City of Lynden, Decision 7527-B (PECB, 2002)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 160	)	CASE 15624-E-01-2599
	)	
Involving certain employees of:	)	DECISION 7527-B - PECB
	)	
CITY OF LYNDEN	)	DECISION OF COMMISSION
	)	
	)	

Dennis P. London, Business Representative, for the union.

Visser, Zender and Thurston, by Deborra E. Garrett, Attorney at Law, for the employer.

This case comes before the Commission on an appeal filed by the City of Lynden, seeking to overturn the Executive Director's ruling that the chief of police is not a confidential employee. We affirm.

BACKGROUND

The City of Lynden (employer) is a growing city with a current population of approximately 9,300. The employer has a mayor-council form of government, under which an elected mayor and seven elected council members jointly appoint top managers such as the city administrator and the chief of police. The city administrator assists the mayor and has general supervisory authority over department heads, including the police chief. The city administrator has been the sole negotiator for the employer in all collective

bargaining negotiations with unions representing four bargaining units of City of Lynden employees.

The police department workforce includes the chief, two lieutenants, eight full-time police officers, three clerical employees, and numerous reserve police officers. Prior to this case, two bargaining units existed within the police department: a unit of non-supervisory police officers and a unit of clerical employees.

On February 5, 2001, International Association of Machinists and Aerospace Workers, District Lodge 160 (union), filed a petition under Chapter 391-25 WAC seeking to represent a bargaining unit of supervisory uniformed employees in the police department, consisting of the chief of police and two lieutenants. The employer initially claimed that all three should be excluded from bargaining as confidential employees under RCW 41.56.030(2)(c).

A hearing was held on May 22, 2001, before Hearing Officer Rex L. Lacy. At the hearing, the employer withdrew its contention that the two lieutenants are confidential employees and agreed that the lieutenants were eligible to be included in an appropriate bargaining unit. The parties filed post-hearing briefs on the remaining issue concerning the eligibility of the police chief.

On October 17, 2001, the Executive Director issued a direction of cross-check, ruling that the police chief is not a confidential employee. The decision also concluded that the police chief has a community of interest with the lieutenants in an appropriate separate bargaining unit of supervisors.

On October 29, 2001, the employer filed objections to the direction of cross-check. On December 1, 2001, the Commission issued an interim certification, certifying the union as the exclusive

bargaining representative while reserving the issue of whether the police chief is a confidential employee for further proceedings before the Commission.

POSITIONS OF THE PARTIES

The employer contends the police chief is a confidential employee, as defined in RCW 41.56.030(2)(c) and WAC 391-35-320, who should not be included in any bargaining unit. The employer claims the chief participates in the formulation of labor relations policy, participates in preparations for collective bargaining, implements the employer's labor policies, and participates in administration of collective bargaining agreements. The employer asserts the chief proposed a majority of the employer proposals advanced and accepted during recent collective bargaining negotiations.

The union argues that the employer did not present evidence proving that chief of police met the labor nexus test established in *International Association of Firefighters v. City of Yakima,* 91 Wn.2d 101 (1978). The union asserts the evidence supports the conclusion that the chief is a supervisor and that general supervisory authority is insufficient to qualify the chief for the confidential exclusion.

DISCUSSION

Applicable Legal Standards

Labor Nexus Test for Confidential Employees -
The declared purpose of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is to promote the continued improvement of

labor relations between public employers and public employees. RCW 41.56.010. RCW 41.56.030(2)(c) defines public employee as "any employee of a public employer except any person . . . (c) whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to (i) the executive head or body of the applicable bargaining unit . . . ." Thus, the exclusion of confidential employees from collective bargaining rights derives directly from the statute itself.

The Supreme Court of the State of Washington defined "confidential" narrowly when it adopted a labor nexus test in *City of Yakima* (emphasis added):

> We begin by discussing the meaning of the phrase confidential relationship in the context of the Public Employee's Collective Bargaining Act. That phrase ordinarily means a fiduciary relationship. . . . This relationship arises when continuous trust is reposed by one person in the skills or integrity of another. An employee who stands in such a relation to an employer must act for the benefit of the employer. . . .
>
> Those in whom such trust is continuously reposed could and perhaps would participate in the formulation of labor relations policy. They would be especially subject to a conflict of interest were they to negotiate on their own behalf. By excluding from provisions of a collective bargaining act persons who work closely with the executive head of the bargaining unit, and who have, by virtue of a continuous trust relation, assisted in carrying out official duties, including the formulation of labor relations policy, such conflict is avoided. And, public trust is protected since officials have the full loyalty and control of intimate associates. *When the phrase confidential relationship is used in the collective bargaining act, we believe it is clear that the legislature was concerned with an employee's potential misuse of confi-*

> *dential employer labor relations policy and a conflict of interest.*
>
> . . .
>
> *We hold that in 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 exclusion.*

Therefore, the confidential exclusion depends on the particular relationships of the persons involved, rather than objective criteria such as proximity of title, position on organization chart, job description, or role. *See Shelton School District,* Decision 1609-B (PECB, 1984).

In *City of Chewelah*, Decision 3103-B (PECB, 1989), the Commission expanded on the need to avoid conflicts of interest as follows:

> The "confidential" exclusion specifically protects the collective bargaining process, protecting the employer (and the process as a whole) from conflicts of interest and divided loyalties in an area where improper disclosure could damage the collective bargaining process. Possession of other types of information that are to be kept from public disclosure is not a threat to the collective bargaining process, and a showing that an employee holds a position of general responsibility and trust does not establish a relationship warranting exclusion from collective bargaining rights, where the individual is not privy to labor relations material, strategies, or planning sessions. *Bellingham Housing*

Authority, Decision 2140-B (PECB, 1985); *Benton County,* Decision 2719 (PECB, 1989).

In *City of Yakima*, the Supreme Court looked to the Educational Employment Relations Act, Chapter 41.59 RCW, for guidance on how to interpret the term "confidential" used in Chapter 41.56 RCW. Between the two often quoted statements set forth above from *City of Yakima*, the Supreme Court quoted the language of RCW 41.59.020(4)(c)(i) and (ii), where confidential employee is defined as follows:

> (i) Any person who participates directly on behalf of an employer in the formulation of labor relations policy, the preparation for or conduct of collective bargaining, or the administration of collective bargaining agreements, except that the role of such person is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment; and
>
> (ii) Any person who assists and acts in a confidential capacity to such person.

The Court voiced concern that any significant deviation from that definition in interpreting RCW 41.56.030(2) could produce anomalous results and expressed desire to maintain consistency between the interpretation of Chapter 41.56 RCW and Chapter 41.59 RCW. That interpretation of Chapter 41.56 RCW has not been seriously challenged since *Yakima* was issued in 1978.

In *Yakima School District,* Decision 7124-A (PECB, 2001), the Commission reiterated its commitment to apply the single confidential exclusion test set forth by the Supreme Court in *City of Yakima.* Several months later, in August 2001, the Commission adopted a rule to codify the labor nexus test for "confidential" status as follows:

> WAC 391-35-320 EXCLUSION OF CONFIDENTIAL EMPLOYEES. Confidential employees excluded from all collective bargaining rights shall be limited to:
>
> (1) Any person who participates directly on behalf of an employer in the formulation of labor relations policy, the preparation for or conduct of collective bargaining, or the administration of collective bargaining agreements, except that the role of such person is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment; and
>
> (2) Any person who assists and acts in a confidential capacity to such person.

Thus, although our rule was not adopted until after this case was filed, it merely codified established precedent.

Burden of Proof -

Consistent with the narrow interpretation by the Supreme Court in *City of Yakima*, the Commission has held that a party seeking to categorize an employee as confidential has a heavy burden of proof, because confidential status deprives the individual of all rights under the Public Employees' Collective Bargaining Act. *City of Chewelah,* Decision 3103-B (PECB, 1989), citing *City of Seattle,* Decision 689-A (PECB, 1979).

Substantial Evidence -

When considering appeals from this agency, Washington courts look for substantial evidence supporting our decisions. *City of Federal Way v. PERC,* 93 Wn. App. 509 (1998). Likewise, the Commission has affirmed decisions issued by staff members in numerous cases when, after reviewing the record on appeal, substantial evidence was found to support the findings of fact, and those findings of fact supported the conclusions of law. *Cowlitz County,* Decision 7007-A (PECB, 2000); *King County,* Decision 7104-A (PECB, 2001). Substan-

tial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the finding is true. *Bering v. Share,* 106 Wn.2d 212 (1986); *Cowlitz County; King County;* RCW 34.05.570(3)(e). The rule is based upon the notion that the trier of fact is in the best position to decide factual issues.

Application of the Legal Standards

Confidential Status of the Police Chief -

Based upon a full review of the record, the Commission holds that substantial evidence supports the Executive Director's decision. The employer did not meet its heavy burden of proving that the police chief is a confidential employee excluded from all collective bargaining rights. *City of Chewelah,* Decision 3103-B (PECB, 1989), citing *City of Seattle,* Decision 689-A (PECB, 1979). The Commission concludes that the police chief lacks the required labor nexus to exclude him from bargaining as a confidential employee.

The labor nexus test, established in *City of Yakima* and codified in WAC 391-35-320, has several requirements. First, an employee is a confidential employee if he or she participates directly on the employer's behalf in either: (1) "the formulation of labor relations policy," or (2) "the preparation for or conduct of collective bargaining," or (3) "the administration of collective bargaining agreements." At the hearing, the former city manager testified that the chief of police provided input and suggestions for issues that could be addressed in upcoming collective bargaining negotiations. Transcript at 27-30, 39, 41. That goes to the requirement that the employee "participates directly on behalf of an employer in . . . the preparation for or conduct of collective bargaining," but the analysis cannot end there.

The labor nexus test also requires that the employee perform the tasks described in the preceding paragraph in a manner that is "not merely routine or clerical in nature but calls for the consistent exercise of independent judgment." This highlights that the labor nexus test protects the employer and the collective bargaining process from conflicts of interest when improper disclosure could damage the collective bargaining process. The evidence presented by the employer does not support the conclusion that the police chief was involved with sensitive labor relations information whose improper disclosure could damage the collective bargaining process:

- The current and former city administrators testified that they routinely asked all department heads, including the police chief, to provide input and suggestions in preparation for upcoming bargaining sessions;
- the former city administrator testified that the chief responded to these requests and that some of his recommendations became part of the final contract. Transcript at 24, 27-30, 31, 39, 41; *see also* exhibits 1, 4.

The general practice described by those witnesses and the chief's responding to requests for information do not constitute the type of consistent exercise of independent judgment needed to qualify the chief for the confidential exclusion. The chief's participation in the formulation of labor relations policies and strategies was never more than indirect, away from the bargaining table.

The record does not show that the chief was in a fiduciary position where he helped to form, helped to analyze, or was even privy to economic proposals and counterproposals. The city administrator was the sole negotiator for this employer in collective bargaining negotiations; the chief did not participate in negotiations. The labor nexus test protects the employer and the collective bargain-

ing process from conflicts of interest when improper disclosure could damage the collective bargaining process. Nor does the record show that the chief of police was ever privy to sensitive labor relations information whose disclosure could damage the collective bargaining process.

Much of the testimony in this case described the duties performed by the chief of police. The chief's duties included: interpreting and applying the terms of the collective bargaining agreement to employees in his department (transcript at 37, 46, 55, 64-65; Brennick Declaration)[1]; recommending which clerical employees should be placed in a newly formed bargaining unit (transcript at 41-45); managing day-to-day personnel matters (transcript at 45-47, 55; Brennick Declaration); discipline (transcript at 49-50; Brennick Declaration); and hiring (Brennick Declaration). The testimony describing routine supervisory duties supports the conclusion that the chief functioned as a supervisor, not as a fiduciary who helped formulate confidential labor relations strategies and policies.

The city argues that the chief of police provided information to the city manager regarding issues that should be addressed in collective bargaining negotiations and that many of the chief's suggestions were incorporated into the final agreement. The chief, like other department supervisors, responded to routine requests and supplied information to the city manager. The chief provided this information as a natural extension of his knowledge and

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[1] The mayor of Lynden, Darryl Brennick, was unable to testify at the hearing in this matter. The employer requested that Brennick's declaration be admitted in evidence. The union agreed the declaration could be admitted in evidence so long as the record reflected that Mayor Brennick was not available for cross examination at the hearing. Transcript at 75-76.

expertise as a department supervisor - not because the chief had an intimate fiduciary understanding of the city's labor relations policies and strategies. In *City of Yakima*, the Washington Supreme Court stated that general supervisory responsibilities are not sufficient to make an employee a confidential employee who is excluded from collective bargaining rights.

We agree with the Executive Director's decision that the chief of police's job duties do not create the necessary labor nexus to make the chief of police a confidential employee.

Inclusion of the Chief in the Supervisory Bargaining Unit - The employer raises a new argument for the first time on appeal regarding the composition of the supervisory bargaining unit. During the investigation conference, the employer argued that the lieutenants should be excluded from any bargaining unit as confidential employees. The employer then argued in its post-hearing brief that the lieutenants should be included in the rank-and-file bargaining unit. Now, the employer acknowledges that the lieutenants are properly allocated to a separate unit of supervisors, but argues the police chief should not be placed in the same unit with the lieutenants.

The Commission relies on both procedural and substantive grounds in rejecting the employer's request that the police chief be excluded from the supervisory bargaining unit:

Procedurally, the Commission has previously held that it will not consider issues raised for the first time on appeal. *King County,* Decision 6994-95-B (PECB, 2002), citing *City of Bremerton,* Decision 2733-A (PECB, 1987).

Substantively, the Commission and courts have long upheld separate units of supervisors that include employees with different

levels of supervisory authority. *City of Richland,* Decision 279-A (PECB, 1978), *aff'd,* 29 Wn. App. 599 (1981), *review denied,* 96 Wn.2d 1004 (1981); *City of Seattle,* Decision 1797-A (PECB, 1985). These decisions avoid the fragmentation of bargaining units and preserve the community of interest of public employees who are excluded from rank-and-file bargaining units. The holding in these and similar cases, that separate units of supervisors are appropriate, is codified in WAC 391-35-340(2).

We affirm the Executive Director's decision that the separate unit of supervisors in the Lynden Police Department should include the chief of police and the lieutenants.

NOW, THEREFORE, it is

ORDERED

The Commission affirms and adopts the direction of cross-check issued by the Executive Director in this case.

Issued at Olympia, Washington, on the 9th day of October, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ LORALEE PERKINS

CASE NUMBER:	15624-E-01-02599	FILED:	02/05/2001	FILED BY:	PARTY 2
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DETAILS:	-				
COMMENTS:					

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