

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: )  
 )  
TEAMSTERS LOCAL 313 ) CASE 21445-E-07-3329  
 )  
Involving certain employees of: ) DECISION 9976-A - PECB  
 )  
TOWN OF RUSTON ) ORDER DETERMINING  
 ) ELIGIBILITY ISSUE  
 )  
\_\_\_\_\_ )

Winterbauer & Diamond PLLC, by *Steven H. Winterbauer*,  
Attorney at Law, for the employer.

*Rick Engelhart*, Organizer, for the union.

On December 27, 2007, Teamsters Local 313 (union) filed a petition seeking to represent all full-time and regular part-time employees of the Town of Ruston (employer).

On February 6, 2008, Sally J. Iverson, Representation Coordinator for the Commission, conducted an investigation conference during which the employer asserted that the job position of clerk/treasurer, currently held by Karen Carlisle, should be excluded from the proposed bargaining unit as a supervisor and/or confidential employee. The union requested that the clerk/treasurer position be included in the unit.

On February 7, 2008, the Commission conducted a cross-check of signed authorization cards per WAC 391-25-410. On February 15, 2008, the Commission issued an interim certification, deferring the unit placement of the clerk/treasurer position to this

proceeding.<sup>1</sup> The interim certification described the bargaining unit as:

ALL FULL-TIME AND REGULAR PART-TIME EMPLOYEES OF THE TOWN OF RUSTON, EXCLUDING SUPERVISORS, CONFIDENTIAL EMPLOYEES, CASUAL EMPLOYEES AND UNIFORMED EMPLOYEES.

There is no evidence of prior collective bargaining history involving the employer. This is the first and only bargaining unit in the Town of Ruston.

On August 4, 2008, Hearing Officer Jessica J. Bradley conducted a hearing to develop a record from which a determination could be made as to whether the clerk/treasurer position should be excluded from the bargaining unit. Both parties filed post-hearing briefs which were considered.

#### ISSUES PRESENTED

1. Should the clerk/treasurer position be excluded from the bargaining unit as a confidential employee?

The Executive Director finds that the clerk/treasurer position is not a confidential employee and should not be excluded from the bargaining unit.

2. Should the clerk/treasurer position be excluded from the bargaining unit based on supervisory status?

The Executive Director finds that the clerk/treasurer position is not a supervisory position and should not be excluded from the bargaining unit.

---

<sup>1</sup> *Town of Ruston, Decision 9976 (PECB, 2008).*

Accordingly, the clerk/treasurer position is properly included in the existing non-supervisory employee bargaining unit.

ISSUE 1: Confidential Employee Status

Applicable Legal Principles

A party seeking a confidential employee designation has a heavy burden of proof, because confidential status deprives an employee of all collective bargaining rights. RCW 41.56.030(2)(c). See *King County Fire Protection District 13*, Decision 9845 (PECB, 2007), *Pierce County*, Decision 8892-A (PECB, 2006), and *State - Natural Resources*, Decision 8711-B (PSRA, 2006).

A Commission rule, WAC 391-35-320, codifies the confidential employee test, often referred to as the labor-nexus test, as follows:

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.

Confidential employees are excluded from bargaining units in order to prevent potential conflicts of interest between the employee's duty to the employer and the employee's status as a union member. *Walla Walla School District*, Decision 5860-A (PECB, 1997); *Yakima School District*, Decision 9020-A (PECB, 2007).

An employee does not have to work exclusively, or even primarily, on labor nexus work in order to be excluded as a confidential employee, so long as the assignments can be described as necessary, regular, and ongoing. *Oak Harbor School District, Decision 3581* (PECB, 1990); *City of Redmond, Decision 7814-B* (PECB, 2003). Sporadic contacts and limited back-up work are not sufficient to meet the test for exclusion. *Clover Park School District, Decision 2243-A* (PECB, 1987), *aff'd in relevant part, Decision 2243-B* (PECB, 1987); *Yakima School District, Decision 7124-A* (PECB, 2001).

### Analysis

The employer bears the burden of proof in this matter because it asserts the clerk/treasurer position should be excluded. The employer argues that Karen Carlisle, the clerk/treasurer, is a confidential employee because she has access to personnel files, payroll and benefit information, communications between and among the mayor, town council and external legal counsel, internal e-mail and related correspondence regarding pending budgets and future plans, and the employer's financial books and records.

Although these documents may be confidential in the sense that they are not available to the general public, the employer failed to show that any of this information concerns confidential aspects of labor relations or collective bargaining. Under the labor-nexus test, an employee must be involved with confidential aspects of labor relations to be excluded from a bargaining unit as confidential. The purpose of excluding employees as confidential is to prevent a conflict of interest concerning labor relations information. The fact that an employee assists with, or has access to, information that the employer considers confidential does not by itself make a position confidential for the purpose of unit placement. *College Place School District, Decision 9445-A* (PECB,

2007); *Community College District 14 (Clark)*, Decision 10044 (PSRA, 2008), *aff'd in Decision 10044-A*. For example, an employee's access to personnel files and payroll data does not establish confidential status. *Darrington School District*, Decision 5573 (PECB, 1996). As the Commission recently explained in *City of Yakima*, Decision 9983-A (PECB, 2008):

Employees . . . 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. *Pierce County*, Decision 8892-A (PECB, 2005), citing *City of Puyallup*, Decision 5460 (PECB, 1996); see also *City of Aberdeen*, Decision 4174 (PECB, 1992).

The Commission cited *City of Aberdeen* for the principle that "sporadic or occasional exposure to labor relations matters or use of an employee as a 'sounding board' for management positions on labor relations matters where no 'necessity' for such discussions has been established will not result in the exclusion of an employee from a bargaining unit." *City of Yakima*, Decision 9983-A.

In the case before us, the employer acknowledges that the clerk/treasurer has not been involved in the collective bargaining process. The clerk/treasurer has never participated in collective bargaining negotiations on behalf of the employer nor has she assisted in formulating labor relations policy or administering a collective bargaining agreement. The clerk/treasurer attends the town council meetings that are open to the public, but does not attend private executive sessions of the town council. The record is devoid of any example of Carlisle's involvement in collective bargaining activities. The employer explained at the hearing that the clerk/treasurer's lack of involvement is due to the fact that

the employer had not yet begun contract negotiations with the union.

The employer argues that once collective bargaining begins the mayor will need to rely on the clerk/treasurer to collect and analyze bargaining-related information, maintain minutes and notes of confidential meetings, and otherwise assist the employer in collective bargaining. The employer also argues that the clerk/treasurer should be excluded because she works closely with the mayor. The employer believes that due to the nature of the clerk/treasurer's current job duties, it is logical to assume that she will be called upon to assist the mayor with collective bargaining.

As the Commission recently reiterated in *City of Yakima*, Decision 9983-A, it "will only consider the current job duties of the employee or employees as they exist at the time that the representation petition is filed." The reasoning used by the Executive Director in *Town of Granite Falls*, Decision 2617 (PECB, 1987), a case cited by the employer, has not been embraced by the Commission. The Commission requires that confidential exclusions be based on an employee's actual duties and responsibilities, and not on speculation about the employee's future duties and responsibilities. *City of Spokane Valley*, Decision 10158 (PECB, 2008); *King County Fire Protection District 13*, Decision 9845 (PECB, 2007); *State - Natural Resources*, Decision 8458-B (PSRA, 2005).

Additionally, in *City of Yakima*, the Commission made it clear that in order to exclude a job position as confidential "an employer must communicate to an employee its expectation that the labor relations information or material be kept confidential. See, e.g., *Pateros School District*, Decision 3911-B (PECB, 1992)." Here,

there is no evidence that the employer had any such communication with the clerk/treasurer.

### Conclusion

The clerk/treasurer position does not prepare confidential labor relations documents on a necessary, regular, or ongoing basis. The employer failed to satisfy its burden of proof with respect to confidential employee status. The clerk/treasurer does not meet the labor-nexus test set forth in WAC 391-35-320(1) or (2) and, therefore, the position cannot be excluded from the bargaining unit on this basis.

### ISSUE 2: Supervisory Status

#### Applicable Legal Principles

In 2001, the Commission adopted WAC 391-35-340, codifying the principle that supervisors are excluded from bargaining units that contain their rank-and-file subordinates. Supervisors are separated from non-supervisory employees to limit or prevent conflicts of interest. *City of Puyallup*, Decision 5639-B (PECB, 1997) (citing *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981)).

Because Chapter 41.56 RCW does not contain a definition of supervisor, the Commission looks to the definition of supervisor set forth in RCW 41.59.020(4)(d):<sup>2</sup>

[S]upervisor . . . means any employee having authority, in the interest of an employer, to hire, assign, promote, transfer, layoff, recall, suspend, discipline, or

---

<sup>2</sup> *City of Lynnwood*, Decision 8080-B (PECB, 2006).

discharge other employees, or to adjust their grievances, or to recommend effectively such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment. . . . The term "supervisor" shall include only those employees who perform a preponderance of the above-specified acts of authority.

The "preponderance" term is an important modifier. In this context, preponderance means "that the disputed employee either spends a preponderance of his/her work time engaged in supervisory indicia or engages in a preponderance of the types of supervisory indicia." *City of Lynnwood*, Decision 8080-A (PECB, 2005), *aff'd*, Decision 8080-B (PECB, 2006), *citing Granite Falls School District*, Decision 7719 (PECB, 2002), *aff'd*, Decision 7719-A (PECB, 2003). "The determination of whether an individual possesses sufficient authority to be excluded from a rank-and-file bargaining unit as a 'supervisor' is made on the basis of the actual duties and authority exercised by that individual, not on the basis of his or her title or job description." *Morton General Hospital*, Decision 3521-B (PECB, 1991).

The Commission distinguishes between supervisors and employees who are "lead workers." As the Commission explained in *City of Toppenish*, Decision 1973-A (PECB, 1985): "In a hierarchical organization, certain employees may be given some supervisory responsibilities, but not a full complement, or they may be allowed to share supervisory responsibilities with their own superiors." These employees, who are often referred to as lead employees or working foremen, lack the true authority and independent judgment that is the hallmark of supervisory status.

When looking at the "types" of supervisory indicia, it is important to determine whether a disputed position has independent authority



to act in the interest of the employer. "While lead workers may possess authority to direct subordinates in their daily job assignments, they generally do not have the authority necessary to make meaningful changes in the employment relationship." *Grant County, Decision 4501 (PECB, 1993).*

### Analysis

The employer believes that the clerk/treasurer position, currently held by Carlisle, should be excluded from the nonsupervisory bargaining unit as a supervisory position. Specifically, the employer argues that Carlisle supervises the utility billing clerk and the part-time office assistant.

The clerk/treasurer reports to the mayor and is one of three employees in the Town of Ruston's administrative branch. The utility billing clerk and part-time office assistant are also included in the administrative branch. The mayor works part-time, often from home, and relies on the clerk/treasurer to keep him updated on what is going on at town hall.

The clerk/treasurer is involved in hiring employees for the part-time office assistant position. According to Carlisle, the part-time office assistant position has high turnover. During the eight years that Carlisle has held the clerk/treasurer position, she has been involved in hiring eight or nine different employees to fill this one part-time office assistant position.

When the part-time office assistant position has become vacant, the clerk/treasurer and the utility billing clerk have reviewed applicant resumes and determined who they thought were the best candidates. Then the clerk/treasurer and the utility billing clerk have shown the resumes to the mayor, and shared their recommenda-

tions regarding which applicants should be interviewed. The mayor has told them to go ahead and interview the applicants they identified.

The clerk/treasurer and the utility billing clerk developed the interview questions and jointly interviewed the applicants. The mayor did not personally interview the applicants. At the conclusion of the interviews, the clerk/treasurer and the utility billing clerk discussed the candidates' strengths and weaknesses. Each time the clerk/treasurer and the utility billing clerk came to an agreement of who they wanted to hire and informed the mayor of their recommendation. The mayor hired their top choice on all but one occasion.

Recently the clerk/treasurer also assisted with interviewing and hiring a new utility billing clerk. The former utility billing clerk, who was still employed at the time, and the clerk/treasurer jointly interviewed the applicants and followed a similar routine as they did with interviewing applicants for the part-time office assistant position. The mayor hired the candidate they recommended.

When the part-time office assistant or utility billing clerk position becomes vacant, the clerk/treasurer spends a couple of days working to fill the position. Overall, the clerk/treasurer spends very little time hiring employees.

The clerk/treasurer and the utility billing clerk both assign work to the part-time office assistant. On average the clerk/treasurer spends about 15 to 20 minutes per day delegating tasks and explaining work assignments to the office assistant. Most of the work performed by the part-time office assistant is delegated to her by the utility billing clerk.

If something comes up that causes the clerk/treasurer to need assistance in order to meet a deadline, the clerk/treasurer will also ask the utility billing clerk for assistance. The utility billing clerk performs her job duties with little supervision. If the utility billing clerk has a question, she asks the clerk/treasurer.

The clerk/treasurer does not set employee work schedules. When the part-time office assistant requested an adjustment in daily work hours, the clerk/treasurer took the request to the mayor. Upon receiving approval from the mayor, the clerk/treasurer adjusted the part-time office assistant's work hours.

There is no evidence on the record to indicate that the clerk/treasurer has the ability to promote or transfer employees. The clerk/treasurer does not have the authority to lay off employees or recall employees after a layoff. The decision to lay off and/or recall employees rests with the mayor.

When the clerk/treasurer was asked whether she has the ability to discipline employees she said, "No. I would have to go to the mayor for that." Former Mayor Transue acknowledged that he never told the clerk/treasurer that she had the ability to discipline employees or send them home. Transue explained that he felt there was a general understanding that the clerk/treasurer was the "office manager and runner of the office." According to the clerk/treasurer, all three mayors she has worked under made the decisions on employee discipline.

The clerk/treasurer's involvement with employee discipline has been extremely limited. On one occasion the clerk/treasurer observed the part-time office assistant and the utility billing clerk wearing clothing that she felt was inappropriate for the office.

The clerk/treasurer reminded the employees that they had been given a copy of the employer's personnel policy. The clerk/treasurer told them that she did not think their attire was professional and reminded them that "we want to portray that we are professional in manner. And so we need to dress the part." The clerk/treasurer did not consult with the mayor prior to talking to her co-workers about their attire. The clerk/treasurer did not document the conversation. Nothing about the conversation was recorded in employees' personnel files. This is the only time the clerk/treasurer has given a verbal warning to an employee.

When asked if she had ever been told she had the ability to issue a written disciplinary warning, the clerk/treasurer testified: "No. That was made perfectly clear when I came on board, that all staff disciplinary measures and so on were done by the mayor." The clerk/treasurer has never suspended any employee or issued a written disciplinary warning. The current mayor acknowledged that it is his responsibility to apply discipline beyond a verbal warning.

According to former Mayor Transue and the current mayor, the clerk/treasurer does not have the ability to fire employees. The clerk/treasurer must have approval from the mayor before terminating the employment of an employee. However, within the past year the clerk/treasurer effectively recommended the discharge of an employee. When a newly-hired, part-time office assistant repeatedly made errors in calculating deposits and counting money, the clerk/treasurer approached the mayor and explained that the new hire was not grasping the financial aspect of the job. The mayor instructed the clerk/treasurer to talk to the new employee and try to work it out. Three or four days later, the clerk/treasurer approached the mayor again and told him, "It's not going to work with her. There's too much at stake, her not being able to take

total control, so to speak, over utility billings and ringing up cash receipts." The mayor then told the clerk/treasurer, "If you feel you need to let that person go, and you feel that's appropriate for the office, I trust your judgement to do that." The clerk/treasurer terminated the employee.

The clerk/treasurer has never adjusted employee grievances. The clerk/treasurer does not believe that she would be the proper person for employees to approach if they had a grievance.

The clerk/treasurer does not complete written evaluations for any employee other than herself. In the past the clerk/treasurer and the utility billing clerk have drafted their own evaluations, then the mayor would make minor changes to the letters and sign them. The part-time office assistant has never had a written evaluation.

The clerk/treasurer maintains the employer's personnel files and is the only person with keys to access the files. The clerk/treasurer is responsible for filing employee tax forms and other documentation that the employer requires employees to keep on file. The clerk/treasurer puts other documents in personnel files at the mayor's request. On one occasion the clerk/treasurer decided to put a copy of an e-mail, sent by a former office assistant who had been terminated, in the former employee's personnel file. This was the only instance in which the clerk/treasurer put additional documents in an employee personnel file without being directed by the mayor to do so.

The clerk/treasurer is responsible for training the part-time office assistant and utility billing clerk concerning office operations. If the clerk/treasurer identifies an outside training opportunity for the part-time office assistant, the clerk/treasurer

can recommend the training to the mayor. The mayor is responsible for approving requests for training.

The clerk/treasurer possesses the authority to direct the utility billing clerk and the part-time office assistant in their daily job assignments, but does not have the authority to make meaningful changes in the employment relationship without first obtaining the mayor's approval. Under *Grant County*, Decision 4501, the clerk/treasurer is a lead employee and not a supervisor.

The clerk/treasurer's supervisory duties are similar to the supervisory duties of the community development department employees in *City of Lynnwood*, Decision 8080-B. In *City of Lynnwood*, three of the job positions at issue were heavily involved in screening, interviewing, and recommending new hires. The department director testified that he agreed with his employees' recommendation about 95 percent of the time. One of the employees had input into a promotional opportunity within his group, although the department director made the final decision. One employee also had experience with formal discipline of workers within their group, but the department director made the final decision about the severity of discipline. None of the disputed employees had any experience with the transfer, layoff, recall, discharge of other employees, or the adjustment of employee grievances. The Commission affirmed the Executive Director's determination that these employees were "leadworkers" and not supervisors for the purpose of unit placement. The Commission explained, "The evidence fails to demonstrate that a preponderance of the duties performed by these employees are supervisory in nature, or that these employees are regularly asked to exercise independent judgment."

Conclusion

The clerk/treasurer is a lead employee, not a supervisor, for the purpose of bargaining unit placement because her duties do not meet the preponderance test for supervisory duties. The clerk/treasurer does not promote, transfer, layoff, recall, suspend employees, or adjust employee grievances. The clerk/treasurer does not perform, or have authority to effectively recommend, a preponderance of the types of authority specified in RCW 41.59.020(4)(d).

The clerk/treasurer is involved in hiring employees, assigning work, verbal discipline of employees, and has effectively recommended the termination of one employee. However, this work makes up a small portion of the clerk/treasurer's work load. In order to meet the preponderance of work time test, the clerk/treasurer would have to spend more than 50 percent of her time on these duties. The record indicates that in an 8-hour work day, the clerk/treasurer typically spends 15 to 20 minutes assigning work. When the part-time office assistant or utility billing clerk positions become vacant, the clerk/treasurer spends a couple days on work involved with recruiting and interviewing applicants. The clerk/treasurer does not spend 50 percent or more of her time performing supervisory duties.

Additionally, the clerk/treasurer's duties do not call for the consistent exercise of independent judgment that is necessary to find supervisory status. The only supervisory actions that the clerk/treasurer can take without the mayor's approval are routine in nature and do not require the level of independent judgment associated with supervisory status.

FINDINGS OF FACT

1. The Town of Ruston is a public employer within the meaning of RCW 41.56.030(1).
2. Teamsters Local 313 is a bargaining representative within the meaning of RCW 41.56.030(3).
3. On February 15, 2008, Teamsters Local 313, was certified by the Commission as the exclusive bargaining representative of all full-time and regular part-time employees of the Town of Ruston, excluding supervisors, confidential employees, casual employees, and uniformed employees.
4. The clerk/treasurer position does not participate in the preparation for or conduct of collective bargaining on behalf of the employer.
5. The clerk/treasurer position does not assist the mayor in formulating labor relations policy or administering a collective bargaining agreement.
6. The clerk/treasurer position does not prepare confidential labor relations documents on a necessary, regular, or ongoing basis.
7. The clerk/treasurer position does not spend a preponderance of work time engaged in the supervision of other Town of Ruston employees, nor does the position have the authority to independently perform or make effective recommendations on a preponderance of the following types of duties: hire, assign, promote, transfer, layoff, recall, suspend, discipline, or discharge other employees, or adjust their grievances.



CONCLUSIONS OF LAW

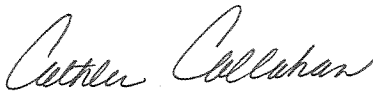
1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC.
2. As described in Findings of Fact 4 through 6, the clerk/treasurer position is a public employee within the meaning of RCW 41.56.030(2) and is not a confidential employee within the meaning of RCW 41.56.030(2)(c).
3. As described in Finding of Fact 7, the clerk/treasurer position is a public employee within the meaning of RCW 41.56.030(2), and is not a supervisor under RCW 41.59.020(4)(d) or WAC 391-35-340.

ORDER

The clerk/treasurer position is included in the bargaining unit involved in this proceeding.

Issued at Olympia, Washington, this 2<sup>nd</sup> day of December, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CATHLEEN CALLAHAN, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the agency under WAC 391-25-660.