

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of)	CASE NO. 1620-E-78-314
SEATTLE POLICE MANAGEMENT)	
ASSOCIATION)	DECISION NO. 689-C - PECB
Involving certain employees of)	
CITY OF SEATTLE)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND ORDER

William H. Simmons and William M. Taylor, Attorneys at Law, appeared on behalf of petitioner.

Douglas N. Jewett, City Attorney, by P. Stephen DiJulio, Assistant City Attorney, appeared on behalf of employer.

BACKGROUND:

This decision concerns narrow issues remanded by the Public Employment Relations Commission for further hearing by Decision 689-A (PECB, 1979).

The proceedings commenced on August 4, 1978, when the Seattle Police Management Association ("petitioner") filed a petition with the Public Employment Relations Commission seeking certification as the exclusive bargaining representative of a unit of certain supervisory employees of the City of Seattle Police Department ("employer").

A formal hearing was conducted on November 13, 1978. At issue was the status of uniformed personnel in the rank of major, captain and certain lieutenants (i.e. administrative assistant to the police chief, administrative assistant to the legal advisor, director of communications) and civilian personnel in the positions of personnel director, and records manager. The employer contended that the positions should be excluded as confidential and also argued that the personnel director and the records manager should be excluded because they were civilian positions. The petitioner argued that all positions at issue should be included in the bargaining unit.

In Decision No. 689 (PECB, 1979), the director of personnel and the records manager were excluded from the bargaining unit because, as civilian employees, they were subject to different impasse procedures than those available to uniformed employees. The positions of administrative assistant to the police chief and the major commanding the traffic division were excluded as confidential. The remaining disputed positions were included in the petitioned for supervisory bargaining unit and a cross-check of records was ordered.

A tally of the cross-check, indicating that petitioner had enough support to represent the bargaining unit, was issued on August 3, 1979. On the same date, the employer filed a motion for reconsideration and additional hearing concerning the director of communications position. On August 17, 1979, the employer filed another motion seeking additional hearing on the positions of major and director of community services. Both motions for additional hearing alleged that a significant change of circumstances had occurred since the matter was originally heard because a new chief had assumed command of the department and had reorganized the command staff.

In Decision No. 689-A (PECB, 1979) the Public Employment Relations Commission granted the employer's motions for additional testimony and remanded the case for further hearing. The bargaining unit was given conditional certification pending the outcome of the additional hearing, Decision No. 689-B (PECB, 1979).

A formal hearing was conducted on February 7 and 8, 1980 before Alan R. Krebs, Hearing Officer. The parties submitted post-hearing briefs.

POSITIONS OF THE PARTIES:

The employer contends that a significant change of circumstances has occurred since this matter was originally heard in 1978, in that its new Chief of Police has reorganized the command staff. The employer asserts that the Chief regularly asks the director of communications, director of community services and majors to participate in the formulation of department labor relations policy. The employer argues that the above named positions are confidential within the meaning of RCW 41.56.030(2)(c) and should be excluded from the bargaining unit.

The petitioner argues that the positions of major, director of communications, and director of community services should be included in the supervisors bargaining unit. The petitioner contends that the employer has failed to demonstrate any change of circumstances which would require exclusion of the disputed positions on the basis of confidentiality. The petitioner also contends that employees holding the disputed positions actually have less participation in any policy making decisions than they had when the matter was originally heard in 1978.

DISCUSSION:

Standard for Determination

As noted by the Commission in the order remanding this case for taking of additional evidence: "Under RCW 41.56.030(2)(c) the burden of excluding employees is a heavy one". The Petitioner's arguments suggest application of

an even higher standard on this employer at this stage of this particular proceeding than might otherwise be applicable.

This matter was remanded for further hearing because the employer claimed that a significant change of circumstances had occurred since the case was originally heard. Unit determination orders of the Commission are final administrative orders under RCW 34.04, to which res judicata principles apply; and it follows that "changed circumstances" are an important element of proof for a party seeking to overcome a previous determination by the Commission. However, the motions on which remand was granted in this case were made prior to the entry of a final order by the Commission. While the Commission was critical of the procedure followed by the employer, and cautioned against reliance on similar procedure in the future, its ultimate order was for the taking of additional evidence in the same proceeding. Decision 689-A is not interpreted as limiting consideration of the employer's "confidential" claims to the evidence adduced on remand, and the standards applied herein are applied to all of the evidence of record in the proceeding on the same basis as would be applied in any "confidential" determination under RCW 41.56.

The Command Staff

It is clear that both the current Chief of Police and his predecessors have surrounded themselves with a cadre of law enforcement officers who hold permanent civil service status at or below the rank of Captain but who hold "Assistant Chief" or "Major" ratings at the pleasure of the Chief. In the past, the "command staff" consisted only of the Assistant Chiefs and the Majors; but the Director of Communications and the Director of Community Services now participate in the command staff as the result of a re-organization initiated by the current Chief, Patrick Fitzsimmons, on or about May 15, 1979.

The employer relies on portions of the discussion found in the Supreme Court's decision in IAFF v. City of Yakima, 91 Wn.2d 101 (1978), while the Petitioner relies on the holding of that case as quoted in Decision 689:

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 officer or executive head of the bargaining unit, including formulation of labor relations policy. General supervisory responsibility is insufficient to place an employee within the exception.

The necessity that a fiduciary relationship extend to encompass labor relations policy was emphasized by the Court in Yakima and in Decision 689 as essential to exclusion of individuals as "confidential" under RCW 41.56.030(2)(c). The Commission noted in Decision 689-A: "We have trouble

fitting the command staff within that definition". The policies and precedents interpreting RCW 41.56.030(2)(c) have not changed. See: Pe Ell School District, Decision 1068-A (PECB, 1981). Chief Fitzsimmons in his testimony, and the employer in its arguments, place great emphasis on the fact that the members of the command staff serve at the pleasure of the Chief. Taken together, RCW 41.08, RCW 41.12 and the ordinance and personnel rules adopted pursuant to Article XVI, Section 4 (as amended) of the Seattle City Charter indicate that this employer provides "for cause" employment security protection to both its uniformed personnel and its non-uniformed personnel under "civil service" or similar personnel procedures. This widespread application of civil service concepts may well increase the sensitivity of this employer to the situation of its "exempt" personnel under those procedures. However, the fact that members of the command staff serve in that capacity at the pleasure of the Chief, and lack "for cause" employment security protection as regards their current ratings, does not, in and of itself, constitute a basis for exclusion from the coverage of the collective bargaining law. Were it otherwise, the vast number of public employees who do not enjoy either statutory or locally adopted "civil service" protections would be precluded from organizing on the basis that, until organized and covered by contractual "for cause" protections, they all serve at the pleasure of the employer.

Bargaining Table Representatives

At the time of the first hearing in this proceeding, the employer indicated that it might use the Director of Communications as a representative of the employer at the bargaining table in negotiations with the union representing dispatchers employed by the City. The evidence adduced on remand indicates that the Director of Communications has actually been used in that capacity. Actual involvement on behalf of the employer at the bargaining table and in negotiations caucus exposes the individual to the type of confidential information protected by the RCW 41.56.030(2)(c) exclusion. The record indicates that, in its negotiations with the union which represents non-supervisory uniformed personnel of the police department, the employer assigns two Assistant Chiefs whose confidentiality is conceded by the Petitioner. The record does not establish that other members of the command staff have any ongoing regular involvement with the representation of the employer in collective bargaining negotiations with labor organizations.

Contract Administration

The unit petitioned for in this proceeding is a separate unit of supervisors. The conventional definitions of supervisor, including that found in Section 2(11) of the National Labor Relations Act (NLRA), encompass the exercise of authority on behalf of the employer to adjust grievances or effectively recommend adjustment of grievances. As used in the NLRA, grievances are

not limited to the formal grievance procedures of a collective bargaining agreement but are also applicable to matters outside of the contract which the employee may wish to have adjusted with or without the intervention of the exclusive bargaining representative. See: Section 9(a) of the NLRA; RCW 41.56.080. Our Supreme Court has made it clear that the mere exercise of supervisory authority is not sufficient to warrant exclusion of individuals from the coverage of the collective bargaining law as "confidential". METRO v. L&I, 88 Wn.2d 925 (1977); Yakima, supra. The line between the type of "labor relations policy" which warrants exclusion and day-to-day administration customarily delegated to supervisors comes into issue in this case. An example in this record is the action of a major to overcome employee dissatisfaction (adjust a grievance) concerning standby pay arrangements outside the context of formal grievance procedures.

Traditionally, meetings of the command staff were held once a week, attended by the Chief, his administrative assistant, the legal advisor, the assistant chiefs and the majors. Matters for discussion included departmental operating policies, recruitment and personnel problems. Detailed minutes were prepared and distributed. Those minutes were not kept confidential from supervisors down to the rank of lieutenant. The Chief and six assistant chiefs met separately four times each week to discuss department policy. No minutes of those separate meetings were distributed.

Fitzsimmons changed the format of command staff meetings after he took office on February 5, 1979. In particular, he abolished the practice of conducting command staff meetings under a formal agenda. The command staff meetings became informal discussions open to any matters that staff members wished to raise. The frequency of command staff meetings has fluctuated under Fitzsimmons' administration, and regular weekly meetings of the command staff did not take place until January, 1980. For a time, Fitzsimmons abolished the separate assistant chief meetings, but those meetings were reestablished on a weekly basis as of September, 1980. If assistant chiefs are not available for these meetings, majors attend as the assistant chiefs' representatives. The employer contends that these executive "mini staff" meetings are used to address unspecified "sensitive" policy issues. To the extent that internal investigations and possible disciplinary actions are discussed, those appear to be "supervisory" functions. Further, there is no indication that labor relations policy is discussed when majors attend assistant chief meetings.

Fitzsimmons testified that he intends to use command staff members' opinions to formulate department bargaining positions on affirmative action, budget, and personnel evaluations. Fitzsimmons has already requested command staff members to discuss special duty days, modification of grievance procedures and firearms policy at command staff meetings. Opinions are given orally or in writing. Written opinions are given on printed cards provided to command

staff members. Captains and lieutenants are regularly invited to command staff meetings to provide information concerning personnel practices in the department's various bureaus and divisions, and these supervisors have been assigned to subcommittees which are used to investigate personnel problems within the department. The results of subcommittee investigations are incorporated into discussions in command staff meetings.

In its motion for additional hearing, the employer claimed that majors had an expanded role in labor relations policy making. However, testimony presented by the employer about majors' participation differed sharply from testimony presented by the petitioner. Individuals holding the disputed major positions perform different duties, as second in command to one of the assistant chiefs, depending on the division or bureau to which they are assigned.^{1/} Chief Fitzsimmons testified that majors have given opinions about vacation policy, grievance procedures and firearms policy during command staff meetings and that the majors' opinions on these issues would be used to formulate negotiating positions. However, testimony presented by several majors indicates that command staff meetings are used to address general policy issues involving the administration of existing collective bargaining agreements.

Major Clark Elster of the Property Crimes Division testified that he has been present at command staff meetings when Fitzsimmons asked for information on collective bargaining, but the information involved general areas of concern with no specific negotiating positions mentioned. Elster believed that general information gathered at command staff meetings would be developed further at executive meetings conducted between the police chief and assistant chiefs, and that negotiating positions were formulated at executive meetings. Similar testimony was offered by Major Larry McCready of the Vice and Narcotics Division. McCready regularly discusses issues raised at command staff meetings with employees in his division, and he has never been told to refrain from these discussions because a particular issue is confidential. Neither Elster or McCready could recall any discussions of wages or hours of work in command staff meetings.

As evidence of the majors' policy making authority, the employer notes that Major Paul Knapp of the Criminal Investigations Division implemented a change in standby pay for detectives in the division's homicide unit. However, Knapp did not personally initiate such changes. Knapp recommended to his immediate superior that homicide detectives receive standby pay, and Assistant Chief Knetchel actually implemented the new standby pay policy. This change in practice arose because of a dispute in the interpretation of

^{1/} A more detailed description of the majors' duties is contained in Decision 689.

the terms of an existing collective bargaining agreement. Majors have supervisory authority over employees in the divisions or bureaus to which they are assigned. As supervisors, majors have authority to interpret collective bargaining agreements as they apply to particular bureaus or divisions. Although Knapp's recommendations about the standby pay issue were followed, this change in the application of the collective bargaining agreement does not indicate that Knapp necessarily has any participation in labor relations policy formulation for the Seattle Police Department.

There is no indication that majors do anything more than administer existing collective bargaining agreements. Lieutenants and captains also participate in general discussions of policy questions, and they have expressed opinions on labor relations matters. It appears that actual labor policy is formulated outside the command staff setting, in consultation with the employer's labor relations department and the labor policy committee of the city council. Although the employer has shown many examples of exercise of supervisory authority, the evidence falls far short of indicating that the majors all are privy to bargaining information of a type where disclosure would be destructive of the collective bargaining process.

Director of Community Services

At the date of hearing, the director of community services position was held by a uniformed employee in the rank of lieutenant. The director is in charge of the Community Service Officer Program, which is staffed by civilian employees who are not represented for purposes of collective bargaining.

An internal dispute existed within the employer's personnel system at the time of the hearing on remand concerning having a uniformed supervisor in charge of civilian employees. The question of whether the director of community services will be a civilian or uniformed position was still unsettled. If the position is finally established as "civilian", the director of community services will be excluded from this uniformed supervisors bargaining unit. See City of Seattle, Decision 689-A, supra. The incumbent at the time of the hearing was "uniformed" and the position will accordingly be included in the bargaining unit involved in this case. The employer's argument that the position should be excluded because it is part of the department command staff is not persuasive. Although the director attends command staff meetings and takes part in general policy discussions, the employer has not demonstrated that the director has any role in the formulation of labor relations policy.

NATURE OF ORDER

As a result of the proceedings on remand, one additional position will be excluded from the supervisory bargaining unit as confidential. The change would not affect the petitioner's majority, the record reflects a change of

incumbents in the Director of Communications position since the cross-check, and the issuance of an amended tally would thus needlessly disclose the secrecy of the authorization cards (or lack thereof) of the persons affected. Accordingly, the tally previously issued is re-issued herewith pursuant to WAC 391-25-550.

FINDINGS OF FACT

1. The City of Seattle is a municipality located in King County and is a "public employer" within the meaning of RCW 41.56.030(1).
2. The Seattle Police Management Association is a bargaining representative within the meaning of RCW 41.56.030(3). On August 4, 1978, the association petitioned the Public Employment Relations Commission for certification as the exclusive bargaining representative of certain supervisory employees in the City of Seattle Police Department. A cross-check of employment records was conducted on August 3, 1979, indicating that the association had been authorized by a majority of the supervisors to represent them for the purposes of collective bargaining.
3. The Public Employment Relations Commission granted the motions of the employer for additional hearing and remanded the case. The Commission gave conditional certification to the association as representative of a bargaining unit composed of supervisory personnel holding the rank of lieutenant and above, excluding the chief of police, civilian personnel, and confidential employees. The issues on remand are narrow eligibility issues.
4. Chief of Police Patrick Fitzsimmons reorganized the department's command staff on or about May 15, 1979. The reorganization of the command staff involved the addition of the director of communications and the director of community services to the command staff, and changes of scheduling and format of meetings.
5. Fitzsimmons meets with the command staff on a weekly basis. At command staff meetings, policy questions are discussed, including personnel grievances and policies. All members of the command staff are given the opportunity to express opinions and to give suggestions. The occurrences at command staff meetings are not preserved as confidential matters withheld from disclosure to supervisors in the bargaining unit described in paragraph 3 of these findings of fact. The final formulation of labor relations policies are developed outside of command staff meetings.
6. Majors attend command staff meetings and discuss general policy issues at those meetings. Majors have authority as supervisors to interpret and to enforce terms of collective bargaining agreements, but they do not have an intimate fiduciary relationship with the Chief of Police on matters of labor relations policy.

7. The director of communications has participated in negotiations with the Police Dispatcher Guild, and has been privy to the labor relations policies of the employer. Chief of Police Fitzsimmons has expressed his intention that the director will continue to participate in negotiations on behalf of the department.

8. The director of community services has not participated in discussions of labor relations policy set by the department. The director of community services is presently a uniformed employee who supervises unrepresented employees. He does not participate in collective bargaining negotiations or have any role in labor policy formulation.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56.

2. The director of communications position is confidential within the meaning of RCW 41.56.030(2)(c).

3. The positions of director of community services and major are supervisory, and, except for the major commanding the traffic division, are not confidential within the meaning of RCW 41.56.030(2)(c).

ORDER

1. The challenge to the eligibility of the director of communications position is sustained.

2. The challenge to the eligibility of the major positions other than the major commanding the traffic division is overruled.

3. The employer's objection concerning the uniformed employee holding the director of community services position is overruled.

DATED at Olympia, Washington this 5th day of June, 1981.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARVIN L. SCHURKE, Executive Director