

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
WASHINGTON STATE COUNCIL OF COUNTY)	CASE 12793-C-96-799
AND CITY EMPLOYEES, LOCAL 1308,)	
AFSCME, AFL - CIO)	
)	DECISION 6789 - PECB
For clarification of an existing)	
bargaining unit of employees of:)	ORDER CLARIFYING
)	BARGAINING UNIT
KITSAP COUNTY)	
)	
)	
<hr/> In the matter of the petition of:)	
)	
KITSAP COUNTY)	CASE 12798-C-96-801
)	
For clarification of an existing)	DECISION 6790 - PECB
bargaining unit represented by:)	
)	
WASHINGTON STATE COUNCIL OF COUNTY)	ORDER CLARIFYING
AND CITY EMPLOYEES, LOCAL 1308)	BARGAINING UNIT
AFSCME, AFL - CIO)	
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John F. Cole, Director for Staff Services, appeared on behalf of the union.

Russell D. Hauge, Prosecuting Attorney, by Jacquelyn M. Aufderheide, Deputy Prosecuting Attorney, appeared on behalf of the employer.

On October 31, 1996, Washington State Council of County and City Employees, AFSCME, AFL - CIO, Local 1308 (union), filed a petition for clarification of an existing bargaining unit of non-supervisory employees of Kitsap County (employer). Case 12793-C-96-799. On

October 31, 1996, the employer filed a petition for clarification of the same bargaining unit. Case 12798-C-96-801. The issues in those cases overlapped, and they were consolidated for processing.

Numerous discussions occurred between the employer and union, as well as between the parties and Hearing Officer Martha M. Nicoloff, in an effort to streamline and expedite the proceedings. The employer and union eventually executed a settlement document in which they agreed that: (1) Certain persons who were "confidential employees" within the meaning of RCW 41.56.030(2)(c) would properly be excluded from all bargaining units; (2) certain positions would properly be placed into the existing bargaining unit of non-supervisory employees represented by the union; and (3) certain supervisory positions would properly be removed from the existing bargaining unit and placed in a new bargaining unit of supervisors represented by Local 1308-S of the Washington State Council of County and City Employees, AFSCME, AFL-CIO.¹

The parties continued to disagree with respect to whether the "supervisor of elections" in the office of the Kitsap County Auditor was a confidential employee. A hearing was held on June 2, 1998, before Hearing Officer Nicoloff. The parties filed post-hearing briefs to complete the record.

¹ The copy of the settlement document which was admitted in evidence as an exhibit at the hearing held in this matter on June 2, 1998, bore only signatures for the union, under date of June 1, 1998. At the hearing, the employer indicated its intent was to have the settlement document signed at a forthcoming meeting of the Kitsap County Board of Commissioners. Nothing has been heard or received which would indicate that the employer did not ultimately sign the document. The employer's brief indicates the settlement was executed on June 8, 1998.

The Executive Director rejects the employer's claim of confidential status regarding the supervisor of elections, and finds that position is properly included in the supervisory bargaining unit created by agreement of the parties.

BACKGROUND

The office of the Kitsap County Auditor is headed by an elected official, Karen Flynn. The office is organized into four major divisions:

The accounting division acts as the in-house accountant for Kitsap County government, and has a workforce of approximately 12 people;

The licensing division collects gambling taxes and issues licenses (e.g., for vehicles, vessels, pets, etc.), and has a workforce of approximately five people;

The recording division is responsible for ensuring that documents are placed in the public record, as well as for providing a public index of those documents, and has a workforce of approximately five people; and

The elections division is responsible for voter registration and the conduct of elections for public office and ballot measures, and has a workforce of five permanent employees plus as many as 500 temporary employees at certain times of the year.

The primary location of the auditor's office is in the Kitsap County Courthouse in Port Orchard. The elections division is housed several blocks away, at the Givens Community Center.

The Disputed Position

The elected auditor has delegated much of the day-to-day work of preparing for and running civil elections to the elections supervisor, Dolores Gilmore. Flynn testified that, because the elections division is separately housed, she relies upon Gilmore for advice with respect to any personnel issues which may arise in that division, as well as for advice with respect to technical elections issues.

POSITIONS OF THE PARTIES

The employer argues that the supervisor of elections has duties which necessarily imply a confidential relationship with the county auditor, because the supervisor of elections assists in carrying out the auditor's official duties, and directly consults with and advises the auditor, including advice regarding administration of collective bargaining agreements. The employer notes that the elections supervisor participates in management team meetings with the auditor, and in the county's strategic planning committee on behalf of the auditor, and it asserts that labor matters are discussed in both of those forums. The employer contends a significant conflict of interest exists between the responsibilities of the elections supervisor to ensure the proper conduct of elections and membership in any union, thereby warranting her exclusion as a "confidential employee".

The union acknowledges that the supervisor of elections is engaged in the general supervision of subordinates, and in the technical support of management in the auditor's office, but contends that her duties do not reach the standard necessary for exclusion as a "confidential employee". It contends the supervisor of elections does not have access to critical labor relations information, and does not prepare, analyze, or present opinions regarding information used by the employer in collective bargaining.

DISCUSSION

The "Confidential Employee" Exclusion

Numerous Commission decisions have reiterated a principle that dates back to IAFF, Local 469 v. City of Yakima, 91 Wn.2d 101 (1978): The "confidential employee" exclusion from Chapter 41.56 RCW is limited to persons who have access to confidential information concerning the employer's labor relations policies. Thus:

In [Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977)] a unanimous Supreme Court pointed to the narrow "elected ..., appointed ..., deputy, administrative assistant or secretary" language of RCW 41.56.030(2), and stated:

Unless the positions involved fall within one of these categories, the persons holding them are not excluded from the definition of public employee under the act. Furthermore, even if they fit one or more of the categories named in the statute, the persons holding them are nevertheless public employees if their duties do not nec-

essarily imply a confidential relationship with [the executive head of the bargaining unit].

The following year, the Supreme Court gave the "confidential" exclusion a narrow interpretation, as follows:

We begin by discussing the meaning of the phrase confidential relationship in the context of the Public Employees' Collective Bargaining Act. That phrase ordinarily means a fiduciary relationship. [citation omitted] This relationship arises when continuous trust is reposed by one person in the skills or integrity of another. ...

Those in whom such trust is continuously reposed could and perhaps would participate in the formulation of labor relations policy. They would be especially subject to a conflict of interest were they to negotiate with an employer on their own behalf. By excluding from the provisions of a collective bargaining act persons who work closely with the executive head of the bargaining unit, and who have, by virtue of a continuous trust relation, assisted in carrying out official duties, including formulation of labor relations policy, such conflict is avoided. And, public trust is protected since officials have the full loyalty and control of intimate associates. **When the phrase confidential relationship is used in the collective bargaining act, we believe it is clear that the legislature was concerned with an employee's potential misuse of confidential employer labor relations policy and a conflict of interest.**

This concern is clearly expressed in the Educational Employment Relations Act, RCW 41.59. Although not controlling here, it contains an instructive

definition of the confidential employee. It reads:

(i) 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

(ii) Any person who assists and acts in a confidential capacity to such person.

RCW 41.59.020(4)(c)(i) and (ii).

Were we to significantly alter this definition in interpreting RCW 41.56.030(2), an anomalous result would occur. ... By a consistent interpretation of the two statutes this result would be avoided. Indeed, this has been recent administrative practice. [Edmonds School District, Decision 231 (PECB, 1977)].

Finally, ... over the years the term confidential, when used with reference to employees, has become something of a term of art in the law which developed from that act. The meaning it has acquired in labor law, including public employment law, accords both with that given it by Washington's legislature in RCW 41.59.020(4)(c) and the interpretation we give to RCW 41.56.030(2).

We hold that in order for an employee to come within the exception of RCW 41.56.030(2), the duties which imply the confidential relationship 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. General supervisory responsibility is insufficient to place an employee within the exclusion.**

IAFF v. City of Yakima, 91 Wn.2d 101 (1978) at 105-107. [Emphasis by **bold** supplied.]

The focus of a dissenting opinion in Yakima was on supervisory responsibilities, and "the reality of how a line staff structure functions", yet the Court did not consider (and apparently was not presented with) the option of a separate bargaining unit of supervisors.

The "labor nexus" test for confidential status has been applied in numerous Commission decisions over the years. For example:

The "confidential" exclusion specifically protects the collective bargaining process, **protecting the employer (and the process as a whole) from conflicts of interest and divided loyalties in an area where improper disclosure could damage the collective bargaining process.** Possession of other types of information that are to be kept from public disclosure is not a threat to the collective bargaining process, and **a showing that an employee holds a position of general responsibility and trust does not establish a relationship warranting exclusion** from collective bargaining rights, where the individual is not privy to labor relations material, strategies, or planning sessions. Bellingham Housing Authority, Decision

2140-B (PECB, 1985); Benton County,
Decision 2719 (PECB, 1989).

City of Chewelah, Decision 3103-B (PECB, 1989)
[Emphasis by **bold** supplied].

And:

It is clear that an employer will be allowed **some reasonable number of excluded personnel to perform the functions of the employer in the collective bargaining process.** Clover Park School District, Decision 2243-A (PECB, 1987). At the same time, because status as a confidential employee deprives the individual of all rights under the statute, the party that seeks exclusion of an employee as confidential has a heavy burden of proof. City of Seattle, Decision 689-A (PECB, 1979).

City of Dupont, Decision 4959-B (PECB, 1995)
[Emphasis by **bold** supplied].

Yakima County, Decision 6267-A (PECB, 1999).

As in Yakima County, there is no evident reason to use the instant case as a vehicle to reopen debate on fundamental precepts which have remained unchanged for more than 20 years.

Because exclusion as a "confidential employee" altogether deprives the individual of collective bargaining rights under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, such exclusions are not lightly granted. A heavy evidentiary burden is placed on the party which proposes a "confidential" exclusion. City of Seattle, Decision 689-A (PECB, 1979); Pateros School District, Decision 3911-B (PECB, 1992). In this case, that burden falls upon the employer.

Application of PrecedentThe Employer's Bargaining Team -

The employer's negotiating team has consisted of a consultant hired by the Board of County Commissioners, one representative of the separately-elected officials, and one representative of the other department heads. The elected auditor has not participated in negotiations on behalf of the employer.

The elected auditor, the chief deputy auditor, and the financial officer have had meetings with the county commissioners and county personnel management, for the purpose of engaging in labor strategy discussions. The parties to this proceeding have stipulated the exclusion of the chief deputy auditor and the financial officer as confidential employees.

The Role of the County Auditor -

The Kitsap County Auditor is endowed, by statute, with a variety of responsibilities for the conduct of civil elections. Those include: Qualifying and registering voters; confirming voter information, such as residency and felony convictions; assuring the secrecy of ballots; assuring the appropriate statutory timing of elections; providing for and staffing polling places; ensuring that all preliminary and statutory deadlines for elections are met, such as ensuring the vote tabulation equipment is functioning accurately, referring ballot measures to the prosecuting attorney's office for review of legal accuracy, and discussing any issues with the submitting jurisdiction; making sure that legal and proper election notices are published; designing the ballot layout for elections; selecting, disbursing, and maintaining voting booths and vote tabulation equipment; verifying signatures on absentee and

mail ballots; providing training to precinct workers; and overseeing the tallying of ballots. None of those functions have anything to do with the employer's collective bargaining processes.

The Role of the Disputed Position -

The disputed supervisor of elections has not served as a member of the employer's bargaining team, and has not participated in the labor strategy discussions between the senior officials within the auditor's office and Kitsap County officials who participate directly in the collective bargaining process. The closest the disputed supervisor of elections has come to the collective bargaining process has been to participate in meetings where supervisors have discussed implementation of possible budget reduction and layoff scenarios, and to prepare information on the impact of potential layoffs. During the course of supervisory meetings, she has participated in the discussion of issues which the auditor's office might wish to raise during the negotiation of the labor agreement for non-supervisory employees.

Review of the employer's job description for the "supervisor of elections" position, dated November 1993, readily discloses a few passages (emphasized in **bold**, below) which indicate supervisory authority over employees within the bargaining unit represented by the union, but absolutely nothing which meets the "labor nexus" test prescribed by the Supreme Court for exclusion as confidential. The job description reads:

GENERAL STATEMENT: Plans, organizes, and **supervises the work of assigned employees** in the overall operation of conducting elections and voter registration, ensuring compliance with state and federal election laws. Evalu-

ates office systems, programs, projects, and equipment needs within the department. Coordinates assigned activities with other County departments, divisions, and outside agencies. Additionally, this individual provides highly responsible and complex administrative support to the County Auditor.

Work assignments are received with little or no technical instruction and requires [sic] the selection of course of action and resolution of complex or unique problems with considerable latitude for independent judgement in establishing priorities, adapting existing policies and procedures to specific situations and developing systems and procedures within the framework of established guidelines. Work is reviewed by the Auditor or the Chief Deputy Auditor for compliance with established objectives and is evaluated through reports, conferences, and results obtained.

ILLUSTRATIVE EXAMPLES OF DUTIES: (Any one position may not include all of the duties listed nor do the listed examples include all tasks which may be found in positions of this class.)

Plans, organizes, and **supervises the work of employees** participating in the operations of the Election Department including the voter registration, cartographic, programming, secretarial and election materials assembly sections; **recommends selection of staff**, provides training for subordinates and reviews and **evaluates work performances; makes recommendations regarding discipline, transfer and termination of subordinate county employees; appoints, supervises and trains temporary election workers.**

Implements new elections laws and procedures as necessary, and ensures compliance with state and federal laws pertaining to elections; develops written procedures and policies, and monitors existing procedures for compliance with state and federal laws; takes action to correct deficiencies; resolve prob-

lems; contacts Prosecutor's Office for legal opinions as necessary; maintains files of all laws and updates pertaining to elections.

Prepares, organizes, and coordinates the design, preparation and publication of various notices, forms and materials, including the annual Election Guidelines Book, local Voter's Pamphlet, and the annual election calendar.

Oversees the ordering of election supplies; delivery and set up of elections devices, voting machines, materials and supplies to the various polling locations; and storage and maintenance of voting machines.

Appoints and provides training of registration officers; develops and implements procedures for the formation, redistricting or deletion of districts; establishes procedures for checking signatures on petitions.

Assists in the development, selection, implementation, and maintenance of computerized elections systems and selection of related equipment; establishes program testing criteria, formats, accuracy tests and audit trails; prepares computer listings of election results as required.

Oversees the preparation of date [sic], legal descriptions and maps on various districts, precincts and polling places; provides the public and other government agencies with maps as required.

Assists in the preparation and administration of the annual Election Reserve budget; and prepares and develops long range plans, goals and objectives in the area of elections in order to meet the growing needs of the county.

Receives and responds to election related information requests from the media, government officials, candidates and the general public.

Maintains necessary records and prepares required reports and special research as necessary.

Supervises the development, coordination, and presentation of community outreach activities.

Plans elections to avoid duplication, emergency staffing, and avoidable pyramiding of work load.

Performs related duties as required.

The incumbent testified that this job description properly reflected her current duties. She could not recall any important duties which were not reflected in that document.

Gilmore has access to some voter registration information which is not disclosed to the general public. For reasons indicated in the foregoing quotation from Yakima County, that is not the type of information protected by RCW 41.56.030(2)(c).

Gilmore has authority to negotiate the timing and manner of conduct of certain elections (such as fire district EMS levies, or school district levies), and has authority to supervise programs and purchasing. Again, however, those types of management activities are outside of both the "supervisor" exclusion under METRO and the "confidential" exclusion under City of Yakima.

The elected auditor considers the chief deputy auditor, the financial services manager, and the supervisors who head the elections, licensing, and records divisions to constitute her management team. The licensing and records supervisors are included in the separate bargaining unit of supervisors created by stipulation of the parties as an outgrowth of these proceedings.²

² Flynn testified that she believed that the licensing and records supervisors should be excluded as "confidential", and that she disagreed with the employer's stipulation to

Flynn testified of her belief that the supervisor of elections had more "extraordinary duties" than the other two:

Q: [By Mr. Cole] And are those extraordinary duties dealing with the statutory requirement to handle elections?

A: [By Ms. Flynn] Somewhat with the elections laws. I think the distinction is that with regard to licensing and recording their duties are much more specifically defined in state law and that is what we've presented here a number of state laws that apply to the elections process. There are also many variables and a need for some independent decision making, much more latitude with regard to carrying out those duties than with licensing and recording.

Q: So it's the degree of obligation under the statutes that makes the supervisor's position either more complicated or more consuming?

A: I believe it is also the duty of carrying out the elections process which is a constitutional requirement as it is to allow to citizens the right to vote. So I believe also the nature of the work there has greater weight under the law.

Tr. 105, 106.

Flynn testified of her desire to have the undivided loyalty of the supervisor of elections, because of the constitutional and statutory elections requirements which that position fulfills, and the liability to the employer if an election were to be conducted improperly. Flynn noted that an election could be overturned if

include them in the separate bargaining unit of supervisors.

sufficient or significant errors were committed en route to or in the course of an election. Again, however, nothing in that testimony indicates that the election supervisor has the "labor nexus" of concern to the Supreme Court in City of Yakima.

Finally, Flynn expressed a concern about the employer's liability if the supervisor of elections were to be represented, because of what could happen in the event the bargaining unit were to engage in a work stoppage at a time critical to the election process,³ and the supervisor of elections felt obligated not to cross a picket line. However, that ignores long-established precedent:

A point lurks in the record which the parties do not address specifically, but we shall notice in passing.

The issue of the membership of the fire inspectors in the unit was raised when the fire inspectors declined to honor a picket line posted by their bargaining representative. RCW 41.56.120 provides:

Nothing contained in this chapter shall permit or grant any public employee the right to strike or refuse to perform his official duties.

Had the fire inspectors honored the picket line, an injunction under this section would doubtless have met the situation in an hour or two.

Clark County, Decision 290-A (PECB, 1977).

³ She indicated the non-supervisory bargaining unit was considering a strike in 1997, and would potentially have been on strike during the election in November 1997.

Just as the Commission rejected the concern voiced by an employer more than 20 years ago about the possibility of an unlawful strike, the concerns expressed by Flynn must be rejected in this case.

Allocation to Unit of Supervisors

The disputed supervisor of elections appears to be a supervisor within the meaning of Commission precedent, so the appropriate outcome in this case is to place the disputed position in the separate bargaining unit of supervisors created by stipulation of the parties. In the METRO decision (which itself concerned a separate unit of supervisors), the Supreme Court gave approval to City of Tacoma, Decision 95-A (PECB, 1977), in which the Commission had announced a revised interpretation of the statute (in connection with a separate unit of supervisors). In City of Richland, Decision 279-A (PECB, 1978), the Commission affirmed the propriety of removing supervisors from the bargaining unit containing their rank-and-file subordinates. The Commission's Richland decision was, in turn, affirmed in 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981).

FINDINGS OF FACT

1. Kitsap County is a political subdivision of the state of Washington, and is a public employer within the meaning of RCW 41.56.030(1). The office of the Kitsap County Auditor is operated under direction of an elected official, Karen Flynn.

2. Local 1308 of the Washington State Council of County and City Employees, AFSCME, AFL-CIO (WSCCCE), is a bargaining representative within the meaning of RCW 41.56.030(3).
3. The employer has historically recognized the WSCCCE as exclusive bargaining representative of non-supervisory employees in various offices and departments of Kitsap County, including the office of the Kitsap County Auditor. The parties have had a series of collective bargaining agreements covering that bargaining unit.
4. The employer's bargaining team for collective bargaining with the bargaining unit described in paragraph 3 of these Findings of Fact has historically included a labor relations consultant hired by the employer, a representative of the separately-elected officials of Kitsap County, and a representative of the other Kitsap County department heads. The incumbent county auditor has not participated at the bargaining table on behalf of the employer.
5. The employer and union each filed timely petitions under Chapter 391-35 WAC, seeking clarification of the bargaining unit described in paragraph 2 of these Findings of Fact, with respect to various supervisors and/or confidential employees. In settlement discussions held over a prolonged period, the parties agreed to the creation of a separate unit of supervisors and resolved all eligibility issues except the status of the supervisor of elections in the office of the Kitsap County Auditor.

6. Together with the elected county auditor, the chief deputy auditor and the financial services manager in the office of the Kitsap County Auditor have met with the county commissioners and county personnel management, for the purpose of engaging in labor strategy discussions. The parties have stipulated that the chief deputy auditor and the financial services manager are "confidential employees" within the meaning of RCW 41.56.030(2)(c).

7. The supervisor of elections has participated in discussions with other supervisors concerning potential implementation of budget reduction and layoff scenarios, but any input on the employer or union proposals considered in collective bargaining negotiations is consistent with the role of a supervisor. The supervisor of elections has not participated in collective bargaining negotiations on behalf of the employer or in the meetings described in paragraph 6 of these Findings of Fact, and the record does not establish that the incumbent is privy to confidential information concerning the formulation of the employer's labor relations policies or strategies.

8. The supervisor of elections is the senior official at an office separate and apart from the principal facility occupied by the office of the Kitsap County Auditor, and is authorized to use independent judgment in exercising authority over subordinate employees with regard to their hiring, training, assignment, promotion, transfer, evaluation, suspension, discipline and discharge.

CONCLUSIONS OF LAW

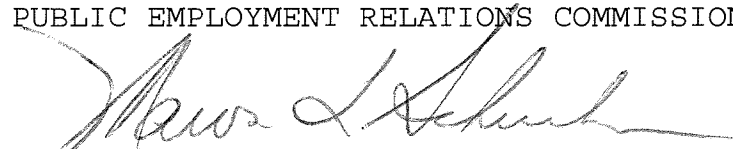
1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC.
2. As described in this record and in the foregoing Findings of Fact, the supervisor of elections is a "public employee" within the meaning of RCW 41.56.030(2), and is not a "confidential employee" within the meaning of RCW 41.56.030(2)(c).
3. As described in this record and in the foregoing Findings of Fact, a separate bargaining unit of supervisors appears to be appropriate under RCW 41.56.060, and the supervisor of elections position is properly allocated to that bargaining unit.

ORDER CLARIFYING BARGAINING UNIT

The supervisor of elections in the office of the Kitsap County Auditor is allocated to the separate bargaining unit of supervisors described in paragraph 5 of the foregoing Findings of Fact.

Issued at Olympia, Washington, on the 16th day of August, 1999.

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 391-35-210.