

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
CITY OF MOUNTLAKE TERRACE	)	CASE 8601-C-90-494
For clarification of an existing bargaining unit of employees represented by:	)	DECISION 3832 - PECB
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 6	)	ORDER CLARIFYING BARGAINING UNIT
	)	
	)	
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Cabot Dow, Management Representative, appeared on behalf of the employer.

Terry Costello, Business Representative, appeared on behalf of the union.

On May 21, 1990, the City of Mountlake Terrace (employer) filed a petition with the Public Employment Relations Commission, seeking clarification of an existing bargaining unit of its employees represented by Service Employees International Union, Local 6 (union). Specifically, the employer seeks to have the position of secretary-coordinator/deputy city clerk excluded from the bargaining unit as a "confidential" employee. A hearing was held at Mountlake Terrace, Washington, on February 11, 1991, before Hearing Officer Walter M. Stuteville. Authority to decide this "eligibility" dispute has been delegated to the Hearing Officer pursuant to WAC 391-35-190. The parties filed post-hearing briefs.

BACKGROUND

The City of Mountlake Terrace is a suburban community with a population of 19,760, located to the north of Seattle, Washington. The city operates under the council-manager form of municipal

government.<sup>1</sup> Robert White is the city manager; Ron Swanson is the city clerk and finance director; Ellen Petre is the assistant to the city manager who acts as the employer's in-house staff person for labor relations matters. The employer is represented in collective bargaining by White, Petre, Swanson, and by Cabot Dow, the city's labor relations consultant.

The employer has collective bargaining relationships with organizations representing four bargaining units covering approximately 86 employees. Since 1974, SEIU Local 6 has represented a bargaining unit of approximately 17 office-clerical employees which has historically included the "deputy city clerk" position currently held by Mavis Fey.<sup>2</sup>

The collective bargaining agreement between the employer and SEIU Local 6 expired on December 31, 1989. During negotiations for a successor contract, the employer requested exclusion of the "deputy city clerk" from the bargaining unit. The parties discussed the

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<sup>1</sup> Chapter 35.18 and Title 35A RCW.

<sup>2</sup> The parties' 1990-91 agreement describes the bargaining unit as follows:

ARTICLE 3: UNION RECOGNITION AND MEMBERSHIP

Section 1. The Employer recognizes the Union as the sole collective bargaining agency for those **regular employees in the position of Secretary/Bookkeeper, Community Development Office Aide, Coordinator and Deputy** and will deal with the Union's representative with respect to wages, hours, working conditions and adjustment of grievances for such employees during the term of this Agreement. Regular employees are those in positions within the bargaining unit, in which employees are continuously so employed for fifteen (15) or more hours per week, for at least three (3) weeks per month over at least a six (6) months period. [emphasis by **bold** supplied]

matter, but no agreement was reached. The employer filed the petition in this case prior to ratification of the new contract. The position description for the disputed "deputy city clerk" position, dated November 24, 1987, is as follows:

COORDINATOR-SECRETARIAL / DEPUTY CITY CLERK

Definition:

Coordinates, assigns, and performs all secretarial and clerical duties for all departments. Performs assigned duties as Deputy City Clerk.

Examples of Duties:

Provides secretarial support to Mayor, City Council, and all departments, including typing from rough drafts, oral dictation, and machine dictation; copies and distributes finished work.

Initiates, designs, updates, and maintains word processing formats necessary for completion of departmental tasks.

Maintains files and control sheets for Ordinances, projects, general correspondence, and minutes of Boards and Commission meetings.

Prepares and maintains permanent official records of Ordinances, and City Council minutes.

Maintains pending file on contracts and agreements; follows up on disposition and maintains permanent contract and deed files.

Maintains catalog of office forms, printed in-house, prepares material for offset press, and orders forms as needed by departments.

Prepares, updates, and distributes Ordinance compilation.

Prepares, legal notices and postings for City Council.

Prepares City Council agenda and materials for Council meetings.

Attends City Council meetings; records and transcribes minutes of meetings.

Prepares agenda and materials and attends MEBT meetings; records and transcribes minutes of meetings.

Maintains Cable T.V. Notices.

Performs other related duties as necessary.

SUPERVISION RECEIVED:

Supervised by Finance Director.

SUPERVISION EXERCISED:

Supervises Secretary/Bookkeeper - Secretary positions and coordinates and delegates typing, copying, filing, and other secretarial/clerical assignments to other Business Office personnel.

MINIMUM QUALIFICATIONS:

Knowledge of secretarial procedures, supervision, City Clerk rules and legal requirements.

Knowledge of work processing procedures.

Ability to take dictation, 100 wpm; transcribe oral and machine dictation, type accurately, 70 wpm.

Experience - Two years secretarial experience.

Education - Courses in work processing, dictation, office machines, typing, filing, English, and supervision.

Continued professional development is expected.

As secretarial coordinator, Fey is responsible for either typing or supervising the typing of correspondence for the city manager, assistant to the city manager, finance director, purchasing operations supervisor, parks and recreation director, fire chief and the police chief, as well as for the mayor and city council. None of those officials have their own personal secretaries.

Fey does not generally type collective bargaining materials. Testimony indicated that the city's labor relations consultant prepares the employer's bargaining proposals. Fey's exposure to such matters appears to be limited to some counter-proposals given to her by the assistant city manager for typing.

#### POSITION OF THE PARTIES

The employer contends that the deputy city clerk has an intimate fiduciary relationship with the city manager, the finance director and the assistant city manager. The employer argues that those officials manage the business, personnel and labor relations affairs of the city and that, by typing their correspondence, the deputy city clerk is made privy to labor relations policies of the employer before such information is available to other employees. The employer also contends that the Commission should consider the "desires" of the disputed employee.

The union's position is that the deputy city clerk has been appropriately included in the bargaining unit dating from when the employer recognized the union as exclusive bargaining representative. The union acknowledges that the deputy city clerk works with some sensitive information, but contends that the information is not related to collective bargaining to an extent sufficient to establish confidentiality under the statute.

#### DISCUSSION

##### The "Desires of Employees"

The employer's argument based on the "desires of the employee" can be disposed of quickly, and at the outset. The employer refers to RCW 41.56.060, which prescribes procedures for the Public Employ-

ment Relations Commission to determine appropriate bargaining units among "public employees". It is not necessary or appropriate to reach the unit determination criteria to resolve this case.

The office-clerical employees of the City of Mountlake Terrace have been organized for the purposes of collective bargaining for a number of years, and no question concerning representation has been raised by the employer pursuant to Chapter 391-25 WAC. The only question presented here is whether the "deputy city clerk" is a public employee at all. If she is, then she clearly belongs within the existing bargaining unit.

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.

The definition was refined in International Association of Fire Fighters v. City of Yakima, 91 Wn.2d 101 (1978), establishing 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]**

The Supreme Court found the definition of "confidential" employee contained in the Educational Employment Relations Act to be "instructive" and worthy of consideration. That statute provides:

**RCW 41.59.020 Definitions.** As used in this chapter:

...

(4) The terms "employee" and "educational employee" means any certificated employee of a school district, except:

...

(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 agreement, 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 Court's analysis was focused on the importance of avoiding inconsistencies between employees covered by Chapter 41.56 RCW (classified employees) and employees covered by Chapter 41.59 RCW (certificated employees); both of whom might be employed by the same employer.

The reasoning behind the "confidential" exclusion was later put in different terms, but to the same result, in City of Chewelah, Decision 3103-B (1989), as follows:

The "confidential" exclusion specifically protects the collective bargaining process, protecting the employer (and the process as a whole) from conflicts of interest and divided loyalties in an area where improper disclosure could damage the collective bargaining process. Possession of other types of information that are to be kept from public disclosure is not a threat to the collective bargaining process, and a showing that an employee holds a position of general responsibility and trust does not establish a relationship warranting exclusion from collective bargaining rights, where the individual is not privy to labor relations material, strategies, or planning sessions. Bellingham Housing Authority, Decision 2140-B (PECB, 1985); Benton County, Decision 2719 (PECB, 1989).

Employees providing clerical support to management officials involved in the formulation of labor relations policy may be found to be "confidential" employees, as in Edmonds School District, Decision 231 (PECB, 1977).<sup>3</sup> However, two conditions must be met to fulfill the "labor nexus" test: First, the specific content of the correspondence must be analyzed to establish that the individual claimed as "confidential" becomes privy to documents closely connected to the employer's labor negotiations; and second, although a "confidential" employee need not work exclusively or even primarily on labor nexus work, the assignments must be describable as "necessary, regular and ongoing". City of Cheney, Decision 3693 (PECB, 1991).

The Commission has consistently analyzed the possession of or access to information related to the collective bargaining process

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



to determine claims of "confidential" exclusion. In City of Tukwila, Decision 451-A (PECB, 1978), a secretary who attended all staff meetings where labor relations strategies and budgets were formulated was found to be a confidential employees. In City of Ocean Shores, Decision 2064 (PECB, 1984), a secretary who typed collective bargaining proposals was found to be a confidential employee. In Oak Harbor School District, Decision 3581 (PECB, 1990), a clerical employee who attended bargaining sessions and typed the employer's proposals prior to them being submitted to the union was declared to be a confidential employee. In Richland School District, Decision 3626 (PECB, 1990), a payroll supervisor who types, develops and processes financial data to be used before and during actual bargaining was determined to be a confidential employee. In Franklin County, Decision 3694 (PECB, 1991), the administrative chief accountant who prepared and reproduced cost analyses to be used in collective bargaining with county employees was found to be a confidential employee.

But persons who handle other types of confidences, and those with only sporadic or occasional contact with labor relations matters, have not been excluded from the rights of the collective bargaining statute. Thus in Clover Park School District, Decision 2243-A (PECB, 1987), modified, Decision 2243-B (PECB, 1987), it was noted:

... the exclusion has been denied with respect to persons holding titles as high as "battalion chief" (i.e., second in command) in the fire departments of Yakima and Richland, "major " (i.e., third in command) in the police department in Seattle, and "deputy chief" (i.e., third in command) in the fire department in Seattle. It is not enough to demonstrate that the employee in question has access to "private" information concerning matters other than labor relations.

The "confidential" exclusion was denied in the Clover Park case as to a variety of clerical support positions where the employer's

need to protect its labor relations policies from disclosure could easily be accommodated by minor changes of procedure without the unnecessary removal of clerical employees from the coverage and rights of the collective bargaining statute.

#### Burden of Proof

In Clover Park School District, Decision 2243-A (PECB, 1987), affirmed, Decision 2243-B (PECB, 1987), the Hearing Officer stated:

The moving party must present evidence that the affected employee has intimate contact with, and necessary knowledge of, the employer's labor relations policies and practices.

The Commission had previously stated: "The party proposing exclusion of an individual as a 'confidential' bears a heavy burden". City of Seattle, Decision 689-A (PECB, 1979). See, also, City of Winslow, Decision 3520-A (PECB, 1991); City of Seattle, Decision 1797-A (PECB, 1985); San Juan County, Decision 1690-A (PECB, 1984).

#### Work Product Analysis

The testimony and job description in evidence in this case clearly show that the "deputy city clerk" is not involved in any way in the formulation of the employer's labor relations policies. She does not sit in on strategy sessions with the city's negotiating team, and does not attend bargaining sessions on behalf of the employer. The position is not described by RCW 41.59.020(4)(c)(i).

The disputed position in the instant case is assigned to type correspondence for employer officials who are members of the employer's negotiating team. In some detail, the argument was made that the "deputy city clerk" has typed documents that were "sensitive", and therefore should fit the definition of "confiden-

tial" employee developed by the Supreme Court and the Commission. The employer submitted 43 documents typed by Mavis Fey as evidence of the "confidential" nature of the deputy city clerk position. The following is an analysis of those documents, beginning with the materials that are the least persuasive and moving to those which have the greatest probative value as evidence of "confidential" status:

Union Correspondence: Two of the documents submitted in evidence were correspondence between the employer and business representatives of labor unions representing the employer's employees. One letter was addressed to Local 6; the other was to another bargaining agent. The former cannot have exposed the bargaining process to unauthorized union access, since the document was provided to the union itself. The latter is an interpretation of several existing contract clauses, and so of no strategic interest beyond that already available to the union.

Job Descriptions: Three of the exhibits were employee job descriptions. Such documents have only an indirect relationship to the collective bargaining process. Even if the job descriptions were eventually to become a subject of bargaining, there was no evidence that these particular job descriptions were confidential materials at the time they were processed by Fey.

Grievance Correspondence: Fifteen of the exhibits were correspondence concerning grievances, personnel actions, or documentation concerning employees or citizens who were filing complaints against management decisions. Grievance administration is a "supervisory" function, however, and personnel action documents given to bargaining unit employees do not illustrate the kind of materials which could potentially breach the security of the bargaining process. City of Seattle, Decision 689-C, (PECB, 1981). Even if some of the information contained in those documents may eventually arise or be used in collective bargaining, (e.g.,

grievances which are later brought to the bargaining table as evidence of contract administration problems), they did not fit the "labor nexus" definition at the time they were typed by Fey.<sup>4</sup>

"Bargaining Related" Correspondence: Eleven of the exhibits were general correspondence claimed by the employer to be "related" to bargaining, including: memos scheduling negotiation meetings; memos transmitting contract clauses to city council members or other city officials; a memo transmitting a list of employee names to the Commission; two cover letters to state retirement agencies, one letter transmitting a collective bargaining agreement, a letter listing four employees who were recent retirees, and an analysis of the salary of the city's retained legal council. Upon close examination, however, those documents are not found to contain particularly sensitive information. The information found in these was already known to, or otherwise obtainable by, the union.

Another set of eight pieces of "bargaining related" correspondence included a letter describing how one of the city's labor agreements relates to the city's personnel ordinance, a letter describing the operation of the Law Enforcement Officer's and Fire Fighters Retirement System created by Chapter 41.26 RCW, surveys of salaries and benefits in neighboring communities, and a letter describing the employer's medical plans and how they are utilized. In analyzing these documents for their "labor nexus", it is noted that all of the materials were merely recapitulations of already-public data being referred to another party for later decision

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The employer cites City of Sunnyside, Decision 2058 (PECB, 1985) for the proposition that "confidential" status was based, in part, upon access to grievance matters. Such a reliance is misplaced. The position in at issue in that case did handle grievance materials, but "confidential" status was solely based upon access to labor relations documents which were: "... an extraction from the raw data generally available, with the intent to provide [management] guidance for specific proposals to be made by this employer in the next round of negotiations".

making, without recommendations. As such, they do not present the "conflict of interest", at the time of their being handled by the deputy city clerk, that is the object of the "labor nexus" test. Some of this evidence described by the employer as "negotiations correspondence" (i.e., surveys of comparable wages and group insurance benefits) is in fact public information available to the union, or anyone, upon request. Their "premature" disclosure to a member of the bargaining unit would not put the collective bargaining process in jeopardy.

"Confidential" Correspondence: Four documents presented by the employer clearly fit the definition of the kind of work product that a "confidential" employee would produce:

The first document is a memo, dated 1987, documenting the reactions of various department managers to a union proposal on hours of work. This is clearly related to bargaining strategies, and is of a type where premature disclosure could be prejudicial to the employer and to the collective bargaining process. It is the type of "confidential" information of concern to the Commission and courts in the cited cases.

The second document is a 1988 letter to the city's labor relations consultant concerning the reclassification of three bargaining unit positions. The letter instructs the consultant on what information should be detailed to the union concerning the employer's ability to do reclassifications. While ultimately intended for disclosure to the union, this information was processed by Fey in advance of its intended disclosure and was clearly "confidential" at the time of its creation.

The third and fourth documents were both prepared by the city manager in November of 1989, for the city council. One is an analysis of the 1990 city budget, identifying proposed reductions in city personnel and services. The other is a medical insurance analysis which describes alternatives to the employee medical benefits and makes recommendations to the city council. Both are

"confidential" documents relating to bargaining strategies and decision-making.

Many of the foregoing documents certainly demand that the employee handling such information be ethical and trustworthy. As stated in City of Chewelah, supra, however:

... a showing that an employee holds a position of general responsibility and trust does not establish a relationship warranting exclusion from collective bargaining rights, where the individual is not privy to labor relations material, strategies or planning sessions.

Even where the information handled may be regarded as "sensitive" among or between individual employees (e.g., much of the grievance information is sensitive as to the specific employee involved), that does not warrant exclusion of Fey as a "confidential" employee under RCW 41.56.030(2)(c).

Given the evident effort and depth of research used by the employer in the preparation of its case and the mass of documents which were provided, the absence of documents corroborating other testimony leaves a serious gap in the record. The assistant city manager testified that Fey typed proposals for fire and police bargaining, but not for the public works or the SEIU Local 6 bargaining, but no such proposals were offered in evidence. None of the documents produced by Fey and entered into evidence were notes, proposals or strategies from any of the employer's negotiations. Thus it appears that the employer's labor consultant, in fact, produces most of the proposals and counter-proposals used by the employer in collective bargaining.

Among a total of 56 exhibits presented in the instant case, 43 were examples of the work product of the "deputy city clerk" spread over a period from 1984 to 1991. Only four of those documents clearly fit the "labor nexus" standard of relating to the process of

collective bargaining to the extent that handling such a document would, at the time of exposure to the documents, compromise the typist as a member of a bargaining unit. Four documents in seven years does not meet the "heavy burden" test recently restated by the Commission in City of Winslow, supra, especially where the position in question does not sit in or participate in executive level meetings where labor relations policy is discussed. City of Chewelah, supra. Nor do the four documents averaging much less than one per year meet the "necessary, regular and ongoing" test of work product applied in City of Cheney, supra. A "confidential" exclusion is not sustainable on the record presented.

Exclusion Based on Size of Employer?

The employer argues, in effect, that a city with a population of 19,760 should have at least one employee in its "business office" who is designated as a confidential employee. The statute contains no particular ratio, however, and all of the cases look to the actual duties of claimed confidential employees.

Furthermore, the specific facts in this case do not justify the employer's conclusion. There is only a finite amount of "labor nexus" work to be accomplished in any employment situation. In analyzing how a particular employer's "confidential" functions are being accomplished, it is incumbent upon the Hearing Officer to look at the entire scope of the management structure, not just the bargaining unit staff.

Over the course of years, this employer has developed a management position (i.e., the assistant to the city manager) and contractual relationships (i.e., the outside labor relations consultant) who have apparently been doing the bulk of the "confidential" work necessitated by the city's collective bargaining relationships. The employer acknowledged in its brief that the assistant to the city manager, "... uses Ms. Fey sparingly in [the] role [of typing

counter-proposals] since Ms. Fey is in a bargaining unit position". The evidence established that 40% of the work effort of the assistant to the city manager is spent on human relations management which includes many "confidential" tasks, and that 20% of the job includes "administrative support".<sup>5</sup> The conclusion could thus be reached that the employer already accommodates the bargaining unit status of the deputy city clerk, and that continuing to do so in the few examples of truly "confidential" presented in this case would not appear to be unreasonable.

#### Conclusion

The employer has not met the standard of proof necessary to declare the position of secretary-coordinator / deputy city clerk a "confidential" employee and thus exempt from representation in collective bargaining. The employer's request for clarification of the existing bargaining unit to exclude the deputy city clerk is denied. The position of secretary-coordinator / deputy city clerk will remain in the bargaining unit represented by the union.

#### FINDINGS OF FACT

1. The City of Mountlake Terrace is a "public employer" within the meaning of RCW 41.56.030(1).
2. Service Employees International Union, Local 6, AFL-CIO, is a "bargaining representative" within the meaning of RCW 41.56-.030(3).

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<sup>5</sup> Although it is certainly beyond the province of this Hearing Officer to dictate what tasks certain positions might perform, it does not appear entirely implausible that the "administrative support" efforts of the assistant to the city manager could include production of the few truly "confidential" documents necessary to the functioning of the city's bargaining; thus maintaining the insulation of the bargaining unit members.



3. SEIU, Local 6 is the exclusive bargaining representative of employees of the City of Mountlake Terrace in a bargaining unit described in the parties' collective bargaining agreement as:

The employer recognizes the union as the sole collective bargaining agency for those regular employees in the position of secretary/book-keeper, community development office aide, coordinator and deputy and will deal with the union's representative with respect to wages, hours, working conditions and adjustment of grievances for such employees during the term of this agreement. Regular employees are those in positions within the bargaining unit in which employees are continuously so employed for fifteen (15) or more hours per week, for at least three (3) weeks per month over at least a six (6) months period.

The collective bargaining agreement is in effect from January 1, 1990 through to December 31, 1991.

4. The employer contracts with a labor relations consultant for representation in collective bargaining meetings and affairs. Written materials for collective bargaining, such as proposals and counter-proposals, are generally prepared by the labor relations consultant, and are not typed or reproduced by any City of Mountlake Terrace employee.
5. The employer has designated an assistant to the city manager as its in-house official on labor relations matters. Approximately 60% of the work effort of that position is devoted to personnel functions and "administrative support" functions.
6. The Secretary-Coordinator / Deputy City Clerk for the City of Mountlake Terrace is Mavis Fey. As a part of her regular responsibilities, she either types or supervises the typing of

correspondence for various elected and management officials of the employer, including officials who serve as members of the employer's negotiating team in collective bargaining.

7. The Secretary-Coordinator / Deputy City Clerk does not attend meetings where the employer's collective bargaining policies or strategies are discussed or developed, nor does she attend collective bargaining negotiations meetings on behalf of the employer.
8. Correspondence and other documents typed by the secretary-coordinator / deputy city clerk over a period of approximately seven years have included some matters tangentially related to collective bargaining, such as correspondence concerning meetings and existing contracts, but the vast majority of such documents are not of the type protected by the "labor nexus" test for exclusions as a "confidential" employee.
9. From the evidence presented, the involvement of the secretary-coordinator / deputy city clerk with "labor nexus" materials has been rare and infrequent, limited to less than one incident per year over the period from 1984 to 1990.

#### 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.
2. The secretary-coordinator / deputy city clerk is a public employee within the meaning of RCW 41.56.030(2), whose duties do not necessarily imply an intimate fiduciary relationship to the executive head of the City of Mountlake Terrace on

confidential matters of labor relations policy, within the meaning of RCW 41.56.030(2)(c).

ORDER

The bargaining unit described in paragraph 3 of the foregoing Findings of Fact is clarified to include the position of secretary-coordinator / deputy city clerk.

DATED at Olympia, Washington, this 16th of August, 1991.

PUBLIC EMPLOYMENT  
RELATIONS COMMISSION



WALTER M. STUTEVILLE  
Hearing Officer

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