

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
WASHINGTON PUBLIC EMPLOYEES)	
ASSOCIATION)	CASE 21236-C-07-01312
)	
For clarification of an existing)	DECISION 10044 - PSRA
bargaining unit of employees of:)	
)	
COMMUNITY COLLEGE DISTRICT 14)	ORDER CLARIFYING
(CLARK COLLEGE))	BARGAINING UNIT
_____)	

Herb Harris, Organizer, for the union.

Attorney General Rob McKenna, by *Rachelle L. Wills*,
Assistant Attorney General, for the employer.

On August 31, 2007, the Washington Public Employees Association (union) filed a unit clarification petition seeking to include five employees of Community College District 14 (Clark College - employer) in the bargaining unit. Previously, the employer and the union agreed the positions at issue in this petition were confidential. Hearing Officer Lisa Hartrich held a hearing on November 27, 2007.

ISSUES

1. Does Laura Elwood-Klein have standing to challenge the proceedings?
2. Is a change in circumstances required for the union to challenge the status of confidential employees when the employees were previously excluded by agreement?

3. Are five employees in the employer's human resources office confidential employees under RCW 41.80.005(4)?

Issue 1

Does Laura Elwood-Klein have standing to challenge the proceedings?

Analysis

Laura Elwood-Klein, one of the employees whose position is at issue in this proceeding, sent a letter to the Hearing Officer on January 31, 2008, after the close of the hearing including her "Statement of Protest Against Forcibly Joining the WPEA."

Challenges to the status of a confidential employee may be made only by the employer or the union representing such an employee. WAC 391-35-010. Only evidence presented at the hearing will be considered by the Executive Director in determining the outcome of whether Elwood-Klein is a confidential employee. The letter will not be considered.

Issue 2

Is a change in circumstances required for the union to challenge the status of confidential employees when the employees were previously excluded by agreement?

Legal Standard

In accordance with WAC 391-35-020(1)(e), the Commission allows petitions regarding confidential status to be filed at any time. *State - Labor and Industries*, Decision 8437-A (PSRA, 2004). The

party seeking a confidential exclusion bears a heavy burden of proof because the confidential exclusion deprives the employee of all collective bargaining rights. *City of Chewelah*, Decision 3103-B (PECB, 1989).

Analysis

The employer relies on *Olympia School District 111*, Decision 4736-A (PECB, 1994), to argue that a change in circumstances is required to alter a prior agreement between the parties regarding a confidential position.

In *Olympia School District 111*, the Commission held that the employer's heavy burden of proving a position is confidential may be met by parties' prior agreements recognizing the confidential nature of the position. The Commission further held that, absent an exclusion abhorrent to Commission policy, the petitioning party must demonstrate a change of circumstances to avoid a binding effect of the prior agreement. In *Yakima School District*, Decision 7124-A (PECB, 2001), the Commission overruled *Olympia School District 111* to the extent it was inconsistent with WAC 391-35-020.

It would be inconsistent with WAC 391-35-020 and Commission policy to require a change in circumstances to challenge the confidential status of a position. It would also be inconsistent with Commission policy to exclude as confidential a position that is not confidential.

While an employer and a union may agree to exclude a position as confidential, WAC 391-35-020 is the applicable standard for all clarification cases regarding confidential exclusions, regardless of the parties' previous agreement. The fact that the positions at

issue were previously excluded, by agreement, from the bargaining unit does not allow the employer to automatically meet its heavy burden of proof.

Issue 3

Are five employees in the employer's human resources office confidential employees under RCW 41.80.005(4)?

Legal Standards

An employer will be allowed a reasonable number of personnel who are exempt from collective bargaining rights in order to perform the employer's functions in collective bargaining. *Clover Park School District*, Decision 2243-A (PECB, 1987). There is no magic formula for determining how many employees may be excluded.

Under the Personnel System Reform Act (PSRA or Chapter 41.80 RCW), a confidential employee is one

. . . who, in the regular course of his or her duties, assists in a confidential capacity persons who formulate, determine, and effectuate management policies with regard to labor relations or who, in the regular course of his or her duties, has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies, or who assists or aids a manager. "Confidential employee" also includes employees who assist assistant attorneys general who advise and represent managers or confidential employees in personnel or labor relations matters, or who advise or represent the state in tort actions.

RCW 41.80.005(4). In order to be excluded as a confidential employee, the employee must satisfy the labor nexus test. *State - Department of Information Services*, Decision 8629-A (PSRA, 2006).

In cases under the PSRA, the Commission has applied the labor nexus test enunciated in *City of Yakima*, 91 Wn.2d 101 (1978). An employee is a confidential employee if he or she participates directly on the employer's behalf either: (1) in the formulation of labor relations policy; or (2) in the preparation for or conduct of collective bargaining; or (3) in the administration of collective bargaining agreements. *City of Lynden*, 7527-B (PECB, 2002). Under the PSRA, the centralization of negotiations substantially limits the potential for application of the labor nexus test at the agency level, because bargaining is not conducted at the agency level. *State - Department of Labor and Industries*, Decision 8437-A.

Not all human resources functions meet the labor nexus test, and personnel functions not related to labor relations are irrelevant in determining confidential exclusions. *Washington State Patrol*, Decision 8469-A (PSRA, 2006). Routine clerical duties will not warrant a confidential exclusion; the employee must consistently exercise independent judgment. *City of Lynden*, Decision 7527-B. Access to personnel files and current payroll data is insufficient to exclude an employee. *Olympia School District 111*.

Facts Relevant to All Employees

The five employees at issue work in the employer's human resources office. Vice President of Human Resources, Katrina Golder, supervises three employees: Human Resource Consultant Assistant 1, Laura Elwood-Klein; Human Resource Consultant 1, Page Pallamounter; and Human Resource Consultant Assistant 2, Megan Brooker. Associate Director of Human Resources, Sue Williams, supervises two employees: Human Resource Consultant Assistants 1, Laura Likes and Dennis "Sam" Osaki.

Currently, there are three bargaining units at the employer's facility: faculty, classified, and classified supervisors. The union represents the classified employees. The Office of Financial Management's Labor Relations Office (LRO) represents the employer during bargaining with the union. Golder did not represent the employer at the bargaining table during negotiations for the 2005-2007 or 2007-2009 collective bargaining agreements; however, she provided information, upon request, to the state negotiating team. Williams administers faculty and administrative contracts but does not represent the employer at the bargaining table during negotiations.

All employees working in the employer's human resources office have access to the I-drive, where Golder stores negotiations material. An employee simply knowing how or where to access information relating to collective bargaining is insufficient to exclude that employee as confidential. *State - Natural Resources*, Decision 8458-A (PSRA, 2005). It is incumbent on the employer to keep confidential labor relations materials secure. Access to the I-drive is not enough to deprive the employees at issue of their bargaining rights.

Human Resources Consultant Assistant 1 Laura Elwood-Klein

Laura Elwood-Klein is the primary support to Katrina Golder and also supports Page Pallamounter. In support of Golder, Elwood-Klein schedules appointments, answers the phone, edits correspondence, and prepares files. In support of Pallamounter, Elwood-Klein prepares memoranda of pay for employees, creates benefit letters for employees, creates files for benefits, and edits correspondence. Additionally, Elwood-Klein maintains the office supplies. These duties are routine clerical duties, and do not qualify Elwood-Klein for exclusion as a confidential employee.

In support of Golder's labor relations functions, Elwood-Klein has prepared documents, gathered information at Golder's request, typed Golder's notes from collective bargaining, and prepared grievance responses. Elwood-Klein reads all of Golder's correspondence, including disciplinary notices and grievances. Depending on the type of information Elwood-Klein gathers, gathering materials may be related to confidential labor relations activity. As Golder currently does not serve on the state bargaining team, there would currently be no notes from collective bargaining negotiations for Elwood-Klein to type. Confidential status depends on the employee's current duties.

The employer offered documents that Elwood-Klein had access to and may have used when gathering information for Golder. The email examples included requests for policies, Washington Personnel Review Board or Commission decisions, and ground rules used in local bargaining. Such information would be available to the union upon request or is public record. Absent analysis or formulation of employer policy by the employee at issue, gathering such information does not support a finding that Elwood-Klein is a confidential employee.

According to Golder, Elwood-Klein proof-read and copied a 2003 internal memorandum to the employer's interim president recommending the employer bargain under the Governor. The letter is an internal recommendation on how the employer should proceed with bargaining under the PSRA, and the letter is related to the employer's labor relations functions. However, the letter is evidence of duties Elwood-Klein previously performed. The employer failed to offer current examples of work Elwood-Klein has performed relating to confidential labor relations.

Elwood-Klein attends labor-management meetings as Golder's assistant and takes notes on Golder's behalf. The union is present at labor-management meetings. Attending a meeting where both the employer and the union are present, for the purpose of taking notes and not advancing positions on the employer's behalf, is not a confidential duty.

The documentary evidence submitted in support of Elwood-Klein's exclusion from the bargaining unit included letters shared with and addressed to the union. If the union is privy to documents, such evidence is irrelevant for determining whether an employee is confidential.

The document most relevant to Elwood-Klein's status as a confidential employee is a 2003 email and attachment including updates and issues for discussion at the bargaining table. The email, from Lorna Ovena, a member of the 2003 state bargaining team for classified employees, addressed to Golder, sought input on the issues to be discussed during negotiations. Golder testified that Elwood-Klein would potentially have had access to the document because Golder kept the document in her files. Golder did not indicate whether Elwood-Klein filed the document. Having access to the files is not enough to warrant exclusion as a confidential employee. Golder must authorize Elwood-Klein to access information. It is unclear from Golder's testimony what involvement Elwood-Klein actually had with the document. Further, the document, from 2003, is not indicative of confidential duties Elwood-Klein currently performs.

Elwood-Klein's job duties include routine clerical support of Golder and Pallamounter. Elwood-Klein is privy to labor relations materials when Golder provides them to her. While gathering

information that Golder may need to pass along to the state bargaining team is a component of Elwood-Klein's duties in support of Golder, Golder is not directly involved in bargaining. Elwood-Klein is not a confidential employee.

Human Resources Consultant 1 - Page Pallamounter

Page Pallamounter's primary duty is administering employee benefits. Pallamounter determines whether employees are eligible for benefits and leave, updates summaries of benefits for new employees, processes Labor and Industry claims, and orients new employees to benefits. Providing new employees with orientation does not warrant a confidential exclusion. *Franklin County*, Decision 6350 (PECB, 1998). Through the administration of benefits and leave, Pallamounter has access to private employee personnel files. To warrant a confidential exclusion, an employer must show more than an employee having access to private information concerning matters other than labor relations. *Clover Park School District*, Decision 2243-A. Possession of information that is not to be disclosed to the public, but would not damage the collective bargaining process if disclosed, does not meet the standard for exclusion. *City of Chewelah*, Decision 3103-B.

Pallamounter performs some duties concerning labor relations. Using the collective bargaining agreement, Pallamounter answers employee questions about benefits and leave. If Pallamounter cannot answer an employee's question, she seeks advice from Golder. Pallamounter is not engaged in an activity that would qualify as independent judgment.

Pallamounter assists Golder with grievances by gathering information, but that information is limited to her correspondence with the grievant. Pallamounter testified on the employer's behalf at

an arbitration, but the employer presented no evidence that she assisted an Assistant Attorney General in preparation for the arbitration. Pallamounter neither responds to grievances on the employer's behalf, nor makes employer policy. Rather, once a grievance has been filed, she provides Golder with documents she also provides to the grievant. By itself, grievance processing is generally insufficient to meet the labor nexus test. *State - Labor and Industries*, Decision 8437-A (PSRA, 2004) citing *City of Seattle*, Decision 689-C (PECB 1981).

When asked, Pallamounter provides Golder with suggestions about changes that could be made to the collective bargaining agreement or employer policies. The use of an employee as a sounding board is insufficient to deprive an employee of his or her bargaining rights. *State - Department of Information Services*, Decision 8629-A. An employer may discuss ideas and ask an employee questions based on the employee's knowledge without disclosing the employer's bargaining position. *Pierce County*, Decision 8892-A (PECB, 2005). A critical question is whether information travels to the employee, rather than from the employee. *Pierce County*, Decision 8892-A. If Golder sought information from Pallamounter about how the benefits administration worked, the information went to the employer, not to the employee. Confidential labor relations information must flow to the employee to deprive an employee of his or her bargaining rights.

While Pallamounter has access to documents that could not be disclosed to the general public, such as medical benefit files, access to this type of information does not make an employee confidential. Confidentiality stems from an employee's access to labor relations materials not shared with the union and participation in the labor relations process on behalf of the employer.

Based upon her stewardship of confidential employee files, answering questions using the collective bargaining agreement as a guide, and providing input to Golder upon request, Pallamounter's duties do not warrant exclusion from the bargaining unit.

Human Resources Consultant Assistant 2 - Megan Brooker

Megan Brooker's duties include maintaining leave records, maintaining lists of employees for the employer, inputting data, and supporting hiring. Brooker maintains lists of classified employees, including their pay range and step; lists of classified employee seniority; lists of adjunct and affiliated faculty; and lists of probationary employees. These duties are routine personnel functions, thus not determinative of Brooker's status as a confidential employee.

Some of Brooker's duties relate to labor relations. Like Pallamounter, Brooker uses the collective bargaining agreement to answer employee questions, and consults with Golder if a question raises issues not previously encountered. Brooker does not exercise independent judgment when making a decision based on the existing collective bargaining agreement or Golder's advice.

Brooker tells Golder if the employer's policies or the collective bargaining agreement raise concerns about leave administration. The information is traveling to the employer, not from the employer to the employee. Brooker's raising concerns or answering questions about her job functions would not be enough to exclude Brooker from the bargaining unit.

Brooker maintained a list of employees at pay step L that were impacted by a pay increase. At some point in time, either during or after the last round of bargaining, Brooker gave the L list to

the accounting office, where the impact of the pay increase was determined. Maintaining a list of employees at a certain pay level is a personnel function, not a labor relations function. Brooker had no involvement beyond maintenance of the list. Brooker did not use the list to cost the effects of the raise, nor was there evidence she conducted analysis based on the list. Maintenance of the list is not determinative to her status as a confidential employee.

Golder testified, based on emails from 2003 and 2004, as to what information she might ask Brooker to gather. Brooker was not employed by the employer at the time the emails were sent, thus the documents are not representative of Brooker's actual duties. Only the duties the employee currently performs are relevant to the employee's status as confidential.

Based upon Brooker's current job duties, she is not a confidential employee.

Human Resources Assistant - Laura Likes

Likes' duties include assisting in recruitment, backing up reception, assisting with faculty salary advancement, editing Williams's correspondence, creating appointment letters, and developing job announcements. Likes gathered salary data for the faculty employees that may have been used in faculty collective bargaining. Likes uses the collective bargaining agreement to answer employee questions. Likes' duties involving the faculty bargaining unit have no bearing on her confidentiality for membership in the classified bargaining unit. Likes' duties are personnel functions unrelated to labor relations, and do not warrant her exclusion from the bargaining unit. Likes is not a confidential employee.

Human Resources Assistant - Dennis "Sam" Osaki

Osaki is the receptionist in the employer's human resources department. Osaki's duties include date stamping, sorting, and distributing mail; answering the phone; posting jobs on the internet; and greeting people. Golder testified that Osaki must read the mail to determine the proper recipient. However, Osaki testified that based on where the mail is coming from, he generally knows who the recipient should be and needs only to glance at the mail to determine the recipient. Osaki's job duties are routine clerical duties, thus, Osaki is not a confidential employee.

Conclusion

None of the positions at issue perform confidential labor relations duties.

FINDINGS OF FACT

1. Community College District 14 (Clark College) is an employer within the meaning of RCW 41.80.005(8).
2. The Washington Public Employees Association is an employee organization within the meaning of RCW 41.80.005(7).
3. The Office of Financial Management's Labor Relations Office (LRO) represents the employer during bargaining with the union.
4. Vice President of Human Resources Katrina Golder did not represent the employer at the bargaining table during negotiations of the 2005-2007 and 2007-2009 collective bargaining agreements.

5. Associate Director of Human Resources Sue Williams does not represent the employer at the bargaining table during collective bargaining negotiations.
6. Human Resources Consultant Assistant 1 Laura Elwood-Klein is the primary support to Katrina Golder. Elwood-Klein schedules appointments, answers the phone, prepares files, attends labor management meetings as Golder's assistant and takes notes, reads correspondence, types notes from collective bargaining, gathers information, and prepares grievance responses.
7. Human Resources Consultant 1 Page Pallamounter handles employee benefits, determines whether employees are eligible for benefits and leaves, uses the collective bargaining agreement to answer employee questions, makes suggestions on changes that could be made to the collective bargaining agreement or employer policies, and has access to employee personnel files.
8. Human Resources Consultant Assistant 2 Megan Brooker maintains leave records and lists of employees, inputs data, and supports hiring. Brooker answers employee questions using the collective bargaining agreement. Brooker tells Golder if she has concerns about how the collective bargaining agreement or employer policies affect leave administration.
9. Human Resources Consultant Assistant 1 Laura Likes supports Williams, assists with recruitment, backs up reception, edits Williams's correspondence, creates appointment letters, and assists in developing job announcements. Likes uses the collective bargaining agreement to answer employee questions.

10. Human Resources Consultant Assistant 1 Dennis "Sam" Osaki is the receptionist. Osaki answers phones, sorts and distributes mail, greets people, and posts jobs on the internet.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.80 RCW and Chapter 391-35 WAC.
2. As described in Finding of Fact 6, Laura Elwood-Klein is not a confidential employee within the meaning of RCW 41.80.005(4).
3. As described in Finding of Fact 7, Page Pallamounter is not a confidential employee within the meaning of RCW 41.80.005(4).
4. As described in Finding of Fact 8, Megan Brooker is not a confidential employee within the meaning of RCW 41.80.005(4).
5. As described in Finding of Fact 9, Laura Likes is not a confidential employee within the meaning of RCW 41.80.005(4).
6. As described in Finding of Fact 10, Dennis "Sam" Osaki is not a confidential employee within the meaning of RCW 41.80.005(4).

ORDER

1. The Human Resources Consultant Assistant 1 position, currently held by Laura Elwood-Klein, is included in the bargaining unit.

2. The Human Resources Consultant 1 position, currently held by Page Pallamouter, is included in the bargaining unit.
3. The Human Resources Consultant Assistant 2 position, currently held by Megan Brooker, is included in the bargaining unit.
4. The Human Resources Consultant Assistant 1 position, currently held by Laura Likes, is included in the bargaining unit.
5. The Human Resources Consultant Assistant 1 position, currently held by Dennis "Sam" Osaki, is included in the bargaining unit.

Issued at Olympia, Washington, this 18th day of April, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CATHLEEN CALLAHAN, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-35-210.