STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JOHN R. MROZ, Complainant, vs. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 6, Respondent.	CASE 7650-U-88-1607 DECISION 3245-B - PECB
JOHN R. MROZ, Complainant, vs. KING COUNTY, Respondent.	CASE 7651-U-88-1608 DECISION 3351-A - PECB DECISION OF COMMISSION

Abelite & Gallagher, by J. Michael Gallagher, Attorney at Law, appeared for the complainant.

Hafer, Price, Rinehart and Scherwin, by John Burns, Attorney at Law, appeared on behalf of SEIU Local 6.

Laura Rasset, Labor Relations Specialist, appeared on behalf of King County.

This case comes before the Public Employment Relations Commission on a petition of the complainant, John R. Mroz, for review of a decision issued by Examiner Walter M. Stuteville.

On October 31, 1988, Mroz filed complaints charging unfair labor practices with the Commission, alleging that his exclusive bargaining representative, Service Employees International Union, Local 6, and his employer, King County, had committed unfair labor practices in violation of RCW 41.56.140 and 41.56.150. After preliminary rulings by the Executive Director, Examiner Walter M. Stuteville held a hearing in the matters and issued his findings of

fact, conclusions of law and order on March 10, 1989. The Examiner dismissed the complaints on the merits.

BACKGROUND

At all times relevant to this proceeding, John R. Mroz was a utility worker employed by King County in its Natural Resources and Parks Department. Mroz was within a bargaining unit represented by Local 6, and was covered by the collective bargaining agreement between the employer and union. Mroz worked under the direction of Ken Croy at a shop in Renton, Washington. Croy's title has been variously called "crafts coordinator" or "equipment coordinator".

Croy was the only equipment coordinator at the Renton shop, and he was responsible for giving work assignments to Mroz and other crafts employees. In addition to his own craft duties, Croy would coordinate the repair of equipment and ensure work was completed. Croy did not have authority to take disciplinary action against other employees, but would report discipline problems to Support Supervisor John Keizer. Croy's position was included in the same bargaining unit as the position held by Mroz.[1]

During the summer of 1987, Mroz began bringing a tape recorder to his assigned work site. Mroz testified that he used the tape recorder only to record his own words for later incorporation into a diary of daily events. Other employees apparently believed that Mroz was recording their conversations, and they complained to Croy, asking him to have Mroz stop. Croy discussed the matter with Keizer, and the two men then met with Mroz to ask if he was taping co-workers. Mroz denied doing so, and no further action was taken.

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[1] The union and the employer were in negotiations for a new collective bargaining agreement at the time of the hearing in this matter. The composition of the bargaining unit was under discussion in those negotiations.

Because Mroz continued to bring the tape recorder to work, and because his co-workers thought it was a voice-activated device, members of the bargaining unit remained concerned. They took their complaints to Sally Obringer, the union business agent responsible for administering the collective bargaining agreement covering the Natural Resources and Parks Department. Obringer contacted the employer[2] to suggest that something needed to be done about the situation. Croy thereafter consulted with John Keizer, who decided Mroz should be asked to remove the recorder from the workplace. Croy communicated that request orally to Mroz, but Mroz refused to comply. Keizer and Croy then conferred with the King County Personnel Department, after which Keizer directed Croy to issue a written directive to Mroz making clear that Mroz was being given a direct order to remove the recorder from the job site. The January 15, 1988 directive initially stated:

> John, as we discussed this morning concerning a resolution to the issue of your tape recorder, a decision has been made. Since you will not comply with my request to remove the recorder from the job site, I am, at this time, giving you a direct order to leave the recorder off the job site.
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> I have discussed this with John Keizer and Wes Moore of Personnel. It was decided that the direct order be issued and that if the order is not followed, further disciplinary action will be taken.

Once Mroz received the written directive, he no longer brought the tape recorder to work.

Mroz subsequently contacted the union, and discussed the matter with Secretary-Treasurer Christine Spieth. In a letter written to King County on Mroz's behalf, Spieth asked that the written order

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[2] Obringer testified that she talked to Chief of Park Maintenance Bill Hutsinpiller. Croy testified that he was the person that Obringer called.

be rescinded as unreasonable on its face and because it seemed to suggest disciplinary action was being taken. When the matter could not be resolved informally, Mroz filed a formal grievance on March 23, 1988. Throughout all processing of the grievance, Mroz was represented by Ms. Spieth.

During processing of the grievance, the employer issued a revised January 15, 1988 memo omitting the word "further". This made it clear that the directive was not itself a disciplinary action.

At a Step 4 meeting held to discuss the grievance in late October, 1988, Mroz and Spieth learned for the first time that Sally Obringer was alleged to have called Croy to suggest action be taken regarding the tape recorder. Mroz subsequently filed the complaints at issue herein.

The processing of the grievance continued and, on November 19, 1988, the union invoked arbitration. An arbitration hearing was scheduled to commence June 28, 1989, but the grievance was settled on that date. Under the terms of the settlement, Mroz was permitted to bring his tape recorder to the job site, so long as it did not interfere with the performance of his work or with the work of other employees.[3]

ISSUES ON REVIEW

Mroz takes issue with paragraphs three through seven of the Examiner's findings of fact, paragraphs two through four of the Examiner's conclusions of law, and the order of dismissal. The

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[3] At the hearing on the unfair labor practice complaints, Mroz expressed some dissatisfaction with the terms of the settlement. Spieth testified, however, that Mroz and his attorney reviewed the settlement agreement, and indicated it was acceptable to them.

complainant asserts that a conflict of interest exists when the union both advises the employer to issue a directive to a member of the bargaining unit it represents, and then represents that employee in a grievance protesting the directive. Mroz asserts that Croy is a supervisor, and that a conflict of interest arises from the inclusion of supervisory personnel in the bargaining unit.

The employer contends that the petition for review was untimely, because the complainant failed to serve the petition on the employer within twenty days, as required by WAC 391-45-350. Regarding the merits of the case, the employer argues that the Commission should limit the unfair labor practice consequences of maintaining a mixed supervisor/subordinate unit to cases of demonstrated harm to an employee's protected rights. The employer asserts that the complainant failed to meet his burden of proving Croy was a supervisor within the meaning of Commission precedent, and failed to show any harm resulted even if there was a mix of supervisors and subordinates in the same bargaining unit. The employer argues that it should not be held liable for a situation that, by administrative rule, it could not have changed during the life of the present collective bargaining agreement.[4] Noting that the burden of proof rested on complainant, and that burden was not met, the employer urges that the Commission's decision should be dispositive only of the unfair labor practice issue; not on any unit determination issue.

The union joins the employer in asserting that the petition was untimely. Regarding the merits of the case, the union concurs with the Examiner's conclusion that Mroz did not prove interference with

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[4] The Commission has held, in a series of decisions beginning with Toppenish School District, Decision 1143-A (PECB, 1981), that parties who agree on bargaining units in a contract will have only limited rights to initiate unit clarification proceedings during the life of that contract. That policy has now been codified as a rule in WAC 391-35-020.

his statutory rights. The union asserts there is no basis in the record for the various claims made in the petition for review. For example, the union asserts that it never suggested disciplinary action; that a union agent simply reported morale problems of which the employer was already aware; and that the management decided how to handle the situation without input from the union. The union argues that Mroz did not prove Croy meets the criteria for exclusion from the bargaining unit as a supervisor, or that any interference resulted from composition of the unit.

DISCUSSION

Timeliness of the Petition for Review

The Examiner's Decision was issued on November 17, 1989. Pursuant to WAC 391-45-350, a request for review of the Examiner's decision must be made within 20 days following issuance of that decision. WAC 391-45-350 requires both the filing of a petition for review with the Commission and service of a copy of the petition upon opposing parties.

Filing with the Commission is effective when the document is actually received by the agency. WAC 391-08-120. In this case, the petition for review was filed with the Commission on December 7, 1989, the last day for it to be timely.

Service on other parties is effective when the documents are properly mailed. WAC 391-08-120. The employer contends that service on the parties was untimely in this case, because its copy of the petition was postmarked December 8, 1989 and was received by the employer on December 11, 1989.[5] In response, the complainant

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[5] The union asserts its copy was received on the same date, but has not offered any evidence as to the postmark date.

has submitted a sworn statement from his counsel's legal assistant asserting, in relevant part:

> On December 7, 1989, I deposited in the mail drop on 5th and Olive, Seattle, WA one copy of Complainant's Appeal Brief and Complainant's Petition for Review to Laura Rasset, County Administration Building, 500 Fourth Avenue, Room 214, Seattle, WA, as I attested in the Certification of Mailing and Delivery. I deposited a copy of both Complainant's Appeal Brief and Complainant's Petition for Review to John Burns, 2505 Third Avenue, Suite 309, Seattle, WA.

While WAC 391-08-120 could be viewed as ambiguous regarding the date by which service is required, the Commission has interpreted that regulation as requiring service within the twenty (20) day time limit for filing. Mason County, Decision 3108-A (PECB, 1989). We need not decide in this case whether late service could ever be excused, because we find copies of the petition were timely served.

WAC 391-08-120(3) provides:

> (3) Service by mail shall be regarded as completed upon deposit in the United States mail properly stamped and addressed.

Given the wording of the rule, neither the date of receipt nor the date of postmark controls timeliness. Rather, it is the act of depositing papers in the mail. The timing of that act would normally be evidenced by the postmark on a document, but when a document is deposited in a mail drop after the last pickup of the day, it will not be postmarked until the next day.[6]

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[6] Because of the vagaries of the U.S. Postal Service, even items placed on a mail drop before the last pickup have been known to be postmarked a day or more later.

In light of the foregoing, we find the affidavit submitted on behalf of the complainant suffices as evidence of timely service of the petition for review on the employer and union, through deposit in the mail on December 7, 1989, properly stamped and addressed.

The Merits of the Dispute

The Findings of Fact -
We have reviewed the record against the list of factual errors alleged by the complainant. As to paragraph 5 of the findings of fact, we agree that decision would more accurately reflect the record if revised to read:

> 5. Croy discussed the use of the tape recorder with Mroz and requested that he stop bringing it to the work site. Mroz refused to comply with that request.

The record indicates that when Croy first discussed the tape recorder with Mroz, he did so in the form of a request that Mroz stop bringing the tape recorder to work. Mroz refused. When given a direct written order, Mroz complied. This change does not affect the outcome of the case. We find no merit in the other assertions of factual errors.

Exclusion of Supervisors From Rank-and-File Bargaining Units -
The issue of excluding supervisors from bargaining units containing their rank-and-file subordinates has been addressed on numerous occasions. Unlike the situation existing in the private sector, supervisors are employees within the meaning of the Public Employees' Collective bargaining Act, Chapter 41.56 RCW. They can organize for the purposes of collective bargaining. City of Tacoma, Decision 95-A (PECB, 1977); METRO v. Department of Labor and Industries, 88 Wn.2d 925 (1977). Although they may remain "employees" under the coverage of the collective bargaining statute, employees who exercise certain types of authority over

other employees are commonly excluded from the bargaining unit(s) containing their subordinates. City of Richland, Decision 279-A (PECB, 1978), aff. 29 Wn.App. 599 (Division III, 1981), rev. den. 96 Wn.2d 1004 (1981); Spokane International Airport, Decision 2008 (PECB, 1984); City of Pasco, Decision 2636 (PECB, 1987); Grays Harbor County, Decision 1948 (PECB, 1984). The basis for exclusion of supervisors from rank-and-file bargaining units is the potential for conflicts of interest that arise when individuals, who exercise supervisory authority, are included in the same bargaining unit with those they supervise.

Since Chapter 41.56 RCW does not contain a definition of "supervisor", the Commission has looked for the types of authority over employees that are listed in the definition of "supervisor" found in RCW 41.59.020(4)(d). That provision states in relevant part:

> [S]upervisor . . . means any employee having authority, in the interest of the employer, to hire, assign, promote, transfer, layoff, recall, suspend, discipline, or discharge other employees, or to adjust their grievances, or to recommend effectively such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment . . .

The foregoing definition is consistent with the definition of "supervisor" found in section 2(11) of the National Labor Relations Act.

Where the requisite authority exists, even the supervision of a small number of employees can be sufficient to warrant exclusion from the bargaining unit containing those employees. City of Mukilteo, Decision 2202-A (PECB, 1986); City of Royal City, Decision 2490 (PECB, 1986); Inchelium School District, Decision 2395-B (PECB, 1987). The focus of attention is on authority. It

is the impact of an individual's actual authority over the members of the bargaining unit which creates either the potential for or an actual conflict of interest. Renton School District, Decision 3287 (PECB, 1989). Labelling a position as "supervisory" does not, in and of itself, lead to automatic removal from an existing bargaining unit. Nor does the fact that an individual may sit in on some management meetings.[7] Instead, the nature of the duties expected of a "supervisor" controls exclusion or inclusion. See, e.g., City of Seattle, Decision 1797-A (PECB, 1985).

In Washington State Patrol, Decision 2806 (PECB, 1988) the Commission discussed several of the leading cases in the area of supervisory exclusion. Subsequent decisions have reiterated that a distinction exists between individuals with sufficient authority to qualify as supervisors within the meaning of Commission precedent and individuals with authority akin to working foremen, e.g., directing subordinates in their assignments without possessing authority to make meaningful changes in the employment relationship. See, Spokane County Fire District 1, Decision 3279 (PECB, 1989); Renton School District, Decision 3287 (PECB, 1989); Benton County, Decision 2719-B (PECB, 1989). If the results of the various cases differ, it is generally because of findings as to the degree of supervisory authority actually possessed and exercised.

The Examiner correctly applied the burden of proof in this case, and found the complainant's evidence lacking. There is no evidence that Croy hires, promotes, transfers, lays off, recalls, takes disciplinary action or even effectively recommends any of the above. All that Mroz established was that Croy assigns work and

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[7] Reference was made in City of Chewelah, Decision 3103-B (PECB, 1989), to the fact that supervisors attended management meetings. That does not suggest that such activity would necessarily suffice to exclude an individual from a rank-and-file unit on the basis of supervisory status. The cases cited in Chewelah do not stand for such a proposition. Decision 3103-B at page 8.

reports problems to his immediate supervisor, who makes the decision (or the effective recommendation) on whether disciplinary action is necessary. This makes Croy akin to a working foreman or leadman.

Croy was not shown to have any independent ability to insist on compliance with his instructions or to initiate disciplinary action. Croy's involvement with the January 15th memo to Mroz is not sufficient to persuade the Commission that Croy effectively recommends disciplinary action. Instead, the record indicates:

1. The memo Croy issued was not intended by management to be disciplinary action; it was a prelude to such action if Mroz failed to comply with a direct order.

2. Croy did not have the authority to initiate disciplinary action, or even to decide whether a direct order was merited.

3. Croy did not recommend disciplinary action, but simply carried out Keizer's instructions.

While Croy may be regarded as a supervisor for some purposes,[8] the complainant simply did not show that Croy exercises the kind of authority that Commission precedent would require for his exclusion from the bargaining unit. We therefore concur with the Examiner's conclusion that the employer and union have not interfered with the complainant's protected rights under Chapter 41.56 by maintaining a bargaining relationship which included both Croy and Mroz in the same bargaining unit.

In light of the foregoing, we need not address the employer's contention that actual, not potential, harm to an employee's rights

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[8] The record indicates that Croy considers himself to be a supervisor, and feels caught in the middle between management and the rank-and-file, but he testified that he has no actual hands-on supervisory responsibility. The record indicates he merely consults with management personnel about work assignments and whether there are any discipline problems.

should be required before any unfair labor practice arises from a mixed unit. We do agree that this decision is dispositive only of unfair labor practice issues, and that any unit determination dispute concerning Croy's position will properly be decided in unit clarification proceedings between the employer and union.

Union's Asserted Conflict of Interest -
The Commission finds the record fully supports the Examiner's conclusions as to the asserted conflicting roles of the union in this situation. Even assuming, arguendo, that Croy was the person contacted by Sally Obringer, she did not tell him anything he did not already know. Croy testified that he had previously received complaints directly from Mroz's co-workers. He and Keizer had already met with Mroz once regarding the tape recorder. All that Obringer's call could have indicated was that, despite the complainant's assurances that he was not tape recording the conversations of others, there was an existing morale problem that needed to be addressed. Croy never contended, and the record does not reflect, that Obringer was suggesting that the employer should discipline Mroz. It appears all she may have done was to suggest that the employer try to work something out to resolve the developing problem between Mroz and other members of the bargaining unit.

We also concur with the Examiner's conclusion that the union reasonably satisfied its representational responsibilities upon being faced with conflicting opinions of bargaining unit employees regarding use of the tape recorder. We see no evidence that the union aligned itself in interest against Mroz. The grievance may not have been processed as fast as he would have liked, but the union could reasonably give priority to cases where there were more serious consequences for those involved, (e.g., lost wages, benefits or grievances impacting a large number of employees). There is no statutory period (or perhaps even a "normal" period) for processing grievances through arbitration, and the 15 months

taken in this case is not so long as to raise questions as to the union's diligence.

Conclusions

For all of the foregoing reasons, and those set forth in the Examiner's decision, we find no violation of RCW 41.56.140 or 41.56.150.

NOW, THEREFORE, it is

ORDERED

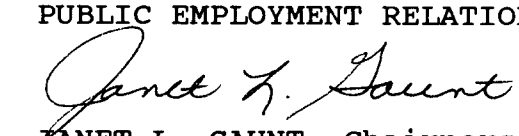
1. Paragraph 5 of the findings of fact is amended to read:

> Croy discussed the use of the tape recorder with Mroz and requested that he stop bringing it to the work site. Mroz refused to comply with that request.

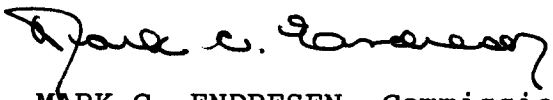
2. As amended, the findings of fact, conclusions of law and order of the Examiner are affirmed and adopted as the findings of fact, conclusions of law and order of the Commission.

DATED at Olympia, Washington, this 18th day of May, 1990.

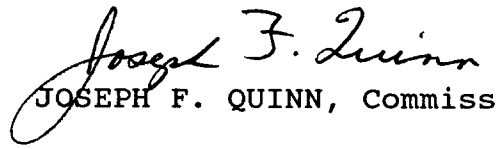
PUBLIC EMPLOYMENT RELATIONS COMMISSION



JANET L. GAUNT, Chairperson



MARK C. ENDRESEN, Commissioner



JOSEPH F. QUINN, Commissioner