STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of COWLITZ COUNTY For clarification of an existing bargaining unit of employees represented by WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, AFSCME, AFL-CIO	Case No. 1194-C-77-48 Decision No. 564-A PECB DECISION ON REVIEW

APPEARANCES:

Fred A. Kaseberg, Civil Deputy Prosecuting Attorney, appearing for the employer.

Pamela G. Bradburn, General Counsel, appearing for the union.

The question before us for decision is whether or not the District Court Coordinator in Cowlitz County is a public employee within the meaning of RCW 41.56.030. We hold that she is.

The statute provides:

41.56.030(2)

> "(2) 'Public employee' means any employee of a public employer except any person (a) elected by popular vote, or (b) 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, 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 District Court judges are elected by popular vote.

In Metropolitan Seattle v. Department of Labor and Industries, 88 Wn.2d 925, 568 P.2d 775 (1977) at page 928 of the Washington Reports, the Supreme Court said:

> "None of the positions involved carries the title 'deputy', 'administrative assistant', or 'secretary'.
>
> Unless the positions involved fall within one of these categories, the persons holding them are not excluded from the definition of 'public employee' under the Act. Furthermore, even if they fit one or more of the categories named in the statute, the persons holding them are nevertheless public employees if their duties do not necessarily imply a confidential relationship with the director of Metro Transit."

This language was quoted with approval by the Supreme Court in Firefighters v. Yakima, 91 Wn.2d 101 (1978), at page 104. The decision in Yakima was by a court divided 5-4. However, the difference of opinion between the majority and the minority was not over the construction of RCW 41.56.030(2), but rather over the application of agreed principles to the facts before the court. We are bound in any event by the majority opinion; however, the minority opinion would not change our conclusion in this case. The Yakima case was concerned with whether or not battalion chiefs in the Yakima Fire Department were public employees within the meaning of the statute and the majority held that they were. In the Yakima case the majority said at page 105:

> "We begin by discussing the meaning of the phrase confidential relationship in the context of the Public Employees' Collective Bargaining Act. That phrase ordinarily means a fiduciary relationship. Stevens v. Marco, 147 Cal.App. 2d 357, 305 P.2d 669 (1956). This relationship arises when continuous trust is reposed by one person in the skills or integrity of another. An employee who stands in such a relation to an employer must act for the benefit of the employer. Feider v. Hanna, 172 Cal.App. 2d 201, 342 P.2d 344 (1959).
>
> Those in whom such trust is continuously reposed could and perhaps would participate in the formulation of labor relations policy. They would be especially subject to a conflict of interest were they to negotiate with an employer on their own behalf. By excluding from the provisions of a collective bargaining act persons who work closely with the executive head of the bargaining unit, and who have, by virtue of a continuous trust relation, assisted in carrying out official duties, including formulation of labor relations policy, such conflict is avoided. And, public trust is protected since officials have the full loyalty and control of intimate associates. 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."

The court noticed the absence of any statutory direction to this Commission that it be guided insofar as possible in its interpretation of RCW 41.56 by the cases interpreting the National Labor Relations Act, while such statutory direction was given in RCW 41.59. But the majority held that the two statutes should be construed consistently when such construction does not contravene statutory language and approved our decision in Public School Employees of Washington and Edmonds School District No. 15, Decision No. 231-PECB, May 24, 1977, which, in turn was predicated in part on B.F. Goodrich, 115 NLRB 722, 724.

The court then concluded:

> "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."

The majority then held that the duties of the battalion chiefs did not flow from a fiduciary relationship or involve formulation of labor relations policy and that they were public employees within the meaning of RCW 41.56.-030(2).

The dissenting opinion, had it been the majority opinion, would not require a different result in the instant case. The concise dissent observed:

> "The actions of these battalion chiefs can be reasonably construed to come within the boundaries of formulation of labor relations policy by their evaluative reports and functions in a confidential relationship with the fire chief. To conclude otherwise simply ignores the reality of how a line staff structure functions. As such, they are not public employees within the meaning of RCW 41.56.-030(2) and the order of the trial court excluding the battalion chiefs from the bargaining unit should be sustained." (p. 111)

The County admits that the District Court Coordinator has no responsibility for formulating labor relations policy.

In its carefully reasoned memorandum of authorities on petition for review, the County urges us to apply the rule of NLRB v. Bell Aerospace Co.(Textron), 416, U.S. 267, and hold that the District Court Coordinator is a managerial employee and, hence, excluded from the definition of "public employee" in RCW 41.56.030(2) by implication.

In the Textron case, the United States Supreme Court held that certain buyers might be managerial employees traditionally excluded by the National Labor Relations Board from the definition of "employee" in section 2 of the National Labor Relations Act.

The court reviewed the Board's decisions with respect to buyers and managerial employees and remanded the case to the Board for reconsideration and application of a proper legal standard to the facts. The court said:

> "Finally, in Swift & Co., 115 NLRB 752, 753-754 (1956), the Board reaffirmed its long-held understanding of the scope of the Act. In refusing to approve a unit of procurement drivers who were found to be representative of management, the Board declared:
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> > 'It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management. Such individuals cannot be deemed to be employees for the purposes of the Act. Accordingly, we reaffirm the Board's position that representatives of management may not be accorded bargaining rights under the Act....' (Footnotes omitted.)
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> Until its decision in North Arkansas in 1970, the Board consistently followed this reading of the Act. It never certified any unit of 'managerial employees,' separate or otherwise, and repeatedly stated that it was Congress' intent that such employees not be accorded bargaining rights under the Act. And it was this reading which was permitted to stand when Congress again amended the Act in 1959. 73 Stat. 519.
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> The Board's exclusion of 'managerial employees' defined as those who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer,' has also been approved by courts without exception. (Citations omitted.) And in NLRB v. North Arkansas Electric Cooperative, Inc., 446 F.2d 602 (1971), the Eighth Circuit reviewed the history of the Act and specifically disapproved the Board's departure from its earlier position."

Our statute with respect to public employees as construed in the Metro and Yakima cases virtually precludes application of Textron to the facts of this case.

The District Court Coordinator does not stand in a fiduciary relationship to the District Court judges. This employee arranges trial schedules, makes up calendars, handles requests for continuances, handles jurors' questionnaires, explains court procedures to jurors and acts as bailiff when juries are sitting.

In its closing statement and memorandum, the County states on page 10:

> "In addition, she is responsible for gathering information on any potential misconduct by attorneys or jurors. The jury questionnaire contains questions of a personal nature, the answers to which are not public record. She also handles confidential instructions from both judges involving certain attorneys and the scheduling of trials when those attorneys are involved."

The testimony is somewhat equivocal on these points and does not carry the weight necessary for exclusion from the definition of "public employee". Judge Albers testified:

"Q (Interposing) Let me ask you a particular question. How about with regard to information gathered on possible misconduct of jurors or attorneys?

A Yes, we have had occasions where things of that nature have been discussed and not acted upon, and of course even if they were it would be a high degree of confidentiality involved.

* * *

Q Okay. Are there any confidential instructions between the judges and her involving what kinds of trials are to be set or when trials are to be set?

A I wouldn't say those are confidential. There are many instructions involving those things that's true, and they're confidential instructions involving certain attorneys. We know when a certain attorney's involved that this matter -- no way it's going to be done in an hour, and naturally that knowledge we don't want it spread around that we know those things because it would damage our relationship with an attorney, if he was known as a windbag or a feisty-fighter to have delayed everything, and there are attorneys who take longer than others, I'll put it that way."

From this testimony we infer that the Coordinator reports to the judges' complaints about misconduct of attorneys or judges, but that such reports are rare, she does not follow up with actual investigation, and makes no recommendations with respect thereto.

We find that the Coordinator handles the routine work of making up dockets, scheduling cases and handling juries necessarily incident to a smoothly functioning district court. Obviously, the employee must be a person of good judgment, tact, fairness and integrity. These essential qualities do not create a fiduciary relationship within the meaning of the Yakima case.

The County seems to be under the impression that inclusion of an employee in a unit for collective bargaining somehow relieves the employee from the obligations of loyalty, integrity and discretion normally attendant on public employment and also private employment. Such is not the case.

The order clarifying bargaining unit entered by the Executive Director on January 12, 1979 is affirmed.

Dated at Olympia this 13th day of April, 1979.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Mary Ellen Krug
MARY ELLEN KRUG, Chairman

Paul A. Roberts
PAUL A. ROBERTS, Commissioner

Don E. Olson
DON E. OLSON, JR., Commissioner