

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) DECISION 3832-A - PECB
bargaining unit of employees)
represented by:)
LOCAL 6, SERVICE EMPLOYEES) DECISION OF COMMISSION
INTERNATIONAL UNION, AFL-CIO)
_____)

Cabot Dow, Management Representative, appeared on behalf of the employer.

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

This matter comes before the Commission on a timely petition for review filed by the City of Mountlake Terrace, seeking to overturn an eligibility ruling issued by Hearing Officer Walter Stuteville.

BACKGROUND

The City of Mountlake Terrace operates under the council-manager form of municipal government.¹ At the time pertinent to this record, Robert White was the city manager; Ron Swanson was the city clerk and finance director; Ellen Petre was the assistant to the city manager. Since she was hired in August, 1987, Petre has been delegated in-house responsibility for labor relations matters. The employer also utilizes the services of an outside labor relations consultant, Cabot Dow. Petre, Dow, White and Swanson serve on the employer's negotiating team for collective bargaining.

¹ Chapter 35.18 and Title 35A RCW.

The employer has collective bargaining relationships with organizations representing four bargaining units covering approximately 86 of its employees. Since 1974, SEIU Local 6 has represented a bargaining unit of approximately 17 office-clerical employees.²

Mavis Fey currently holds the position of "coordinator-secretarial/deputy city clerk" (hereinafter: "deputy clerk"), which has historically been included in the SEIU unit. A November 24, 1987 position description for Fey's position, reads as follows:

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.

²

The remaining bargaining units include a Police Department unit represented by an independent association; a Fire Department unit represented by an affiliate of the International Association of Fire Fighters, AFL-CIO; and a unit of public works and parks maintenance employees represented by an affiliate of the International Brotherhood of Teamsters, et al., AFL-CIO.

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 deputy clerk, Fey coordinates, assigns, and performs secretarial duties for all of the employer's departments. She provides direct secretarial support to the mayor, city council, city manager, assistant to the city manager, and finance director. None of those individuals have their own secretary, and all of them are privy to the formulation of the employer's labor relations policies.

Fey sometimes handles correspondence involving sensitive matters, including disciplinary actions against employees, queries to department heads regarding issues to be addressed in collective bargaining, requests to the employer's labor consultant for analysis of medical costs and bargaining strategies, final revisions in labor contracts before signing, revisions to job descriptions, and budget reduction proposals including proposed lay-offs. From time to time, Fey is also responsible for typing documents to the city attorney.

A collective bargaining agreement between the employer and union expired on December 31, 1989. During negotiations for a successor contract, the employer requested exclusion of the "deputy clerk" from the bargaining unit. The parties discussed the matter, but no agreement was reached. The employer filed the petition in this case on May 21, 1990, prior to ratification of the new contract, seeking to have the "deputy clerk" position excluded from the bargaining unit as a "confidential" employee.

A hearing was held on February 11, 1991, and both parties filed post-hearing briefs. Authority to decide the "eligibility" dispute was delegated to the Hearing Officer, pursuant to WAC 391-35-190. Hearing Officer Stuteville ruled that the employer had not met the standard of proof necessary to exclude the deputy city clerk position from the bargaining unit as a "confidential" employee.

POSITIONS OF THE PARTIES

The employer bases its petition for review on alleged factual errors in the Hearing Officer's analysis of the work performed by Fey, error in the burden of proof assigned to the employer, and error in the Hearing Officer's ultimate conclusion that the deputy clerk position does not qualify as a confidential employee. The employer argues that, by typing certain correspondence, the deputy

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 contends that the Hearing Officer's ruling was proper, and should not be overturned. The union acknowledges that the deputy 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 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.]

That statutory exclusion was given a narrow interpretation by the Supreme Court of the State of Washington in International Association of Fire Fighters v. City of Yakima, 91 Wn.2d 101 (1978), where the court 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 supplied.]

The "confidential" exclusion is not limited to those who directly participate in the formulation of labor relations policy and objectives, but also extends to those support personnel who process sensitive labor relations-related material at the direction of those responsible for collective bargaining matters.³

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.⁴ 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.⁵

Second, the contact with labor relations-related material must be describable as "necessary, regular and ongoing". The require-

³ 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).

⁴ City of Cheney, Decision 3693 (PECB, 1991).

⁵ Pateros School District, Decision 3911-B (PECB, 1992).

ment that contact with labor relations matters be "necessary" precludes the exclusion of individuals performing a limited amount of labor relations work that could be readily assigned to agreed-upon confidential secretaries already excluded from the bargaining unit.⁶ What amounts to "regular" contact must be decided on the facts of each case. Once in five years may not be not enough, but a specified percentage of time working on confidential labor relations documents is not required.⁷ The requirement that contact be "ongoing" precludes the exclusion of individuals whose contact with sensitive matters has ceased or whose alleged confidential status is based just on speculation as to the employee's use in the future.⁸

The Applicable Burden of Proof -

The burden of proof is on the party seeking exclusion of an employee on the grounds of confidentiality. The employer takes issue with the Hearing Officer's characterization of this burden as a "heavy" one.

Exclusion of a position as "confidential" deprives the individual holding the excluded position of all collective bargaining rights. For that reason, the Commission has long emphasized that the party proposing exclusion of a position as "confidential", bears a heavy burden of proof.⁹ This description of the burden of proof emphasizes that it is not enough to simply establish the existence of an

⁶ Persons who handle other types of correspondence, or those with only sporadic contact with labor relations matters, have not been excluded as "confidential employees". Clover Part School District, Decision 2243-A (PECB, 1987), modified, Decision 2243-B (PECB, 1987).

⁷ City of Tukwila, Decision 451-A (PECB, 1978).

⁸ Benton County, Decision 2719-B (PECB, 1989); City of Winslow, Decision 3520-A (PECB, 1990).

⁹ City of Seattle, Decision 689-A (PECB 1979); City of Winslow, Decision 3520-A (PECB 1990).

intimate fiduciary relationship between the allegedly confidential employee and a public official. The "labor nexus" between actual job duties and the formulation of labor relations policy must be demonstrated as well. International Association of Fire Fighters v. City of Yakima, supra. The Hearing Officer did not err in noting this well-established precedent.

The "Desires of Employees" -

In reaching his decision, the Hearing Officer gave no weight to Fey's expressed desire to be removed from the bargaining unit. The employer takes issue with the Hearing Officer's handling of that testimony.

The "desire of the public employees" is one of four criteria specified for consideration by the Commission in determining the unit(s) appropriate for collective bargaining. RCW 41.56.060. The issue in this case is whether Fey qualifies as a "public employee" under RCW 41.56.030(2)(c), rather than the propriety of the bargaining unit in which her position has historically been included.

On the "eligibility" issue raised here, the express language of the statute, as well as Commission and Supreme Court precedent, makes clear that the focus should be on the duties performed by the individual in question, not upon his or her preference. The Hearing Officer did not err in disregarding the testimony concerning the "desire" of the employee involved.

The Confidential Claim

It is undisputed that Fey is not involved in the formulation of the employer's labor relations policies, does not sit in on strategy sessions with the city's negotiating team, and does not attend bargaining sessions. On the other hand, it is also undisputed that the deputy clerk **occasionally** handles some documents whose

disclosure could damage the collective bargaining process. Thus, the central issue before us is whether the second part of the "labor nexus" test is satisfied, i.e., whether Fey has sufficient contact with documents related to the employer's labor relations that she qualifies for exclusion from the rights of the collective bargaining statute.

Both Fey's job description and her testimony as to her actual duties support a conclusion that Fey's contact with labor relations material is "**necessary**". Ellen Petre, the administrator who now handles labor relations matters, cannot type. All of Petre's word processing is coordinated by Fey. It is true that some sensitive materials are prepared by the employer's outside labor relations consultant, but the amount and type of confidential material that Petre generates is such that the employer can reasonably choose to have the material prepared by a non-bargaining unit employee within its own workforce. Fey is the logical person to serve in that capacity, and the employer has no other excluded "confidential" employee in its business office. The present case is thus distinguishable from the situation presented in City of Winslow, Decision 3520-A (PECB, 1990), where the employer already had a number of agreed "confidential" secretaries who could be utilized to prepare sensitive material.

The record also established that Fey's preparation and handling of labor relations materials has been "**ongoing**" since the hiring of Petre in August, 1987. Petre's arrival marks a change of circumstances which contradicts the historical inclusion of the "deputy clerk" position in the bargaining unit.

The dispute in this case clearly turns on whether Fey's contact with material meeting the labor nexus test has been sufficiently "**regular**" to warrant her exclusion from collective bargaining rights. To demonstrate regular contact, the employer submitted over forty documents which were allegedly "confidential" in nature.

We concur with the Hearing Officer that, upon close scrutiny, most of the submitted documents failed to satisfy the labor nexus test. The employer apparently sought to meet its burden of proof through the quantity, rather than the quality, of its evidence. That tactic makes this a close case, because the number of documents ultimately supportive of Fey's exclusion proved to be so limited. Nevertheless, we conclude that when the documentary evidence is viewed in conjunction with testimonial evidence also offered by the employer, the record supports Fey's exclusion as a "confidential" employee.

We concur with the Hearing Officer that most of the 43 documents produced by the employer at the hearing are not evidence of "confidential" status. These include employee job descriptions,¹⁰ correspondence with the union, routine personnel action documents, and "bargaining related" correspondence that lacks any sensitive information.

The Hearing Officer concluded that only four documents clearly fit the "labor nexus" test.¹¹ The Commission finds that five additional documents in the record were also indicative of confidential

¹⁰ There was no showing that premature disclosure of these descriptions would disadvantage the employer.

¹¹ The documents viewed by the Hearing Officer as the type where premature disclosure could be prejudicial to the collective bargaining process included:

(1) a 1987 memo regarding reactions of department managers to a union proposal on hours of work (Ex. 15);

(2) a 1988 letter to the outside labor relations consultant, concerning the reclassification of three bargaining unit positions (Ex. 21);

(3) an analysis of the employer's 1990 budget, identifying proposed reductions in personnel and services (Ex. 37); and

(4) a 1989 medical insurance analysis, which describes alternatives to the employee medical benefits and makes recommendations to the city council (Ex. 48).

status under that test. We include in this category Exhibits 16, 32, 38, 47, and 51:

Exhibit 16 is an April, 1988 memo from the city manager to the employer's labor relations consultant. The second paragraph relates to how the employer should respond to the expressed desire of certain union members to change their representation.¹²

Exhibit 32 is a March, 1988 memo regarding the employer's implementation of a 1987 collective bargaining settlement in a unit different from the one in which Fey is employed.¹³ A memo such as this, prepared in contemplation of what action the employer might take, also meets the "labor nexus" test.

Exhibit 38 is a June, 1990 secretarial survey impacting the SEIU bargaining unit. The employer is entitled to retain the data and analysis contained in this document for its own use.¹⁴

Exhibit 47 is a November, 1989 administrative memo discussing employer-provided medical insurance, and whether to impose a buy-in charge to reduce dual/unnecessary coverage for employee spouses and families, while Exhibit 51 is a March 1990 memo to the city manager in which an administrative assistant recommends whether certain leave requests should be granted. These two documents relating to the SEIU bargaining unit are examples of investigatory material exchanged between managers and kept confidential while an employer decides whether to take actions that affect members of a bargaining unit. They too fit the "labor nexus" test.

¹² The first paragraph of this memo refers to purely ministerial matters that would not suffice to meet the "labor nexus" test.

¹³ It makes no difference that the confidential information protected relates to a different bargaining unit than the one in which the individual is employed. City of Sunnyside, Decision 2058 (PECB, 1985). See also Snohomish County, Decision 1439 (PECB, 1982).

¹⁴ Where data is extracted from raw data available to the general public, access to such compilations can help meet the labor nexus test for exclusion as a confidential employee. City of Sunnyside, Decision 2058 (PECB, 1985).

One other document is of a type that could potentially have supported Fey's exclusion as a confidential employee, but we are unable to credit it in this case. Exhibit 42 reports the results of an internal investigation into unauthorized accounting practices in the Parks Department, and thus falls in the category of an investigatory memo exchanged between city administrators in preparation for deciding whether to take action that affects members of a bargaining unit. The identification of the person(s) to whom the memo was circulated has been blackened out on the copy admitted in evidence, however, so it is not clear whether circulation of the memo was limited to persons outside of the bargaining unit.¹⁵ Absent a clear indication as to the circulation of the document, we concur with the Hearing Officer that Exhibit 42 does not support Fey's exclusion from the bargaining unit.

Since so many of the employer's exhibits did not satisfy the labor nexus test, the Hearing Officer understandably focused on the limited number of documents that met the test. He concluded that four documents in seven years did not suffice to demonstrate contact with labor relations material that was "necessary, regular, and ongoing". With the additional documents found by the Commission to be reflective of confidential status, the number of "labor nexus" documents totals nine, covering a period of roughly four years, 1987-1991.¹⁶ We note, however, that the record consists of both exhibits and testimony.

The employer did not purport to present an all-inclusive documentary record. The exhibits produced by the employer, and accepted by the Commission as indicative of confidential status, were "exam-

¹⁵ As noted above, a document provided to a member of the bargaining unit is not deemed "confidential" for purposes of the labor nexus test. In such instances, the union has access to the information through sources other than the individual who processed the sensitive material.

¹⁶ The hearing in this case was held in February, 1991.

ples" of the deputy clerk's work product. In addition to the offered documentation, the employer provided unrebutted testimony by various witnesses, who described Fey as having regular intimate contact with labor relations material whose premature disclosure would detrimentally impact the collective bargaining process.¹⁷ We find it appropriate to credit the undisputed testimony of Fey and the city administrators for whom she works.

The fact that the employer currently has no other secretary in its business office, who is available to type "confidential" labor relations correspondence, lends support to the employer's assertions that: (1) Fey has been regularly utilized in the preparation of confidential labor relations material in the past; and (2) Fey will be utilized increasingly in that manner in the future, once her exclusion from the bargaining unit has been clarified. It is reasonable to allow an employer at least one confidential employee in its business office.¹⁸ Secretaries to labor relations policy-makers have been excluded on the basis of confidentiality in prior cases.¹⁹ In this case, Fey serves as the primary secretary for Petre, whose duties clearly include labor relations policy-making. In light of the foregoing considerations, we find Fey's contact with confidential labor relations material in recent years has been sufficient to meet the employer's burden of proof.

The record indicates that Fey is aware of the confidential nature of some of her work in the deputy clerk position. Further, Fey is

¹⁷ Uncontradicted testimony regarding the use of an administrative bookkeeper/secretary sufficed to show a confidential relationship. Wapato School District, Decision 788-A (PECB, 1980).

¹⁸ An employer will be allowed some reasonable number of exempt personnel in order to perform its functions under the collective bargaining statutes. Franklin Pierce School District, Decision 3371-A (PECB, 1991).

¹⁹ Edmonds School District, supra; Tahoma School District, Decision 1125 (PECB, 1991).

aware of the potential conflict of interest that such knowledge creates.

Conclusion

The deputy clerk assists and acts in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations. In that capacity she deals with documentation and information whose premature disclosure would detrimentally impact the collective bargaining process. Inclusion of the position of deputy clerk in the bargaining unit would place Fey in a position of compromised loyalty. While it is true that Fey does not perform confidential work exclusively or frequently, the record is persuasive that her "labor nexus" assignments have been regular, necessary and ongoing enough to support the deputy clerk's exclusion from the SEIU bargaining unit as a "confidential" employee. The decision of the Hearing Officer is REVERSED.

AMENDED 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).
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, commu-

nity 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.

A collective bargaining agreement was in effect between the employer and union from January 1, 1990 through to December 31, 1991.

4. Since 1987, the employer has designated an assistant to the city manager, Ellen Petre, as its in-house official on labor relations matters. Approximately 60% of Petre's work effort is devoted to personnel functions and "administrative support" functions.
5. Mavis Fey holds the position of "coordinator secretarial / deputy city clerk" for the City of Mountlake Terrace. As a part of her regular responsibilities, Fey 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.
6. Fey 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.
7. Since Petre's hiring in 1987, Fey's work assignments have regularly and necessarily included the typing of confidential correspondence and other documents related to collective bargaining, including documents of a type that premature

disclosure to the union would be harmful to the collective bargaining process. The employer currently has no "confidential" secretary in its business office, who is available to type such materials.

CONCLUSIONS OF LAW

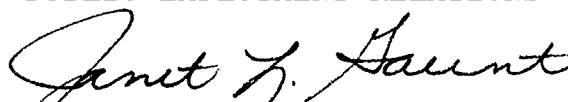
1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-35 WAC.
2. The coordinator secretarial / deputy city clerk is a confidential employee within the meaning of RCW 41.56.030(2)(c), and is not a public employee within the meaning and coverage of the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.

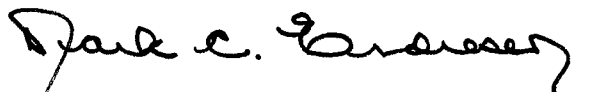
ORDER

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

Issued at Olympia, Washington, the 7th day of December, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


JANET L. GAUNT, Chairperson


MARK C. ENDRESEN, Commissioner


DUSTIN C. MCCREARY, Commissioner