

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of
CITY OF BELLINGHAM,

For clarification of an existing
bargaining unit of employees
represented by

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL NO. 106

Case No. 611-C-76-19

Decision No. 565 PECB

ORDER CLARIFYING
BARGAINING UNIT

APPEARANCES:

Cabot Dow, Cabot Dow Associates, appearing for the employer.

Schwepe, Doolittle, Krug, Tausend & Beezer, by Lee M. Burkey, Jr.,
Attorney at Law, appearing for the union.

On October 29, 1976, the City of Bellingham filed a petition with the Public Employment Relations Commission seeking clarification of an existing bargaining unit. Substantial delay occurred in the processing of the case while the parties awaited rulings on similar issues on other cases then pending before the Commission. The City made a request to proceed on May 3, 1978. A hearing was held before Willard G. Olson, Hearing Officer, on August 14, 1978. Both parties filed post-hearing briefs, the last of which was received on October 18, 1978.

POSITIONS OF THE PARTIES:

The employer contends that three "Battalion Chief" positions, one "Fire Marshal" and one "Medical Services Officer" should be excluded from the bargaining unit of rank and file firefighters. The City initially argues that the occupants of the disputed positions are "confidential" employees excluded from the coverage of the Act by RCW 41.56.030(2)(c). In the alternative, the City argues that the disputed individuals should be excluded from the bargaining unit under RCW 41.56.060 and the decision of the Commission in City of Richland, Decision 279-A (PECB, 1978).

The union contends that the disputed positions have historically been included in the bargaining unit and covered by the collective bargaining agreements between the city and the union, that they share a community of interest with the other employees in the bargaining unit, that they are

under the same civil service rules and departmental rules as the other employees in the existing bargaining unit, and that there is substantial interchange and overlap between the disputed positions and their immediate subordinates in the para-military structure of the fire department.

STATUTORY PROVISIONS:

"RCW 41.56.030 Definitions. As used in this chapter:

...

(2) '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 a specified term 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 a specified term of office by the executive head or body of the public employer.

...

41.56.060 Determination of a bargaining unit - Bargaining representative. The department, after hearing upon reasonable notice, shall decide in each application for certification as an exclusive bargaining representative, the unit appropriate for the purpose of collective bargaining. In determining, modifying, or combining the bargaining unit, the department shall consider the duties, skills, and working conditions of the public employees; the history of collective bargaining by the public employees and their bargaining representatives; the extent of organization among the public employees; and the desire of the public employees."

BACKGROUND:

Bellingham Fire Fighters Union Local No. 106, IAFF, represents the fire fighter employees of the City of Bellingham. The parties have had a series of collective bargaining agreements since 1968, and those agreements have covered at least the "Battalion Chief" and "Fire Marshal" positions in dispute here. The "Medical Services Officer" position was created in 1977 or 1978 as an "exempt" position and is not listed as such in the collective bargaining agreement. The incumbent of that position holds the civil service rank of Captain, but has the pay rate and status of a Battalion Chief, and has maintained his membership in the union. The existing bargaining unit is described in the current collective bargaining agreement as:

"Article 3 - Recognition and Bargaining Unit

Until such time as the Public Employment Relations Commission can hear and make a ruling on Case No. C-76-19 (sic) regarding the City's petition to exclude the position of Battalion Chief from the bargaining unit, the City hereby recognizes the union as the exclusive bargaining representative of all regular, full-time uniformed employees of the Bellingham Fire Department except the Fire Chief and the Assistant Fire Chief."

There are 87 fire fighting or "uniformed" personnel in the Bellingham Fire Department below the Fire Chief and the Assistant Chief. The 3 disputed Battalion Chiefs each head a platoon consisting of 5 Captains, 12 fire fighters, one alarm operator and 3 to 5 relief men. The Fire Marshal heads the Fire Prevention Bureau and has 4 subordinate fire inspectors, whose rank is equivalent to that of Captain. The Medical Services Officer heads a mobile intensive care (paramedic) program staffed by 14 ambulance personnel.

The fire suppression activities of the Department are conducted by employees working a 54 hour per week schedule generally consisting of 24 hours on duty followed by 48 hours off duty. The Battalion Chiefs share a work schedule and eating facilities with their subordinates, but have separate office space, separate sleeping facilities, and distinct duties. The City operates 5 fire stations. A person holding the rank of Captain is in charge at each fire station. The Battalion Chiefs have city-wide responsibilities, are provided with a car, and have freedom to move about within the City while on duty. The Battalion Chiefs may respond to any alarm and are obligated to respond on any alarm for which more than one company is dispatched. In that the Fire Chief and Assistant Chief work an 8 hour shift, 5 days a week, the Battalion Chiefs are in command for 128 hours of each week, or more than 76% of the time.

The City contracted in 1976 to take over the fire inspection and investigation functions for all of Whatcom County. Since that time, the Fire Prevention Bureau has extended its responsibilities outside of the City limits to include the 19 fire protection districts in the County. The Fire Marshal works an 8 hour day, 5 days a week. He generally wears civilian clothing while on duty. He has a private office and is assigned a car on a twenty-four hour basis.

The paramedic and ambulance services of the Fire Department also cover Whatcom County. The Medical Services Officer works an 8 hour day, 5 days a week. He, too, generally wears civilian clothing while on duty, has a private office and has an assigned car. His subordinates work the same schedule as the fire suppression personnel.

The Battalion Chiefs, the Fire Marshal and the Medical Services Officer are considered "staff", and they attend staff meetings with the Chief and the Assistant Chief at which personnel problems and other management matters are discussed. The disputed individuals have authority with respect to the evaluation, scheduling, assignment, transfer and discipline of their subordinates. While not formally included in the contractual grievance procedure, the Battalion Chiefs do in practice become involved in the settlement of disputes involving their subordinates. The disputed individuals are involved in budget proposals, determinations of manning levels and purchasing. There is evidence that Battalion Chiefs can effectively recommend suspension or discharge, and can effectively recommend termination of probationary employees. The disputed individuals do not participate on behalf of the City in the collective bargaining process.

A majority of the disputed individuals testified that they desired not to be included in the rank-and-file firefighter bargaining unit. One of those individuals was not a member of the union at the time of the hearing, while it would appear that the other two have maintained their membership in the union.

It is the practice in the Department to replace an absent employee with an employee working in an "acting" capacity who is selected from among the subordinates of the absent employee. At the time of the hearing the Fire Chief had been on disability leave for two and one half months and the Assistant Chief had been named Acting Fire Chief. When a Battalion Chief is absent due to illness or on vacation, a Captain is designated as "Acting Battalion Chief" and assumes all of the responsibilities and duties of the position. Similarly, when the Medical Services Officer is absent, a Captain replaces him in an "acting" capacity.

DISCUSSION:

The briefs of the parties were filed well in advance of the issuance by our Supreme Court, on November 30, 1978, of a decision having a substantial bearing on this case. In Local Union No. 469, International Association of Fire Fighters, AFL-CIO v. the City of Yakima and the Department of Labor and Industries, ___ Wn.2d ___ (1978); No. 44892, decided November 30, 1978, the Supreme Court interpreted RCW 41.56.030(2) in light of the precedents of the National Labor Relations Board, in light of the definition of "confidential employee" contained in Chapter 41.59 RCW relating to school district certificated employees, and in light of the decision of this agency in Edmonds School District, Decision 231 (PECB, 1977). The Court cites Edmonds with approval, stating:

"...over the years the term confidential, when used with reference to employees, has become something of a term of art in the law which developed from that act (the federal Labor-Management Relations Act). The meaning it has acquired in labor law, including public employment law, accords both with that given it by Washington's Legislature in RCW 41.59.020(4)(c) and the interpretation we give to RCW 41.56.030(2)." Local Union No. 469, International Association of Fire Fighters, AFL-CIO v. the City of Yakima and the Department of Labor and Industries, Wn.2d (1978); No. 44892, decided November 30, 1978.

The Court goes on to 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 the formulation of labor relations policy. General supervisory responsibility is insufficient to place an employee within the exclusion." IAFF v. City of Yakima, supra. (emphasis supplied)

The exclusion is narrow. When the Supreme Court described in Yakima the type of information to be protected, it did so within the confines of its previous METRO decision:

"Unless the positions involved fall within one of these categories (deputy, administrative assistant, or secretary), the persons holding them are not excluded from the definition of "public employee" under the act. Furthermore, even if they fit one or more of the categories named in the statute, the persons holding them are nevertheless public employees if their duties do not necessarily imply a confidential relationship..." METRO, 88 Wn.2d 925, 928. (1977) (emphasis supplied)

The arguments of the employer here are further weakened by a factual distinction between the instant case and the situation before the Court in Yakima. The Yakima battalion chiefs report directly to the fire chief without going through an intermediate management level such as the Assistant Chief rank found in the Bellingham organization.

The employer's reliance on unit determination principles and the Commission's Richland decision are, on the other hand, well placed. The "bottom line" result in Yakima, by which the battalion chiefs were left in the rank and file firefighter unit, must be taken in the context of the facts and principles involved in METRO, supra. The 5 to 4 split of the Court in Yakima even appears to be unlikely in light of the unanimity of the same Court in METRO. However, on close analysis of the dissenting opinion in Yakima, it becomes clear that the Court is unanimous in its view of the test for "confidential employee".

It was the application of that test on the facts of that case that divided the Court. Further, it appears that the employer in Yakima based its arguments exclusively on RCW 41.56.030(2). In doing so, it ignored a change of administrative agency and a significant shift in the interpretation of the law which occurred while the Yakima case was in the Courts.

Apart from an isolated reference to "RCW 41.56.060 - .080" in a footnote relating to the procedural history of the case, there is no reference in the Supreme Court's Yakima decision to unit determination principles. The Court stated the issue before it as:

"The central issue with which we are concerned is: Are the battalion chiefs public employees under RCW 41.56.030(2)? If, by reason of their duties, they are not within the statutory definition of public employees, the director's exclusion of battalion chiefs from the definition of public employees and thus from coverage under the act was correct."
Yakima, slip opinion at page 3.

A third alternative found in METRO and in recent decisions of the Commission was quite evidently not considered in Yakima: A separate unit composed entirely of supervisors.

Jurisdiction for the administration of RCW 41.56 was transferred to the Public Employment Relations Commission some time after the issuance of the final order of the Department of Labor and Industries in Yakima. In City of Tacoma, Decision 95-A (PECB, 1977), the Commission expressly rejected the precedents of the Department of Labor and Industries, and concluded that supervisors are employees within the meaning of RCW 41.56. In Tacoma, the Commission refused to disturb a previously existing unit composed entirely of supervisors. A few months later, in METRO, our Supreme Court also concluded that supervisors were employees within the meaning of RCW 41.56, and cited Packard Motor Car Co. v. National Labor Relations Board, 330 U.S. 485 (1947) in support of the proposition that separate units of supervisors can be found appropriate. The METRO decision resulted in reinstatement of a certification of a supervisor unit. In Richland, supra, the Commission affirmed the exclusion of supervisors from a rank and file firefighter bargaining unit under RCW 41.56.060 based on the separate duties, skills, working conditions and community of interest shared by the supervisors and on the conflicts of interest between the exercise of supervisory authority and inclusion in a common bargaining unit with those supervised. The Commission's Richland decision has been affirmed by the Benton County Superior Court. As noted by the employer in its brief, numerous similarities exist between the situation at hand and the situation which existed in Richland.

FINDINGS OF FACT

1. The City of Bellingham, Washington, is a public employer within the meaning of RCW 41.56.030(1).

2. International Association of Fire Fighters, Local No. 106, is a bargaining representative within the meaning of RCW 41.56.030(3).

3. The City of Bellingham has since about 1968 recognized Local 106 as the exclusive bargaining representative of "all regular full time uniformed employees of the Bellingham Fire Department except the Fire Chief and the Assistant Chief".

4. A dispute has arisen concerning the continued inclusion of three Battalion Chief positions and one Fire Marshal position, and as to the inclusion or exclusion of one Medical Services Officer, in the bargaining unit described in paragraph 3, above.

5. The Battalion Chiefs, Fire Marshal and Medical Services Officer are not involved on behalf of the employer in collective bargaining, do not have an intimate fiduciary relationship with their superiors or with the City of Bellingham on matters of the labor relations policies of the City of Bellingham, and do not have access to confidential information concerning the labor relations policies of the City of Bellingham.

6. The Battalion Chiefs, Fire Marshal and Medical Services Officer consult regularly with the Fire Chief and Assistant Chief on matters concerning the management and operation of the Fire Department and the direction of its working force. They have authority, on behalf of the employer, with respect to the evaluation, scheduling, assignment, transfer, discipline and discharge of their subordinates. They are authorized to act and act as supervisors and have duties, skills and working conditions which are distinct from those of their subordinates. Their duties and responsibilities as supervisors place them in a position of potential conflict of interest with respect to their inclusion in the same bargaining unit with their subordinates.

CONCLUSIONS OF LAW

1. No question concerning representation presently exists, and the Public Employment Relations Commission has jurisdiction in this matter to determine a dispute, pursuant to WAC 391-21-300, et. seq., concerning the composition of an existing bargaining unit.

2. The Battalion Chiefs, Fire Marshal and Medical Services Officer are "public employees" within the meaning of RCW 41.56.030(2) and are not "confidential employees" excluded from the coverage of the Act by RCW 41.56.030(2)(c).

3. The Battalion Chiefs, Fire Marshal and Medical Services Officer are supervisors whose duties, skills and working conditions differ substantially from those of their subordinates, and who are properly excluded from a bargaining unit consisting of nonsupervisory uniformed personnel of the Bellingham Fire Department.

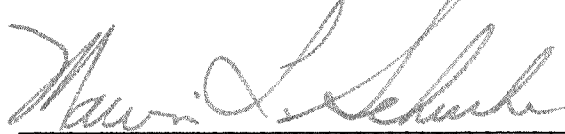
4. A bargaining unit consisting of all regular full time uniformed firefighter employees (as defined by RCW 41.56.030(6)) of the City of Bellingham, excluding the Fire Chief, Assistant Fire Chief and supervisors is an appropriate unit for the purposes of collective bargaining within the meaning of RCW 41.56.060.

ORDER

The bargaining unit described in findings of fact paragraph 3, above, is clarified to exclude the Battalion Chiefs, the Fire Marshal and the Medical Services Officer in addition to the previous exclusion of the Fire Chief and Assistant Chief.

Dated at Olympia, Washington, this 17th day of January, 1979.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director