

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

|                                   |   |                        |
|-----------------------------------|---|------------------------|
| In the matter of the petition of: | ) |                        |
|                                   | ) |                        |
| PUBLIC SCHOOL EMPLOYEES           | ) | CASE 16245-C-02-01043  |
| OF WASHINGTON                     | ) |                        |
|                                   | ) |                        |
| For clarification of an existing  | ) | DECISION 8131-A - PECB |
| bargaining unit of employees of:  | ) |                        |
|                                   | ) |                        |
| CONCRETE SCHOOL DISTRICT          | ) | DECISION OF COMMISSION |
|                                   | ) |                        |
|                                   | ) |                        |

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Vandeberg, Johnson & Gandara, by *Mark Hood*, Attorney at Law for the employer.

This case comes before the Public Employment Relations Commission on a timely notice of appeal filed by the Public School Employees of Washington, seeking to overturn findings of fact, conclusions of law, and an order clarifying a bargaining unit issued by Executive Director Marvin L. Schurke on June 30, 2003.<sup>1</sup> The Commission affirms the exclusion of the technology network system supervisor from the bargaining unit.

BACKGROUND

The Concrete School District (employer) operates common schools serving approximately 800 students. Marie Phillips is the superintendent.

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<sup>1</sup> *Concrete School District*, Decision 8131 (PECB, 2003)

Public School Employees of Concrete (union), an affiliate of Public School Employees of Washington, represents a bargaining unit of approximately 53 classified employees of the employer. The unit encompasses custodial-maintenance workers, food service employees, transportation workers, aides, and office-clerical employees.

The bargaining relationship between the union and the employer has existed since 1969. In 1999, the parties ratified a collective bargaining agreement that was effective through August 31, 2001.

The position at issue in this proceeding was created in 2000, and was not included in the bargaining unit at that time.

The union commenced this proceeding by filing a petition prior to the ratification of the parties' successor agreement for 2001-2003. The Executive Director's decision excluded the position from the bargaining unit, as a confidential employee.

#### POSITIONS OF THE PARTIES

The union asserts that the incumbent is not a confidential employee within the meaning of RCW 41.56.030(2)(c). It maintains that there is nothing to support the proposition that the incumbent and the superintendent work closely together with regard to any of her official and policy responsibilities. The union also contends the position is non-supervisory, and that the incumbent has no direct supervisory control over any employee. Lastly, the union contends that the position has a community of interest with other members of the bargaining unit it represents.

The employer supports the Executive Director's ruling that the position at issue is confidential within the meaning of RCW

41.56.030(2)(c) and WAC 391-35-320. It contends the incumbent provides meets the labor-nexus test for exclusion from a bargaining unit. In addition, it predicts a substantial potential for conflicts if the disputed position were to be included within the bargaining unit, because the incumbent oversees the use of technology by members of the bargaining unit and reports technology misuse to the employer. Lastly, the employer contends there is insufficient evidence of a community of interest to warrant including the position in the bargaining unit.

## DISCUSSION

### The Challenged Findings

The union has challenged three of the Executive Director's findings of fact:

4. The network supervisor has a fiduciary relationship with the superintendent.
5. The network supervisor acts in a confidential manner to the superintendent by supplying information for use by the superintendent in forming labor relations policies and strategies.
6. The network supervisor's ongoing responsibility creates a potential for conflicts of interest if included in the unit.

In addition, the union has also challenged three of the Executive Director's conclusions of law:

2. [T]hat the network specialist is a confidential employee. . . .
3. [T]hat the network supervisor is properly excluded from the bargaining unit as a supervisor. . . .

4. [T]hat the network supervisor does not share a community of interest with other employees in the bargaining unit. . . .

#### The Standard of Review

In considering appeals from staff decisions, the Commission reviews challenged findings of fact to determine whether they are supported by the substantial evidence, and if so, whether they support the conclusions of law. *C-Tran*, Decision 7088-B (PECB, 2002).

#### Applicable Legal Principles

The determination of appropriate bargaining units is a function delegated by the Legislature to the Public Employment Relations Commission. RCW 41.56.060.

The exclusion of "confidential employees" is rooted in the statute. The definition of "public employee" in RCW 41.56.030 includes:

[A]ny employee of a public employer *except any person . . . (c) whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit.*

The Supreme Court of the State of Washington gave that exclusion a narrow interpretation in *IAFF v. City of Yakima*, 91 Wn.2d 101 (1978), concluding:

We hold that in order for an employee to come within the exception of RCW 41.56.030(2), the duties which imply the confidential relationship must flow from an official intimate fiduciary relationship with the executive head of the bargaining unit or public official. The nature of this close association must concern the official and

policy responsibilities of the public officer or executive head of the bargaining unit, *including formulation of labor relations policy*. General supervisory responsibility is insufficient to place an employee within the exclusion.

*IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978) (emphasis added). Thus, a showing that a person holds a position of general responsibility and trust does not warrant exclusion from the collective bargaining process, where the individual does not have privity to labor relations material.

After many years of citing *City of Yakima*, the Commission codified the test embraced by the Supreme Court into our rules, at WAC 391-35-320, 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.

Numerous decisions before and since that codification have held that confidential employees are excluded from all bargaining units in order to protect the collective bargaining process.

#### Application of Standards

Having reviewed the record, we find that there is substantial evidence to support the Executive Director's findings and conclusion that the position in question is properly excluded.

The "Confidential Employee" Issue -

As to paragraph 5 of the findings of fact, the union asserts that the record does not support a finding that the incumbent had a fiduciary relationship with the superintendent. To support its assertion, the union points out that the incumbent never sat at the bargaining table, was not consulted as to what salary schedule was proposed, and did not make any recommendations to the superintendent. The union characterizes his role as clerical (limited to preparation of spreadsheets), rather than as confidential.

Applying the standard set forth by the Supreme Court, it is clear that the employer utilized the incumbent in a confidential capacity, satisfying at least the second prong of WAC 391-35-320. Uncontroverted testimony establishes that the superintendent is responsible for formulation and negotiation of the employer's labor relations policies. The superintendent called upon the incumbent to create wage models and adjust specific data in accordance to her specifications. The preparation of that data, which was to be used by the superintendent for the purposes of bargaining with the union, was in the course of an intimate fiduciary relationship between the incumbent and the superintendent. The nature of that relationship concerned the official and policy responsibilities of the executive head of the bargaining unit. The record also supports that there is significant potential for conflicts of interest between the position at issue and members of the bargaining unit. The incumbent had knowledge of the specific wage alternatives that the employer was considering in preparation for collective bargaining. If the incumbent were to be included in the bargaining unit, a potential would exist for serious conflicts of interest between his role as a union member and his role serving the interests of the employer, so that the collective bargaining process could be significantly undermined.

Paragraph 5 of the findings of fact thus fully supports paragraph 2 of the conclusions of law. The analysis can end there.

The "Supervisor" and "Community of Interest" Issues -

The Executive Director provided detailed responses to the union's assertions in this case that: (1) the incumbent was not excludable as a supervisor; and (2) the incumbent has a community of interest with the bargaining unit represented by the union. Challenged paragraphs 4 and 6 of the Executive Director's findings of fact, as well as challenged paragraphs 3 and 4 of the Executive Director's conclusions of law, respond to those union claims. Because the disputed position is properly excluded from the bargaining unit (and from all collective bargaining rights under Chapter 41.56 RCW) as a "confidential employee" under paragraph 2 of the conclusions of law, there is no need to address whether he might also be excludable on the basis of supervisory status (under WAC 391-35-340) or includable on the basis of sharing a community interests with other employees (under RCW 41.56.060).

NOW, THEREFORE, it is

ORDERED

The findings of fact, the conclusions of law, and the order clarifying bargaining unit issued by Executive Director Marvin L. Schurke in the above-captioned matter are AFFIRMED and adopted as the findings of fact, conclusions of law, and order of the Commission, except as follows:

1. Paragraphs 6 through 8 of the findings of fact are deleted as unnecessary to the resolution of the dispute; and

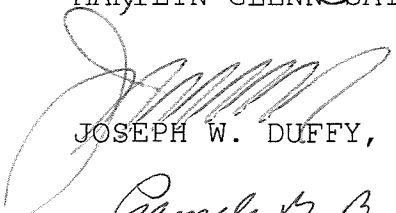
2. Paragraphs 3 and 4 of the conclusions of law are deleted as unnecessary to the resolution of the dispute.

Issued at Olympia, Washington, the 7<sup>th</sup> day of May, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson



JOSEPH W. DUFFY, Commissioner



PAMELA G. BRADBURN, Commissioner