

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
)
SERVICE EMPLOYEES INTERNATIONAL)
UNION, LOCAL 519) CASE 15762-E-01-02622
)
Involving certain employees of:) DECISION 7814-B - PECB
)
CITY OF REDMOND) DECISION OF COMMISSION
)
)
_____)

Thomas A. Leahy, Attorney at Law, for the union.

Ogden, Murphy, Wallace, P.L.C.C., by *Douglas E. Albright*,
Attorney at Law, for the employer.

This case comes before the Commission on timely objections filed by the City of Redmond, seeking to overturn a decision of Executive Director Marvin L. Schurke, holding the administrative commander of the police department is not a confidential employee.¹ We affirm.

BACKGROUND

The City of Redmond (employer) is located in King County. The supervisory law enforcement staff (serving directly under the chief of police) consists of an assistant chief and four commanders. The employer and the Redmond Police Association have bargaining relationships for two bargaining units: A unit of non-supervisory law enforcement officers ("commissioned unit"), and a unit of support staff ("support unit").

¹ *City of Redmond*, Decision 7814 (PECB, 2002).

On April 17, 2001, Service Employees International Union, Local 519 (union) filed a petition seeking certification as exclusive bargaining representative for the five supervisory law enforcement officers. The parties later stipulated that the assistant chief should be excluded from, and that two of the commander positions were properly included in, that separate unit of supervisors. The status of the remaining two commander positions was the subject of a hearing held on September 25 and November 13, 2001, before Hearing Officer Kathleen O. Erskine. The parties filed post-hearing briefs.

On August 21, 2002, the Executive Director issued a direction of cross-check, ruling that the day-shift operations commander was properly excluded from the bargaining unit as a confidential employee, but that the administrative commander was eligible for inclusion in the bargaining unit. On September 23, 2002, the employer filed objections to the eligibility ruling.²

POSITIONS OF THE PARTIES

The employer contends the administrative commander is a confidential employee, as defined in RCW 41.56.030(2)(c) and WAC 391-35-320, who should be excluded from the bargaining unit. The employer argues that the administrative commander position has historically been involved in the collective bargaining process, reports directly to and has an intimate relationship with the chief of

² The cross-check was conducted on September 17, 2002. The Commission issued an interim certification on November 12, 2002, certifying the union as exclusive bargaining representative. *City of Redmond*, Decision 7814-A (PECB, 2002). The issue of whether the administrative commander is a confidential employee was reserved for further proceedings before the Commission.

police and the assistant chief, has access to confidential information used in the formulation of labor policy, and consistently uses independent judgment.

The union points out that if the administrative commander position were found to be confidential, then three out of the five positions it originally sought would be excluded from the bargaining unit. The union asserts the employer has not demonstrated that it is necessary to exclude the position (as required in *City of Cheney*, Decision 3693 (PECB, 1991)), nor reasonable (as described in *Yakima School District*, Decision 7124-A (PECB, 2001)). In addition, the union objects that the proposed exclusion is not based on a pre-existing labor nexus, but rather on speculation as to future job duties of the administrative commander.

DISCUSSION

Applicable Legal Standards

Labor Nexus Test for Confidential Employees -

The phrase "confidential relationship" in the context of the Public Employees' Collective Bargaining Act is meant to express the legislature's concern with an employee's potential misuse of confidential employer labor relations policy information and the potential for a conflict of interest. An employee would especially be subject to a conflict of interest were they to negotiate with an employer on their own behalf. Confidential employees are therefore excluded from the protection of collective bargaining rights. *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978).

In 2001, the Commission adopted WAC 391-35-320 to codify the "labor nexus" ruling of the Supreme Court of the State of Washington in *City of Yakima*. Under that labor nexus test, the Commission has limited the exclusion of confidential employees to those having access to confidential information about the employer's labor relations policies:

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.

Persons who could have access to the type of confidential information which might damage the collective bargaining process are rightfully excluded from bargaining units. Occupying a position of general responsibility and trust does not establish a relationship warranting exclusion from collective bargaining rights, however, if the individual is not privy to labor relations material, strategies, or planning sessions. *Bellingham Housing Authority*, Decision 2140-B (PECB, 1985).

A confidential employee need not work exclusively, or even primarily, on confidential work, so long as the assignments can be described as necessary, regular, and ongoing. *City of Cheney*, Decision 3693 (PECB, 1991).

Burden of Proof -

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 Chapter 41.56 RCW. *City of Chewelah*, Decision 3103-B (PECB, 1989), citing *City of Seattle*, Decision 689-A (PECB, 1979).

Application of Legal Standards

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 administrative commander is now a confidential employee. The Commission concludes that the administrative commander lacks the required pre-existing labor nexus necessary to exclude him from the bargaining unit. Speculation that Morgan will be asked to be on the bargaining team at some time in the future is not sufficient evidence to support the employer's position.

The Challenged Findings of Fact -

The employer takes issue with two findings of fact in the Executive Director's decision:

- The employer believes the Executive Director erred in finding of fact 4, by unduly limiting the job description for the position of commander; and
- The employer believes the Executive Director erred in finding of fact 6, by holding there was insufficient evidence to show Morgan had necessary, regular, and ongoing involvement with confidential labor relations policy and strategy.

The Commission does not agree. The challenged findings of fact are supported by substantial evidence.

The person who previously held the administrative commander position, James Kriebel, consistently participated in labor

negotiations on behalf of the employer with both the support unit and the commissioned unit.³ The person in a "support services commander" position that had existed from about 1997 to about 1999 was in charge of records and support personnel, and also served on the employer's bargaining team for negotiations with the support unit. Transcript at 106, 112, 134, 217. After a reorganization of the department, the supervision of the support unit and records division was ultimately transferred to the administrative commander. Kriebel retired in October 2000, and was replaced by the current administrative commander, Terrence Morgan, in February 2001.

Prior to his appointment as administrative commander, Morgan had served as an operations commander, he primarily had oversight of the Traffic Division, and he had never been involved in collective bargaining on behalf of the employer. Through the time of the hearing in this matter, Morgan had never been involved in contract negotiations for the employer, and had never been involved in costing out contract proposals. Transcript at 169-70, 195, 210. He has not seen employer proposals prior to their presentation to a union.

History Not Conclusive -

The employer argues that since Morgan now occupies the administrative commander position, he is a confidential employee because of the nature of the historical duties of that position. The employer would have us accept Kriebel's past involvement, as a seasoned labor negotiator for the employer, as evidence to satisfy the "labor nexus" test for the administrative commander position.

³ Contrary to an employer argument, Kriebel testified that his budget duties as administrative commander did not play a role in his negotiation assignments. Transcript at 92.

Employees are not to be considered confidential based on speculative inferences. In *Pateros School District*, Decision 3911-B (PECB, 1992), the Commission looked to the actual facts when evaluating the status of an individual who computed the costs of bargaining proposals. Because that individual had never been told to keep the information confidential, she was left in the bargaining unit. Noting that "confidential" questions can be raised at any time under WAC 391-35-020, the Commission left the possibility of changed instructions to a future case.

The requirement that contact be ongoing means an employee whom the employer speculates might handle sensitive information in the future cannot be excluded as confidential. *City of Winslow*, Decision 3520-A (PECB, 1990). The test for confidential exclusions is based on the actual labor nexus duties and responsibilities at the present time. *Kennewick School District*, Decision 6957 (PECB, 2000). "Present time" refers to the time the hearing was held. Until Morgan actually satisfies the labor nexus test, he remains eligible for protection under the collective bargaining act.

Employer Claims are Speculative -

An employer will be allowed a reasonable number of "confidential" exclusions. *City of Bellevue*, Decision 6699 (PECB, 1999), citing *Lewis County*, Decision 5259 (PECB, 1995). The employer argues here that it will be necessary to have the administrative commander at the bargaining table because that position is most familiar with the intricacies of the support unit employees, but the Commission is not persuaded that such a connection is necessarily implied. The department has undergone one recent reorganization, and the administrative commander has only recently begun to manage the support employees. Kriebel was at the bargaining table for the support unit even before it came under his direct control. Thus, the employer's selection of its negotiators seems to have had less

to do with the nature of his particular job duties than with the fact of being a seasoned negotiator.⁴

Job descriptions and duties are not static entities. They change as organizations evolve, expand, downsize, or face new challenges. While the Commission does not doubt that Morgan *could* become involved with sensitive labor relations information at some time in the future, we must base our decision on the evidence presented at the hearing.⁵

It is similarly unnecessary for us to address the union's claim that there is no need for exclusion of three "confidential" employees in this department. Billington testified that, in addition to himself, two attorneys, the employer's human resources director, and the assistant chief all participated in the employer's preparation for negotiations with the commissioned unit. Transcript, page 189. The fact is, however, that Morgan was not asked to participate in that effort. Thus, there is no occasion for us to decide whether his addition to that cadre would have been either reasonable or necessary under *Yakima School District*, Decision 7124 (PECB, 2001), and *City of Cheney*, Decision 3693 (PECB, 1991).

The Size of the Unit -

The union asserts a concern about "stranding" while the employer suggests that the size of the bargaining unit is of no consequence.

⁴ Chief Steven Harris testified that Kriebel had a "unique" talent for personnel issues, and therefore was regularly involved in communicating with city officials about labor relations issues. Transcript at 35.

⁵ Morgan speculated that he would "probably be asked" to participate in the next support unit negotiations, but at the time of the hearing he had not even been directly approached on that matter. Transcript at 174.

A bargaining unit of two or more employees can be found appropriate. WAC 391-35-330. Any supervisor who does not qualify for exclusion as a "confidential" employee will properly be included in the separate bargaining unit of supervisors.

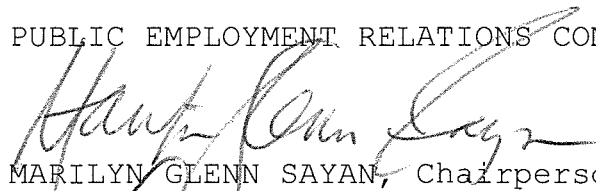
NOW, THEREFORE, it is


ORDERED

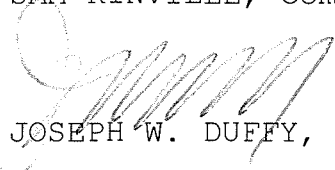
1. The findings of fact, conclusions of law, and eligibility ruling issued by the Executive Director are AFFIRMED.
2. The case is remanded to the Executive Director for issuance of the appropriate final certification.

Issued at Olympia, Washington, the 11th day of March, 2003.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARILYN GLENN SAYAN, Chairperson


SAM KINVILLE, Commissioner


JOSEPH W. DUFFY, Commissioner