

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

PROTEC17

Involving certain employees of:

CITY OF SEATTLE

CASE 132063-E-19

DECISION 13097-A - PECB

ORDER ON ELIGIBILITY

*Paul Marvy*, Projects Administrator, for PROTEC17.

*Tamara Gerrard* and *Paul A. Olsen*, Assistant City Attorneys, for the City of Seattle.

On August 28, 2019, PROTEC17 (union) filed a representation petition seeking to represent the Council Central Staff Legislative Analysts and Analyst/Supervisors of the City of Seattle (employer). The employer objected to the inclusion of legislative analyst Karina Bull as a confidential employee. An interim certification of the unit was issued with the employer's eligibility objections remanded for further investigation. On February 13, 2020, Hearing Officer Loyd Willaford held a hearing on the employer's confidential status objection. Bull is a confidential employee within the meaning of RCW 41.56.030(11)(c) and is excluded from the bargaining unit.

BACKGROUND

The employer has collective bargaining agreements with approximately 28 different unions. Approximately 24 of these unions bargain in a coalition. By statute, the employer's city council must approve all collective bargaining agreements. The employer has a labor relations policy committee (LRPC) that meets regularly. The LRPC members include five city council members and members of the employer's executive team. At the preparatory meetings and the actual LRPC

meetings, the employer sets its bargaining strategy and parameters. The employer expects and instructs its employees to keep information discussed in the LRPC process confidential.

The employer employs 15 legislative analysts. The analysts perform a number of duties including gathering information and advising the city council on the various matters that come before it. The analysts do research and provide advice on a wide variety of topics as assigned by the council. The analysts are assigned specific topic areas within three broad groups of topics. Each group is headed by a supervisor.

One of the analysts is assigned to work on labor relations topics. Historically, this analyst attends and participates in LRPC meetings and meets with the employer's executive staff to prepare for the LRPC meetings. This analyst also attends collective bargaining sessions and updates city council members on the progress of bargaining. The employer has also invited analysts who have subject matter expertise relevant to specific topics to attend and participate in LRPC meetings.

Karina Bull is the analyst currently assigned to topics related to labor relations. Bull also works on matters related to the office of employee ombud, the human resources department, the office of labor standards, and gender equity topics. Bull began working in the analyst position three months before the union filed the petition in this matter. Prior to the hearing, Bull was in an observational role in the LRPC meetings and other meetings related to collective bargaining. Bull's supervisor also attended the LRPC meetings. Bull's initial observational role and the supervisor's participation in these meetings were for training purposes. Bull will transition to performing the functions independently (as had prior individuals in her position). Bull has participated in one-on-one meetings with city council members regarding labor issues. In those meetings, Bull has answered substantive questions regarding documents produced for bargaining purposes. As part of the position's duties, Bull has updated a memo on the employer's collective bargaining process. This memo states that the central staff executive director and a legislative analyst attend all LRPC meetings, which are nonpublic meetings where the employer discusses its labor strategy.

ANALYSISApplicable Legal Standards

The creation and maintenance of appropriate bargaining units is a function of this agency. RCW 41.56.060. The purpose of this function is to ensure there is a community of interest among the employees sufficient to enable them to bargain effectively with their employer. *Central Washington University*, Decision 9963-B (PSRA, 2010); *Quincy School District*, Decision 3962-A (PECB, 1993). Only those personnel who qualify as “public employees” may exercise collective bargaining rights under the statute. RCW 41.56.030(11).

Excluded from this definition are employees whose duties imply a confidential relationship to the bargaining unit or to the executive management of the employer, such as an appointee to a board, commission, or committee for a particular term of an elected official. RCW 41.56.030(11)(c)(i–iii). Accordingly, anyone who meets the confidential employee definition is precluded from exercising collective bargaining rights under the statute. *Id.* Because confidential employees are precluded from exercising collective bargaining rights, a heavy burden is placed on the party seeking that confidential determination. *City of Seattle*, Decision 689-A (PECB, 1979).

A confidential employee is further defined as any employee who participates directly on behalf of the employer in the formulation of labor relations policy, the preparation for or conduct of collective bargaining, or the administration of collective bargaining agreements. WAC 391-35-320(1). The nature of the work that creates the confidential status should be more than routine or clerical in nature. Rather, the work must call for the consistent exercise of independent judgment. *Id.*; *see also, City of Lynden*, Decision 7527-B (PECB, 2002).

In determining whether the work performed by an employee is confidential in nature, a labor relations nexus test is used to examine the employee’s current duties. *City of Yakima*, Decision 9983-A (PECB, 2008). The labor nexus test examines whether the employee’s current duties imply a confidential relationship that flows from an official intimate fiduciary relationship with the

executive head of the bargaining unit or public official. *International Association of Fire Fighters, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978).

The confidential exclusion depends on the particular association of the persons involved, rather than on any arbitrary test including title, position on organization chart, job description, or role. *See Shelton School District*, Decision 1609-B (PECB, 1984). “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 107. The exclusion prevents potential conflicts of interest between the employee’s duty to their employer and status as a union member. *Walla Walla School District*, Decision 5860-A (PECB, 1997). An employee’s official duties may provide them with access to sensitive information regarding the employer’s collective bargaining position. In that case, the employee’s loyalties should not be placed in a position where they could be questioned by either the employer or bargaining unit. *State – Natural Resources*, Decision 8458-B (PSRA, 2005). Any relied-upon labor relations responsibilities must be necessary, regular, and ongoing. *Yakima School District*, Decision 7124-A (PECB, 2001) (citing *Oak Harbor School District*, Decision 3581 (PECB, 1990)).

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, 2006). General supervisory responsibility is insufficient to render an employee confidential. *City of Yakima*, 91 Wn.2d at 107. 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) (finding that employee was not confidential where the record was void of any indication that the employer expected the information she prepared to be kept confidential at any time). Finally, an employer may not obtain an excessive number of confidential exclusions by spreading out confidential duties to a large number of employees. *See, e.g., Clover Park School District*, Decision 2243-A (PECB, 1987), *aff’d*, Decision 2243-B (PECB, 1987).

Application of Legal Standards

Bull is a confidential employee who is excluded from collective bargaining because there is a labor nexus to Bull's work with the city council. Bull's participation on behalf of the employer in the preparation for, and conduct of, collective bargaining meets the standard for confidential employee outlined in WAC 391-35-320.

Bull regularly briefs city council members and answers their questions about labor-related topics. Bull revised a memo produced by a prior labor relations legislative analyst that outlined the employer's labor relations process. The evidence produced at the hearing established that Bull's predecessor regularly met with city council members and received and relayed information both to the city council and to the employer's bargaining team. The employer's representative credibly testified that Bull was in training to do the same work, including briefing council members on the progress of collective bargaining and representing the council's interests to the employer's bargaining team.

The union argues that the employer has offered mere speculation about Bull's future role and that this is not enough to make Bull a confidential employee. The present case differs from *Yakima School District*, Decision 7124-A (PECB, 2001), where the Commission found that a certificated placement coordinator was not a confidential employee. In that case, the employer provided nonspecific evidence that the new coordinator was "involved with" labor relations issues and that the employer intended to have her involved in labor strategy sessions in the future. The Commission found that this was not specific enough to suggest that the coordinator currently performed confidential duties. In the present case, the employer presented evidence of current confidential work and not merely speculation about future work. Bull attended bargaining sessions, received confidential bargaining information, and answered city council member's questions about this information.

The union also argues that Bull merely received confidential information and did not exercise any discretion regarding the information. Where the Commission has found that nondecision-making employees who have access to confidential information are not confidential employees, there has been evidence that the employees merely relayed information related to bargaining in one direction

to decision makers; the employees did not provide actual input to or from the decision makers. *See, e.g., Lewis County*, Decision 12312 (PECB, 2015). In the present case, Bull does more than merely relay information in one direction. Bull is responsible for representing the city council's views on labor-related matters to the employer's bargaining team and is responsible for updating the city council on the progress of collective bargaining.

Finally, the union suggests that for Bull to be a confidential employee, the confidential work must be a majority of the job duties. The collective bargaining work is not required to be the majority of Bull's job. Rather, it is only necessary that Bull regularly receives confidential information and that the work Bull performs related to this information be more than merely routine or clerical. *See Oak Harbor School District*, Decision 3581 (PECB, 1990). Bull briefs the city council on labor-related matters and receives confidential labor-related information and performs more than mere clerical tasks with the information. The evidence produced at hearing is sufficient to meet the employer's burden of proof on this topic.<sup>1</sup>

### CONCLUSION

For the reasons given above, legislative analyst Karina Bull is a confidential employee and is excluded from the bargaining unit.

### FINDINGS OF FACT

1. The City of Seattle (employer) is an employer within the meaning of RCW 41.56.030(12).
2. PROTEC17 (union) is a bargaining representative within the meaning of RCW 41.56.030(2).

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<sup>1</sup> While the union argues that Bull's supervisors are serving or could serve in the confidential capacity that her predecessor occupied, the Commission does not dictate to employers how to deploy their workers, so long as that deployment does not violate collective bargaining rights. Employers are permitted to have confidential employees. One such employee from this unit is not an excessive number. *See Yakima School District*, Decision 7124-A (PECB, 2001) (finding three confidential employees was excessive).

3. The union represents a bargaining unit of Council Central Staff Legislative Analysts and Analyst/Supervisors.
4. The employer employs 15 legislative analysts. The analysts perform a number of duties including gathering information and advising the city council on the various matters that come before it. The analysts do research and provide advice on a wide variety of topics as assigned by the council.
5. By statute, the employer's city council must approve all collective bargaining agreements.
6. The employer has a labor relations policy committee (LRPC) that meets regularly. The LRPC members include five city council members and members of the employer's executive team. At the preparatory meetings and the actual LRPC meetings, the employer sets its bargaining strategy and parameters. The employer expects and instructs its employees to keep information discussed in the LRPC process confidential.
7. One of the analysts is assigned to work on labor relations topics. Historically, this analyst attends and participates in LRPC meetings and meets with the employer's executive staff to prepare for the LRPC meetings. This analyst also attends collective bargaining sessions and updates city council members on the progress of bargaining.
8. Karina Bull is the analyst currently assigned to topics related to labor relations. Bull also works on matters related to the office of employee ombud, the human resources department, the office of labor standards, and gender equity topics. Bull began working in the analyst position three months before the union filed the petition in this matter. Prior to the hearing, Bull was in an observational role in the LRPC meetings and other meetings related to collective bargaining. Bull's supervisor also attended the LRPC meetings. Bull's initial observational role and the supervisor's participation in these meetings were for training purposes. Bull will transition to performing the functions independently (as had prior individuals in her position). Bull has participated in one-on-one meetings with city council members regarding labor issues. In those meetings, Bull has answered substantive questions regarding documents produced for bargaining purposes.

CONCLUSIONS OF LAW

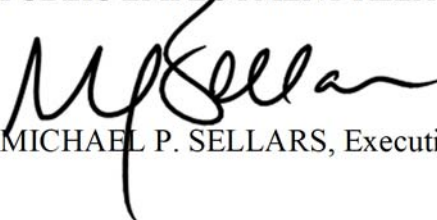
1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to chapter 41.56 RCW and chapter 391-25 WAC.
2. An employee whose actual duties imply a confidential relationship that flows from an official intimate fiduciary relationship with the executive head of the bargaining unit or public official is deemed to be confidential in nature.
3. A confidential employee who performs labor relations duties concerning a bargaining unit lacks a community of interest with that bargaining unit. The potential for conflicts of interest between the employee's duty to his or her employer and the employee's status as a union member precludes any community of interest.
4. Based upon findings of fact 4, 5, 6, 7, and 8, Karina Bull is a confidential employee who has a conflict of interest with the bargaining unit described in finding of fact 3.

ORDER

Karina Bull is excluded from the legislative analyst bargaining unit described in finding of fact 3.

ISSUED at Olympia, Washington, this 23rd day of June, 2020.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MICHAEL P. SELLARS, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-25-660.





# RECORD OF SERVICE

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ISSUED ON 06/23/2020

DECISION 13097-A - PECB has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

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CASE 132063-E-19

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