

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
COLFAX SCHOOL DISTRICT) CASE 22017-C-08-1386
For clarification of an existing) DECISION 10474 - PECB
bargaining unit represented by:)
COLFAX EDUCATIONAL SUPPORT) ORDER CLARIFYING
PERSONNEL) BARGAINING UNIT
_____)

Gregory L. Stevens, Attorney at Law, appeared for the employer.

Eric R. Hansen, Attorney at Law, Washington Education Association, appeared for the union.

On October 6, 2008, the Colfax School District (employer) and Colfax Educational Support Personnel (CESP)¹ jointly filed a unit clarification petition seeking to remove the district maintenance/grounds position and the director of technology from a bargaining unit of classified employees represented by the union. The employer asserted that both positions are supervisory and confidential and should not be included in the bargaining unit.

Hearing Officer J. Martin Smith held a hearing on December 17, 2008, at Colfax, Washington. The parties filed briefs to complete the record.

¹ CESP is an affiliate of the Washington Education Association.

ISSUES

The issues presented for decision in this case are limited to the following:

1. Should the district's maintenance/grounds employee be excluded from the bargaining unit as a supervisor or a confidential employee?
2. Should the director of technology position be excluded from the bargaining unit as a supervisor or a confidential employee?

The Executive Director concludes that the district maintenance/grounds position does not meet the criteria for exclusion as a confidential employee under RCW 41.56.030 and WAC 391-35-320. The district maintenance/grounds position is not supervisory. As of the time of hearing, the director of technology position had not been filled. It is therefore premature to make a determination whether that position is either supervisory or confidential.

APPLICABLE LEGAL PRINCIPLES

This case arises under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. The Legislature has delegated the task of determining and modifying appropriate bargaining units to the Commission. RCW 41.56.060.

The status of supervisors - Supervisors are employees within the meaning of RCW 41.56.030(2), and are entitled to organize for the purposes of collective bargaining. *METRO v. Department of Labor and Industries*, 88 Wn.2d 925 (1977). The Commission has exercised

its unit determination authority in the past to exclude "supervisors" from bargaining units containing their rank-and-file subordinates. This practice serves to limit or prevent conflicts of interest arising within the bargaining unit due to the authority supervisors have over their subordinates. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981).

WAC 391-35-340 codified Commission and judicial precedent dating back to *City of Richland*. The rule states:

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.

Chapter 41.56 RCW does not contain a definition of supervisor, but the Commission has traditionally looked to the definition of supervisor set forth in RCW 41.59.020(4)(d) to describe the types of authority that might create potential conflicts of interest. The term "supervisor":

[M]eans any individual having authority, in the interest of the employer, to hire, assign, promote, transfer, layoff, recall, suspend, discipline, or discharge other employees, or to adjust their grievances, or to effectively recommend 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.

Supervisors compared to lead workers - Supervisors and lead workers are distinguished from each other by Commission precedent. Lead workers exercise limited authority that does not warrant their separation from the rank-and-file employees they lead. *City of Puyallup*, Decision 5639-B (PECB, 1997). Discretionary authority in administrative matters, or having the ability to direct employees in daily job assignments, may not rise to the level of possessing independent authority to act on, or effectively recommend, personnel actions. *Granite Falls School District*, Decision 7719-A (PECB, 2003); *City of Gig Harbor*, Decision 4020-A (PECB, 1992); *City of Aberdeen*, Decision 4174 (PECB, 1992).

In order to determine whether an individual possesses sufficient supervisory authority to be excluded from a rank-and-file bargaining unit, the *actual* duties and authority exercised by that individual must be examined. Such determinations are not made on the basis of titles or job descriptions. *King County*, Decision 7053 (PECB, 2000); *Morton General Hospital*, Decision 3521-B (PECB, 1991).

Exclusions of confidential employees - A public employer seeking a confidential employee designation has a heavy burden of proof, because confidential status deprives an employee of all collective bargaining rights. *King County Fire District 13*, Decision 9845 (PECB, 2007); *Pierce County*, Decision 8892-A (PECB, 2006); *State - Natural Resources*, Decision 8711-B (PSRA, 2006); *Town of Ruston*, Decision 9976 (PECB, 2008).

The Commission's rule at WAC 391-35-320 codifies the confidential employee test, often referred to as the labor nexus 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.

It is not sufficient to simply establish the existence of an intimate fiduciary relationship between the alleged confidential employee and a public official because the "labor nexus" between actual job duties and the formation of labor relations policy must be demonstrated as well. *King County Fire District 13*, Decision 9845. Confidential employees' work assignments do not have to be exclusively or primarily confidential, but the employees must have "necessary, regular, and ongoing" confidential work assignments. *City of Redmond*, 7814-B (PECB, 2003), citing *City of Cheney*, Decision 3693 (PECB, 1991).

ANALYSIS

Issue 1: District Maintenance/Grounds Position

According to Superintendent Michael Morgan, the district maintenance/grounds position was developed as a replacement for a lead custodial position vacated in August 2008. The employer wanted the new position to be responsible for repair of heating and air conditioning systems and to take over supervision of custodial employees from building principals.

Jim Sharp was hired into the district maintenance/grounds position in August 2008, and was assigned to Colfax High School. He had not

completed his first year at the district as of the time of hearing. Analysis of the record regarding Sharp's supervisory responsibilities reveals the following:

Authority to hire - The school board approves all new hires, including classified employees. Sharp interviewed and recommended to his supervisor that an individual be hired as a substitute custodian, but Sharp was unaware of what action followed his recommendation. He testified that he would hope to have some input on hiring any employees in the future, but that "I'm not allowed to hire."

Authority to discipline and discharge - Sharp testified that he would write up an employee who had faltered or failed, but in the case of a second problem, he would "have it officially written up, and pass it on to my supervisor, with my recommendation." Morgan typically works with a supervisor if a written warning is involved, although the supervisor has the authority to issue the warning. Morgan is responsible for suspensions, while the school board has the final authority to discharge an employee.

Authority to evaluate - At the time of the hearing, Sharp had received no input or instruction regarding evaluation of custodial staff and had not yet evaluated employees.

Other indicia - Sharp had made no recommendations on layoffs, promotions, or the granting of special leave for bargaining unit employees at the time of hearing. He had not been involved in any grievances.

Preponderance of duties and time - Sharp spends six to seven hours per day performing maintenance at the high school and taking care of the grounds throughout the district. He spends approximately

one to one and one-half hours each day reviewing work and answering questions employees might have. As to the custodians in the district, Sharp indicated that:

I try to get in contact with each one of them each day, see if they have any concerns, problems, questions, walk around, do a few inspections of the classrooms and what not, see if anything needs to be done.

Sharp spends some 80 percent or more of his time doing bargaining unit work. The district maintenance/grounds position falls short of the preponderance of duties that supervisors typically exercise. Sharp exercises lead responsibility, but does not have the ability to hire, terminate and discipline, or schedule vacations and leaves. The position occupied by Sharp is not supervisory.

Although the new job description indicates that the position will provide input for changes to the collective bargaining agreement and will serve on the employer bargaining team, no record was made to indicate any existing confidential status. As of the date of the hearing, no labor nexus attached to this position.

Issue 2: Director of Technology

The position in question - Margie Hamilton was hired in 2003 as a teacher's aide. In about 2004, she became the technology support specialist. In addition to troubleshooting computer hardware, she assists in the management of network resources and provides technical support for several school projects, especially at the high school. Four curriculum aide employees and two technology assistants report to Hamilton.

Morgan testified that Hamilton's duties have changed significantly since the district added maintenance of the telephone system and

management of the computer network to her duties. Some of this work had been contracted out prior to Hamilton's appointment as the technology support specialist.

The petition in this matter requests exclusion of the position of director of technology from the bargaining unit. However, the record and the briefs from both parties indicate that, although the director of technology position was adopted by the school board, Hamilton has not been appointed to that position. At the time of hearing, Hamilton remained employed as the technology support specialist.²

Long-standing Commission precedent indicates that the assessment of the responsibilities of a position must be made on current, not prospective or speculative duties. *King County*, Decision 7053; *Morton General Hospital*, Decision 3521-B. Because the position of director of technology has not been filled, it is not possible to determine whether that position is supervisory. The position cannot be excluded from the bargaining unit based on speculation or anticipated, rather than actual, duties.

Technology support specialist - It is unclear why a record was developed concerning the technology support specialist because the petition did not address this position. Although the record fell short of establishing the technology support specialist as a supervisor, no finding will be made concerning that position.

² Morgan acknowledged on cross-examination that the position of director of technology had not been filled. The employer's brief was also clear on this point: Hamilton is currently the technology support specialist and the director of technology position "does not technically exist."

Bargaining unit status of technology employees - Should either party petition in the future to exclude a technology position as supervisory, it is important to recognize that exclusion of supervisors from bargaining units is based upon the potential for a conflict of interest with employees whom they supervise. The record in this matter reveals the parties' uncertainty as to whether the six part-time technology employees are in the CESP bargaining unit. Determining whether the technology specialists are in the bargaining unit would be a fundamental element in any decision to exclude an individual as a supervisor from that unit.

The union argues that the six technology assistant positions are not in the bargaining unit. The union also appears to argue that the positions could not be included in the bargaining unit because some position incumbents also perform certificated work for the employer, and are in the certificated bargaining unit in that capacity. To the extent the union is making that argument, it is misplaced. An individual may perform work in two or more bargaining units, or may perform several functions that are included in the same bargaining unit. Each of the technology support employees could have a certificated supervisor and/or one or more classified supervisors.³ See *Mead School District*, Decision 7183 (PECB, 2000).

City of Port Angeles, Decision 1701 (PECB, 1983), presented a similar question of the bargaining unit status of certain employees. There the Executive Director examined the language of the recognition clause and wage appendices of the contract and applied principles of contract interpretation in making a decision about

³ Certificated employees often work in more than one bargaining unit (some drive school buses in rural districts, as here) and this is especially true after *Castle Rock School District*, Decision 4722-A (EDUC, 1992).

unit status. In the situation at hand, the recognition clause names the bargaining unit as:

Any and all employees including all full-time and regular part-time employees performing work as classified employees in any of the following job classifications: teacher assistants, secretary, custodian, maintenance/groundskeeper, food service worker, bus driver, mechanic, accounts payable clerk and technology support specialist.

Such recognition language appears to indicate that the bargaining unit here includes all full-time and regular part-time classified employees of the district. Indeed, the wage appendix refers to "technology" employees generally. In the event that a petition is filed in the future regarding a supervisory technology position, a record would need to be made to establish the unit status of the technology assistants, including the issue of their regular part-time status.

Exclusion as confidential - Just as a supervisory exclusion will not be granted based on speculation, a person will not be excluded as a confidential employee without a record having been made on current confidential labor relations responsibilities. Because the position of director of technology has not been filled, that position cannot be excluded as confidential.

FINDINGS OF FACT

1. The Colfax School District is a public employer within the meaning of RCW 41.56.030(1).
2. Colfax Educational Support Personnel, an affiliate of the Washington Education Association, is a bargaining representa-

tive within the meaning of RCW 41.56.030(3), and represents a bargaining unit of classified employees of the employer.

3. The parties jointly petitioned for determination of the supervisory and confidential status of the district maintenance/grounds employee and the director of technology.
4. Jim Sharp, the district maintenance/grounds employee, spends six to seven hours per day performing maintenance at the high school and taking care of the grounds throughout the district. He spends approximately one to one and one-half hours each day reviewing work and answering questions employees might have. He does not have the authority to hire, terminate, or discipline employees, or to recommend layoffs, transfers, or promotions. He does not have authority over budgets for the maintenance section of the district. The district maintenance/grounds position falls short of exhibiting the preponderance of the indicia of supervisory authority. While he has lead responsibility for the maintenance and grounds functions of the employer, he spends the preponderance of his time performing bargaining unit work.
5. Sharp has not participated in collective bargaining activities for the employer.
6. There is no incumbent in the position of director of technology. A decision as to the supervisory or confidential nature of the position of director of technology cannot be made based upon speculative duties.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction of this matter under Chapter 41.56 RCW and Chapter 391-35 WAC.

2. The district maintenance/grounds position is neither a supervisor nor a confidential employee.
3. The director of technology position is as yet unfilled. The Commission will not make a determination regarding supervisory or confidential status based upon speculative or intended duties.

ORDER

The district maintenance/grounds position is included in the bargaining unit represented by the Colfax Educational Support Personnel.

Dated at Olympia, Washington, this 2nd day of June, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CATHLEEN CALLAHAN, Executive Director

This will be the final order of the Commission unless an appeal is filed under WAC 391-35-210.