

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF WISHKAH VALLEY,)	CASE 9623-U-92-2167
)	
Complainant,)	DECISION 4093-A - PECB
)	
vs.)	
)	
WISHKAH VALLEY SCHOOL DISTRICT,)	DECISION OF COMMISSION
)	
Respondent.)	
)	
)	

Caroline Lacey, Attorney at Law, appeared on behalf of the complainant.

Vandeberg & Johnson, by Clifford D. Foster, Jr., Attorney at Law, appeared on behalf of the respondent.

This case comes before the Commission on a timely petition for review filed by Public School Employees of Wishkah Valley (PSE), seeking to overturn an order of dismissal issued by the Executive Director under WAC 391-45-110.¹

BACKGROUND

On November 12, 1991, a member of the Commission staff issued a decision in a unit clarification case under Chapter 391-35 WAC,² ruling that an individual holding the position of "Secretary I" was a confidential employee under RCW 41.56.030(2)(c), and thus should

¹ Wishkah Valley School District, Decision 4093 (PECB, 1992).

² Wishkah Valley School District, Decision 3910 (PECB, 1991). The Hearing Officer issued the decision under authority delegated pursuant to WAC 391-35-190.

be excluded from the bargaining unit of classified employees represented by PSE at the Wishkah Valley School District. PSE did not petition for Commission review of that decision.

On February 7, 1992, PSE filed this unfair labor practice complaint against the employer. PSE alleges that, since issuance of the unit clarification decision, the employer has allowed the confidential employee to perform non-confidential bargaining unit work, without bargaining the removal of that work from the bargaining unit. The union asserted that this constituted an unlawful "skimming" of bargaining unit work, in violation of RCW 41.56.140(4).

Executive Director Marvin L. Schurke considered the complaint for purposes of making a preliminary ruling under WAC 391-45-110.³ On June 12, 1992, the Executive Director dismissed the complaint, noting that it included no allegation of any change in the confidential employee's work assignments. The Executive Director ruled that, absent any allegation that work previously done by employees who remain in the bargaining unit has been shifted to the confidential employee, no "skimming of unit work" violation arises.

The union filed a petition for review on July 1, 1992. After the receipt of briefs from the parties, the matter has come before the Commission.

POSITIONS OF THE PARTIES

The union takes issue with the Executive Director's assertion that a "skimming" violation cannot arise unless work performed by others

³ At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

in the bargaining unit is shifted to the confidential employee. In the union's view, the only relevant consideration would be whether the work performed by a confidential employee has been bargaining unit work. In situations where, as here, an employee newly designated as "confidential" continues to perform bargaining unit work, the union asserts that removal of that work from members of the bargaining unit must be negotiated.

The employer agrees with the Executive Director's ruling, and asks that it be affirmed.

DISCUSSION

It is well-established that an employer must give notice to the exclusive bargaining representative of its employees, and provide an opportunity for bargaining upon request, before transferring the work of bargaining unit employees to either: (1) employees of another employer;⁴ or (2) its own employees who are either unrepresented or members of a different bargaining unit.⁵ The question presented in this case is whether a "skimming" violation arises when there is no change in an individual's assigned duties, but instead that individual's position is simply removed from the bargaining unit through unit clarification proceedings. We concur with the Executive Director that a violation of RCW 41.56.140(4) does not arise in such circumstances.

The "confidential" exclusion has been narrowly interpreted by the Commission and courts, with a focus on the "labor nexus" test. International Association of Fire Fighters v. City of Yakima, 91

⁴ I.e., a "contracting out" as in North Franklin School District, Decision 3980-A (PECB, February 9, 1993).

⁵ I.e., a "skimming" of unit work, as in South Kitsap School District, Decision 472 (PECB, 1978).

Wn.2d 101 (1978). It is common for individuals who perform some "labor nexus" duties, and who are thus excludable from a bargaining unit as a confidential employee, to perform some non-confidential work in addition to their confidential duties. In fact, the amount of confidential work performed may be a relatively small percentage of the employee's overall workload. The exclusion of an individual from a bargaining unit as a confidential employee does not automatically preclude that individual from continuing to perform other assignments that were performed before the exclusion was granted.

In the union's view, the question of how work comes to be removed from the bargaining unit is irrelevant, and the fact that the work is no longer being performed by a member of the bargaining unit should suffice to establish a "skimming" violation. We cannot agree. In all of the cases cited by the union, an actual change of work assignments occurred, and it was the fact of the **change** without bargaining which supported the finding of an unfair labor practice:

In South Kitsap, supra, implementation of a new instructional plan caused the transfer of unit work from a group of non-confidential employees to other non-confidential employees.

In City of Kennewick, Decision 482-B (PECB, 1980), the work of custodial employees was contracted out.

In Lakewood School District, Decision 755-A (PECB, 1980), new supervisory positions were created and the work of lead positions in the bargaining unit was effectively transferred to the new positions outside the unit.

In City of Vancouver, Decision 808 (PECB, 1980), the entire operation of a sewage treatment plant was contracted out.

In City of Mercer Island, Decision 1026-A (PECB, 1981), a restructuring of the police department resulted in the abolition of two lieutenant positions, and the creation of two deputy chief positions which were outside the bargaining unit.

In North Mason School District, Decision 3155 (PECB, 1989), there was an actual change when a new position was created from two existing bargaining unit positions.

As the Commission noted in Battleground School District, Decision 2449-A (PECB, 1986), the actual loss of work should not be the yardstick by which "skimming" violations are measured. Increasing the amount and type of work performed by non-bargaining unit employees without prior bargaining can suffice, but a change of some sort is nevertheless required.

When an employer, for reasons of its own, expands or intensifies a program **so as to need additional hours of work performed or additional workers to perform the work, ...** the exclusive bargaining representative of the employees doing that type of work will have a claim of work jurisdiction.

Battleground, at p. 12. [Emphasis by bold supplied.]

As noted by the Executive Director in this case, PSE's unfair labor practice complaint does not allege any change. There was no allegation of a restructuring of the duties of the newly-excluded confidential position to encompass more bargaining unit work. We can only infer that the employee at issue in this case continued to perform the same duties after her exclusion from the bargaining unit as she did prior to her exclusion.

An employer has a right to protect its confidential labor relations information from disclosure. As described by the Supreme Court in Yakima, supra, the confidential exclusion serves the public interest by avoiding potential for conflicts of interest or breach of the public trust. The Executive Director's ruling in this case is consistent with the statutory purposes of the confidential employee exclusion. An employer does not "unilaterally shift bargaining unit work" by exercising its right to an exclusion of a confidential employee from a bargaining unit. If, as here, all

that occurs is a legal declaration of the status of a position, then no "transfer" or "skimming" results.

NOW, THEREFORE, it is

ORDERED

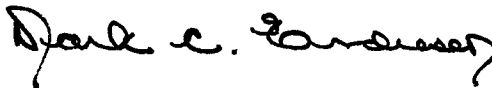
The order of dismissal issued by the Executive Director in the above-captioned matter is AFFIRMED.

Issued at Olympia, Washington, the 13th day of April, 1993.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



JANET L. GAUNT, Chairperson



MARK C. ENDRESEN, Commissioner



DUSTIN C. MCCREARY, Commissioner