STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of: CITY OF SPOKANE VALLEY and WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES For clarification of an existing bargaining unit.	CASE 21449-C-08-1324 DECISION 10158-A - PECB DECISION OF COMMISSION

Summit Law Group PLLC, by *Elizabeth R. Kennar*, Attorney at Law, for the employer.

The City of Spokane Valley (employer) and Washington State Council of County and City Employees (union) filed a joint unit clarification petition seeking a determination of whether an administrative assistant in the City Attorney's Office is a confidential employee within the meaning of Chapter 41.56 RCW and WAC 391-35-310. The City Attorney's Office is comprised of the city attorney, a deputy city attorney, an administrative assistant, and legal interns working on a temporary basis. The administrative assistant provides clerical support for the two attorneys, including answering phones, maintaining files, providing legal research, and drafting documents. Patti McConville is the current administrative assistant.

Executive Director Cathleen Callahan ordered a hearing and, based upon the developed record, found that McConville was not a confidential employee.[1] The employer now appeals that decision.

---

[1] *City of Spokane Valley*, Decision 10158 (PECB, 2008).

ISSUE PRESENTED

Does this record support the Executive Director's findings and conclusions that the administrative assistant in the City Attorney's Office is not a confidential employee?

Having reviewed the record presented, we find that substantial evidence supports the Executive Director's findings and conclusions. Accordingly, we affirm.

STANDARD OF REVIEW

This Commission reviews conclusions and applications of law and interpretations of statutes de novo. We review findings of fact to determine if they are supported by substantial evidence and, if so, whether those findings support the Executive Director's conclusions of law. *C-TRAN (Amalgamated Transit Union, Local 757)*, Decision 7087-B (PECB, 2002). Substantial evidence exists if the record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the matter. *Renton Technical College*, Decision 7441-A (CCOL, 2002).

APPLICABLE LEGAL STANDARD

This Commission, using long-standing established case precedent, applies a labor nexus test to determine the confidential status of employees to be included or excluded from a bargaining unit. That test, accepted in *International Association of Fire Fighters, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978), and consistently applied since, states that a confidential employee is an employee whose duties imply a confidential relationship that must flow from an official intimate fiduciary relationship with the executive head of the bargaining unit or public official and involve confidential collective bargaining information.

Confidential employees are denied statutory collective bargaining rights, and therefore a heavy burden is placed on the party seeking that confidential determination. *City of Seattle*, Decision 689-A (PECB, 1979). Labor relations responsibilities must be necessary, regular, and ongoing to make an employee confidential. *Yakima School District*, Decision 7124-A (PECB, 2001)(citing *Oak Harbor School District*, Decision 3581 (PECB, 1990).

An employer may not obtain an excessive number of confidential exclusions by giving little bits of confidential duties to a large number of employees. *Clover Park School District*, Decision 2243 (PECB, 1987). Employees, and in particular supervisors who are sources of important information to the employer's bargaining team, are not rendered confidential merely because they might have access to the employer's confidential labor relations materials or provide input to the employer's labor relations team. *Pierce County*, Decision 8892-A (PECB, 2005), citing *City of Puyallup*, Decision 5460 (PECB, 1996); *see also City of Aberdeen*, Decision 4174 (PECB, 1992)(sporadic or occasional exposure to labor relations matters or use of an employee as a "sounding board" for management positions on labor relations matters where no "necessity" for such discussions has been established will not result in the exclusion of an employee from a bargaining unit). Furthermore, an employer must communicate to an employee its expectation that the labor relations information or material be kept confidential. *See, e.g., Pateros School District*, Decision 3911-B (PECB, 1992) (employee found not to be confidential where the record was void of any indication that the employer expected the information she prepared to be kept confidential at any time).

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. *City of Yakima*, 91 Wn.2d at 106-107 (emphasis added). General supervisory responsibility is insufficient to place an employee within the exclusion. *City of Yakima*, Wn.2d at 107. This type of exclusion prevents potential conflicts of interest between the employee's duty to his employer and status as a union member. *Walla Walla School District*, Decision 5860 (PECB, 1997). If the employee's official duties provide them access to sensitive information regarding the employee's collective bargaining position, that employee should not be placed in a position where that employee must question whether his or her loyalty lies with the employer or with the exclusive bargaining representative who is trying to attain the best agreement for that employee and his or her co-workers. *State - Natural Resources*, Decision 8458-B (PSRA, 2005).

Not only is the *City of Yakima* decision one of the agency's oldest precedents that has been applied unchanged since its announcement it in 1978, it is so well understood by the clientele practicing before this agency that the Commission codified the standard in 2001 when it adopted WAC 391-35-320. *City of Lynden*, Decision 7527-B (PECB, 2002). Accordingly, it is

disingenuous and a misuse of state resources for parties to attempt to argue that "confidential employee" means anything different.

Leading Questions

A leading question is one that contains within it the suggestion of the answer to be given; in order to be leading it need not necessarily require a "yes" or "no" answer. *Lyle School District*, Decision 2736-A (PECB, 1988). Leading questions in direct examination detract from the candor, and perhaps more importantly, from the persuasiveness of the testimony of a witness who has been led. *Lyle School District*, Decision 2736-A. In representation or unit clarification cases, leading questions offer little probative value about the actual duties of an employee because that witness is merely answering, either in the negative or affirmative, counsel's interpretation of the employee's duties. Answers to leading questions will not support a finding of fact without additional evidence.

Application of Standard

The Executive Director held that the employer failed to demonstrate that McConville's duties met the labor nexus test for establishing her as a confidential employee. In reaching this conclusion, the Executive Director found that the employer failed to demonstrate with any specificity how McConville was privy to the employer's confidential labor relations information. The Executive Director also noted that, even though the employer granted McConville considerable discretion in performing her duties, that trust and responsibility did not satisfy the labor nexus test.

The employer claims that the Executive Director ignored testimony demonstrating that McConville had access to and was responsible for labor relations information. The employer also argues that requiring its witnesses to testify about specific instances of participation in the labor relations process would force the employer to disclose sensitive confidential information that could be damaging to the employer's interests and the bargaining process. In the employer's opinion, it has provided the necessary evidence to demonstrate that McConville is a confidential employee. We disagree.

In *City of Yakima*, Decision 9983-A (PECB, 2008), this Commission stated that the "high burden of proof required to exclude an employee from all bargaining rights, and the regularity, necessity, and continuing nature of labor nexus duties require more than vague and conclusory statements provided by the employer's witnesses." In that case, an employer sought to exclude three police captains as confidential employees. The Commission affirmed the Executive Director's conclusion that one particular captain was a confidential employee because enough specific instances were provided demonstrating how he performed labor relations duties, including attendance at specific meetings in addition to anecdotal evidence regarding input he provided about specific policies that were being bargained. However, the Commission reversed the Executive Director's conclusion that two other captains were confidential because the employer could only provide vague references as to how those two employees attended labor relations meetings, and the employer was unable to provide specific instances as how the employees' duties satisfied the labor nexus test.

We agree with the Executive Director that the employer failed to provide specific instances as to how McConville's official duties assisted the employer in formulating its labor relations strategy. During direct examination, employer's counsel asked several series of leading questions when attempting to develop a record regarding McConville's duties. For example, the following exchange occurred during the employer's direct examination of McConville:

> Q. When you say for the most part, are there additional duties that you do that aren't accurately reflected here in your opinion?
>
> A. Well, basically I'm the only support person in that office. So everything that enters the office, leaves the office I touch, one way or the other, whether it's electronic or hard copy. There's no way really to put that on paper. I -- so yes, for the most part this is.
>
> Q. Okay. And when you say everything that comes in the office, let's talk about electronic. Do you have access to Mike Connelly's Outlook and e-mail?
>
> A. Yes, I do.
>
> Q. Do you have access to Cary Driskell's e-mail?
>
> A. Yes, I do.
>
> Q. So are you then privy to any communication that may come in from outside counsel?

A. Yes.

Q. Are you privy to any communication that may come from a department director regarding an employee misconduct issue?

A. Yes.

Q. Can you -- other than -- strike that. In terms of the hard copies, are there hard copies of files?

. . .

A. Yes.

Q. And do you maintain all those?

A. Yes, I do.

Q. What about drafts of documents, do you maintain those?

A. Yes.

Q. And do you maintain an electric file for those drafts?

A. Yes, I do.

Transcript, page 65, line 16 though page 66 line 22.[2] Although the union did not object to the employer's line of questioning, that fact is irrelevant. Inasmuch as unit clarification proceedings are "investigatory," rather than "adversary," litigation concepts are inapplicable. *Pierce County Rural Library District*, Decision 7035 (PECB, 2000).

Although we recognize that some questions can only be answered in the negative or affirmative, parties should nevertheless ask questions about employee job duties in a manner that allows the employee to describe those duties. Here, because there are several instances where employer's counsel asked leading questions in order to describe McConville's job duties in order to demonstrate how she is a confidential employee, we grant that testimony only minimal weight.[3] Furthermore, even where employer witnesses provided competent testimony, that testimony

---

[2] A second example of where employer's counsel asked leading questions during direct examination is Transcript, page 70, line 6 through page 78, line 15.

[3] Although we are more tolerant of leading questions during cross-examination and for witnesses called by the adverse party, parties should still ask questions that allow the employee or witness to answer the question asked.

failed to demonstrate specific instances of how she contributes to the formulation of the employer's labor relations strategy. We agree with the employer that an employer should not be required to divulge current labor relations strategy in order to demonstrate that an employee is confidential within the meaning of Chapter 41.56 RCW. However, a witness can still provide testimony about specific instances where that employee was asked to provide necessary input to the employer's labor relations strategy. Without specific instances demonstrating exactly how McConville contributed to formulating the employer's labor relations strategy, the employer has failed to meet its heavy burden to exclude McConville from her collective bargaining rights.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Executive Director in the above-captioned case are AFFIRMED.

ISSUED at Olympia, Washington, this 17th day of November, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

THOMAS W. McLANE, Commissioner