

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
WASHINGTON STATE COUNCIL OF	)	CASE 17138-E-03-02802
COUNTY AND CITY EMPLOYEES	)	
	)	DECISION 8080-A - PECB
Involving certain employees of:	)	
	)	ORDER DETERMINING
CITY OF LYNNWOOD	)	ELIGIBILITY ISSUES
_____	)	

*David M. Kanigel, Attorney at Law, for the union.*

*Ogden Murphy Wallace, by Greg A. Rubstello, Attorney at Law, for the employer.*

On January 24, 2003, the Washington State Council of County and City Employees (WSCCCE) filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission, involving certain employees of the City of Lynnwood (employer). The WSCCCE sought certification as exclusive bargaining representative of various clerical, technical and professional employees in the employer's Parks, Recreation and Cultural Arts Department, Community Development Department, Public Works Department, Police Department, and Mayor's Office. The proposed bargaining unit encompassed approximately 93 employees out of a total employer workforce that can number more than 500 employees (including about 330 regular full-time employees, 25 regular part-time employees, and 50 to 150 seasonal employees). The WSCCCE already represented some other clerical and professional employees in the Parks, Recreation and Cultural Arts Department and in the Public Works Department. A local union affiliated with the International Brotherhood of Teamsters already represents some

maintenance employees in those departments. The WSCCCE filed an amended petition on April 17, 2003, adding some office-clerical employees to the proposed bargaining unit.

Representation Coordinator Sally Iverson conducted an investigation conference on April 25, 2003. During that conference, the parties stipulated to the jurisdiction of the Commission under Chapter 41.56 RCW, and they stipulated other matters that were conditions precedent to determining a question concerning representation. The parties framed issues as to the eligibility of certain employees for inclusion in the bargaining unit.

The WSCCCE filed a second amended petition on April 28, 2003, adding recreation employees to the bargaining unit description. The parties disagreed as to the eligibility of certain of those individuals for inclusion in the bargaining unit.

A representation election was conducted on May 13, 2003, with disputed individuals voting by challenged ballot.<sup>1</sup> A majority of the ballots cast favored the WSCCCE, and an interim certification was issued on May 21, 2003, naming the WSCCCE as exclusive bargaining representative. The bargaining unit was described as follows:

All full-time and regular part-time clerical, technical and professional employees of the City of Lynnwood, excluding supervisors, confidential employees, maintenance employees, recreational employees and all other employees.

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<sup>1</sup> Although the investigation statement issued in this case erroneously indicated that no issues remained in dispute, notes in the case file indicated that certain employees were to vote by challenged ballot. Those notes were honored in the election process.

The case was kept open for disposition of the reserved eligibility issues, and Hearing Officer Joel Greene held a hearing on May 18, 19, and 20, 2004. At the time of hearing, no collective bargaining agreement was in place between the employer and the WSCCCE. The parties filed post-hearing briefs in August 2004.

#### ISSUES PRESENTED

1. Should four named individuals be excluded as "confidential" under the applicable statute, rule, and precedents?
2. Should five named employees be excluded as "supervisors" under the Commission's rules and precedents?

On the basis of the record as a whole, the Executive Director rules that: (1) Only three individuals are properly categorized as "confidential employees" excluded from the bargaining unit; and (2) none of the disputed employees are properly excluded, as supervisors, from the bargaining unit.

#### ANALYSIS

The determination and modification of bargaining units is a function delegated by the Legislature to the Public Employment Relations Commission. RCW 41.56.060. Such issues are routinely resolved in representation proceedings under Chapter 391-25 WAC.

#### Issue 1: Are the Disputed Individuals "Confidential"?

The exclusion of confidential employees is rooted in statute. Excluded from the definition of "public employee" in RCW 41.56.030(2) is: "[A]ny person . . . (c) whose duties as deputy, administrative assistant or secretary necessarily imply a confiden-

tial relationship to the executive head or body of the applicable bargaining unit." The Supreme Court of the State of Washington gave the confidential exclusion a narrow interpretation in *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978). In 2001, the Commission adopted a rule to codify the "labor nexus" ruling in the *City of Yakima* decision. That rule reads 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 judgement; and

(2) Any person who assists and acts in a confidential capacity to such person.

*Concrete School District*, Decision 8131 (PECB, 2003), *aff'd*, Decision 8131-A (PECB, 2004) and numerous other Commission decisions establish that employers will be allowed a reasonable number of excluded confidential employees, but the exclusion is still limited to avoiding potential misuse of the employer's confidential labor relations policy information and avoiding conflicts of interest damaging to the collective bargaining process.

The Commission decides unit questions based on present facts, not future plans. *Mount Vernon School District*, Decision 6858-A (PECB, 2000), *citing Colville School District*, Decision 5319-A (PECB, 1996). A confidential employee need not work exclusively (or even primarily) on "labor nexus" work, so long as the assignments can be described as necessary, regular and ongoing. *City of Redmond*, Decision 7814-B (PECB, 2003). Importantly, occupying a position of general responsibility and trust is clearly insufficient to warrant

exclusion as a confidential employee, absent evidence that the individual is privy to labor relations material, strategies, or planning sessions. *City of Redmond*, Decision 7814-B.

Issues remain in this case as to whether four individuals are excludable as confidential employees.<sup>2</sup> A separate analysis follows as to each disputed individual.

Is Carolyn Wies a Confidential Employee?

Wies provides office-clerical support to the employer's mayor and to William Nolan, who occupies a position titled "assistant city administrator" on the employer's table of organization.<sup>3</sup> Wies works at a desk just outside the offices occupied by the mayor and Nolan. She prepares correspondence for both the mayor and Nolan, and she opens, reviews and distributes their incoming mail. Wies attends and takes notes at public meetings of the city council, as well as at weekly administrative staff meetings with the mayor, Nolan, and department heads.

The employer retains an outside consultant for collective bargaining, and assigns various staff members to its bargaining teams. The mayor does not participate directly in collective bargaining

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<sup>2</sup> The parties stipulated the exclusion of the administrative assistant in the Public Works Department (Allison Hudson) and the administrative assistant in the Community Development Department (Sandra Wallenfelsz or Shay Danner) as confidential employees. In accepting the parties' stipulations, the Executive Director makes no ruling as to the propriety of those exclusions.

<sup>3</sup> It is clear from the testimony that Nolan reports directly to the mayor. While there is reference to a "city administrator" in the testimony in this record, no such position appears on the organization chart admitted in evidence. The references to a "city administrator" are thus understood to relate to Nolan.

negotiations, but Nolan sits at the bargaining table on behalf of the employer, and he works with the mayor, the outside consultant, and the other members of the employer's bargaining teams, to formulate strategy and proposals.

Wies does not attend executive sessions of the city council, and has historically been excluded from at least some discussions of labor relations matters at administrative staff meetings, but she still has regular and ongoing contacts consistent with a "derivative" exclusion under WAC 391-35-320(2):

- Wies distributes envelopes to city council members that may include confidential collective bargaining documents to be reviewed in executive sessions, including materials that come from the employer's negotiators or the outside consultant.
- Wies did not recall opening any email messages dealing with collective bargaining negotiations, but Nolan has given her both summaries of bargaining positions (for forwarding to the city council members) and drafts of collective bargaining agreements before they are final.
- Wies has not seen or had access to notes made by the employer's bargaining team during negotiations, and she has not filed or edited any documents with regard to negotiations, but she has authorized access to the files containing employer policies, positions, and strategies in negotiations.

Because of her work location in a small cluster of offices, Wies is in a position to overhear conversations between the mayor and Nolan, and their conversations with others. Wies has heard (and even participated in) conversations about employer policies or bargaining positions. Wies is thus privy to the employer's proposals before they are presented at the bargaining table.

Wies alerts the mayor or Nolan when a grievance is appealed to the mayor, and the mayor then works with the employer's human resources officials and attorney to prepare a response. Wies has both overheard conversations between the mayor and others regarding grievances and has edited grievance responses at the mayor's direction. While grievance processing is only a "supervisor" function at initial levels, under *City of Seattle*, Decision 1797-A (PECB, 1985), it can take on greater significance at the employer-wide level. Here, the facts support a "derivative" exclusion of Wies under WAC 391-35-320(2).

Applying the established standard, this record supports exclusion of Wies as a confidential employee. Wies functions in a support role to persons directly involved in the formulation of the employer's labor relations policies and preparation for and conduct of collective bargaining. Her exclusion will protect the employer and the collective bargaining process from inappropriate disclosures of confidential employer information. See *Olympia School District*, Decision 4736-A (PECB, 1994).

Is Angela Madsen a Confidential Employee?

Madsen is the support services manager in the employer's Police Department. She is at the same level of the organization chart as three others who are excluded from bargaining units. Madsen has seven full-time police clerks, one part-time clerk, two full-time evidence officers, five part-time cadets, and one part-time data entry clerk who work under her. The data entry clerk is included in the bargaining unit represented by the WSCCCE, while the clerks and the evidence technicians are represented by another union.<sup>4</sup>

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<sup>4</sup> In *City of Lynnwood*, Decision 3982 (PECB, 1992), the Lynnwood Police Guild was certified as exclusive bargaining representative of police support employees.

Madsen sat at the bargaining table for the employer in the contract negotiations between the employer and the union representing the police support employees. There is uncontroverted testimony that her participation included development of both employer proposals and strategies, and that she had input into the positions the employer took on various issues.

Applying the established standard, Madsen qualifies as a confidential employee under WAC 391-35-320(1). The uncontroverted testimony about her direct participation in collective bargaining on behalf of the employer establishes that her role was not merely routine or clerical in nature. The fact that Madsen has not assisted with collective bargaining between the employer and the WSCCCE is irrelevant, because Madsen has access to confidential labor relations information that could apply to (and be misused in connection with) negotiations between the employer and the WSCCCE. The employer's human resource director testified that the employer has organization-wide bargaining strategies that carry over in its negotiations with various unions, and the policy concerns that underlie the confidential exclusion apply employer-wide.

Is Robert Colinas a Confidential Employee?

Colinas had been the employer's park maintenance superintendent for about 27 years at the time of the hearing. He reports to Craig Larsen, who has been director of the Parks, Recreation and Cultural Arts Department for about two years, and is at the same level on the employer's departmental organization chart as Recreation Manager Katie Anderson and Golf Superintendent Gary Stormo, who are excluded from the bargaining unit represented by the WSCCCE. Colinas supervises 10 full-time maintenance employees who are in the bargaining unit represented by the Teamsters union, and the parties stipulated that he is excluded from that bargaining unit.



Prior to the arrival of Larsen, Colinas sat at the bargaining table for the employer in contract negotiations with the Teamsters union. Larsen has taken over the at-the-table role, but Colinas provided Larsen with a list of issues he wanted addressed before the latest negotiations began between the employer and the Teamsters. Larsen frequently sought Colinas' opinion on a variety of bargaining matters during the negotiations, including management proposals and strategies, and the wages and working conditions of the employees involved.

Applying the established standard, this record supports exclusion of Colinas as a confidential employee. Even though he is no longer a direct participant excluded under WAC 391-35-320(1), Colinas assists and acts in a confidential capacity to Larsen, who participates directly in the formulation of labor relations policy and preparation for and conduct of collective bargaining. Those facts distinguish this case from *Richland School District*, Decision 2208-A (PECB, 1985), where a "derivative" exclusion terminated upon a change of circumstances that ended the labor nexus work of the person supported. Colinas continues to meet the "labor nexus" test for a "derivative" exclusion under WAC 391-35-320(2).<sup>5</sup>

Is Elena Victorine a confidential employee?

Victorine has been an administrative assistant in the Parks, Recreation and Cultural Arts Department for more than four years. She reports to Larsen and works in an open cubicle located near Larsen's office. She opens Larsen's mail, and she has access to

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<sup>5</sup> At the hearing, the employer argued that Colinas lacks a community of interest with the other employees represented by the WSCCCE. With the conclusion that Colinas is properly excluded as a confidential employee, it is not necessary to reach or decide the employer's community of interest arguments. See *Concrete School District*, Decision 8131-A.

everything in Larsen's office. She processes purchase orders, requisitions, and correspondence, and also handles personnel issues concerning both represented and unrepresented employees. She collects numbers from supervisors for the department budget, and assembles materials in the budget format. She prepares the agendas for the city council. She testified that she coordinates a newsletter titled "Inside Lynnwood" and Lynnwood University.

Victorine has not been asked to manipulate data or compute package costs for collective bargaining, and has not even seen any email messages having to do with collective bargaining. Although she knew that Larsen had a copy of the collective bargaining agreement covering the Teamsters unit in his file cabinet, Victorine testified that she had never looked at a collective bargaining agreement. She has not seen any documents that could be characterized as economic proposals for wages or insurance, policy positions, strategies, notes, minutes, or collective bargaining proposals, and has never prepared materials for contract negotiations. Although she provides some clerical support to Colinas, she has not assisted him with collective bargaining matters.

Applying the established standard, this record does not support exclusion of Victorine as a confidential employee. Her limited work on the department budget fails to meet the "labor nexus" test, absent any evidence that she is involved with preparation of proposals for collective bargaining negotiations. *Concrete School District*, Decision 8131. The evidence that she has dealt with some documents concerning disciplinary matters and grievances at the department level is largely irrelevant, because those are primarily supervisory functions at their early stages. *City of Milton*, Decision 5202 (PECB, 1995) (citing *City of Seattle*, Decision 1797-

A).<sup>6</sup> Victorine provides support to a manager who has only a peripheral involvement in labor nexus work. The employer should be able to avoid compromise of its labor relations materials and strategies by modest changes of office practices, perhaps as simple as supplying Larsen with a locking file cabinet and using "confidential" labels on sensitive materials.<sup>7</sup> See *Clover Park School District*, Decision 2243-A (PECB, 1987).

Issue 2: Are the Disputed Employees Supervisors?

Supervisors have the same collective bargaining rights as other public employees under Chapter 41.56 RCW. *Metro v. Department of Labor and Industries*, 88 Wn.2d 925 (1977). The Commission has, however, exercised its unit determination authority to exclude supervisors from the bargaining units that contain their rank-and-file subordinates, in order to limit or prevent conflicts of interest arising when supervisors and their subordinates are in the same bargaining unit. *City of Puyallup*, Decision 5639-B (PECB, 1997) (citing *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981)).

The Commission codified the *Richland*, Decision 279-A, and *Metro*, 88 Wn.2d 925, precedents in WAC 391-35-340, stating in part:

(1) It shall be presumptively appropriate to exclude persons who exercise authority on behalf of the employer over subordinate employees (usually termed "supervisors") from bargaining units containing their rank-and-file

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<sup>6</sup> Undermining any claim of "necessity" for the proposed exclusion, Larsen acknowledged that he could work around Victorine if the parks planner were to be involved in a future disciplinary issue or grievance.

<sup>7</sup> Even now, Victorine only reviews Larsen's email messages when he is on vacation.

subordinates, in order to avoid a potential for conflicts of interest which would otherwise exist in a combined bargaining unit.

The focus of the Commission's precedents and rule is on avoidance of the potential for conflicts of interest that would exist when supervisors acting on behalf of their employer are included in the same bargaining unit as the employees they supervise. Employees categorized as "leadworkers" are not excluded from bargaining units on that basis.<sup>8</sup> Leadworkers may possess limited authority, such as directing subordinates in their daily job assignments, or may have limited discretionary authority in administrative matters, but are distinguished from supervisors by the absence of the independent authority to make meaningful changes in the employment relationship that is the hallmark of "supervisor" status and the basis for concern about conflict of interest within a bargaining unit. *Grant County*, Decision 4501 (PECB, 1993).

Because Chapter 41.56 RCW does not contain a definition of supervisor, the Commission has looked to the definition of supervisor set forth in RCW 41.59.020(4)(d):<sup>9</sup>

[S]upervisor . . . means any employee having authority, in the interest of an employer, to hire, assign, promote, transfer, layoff, recall, suspend, discipline, or discharge other employees, or to adjust their grievances, or to recommend effectively such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature but calls for the

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<sup>8</sup> Similarly, the potential for conflicts of interest is reduced or eliminated if the employees supervised are not in the same bargaining unit as the individual claimed to be a supervisor. *City of Puyallup*, Decision 5639-B.

<sup>9</sup> Chapter 41.59 RCW is the Educational Employment Relations Act (EERA). It covers only the certificated (faculty) employees of common school districts.

consistent exercise of independent judgment. . . . The term "supervisor" shall include only those employees who perform a preponderance of the above-specified acts of authority.

The "preponderance" term has been interpreted as meaning that the disputed employee either spends a preponderance of his/her work time engaged in supervisory indicia or engages in a preponderance of the types of supervisory indicia. *Granite Falls School District*, Decision 7719 (PECB, 2002), *aff'd*, Decision 7719-A (PECB, 2003). When looking at the "types" of supervisory indicia, it is important to determine whether a disputed position has independent authority to act in the interest of the employer. *Grant County*, Decision 4501; *Granite Falls School District*, Decision 7719. The supervisor at issue need not be the final authority on such actions - making recommendations to a higher authority is sufficient, if the recommendations are effective. *Grant County*, Decision 4501; *Granite Falls School District*, Decision 7719.

Determinations on whether an individual should be excluded as a supervisor are based on the actual duties and authority exercised by that individual; the titles and characterizations applied to positions by the parties are not controlling. *Concrete School District*, Decision 8131; *City of Redmond*, Decision 8486 (PECB, 2004). Substantial similarity in duties and working conditions shared by the disputed employee and the bargaining unit employees, reduces the potential for the types of conflicts of interest that the Commission has sought to avoid. *Granite Falls School District*, Decision 7719, *aff'd*, Decision 7719-A. Additionally, having evaluations made by employees who are in the best position to observe the performance of subordinate employees does not necessarily pose sufficient conflict of interest to warrant a supervisory exclusion. *City of Redmond*, Decision 8486.

Are Three Community Development Employees Supervisors?

The workforce in the employer's Community Development Department includes both unrepresented employees and employees represented by the WSCCCE. James Cutts has been the department head since 1998, when a permits and inspections function was added to the department. Cutts organized the department along functional lines, with one of his direct subordinates specializing in current planning (Kevin Garrett), another of his direct subordinates specializing in comprehensive planning (Ronald Hough), and a third direct subordinate in charge of permits/inspections (Kenneth Korshaven). The employer now contends that Garrett, Hough and Korshaven should be excluded, as supervisors, from the bargaining unit involved in this proceeding. Garrett and Hough attend weekly staff meetings with Cutts, and all three of the disputed employees and Cutts attend two additional weekly meetings to review actions of the city council and the mayor. If Cutts is absent, one of the division managers may be designated to act in his place.<sup>10</sup>

Kevin Garrett has held his current position since 1998. Four employees included in the bargaining unit represented by the WSCCCE report to Garrett: A senior planner, two associate planners and a plans examiner. Testimony established that Garrett's duties include the following:

Hiring: Although Garrett testified that he has minimal supervision when hiring, the evidence indicates that he needs

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<sup>10</sup> Hough acts in place of Cutts approximately three to four times per year, and he testified that management proposals and labor negotiations are discussed at the meetings, but the employer does not claim that this substitution invokes the "confidential" exclusion discussed above. Cutts testified that he was not aware of the division managers being involved in any way in labor negotiations.

approval from both Cutts and the mayor. Garrett has been involved in the hiring of three or four subordinate employees. In a recent situation where the employer's human resources staff supplied Garrett with a list of names, he reviewed the applications, determined who to interview, and then got approval from Cutts to proceed with the initial interviews and coordinate with the human resources staff. Garrett was not on the panel for the initial interviews, but received feedback from the panel. Cutts and Garrett then interviewed the final candidate, talked between themselves, and agreed to hire that person. In a previous situation when Cutts and Garrett differed as to their favored candidate(s), they "worked it out" as to who would actually be interviewed. Garrett stated his belief that Cutts would ask him a lot of hard questions if they disagreed over who to hire, but that Cutts would ultimately go along with his recommendation.

Assigning and scheduling: Garrett assigns work to the employees in his division, and schedules staff members to cover the telephone and the counter in the office. Those assignments and schedules are not reviewed or approved by Cutts.

Evaluations and promotions: Garrett prepares drafts of performance evaluations on the four people in his division, but he then shows the drafts to Cutts and makes changes as directed by Cutts before giving the evaluations to the employees. Cutts actually signs the evaluations. Garrett may review records, but Cutts makes the decision regarding any promotion.

Transfers, layoffs, and recalls: Garrett has not been involved in decisions concerning any transfers of employees, nor has he been involved in any layoff or recall decisions.

Suspension, discipline, and discharge: Garrett has not been involved in any formal disciplinary action, although he has had several discussions with employees regarding their performance.

Adjusting grievances: Garrett has not been involved in processing any grievances on behalf of the employer.

Garrett spends about 20 to 30 percent of his work time on administrative functions such as hiring, training, assignments, performance evaluations, and the budget. About 25 to 33 percent of his work time is spent performing tasks on a "City Center Project" that are impliedly similar to those performed by his subordinates on other projects. Garrett processes some applications himself, and he takes his turn working at the counter and answering the office telephone each Tuesday. He has occasionally become involved in other projects when a planner has left the staff, and he deals with an oversight committee and the hearing examiner.

Application of the established standard results in a conclusion that Garrett is better described as a leadworker than as a supervisor. Even though he appears to have authority to act independently in regard to assignments and scheduling, he only spends a small portion of his work time on those activities. He certainly does not act independently or have the authority to effectively recommend the hiring or evaluation of subordinates. Garrett lacks (or at least has never exercised) the necessary authority in the other indicia of supervisory status.

Ronald Hough has held his current position since 1999. Four employees in the bargaining unit represented by the WSCCCE report to Hough: A code enforcement officer, a public nuisance abatement officer, a senior planner, and an assistant planner. Testimony established that Hough's duties included the following:

Hiring: Hough has had only a limited involvement in the hiring process. He reviewed applications, and sent Cutts a report describing why he wanted to interview particular people. Hough was on an interview panel, along with the senior planner and a planner



from another county, but the ratings of all three panel members were given equal weight in compiling the recommendation forwarded to Cutts. There is evidence that Cutts has disagreed with Hough's recommendation regarding who to interview, but not over who to hire. Interviews of finalists are conducted by Hough and Cutts. Although Hough testified that he does most of the work involved in hiring, he also stated: "I don't independently do these things. Virtually everything I do I check with the director because he has to approve just about everything I do . . ." The mayor's office also has final approval over who the employer hires.

Assigning and scheduling: Cutts decides what projects will be pursued by the comprehensive planning staff. Although the senior and assistant planners generally respond to complaints from the public, Hough assigns the senior and assistant planners to work on some complaints. Hough and the other planners work as a team to do different parts of projects. The code enforcer and nuisance abatement officer operate their own programs 90 percent of the time, as they have been doing for years, and Hough has very little involvement with those programs.

Evaluations and promotions: Hough prepares drafts of performance evaluations for the four employees who report to him, and shows those drafts to Cutts. When Cutts does not agree with Hough's evaluation, Hough and Cutts discuss the situation. There have been situations where an evaluation was modified because Cutts did not agree with it. Cutts and Hough both sign the evaluation before the employee signs it. Ultimately, Cutts and the mayor's office have final approval of evaluations. Hough has not handled any promotions and testified that he was not sure of his role in that area.

Transfers, layoffs, and recalls: Hough has not handled any layoffs but was sure his role would be advisory and that Cutts would make the decision.

Suspension, discipline, and discharge: Although Hough has given some employees oral counseling, Hough has not handled any formal disciplinary issues. He testified that he would talk to Cutts before he put any disciplinary action in writing, and that Cutts would make the ultimate decision.

Adjusting grievances: Hough has not been involved in processing any grievances on behalf of the employer.

The record indicates that Hough spends "very little time supervising, probably, say 80 percent of his time is spent on production." Even then, Hough spends the other 20 percent of his time on a wide variety of duties including "administration, scheduling, keeping track of things, filling out logs and forms and e-mail, voice mail, responding to citizens, dealing with outside organizations, things like that that aren't project oriented."

Application of the established standard results in a conclusion that Hough is also better described as a leadworker than as a supervisor. Hough spends the vast majority of his work time on duties similar to those performed by bargaining unit employees,<sup>11</sup> and he clearly does not perform or have authority to effectively recommend a preponderance of the types of authority specified in RCW 41.59.004(d). He makes some work assignments, but he only spends a very small portion of his work time on that activity. He does not act independently in the hiring or evaluation of subordinates. He lacks (or at least has never exercised) authority in the other indicia of supervisory status.

Kenneth Korshaven has been with the department since 1990, and was promoted to his present position when Cutts became director in 1998. Six employees in the bargaining unit represented by the

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<sup>11</sup> Even Cutts testified that Hough spends 70 percent of his time doing actual planning work.

WSCCCE report to Korshaven: one plan reviewer, two combination inspectors, one combination electrical inspector, one permit coordinator, and one permit technician. Testimony established that Korshaven's duties include:

Hiring: Korshaven has been involved in the hiring process three times. He reviews applications to verify that the applicants meet the minimum qualifications, and he recommends who he would want on an interview panel, but Cutts and Hall approve the interview panels that have not included Korshaven. After the interviews are completed by others, Korshaven reviews the scores, makes up a second interview list, and presents that list to Cutts for approval. Korshaven and a permit coordinator have conducted the second interviews, and Korshaven then puts together a composite rating of both sets of interviews. Korshaven presents the data to Cutts and recommends a candidate for hiring. Although Cutts relies heavily on Korshaven's experience and abilities, Cutts and the mayor have the ultimate hiring authority.

Assigning and scheduling: Korshaven shares the responsibility for distributing inspections with one of his plan reviewers, and assignments are made on a daily basis.

Evaluations and promotions: Korshaven drafts performance evaluations, but Cutts reviews and edits them as he feels necessary. Korshaven testified that he does not think Cutts just "rubber stamps" his evaluations. Cutts and the mayor sign the evaluation. Korshaven made a recommendation on one promotion, but Cutts appears to have made the decision.

Transfers, layoffs, and recalls: Korshaven testified that he has not dealt with any employee transfer or layoff. No evidence was presented as to whether Korshaven has participated in any recalls.

Suspensions, discipline, and discharge: Korshaven has been involved in formal disciplinary action. Korshaven worked with Cutts, Hall and the employer's attorney to determine the proper level of discipline in one case where an employee was suspended, but Korshaven did not have authority to suspend the employee on his own. Moreover, it was Cutts that presented the suspension letter to the employee, with Korshaven present only to answer questions. Additionally, there was evidence that Korshaven would immediately inform Cutts if he observed employee misconduct.

Adjusting grievances: Korshaven has not been involved in processing any grievances on behalf of the employer.

Korshaven spends approximately 10 to 15 percent of his time in the field doing inspections or helping other inspectors follow-up. He spends approximately 85 to 90 percent of his time in the office, but most of that time is spent on tasks that do not involve oversight of employees, such as doing plan checks, assigning addresses within the city, meeting with people, working at the public information counter, providing advice for the city, holding a one hour weekly meeting to explain city council and mayoral activities to others in his division, and attending informal meetings with other department staff for direction. He testified that the employees in his division are fairly self sufficient. Unless he is dealing with a specific personnel issue,<sup>12</sup> on average, he spends 15 to 20 percent of his time managing the employees in his division.

Application of established standard results in a conclusion that Korshaven is also better described as a leadworker than as a supervisor. He spends only a very small portion of his work time

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<sup>12</sup> The testimony indicates that Korshaven could spend much more time, perhaps up to one-half of his work time, dealing with employee issues.

overseeing subordinates, and he certainly does not act independently or have the authority to recommend effectively the hiring, promotion, evaluation or discipline of subordinates. Although he drafts evaluations for people in his division, it is clear that the independent authority is vested in Cutts or at an even higher level. Korshaven does not have authority to effectively recommend the suspension of employees involved in formal disciplinary action, and he lacks (or at least has never exercised) the necessary authority in the other indicia of supervisory status.

Are Two Public Works Employees Supervisors?

The employer's Public Works Department is headed by Public Works Director William Franz. A Transportation Division within the Public Works Department is headed by Transportation Manager Les Rubstello, who reports to Franz.

Al Grieve has been a resident construction engineer for more than three years in the Construction Management Section of the Transportation Division, reporting to the transportation manager. One to seven city employees and/or outside consultants may report to Grieve at any time, depending on the project to which he is assigned. A construction coordinator and two construction inspectors who are within the bargaining unit represented by the WSCCCE may report to either or both Grieve and Kevin Kinsella (discussed below), depending on current assignments and workloads. Testimony established that Grieve's duties included:

Hiring: Grieve knew that an individual who had worked with him as a consultant on a project was looking for a job, and he gave that person's resume to the human resources office when a recent vacancy occurred. The individual was eventually hired. On a previous occasion, Grieve participated in the interview process as

one of three members on a panel that made a combined recommendation, and that recommendation was accepted by his supervisor.

Assignments and scheduling: Employees in the Transportation Division are assigned to projects by the transportation manager, so Grieve only makes assignments for inspectors on a day-to-day basis.

Evaluations and promotions: Grieve has prepared drafts of some performance evaluations, but Franz has also prepared evaluations for employees who work under Grieve. Even if Grieve does the initial drafting, he discusses the evaluation with his supervisor before it is given to the employee. While Grieve's superiors have not changed a performance evaluation drafted by Grieve, it is clear that they retain the authority to make changes. Further limiting Grieve's role in the evaluation process, Grieve does not perform evaluations for all city employees who work on the various projects he oversees, because those same people may also work on other projects for other people during a year. Although Grieve was consulted in connection with a recent promotion, he does not have the final authority to make promotions within his office.

Transfers, layoffs, and recalls: Grieve has not been involved in the transfer or recall of any employee. His input on layoffs is limited to daily communications with his own supervisor about the workload and the performance of employees who report to him; he has not been formally involved in a layoff decision.

Suspension, discipline, and discharge: Although Grieve has had informal discussions with employees regarding performance issues, he has never been involved in any formal disciplinary actions. He would pass cases needing some type of formal discipline onto his supervisor.

Adjusting grievances: Grieve has not been involved on behalf of the employer in the resolution of any grievances.

Grieve has overall responsibility for projects, and he estimated he spends 30 to 40 percent of his time doing things like conducting daily morning meetings with employees, visiting project sites at least twice a day on large projects, and checking with inspectors while visiting the site. The construction inspectors typically visit job sites multiple times a day, and report to Grieve each morning about what occurred the previous day. Grieve also attends meetings every other week with the transportation manager. The remainder of his time is spent on things like correspondence, change orders, and preparing payments to contractors.

Application of the established standard results in a conclusion that Grieve is also better described as a leadworker than as a supervisor. His limited role does not satisfy the preponderance test. Even though he may make day-to-day task assignments, he does not act independently or have the authority to effectively recommend the hiring, evaluating, or promoting of subordinates. He lacks (or at least has never exercised) the necessary authority in the other indicia of supervisory status.

Kevin Kinsella had been in "acting" status for more than two years at the time of the hearing, as a resident construction engineer in the Construction Management Section of the Transportation Division.<sup>13</sup> He also reports to the transportation manager and oversees construction projects at the same level as Grieve (discussed above), but he only oversees the one construction coordinator and the construction inspectors that he shares with Grieve. Testimony established that his duties included:

Hiring: Kinsella has been a member of an interview panel, and he has helped to prepare and analyze questions. He anticipated

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<sup>13</sup> Kinsella's permanent title is as a construction inspector.

that he would be on future interview panels with his supervisor, possibly one of his co-workers, and someone from human resources.

Assigning and scheduling: Given the project assignments made by Transportation Manager Rubstello and the limited number of people who report to him, Kinsella only has very limited opportunity or authority to assign or schedule subordinates.

Evaluations and promotions: Kinsella has prepared drafts of two performance evaluations in two years. Different from the other claimed supervisors, the evidence suggests that he goes over his draft with the employee before he gives the draft to his supervisor. Kinsella has never had changes made to his evaluation drafts, but the evidence taken as a whole suggests that (as with evaluations drafted by Grieve) either Franz or Rubstello could make changes as they see fit. Further limiting Kinsella's authority in this area, he would collaborate with Grieve about the evaluation of the construction coordinator currently assigned to both of them.

Transfers, layoffs, and recalls: Although Kinsella has given input to his supervisor regarding employee performance, he has not been involved in a formal layoff.

Suspensions, discipline, and discharge: Kinsella has had conversations with employees about their performance, but he has never been involved in any formal disciplinary action. He also informed his own supervisor when he had those conversations. Kinsella has never been involved in a suspension or termination.

Adjusting grievances: Kinsella has never been involved in any grievance procedure.

On average, Kinsella has only had one or two people to oversee at any time. Because of that, Kinsella does not think he spends very much time on supervisory duties.



Application of the established standard results in a conclusion that Kinsella is also better described as a leadworker than as a supervisor. He certainly does not spend a preponderance of his work time on supervisory tasks, and he does not perform, or have authority to effectively recommend, on a preponderance of the criteria that would warrant his exclusion as a supervisor. He does not act independently in the hiring or evaluating of subordinates. Kinsella spends very little time filling out employee evaluations and may not even fill out the entire evaluation for those who work under him. He lacks (or at least has never exercised) the necessary authority in the other indicia of supervisory status.

#### FINDINGS OF FACT

1. The City of Lynnwood is a "public employer" within the meaning of RCW 41.56.030(1).
2. The Washington State Council of County and City Employees, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of certain employees of the City of Lynnwood, under an interim certification issued in this case.
3. As the executive assistant to the mayor and the employee providing office-clerical support to the assistant city administrator, Carolyn Wies assists and acts in a confidential capacity to the mayor and a senior administrator, who are both directly involved in the formulation of the employer's labor relations policies and the preparation for and conduct of collective bargaining.
4. As the support services manager in the employer's Police Department, Angela Madsen participates directly in the

formulation of the employer's labor relations policies and represents the employer in collective bargaining.

5. As the Parks Maintenance Superintendent for the employer, Robert Colinas has historically represented the employer in collective bargaining, and he continues to be consulted about and privy to confidential information concerning the employer's labor relations policies.
6. As the administrative assistant in the employer's Parks, Recreation and Cultural Arts Department, Elena Victorine does not participate directly in collective bargaining on behalf of the employer and does not assist or act in a confidential capacity to any person who participates directly in the formulation of labor relations policy, the preparation for or conduct of collective bargaining, or the administration of collective bargaining agreements.
7. As employees in the employer's Community Development Department, Kevin Garrett, Ronald Hough, and Kenneth Korshaven neither spend a preponderance of their work time engaged in the supervision of other City of Lynnwood employees nor do they have the authority to independently perform or make effective recommendations on a preponderance of the following types of duties: hire, assign, schedule, evaluate, promote, transfer, layoff, recall, suspend, discipline, discharge or adjust grievances.
8. As employees in the Transportation Division of the employer's Public Works Department, Al Grieve and Kevin Kinsella neither spend a preponderance of their work time engaged in the supervision of other City of Lynnwood employees nor do they have the authority to independently perform or make effective

recommendations on a preponderance of the following types of duties: hire, assign, schedule, evaluate, promote, transfer, layoff, recall, suspend, discipline, discharge or adjust grievances.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC.
2. As described in paragraphs 3, 4, and 5 of the foregoing findings of fact, Carolyn Wies, Angela Madsen and Robert Colinas are each a "confidential employee" within the meaning of RCW 41.56.030(2)(c).
3. As described in paragraph 6 of the foregoing findings of fact, Elena Victorine is a public employee within the meaning of RCW 41.56.030(2) and is not a "confidential employee" within the meaning of RCW 41.56.030(2)(c).
4. As described in paragraphs 7 and 8 of the foregoing findings of fact, Kevin Garrett, Ronald Hough, Kenneth Korshaven, Al Grieve, and Kevin Kinsella are public employees within the meaning of RCW 41.56.030(2) whose authority as leadworkers is insufficient to warrant their classification as supervisors under WAC 391-35-340 or their exclusion from the bargaining unit under RCW 41.56.060.

#### ORDER DETERMINING ELIGIBILITY ISSUES

1. The position of executive assistant to the mayor and assistant city administrator, the position of support services manager in the Police Department, and the position of park maintenance

superintendent in the Parks, Recreation and Cultural Arts Department are each excluded from the bargaining unit represented by the Washington State Council of County and City Employees.

2. The administrative assistant in the Parks, Recreation and Cultural Arts Department, the current planning manager in the Community Development Department, the comprehensive planning manager in the Community Development Department, the building official in the Community Development Department, and the construction engineers in the Transportation Division of the Public Works Department are included in the bargaining unit represented by the Washington State Council of County and City Employees.
3. All challenged ballots cast in this proceeding shall be impounded to preserve their secrecy.
4. The date of the interim certification issued in this case shall stand as the date of certification for purposes of WAC 391-25-030.

ISSUED at Olympia, Washington, this 4<sup>th</sup> day of March, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-25-660.