STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| In the matter of the petition of: | ) | |
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| WASHINGTON FEDERATION OF STATE EMPLOYEES | ) | CASE 18425-E-04-2942 |
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| Involving certain employees of: | ) | DECISION 8711-B - PSRA |
| | ) | |
| WASHINGTON STATE - NATURAL RESOURCES | ) | DECISION OF COMMISSION |
| | ) | |

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

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

This case comes before the Commission on a timely appeal filed by the Washington Federation of State Employees (union), seeking reversal of an eligibility ruling issued by Executive Director Marvin L. Schurke.[1] The Washington State Department of Natural Resources (agency) declined to file a brief on appeal.

ISSUE PRESENTED

1. Did the Executive Director properly reject application of a "labor nexus" test for exclusions based upon the "assist assistant attorneys general" language in RCW 41.80.005(4)?

2. Did the employer sustain its burden of proof on the basis of the record made in this case?

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[1] *State - Natural Resources*, Decision 8711-A (PSRA, 2005).

We find the Executive Director properly concluded that the "assist assistant attorneys general . . ." language in RCW 41.80.005(4) is not limited to labor nexus activities, but we conclude the record before us does not satisfy the heavy burden needed to support an exclusion of the employee at issue in this case. We thus reverse the Executive Director's decision.

ISSUE 1 - THE APPROPRIATE LEGAL STANDARD

Applicable Legal Principles

This case arises under the Personnel System Reform Act of 2002, Chapter 41.80 RCW. In the course of exercising authority to determine appropriate bargaining units under RCW 41.80.070 and to certify exclusive bargaining representatives under RCW 41.80.080, this Commission rules upon claims that individuals are properly excluded from bargaining rights as "confidential employees" under RCW 41.80.005(4). That statute provides:

> "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.*

(emphasis added). This is a case of first impression as to interpretation of the second sentence in that definition. We have previously interpreted the first sentence of that definition in conformity with the labor nexus test endorsed by the Supreme Court of the State of Washington in *IAFF, Local 469 v. City of Yakima*, 91

Wn.2d 101 (1978).[2] *State - Natural Resources*, Decision 8458-B (PSRA, 2005).

Analysis

Throughout the proceedings before the Executive Director and in the appeal, the union has urged an interpretation imposing the labor nexus test on the "assists assistant attorneys general . . ." language in RCW 41.80.005(4). We find no support for such an interpretation.

Placement in a separate sentence connotes that the "assists assistant attorneys general . . ." subject is separate and apart from the subject matter of the first sentence. Giving the first sentence the traditional labor nexus interpretation does not compel giving the same interpretation to the second sentence.

The legislative history provides little insight on how the second sentence of RCW 41.80.005 is to be interpreted. Although various versions of a state collective bargaining law have been proposed since the early 1980's, the PSRA as we know it grew out of a study committee created in 1993-1994 created by Substitute House Bill 2049 of 1993. Versions of the PSRA proposed after the 1993-1994 study committee excluded all employees of the Office of the Attorney General from collective bargaining rights. However, in 2000, the proposed PSRA legislation changed the definition of

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[2] The Supreme Court characterized "confidential" as a term of art in labor-management relations, and this Commission codified the *City of Yakima* test in WAC 391-35-320. Although the PSRA language differs from WAC 391-35-320, we found that RCW 41.80.005(4) substantially fulfills the term of art characterization. Moreover, the uniformity mission given to this Commission in RCW 41.58.005 supported application of the labor nexus test to persons who assist managers.

"confidential employee" to permit some, but not all, of the classified staff in the Office of the Attorney General to exercise collective bargaining rights.[3] We cannot ignore or nullify those subject matter exclusions.

Torts are a separate and distinct area of legal practice from "labor relations". We thus infer that the Legislature did not intend to impose a labor nexus test on assistance with torts matters.

Conclusion on Issue 1

Giving effect to all of the words in the second sentence of RCW 41.80.005(4), we find the Executive Director properly resisted the union's effort to engraft a labor nexus test onto the "assists assistant attorneys general . . ." language in RCW 41.80.005(4).

ISSUE 2: DID THE EMPLOYER SUSTAIN ITS BURDEN OF PROOF?

Faced with union support for an incorrect test, the Executive Director ruled that a meager evidentiary record supported exclusion of Margaret Murphy from the bargaining unit.

Applicable Legal Principles

In decisions dating back to *City of Tacoma*, Decision 95-A (PECB, 1977), the Commission has given narrow interpretation and application to statutory exclusions from collective bargaining rights. The Supreme Court of the State of Washington gave statutory exclusions a similar narrow interpretation when addressing the

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[3] Assistant attorneys general are exempt employees not covered by Chapter 41.06 RCW, and therefore do not possess collective bargaining rights. *See, e.g., University of Washington*, Decision 9410 (PSRA, 2006)(discussing the collective bargaining rights of exempt employees).

status of supervisors in *Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries*, 88 Wn.2d 925 (1977), and when addressing confidential employees in *Yakima*, 91 Wn.2d 101. Consistent with the narrow interpretations of the statutory exclusions, the Commission imposes a heavy burden of proof on a party seeking to exclude individuals from all collective bargaining rights. *City of Seattle*, Decision 689-A (PECB, 1979).

Application of Standards

We have closely scrutinized this record to ascertain whether the employer carried the heavy burden imposed upon it. We conclude the burden of proof was not satisfied.

Evidence on post-petition events should have been excluded from consideration in this case. Numerous Commission precedents have required that eligibility determinations be based on actual duties, rather than on speculation about duties that might be assigned to the disputed individual at some time in the future. A pre-petition focus is particularly apt in the representation case context of this case, because WAC 391-25-140 required the employer to maintain the status quo during the pendency of the proceedings. Strict application of that principle to claims of "confidential employee" status is consistent with WAC 391-35-020(1)(e), which allows the filing of unit clarification petitions on "confidential employee" status at any time. Parties should expect our hearing officers to reject evidence concerning changes of employee duties that occur during the pendency of the proceedings.[4] In this case, evidence

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[4] Permitting parties to "bootstrap" claims of confidential employee status by assigning additional duties to employees who are at issue in representation or unit clarification proceedings invites mischief, and improperly presents both other parties and this agency with a moving target.

concerning activities that occurred after the petition was filed, on April 12, 2004, should not have been admitted or considered.

Murphy's training as a "paralegal" is irrelevant on this record, since Murphy is not working in a paralegal position within either the Department of Natural Resources or the Office of the Attorney General. Eligibility rulings must be based on current duties, not on the qualifications an individual may possess.

Murphy's testimony in this record was equivocal, at best. Apart from her characterizing only a small portion of her work as "assisting" assistant attorneys general, her testimony lacked details and she was even uncertain as to the number of events. Notwithstanding being unrefuted, or being the only evidence, equivocal evidence does not meet the heavy burden of proof imposed by *City of Seattle*, Decision 689-A and subsequent precedents.

Murphy's functions would fall short of connoting "assistance" to assistant attorneys general, even if her testimony had been definite and certain. As the Executive Director correctly noted, Murphy's regular and ongoing job functions include preparing agency responses to requests for public records. Most such requests come from members of the general public and pertain to land use or asset preservation matters. Such work assignments are commonplace in state agencies, since Chapter 42.56 RCW obligates each and every state agency to assemble and provide public records upon request. There is no categorical exclusion from the PSRA for employees who respond to public records requests and, consistent with the narrow interpretation given to statutory exclusions in *METRO*, 88 Wn.2d 925 and *City of Yakima*, 91 Wn.2d 101, we interpret the "assists assistant attorneys general" language in RCW 41.80.005 as requiring something more than providing a service to which each and every member of the general public is entitled.

Conclusion on Issue 2

On the record made in this case, the employer did not sustain the heavy burden of proof to warrant exclusion of Margaret Murphy from collective bargaining rights under the PSRA.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Executive Director Marvin L. Schurke in the above-captioned case are amended as follows:

1. Paragraph 6 of the findings of fact is amended to read as follows:

> Prior to the filing of the petition to initiate this proceeding, Murphy may have assembled and provided public records to assistant attorneys general related to personnel matters, labor relations matters, and/or torts matters, but equivocal evidence in this proceeding falls short of establishing that Murphy's activities constituted meaningful direct assistance beyond assembling documents that were not otherwise subject to public disclosure.

2. Paragraph 2 of the conclusions of law is amended to read as follows:

> The facts described in paragraph 6 of the foregoing findings of fact fail to satisfy the heavy burden of proof required for exclusion as a "confidential"

employee within the meaning of the last sentence of RCW 41.80.005(4).

3. The order is amended to read as follows:

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

The above-captioned case is REMANDED to Executive Director Cathleen Callahan or her designee for further processing consistent with this opinion.

Issued at Olympia, Washington, this 15th day of November, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

DOUGLAS G. MOONEY, Commissioner