

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

CITY OF KIRKLAND

For clarification of an existing bargaining unit
represented by:

WASHINGTON STATE COUNCIL OF
COUNTY AND CITY EMPLOYEES

CASE 132859-C-20

DECISION 13332 – PECB

ORDER CLARIFYING
BARGAINING UNIT

Ed Stemler, General Counsel, for the Washington State Council of County and City Employees.

Shannon E. Phillips, Attorney at Law, Summit Law Group PLLC, for the City of Kirkland.

On June 24, 2020, the City of Kirkland (employer) filed a unit clarification petition seeking to exclude the Information Technology (IT) Supervisor for Network and Desktop Services (SNDS) position from the Washington State Council of County and City Employees' (union) bargaining unit. The employer asserts the newly created position is supervisory and should be excluded from the nonsupervisory bargaining unit. The union disputes that the position is supervisory and argues that the SNDS is a lead worker.

Hearing Officer Daniel M. Hickey conducted a hearing by videoconference on December 9, 2020. The parties filed post-hearing briefs on January 27, 2021, to complete the record. Based on the documentary evidence and testimony, the SNDS is a supervisor within the meaning of WAC 391-35-34 and is excluded from the union's bargaining unit.

BACKGROUND

The employer employs approximately 650 employees in multiple departments, including Finance and Administration, Human Resources (HR), Building and Planning, Police, Fire, Parks and Community Service, City Attorney, Public Works, and Information Technology (IT). The head of each department reports directly to the City Manager.

The union is the exclusive bargaining representative of all full-time and regular part-time employees of the employer, excluding Police, Fire and Public Works, and also excluding supervisory and confidential employees. The bargaining unit described in the parties' most recent collective bargaining agreement includes all nonsupervisory employees employed in the IT department. No employees with the title of supervisor are represented by the union in the existing bargaining unit. The bargaining relationship between the parties has existed since approximately 1996.

Chuck Saunders was hired in the employers' IT department in 2002 and promoted to Senior Network Engineer (SNE) in 2011. As a SNE, Saunders reported to IT Manager Donna Gaw. Saunders was responsible for the architecture, design, analysis, function, fitness, and daily operation of the employer's wide area and local networks, as well as directing the activities of other IT department employees.

In early 2020, IT Director Smitha Krishnan reorganized the IT department. As part of that reorganization, Krishnan decided to reclassify two vacant managerial positions down to supervisory positions (IT Supervisor for Enterprise Applications and IT Supervisor for Geographic Information Systems) and reclassify Saunders' bargaining unit SNE position up to a supervisory SNDS position. Under the reorganization, three employees would report to the new SNDS position. The employer notified the union of its intention to reclassify Saunders to the SNDS position and remove it from the bargaining unit because the position would supervise bargaining unit employees.

Following the reorganization, the IT department consisted of approximately 27 employees, including the Director, Deputy Director, Information Security Manager, the three new supervisor positions, and 21 bargaining unit employees. The Enterprise Applications and Geographic Information Systems supervisors report to the Deputy Director and supervise approximately seven unit employees each. The SNDS reports directly to Krishnan and supervises approximately three bargaining unit employees.

The union welcomed Saunders' promotion, but disputed that the SNDS position was supervisory. The parties discussed the matter for several weeks. On April 27, 2020, the employer sent the union a revised SNDS job description that added hiring, discipline, and adjusting grievances to the listed supervisory duties for the position. The union continued to oppose removing the SNDS position from the bargaining unit. The parties agreed that the employer would proceed with the reclassification, but Saunders would remain in the unit pending a unit determination by this agency. On May 16, 2020, the employer reclassified Saunders into the new SNDS position.

Within a six months of the reclassification, the three positions reporting to Saunders became vacant. Saunders led the hiring process for each of these positions and ultimately chose the people to be hired. In October 2020, Saunders coordinated the external hiring of a Network Engineer and a Network Analyst. Saunders reviewed and slightly modified job descriptions for the positions. Saunders then reviewed the resumes with Krishnan and winnowed the applicant pool down to approximately a dozen applicants per position. Saunders then scored a technical test administered to those applicants and further reduced the applicant pool down to five or six top candidates. Saunders next assembled the interview panel. The panel consisted of Saunders, an employee from Saunders' team, and IT Manager Gaw. Krishnan did not participate in the interview panel for either position. After the interviews, Saunders recommended which applicant to hire. Krishnan is the hiring authority, but did not independently review Saunders recommendations. Rather, Krishnan, signed off on the recommendations and Saunders made the formal job offers to the successful applicants.

With respect to the Network Engineer position, Saunders and Krishnan both testified that the top two applicants for the position were basically tied after the interview process. Saunders preferred the candidate with more industry experience, while Krishnan favored the applicant with less experience. Krishnan deferred to Saunders' choice, stating that Saunders had the final say on who to hire for the team. Saunders offered the Network Engineer position to the more senior employee, who declined the position. Ultimately, the less senior applicant accepted the position.

Saunders also coordinated the internal hiring of a Desktop Services Analyst in November 2020. Krishnan interviewed both internal applicants with Saunders, but again testified that Saunders was the "hiring manager" for the position. At the time of the hearing, Saunders' team included three employees, but the employer intends to add an Information Security Analyst to Saunders' team in early 2021. Saunders and Krishnan anticipate that Saunders will again be the hiring manager for this process.

Saunders has authority to issue lower level discipline, but Krishnan has final authority over higher level discipline such as written warning, suspension, demotion, and termination. Saunders has not issued any discipline since being reclassified. Krishnan, Saunders, and HR Manager Shawn Friang all testified that any recommendation Saunders made regarding higher level discipline would "carry weight." Saunders can adjust grievances, although no grievances have occurred since the reclassification.

The SNDS is responsible for conducting evaluations. Prior to the hearing, Saunders conducted an initial 30-day performance review for the Network Engineer. Saunders did not show the evaluation to Krishnan before issuing it to the employee. Saunders assigns work to employees on the team. Those assignments are based upon Saunders' assessment of the individual employee's skill and expertise. Saunders independently schedules employees and approves leave. For example, Saunders created a rotating schedule that balances minimum staffing requirements with COVID restrictions that limit the number of staff that can be physical present in the employer's buildings. Saunders was involved in developing the budget for the division, as well as forecasting expenditures for several large capital projects. Saunders approves and assigns internal and external

training. Saunders participates in weekly management meetings with the IT Director, IT Deputy Director, IT Manager, and two other IT Supervisors. The SNDS position is FSLA exempt, but the employees on Saunders' team are not.

ANALYSIS

Applicable Legal Standard

The determination of appropriate bargaining units is a function delegated to this agency by the legislature. RCW 41.56.060. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981). The goal in making unit determinations is to group together employees who have sufficient similarities (community of interest) to indicate that they will be able to bargain effectively with their employer. *Central Washington University*, Decision 9963-B (PSRA, 2010); *Quincy School District*, Decision 3962-A (PECB, 1993).

Included in this agency's authority to determine an appropriate bargaining unit is the power to modify that unit, upon request, through a unit clarification proceeding. *University of Washington*, Decision 11590 (PSRA, 2012), *aff'd*, Decision 11590-A (PSRA, 2013); *see also Pierce County*, Decision 7018-A (PECB, 2001). Unit clarification cases are governed by the provisions of chapter 391-35 WAC. The general purpose of the unit clarification process is to provide this agency, as well as the parties, to a collective bargaining relationship a mechanism to make changes to an existing bargaining unit based upon a change in circumstances to ensure its continued appropriateness. *See, e.g., Toppenish School District*, Decision 1143-A (PECB, 1981) (outlining the procedures to remove supervisors from existing bargaining units).

Generally, supervisors are not included in the same bargaining units as the employees they supervise. WAC 391-35-340. Separating supervisors from the rank-and-file bargaining unit avoids the potential for conflicts of interest that would otherwise exist in a combined bargaining unit. *Id.*

A supervisory employee is any employee whose preponderance of duties include the independent authority "to hire, assign, promote, transfer, layoff, recall, suspend, discipline, or discharge other

employees, or to adjust their grievances, or to recommend effectively such action.” *Granite Falls School District*, Decision 7719-A (PECB, 2003) (citing RCW 41.59.020(4)(d)). “Preponderance” can be met in two different ways. An employee may be a supervisor if a preponderance of the employee’s time is spent performing one or more of the statutory supervisory activities. *City of East Wenatchee*, Decision 11371 (PECB, 2012); *Inchelium School District*, Decision 11178 (PECB, 2011). An employee may also be a supervisor if less than a preponderance of that employee’s time is spent performing supervisory activities but the employee performs a preponderance of supervisory activities. *City of East Wenatchee*, Decision 11371; *King County*, Decision 12079 (PECB, 2014).

The Commission places emphasis on whether a disputed position has independent authority to act in the interest of the employer and make meaningful employment changes in the employment relationship. *City of Lakewood*, Decision 12453 (PECB, 2015); *State – Office of Administrative Hearings*, Decision 11503 (PSRA, 2012). If a position merely executes the instructions of a higher-ranking employee when making meaningful change to the workplace, that employee has not exercised independent judgment. *Id.* (citing *City of Lynnwood*, Decision 8080-A (PECB, 2005), *aff’d*, Decision 8080-B (PECB, 2006)).

The distinguishing characteristic is that the authority does not rise to the level of conflict expressed in the statute that would require separating the employee out of the bargaining unit. *Rosalia School District*, Decision 11523 (PECB, 2012). In determining supervisory status, the agency considers the extent of authority of first-line supervisors to hire, terminate, suspend without pay, or to effectively recommend such actions as being the paramount criteria. *Okanogan County*, Decision 6142-A (PECB, 1998). An employee’s exercise of authority to assign and direct work, grant time off, authorize overtime, issue oral or written reprimands, and evaluate and train subordinate employees may be insufficient when that individual does not have authority to hire, terminate, suspend without pay, or effectively recommend such actions. *Id.*

The Commission distinguishes supervisors from employees who are “lead workers.” Lead workers are not excluded from a subordinate bargaining unit. *City of Lynnwood*, Decision 8080-A. The lead worker may have limited discretionary authority in administrative matters or to direct

subordinates in daily job assignments. However, the lead worker does not have independent authority to make meaningful changes in the employment relationship, which is the hallmark of supervisory status. *Id.*; *Grant County*, Decision 4501 (PECB, 1993).

Application of Standard

The SNDS is a supervisor within the meaning of WAC 391-35-340. Saunders has independent authority to act in the interest of the employer and make meaningful changes to the employment relationship.

The SNDS assigns and approves training, coaches, and evaluates the employees reporting to that position. The SNDS schedules those employees and, after assessing the skills needed for specific tasks, assigns work. Saunders participates in the IT department's budgeting process and attends weekly departmental management meetings.

The authority to assign and direct work, grant time off, authorize overtime, issue oral or written reprimands, and evaluate and train subordinate employees is often insufficient to render an individual a supervisor under WAC 391-35-340 without the authority to hire, terminate, suspend without pay, or effectively recommend such actions. *Okanogan County*, Decision 6142-A.

The evidence demonstrates that, while not technically the hiring authority, Saunders does effectively hire. Saunders has been involved in the hiring of three individuals since the reclassification. In each process, Saunders led the process and ultimately selected the candidate to be hired. Krishnan deferred to Saunders the decision of whom to hire – even if Krishnan might have preferred a different candidate. Krishnan testified that Saunders does more than “just make recommendations” with respect to hiring. Clearly, Krishnan considers Saunders to be making the hiring decision.

Saunders' role with respect to hiring is greater than in other cases where the disputed positions participated in the hiring process with supervisors or the hiring authority, only gave input to the hiring authority, or were part of a consensus recommendation. *See e.g., Grant Transit Authority*,

Decision 13014-A (PECB, 2020); *Thurston County*, Decision 12727 (PECB, 2017); *Eastern Washington University*, Decision 12763 (PECB, 2017); *City of Kirkland*, Decision 12196 (PECB, 2014). Participation on a hiring panel that makes selections based upon consensus does not equate to an effective recommendation. *Thurston County*, Decision 12727; *City of Tacoma*, Decision 12744 (PECB, 2017).

Saunders does not have the authority to suspend without pay or terminate employees. Krishnan testified that Saunders' opinion on higher levels of discipline would "carry weight." An opinion that carries weight is not tantamount to effective recommendation and, at this point, is speculative at best.

The union asserts that all of the paramount criteria referenced *Okanogan County*, Decision 6142-A must be present in order for an individual to be considered a supervisor under WAC 391-45-340. That is not the case. In this instance, the hiring authority possessed by Saunders combined with the authority to assign work, schedule employees, assign and approve training, coach, and evaluate employees is sufficient to render Saunders a supervisor under WAC 391-45-340.

CONCLUSION

The SNDS position has independent authority in hiring and spends a preponderance of its time performing supervisory duties. Accordingly, the SNDS position should be excluded from the nonsupervisory bargaining unit.

FINDINGS OF FACT

1. The City of Kirkland (employer) is a public employer within the meaning of RCW 41.56.030(12).
2. The Washington State Council of County and City Employees (union) is a bargaining representative within the meaning of RCW 41.56.030(2).

3. The union represents a bargaining unit of nonsupervisory employees in the employer's workforce. The bargaining unit described in the parties most recent collective bargaining agreement includes all full-time and regular part-time employees of the employer, excluding Police, Fire and Public Works, and also excluding supervisory and confidential employees.
4. Included in the bargaining unit is the Senior Network Engineer (SNE) position.
5. The employer reclassified the SNE position to an IT Supervisor for Network and Desktop Services (SNDS) position.
6. The employer filed a petition seeking clarification as to whether the SNDS position should be excluded from the bargaining unit as a supervisor.
7. The SNDS position exercises independent authority in hiring, evaluating employees, assigning work, scheduling, and approving leave.
8. The SNDS position spends a preponderance of its time performing 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 findings of fact 5 through 8, the SNDS position is a public employee under RCW 41.56.030(11) and a supervisor under WAC 391-35-340 or as described under RCW 41.59.020(4)(d).

ORDER

The SNDS position is excluded from the bargaining unit represented by the Washington State Council of County and City Employees.

ISSUED at Olympia, Washington, this 6th day of April, 2021.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in black ink, appearing to read "M. Sellars", is written over the printed name below.

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.



RECORD OF SERVICE

ISSUED ON 04/06/2021

DECISION 13332 - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: DEBBIE BATES

CASE 132859-C-20

EMPLOYER: CITY OF KIRKLAND

REP BY: PENNY SWEET
CITY OF KIRKLAND
123 5TH AVE
KIRKLAND, WA 98033
psweet@kirklandwa.gov

MICHAEL DOUCETTE
CITY OF KIRKLAND
123 5TH AVE
KIRKLAND, WA 98033
mdoucette@kirklandwa.gov

SHANNON E. PHILLIPS
SUMMIT LAW GROUP PLLC
315 5TH AVE S STE 1000
SEATTLE, WA 98104-2682
shannonp@summitlaw.com

PARTY 2: WSCCCE

REP BY: CHRIS DUGOVICH
WSCCCE
PO BOX 750
EVERETT, WA 98206-0750
c2everett@council2.com

ED STEMLER
WSCCCE
PO BOX 750
EVERETT, WA 98206
ed@council2.com