

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

CITY OF EAST WENATCHEE

For clarification of an existing bargaining
unit of employees represented by:

TEAMSTERS LOCAL 760

CASE 24444-C-11-1474

DECISION 11440 - PECB

ORDER CLARIFYING
BARGAINING UNIT

Devin Poulson, City Attorney, for the employer.

Paul Parmley, Business Representative, for the union.

On December 13, 2011, the City of East Wenatchee filed a unit clarification petition seeking to exclude the position of sergeant from the existing police officer bargaining unit. Jamie L. Siegel conducted a hearing on March 13 and 14, 2012, and the employer filed a post-hearing brief.

ISSUE

Should the sergeant position be excluded from the law enforcement officer bargaining unit based upon supervisory status?

Although the record demonstrates that the sergeants perform some supervisory duties, the authority they exercise does not meet the required standards for exclusion from the bargaining unit. The sergeant position remains in the law enforcement bargaining unit.

APPLICABLE LEGAL STANDARDS

The determination and modification of bargaining units is a function delegated to the Commission by the Legislature. *Ronald Wastewater District*, Decision 9874-C (PECB, 2009).

Through rule and case precedent, the Commission excludes supervisors from bargaining units containing their subordinates in order to limit or prevent conflicts of interest. WAC 391-35-340; *Ronald Wastewater District*, Decision 9874-C. The Commission applies the following definition from RCW 41.59.020(4)(d) to differentiate supervisors, who are excluded from bargaining units with their subordinates, from lead workers, who are included in bargaining units with those they lead:

[S]upervisor . . . means any employee having authority, 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 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 term "supervisor" shall include only those employees who perform a preponderance of the above-specified acts of authority.

“Preponderance” as used in the definition of supervisor can be met in two ways. *City of East Wenatchee*, Decision 11371 (PECB, 2012). First, if an employee spends a preponderance of his or her time performing one or more supervisory activities, that employee is a supervisor. *City of East Wenatchee*, Decision 11371; *Inchelium School District*, Decision 11178 (PECB, 2011). Second, an employee who spends less time performing supervisory activities but performs a preponderance of the type of supervisory activities enumerated in RCW 41.59.020(4)(d) may also be considered to be a supervisor. *City of East Wenatchee*, Decision 11371; *King County*, Decision 10075 (PECB, 2008). The determination of whether an employee possesses sufficient authority to be excluded from a rank-and-file bargaining unit as a supervisor is made by examining the actual duties and authority exercised by that individual, not on the basis of his or her title or job description. *Morton General Hospital*, Decision 3521-B (PECB, 1991).

When analyzing supervisory duties, it is important to determine whether a disputed position has independent authority to act in the interest of the employer and to make meaningful changes in the employment relationship. To meet the Commission’s standards, the employee must act with independent judgment rather than carrying out the decision of a higher ranking employee. *City of Lynnwood*, Decision 8080-A (PECB, 2005), *aff’d*, Decision 8080-B (PECB, 2006).

The definition of supervisor utilized by the Commission in RCW 41.59.020(4)(d) may be more restrictive than the common understanding of the term supervisor. The Commission's definition is limited to bargaining unit determinations and designed to prevent conflicts of interest that would occur by commingling supervisors in the same units as other bargaining unit employees. A determination under the Commission's definition of supervisor does not negate or strip away any titular or other supervisory authority of that employee. Indeed, while an employee may possess lesser or other types of supervisory authority, that authority does not pose the level of conflict contemplated by the statute such that separating the employee out of the bargaining unit would be required.

The Commission bases eligibility determinations on the actual duties performed by employees and does not consider speculative testimony concerning potential future duties. *Ronald Wastewater District*, Decision 9874-C. As the Commission explained in *Ronald Wastewater District*:

Thus, where an employer has assigned a particular function to an employee that has never been exercised, such as laying off or terminating employees, there must be actual evidence demonstrating that the employee is assigned that duty. Absent concrete evidence of such assignment, we can only examine the duties an employee currently performs when making supervisory determination.

BACKGROUND

Chief J. Randy Harrison runs the employer's Police Department (department) along with Assistant Chief Dan Reiersen. The union represents a bargaining unit that, at the time of hearing, included two sergeants, two detectives, and 15 police officers. The department previously employed three sergeants; one retired September 30, 2011, and that vacancy remained unfilled at the time of hearing. The officers report to the sergeants; the sergeants report to Reiersen. The department also utilizes reserve officers who are not bargaining unit employees. One of the sergeants coordinates the reserve program.

The current bargaining unit includes: "All non-supervisory law enforcement officers employed by the City of East Wenatchee; excluding the chief of police, supervisors, confidential

employees, non-commissioned personnel and all other employees of the employer.” *City of East Wenatchee*, Decision 3663-A (PECB, 1991).

This unit clarification arises as a result of concerns from some of the officers about the authority exercised by the sergeants. The issue came to a head when an officer failed to complete his scheduled firing range responsibilities and a sergeant required the officer to document why he did not fulfill the responsibility. When the officer failed to do so, the sergeant ordered him to a meeting and advised him to bring a union representative. The officer filed a grievance on November 17, 2011, and included the following as the requested remedy: “The Sergeants need to be removed from the Union, or the amount of authority given to the sergeants need to be limited.” The employer then filed the petition for unit clarification to exclude sergeants from the bargaining unit.

The parties stipulated that the petition was timely. Consistent with WAC 391-35-020(2)(a), the employer put the union on notice of the issue and filed the unit clarification petition prior to signing the current collective bargaining agreement.

APPLICATION OF STANDARDS

Preponderance of Time

Sergeants manage the day-to-day activities of their shifts and work to ensure that it is running appropriately. Chief Harrison expects sergeants to spend approximately 70 to 80 percent of their time in the patrol car and in the field with the officers. The sergeants respond to calls with the officers. They give direction and advice as needed, and ensure that officers are fulfilling their responsibilities appropriately. For example, sergeants advise officers regarding pursuits and officers may ask sergeants questions about probable cause, search warrants, whether to “boot a door,” and other such activities.

Sergeants review and sign-off on all officer reports, checking them for grammar as well as appropriateness in terms of arrests and elements of the alleged crime. Sergeants also review and

sign-off on all use of force reports.¹ On Friday mornings when Harrison, Reiersen, and sergeants are not working, a senior officer reviews and signs-off on officer reports.

As described in more detail below, sergeants also coach and counsel officers, complete their yearly performance evaluations, and approve some short notice requests for time off.

The evidence demonstrates that sergeants spend a substantial portion of their work day performing tasks similar to the officers. They also provide important direction and oversight while performing those tasks and are directly involved in making front-line operational decisions impacting officers and public safety on a day-to-day basis. These duties further the employer's operations and Harrison and Reiersen rely on the sergeants to perform the oversight function throughout their work day. Such responsibilities, however, do not fall within the definition of supervisory functions used by the Commission to determine supervisory exclusions from bargaining units. As explained in *Inchelium School District*, Decision 11178 (PECB, 2011), "Monitoring the work of a fellow employee, even if done constantly, is not enough to satisfy the 'preponderance of time' standard." The evidence establishes that the sergeants do not spend a preponderance of their time performing supervisory duties.

Preponderance of Duties

Sergeants perform some supervisory duties as follows:

Hiring/Transfer/Promotions: Sergeants play no formal role in the hiring process for officers. Harrison considers input from anyone in the department who knows a candidate. When promoting an officer to detective, Harrison makes the decision but will ask sergeants for their input. When Harrison hires the next sergeant, he intends to rely on input from the existing sergeants. Sergeants may also recommend to Harrison that he appoint a particular officer to hold

¹ The employer adopted a Police Department manual that contains a number of policies or "General Orders" that each officer is expected to know and follow. Department General Order 1 identifies that the supervisor reviews and approves the report for completeness, accuracy, and compliance with policy and then forwards it up the chain-of-command. General Order 1 also indicates that the command officer (assistant chief) bears responsibility for "any necessary recommendations to the Chief of Police should any use of non-lethal weapon appear to be improper."

a role such as defensive tactics trainer and sergeants recommend officers for temporary assignments.

With respect to new officers, sergeants review the field training officer reports and keep Reiersen informed of employee progress. Reiersen relies on input from the sergeant on when a new officer is ready for solo patrol and when the officer needs more training. Harrison and Reiersen would rely on the sergeant to help determine that a new officer should separate from employment.

Discipline/Discharge: Sergeants coach and counsel officers. According to Harrison, sergeants spend less than ten percent of their time coaching and counseling.² Based upon the record, coaching and counseling equates to oral warnings or oral reprimands.

About four to five years ago Harrison issued a written reprimand to an officer. He testified that he relied on the sergeant's recommendation in meting out that discipline. The sergeant delivered the reprimand to the officer. In another situation, a sergeant testified that he thought an officer was insubordinate, warranting discipline; Harrison disagreed and instructed the sergeant to counsel the officer.

Sergeants sometimes play a role in investigations. When Harrison receives an allegation of officer misconduct, depending upon the circumstances, he may ask a sergeant, a detective, or the assistant chief to conduct an investigation. Sergeants generally determine who investigates officer-involved collisions. If an officer appeared unfit for duty, a sergeant would have the authority to send the officer home.

Evaluations: According to General Order 35, the evaluation program is designed to measure individual performance, provide incentive to improve performance, and encourage career development. Sergeants currently evaluate 10 to 11 officers. This involves completing a formal written evaluation each year that is signed by the employee, the sergeant, Harrison, and Reiersen.

² The record reflects that the department benefits from an experienced police force. During the course of his testimony, Harrison commended the force for being veteran officers who know their responsibilities and need little guidance.

Sergeants spend approximately 45 to 60 minutes per employee in preparing the evaluation. If sergeants have questions about evaluations, they go to Reiersen. On one occasion a sergeant wanted to document something in an officer's evaluation and Harrison instructed him not to do so.

The record, including evaluations admitted into evidence, demonstrates no apparent conflicts between officers and sergeants with respect to the evaluation process. Department General Order 35.1.12 sets forth an "Evaluation Appeal Process" that allows employees to contest their evaluation prior to pursuing a grievance. The evidence does not reflect that officers have used the appeal process.

Adjustment of Grievances: According to the collective bargaining agreement, employees present grievances to their immediate supervisor. The employer expects an officer filing a grievance to present it to his or her sergeant.

Officers have filed several grievances in the last few years. One grievance "going back quite a while," according to the sergeant, involved the use of reserves. The sergeant testified that he resolved the issue at his level and made the necessary changes, after talking with the assistant chief or chief. Another grievance involved a payroll issue. The sergeant testified that he agreed with the officer's grievance, but did not have the authority to make the payroll change; as a result, he encouraged the officer to move the grievance to the next level. Sergeants inform the assistant chief when they receive grievances.

Assignment of Work: Sergeants play a role in assigning work. For example, they may determine which officers report for court security, they can assign an officer to bicycle patrol, and they may direct that officers emphasize a particular area when patrolling.

Requests for Vacation/Time Off/Overtime: Reiersen schedules officers. He handles most of the vacation requests through the annual bid process delineated in the collective bargaining agreement. Each month Reiersen posts the schedule for the following month. Once the schedule is posted for the month, the sergeants frequently handle schedule adjustments and requests for

short notice leave. Sergeants approve and disapprove leave requests depending upon available coverage. If a sergeant has a question about a request, he goes to Reierson.

Sergeants can ask an officer to come in earlier than scheduled and can hold an officer over to the next shift to meet minimum staffing requirements. Sergeants can determine that overtime is necessary and approve limited amounts of overtime. If more substantial overtime is needed, the sergeants check with Reierson. Officers can authorize overtime for themselves in emergency situations. They turn overtime slips into their sergeants.

Summary: In analyzing whether a position performs a preponderance of supervisory duties, the focus is on whether the position maintains independent authority to make meaningful changes to the employment relationship or to effectively recommend personnel actions on behalf of the employer. Sergeants do not have the independent authority to hire, promote, discipline, or adjust grievances. Harrison retains clear authority in most personnel matters.

Although the sergeants play a role in grievance processing and can resolve disputes, the evidence demonstrates that they still need to seek some level of authorization from Harrison or Reierson. Additionally, with respect to short notice leave requests, the sergeants operate within the minimum staffing parameters and can authorize only limited amounts of overtime. With respect to evaluation, Commission decisions address that sometimes an employee's authority extends to evaluating a subordinate's job performance because that employee is in the best position to observe the subordinate's performance. The fact that an employee evaluates a subordinate does not automatically create a conflict of interest warranting a supervisory exclusion. *City of Lynnwood*, Decision 8080-A (PECB, 2005), *aff'd*, Decision 8080-B (PECB, 2006). In this case, the record does not support conflicts warranting a supervisory exclusion.

The employer argues that *City of Marysville*, Decision 4854 (PECB, 1994) should control the outcome of this case. The *City of Marysville* decision is distinguishable from this case. In *City of Marysville*, the parties stipulated to creating a separate bargaining unit of sergeants; at hearing, however, the union argued against a separate bargaining unit. Although the decision highlighted some of the sergeants' duties that the Executive Director found supported their designation as

supervisors, the pertinent finding of fact states: “the parties stipulated to the propriety of a separate bargaining unit of supervisors, in which the police sergeants employed in the Marysville Police Department would be eligible voters. No party has shown good cause to be excused from that stipulation.” No such stipulation exists in this case.

Conclusion

The sole issue before the Executive Director is whether the sergeant position should be excluded from the law enforcement officer bargaining unit based upon supervisory status. The record demonstrates that sergeants do not perform supervisory duties for a preponderance of work time and do not perform a preponderance of supervisory duties, as defined by the Commission for purpose of bargaining unit determinations. As a result, sergeants remain included in the bargaining unit.

The employer’s brief expresses concern that if sergeants remain in the bargaining unit with the officers, the sergeants’ duties would need to change and Assistant Chief Reiersen would end up directly supervising all the officers. This decision does not require the employer to change the responsibilities it assigns to the sergeants nor does it bar the employer from referring to sergeants as supervisors. This decision does no more than conclude that sergeants are properly included in the existing bargaining unit.

FINDINGS OF FACT

1. The City of East Wenatchee is a public employer within the meaning of RCW 41.56.030(12).
2. Teamsters Local 760 is a bargaining representative within the meaning of RCW 41.56.030(2).
3. The employer filed the unit clarification petition on December 13, 2011, prior to the parties signing the current collective bargaining agreement.

4. The sergeant position does not spend a preponderance of work time performing supervisory duties.
5. The sergeant position does perform a preponderance of supervisory duties.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-35 WAC.
2. As described in Finding of Fact 4 and 5, sergeants are public employees within the meaning of RCW 41.56.030(11) and are not supervisors under RCW 41.59.020(4)(d) or WAC 391-35-340.

ORDER

The unit clarification petition filed by the employer is hereby dismissed. The sergeants remain included in the bargaining unit.

ISSUED at Olympia, Washington, this 8th day of August, 2012.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MICHAEL P. SELLARS, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-35-210.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

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COMMISSION


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CASE NUMBER: 24444-C-11-01474 FILED: 12/13/2011 FILED BY: EMPLOYER
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