Skagit County, Decision 8038 (PECB, 2003)

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 16382-E-02-2710
	)	
Involving certain employees of:	)	DECISION 8038 - PECB
	)	
SKAGIT COUNTY	)	DIRECTION OF ELECTION
	)	
	)	

David M. Kanigel, Attorney at Law, and *William Keenan*, Staff Representative, for the union.

Summit Law Group, by *Bruce L. Schroeder*, Attorney at Law, for the employer.

On May 1, 2002, the Washington State Council of County and City Employees (union) filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission under Chapter 391-25 WAC, seeking certification as exclusive bargaining representative of certain employees of Skagit County (employer). An investigation conference was conducted on June 17, 2002, at which time issues were framed as to: (1) whether the proposed bargaining unit is appropriate; and (2) whether some or all of the employees in the Civil Division are "confidential" employees. A hearing was held on September 4, 2002, before Hearing Officer Sally B. Carpenter. The parties submitted briefs.

The Executive Director concludes: (1) The bargaining unit proposed by the union is appropriate under the statute; and (2) none of the three employees working in the Civil Division is excludable as a "confidential" employee at this time.

BACKGROUND

Skagit County is governed by a Board of Commissioners consisting of three elected officials. A county administrator reporting to the board oversees 13 administrative divisions. Seven other departments are headed by separately elected officials, including the prosecuting attorney. Elected judges head the two court systems.

The employer has a total of about 800 employees. Personnel policies and procedures adopted by the employer apply in their entirety to non-represented employees, and regulate union-represented employees except where they conflict with applicable collective bargaining agreements.

The union seeks certification as exclusive bargaining representative of office-clerical employees in the office of the prosecuting attorney, excluding the elected official, deputy prosecuting attorneys, confidential employees, and supervisors. As proposed by the union, there would presently be 22 employees in the unit.

At the time of the hearing in this matter, the employer had collective bargaining relationships with unions representing five existing bargaining units that include office-clerical employees:

- Employees in a courthouse unit (1), a District Court unit (2), and a juvenile corrections unit (3), are represented by Teamsters Local 231.
- Employees in a Public Works Department unit (4), are represented by American Federation of State, County, and Municipal Employees, Local 176.
- Employees in a Sheriff's Office support unit (5), are represented by Service Employees International Union, Local 925.

Eighty-three out of approximately 200 individuals working for the employer in office-clerical positions were scattered among those existing bargaining units.

The prosecutor's office has three specialized divisions, which are located in separate office facilities and operate separately from one another:

- The Civil Division - Three attorneys and three office-clerical employees handle the employer's civil law matters.
- The Family Support Division - Two attorneys and six office-clerical employees create the paperwork which allows the state to determine paternity and establish child support.
- The Criminal Division is further subdivided into three operating groups:
    - Adult Felonies - Five attorneys and six office-clerical employees process all potential felony charges from the receipt of information and the making of a charging decision through the trial and appellate processes.
    - Adult Misdemeanors - Two attorneys and four office-clerical employees process misdemeanor cases.
    - Juveniles - Two attorneys and two office-clerical employees handle criminal offenses involving juveniles.

Two office-clerical employees in the Criminal Division perform the receptionist function and provide data entry services.

The parties stipulated that an office manager, who reports to the elected official and exercises authority regarding all three divisions, is properly excluded from the bargaining unit in this proceeding.

POSITIONS OF THE PARTIES

The union asserts there is a community of interest among the employees it seeks to represent. It argues that office-clerical employees are already represented in many existing units within this employer's overall workforce; that the proposed unit is organized along departmental lines created by the employer; that no work jurisdiction conflicts will arise between bargaining units; that no employees will be stranded in situations that would prevent them from exercising their statutory collective bargaining rights; and that the petitioned-for employees differ significantly from other office-clerical positions in the employer's workforce. The union particularly cites their having to deal with people at a heightened level of anger and upset, and their skills in legal matters which are not required of other office-clerical employees working for this employer. Responding to the exclusions proposed by the employer, the union argues that the employees in the Civil Division do not meet the requirements for exclusion from statutory rights as "confidential" employees.

The employer contends the proposed bargaining unit contravenes a Commission policy against unnecessary fragmentation of workforces, and is inappropriate. The employer states a preference for a horizontal bargaining unit encompassing all of its office-clerical employees, and claims that the petitioned-for employees share a community of interest with employees in other Skagit County departments. The employer claims that all three office-clerical employees in the Civil Division have regular, necessary and ongoing exposure to labor relations activities of the employer, and thus should be excluded from the coverage of the statute (and thus from any bargaining unit) as "confidential" employees.

DISCUSSION

The Appropriate Bargaining Unit

The bargaining unit configuration proposed by the union in this case is found to be appropriate. The record does not support the employer's contention that the petitioned-for employees exclusively share a community of interest with office-clerical employees in other Skagit County departments or operations.

The Statutory Unit Determination Criteria -
These parties are subject to the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. The determination of appropriate bargaining units is a function delegated by the legislature to the Public Employment Relations Commission, as follows:

> RCW 41.56.060 DETERMINATION OF BARGAINING UNIT--BARGAINING REPRESENTATIVE. The commission, after hearing upon reasonable notice, shall decide in each application for certification as an exclusive bargaining representative, the unit appropriate for the purpose of collective bargaining. In determining, modifying, or combining the bargaining unit, the commission shall consider the duties, skills, and working conditions of the public employees; the history of collective bargaining by the public employees and their bargaining representatives; the extent of organization among the public employees; and the desire of the public employees.

The Commission makes unit determination decisions on a case-by-case basis. The purpose of the unit determination process is to:

> [G]roup together employees who have sufficient similarities (community of interest) to indicate that they will be able to bargain collectively with their employer. The statute does not require . . . the "most" appropriate bargaining unit. It is only necessary that the petitioned-for unit be an appropriate unit. Thus, the fact that there may be other groupings of employees which

> would also be appropriate, or even more appropriate, does not require setting aside a unit determination.

City of Winslow, Decision 3520-A (PECB, 1990). The union correctly notes that its petition is the starting point for the unit determination process in this case:

> It is well established that the starting point for any unit determination analysis is the configuration sought by the petitioning union. *King County*, Decision 5910-A (PECB, 1997); *South Central School District*, Decision 5670-A (PECB, 1997); *Okanogan School District*, Decision 5394-A (PECB, 1997); *City of Auburn*, Decision 5775 (PECB, 1996); *Reardan-Edwall School District*, Decision 5549 (PECB, 1996); *Puget Sound Educational Service District*, Decision 5126 (PECB, 1995); *Spokane County*, Decision 5019 (PECB, 1995); *King County*, Decision 5018 (PECB, 1995); *City of Marysville*, Decision 4854 (PECB, 1994); Lewis County, Decision 4852 (PECB, 1994).

Snohomish Public Hospital District 2, Decision 6687 (PECB, 1999).[1] It is not enough for an employer to suggest another configuration that might be appropriate (or even more appropriate) than the unit sought in a properly supported petition. *City of Winslow*, Decision 3520-A. Indeed, an employer must show that a proposed bargaining unit is *inappropriate* for reasons such as artificially dividing a workforce, being too small (fragmentary), stranding employees, or mixing supervisors with rank-and-file employees.[2]

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[1] Proposed unit configurations are always subject to scrutiny. Proposed units have been rejected in cases such as *Port of Seattle*, Decision 890 (PECB, 1979) and *City of Vancouver*, Decision 3160 (PECB, 1989).

[2] Commission rules also require separate units of employees eligible for interest arbitration (WAC 391-35-310), prohibit bargaining units consisting of only one employee (WAC 391-35-330), require separate units for supervisors (WAC 391-35-340), and exclude "casual" employees from bargaining units (WAC 391-35-350).

Units encompassing all employees of an employer are generally considered appropriate, but Commission precedents also support creation of "vertical" units (encompassing all of the employees in a department or other branch of the employer's table of organization) and "horizontal" units (encompassing all of the employees of a generic occupational type). *Grant County Public Hospital District 2*, Decision 7558 (PECB, 2001). The existence of a community of interest is determined by application of the four factors set forth in the statute. Among those, no one factor is overriding or controlling. *Bremerton School District*, Decision 527 (PECB, 1979).

Duties, Skills, and Working Conditions -

The evidence supports finding a separate community of interest among the petitioned-for employees in this case:

- Employees in the proposed bargaining unit work in support of professionals (attorneys), exercising discretion, confidentiality, precision, skills with hostile and upset persons, and knowledge of legal processes and deadlines. Their duties and skills are substantively distinguishable from those of office-clerical employees in other departments.[3]

- The proposed bargaining unit draws its essence from its "vertical" nature, encompassing all office-clerical employees working in the separate operation headed by a separately-elected official.

- Movement has been rare between the petitioned-for positions and positions outside of the prosecutor's office.

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[3] In addition, the union asserts that many of these positions are exposed to gruesome facts unlike anything experienced by other office-clerical employees.

The position titles used in the proposed bargaining unit are "office assistant", "staff assistant" (in multiple levels and variations), "program director", "domestic violence liaison", and "victim/witness coordinator". Admitted in evidence at the hearing were 13 position descriptions covering the 22 positions in the unit, but they provide little assistance in determining whether the petitioned-for bargaining unit is appropriate under the statute.

History of Bargaining -

The employees involved in this proceeding have no history of collective bargaining.

Extent of Organization -

The employer's workforce already includes multiple bargaining units, some of which appear to be "horizontal" in nature, while others appear to be "vertical" in nature. As a general proposition, adding another bargaining unit would not be unusual, and does not present a compelling reason to reject the proposed unit.

The employer's office-clerical workforce is already broken up into multiple bargaining units, with about 40 percent of the total included in the existing bargaining units. Against that background, the fact that the petitioned-for unit includes only about 10 percent of the claimed total of nearly 200 office-clerical employees is not compelling evidence of excessive fragmentation. The employer's yearning for an employer-wide office-clerical unit should have been asserted when the first union proposing to fragment an entirely-unrepresented office-clerical workforce filed its petition or sought voluntary recognition. While an attempt to sever a small portion of the office-clerical workforce from a homogeneous group could rise or fall on whether the petitioned-for employees had unique duties or skills, those are not the facts

here. The unit proposed by the union is an all-inclusive ("vertical") unit within a specific department.

Desires of Employees -

There is no occasion to assess the desires of employees by a unit determination election separate from conducting a representation election or cross-check in this case. There is only one organization seeking status as exclusive bargaining representative.[4]

Confidential Employees

The evidence does not support the employer's contention that the office-clerical employees in the Civil Division of the prosecutor's office are "confidential" employees.

The "Labor Nexus" Test -

The definition of "public employee" set forth in the Public Employees' Collective Bargaining Act at RCW 41.56.030(2) contains an exclusion of "confidential" employees, as follows:

> (2) "Public employee" means any employee of a public employer except any person . . . (c) whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit . . . .

The Supreme Court of the State of Washington has interpreted that definition narrowly, as follows:

> When the phrase confidential relationship is used in the collective bargaining act, we believe it is clear that

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[4] Where two or more appropriate unit configurations are sought by competing unions, the desires of employees will be assessed by conducting a unit determination election under WAC 391-25-420(1).

> the legislature was concerned with an employee's potential misuse of confidential 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.

City of Yakima v. IAFF, 91 Wn.2d 101 (1978) (emphasis added). That *labor nexus* test is consistent with the interpretation given to the National Labor Relations Act by the Supreme Court of the United States in *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981).

The specific definition embraced by the Supreme Court in *Yakima* has been codified by the Commission in WAC 391-35-320, as follows:

> **WAC 391-35-320 Exclusion of confidential employees.** Confidential employees excluded from all collective bargaining rights shall be limited to:
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> (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, the statutory exclusion is neither open-ended nor automatic. Because status as a "confidential" employee deprives the individual of all rights under the statute, the Commission imposes a heavy

burden of proof on the party proposing the exclusion. *City of Seattle*, Decision 689-A (PECB, 1979).

Application of Standards -
Within the Civil Division of the prosecutor's office, one of the attorneys devotes most of his work time to land use issues and growth management law, while the other two attorneys advise various departments on all issues. Only the latter role could include personnel issues and labor negotiations.

The record is devoid of convincing evidence supporting the existence of a "labor nexus" in this case. None of the three attorneys in the Civil Division were called as witnesses in this proceeding; neither the county administrator nor the head of any other department testified as to what role, if any, the Civil Division attorneys have historically had in formulating the employer's labor relations policies or proposals for bargaining.

The direct basis for exclusion under subsection (1) of WAC 391-35-320 would require proof that the disputed office-clerical employees have actually participated in the employer's labor relations processes. Such proof is lacking in this case. While he stated his support for the exclusion proposed by the employer, the elected prosecuting attorney testified that the employees holding the disputed positions do not participate in negotiating collective bargaining agreements. Another witness confirmed that the disputed employees do not attend collective bargaining meetings. In the absence of any evidence of direct participation by any of the disputed office-clerical employees in labor relations work on behalf of the employer, the question as to whether they (or any of them) meets the test for "confidential" status must rise or fall on the second subsection of the rule, *i.e.*, whether they assist and act in a confidential capacity to persons who formulate labor

relations policy or conduct collective bargaining on behalf of the employer.

The derivative basis for exclusion under subsection (2) of WAC 391-35-320 requires proof of two involvements: First, that the employees' supervisor is involved in "labor nexus" work; and second, that the employee himself/herself assists the supervisor with that "labor nexus" work. Again, such proof is lacking in this case:

- The fact that the Civil Division attorneys are excluded from the separate bargaining unit of attorneys is too thin a reed to support a claim of derivative confidential status for the office-clerical employees in the division. The exclusion is the result of a stipulation made by the parties to that bargaining relationship, perhaps in contravention of established legal principles,[5] and is not binding on the Commission in another proceeding such as the instant case.

- There is no credible evidence (let alone evidence sufficient to sustain a "heavy burden of proof" under established precedents) that the attorney who works on land use issues has any involvement with labor-management issues. It follows that there would be no basis for a "derivative" confidential exclusion based on office-clerical support for that attorney.

- Although the remaining two attorneys in the Civil Division could advise various departments on personnel issues and labor negotiations, the testimony is (at best) unclear as to their

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[5] The attorney bargaining unit was certified in February of 2002, based on the results of a cross-check conducted by agreement of the parties. *Skagit County*, Decision 7634 (PECB, 2002). The Commission was not called upon to rule (and did not rule) on the propriety of excluding all of the Civil Division attorneys from that bargaining unit.

responsibilities with respect to formulation of labor relations policy. Indeed, it appears from the testimony that they are much more involved with general "personnel" issues than with specific labor-management relations issues. The testimony of Prosecuting Attorney Tom Verge mixed "personnel" and "labor relations" as if they were one and the same. Office Manager Mavis Betz similarly mixed labor relations and personnel matters as if there was no distinction between them. Even before the *City of Yakima* case was decided by the Supreme Court, general personnel work was found insufficient to establish "confidential" status. *City of Lacey*, Decision 396 (PECB, 1978). The distinction set forth by the Commission in *City of Chewelah*, Decision 3103-B (PECB, 1989),[6] was recently cited by the Commission with approval in *City of Lynden*, Decision 7527-B (PECB, 2002).

- The testimony about what the secretaries actually do is not sufficient. Two out the three job descriptions contain vague references to "maintenance of files containing confidential

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[6] The Commission explained the need to avoid conflicts of interest in *Chewelah*, 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.

information," but characterizations of "politically or personally sensitive," "public significance," "personnel matters," "whistle blower," "civil service," "land use," "risk management" and "accident reconstruction" simply do not connote the *labor nexus* test. A vague reference to "collective bargaining" materials is insufficient, in light of Commission precedent holding that processing of mail or filing documents is not evidence of "confidential" status, if the employer's concerns could be satisfied by practices which limit unnecessary contact with sensitive material. *Clover Park School District*, Decision 2243-A (PECB, 1987).

- The elected prosecuting attorney made vague reference to a need for confidential assistance in the future, but the Commission has recently (and strongly) rejected speculation about future responsibilities as a basis for current exclusions. *City of Redmond*, Decision 7814-B (PECB, 2003).

It follows that, on the record made in this case, the employer has failed to establish that any of the office-clerical employees in the Civil Division historically and currently perform *labor nexus* duties deriving from the *labor nexus* duties of their superiors.[7]

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[7] The Executive Director acknowledges that the situation described in this record may be of a temporary nature, but that does not justify a different outcome. The general rule is that employers are allowed a reasonable number of employees who are excluded from the exercise of collective bargaining rights in order to perform the functions of the employer in the collective bargaining process. In *Pateros School District*, Decision 3911-B (PECB, 1992), the Commission left an office-clerical employee in a bargaining unit because she had never been told to keep the information confidential. 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.

FINDINGS OF FACT

1. Skagit County is a political subdivision of the state of Washington, and is a public employer within the meaning of RCW 41.56.030(1). The Office of Skagit County Prosecuting Attorney is operated under direction of a separately-elected official, Tom Verge.

2. The Washington State Council of County and City Employees, a bargaining representative within the meaning of RCW 41.56.030-(3), has filed a timely and properly supported petition for investigation of a question concerning representation, seeking certification as exclusive bargaining representative of office-clerical employees working in the Office of Skagit County Prosecuting Attorney.

3. The bargaining unit configuration proposed by the union is of a "vertical" nature, encompassing all of the office-clerical and related employees within a separate branch of the employer's table of organization. All of the employees in the proposed unit perform work within the generic office-clerical type, working under the same office manager and elected official. There is no evidence of interchange of functions or employees between the bargaining unit proposed by the union and other branches of the employer's table of organization.

4. The employees in the bargaining unit proposed by the union have no history of collective bargaining.

5. Office-clerical employees in several other Skagit County departments are already represented for the purposes of collective bargaining by organizations which are not parties to this proceeding, and have separate histories of bargaining

in those bargaining units, so that the theoretical propriety of an employer-wide bargaining unit of office-clerical employees is not a matter open to debate or a subject for decision in this proceeding.

6. The addition of the bargaining unit proposed by the union in this case will neither unduly fragment the employer's work-force, nor have the effect of stranding employees in groupings too small to exercise their statutory bargaining rights.

7. One of the three attorneys assigned to the Civil Division of the Office of Skagit County Prosecuting Attorney works on land use issues, and does not appear to have any established and ongoing role in labor-management relations on behalf of the employer.

8. Two of the three attorneys assigned to the Civil Division of the Office of Skagit County Prosecuting Attorney provide general legal advice to various departments, but no evidence was offered that either of them participates directly in collective bargaining on behalf of the employer, and the evidence in this record is insufficient to discern the extent of their involvement in labor-management relations (as distinguished from general "personnel" work) on behalf of the employer.

9. The three office-clerical employees assigned to the Civil Division of the Office of Skagit County Prosecuting Attorney work in support of the attorneys described in paragraphs 7 and 8 of these findings of fact. None of them participates directly in collective bargaining on behalf of the employer, and the evidence in this record is insufficient to establish

that they have necessary, regular and ongoing involvement in labor-management relations work on behalf of the employer.

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. The petitioned-for bargaining unit consisting of all full-time and regular part-time office-clerical and related employees of the Skagit County in the Office of Prosecuting Attorney, excluding the elected official, deputy prosecuting attorneys, the office manager, confidential employees, and supervisors, is an appropriate unit for purposes of collective bargaining under RCW 41.56.060.

3. On the record made in this case, all of the office-clerical employees working in the Civil Division are public employees within the meaning of RCW 41.56.030(2), and are not "confidential" employees within the meaning of RCW 41.56.030(2)(c).

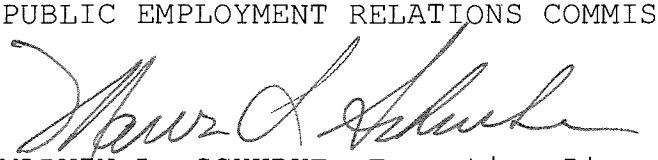
DIRECTION OF ELECTION

1. A representation election shall be held by secret ballot, under the direction of the Public Employment Relations Commission in the bargaining unit described in paragraph 2 of the foregoing conclusions of law, to determine whether a majority of the employees in that bargaining unit desire to be represented by the Washington State Council of County and City Employees for the purposes of collective bargaining with their employer under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.

2. The office-clerical employees in the Civil Division of the Office of Skagit County Prosecuting Attorney shall be eligible voters in the election conducted in this proceeding.

ISSUED at Olympia, Washington, on the 18th day of April, 2003.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

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