

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

AMERICAN FEDERATION OF
TEACHERS

Involving certain employees of:

CLOVER PARK TECHNICAL COLLEGE
(COMMUNITY COLLEGE DISTRICT 29)

CASE 21807-E-08-3374

DECISION 10157-D - PECB

ORDER DETERMINING
ELIGIBILITY ISSUE

Robert M. McKenna, Attorney General, by *Terrance J. Ryan*, Assistant Attorney General, for the employer.

Thomas McCarthy, Organizer, for the union; *Merrilee Miron*, Labor Representative, on brief, for the union.

On June 27, 2008, the American Federation of Teachers of Washington (union) filed a representation petition seeking certification as the exclusive bargaining representative of the full-time and regular part-time exempt employees of Clover Park Technical College (employer), excepting those excluded by statute. The employer contested the Commission's jurisdiction. Ultimately, the Commission affirmed the Executive Director's determination that exempt employees at technical colleges have collective bargaining rights under Chapter 41.56 RCW and ordered further proceedings to determine the eligibility of certain employees.¹ The Commission issued an interim certification on April 8, 2009, after determining that the reserved eligibility issues did not impact the outcome of the question concerning representation.²

¹ *Community College District 29 (Clover Park Technical College)*, Decision 10157-B (PECB, 2009).

² *Community College District 29 (Clover Park Technical College)*, Decision 10157-C (PECB, 2009).

Jamie L. Siegel served as the Hearing Officer at a hearing on June 1 and 12, 2009. Prior to hearing, the parties resolved all but one of the eligibility issues. The parties filed post-hearing briefs which were considered.

ISSUE PRESENTED

Should the human resources specialist position currently held by Kathleen Mandt be excluded from the bargaining unit as a supervisor or as a confidential position?

Based upon the record, the applicable statutes, rules, and case precedent, the Executive Director concludes that the human resources specialist position does not meet the criteria for exclusion as a confidential position or as a supervisor. The position is properly included in the bargaining unit.

APPLICABLE LEGAL PRINCIPLES

Confidential Exclusion

In determining the issue of an employee's status as confidential, the Commission applies a labor nexus test. *Yakima School District*, Decision 9020-A (PECB, 2007). This test states that a confidential employee is an employee whose duties imply a confidential relationship which must flow from an official intimate fiduciary relationship with the executive head of the bargaining unit or public official. *Yakima School District*, Decision 9020-A. WAC 391-35-320 codifies the confidential employee 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.

As demonstrated by this rule and case precedent, the confidential exclusion extends beyond those who are directly responsible for formulating labor relations policy and includes 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 the employee's status as a union member. For example, when employees' official duties provide access to sensitive information regarding the employer's collective bargaining position, it would be unfair to place the employees in a position where they must question whether their loyalties lie with the employer or with the union. *Pierce County*, Decision 8892-A (PECB, 2006).

The Commission requires that confidential exclusions be based on the employee's actual duties and responsibilities and not on speculation about the employee's future duties and responsibilities. *State – Natural Resources*, Decision 8458-B (PSRA, 2005). Although the Commission recognizes that employee job descriptions and duties are not static and may change as an organization evolves and faces different challenges, the Commission unequivocally holds that a confidential exclusion can only be based upon current job duties. *City of Redmond*, Decision 7814-B (PECB, 2003).

To be considered confidential, an employee need not work exclusively or primarily on confidential work provided that the assignments are necessary, regular, and ongoing. *City of Redmond*, Decision 7814-B. Because an individual's status as a confidential employee deprives the person of all bargaining rights under state law, the party seeking a confidential exclusion bears a heavy burden of proof. *City of Redmond*, Decision 7814-B.

Supervisory Status

Through rule and case precedent, the Commission excludes supervisors from bargaining units containing their subordinates to limit or prevent conflicts of interest. WAC 391-35-340; *Ronald Wastewater District*, Decision 9874-C (PECB, 2009). The Commission applies the following definition from RCW 41.59.020(4)(d) to differentiate supervisors from lead workers:

[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 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.

To meet the preponderance standard requires the employee in the disputed position to either spend a majority of work time performing the supervisory duties detailed in the statute or engage in a majority of the types of supervisory duties detailed in the statute. *Ronald Wastewater District*, Decision 9874-B (PECB, 2008), *aff'd*, Decision 9874-C (PECB, 2009). When analyzing supervisory duties, it is important to determine whether a disputed position has independent authority to act in the interest of the employer.

ANALYSIS

Duties at Time of Hearing

As previously stated, the Commission and Executive Director make eligibility determinations based upon the actual duties the employee performed at the time the petition was filed. In this case, the union filed the petition just days before the employee started in the disputed position. Applying the Commission's general rule in this case would allow for no admissible evidence concerning the employee's duties. As a result, in this unique case, the Executive Director bases her determination on the actual duties the employee performed from the time she started in the position until the time of the hearing. The fact that post-petition job duties are being considered due to the unique factors presented in this case does not create a precedent that will allow departure from normal practice in future cases.

The Human Resources Department and Kathleen Mandt's Duties

The employer's human resources department includes four employees: Jim Tuttle, special assistant to the president for human resources and legal affairs; Kathleen Mandt, human resources specialist; Tuttle's assistant, Susan Bushey, who the parties excluded from the bargaining unit as a

confidential employee; and a human resources generalist, who the parties included in the bargaining unit.³

Jim Tuttle has served in his position since July 2008. His responsibilities include recruitment and labor relations. He serves as the employer's lead negotiator at the bargaining table. Unions represent employees in four bargaining units on the employer's campus. Since July 2008, Tuttle has been involved in faculty negotiations and was involved in one bargaining session with a classified bargaining unit where the parties agreed to roll the contract over for one year.

Kathleen Mandt has served as the employer's human resources specialist since July 2008. She reports to Tuttle. Prior to her promotion to the specialist position, she worked for the employer for four years as a human resources generalist. Mandt maintains a variety of responsibilities, including tracking employee training units, tracking performance assessments, investigating complaints, and providing support to Tuttle. She speaks with union representatives, administrators, and employees on a regular basis, answering their questions and providing them with the employer's interpretation of the bargaining agreements in specific areas where she has developed expertise as a result of her responsibilities. For example, she spends considerable time on issues involved with employee training units, an area in which she has developed expertise.

Mandt's tracking of employee performance assessments includes communicating with employees and supervisors as issues arise, including guiding administrators about professional improvement plans which are required for employees who receive less than positive performance assessments.

Mandt plays no role at the bargaining table although her job responsibilities include providing Tuttle with some bargaining and grievance support. On three documented occasions since assuming the specialist position, Mandt was asked to provide input on the employer's bargaining position. She recommended that the employer make several changes to the classified bargaining agreement, including eliminating a required 45-day evaluation. Because she is the one who tracks performance assessments of her duties, Mandt was aware that the employer was not

³ Additionally, the parties agreed to exclude six administrative assistants from the bargaining unit as confidential employees who report to vice presidents.

consistently complying with the 45-day evaluation requirement. With respect to bargaining with the faculty, Tuttle, by e-mail, asked the payroll coordinator and his confidential assistant, Susan Bushey, to comment on Article 20 of the collective bargaining agreement. Mandt was copied on the message and her name was included in parenthesis with a question mark. Mandt was included on a second e-mail that Tuttle addressed to several people including two vice presidents and the payroll coordinator wherein he was seeking input on management's "what if" proposal. Given her history at the college and her involvement with the training units, he wanted her to help flag issues and improve processes. Tuttle testified that he did not recall but was "pretty sure" Mandt provided verbal feedback on the proposals. On one occasion, Mandt surveyed other colleges concerning wages and benefits.

The record demonstrates that in one instance Mandt provided grievance support to Tuttle. In that situation, she provided assistance to a dean about the dean's response to a grievance, and asked the dean to send her response to either her (Mandt) or to Tuttle prior to sending it to the union. Mandt summarized the grievance in a multi-page confidential memo to Tuttle. In the memo, she discussed that the dean agreed with the union's position, she pointed out weaknesses in the union's grievance, and she explained how the employer may be able to "buy time," if necessary, in responding to the grievance. Mandt also included in the memo her recommendation on how Tuttle should handle the grievance when it reached the human resources level. Although Mandt titled the last paragraph of the memo "my thoughts," it reads as her recommendation on how the employer should proceed; Tuttle adopted her recommendation.

Another of Mandt's job responsibilities is to investigate and recommend resolutions to personnel, harassment, and discrimination complaints. The employer produced limited evidence of Mandt's specific experiences in this area. She had started an investigation into a student complaint about a faculty member, but a dean ultimately handled the situation. In another situation, Mandt investigated a complaint about a faculty member's ability to sell the book he authored to his students.

Mandt also directs and monitors the work of the human resources generalist. She approves the generalist's leave requests, she drafted her performance assessment, which she shared with Tuttle

before presenting it to the generalist, and addressed particular performance concerns. Mandt attended employer-provided supervisor training.

Position Does Not Meet Labor Nexus Test

When analyzing whether an employee's duties meet the standards for confidential status, the Commission and Executive Director focus on the role the employee plays in supporting the formulation of labor relations policy. The formulation of labor relations policy can encompass more than the negotiations taking place at the bargaining table. In *City of Mountlake Terrace*, Decision 3832-A, the Commission said:

When an employee provides clerical support to management officials involved in the formulation of labor relations policy, two conditions must be met: First, the specific content of the correspondence must be analyzed to establish that documents handled by the employee are the type whose disclosure could detrimentally impact the collective bargaining process. If, for example, copies of the documents are shown as being sent to representatives or members of a bargaining unit, then the kind of conflict of interest that justifies exclusion as a 'confidential' employee does not arise. Second, the contact with labor relations-related material must be describable as 'necessary, regular and ongoing'.

In this case, the employer introduced documentary evidence illustrating that Mandt provided assistance to Tuttle with some confidential labor relations information. The employer did not, however, establish that this assistance was necessary, regular, and ongoing.

Mandt's one-time analysis and recommendation regarding a grievance demonstrates her limited involvement with confidential labor relations information. Her role in analyzing the grievance included pointing out weaknesses and suggesting employer strategy that the employer adopted. Although Mandt's active involvement in this grievance provided Mandt access to sensitive labor relations information, this one instance provides insufficient contact with sensitive labor relations information to warrant the position's exclusion from all bargaining rights.

The employer points to Mandt's work with employees, union representatives, and administrators on issues involving employee training units and employee performance assessments as evidence

of her confidential status. The record demonstrates that Mandt regularly responds to employee, union representative, and administrator questions that require Mandt to interpret existing collective bargaining agreements, particularly in the areas of training units and performance assessments. Although interpreting existing collective bargaining agreements in these areas is extremely important work and requires Mandt to act with considerable discretion, it is not confidential labor relations work. *City of Lynden*, Decision 7527-B (PECB, 2002).

The employer also points to Mandt's recommendation for changes to bargaining agreement provisions as evidence of her confidential status. An employee who provides information or recommendations to an employer bargaining team does not necessarily meet the labor nexus test. *City of Yakima*, Decision 9983-A (PECB, 2008). As the Commission explained in *Pierce County*, Decision 8892-A:

Employees . . . who are sources of important information to the employer's bargaining team are not rendered confidential merely because they might have access to the employer's confidential labor relations materials or provide input to the employer's labor relations team It is important to determine whether confidential information had flowed down to the employee, not whether useful information or recommendations flowed up to the bargaining team. The quality and quantity of employees' input and recommendations does not make them confidential unless they also have been privy to the employer's sensitive labor relations information.

In *City of Lynden*, Decision 7527-B, the Commission ruled that the police chief was not a confidential employee even though he responded to requests for information regarding the collective bargaining negotiations and his suggestions may have been incorporated into the final agreement. The Commission described the information the police chief provided as "a natural extension of his knowledge and expertise as a department supervisor - not because the chief had an intimate fiduciary understanding of the city's labor relations policies and strategies."

Similarly here, Mandt's recommendation for changes to the bargaining agreement provisions amounted to suggestions for technical changes based upon her specialized knowledge and her experiences in the human resources department. Although Tuttle also sought Mandt's input on two

different draft bargaining proposals, the evidence does not demonstrate that Mandt was privy to sensitive labor relations information on a regular and ongoing basis.

Position Does Not Meet Supervisory Criteria

The record demonstrates that Mandt has been responsible for directing and monitoring the work of the human resources generalist, approving the employee's leave requests, addressing performance issues with the employee, and evaluating the employee's job performance. Mandt spends less than 30 percent of her work time on these duties.

With respect to the generalist position, Mandt has not been involved in hiring, promoting, transferring, laying off, or disciplining the employee. She does not have the authority to independently assign overtime and it was Tuttle, not Mandt, who decided to reduce the generalist's work hours. Even when addressing performance issues, Mandt has not consistently exercised independent judgment. Although Mandt testified that she was just keeping Tuttle "in the loop" with some of her e-mails, the record demonstrates that she consulted with him for direction or confirmation before acting in several instances. She sought guidance from Tuttle prior to addressing specific performance issues with the generalist and, prior to finalizing her evaluation, Mandt asked Tuttle to review the draft she had prepared.

The employer recognizes that Mandt has not had occasion to engage in hiring or disciplining for the human resources generalist position but anticipates that Mandt will have "major input" in any future hiring and "a major say" about discipline. The Commission bases eligibility determinations on the actual duties of employees and does not consider speculative testimony concerning potential future duties. *Ronald Wastewater District*, Decision 9874-C. As the Commission explained in *Ronald Wastewater District*:

Thus, where an employer has assigned a particular function to an employee that has never been exercised, such as laying off or terminating employees, there must be actual evidence demonstrating that the employee is assigned that duty. Absent concrete evidence of such assignment, we can only examine the duties an employee currently performs when making supervisory determination.

Mandt does not perform supervisory duties for a preponderance of her work time and does not perform a preponderance of supervisory duties.

CONCLUSION

The employer has not met its heavy burden of establishing that the human resources specialist position is confidential and excluded from all collective bargaining rights. Additionally, the employer failed to establish that the position meets the supervisor criteria. The human resources specialist position is included in the bargaining unit.

FINDINGS OF FACT

1. Clover Park Technical College (Community College District 29) is a public employer within the meaning of RCW 41.56.030(1).
2. The American Federation of Teachers is an employee organization within the meaning of RCW 41.56.030(3).
3. Jim Tuttle serves as the employer's special assistant to the president for human resources and legal affairs. He participates directly on behalf of the employer in formulating its labor relations policy and preparing for and conducting collective bargaining.
4. Kathleen Mandt serves as the employer's human resources specialist. She maintains a variety of responsibilities, including tracking employee training units, tracking performance assessments, investigating complaints, and providing support to Tuttle.
5. Mandt directs and monitors the work of the human resources generalist. She approves the generalist's leave requests, she drafted her performance assessment, and she addressed some performance concerns. She spends less than 30 percent of her work time on these duties.

6. When addressing performance issues, Mandt has not consistently exercised independent judgment.
7. With respect to the generalist position, Mandt has not been involved in hiring, promoting, transferring, laying off, or disciplining the employee. She does not have the authority to independently assign overtime and it was Tuttle, not Mandt, who decided to reduce the generalist's work hours.
8. Mandt does not spend a preponderance of work time engaged in the supervision of other employees nor does she have the authority to independently perform or make effective recommendations on a preponderance of supervisory duties.
9. Mandt's work in responding to employee, union representative, and administrator questions which require her to interpret existing collective bargaining agreements is based upon her expertise in certain matters, but is not confidential labor relations work.
10. Mandt plays no direct role at the bargaining table although she provides Tuttle with some bargaining support.
11. Mandt's recommendation for changes to bargaining agreement provisions amounted to suggestions for technical changes based upon her specialized knowledge and her experiences in the human resources department.
12. On two occasions Tuttle sought input from others on draft bargaining proposals. Mandt was included on such e-mail inquiries. He wanted her to help flag issues and improve processes. It is unclear from the record whether Mandt provided input.
13. Mandt provided grievance support to Tuttle in only one documented situation. Her role in analyzing the grievance included pointing out weaknesses and suggesting employer strategy. This responsibility provided Mandt access to sensitive labor relations information.

14. The employer did not establish that Mandt's assistance with sensitive labor relations information has been regular, necessary, and ongoing.

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 9 through 14, Kathleen Mandt is a public employee within the meaning of RCW 41.56.030(2), and is not a confidential employee under WAC 391-35-320.
3. As described in Findings of Fact 5 through 8, Kathleen Mandt is not a supervisor under RCW 41.59.020(4)(d) or WAC 391-35-340.

ORDER

The human resources specialist position currently held by Kathleen Mandt is included in the bargaining unit.

Issued at Olympia, Washington, this 10th day of December, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



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 391-25-660.