

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
)
CITY OF KIRKLAND) CASE 16257-C-02-1044
)
For clarification of an existing) DECISION 8009 - PECB
bargaining unit represented by:)
)
WASHINGTON STATE COUNCIL OF) ORDER CLARIFYING
COUNTY AND CITY EMPLOYEES) BARGAINING UNIT
)
)
_____)

James D. LaCour, Human Resources Manager, for the employer.

Audrey B. Eide, Attorney at Law, for the union.

On February 25, 2002, the City of Kirkland (employer) filed a petition with the Public Employment Relations Commission under Chapter 391-35 WAC, seeking clarification of an existing bargaining unit represented by the Washington State Council of County and City Employees, Council 2, AFSCME, AFL-CIO, Local 1837 (union or WSCCCE), with respect to the status of one person claimed by the employer to be a "confidential" employee. A hearing was held on October 30, 2002, before Hearing Officer Kenneth J. Latsch. The parties submitted post-hearing briefs on December 20, 2002. Authority to decide this case, limited to an "eligibility" issue, has been delegated to the Hearing Officer under WAC 391-35-190(2).

Based upon the evidence and arguments, the Hearing Officer rules that the position at issue is properly included within the existing bargaining unit.

BACKGROUND

The City of Kirkland is located in King County. The bargaining unit represented by the WSCCCE is described in the parties' collective bargaining agreement, effective January 1, 2000, through December 31, 2002, as follows:

ARTICLE 2 - Recognition and Bargaining Unit

The Employer recognizes the Union as the exclusive collective bargaining representative for all regular employees of the City of Kirkland as noted in the classification in article 12 with positions that require at least eighty (80) hours of compensable service per month for five (5) or more consecutive months, excluding supervisory and confidential employees.

Article 12 of the collective bargaining agreement includes the following relevant positions: "senior financial analyst," "associate planner," and "budget analyst." In its petition, the employer proposed the exclusion of the senior financial analyst/01 classification from the existing bargaining unit as a "confidential" employee.

Approximately six years ago, the responsibility for evaluating the cost of proposals and counter-proposals in collective bargaining was transferred to the employer's finance department. At that time, Chip Corder held the position of financial analyst. Corder was generally assigned the responsibility of "costing" contract proposals and attending management strategy meetings relating to collective bargaining. The employer did not assign such duties to Corder with respect to the WSCCCE contract, however, due to his membership in the bargaining unit represented by that union.

Corder was later given the senior financial analyst title, but remained in the bargaining unit represented by the WSCCCE. Corder

retained the task of costing proposals, but other confidential employees were assigned responsibility for costing both the WSCCCE contract and contracts between the employer and other unions.

The employer reorganized its Finance Department again in 2001. At that time, the employer created a "financial planning manager" position. The job description for that position includes the following duties:

Coordinates and/or conducts fiscal analysis of City's labor agreements. Develops models and analyzes fiscal impacts of a variety of scenarios. Coordinates between the Administrative Services Department and the Finance Director and Financial Operations Division to assure feasibility of the implementation.

Corder was promoted to the new position. He continued having responsibility for the collective bargaining "costing" duties he had performed under his previous titles, and took on supervision of the "financial analyst" and "senior financial analyst" positions. Based on the employer's assertion that it needed a confidential position outside of the bargaining unit to be responsible for costing contracts, the union acquiesced to placement of Corder's new position outside of the bargaining unit.

The "senior financial analyst" position remained in the bargaining unit, and Sandi Hendricks was promoted to that position from the "financial analyst" position.

POSITIONS OF THE PARTIES

The employer contends that costing of bargaining proposals necessarily implies work of a confidential nature, and that the

information to be developed by the disputed position is so highly confidential that management decisions during negotiations could potentially be compromised if the position remains in the bargaining unit. The employer contends that it needs additional positions designated as "confidential" to provide support for management bargaining teams. Due to the cyclical nature of bargaining and the need to cost several contracts at a time, the employer claims one position cannot be solely responsible for the costing work for all of the bargaining units existing within the employer's workforce. It points out that the job description for the position currently held by Sandi Hendricks includes costing support. The employer contends the level of detailed analysis cannot be given to the financial planning manager alone, because that manager's responsibility also consists of supervising, scheduling and managing the work of the senior financial analyst and the budget analyst. It reasons that the disputed employee must be able to provide requested information for the management bargaining teams if the financial planning manager is unavailable for any reason.

The union disputes the exclusion proposed by the employer. It notes that the employer's Finance Department is not part of the employer's bargaining team and does not create management proposals or policy. It contends that the current incumbent in the senior financial analyst position has never engaged in costing proposals, or any other labor relations matters. Moreover, it asserts that the duties of the disputed employee are limited with respect to labor relations work, and that she does not exercise independent judgment in costing contract proposals. It notes that costing tasks are found in the job descriptions of two other Finance Department positions already excluded from the unit, the "financial operations manager" and the "finance director." In addition, it points out that Corder has continued to do most of the costing work.

DISCUSSIONThe Exclusion of "Confidential" EmployeesBurden of Proof -

Because exclusion as a "confidential employee" altogether deprives the individual of collective bargaining rights under the Public Employees' Collective Bargaining Act, such exclusions are not lightly granted. A heavy evidentiary burden is placed on the party proposing a "confidential" exclusion. *City of Seattle*, Decision 689-A (PECB, 1979); *City of Seattle*, Decision 1797-A (PECB, 1985); and *Pateros School District*, Decision 3911-B (PECB, 1992).

Standard for Exclusion -

In *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978), the Supreme Court of the State of Washington gave a narrow interpretation to the exclusion of "confidential employees" from the coverage of Chapter 41.56 RCW, concluding at page 107 with:

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.

That "labor nexus" test has been applied by the Commission in numerous subsequent cases. In 2001, following a review of its representation case rules and unit clarification case rules with the assistance of a focus group consisting of labor representatives, management representatives, and agency staff members, the

Commission adopted a rule codifying the line of precedents dating back to *City of 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.

That rule was effective August 1, 2001, and is applicable to this proceeding initiated thereafter.

Within bounds of reason, an employer may structure its organization as it sees fit. *Puyallup School District*, Decision 5764 (PECB, 1997). An employer will be allowed some reasonable number of excluded personnel to perform the employer functions in the collective bargaining process. *Clover Park School District*, Decision 3581 (PECB, 1990). Thus, the "confidential" exemption has been granted where the employee at issue was charged with computing the cost of proposals and participating in negotiations;¹ and where an employer that had no human resources department relied upon its budget/payroll supervisor to provide contract interpretations and counter-proposals in contract negotiations, to cost union and employer proposals, and to participate in formulation of labor policies involving six bargaining units.²

¹ *Colville School District*, Decision 5319-A (PECB, 1996).

² *Franklin County*, Decision 6350-A (PECB, 1998).

On the opposite side of the equation, an excluded employee must have necessary and ongoing access to information regarding labor relations policy and strategy of the employer. *Tacoma-Pierce County Health Department*, Decision 4664 (PECB, 1994). Where confidential work can be assigned to employees already excluded as confidential, it would be unreasonable for the employer to deprive additional employees of their statutory bargaining rights. *Clover Park School District*, Decision 3581. Thus, "confidential" status was denied as to a personnel office secretary who had access to personnel files, had responsibility for orientation of new employees, took notes at bargaining sessions, and conducted salary and benefit surveys of other public employers, where the data collected was information the public was entitled to see and the individual did not analyze calculations for bargaining;³ and where an individual who computed the costs of bargaining proposals had never been told to keep the information confidential.⁴

Speculative Duties Not Persuasive -

The test for confidential exclusions is based on the actual labor nexus duties and responsibilities *at the present time*. *Kennewick School District*, Decision 6957 (PECB, 2000). "Present time" refers to the time the hearing was held. Employees are not to be considered "confidential" based upon speculation as to their duties in the future. In *Pateros School District*, the Commission looked to the actual duties performed by the individual as of the time of the hearing in that case. Similarly, in *City of Winslow*, Decision 3520-A (PECB, 1990), employer speculation about a person handling sensitive information in the future was not a basis for "confiden-

³ *North Franklin School District*, Decision 6499 (PECB, 1998).

⁴ *Pateros School District*, Decision 3911-B (PECB, 1992).

tial" status. The Commission reiterated its rejection of speculation in *City of Redmond*, Decision 7814-B (PECB, 2003), where it denied an employer's request for exclusion of a position affected by a recent reorganization. Although the former incumbent of the disputed position had historically been involved in bargaining, the employee recently assigned to that position had never participated in contract negotiations for the employer and was never involved in costing out proposals. The Commission noted:

[P]ersons who could have access to the type of confidential information which might damage the collective bargaining process are rightfully excluded from the bargaining unit. However, occupying a position of general responsibility and trust does not establish a relationship warranting exclusion from collective bargaining rights if the individual is not privy to labor relations material, strategies, or planning sessions.

Absent any time limitation on "confidential" claims under WAC 391-35-020, actual assignment of job duties involving a "labor nexus" will provide a basis for a unit clarification petition.

Application of Standard

Disputed Position Lacks Labor Nexus to Warrant Exclusion -

When closely examined, the changes in the employer's finance staff have materially altered the "labor nexus" of the position in dispute. Although the department continues to be involved with confidential labor relations matters, those duties followed Corder into his new position and the current incumbent in the disputed position has never had (and continues to lack) the labor nexus necessary for "confidential" status. In fact, there is no evidence that the senior financial analyst has engaged in any cost analysis of any bargaining proposal or contracts, or participated in any way in labor relations matters on behalf of management.

Employer Claims are Speculative -

The employer argues that it will be necessary to have the senior financial planner at the bargaining table at some point in the future, and that the financial planning manager may need the assistance of the senior financial analyst with respect to preparing cost analyses of contract proposals. Moreover, the employer further contends that the disputed position should be excluded as "confidential" now because it intends to give the senior financial analyst the duties of costing labor contracts at some time in the future. Those arguments are rejected as speculative.

The employer's Finance Department has undergone one recent reorganization, and nothing would preclude further reorganizations. As of the time of the hearing in this case, the senior financial planner had not assessed the costs of any contract proposals, nor had she handled any other labor relations matters. Until the Senior Financial Planner position actually satisfies the labor nexus test, she remains eligible for protection under the collective bargaining act. *City of Redmond*, Decision 7814-B (PECB, 2003).

FINDINGS OF FACT

1. The City of Kirkland is a "public employer" within the meaning and coverage of RCW 41.56.030(1).
2. Washington State Council of County and City Employees, Council 2, AFL-CIO, Local 1837 (WSCCCE), a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representatives of a bargaining unit of executive, administrative and professional employees of the City of Kirkland.

3. Prior to 2001, Chip Corder was included in the bargaining unit represented by the WSCCCE notwithstanding the fact that he costed bargaining proposals on behalf of the employer while working in a "senior financial analyst" position.
4. The employer reorganized its Finance Department in 2001. Chip Corder was promoted from the "senior financial analyst" position to a newly-created "finance planning manager" position outside of the bargaining unit, but retained his responsibilities with regard to costing bargaining proposals for the employer.
5. Sandi Hendricks was promoted to the "senior financial analyst" position after Corder was promoted as described in paragraph 3 of these findings of fact.
6. As of the time of the hearing in this proceeding, Hendricks had not been called upon to cost any bargaining proposals or perform any other labor relations functions on behalf of the employer. She is not privy to confidential information concerning the employer's labor relations policies and practices.

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. The employee holding the position of "senior financial analyst" as presently constituted in the Finance Department of the City of Kirkland is a public employee within the meaning

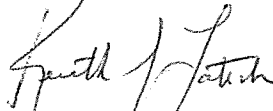
of RCW 41.56.030(2), and is not a confidential employee within the meaning of RCW 41.56.030(2)(c) and WAC 391-35-320.

ORDER

The employee holding the job title of "senior financial analyst" shall be included in the existing bargaining unit involved in this proceeding.

ISSUED at Olympia, Washington, this 26th day of March, 2003.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



KENNETH J. LATSCH, Hearing Officer

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.