

MINUTES OF THE SCHEDULED MEETING OF THE
PHOENIX EMPLOYMENT RELATIONS BOARD
CITY OF PHOENIX, STATE OF ARIZONA
Tuesday, March 16, 2021

Members Present:

Gregory E. Fretz, Chairman
Phillip Hanley, Management Member

Via WebEx:

Fernando Ortega, Public Member
Joseph Diggs, Labor Member

Others Present:

William R. Brown, PERB Legal Counsel
Kathy Schmidt, PERB Executive Director

Nick Enoch, Lubin and Enoch, Attorney, AFSCME 2384

Present Via WebEx were:

Eric Wilson, Napier, Courey, Bailey, Attorney, ASPTEA
Heidi Gilbert, Attorney, City of Phoenix
Jason Stokes, ASPTEA President
Mario Ayala, AFSCME 2384 President
Mark Bizik, HR Department
Toni Maccarone, Deputy City Manager
Xavier Frost, HR Department

1. **Call to Order: Chairman Gregory Fretz**, called the March 16, 2021 meeting to order with two-members present and two members' present via WebEx.

2. Roll Call – Quorum

3. **Review and approval of the November 17, 2020 Regular Minutes.**

A **motion** was made that the minutes of the November 17, 2020 Regular Meeting be approved by **Joseph Diggs, Labor Member**. The **motion** was **seconded** by **Phillip Hanley, Management Member**, and carried by a vote of **4-0**.

4. **Review and approval of the March 5, 2021, Impasse Special Meeting Minutes.**

A **motion** was made that the minutes of the March 5, 2021 Impasse, Special Meeting be approved by **Fernando Ortega, Public Member**. The

motion was seconded by Joseph Diggs, Labor Member, and carried by a vote of 4-0.

5. **American Federation of State, County and Municipal Employees, Local 2384, Technician Specialists, Petitioner.**
UC-19

Consideration, decision and action regarding the Hearing Officer Report and Recommendations issued by Hearing Officer Douglas P. Hammond.

William Brown, PERB Legal Counsel, Heidi you filed the exceptions to the Hearing Officer's Report and Recommendation.

Gregory Fretz, Chairman, we will let Heidi go first.

Heidi Gilbert, Attorney, City of Phoenix, good morning everybody Heidi Gilbert on behalf of the city and the city's exceptions were limited. The city does believe that Mr. Hammond came to the right conclusion with respect to our Safety Analysts and the issue here was whether or not the Environmental Health Safety Specialists were similar enough to a Safety Analyst position to require the city to reclassify the Safety Analyst 1 from Unit 7 as professional employees to Environmental Health and Safety Specialists. Mr. Hammond correctly concluded that the evidence shows that the city has correctly classified a Safety Analyst 1 as a professional employee since the 70's. It hasn't changed. The Environmental Health and Safety Specialists that classification was created in 2014. The work that these employees has not changed in a substantial way since that position was created. It actually begs the questions that they are so similar why we needed to create the Environmental Health and Safety Specialists at all. It is also really curious why it took Unit 2 so long to raise these issues given that the work has not changed. So the key issue here isn't really, and I will let Mr. Wilson speak more to the conclusions about being a professional employee. The key issue that is left for the city and for this Board is whether or not they are actually covered by the Ordinance. In the Meet and Confer groups, the five groups it defines public employees in a specific way. Meet and discuss defines public employees in a different way. Once Mr. Hammond decided and he concluded that the Safety Analyst 1 is a professional employee, he should have looked to the definition of public employee under the meet and discuss ordinance and he didn't do that. That is the basis for the City's exceptions. So, it was very limited in the conclusions and I'm looking at page 22 of his report, his conclusion tells you that he was on the right train but the wrong track perhaps. He said whether or not a SA1 is a confidential employee, that's not the analysis. He said can be determined

by the extent of their involvement in the labor relations function of the city. The direct knowledge of an employee involvement and the acts that it learned from their investigation the Safety Analyst 1 does not have clear roles in grievance investigations, preparations for the meet and confer process or serve in a leadership position with the city regarding it deliberations with the union. Its sole function within the human resources department is to provide a result to any investigations they have conducted. It does not meet the definition contained in the ordinance for a confidential employee. That is not the correct analysis. Once he has decided the professional employee the analysis slips to what is concluded under meet and discuss. That definition is a little bit different. Then he talks about whether or not specifically the role and I'm not going to say that those things are not interrelated, because when I read this list of categories, you're going to see that same intent was there. Keep in mind that he did consider this to be a human resources department employee. We will talk about that a little bit too. The excluded employees so public employees of course we have to meet and discuss, we have to exclude everybody that is in meet and confer but, it also says this, excluded employee means, employees of the city manager's office, offices of the mayor and city council, all department heads and assistant department heads, all executives and middle managers, employees in personnel and assistant city attorney classifications. All employees in the human resources department, all employees in the budget and research department, all employees in the communications offices and all persons meeting the definition of a public employee under meet and confer. That is not the analysis that he used but he very clearly concluded that they were a human resources function. In doing so he should have concluded that's a personnel function. These employees in the safety analyst 1 are completing a personnel function. The city's position is that they are correctly classified as a professional employee under benefit category 7 so they should be excluded as confidential under the ordinance based on the definition in the meet and discuss ordinance. That is the evidence the city presented, Deputy Director, Greg Carmichael actually created a report. His synopsis is on a chart on page 9 of the hearing officer's report and you will see that those bottom two boxes he does say it is benefit category 2 for the Environmental Health and Safety Specialist, benefit category 7 for the Safety Analyst 1, but if you'll notice the labor assignment. This is what unit they belong to. Environmental Health and Safety Specialists belongs with unit 2, they are represented by Local 2384. Safety Analyst 1 is deemed confidential and is excluded. That is because they are serving a personnel function. The way that we know that is what the Safety Analyst does they are supporting HR, they can actually be assigned to the HR department, they can be assigned to any city department. It does seem a little arbitrary just by the reporting

structure that determines whether or not they are doing the same kind of work or what group they actually belong in. Theoretically the employees that talked about in the hearing and also their supervisor Mr. Burns. Clark reports up through the water management chain, but he is still performing a personnel function. The city could have just as easily had Mr. Burns report to Ashley Pritchett who is our deputy director for safety in the human resources department, they would all be deemed human resources employees. Based on this definition I don't think that any of us to disagree that if the code says the human resources department employee is supposed to be excluded that these employees would not. The work that they are doing would not change. The com has to include this personnel function and the human resources department because over the years the city has gone from decentralized to a more centralized HR function. There was a time when we had HR people that were reporting up the management chain for a specific department as opposed to reporting directly to HR. As that has gone back and forth, we needed to give management the flexibility to do that. The code allows that. The city's position is that the safety analyst 1 is absolutely a professional employee, they have a higher level of expectation, they have a higher level of responsibility. They are not merely auditing and inspecting equipment or accidents they are actually helping to develop policy. They are responsible for development of those policies, they're responsible for investigating accidents, they are responsible for insuring compliance with the safety regulations and all the things would potentially link to allegations of misconduct involving our employees. They have done something they shouldn't have done, or they didn't do something they should have done. Although they are professional, they are a personnel function and they should be excluded under the ordinance. That's the city's position, the evidence clearly supports it. There wasn't anything to overcome what the city has been doing in practice for decades.

Gregory Fretz, Chairman, any questions?

Eric Wilson, Attorney, ASPTEA, let me try to focus on the predominating issue in this case which was whether the safety analyst professional in nature. The burden is on the petitioner on that and Mr. Hammond correctly found that they didn't carry their burden. The evidence was overwhelmingly showing that the professional nature of this position. The issue that the city is bringing forward in their exceptions is rather a collateral issue, it is not mentioned in the petition which is probably why Mr. Hammond's evaluation of the case was not laser focused on this classification of whether it's confidential, excluded or a personnel function in nature. Truly, that wasn't a targeted issue during the hearing of evidence. The city mentions Greg Carmichael's evaluation and even Mr.

Carmichael admitted under testimony that he wasn't evaluating whether there was a confidential or personnel nature in the case. The city's exceptions in arguing this personnel function of the safety analyst position is overly broad and the board should reject it. Mostly because in order to accept that definition of personnel function it would essentially eviscerate any supervisory role that anyone plays in this. Truly, the SA1 employee position does some investigations. They do a lot more other professional functions in developing and writing policies. Their task isn't to insure or investigate misconduct. The main role is to identify at least as far as the evidence we have is to identify safety concerns or safety measures were not taken and they provide what is called a root cause analysis. They determine what actually happened that resulted in a safety issue. Once they make that determination and they conduct this investigation, they then hand it over to HR who then performs the personnel function that the city is eluding to. There was no evidence that the misconduct investigations that are traditionally an HR function are conducted here by either the SA1's. So that whole collateral issue, this confusion caused in the personnel classification wasn't the main problem of this case. The city is trying to make this collateral argument in order for a personnel classification that really highly tried if you will as far as the evidence goes. Where the evidence did lead us is to the proper analysis and recommendation of the hearing officer in finding that the professional nature and that the SA1 is in the professional classification belonging in unit 7. These analytical functions could not be ignored throughout the testimony of all the SA1's that testified and as far as the superintendent's own testimony. It is highlighted in the hearing officer's report, I believe on page 19 and 20. The similar nature of the EH&S and SA1's but rather that the safety analysts do take that extra step, that EH&S just simply don't. Where they are developing and researching and writing the policies, their developing these training programs and then they are applying that to create these policies to determine root cause and ensure safety compliance. There is an intellectual step that goes beyond what the EH&S's do. For that reason Mr. Hammond was correct in his finding and recommendations that the SA1 is a professional classification and status quo should be maintained.

Gregory Fretz, Chairman, any questions?

Nicholas Enoch, AFSCME 2384 Attorney, there was only one set of exceptions filed and that was by the city and unit 2 doesn't really have a dog in the fight between ASPTEA and the city.

Gregory Fretz, Chairman, questions, comments?

William Brown, PERB Legal Counsel, you may want to take a motion regarding the exceptions filed by the city first. To reject or accept them,

Gregory Fretz, Chairman, does anyone want to make a motion?

Heidi Gilbert, Attorney, City of Phoenix, I'm sorry Mr. Fretz will I get an opportunity to respond to Mr. Wilson?

Gregory Fretz, Chairman, yes you may.

Heidi Gilbert, Attorney, City of Phoenix, I just wanted to point out it is not a collateral issue and it is within PERB's authority. The challenge here was whether or not by unit 2 whether or not properly classified but part of PERB's responsibility is not just to make sure that's it's in the appropriate unit but also whether or not it is excluded from the ordinance. The city just wanted to point out that by changing that designation and saying they are not excluded under the ordinance you are actually changing the status quo. This is how the report that Mr. Carmichael prepared it was exhibit number 8. That wasn't his recommendation per se it was him explaining why the city does it that way. Currently, that classification is excluded under the ordinance and if you decide to change that we would have to make that change. I'm not sure if that was clear to you.

Gregory Fretz, Chairman, any questions, would anyone like to respond?

Joseph Diggs, Labor Member, I have a question, just a clarifier. In the hearing officer's recommendations is to keep the status quo. My understanding according to Ms. Gilbert that the status quo currently is that this unit is outside this group of people because they are confidential employees and that is the status and that represents a change.

Heidi Gilbert, Attorney, City of Phoenix, I'm going to be very careful with my words. They are professional employees, they belong to benefit category 7 but they are excluded under the ordinance and so they live in bargaining unit 8, I use air quotes for bargaining unit because they don't have the right to bargain. So yes, sir they are excluded under the ordinance but absolutely we get the benefit of the bargain through unit 7.

Joseph Diggs, Labor Member, to the representative of ASPTEA is that your understanding of it? When the report reads keep the status quo I don't remember this being the main thrust of the petition originally right? That's why I'm waiting, if this is the status quo this would basically be an issue with AFSCME, ASPTEA and the city, if you all disagree on this particular piece of it. What say you Mr. Wilson?

Eric Wilson, Attorney, ASPTEA, I think that's a fair assessment that's why I dubbed it collateral, we can call it whatever we want, but essentially this additional argument of not professional but how excluded there wasn't a lot of evidence on this. There wasn't a lot of evidence on the path as to how the city came to the conclusion that they should be confidential or excluded or whether that was proper and so that's why I called it a collateral issue. I think your assessment is fair of now this secondary issue, yeah it would be between the city and ASPTEA now because the professional because they are no longer unit 2, unit 7 dispute, now it is a unit 7, unit 8 dispute. Unit 7 ASPTEA does bargain for unit 8 members they essentially have similar benefits which is why the benefit category is the same. The reason why the city has designated SA1's as confidential or excluded there isn't a lot of information on that.

Joseph Diggs, Labor Member, that's why I was asking the question in terms of the status quo as we went into this particular hearing the status quo was that SA1's were they always considered to be bargaining unit 8 even in the context of this dispute?

Eric Wilson, Attorney, ASPTEA, I would have to defer to the city on that, I don't know about their specific labor unit assignment.

Heidi Gilbert, Attorney, City of Phoenix, the answer to that question Mr. Diggs, is yes and that why the city filed exceptions because it wasn't maintaining the status quo. Not saying they were not a confidential employee although that's not the right terminology. That was not maintaining the status quo.

Joseph Diggs, Labor Member, that's what I was trying to get to. What is the actual status quo, whether these were collateral or whatever it was not the main thrust of what got there the inter roles it's an important issue, so we shouldn't short shirk it at all, because it is important, but the recommendation is to keep status quo in our terms of our ability to respond to what the hearing officers recommendation is in taking into consideration the city's exceptions, I just needed to understand what exactly is status quo. It sounds like you two were squaring off for maybe a dispute over whether or not these people should even actually be considered confidential for the purposes of bargaining unit permission. In my mind that's a completely separate hearing because you would need a record to re-explore that specifically.

Eric Wilson, Attorney, ASPTEA, Mr. Diggs, if I may, I have information that perhaps the city does not treat all of the SA1's consistently and that

some of them are excluded and some of them are not. My now understanding of status quo is some of them are excluded, some of them are not treated by the city but again you are right to say that if this board is going to accept the exceptions of the city there is more evidence to be had. That is a whole other issue. I'm not saying PERB doesn't have the jurisdiction to determine that it certainly does but that wasn't what we presented evidence on. I'm sure there is more to be had.

Heidi Gilbert, Attorney, City of Phoenix, this was the time, this was the hearing, that was an issue. We did bring evidence to that effect. To Mr. Wilson's point, where there are discrepancies the city will fix those. This is collectivized as excluded. If there is somebody that is not classified as excluded they will be excluded. Mr. Wilson if there are discrepancies and not properly classified we will have to make that fix. Without getting too much into the weeds for the rest of it my understanding Mr. Wilson is that Mr. Stokes another representatives from ASPTEA have repeatedly approached HR with some of these inconsistencies or some places where they just don't believe that this part of the code makes sense. Without reveling too much, the city believes there may be some functions that this code no longer makes sense. If it will help resolve the issue today Mr. Wilson on this point is that you would be willing to commit to work with ASPTEA to work through some of those inconsistencies and focus on today just maintaining them as professional employees and working through those issues with ASPTEA later. Is that something that ASPTEA would be willing to do?

Eric Wilson, Attorney, ASPTEA, I would need to confer with my client of course.

William Brown, PERB Legal Counsel, can I ask a question?

Gregory Fretz, Chairman, yes you may.

William Brown, PERB Legal Counsel, Heidi, my question is, is it your desire to have the hearing officer report and recommendation accepted except for this discussion of confidentiality?

Heidi Gilbert, Attorney, City of Phoenix, yes Mr. Brown that's correct.

William Brown, PERB Legal Counsel, ok

Eric Wilson, Attorney, ASPTEA, certainly we would agree to that and to Ms. Gilbert's offer we would accept that we just wouldn't waive any opportunity to of course bring that to PERB should we come to a

disagreement. Without any waiver of those rights we would certainly agree to the offer the city just came forth.

Heidi Gilbert, Attorney, City of Phoenix, and the city would stipulate to that Mr. Wilson. We understand that PERB absolutely has the final say as to who falls where, who's excluded or not. I do know that the parties have identified some areas that could be addressed and unfortunately the difference between meet and confer and meet and discuss is that it is an all or nothing game in terms of this exclusion. The meet and confer ordinance says, certain confidential employees whereas the meet and discuss that once you are in that department or serving in that function, even if you are not doing the full range of those things you are automatically excluded. That's why the parties have seen some inconsistencies, I know that ASPTEA has identified some and I know that we have identified some and we would really welcome the opportunity to resolve them and maybe bring them to your attention. I will say this may even require modification of the code. There are just some things that just aren't making sense anymore the way it's defined. If we could have time to work on that resolution and then maybe bring those issues forward later.

Eric Wilson, Attorney, ASPTEA, we certainly don't need to hold up UC-19 for that.

William Brown, PERB Legal Counsel, Heidi, if I understand your argument basically the report and recommendation should be accepted, except for the last two paragraphs on page 22? It starts with whether or not the SA1 is a confidential employee can be determined?

Heidi Gilbert, Attorney, City of Phoenix, I would actually think just that paragraph, the whether or not the SA1. The second paragraph or the last paragraph on page 22, in addition to the specific declarations. I believe that is accurate.

William Brown, PERB Legal Counsel, it is just that one paragraph you want deleted from the report and recommendation?

Heidi Gilbert, Attorney, City of Phoenix, yes.

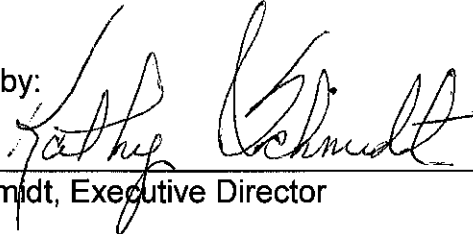
Gregory Fretz, Chairman, do we have a motion?

A motion was made by **Phillip Hanley, Management Member**, to adopt the Report and Recommendation of the Hearing Officer with the exception of the next to last paragraph on page 22, and that the Findings and

Conclusions of the Hearing Officer are herein incorporated by reference as part of this decision; and that the portion of the Petition seeking to move the classification of Safety Analyst from Unit 7 to Unit 2 be dismissed. The **motion** was seconded by **Joseph Diggs, Labor Member**, and carried by a vote of **4-0**.

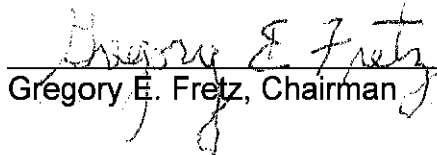
6. **Report on Pending Cases**
Kathy Schmidt, Executive Director gave update on pending cases.
7. **Kathy Schmidt, Executive Director** announced that the next meeting of the Board would be Tuesday, April 20, 2021 at 9:30 AM.
8. **Public Comment**
NA
9. **Joseph Diggs, Labor Member** made a **motion** that the meeting be adjourned. The **motion** was **seconded** by **Fernando Ortega, Public Member**, and carried by a unanimous vote of **4-0**.

Submitted by:



Kathy Schmidt, Executive Director

Approved by:



Gregory E. Fretz, Chairman