STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: PIERCE COUNTY CAPTAIN'S ASSOCIATION Involving certain employees of: PIERCE COUNTY	CASE 18681-E-04-2970 DECISION 8892-A - PECB DECISION OF COMMISSION

Patrick Kelly for the Pierce County Captains Association.

Joe Carillo, Labor Relations Manager, for the employer.

This case comes before the Commission on a timely appeal filed by Pierce County (employer) seeking to overturn certain findings of fact, conclusions of law, and order holding that employees holding the rank of captain were not confidential in status and therefore properly included within the bargaining unit.[1] The Pierce County Captains Association (union) supports the Executive Director's decision. We affirm.

PROCEDURAL BACKGROUND

On July 6, 2004, the union filed a petition seeking to represent the law enforcement and correctional captains of the employer. The employer and the union disagreed about whether the law enforcement captains shared a community of interest with the correctional captains and whether any of the correctional captains should be excluded as confidential employees. Hearing Officer Starr Knutson

[1] *Pierce County*, Decision 8892 (PECB, 2005).

held a hearing on October 13, 2004, and the parties were invited to submit briefs supporting their respective positions. On March 21, 2005, the Executive Director issued his decision finding that all of the captains shared a community of interest and that the correctional captains were not confidential employees. The employer filed this appeal challenging only the decision regarding the confidential status.

ISSUE PRESENTED

The sole issue presented in this case is whether the Executive Director is correct in holding that the employer failed to meet its burden of proof in establishing that all of the petitioned-for employees are not confidential in status and therefore properly included within the bargaining unit.

ANALYSIS

Standard of Review

This Commission reviews conclusions and applications of law, as well as interpretations of statutes, de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings in turn support the Executive Director's conclusions of law. *C-Tran*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002); *World Wide Video Inc. v. Tukwila*, 117 Wn.2d 382 (1991). The Commission attaches considerable weight to the factual findings and inferences made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

Are the Correctional Captains Confidential Employees?

This Commission, using established case precedent, applies a labor nexus test to determine the confidential status of employees to be included or excluded from a bargaining unit. That test, which originated in *International Association of Fire Fighters, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978), states that a confidential employee is an employee whose duties imply a confidential relationship which 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.*" *City of Yakima*, 91 Wn.2d 101, 106-107 (emphasis added). General supervisory responsibility is insufficient to place an employee within the exclusion. *City of Yakima*, Wn.2d at 107. This type of exclusion prevents potential conflicts of interest between the employee's duty to the employer and status as a union member. *Walla Walla School District*, Decision 5860 (PECB, 1997). If the employee's official duties provide access to sensitive information regarding the employee's collective bargaining position, that employee should not be placed in a position where he or she must question whether his or her loyalty lies with the employer or with the exclusive bargaining representative who is trying to attain the best agreement for that employee and co-workers. For this reason, the *City of Yakima* is one of the Commission's oldest precedents and has been applied unchanged to unit determination cases issued by the Commission since the Washington Supreme Court announced it in 1978.

In August of 2001, the Commission adopted WAC 391-35-320 which codified the confidential employee test announced in *City of Yakima* into its own rules. WAC 391-35-320 reads:

> 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.

In *City of Lynden*, Decision 7527-B (PECB, 2002), the Commission, commenting about the application of WAC 391-35-320, noted that although previous decisions of the Commission were decided without the benefit of the new rule, the confidential employee test applied in those cases was exactly the same test as the one codified in WAC 391-35-320. Thus, the Commission gave its stamp of approval for previous decisions applying the labor nexus test to act as precedent for cases decided under WAC 391-35-320.

Supervisors Have Collective Bargaining Rights

Although the employees in question supervise a unit of rank-and-file employees, this does not in and of itself demonstrate that they are confidential employees, and the employees' supervisory status does not exclude them from the their collective bargaining rights.[2] The duties of supervising bargaining unit members

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[2] Unlike Section 2(3) of the National Labor Relations Act which specifically excludes supervisors from collective bargaining rights, Chapter 41.56 RCW permits units of supervisors provided they are separate from the rank-and-file employees. *METRO v. Labor and Industries*, 88 Wn.2d 925 (1977).

inherently includes some contract administration, such as hiring and firing, without necessarily knowing any of the employer's confidential labor relations material. If a labor nexus test did not apply to supervisory employees, then almost all supervisors would lose their collective bargaining rights. Only those supervisors who have an actual conflict of interest because they were privy to the employer's confidential labor management materials should be confidential.

Information Resources Not Necessarily Confidential

If the employees based their input on confidential labor relations materials provided to them by the employer, then this would be a strong indication that these employees could qualify as confidential employees. However, to reach such a conclusion we must consider the exposure that they had to confidential labor relations materials, and whether their involvement in the employer's labor relations strategy is substantial enough to warrant denying these employees their bargaining rights.

Employees, and in particular supervisors, who are sources of important information to the employer's bargaining team are not rendered confidential merely because they might have access to the employer's confidential labor relations materials or provide input to the employer's labor relations team. *City of Puyallup*, Decision 5460 (PECB, 1996). Supervisors can provide valuable information if asked, "What do you think of the nonsupervisory union's proposal?" or "How much will our insurance company charge for medical insurance next year?" and still not be aware of an employer's bargaining position. Such discussions do not necessarily involve the employer's own sensitive labor relations materials, even if the employer bases its strategy on the employee's answer. It is important to determine whether confidential information had flowed

down to the employee, not whether useful information or recommendations flowed up to the bargaining team. The quality and quantity of employees' input and recommendations does not make them confidential unless they also have been privy to the employer's sensitive labor relations information.

To find employees confidential simply because they provide input and recommendations to the bargaining team would unnecessarily broaden the definition of confidential employees, and go against established Commission precedent. For example, in *State - Natural Resources*, Decision 8458-B (PSRA, 2005), the state agency argued that certain budget specialists who, at times, were asked to comment on pending legislation and prepare salary information were confidential employees and thus should have been excluded from the bargaining unit. The agency posited that asking employees to comment on certain scenarios, such as proposed legislation that could impact employee wages, sufficed to make the employees confidential. We rejected that argument and agreed with the Executive Director's conclusion that those requests were not substantial enough by themself to warrant their exclusion from the bargaining unit.

Although an employer's bargaining team may rely upon employees, including supervisors, as sources of information to base strategy, plans, and proposals, that doesn't by itself make those employees confidential. *See Pateros School District*, Decision 3911-B (PECB, 1992)(employers are responsible for instruction for employees to keep confidential collective bargaining information secret). To adopt such a conclusion in this case would once again create a loophole where any employee could be stripped of bargaining rights because the employer has decided to place a high value on any non-

confidential information that the employee provided even when that employee was not privy to confidential information.[3]

Application of Standards

Here, the employer provided some evidence on the record that it relied upon the correctional captains to provide some information to the employer's bargaining team. However, those instances do not by themselves establish the employer's heavy burden that the employees are confidential. No evidence exists demonstrating the captains were told to keep their input and recommendations a secret. By finding that the correctional captains were not confidential, the Executive Director inferred that not enough of the employer's confidential labor relations material flowed down to the correctional captains, and absent substantial evidence showing otherwise, we find the same.

The record also lacks sufficient details to support the employer's claim that the employees have significant contacts with confidential labor relations materials. For example, although Mike Larsen testified that he took part in meetings where the county discussed labor relations, no further details were given about these meetings. The petitioned-for employees' involvement in meetings where bargaining positions were established is relevant and is a possible example of activity that might make an employee confidential, but the record does not provide enough detail for us to second guess the Executive Director. There are other examples within the record where general statements of involvement with confidential, labor relations materials were not backed up with specific details.

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[3] Similarly, employers may not obtain an excessive number of confidential exclusions by giving bits and pieces of confidential duties to a large number of employees. *City of Auburn*, Decision 5775 (PECB, 1996).

Even when the record contains specific examples of the employees' duties possibly touching upon the employer's labor relations strategy, those examples fail to provide sufficient evidence that the correctional captains were privy to confidential information:

- The employer's question to a captain about the cost of uniforms, even though made during a break in negotiations, is distinguishable from a situation where an employer asks an employee to cost out a full proposal. The employer's question presents a situation where an employee relayed non-confidential information that had been gathered by a uniform committee which included bargaining unit members.
- The captains who were involved in bargaining a safety issue when a new jail was opened received e-mails from the correctional bureau chief which showed that she would or did discuss some issues with the captains. However, the e-mails do not describe what the captains learned of the employer's bargaining strategy, plans or proposals.
- An e-mail relaying a conversation between a corrections captain who was acting as the chief and a union official to clarify language provides little, if any, detail about the nature of the conversation and if it demonstrated that the corrections captain was privy to confidential information.
- An e-mail demonstrating that the captains provided input and recommendations on a tentative settlement is not detailed enough to demonstrate how the captains viewed those proposals in day-to-day operations, and it does not demonstrate that the captains were directly involved in the employer's labor relations negotiations.

Overall, the record lacks detailed evidence necessary to show that any of the petitioned-for employees had significant confidential roles in collective bargaining. Viewed as a whole, the record demonstrates, at best, that the captions had only sporadic contacts with the collective bargaining process.

NOW, THEREFORE, it is

ORDERED

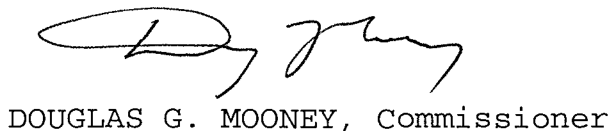
The Finding of Fact, Conclusions of Law, and Order issued by Executive Director Marvin L. Schurke are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

Issued at Olympia, Washington, the 24th day of April, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner



DOUGLAS G. MOONEY, Commissioner