STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
WASHINGTON FEDERATION OF STATE EMPLOYEES	)	CASE 17739-E-03-2864
	)	DECISION 8469-A - PSRA
Involving certain employees of:	)	
	)	ORDER DETERMINING
WASHINGTON STATE PATROL	)	ELIGIBILITY ISSUES
	)	

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

Attorney General Rob McKenna, by *Elizabeth Delay Brown*, Assistant Attorney General, for the employer.

The Washington Federation of State Employees (union) petitioned for certain classified employees of the State of Washington (employer) working at the Washington State Patrol (agency) and, following an election conducted by the Commission, an interim certification issued on March 24, 2004, named the union as exclusive bargaining representative.[1] The case was held open to resolve issues about "confidential" status that were framed during the investigation conference. Hearing Officer Lisa A. Hartrich held a hearing on November 19, 2004.[2] The parties filed post-hearing briefs. In

---

[1] *State - Washington State Patrol*, Decision 8469 (PSRA, 2004). This case concerns a "mixed classes" bargaining unit, excluding confidential employees, supervisors, members of the Washington Management Service, and agency employees in other bargaining units.

[2] The Washington Public Employees Association (WPEA) was a party in the early stages of this proceeding, but it withdrew from participation prior to hearing.

September 2005, the parties were invited to submit supplemental briefs in light of a Commission decision interpreting the "confidential" exclusion from the Personnel System Reform Act (PSRA),[3] and both parties filed supplemental briefs by October 4, 2005.

ISSUE

The only issue remaining to be decided by the Executive Director in this case is: Are two employees in the Human Resource Consultant 3 (HRC-3) classification "confidential employees" within the meaning of RCW 41.80.005?

Based upon the record, the applicable statutes and rules, and the applicable case precedents, the Executive Director rules that the HRC-3 employees at issue in this case are not confidential, and therefore are properly included in the bargaining unit.

APPLICABLE LEGAL PRINCIPLES

The PSRA excludes "confidential employees" from all 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.
>
> . . .
>
> (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.

---

[3] *See Department of Natural Resources*, Decision 8458-B (PSRA, 2005).

In *State - Department of Natural Resources*, Decision 8458-B (PSRA, 2005), the Commission gave that definition a "labor nexus" interpretation consistent with *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978) and WAC 391-35-020.[4]

Because status as a confidential employee deprives the individual of all collective bargaining rights, the Commission imposes a heavy burden of proof on the party proposing the exclusion. *City of Seattle*, Decision 689-A (PECB, 1979).

ANALYSIS

This case involves two employees who work in the agency's Human Resource Division. That division is responsible for hiring of new employees, test development, training, injured worker programs, and policy development.

- Yvette McCloskey primarily works on resolving issues related to injured workers, including claims filed with the Department of Labor and Industries under Title 51 RCW. She is also knowledgeable on the rules and regulations related to the

---

[4] Codifying the definition applied by the Supreme Court in *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978), the rule provides:

> WAC 391-35-320 EXCLUSION OF CONFIDENTIAL EMPLOYEES. Confidential employees excluded from all collective bargaining rights shall be limited to:
>
> (1) Any person who participates directly on behalf of an employer in the formulation of labor relations policy, the preparation for or conduct of collective bargaining, or the administration of collective bargaining agreements, except that the role of such person is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment; and
>
> (2) Any person who assists and acts in a confidential capacity to such person.

Americans with Disabilities Act (ADA), the Family Medical Leave Act (FMLA), and other types of leave programs. She advises the agency staff on these and other issues related to injured workers.

- Joanna Falcatan specializes in diversity training, affirmative action plans, and reasonable accommodation.

Each of the disputed employees is supervised by an employee in the Human Resources Consultant 4 (HRC-4) classification. Neither of them attends meetings where collective bargaining agreements are negotiated, or has other direct involvement in the collective bargaining process.

The employer contends that both of the HRC 3 positions should be "confidential" under RCW 41.80.005(4), on the basis that they assist the employer's negotiators by providing information on issues to be addressed in collective bargaining.[5] The union asserts that the disputed individuals do not meet the "labor nexus" test, and should be included in the bargaining unit. Absent any evidence of direct participation by the disputed employees in labor relations work on behalf of the employer, the question here is limited to whether the HRC-3 employees "assist or aid" a manager who formulates labor relations policy or conducts collective bargaining on behalf of the employer.

---

[5] In its initial brief, the employer argued that the Legislature intentionally left the "labor nexus" requirement out of the "assists or aids a manager" prong of 41.80.005(4). The employer did not reassert that argument in its supplemental brief filed in light of *State - Department of Natural Resources*, Decision 8458-B (PSRA, 2005).

No Blanket Exclusion of Human Resources Personnel from PSRA

The Legislature is fully capable of making blanket exclusions when it wants to, and the PSRA contains a blanket exclusion of the Office of Financial Management, the Department of Personnel, and the Public Employment Relations Commission from its coverage. No similar language provides basis to either suggest, consider, or grant a blanket exclusion of everybody who works in the human resources offices of state agencies.

Personnel Work Does Not Equate With Labor Relations

Even if labor relations functions are handled within the human resources offices of state agencies, not all of what occurs in an agency human resources office meets the "labor nexus" test. Of particular interest here, the hiring and testing of new employees (who are not yet bargaining unit members represented by any union), the processing of workers compensation claims (which are regulated by a state law outside of the collective bargaining process), and compliance with federal laws such as the ADA and FMLA (which override the collective bargaining process), are personnel functions that are irrelevant for purposes of WAC 391-35-320 and the "labor nexus" test. *See Skagit County*, Decision 8038 (PECB, 2003); *City of Lynden*, Decision 7527-B (PECB, 2002).

Support Relationships Are Only Indirect

The Human Resource Administrator for the agency, Ms. Christensen, was an agency representative to the employer's statewide bargaining team. In her testimony, she characterized the employees in the HRC-4 classification as "supervisors" who help her in policy-making and decision-making, and characterized the employees in the HRC-3 classification as merely "lead workers" who the HRC-4 employees utilize to assemble information. Thus, the HRC-3 employees are a step removed from the collective bargaining process even if the

HRC-4 employees have some relevant involvement in the collective bargaining process.

Claimed Labor Relations Activities were After-The-Fact

While both of the disputed employees had some occasion to do work associated with implementing the negotiated collective bargaining agreements, their involvement was after the actual contract negotiations were concluded:

- According to Falcatan's testimony, the closest she came to "labor nexus" work was on one or two occasions when she was asked to interpret already-negotiated contract language on work schedules. She never attended meetings with managers about contract negotiations with the union, and did not work on any policies that were the subject of contract negotiations. While providing diversity training for agency staff and drafting of a reasonable accommodation policy for the agency were undoubtedly accomplishments of value to the employer, they were personnel work outside of the "labor nexus" arena that is of interest here.

- The closest that McCloskey came to "labor nexus" work in her testimony was when she compared already-negotiated contracts to identify differences. She was not involved in any contract negotiations, nor did she attend any negotiation sessions. She was not part of any labor management committee, and she lacked even general knowledge of the bargaining process.

Although both employees may consult with, assist, and train managers within the agency, that activity appears to be more related to their specialized knowledge of personnel issues than to the formulation of labor relations policy. Such personnel work does not meet the labor nexus test.

CONCLUSION

The employer has not satisfied its burden of proof in this case. While there is no doubt that Falcatan and McCloskey both have specific knowledge about their particular areas of expertise, they respond to routine requests and provide information as a natural extension of their knowledge and expertise. They do not have an intimate fiduciary role in connection with the employer's labor relations policies and strategies, and this record particularly lacks evidence indicating that either of them is privy to sensitive labor relations information such that disclosure could damage the collective bargaining process.[6] They lack the labor nexus required to warrant their exclusion from coverage of the PSRA.

FINDINGS OF FACT

1. The Washington State Patrol is a general government agency of the state of Washington within the meaning of 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 Washington State Patrol, under an interim certification issued in this proceeding on March 25, 2004.

3. Yvette McCloskey is employed by the Washington State Patrol in the Human Resource Consultant 3 classification, where she is primarily responsible for resolving issues concerning injured workers, for implementation of the federal American with Disabilities Act, and for implementation of the federal Family

---

[6] Any testimony speculating about their potential future involvement in labor relations has been disregarded.

Medical Leave Act. She has had no direct involvement in preparing for or conducting collective bargaining negotiations on behalf of the employer, and has only performed limited analysis for the agency's implementation of already-negotiated collective bargaining agreements.

4. Joanna Falcatan is employed by the Washington State Patrol in the Human Resource Consultant 3 classification, where she is primarily responsible for diversity training, affirmative action plans, and reasonable accommodation issues. She has had no direct involvement in preparing for or conducting collective bargaining negotiations on behalf of the employer, and has only performed limited analysis of already-negotiated collective bargaining agreements for the agency.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.80 RCW and WAC 391-25-270.

2. The HRC-3 positions held by Yvette McCloskey and Joanna Falcatan are, as presently constituted, "employees" within the meaning of RCW 41.80.005(6), and are not "confidential employees" within the meaning of RCW 41.80.005(4).

ORDER

1. The HRC-3 positions described in paragraphs three and four of the foregoing findings of fact are included in the bargaining unit involved in this proceeding.

2. The interim certification issued in this proceeding as State - *Washington State Patrol*, Decision 8469 (PSRA, 2004) shall

stand as the final certification of representation in this case.

Issued at Olympia, Washington, this 13th day of January, 2006.

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.