STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

| | | |
|---|---|---|
| In the matter of the petition of: | ) | |
| | ) | |
| CITY OF FIFE | ) | CASE 8244-C-89-464 |
| | ) | |
| For clarification of an existing bargaining unit of its employees represented by: | ) | DECISION 3397 - PECB |
| | ) | |
| INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 751 | ) | ORDER OF DISMISSAL |
| | ) | |

This proceeding was commenced by a petition for clarification of an existing bargaining unit filed by the City of Fife on October 23, 1989. The petition seeks exclusion, as "supervisors", of the employees in five positions: Finance Officer, Accounting Assistant, Building Official, Aquatics Program Specialist, and Aquatics Program Coordinator. The petition makes reference to City of Fife, Decisions 3055-A and 3206 (PECB, May 19, 1989), in which the International Association of Machinists and Aerospace Workers, District Lodge 751, was certified as the exclusive bargaining representative of certain employees of the City of Fife.

Another labor organization filed a petition with the Commission in May of 1988, seeking certification as the exclusive bargaining representative of a "residual" bargaining unit of City of Fife employees. Issues were framed in that proceeding concerning the eligibility of a number of employees, and a hearing was scheduled. Further stipulations reduced the issues to be decided, although the employer continued to claim that the "finance officer" and two others were "confidential" employees to be excluded under RCW 41.56.030(2)(c). The employer did not pursue any "supervisor"

claims to hearing or decision. The Executive Director's December 8, 1988 decision, City of Fife, Decision 3055 (PECB, 1988), rejected the employer's "confidential" arguments, and placed the "finance officer" and other disputed positions in the bargaining unit. District Lodge 751 prevailed in the election which followed. The employer did not seek Commission review of the Executive Director's decision, and a certification was issued.

The union sought dismissal of the instant petition in a written response filed on November 8, 1989. It cited the recent certification of the bargaining unit and the decision in Island County, Decision 2572 (PECB, 1986).[1]

By letter dated November 15, 1989, the City of Fife was directed to show cause why its petition in this case should not be dismissed as untimely under the Island County precedent.

## POSITION OF THE EMPLOYER

The employer filed a written response on November 27, 1989, supporting its petition on a variety of grounds: (1) That this case does not involve a question concerning representation, so that RCW 41.56.070 does not apply; (2) that the employer has met its

---

[1] In Island County, the employer filed a unit clarification petition shortly after a certification was issued in a representation proceeding. The employer was attempting to raise issues in the unit clarification proceeding beyond those it had raised in the representation case. The unit clarification petition was dismissed as untimely, based upon: (1) The stipulations entered into by the employer during the representation proceedings; (2) the absence of any allegation of changed circumstances involving the petitioned-for positions; and (3) the "certification bar" provision of RCW 41.56.070, which precludes an attack on a certification prior to the expiration of a one-year period during which the union is entitled to uninterrupted good faith bargaining.

notice obligations under Toppenish School District, Decision 1143-A (PECB, 1981) and WAC 391-35-020; (3) that WAC 391-35-020 "prevails" over the precedent of Island County, supra; (4) that no change of circumstances is required under Toppenish School District or WAC 391-35-020; (5) that the underlying certification excludes "supervisors" from the bargaining unit; (6) that the previous ruling on the "confidential" status of the "finance officer" is not res judicata on the issue of whether that individual is a supervisor; (7) that stipulations made during the representation proceedings do not bind the employer in this unit clarification proceeding; and (8) that there have, in fact, been changed circumstances increasing the supervisory roles of the two disputed "aquatic" positions.

Adding to the factual allegations of the petition, the employer's response indicates that the employer and union signed a collective bargaining agreement shortly after the petition was filed to initiate these proceedings. The employer has also supplied affidavits from its attorney / chief negotiator (stating that he put the union on notice by September of 1989 "that the City Council was considering protesting the inclusion of supervisors in the bargaining unit", and that the union was put on notice in October of 1989 that the employer intended to file this unit clarification proceeding), and from its director of parks and recreation (stating that the duties of the "aquatic program specialist" and "aquatic program coordinator" were changed during or about September of 1989, as part of an ongoing "transition" towards making those positions supervisory in nature).

## DISCUSSION

The applicable statute, the rules adopted by the Commission to implement that statute, and Commission precedent all reflect

concern for the stability of collective bargaining relationships, as well as concern that the processes of the Commission not be abused. For reasons indicated below, it is concluded that the petition in this case must be dismissed.

Exclusion of "Supervisors" is not Jurisdictional

As the employer observes in its written response, "supervisors" are public employees within the meaning and coverage of Chapter 41.56 RCW. The decisions in City of Tacoma, Decision 95-A (PECB, 1977) and Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977), rejected previous interpretations of Chapter 41.56 RCW, and held that "supervisors" can organize and be included in bargaining units.

While the Tacoma and METRO decisions involved attempts by employers to terminate collective bargaining relationships with separate units of supervisors, many bargaining units were already in existence in 1977 that included both supervisors and their rank-and-file subordinates in the same unit. The Commission was thus faced with attempts to have supervisors removed from such mixed units. The decision in City of Richland, Decision 279 (PECB, 1977), extensively detailed the duties that distinguished the disputed supervisors from their subordinates, and addressed the potential for conflict of interest that is inherent in having both supervisors and their subordinates in the same bargaining unit. The Commission affirmed the exclusion of the supervisors from the unit in Richland.[2] The Commission has since responded favorably to timely requests that "supervisors" be excluded from the bargaining units containing their rank-and-file subordinates. Importantly, while the Commission's policy concerning supervisors implements the

---

[2] City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981).

discretion delegated to the Commission in matters of unit determination, the separation of supervisors from their subordinates is not an absolute requirement of the statute.

## The Timing of Supervisor Exclusions

The timing of the request for a "supervisor" exclusion was hotly contested in the Richland situation, and such issues have continued to be of substantial concern.

Representation Case Proceedings -
The transaction which gives rise to the bargaining relationship clearly provides the best opportunity for the parties to sort out supervisors from their subordinates. Parties must do this on their own in "voluntary recognition" situations. When they come to the Commission, the representation case procedures of Chapter 391-25 WAC encourage early and definitive resolution of such questions. WAC 391-25-130 calls for production of a list of employees at an early stage of the proceedings. The Commission routinely uses prehearing conference procedures, under WAC 10-08-130 and/or WAC 391-08-210, to solicit stipulations of representation case parties on "eligibility" issues, including exclusions of individuals from bargaining units as "confidential employees" or as "supervisors". The Election Agreement procedure calls, at WAC 391-25-230(6), for a stipulated eligibility list. The positions taken and stipulations made in representation proceedings are binding upon the parties except for good cause shown. Community College District No. 5, Decision 448 (CCOL, 1978). The object of the representation case is that the parties go away from that process with a clear framework for an ongoing relationship that will be stable for an extended period of time. The statute enforces that stability by its "certification bar" provision in RCW 41.56.070, which precludes disruption of the relationship for at least one year following the conclusion of the representation proceeding.

The affected employees of the City of Fife were unrepresented prior to the onset of the representation proceedings in 1988, and the employer clearly had the opportunity to assert and pursue claims that certain individuals should be excluded as supervisors. A generic exclusion of "supervisors" was even included in the unit description, but the employer did not pursue claims that any or all of the individuals now in dispute were "supervisors". Throughout the hearing and determination process leading to City of Fife, Decision 3055 (PECB, 1988), the eligibility of the "finance officer" was challenged only on "confidential" grounds. The other individuals now in dispute were deemed by all parties to be eligible voters. The employer's petition in the instant case must be viewed in that context.

Unit Clarification Proceedings -

The decision in Island County, supra, demonstrates application of the "certification bar" provision of RCW 41.56.070. Unit clarification proceedings are not available within one year following certification to raise issues that could have been raised in the representation proceedings.

Even after expiration of the "certification bar" year, clarification of a bargaining unit is not available at the whim of the parties to the bargaining relationship. The Commission ordered the exclusion of supervisors from the bargaining unit in City of Richland, supra, but that same decision made it clear that the Commission was not creating a perpetual "open season" on "supervisor" claims:

> Absent a change of circumstances warranting a change of the unit status of individuals or classifications, the unit status of those previously included in or excluded from an appropriate unit by agreement of the parties or by certification will not be disturbed. (emphasis supplied)

In the Richland case, the recent substantial change of statutory interpretation made by the Commission in City of Tacoma, supra, and by the Supreme Court in METRO, supra, was deemed a sufficient basis to upset a long-standing inclusion of supervisors in the unit.

The exclusion of "supervisors" remained hotly contested through the balance of the decade and into the 1980's, as numerous attempts were made to obtain exclusions of supervisors from already-existing bargaining units under the new policies enunciated in Tacoma, METRO and Richland. After further experience with the "timing" problem, Toppenish School District, Decision 1143, 1143-A (PECB, 1981), imposed a further limitation on the Richland scenario. "Changed circumstances" remained a basis for filing of a unit clarification petition at any time, but exclusionary claims based on the change of policy concerning "supervisors" were effectively limited to the period at the end of a contract. The Toppenish holding has now been codified as WAC 391-35-020. Contrary to the employer's argument in this case, WAC 391-35-020 does not limit or overturn Island County or Richland.

The case at hand does not involve a bargaining unit burdened with a "mixed" structure created under the policies rejected in Tacoma, METRO and Richland. Instead, those precedents were available to this employer during the representation proceedings if it desired to make use of them. This unit clarification case must take the disputed positions where they are found. In the absence of obtaining their exclusion during the representation proceedings, at least the "finance officer", "accounting assistant" and "building official" must now be regarded as having been "previously included in . . . an appropriate unit . . . by certification". It follows, under Richland, that their status will not be disturbed in the absence of a subsequent change of circumstances.

## Allegations of Changed Circumstances

While contending that "changed circumstances" are not required for its petition, the employer does allege that there has been some change of circumstances regarding the two "aquatic" positions at issue in this case. The context indicates careful review.

The "Transition" Nature of the Alleged Change -
Examination of the affidavit supplied by the employer indicates that only minor types of authority have been given to the disputed "aquatic" positions, and that "verification" by the department head is required on each exercise of authority. Moreover, the affidavit clearly indicates that a "transition" of authority remains incomplete. No specific date is indicated when that transition is to be finalized. These facts lead to a conclusion that the petition is anticipatory, rather than based upon actual facts, and should not be processed at this time.

The Duty to Bargain "Skimming" Decisions -
Review of the events in this case also calls to mind the prolonged course of litigation in City of Mercer Island, Decision 1026, 1026-A, 1026-B (PECB, 1982). The City of Mercer Island had relied exclusively on a "confidential" theory in seeking exclusion of certain individuals from a bargaining unit. The employer declined to seek a separation of "supervisors" under Richland, because it did not want to deal with a separate unit of supervisors. Having had its "confidential" claim rejected, the employer created some new positions outside of the bargaining unit and acted unilaterally to transfer bargaining unit work to those new positions. An unfair labor practice violation was found by the Examiner, affirmed by the Commission, and enforced by the Commission in a supplemental order. Having passed up its opportunity to have the disputed individuals excluded from the bargaining unit as "supervisors", the employer had made their duties subject to the work jurisdiction claims of

the union. Thus, it was obligated to give notice to the union prior to transferring their work to persons outside of the unit. Further, the employer was obligated to negotiate, upon request, concerning both the decision and effects of such a transfer.

The aquatics positions at issue in the instant case were included in the bargaining unit by a recent certification. The alleged change of circumstances did not begin until September of 1989, when the parties were apparently at an advanced stage of bargaining on their first contract. The alleged changes appear to involve only a small portion of their total activity. While there is some indication that the employer had previously given notice to the union that it was seeking removal of the positions from the bargaining unit, there is no indication that it gave notice or otherwise fulfilled its bargaining obligations concerning removal of the bulk of their duties from the scope of bargaining unit work. The parties have since signed a collective bargaining agreement. It is concluded that the issue is not properly raised at this time.

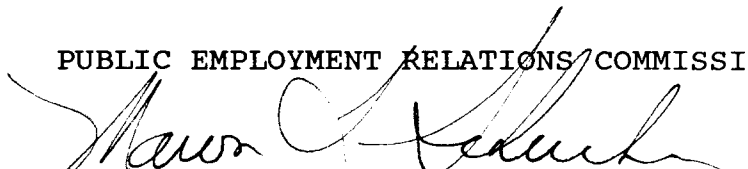
NOW, THEREFORE, it is

ORDERED

The petition for clarification of an existing bargaining unit filed in the above-captioned matter is DISMISSED as untimely.

Dated at Olympia, Washington, the 22nd day of January, 1990.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-35-210.