City of Bremerton, Decision 8674 (PECB, 2004)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CITY OF BREMERTON, Employer.	)	
RONALD MCKIERNAN, Complainant,	)	CASE 17133-U-03-4434 DECISION 8674 - PECB
vs.	)	
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 437, Respondent,	)	
RONALD MCKIERNAN, Complainant,	)	CASE 17135-U-03-4436 DECISION 8675 - PECB
vs.	)	
CITY OF BREMERTON Respondent.	)	CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Ronald McKiernan, appeared *pro se*.

Todd Thorsen, President, for the union.

Kussmann and Lindstrom, by *Edward Lindstrom*, Attorney at Law, for the employer.

On January 22, 2003, Ronald McKiernan (McKiernan) filed a complaint with the Public Employment Relations Commission under Chapter 41.56 RCW and Chapter 391-45 WAC. McKiernan alleged unfair labor practices against both the International Association of Fire Fighters, Local 437 (union) and the City of Bremerton (employer).

The Commission docketed the complaint against the union as Case 17133-U-03-4434, and the complaint against the employer as Case 17135-U-03-4436.

The Commission reviewed the complaints under WAC 391-45-110. The Commission found a cause of action to exist in Case 17133-U-03-4434, on allegations summarized as:

> Union interference with employee rights in violation of RCW 41.56.150(1), by including the position of battalion chief in a bargaining unit represented by International Association of Fire Fighters, Local 437.

The Commission also found a cause of action to exist in Case 17135-U-03-4436, on allegations summarized as:

> Employer interference with employee rights in violation of RCW 41.56.140(1), by including the position of battalion chief in a bargaining unit represented by International Association of Fire Fighters, Local 437.

Examiner Starr Knutson held a hearing on March 23, 2004. The parties submitted post-hearing briefs. Based on the evidence and arguments advanced by the parties, and the relevant statutes and precedents, the Examiner rules that McKiernan failed to prove that either the union or the employer interfered with his employee rights under Chapter 41.56 RCW. The complaints against both the union and employer are DISMISSED on their merits.

BACKGROUND

The employer maintains a fire department consisting of over 50 full-time uniformed employees. The union is the exclusive bargaining representative for a bargaining unit consisting of all uniformed employees except the fire chief and (the sole) assistant

fire chief. The bargaining unit employees range in rank from fire fighters, lieutenants, and captains, to one battalion chief. McKiernan was a captain at the time he filed the present complaint, and was promoted to battalion chief when the employer created the position in July 2003.

On October 26, 2001, McKiernan filed a petition with the Commission for investigation of a question concerning representation (QCR), with the intent to form a bargaining unit for supervisors within the employer's fire department. The Executive Director dismissed the petition as procedurally defective on November 12, 2001.

The Commission certified a separate unit of supervisors within the employer's fire department in 1989. *City of Bremerton,* Decision 3176 (PECB, 1989). The unit, consisting of deputy chiefs, became defunct by 1993, when the employer no longer used the deputy chief position. In the process of bargaining for the current contract between the parties, the employer and union agreed to place the battalion chief position in the bargaining unit.

The battalion chief reports to the assistant chief, and his duties include responsibility for management and operation of the fire department's training and safety programs, participation in the budget process with the fire chief, and in the absence of the fire chief and assistant fire chief he assumes all functions of the chief. Prior to his promotion to battalion chief, McKiernan served as the captain in charge of training. His training duties did not substantially change with the promotion.

ANALYSIS

Neither McKiernan, the employer, nor the union argued for an exclusion from collective bargaining rights for the battalion chief

position. Thus, the question before the Examiner is whether the battalion chief is appropriately placed within the union's bargaining unit.

Did McKiernan correctly file an unfair labor practice complaint against the employer and union?

McKiernan asserts that the employer and union improperly placed the battalion chief in the union's bargaining unit in violation of Commission precedent that parties to a collective bargaining agreement may not disregard a unit certification issued by the Commission.

The employer believes that it included the battalion chief in the only bargaining unit available as a compromise that protects his collective bargaining rights.

The union states that the battalion chief is appropriately placed in its bargaining unit, and that the unit is appropriate with him in it.

Applicable Legal Standards -
It is an unfair labor practice for a public employer to discriminate against, interfere with, restrain, or coerce public employees in the exercise of their collective bargaining rights. *See* RCW 41.56.140(1) (referring to RCW 41.56.040). RCW 41.56.150(1) similarly prohibits interference by unions. An individual employee does not have legal standing to file or process a unit clarification petition under Chapter 391-35 WAC, but individual employees do have legal standing to file and process unfair labor practice complaints alleging interference with their statutory rights and/or discrimination connected with their exercise of rights under a collective bargaining statute.

Commission precedents under RCW 41.56.140 through .160 recognize the right of an individual employee to file unfair labor practice complaints against both an employer and union, where the employee claims that the position he or she holds has been improperly included in or excluded from an existing bargaining unit by agreement of the employer and union. *Shoreline School District*, Decisions 5560, 5560-A (PECB, 1996); *Castle Rock School District*, Decision 4722-B (EDUC, 1995); *Richland School District*, Decisions 2208, 2208-A (PECB, 1985). Thus:

> The Commission has exclusive jurisdiction to determine appropriate bargaining units, which could include imposing sanctions upon an "exclusive bargaining representative" which is found guilty of a breach of the duty of fair representation by aligning itself in interest against bargaining unit employees on unlawful grounds . . . .

University of Washington, Decision 8216 (PSRA, 2003); *Shoreline School District*, Decisions 5560, 5560-A. Thus, even one employee can challenge bargaining unit status for reasons such as improper inclusion of confidential or supervisory employees, or where no community of interest exists; or improper exclusion which strands an individual without access to statutory bargaining rights.

In his November 2, 2001, response to McKiernan's QCR petition, the Executive Director gave three options for employees who feel they have improperly been included in a bargaining unit: (1) file a representation petition seeking decertification of their existing union; (2) form their own organization and have it file a representation petition seeking a change of representation; and (3) file an unfair labor practice charge against an employer and union that have improperly included them in a bargaining unit that is rendered inappropriate by their inclusion. McKiernan chose the third option. He had the burden to prove that the employer and union not

only improperly included him in the bargaining unit, making that unit inappropriate, but that the employer and union unlawfully aligned themselves against his interest and restricted his collective bargaining rights.

However, McKiernan offered no evidence on either of those material issues. His testimony concerned only his legal argument that the employer and union acted contrary to the principle most recently affirmed in *Mead School District*, Decision 7183-A (PECB, 2001). In *Mead,* the Commission had certified a bargaining unit of classified employees of a school district. Two unions subsequently divided up the bargaining unit between themselves in contravention of the Commission's certification. The Commission upheld a decision by the Executive Director faulting the unions' action, stating that, "unit determination questions are within the authority of the Commission to decide, not matters for unions to divide among themselves, and the Commission need not give any weight or deference to agreements between parties." *Mead School District,* Decision 7183-A. But McKiernan failed to produce any evidence that a Commission certified unit exists that is more appropriate than the union's bargaining unit, that the battalion chief should be included in one and excluded from the other, or that the employer and union interfered with his inclusion or exclusion from one or the other units.

> Did the employer and union co-opt the Commission's authority when they agreed to place the battalion chief in the union's bargaining unit and not a supervisory unit?

Applicable Legal Standards -

Unit determination is a function delegated by the Washington legislature to the Commission; parties cannot bind the Commission by their agreements on unit matters. *City of Richland*, Decision

279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *rev. denied*, 96 Wn.2d 1004 (1981); *Mead School District*, Decision 7183-A (PECB, 2001).

WAC 391-35-340 addresses the unit placement and bargaining rights of supervisors:

> (1) It shall be presumptively appropriate to exclude persons who exercise authority on behalf of the employer over subordinate employees (usually termed "supervisors") from bargaining units containing their rank-and-file subordinates, in order to avoid a potential for conflicts of interest which would otherwise exist in a combined bargaining unit.
>
> (2) It shall be presumptively appropriate to include persons who exercise authority on behalf of the employer over subordinate employees (usually termed "supervisors") in separate bargaining units for the purposes of collective bargaining.
>
> (3) The presumptions set forth in this section shall be subject to modification by adjudication.

In questions concerning uniformed fire fighter bargaining units, the Commission excludes battalion chiefs from rank-and-file bargaining units when they serve in supervisory positions. *City of Richland*, Decision 279 (PECB, 1977). The Commission has often used the following statutory reference, from RCW 41.59.020(4)(d) to define the term "supervisor":

> [Supervisor] . . . 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.

Application of Standards -

McKiernan asserts that the employer and union, in agreeing to place the battalion chief in the union's bargaining unit, did so in the face of clear Commission precedent against such agreements, where the Commission had previously certified a more appropriate unit, namely the deputy chiefs' supervisory unit. This unit became defunct in 1993, but even if it were viable, McKiernan needed to show that it was an appropriate unit for the battalion chief. McKiernan had to provide evidence that more than one person was eligible for the unit and that the proposed unit members were supervisors. As noted above, McKiernan merely assumed that the battalion chief's position is supervisory. McKiernan's reliance on *Mead School District*, Decision 7183-A is misplaced, since on the facts of this case, *Mead* is inapplicable. In *Mead,* the parties erroneously divided up a Commission certified unit. In the present case, the supervisor's unit McKiernan points to as central to his claim no longer exists.

The union claimed, without proof, that the battalion chief belongs in its bargaining unit. None of the parties produced any evidence of an appropriate supervisors' unit replacing the deputy chiefs' unit.

While neither McKiernan nor the union presented evidence that the battalion chief is a supervisory position, the employer gave limited testimony, along with a position description, of the battalion chief's duties and stated its opinion that the position is supervisory. The most telling aspect of the employer's evidence was that the battalion chief assumes the fire chief's duties when both the fire and assistant chiefs are absent. However, the employer did not elaborate on this, and did not attempt to connect the battalion chief's duties with the elements set forth in Chapter 41.59 RCW; thus, the record does not indicate whether this

assumption of the fire chief's role pertains substantially to managerial authority, as in the power to hire, fire, discipline, set policy, etc., or is merely custodial. There was evidence that McKiernan's battalion chief training duties are substantially the same as those he had as a captain. No case was made for the battalion chief's position being closer to the assistant chief than to a captain. In sum, the Examiner cannot make a decision on the supervisory nature of the battalion chief position from the incomplete record supplied by the parties.

As noted above, the employer gave evidence supporting its contention that the battalion chief is a supervisor, implying that the position might be inappropriately placed in the bargaining unit with those he supervises. This deserves some comment. The employer and the union would commit unfair labor practices if they were aware that: (1) the battalion chief's position is actually supervisory; (2) an appropriate supervisory unit exists; and (3) the battalion chief should be placed in the supervisory unit; but (4) nevertheless agreed to include the position in an inappropriate unit. That agreement would interfere with the battalion chief's collective bargaining rights.

Further, had the deputy chief's unit remained viable, the employer and union would not have been free to ignore the Commission's certification of the supervisor's unit, especially in light of the employer's argument that the battalion chief is a supervisory position. The employer stated that it agreed to include the battalion chief in the union's bargaining unit upon the recommendation of a Commission mediator. Although the Administrative Procedure Act, Chapter 34.05 RCW, allows the introduction of hearsay evidence under certain conditions, alleged communications of a mediator are never admissible. WAC 391-08-810; WAC 391-55-090; *City of Lynnwood,* Decision 7637 (PECB, 2002). Had an

appropriate supervisor's unit existed, the employer's attempted explanation for its actions would be without merit. In any case, the Examiner has not considered the employer's explanation for its actions, because the reference to the mediator's comments constitutes inadmissible hearsay.

Would the battalion chief's collective bargaining rights be protected outside of the union's bargaining unit?

The testimony of all parties was consistent in showing that only one battalion chief is at issue here, and that only one bargaining unit presently exists that could include him.

Applicable Legal Standards -

One person bargaining units are inappropriate. WAC 391-35-340. The Commission has consistently included employees in bargaining units where exclusion of those employees would prejudice their collective bargaining rights. Such exclusions might place only a few employees in a bargaining unit too small to be effective, or strand a single employee outside of any bargaining unit. *Town of Fircrest,* Decision 246-A (PECB, 1977); *City of Vancouver*, Decision 3160 (PECB, 1989); *City of Blaine,* Decision 6619 (PECB, 1999). There is no requirement that the Commission determine the most appropriate bargaining unit, and the Commission's refusal to strand employees will override other community of interest considerations. *Benton County,* Decision 7651 (PECB, 2002).

Application of Standards -

Exclusion of the battalion chief from the only appropriate bargaining unit would strand McKiernan and prevent him from exercising his collective bargaining rights. The record shows that the union's bargaining unit of fire fighters is an appropriate unit for the battalion chief, as no other unit with a community of

interest with the battalion chief exists at the City of Bremerton. The battalion chief position is appropriately included the bargaining unit, and neither the employer nor the union interfered with McKiernan's collective bargaining rights by their agreement to that effect.

FINDINGS OF FACT

1. The City of Bremerton is a public employer within the meaning of RCW 41.56.030(1).

2. The International Association of Fire Fighters, Local 437 (union), a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of uniformed fire personnel employed by the City of Bremerton.

3. The City of Bremerton employs Ronald McKiernan as a battalion chief.

4. McKiernan is a member of the bargaining unit represented by the union.

5. McKiernan became battalion chief in July 2003.

6. The employer created the battalion chief position in 2002 and included it in the bargaining unit by agreement with the union.

7. Only one battalion chief position exists within the employer's fire department.

8. Although at one time a supervisory unit existed in the fire department, it became defunct in 1993 and never included battalion chiefs.

9. No substantial evidence exists in the record showing that the battalion chief position is supervisory.

10. The battalion chief is not exempt from union membership.

11. There is no bargaining unit in the City of Bremerton, other than the union's bargaining unit, with which the battalion chief has a community of interest.

12. McKiernan could not form a one person unit; if he is not included in the union's bargaining unit he would be stranded.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. Based upon the foregoing findings of fact, the employer and union did not co-opt Commission authority by agreeing to include the battalion chief position in the union's bargaining unit.

3. Based upon the foregoing findings of fact, McKiernan's collective bargaining rights would not be protected outside of his inclusion in the bargaining unit.

4. Based upon the foregoing findings of fact, the battalion chief position has been appropriately included in the only bargaining unit available to the position.

5. Based upon the foregoing findings of fact and conclusions of law, the union did not commit an unfair labor practice by agreeing to include the battalion chief in the bargaining unit.

6. Based upon the foregoing findings of fact and conclusions of law, the employer did not commit an unfair labor practice by agreeing to include the battalion chief in the bargaining unit.

ORDER

1. The complaint charging unfair labor practices filed in Case 17133-U-03-4434 against International Association of Fire Fighters, Local 437 is DISMISSED on its merits.

2. The complaint charging unfair labor practices filed in Case 17135-U-03-4436 against the City of Bremerton is DISMISSED on its merits.

Issued at Olympia, Washington, this 16th day of August, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Starr Knutson

STARR H. KNUTSON, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.