

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
INTERNATIONAL UNION OF OPERATING)	CASE 10236-E-93-1688
ENGINEERS, LOCAL 280)	
)	DECISION 4354-A - PECB
Involving certain employees of:)	
)	
COLUMBIA IRRIGATION DISTRICT)	ORDER DETERMINING
)	ELIGIBILITY ISSUES
)	

Larry Johnston, Business Representative, appeared on behalf of the union.

Roy Wesley, Employer Labor Management Services, Inc., appeared on behalf of the employer.

On February 5, 1993, International Union of Operating Engineers, Local 280, filed a petition for investigation of a question concerning representation with the Public Employment Relations Commission, seeking certification as exclusive bargaining representative of certain employees of the Columbia Irrigation District.

During preliminary processing of the case, the parties stipulated to reserve an issue concerning the position of "field foreman" for a post-election hearing and determination. The representation election was conducted by mail ballot. The tally of ballots issued on April 12, 1993 indicated that a majority of the employees voted in favor of representation by Local 280, and an interim certification was issued on April 20, 1993, designating Local 280 as exclusive bargaining representative of the petitioned-for employees.¹ The hearing on the reserved issue was held at Kennewick, Washington, on July 20, 1993, before Hearing Officer J. Martin Smith. Authority to determine this "eligibility" issue has been delegated by the Executive Director pursuant to WAC 391-25-390.

¹ Columbia Irrigation District, Decision 4354 (PECB, 1993).

BACKGROUND

The Columbia Irrigation District covers portions of Franklin County and Benton County, in south-central Washington. The employer's headquarters are at Kennewick, Washington. Originally incorporated as a private company to provide canal and water utility services to the Tri-Cities area, it now is a municipal corporation operated under Washington law by a three-member board of directors. The chairman of the board is Bud Eggers.

Day-to-day operations of the utility are under the overall direction of Tim Mainwaring, who the board has appointed as secretary/manager. Clerical, billing and other administrative matters are handled by an office manager who reports to Mainwaring. Roger Miller has held the disputed "field foreman" position since January of 1993.

The employer has six full-time employees, who are designated as "field maintenance" employees under its pay plan.² All permanent field employees are required to have or acquire a Washington commercial drivers' license (CDL), to accommodate their operation of tractors, backhoes, and other heavy vehicles and tools used in excavating, constructing and maintaining canals and fresh-water pipes throughout the system. The employer's roster includes employees hired in 1975, 1984, 1989, 1991, 1992, and 1993. Their wages range from \$8.50 per hour to \$14.21 per hour.³

² Those employees are often referred to by working titles more specific to their job duties, such as "ditch-rider", "mechanic" or "welder".

³ The term "salaried" is used in the employer's personnel policy statement, but refers to the pay of employees at the rate of \$8.00 per hour "plus an additional \$.50 per hour following satisfactory completion of each six [6] month period of full-time employment until reaching \$10.00 per hour...."

Tim Mainwaring was preceded in the position of secretary/manager by Ingval Sunford.⁴ Mainwaring was given the "field foreman" title in 1986, but testified that he had little to do with formulating the employer's personnel policies while he was in the foreman role. There were few disciplinary situations, and no discharges for cause; no formal evaluations were conducted. Mainwaring remembered doing some backhoe work, on occasion, during his days as foreman.

By 1989, Mainwaring had been elevated to his current position and an individual by the name of Tom Bennett was hired to be the field foreman. Bennett was not required to attend meetings of the employer's board of directors. Although there was testimony that Bennett participated in bargaining unit work in the field, especially in construction tasks, there was also recollection that he did employee evaluations and otherwise was treated by management as a supervisor. Bennett resigned in early 1992, to accept a position with another local employer.

Mainwaring served as both secretary/manager and field foreman until January of 1993, but spent little time in the field directing the workforce during 1992. Roger Miller was told in mid-December of 1992 that he was hired to take over the field foreman job as of the first business day of 1993. Miller had been foreman at a large agricultural concern south of Pasco, where his duties had involved supervision of field crews, tractor drivers and shop crews. Miller was told that he would be evaluating Columbia Irrigation District employees in April and October of each year. He was issued a "personnel policy" document which had an effective date of January 1, 1993, and was told he was responsible for enforcement of the disciplinary procedure contained in that policy, because he was the "immediate supervisor" of the field employees.

⁴ The Hearing Officer apologizes for any mis-spelling of this person's name. After great efforts were made off-the-record to ascertain the correct spelling, the parties advised that they referred to him as "Swede".

The record shows that, by June of 1993, Miller made written evaluations of bargaining unit employees Mitch Schoonover, David Miller, and Brett Christiano. Bargaining unit employee Richard Amend testified that, in the past, any evaluations came from Mainwaring. Miller also participated in the hiring of Schoonover as a ditch-rider in February of 1993. Miller also testified as to the recent discipline of Amend, who was issued a "warning letter" after an incident that occurred on April 22, 1993. Amend testified that Miller issued instructions for field work in much the same manner as Bennett had done, while other instructions for field work continued to come from Mainwaring.⁵

POSITIONS OF THE PARTIES

The employer asks the Commission to exclude the field foreman as a supervisor and as a confidential employee. It points out that Miller has been exercising the authority to hire, discipline, and evaluate employees since January of 1993. In the context of a newly-created bargaining relationship, the employer asserts that Miller has also been directed to become involved in collective bargaining on behalf of the management team.

The union argues that the field crew foreman is neither a supervisor nor a confidential employee, and should be included in the bargaining unit consisting of all full-time and regular part-time maintenance employees of the employer. It contends that Miller's job description and supervisory actions are deceptive, and that any "labor nexus" role for Miller is merely speculative.

⁵ There is some discussion in the record as to whether Miller has been involved in "rough sketching" or "mapping" of certain of the employer's projects. The extent of any intrusion on traditional "bargaining unit work" was not made clear. The Hearing Officer is reluctant to travel down a path drawn to such an uncertain destination and result.

DISCUSSIONControlling Legal PrinciplesExclusions of Confidential Employees

The law on "confidential" exclusions is clear. As an exception to the otherwise broad definition of "public employee" in the statute, employers are allowed to exempt a reasonable number of persons from the rights of the collective bargaining statute, in order to perform the functions of employer in the collective bargaining process:

RCW 41.56.030 DEFINITIONS. As used in this chapter:

...
(2) "Public Employee" means any 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, or any person elected by popular vote or appointed to office pursuant to statute, ordinance, executive head or body of the public employer.

[Emphasis by **bold** supplied.]

The Supreme Court of the State of Washington interpreted that definition in City of Yakima v. International Association of Fire Fighters, 91 Wn.2d 101 (1978), where it wrote:

When the phrase confidential relationship is used in the collective bargaining act, we believe it is clear that the legislature was concerned with an employees' potential misuse of **confidential employer labor relations policy** and a conflict of interest.

...
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 office 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.

[Emphasis by **bold** supplied.]

In Yakima, the Supreme Court took direction from the definition of "confidential employee" found in the Educational Employment Relations Act, Chapter 41.59 RCW, at RCW 41.59.020(4)(c):

(c) Confidential employees, which shall mean:

(i) 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

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

Because "confidential" status altogether deprives the individual of collective bargaining rights under the Public Employees' Collective Bargaining Act, such exclusions are not lightly granted. A heavy evidentiary burden is placed on the party proposing a "confidential" exclusion. City of Seattle, Decision 679-A (PECB, 1979).

Three recent decisions demonstrate application of the "labor relations nexus" test:

* In Pateros School District, Decision 3911-B (PECB, 1992), the Commission underscored that an employee would not be categorized as "confidential" unless the nature of the information to which they were exposed was of a type which was to be kept from public review. Thus, the employer was unable to establish a

fiduciary "labor relations nexus" by linking the employee to correspondence and employer documents which were freely given to the public, upon request.

* In City of Mountlake Terrace, Decision 3832-A (PECB, 1992), the employee at issue handled labor relations documents only occasionally, but was the only clerical employee available to perform such functions as an ongoing and regular part of her job. Reversing a Hearing Officer decision on narrow evidentiary grounds, the Commission excluded that person from the bargaining unit.

* In City of Gig Harbor, Decision 4020-A (PECB, 1992), an employee who saw sensitive labor relations materials each week, and was privy to city council executive sessions where labor relations matters were discussed, was excluded from bargaining rights.

The clear message of this recent trilogy of cases is that an employer must show, **as a minimum**, that the employee in question has had prior labor relations involvement, preferably collective bargaining or meetings where strategy for bargaining is laid down, or will have such involvement on a regular and ongoing basis. While the "confidential employee" need not work exclusively, or even primarily, on "confidential" work, the intimate fiduciary relationship must be with a department head or other management official responsible for labor policy matters, and the "confidential" assignments must be describable as "necessary", "regular" and "ongoing". For example, contrast Edmonds School District, Decision 231 (PECB, 1977), which examined the status of secretaries who reported to a small circle of top school district managers,⁶ with Clover Park School District, Decision 2243-A (PECB, 1987), where the Commission rejected "confidential" claims regarding secretaries to a more diverse group of supervisors and managers. As to office-clerical employees, both Clover Park and Mountlake Terrace, supra, noted that an employer's need to protect its labor relations

⁶ The Edmonds decision was cited with approval by the Supreme Court in Yakima.

policies from disclosure can often be easily accommodated by minor changes of procedure, without the unnecessary removal of employees from the coverage and rights of the statute.

Exclusions Based Upon Supervisory Status -

Unlike "confidential" employees, supervisors have collective bargaining rights under Chapter 41.56 RCW. Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977). As a general rule, however, supervisors will be excluded from bargaining units of their subordinates, in order to avoid conflicts of interest that would otherwise tend to arise within the bargaining unit. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981).

The titles assigned to positions by employers are seldom influential in determining "supervisor" questions. A public works supervisor and a treatment plant supervisor in a small municipality were included in a bargaining unit notwithstanding their titles in Gig Harbor, supra, because they did not possess personnel authority such as the ability to recommend discipline and discharge. The job title "administrative assistant" did not itself convey supervisory authority in Yakima County, supra. See, also, City of Winlock, Decision 4056 and 4056-A (PECB, 1992), where the high-sounding title of "police chief" was attached to an individual who had little authority over other employees.

Commission precedents do recognize that an employee's job description can be changed over time, and that assignment of new supervisory authority to a position can warrant its exclusion from a bargaining unit. Pierce County, Decision 3992 (PECB, 1992). The decision in Bethel School District, supra, where a supervisor exercised substantial authority over only two employees, stands for the proposition that an individual can be a supervisor, even if there are only a few employees to supervise.

Application of PrecedentThe "Supervisor" Question -

It is clear that the employer intended that Roger Miller be a supervisor. There are two versions of his job description, one that was in effect when he took over the job on January 1, 1993, and a second version that was changed during the pendency of this representation case.⁷ The changes are identified by **bold italics** in the text which follows:

FIELD CREW-FOREMAN

The position of FIELD CREW-FOREMAN shall carry the following responsibilities:

1. Meet the field crew at arrival and dismissal time, assign the daily job responsibilities and oversee their performance.
2. Assign "work orders", assure completion and accurate record-keeping on the same and "time cards." Submit completed "work orders" and "time cards" to the office daily.
3. Communicate with the district Manager to plan for the field operation of the district and field personnel activity.
4. Oversee the maintenance planning for all district facilities and equipment. ***Assure that water is provided to all patrons at all times with a minimum of non-service time. Plan activities to minimize unnecessary time loss.***
5. Assist the Manager in the ordering of supplies equipment for the operation of the field ***and oversee inventory control of field supplies.***
6. Plan for the monthly safety meeting and insure the safe operation of all district field activities.
7. Perform the operations for the construction of Local Improvement Districts including:

⁷ The more recent job description was admitted in evidence as Exhibit 1 in this record. The January, 1993, version was admitted as Exhibit 8. Miller was probably shown a copy of Exhibit 8 during his interview in December, 1992.

- a. Pre-Construction-
 - 1) Taking pictures of the existing surroundings prior to construction.
 - 2) Insure materials for construction are available and notify the Manager if purchases need to be made.
 - 3) Check easements to insure they are approved prior to construction.
 - 4) Obtain encroachment permits from municipalities where necessary.
- b. Construction-
 - 1) Communicate with patrons to inform them of the district's action and to obtain the site for installing services in the approved easements.
 - 2) Assure that proper flagging is available at the construction site at all times.
 - 3) Restore the construction site at the soonest opportunity to avoid irate patrons.
 - 4) Measure and update drawings and used materials lists prior to burial on a daily basis and submit to the district office at the soonest opportunity.
- c. Post-construction-
 - 1) Be certain all construction and structures are restored prior to final site departure.
 - 2) Complete final construction drawings and materials and submit to the district office.
 - 3) Obtain final drawings from the office to update the field employees "As Built" folders.
 - 4) Notify the Manager of inventory shortages to allow for re-ordering.
- 8. Oversee employee performance as designated by job description and perform employee evaluations as per the district "Personnel Policy." ***Discipline field employees where necessary for non-performance, insubordination, etc.***
- 9. Carry the district's emergency pager and respond to calls through the 9-1-1 system in the absence of the Manager.
- 10. Actively participate in locating and mapping the district's canal and piping systems.
- 11. Review invoices to insure proper account billing and minimize unnecessary trips to

- the supply stores. Submit to the office regularly (especially prior to the month end).
12. Assist in the physical operation of the field by performing any manual task necessary for that operation including but not limited to welding, electrical wiring, pipeline installation, equipment operation, spraying weeds or applying aquatic herbicides, and performing the required maintenance on machinery.
 13. Serve as a liaison (sic) between management and field employees. Communicate with district patrons as requested by the Manager.
 14. Perform special tasks as requested by the district manager to allow for the smooth operation of the field.

It would appear that the language added in item 8 was intended to make certain that the field foreman would have appropriate supervisory authority to take disciplinary action in relatively severe cases. The secretary/manager testified that Miller has authority to carry out the first four steps of the discipline procedure in the employer's existing personnel policies (verbal warning, written warning, one-week suspension and termination), and to carry out all of those steps without consulting the manager.

In response to union questions at the hearing, the employer put forth testimony that Mainwaring changed Miller's job description on paper, but not in fact. It appears that Miller had the authority to discipline subordinates beginning with his first days on the job in January of 1993, and he certainly exercised that authority by the warning to Amend, which was issued prior to the amendment of his job description.

The Commission will not automatically be suspicious of an employer's motives, merely because it added to the number of supervisory duties which a particular employee had been performing. Pierce County, Decision 3992 (PECB, 1992). There seems to be adequate evidence that Miller has acted as a supervisor at the Columbia

Irrigation District, and will continue to do so. Since the filing of the petition in this matter in February, Miller has been involved in the interview and hiring process, evaluations, and even the discipline of subordinates. Miller is not a mere "conduit" for information and commands from Mainwaring to the crew. Rather, his authority to direct the field staff is consistent and independently exercised, without review or pre-authorization by Mainwaring. The expectation that Miller would attend future meetings of the employer's board is also pertinent to a finding that he is a supervisor, with primary loyalties to the management.

The union's expressed concerns about Miller doing bargaining unit work are not a sufficient basis to reject the evidence of his supervisory role. Recent cases indicate that an employee retains his/her supervisory status even if they are sometimes called upon to perform some bargaining unit work. Here, there were estimates by both sides at the hearing that Miller spends 80 to 85% of his work time in supervising employees, leaving only 15 to 20% of his time when he may have been doing maintenance work of the type performed by his subordinates. Such a minor "hands on" role is within the guidelines for "working foremen" who are also supervisors under the National Labor Relations Act. See, Superior Bakery Inc. v NLRB, 893 F.2d 493 (2nd Cir., 1990). Because Miller makes decisions as to what work to assign and what schedules for the employees to keep, he acts independently of the manager's daily administration of the utility, and hence is a supervisor.

The "Confidential" Claim -

The employer bears the burden of establishing a "confidential" exclusion here. Pateros School District, supra. Even though no collective bargaining has taken place for employees of the Columbia Irrigation District, the employer has given assurances that, when the time comes to bargain a contract, Miller will be actively involved on the management side. For understandable reasons, the union views the employer's position as speculative.

Miller will be excluded from this bargaining unit as a "supervisor". One of the often-forgotten passages in the Supreme Court's City of Yakima decision, op. cit., is that "general supervisory responsibility is insufficient to place an employee within the [confidential] exclusion." That decision also cautioned that, because such a category removed an employee from all bargaining units as well as supervisory ones, there is to be greater scrutiny of the exclusion on this basis. Miller's access to confidential labor relations material is not usual, consistent, ongoing or day-to-day. See, City of Gig Harbor, supra. He has not been required to attend, and has not consistently attended, meetings of the employer's board of directors. Clerical personnel are available to type, process, file and otherwise administer labor relations paperwork on a routine basis. There is no present reason to exclude Roger Miller as a confidential employee.

FINDINGS OF FACT

1. Columbia Irrigation District is a municipal corporation of the state of Washington, located in Benton County, and is a public employer within the meaning of RCW 41.56.030(1).
2. International Union of Operating Engineers, Local 280, a labor organization within the meaning of RCW 41.56.030(3), has previously received interim certification as exclusive bargaining representative of a bargaining unit comprised of full-time and regular part-time maintenance employees of Columbia Irrigation District.
3. There has been no history of collective bargaining activity among employees of the Columbia Irrigation District prior to the onset of these proceedings.

4. Roger Miller has held the title of "field crew foreman" since January of 1993, when he was hired away from a supervisory job with another employer. Miller reports directly to the secretary/manager of the Columbia Irrigation District. Miller spends a substantial majority of his work time in directing the employees engaged in maintenance of the employer's water, ditch, canal and pipe facilities. Miller has the authority to take action or make effective recommendations on the discipline and discharge of subordinate employees, and has actually exercised that authority in the discipline of at least one subordinate during his brief tenure in his present position.
5. The field foreman has not consistently been held to the level of a fiduciary relationship with the secretary/ manager on matters of labor relations policy, and is not consistently involved in the labor relations of the employer as a negotiator or planner of labor relations strategy.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter pursuant to Chapters 41.56 RCW and 391-25 WAC.
2. The field foreman at Columbia Irrigation District exercises substantial supervisory authority with respect to employees in the bargaining unit represented by International Union of Operating Engineers, Local 280, creating a potential for conflicts of interest which warrants exclusion of the field foreman position from the bargaining unit under RCW 41.56.060.
3. The field foreman does not, at the present time, have a sufficient "labor nexus" to warrant his classification as a "confidential employee" under RCW 41.56.030(2)(c).

ORDER

The position of "field foreman" is excluded from the bargaining unit consisting of all full-time and regular part-time maintenance personnel.

Issued at Olympia, Washington, the 17th day of November, 1993.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

A handwritten signature in cursive script, reading "J. Martin Smith". The signature is written in dark ink and is positioned above the printed name of the signatory.

J. MARTIN SMITH, Hearing Officer

This order may be appealed by filing timely objections with the Commission pursuant to WAC 391-25-590.