City of Spokane Valley, Decision 10158 (PECB, 2008)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	
CITY OF SPOKANE VALLEY	CASE 21449-C-08-1324
and	DECISION 10158 - PECB
WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES	ORDER CLARIFYING BARGAINING UNIT
For clarification of an existing bargaining unit.	

Summit Law Group, by *Elizabeth R. Kennar*, Attorney at Law, for the employer.

David M. Kanigel, Legal Counsel, for the union.

On January 2, 2008, the City of Spokane Valley (employer) and the Washington State Council of County and City Employees (union) filed a joint unit clarification petition with the Public Employment Relations Commission seeking determination of whether the position of administrative assistant in the City Attorney's Office is a confidential employee. Hearing Officer Jamie Siegel held a hearing on April 22, 2008. The parties filed post-hearing briefs which were considered.

ISSUE PRESENTED

Does the administrative assistant position in the City Attorney's Office, currently held by Patti McConville, meet the standards required to be confidential within the meaning of Chapter 41.56 RCW?

Based upon the record, the applicable statutes, rules, and case precedent, the Executive Director rules that the position is not confidential and is properly included in the bargaining unit.

APPLICABLE LEGAL PRINCIPLES

In determining the issue of an employee's status as confidential, the Commission applies a labor nexus test. *Yakima School District*, Decision 9020-A (PECB, 2007). This test states that a confidential employee is an employee whose duties imply a confidential relationship which must flow from an official intimate fiduciary relationship with the executive head of the bargaining unit or public official. *Yakima School District*, Decision 9020-A.

Commission rule WAC 391-35-320 codifies the confidential employee test as follows:

> 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.

As demonstrated by this rule and case precedent, the confidential exclusion extends beyond those who are directly responsible for formulating labor relations policy and includes those support personnel who process sensitive labor relations material at the direction of those responsible for such matters. *City of Mountlake Terrace*, Decision 3832-A (PECB, 1992).

The confidential exclusion prevents potential conflicts of interest between the employee's duty to the employer and the employee's status as a union member. For example, when employees' official duties provide access to sensitive information regarding the

employer's collective bargaining position, it would be unfair to place the employees in a position where they must question whether their loyalties lie with the employer or with the union. *Pierce County*, Decision 8892-A (PECB, 2006).

The Commission requires that confidential exclusions be based on the employee's actual duties and responsibilities and not on speculation about the employee's future duties and responsibilities. *State - Natural Resources,* Decision 8458-B (PSRA, 2005). Although the Commission recognizes that employee job descriptions and duties are not static and may change as an organization evolves and faces different challenges, the Commission unequivocally holds that a confidential exclusion can only be based upon current job duties. *City of Redmond*, Decision 7814-B (PECB, 2003).

To be considered confidential, an employee need not work exclusively or primarily on confidential work, so long as the assignments can be described as necessary, regular, and ongoing. *City of Redmond*, Decision 7814-B.

Because an individual's status as a confidential employee deprives the person of all bargaining rights under state law, the party seeking a confidential exclusion bears a heavy burden of proof. *City of Redmond*, Decision 7814-B.

ANALYSIS

Overview

The union represents approximately 60 of the employer's 90 employees in one bargaining unit. The remainder of the workforce is unrepresented. In 2006, the parties negotiated a bargaining agreement for the remainder of that year as well as the current bargaining

agreement. The deputy city manager, parks director and outside legal counsel served on the employer's negotiating team. The current agreement expires December 31, 2009.

The City Attorney's Office consists of the city attorney, the deputy city attorney, the administrative assistant position at issue, and legal interns who work on a temporary basis. The attorneys in the City Attorney's Office advise the city manager and City Council on a full range of municipal issues, including community development, contracts, labor relations, and operations.

The employer created the administrative assistant position in the City Attorney's Office in June of 2007 and hired Patti McConville to fill the position in July of 2007. McConville provides the sole clerical support for the two attorneys. She answers the phone, maintains the electronic and hard copy filing systems, researches a variety of legal issues, and drafts documents.

No one from the City Attorney's Office participated at the bargaining table when the parties negotiated the current bargaining agreement. During the course of negotiations, Deputy City Attorney Cary Driskell discussed negotiating positions and advised the City Council. He has also worked with the City Council to develop policies, including labor-related policies. According to Driskell, the City Attorney's Office is researching and planning strategy for negotiating the next bargaining agreement. He testified that the employer has not yet determined whether he will serve on the next bargaining team.

Application

When analyzing whether a clerical employee's duties meet the standards for confidential status, we focus on the role the employee

plays in supporting the formulation of labor relations policy, with particular emphasis on the collective bargaining process.

McConville was not employed in the disputed position at the time the parties negotiated the current bargaining agreement. Since her employment in the City Attorney's Office began, the employer has not negotiated any labor agreements or memoranda of understanding or responded to any grievances. The current bargaining agreement does not expire until December 31, 2009, twenty months from the time of the hearing.

The employer argues that McConville meets the labor nexus test through her research of issues for "upcoming" negotiations, participation in meetings with the attorneys, research and involvement in disciplinary actions and wrongful termination litigation, access to all of the City Attorney's Office documents, and other such activities.

Although the formulation of labor relations policy may encompass more than the negotiations taking place at the bargaining table, in this case the employer failed to establish that McConville necessarily assists with the formulation of confidential labor relations policy on a regular and ongoing basis. As described in more detail below, the employer's evidence lacked specificity; where the employer provided more specific information about McConville's duties, the duties do not meet the labor nexus test.

<u>Lack of specificity</u>. The employer's case failed to provide specific evidence that demonstrated McConville's involvement with confidential labor relations policy. In *City of Mountlake Terrace*, Decision 3832-A, the Commission said:

> When an employee provides clerical support to management officials involved in the formulation of labor relations policy, two conditions must be met: First, the specific content of the correspondence must be analyzed to establish that documents handled by the employee are the type whose disclosure could detrimentally impact the collective bargaining process. If, for example, copies of the documents are shown as being sent to representatives or members of a bargaining unit, then the kind of conflict of interest that justifies exclusion as a 'confidential' employee does not arise. Second, the contact with labor relations-related material must be describable as 'necessary, regular and ongoing'.

In this case, the employer introduced no documentary evidence illustrating McConville's involvement with confidential labor relations policy. The employer declined to offer evidence, through testimony or exhibits, it considered confidential. Instead, witnesses made conclusory statements that McConville was involved in the formulation of confidential labor relations policy.

For example, Driskell testified that McConville has been researching issues involving labor policy and strategy for upcoming negotiations. He indicated that the employer has already started to identify issues for bargaining but would reveal no more than the issues involving work week, work hours, and work issues. When pressed about what McConville's research entailed, Driskell stated that she conducted legal research "in terms of what is allowed by law, what potential impacts there are, depending on the choice set that the city looks at or that the union requests."

The employer identified that files in the City Attorney's Office contain notes of communication between Driskell and the City Council concerning the 2006 bargaining, but the employer provided no specifics.

Additionally, Driskell and McConville testified about the weekly meetings where the attorneys, McConville, and legal interns discuss "strategy, liability, and policy recommendations" with respect to a variety of matters, including labor relations. At these meetings, the attorneys reveal what they are thinking and how they may approach issues. The employer provided the example of reclassifications and McConville's knowledge of how the employer may respond to a reclassification request. As described below, position reclassifications do not fall within confidential labor relations policy. The employer did not provide other specific examples.

As the above examples demonstrate, the record lacks sufficient specificity about McConville's duties to establish that she is privy to confidential labor relations information, the disclosure of which would damage the collective bargaining process. To deprive an employee of collective bargaining rights, the employer must meet its heavy burden with specific evidence. As described in more detail below, where the record contains more specific examples of McConville's duties, the examples do not meet the labor nexus test.

Employee discipline. McConville and Driskell testified about McConville's involvement with employee disciplinary matters. Prior to McConville assuming her position, the employer fired an employee. The former employee filed a wrongful termination lawsuit against the employer. After beginning her position in the City Attorney's Office, McConville provided litigation support to the employer's attorneys. Additionally, during McConville's employment in her current position, the employer allowed an employee to resign in lieu of termination. McConville was involved in the employer's consideration and research of the alleged action, the range of potential disciplinary action, and the potential impacts of such actions. She

drafted documents and gathered information for the employer's use in setting future policies and procedures.

Commission precedent holds that routine discussions of disciplinary situations, including reviewing alternatives and impacts, as well as discussions of contract interpretation do not meet the labor nexus test. *State - Information Services*, Decision 8629-A (PSRA, 2006). McConville's work with employee disciplinary matters does not qualify her as a confidential employee.

Duties requiring discretion. McConville plays an important role for the employer and for the City Attorney's Office. The attorneys share considerable information with her and rely on her to skillfully and discretely perform many responsibilities. For example, she has been involved in researching issues relating to employee workplace issues, including diversity and potential discrimination. She gathered information on pre-employment background checks and drug testing. McConville has been involved in discussions regarding job description disputes and requests for position reclassifications. She drafts litigation-related documents and has been involved with garnishments. She maintains the electronic and hard copy filing systems and is privy to attorney-client privileged communications and attorney work product, including drafts of legal opinions. McConville has access to all notes, documents, and files and all e-mails sent and received by the two attorneys.

These responsibilities require McConville to act with considerable discretion. These responsibilities are not, however, related to labor relations and do not meet the standards for confidential status. If disclosed, the information McConville has would potentially be damaging, but not to the collective bargaining process. 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 standards for confidential status. *City of Chewelah*, Decision 3103-B (PECB, 1989). The Commission has made clear that, standing alone, a person who occupies a position of general responsibility and trust does not establish a relationship warranting exclusion from collective bargaining rights. *City of Redmond*, Decision 7814-B..

CONCLUSION

As bargaining for the successor contract draws closer, McConville's future duties may include confidential work. At this time, however, I base my decision on McConville's actual duties, not on speculation as to her future duties. *State - Natural Resources*, Decision 8458-B.

The employer has not met its heavy burden to establish that McConville's duties currently meet the labor nexus test. The position is included in the bargaining unit.

FINDINGS OF FACT

1. The City of Spokane Valley is a public employer within the meaning of RCW 41.56.030(1).

2. Washington State Council of County and City Employees is a bargaining representative within the meaning of RCW 41.56.030(3).

3. Patti McConville is employed as an administrative assistant in the employer's City Attorney's Office. She provides the sole clerical support for the two attorneys in that office. She answers the phone, maintains the electronic and hard copy

filing systems, researches a variety of legal issues, and drafts documents.

4. McConville was not employed in the administrative assistant position at the time the parties negotiated the current bargaining agreement. Since her employment in the City Attorney's Office began, the employer has not negotiated any labor agreements or memoranda of understanding or responded to any grievances.

5. The record lacks sufficient specificity about McConville's duties to establish that she is privy to confidential labor relations information, the disclosure of which would damage the collective bargaining process.

6. Many of McConville's duties, including her involvement with disciplinary actions, require her to act with considerable discretion. The duties are not, however, related to confidential labor relations matters.

7. The record did not establish that McConville assists with the formulation of confidential labor relations policy on a regular and ongoing basis.

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. As described in Findings of Fact 3, 4, 5, 6, and 7, Patti McConville is a public employee within the meaning of RCW

41.56.030(2), and is not a confidential employee under WAC 391-35-320.

ORDER

The administrative assistant position currently held by Patti McConville is included in the bargaining unit.

Issued at Olympia, Washington, this 11th day of August, 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.