North Olympic Library System, Decision 7106 (PECB, 2000)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES	)	CASE 15024-E-00-2500
	)	
Involving certain employees of:	)	DECISION 7106 - PECB
	)	
NORTH OLYMPIC LIBRARY SYSTEM	)	DIRECTION OF ELECTION
	)	
	)	

John F. Cole, Director for Staff Services, represented the union.

Hal Enerson, Administrative Services Manager, represented the employer.

On February 8, 2000, the Washington State Council of County and City Employees (union), filed a petition with the Public Employment Relations Commission under Chapter 391-25 WAC, seeking certification as exclusive bargaining representative of certain supervisory employees of the North Olympic Library System (employer). The employer opposed the petition, asserting that each of the petitioned-for employees is a "confidential employee" under the statute. A hearing was held on April 24, 2000, before Hearing Officer Rex L. Lacy. The parties made oral arguments at the hearing, and waived filing of briefs.

Based on the evidence presented, the Executive Director rules that neither of the two assistant directors contested by the employer is a "confidential employee" excluded from bargaining rights under RCW 41.56.030(2)(c) and interpreting precedent. An election is directed to resolve the question concerning representation.

BACKGROUND

The North Olympic Library System operates public library facilities in Clallam County. The operation is under the policy direction of a five-member board appointed by the county commissioners. George Stratton has been the director of the library since 1990. For about the same period of time, Hal Enerson has been responsible for administrative matters, including labor relations.

The employer and union have an existing bargaining relationship, under a certification issued in 1979, for a bargaining unit of the employer's non-supervisory employees.[1] The employer and union were parties to a collective bargaining unit covering that bargaining unit when the union filed the petition to initiate this proceeding.

One of the petitioned-for employees holds the title of "assistant director of support services"; the other holds the title of "assistant director of public services".

POSITIONS OF THE PARTIES

The union acknowledges that the assistant directors are supervisors, but asserts that they are public employees eligible to organize and bargain under Chapter 41.56 RCW. It contends neither of them is a "confidential employee" within the meaning of RCW 41.56.020(2)(c). The union asserts that the assistant directors are not privy to documents closely connected to the employer's labor relations policies, and that they do not have regular and ongoing involvement with confidential labor relations materials.

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[1] Notice is taken of the Commission's docket records for Case 2348-E-79-425. The certification was issued as North Olympic Library System, Decision 746 (PECB, 1979).

It characterizes their involvement with administration of collective bargaining agreements as being within the normal range of supervisory functions.

The employer contends that the petitioned-for unit of supervisors is inappropriate because of the "executive nature" of decisions made by the two assistant directors, and that they have "in the past and recently" participated in confidential discussions related to personnel in collective bargaining issues. While it acknowledges that the "confidential" activity of the assistant directors "has been a very limited process recently", it argues that they are two of four executive positions in its entire system.

DISCUSSION

The Separate Unit of Supervisors

Decisions validating the propriety of separate bargaining units of supervisors go back to City of Tacoma, Decision 95-A (PECB, 1977), and it is clear that supervisors are employees with all rights conferred by Chapter 41.56 RCW. Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977).

The only substantial distinction between supervisors and other employees is an implementation of the unit determination criteria set forth in RCW 41.56.060. Supervisors are routinely excluded from the bargaining units which include their subordinates, in order to avoid a potential for conflicts of interest which would otherwise exist. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981).

The "Confidential" Exclusion

The employer has claimed that both of the assistant directors come within the definition of "confidential employee" found in RCW 41.56.030(2). That statute provides, in relevant part:

> "Public employee" means any employee of a public employer except any person ... (c) whose duties as a deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the public employer ...

In ruling on "confidential employee" issues, the Commission applies the labor nexus test established by the Supreme Court of the State of Washington in International Association of Fire Fighters v. City of Yakima, 91 Wn.2d 101 (1078), as follows:

> Those in whom ... 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 with an employer on their own behalf. By excluding from the 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 relationship, assisted in carrying out official duties, including formulation of labor relations policy, such conflict is avoided. And, public trust is protected since officials have 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 confidential employer labor relations policy and a conflict of interest.**
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> This concern is clearly expressed in the Educational Employment Relations Act, RCW 41.59. Although not controlling here, it

> contains an instructive definition of the confidential employee. It reads:
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> > (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.
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> RCW 41.59.020(4)(c)(i) and (ii).
>
> Were we to significantly alter this definition in interpreting RCW 41.56.030(2), an anomalous result would occur. ...
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> ...
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> **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.**

City of Yakima at 105-107 [emphasis by **bold** supplied].

The party claiming a "confidential" exclusion has a heavy burden of proof. City of Seattle, Decision 689-A (PECB, 1979). At the same time, employers are allowed some reasonable number of personnel who are exempt from the rights of the collective bargaining statute, in order to perform the functions of the employer in the collective bargaining process. Lewis County, Decision 5259 (PECB, 1995).

City of Yakima, supra, arose out of an employer's attempt to apply the "confidential employee" label to fire department battalion chiefs who were unquestionably supervisors. Immediately following the above-quoted holding in Yakima, the Supreme Court added: "General supervisory responsibility is insufficient to place an employee within the exclusion."

Application of Precedent

Exclusion by Formula -
The employer's characterization of the assistant supervisors as "executive" personnel is not persuasive.

At a minimum, it is appropriate to point out that the Commission has specifically rejected the use of any sort of numeric formula in making decisions on exclusions from bargaining units under the "confidential employee" category. See Walla Walla School District, Decision 5860-A (PECB, 1997), affirmed WPERR CD-1275 (Thurston County Superior Court, 1998).

In the context of administrative precedents which created a "managerial" category that has some basis in National Labor Relations Board precedent,[2] the Supreme Court confined the focus to the specific terms used in Chapter 41.56 RCW, writing:

> None of the positions involved carries the title "deputy", "administrative assistant", or "secretary".

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[2] As noted in footnote 1 of the METRO decision, the Public Employment Relations Commission had come into existence, and had supplied the Supreme Court with the Tacoma decision in which the Commission disavowed the "managerial-supervisors" category used by the Department of Labor & Industries while it administered Chapter 41.56 RCW prior to January 1, 1976.

> Unless the positions involved fall within one of these categories, the persons holding them are not excluded from the definition of "public employee" under the act. Furthermore, even if they fit one or more of the categories named in the statute, the persons holding them are nevertheless public employees if their duties do not necessarily imply a confidential relationship with the director ....

METRO, supra.

The term "executive" appears in Chapter 41.56 RCW, but only as part of an "executive head of the bargaining unit" phrase which is inapposite to the assistant director positions as they are now constituted.[3] The complete phrase only fits the library director.

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[3] The Executive Director notes two troubling statements made by employer officials during the hearing in this matter. As part of his opening statement, at page 12 of the transcript, Enerson said:

> The only thing I probably should add to that is based on their discussions should this unit be approved, the board is likely going to need to consider reorganization of the system in the sense that they feel it would be unacceptable to have employee — employees at the assistant director level position which they could not have a confidential relationship with if needed, and therefore may see the need to reclassify these employees as lead workers as opposed to assistant directors.

In his testimony at pages 19-20 of the transcript, Stratton said:

> And those are — those are decisions that have been a part of a confidential discussion that has taken place with myself, and I can see that the formation of this unit for me is going to have to — is going to change the way the library's organized.

A reorganization in response to organizing of a unit of supervisors was found to be an unfair labor practice in City of Mercer Island, Decision 1026-A (PECB, 1981).

Past Involvement in Executive or Confidential Roles -
The employer points out that an assistant director served as acting director of the library for a time, and even signed a collective bargaining agreement on behalf of the employer. The Executive Director is not persuaded by those facts which, although undisputed, occurred more than 10 years ago.

It is clear from the record that the assistant director who headed the operation during the search for a new director reverted to a lesser role upon the arrival of George Stratton as director in June of 1990. It is also clear that Enerson has had primary responsibility for labor relations matters during most or all of Stratton's tenure as director. The activities performed during and before 1990 cannot be described as "ongoing" by any stretch of the term. The evidence does not support a finding that an assistant director who is "in charge" during a routine absence of Stratton (such as for vacation or a conference) would have or exercise the full authority of the director. The possibility that an assistant director might be called upon to serve as "acting" director should the director position become vacant in the future is too remote and theoretical to justify depriving the assistant directors of their statutory rights under Chapter 41.56 RCW.[4]

Consultation is a Supervisory Function -
The administration of collective bargaining agreements and adjustment of contractual grievances are traditional and normal activities of supervisors, and so do not qualify a person who performs those functions for exclusion as a "confidential employee" under RCW 41.56.030(2). When preparing for contract negotiations or preparing responses to union proposals, it is common and

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[4] There is certainly no indication in the evidence that Stratton's departure is anticipated or imminent.

entirely appropriate for senior management officials to consult with supervisors who work closer to the actual implementation of contract language.

Consultation does not equate with having advance information about what the employer's positions will be at the bargaining table. There is no evidence here that the assistant directors are privy to the employer's strategies for bargaining, or to the alternatives and proposals considered by the employer before they are presented to a union. Enerson is the employer's negotiator in collective bargaining, almost to the exclusion of Stratton and certainly to the exclusion of the assistant directors. Enerson communicates directly with the board on labor relations issues,[5] while the assistant directors have had minimal contact with the board in general, and no recent confidential contacts with the board on labor relations matters. The situation of the assistant directors is thus clearly distinguishable from that of police majors excluded as "confidential" in City of Bellevue, Decision 6699 (PECB, 1999), because the assistant directors do not go beyond providing operational advice.[6]

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[5] In the public sector, it is typical for employer negotiators to perform their functions within a range of authority conferred upon them, and to negotiate tentative agreements which are subject to ratification at an open, public meeting of a governing board. See State ex rel. Bain v. Clallam County, 77 Wn.2d 542 (1970).

[6] In addition to providing operational advice, the police majors in Bellevue participated in management team discussions of strategy, had freedom to look at the whole range of authority conferred upon that employer's negotiator, to assess how items could be packaged in a manner that might be acceptable to both parties, to question the amount allocated, or make recommendations to increase the funds available. In some instances, proposals have been substantially modified.

FINDINGS OF FACT

1. The North Olympic Library System is a municipal corporation of the state of Washington, and is a public employer within the meaning of RCW 41.56.030(1).

2. Washington State Council of County and City Employees, AFSCME, AFL-CIO, a bargaining representative within the meaning of RCW 41.56.030(3), filed a petition with the Public Employment Relations Commission, seeking certification as exclusive bargaining representative of certain supervisory employees (assistant directors) employed by the North Olympic Library System.

3. The employer and union have an existing collective bargaining relationship for a bargaining unit of non-supervisory employees.

4. Employees holding the assistant director positions are supervisors within the meaning of Commission precedent.

5. Employees holding the assistant director positions have no regular or ongoing responsibilities regarding the formulation or implementation of the employer's labor relations policies, do not participate in collective bargaining on behalf of the employer, and are not privy to confidential information concerning the employer's labor relations policies.

CONCLUSIONS OF LAW

1. Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC.

2. A bargaining unit consisting of all supervisory employees of the North Olympic Library System, excluding board members appointed for a fixed term of office, the library director, confidential employees, and non-supervisory employees, is an appropriate unit for the purposes of collective bargaining under RCW 41.56.060, and a question concerning representation currently exists in that bargaining unit under RCW 41.56.070.

3. The assistant directors are public employees within the meaning of RCW 41.56.020(2), and are eligible to vote in the representation election directed in this proceeding.

DIRECTION OF ELECTION

A representation election shall be conducted by secret ballot, under the direction of the Public Employment Relations Commission, in the appropriate bargaining unit described in paragraph 2 of the foregoing Conclusions of Law, for the purpose of determining whether a majority of the employees in that unit desire to be represented for the purposes of collective bargaining by Washington State Council of County and City Employees or by no representative.

Issued at Olympia, Washington, the 22nd day of June, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

This order may be appealed to the Commission by filing objections under WAC 391-25-590.