, but does not have authority to hire, fire, discipline, or grant time off. The maintenance supervisor spends part of his working days in the field, performing duties similar to those of the maintenance worker.

The police chief also reports to the administrator. With only two full-time, paid police officers in the city, the chief performs regularly scheduled shifts as a patrol officer. He does not have authority to hire or fire, and must obtain prior approval to discipline officers.⁵

On the facts as they currently exist, the maintenance supervisor and police chief are, at most, lead workers who lack sufficient authority to create the potential for conflicts of interest that was of concern in City of Richland, supra. This case is comparable to City of Winlock, supra, affirmed, Decision 4056-B (PECB, 1993), where the police chief, street superintendent, and water/sewer operator in a small municipality were found to be working foremen eligible for inclusion in a city-wide bargaining unit.

Propriety of the Bargaining Unit

The employer has proposed that there should be at least three bargaining units within its workforce. Although its brief

⁵ Two "reserve" police officers are associated with the employer's law enforcement function, but are not on the regular payroll. They are in the process of obtaining (or have recently obtained) accreditation, and would ordinarily be used only for backup of the two paid officers.

acknowledges rejection of a similar argument by the Commission in City of Winslow, Decision 3520, 3520-A (PECB, 1991), it urges the creation of a bargaining unit structure suited to a municipality of its projected size, and expresses concern that a city-wide unit would become an impediment in a much larger workforce.

The purpose of unit determination is to group together employees who have sufficient similarities (community of interest) to indicate that they will be able to bargain collectively with their employer. City of Pasco, Decision 2636-B (PECB, 1987). The statute does not require determination of the "most" appropriate bargaining unit. It is only necessary that the petitioned-for unit be an appropriate unit. City of Winslow, supra.

At the hearing held in this matter on July 7, 1994, the evidence established that the employer's current workforce consisted of 10 positions, of which 9 were then occupied. As already noted above, the language used to describe the bargaining unit and the petitioner's insertion of "7" on the petition form are the basis for an inference that it was seeking a city-wide unit excluding only the administrator, the clerk-treasurer and the part-time fire chief. A bargaining unit consisting of "all of the employees of the employer" after exclusion of elected officials, confidential employees and supervisors, is inherently appropriate under the "duties, skills and working conditions" and "extent of organization" criteria of RCW 41.56.060. City of Winlock, Decision 4056 (PECB, 1992). There is no history which would contradict a city-wide unit in this workforce under the "history of bargaining" aspect of the statutory unit determination criteria.

The employer's concern about the effects of future growth are premature and speculative. The Legislature has vested unit determination authority in the Commission in RCW 41.56.060. That statute specifically authorizes the Commission to "modify" bargaining units, and the Commission has indicated its willingness

to modify bargaining unit structures when there is a change of circumstances. City of Richland, supra; WAC 391-35-020(2)(a). Unit determination cases are thus decided on the basis of the facts as they currently exist.

Should the employer's population exceed 7,500 at some time in the future (i.e., a 1150% growth from its present level), its police officers would become eligible for "interest arbitration" under RCW 41.56.430, et seq. A unit clarification seeking a separate unit of police officers would be indicated at that time, under Commission precedent requiring that law enforcement officers eligible for interest arbitration be kept separate from other employees. City of Yakima, Decision 837 (PECB, 1980). Similarly, should any of its departments grow sufficiently in the future to warrant supervisory exclusions, that could be the basis for a unit clarification petition filed at that time under City of Richland, supra.

Finally, the structure sought by the employer would actually have deprived all of the current employees of their collective bargaining rights. The employer's "departmental" categories were as follows: Administrative (one employee), public works (two employees, with one claimed as supervisor), police (two employees, with one claimed as supervisor), planning (one employee), and building inspection (one employee). Thus, even the limited supervisory exclusions sought by the employer at the pre-hearing conference reduced all of its proposed "departmental" units to one-person units that would have been inappropriate under precedent dating back to Town of Fircrest, Decision 248 (PECB, 1977). Aside from the anticipated growth of its population, the employer has not demonstrated any unique circumstance which would warrant preferring smaller bargaining units at this time. Even if it had done so, any preference for departmental units in the long-term would have to give way to permitting employees of various departments to combine in order to implement their statutory bargaining rights in the short-term.

FINDINGS OF FACT

1. The City of Dupont is a municipality of the State of Washington, and is a public employer within the meaning of RCW 41.56.010(1).
2. The City of Dupont Employees Association, a bargaining representative within the meaning of RCW 41.56.030(3), has filed a timely petition for investigation of a question concerning representation, seeking certification as exclusive bargaining representative of a city-wide bargaining unit of employees of the City of Dupont. The petition was supported by a showing of interest demonstrating that the petitioner has the support of more than 70% of the employees in the proposed bargaining unit.
3. The petition filed by the City of Dupont Employees Association implied excluded the employer's "administrator" and "clerk-treasurer" from the bargaining unit. The "administrator" is the highest full-time official of the employer, and exercises authority over all other employees of the employer. The "clerk-treasurer" is the chief financial officer of the employer, and would necessarily be involved in the employer's preparations for collective bargaining.
4. During a pre-hearing conference held in this proceeding, the persons participating on behalf of the employer with apparent authority as mayor and attorney stipulated the inclusion of the "planner" and "building inspector" in the petitioned-for bargaining unit. A statement of results of pre-hearing conference was issued, and no objections were filed by any party within the time provided.
5. The chief of police and the maintenance supervisor each work in conjunction with one employee of lower rank or status and

perform the same work that is performed by their subordinates, sharing similar duties, skills and working conditions. As working foremen, neither the chief of police nor the maintenance supervisor has authority to hire, fire or discipline subordinate employees.

CONCLUSIONS OF LAW

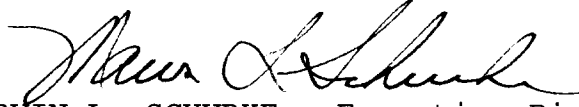
1. The Public Employment Relations Commission has jurisdiction over this case pursuant to RCW 41.56.060.
2. In the absence of timely objections or a showing of good cause why they should not be enforced, the stipulations made by the parties during the pre-hearing conference and recorded in the statement of results of pre-hearing conference are binding on the parties under RCW 34.05.431 and WAC 10-08-130.
3. A bargaining unit consisting of all regular employees of the City of Dupont, excluding elected officials, the city administrator, confidential employees, and casual employees, is an appropriate unit for the purposes of collective bargaining under RCW 41.56.060.
4. The chief of police and the maintenance supervisor are "public employees" within the meaning of RCW 41.56.030(2), whose duties do not present a potential for conflicts of interest warranting their exclusion under RCW 41.56.060 from the bargaining unit described in the preceding paragraph.
5. A question concerning representation presently exists in the bargaining unit described in paragraph 3 of these conclusions of law, and the conditions for direction of a cross-check under RCW 41.56.060 and WAC 391-25-391 are met.

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 conclusions of law, to determine whether a majority of the employees in that bargaining unit have authorized the City of Dupont Employees Association to represent them for the purposes of collective bargaining.

DATED at Olympia, Washington, this 9th day of February, 1995.

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.