

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

WASHINGTON STATE OFFICE OF THE
ATTORNEY GENERAL

and

WASHINGTON FEDERATION OF STATE
EMPLOYEES

For clarification of an existing bargaining unit.

CASE 134347-C-21

DECISION 13384 - PSRA

ORDER CLARIFYING BARGAINING
UNIT

Herb Harris, Coordinator of PERC Activities, for the Washington Federation of State Employees.

Ann Green, Labor Relations Manager, for the Washington State Office of the Attorney General.

On July 21, 2021, the Washington State Office of the Attorney General (employer) and the Washington Federation of State Employees (union) jointly filed a unit clarification petition concerning the civil service employees in the employer's Torts division. The union represents a bargaining unit of civil service employees in the employer's legal divisions, General Services units, and Facilities unit. *Washington State Office of the Attorney General, Decision 13216 (PSRA, 2020)*. Confidential employees are specifically excluded from the union's bargaining unit. The employees in the Torts division have been excluded from the bargaining unit as confidential employees under a unique provision of former RCW 41.80.005(4) that deemed employees who assist assistant attorneys general who represent the state in tort actions to be confidential.

In 2021, the Legislature amended the RCW 41.80.005(4) to eliminate the unique statutory provision that applied to employees who assist assistant attorney generals in tort actions. The

parties assert that the employees in the Torts division do not meet the new confidential employee definition and should be included in the union's bargaining unit.

The civil service employees in the Torts division shall be included in the union's bargaining unit because they do not meet the new RCW 41.80.005(4) definition for confidential employees. The union's bargaining unit encompasses all of the civil service employees in the employer's legal divisions and the employees in the Torts division were only excluded on the basis of the unique provision of former RCW41.80.005(4). The employees do not perform duties that would exclude them from the bargaining unit as confidential employees under the remaining statutory language.

ANALYSIS

The creation and maintenance of appropriate bargaining units is a function of this agency. RCW 41.80.070. 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).

This agency also has the authority to modify an existing bargaining unit, upon request, through a unit clarification proceeding. Chapter 391-35 WAC; *University of Washington*, Decision 11590 (PSRA, 2012), *aff'd*, Decision 11590-A (PSRA, 2013); *see also Pierce County*, Decision 7018-A (PECB, 2001). The general purpose of the unit clarification process is to provide this agency as well as the parties to a collective bargaining relationship a mechanism to make changes to an appropriate bargaining unit based upon a change of circumstances. *See, e.g., Toppenish School District*, Decision 1143-A (PECB, 1981) (outlining the procedures to remove supervisors from existing bargaining units).

Confidential employees are precluded from exercising collective bargaining rights under chapter 41.80 RCW. RCW 41.80.005(6)(b). RCW 41.80.005(4) contained two different ways in which an employee can be deemed confidential. An employee is considered confidential if they "in the regular course of his or her duties, assists in a confidential capacity persons who formulate,

determine, and effectuate management policies with regard to labor relations or who, in the regular course of his or her duties, has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies, or who assists or aids a manager". RCW 41.80.005(4). This definition mirrors the agencies traditional labor-nexus test that it has traditionally applied when determining whether an employee is confidential in nature. *See State – Natural Resources*, Decision 8458-B (PSRA, 2005). Under the labor nexus test, an employee's duties are examined for a labor nexus and whether the employee's actual duties imply a confidential the bargaining unit or public official. *International Association of Fire Fighters, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978). This test originated for employees covered by the Public Employees' Collective Bargaining Act, chapter 41.56 RCW, but has been adopted and applied to employees covered by chapter 41.80 RCW. *State – Natural Resources*, Decision 8458-B.

Employees are also deemed confidential if the employees "assist assistant attorneys general who advise and represent managers or confidential employees in personnel or labor relations matters, or who advise or represent the state in tort actions." RCW 41.80.005(4). In determining whether an employee should be excluded under this provision, the level of assistance that the employee provides to an assistant attorney general is examined but the labor nexus test is not applied. *State - Natural Resources*, Decision 8711-B (PSRA, 2006).

In 2021, the Legislature amended the RCW 41.80.005(4) confidential employee definition to remove the language concerning employees who assist attorneys general that advise or represent the state in tort actions. Now, an employees will be deemed confidential if that employees duties either meets the labor nexus test or if the employee assists assistant attorneys general who advise and represent managers or confidential employees in personnel or labor relations matters.

Application of Standards

The civil service employees in the torts division are not confidential employees within the meaning of RCW 41.80.005(4) and must be included in the union's bargaining unit. When the bargaining unit was originally certified, the parties agreed that the civil service employees in the Torts division

were excluded from the bargaining unit because those employees assisted assistant attorneys general who advise or represent the state in tort actions. Following the 2021 statutory change, the civil service employees in the Torts division could only remain excluded from the bargaining if they met the remaining definition for confidential employees. The parties assert that the civil service employees in the Torts division do not perform duties that meet the traditional labor nexus test and the employees do not assist assistant attorneys general who advise and represent managers or confidential employees in personnel or labor relations matters. Because the civil service employees in the Torts division no longer meet the confidential exclusion, those employees are appropriately included in the union's bargaining unit under the existing bargaining unit description.

FINDINGS OF FACT

1. The Washington State Office of the Attorney General is an employer within the meaning of RCW 41.80.005(8).
2. The Washington State Federation of State Employees (union) is an employee organization within the meaning of RCW 41.80.005(7).
3. The union represents a bargaining unit of civil service employees in the employer's legal divisions, General Services units, and Facilities unit. *Washington State Office of the Attorney General, Decision 13216 (PSRA, 2020)*. Confidential employees are specifically excluded from the union's bargaining unit.
4. The employees in the Torts division have been excluded from the bargaining unit as confidential employees under a unique provision of former RCW 41.80.005(4) that deemed employees who assist assistant attorneys general who represent the state in tort actions to be confidential.

5. In 2021, the Legislature amended the RCW 41.80.005(4) to eliminate the unique statutory provision that applied to employees who assist assistant attorneys general in tort actions.
6. The civil service employees in the Torts division do not perform duties that meet the traditional labor nexus test and the employees do not assist assistant attorneys general who advise and represent managers or confidential employees in personnel or labor relations matters.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to chapter 41.80 RCW and chapter 391-35 WAC.
2. Based upon findings of fact 5 and 6, the employees described in finding of fact 4 are not confidential employees within the meaning of RCW 41.80.005(4) and WAC 391-35-320.

ORDER

The civil service employees in the Torts division at the Washington State Office of the Attorney General shall be included in the bargaining unit described in finding of fact 4.

ISSUED at Olympia, Washington, this 29th day of July, 2021.

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 391-35-210.



RECORD OF SERVICE

ISSUED ON 07/29/2021

DECISION 13384 - PSRA has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

BY: DEBBIE BATES

CASE 134347-C-21

EMPLOYER: WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL

REP BY: FRANKLIN PLAISTOWE
OFFICE OF FINANCIAL MANAGEMENT
LABOR RELATIONS SECTION
PO BOX 47500
OLYMPIA, WA 98504-7500
labor.relations@ofm.wa.gov

ANN GREEN
OFFICE OF FINANCIAL MANAGEMENT
INSURANCE BUILDING
PO BOX 43113
OLYMPIA, WA 98504-3113
ann.green@ofm.wa.gov

PARTY 2: WASHINGTON FEDERATION OF STATE EMPLOYEES

REP BY: HERB HARRIS
WASHINGTON FEDERATION OF STATE EMPLOYEES
1212 JEFFERSON ST SE STE 300
OLYMPIA, WA 98501-2332
perc@wfse.org