

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

MERCER ISLAND POLICE ASSOCIATION,)	
)	
Complainant,)	CASE NO. 2458-U-79-355
)	
vs.)	DECISION NO. 1026-A PECB
)	
CITY OF MERCER ISLAND,)	
)	
Respondent.)	DECISION AND ORDER OF COMMISSION
)	

Schweppe, Doolittle, Krug, Townsend and Beezer, by Lee M. Burkey, Attorney at Law, appeared on behalf of the Mercer Island Police Association.

Ronald C. Dickinson, City Attorney, appeared on behalf of the City of Mercer Island.

PROCEDURAL BACKGROUND:

On November 21, 1979, the Mercer Island Police Association (MIPA) filed a complaint with the Public Employment Relations Commission (PERC) charging an unfair labor practice against the City of Mercer Island. The matter was heard January 17 and 18, 1980 in Mercer Island, Washington, before Examiner Katrina I. Boedecker. The Examiner issued Findings of Fact, Conclusions of Law, and Order on October 3, 1980. The Examiner concluded that the employer violated RCW 41.56.140(4) by failing or refusing to bargain with the union concerning the employer's decision to abolish two bargaining unit positions (lieutenants) in order to create two excluded confidential positions (deputy chief) with similar duties. The employer has petitioned for review. The factual background of this dispute is fully set forth in the Examiner's decision, and is incorporated by reference herein.

POSITIONS OF THE PARTIES:

The employer begins its brief on review by a statement of facts which places great weight on the formal actions taken by its City Council in connection with the creation of new positions which it "wanted...to be confidential". The employer contends that the elimination of existing lieutenant positions were not intended as, nor did they result in retaliatory or discriminatory actions against the incumbents of those positions. Much of its argument is directed to whether the City Council

had the authority to do what it did and whether the city properly followed civil service rules in making a series of demotions stemming from the elimination of the lieutenant positions. The city also challenges the Examiner's order as being over-broad, arbitrary and capricious.

The union's brief to the Commission points out shifts in the city's position between its brief to the Examiner and its brief to the Commission. In particular, the union points out substitution by the city of a concern for economic reasons in place of the concern with the confidentiality of its personnel practices which was emphasized before the Examiner. The union contends that the employer actually was concerned with neither, and that it was attempting to evade the effects of a unit clarification order (Decision 725-PECB) issued by the Executive Director of this Commission approximately 6 weeks prior to the City Council action.

DISCUSSION:

The sequence of events which led to this case began with a petition seeking a unit of police lieutenants. The employer failed or refused to assert "supervisor" claims as to the lieutenants and stipulated their inclusion in the rank-and-file police unit if they were not "confidential". After a ruling that the lieutenants were not confidential, and placing them in the same unit as rank-and-file personnel, the city devised the scheme that is the subject of dispute in this case. We have reviewed the employer's arguments at hearing and on appeal, the Hearing Examiner's findings, conclusion and reasoning, and except as noted below, we are in full agreement with the Examiner's decision. We do not think it necessary to reiterate the reasoning and conclusion on every issue, but we do have some observations on the salient features of this dispute.

The basic issue in this case is whether the employer violated any collective bargaining obligation when it undertook the reorganization. We agree with the Hearing Examiner that the employer is free to create new positions, but it had an obligation to negotiate the elimination of positions and demotions. See: Fibreboard Paper Products, 130 NLRB 1558 (1961), 138 NLRB 550 (1962), enf'd 322 F.2d 411 (CA D.C., 1963), aff'd 379 U.S. 203 (1964); Lakewood School District, Decision 755-A (PECB, 1980). It did not do so; hence the union is entitled to relief. Moreover, we agree with the Hearing Examiner's conclusions and reasoning that the employer's reorganization in this case unlawfully discriminated against the employees who suffered therefrom.

Taking a broader view of this dispute, the Commission believes that the underlying problem is the employer's failure to grasp the significance of terms of art as they are generally accepted in the field of labor-management relations under both the Revised Code of Washington and the National Labor Relations Act. Specifically, this employer does not understand the meanings and applications of the terms "confidential" and "supervisor".

"Confidential" has a very narrow connotation in labor relations parlance. Our Supreme Court held in IAFF v. City of Yakima, 91 Wn.2d 101, 587 P.2d 165 (1978) as follows:

"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 a 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 the formulation of labor relations policy. General supervisory responsibility is insufficient to place an employee within the exclusion." (Emphasis added)

As has been pointed out elsewhere, the exclusion is narrow and has been narrowly applied. Cowlitz County, Decision No. 564-A (PECB, 1979); City of Bellingham, Decision No. 565 (PECB, 1979); City of Mercer Island, Decision No. 725 (PECB, 1979). The "confidential" exclusion does not encompass those who are otherwise privy to sensitive information arising out of the day-to-day course of their employment.

"Supervisors" are employees within the meaning of RCW 41.56. METRO v. L & I, 88 Wn.2d 925, 568 P.2d 775 (1977). Supervisors have management roles entailing duties such as hiring, firing, assignment, transfer, layoff, recall of subordinate employees and the processing of their grievances. See: Section 2(11) of the National Labor Relations Act; RCW 41.59.020(4)(d). Although RCW 41.56 does not contain a definition of "supervisor", this Commission has followed the lead of the Supreme Court's METRO decision, which involved a separate unit of supervisors, and the Supreme Court's reliance in METRO on Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947), which endorsed the creation of separate units of supervisors under the provisions of the Wagner Act, to exercise the unit determination authority conferred on us by RCW 41.56.060 to place supervisors in separate bargaining units. City of Richland, Decision 279-A (PECB, 1978).

When the Respondent stipulated to the inclusion of the lieutenants in the bargaining unit if found not to be "confidential" - as they were so found - it was obligated to play by the ground rules governing the rights of

those represented employees and the work associated with their positions. Whether the Respondent's stipulation was a good one or not is beside the point. The decision on "confidential" status was made, has not been appealed, and is now res judicata. The results were to be lived by. It was entirely inappropriate for the Respondent, having stipulated to inclusion of the lieutenant positions in a bargaining unit, to summarily restructure its organization to effectively skim off this same work without so much as a tip of the hat to the complainant union. The Examiner's observations on this point are well stated and pertinent. See, also: Lakewood School District, Decision 755-A (PECB, 1980) and citations therein.

As an entity, the City of Mercer Island is a public employer subject to the rights and obligations of state law, RCW 41.56, and the jurisdiction of this Commission. The Respondent must accept the fact that either the City Council or the City Manager, as the city's authorized agent, is the "final" authority on behalf of the city in terms of labor relations policy and positions taken in a two-party process under state law. Whichever the case may be, the union is entitled to bargain with the representative of the employer in seeking redress of its grievances, and if that "final" authority is delegated within the employer's structure, the City of Mercer Island must bear responsibility for decisions made and actions taken in its name.

Having so noted, the Commission concludes that there is no reversible error in the Examiner's discussion, findings of fact or conclusion of law, except in the discussion in the second paragraph on Page 13, where it is stated:

"Since the deputy chief positions include labor-related job duties that make the positions confidential, the deputy chiefs would not be public employees within the meaning of the act nor would they be in the bargaining unit."

While that may well be the fact situation if fully explored, we have the benefit of only limited testimony going to the proposed structure of the deputy chief positions. Further, the issue of their confidentiality is not directly before us. Therefore, that observation is stricken.

In light of the city's actions, the Examiner's remedy is appropriate. The city adversely affected the two employees whose positions were abolished. The city's actions also had a detrimental impact on the bargaining unit by eliminating the promotional positions within the bargaining unit. A return to the status quo ante accompanied by the obligation to negotiate about the decision to abolish the positions at issue properly recreates the situation as it existed when the city abolished the bargaining unit positions, and allows the affected

employees' bargaining representative to fulfill its obligation to bargaining unit members.

NOW, THEREFORE, it is

ORDERED

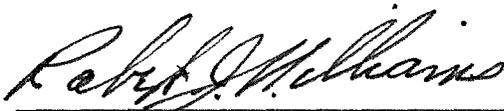
1. Except for the Examiner's discussion, indicated above, concerning the confidential status of the Deputy Chief positions, which is stricken, the Commission adopts the decision issued by Examiner Katrina I. Boedecker on October 31, 1980 as Decision 1026-PECB.
2. The City of Mercer Island shall notify the Executive Director of the Commission, in writing, within thirty (30) days following the date of this Order, as to what steps have been taken to comply with the Order issued by the Examiner, and at the same time shall provide the Executive Director with a signed copy of the notice required by the same Order.

DATED this 5th day of May, 1981.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JANE R. WILKINSON, CHAIRMAN



R. J. WILLIAMS, COMMISSIONER



MARK C. ENDRESEN, COMMISSIONER