

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
)
PUYALLUP PROFESSIONAL PUBLIC) CASE 11579-E-95-1901
SAFETY MANAGER'S ASSOCIATION))
)
Involving certain employees of:) DECISION 5460 - PECB
)
CITY OF PUYALLUP) DIRECTION OF CROSS-CHECK
)
)
)
)

Schwerin, Burns, Campbell and French by Lawrence Schwerin, Attorney at Law, appeared on behalf of the union.

Perkins Coie, by Michael T. Reynvaan, Attorney at Law, appeared on behalf of the employer.

On February 7, 1995, the Puyallup Professional Public Safety Manager's Association (union), filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission, seeking certification as exclusive bargaining representative of certain supervisory uniformed personnel employed by the City of Puyallup (employer). During a telephonic prehearing conference, the employer asserted that all of the petitioned-for supervisors are "confidential" employees under RCW 41.56.030(2)(c). A hearing was held on April 28, 1995, before Hearing Officer Paul T. Schwendiman. Both parties submitted post-hearing briefs.

BACKGROUND

The City of Puyallup has a council-manager form of government. The city manager is the hiring authority for all city employees. City-wide issues, including labor relations and finance matters, are discussed at meetings held by the city manager, usually on a weekly basis, with department heads or their designees. The chief of the

employer's fire department or his designee, along with the police chief, city attorney, and public works director or their designees, are expected to attend those meetings.

The Puyallup Fire Department is headed by Fire Chief Merle Frank, who reports directly to the city manager. The department operates three fire stations staffed by three "shifts" of employees. A bargaining unit of 42 rank-and-file employees, including battalion chiefs, captains, deputy fire marshals, fire fighters, and paramedics, is represented by International Association of Fire Fighters, Local 726. A battalion chief commands each fire suppression shift; a captain is in charge at each station. Two assistant fire chiefs supervise the battalion chiefs and deputy fire marshals.

The parties to this proceeding stipulated to the following unit description:

All persons who are commissioned, appointed, administrative employees of the Fire Department of the City of Puyallup and who are eligible to become members of the Washington State law enforcement and fire fighters' pension system as established by state law.

In actual practice, that unit is limited to the two employees who hold the "assistant chief" positions in the department.

The Assistant Chiefs

Assistant Fire Chief Richard Carman serves as fire marshal, and oversees the fire prevention and emergency management functions for the department. He has been with the department for about 20 years, and served as acting fire chief during a period of eight months in 1981. Carman was on the employer's bargaining committee in 1981, but his participation was limited to listening and giving his opinion about the accuracy of statements made by Local 726. Carman has not participated on the employer's bargaining resource

team or the employer's bargaining committee during his subsequent tenure as an assistant chief.

Assistant Fire Chief Lyle Nicolet oversees operations and training functions for the department. He became an assistant chief in 1989, after serving as the president and chief negotiator of Local 726 for about seven years. Nicolet applied for the position in response to a civil service examination announcement which included:

ASSISTANT FIRE CHIEF/TRAINING OFFICER
PROMOTIONAL EXAMINATION

NATURE OF WORK

This position assists in achieving the Fire Department's goals and objectives by serving as a member of the department's management team in formulating management short-contract and long-contract objectives, and developing, administering, and evaluating staff development programs to assist the Fire Chief in the achievement of department objectives. This position also assists the Fire Chief in the **development and execution of the Department's labor relations program by attending contract negotiation sessions**, monitoring compliance with contract, and strategies/plans to foster improved communications and high morale in the department. ...

...
EXAMPLES OF DUTIES

...
Assists the Fire Chief in the **development and execution of the department's labor relations program by developing strategies for bargaining by attending contract negotiating sessions**, monitoring compliance with contract advising in the resolution and defense of grievances and other duties directed by the Chief.

...
QUALIFICATIONS

Knowledge of:

- ...
- **management's rights and responsibilities in the labor contract negotiations and administrative process.**

...
Ability to:

- ...
- **represent management interests in the labor relations process and to effectively participate in labor contract negotiations and administration;**

...
EXPERIENCE AND EDUCATION

...
Preferred:

- ...
- Two years experience in working in labor relations with firefighters ...

[Emphasis by **bold** supplied.]

Prior to accepting the promotion, however, Nicolet solicited a commitment that he would not have to sit across the bargaining table or work against Local 726. Chief Frank made such a commitment. Nicolet has not served on the employer's bargaining committee, and has not participated in executive sessions of the city council.

In his 20 years as assistant chief, Carman attended four or five weekly department head meetings, when the fire chief was unable to attend. Nicolet attended one such meeting, when the fire chief was unable to attend. After that meeting, however, Nicolet asked for no further assignment to those meetings. He attended no more department head meetings.¹

Both assistant chiefs attend regular weekly meetings with the chief, where the subjects for discussion include operational problems, employee grievances, interpretations of the collective bargaining agreement covering the rank-and-file unit, positions to be taken by the department in its relations with the rank-and-file

¹ At least one battalion chief, who is clearly a member of the rank-and-file unit, has been assigned to attend a department head meeting. The subjects discussed at that particular meeting are not in evidence, however.

bargaining unit, and things peculiar to the operations and prevention divisions. Frank uses those meetings to pass along information he has received at the weekly department head meetings.

Nicolet attended meetings of a joint labor-management committee or similar forum in 1991. Personnel Director Bruce Uhl, Chief Frank and representatives of Local 726 were present at those meetings.

Vacant Position and Re-Organization

A third "assistant chief" position existed within the department until 1993 or 1994, when former Assistant Fire Chief Denny Parlari left and was not replaced. Prior to his promotion to assistant chief, Parlari had been active in Local 726 and had served as an officer in the state fire fighters' organization. When Chief Frank came to the department from out-of-state, he relied on Parlari and Nicolet for the history of the rank-and-file collective bargaining agreement.²

Parlari routinely served on a bargaining resource team that develops the employer's bargaining proposals and strategy, and he sometimes represented the employer in collective bargaining negotiations. He continually discussed issues with the bargaining resource team to see if the negotiations were heading in the right direction, drafted contract language, and prepared memos about what he wanted brought up in negotiations. Parlari's request about a scheduling problem was adopted as the employer's highest priority in negotiations, after economic issues. Parlari met with the chief and the employer's labor relations attorney, Dave Andrews. When Andrews assigned Parlari the task of collecting and assembling economic and operational data from other cities, Parlari traveled in both Washington and Oregon to collect and assemble data and

² As leaders of Local 726, Parlari and Nicolet had participated in the development of much of the language in the Local 726 collective bargaining agreement.

contracts for the employer's use during bargaining and possible interest arbitration. Parlari was always available for consultation with the employer's bargaining committee by telephone during contract negotiations in 1989 and 1992, and sometimes sat across the bargaining table from Local 726. Parlari also attended city council meetings, including executive sessions when collective bargaining with Local 726 was discussed.

The assistant chief for operations position held by Parlari was combined with the assistant chief for training position upon his departure, but Parlari's duties were actually divided between the fire chief, the two assistant fire chiefs, and the battalion chiefs. General responsibilities of the fire chief and the two remaining assistant chiefs are found in Fire Department Operational Guideline 1-10, as revised February 18, 1994:

I. Fire Chief:

Annexation and Merger Plans
Assistant Chief and Administrative Secretary
Evaluations
Automatic and Inter-Local Agreements
Civil Service
Department Planning
Inter-City Department Coordination
Labor Contract Administration
Mutual Aid
New Construction
Operational Guidelines
Public Safety Committee Coordination
Rules and Regulations
Supervision of Assistant Chiefs/Divisions and
Functions

II. Assistant Chief/Prevention (Fire Marshal):

Annual Report
Background Investigations
Budget Analysis Reporting
Community Development Review Committee
Complaint Inspections
Data Processing/Hardware/Software
Department Member Identification Cards and Pictures
Fees and Charges Program
Fire Department Planning Commission Liaison
Fire Investigation Training
Fire Investigations
Fire Prevention Code and Ordinance Adoption Revision and Permits

Hazardous Material Inventory and Control
Inspector Training
Media Relations/Public Information
Nuisance Abatements
Prevention Budget
Public Education/Inspection Service
Special Reports and Analysis

III. Assistant Chief/Training and Operations:

Battalion Chief Supervision
Breathing Apparatus Repair and Maintenance
Budget Processing
Budget Suppression/EMS/and Facilities
Clothing Inspections
Communication Equipment/Maintenance and Repair
Department and Individual Training in Suppression
Department and Safety Program
Emergency Medical Service
Emergency Medical Supplies
Employee Benefits Assistance
Equipment Testing
Facility Ground Maintenance
Fire Fighter Recruit Training/Orientation
Fire Watch Operations
Haz-Mat
Hose Maintenance Program
Hydrant Program
Leave Processing PAFS
Mapping
Mobile and Accessory Equipment Repair and Maintenance
New City Employee Orientation
On Scene Safety Officer
Operational Guidelines
Out Side Training Coordinator
Personnel Selection and Training
Promotional Testing
Quarterly Plan Administration
Research and Development on New Procedures, Equipment and Physical Fitness Programs.
TASK Force and STRIKE Team Planning
Time Cards
Training Budget Administration
Training Records
Water Rescue-Over the Bank Heavy Rescue
Western Washington Fair Operations
Work Schedules

The testimony in this proceeding indicates that the duties listed in the operational guidelines are not all-inclusive.

Nicolet was involved in a labor-management retreat in 1994. The chief, the two assistant chiefs, the three battalion chiefs, and

three representatives of Local 726 attended that retreat. The chief and Nicolet met with a representative of Local 726 in about 1994, to resolve an issue concerning auto-defibrillation which arose while there was a collective bargaining agreement in effect. Nicolet was also involved in the discussion of issues concerning the fair labor standards act (FLSA), educational assignments, and a sell-back of annual leave.

POSITIONS OF THE PARTIES

The employer contends that both assistant fire chiefs should be excluded from the petitioned-for bargaining unit as confidential employees within the meaning of RCW 41.56.030(2)(c). The employer also contends that if either of the two assistant fire chiefs is a confidential employee, then the petition should be dismissed on the basis that a one-person bargaining unit is not appropriate.

The union contends that neither of the assistant fire chiefs are confidential employees within the meaning of RCW 41.56.030(2)(c).

DISCUSSION

Applicable Legal Principles

The employer and union agreed that the two assistant chiefs are supervisors, and the evidence presented at the hearing confirms that they both exercise authority over subordinate employees. Status as a "supervisor" does not, however, preclude them from asserting collective bargaining rights under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977).

The proposed separate bargaining unit of supervisors is also in keeping with well-established Commission precedent. Those who exercise authority for an employer are normally excluded from the bargaining units containing their subordinates, in order to avoid a potential for conflicts of interest which would otherwise exist within the bargaining unit. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981).

The issue here is whether the assistant chiefs should be classified as confidential employees. RCW 41.56.030(2) provides:

"Public employee" means any employee of a public employer **except any person** (a) elected by popular vote, or (b) appointed to office pursuant to statute, ordinance or resolution for specified contract of office by the executive head or body of the public employer, or (c) **whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit**, or any person elected by popular vote or appointed to office pursuant to statute, ordinance or resolution for specified contract of office by the executive head or body of the public employer, ...

[Emphasis by **bold** supplied.]

The Commission has consistently adhered to a "labor nexus" test for confidential status, applying the precedent set by the Supreme Court of the State of Washington in International Association of Fire Fighters v. City of Yakima, 91 Wn.2d 101 (1978):

We hold that in order for an employee to come within the exception of RCW 41.56.030(2)(c), 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 offi-

cer or executive head of the bargaining unit, including formulation of labor relations policy.

In Yakima, the Supreme Court took direction from the definition of "confidential employee" found in the Educational Employment Relations Act, Chapter 41.59 RCW, which sets forth a "labor nexus" test for confidential status.³ The emphasis in Yakima was on collective bargaining matters, where disclosure of confidential employer information would be harmful to the collective bargaining relationship and process.⁴ That focus has been repeated in numerous decisions including Wahkiakum County, Decision 1876 (PECB, 1984); City of Bremerton, Decision 3176 (PECB, 1989); City of Richland, Decision 1519 (PECB, 1982); and Lewis County, Decision 5260 (PECB, 1995).

³ RCW 41.59.020(4)(c) provides:

(c) Confidential employees, which 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.

⁴ The Supreme Court also stated in Yakima:

Those in whom such a trust is continuously reposed could and perhaps would participate in the formulation of labor relations policy. They would be especially subject to a conflict of interest were they to negotiate with an employer on their own behalf. By excluding from the provisions of a collective bargaining act persons who work closely with the executive head of the bargaining unit, and who have, by virtue of a continuous trust relation, assisted in carrying out official duties, including formulation of labor relations policy, such conflict is avoided. And, public trust is protected since officials have the full loyalty and control of intimate associates. 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.

Because status as a confidential employee deprives the individual of all collective bargaining rights under Chapter 41.56 RCW, the party proposing a confidential exclusion bears a heavy burden. City of Seattle, Decision 689-A (PECB, 1979). In this case, the employer must prove the assistant chiefs actually have duties which include a "necessary, regular and ongoing" labor relations nexus. Clover Park School District, Decision 2243-B (PECB, 1987); City of Dupont, Decision 4959-B (PECB, 1995). Ambiguous or contradictory evidence will not support a claim of confidential status. Pateros School District, Decision 3911-B (PECB, 1992).

As clearly stated by the Supreme Court in Yakima: "General supervisory responsibility is insufficient to place an employee within the [confidential] exclusion." General personnel functions, making of contract interpretations, discipline of subordinates, and grievance processing are common indicia of supervisory authority, and do not warrant exclusion from a bargaining unit of supervisors on the basis of being a confidential employee. City of Seattle, Decision 689-C, (PECB 1981); City of Yakima, Decision 4625 (PECB, 1994).

Occasional or incidental involvement in the collective bargaining process is not sufficient to warrant a confidential exclusion. Supervisory employees who merely provide input to the employer's labor policy makers or negotiating team concerning the impact of various contract proposals are not regarded as confidential employees. King County, Decision 4004-A (PECB, 1992); Snohomish County, Decision 4027 (PECB, 1992). Such support functions are a normal incident of supervisory status and, without more, do not support an exclusion from the bargaining rights based upon confidential status. Mason County, Decision 1552 (PECB, 1983).

Application of Precedent

The two assistant chiefs at issue here are utilized as a resource to the chief in assessing the impact of collective bargaining

proposals, processing grievances, and interpreting the collective bargaining agreement for the rank-and-file unit. These are normal supervisory functions, however, and would not warrant exclusion of either assistant chief as confidential.

The two assistant chiefs meet with Chief Frank on a weekly basis, but the record is unclear as to the nature of those meetings. There is some indication that the employer's positions in collective bargaining negotiations were discussed at some meetings between the chief and the assistant chiefs prior to the departure of former Assistant Chief Parlari, but the exact nature of those discussions is not established in this record.⁵ Moreover, no collective bargaining negotiations or preparations have occurred since Parlari left employment with the employer in 1993 or 1994. The evidence is thus ambiguous on the weekly meetings.

Assistant Fire Chief Carman -

Assistant Chief Carman has not attended collective bargaining sessions since 1981, when he served on the employer's bargaining committee during the eight month period he was the acting fire chief. Even then, his role on the employer bargaining team was mainly to listen and give his opinion on the accuracy of statements made by Local 726. Even if he might have been excludable as a confidential employee during that period, the activity is not "ongoing".

Carman's attendance at four or five department head meetings over a 20-year period is not sufficiently "regular" to warrant exclusion as a confidential employee. While employer-wide labor issues are sometimes discussed at such meetings (along with operational issues, council policy issues, and council directives), no evidence

⁵ They could have been no more than providing input to the chief on how proposals would affect operations.

was produced to show that sensitive matters were actually discussed at any of the meetings attended by Carman.

Assistant Fire Chief Nicolet -

The job description under which Nicolet became an assistant chief certainly provides some basis for a claim of confidential status. Unrefuted testimony shows, however, that Nicolet conditioned his acceptance of the position on not being required to work against Local 726, and that Chief Frank acceded to Nicolet's demand. The testimony also shows that Nicolet has historically been excused from attending department head meetings. The other evidence thus contradicts the job description.

It is clear that Parlari performed duties which were intimately involved in the collective bargaining process,⁶ but Parlari's status is not at issue here. It is also clear that Parlari's duties were divided between the chief, the two remaining assistant chiefs, and the three battalion chiefs. The division of Parlari's labor relations duties is less clear, except that they were not shifted to Nicolet on a wholesale basis. The current operational guidelines only mention administration of collective bargaining agreements, and then only for the chief. Moreover, there has been no occasion for repetition of Parlari's duties related to preparation for bargaining of a successor agreement with Local 726. The employer's heavy burden is not met by speculative evidence regarding the role Nicolet might play in the future.⁷

⁶ Parlari formulated confidential bargaining information and employer labor relations policies at resource team meetings. He ranked the employer's departmental priorities on noneconomic bargaining issues and positions. He was the primary employer representative to develop and analyze wage and contract comparability data that he obtained from other fire departments. Parlari attended collective bargaining sessions on more than an isolated basis.

⁷ See, Benton County, Decision 3693 (PECB, 1989); City of Cheney, Decision 3693 (PECB, 1991); and Pateros School District, supra.

Chief Frank relies on Nicolet for interpretation of the Local 726 collective bargaining agreement, but it appears that reliance is based in substantial part on Nicolet's experience as an official and bargainer for Local 726. Frank testified how Nicolet's experience assisted him to interpret the Local 751 collective bargaining agreement:

I rely on them [Nicolet and Parlari] because I was from outside the area. I don't have the history. I didn't have the history of labor agreements or why the articles were there and things like that. So I rely upon Denny [Parlari] and Lyle [Nicolet] primarily because they were in the leadership position in the union [Local 726] and were responsible for a lot of language being in the contract. (Tr. 144-145)

Information obtained by Nicolet while he was a representative of Local 726 is already known to Local 726, and cannot be converted to confidential employer information by the passage of time or by passage of a former union officer to a supervisory rank. In particular, past practices are available to observation by employees and unions representing employees, and are not the type of information protected by the confidential exclusion. Thus, assisting Frank with such information does not imply any exchange of confidential information.

Unlike Carman, Nicolet has been involved in several mid-contract discussions with Local 726. These include related "FLSA", "automatic defibulation" and "buy-back of leave" issues, and a medic-as-captain issue. On the record made here, however, Nicolet's actual dealings with these mid-contract issues were an extension of his duties as a supervisor and as the officer in charge of training, rather than as a confidential employee:

* The FLSA matter was discussed when Nicolet was president of Local 726, but resurfaced as an issue after he became assistant chief in charge of training. The issue impacted directly on training, as questions arose concerning application of the FLSA to

paid time for study, driving, and hospital attendance for employees involved full-time in training for advanced life support (paramedic) work. The record is unclear as to the outcome of this issue.

* Nicolet had limited involvement with the auto-defibrillation issue. The employer produced notes which show that Nicolet attended an earlier meeting with Frank and a representative of Local 726 sometime prior to December 11, 1991.⁸ The notes indicate that it was Parlari who was involved in the actual negotiations on this and other issues, not Nicolet or Carman.

* The buy-back of leave matter arose as a training-related issue while Nicolet was assistant chief for training. Local 726 came to Nicolet with a concern that paramedic trainees would have substantial leave accumulations during full-time training. A buy-back program allowed new paramedics to proceed immediately from trainee to regular duty, without having to first take a substantial amount of leave. Nicolet took the issue to Chief Frank with an affirmative recommendation that was closely related to his "training" responsibilities (i.e., that putting the training to use immediately would be beneficial and prevent loss of skills).

* Although reference was made to an issue concerning the assignment of a paramedic as captain at a fire station, the only evidence in the record suggests that Nicolet was strongly opposed to such assignments. The evidence does not establish how, if at all, Nicolet represented the employer in negotiations on the issue.

Nicolet became involved in the processing of a grievance when he sought to establish a tie between training standards and employee performance evaluations. Frank expects the assistant chiefs to be:

[His] first line of defense against grievances. If they can deal with them and resolve them, even before they become grievances, we would want that to occur and that has occurred. (Tr. 159)

⁸ Minutes of December 11, 1991, show that no proposals were generated at the earlier meeting.

In the cited instance, however, Frank agreed with Local 726, rather than with Nicolet. As to other grievances, Chief Frank was uncertain as to which of Nicolet's recommendations he actually followed:

- Q. [By Mr. Reynvaan] Are there other times (unlike the performance evaluation grievance) when you have followed [Nicolet's] recommendations?
- A. [By Chief Frank] I was trying to think of that this morning when that was going on. I think there is. But I don't recall specifically the case, because there is a lot of them. (Tr. 160)

As noted above, however, grievance handling is a normal supervisory task that does not warrant a confidential exclusion.⁹ The evidence does not support a finding that Nicolet has gone beyond providing supervisory input and assistance with grievance adjustment.

The employer appears to argue that the issues described above amounted to mid-contract "collective bargaining", rather than grievance adjustments, so that Nicolet's assistance to Chief Frank was sufficient to make Nicolet a confidential employee. The employer is in error. The line between grievance adjustment and

⁹ See, for example, City of Bremerton, supra, where the employer based its claim that several deputy chiefs were confidential, in part, on their work with grievance adjustment and administration of labor agreements. It was determined that those deputy chiefs were not confidential, because they did not assist in the formulation of labor relations policy, or participate in collective bargaining negotiations on behalf of the employer. Similar results were reached in City of Bellingham, Decision 565 (PECB, 1979); City of Richland, Decision 1519 (PECB, 1982); and City of Seattle, supra. In the instant case, the record may not even support a conclusion that Nicolet possesses the "supervisory" authority to consistently exercise independent judgment in adjusting grievances. Nicolet's positions on grievances are subject to the chief's approval, and that approval is frequently withheld.

mid-contract collective bargaining may sometimes be blurred, but it is not obliterated. Grievance procedures are mentioned in the definition of "collective bargaining" found in RCW 41.56.030(4):

(4) "Collective bargaining" means the performance of **the mutual obligations of the public employer and the exclusive bargaining representative** to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement **with respect to grievance procedures** and collective negotiations on personnel matters, including wages, hours and working conditions ...

[Emphasis by **bold** supplied.]

The adjustment of grievances is, however, traditionally mentioned among the defining criteria for a "supervisor".¹⁰ Our Supreme Court was most definite in excluding general supervisory functions from the confidential definition in Yakima, supra, and numerous Commission precedents have assigned contract administration tasks to the "supervisor" category.

Chief Frank wanted to improve labor relations with Local 726 after problems arose in 1986.¹¹ Allowing that his effort has largely been successful, and that labor-management cooperation appears to be at a high level in the department, that does not compel a

¹⁰ See, e.g., Section 2(11) of the National Labor Relations Act and RCW 41.59.020(4)(d), both of which have been cited in numerous Commission decisions as setting forth the types of authority which typically warrant exclusion as a super-visor under Richland, supra.

¹¹ As the chief noted, his attitude toward the Local 726 collective bargaining agreement changed:

[From 1987 on] There was almost continuous negotiations. There were always issues. We took a different approach. Instead of waiting for issues to surface only once every three years, and because of the difficulty we had in '86, we addressed them on a routine basis. Which I felt would foster better labor relations in each department. (Tr. 154)

conclusion that Nicolet has been involved in collective bargaining negotiations qualifying him for exclusion as a "confidential employee". While no grievance has gone to arbitration during Chief Frank's tenure, the evidence suggests that is largely attributable to the chief's willingness to accommodate the Local 726 leadership even when there is arguably a basis for him to do otherwise, in order to keep matters within the department.¹² Frank indicated that "sometimes by being right you could win the battle and lose the war",¹³ and he has kept most grievances from "going across the street [to the city manager]". This weighs against the employer's "bargaining-not-grievances" argument, in that it is clear that the chief and his designees are only authorized to settle grievances at step 2 of the procedure. The city manager becomes involved both at step 3 of the grievance procedure (where he can settle any grievance not settled by the chief) and in contract negotiations. Thus, the fire chief is vested with only a portion of the authority

¹² Frank testified about adjustments made after the negotiation of a three-year agreement in 1992:

[The 1992] negotiations set up some things that were going to happen. On purpose we didn't address the paramedic issue, which has been discussed earlier today here. We knew there was some inherent problems we were going to have to deal with. And we have been dealing with those. (Tr. 157)

Frank also noted his attempt with consensus building with supervisors, rank-and-file employees and union leaders. He included his reaction to the union officers to change their mind on a consensus-based agreement:

I tried to report consensus of the group just like [Parlari] was. I felt that the agreement we had when we went [to a labor-management retreat] was that we all would support consensus. But the union officials came back, had a problem with their organization, and I didn't feel like we wanted to fight about that right now. There were other ways to deal with that. So yes, I did [overrule Nicolet on the call back pay issue] I feel we will get there another way. (Tr. 177-178)

¹³ Although he believed that Nicolet's interpretation of the collective bargaining agreement was correct, he felt it was better for the department if he did not follow Nicolet's lead with Local 726.

concerning labor policy matters, and the mid-contract adjustments cited by the employer were within that limited authority. The cited situations were not matters to which the confidential exclusion is properly attached.

While a collective bargaining agreement is in effect, the contract language will control matters that are specified in the contract. A dispute arising while a collective bargaining agreement is in effect is normally considered a grievance subject to adjustment under a contractual grievance procedure. Adjusting a grievance by a supervisor, such as Nicolet, may require some discussion and negotiation. Sometimes even mediation is used prior to submitting an unresolved grievance to final and binding arbitration. Consistent with the conclusion that such grievance adjustment by a first level supervisor does not rise to the level of collective bargaining, the Public Employment Relations Commission does not assert jurisdiction to remedy violations of collective bargaining agreements through the unfair labor practice provisions of the statute. City of Walla Walla, Decision 104 (PECB, 1976).

Absent a contractual reopener clause, the mutual obligation to bargain collectively is limited during the life of a contract to mandatory subjects that are not specified in the contract. Lewis County, Decision 3418 (PECB, 1990). Even then, where employer actions are arguably protected or prohibited by an existing collective bargaining agreement, Commission precedent endorses "deferral" of unfair labor practice claims pending arbitration to obtain an interpretation of the parties' contract through a contractual grievance procedure. City of Yakima, Decision 3564-A (PECB, 1991). Again, mid-contract negotiations are not deemed to be the type of collective bargaining required for exclusion as a confidential employee, absent clear proof that the parties are engaged in negotiating on future interests not covered by the existing collective bargaining agreement. The evidence in this case clearly does not rise to that level.

There is minimal evidence that Nicolet has ever had any role in the actual preparation for or conduct of negotiations on collective bargaining agreements.¹⁴ Collective bargaining involves a mutual obligation compelling the parties to negotiate in good faith, which continues until agreement is reached through mediation and possible interest arbitration.¹⁵ In this case, the evidence suggests that the chief agreed to exclude Nicolet from acting on behalf of the employer in that process.

Involvement of Others in Labor Relations -

The extent of involvement by persons outside the fire department is noteworthy:

* Prior to and during negotiations, a bargaining resource team discusses labor policy issues, and decides collective bargaining strategy. That team normally consists of the employer's bargaining committee plus the finance director, other department directors, and (sometimes) the city attorney.

* The employer's committee for negotiations with Local 726 is normally composed of a representative from the city manager's office, the human resources / personnel director, and a labor relations attorney or the city attorney, in addition to the chief.

¹⁴ The testimony on this point was contradictory, at best. Former Assistant City Manager Larry Werner seemed to recall that Nicolet was present at a meeting of an exploratory bargaining resource team prior to negotiations with Local 726 for the parties' 1990 - 1993 contract, but he was "hazy" about his recollection. (Tr. 116) Human Resource Director Bruce Uhl testified that Nicolet was president of Local 726, rather than assistant chief, at that time. (Tr. 138) Nicolet testified he had never been advised he was a member of the employer bargaining resource team. (Tr. 186)

¹⁵ RCW 41.56.430 et seq. provides for mediation and interest arbitration to resolve contract negotiations disputes involving fire fighters and advanced life support technicians.

The ability of the employer to move confidential work out of the fire department was highlighted when the fire chief moved all typing of confidential materials to the office of the city attorney or the office of the Perkins Coie law firm, after the chief's administrative assistant was replaced with an office assistant. This further reinforces a conclusion that the employer's labor relations policies and strategies are formulated and held at a higher level than the fire department.

Plans for the Future -

Chief Frank takes a team approach with the assistant chiefs. His testimony about the future effect of allowing the two assistant chiefs to bargain collectively is instructive:

I think **it will affect the team approach. To what degree, I don't know.** It kind of depends on the perspective they both take. And then what happens with the existing bargaining unit and them. And then a relationship of those as far as the confidential resource like they serve, I think they do serve me in that capacity. And it would be like trying to administer the appearance of the department with your arms cut off. You're less effective. I do think it will contribute to -- **it will change the labor relations environment in the department as a whole. And there will have to be adjustments.** And changes are always difficult for everyone, probably myself and them included. That will be -- I think will be an issue, too.

Tr. 165 [emphasis by **bold** supplied].

The initial concern expressed by the chief goes to the effect on his team approach; he is also concerned about the appearance of the fire department. Neither of these have a labor nexus. He did not explain a necessity to discontinue the involvement of the assistant chiefs in what they have historically done. At most, he expressed concern about a possible change of perspective by the assistant chiefs if they have the right to bargain collectively. Such speculative concerns about a future situation that may never

materialize are insufficient to deny the assistant chiefs employee status under RCW 41.56.030.

Tacoma School District, Decision 2250-A (PECB, 1986) stands for the proposition that a history of involvement in labor relations of a predecessor position will avoid a "speculative" characterization if the labor nexus duties are assigned to a successor position in a reorganization. In this case, the missing link is the absence of evidence that either Carman or Nicolet have been told that they are to be Parlari's "successor" with respect to the labor relations functions formerly performed at the assistant chief level.

Evidence from the history of the persons involved makes an inference of future intention less than probable:

- * Chief Frank has excused Nicolet from any labor nexus work with Local 726 that Nicolet is not disposed to undertake.

- * Carman noted an instance where he requested not to be assigned an investigation of possible wrongdoing by an employee he supervises. His request was also honored by Frank.

- * Testimony suggests that Nicolet is a very adamant person, who could be a negative influence in negotiations if Local 726 did not agree with him. For example, he simply left mid-contract negotiations with Local 726 when he was not getting what he wanted.

This decision is, of necessity, based on a record which was made some months ago. No motion to reopen the hearing has been received, and any changes in circumstances since the hearing have not been considered. An employer is normally allowed some reasonable number of excluded personnel to perform the functions of "employer" in the collective bargaining process, and it is possible that there may have been changes of assignments or delegations of authority since the close of the hearing which would dictate a different result than is reached here.

A generic description of the appropriate bargaining unit is substituted for the unit description stipulated by the parties, to reflect that the parties cannot stipulate away the provisions of the statute.¹⁶ If the facts now support the claim of confidential status for either assistant chief, the parties will be able to present them in future unit clarification proceedings filed and pursued under Chapter 391-35 WAC.

Conclusion -

The fire chief places great trust in the assistant chiefs, but the record does not support a finding of confidential status arising from that trust. The two remaining assistant chiefs have not participated meaningfully in the formulation of labor policy, and have not taken part in collective bargaining negotiations on behalf of the city. At the most, the record proves that the petitioned-for employees have some role in the administration of collective bargaining agreements, which is a general supervisory function.

FINDINGS OF FACT

1. The City of Puyallup is a "public employer" within the meaning of RCW 41.56.020(1). Among other activities, it maintains and operates the Puyallup Fire Department.
2. The Puyallup Professional Public Safety Manager's Association, a bargaining representative within the meaning of RCW 41.56-.030(3), filed a timely and properly supported petition for investigation of a question concerning representation with the Commission. The petitioner seeks certification as exclusive

¹⁶ The Commission has traditionally used generic terms to describe bargaining units, because of the potential problems created by the use of specific titles or other terminology. City of Milton, Decision 5202-B (PECB, 1995).

bargaining representative of certain supervisors who are uniformed personnel, employed in the Puyallup Fire Department.

3. The city manager appoints a bargaining resource committee which includes the city manager or his designee, the human resource director, the fire chief, and other officials, to determine collective bargaining and labor relations policy for the Puyallup Fire Department in conjunction with the city council.
4. The employer is represented in collective bargaining negotiations by an attorney, as chief spokesman, and its human resources / personnel director, with assistance from various department heads.
5. The Puyallup Fire Department is headed by a fire chief and two assistant chiefs who report directly to the chief. The assistant chiefs supervise approximately 42 rank-and-file employees represented by International Association of Fire Fighters, Local 726.
6. Assistant Chief Richard Carman is the fire marshal, and he supervises two assistant fire marshals. Although he served as acting fire chief for eight months in 1981, he has had no ongoing responsibility for collective bargaining in his role as an assistant chief, except for advising on the impact of proposals and providing day-to-day administration of the collective bargaining agreement with Local 726.
7. Assistant Chief Lyle Nicolet is responsible for operations and training within the department. He supervises battalion chiefs, captains, fire fighters and medics who are members of the rank-and-file bargaining unit represented by Local 726. When Nicolet accepted promotion to his present rank of assistant chief, it was subject to an agreement with the chief

that Nicolet would not be called upon to sit across the bargaining table from or work against Local 726. Nicolet has had no ongoing responsibility for collective bargaining, beyond advising on the impact of proposals and providing day-to-day administration of the collective bargaining agreement with IAFF Local 726.

8. A third assistant chief who formerly participated in collective bargaining on behalf of the employer had departed from the department, and the duties of that position were distributed between the chief, the two assistant chiefs, and certain battalion chief, without clear delegation of the collective bargaining functions to anybody other than the chief. On the record made here, neither assistant chief is necessarily privy to the development of the employer's labor relations policies or collective bargaining strategy.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.
2. A bargaining unit consisting of all full-time and regular part-time supervisory uniformed personnel within the City of Puyallup fire department, excluding the fire chief, confidential employees and non-supervisory employees, is an appropriate unit for the purposes of collective bargaining under RCW 41.56.060.
3. Assistant Fire Chiefs Nicolet and Carman do not have a fiduciary relationship with the fire chief with respect to labor relations matters sufficient to be deemed confidential employees within the meaning of RCW 41.56.030(2)(c), and are public employees within the meaning of RCW 41.56.030(2).

4. A question concerning representation presently exists in the appropriate bargaining unit described in paragraph 2 of these conclusions of law, and the circumstances for direction of a cross-check under WAC 391-25-391 have been met.

DIRECTION OF CROSS-CHECK

1. A cross-check of records shall be made under the direction of the Public Employment Relations Commission in the appropriate bargaining unit described as:

All full-time and regular part-time supervisory uniformed personnel within the City of Puyallup fire department excluding the fire chief, confidential employees and non-supervisory employees

to determine whether a majority of the employees in that bargaining unit have authorized the Puyallup Professional Public Safety Manager's Association to represent them for purposes of collective bargaining.

2. The employer shall immediately supply the Commission with copies of documents from its employment records which bear the signatures of the employees on the eligibility list stipulated by the parties.

Issued at Olympia, Washington, on the 11th day of March, 1996.

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.