

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
PUBLIC SCHOOL EMPLOYEES OF)	CASE 12343-C-96-773
WALLA WALLA)	
)	
For clarification of an existing)	DECISION 5860-A - PECB
bargaining unit of:)	
)	
WALLA WALLA SCHOOL DISTRICT)	DECISION OF COMMISSION
)	
_____)	

Eric T. Nordlof, Field Attorney, appeared on behalf of the union.

Robert D. Schwerdtfeger, Labor Relations Consultant, appeared on behalf of the employer.

This case comes before the Commission on a petition for review of an order clarifying bargaining unit issued by Rex L. Lacy.¹

BACKGROUND

Walla Walla School District (employer) and Public School Employees of Washington (PSE) (union) have been parties to a series of collective bargaining agreements covering a wall-to-wall bargaining unit of the employer's approximately 360 classified employees. The parties' latest agreement, covering the period from September 1, 1995 through August 31, 1998, shows the following employees to be exempt as confidential employees: Secretary to the superintendent,

¹ Walla Walla School District, Decision 5860 (PECB, 1997).

secretary to the assistant superintendent, secretary to the executive director of personnel, secretary to the business manager and assistant for special programs accounting. Other evidence in the record identifies eight office clerical positions as exempt from the bargaining unit.²

Yvon Barber began work for the employer in 1982, and was considered a member of the bargaining unit while working under an "administrative clerk / district information officer" title. By April of 1995, she had acquired the title of "communications coordinator" or "communications director". Barber asked the employer to have her position excluded from the bargaining unit in a letter dated April 18, 1995. In subsequent negotiations, the employer requested the union to agree to Barber's removal from the bargaining unit. The union denied that request.

By letter to the union dated October 12, 1995, the employer asserted that it was necessary to reclassify Barber as an exempt employee and remove her from the unit. A job description published in October of 1995, shows the "communications coordinator" reporting to the superintendent, and includes the following duties:

Assists in gathering and preparing information for classified and certificated negotiations. Prepares proposals for negotiations meetings and may be required to type the final negotiated agreements.

² Those titles are: Administrative secretary for personnel, personnel secretary, payroll officer, assistant secretary-curriculum/instruction department, assistant payroll officer, administrative secretary for curriculum and instruction, administrative assistant to the district director of physical education/athletics/intramurals, and secretary-business manager.

Serves as liaison officer between the district and news media and supervises the production and distribution of all news releases; ...

Supervises and coordinates the preparation of all school district publications (except student publications) ...

Without agreement of the union, the employer removed Barber from the bargaining unit on November 1 of 1995, as an exempt employee.

On February 21, 1996, the union filed a petition for clarification of existing bargaining unit, objecting to the employer's removal of the communications coordinator from the bargaining unit. Hearing Officer Rex L. Lacy issued a decision on March 19, 1997, in which he ordered exclusion of the communications director position from the bargaining unit. The union petitioned for review on April 7, 1997, thus bringing the matter before the Commission.

POSITIONS OF THE PARTIES

The union argues that the incumbent of the disputed position performs insufficient labor relations work to be "confidential" and that the employer lacks the need for another confidential employee. The union contends that the employer unilaterally changed seniority rights of bargaining unit employees when the employee took bargaining unit work with her to her new position. It suggests a conditional removal of the disputed position from the unit, with a prohibition against assigning non-confidential duties that previously fell within the scope of bargaining unit work.

The employer did not file a brief in response to the union's petition for review, but argued before the Hearing Officer that the disputed employee has a confidential relationship with the

superintendent of schools, serves as the acting secretary to the superintendent, and is directly involved in collective bargaining and labor relations matters. The employer asserted that Barber has been assigned supervision of the print shop and its two employees.

DISCUSSION

The Legal Standard on "Confidential" Status

"Confidential employees" are excluded from the coverage of the Public Employees' Collective Bargaining Act by RCW 41.56.030(2)(c), which provides:

DEFINITIONS. As used in this chapter: ...
(2) "Public employee" means any employee of a public employer **except** any person ... or
(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 or resolution for a specified term of office by the executive head or body of the public employer ...

[Emphasis by **bold** supplied.]

The Supreme Court of the State of Washington interpreted the confidential exclusion in International Association of Fire Fighters v. City of Yakima, 91 Wn.2d 101 (1978), and established the "labor nexus" test as follows:

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.

[Emphasis by **bold** supplied.]

Since exclusion of a position as "confidential" deprives the incumbent of all collective bargaining rights, the party proposing exclusion bears a heavy burden of proof.³ That burden of proof may be met by prior agreements of the parties recognizing the exempt nature of particular positions, as long as the agreement is not abhorrent to Commission policies. Absent a prior agreement, an employer or union must demonstrate a change of circumstances that warrants a change in the unit status of a position.⁴

Application of the "Confidential" Standard

Change of Circumstance Required -

Barber's position was neither specifically included in, nor specifically excluded from, the parties' collective bargaining agreement. The record shows, however, that the parties considered her to be (and acted as if she was) included in the bargaining unit. Because of that apparent prior agreement of the parties to

³ City of Seattle, Decision 689-A (PECB, 1979); City of Winslow, Decision 3520-A (PECB, 1990).

⁴ City of Richland, Decision 279-A (PECB, 1978), affirmed, 29 Wn.App. 599 (Division III, 1981), review denied, 96 Wn.2d 1004 (1981). See, also, Olympia School District, Decision 4736-A (PECB, 1994).

include the position in the unit, the employer must show a change of circumstances to justify exclusion of the position now.

The "Labor Nexus" -

The union argues that the disputed employee does not negotiate contracts, adjust grievances, or develop and administer labor relations policy. Such direct responsibilities are not necessary, however, since the "confidential" exclusion extends to support personnel who process sensitive labor relations materials at the direction of those responsible for collective bargaining matters.⁵

Barber reports directly to the superintendent, the "executive head of the bargaining unit" under RCW 41.56.030(2)(c). She discusses policy and operations with the superintendent, gathers and prepares information and proposals for bargaining, and calculates salary increase projections for use in negotiations. Barber fills in for the superintendent's secretary and is thereby exposed to any confidential labor relations matters occurring during the times she substitutes in that role. Barber meets with the business manager, executive director of personnel and assistant superintendent in cabinet meetings, where confidential labor relations matters are discussed. Since 1990, Barber has attended weekly "administrative council" meetings, where she is privy to discussions concerning collective bargaining negotiations, and other labor relations matters. She supervises and coordinates publications, including salary schedules and two collective bargaining agreements.⁶

⁵ See, Edmonds School District, Decision 231 (PECB, 1977), cited with approval by the Supreme Court in Yakima, and Franklin Pierce School District, Decision 3371-A (PECB, 1991).

⁶ Barber has typed collective bargaining agreements since 1983, but other assignments are of more recent origin.

One of the most compelling arguments for Barber's exclusion is her own letter to the employer in April of 1995, in which she stated:

When I first accepted this position, the duties were fairly clerical/secretarial in nature. Since that time, **the position has gradually increased in expectations**, including administrative responsibilities involving confidential information.

I feel that I should be excluded from the PSE bargaining unit because in order to execute my job properly, **I am required on a daily basis to be privilege [sic] to highly sensitive information, including information about employees** and possible news coverage implications. I attend administrative council, and have been a member for the past four years. In addition, I attend Ad Cabinet meetings regularly to discuss school board meetings and to anticipate the need for background materials for press packets. At times, I am also called upon to complete confidential memos to the school board. In addition, I work closely with the Personnel Office and many times have access to privileged information. **I am also involved with information pertinent to classified and certificated negotiations proposals.**

These duties often put me in an awkward position as a member of PSE. I believe that in the best interest of Walla Walla Public Schools and PSE, that it is no longer feasible for me to be a member of the PSE bargaining unit.

[Emphasis by **bold** supplied.]

In Olympia School District, Decision 4736-A (PECB, 1994), the Commission excluded a position from a bargaining unit, largely based on the incumbent's testimony which demonstrated a discomfort with questions from bargaining unit members concerning the

employer's proposals for contract negotiations. The Commission said in that case:

The pressure to reveal confidential information is the type of circumstance that the Supreme court intended to avoid when it adopted its interpretation of the "confidential" exclusion in Yakima, supra.

Similarly, Barber's letter to the employer is persuasive support for excluding her position on the basis of confidentiality. It is apparent that Barber considered her duties for the employer to conflict with her membership in the union, and this conflict is precisely the circumstance that is meant to be avoided by the "labor nexus" test.

The union suggests that the employer's need for a confidential position could be accommodated by minor changes in procedure, and cites Columbia Irrigation District, Decision 4354-A (PECB, 1993) as support for its argument. That case turned, however, on different facts. The incumbent of the disputed position in Columbia had not consistently attended meetings of the employer's board of directors, and that employee's access to confidential labor relations material was not ongoing or consistent, as it is in this case. Clerical personnel routinely typed, processed, filed and administered labor relations paperwork in Columbia, whereas the communications coordinator at issue here is frequently involved in labor relations matters.

The record here clearly establishes a change of circumstances. Barber's level of responsibility and authority in regard to confidential labor relations information has increased over the years. Barber now has a substantial, rather than incidental or sporadic, involvement with "labor nexus" materials. She performs

duties that show an official fiduciary relationship with the executive head of the bargaining unit or public official concerning the formulation of labor relations policy, as required under City of Yakima, supra.

The Number of "Confidential" Positions -

The union questions whether it is necessary to exclude another exempt position, in order for the employer to perform its labor relations tasks. The Commission has long held that the test for confidential exclusions is based on the "labor nexus" duties and responsibilities at the present time, and it has never established a formula by which numbers of confidential exclusions will be allotted to an employer.⁷ It reiterated that policy in Olympia School District, supra, by stating that while the employer bears an obligation of reasonableness in assigning its confidential work, "the Commission cannot dictate the number of 'confidential' exemptions an employer receives". We are unwilling to substitute our judgement for that of employers in configuring their administrative staffs, within limits of reasonability. See, Clover Park School District, Decision 2243-B (PECB, 1987).

As in Wapato School District, Decision 788-A (PECB, 1980), other claimed confidential positions would need to be evaluated on their own merits, if and when they are properly placed before the Commission for ruling(s).

⁷ The union cites City of Yakima, Decision 4672 (PECB, 1994) for the proposition that this should be a numbers game. While that decision referred to employers being allowed a reasonable number of personnel to be exempt from collective bargaining in order to perform the functions of the employer in the collective bargaining process, the decision did not rest on the number of confidential positions available to the employer.

The Non-Confidential Duties -

The union asserts that many of the tasks of the disputed position are not confidential, and urges the Commission to revisit Wishkah Valley School District, Decision 4093-A (PECB, 1993), where the employer was found to have no obligation to bargain the issue of a confidential employee performing non-confidential bargaining unit work. The union claims that removal of the communications coordinator/director from the bargaining unit unlawfully divests the remaining bargaining unit members of property rights in those non-confidential tasks, in that their seniority rights are unilaterally removed from the bargaining unit.

We find the union's argument without merit. Seniority rights are negotiated in collective bargaining agreements, and we find nothing in the parties' contract that addresses the loss of seniority by the change of job duties under these circumstances.⁸ A unit clarification proceeding is not the proper forum to rule on "skimming" charges, and there is no unfair labor practice complaint before us on alleged "skimming" of bargaining unit work. The union's hypothetical suggestion regarding conditional removal of confidential positions from bargaining units with a prohibition against assigning non-confidential duties that previously were bargaining unit work is also untenable. We are comfortable that the "labor nexus" test adopted by the Supreme Court in Yakima, supra, and the Wishkah Valley precedent remain appropriate.

⁸ The union cited Wheeler v. East Valley School District, 59 Wn.App. 326 (1990), but that case strongly supports the view that seniority is not affected by the action complained-of here. The court said, "Seniority rights are created by the bargaining agreement and, therefore, they are limited by its terms".

Supervisory Responsibilities

At some point between the autumn of 1995 and January of 1996, the employer reorganized its classified administration, resulting in the creation of a new "assistant supervisor of plant facilities" position. The person chosen for that position left behind duties involving supervision of the print shop, including the evaluation and supervision of one full-time and one part-time employee. By January of 1996, the supervision of the print shop had been assigned to the communications coordinator/director.

While Barber is required to conduct annual performance evaluations and adjust first level grievances for the print shop employees, an issue of exclusion based on supervisory status is not before us in this case. Barber is properly excluded as a confidential employee based on her labor relations activity in support of the superintendent. That conclusion resolves the issue raised by PSE in its petition in this case.

NOW THEREFORE, it is

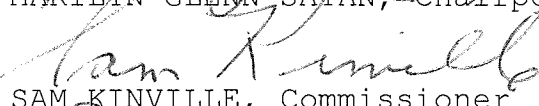
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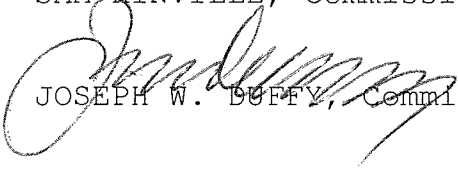
The order clarifying bargaining unit issued by Rex L. Lacy in the above-captioned matter on March 19, 1997 is affirmed.

Issued at Olympia, Washington, on the 15th day of July, 1997.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


MARILYN GLENN SAYAN, Chairperson


SAM KINVILLE, Commissioner


JOSEPH W. DUFFY, Commissioner