

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
)	
CITY OF YAKIMA)	CASE 9915-C-92-571
)	
For clarification of an existing)	
bargaining unit of employees)	DECISION 4672 - PECB
represented by:)	
)	
WASHINGTON STATE COUNCIL OF)	ORDER CLARIFYING
COUNTY AND CITY EMPLOYEES,)	BARGAINING UNIT
LOCAL 1122)	
)	
)	
)	

Menke and Jackson, by Anthony F. Menke, Attorney at Law, appeared on behalf of the employer.

William F. Johnson, Staff Representative, appeared on behalf of the union.

On July 23, 1992, the City of Yakima filed a petition for clarification of an existing bargaining unit with the Public Employment Relations Commission, seeking to have three positions in its Public Works Department excluded from a bargaining unit of its employees represented by the Washington State Council of County and City Employees.¹ A hearing was held at Yakima, Washington, on September 14, 1993, before Hearing Officer Rex L. Lacy. The employer submitted a post-hearing brief, the union did not. Authority to determine these "eligibility" issues has been delegated by the Executive Director to the Hearing Officer, pursuant to WAC 391-35-190.

¹ At the outset of the hearing, the parties notified the Hearing Officer that they had executed a settlement agreement in which they stipulated that a "supervising sanitary engineer" position listed in the petition was properly excluded from the bargaining unit as a supervisor. Accordingly, no determination is made herein regarding that position.

BACKGROUND

The City of Yakima (employer) is the largest municipality in central Washington, with a population of approximately 57,660.² An elected seven member city council appoints the city manager, who is responsible for day-to-day operations. Among other municipal services, the employer operates a public works department.

American Federation of State, County, and Municipal Employees, Local 1122, an affiliate of the Washington State Council of County and City Employees (WSCCCE), was certified on January 17, 1992, as exclusive bargaining representative of a bargaining unit described as:

All permanent city employees; excluding supervisors, confidential employees, commissioned employees of the police department, all employees of the fire department, persons appointed to exempt or unclassified positions, city manager, members of the city manager's staff (including administrative secretary), and deputy clerk.

City of Yakima, Decision 3972 (PECB, 1992).³

Barely more than six after the issuance of that certification, the employer initiated this unit clarification proceeding.

The employer and union are parties to a collective bargaining agreement which is effective through December 31, 1994. By

² Population data from Municipal Research Services Center Bulletin 475, titled "Officials of Washington Cities Directory" (February, 1992).

³ Notice is taken of the Commission's docket records for Case 9389-E-91-1556, which disclose that the WSCCCE was the incumbent organization, and prevailed in a representation election conducted on January 7, 1992.

Addendum to that agreement dated August 17, 1993, the parties described the bargaining unit as:

The City recognizes the Union as the exclusive bargaining representative of the bargaining unit consisting of all permanent City employees except commissioned employees of the Police Department and all employees of the Fire Department and except those persons appointed to exempt or unclassified positions, City Manager and members of his staff (including Administrative Secretary), Deputy City Clerk, Supervising Sanitary Engineer, all employees of the Human Resources and Legal Departments, and Supervisors and confidential employees **as agreed by the Parties in PERC Case Number 08382-C-90-00474 and 9915-C-92-00571**

[Emphasis by **bold** supplied.]

The case numbers cited in that contract referred to this case, and to a unit clarification proceeding which had been withdrawn and closed prior to the signing of that contract.⁴

The employer's Public Works Department is comprised of several sections, including administration, fleet and facility, parks and recreation, refuse and recycling, transit, and street and traffic operations. The department operates under the direction of Director Jerry Copeland. Section managers reporting to Copeland oversee day-to-day operations of their respective sections. A basic staff of 176 employees in the Public Works Department is supplemented by as many as 75 temporary and seasonal employees.

⁴ The employer had filed Case 8382-C-90-474 with the Commission on November 15, 1990, seeking to exclude some 37 positions from the bargaining unit on the basis that they were supervisors. The issues involved in that petition were subsequently resolved by the parties, and that petition was dismissed with no unit determination rulings made by the Commission. City of Yakima, Decision 3704 (PECB, 1991).

Some of the sections within the Public Works Department are further subdivided into divisions. In particular, the "Street and Traffic Operations" section, which has a core staff of approximately 35 employees, is partitioned as follows: The Traffic Engineering Division is normally staffed with three individuals; the Traffic Operations Division is normally staffed with nine individuals; the Street and Maintenance Division is normally staffed with 22 individuals; a "St. Break [sic] Inspector" division employs 1 employee.⁵

POSITIONS OF THE PARTIES

The employer contends that the "administrative assistant to the public works director" and its "traffic operations supervisor" should be excluded from the existing bargaining unit, because they perform sufficient supervisory duties to create a potential for conflicts of interest between themselves and the employees they supervise. Additionally, the employer contends that the administrative assistant has duties involving collective bargaining, which warrant exclusion of that individual from the bargaining unit as a "confidential" employee under RCW 41.56.030(2)(c). Citing its aquatics supervisor, fleet supervisor, park operations supervisor, recreation supervisor, refuse supervisor, and transit operations supervisor, the employer contends that the incumbents in the two disputed positions have standing equal to a number of other public works positions that are excluded from the bargaining unit because of their supervisory duties.

The union contends that the employer's claim of supervisory status for both positions, as well as its claim of confidential status for the administrative assistant, is highly speculative. The union

⁵ There is no other information in the record regarding that division.

contends that neither of the disputed employees performs sufficient supervisory duties to create a conflict of interest, and it denies that the administrative assistant performs confidential duties as contemplated by Chapter 41.56 RCW. It is the union's position that the disputed employees should remain in its bargaining unit.

DISCUSSION

Applicable Legal Standards

The law regarding "confidential" exclusions is well developed under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. Employers are allowed a reasonable number of personnel who are exempt from the rights of the collective bargaining statute, in order to perform the functions of the employer in the collective bargaining process. Clover Park School District, Decision 2243-A (PECB, 1987). The Supreme Court has given RCW 41.56.030(2)(c) a narrow interpretation, limiting its effect by application of a "labor nexus" test:

When the phrase confidential relationship is used in the collective bargaining act, we believe it is clear that the legislature was concerned with an employee's 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 official or executive head of the bargaining unit, including **formulation of labor relations policy**. General supervisory responsibility is insufficient to place an employee within this exclusion.

City of Yakima v. IAFF, 91 Wn.2d 101 (1978).

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

(c) Confidential employees, ... 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.

The Supreme Court indicated a desire to fashion a similar test for "confidential" status under Chapter 41.56 RCW. The intimate fiduciary relationship must be with a department head or other management official responsible for the formulation of labor policy; the qualifying involvement with confidential material must be "necessary", "regular" and "ongoing". City of Cheney, Decision 3693 (PECB, 1991).

Because status as a "confidential" employee deprives the individual of all collective bargaining rights, the party proposing a "confidential" exclusion bears a heavy burden of proving the necessity for excluding the employee from the rights of the collective bargaining statute. City of Seattle, Decision 689-A (PECB, 1979). Where the evidence offered in support of a "confidential" claim is ambiguous or contradictory, that burden requires a decision against the proposed exclusion. Pateros School District, Decision 3911-B (PECB, 1992).

Collective bargaining contemplates the exercise of flexible authority, in the interest of the employer, to bargain with an employee representative with the goal of reaching an agreement

regarding employment-related matters by making good faith compromises and concessions. It is only the exercise of such authority, which is guided by strategies and policies established by the employer, that the "confidential" exclusion protects. Grievance administration is a supervisory function that is not inherently "confidential". City of Seattle, Decision 1797-A (PECB, 1985). Similarly, budget preparation activities of management officials do not necessarily warrant imposition of the "confidential" exclusion.

Chapter 41.56 RCW does not define "supervisors" or exclude them from access to collective bargaining. Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977). Numerous Commission and court precedents have established and reiterated the principle that supervisors will be excluded from bargaining units containing their subordinates, however, to avoid an inherent potential for conflicts of interest which otherwise arises. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981). Such separations are accomplished under the unit determination criteria of RCW 41.56.060, and recognize that supervisors have duties, skills, and working conditions which are separate from those of their subordinates. Thus, supervisors have a fundamentally different community of interest. Seattle School District, Decision 2830-A (PECB, 1988).

The Public Employment Relations Commission and the Washington Courts have applied federal precedent in the administration of Chapter 41.56 RCW, where such precedent is compatible with the provisions of state law. Nucleonics Alliance, Local I-369 v. WPPSS, 101 Wn.2d 24 (1984). The term supervisor is defined in Section 2 (11) of the National Labor Relations Act as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or

effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In evaluating a claim of supervisory status, the scope of the disputed individual's employment relationships with the other employees is taken into consideration. Factors such as hiring, assignment of work, direction of the workforce, discipline and discharge, evaluation, the approval of leave requests, and the authority to recommend actions affecting subordinate employees are pivotal in assessing the existence of supervisory status.

Application of the Standards

Administrative Assistant -

Willma Meyer is the administrative assistant to the director of public works. The job specification for her position reads, in relevant part:

DUTIES

Performs a variety of administrative research projects for Public Works Department and determines, develops, and recommends for adoption, departmental policies and programs. Reviews problems of internal and interdepartmental communications and services and recommends solutions. Conducts a variety of management, statistical and organizational studies designed to increase service levels and productivity on the department or subordinate division.

Reviews operational and budget reports and assists in setting priorities and scheduling reports to the City Manager and City Council. Reviews purchases for conformance to policy and purchasing guidelines.

Coordinates the preparation of division and departmental budgets, and acts as liaison with the Department of Finance & Budget. Attends department and division staff meetings and

City Council meetings and makes presentations at Council meetings and in other public forums.

Meets with citizens, employees, community groups and others to discuss, explain, or interpret division or departmental policies, rules, regulations, or procedures. Resolves issues of concern or complaint within City and departmental guidelines or makes recommendation for resolution as appropriate.

May conduct disciplinary hearings and recommend disciplinary action to the department head. May exercise limited supervision on a small number of clerical, administrative or other staff. Coordinates Departmental hiring and personnel procedures to ensure compliance with established policies and procedures.

Performs related duties as assigned.

Meyer reports directly to Public Works Director Copeland. She serves as the head of the administrative section, which is responsible for accounts payable and receivable, budget, cemeteries operated by the employer, customer relations, payroll, public reception, purchasing, registrations, word processing, and special projects.

Meyer supervises 10 permanent employees, and the use of temporary employees in her section occasionally increases her staff by 5 to 10 employees. Meyer interviews applicants, and submits hiring recommendations directly to Copeland. She determines work priorities, establishes work schedules, conducts training, approves overtime, and approves certain types of leaves.⁶ Meyer conducts periodic evaluations of employee performance, has authority to impose oral warnings, and can recommend more serious discipline, including discharge. She has authority to recommend retention or dismissal of probationary employees.

⁶ Meyer does not have authority to grant leaves without pay.

Meyer represents the employer in grievance meetings with union representatives. She advises Copeland and other division managers about the application of civil service regulations, municipal codes, or any other relevant governmental authorities concerning grievances in their sections.

Meyer has budget responsibilities for the administrative division, and assists other division managers with their budgets. Meyer prepares special reports for Copeland, and has been assigned to visit other public agencies to look for ideas to improve the employer's public works operations. Meyer coordinates special projects for all of the divisions and serves as Copeland's liaison in passing along personnel-related information. Meyer is responsible for coordination of all Public Works Department operations. She signs documents for the director in his absence, including personnel action forms or budget expenditures.

The employer assigns its collective bargaining responsibilities to a labor relations consultant, the city manager and his designees. Copeland has attended some bargaining sessions, but his involvement is unclear. Thus, the record made here fails to establish that Copeland meets the fiduciary responsibility prerequisites of Yakima, supra. Rather, it is clear that the city manager, subject to council approval, is the voice of authority for the employer in collective bargaining matters.

Meyer attends management meetings for division heads and exempt supervisors, where the topics of discussion include city council action, the status of collective bargaining, department organization, and other matters raised by the city manager. Meyer has recommended changes in the employer's bargaining positions, but the record contains no evidence regarding frequency or subject, or whether her recommendations were either considered or adopted. There is no evidence that the employer's bargaining strategy has been a topic of discussion at these meetings.

It is relatively clear that Meyer is a "supervisor" whose inclusion in the same bargaining unit with her subordinates would present an ongoing potential for conflicts of interest. That is the type of conflict to be avoided under Richland, supra, and warrants her exclusion from the bargaining unit.

Once the conclusion is reached that Meyer is a "supervisor", it is arguable that any discussion of the employer's "confidential" claim is unnecessary to the decision of this case, but the Hearing Officer recognizes that reasonable minds can differ about the application of even well-established principles. On the record made here, however, a "confidential" exclusion is not warranted. In the context in which they were explained, the tasks performed by Meyer are not of the nature or degree required to meet the "labor nexus" test. Copeland meets the "fiduciary" test only marginally, if at all. The evidence is insufficient to establish that Meyer has the authority to consistently exercise independent judgment regarding labor relations policy, or that she acts as a confidential assistant to a member of the management who does exercise such independent judgment regarding labor relations policy. The periodic management meetings simply do not qualify.⁷

Supervising Traffic Engineer -

Shelly Wilson is one of the three full-time employees in the Traffic Engineering Division. Wilson is responsible for the supervision and direction of the daily activities of the division, which is responsible for traffic control devices and signals. The

⁷ It may well be a good management policy to include division managers in an exchange of ideas regarding bargaining objectives and responses to union bargaining proposals, because they are the individuals who will be faced with day-to-day compliance with any collective bargaining agreement, but a general discussion regarding the status of negotiations, personnel problems, reductions of personnel, and an exchange of ideas regarding personnel related matters does not, in and of itself, warrant confidential exclusion.

job classification specification for Wilson's position states, in relevant part:

Under direction of the Street & Traffic Operations Manager is responsible for planning, coordinating, and **directing** the Traffic Engineering Office. **May direct** the Signal and Sign Shops. Also, reviews all work performed by the Division; assists in preparation of Division budget and activity reports; is responsible for traffic control, street lighting and dimensions, enforcing related City ordinances; **supervises** technical personnel.

MAJOR WORKER CHARACTERISTICS

Knowledge of traffic engineering principles, practices, and procedures. Knowledge of traffic control equipment design, operations, materials, and construction techniques. Knowledge of current literature, trends and developments in the field of traffic engineering. Knowledge of traffic control ordinances and requirement of the City and other government agencies. Knowledge of Federal, State and local laws and policies pertaining to traffic. Knowledge of computer applications and design. Knowledge of budget preparation and supervision principles.

Ability to **plan and direct** the work of others. Ability to apply the relevant traffic laws, ordinances, codes standards and specifications to the work of the Division. Ability to establish and maintain effective working relationships with other City officials and the general public, and to deal with each in a courteous and tactful manner. Ability to communicate effectively, both orally and in writing. Ability to prepare clear, concise and complete reports.

Wilson is expected to participate in management meetings for division heads and exempt supervisors. Topics of discussion at these meetings include city council action, the status of collective bargaining, department organization, and any other topics raised by the city manager. According to the public works director, the

traffic engineering supervisor may also serve as acting manager of the street and traffic operations section in the absence of its manager.

Wilson develops the budget for the traffic engineering division, and assists in budget preparation for street operations. According to Director Copeland, Wilson would be consulted in the event that budgetary constraints would result in staffing level reductions. Copeland also indicated that Wilson would be consulted regarding budget matters impacted by union proposals.

Wilson has responsibility for a workforce that varies in size from 2 to 35 employees, depending on the season. She interviews job applicants and submits hiring recommendations to the street and traffic operations manager. Wilson determines work schedules and job assignment priorities, approves leave requests, and approves overtime work. She conducts periodic evaluations of employee performance, and is empowered to make recommendations regarding employees to be laid-off or retained in connection with seasonal changes of staffing levels. Wilson has authority to issue oral warnings, and to impose a limited degree of discipline. She has the authority to recommend more severe discipline up to and including discharge. Wilson represents the employer in the course of processing employee grievances, and has authority to make personnel decisions to resolve employee grievances, subject to approval of the director of public works, and final approval from the city manager.

Wilson's supervisory duties and responsibilities are sufficient to warrant a conclusion that a conflict of interest could result from her inclusion in the same bargaining unit as the employees she supervises.

FINDINGS OF FACT

1. The City of Yakima is a "public employer" within the meaning of RCW 41.56.030(1).
2. Washington State Council of County and City Employees, Local 1122, is a "bargaining representative" within the meaning of RCW 41.56.030(3).
3. Local 1122 is the certified exclusive bargaining representative of non-uniformed employees of the City of Yakima, in a bargaining unit described as:

All permanent city employees; excluding supervisors, confidential employees, commissioned employees of the police department, all employees of the fire department, persons appointed to exempt or unclassified positions, city manager, members of the city manager's staff (including administrative secretary), and deputy clerk.

4. The Public Works Department operates under the direction of Jerry Copeland. The department is comprised of several sections, some of which are partitioned into divisions, and employs a core staff of approximately 176 employees. Temporary and seasonal employees may increase the total workforce in the department to approximately 250 employees.
5. Willma Meyer is the administrative assistant to the director of public works, and is the manager of the administrative division. Meyer supervises the workforce in the administrative section, including participation in job applicant interviews, making hiring recommendations, determining work schedules and job assignment priorities, approving overtime, approving certain time-off requests, conducting employee performance evaluations, recommending employees for layoff, imposing a limited degree of discipline and making recommend-

ations on more severe discipline up to and including discharge, and adjusting employee grievances.

6. Meyer coordinates the preparation of section and division budgets within the department, attends department and division staff meetings, signs documents for the director in his absence, including personnel action forms or budget expenditures, and determines the fiscal impact of budgetary proposals. Meyer's assignments include examining budgetary matters in order to be able to absorb wage increases and other labor costs resulting from collective bargaining, but there is no evidence that she has necessary, regular and ongoing involvement with confidential information concerning the labor relations policies and strategies of the employer, or that she has an intimate fiduciary relationship with a management official responsible for labor policy.
7. Shelly Wilson is one of the three core staff members in, and is the manager of, the Traffic Engineering Division. Wilson supervises the workforce in her section, including participation in job applicant interviews, making hiring recommendations, determining work schedules and job assignment priorities, approving overtime, approving certain time-off requests, conducting employee performance evaluations, recommending employees for layoff, imposing a limited degree of discipline and making recommendations on more severe discipline up to and including discharge, and adjusting employee grievances.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-35 WAC, and no question concerning representation exists.

2. The employee holding the position of administrative assistant in the Public Works Department exercises sufficient supervisory authority on behalf of the employer to warrant her exclusion, pursuant to RCW 41.56.060, from the bargaining unit described in paragraph 3 of the foregoing findings of fact, due to the potential for conflict of interests which would otherwise exist within the bargaining unit.
3. The employee holding the position of administrative assistant in the Public Works Department is a public employee within the meaning of RCW 41.56.030(2), and is not a "confidential employee" within the meaning of RCW 41.56.030(2)(c).
4. The employee holding the position of "supervising traffic engineer" exercises sufficient supervisory authority on behalf of the employer to warrant her exclusion, pursuant to RCW 41.56.060, from the bargaining unit described in paragraph 3 of the foregoing findings of fact, due to the potential for conflict of interests which would otherwise exist within the bargaining unit.

ORDER

The bargaining unit described in paragraph 3 of the foregoing findings of fact is clarified to exclude the positions of "administrative assistant to the public works director", and "traffic operations supervisor".

DATED at Olympia, Washington, this 4th day of May, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


REX L. LACY, Hearing Officer

This order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-35-210.