STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL NO. 1052	CASE NO. 3744-E-81-712
	DECISION NO. 1519 - PECB
Involving certain employees of:	
CITY OF RICHLAND	ORDER OF DISMISSAL

Critchlow & Williams, by David E. Williams, attorney at law, appeared on behalf of the union.

Perkins, Coie, Stone, Olsen & Williams, by J. David Andrews and Bruce Michael Cross, attorneys at law, appeared on behalf of the employer.

On October 12, 1981, International Association of Firefighters, Local No. 1052, filed a petition with the Public Employment Relations Commission for investigation of a question concerning representation of employees of the City of Richland. The bargaining unit claimed appropriate is limited to battalion chiefs employed in the city's fire department. A hearing was held on April 16, 1982 before Marvin L. Schurke, Executive Director. Both parties filed post-hearing briefs.

BACKGROUND

Local 1052 is the exclusive bargaining representative of the unit of non-supervisory firefighters employed by the City of Richland. This case is the latest in a course of litigation which pre-dates the existence of the Public Employment Relations Commission. The early history is reviewed in City of Richland, Decision 279 (PECB, 1977), at paragraph 4. In that decision, the authorized agent of the Commission concluded that the battalion chiefs were supervisors who, because of their duties and authority as supervisors, ought be excluded under the unit determination provisions of the Act, RCW 41.56.060, from the bargaining unit of employees they supervise.[1/] That reasoning and result has been adopted by the Commission and the Courts. See: City of Richland, Decision 279-A (PECB, 1978), affirmed: 29 Wa. App.

1/ Although raised by the employer in that case, the question of "confidential" status under RCW 41.56.030(2) was not addressed.

599 (Division III, 1981); cert. den., 96 Wa.2d 1004 (1981). The petition in the instant case was filed shortly after the decision of the Supreme Court finalized the exclusion of the battalion chiefs from the rank-and-file firefighter bargaining unit.

The City of Richland is governed under the council/manager form. The city's Department of Fire and Emergency Services is one of eight city departments, and is headed by a "Director", Robert Panuccio. The city has two fire stations which are staffed 24 hours a day. The fire department work force is divided into inspection and suppression divisions. The suppression work force is, in turn, subdivided into three platoons which are scheduled in rotation on a pattern of 24 hours on duty followed by 48 hours off duty. Each of the suppression platoons is headed by a battalion chief and has approximately 11 non-supervisory firefighters assigned in addition to the battalion chief. The battalion chief in the inspection division (working title: Fire Marshall) has two subordinates in the rank-and-file firefighter bargaining unit.

The battalion chiefs are provided a separate vehicle for their use while on duty and they exercise supervisory authority, including making of effective recommendations on discipline, discharge and promotions, adjusting grievances of their subordinates and making independent decisions on other matters such as assignments and leave requests. The battalion chiefs exercise supervisory authority within the scope of a number of written policies and directives promulgated by the city and the department director. Actions beyond the authority of the battalion chiefs and challenges to the validity of existing policies are referred to the department director. All personnel actions taken by battalion chiefs are subject to affirmation or reversal by the director. Inasmuch as there is no deputy or assistant director with department-wide authority, the battalion chiefs are the sole link between the director and the rank-and-file employees of the department. One of the battalion chiefs is assigned department-wide responsibilities for maintenance of department apparatus and buildings, another of the battalion chiefs has "staff" responsibilities with respect to departmental budget and accounting, and a third battalion chief has "staff" responsibilities concerning communications.[2/]

The employer permitted the battalion chiefs to remain in the rank-and-file firefighter bargaining unit throughout the time that the appeals were pending from the order excluding them from that unit. They have not been included in management preparations for or negotiation of the collective bargaining agreements between the city and Local 1052. On the contrary, one of the individuals who occupied a battalion chief position at the time of the hearing in this matter was then the president of Local 1052 and another

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2/ A number of captains and lieutenants employed within the rank-and-file firefighter bargaining unit have some form of "staff" assignment in addition to emergency response duties.

of the battalion chiefs, who was a former president of Local 1052 and a current member of its executive board, held office as a vice-president and paid district representative of Local 1052's state-wide affiliate. In their capacity as union officers, those battalion chiefs have represented Local 1052 and bargaining unit employees in grievance procedures as well as in the negotiation of contracts.

POSITIONS OF THE PARTIES:

The employer contends that the battalion chiefs are "confidential" employees excluded from the coverage of the Act by RCW 41.56.030(2)(c). While expressly contending that the interpretation of the "confidential" definition made by the Supreme Court in International Association of Firefighters v. City of Yakima, 91 Wa. 2d 101 (1978), was overly restrictive and incorrect, the city also urges that factual distinctions exist between the battalion chiefs involved here and those considered in the Yakima case. In the alternative, the city contends that Local 1052 should be disqualified from representing the petitioned-for supervisor unit because of its status as the incumbent exclusive bargaining representative of the city's rank-and-file firefighters. The latter contention is founded on dual reasons. First, it is contended that representation of both units by the one organization would circumvent the reasoning and result of the recently concluded litigation removing the supervisors from the rank-and-file unit. Second, it is contended that there exists a clear and present danger that a conflict of interest would exist within the union as a result of its simultaneous representation of both supervisors and their subordinates.

Relying on Yakima, supra, and Municipality of Metropolitan Seattle (METRO) v. L & I, 88 Wa.2d 925 (1977), the union contends that the battalion chiefs lack the critical exposure to confidential information concerning the employer's labor relations policies, and that they are public employees having a statutory right to organize and select representatives of their own choosing. Responding to the employer's disqualification arguments, the union contends that it is a bona fide labor organization which is competent and qualified to represent the petitioned-for employees.

DISCUSSION:

Confidential Employee Issue

In NLRB v. Hendricks County Rural Electric Membership Corporation, ____ U.S. ____, 108 LRRM 3105, decided December 2, 1981, the Supreme Court of the United States adopted a "labor nexus" test for "confidential employee" status which is similar to that adopted by the Supreme Court of the State of

Washington in its Yakima decision. The "labor nexus" test was adopted by the National Labor Relations Board (NLRB) prior to the adoption of the Taft-Hartley Act and was adopted by the Public Employment Relations Commission in 1977 in Edmonds School District, Decision 231 (PECB, 1977). Whether at this or any other stage of this proceeding, little credit can be given to argument that these interpretations are out of step with the statute. RCW 41.56.030(2) provides:

> "(2) 'Public employee' means any employee of a public employer except any persons (a) elected by a popular vote, or (b) appointed to office pursuant to statute, ordinance or resolution for a specified term of office by the executive head or body of the public employer, or (c) whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit, or any person elected by popular vote or appointed to office pursuant to statute, ordinance or resolution for a specified term of office by the executive head or body of the public employer."

The Court summarized its conclusion as to the interpretation of RCW 41.56.030(2) in Yakima as follows:

> "[I]n order for an employee to come within the exception of RCW 41.56.030(2), the duties which imply the confidential relationship must flow from an official intimate fiduciary relationship with the executive head of the bargaining unit or public official. The nature of this close association must concern the official and policy responsibilities of the public officer or executive head of the bargaining unit, including formulation of labor relations policy. General supervisory responsibility is insufficient to place an employee within the exception." 91 Wn.2d at 106-07. (emphasis supplied)

The burden of showing the need for exclusion as "confidential" is a heavy one. City of Seattle, Decision 689-A (PECB, 1979).

Without any question, the battalion chiefs are supervisors who exercise substantial authority, in the name and interest of the employer, over their subordinates in the rank-and-file firefighter bargaining unit. But that determination was made in the prior case. Nothing in the evidence suggests any diminution of the battalion chiefs' authority since the record was made on their supervisory status. Similarly, nothing in the evidence suggests any recent increase in their status or authority or in their exposure to the management's labor relations policies. On the contrary, it appears that there has been very little change in the status of battalion chiefs other than their exclusion from the coverage of the latest collective bargaining agreement covering the rank-and-file unit.

The City of Yakima decision involved four battalion chiefs in that city's fire department who were supervisors and the direct link between the fire

chief and the rank-and-file firefighters. The Yakima job description is reproduced in footnote 2 to the Supreme Court's majority opinion and can easily be compared to the Richland job description in evidence in this record as Exhibit 13 and to the testimony describing how things work in Richland. The Richland job description states:

> "CLASS TITLE: BATTALION CHIEF
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> DEFINITION: Under general direction to perform moderately difficult work in managing emergency and non-emergency operations of a shift of firefighting personnel, participating in planning and administration of Fire and Emergency Services Department goals and policies; and to perform related work as required.
>
> TYPICAL TASKS:
>
> 1. Commands all fire and ambulance apparatus and personnel at the scene of a fire or other emergency in the absence of the Fire Chief.
> 2. Assigns, trains, motivates, evaluates, and recommends promotions, terminations, and disciplinary actions for shift Fire Department personnel.
> 3. Responds on behalf of management to employee complaints and grievances, and may settle grievances within supervisor's guidelines.
> 4. Prepares annual recommended operating budget for assigned unit and controls and monitors expenses within that budget.
> 5. Ensures that all facilities, equipment, and supplies are in readily available, safe and useful condition.
> 6. Reviews reports of subordinate officers and refers important, unusual matters, or factors that affect costs, to the Fire Chief.
> 7. Makes periodic inspections of personnel, equipment, and quarters, and reports conditions and needs to the Fire Chief.
> 8. May be accountable for ensuring that specific procedures and equipment, such as that used for Department communications, are responsive to changing Department needs.
> 9. Ensures the operational readiness of the equipment and personnel under assigned command.
> 10. Coordinates assigned functions with other shifts.
> 11. Maintains a high level of morale, promoting employee productivity and contributing to Departmental objectives.
> 12. Prepares regular or special reports on a wide variety of Department-related functions.
>
> KNOWLEDGES, SKILLS AND ABILITIES:
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> 1. Ability to advise and direct subordinates in the performance of their work.

2. Ability to communicate effectively both orally and in writing.

3. Knowledge of interdepartmental structure and functions.

4. Knowledge of laws, regulations, policies and procedures applicable to assigned tasks.

5. Thorough knowledge of fire suppression, prevention, and investigation principles and practices."

Comparison reveals that the Yakima battalion chiefs had certain specified supervisory authority (e.g., grant leave, suspend for cause, inspect uniforms, make recommendations on probationers and convey orders to subordinates) which would appear to be subsumed within the broad language of tasks 2 and 7, above. The Richland battalion chiefs have more specific grievance response authority than the Yakima battalion chiefs, but that is circumscribed by established city policies and is, in any case, an indicator of supervisory rather than confidential authority. See: City of Seattle, Decision 689-C (PECB, 1981), dealing with individuals holding the title of "major" and charged with contract administration responsibilities in the police department of the City of Seattle. Testimony indicates that the battalion chiefs have no special input on the policies finally adopted by the director, and that input has been received from members of the rank-and-file unit as well. The testimony also indicates that only one of the battalion chiefs has department-wide fiscal or budgetary responsibilities, the other battalion chiefs and a number of their subordinates being limited to budgetary responsibility only for a small segment of the department within their "staff" assignment.

The "separate unit of supervisors" concept was evidently neither advanced before nor considered by the Court in City of Yakima. Reflecting on the dissenting opinion in that case, it is nevertheless concluded that the Richland battalion chiefs do not rise above the status of "supervisor". They are public employees within the meaning of RCW 41.56.030(2), and this analysis must move ahead to consider the implementation of their rights under RCW 41.56.

Propriety of Certification of Local 1052 as Representative

This case presents only the second time in its history that the Public Employment Relations Commission has been asked to rule that a particular labor organization is disqualified from being certified as exclusive bargaining representative of particular employees. The first such case was Snohomish County, Decision 1439 (PECB, 1982), decided subsequent to the filing of the briefs by the parties to the instant case.

a. General Legal Principles

Supervisors are public employees within the meaning of RCW 41.56.030(2). City of Tacoma, Decision 95-A (PECB, 1977); Municipality of Metropolitan Seattle (METRO) v. L & I, 88 Wa.2d 925 (1977). It is the general rule and statutory policy that public employees covered by RCW 41.56 are entitled to select a bargaining representative of their own choosing. RCW 41.56.040 provides:

> "No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter." (Emphasis added).

The parties stipulated at the outset of the hearing in this matter that Local 1052 is a labor organization within the meaning of the Act. The union would have the analysis end at this point, while the employer seeks examination of the policy considerations on which the statute is founded.

One of the cases cited by the employer in its brief is NLRB v. Annapolis Emergency Hospital, 562 F.2d 524 (4th Circuit, 1977), which contains the following statement suggestive of the starting point for the analysis in this case.

> "If this Employer's concern with supervisory domination is genuine, it comes some 30 years too late. Prior to the Taft-Hartley Act of 1947 the involvement of supervisors with unions was a source of legitimate concern on the part of employers. That was so because of decisions which held that supervisory personnel were entitled to full rights under the Wagner Act of 1935. Packard Motor Car Co. v. NLRB, 330 U.S. 485, 19 LRRM 2397 (1947). The effect of Packard was to erode industrial discipline by "obliterat[ing] the line between management and labor." 330 U.S. at 494, 19 LRRM at 2401 (Douglas, J., dissenting); S. Rep. No. 105, 80th Cong., 1st Sess. 3(1947); 1 Legislative History of the Labor Management Relations Act 409-410 (1947). The Taft-Hartley Act changed this by denying to supervisors the status of 'employees' within the Act. 29 U.S.C. Sec. 152(3). Today if a supervisor devotes his time or loyalty to a union, he is unprotected by 29 U.S.C. Sec. 157, and does so at the mercy of his employer, who may lawfully fire him for unapproved union activity. Beasley v. Food-Fair of North Carolina, 416 U.S. 653, 86 LRRM 2196 (1974); Florida Power & Light Co. v. IBEW, 417 U.S. 790, 86 LRRM 2689 (1974). Thus Taft-Hartley, as interpreted in Beasley, has all but eliminated genuine employer concern with union activity by its supervisors. For this reason alone, any asserted fear of erosion of management prerogatives is untenable."

By contrast to the situation under the National Labor Relations Act (NLRA), interpretation of RCW 41.56 must be concerned with thirty-five year old cases and with the issues and policies related to Packard Motor Car Co. v. NLRB, precisely for the reason that the Packard decision was cited with approval by our Supreme Court in its METRO decision holding supervisors to be employees within the coverage of RCW 41.56.

Some of the arguments advanced by the parties are beyond the scope of what can be addressed in this case. Thus, perceived problems with a statutory definition extending collective bargaining rights to supervisors, including those reviewed by the dissenting opinion in Packard, would need to be raised with the legislature. Similarly, perceived problems with the interpretations of RCW 41.56.060, which place supervisors in bargaining units separate and apart from the bargaining unit of rank-and-file employees which they supervise, would also be a matter for the legislature. The bargaining unit sought in the petition presently before the Commission is a separate unit of supervisors. The statutory right of those supervisors to organize and bargain has been limited to preclude their choice of representation in the same bargaining unit as their subordinates. The question at hand is: What further limitations, if any, can and should be imposed on the choice of labor organizations available to the battalion chiefs?

A limitation on the choice of labor organization could be imposed at any of a number of levels. A "no limitation" policy would permit supervisors and their subordinates to be commingled as equal participants in the same local labor organization. A minimum limitation would permit representation by the same local organization coupled with restrictions on the leadership activity of the supervisors. A more limiting alternative would require autonomous units within the same organization, or separate local organizations which may be affiliated with the same state or national organization(s). At the other extreme, supervisors would be prohibited from affiliation with any non-supervisory employees and would thereby be limited to choosing only independent organizations restricting their membership to supervisors.

The organization seeking to represent the supervisors in Packard appears to have been an independent organization limiting its membership to supervisors. The issue existing in the instant case was, accordingly, not squarely before the Packard court. Nevertheless, the majority went to the trouble to focus in a footnote on the independence or affiliation of the unions which had sought to represent "supervisor" units in previous cases before the NLRB. Those citations lead, in turn, to Jones & Laughlin Steel Corp., 331 U.S. 416 (1947), wherein the Court held:

> "BARGAINING UNIT
>
> The Board, of course, has wide discretion in performing its statutory function under Sec. 9 (b) of deciding

> 'the unit appropriate for the purposes of collective bargaining.' Pittsburgh Plate Glass Co. v. Labor Board, 313 U.S. 146. It likewise has discretion to place appropriate limitations on the choice of bargaining representatives should it find that public or statutory policies so dictate. Its determinations in these respects are binding upon reviewing courts if grounded on reasonableness. May Stores Co. v. Labor Board, 326 U.S. 376, 380. A proper determination as to any of these matters, of course, necessarily implies that the Board has given due consideration to all the relevant factors and that it has correlated the policies of the Act with whatever public or private interests may allegedly or actually be in conflict."

It is necessary that the Commission give consideration in the instant case to all of the relevant factors and correlate the policies of the Act with whatever public or private interests that may exist.

b. The Interests of the Employer

In testimony, the city manager expressed his frustration with his perceived inability to install a "management team" in the city's fire department, and thereby an inability to implement the philosophy that "two heads are better than one". Other city departments have such management teams, structured exclusively from employees who are not included in bargaining units. On cross-examination, however, the same employer official acknowledged that nothing prevented the city from creating an assistant or deputy position in the fire department to which sufficient confidential work and authority could be delegated to require exclusion of the position from the coverage of RCW 41.56. The city's quest to limit the bargaining rights of four employees in this case must be looked at in perspective, including the city's failure to help itself by creating a position more resembling an alter ego to the director. The wide-spread dissemination of "staff" assignments within the department, including a number of "staff" assignments made to members of the rank-and-file firefighter bargaining unit, makes it very difficult to distinguish any clear line of demarcation between line and staff or between administration and operations.

The city's argument that it is entitled to "the undivided loyalties of the battalion chiefs" is similar to arguments advanced before the Supreme Court in Packard, wherein they were answered in the following manner:

> "Even those who act for the employer in some matters, including the service of standing between management and manual labor, still have interests of their own as employees. Though the foreman is the faithful representative of the employer in maintaining a production schedule, his interest properly may be adverse to that

> of the employer when it comes to fixing his own wages, hours, seniority rights or working conditions. He does not lose his right to serve himself in these respects because he serves his master in others. And we see no basis in this Act whatever for holding that foremen are forbidden the protection of the Act when they take collective action to protect their collective interests.
>
> * * *
>
> The company's argument is really addressed to the undesirability of permitting foremen to organize. It wants selfless representatives of its interest. It fears that if foremen combine to bargain advantages for themselves, they will sometimes be governed by interests of their own or of their fellow foremen, rather than by the company's interest. There is nothing new in this argument. It is rooted in the misconception that because the employer has the right to wholehearted loyalty in the performance of the contract of employment, the employee does not have the right to protect his independent and adverse interest in the terms of the contract itself and the conditions of work."

Both the dissenters in Packard and the members of Congress, who within the year enacted the Taft-Hartley amendments, were obviously inclined to look with favor on arguments similar to those advanced here by the employer. Our legislature had both the Packard dissent and twenty years of experience under the Taft-Hartley model available to it when it adopted RCW 41.56, but chose not to accept those precedents. City of Tacoma, Decision 95-A (PECB, 1977). Rather than the "two tier" bargaining structure current in the private sector, with its firm dividing line between labor and management, RCW 41.56 establishes a "three tier" bargaining structure in which separate bargaining units of supervisors created under RCW 41.56.060 constitute the middle ground. Accordingly, the treatment and rights of supervisors are a matter of degree, rather than of kind.

In Snohomish County, supra, the employer contended that a labor organization seeking to represent deputy prosecuting attorneys employed by the county should be disqualified from certification because the same organization represented various clerical, operations and maintenance employees of the same employer in different bargaining units. Coupled with a determination that certain of the deputy prosecuting attorneys were to be excluded from the bargaining unit and from the coverage of the Act as "confidential" employees, it was concluded in that case that the employer was unable to demonstrate any threat to it or to the collective bargaining process which could not be cured by application of the "confidential" exclusion. Thus, there was no basis for limiting the public employees involved as to their choice of labor organization to be their exclusive bargaining representative. In the present case, the union has argued persuasively that the confidential

exclusion is inapplicable to the battalion chiefs. This leaves the employer in the unsettling quandary of never being quite sure whether its battalion chiefs, and particularly those who hold office and take an active role in Local 1052, are acting as employer officials or as union officials in their dealings with the employer and/or with their subordinates. That dual role is troublesome.

In a footnote in its brief, the employer suggests a concern arising from the "domination" unfair labor practice provision, RCW 41.56.140(2). That concern stems from the supervisory status of the battalion chiefs. Discussion of that potential conflict is reserved for consideration, along with the similar interests of rank and file employees, under sub-heading "d", below.

c. The Interests of the Supervisors

Section 14(a) of the NLRA preserves the right of supervisors to become and remain members of labor organizations. No similar provision is found in RCW 41.56, nor is such a provision necessary if supervisors are public employees who enjoy the rights conferred by the Act.

It should be clear, and the employer does not argue to the contrary, that supervisors have a right to form and join their own independent organization, such as the one which was involved in the Packard case. City of Seattle, Decision 689, 689-A 689-C (PECB, 1981) involved an independent "police management" organization. But can the employer's expressed concern for the creation of a "management team" or for the separation of the supervisors into a separate unit lead necessarily to a requirement that supervisors be represented only by separate organizations of supervisors? Clearly not. Had the legislature intended to limit the bargaining rights of supervisors to membership in separate organizations composed entirely of supervisors, it could easily have adapted language such as the portion of Section 9(b)(3) of the NLRA which precludes certification of an organization as the representative of a bargaining unit of guards if that organization admits to membership or is affiliated directly or indirectly with an organization which admits to membership employees other than guards. Another state has imposed such limitations on the organizational rights of supervisors. See: Section 111.81(3)(d), WIS. STATS. Additionally, any response to that question must recognize that both City of Tacoma, supra, and METRO, supra, involved separate supervisor units represented by the same local labor organization which held the incumbency as the exclusive bargaining representative of the employees supervised by the disputed supervisors. While there was evidently no issue raised in either of those cases concerning disqualification of the particular labor organization, it is unlikely that the decisions supporting those representation claims would have been reached

if any statutory language or obvious policy consideration existing prohibiting representation of both units by the same labor organization.

Nothing is found or suggested which would limit the ability of supervisors to assume a leadership role in their own representation. Similarly, nothing is found or suggested which would limit the right of supervisors to vote on ratification of a collective bargaining agreement covering a separate unit of supervisors.

The concern that supervisors will be influenced in their day-to-day activities by their membership in and representation by an organization dominated (at least in numbers) by their subordinates merely calls back to mind the majority opinion in Packard:

> "Every employee, from the very fact of employment in the master's business, is required to act in his interest. He owes to the employer faithful performance of service in his interest..."

The battalion chiefs have a job to do, which at least includes, and may primarily be, the task of riding herd on their subordinates. They would be subject to discipline by the employer should they fail to do their job. Furthermore, in balancing these concerns against the rights of supervisors, it should be kept in mind that the supervisors would retain their identity as a separate bargaining unit even if represented by the same union. Accordingly, if the supervisors came to feel that their continued representation by a union which also represented their subordinates was in conflict with their separate interests as supervisors, they would be entitled, no less often than once each three years under RCW 41.56.070, to raise a question concerning representation to decertify that union.

d. The Interests of Rank-and-file Employees

The Public Employees Collective Bargaining Act, RCW 41.56, is remedial legislation. Roza Irrigation District v. State, 80 Wa.2d 633 (1972). A stated purpose of the Act is the protection of the right of employees to organize and bargain collectively. RCW 41.56.010. Infringements on employee rights can more easily be reduced to "yes" or "no" propositions in the two-tier bargaining environment than they can in the three-tier bargaining environment. Under RCW 41.56, the rights of rank-and-file employees must also be balanced, where they come into conflict, with the rights of supervisors.

As noted in Annapolis, the problem of management domination of labor organizations was sufficiently severe in the pre-NLRA era that specific prohibitions on such activity were included among the unfair labor practice

provisions of the NLRA. Our legislature adopted similar provisions in RCW 41.56.140(2), making it an unfair labor practice for an employer:

> "(2) To control, dominate or interfere with a bargaining representative;"

Nothing has so great a potential to chill the collective bargaining rights of rank-and-file employees as the inclusion of their supervisors in the governance of their labor organizations. Rejecting employer arguments that supervisors fell within the definition of "employer" under Section 2(2) of the NLRA, the Packard court reasoned:

> "The purpose of Sec. 2(2) seems obviously to render employers responsible in labor practices for acts of any persons performed in their interests. It is an adaption of the ancient maxim of the common law, respondeat superior, by which a principal is made liable for the tortious acts of his agent and the master for the wrongful acts of his servants. Even without special statutory provision, the rule would apply to many relations. But Congress was creating a new class of wrongful acts to be known as unfair labor practices, and it could not be certain that the courts would apply the tort rule of respondeat superior to those derelictions. Even if it did, the problem of proof as applied to this kind of wrongs might easily be complicated by questions as to the scope of the actor's authority and of variance between his apparent and his real authority. Hence, it was provided that in administering this act the employer, for its purposes, should be not merely the individual or corporation which was the employing entity, but also others, whether employee or not, who are "acting in the interest of an employer."

Because they act on behalf of the employer some of the time, the Richland battalion chiefs have been excluded from the bargaining unit of their subordinates.

Can the implementation of the statutory bargaining rights of the supervisors result in giving them a free hand in the leadership of a union representing their subordinates? Local 1052 makes no pretense of promising autonomy for the supervisor unit or exclusion of the supervisors from the activities of the union in its representation of rank-and-file employees. All indications are that Local 1052's current President, Battalion Chief Roney, would continue to serve in that capacity. Battalion Chief Downs will evidently continue as vice-president of the Washington State Council of Firefighters and as its district representative servicing the rank-and-file bargaining unit represented by Local 1052.

The most compelling reason for concern about the past and present leadership role of battalion chiefs in Local 1052 is to be found in the testimony of Battalion Chief Downs at pages 69 to 74 of the transcript, beginning with cross-examination by counsel for the employer:

"Q Now, on the two collective bargaining agreements that we have in evidence, Exhibit 1 and Exhibit 5, Mr. Roney has signed. Mr. Roney is a battalion chief?

A Yes, he is.

Q And yet when I look at the grievance procedure, Article XVII, is it not your testimony that he will have to act as management to handle those grievances that come to him from a firefighter under him; is that a fair statement?

A As management?

Q Yes; he'll have to represent management in that situation.

A He would have to administer the policies to the extent that they pertain to the grievance.

Q And would he not be representing management doing that?

MR. WILLIAMS: I think that's argumentative. Mr. Downs doesn't think that he would be representing management; Mr. Andrews does.

Mr. ANDREWS: That's the whole point.

Q There is nobody representing management; isn't that right? Isn't that what you're saying?

A No; that's not what I'm saying.

Q What are you saying?

A I'm saying the battalion chiefs are only involved in the grievance procedure in the preliminary procedure.

Q Well, let's take --

A (Interposing) Which does not become -- if you look in the contract, does not become a formal grievance until it is handled by the grievance committee. At that point it does not come to the Battalion Chief; it comes to the Chief. So it's a problem that is being discussed. Some fellow has -- a lot of them may come up verbal. You're asked as a supervisor -- you're attempting to handle --

Q (Interposing) All right. And when you're acting as a supervisor, you're acting as management at that point. Or are you acting as a member of the Union that's my question. You got to be one or the other; which one?

A Both.

Q Both; okay.

MR. ANDREWS: No further questions.

REDIRECT EXAMINATION

BY MR. WILLIAMS:

Q Mr. Downs, I don't fully understand your last answer to Mr. Andrews' question. You said you represent both. Will you explain that, please?

A Yes. When I -- as a battalion chief, also a member of the Union and I've served on the negotiating team for the collective bargaining agreement, I have a pretty fair understanding of the manner in which the collective bargaining agreement was reached. As -- from being in the Union, I am aware of certain things that individual members may not be -- Union members, and many times when I'm handling a problem for one of the individuals my position in the Union allows me to fill the individual in on the Union's position on the thing as far as whether or not he is out of line or is not carrying out the intent that was negotiated. He still has the right, of course, to file a grievance, but I can tell him what was negotiated and what was discussed during the negotiations and how it was looked at. As far as the supervisor --

Q (Interposing) Suppose he thinks you're wrong; Mr. Downs doesn't know what he's talking about with respect to what was negotiated and what can he do to advance his grievance?

A Very simply, after I answer that grievance -- I answer it as a supervisor and that's where I guess I have the problem in the questions asked of management. I feel I'm a supervisor; I'm supervising the individual and I answer the grievance or the problem -- try to deal with the problem as his supervisor, giving input or the understanding from both sides and many times I can work it out. If he still does not agree after I have given him my answer, then he has the option of taking it to the Chief. I submit my answer or make the Chief aware of my answer; if he disagrees with it he has the authority to override and remedy the grievance at that point. If he agrees with my interpretation of facts, then the individual has the right to file the grievance in writing with the grievance committee of the Union and they then take that grievance; they make a decision as to whether or not they feel it's just or not; a grievance is then taken by the grievance committee, with or without the presence of the grieved employee, to the Chief of the Department as the first step in the formal grievance procedure."

One must have some doubts about the efficacy of the internal union processes from the point of view of the rank-and-file employee when two such key leaders of the local union are both battalion chiefs who, between them, supervise somewhat in excess of half of the employees in the rank-and-file bargaining unit.

This is not an unfair labor practice case, nor would it be appropriate to litigate "domination" unfair labor practice allegations in a representation

case. What is at issue is the creation of bargaining relationships for the future, and that process cannot look at some sections of RCW 41.56 in isolation from other sections of the same statute. Just as it would have been an anomaly to create a bargaining unit where there was a clear potential for conflicts concerning work jurisdiction, City of Seattle, Decision 781 (PECB, 1979), it is necessary to consider in this case the possibility of conflicts of interest resulting from representation of both the battalion chiefs and their subordinates by Local 1052 as it is presently administered.

Even before the Taft-Hartley amendments excluded supervisors from the coverage of the NLRA, the NLRB had adopted a policy of denying certification to a union organized or led by a supervisor, because the organization was incapable of bargaining at arm's length with the employer. Douglas Aircraft Co., Inc., 53 NLRB 486 (1943). After the Taft-Hartley amendments, the problem remained somewhat dormant until the "health care" amendments to the NLRA were enacted in 1974. Those amendments brought private not-for-profit hospitals and their employees under the coverage of the NLRA. The health care amendments did not affect the definition or exclusion of supervisors, but they opened opportunities for previously existing professional organizations comprised of nurses and other health care professionals to assume a new role as labor organizations. Since some of those organizations had been or continued to be led by persons excluded from the coverage of the NLRA as "supervisors", issues arose concerning the qualifications of those organizations to serve as exclusive bargaining representative of employees. Thus, the NLRB was again called upon to exercise the discretionary authority reserved to it by the Supreme Court of the United States in Jones & Laughlin Steel, supra, to "place appropriate limitations on the choice of bargaining representatives". Thus the clear and present danger of a conflict between the representation rights of rank-and-file employees and those of their supervisors was considered by the NLRB in Sierra Vista Hospital, 241 NLRB 631 (1979). It is pointed out in that case that the mere presence of supervisors among the membership of a labor organization does not affect the status of the organization as a labor organization. Neither does active participation or the holding of office by a supervisor create a conflict so long as the labor organization is representing employees other than the subordinates of that supervisor. It is the conflict inherent in the representation of rank-and-file employees by their own supervisor(s) that is identified as a problem to be avoided.

> "But, while the presence of supervisors in an association does not bear upon its "labor organization" status, the identity and role of those supervisors in the labor organization may operate, nonetheless, to disqualify it from bargaining in certain instances. This potential for disqualification stems from an inherent statutory concern that '[e]mployees have the right to be represented in collective-bargaining negotiations by

> individuals who have a single-minded loyalty to their interests.' and the identity and role of supervisors, admitted to membership in a labor organization can, in certain circumstances, compromise that statutory interest. Thus, active participation in the affairs of a labor organization by supervisors employed by the employer with whom that labor organization seeks to bargain can give rise to question about the labor organization's ability to deal with the employer at arm's length. Central factors involved in considering this issue are the employee's right to a collective-bargaining representative whose undivided concern is for their interests and the employer's right to expect loyalty from its own supervisors. Active participation by the employer's own supervisors may, in a given case, contravene either or both of these legitimate interests. Indeed, we have held that an employer has a duty to refuse to bargain where the presence of that employer's supervisors on the opposite side of the bargaining table poses a conflict between those interests.
>
> The active, internal union participation of supervisors of a third-party employer (i.e., an employer other than the one with whom the labor organization seeks to bargain) does not present the danger than an employer may be 'bargaining with itself.' But it may operate, nonetheless, to disqualify a labor organization from acting as a bargaining representative for particular employees. Although, in such cases, the legitimate interest of an employer in the loyalty of its supervisors is not in issue (the active supervisors are not its own), the presence of supervisors of third-party employers may impinge upon the employees' right to a bargaining representative whose undivided concern is for their interests. Not because, as has been argued during the course of the debate on this issue, there is an inherent conflict between all supervisors and all employees, but because of the possible relation between the employer with whom bargaining is sought and the employer or employers of the supervisor participating in the bargaining process. Thus, we have held that an employer may lawfully refuse to bargain with a bargaining representative which itself was in a competing business. We have also held that an employer may refuse to bargain where the union's bargaining team included an agent of a union representing employees of a principal competitor; since trade secrets might be revealed, that agent's presence as a negotiator raised a clear and present danger to meaningful bargaining.
>
> Under the foregoing analysis, it is conceivable that the presence of even one supervisor on CNA's board of directors, if employed by Respondent, could present a danger that unit employees' interests might not be single-mindedly represented. That would depend on the role, if any, of that supervisor in CNA's internal affairs." Sierra Vista Hospital, supra, (emphasis supplied).

Thus, even without reliance on employer concerns such as those stressed in Packard and urged again by the employer here, there are interests of rank-and-file employees to be considered and protected.

In considering whether a particular organization led by supervisors should be disqualified from representing rank-and-file employees,

> "'There is a strong public policy favoring the free choice of a bargaining agent by employees. The choice is not lightly to be frustrated. There is a considerable burden on a nonconsenting employer, in such a situation as this, to come forward with a showing that danger of a conflict of interest interfering with the collective bargaining process is clear and present'22/

22/ N.L.R.B. v. David Buttrick Company, 399 F.2d 505, 507 (1st Cir. 1968). There can be no question with regard to a conflict-of-interest defense that the Board agrees with the Court of Appeals for the First Circuit's formulation of a respondent's burden of showing a 'clear and present danger.' and that the Board will strike that defense when a respondent fails to carry its burden." Sierra Vista Hospital, supra.

In Sierra Vista Hospital, the NLRB concluded that the petitioning union should not be disqualified. It was sufficient that the union had delegated its collective bargaining responsibilities to an autonomous local unit of non-supervisory employees and that the local unit was properly exercising that authority on its own behalf. By contrast, in Exeter Hospital, 248 NLRB 377 (1980), the ability of supervisors to assume leadership roles in a small organization, together with evidence that they had held leadership roles, was sufficient to disqualify the organization.

e. Conclusions

RCW 41.56 creates some private rights in the process of protecting the public interest. There are times when the private interests of particular individuals, including individuals who are employees within the meaning of the Act, must stand subordinate to the broader policy considerations of the statute. This is particularly true when conflict or the potential for conflict arises between supervisors and rank-and-file employees. The policy considerations operative in the previous City of Richland litigation clearly prefer protection of the bargaining rights of the rank-and-file employees over those of the supervisors. The result of the previous litigation imposed a limitation on the bargaining rights of the supervisors, by overruling their desires to be included in the same bargaining unit as their subordinates. The problem at hand is the same problem noted to the earlier litigation:

> "The hearing examiner found the problems inherent in grouping supervisors and nonsupervisors in the same bargaining unit are evident in the instant case. The president of the Union Local is a battalion chief. As a supervisor, he owes a certain fiduciary duty to the City and, as president of the Local, a duty to the Union membership. The dilemma is apparent when an employee

> under his supervision files a grievance with him. In whose interest should be act? What pressure will he receive from either the City or the Union? Further, is it not more likely that grievances with regard to battalion chiefs' actions, including imposed discipline, would not be filed? How could the aggrieved employee then depend on the support of his union? Would not members of the battalion chief's platoon be hesitant to challenge his union leadership in view of the extent of his authority over them? Would there not be a stifling of discussion at union meetings when problems with supervision arose?
>
> It is the traditional view of the rank and file that supervisors tend to a higher degree of allegiance to management than do the rank and file." IAFF v. City of Richland, 29 Wn App. 599 (Division III, 1981) paraphrasing City of Richland, Decision 279 (PECB, 1977).

It is concluded that the history of and potential for active participation by supervisors in the governance of Local 1052 presents a clear and present danger of conflict with the interests of the non-supervisory employees represented by Local 1052.

Following the determination by the Court of Appeals in Annapolis Emergency Hospital, supra, that the NLRA lacked authority to issue a "conditional" certification of a union with direction that the union clean up its internal affairs, the NLRB has acted in Exeter Hospital in the only manner remaining available to it, viz. denial of certification to the labor organization as exclusive bargaining representative of the affected non-supervisory employees. The three-tier bargaining structure under RCW 41.56 provides the Public Employment Relations Commission an additional option. There is no motion before the Commission for revocation of the certification of Local 1052 as the exclusive bargaining representative of the non-supervisory unit, but there is a petition before the Commission for certification of Local 1052 as exclusive representative in the supervisory unit. It is sufficient for the present purpose to deny Local 1052 certification in the supervisory unit, leaving to another time and case the question of whether Local 1052 is or will in the future be led or influenced by supervisors of the non-supervisory employees it is certified to represent.

FINDINGS OF FACT

1. The City of Richland is a municipality of the State of Washington and a "public employer" within the meaning of RCW 41.56. Among other municipal services, the city maintains and operates a Department of Fire and Emergency Services. That department is headed by a director who reports to the city manager. Reporting directly to the department director are four individuals holding the rank and title "battalion chief" and/or the equivalent title "fire marshall".

2. International Association of Firefighters, Local 1052, is a labor organization within the meaning of RCW 41.56. Larry Roney, who is employed by the City of Richland as a battalion chief, is president of Local 1052. Dan Downs, who is employed by the City of Richland as a battalion chief, is a former president of Local 1052 and is currently a member of its executive board. Local 1052 is affiliated with the Washington State Council of Firefighters, of which Downs is a vice-president and paid district representative charged with responsibility for providing collective bargaining services to Local 1052 in connection with its activities as exclusive bargaining representative of employees.

3. Local 1052 is recognized by the City of Richland as exclusive bargaining representative of non-supervisory firefighters employed by the City of Richland in its Department of Fire and Emergency Services.

4. Local 1052 initiated this proceeding by filing a timely and properly supported petition for investigation of a question concerning representation of employees, claiming appropriate a bargaining unit consisting of persons holding the title of battalion chief (or equivalent) employed by the City of Richland in its Department of Fire and Emergency Services.

5. Individuals holding the title of battalion chief and/or fire marshall in the Department of Fire and Emergency Services exercise substantial authority, in the name and interest of the City of Richland, as supervisors of non-supervisory firefighters employed by the City of Richland. The existence and exercise of that authority was previously the basis for exclusion of the battalion chiefs and/or fire marshall from the bargaining unit of non-supervisory firefighters employed by the City of Richland.

6. The battalion chiefs and/or fire marshall have not been given access to confidential information concerning the labor relations policies of the City of Richland and do not have an intimate fiduciary relationship with either the director of the Department of Fire and Emergency Services or with the city manager which includes the formulation of labor relations policy.

7. In the processing of grievances and other matters, individuals holding the rank of battalion chief and/or fire marshall who are or have been active in the leadership of Local 1052 assume a dual role, acting in part on behalf of the employer and in part as spokesmen on behalf of Local 1052. A clear and present danger exists of a conflict of interest within Local 1052 so long as its leadership includes persons acting on behalf of the employer as supervisors of non-supervisory employees represented by Local 1052.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56.

2. International Association of Firefighters, Local 1052, is, because of its domination by supervisors employed by the City of Richland, incapable of dealing at arm's length with the City of Richland as exclusive bargaining representative of both a bargaining unit of supervisors employed by the City of Richland and a bargaining unit of non-supervisory employees subject to the authority of those supervisors, and is therefore disqualified from certification at this time as exclusive bargaining representative of both such bargaining units.

ORDER

The petition for investigation of a question concerning representation filed in the above-entitled matter is dismissed.

Dated at Olympia, Washington, this 8th day of November, 1982

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, EXECUTIVE DIRECTOR