

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

WALLA WALLA POLICE CAPTAINS
ASSOCIATION

Involving certain employees of:

CITY OF WALLA WALLA

CASE 23444-E-10-3588

DECISION 10979 - PECB

DIRECTION OF CROSS-CHECK

Chuck Reisenauer, Labor Consultant, joined on the brief by Aitchison and Vick, by *Jeffrey Julius*, Attorney at Law, for the union.

Summit Law Group, P.L.L.C., by *Shannon E. Phillips*, Attorney at Law, for the employer.

On August 13, 2010, the Walla Walla Police Captains Association (union) filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission, seeking to represent a bargaining unit of police captains at the City of Walla Walla (employer). The employer asserted that the petitioned-for employees were confidential. A hearing was held before Hearing Officer J. Martin Smith on October 4, 2010. Both parties filed briefs, which were considered.¹

ISSUE PRESENTED

Are Police Captains Gary Bainter and Terry Heisey confidential employees who are appropriately excluded from collective bargaining rights?

¹ Mr. Reisenauer is affiliated with a group called the Washington Council of Police and Sheriffs (WACOPS). WACOPS is not a party in this case.

Based upon the record as a whole, the applicable statutes, rules and case precedents, neither police captain position is confidential, and a bargaining unit of police captains is appropriate for representation purposes. A cross-check of records is ordered.

APPLICABLE LEGAL PRINCIPLES

The Commission applies a labor nexus test to determine the confidential status of employees. That test, which originated in *IAFF Local 469 v City of Yakima*, 91 Wn.2d. 101 (1978), has been codified as WAC 391-35-320. The rule requires that confidential exclusions be limited to:

- (1) 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
- (2) Any person who assists and acts in a confidential capacity to such person.

The nature of confidentiality “must concern the official and policy responsibilities of the public officer or executive head of the bargaining unit, including formulation of labor relations policy. *City of Yakima*, 91 Wn.2d. 101. The Commission narrowly construes the confidential exclusion. Because confidential employee status deprives an employee of all statutory bargaining rights, a heavy burden of proof is placed on the party proposing exclusion. *City of Redmond*, Decision 7814-B (PECB, 2003); *City of Spokane Valley*, Decision 10158-A (PECB, 2008). Confidential responsibilities must be “necessary, regular, and ongoing.” *City of Mountlake Terrace*, Decision 3832-A (PECB, 1992); *City of Yakima*, Decision 9983-A (PECB, 2008). An employer is entitled to a reasonable number of confidential exclusions, but it must establish by specific evidence that an employee meets the confidential definition. *Clark College*, Decision 10044-A (PECB, 2008).

Some, but not all, supervisors are confidential employees, and supervisors may be sources of important information to the employer’s bargaining team without being rendered confidential. *City of Puyallup*, Decision 5460 (PECB, 1996). For example, in *Pierce County*, Decision 8892-A (PECB, 2005), the Commission determined that correctional captains were not confidential

employees, because the input of the captains only flowed up to the Pierce County bargaining team, and no information flowed down to them that had to be kept confidential from those they supervised. *See also City of Yakima, Decision 9983-A.*

ANALYSIS

The City of Walla Walla employs 45 commissioned officers (including the chief and captains) as well as approximately 29 civilian employees in its police department. Charles Fulton has been the police chief for almost 28 years. The police department is organized into operations, investigations, and support divisions. Captain Gary Bainter supervises the operations division, which includes police officers, sergeants, animal control officers, and parking enforcement. Captain Terry Heisey supervises the investigations division, which includes police officers and sergeants as well as domestic violence, code enforcement, and criminal prevention personnel. The support services division includes dispatchers and technical services personnel. At one time, support services was supervised by a police captain. When that individual retired, the captain position was replaced by a civilian supervisor. Fulton considers the two captains and the civilian dispatch supervisor to be his “management team.”

Police department employees working in dispatch, records, animal control, parking enforcement, and code enforcement are represented by WSCCCE Local 1191-W (AFSCME) in a bargaining unit that also includes employees of other city departments. A collective bargaining agreement covering that unit is in effect through the end of 2012. The Walla Walla Police Guild represents a bargaining unit of police officers and sergeants. At the time of hearing, the guild and the employer were in negotiations for a successor collective bargaining agreement to replace the agreement that was effective through December 31, 2010.

The bargaining team for the 2009-2010 contract with the police guild included only the human resources manager and the employer’s Director of Support Services.² Chief Fulton was not on

² The Support Services Department is one of seven departments within the city. Its functions include finance, facilities, city clerk, and human resources.

that bargaining team, nor had he been on the bargaining team for at least the prior three or four contracts. For those contracts, Fulton provided input and advice to the bargaining team. He communicated with the (at that time) three police captains as necessary about bargaining issues.

The employer contracted with attorney Bruce Schroeder to be its representative for negotiations with the police guild for the 2011 collective bargaining agreement. In addition to Schroeder, the employer's bargaining team includes the city manager, the human resources manager, a human resources specialist, and Fulton. Neither captain is on this bargaining team, nor have they ever been on the employer's bargaining team.

The employer offered a number of documents regarding the involvement of the captains in labor relations issues:

- A grievance filed by a police officer and Bainter's response denying the grievance on August 26, 2004.
- A series of emails from August and September 2005, in which the chief, the human resources manager, and the city manager discuss what action to take about a request from the police guild to discuss 12 hour shifts away from the bargaining table. The captains are copied on the emails.
- An email series from July 2006, in which the human resources manager inquires of the chief and captains about a possible contract reopener on shifts. The chief indicates, "This seems to have died from lack of interest by the Guild. I will talk to Bainter and get his thoughts."
- An email series, with attachments, from January and February 2007, concerning holiday compensation under the guild contract. The matter began as an inquiry from a sergeant to Bainter, and ended as a formal grievance resolved by Fulton. Bainter was copied on Fulton's response to the grievance.
- An August 2, 2007 email from the human resources manager to the chief and Bainter inquiring about the issue of possible police officer misconduct.
- A December 2007 memorandum from Bainter to a sergeant regarding interpretation of the holiday pay provisions of the guild contract.

- A May 2008 email series, with an attachment of a May 29, 2008 memorandum from Heisey to the chief, providing Heisey's comments "related to your request that we review the Guild
- Contract to assist Human Resources in preparation for negotiations." Heisey sent the memorandum to the other captains as well. The chief forwarded the memorandum to the support services director, who was on the employer's bargaining team, with the comment "We all agree with Terry's evaluation of the current contract."
- A February 4, 2009 email series from the human resources manager requesting comments from Fulton, Heisey, and Bainter regarding a proposal the employer contemplated presenting to the police guild in negotiations later that day. The email denotes its sensitivity as "confidential." The chief and Heisey commented on the proposal; Bainter was copied on those comments.
- An email series from May 2009 in which Bainter requests input from the human resources director about the interpretation of certain contract provisions concerning holidays.
- A July 2010 email from the human resources manager to the captains requesting a 15 or 20 minute meeting with either of them regarding "some contract questions that I need in preparation for negotiations [with the guild]."
- A copy of the 2009 – 2010 guild contract with comments and questions from Schroeder, comments and responses from Bainter and Heisey, and a cover email involving the human resources manager and the captains. In one portion of the email, Bainter notes that "I was trying to think of other issues we had about the shortcomings of the contract. I will go through it again as time allows."

Many of the documents offered by the employer are indicative of the captains' supervisory, rather than confidential, responsibilities. The documents in which Bainter responds to grievances are clear examples of supervisory responsibility, as is the correspondence regarding investigation of possible police officer misconduct. The May 2008 email series and the annotated 2009 – 2010 police guild contract are primarily examples of input flowing from the police captains to the bargaining team. The captains were not included in the employer's meetings and discussions with Schroeder to prepare for negotiations with the police guild. They have not been included in

negotiation strategy discussions with the support services director and city manager. When they have met to discuss guild negotiations with the human resources manager, it was to allow her to review with them their comments about the contract. When she was asked if she shared actual bargaining positions with the captains, she indicated that “we talked in generalities about each of the articles in the sections.” This is the type of involvement that the Commission found to be reflective of supervisory rather than confidential responsibilities in *Pierce County*, Decision 8892-A. In that decision, the Commission noted, “Supervisors can provide valuable information if asked, ‘What do you think of the nonsupervisory union’s proposal?’ or ‘How much will our insurance company charge for medical insurance next year?’ and still not be aware of the employer’s bargaining position. Such discussions do not necessarily involve the employer’s own sensitive labor relations materials, even if the employer bases its strategy on the employee’s answer.”

The email series from August and September 2005, and July 2006, reflect a discussion about whether the guild contract will reopen, and whether to discuss an issue away from the bargaining table, not anything about the employer’s strategy or substance of those discussions. Without further information indicating that the captains were involved in the employer’s strategy, those documents do not indicate confidential status.³ Bainter’s May 2009 request to the human resources manager for interpretation of holiday language in the guild contract reflects that he was not originally privy to the employer’s interpretation of the contract, and is another indication of supervisory, rather than confidential, status.

The emails of February 2009, and July 2010, and the December 2007 memorandum could reflect possible involvement by the captains in the employer’s bargaining and contract interpretation strategy and policy. However, the record regarding the 2009 and 2010 emails indicates only that the captains were asked for input, not that they were involved in strategy discussions. The chief could only recall that there were a number of issues about holiday pay in the December 2007 time period. He testified that there were “probably” discussions with all of the management team, and

³ In fact, Chief Fulton testified that he did not believe any harm would result if the police guild had seen the 2005 email series.

that “I’m sure” the captains were a part of that process. Without more specifics about the confidential role of the captains, the record concerning these documents cannot support a conclusion that they are confidential. *Clark College*, Decision 10044-A; *Central Kitsap Fire and Rescue*, Decision 10573-A (PECB, 2010). The role of the captains appears to be more akin to that of the police chief in *City of Lynden*, Decision 7527-B (PECB, 2002), whose input was “a natural extension of his knowledge and expertise as a department supervisor -- not because the chief had an intimate fiduciary understanding of the city’s labor relations policies and strategies.” As the Commission noted in *Pierce County*, “If a labor nexus test did not apply to supervisory employees, then almost all supervisors would lose their collective bargaining rights. Only those supervisors who have an actual conflict of interest because they were privy to the employer’s confidential labor management materials should be confidential.”⁴

CONCLUSION

Bainter and Heisey are not confidential employees. A bargaining unit of police captains of the City of Walla Walla is an appropriate unit for collective bargaining.

FINDINGS OF FACT

1. The City of Walla Walla is a public employer within the meaning of RCW 41.56.030(13).
2. The Walla Walla Police Captains Association is a bargaining representative within the meaning of RCW 41.56.030(2).
3. The City of Walla Walla operates a police department, which is organized into operations, investigation, and support divisions. Charles Fulton is the police chief; Terry Heisey is a police captain supervising both commissioned officers and civilian employees in the investigations division, and Gary Bainter is a police captain supervising commissioned

⁴ The employer also asserted that the captains’ access to “Lexipol,” an online version of various police department’s policies and procedures, was an indication of confidential status. There is nothing in the record to indicate that these are confidential labor strategy or policy materials.

officers and civilian employees in the operations division. A civilian supervisor is in charge of the support division.

4. Police department employees working in dispatch, records, animal control, parking enforcement, and code enforcement are represented by WSCCCE Local 1191-W (AFSCME) in a bargaining unit that also includes employees of other city departments. A collective bargaining agreement covering that unit is in place through the end of 2012.
5. The Walla Walla Police Guild represents a bargaining unit of police officers and sergeants. The guild and the employer have been in negotiations for a collective bargaining agreement to replace the agreement which was due to expire on December 31, 2010. The employer's bargaining team for that contract includes attorney Bruce Schroeder, as well as the city manager, the human resources manager, a human resources specialist, and the police chief.
6. Neither police captain has ever been on the employer's collective bargaining team. They were not included in the employer's meetings and discussions to prepare for negotiations with the police guild. They have not been included in negotiation strategy discussions with the support services director and city manager.
7. The police captains have usually been asked to comment and provide input to the chief or the employer's bargaining team in preparation for negotiations with the police guild. The captains have provided both written and oral comments. Meetings about guild negotiations that included the two captains and the human resources manager were primarily to allow the human resources manager to review the captains' comments with them. Contract articles were discussed in generalities in those meetings. The involvement of the captains described herein reflects supervisory, rather than confidential, responsibility.

8. The police captains have responded to grievances and have engaged in correspondence regarding possible police officer misconduct. Such actions are examples of supervisory, rather than confidential, responsibilities.
9. The record does not support that the police captains have been involved in formulation of the employer’s labor relations policy or strategy, or that they have necessary, regular, and ongoing confidential labor relations responsibilities.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC.
2. As described in the foregoing findings of fact, Gary Bainter and Terry Heisey, who hold the position of police captain, are public employees and are not confidential employees within the meaning of RCW 41.56.030(12) (c).
3. A bargaining unit of police captains of the City of Walla Walla Police Department is an appropriate unit for the purpose of collective bargaining under RCW 41.56.060.

NOW, THEREFORE, it is

ORDERED

1. 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.

2. A cross-check of records shall be conducted in the bargaining unit described as:

All full-time and regular part-time police captains of the City of Walla Walla, excluding supervisors, confidential employees, and all other employees.

to determine whether a majority of the employees in that bargaining unit have authorized the Walla Walla Police Captains Association to represent them for the purpose of collective bargaining.

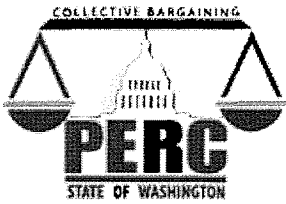
Issued at Olympia, Washington, this 21st day of January, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in cursive script that reads "Cathleen Callahan".

CATHLEEN CALLAHAN, Executive Director

This order may be appealed by filing a timely appeal with the Commission pursuant to WAC 391-25-660.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

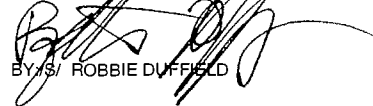
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PUBLIC EMPLOYMENT RELATIONS COMMISSION


BY: /s/ ROBBIE DUFFIELD

CASE NUMBER: 23444-E-10-03588 FILED: 08/13/2010 FILED BY: PARTY 2
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