

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
CITY OF SPOKANE) CASE 10794-C-93-0644
For clarification of an existing) DECISION 4956 - PECB
bargaining unit represented by:)
WASHINGTON STATE COUNCIL OF CITY) ORDER CLARIFYING
AND COUNTY EMPLOYEES, COUNCIL 2) BARGAINING UNIT

James Sloan, City Attorney, by Patrick Dalton, Assistant City Attorney, appeared for the employer.

Randy Withrow, Staff Representative, appeared for the union.

On November 22, 1993, the City of Spokane filed a petition for clarification of an existing bargaining unit with the Public Employment Relations Commission, seeking to have certain positions excluded from a bargaining unit of municipal employees represented by the Washington State Council of County and City Employees (WSCCCE). Although the employer took the position that the disputed employees should be placed in a supervisory bargaining unit represented by the Spokane Managerial and Professional Association (SMPA), no notice of appearance or motion for intervention was filed in this matter by the SMPA.¹ A hearing was held at Spokane, Washington, on June 2, 1994, before Hearing Officer J. Martin Smith.² The employer and WSCCCE filed briefs.

¹ The Commission listed the SMPA on its docket records for this case, as if it were a third party to the proceeding, in order to assure the issuance of notices to that organization.

² The SMPA was provided with a copy of the notice of hearing. Its president, Barbara Burns, was present at the hearing but did not participate in it.

BACKGROUND

WSCCCE Local 270 has represented employees of the City of Spokane for over 40 years. The most recent collective bargaining agreement between those parties describes the bargaining unit by reference to an appendix which includes office-clerical, administrative, labor, technical, library, and mechanical classifications. Most of the bargaining unit employees in the Transportation Department are laborers, street maintenance operators, foremen, asphalt rakers, and bridge maintenance employees. The unit also includes two Transportation Department clerical employees, a radio operator/dispatcher, a sign painter, and an engineering technician.

On April 29, 1993, Local 270 made a request of the employer for voluntary recognition as the exclusive bargaining representative of three additional classifications: (1) Street Maintenance Supervisor [SPN # 569], (2) Assistant Street Maintenance Supervisor [SPN # 568], and (3) Street Maintenance Foremen/Forewomen [SPN # 564].³ That letter to the employer's chief labor negotiator, Gary Persons, clearly contemplated the inclusion of these positions in the bargaining unit represented by Local 270.

On May 5, 1993, the SMPA filed two representation petitions with the Commission. Case 10451-E-93-1723 involved a bargaining unit of approximately 46 "managers". Case 10452-E-93-1724 involved a bargaining unit of approximately 266 "professional" and "managerial" employees.

In a letter dated May 28, 1993, Persons and City Manager Roger Crum refused to extend voluntary recognition to Local 270. The employer asserted that an alternate demand for recognition for the same

³ "SPN" is a designation used by the employer's civil service commission and personnel department to identify positions in a comprehensive wage and compensation plan which includes union and non-union employees.

employees had been received, and that the SMPA had just filed a representation petition with the Commission seeking to represent supervisory and managerial employees.

Local 270 next filed its own representation petition with the Commission, seeking a **separate bargaining unit** of "all street maintenance forepersons, assistant street maintenance supervisors and street maintenance supervisors" within the Transportation Department.⁴ The Commission conducted a telephonic pre-hearing conference as part of the normal processing of that case,⁵ wherein the employer and Local 270 agreed in principle to a voluntary recognition placing the "forepersons" into the rank-and-file bargaining unit represented by Local 270. There was discussion about the assistant street maintenance supervisor and street supervisor positions, but there was no resolution of their status.

On August 26, 1993, the SMPA was certified as exclusive bargaining representative for two City of Spokane bargaining units.⁶ Inasmuch as Appendix B of the contract between the employer and Local 270

⁴ Case 10537-E-93-1743 was filed on June 23, 1993. At the same time, the WSCCCE filed Case 10538-E-93-1744, seeking a bargaining unit of criminal litigators in the city attorney's office. It received certification for the latter bargaining unit on August 27, 1993. City of Spokane, Decision 4476 (PECB, 1993).

⁵ WAC 391-25-130 obligated the employer to provide a list of the employees in the petitioned-for bargaining unit. The list provided by the employer included six forepersons (Albrecht, Holland, Malmquist, Niemczyk, Porter, and Thornton), listed Don Burger as the street maintenance supervisor, and listed Terry Thompson as the assistant street maintenance supervisor.

⁶ In City of Spokane, Decision 4477 (PECB, 1993), the SMPA was certified for a unit of exempt managers, civil attorneys, chief examiners, assistant to the mayor, assistant to the city manager, and executive secretary. In City of Spokane, Decision 4478 (PECB, 1993), the SMPA was certified for a unit of classified managers, classified professionals, and the mayor's clerical staff.

states that "employees not included in Appendix A of this agreement or in other collective bargaining agreements are considered exempt or managerial", those employees included in the SMPA bargaining unit are, by implication, excluded from the bargaining unit represented by Local 270.

On August 30, 1993, City Manager Crum wrote that the employer agreed to recognize Local 270 as the exclusive bargaining representative of the street maintenance forepersons within the parties' existing contract. The employer asserted that the street supervisors were properly included in the "M & P" bargaining unit, and that it would file a petition with the Commission to seek a determination on that matter. Since no question concerning representation remained from the issues raised by the original petition in Case 10537-E-93-1743, that case was closed.⁷ The effect of that proceeding was to "accrete" six employees to the existing bargaining unit represented by Local 270, and to bring them under the terms of the contract covering that bargaining unit. The employer then filed the petition to initiate this proceeding.

Reorganization of the Transportation Department

Overall authority for the employer's street maintenance function is vested in Director of Engineering Services Irving Reed, who reports only to the city manager. Bruce Steele, who took over as director of the street department on January 1, 1994, testified that the department was undergoing a reorganization. In his first five months as department head, Steele had shifted more duties to Maintenance Engineer Jim Smith. Steele indicated that the transfer of duties was continuing at the department in June of 1994, although the physical worksite of most of these employees -- the East Ermina Street office -- had not changed.

⁷ City of Spokane, Decision 4600 (PECB, February 7, 1994).

Until 1993, the department was divided into "street" and "traffic" divisions. Steele testified that the department had been divided into four divisions beginning January 1, 1994: (1) Roadway Maintenance; (2) Administration; (3) Signs and Markings; and (4) Bridge and Pavement Evaluation. Smith summarized the transition within the department by stating:

Prior to January 1st, we took care of the pavement services and the bridges. After January of '94, we have added the striping and all of the regulatory signage and the information signing in the City of Spokane as part of our division.

[Transcript, at page 25]

Smith indicated that his discussions in January led him to add an administrative section to the division. Smith was responsible for drafting an organization chart dated January 10, 1994.

Don Burger is now listed on the organization chart as head of the roadway division. Terry Thompson is now listed as head of administration. Kent Green, who had been traffic engineering supervisor, is now listed as head of signs and markings. Mark Serbousek, the former bridge engineer, is now listed as head of bridge and pavement evaluation. When Smith is absent, the streets department is left to the management of Serbousek.

Steele understood that Green, Serbousek and Smith were in the "M&P" bargaining unit. Steele testified that Jim Smith had requested that Burger and Thompson be excluded from the rank-and-file unit as supervisors, but he did not testify as to whether Burger or Thompson had supervisory duties over subordinate employees.

Smith testified that Thompson will have responsibility for tracking of equipment in the department and tracking records through the computers. Thompson was also trained in the proper handling of hazardous materials, and stands as the department expert in this

area. Smith indicated that Thompson supervises bargaining unit employees, including the office-clerical staff. Burger testified that he has been one of several employees, including Thompson and foremen, who have screened applicants. Hiring decisions rest with Jim Smith, who indicated that, as the "division leader" he always had final authority as to new hires. Smith testified, however, that he always took the recommendation of the supervisor the new employee was destined to work with, and that he generally reviews the ratings given by both Thompson and Burger. Smith indicated that the final approval of overtime is made by him, but that the decision to keep a crew working lies with Thompson and Burger.

Under re-direct testimony, Smith indicated that he manages and directs the work of Burger, and that Burger in turn supervises Thompson "in the line of progression". He indicated, however, that the department prefers that Thompson be directed by Smith and that the positions held by Thompson and Burger be considered at the same level.

POSITIONS OF THE PARTIES

The employer argues that Thompson and Burger are supervisors because they have supervisory authority over two divisions of the reorganized Street Department, and hence have supervisory authority over clerical and maintenance employees working in those two divisions. The employer bases its claim largely on the fact that two similar division heads are considered supervisors and have been bargained for by a supervisory bargaining unit.

The WSCCCE argues that the two positions do not possess the authority to effectively recommend discharge, hiring or grievance disposition, except at the instigation of the department director. The union contends the department head's orders are conveyed to the rank and file by the street maintenance supervisor, but this person

takes no independent supervisory action. It contends both of the disputed positions share a community of interest with the rank-and-file employees and the foreman in the existing bargaining unit.

The SMPA took no position with respect to either of these job classifications.

DISCUSSION

The legal principles regarding the determination of supervisory issues are well-established. Different from the division between labor and management which exists in the private sector under the National Labor relations Act (NLRA), supervisors are employees within the meaning and coverage of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977). As a general rule, however, supervisors will be excluded from bargaining units of employees that they supervise under RCW 41.56.060, in order to avoid conflicts of interest that inevitably arise among factions within a bargaining unit. City of Richland, Decision 279-A (PECB, 1978), affirmed, 29 Wn.App. 599 (Division III 1981), review denied 96 Wn.2d 1004 (1981).

The criteria of supervisory status found in Section 2(11) of the National Labor Relations Act have been used as guideposts for determining who is a "supervisor" under Chapter 41.56 RCW. Thus, the impact of an individuals' actual authority to hire, discharge, discipline, lay off, transfer, assign, promote, adjust grievances and direct the work of other employees is well known to the Commission and its staff. Renton School District, Decision 3287 (PECB, 1989). To establish supervisory status, a party must examine and prove the entirety of the job performed, and if a majority of this person's time is spent on one or more supervisory duties, that person is a supervisor.

Titles are not controlling. In City of Winlock, Decision 4056, 4056-B (PECB, 1993), a police chief was not a supervisor. Even though he was required to direct the work of one other police officer, and earned a higher salary than the junior officer, the Commission found that supervisory duties that may have once been the province of the chief had been eliminated by the new mayor and city council. The chief spent three-fourths of his time in routine patrol duties of the same type of work as the other officer.⁸ In contrast, in City of Deer Park, Decision 4237-C (PECB, 1993), the Commission ruled that a public works supervisor was entitled to a supervisory exclusion because he had sole authority to direct the workforce without assistance of crew forepersons, and his authority was rarely countermanded by the city supervisor.

In the instant case, we must deal with two employees who perform a variety of "field" and "crew" work in the street maintenance operation. Four levels of authority are observed above the assistant street maintenance supervisor, not counting the city manager. Three levels of authority exist above the street maintenance supervisor in the line-and-staff arrangement of the city.

The Supervisory Status of Don Burger -

Burger has been the street maintenance supervisor for seven years. His duties generally reflect his civil service job description. He described his role as essentially public relations, although he directs the crews to field assignments each morning and outlines their job tasks. His approval of vacation leave is subject to a limited number of employees (set by Smith) who are allowed to be on annual leave each day. Burger approves sick leave because he hears the phone calls as they come in each morning. Burger then must re-organize the manning of certain crews.

⁸ See, also, Town of Granger, Decision 2634 (PECB, 1987), where another small-town police chief was included in a city-wide bargaining unit.

Burger has not been involved in any predisciplinary hearings or grievances in his current position. He has filled out performance evaluation (PAR) forms on several employees, mostly foremen. Those are subject to the review by Jim Smith, but Burger indicated his opinions on PAR matters are usually accepted by his superior. When asked if he was anyone's supervisor, Burger replied that he was the "foremen's" supervisor, as best as he could determine.

Burger received a pay raise which was distributed by the employer to non-bargaining unit employees during 1993-94.⁹ His receipt of overtime pay was inconsistent, and subject to review by Jim Smith. As of the day of the hearing, he generally received the same benefits as employees in the Local 270 bargaining unit. Burger receives 40 hours of personal leave per year, and has a choice as to take time off or compensatory pay.

The case for Burger's supervisory status is subject to several troubling factors. On the one hand, Jim Smith seems to vest Burger with considerable authority to arrange the manning of crews, direct the workforce, and inspect street repair activity. Yet Smith testified that he intends for Burger to do less of this work in the future, because he wants to transfer administrative duties to Thompson in a separate division.

The promotional charts put Burger's "street maintenance supervisor" position at the top of the "bridge maintenance" progression list, as well as the top of the "street maintenance" progression for civil service purposes. Burger held substantial authority over the streets operation when there were two divisions, and that has not changed. The new organization chart defines Burger as a "division

⁹ There is no record of the SMPA and the employer negotiating a contract for either 1993 or 1994. As of the date of hearing, the employer and Local 270 had not settled a contract for 1994.

head", and 55 of the 78 employees in the department work in his division.

A major weakness in the employer's case regarding Burger is that this unit clarification proceeding was filed in the context of competing claims by two labor organizations, the SMPA and WSCCCE. The employer claimed that both employees were supervisors "belonging" to the SMPA bargaining unit, but that assertion was not dictated by the organization charts now in evidence as part of the record. Rather, the employer's claims relate to circumstances as they existed on August 30, 1993. The employer's petition in this case came some three months after SMPA was recognized to represent two additional supervisory bargaining units in the City of Spokane.

The contention that Burger is instrumental in hiring decisions would appear to conflict with the job description for his position, which does not mention "hiring" or "interviewing". The testimony was that street employees at the foreman, assistant superintendent and street maintenance level participated in interviews, but that Director Smith made the final hiring decisions. The job description mentions supervision of the radio operators, but the testimony indicated that Terry Thompson was given authority over these people.¹⁰

Clearly, the employer contemplated changes in the organization of the department, and Steele's testimony is not disregarded on this

¹⁰ As to Burger, there are conflicts between Exhibit 7, prepared in January of 1994, and earlier organization charts for the Transportation Department. Similarly, the job description for the street maintenance supervisor conflicts with a handwritten document admitted as Exhibit 8. Burger drafted this document in February of 1994, some six months after filing of the instant case. In Morton General Hospital, Decision 3521-B (PECB, 1991), the Commission affirmed the Executive Director's ruling that documents prepared to buttress a case at hearing are not to be accorded full probative weight as evidence.

point. Based on the record, however, Burger still reports to Jim Smith, and is a conduit for policy decisions made by Steele and Smith in the chain of command. Burger's limited supervisory duties are occasional and sporadic. He is still paid at a level consistent with the foremen and crew members; he does not attend management meetings; he is not instrumental in forming the budget of the department. The employer's characterization of Burger's duties are prospective at best, and the Commission is reluctant to remove employees from bargaining units based upon speculative, future supervisory duties. As was pointed out recently in Snohomish County Health District, Decision 4735 (PECB, 1994), there is a vast difference between a "contemplated course of action" in reorganizing a department and in an "established modus operandi". The City of Spokane has failed to show that conflicts of interest now exist if Don Burger remains in the same bargaining unit as street maintenance forepersons and crewmen.

Supervisory Status of Terry Thompson -

Thompson has been the assistant street supervisor for three years. He indicated that he begins each day reviewing time cards and checking the availability of street maintenance equipment. Thompson receives sick leave and vacation leave requests from crew members, but does not become involved in review or disapproval of the leave taken. Thompson has not participated in any disciplinary hearing in his tenure as a street supervisor. His role in hiring has been limited to participating as a "rater" in interviews of applicants for radio operator and clerk positions. He prepares PAR reviews for radio operators and clerks, but these are reviewed by Don Burger and Jim Smith at the higher levels of the chain of command. He schedules, but does not instruct, training classes for commercial drivers license, CPR, first aid, and flagman duties. He is also responsible for filing hazardous materials reports.

Thompson appears to have even less supervisory authority than Burger. He only does preliminary evaluations on five radio operator and clerk employees, and his new job description does not change this. Thompson has not heard, adjusted or participated in any grievance processing on behalf of the employer.

Thompson has typically reported to Burger, rather than to Jim Street or Mark Serbousek, putting him at a lower level on the table of organization. Such circumstances are not consistent with the employer's argument that Burger, Thompson, Green, and Serbousek are "equal in rank". The employer's "equals" argument is further discredited by the evidence showing that the bridge engineer has authority to manage the department in Smith's absence.

Bruce Steele, who is three levels above Thompson in the chain of command, testified that Thompson is "handling a good share of that administrative duty right now but not the total duties". [TR. 18] This is hardly a ringing endorsement of the management authority for Thompson. In fact, Jim Smith, who is two levels above Thompson in the chain of command, testified that Burger has less authority because "the assistant [Thompson] was moved out from underneath [Burger] and put under my direct supervision as opposed to being supervised by [Burger]." [TR. 49] Any authority that Thompson may appear to have over office-clerical employees is also negated by the fact that the Clerk II position is actually supervised by Kent Green as part of the signs and markers division.¹¹ Thompson does

¹¹ The employer's organization charts (Exhibits 4, 5 and 6) were designed by the civil service commission to indicate the "progression" of promotions within the streets department of the city. SPN #231, the engineering trainee, would promote to position SPN #232, the associate engineer; SPN #237, the bridge engineer could promote to SPN #234, supervisory engineer, or SPN #239, design engineer. The positions held by Burger and Thompson each appear on two of the exhibits. Hence, the exhibits are not **tables of organization** indicating supervision or other indicia of responsibility and authority.

not spend a majority of his time in a supervisory capacity, nor does he have effective authority to determine discipline or otherwise direct the workforce. His community of interest would appear to remain with the rank-and-file bargaining unit. See, City of Wenatchee, Decision 4872 (PECB, 1994).

FINDINGS OF FACT

1. The City of Spokane is a public employer within the meaning and coverage of Chapter 41.56 RCW.
2. The Washington State Council of City and County Employees, a bargaining representative within the meaning of Chapter 41.56 RCW, is the exclusive bargaining representative of non-uniformed employees of the City of Spokane. This bargaining unit includes non-supervisory maintenance, clerical and administrative employees, of which some work in the streets and bridge maintenance departments.
3. Assistant Street Maintenance Supervisor Terry Thompson appears to spend a majority of his time in job tasks associated with projects of the bargaining unit and related field work. He has occasionally reviewed performance data for radio operator and office-clerical employees, but his evaluations are subject to independent review and approval by his superiors. Thompson has participated in interviews of applicants for employment, but hiring decisions are made by his superiors. He does not serve as the division head or have budgetary or management responsibilities at the present time. Thompson has not processed grievances on behalf of the employer.
4. Street Maintenance Supervisor Don Burger spends the majority of his work time in activities common to the bargaining unit, such as the direction of snow removal and assignment of crews to street repair. Burger works subject to policy decisions

set out by the maintenance engineer, Jim Smith. Burger exercises supervisory authority only on an occasional basis, and most managerial decisions occur above his level in the chain of command. He shares a community of interest with the assistant street maintenance supervisor and the forepersons in the street maintenance department bargaining unit.

CONCLUSIONS OF LAW

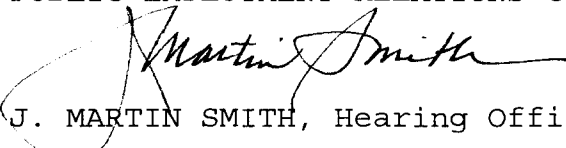
1. The Public Employment Relations Commission has jurisdiction over this case under Chapter 41.56 RCW, and authority to determine this eligibility dispute has been delegated to the Hearing Officer under WAC 391-35-190.
2. Street Maintenance Supervisor Don Burger and Assistant Street Maintenance Supervisor Terry Thompson share a community of interest with the bargaining unit represented by WSCCCE Local 270, so that their inclusion in that bargaining unit is appropriate under RCW 41.56.060.

ORDER

The bargaining unit represented by WSCCCE Local 270 is clarified to include the positions of Street Maintenance Supervisor and Assistant Street Maintenance Supervisor.

Issued at Olympia, Washington on the 17th day of January, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


J. MARTIN SMITH, Hearing Officer

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