

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
)
TEAMSTERS LOCAL 760) CASE 21235-E-07-3294
)
Involving certain employees of:) DECISION 9983-A - PECB
)
CITY OF YAKIMA) DECISION OF COMMISSION
)
_____)

Reid Pedersen McCarthy & Bellew, L.L.P., by *Kenneth J. Pedersen*, Attorney at Law, for the union.

Sofia D. Mabee, Assistant City Attorney, for the employer.

This case comes before the Commission on a timely appeal filed by the Teamsters Local 760 (union) seeking review and reversal of certain Findings of Fact, Conclusions of Law, and Order Determining Eligibility issued by Executive Director Cathleen Callahan.¹ The City of Yakima (employer) supports the Executive Director's decision.

ISSUES PRESENTED

The issue before this Commission is whether this record supports the Executive Director's findings and conclusions that Captains Greg Copeland, Jeff Schneider, and Rod Light are confidential employees within the meaning of Chapter 41.56 RCW, and therefore excluded from the petitioned-for bargaining unit of supervisory employees?

¹ *City of Yakima*, Decision 9983 (PECB, 2008).

For the reasons set forth below, we affirm the Executive Director's decision that Captain Jeff Schneider is excluded from the petitioned-for bargaining unit as a confidential employee. This record demonstrates that, at the time of the union's petition, Schneider's duties show that he has a continuing intimate fiduciary relationship with the executive head and assists in the formulation of the employer's labor relations policy that warrants his exclusion from his collective bargaining rights.

However, we reverse the Executive Director's decision that the employer met its burden demonstrating that Captain Greg Copeland and Captain Rod Light's current duties exclude them from their collective bargaining rights as confidential employees. While Copeland may have participated in bargaining on behalf of the employer in the past, his current duties fail to demonstrate that he participates directly in the formulation of the employer's collective bargaining policies. Although Light was also part of the employer's negotiating team, the evidence on this record also fails to support the Executive Director's findings and conclusions that his actual duties qualify him as a confidential employee at the time the union filed its representation petition.

ARE THE POLICE CAPTAINS CONFIDENTIAL EMPLOYEES?

The Petitioned-for Bargaining Unit

The union petitioned for a bargaining unit of supervisory employees within the police department of the employer. Specifically, the union seeks to represent a bargaining unit of supervisors that includes all of the captains and lieutenants within the department. The employer challenged the inclusion of the captains, arguing that they should be excluded from the bargaining unit as confidential employees as defined by Chapter 41.56 RCW. Because the employer

challenged a significant portion of the bargaining unit, the Executive Director declined to conduct a representation election until the eligibility issues were resolved.

Applicable Legal Standards

This Commission, using established case precedent, applies a labor relations nexus test to determine the confidential status of employees to be included or excluded from a bargaining unit. That test, accepted 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 that must flow from an official intimate fiduciary relationship with the executive head of the bargaining unit or public official.

Confidential employees are precluded from exercising their statutory collective bargaining rights, and therefore a heavy burden is placed on the party seeking that confidential determination. *City of Seattle*, Decision 689-A (PECB, 1979). Any reliance upon labor relations responsibilities must be necessary, regular, and ongoing. *Yakima School District*, Decision 7124-A (PECB, 2001) (citing *Oak Harbor School District*, Decision 3581 (PECB, 1990)). An employer may not obtain an excessive number of confidential exclusions by giving little bits of confidential duties to a large number of employees. *Clover Park School District*, Decision 2243 (PECB, 1987). 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. *Pierce County*, Decision 8892-A (PECB, 2005), citing *City of Puyallup*, Decision 5460 (PECB, 1996); see also *City of Aberdeen*, Decision

4174 (PECB, 1992) (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). Furthermore, 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) (employee found not to be confidential where the record was void of any indication that the employer expected the information she prepared to be kept confidential at any time).

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 at 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 his employer and status as a union member. *Walla Walla School District*, Decision 5860 (PECB, 1997). If the employee's official duties provide them access to sensitive information regarding the employee's collective bargaining position, that employee should not be placed in a position where that employee 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 his or her co-workers. *State - Natural Resources*, Decision 8458-B (PSRA, 2005).

For these reasons, the *City of Yakima* is one of the Commission's oldest precedents and has been applied unchanged to unit determina-

tion cases issued by the Commission since the Washington Supreme Court announced it in 1978, and is so well understood that the Commission codified the standard by adopting WAC 391-35-320. See also *City of Lynden*, Decision 7527-B (PECB, 2002).

Supervisors Have Collective Bargaining Rights

Although the employees in question have some supervisory authority over the 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 their collective bargaining rights.² The duties of supervising bargaining unit members 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 unnecessarily 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.

Application of Legal Standards

Evidence and Testimony Regarding Deputy Police Chief Irrelevant

As a threshold matter, we begin by noting that the evidence and testimony submitted by the union and testimony of the employer's witnesses regarding the employer's intention on hiring a deputy chief of police to handle labor relations matters is irrelevant to

² Unlike 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).

this proceeding. In *City of Redmond*, Decision 7814-B (PECB, 2003), the Commission held that any decision about the confidential status of an employee must be based upon the evidence presented within the record about the employee's actual duties. To exclude employees based on speculation about future duties would produce a result that would support neither the purpose of the state's collective bargaining laws nor the Administrative Procedure Act. *State - Natural Resources*, Decision 8458-B; *Pateros School District*, Decision 3911-B. In reaching these conclusions, the Commission consistently noted that although job descriptions and duties are not static entities, and the duties of employees may perhaps change as an organization evolves and faces new challenges, only current job duties may be considered when determining an employee's eligibility for collective bargaining rights. *State - Natural Resources*, Decision 8458-B.

We once again reiterate those legal principles, and stress to the parties that, when making eligibility determinations, this Commission will only consider the current job duties of the employee or employees as they exist at the time that the representation petition is filed.³ While the employer's decision to create a position that is responsible for labor relations may be a certainty, how that position ultimately affects the current assigned duties of the three employees at issue is speculative. As such, the union's motion to re-open the administrative hearing to accept new evidence regarding the job announcement for the deputy chief position is out of order.⁴

³ Either the employer or union may file a unit clarification petition should circumstances change in the future.

⁴ We note that the Executive Director correctly declined to consider evidence regarding the deputy chief position.

Captain Jeff Schneider

The Executive Director found Schneider's duties warranted his exclusion from the bargaining unit as a confidential employee. Specifically, she found that Schneider participated in bargaining, attended "bargaining session as the employer's bargaining representative, and provided input in the drafting of employer proposals, and attended caucuses and meetings where confidential strategies and counter-proposals were discussed."

The record in this case presents a very close call on the status of Captain Schneider. Although there are some conflicts in the testimony about how recently Schneider had appeared at the bargaining table, the major difficulty is the lack of specific evidence. The high burden of proof required to exclude an employee from all bargaining rights, and the regularity, necessity, and continuing nature of labor nexus duties require more than vague and conclusory statements provided by the employer's witnesses. However, Schneider's testimony corroborated the vague and conclusory statements of management employees about his participation in high level and labor-related discussions he knew were to be kept secret from the union, and supports the Executive Director's conclusion that Schneider's position is confidential based on the facts at the time of the hearing.

For example, although this record demonstrates that Schneider last sat at the bargaining table for negotiations with represented employees in 2003, the testimony presented at hearing demonstrates that he attended and participated in ongoing confidential discussions with the employer regarding labor relations policy. Schneider testified that he worked on and commented upon a random drug testing policy that was being negotiated with Yakima Police Patrolmen's Association (YPPA), and participated in interest

arbitration with the YPPA on behalf of the employer. Additionally, Schneider testified that he played a role in negotiations with the YPPA when Chief Sam Granato ceased actively participating in negotiations with that union. While these events may not have been direct face-to-face negotiations, they nevertheless demonstrate that labor relations duties continue to be assigned to Schneider on an ongoing basis.

The evidence also demonstrates that Schneider was privy to and participated in confidential discussions regarding the employer's labor relations strategy. Schneider testified that he was often asked questions regarding the nuts and bolts of the employer's operation and commented upon union proposals and how they might affect the employer's operation.⁵ The employer's witnesses also testified that they expect Schneider to continue to provide this type of input. Finally, while Schneider may have questioned whether his input was valued by the employer, the evidence and testimony of the employer's witnesses nevertheless demonstrates that the employer relied on Schneider's advice when analyzing union proposals and preparing counter-proposals, and that there was a free exchange of information between Schneider and those employer officials in charge of the city's labor relations policies and strategies.

Greg Copeland

The Executive Director found Copeland's duties warranted his exclusion from the bargaining unit as a confidential employee. Specifically, she found the testimony demonstrated that Copeland participated in bargaining, including sitting at the negotiating table as an employer representative during bargaining with the YPPA, attending private meetings and caucuses where confidential

⁵ Transcript page 177, line 18 through page 178, line 15.

information was discussed, and discussed confidential information with Granato regarding the state of those negotiations. We disagree that the employer has met its heavy burden demonstrating that Copeland's current duties warrant his exclusion.

Copeland did not testify at the hearing about his current duties, and evidence regarding his duties was explained through the testimony of other witnesses. That testimony demonstrates that while Copeland may have attended bargaining sessions, the evidence fails to support a finding that he was privy to confidential labor relations information and strategy. For example, although Granato testified that Copeland attended the most recent negotiations with YPPA, he was unable to point to specific instances where Copeland was intimately involved in formulating the employer's collective bargaining strategy or privy to collective bargaining information. Granato testified that he "pretty sure" that he thought Copeland worked on costing out an overtime issue, this uncertainty fails to satisfy the employer's burden.

Additionally, while there is some evidence that Copeland disciplines employees and processes grievances, that evidence demonstrates that these duties are more indicative of Copeland's supervisory status, as opposed to his confidential status. Although the testimony suggests that Copeland does have the ability to exercise independent judgment to settle grievances, the evidence fails to demonstrate Copeland consistently performs either of these duties at such a level that this duty would warrant his exclusion as a confidential employee.

Finally, Granato testified that he often explained his philosophy regarding the employer's response to a specific union proposal with Copeland, and that he expects to be able to have frank conversations with his captains. While Granato may have had expectations

of Copeland, these expectations do not equate to actual duties, and merely explaining a labor relations philosophy does not equate to providing the employee with confidential information. Furthermore, we have no evidence from Copeland describing what information he was privy to and if it was expected that he keep that information confidential. This record does not support the Executive Director's findings and conclusions that Copeland is a confidential employee.

Rodney Light

The Executive Director found Light's duties warranted his exclusion from the bargaining unit as a confidential employee. Specifically, she found the testimony demonstrated that Light participated in bargaining, including sitting at the negotiating table as an employer representative during bargaining with the Washington State Council of County and City Employees (Council 2),⁶ and attending private meetings and caucuses where confidential information was discussed with Granato regarding the state of those negotiations. In this instance, we disagree that the evidence supports Light's exclusion as a confidential employee.

Granato testified that he intended to rotate bargaining assignments of the three captains to expose them all to labor relations duties. As part of this rotation, Granato assigned Light to the negotiations regarding the Council 2 contract.

⁶ The parties referred to this unit at the "AFSCME" unit, which is an acronym for American Federation of State, County Municipal Employees, an international labor organization. Council 2 is the certified bargaining representative of the non-uniformed employees in the police department, and is an AFSCME affiliate.

Light's current duties fail to establish that he has a fiduciary relationship with the employer that warrants his exclusion from the bargaining unit. Although Light sat at the table for the Council 2 negotiations, that bargaining was not for the entire contract, but rather for a reopener on a single issue, and there is no evidence on this record demonstrating that Light had any meaningful input for the negotiations. In fact, Light testified that he did not assist in drawing up proposals or counter-proposals, was not asked to critique any AFSCME proposal, and was there to listen and provide answers to procedural questions. Unlike Schneider, there is no evidence that a direct exchange of confidential labor relations information occurred between the employer and Light. Substantial evidence does not support the Executive Director's findings and conclusion that Light is a confidential employee.

NOW, THEREFORE, the Commission makes the following:

AMENDED FINDINGS OF FACT

1. The City of Yakima is a public employer within the meaning of RCW 41.56.030(1). The employer maintains and operates a police department.
2. Teamsters Local 760 is a bargaining representative within the meaning of RCW 41.56.030(3) and has filed a petition with the Public Employment Relations Commission seeking certification as the exclusive bargaining representative of a supervisory bargaining unit of police lieutenants and captains.
3. The employer has contended that the position of police captain is confidential as defined by statute and should be excluded from the bargaining unit.

4. Jeff Schneider actively participates with the employer's bargaining team, provides input about collective bargaining proposals, has access to confidential information, and assists in formulating labor policy.
5. Greg Copeland and Rod Light sit at the employer's negotiating table and answer technical questions about the impact that proposals may have on the employer's operation. Neither employee consistently assists the employer in formulating labor policy.

AMENDED 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. Based upon Finding of Fact 4, the employer has met its burden establishing that Jeff Schneider is a confidential employee within the meaning of RCW 41.56.030(2)(c) and WAC 391-35-302(1), and should be excluded from the petitioned-for bargaining unit.
3. Based upon Finding of Fact 5, the employer has not met its burden establishing that Greg Copeland and Rob Light are confidential employees within the meaning of RCW 41.56.030(2)(c) and WAC 391-35-302(1), and should be included in the petitioned-for bargaining unit.

ORDER

Processing of this case is REMANDED to the Executive Director for the purpose of conducting a representation election consistent with this Order.

Issued at Olympia, Washington, the 11th day of September, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson



PAMELA G. BRADBURN, Commissioner



THOMAS W. McLANE, Commissioner