

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
TACOMA ASSOCIATION OF)	
PROFESSIONAL-TECHNICAL EMPLOYEES)	CASE 22137-C-08-1390
)	
For clarification of an existing bargaining)	DECISION 10421 - PECB
unit of employees of:)	
)	
BATES TECHNICAL COLLEGE)	ORDER CLARIFYING
(COMMUNITY COLLEGE DISTRICT 28))	BARGAINING UNIT
)	
_____)	

Vickie Lackman, Vice President of Human Resources, for the employer.

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

On November, 26, 2008, the Tacoma Association of Professional-Technical Employees (union) filed a petition seeking to clarify a nonsupervisory bargaining unit of professional and technical employees working at the Tacoma campus of Bates Technical College (employer). Specifically, the union seeks to clarify whether or not the manager of local programming at KBTC public television is a supervisor and/or confidential employee, and therefore excluded from the bargaining unit.

Hearing Officer Jessica Bradley held a hearing in Tacoma, Washington, on February 27, 2009. The parties filed post-hearing briefs which were considered.

ISSUES PRESENTED

1. Should the manager of local programming position be excluded from the bargaining unit as a confidential employee?

The Executive Director finds that the manager of local programming is not a confidential employee and should not be excluded from the bargaining unit on that basis.

2. Should the manager of local programming position be excluded from the bargaining unit based on supervisory status?

The Executive Director finds that the manager of local programming is a supervisor and is properly excluded from the nonsupervisory bargaining unit on that basis.

ISSUE 1: Confidential Employee Status

Applicable Legal Principles

Under RCW 41.56.030(2)(c), confidential employees are excluded from bargaining units. The Commission places a heavy burden of proof on a party seeking to categorize an employee as "confidential" because such status deprives the individual of all collective bargaining rights. *City of Chewelah*, Decision 3103-B (PECB, 1989), citing *City of Seattle*, Decision 689-A (PECB, 1979); *State - Natural Resources*, Decision 8711-B (PSRA, 2006).

When determining whether a position should be excluded from a bargaining unit as a confidential employee, the Commission utilizes a labor nexus test.

WAC 391-35-320 EXCLUSION OF CONFIDENTIAL EMPLOYEES.

Confidential employees excluded from all 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.

An employee does not have to work exclusively, or even primarily, on labor nexus work in order to be excluded as a confidential employee, so long as the assignments can be described as necessary,

regular, and ongoing. *Oak Harbor School District, Decision 3581* (PECB, 1990); *City of Redmond, Decision 7814-B* (PECB, 2003). Sporadic contacts and limited back-up work are not sufficient to meet the test for exclusion. *Clover Park School District, Decision 2243-A* (PECB, 1987), *aff'd, in relevant part, Decision 2243-B* (PECB, 1987); *Yakima School District, Decision 7124-A* (PECB, 2001).

Analysis

KBTC is a public television broadcasting station operated by the employer. Phil Kane is the interim general manager of KBTC. The union has represented the professional and technical employees bargaining unit since 1993. The union and employer have a collective bargaining agreement that is effective from July 1, 2008 through June 30, 2012.

The employer created the manager of local programming position at KBTC in May of 2008. Daniel Kopec was hired into the position. The position description lists five percent of the position's work time as: "Represent Bates Technical College and KBTC's philosophy and mission in all outreach activities. Participate in labor negotiations." Despite this reference in the position description, Kopec has not participated in collective bargaining and has not formulated any labor relations policy.¹ Kopec has not assisted or acted in a confidential capacity to any person who participates directly in the formulation of labor relations policy or the preparation for or conduct of collective bargaining.

The employer bears the burden of proof in this matter because it asserts the manager of local programming should be excluded from the bargaining unit as a confidential employee. Based on the record, I find that the manager of local programming does not play a necessary, regular, and ongoing role in collective bargaining. The employer's arguments are based on duties it expects Kopec to perform in the future. As the Commission recently reiterated in *City of Yakima, Decision 9983-A*

¹ In February 2009, Kopec was scheduled to participate in an employer meeting about the upcoming contract negotiations for a bargaining unit of maintenance and custodial employees represented by the International Union of Operating Engineers. Due to unforeseen circumstances Kopec was unable to attend the meeting. This fact was not considered because it occurred after the petition was filed.

(PECB, 2008), it "will only consider the current job duties of the employee or employees as they exist at the time that the representation petition is filed." The Commission requires that confidential exclusions be based on an employee's actual duties and responsibilities, and not on speculation about the employee's future duties and responsibilities. *City of Spokane Valley*, Decision 10158 (PECB, 2008); *King County Fire Protection District 13*, Decision 9845 (PECB, 2007); *State - Natural Resources*, Decision 8458-B (PSRA, 2005).

Conclusion

The employer failed to satisfy its burden of proof with respect to the manager of local programming's confidential employee status. The position's anticipated future involvement with labor negotiations does not meet the labor nexus test set forth in WAC 391-35-320 and, therefore, the manager of local programming position may not be excluded from the bargaining unit on this basis.

ISSUE 2: Supervisory Status

Applicable Legal Principles

In 2001, the Commission adopted WAC 391-35-340 codifying precedent that excludes supervisors from bargaining units that contain their rank-and-file subordinates. Supervisors are separated from nonsupervisory employees to limit or prevent conflicts of interest. *City of Puyallup*, Decision 5639-B (PECB, 1997) (citing *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981)).

Because Chapter 41.56 RCW does not contain a definition of supervisor, the Commission looks to the definition of supervisor set forth in RCW 41.59.020(4)(d):²

[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

² *City of Lynnwood*, Decision 8080-B (PECB, 2006).

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.

The "preponderance" term is an important modifier. In this context, preponderance means “. . . that the disputed employee either spends a preponderance of his/her work time engaged in supervisory indicia or engages in a preponderance of the types of supervisory indicia.” *City of Lynnwood*, Decision 8080-A (PECB, 2005), *aff'd*, Decision 8080-B (PECB, 2006), *citing Granite Falls School District*, Decision 7719 (PECB, 2002), *aff'd*, Decision 7719-A (PECB, 2003).

The Commission distinguishes between supervisors and employees who are “lead workers.” As the Commission explained in *City of Toppenish*, Decision 1973-A (PECB, 1985): “In a hierarchical organization, certain employees may be given some supervisory responsibilities, but not a full complement, or they may be allowed to share supervisory responsibilities with their own supervisors.” These employees, who are often referred to as lead employees or working foremen, lack the true authority and independent judgment that is the hallmark of supervisory status.

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).

Analysis

Much of the work of the KBTC operation is performed by bargaining unit employees. KBTC employs approximately 11 bargaining unit employees, including a videographer/editor and a temporary associate producer.

In December 2007, the union filed a petition to clarify whether or not the creative content manager position held by Daniel Kopec was a supervisor. In *Community College District 28 (Bates)*,

Decision 10155 (PECB, 2008), the position was determined not to be a supervisor and clarified the bargaining unit to include the creative content manager position.

In 2008, three management positions at KBTC became vacant. As a result of the vacancies, a number of positions and reporting relationships at the television station were restructured. The employer eliminated the creative content manager position and created a new manager of local programming position. Kopec was selected and started his new position in or around May of 2008 without a break in service. Kopec's rate of pay did not change when he began the new position.

When Kopec was the creative content manager, he reported to the director of programming and production. As manager of local programming, he reports directly to the interim general manager.

Supervisory Factors

The manager of local programming is responsible for all of the locally produced KBTC programming. The bargaining unit videographer/editor and temporary associate producer report to the manager of local programming. If any of the local programming produced by the videographer/editor and the temporary associate producer were not in compliance with Public Broadcasting System (PBS) or Federal Communications Commission (FCC) regulations, Kopec would be held responsible.

Authority to Hire - As manager of local programming, Kopec has the authority to select and hire temporary employees. In the summer of 2008, Kopec and Interim General Manager Kane decided that the workload of the production department warranted an additional employee. Because immediate assistance was needed, Kane created a temporary associate producer position. The intent was to start the position as temporary and subsequently requisition a regular full-time position.

After Kane gave Kopec permission to hire a temporary associate producer, Kopec contacted an intern he had worked with in the past. In September 2008, without any additional approval from management, Kopec interviewed and hired the former intern.

The process for hiring a regular full-time employee is more complex and involves a hiring committee comprised of several managers, the human resources director, and other employees. The committee makes a recommendation on who should be hired, but the ultimate decision is made by the president of the college. Kopec has not been involved with hiring a regular full-time employee since becoming manager of local programming.

Assignment of Work - Kopec is responsible for assigning work to the videographer/editor and the temporary associate producer. Kopec closely directs the work of both employees on a daily basis. Kopec tells the videographer/editor what type of approach to take in different video shots, including the mood and lighting. Kopec closely monitors the video footage taken by the videographer/editor and provides direction and feedback. Kopec also tells the videographer/editor how the footage should be edited and closely reviews all editing work.

Kopec directs the work of the temporary associate producer. Kopec gives the temporary associate producer specific research assignments, transcription assignments and direction to contact individuals about scheduling shoots. The temporary associate producer performs an assortment of other support functions at Kopec's request.

Kopec describes the creation of local programming as a team effort that requires him to work closely with the videographer/editor and temporary associate producer. Kopec estimates that he spends more than half of his work time directing and reviewing work performed by the videographer/editor and temporary associate producer. This estimate was consistent with the testimony of the videographer/editor and the interim general manager.

Promote and Transfer - Kopec has never promoted or transferred an employee. Nothing in the record indicates that Kopec has the authority to promote or transfer employees.

Layoff and Recall – Kopec has not been involved in making layoff or recall decisions. Kopec believes that these type of decisions can only be made by the president of the college.

Discipline, Suspension or Discharge - Since becoming the manager of local programming, Kopec has initiated two conversations with employees that were disciplinary in nature.³ In October of 2008, Kopec spoke with the videographer/editor about use of the internet and personal phone calls. Kopec describes this exchange as a corrective action conversation, which is less serious than a verbal warning.

On November 17, 2008, Kopec gave an official verbal warning to the temporary associate producer. Kopec shared his concerns with Kane prior to issuing the verbal warning to the employee, but did not ask Kane for permission to issue the warning. Kopec kept written notes documenting the verbal warning. Kopec informed Kane of the verbal warning after he had issued it so that Kane would be aware that the action had been taken.

Kopec has never issued or recommended discipline beyond a verbal warning, but he has the authority to do so. If a problem persisted after a written warning were issued, Kopec would have to contact the human resources department to get advice on what action to take next.

Kopec does not have the authority to terminate an employee. Termination decisions can only be made by the president of the college.

Adjustment of grievances - Kopec has not had any involvement with processing or adjusting grievances. Kopec thinks he could resolve a grievance at the verbal level. Kopec has not received any training or instruction on how to handle grievances. If an employee had a grievance that Kopec were unable to resolve at an informal level, Kopec would contact the human resources department.

³ The February 2008 example provided by Kopec is not relevant to this decision because it occurred prior to the time Kopec assumed the manager of local programming position.

Conclusion

Kopec is involved in hiring employees, assigning and directing the work of employees, and disciplining employees. Kopec uses independent judgement in giving employees work assignments and directing their work. Kopec spends a preponderance of his work time engaged in these supervisory duties. Under the preponderance of work time test, Kopec is a supervisor. The fact that Kopec is held accountable for the work of his subordinates is also indicative of his supervisory status.

Based upon the record, the applicable statutes, rules and case precedents, the Executive Director rules that the manager of local programming is a supervisor. Kopec is properly excluded from the existing nonsupervisory bargaining unit.

FINDINGS OF FACT

1. Bates Technical College is a public employer within the meaning of RCW 41.56.030(1).
2. Tacoma Association of Professional-Technical Employees is a bargaining representative within the meaning of RCW 41.56.030(3) of an appropriate unit of certain nonsupervisory professional and technical employees of the employer.
3. The employer and union are parties to a collective bargaining agreement effective July 1, 2008 through June 30, 2012.
4. The employer operates a public television broadcasting station known as KBTC.
5. The employer created the manager of local programming position at KBTC in May of 2008.
6. The manager of local programming has not participated in collective bargaining and has not formulated any labor relations policy.

7. The manager of local programming has not assisted or acted in a confidential capacity to any person who participates directly in the formulation of labor relations policy or preparation for or conduct of collective bargaining.
8. The manager of local programming does not play a necessary, regular, and ongoing role in collective bargaining.
9. The manager of local programming is involved in hiring employees, assigning and directing the work of employees, and disciplining employees. The manager of local programming uses independent judgment in giving employees work assignments and directing their work.
10. The manager of local programming spends a preponderance of work time engaged in the supervisory duties described in Finding of Fact 9.

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 6 through 8, the manager of local programming position is a public employee within the meaning of RCW 41.56.030(2) and is not a confidential employee under RCW 41.56.030(2)(c) or WAC 391-35-320.
3. As described in Findings of Fact 9 and 10, the manager of local programming position is a supervisor under RCW 41.59.020(4)(d) and WAC 391-35-340, and is appropriately excluded from the nonsupervisory professional and technical employee bargaining unit represented by the union.

ORDER

The manager of local programming position currently held by Daniel Kopec is properly excluded from the bargaining unit.

Issued at Olympia, Washington, on the 4th day of June, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in cursive script, appearing to read "Cathleen Callahan".

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 391-45-350.