

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
WASHINGTON PUBLIC EMPLOYEES)	
ASSOCIATION)	CASE 21236-C-07-1312
)	
For clarification of an existing)	DECISION 10044-A - PSRA
bargaining unit of employees of:)	
)	
COMMUNITY COLLEGE DISTRICT 14)	DECISION OF COMMISSION
(CLARK COLLEGE))	
_____)	

Herb Harris, Organizer, for the union.

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

This case comes before the Commission on a timely appeal filed by Community College District 14 (Clark College, employer) seeking to overturn specific Findings of Fact, Conclusions of Law, and Order issued by Executive Director Cathleen Callahan ruling that Laura Elwood-Klein does not meet the definition of a confidential employee.¹ Washington Public Employees Association (union) supports the Executive Director's decision.

ISSUE PRESENTED

Did the Executive Director err in determining that the position held by Laura Elwood-Klein is not confidential and should be included in the bargaining unit?

¹ The Executive Director ruled that none of the five positions at issue met the definition of confidential employee. *Community College 14 (Clark)*, Decision 10044 (PSRA, 2008). The employer appealed the one position.

For the reasons set forth below, we find that the Executive Director correctly determined the issue and affirm her decision.

STANDARD OF REVIEW

This Commission reviews conclusions and applications of law and interpretations of statutes de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings support the Executive Director's conclusions of law. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002). Substantial evidence exists if the record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the matter. *Renton Technical College*, Decision 7441-A (CCOL, 2002).

ANALYSIS

Applicable Legal Standards

Under the Personnel System Reform Act (PSRA), the Legislature defines a confidential employee as one

[w]ho, 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.

RCW 41.80.005(4).

Although the PSRA definition differs somewhat from other statutes that define confidential employees, this Commission applies the same labor nexus test under all the laws we administer. *State -*

Natural Resources, Decision 8458-B (PSRA, 2005). The labor nexus test states that a confidential employee is:

(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 judgement; and

(2) Any person who assists and acts in a confidential capacity to such person.

WAC 391-35-320; *State - Natural Resources*, Decision 8458-B.

As indicated above, 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 status as a union member. For example, when employees' duties provide access to sensitive labor relations information, it would be unfair to place the employees in a position where they question whether their loyalties lie with the employer or the union. *Pierce County*, Decision 8892-A (PECB, 2005).

This Commission recognizes the significance of classifying employees as confidential as it denies them access to all collective bargaining rights and eligibility in any bargaining unit. *Concrete School District*, Decision 8131-A (PECB, 2004). For that reason, the Commission has long emphasized that the party proposing

exclusion of a position as "confidential" bears a heavy burden of proof. *Olympia School District*, Decision 4736-A (PECB, 1994) citing *City of Seattle*, Decision 689-A (PECB, 1979). We also recognize the legitimate need of employers to have a reasonable number of employees who are exempt from collective bargaining rights so that they can participate in the formulation of the employer's labor policies. *City of Redmond*, Decision 7814-B (PECB, 2003).

Application

Laura Elwood-Klein, Human Resource Consultant Assistant 1, reports to Associate Vice President of Human Resources, Katrina Golder. In analyzing whether Elwood-Klein's position is confidential, we first look at Golder's responsibilities and then turn to those of Elwood-Klein.

As Associate Vice President of Human Resources, Golder maintains responsibility for the work of the Human Resources Department which includes recruitment, benefits, labor relations, disciplinary matters, evaluation, training, and environmental health and safety. She serves on the employer's Executive Cabinet which formulates the employer's labor relations policy. Unions represent employees in three bargaining units at the employer's facility, including faculty, classified, and classified supervisors.

The union represents the nonsupervisory classified employees in a wall-to-wall bargaining unit. The Office of Financial Management's Labor Relations Office (LRO) represents the employer at the bargaining table with the union. Golder did not directly participate during classified negotiations for the 2005-2007 or 2007-2009 collective bargaining agreements although she provided information to the state negotiating team upon request. Golder testified she will serve on the state negotiating team for the 2009-2011

agreement, and the Human Resources group in which she participates is preparing for the bargaining.

The faculty bargaining unit, the Association for Higher Education (AHE), consists of approximately 170 full-time employees and 350 to 400 part-time employees. Golder serves as the employer's lead negotiator for the faculty bargaining. The AHE has made several bargaining demands during the course of the year and also filed up to 13 grievances.

Turning to Elwood-Klein, she serves as the primary support to Golder and also supports Page Pallamouter, an employee who the Executive Director ordered included in the bargaining unit.² The evidence demonstrates that Elwood-Klein handles many routine clerical duties that do not meet the confidential definition such as scheduling appointments (including those related to grievances, discipline, and bargaining), answering the phone, editing correspondence, and preparing files. She and other support staff in the Human Resources office have access to the I-drive, where Golder stores negotiations material.

The employer introduced limited evidence of tasks Elwood-Klein performs that fall within the context of confidential labor relations material. As the Executive Director found, she has prepared documents, gathered information at Golder's request, typed Golder's notes from collective bargaining sessions, and prepared grievance responses. Elwood-Klein opens and reads all of Golder's correspondence, including disciplinary notices and grievances, and edits some of Golder's outgoing communications. Golder testified that Elwood-Klein would have access to the employer's negotiations strategies since "I may ask her to go into that [I- drive where she

² *Community College 14 (Clark)*, Decision 10044 (PSRA, 2008)

keeps negotiations materials] and pull up a document and make revisions." There is no evidence Golder has specifically asked Elwood-Klein to do so and if Golder has, with what frequency and under what circumstances she has done so.

Lack of Specificity

The employer argues that in Finding of Fact 6, the Executive Director "failed to recognize the full scope of Ms. Elwood-Klein's duties and responsibilities." The record contains a number of general statements about Elwood-Klein's duties and responsibilities but lacks sufficient specificity to support a more expansive or detailed finding. For example, the employer asserts that Elwood-Klein prepares materials for negotiations. When asked to provide a specific example, however, Elwood-Klein was unable to do so.³

The employer makes another general statement, that Elwood-Klein's duties "routinely require that she have access to information regarding the College's labor relations policies and collective bargaining activities." Here, the employer introduced more specific examples, but the examples failed to provide sufficient evidence that Elwood-Klein performed confidential tasks on a regular and ongoing basis.

Turning to those examples, the employer introduced several documents from 2003 and 2004. One of the documents, a 2003 e-mail and attachment Golder received from the state classified bargaining team, updated employers on issues for discussion at the bargaining table and sought employer input. Golder testified that Elwood-

³ In response to counsel's question, she affirmed that although she could not think of an example she felt confident that she has helped prepare documents for Golder to use during negotiations.

Klein would have access to the document because Golder kept the document in her files.

Elwood-Klein proofread and copied another 2003 document, an internal memorandum to the employer's interim president recommending the employer elect to have the Governor bargain on its behalf. The employer introduced two 2004 memoranda from the state bargaining team requesting information for bargaining. One memorandum requested copies of several documents, including the layoff procedure, the order establishing the bargaining unit, and copies of bargaining ground rules. There is no clear testimony what involvement, if any, Elwood-Klein had with this document. The other memorandum requested feedback on re-creating layoff units. Golder testified that Elwood-Klein faxed Golder's response back to the bargaining team.

At best, even if Elwood-Klein were involved with each of the above-referenced documents, the evidence demonstrates isolated instances from several years ago where Elwood-Klein's duties required her to access matters with marginal confidential labor relations connections. 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. In this case, the record does not demonstrate that Elwood-Klein's confidential work was regular and ongoing.

Confidential Duties Relating to Other Bargaining Units

The employer argues in its appeal brief that the Commission may consider Elwood-Klein's duties with respect to labor relations activities concerning other bargaining units, besides the unit to which Elwood-Klein would belong. We agree. When analyzing whether a person's work meets the requirements to be considered confiden-

tial, we consider labor relations work involving all of the employer's bargaining units. *City of Clarkston*, Decision 4524 (PECB, 1993); *City of Sunnyside*, Decision 2058 (PECB, 1985).

In this case, the record focused on the classified bargaining unit. The employer introduced limited evidence of Elwood-Klein's responsibilities with AHE labor relations material and considering that evidence does not change the result.

Similarly, the employer argues that the Executive Director erred because she did not include Golder's status as a bargaining representative for faculty negotiations and her service on the state-wide bargaining team for the 2009-2011 bargaining agreement in Finding of Fact 4. With respect to the faculty bargaining, it was unnecessary to include that reference because there was little relevant evidence related to Elwood-Klein's involvement with faculty labor relations material. With respect to Golder's recent assignment to the state classified bargaining team, the employer presented no evidence that any of that work has flowed to Elwood-Klein. Although Golder's role on that team may lead to future confidential work for support staff, our decision about the confidential status of an employee is based upon his or her actual duties, not on speculation as to future duties. *State - Natural Resources*, Decision 8458-B.

CONCLUSION

Although employers are entitled to a reasonable number of employees who are exempt from collective bargaining rights so that they can participate in the formulation of the employer's labor policies, employers must establish that the employees meet the confidential employee definition. In this case, the employer did not carry its

heavy burden of establishing that Elwood-Klein meets the definition of a confidential employee.


NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Executive Director Cathleen Callahan are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

Issued at Olympia, Washington, the 21st day of August, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson



PAMELA G. BRADBURN, Commissioner



THOMAS W. MCLANE, Commissioner