

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: )  
 )  
PUBLIC SCHOOL EMPLOYEES OF ) CASE 16245-C-02-1043  
WASHINGTON )  
 ) DECISION 8131 - PECB  
For clarification of an existing )  
bargaining unit of employees of: )  
 ) ORDER CLARIFYING  
CONCRETE SCHOOL DISTRICT ) BARGAINING UNIT  
 )  
 )  
\_\_\_\_\_ )

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Vandeberg Johnson & Gandara, by *Mark A. Hood*, Attorney at Law, for the employer.

On February 19, 2002, Public School Employees of Washington (union) filed a petition with the Public Employment Relations Commission under Chapter 391-35 WAC, seeking clarification of an existing bargaining unit of employees of the Concrete School District (employer). The petition was amended on February 27, 2002. A hearing was held on November 14, 2002, before Hearing Officer David I. Gedrose. The parties submitted post-hearing briefs.

Based on the evidence introduced at the hearing and the arguments advanced by the parties, the Executive Director concludes that the "technology systems network supervisor specialist" at issue in this proceeding is properly excluded from the bargaining unit represented by the union for multiple reasons: (1) because the incumbent provides confidential support for a confidential employee, and so meets the labor-nexus test for exclusion; (2) a substantial potential for conflicts of interest warrants exclusion from the

bargaining unit as a supervisor; and (3) there is insufficient evidence of a community of interest to warrant including the disputed position in the existing bargaining unit.

#### BACKGROUND

The employer operates common schools, serving students at the elementary school, middle school, and high school levels.

The union has been the exclusive bargaining representative of classified employees of this employer since about 1969.

The parties' collective bargaining agreement for 2001 through 2003 had not been ratified at the time the petition was filed to initiate this proceeding. The parties' contract in effect for the period from September 1, 1999, through August 31, 2001, defined the existing bargaining unit as follows:

SECTION 1.4 The bargaining unit to which this Agreement is applicable shall consist of *all classified employees in the following job classifications: Custodial, Maintenance, Food Service, Transportation, Secretarial, Aides, Nurses, and Substitutes* whose contractual rights are limited solely to Section 1.4.1 of this Agreement. *Except: the Superintendent's Secretary, Business Manager, Accounts Payable Secretary, and one-half portion of each of the following two positions: Supervisor of Transportation and Custodial/Maintenance Supervisor.*

The position at issue in this proceeding did not exist when the parties signed their 1999-2001 contract.

The employer established the "technology systems network supervisor/specialist" in 2000. The job description states:

## JOB SUMMARY

Manage all information support programs, including the resources, budget, operations, and technology committee. Implement, maintain, and update the Technology plan. Coordinate technology applications with instructional goals through appropriate building administrators. Organize and supervise the district network. This is a full-time (1,000 [sic] FTE) position of 260 annual employment days, paid holidays, and 10 days paid vacation.

## QUALIFICATIONS

Certification: MCP and A+ certification desired

Education: Four year college degree or equivalent work experience

Experience: Two years work experience in Windows NT server using TCP/IP in a LAN topology

## DUTIES AND RESPONSIBILITIES:

1. Serves as a productive member of a team and maintains a positive customer service attitude.
2. Serves as an advisor to the Superintendent while chairing the technology committee to ensure the continued improvement of the district's computer and information technology.
3. Works to ensure the continued, uninterrupted operation of the district's information technology network.
4. Works with ESD 189 and WSIPC on network related issues.
5. *Works to ensure the ethical use of the district's information network by all district staff and students, including the monitoring of appropriate use and investigation of inappropriate use by students and staff.*
6. Works with and maintains technology related grants while participating in the District Grant Committee.
7. Maintains the technology budget and expenditures.
8. *Maintains a fiduciary relationship with the Superintendent and School Board regarding unique access to all technology related files and documents throughout the district, including information*

*related to personnel records, student and staff disciplinary actions, as well as additional sensitive information.*

9. Serves as an evaluative advisor on disciplinary matters related to technology.
10. Maintains a positive relationship with staff, vendors, and consultants.
11. Works with the administrative team to design and maintain a three year technology plan.
12. Exercises sound judgment with regard to the use of allocated resources and time management for task completion and goal fulfillment.
13. Responds positively to suggestions for improvement and works well with a wide variety of people.
14. Evaluates staff use of technology in the classroom environment and provides staff development opportunities.
15. Maintains video conference equipment and District WEB development.
16. Continues technical training and professional growth to include PC and MAC platforms.
17. Maintains confidentiality in sensitive areas that are technology accessible to include but not limited to student and staff information, passwords, evaluations, etc.
18. Accepts and performs such other duties as may be assigned in this capacity.

#### REPORTING RELATIONSHIPS

Supervised and evaluated by the Superintendent.

Supervises and evaluates technology support and computer technician personnel.

(emphasis added). The network specialist is paid on a salaried basis. His work hours vary, as his duties require him to work after school hours when the network is relatively idle.

Prior to the creation of the disputed position, a certificated employee outside of the bargaining unit represented by this union

was paid a stipend to maintain the employer's computer system, and the employer also contracted with the local educational service district for technology services.

The network specialist reports directly to the superintendent and performs the following specific duties that are of particular interest in this proceeding: administering the employer's technology budget (around \$60,000 per year as of the time of hearing); training both certificated and classified staff in the use of computers and general information support; and monitoring all computer use by staff and students. While he is not the direct supervisor of any other employees, and does not have independent discretion to recommend disciplinary action if he discovers misuse of technology, he has told other employees to cease their unauthorized use of the employer's computers. Moreover, the disputed employee has both authority and obligation to report violations of the employer's technology policy by staff and students or other misuse of the employer's computer system to the administration.<sup>1</sup>

The superintendent has assigned the network specialist to develop computer-generated wage and benefit calculations for use in collective bargaining.<sup>2</sup> Although the disputed employee is not directly involved in contract negotiations, the employer has treated his calculations as confidential in preparation for bargaining. The network specialist has performed this task once in relation to negotiations for the bargaining unit of classified employees.

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<sup>1</sup> The network specialist also acts as liaison with the educational service district and serves as the lead person for the employer on a water quality program.

<sup>2</sup> This task had previously been manually performed by the business manager.

The employer provided testimony that the relationship of the new position to the bargaining unit was discussed with a union representative at the time the position was created, and that an agreement was reached to exclude the position from the bargaining unit. The union denied that such an agreement was reached.

#### POSITIONS OF THE PARTIES

The union contends the network specialist is not a confidential employee. It points out that the disputed employee is not directly involved in collective bargaining, and contests the existence of an intimate fiduciary relationship between the disputed employee and the superintendent with regard to labor relations. The union acknowledges the involvement in computing of salary costs for negotiations, but contends that is insufficient to meet the labor nexus test. The union urges that the network specialist has no supervisory duties relative to other employees, and sees his investigative role as limited and as stopping short of any ability to discipline or even recommend discipline. Finally, the union contends the network specialist shares a community of interest with the bargaining unit, and particularly with library and media specialists in that unit. The union claims that a failure to include the position in the bargaining unit would strand the position without collective bargaining rights, and would unnecessarily fragment the unit. The union argues that Commission precedent involving a similar position should be dispositive in deciding this case.

The employer contends that the position should be excluded on the basis of providing necessary, regular, and ongoing support to the superintendent in the collective bargaining process. The employer urges that the network specialist has a supervisory role in that he

is in charge of and oversees all computer use and activity for the employer, and provides evaluations of bargaining unit members. The employer argues that the supervisory nature of the position creates a potential for conflicts of interest which should exclude the position from the bargaining unit. The employer denies that the network specialist shares a community of interest with the bargaining unit, pointing out that the position is salaried, works irregular hours, reports directly to the superintendent, has unique budget, purchasing, training, and investigative roles, and has access to confidential information. The employer also contends that the Commission precedent cited by the union is distinguishable from this case.

#### DISCUSSION

This case involving "classified" employees of a school district arises under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. See *Bellingham School District*, Decision 7587 (PECB, 2002).

#### The Claim of "Confidential" Status

##### Applicable Legal Principles on "Confidential" -

RCW 41.56.030(2) excludes "confidential" employees from the definition of "public employee" and from all bargaining rights:

RCW 41.56.030 DEFINITIONS. As used in this chapter:

. . . .  
 (2) "Public employee" means any employee of a public employer except any person . . . (c) whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to (i) the executive head or body of the applicable bargaining unit, or (ii)

any person elected by popular vote, or (iii) any person appointed to office pursuant to statute, ordinance or resolution for a specific term of office as a member of a multi-member board, commission, or committee, . . . .

Fundamental principles concerning interpretation of the "confidential" exclusion were set forth by the Supreme Court of the State of Washington in *IAFF Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978), as follows:

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.*

. . . . .  
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.

(emphasis added). Numerous Commission decisions have stated and reiterated that an employer will be allowed a reasonable (but not unlimited) number of "confidential" exclusions. See *Clover Park School District*, Decision 2243-A (PECB, 1987); *City of Seattle*, Decision 689-A (PECB, 1979); *City of DuPont*, Decision 4959-B (PECB,



1995). At the same time, because confidential status deprives the individual employee of all statutory bargaining rights, a heavy burden is placed on a party seeking such an exclusion. *City of Mountlake Terrace*, Decision 3832-A (PECB, 1992); *Olympia School District*, Decision 4736-A (PECB, 1994); *Colville School District*, Decision 5319-A (PECB, 1996).

After applying the "labor nexus" test set forth by the Supreme Court in *Yakima* (and rejecting proposed exclusions that were either excessive or proposed on other grounds) in numerous cases, the Commission adopted a rule conforming to the definition embraced by the Supreme Court in *Yakima*, as follows:

WAC 391-35-320 EXCLUSION OF CONFIDENTIAL EMPLOYEES.  
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.

Even before adopting that rule, the Commission had explicitly expressed a preference for use of the definition incorporated into that rule. *Yakima School District*, Decision 7124-A (PECB, 2001).

Application of "Labor Nexus" Standard -

The employer called both its superintendent, Marie Phillips, and the network specialist, Robert Sutton, as witnesses in this proceeding. Portions of their testimony are instructive here:

Q. [By Mr. Hood] How did the position come about?

A. [By Ms. Phillips] Well, it is a new position and unique, . . . [W]e were . . . moving into the technology age, getting more equipment, having more need for an expert in technology. And so I wanted to hire someone that could really help in a number of ways. There's so many more issues today, legal issues, that relate to technology and where this district could be compromised today. The monitoring of personnel, as far as internet use and -- and even in their daily work. I needed somebody that I could count on to monitor the system. This person was able to handle things that we were paying the [Educational Service District] to do. . . .

Transcript, 48-49.

Q. [By Mr. Hood] [W]hat kind of information does [the disputed employee], in this position, have access to?

A. [By Ms. Phillips] He has access to everything on everybody's computer. Everything.

Q. Okay. And with regard to information of the district that -- what would that include?

. . . . .  
A. We have our financial records. We have the -- all of the budgeting, everything is on the computer.

. . . . .  
Q. [W]hat kind of information do you use in the collective bargaining process?

A. We do have financial records, of course, on the computer. One of the areas, an example with PSE would be the salary schedule, schedule A. . . . I have [the disputed employee] run us a variety of schedule A samples with the 3.6 or with various things, so I could just look to see what those dollars look like. And he helped me run those.

. . . . .  
Q. Can you identify what Exhibit 7 is?

A. Well, this is schedule A that we looked at when we were adding the COLA. Our business manager has written in, along each of the figures and each of the columns, the amount that would be reflected if there were a 3.6 COLA given to the staff.

- Q. So this -- how was this done, at the time.
- A. [The business manager] just sits down with a calculator and goes through and figures out each one of them.
- Q. Okay. Now, let's -- let's talk -- you mentioned that you had involved [the disputed employee] in a similar . . . . How -- what role does he play in this?
- A. [The disputed employee] doesn't have to sit down with a calculator and do this. *If I ask him to run a schedule for me he can just do it and calculate it and run through the numbers and produce them.*

. . . . .

And then I have something to look at for myself if I want to look at it, to see what it would look like without a column or if I -- you know, with a column. *And he would go through and work out some of those numbers.* And we didn't spend a lot of time on this but [the disputed employee] prepared a few of these for me, but not much. Because we -- I think you know, we just haven't been spending time on this area. . . . As a group. We did initially last year.

- Q. [H]ow many opportunities have you had -- how many since [the disputed employee] has been here - since this position has been created how many collective bargaining negotiation processes have you been through?
- A. One with the PSE. And with the USVEA we just settled so quickly that there was no need to do anything. But I foresee his help in, you know - when you look at the time and effort that [the business manager] had to spend on this and then look at what he can do then, you know.
- Q. [W]hen [the disputed employee] was involved in creating these computer models for you, what bargaining process was he involved with?
- A. Actually, just helped me in that part. He was not ever at the table or anything like that.
- Q. Well, what negotiations was that?
- A. Oh, that was for PSE.

. . . . .

Q. *And do you consider this kind of information confidential?*

A. *Yes.*

Q. *Why?*

A. *Well . . . if I'm thinking about figures and I just don't want to put them on the table yet -- if those copies were out for everybody would pretty much defeat the whole purpose of the negotiations. They would have all my information before I had a chance to talk about it. It would undermine the process.*

Transcript at 54 -61. Similarly:

Q. [By Mr. Hood] What about information that the superintendent has asked you to prepare regarding financial matters? . . . I'm thinking specifically of budgeting matters and information the superintendent has asked you to prepare, regarding collective bargaining issues?

A. [By Mr. Sutton] I prepared spread sheets last year for the PSE collective bargaining.

Q. . . . And how did you prepare those? What do you do?

A. What I do is I take all the numbers that were on a white sheet of paper. I digitize them into a spreadsheet format and then I can put formulas in there that automatically change to different percentages. . . . [i]n three parts, one would show what the payroll is at that time, what they're getting at their different specific levels, what it would be if it was at -- I don't remember the exact percentages but the first one was -- second one was less than two percent, and the third one was three, three point something that -- so there was three of them that was built to show what the difference would be at the different pay rates, pay levels. What it is now and two other percentages.

Transcript, 93-94.

Thus, the disputed employee has actually been utilized by the executive head of the bargaining unit in the classic role of a

"confidential" employee under the second component of the labor nexus test: preparing fiscal models from which the employer's negotiators will select the proposals actually to be advanced by the employer in collective bargaining.

The union has cited *Darrington School District*, Decision 5573 (PECB, 1996), where a claim of "confidential" status was rejected in a case involving an information systems technologist. That decision included:

The information technologist . . . is, at most, vested with some authority to access confidential documents involving student and personnel records. Whether current or prospective, such authority does not, standing alone, warrant a "confidential" exclusion. *Snohomish County*, Decision 346 (PECB, 1981).

Even if . . . the same access to personnel and payroll records as others who are now excluded from the bargaining unit as "confidential employees", that does not establish a "labor nexus". Most personnel and payroll records on individual employees are necessarily historical in nature (e.g., showing when the employee was hired, at what rates they have been paid, and when they have been promoted or disciplined), and employees generally have access to their own personnel files, so that there is no risk of damage to the collective bargaining process. None of those materials are likely to reveal the employer's labor relations policy or strategy in current or future negotiations with unions representing either of the bargaining units existing within the employer's workforce.

. . . Bargaining on behalf of this employer is accomplished solely by the superintendent, and no evidence suggests that Byrd will be involved in future collective bargaining on behalf of the employer. . . .

Given that the employer already apparently has at least four persons excluded from the PSE bargaining unit as "confidential", any future assignment of "labor nexus" responsibilities to Byrd would have to be evaluated at that time against the standards of *Clover Park School District*, Decision 2243 (PECB, 1987). With one or more building principals, the superintendent's secretary, the

business manager, and two payroll clerks available to it, the need for the employer to have Byrd handle sensitive labor relations materials cannot be assumed.

More recently, a computer position at issue in *Mt. Baker School District*, Decision 7510 (PECB, 2001) was excluded from an existing bargaining unit on the basis of supervisory authority over a network technician, even though a claim of "confidential" status was rejected. That decision included:

The employer's argument that this position is a confidential employee must be denied. Virtually nothing in this record evidences either a confidential relationship with the executive head of the bargaining unit or of the labor nexus required for the exclusion of a position as a confidential employee. Even the employer's job description for the disputed position is vague on the subject, containing only [limited] language . . . remotely pertinent to the "labor nexus" test:

. . . .  
Thus, the only five words in the employer's job description which support the claim of confidential status are "access to . . . collective bargaining positions" (item 10) out of more than two dozen paragraphs.

. . . . Speculative or prospective future involvement in the collective bargaining process has not been accepted by the Commission as a basis for allowing a confidential exclusion. *City of Winslow*, Decision 3520-A (PECB, 1990). The disputed position did not exist during the negotiations for the current contract. . . .

. . . .  
The possibility [of being] called upon to advise the employer's negotiators on issues in collective bargaining related to computers or use of the internet is also far from convincing. Being a resource to the bargaining process is far different from the direct participation or confidential support detailed in the rule and numerous Commission precedents. See *City of Ferndale*, Decision 6485-A (PECB, 1999).

Although the network administrator presently has access to confidential records, that access may not be necessary and is certainly incidental to his work in maintaining

the employer's computer systems. The employer can be expected to take reasonable steps to secure confidential information on network storage systems, or to maintain such information on removable media not accessible via its computer network. There was no evidence that the network administrator is privy to executive sessions of the school board, or to any meetings related to collective bargaining.

The case at hand is clearly distinguished on its facts from the situations in both *Darrington* and *Mt. Baker*. There is evidence here of an actual (and recent) shift from pen and paper computation methods to manipulation of data by computer. Even if that technology shift is long-delayed from the earliest mentions of applying computer technology in support of collective bargaining,<sup>3</sup> it is not speculative. The union's attempt to minimize the labor nexus functions of the employee at issue here is rejected: The superintendent is the executive head of the bargaining unit, and is the employer's primary agent in collective bargaining. The superintendent has assigned the network specialist to run various spreadsheets in preparation for collective bargaining, and testified that she considers the information prepared by the network specialist to be confidential.

The union points out that it can also prepare spreadsheets from public information, but that ability of the union to guesstimate where the employer might be coming from does not undermine or destroy the confidential nature of the employer's preparations and deliberations. Were the network specialist a bargaining unit member, he would be subjected to conflicting loyalties to the union and to the employer. See *Olympia School District 111*, Decision 4736-A (PECB, 1994), where the secretary to an employer negotiator was excluded from a bargaining unit after the union approached her

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<sup>3</sup> See *West Valley School District*, Decision 798 (PECB, 1979).

with a request that she disclose the employer's true intentions in bargaining. The Supreme Court protected employers from premature disclosure of their bargaining strategies in *Yakima*.

### The Claim of "Supervisor" Status

#### Applicable Legal Principles on Supervisors -

Supervisors have the same collective bargaining rights as other public employees under Chapter 41.56 RCW. *Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries*, 88 Wn.2d 925 (1977). In a long line of decisions (with approval of the courts), however, the Commission has exercised its unit determination authority under RCW 41.56.060 to exclude supervisors from bargaining units that include their subordinates. That separation avoids the potential for conflicts of interest which might otherwise occur within a mixed bargaining unit. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd* 29 Wn. App. 599 (1981), *review denied* 96 Wn.2d 1004 (1981).

In the absence of a definition of "supervisor" within Chapter 41.56 RCW, the Commission has looked to the definition set forth in the Educational Employment Relations Act (EERA), at RCW 41.59.020-(4)(d), as suggesting the types of authority which tend to generate a potential for conflicts of interest:

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



See *King County*, Decision 7053 (PECB, 2000). Determinations on whether an individual should be excluded as a supervisor are based on the actual duties and authority exercised by that individual, not on the title of the position. In *Clover Park School District*, Decision 376 (EDUC, 1978) [as to a "supervisor of testing and program evaluation"] and in *Tacoma School District*, Decision 652 (EDUC, 1979) [as to coordinators of research and evaluation], individuals who evaluated programs and personnel on behalf of employers were excluded from bargaining units as supervisors.

The Commission eventually adopted a rule concerning the bargaining rights and unit placement of supervisors, as follows:

WAC 391-35-340 UNIT PLACEMENT OF SUPERVISORS -- BARGAINING RIGHTS OF SUPERVISORS. (1) It shall be presumptively appropriate to exclude persons who exercise authority on behalf of the employer over subordinate employees (usually termed "supervisors") from bargaining units containing their rank-and-file subordinates, in order to avoid a potential for conflicts of interest which would otherwise exist in a combined bargaining unit.

(2) It shall be presumptively appropriate to include persons who exercise authority on behalf of the employer over subordinate employees (usually termed "supervisors") in separate bargaining units for the purposes of collective bargaining.

(3) The presumptions set forth in this section shall be subject to modification by adjudication.

That rule codified years of precedents dating back to *METRO* and *Richland*.

Application of "Potential for Conflicts" Standard -

Testimony by the superintendent about the non-standard work hours of the disputed position and the salaried compensation of the disputed position is not conclusive, but provides background to the

investigative role that has actually been assigned to the disputed position, including: "There are a number of times when there are problems, or when I ask him to research a situation for me or to get information of a confidential nature from someone's computer, that he does that. And he usually does that after hours." Transcript, 51. The questioning returned to that subject later, as follows:

- Q. [By Mr. Hood] Let's . . . talk about . . . investigative roles. Can you describe how he is involved in that?
- A. [By Ms. Phillips] . . . I've had him get information from computers. I had a disciplinary issue with an administrator, and had him go in and secure information that documented the actual time that certain evaluations were prepared. The process that . . . the administrator was supposed to follow was to meet with an employee, who was on a program of improvement on an ongoing basis, on a weekly basis, and prepare evaluations every two weeks which is required in the USVEA contract. And what occurred is that one day the administrator handed all of these to me. It was in the winter. He handed 37 evaluations to me at one point, all in one hand. And I asked [the disputed employee] to go in and find those and document the dates. And the administrator claimed the he had done them on those days and had them signed off along the way. And he hadn't. He had done them all at once. And it comes very close, if not outright, a violation of professional ethics, and it's illegal to . . . falsify evaluations. And [the disputed employee] was able to secure the dates and times when the actual evaluations were performed on his computer.
- Q. [I]s that investigative role limited -- you mentioned that was an USVEA member. Are there . . . are there any limitations on his investigative role?
- A. No, he has access to any area, any person that may be violating conduct rules in the district, as far as use of technology.

Transcript, 63. Similarly,

- Q. [By Mr. Hood] And to whom do you report?
- A. [By Mr. Sutton] Only to the superintendent . . .
- . . . .
- Q. What kind of monitoring of the network do you do?
- A. Through the fire wall, I have access to watch all data that comes and goes from the school district, to show whether it is school related activities. And to also watch through the internet filtering server to see that the sites are appropriate, to where people are going. . . . [T]here's always new sites coming up that somebody can always get to. And if I don't watch what's going on that, we would be in violations of CIPA, the Children's Internet Protection Act.
- Q. What -- have you encountered situations where, as a result of monitoring, you saw something that perhaps shouldn't have been happening?
- A. In two parts, yes. One is identified sites that needed to be blocked, inappropriate sites that individuals had visited. And in a second aspect is on the K-20 network, the band width and how we use it is monitored through Western Washington University. And they have a site that shows charts and data of how we, as a component of the K-20 network, use that bandwidth. And I have found where we had more data leaving the school than was coming in. So in tracking that down I found out that certain machines had been sharing music files illegally over the network. Which is one of the ways a school district can be dropped off of the K-20 network.
- Q. What did you do when you learned that?
- A. The machines that I found, I spoke to the individuals and told them how illegal it was, that I wanted it off their machines and then reported it to their supervisors, that it was being done.
- . . . .
- Q. Can you describe what your roles have been with regard to providing information to the superintendent?
- A. When asked to retrieve information from computers, for whatever reason, doesn't matter to me. My supervisor is the superintendent. I'll go to the computer and retrieve whatever information she

requests. I can find out when certain items were initially made, when they were last modified, and report that information, and the files, to the superintendent.

Q. And did you do that -- you've done that in the past with regard to investigation?

A. Yes, I have.

Q. What information do you have access to that's on your school network system?

A. I can see and watch everything. I have the software to actually watch somebody's monitor key stroke for key stroke. I can lock their work station, send them a message tell them what they're doing is wrong. I can make a copy, a picture, of what's on their screen and print it. I can -- with our new mail server I can actually open e-mails before it's actually given to the individual. It's all the old fears of Big Brother's watching. . . . I'm just a little piece of Big Brother. Big Brother is the K-20 network and we're just doing what we need to do to keep their access.

Transcript at 94. The disputed individual testified further about a training role, which includes evaluations of the employees who receive training. Those evaluations go back to the building principals, and can thus contribute to the overall evaluations made periodically by those administrators. Transcript, 96.

Even though the employee at issue in this proceeding does not have direct responsibility for supervision of any bargaining unit employees, a potential clearly exists for him to have conflicts with the bargaining unit. The evidence concerning his roles as a sleuth on behalf of the superintendent, as the agent guarding against misuse of the employer's computer system by other employees, and as a initiator of training evaluations that go to other supervisors all align the disputed position in interest with the employer's administration. A potential for conflicts of interest would be inherent in having the overseer of technology policy

included in the bargaining unit he must police. Even if not conceded to, pressure to go easy on other bargaining unit members could be perceived by other employees and students as affecting the appearance of fairness. Conversely, as a bargaining unit member the disputed individual would need to rely on the union for assistance with grievances as well as for negotiating the wages and working conditions of his unique position, which could negatively affect the performance of his assigned functions.

#### The "Community of Interest" Claim

##### Applicable Legal Principles on Unit Determination -

The authority to determine and modify appropriate bargaining units has been delegated by the legislature to the Public Employment Relations Commission. RCW 41.56.060 provides:

In determining, modifying, or combining the bargaining unit, the commission shall consider the duties, skills, and working conditions of the public employees; the history of collective bargaining by the public employees and their bargaining representatives; the extent of organization among the public employees; and the desire of the public employees.

The Commission makes unit determinations on a case-by-case basis, with a purpose of grouping together employees who have sufficient similarities (community of interests) to indicate that they will be able to bargain collectively with their employer. There is no requirement that the Commission determine or certify the most appropriate bargaining unit configuration in any case. *City of Winslow*, Decision 3520-A (PECB, 1990). None of the four factors listed in the statute is overriding or controlling. *Bremerton School District*, Decision 527 (PECB, 1979). Additionally, all four factors need not arise in each and every unit determination case:

Analysis under the "duties, skills and working conditions" component does not require separation of employees on a classification-by-classification basis, but established differences of qualifications,<sup>4</sup> duties, hours of work, and method of computing compensation (i.e. "salaried" versus "hourly") can be a basis for allocating positions to different bargaining units within an employer's workforce;

Analysis under the "history of bargaining" component ranges from no inquiry for unrepresented employees to recognition to the history that develops with each passing day;

Analysis under the "extent of organization" component avoids stranding of individuals by unit configurations that would preclude their exercise of their statutory collective bargaining rights, as in *City of Blaine*, Decision 6619 (PECB, 1999),<sup>5</sup> and avoids fragmentation of workforces resulting in a proliferation of bargaining

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<sup>4</sup> Although the federal National Labor Relations Act (NLRA) makes special provisions for "professional" employees, the NLRA both defines "professional" in Section 2(12) and then assures professional employees an opportunity to be in separate units, in Section 9(b). There are no such provisions in Chapter 41.56 RCW, and differences can only be evaluated under the "duties, skills and working conditions" component of the statutory unit determination criteria. See *City of Vancouver*, Decision 440-A (PECB, 1978). Professional employees have been commingled with other employees, to avoid fragmentation of workforces. *Ritzville Memorial Hospital*, Decision 3607 (PECB, 1990); *City of Moses Lake*, Decision 3322 (PECB, 1989).

<sup>5</sup> *City of Blaine* demonstrates the degree of concern for inappropriate stranding and consequent deprivation of individual collective bargaining rights. In that case a proposed bargaining unit of both uniformed and non-uniformed supervisors was granted certification notwithstanding claims of a lack of community of interest and WAC 391-35-310 (which normally requires placement of employees eligible for interest arbitration into separate bargaining units) to avoid stranding an employee.

units and conflicting work jurisdiction claims. *City of Auburn*, Decision 4880-A (PECB, 1995); *Ben Franklin Transit*, Decision 2357-A (PECB, 1986); and

Analysis under the "desires of employees" component is by means of conducting a unit determination election, but that is only done in representation proceedings under Chapter 391-25 WAC, and only where either of two or more unit configurations sought by employee organizations could be appropriate.

Unit clarification proceedings under Chapter 391-35 WAC are apt for dealing with changes of circumstances after a bargaining unit is created. That includes modification of bargaining unit descriptions to recognize the evolution of government services, technological advances, and the arrival of new generations of employees who perform such services.

Where new positions are added to a workforce in which some employees are already represented for the purposes of bargaining, the "accretion" standards set forth in Commission precedents such as *Kitsap Transit Authority*, Decision 3104 (PECB, 1989); and *Seattle School District*, Decision 4868 (PECB, 1984) are applicable.

An accretion will be ordered where a newly created position is logically aligned with only one existing bargaining unit and creation of a new separate bargaining unit would not be appropriate under the unit determination provisions of the statute. See: *Oak Harbor School District*, Decision 1319 (PECB, 1981). *City of Port Angeles*, Decision 1701 (PECB, 1983).

*Benton County*, Decision 7651 (PECB, 2002). Thus, accretion will not be ordered if the affected employee could stand on his own or be claimed by any other bargaining unit.

Application of "Community of Interests" Standard -

The *Darrington* case relied upon by the union reached a "community of interests" question, as follows:

In the absence of a "confidential" exclusion, the information technologist at the Darrington School District has collective bargaining rights under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Accordingly, care must be taken to assure that the rights of the individual employee will not be prejudiced.

As historically constituted, the bargaining unit represented by PSE has encompassed all of the non-supervisory employees of the employer who are "public employees" within the meaning and coverage of Chapter 41.56 RCW. Exclusion from that unit (e.g., on the basis that he is a "specialist") would strand Byrd or his successor without any way to implement rights under Chapter 41.56 RCW, since a one-person bargaining unit would not be appropriate. *Town of Fircrest*, Decision 246-A (PECB, 1977). Such an exclusion must be rejected. *City of Vancouver*, Decision 3160 (PECB, 1989).

In *Mt. Baker School District*, Decision 7510, the exclusion of the disputed individual as a supervisor obviated the need for any further "community of interests" analysis. A fundamental distinction between those cases and this case arises from the result reached here on the claim of "confidential" status. It is not necessary to reach a "community of interests" question or to be concerned about stranding in this case, where the disputed network specialist is excluded from all rights under Chapter 41.56 RCW.

Even in the absence of a "confidential" exclusion or a "supervisor" exclusion, the absence of a community of interests is evident in this case.

The duties, skills and working conditions of the disputed position are clearly distinguished from the bargaining unit employees, who



are largely custodians, maintenance workers, bus drivers, food service workers, and teacher aides. The varied work hours and compensation on a salaried basis further distinguish the disputed employee from the bargaining unit. The bulk of the testimony produced by the union concerned alleged comparisons between the network specialist and other classified employees, but contrasts also emerge from that evidence. The network specialist has unique duties and responsibilities, including budget oversight, a liaison role with the educational service district, training (and evaluation of training accomplishment) of employees, monitoring of computer usage by employees and students, and serving as the water quality program coordinator. That far exceeds the scope of duties performed by the two bargaining unit members called as witnesses by the union, who process new books and materials, schedule the use of the library by classes, check books in and out, maintain an automated circulation and card catalog system, and oversee the work of assistants, volunteers, and student teaching assistants. If the duties of the media and library media specialists are the closest to the disputed position, a visible gap remains. Those positions do not even begin to approach the network specialist's job in complexity, scope, and responsibility. Moreover, the library and media specialist positions do not require the knowledge, expertise, and training needed by the network specialist. The working conditions of the network specialist are distinguished by the varied work schedule and by his status as an exempt employee under the federal Fair Labor Standards Act (apparently as a "professional" employee). Finally any comparability with the library and media specialists is compromised by the direct reporting relationship of the disputed individual with the superintendent, where the bargaining unit employees report to lower-ranking officials.

The history of bargaining provides little guidance, because the disputed position in question is new, and because the testimony

regarding an alleged agreement to exclude the position was ambiguous.

The extent of the organization is difficult to discern from this record. It is clear that there are two bargaining units in the employer's workforce at the present time:

A bargaining unit of certificated employees under Chapter 41.59 RCW, which formerly had some of the work now performed by the disputed position. That unit could not include the disputed position, however, because it does not require certification as an educator and the incumbent lacks certification as an educator; and

A bargaining unit of certain types of classified employees under Chapter 41.56 RCW, where the disputed position does not fit cleanly within any of the categories specified in the parties' contract.

In addition, a number of exclusions are evident or can be inferred from the circumstances:

The superintendent and business manager are clearly excluded from all bargaining units, and exclusion of building administrators from the certificated unit can be inferred from RCW 41.59.080.

At least a secretary and an accounts payable position are excluded from the classified unit, although the basis for the exclusion of the latter position is not established in this record.

The supervisors of transportation and custodial/maintenance are at least partially excluded from the classified unit by the parties' contract, and the propriety of their total exclusion from that unit can be inferred from WAC 391-35-340.

Thus, the network administrator could have a community of interest with other classified supervisors.

The "desires of employees" component cannot be implemented in this unit clarification case.

FINDINGS OF FACT

1. The Concrete School District is a public employer within the meaning of RCW 41.56.030(1).
2. Public School Employees of Washington, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of certain groups of classified employees of the Concrete School District.
3. The union filed a timely amended petition seeking clarification of the existing bargaining unit with regard to a position titled "Technology Systems Network Supervisor/Specialist" which was recently created by the employer.
4. The network specialist reports directly to the superintendent and performs duties as assigned by her. As such, the network specialist has a fiduciary relationship with the superintendent.
5. The superintendent is responsible for collective bargaining for the employer. The network specialist assists and acts in a confidential capacity to the superintendent, by supplying information for use by the superintendent in forming the labor relations policies and strategies of the employer. The superintendent considers this to be confidential information.
6. The network specialist monitors computer use by all employees and students of the employer, has the authority to order employees and students to cease the misuse of computers, and

has the responsibility to report any misuse to the superintendent. Those ongoing responsibilities of the network specialist would create a potential for conflicts of interest if the position were to be included in the bargaining unit represented by the union.

7. The network specialist is a highly trained and skilled professional who: manages the employer's computer network, and administers a separate budget; serves on a technology committee on behalf of the employer; has responsibility for a water quality program; and provides computer training for other employees, and reports on their progress to their supervisors. The incumbent does not share those varied duties and skills with any other employee of the employer.
8. The network specialist is paid on a salaried basis, and works irregular hours in the performance of his varied duties. No members of the bargaining unit have similar working conditions.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-35 WAC.
2. Based on the facts set forth in paragraphs 4 and 5 of the foregoing findings of fact, the network specialist is a confidential employee within the meaning of RCW 41.56.030(2)(c), and is excluded from all bargaining rights under Chapter 41.56 RCW.
3. Based on the facts set forth in paragraph 6 and 7 of the foregoing findings of fact, the network specialist would

properly be excluded from the existing bargaining unit under RCW 41.56.060 and WAC 391-35-340 as a supervisor, if he were not excludable as a confidential employee.

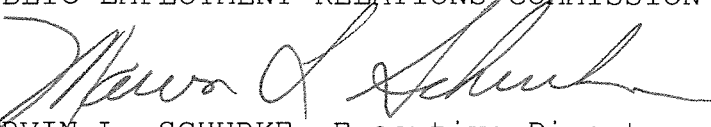
4. Based on the facts set forth in paragraphs 8 and 9 of the foregoing findings of fact, the network specialist would properly be excluded from the existing bargaining unit for lack of a community of interest under RCW 41.56.060, if he were not excludable as a confidential employee or supervisor.

ORDER

The Technology Systems Network Supervisor/Specialist is excluded from the bargaining unit of Concrete School District classified employees.

Issued at Olympia, Washington, on the 30<sup>th</sup> day of June, 2003.

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.