STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
WASHINGTON FEDERATION OF STATE EMPLOYEES	)	CASE 18425-E-04-2942
	)	DECISION 8711-A - PSRA
Involving certain employees of:	)	
	)	
WASHINGTON STATE - NATURAL RESOURCES	)	ORDER DETERMINING ELIGIBILITY ISSUES
	)	

Parr Younglove Lyman & Coker, by *Edward Earl Younglove III*, Attorney at Law, for the union.

Roger Theine, Assistant Human Resources Division Manager, for the employer.

This case is before the Executive Director for ruling on an eligibility issue reserved at an earlier stage of the proceedings. The Washington Federation of State Employees (union) sought certification as exclusive bargaining representative of certain employees of the State of Washington (employer) working at the Department of Natural Resources (agency) in April 2004, multiple eligibility issues were set aside in an investigation statement issued in June 2004, the union prevailed in a representation election, and an interim certification was issued in September 2004.[1] The parties resolved issues concerning employees who had been disputed as supervisors or on other grounds, but continued to have a dispute about one position. Hearing Officer Karyl Elinski held a hearing on June 16, 2005. The parties filed briefs.

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[1] *State - Natural Resources*, Decision 8711 (PSRA, 2004).

ISSUE

The sole issue remaining to be decided by the Executive Director in this case is:

> Should Margaret Murphy be excluded from the bargaining unit under RCW 41.80.005(4), as a person who assists an assistant attorney general?

The Executive Director rules that the disputed employee is properly excluded from the bargaining unit as a confidential employee.

APPLICABLE LEGAL STANDARDS

This case arises under the Personnel System Reform Act of 2002 (PSRA). Like several other state collective bargaining laws, the PSRA gives the Commission authority to determine which employees should be included in or excluded from appropriate bargaining units. RCW 41.80.070. Neither employers nor unions have the capacity to decide or control unit determination matters. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981). The courts have recognized the Commission's expertise in the administration of collective bargaining statutes, and have deferred to the Commission's interpretations and conclusions. *See Public Employment Relations Commission v. City of Kennewick*, 99 Wn.2d 832 (1983).

The PSRA defines which employees are eligible for collective bargaining rights, as follows:

> RCW 41.80.005 DEFINITIONS. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.
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> . . .

> (4) "Confidential employee" means an employee who, in the regular course of his or her duties, assists in a confidential capacity persons who formulate, determine, and effectuate management policies with regard to labor relations or who, in the regular course of his or her duties, has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies, or who assists or aids a manager. *"Confidential employee" also includes employees who assist assistant attorneys general who advise and represent managers or confidential employees in personnel or labor relations matters, or who advise or represent the state in tort actions.*
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> . . .
>
> (6) "Employee" means any employee, . . . covered by chapter 41.06 RCW, except:
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> . . .
>
> (b) Confidential employees; . . .

(emphasis added). The Commission gave the first sentence of RCW 41.80.005(4) a traditional "labor nexus" interpretation in *State - Natural Resources*, Decision 8458-B (PSRA, 2005) citing *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978).[2] RCW 41.80.005(4)

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[2] In *Yakima*, the Supreme Court embraced the "confidential" definition contained in the Educational Employment Relations Act, at RCW 41.59.020(4)(c). In turn, the Commission codified that definition in its rules:

> 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.

clearly differs from the EERA definition and from WAC 391-35-320, and the Legislature certainly had the capacity to enact provisions in the PSRA that substantively differ from the definition used under other statutes. This is a case of first impression as to interpretation of the last sentence in RCW 41.58.005(4), which is unique to the PSRA.

ANALYSIS

At all times relevant to this proceeding, Margaret Murphy has been employed by the Department of Natural Resources. The employer seeks her exclusion from the bargaining unit under the last sentence of RCW 41.80.005(4), and does not claim she has the "labor nexus" normally needed to qualify for exclusion as a confidential employee; the union concurs that Murphy lacks a "labor nexus" but claims she does not do a sufficient amount of labor/personnel or torts work to qualify her for exclusion under RCW 41.80.005(4).

The Evidence Warrants an Exclusion Specific to Murphy's Duties

Murphy's regular and ongoing job functions include preparing agency responses to requests for records. Most such requests come from members of the general public under the state public records law (and mostly pertain to land use or asset preservation matters), but Murphy also provides records to assistant attorneys general.

Murphy offered unrefuted testimony that some of her assistance to assistant attorneys general involved personnel/labor relations matters and/or tort matters.[3] Of particular interest here, Murphy

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[3] In its post-hearing brief, the union conceded that "[o]n a few occasions, Ms. Murphy has provided assistance to Assistant Attorneys General from either the Labor and Personnel or Torts Divisions of the [Office of the Attorney General]."

prepared materials for the assistant attorneys general involved in at least three personnel/labor or torts cases that were pending in litigation at the time of the hearing in this case.[4] While other employees of the agency, primarily in its human resources operation, provide the majority of materials requested by assistant attorneys general, an assistant attorney general who needs additional input will work directly with Murphy. Murphy communicates with assistant attorneys general via telephone calls, e-mail messages, and other forms of communication.

Murphy's testimony distinguishing personnel/labor matters and/or tort matters from other legal issues was credible and entitled to substantial weight, in light of her training and experience. Prior to becoming a state employee in 1998, Murphy had nine months of paralegal training, and had approximately 16 years of experience working as a paralegal.

The credible evidence concerning Murphy's assistance to assistant attorneys general cannot be brushed aside. Implementing the statutory mission of the Commission to provide "uniform and impartial . . . efficient and expert" administration of collective bargaining laws,[5] the Commission uniformly imposes a heavy burden on the party that seeks a "confidential" exclusion, because confidential status deprives the individual of all of the collective bargaining rights that would otherwise be conferred upon the individual by statute. *See City of Chewelah*, Decision 3103-B

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[4] The employer produced 15 documents as part of its effort to show Murphy's interactions with assistant attorneys general, but they have limited probative value here. Heavy redactions make it impossible to gauge whether her assistance involved personnel / labor relations / torts matters, or some other scope of inquiry irrelevant here.

[5] *See* RCW 41.58.005(1).

(PECB, 1989), citing *City of Seattle*, Decision 689-A (PECB, 1979). It suffices to say here that Murphy's current job functions clearly come within the last sentence of RCW 41.80.005(4).

The Evidence Does Not Support a General Interpretation

RCW 41.80.005(4) is exclusionary language of a type that has been given narrow interpretations in judicial precedents dating back more than 30 years. Indeed, the courts have repeatedly maximized the collective bargaining rights of public employees:

- In *Roza Irrigation District v. State*, 80 Wn.2d 633 (1972), the Supreme Court of the State of Washington extended the coverage of Chapter 41.56 RCW into nooks and crannies of the local government public sector that apparently hoped or believed they would be covered by that statute;

- In *Zylstra v. Piva*, 85 Wn.2d 743 (1975), the Court preserved the bargaining rights of employees vis-a-vis their county co-employers under Chapter 41.56 RCW, even though their judicial co-employers were not covered by the statute at that time;[6]

- In *Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries*, 88 Wn.2d 925 (1977), the Court extended full collective bargaining rights to supervisors who were represented in a separate bargaining unit;

- In *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101, the Court gave the "confidential" exclusion a narrow interpretation.

That long line of precedents clearly weighs against making broad pronouncements about exclusions, and there is no reason to deviate from that line of precedent in this case.

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[6] Chapter 41.56 RCW has since been amended to make district courts and superior courts employers under that statute. *See* RCW 41.56.030(2).

Both parties offered theories as to how the last sentence of RCW 41.80.005(4) should be interpreted. The best that can be said is to infer (from the fact that the statutory language is unique) that it likely originated within the specific history predating enactment of the PSRA in 2002. That history includes a study committee that worked on the general subjects of civil service reform, contracting out, and state employee collective bargaining after 1993 HB 2054 failed of passage in the Legislature, as well as legislative debates on multiple bills that were considered by our Legislature between 1994 and 2002.[7]

Important for the present inquiry, this record contains minimal evidence concerning the legislative history of the language which the parties would have interpreted in this case. This warrants rejection of any temptation to go forward here with exploring the parties' theories - no matter how interesting they may seem - to produce an interpretation for the sake of posterity.

FINDINGS OF FACT

1. The Department of Natural Resources is operated under the direction of the Commissioner of Public Lands, as provided in

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[7] Assistant attorneys general are excluded from collective bargaining rights under the PSRA, because they are excluded from the coverage of the State Civil Service Law, Chapter 41.06 RCW, at RCW 41.06.070(1)(j). An early version of the legislation that came out of the study committee would have excluded all employees of the Office of the Attorney General from collective bargaining rights, and would not have provided basis for exclusion of this employee of another agency. Later bills and the PSRA appear to extend collective bargaining rights to at least some of the support personnel in the Office of the Attorney General. The language at issue here was contained in at least 2000 SB 6402, and in 2001 HB 1268, and carried forward in the legislation enacted in 2002.

RCW 43.30.050, as a general government agency of the state of Washington. In turn, the state of Washington is an employer within the meaning of RCW 41.80.005(1).

2. The Washington Federation of State Employees is an employee organization within the meaning of RCW 41.80.005(7), and is the exclusive bargaining representative of certain employees of the Department of Natural Resources under an interim certification issued in this proceeding.

3. During the initial processing of the above-captioned case in 2004, the parties framed issues concerning the eligibility of several individuals for inclusion in the bargaining unit. The parties later resolved their differences with respect to all of the employees originally at issue, except for the employer's assertion that Margaret Murphy should be excluded as a confidential employee.

4. Prior to becoming a state employee in 1998, Margaret Murphy completed nine months of training as a paralegal and had about 16 years of experience working as a paralegal.

5. Throughout the processing of the above-captioned case, Margaret Murphy has been employed by the Department of Natural Resources as a project section administrator. Her regular and ongoing duties include responding to requests received by the agency for various documents.

6. Prior to and through the time of the hearing, Murphy has assisted assistant attorneys general by assembling and providing documents and other materials related to personnel and labor relations matters, and/or pertaining to torts matters. This has included, on occasion, direct interactions

between Murphy and assistant attorneys general. Murphy collects and organizes information for potential or ongoing litigation, including responses to discovery requests (such as interrogatories or requests for production of documents), conducting interviews, and researching questions for the assistant attorney general assigned to the particular case.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.80 RCW and Chapter 391-25 WAC.

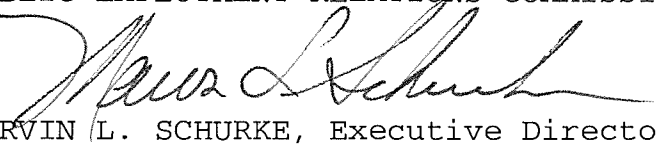
2. As described in paragraph 6 of the foregoing findings of fact, Margaret Murphy is currently a "confidential" employee within the meaning of the last sentence of RCW 41.80.005(4).

ORDER CLARIFYING BARGAINING UNIT

The position held by Margaret Murphy is excluded from the bargaining unit for which the Washington Federation of State Employees has been certified as exclusive bargaining representative in this proceeding.

Issued at Olympia, Washington, this 16th day of December, 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.