

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: )  
 )  
CITY OF EDMONDS ) CASE 11797-C-95-723  
 )  
For clarification of an existing )  
bargaining unit of employees of: ) DECISION 5524 - PECB  
 )  
SERVICE EMPLOYEES INTERNATIONAL ) ORDER CLARIFYING  
UNION, LOCAL 6 ) BARGAINING UNIT  
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Ogden Murphy Wallace, by Christopher A. Washington,  
Attorney at Law, appeared on behalf of the employer.

Terry Costello, Legal Assistant, appeared on behalf of  
the union.

On May 23, 1995, the City of Edmonds filed a petition for clarification of an existing bargaining unit with the Public Employment Relations Commission, under Chapter 391-35 WAC. The employer sought to have a "programmer analyst" position removed from a bargaining unit of clerical and technical employees represented by Service Employees International Union, Local 6, citing confidential and supervisory responsibilities. After three postponements, a hearing was conducted on February 22, 1996, before Hearing Officer Pamela G. Bradburn. The parties waived closing argument, so the record was complete when the Hearing Officer received the transcript on March 12, 1996.

BACKGROUND

The City of Edmonds (employer) and Service Employees International Union, Local 6, have had a collective bargaining relationship since 1981, when the union was certified as exclusive bargaining representative of a bargaining unit described as:

INCLUDED: All regular full and part-time clerical, professional and technical employees.

EXCLUDED: All positions contained in other bargaining units, including public works shop and field laborers, custodial and service positions and parks maintenance laborers; Police Department; Executive Secretary' [sic] Council Secretary; Office Administrators; Personnel Department; City Clerk Department; supervisory and management; guards and confidential as described under the act; temporary or interim-funded positions.

City of Edmonds, Decision 1138 (PECB, 1981).

The employer has collective bargaining relationships with other organizations representing four other bargaining units among its employees.<sup>1</sup>

The employer appears to have been either fortunate or wise in its choice of employees, for they have long employment histories:

\* Personnel Director Brent Hunter, who is a relative newcomer having held his position since 1988, is responsible for negotiating with the five bargaining units.

\* Administrative Services Director Art Housler has held various titles since 1977, but his duties have always included managing the employer's data processing, city clerk, and accounting divisions.

\* Mike Stark has held the programmer analyst position at issue in this proceeding since it was created in 1977, and has reported to Housler during the entire time that both of them have worked for the employer.

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<sup>1</sup> These comprise a uniformed police unit, a police support unit, a uniformed fire fighter unit, and a public works unit.

The programmer analyst position held by Stark has been included in the clerical/technical bargaining unit at all times since the certification of the union in 1981.

Programmer Analyst Duties and Work Relationships

The details of Stark's duties have changed with modifications of the employer's computer systems, but his major responsibilities have not changed:<sup>2</sup>

\* Stark has advised the employer each time a new computer operating system has been considered. On the most recent occasion, Stark chaired the technical committee, recommended hardware and software, handled advertising for and reviewed bids from potential vendors, organized the transfer from the old system to the new one, and worked with a vendor to train employees on the new system.

\* Stark maintains and troubleshoots the employer's computer system. To do this, he has permission to physically access all the computers, and also has a unique password giving him access to all files stored on the employer's server.

\* He assures adequate staffing of the data processing division. On two occasions, Stark obtained permission to hire a temporary employee, defined the job requirements, was the sole interviewer of applicants, and recommended to Housler the person who was offered the position.

\* When needed, Stark writes programs for specialized needs. Where a report requires file manipulations beyond the capabilities of the employer's present software, Stark writes a program to produce the report. Stark is the only person working for the employer who has the knowledge to write such programs.

\* Stark oversees the work of Computer Operator Rosemary Weiss, approves her use of sick leave and occasional adjustments of her work hours, and authorizes overtime work and compensation in

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<sup>2</sup> A job description written for Stark's position in 1986 is still largely accurate.

time off or pay. Stark has authority to discipline Weiss, with Housler's approval. Stark evaluates her performance yearly.<sup>3</sup>

An employer organization chart admitted in evidence at the hearing indicates Stark is at the same level as an accounting manager and a city clerk who are excluded from this bargaining unit. Housler regards Stark as equal to the other division heads who work under his direction. When the employer experienced income shortages in 1992, Housler asked Stark for ideas about cost-cutting. Housler made no similar requests of any other union-represented employees.

#### The Employer's Labor Relations Processes

The employer typically enters into two-year collective bargaining agreements with the five unions that represent its employees. All five agreements have expired at the same time during Hunter's tenure as personnel director. Although statutory time limits require Hunter to open negotiations with the two uniformed units earlier than with the others, all of the negotiations occur during the same general timeframe. Because of this synchronicity, Hunter must evaluate the effects of proposals on all five units. For example, when the employer considered adding an orthodontic benefit in the most recent round of negotiations, Hunter had to determine the probable cost for every bargaining unit, knowing other unions would request the benefit if one got it.

Hunter presents estimated costs of union and employer proposals to the city council at several stages of negotiations with each unit. Hunter prepares these figures himself, if they are straight-forward arithmetical computations. If a complicated matrix is involved, or if costs vary by the number of employee dependents, Hunter asks Stark to do the computations. Stark then projects employee payroll

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<sup>3</sup> Housler's only role in Stark's performance evaluations of Weiss was to sign as department head, after Stark had prepared the evaluation and Weiss had reviewed it.

costs (e.g., based on cost-of-living adjustments or percentage increases), employee insurance costs (e.g., the cost of changed premiums for medical/dental/vision insurance), or the effects of such changes on individual departments. These requests sometimes come to Stark without identification of which party is proposing the change. Hunter tells Stark when to keep these requests quiet, and trusts him to do so. Stark deletes the computer file once the desired report is produced.

Stark could not specifically recall when he had prepared negotiations-related reports (as distinguished from the other reports he generates), but testified he had been doing them as long as the employer's workers had been represented by unions. On one occasion when Hunter was preparing a complex calculation involving Local 6, he refrained from calling upon Stark for a report that ordinarily would have been Stark's task. Hunter felt uncomfortable about asking Stark to make a computation affecting Stark's position.

#### POSITIONS OF THE PARTIES

The employer contends its negotiator has depended upon, and continues to depend upon, the programmer analyst to compute the costs of bargaining proposals and of the employer's bottom line, so that the negotiator can get direction from the city council. The employer also asserts that the programmer analyst exercises supervisory authority over the computer operator, which requires an exclusion to avoid conflicts of interest within the bargaining unit.

The union questions the timeliness of the employer's petition. The union also contends the programmer analyst is neither supervisory nor confidential, and that the bargaining unit status of the disputed position should not be changed.

DISCUSSIONTimeliness of the Petition

The time for filing a unit clarification petition is specified in WAC 391-35-020, which provides in pertinent part:

(1) **Disputes concerning status as a "confidential employee" may be filed at any time.**

(2) Except as provided in subsection (1) of this section, where there is a valid written and signed collective bargaining agreement in effect, a petition for clarification of the covered bargaining unit will be considered timely only if:

...

(b) The petitioner can demonstrate that, although it signed the current collective bargaining agreement covering the position or class at issue in the unit clarification proceedings, (i) it put the other party on notice during negotiations that it would contest the inclusion or exclusion of the position or class via the unit clarification procedure, and (ii) it filed the petition for clarification of the existing bargaining unit prior to signing the current collective bargaining agreement.

Emphasis by **bold** supplied.

The employer's 14 year delay in seeking exclusion of the programmer analyst from the bargaining unit does not preclude it from making the argument at this time. The question of whether a position possesses "confidential" status is a jurisdictional one, which can be raised at any time. Thus, the timeliness of the petition is only at issue with respect to the employer's argument that the programmer analyst position should be excluded from the bargaining unit as a supervisory relationship with the computer operator position.

The petition filed by the employer on May 23, 1995, asserted that the parties were then in contract negotiations.<sup>4</sup> Hunter testified he notified the union's representative, during the negotiations and before the contract was signed, that the employer intended to file this petition. The collective bargaining agreement introduced at hearing did not show any execution date,<sup>5</sup> but Hunter testified the union ratified the tentative agreement on May 22, 1995, and the city council approved it May 30, 1995. This testimony was not controverted. A tentative agreement does not mature into a binding collective bargaining agreement until after both parties have ratified and signed it. City of Port Orchard, Decision 483 (PECB, 1978). See also State ex rel. Bain v. Clallam County, 77 Wn.2d 542, 545-547 (1970). It follows that the petition was timely.

#### The "Confidential" Claim

The legislative exclusion of "confidential employees" from the Public Employees' Collective Bargaining Act has been the subject of numerous decisions. Suffice it to say that a person

whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit

is excluded from the right to organize and bargain collectively under Chapter 41.56 RCW. RCW 41.56.030(2)(c). Under long-standing judicial interpretation of that exclusion, the confidential relationship must include the employer's formulation and implementation of its labor relations policy. IAFF, Local 469 v. City of Yakima, 91 Wn.2d 101 (1978). "[S]upport personnel who process

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<sup>4</sup> Their collective bargaining agreement had expired December 31, 1994.

<sup>5</sup> By its terms, the parties' current contract became effective January 1, 1995.

sensitive labor relations-related material at the direction of those responsible for collective bargaining matters" also possess the cited confidential relationship. Olympia School District, Decision 4736-A (PECB, 1994).

The uncontroverted evidence conclusively demonstrates that Stark has produced cost estimates for proposals the employer is considering making, and proposals it has received from unions, for at least the last eight years. Stark provides these computations to Hunter, who is the employer's negotiator and who uses them to advise the city council. No present employee other than Stark knows how to write the programs he uses to generate such cost estimates. Although the data that Stark uses as a base for determining the projected costs of various proposals may primarily be a matter of public record, the percentage or dollar increases he is asked to apply in projecting future costs are not made public until presented, if ever, at the bargaining table. These computations qualify Stark as a confidential employee who must be excluded from the bargaining unit.<sup>6</sup>

#### The "Supervisor" Claim

Supervisors are employees within the meaning and coverage of Chapter 41.56 RCW. Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977). Supervisors are routinely excluded from bargaining units which include their subordinates, however, by application of the unit determination authority conferred upon the Commission in RCW 41.56.060. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). The Commission has concluded there is a likelihood of disruptive

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<sup>6</sup> Compare Lakehaven Utility District, Decision 5401 (PECB, 1995), with City of Dupont, Decision 4959-B (PECB, 1995).



conflicts of interest if an individual exercises a preponderance of the indicia of supervisory authority listed in RCW 41.59.020(4)(d):

[A]uthority, in the interest of an 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 ... the exercise of such authority is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment....

Snohomish Health District, Decision 4735-A (PECB, 1995).

Thus, the focus in deciding "supervisor" claims is on the authority of an individual over subordinate employees, rather than on titles or authority over programs and functions.

Because Stark is clearly a "confidential employee" in his current assignment, it is not necessary to decide whether he is also excludable as a "supervisor" in that assignment. If the employer were to change Stark's role so significantly as to warrant revocation of the "confidential" exclusion, it is entirely possible (if not probable) that the changes would be sufficient to warrant a re-examination of any "supervisor" determination made at this time.

#### FINDINGS OF FACT

1. The City of Edmonds is a public employer within the meaning of RCW 41.56.030(1).
2. Service Employees International Union, Local 6, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a bargaining unit of clerical and technical employees of the City of Edmonds.
3. Mike Stark has held the programmer analyst position since 1977. The position was included in the bargaining unit

described in paragraph 2 of these findings of fact when the unit was certified in 1981, and has remained in that bargaining unit at all times since the certification.

4. During negotiations for a successor agreement to replace one which expired on December 31, 1994, and prior to the execution of a successor agreement, the City of Edmonds informed Local 6 that the employer would be filing a petition to clarify the bargaining unit status of the programmer analyst position.
5. Stark has written computer programs to produce reports giving the cost of various wage or benefit changes. This activity has occurred for as long as employees of the City of Edmonds have been represented by unions. Stark has not always been told whose proposal is involved, or why the data is needed.
6. Since 1988, Personnel Manager Brent Hunter has been the employer's primary negotiator with Local 6, and with four other organizations which represent bargaining units of City of Edmonds employees. Since at least 1988, the expiration dates of all of those collective bargaining agreements have been orchestrated so that Hunter negotiates with all of the bargaining units during the same general time periods.
7. Hunter determines the cost of employer and union proposals, and presents information to the city council. If the computations involve simple arithmetic, Hunter does them himself.
8. Since 1988, and continuing at the present time, Hunter has asked Stark to make more complex wage and benefit computations for collective bargaining. Hunter has told Stark that such requests need to be kept quiet. Mike Stark is the only employee of the City of Edmonds with the knowledge to write and run programs to extract the data or make the complex computations requested by Hunter.

CONCLUSIONS OF LAW


1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-35 WAC, and no question concerning representation presently exists in the bargaining unit described in paragraph 2 of the foregoing findings of fact.
2. The petition for clarification of an existing bargaining unit in this matter was timely filed under WAC 391-35-020, with respect to the claim that the programmer analyst is a "confidential employee".
3. The duties of the programmer analyst position necessarily imply a confidential relationship to an official responsible for formulating the labor relations policies of the City of Edmonds, so that the programmer analyst is a "confidential employee" within the meaning of RCW 41.56.030(2)(c).

ORDER CLARIFYING BARGAINING UNIT

The position of programmer analyst is excluded from the bargaining unit involved in this proceeding.

Issued at Olympia, Washington, this 8th day of May, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-35-210.