STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	
WASHINGTON FEDERATION OF STATE EMPLOYEES	)	CASE 17922-E-03-2893
	)	DECISION 8458-A - PSRA
Involving certain employees of:	)	
	)	
WASHINGTON STATE - NATURAL RESOURCES	)	ORDER CLARIFYING BARGAINING UNIT
	)	

Parr Younglove Lyman & Coker, by *Edward Earl Younglove III*, Attorney at Law, for the union.

Roger Theine, Assistant Human Resources Division Manager, for the employer.

On October 15, 2003, the Washington Federation of State Employees (union) filed a petition with the Public Employment Relations Commission, seeking certification as exclusive bargaining representative of certain employees of the Washington State Department of Natural Resources (employer). An investigation conference was conducted, and eligibility issues were framed in an Investigation Statement issued on February 9, 2003.[1] The Commission staff conducted a representation election, in which the disputed employees had the opportunity to vote by challenged ballot. The union prevailed in that election, and an Interim Certification was issued on March 15, 2004. The case was held open to resolve the eligibility issues, and Hearing Officer Christy L. Yoshitomi held

[1] Eleven individuals were claimed to be confidential employees; five others were claimed to be supervisors; one other was disputed on other grounds.

a hearing on September 9, 2004. Prior to that hearing, a motion for intervention filed by the Washington Public Employees Association was denied, and the WFSE acknowledged that one of the employees originally at issue was properly excluded as a supervisor.[2] At the hearing, the employer withdrew the other supervisor claims and withdrew its objection concerning the employee that had been disputed on other grounds.[3] The hearing was thus confined to the claims of confidential status advanced by the employer. The parties filed post-hearing briefs.

ISSUES

1. What is the proper interpretation of the "assists in a confidential capacity" clause of RCW 41.80.005(4)?

2. What is the proper interpretation of the "authorized access to information" clause of RCW 41.80.005(4)?

3. Are anticipated or contemplated future duties a basis for a ruling on confidential status?

4. Are any or all of the disputed employees (Lori Anthonsen, Pouth Ing, Robert Brauer, Marica Wendling, Phillip Aust, Laura Jane Mattishaw Chavey, Blanche Sobottke, Dena Scroggie, Luis Prado, Nancy Charbonneau and/or Princess Jackson-Smith) excludable as confidential employees?

---

[2] During the investigation conference, the employer claimed Sandra Bahr should be excluded as a supervisor.

[3] During the investigation conference, the employer claimed Wendy Gerstel, Marsha Hixon, Zdenek Donda and Steven Ivey should be excluded from the bargaining unit, as supervisors, and that Dorian Smith should be excluded from the bargaining unit on other grounds.

The Executive Director rules that, with the exception of Robert Brauer and Marcia Wendling, the disputed employees are not excludable as confidential employees at this time.

ANALYSIS OF ISSUE 1 - The "Assists" Clause

The employer asserts that the "assists" clause in RCW 41.80.005(4) is both broader than the "participates directly" language used in other confidential employee definitions, and that it is a basis to find a legislative intent to have the Personnel System Reform Act (PSRA) interpreted differently from other state laws. The union supports giving the PSRA language the interpretation customarily given to confidential employee exclusions.

The PSRA contains several definitions that are pertinent to this case, as follows:

> RCW 41.80.005 DEFINITIONS. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.
>
> . . .
>
> (2) "Collective bargaining" means the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times and to bargain in good faith in an effort to reach agreement with respect to the subjects of bargaining specified under RCW 41.80.020. The obligation to bargain does not compel either party to agree to a proposal or to make a concession, except as otherwise provided in this chapter.
>
> . . .
>
> (4) "Confidential employee" means an employee who, 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. "Confidential employee" also includes employees who

> 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.
>
> . . .
>
> (6) "Employee" means any employee, . . . covered by chapter 41.06 RCW, except:
>
> . . .
>
> (b) Confidential employees;
>
> . . .
>
> (8) "Employer" means the state of Washington.
>
> . . .
>
> (11) "Labor dispute" means any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment with respect to the subjects of bargaining provided in this chapter, regardless of whether the disputants stand in the proximate relation of employer and employee. . . .

The PSRA definition of "confidential employee" was interpreted in *State - Labor & Industries*, Decision 8437-A (PSRA, 2004), where Commission and judicial precedents were reviewed, as follows:

> When the Legislature enacted the PSRA, it can be presumed to have been aware of a long line of precedents giving "confidential" exclusions a narrow interpretation. In *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978), the Supreme Court of the State of Washington wrote:
>
> > We hold that in order for an employee to come within the [exclusion], 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 added). The Supreme Court reasoned that a potential for conflicts of interest would arise if public employees could misuse legitimate access to an employer's confidential labor relations information.
>
> The Commission has consistently applied a labor nexus test for confidential employee exclusions since the *Yakima* decision was handed down.

The exclusion of confidential employees from the coverage of the PSRA was thus given a similar "labor nexus" interpretation that avoids potential for conflicts of interest that would undermine the collective bargaining process: "[I]nterpreting RCW 41.80.005(4) narrowly (and in a labor law context) is entirely consistent with the approach in *City of Yakima*, 91 Wn.2d 101." *State - Labor & Industries*, Decision 8437-A.

In the absence of a definition within the statute applicable to the case before it in *Yakima*, the Supreme Court embraced the definition contained in the Educational Employment Relations Act, at RCW 41.59.020(4)(c). In turn, the Commission codified that definition in its rules, as follows:

> WAC 391-35-320 EXCLUSION OF CONFIDENTIAL EMPLOYEES. Confidential employees excluded from all collective bargaining rights shall be limited to:
>
> (1) Any person who participates directly on behalf of an employer in the formulation of labor relations policy, the preparation for or conduct of collective bargaining, or the administration of collective bargaining agreements, except that the role of such person is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment; and
>
> (2) Any person who assists and acts in a confidential capacity to such person.

It is clear that RCW 41.80.005(4) differs from the EERA definition and from WAC 391-35-320, and there is no doubt that the Legislature had the capacity to enact provisions in the PSRA that substantively

differ from the definition used under other statutes. The question before the Executive Director in this case is whether there is a basis to conclude that the Legislature actually intended the term "confidential" to have a meaning in the PSRA substantially different from the same term in other statutes.

This employer bears a heavy burden to avoid the meaning generally given to "confidential" by the Supreme Court of the State of Washington: "[O]ver the years the term confidential, when used in reference to employees, has become something of a term of art in the law which developed from [the National Labor Relations Act]." *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101. The Supreme Court went on to announce that it would construe the term "confidential" in labor relations statutes as only encompassing persons that perform duties directly affecting the labor relations policy process.

A notable distinction between the PSRA definition and WAC 391-35-320 is that the PSRA language completely skips over the direct participants in the collective bargaining process. That omission is logical, however, if one considers the larger context in which the PSRA exists. The PSRA only applies to classified employees under the State Civil Service Law, Chapter 41.06 RCW. Thus:

- Separately elected officials (such as the Commissioner of Public Lands, who heads the agency involved in this case) are excluded from civil service by RCW 41.06.070(1)(e), which made it unnecessary to have an exclusion within the PSRA that aligns with the exclusion of elected officials in RCW 41.56.030(2)(a).
- Agency heads are excluded from civil service by RCW 41.06.070(1)(f), (g), and (h), which made it unnecessary to have an exclusion within the PSRA that aligns with the

exclusions of: the "chief administrative officer" referenced in RCW 28B.52.020(2), the "executive head of the bargaining unit" referenced in RCW 41.56.030(2), or the "chief executive officer" referenced in RCW 41.59.020(4)(a).

- Assistant directors and other titles are excluded from civil service in RCW 41.06.070(1)(g) and (w), as well as in RCW 41.06.071 through .079 and RCW 41.06.082 through .094, which made it unnecessary to have an exclusion of those positions from the definition of "employee" in the PSRA.

- Confidential secretaries are excluded from civil service by RCW 41.06.070(1)(g), (h), and (i), as well as in RCW 41.06.071 through .079 and RCW 41.06.082 through .094, which made it unnecessary to have an exclusion of those positions from the definition of "employee" in the PSRA.

- Appointed board and commission members are excluded from civil service by RCW 41.06.070(h), which made it unnecessary to have an exclusion from "employee" in the PSRA that aligns with the exclusion of appointed officials in RCW 41.56.030(2)(b).

- All executive assistants for personnel administration and labor relations in all state agencies are excluded from civil service by RCW 41.06.070(v), which made it unnecessary to have an exclusion of those positions from the definition of "employee" in the PSRA.

- Adding to the numerous exclusions from the coverage of the State Civil Service Law, the PSRA contains a blanket exclusion of all members of the Washington Management Service that is created within the State Civil Service Law, at RCW 41.06.022.

Analysis of the PSRA must start from a much broader exclusion of management personnel in state government entities than was allowed by our Supreme Court for local government entities in *Municipality*

of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977). Most, if not all, of the officials likely to be involved in the formulation and implementation of the state's labor relations policies are excluded from the coverage of the PSRA by operation of other statutes. This clearly reduced or eliminated the need for an exclusion of direct participants comparable to WAC 391-35-320(1).

A second notable distinction is that the "assists" language in RCW 41.80.005(4) only aligns with the exclusion of support personnel in WAC 391-35-320(2). *See State - Labor and Industries*, Decision 8437-A.

Taking the context distinctions into account, the fact that the PSRA definition of "confidential" differs from the definition embraced by the Supreme Court and restated in WAC 391-35-320 is not enough, by itself, to establish that the Legislature intended something substantively different from the "term of art" described by the Supreme Court in *City of Yakima*, 91 Wn.2d 101.

No evidence of legislative history has been presented by the employer in this case to affirmatively show that the Legislature intended the PSRA exclusion of "confidential" employees to have a meaning substantially different from other Washington collective bargaining statutes. As pointed out in *State - Transportation*, Decision 8317-A (PSRA, 2004), the Legislature was not coy about making other exclusions from the PSRA: It expressly excluded "internal auditors" from the coverage of the PSRA, at RCW 41.80.005(6)(d); it expressly excluded employees who assist assistant attorneys general in the processing of tort claims, at RCW 41.80.005(4); it expressly excluded three entire agencies from the coverage of the PSRA, at RCW 41.80.005(6)(e). The Legislature needed to be equally (or even more) explicit to overrule or avoid

the "term of art" interpretation given to "confidential" by the Supreme Court in *City of Yakima*, 91 Wn.2d 101.

Rejection of the employer argument is required by the PSRA language when it is subjected to close analysis:

- RCW 41.80.005(4) requires that those who "assist" in labor nexus work must do so in the "regular course of his or her duties . . ." to qualify for exclusion. Sporadic and non-routine assignments are insufficient to support exclusion of an employee as confidential under the statute. This clearly contradicts the blanket exclusion suggested by the employer.

- RCW 41.80.005(4) requires that those who "assist" in labor nexus work must do so "in a confidential capacity" to qualify for exclusion. That re-use of the term of art identified by the Supreme Court in *City of Yakima*, 101 Wn.2d 78, reinforces a conclusion that the PSRA exclusion should not be interpreted differently here.

The exclusion of "confidential" employees is not absolute and unqualified, as it is for internal auditors, for employees supporting attorneys on tort claims, or for the three agencies named in RCW 41.80.005(6)(e).

The employer cites National Labor Relations Board (NLRB) practice under the National Labor Relations Act (NLRA), but those arguments are not persuasive:

- The employer first cites a Hearing Officer's Guide issued by the Office of General Counsel of the NLRB, for the proposition that NLRB Hearing Officers are to explore the work of the person for whom a disputed employee works, as well as the work of an employee whose confidential status is in dispute. The NLRB document is easily harmonized with Commission and

judicial precedents under Washington law: The NLRB applies a labor nexus test similar to WAC 391-35-320, so exclusions of support personnel (sometimes referred to as "derivative" exclusions) are tied to the status of the person(s) assisted. The inquiry called for in the NLRB manual is always relevant to establish that the boss meets the labor nexus test before getting into the details concerning a disputed support employee under either RCW 41.80.005(4) or WAC 391-35-320(2).[4]

- The employer next cites the Representation Case Law Guide issued by the Office of General Counsel of the NLRB, for the proposition that "the amount of time devoted to labor relations matters is not the controlling factor in determining confidential status." Where the exclusion of "confidential" employees is entirely a product of case precedents under the NLRA, RCW 41.80.005(4) specifically limits "confidential employee" to "an employee who, in the *regular course of his or her duties*, assists in a confidential capacity . . ." (emphasis added). Thus, the time that an employee is involved in labor relations matters is a statutory factor to be considered under the PSRA. Consistent with the language of RCW 41.80.005(4), Commission precedent developed under other Washington statutes have held that sporadic contact or limited back-up work for another confidential employee will generally not be sufficient to meet the test for exclusion. *Mason School District*, Decision 1198 (PECB, 1965); *Clover Park School District*, Decision 2243-A (PECB, 1987).

The definition in RCW 41.80.005(4) must be applied in this case. The NLRB documents relied upon by the employer are not binding on

---

[4] The "derivative" confidential status terminates, under *Richland School District*, Decision 2208-A (PECB, 1985), if the boss ceases to have labor nexus duties.

the Commission, and certainly cannot be used as a basis to overrule or contradict the PSRA.[5]

The conclusion as to this issue is that simply providing support services to a state official who is excluded from the coverage of the PSRA is not sufficient to warrant a "confidential" exclusion. The person assisted must be performing labor nexus duties,[6] and the person providing assistance must actually assist in the performance

---

[5] In *Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24 (1981), our Supreme Court ruled that NLRB decisions and federal court decisions construing the NLRA are persuasive in interpreting state labor acts *which are similar to the NLRA*. That qualifier inherently sets the stage for the opposite to pertain: If the state and federal laws are dissimilar (as they are in many details), then federal practices and precedents cannot be considered persuasive, let alone binding, on the Commission.

[6] Other potentially sensitive tasks, including preparation of the employer's budget and interaction with outside groups (*e.g.*, native American, land owner, and environmental groups) are irrelevant for this purpose. Responsibilities which would be considered confidential in other contexts do not come within the meaning of the term "confidential" as it is used in labor relations:

> Public officials in a variety of settings have solemn responsibilities and fiduciary obligations which are enforced by other statutes, but "confidential" as those may be vis-a-vis the public, competitors in business or even other public employees, they are not disqualifying for purposes of exercising the rights conferred by the collective bargaining law. A position of responsibility and the ability of the employee to maintain the trust of the employer do not necessarily imply the type of confidentiality addressed by the Act. *City of Hoquiam*, Decision 880 (PECB, 1980).

Bellingham Housing Authority, Decision 2140-B (PECB, 1985).

of labor nexus functions in a confidential capacity, and must do so in the regular course of his or her duties.

ANALYSIS OF ISSUE 2 - The "Access" Clause

The employer asserts that the "access" clause in RCW 41.80.005(4) is a basis to find a legislative intent to have the PSRA interpreted differently from other state collective bargaining laws. The union again supports the interpretation customarily given to exclusions of "confidential" employees.

The statutory provisions applicable to analysis of this issue are largely the same as those applicable to the "assists" issue discussed above, and thus are not repeated here in full. The focus of this analysis is on the specific language that reads:

> "Confidential employee" means an employee . . . 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 . . ."

RCW 41.80.005(4). The employer would have that language contrasted with the "except that the role of such person is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment" clause in WAC 391-35-320(1). For the same reasons discussed in the foregoing analysis of the "assists" clause in RCW 41.80.005(4), a fundamental defect with the employer's argument is that it inaptly compares the PSRA language to WAC 391-35-320(1). The appropriate counterpart to the PSRA definition of "confidential" is WAC 391-35-320(2). The "is not merely routine or clerical in nature . . . independent judgement" clause cited by the employer would apply to people who are excluded from the coverage of the PSRA by operation of the State Civil Service Law.

The scope of privacy must also be considered in this case that arises in a state government context. The general rule under the state public records statute, Chapter 42.17 RCW, is that materials held by state agencies are subject to public disclosure. Beyond the public records statute, an employer must affirmatively designate materials that it claims to be "confidential" under the labor nexus test. In *Pateros School District*, Decision 3911-B (PECB, 1992), the Commission denied "confidential" status for an employee who prepared estimates of package costs for collective bargaining negotiations (which would usually be a basis for exclusion), but then delivered the figures to both the employer and union involved.

The narrow interpretation of "confidential" by the Supreme Court of the State of Washington must also be considered when interpreting the "access" clause. In *State - Labor & Industries*, Decision 8437-A (PSRA, 2004), the "labor nexus" test embraced in *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101, as found to be applicable to the exclusion of "confidential" employees under the PSRA. In the absence of definitions of either "authorized" or "access" within the PSRA, the rules of statutory construction call for using their dictionary definitions. *See State v. Fjermestad,* 114 Wn.2d 828 (1990) [terms may be given their dictionary definitions] and *State v. Sunich,* 76 Wn. App. 202 (1994) [ordinary dictionary definition may be used when a term, including a compound term, is not defined in a statute]:

- The first usage of term "authorize" in Webster's Third New International Dictionary (unabridged) is: "to endorse, empower, justify or permit by or as if by some recognized or proper authority."

- The usages of the term "access" in Webster's Third New International Dictionary (unabridged) include: "permission,

> liberty, or ability to enter, approach, communicate with, or pass to and from."

The compound term "authorized access" as used in RCW 41.80.005(4) then means that an employee must have an officially approved right to use "information relating to the effectuation or review of the employer's collective bargaining policies."

The repetition of the "regular course of his or her duties" concept as a qualifier to the "access" clause reinforces a conclusion that simply knowing how or where to access collective bargaining information or documents is insufficient to support a "confidential" exclusion. An employee would need to have been authorized to access the material on an ongoing basis. Conversely, preventing unauthorized access to confidential collective bargaining information (via screening and/or security devices ranging upward from simple "confidential" labels and locking file cabinets) is the responsibility of the employer.[7] A failure of the employer to take reasonable steps to protect itself cannot be a basis to deprive employees of their statutory bargaining rights. A narrow reading of the PSRA definition both conforms with *City of Yakima*, 91 Wn.2d 101, and supports a conclusion that, even when access to a document is authorized, an employee must be authorized to use the information contained in the confidential materials.

Further narrowing the "authorized access" clause in RCW 41.80.005(4), the Legislature used "*collective bargaining policies*" language that is somewhat narrower than the "*labor relations*" term

---

[7] Confidential exclusions proposed on the basis that office-clerical employees might read sensitive materials sent to a wide range of middle-management officials were rejected in *Clover Park School District*, Decision 2243-A (PECB, 1987). The simple solution was for the office-clerical employees to pass along the envelopes unopened.

used in the "assists" clause discussed above. Those terms have somewhat different meanings:

- The term "labor relations" is not defined in Chapter 41.80 RCW, but Black's Law Dictionary, Sixth Edition (1990) defines "labor-management relations" as, "[A] broad spectrum of activities which concern relationship of employees to employers . . ."

- The term "collective bargaining" is specifically defined in Chapter 41.80 RCW as follows:

> "Collective bargaining" means the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times and to bargain in good faith in an effort to reach agreement with respect to the subjects of bargaining specified under RCW 41.80.020. The obligation to bargain does not compel either party to agree to a proposal or to make a concession, except as otherwise provided in this chapter.

Collective bargaining thus is a subset or component of "labor relations" that involves bargaining in good faith in an effort to reach agreement with respect to mandatory subjects of bargaining.

Thus, the term "collective bargaining policies" used in the "authorized access" clause now under consideration is arguably to be given an even-narrower interpretation than the "labor relations" term used earlier in the same statutory subsection.[8]

---

[8] "Where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent." *American Continental Ins. Co. v. Steen,* 151 Wn.2d 512, (2004) [quoting *United Parcel Serv., Inc. v. Dep't of Revenue,* 102 Wn.2d 355,(1984)].

Although the Department of Natural Resources is headed by a separately-elected state official, it is nevertheless a general government agency for purposes of the PSRA. Under RCW 41.80.010, the responsibility for collective bargaining is vested in the Governor or the Governor's designee. That is a significant change from the situation that existed under the collective bargaining provisions formerly included in the State Civil Service Law at RCW 41.06.150, where the duty to bargain was vested at the agency level. As was noted in *State - Labor and Industries*, Decision 8437-A, the change of the locus of authority to represent the employer in collective bargaining inherently reduces the potential for and volume of labor nexus material to be kept "confidential" at the agency level.

The "free speech" language in the PSRA is cited by the employer as an additional basis for a broadened exclusion of "confidential" employees. RCW 41.80.110 proscribes employer and union unfair labor practices, and includes:

> (3) The expressing of any views, arguments, or opinion, or the dissemination thereof to the public, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under this chapter if such expression contains no threat of reprisal or force or promise of benefit.

There are, however, multiple reasons to reject that employer argument. First and foremost, the language relied upon by the employer in this case has close counterparts in the NLRA and other state collective bargaining laws, but no agency or court decision is cited for the proposition that it provides a basis to broaden the "labor nexus" test for confidential exclusions. Second, the argument in this case concerns employees who are involved in production of materials for dissemination to the public, which is the antithesis of keeping anything confidential.

The conclusion as to this issue is that the "authorized access" warranting exclusion as a confidential employee under the PSRA is limited to persons who have regular and ongoing authority to enter and use materials that are related to the employer's collective bargaining process.

ANALYSIS OF ISSUE 3 - SPECULATION AS TO THE FUTURE

The Commission has consistently, and often, rejected "confidential" claims based on assignments or responsibilities that employers would like to implement at some time in the future. *City of Redmond*, Decision 7814-B (PECB, 2003); *Colville School District*, Decision 5319-A (PECB, 1996); *State - Labor & Industries*, Decision 8437-A.

Questions about future assignments do not suffice in this case. In examining its witnesses during the hearing in this case, the employer routinely asked disputed employees how they might act if given sensitive assignments in the future. Applying the established standard, the employer's questions about future assignments are speculative, and provide no basis for a current exclusion under RCW 41.80.005(4).

The possibility of "supplemental bargaining" under the PSRA does not suffice on the record made in this case. RCW 41.80.010(2)(c) gives any separately-elected state official with more than 500 employees a right to have supplemental bargaining, separate from the negotiations for master contracts to be conducted by the Governor's designee. The employer claims, and the union does not dispute, that the Commissioner of Public Lands is entitled to have supplemental bargaining concerning the employees of the Department of Natural Resources. Again, however, speculation is not sufficient. The record now before the Executive Director does not

establish that any supplemental bargaining process has been held, or was even scheduled at the time of the hearing in this case. The employer's concerns about protection of an in-house collective bargaining process within the agency are thus entirely theoretical and speculative.

ISSUE 4: APPLICATION OF STANDARDS

The Commission imposes a heavy burden on the party that seeks a "confidential" exclusion, because confidential status deprives the individual of all of the collective bargaining rights that would otherwise be conferred upon the individual by statute. *City of Chewelah*, Decision 3103-B (PECB, 1989) (citing *City of Seattle*, Decision 689-A (PECB, 1979)).

All of the disputed employees work in the headquarters office of the Department of Natural Resources, in Olympia. The disputed employees were subdivided into groups at the hearing, and those same groupings are used in the following analysis.

A "budget shop" group works under Robert VanSchoorl, the budget director for the agency.

Robert Brauer and Marcia Wendling have the same civil service classification, Program Budget Specialist 4, and the parties stipulated that the testimony given was equally applicable to both employees.[9] Brauer has worked for the employer for three years, and he serves as a leadworker for newer budget specialists involved in preparation of the employer's overall biennial budget. To the extent that he compiles, edits and verifies information from various divisions within the agency, and to the extent that he

[9] Only Brauer testified at the hearing in this case.

presents and clarifies budget figures to those who make the budget decisions for the agency, that evidence is largely irrelevant. What is important in this case is that Brauer has been involved in: (1) computing cost estimates for wages to be offered to employees in the recent collective bargaining negotiations under the PSRA; and (2) computing the costs of possible grievance resolutions being considered at the agency level. The types of duties performed by Brauer appear to be of a regular and ongoing nature, and are clearly related to the formulation of the employer's labor relations policy and/or collective bargaining strategy. Under the "assists" clause as interpreted above, the duties that Brauer and Wendling perform create a potential for damage to the collective bargaining process even if Brauer does not know which of the proposals he costs-out will actually be advanced by the employer in negotiations. Under the ""authorized access" clause as interpreted above, this record supports a conclusion that Brauer and Wendling have authorized and ongoing access to the employer's collective bargaining materials. Those duties are sufficient to invoke the "labor nexus" test, and to warrant their exclusion from the bargaining unit as "confidential" employees.

Pouth Ing, Lori Anthonsen and Phillip Aust are in the "Program Budget Specialist 3" classification, and the parties stipulated that the testimony given was equally applicable to these employees.[10] Ing had worked in his position for one year, reporting to the same supervisor as Brauer. He testified that most of his work time is spent monitoring the budgets for two programs totaling approximately $43 million, and that the other employees in his classification perform essentially the same function in regard to the budgets for other programs. Ing has never been involved in

---

[10] Only Ing testified at the hearing in this case. One noted variance among these employees is that Aust reports directly to VanSchoorl.

assessing, or running any type of impact scenarios concerning salary proposals, has never been involved in preparing any figures for use in collective bargaining negotiations, and has never been involved in estimating the cost of any grievance settlement. Ing was also unaware of any of the other employees in his classification ever being in any of those activities. Ing is involved with assessing the fiscal impacts of proposed legislation that may have an impact on the agency, but fiscal notes are a matter of public record and none of the fiscal notes Ing had dealt with had any relation to employee wages or other issues negotiated with unions representing employees of the department. To the extent that Ing had some involvement in computing layoff scenarios, the information is irrelevant because the State Civil Service Law still controls the subjects of layoff and recall.[11] Ing has inputted data into a Compensation Impact Module System (CIMS) used by the Office of Financial Management (OFM) and the Governor's designee in collective bargaining, but the data all appears to be public information. Under the "assists" clause as interpreted above, the duties of Ing, Anthonsen and Aust have not been sufficiently related to labor relations policy formulation, or to anyone involved in "labor nexus" activities, to justify their exclusion from bargaining rights under the PSRA. Mere input to employer labor policy makers or negotiating team members concerning the "impact" of contract proposals is not sufficient for a finding of confidential status. *See City of Puyallup*, Decision 5460 (PECB, 1996). Analysis of bills considered by the Legislature and of legislative actions does not create a potential for damage to the collective bargaining process. Under the "access" clause as interpreted above, it has not been shown that Ing, Anthonsen or Aust have any access (let

---

[11] Brauer and Wendling may have engaged in similar activities, but layoffs and recalls will not be a matter controlled by collective bargaining agreements until the first PSRA contracts go into effect on July 1, 2005.

alone authorized access) to any of the employer's collective bargaining materials. Their positions are not found to be confidential under RCW 41.80.005(4).

A "communications group" works under Todd Meyers, the communications director for the agency.

Laura Jane Mottishaw Chavey has been with the agency for 17 years, and is currently in the Public Information Officer 3 classification. Her duties involve development of goals for "outreach to the public in one way or another" and Chavey "help[s] develop displays, press releases, brochures, all kids of publications . . ." Chavey interacts with other employees in the communication shop, such as graphic designers. None of the work she has performed in the past has ever related to labor relations in any form, and she has never participated in the design of any document of any type related to labor relations or collective bargaining. Chavey has never sat in on any meeting where wage proposals were discussed, she has never attended a labor-management committee meeting, and she has never attended any meeting where management discussed or formulated positions or strategies to take during the labor-management committee process. Management officials have never shared any type of confidential information related to labor relations with Chavey. During a period of eight years, Chavey attended one executive management meeting when Meyers was unavailable, but the record indicates that employees sitting in for their absent superior are excluded from the portions of meetings where personnel or labor relations issues are discussed. Chavey has never been involved in the resolution of a grievance or in a layoff/recall situation, nor has she been given information on any such matters. She has not been involved in working on any project relating to labor issues or the collective bargaining process under the PSRA, and was not aware of any work being

performed by any other communications shop employee relating to labor issues or the PSRA bargaining process. Under either the "assists" or "access" clauses, as interpreted above, this record does not support a conclusion that Chavey's duties are sufficiently related to labor relations or collective bargaining to justify her exclusion from bargaining rights under the PSRA. No potential for damage to the collective bargaining process would exist if her position were included in the bargaining unit.

Blanche Sobottke is another Public Information Officer 3 in the "communications shop" and also reports to Meyers. She has been with the agency for 18 years and has been in a public information role for 10 years. Her unofficial working title is "editor" and her job duties are generally similar to those of Chavey, but her particular focus is on the clarity of documents concerning legislative community relations and various decision packages advanced by the agency.[12] As with the budgets prepared by Brauer and Wendling, Sobottke's involvement in preparing the biennial budget for the communications shop is irrelevant, in the absence of any direct connection with collective bargaining. Sobottke has not been involved in the formulation of agency wage positions, policies or proposals, she has never served as a member of the management team at any negotiations with a union, and she has not even participated in a management caucus or other meeting where management was formulating responses to positions to take in

---

[12] Sobottke testified that she has worked on various legislative "fact sheets" where a decision regarding various policies had already been made. Testimony by Sobottke regarding proposals concerning "lump sum relocation incentive compensation" and "assault victim benefits" is largely irrelevant, because the fact sheets she edited had no relation to labor/management relations or the collective bargaining process.

negotiations with a union.[13] Sobottke has never been involved in any manner in the formulation of a collective bargaining agreement nor has she been involved in the current collective bargaining process under the PSRA. Under either the "assists" or "access" clauses, as interpreted above, this record does not support a conclusion that Sobottke's duties are sufficiently related to labor relations or collective bargaining to justify her exclusion from bargaining rights under the PSRA. No potential for damage to the collective bargaining process would exist if her position were included in the bargaining unit.

Princess Jackson-Smith has been an Environmental Education Outreach Specialist 3 in the "communications shop" for six years, working under Meyers. Jackson-Smith testified of her belief that her position description and classification questionnaire are inaccurate, and that she really performs duties similar to those performed by Chavey, as described above. Jackson-Smith has never been involved in the agency's positions or policies on salaries or wages, she has never participated as a management member of any labor-management committee, and she has never been a resource to any management official negotiating with a union. She has not been involved in any way, either at the state-wide or agency level, in the current collective bargaining process under the PSRA. She has never been involved in the grievance process, discipline, reductions in force or layoffs. Under either the "assists" or "access" clauses, as interpreted above, this record does not support a conclusion that Jackson-Smith's duties are sufficiently related to labor relations or collective bargaining to justify her exclusion

---

[13] Athough Sobottke had some involvement with grievance processing when she was a supervisor, she does not supervise any employees in her current position. Moreover, the initial stages of grievance processing are not an indicator of "confidential" status. *See City of Seattle*, Decision 1797-A (PECB, 1985).

from bargaining rights under the PSRA. No potential for damage to the collective bargaining process would exist if her position were included in the bargaining unit.

Nancy Charbonneau, Dena Scroggie and Luis Prado are all in the Graphic Designer 2 classification, and the parties stipulated that the testimony given was equally applicable to all three employees.[14] All three employees work in the "communications shop" reporting to Meyers. Charbonneau has worked for the agency for 12 years. While Scroggie's main responsibility is as the "webmaster" for the agency's internet presence, Charbonneau's duties involve the layout, photo editing and typesetting of various publications produced for all of the divisions and regions of the agency. Charbonneau is not responsible for the content of the publications. None of her work involves the agency's position on wages. She has never participated in any labor-management committee proceedings, nor has she ever been called in as a resource for such a meeting. She has never prepared any material for any proposal being prepared by management for presentation to a union. Charbonneau was uncertain about any collective bargaining that occurred under the State Civil Service Law, and she certainly did not participate at either the state-wide nor agency level in the negotiations under the PSRA. Under either the "assists" or "access" clauses, as interpreted above, this record does not support a conclusion that the duties of these employees are sufficiently related to labor relations or collective bargaining to justify her exclusion from bargaining rights under the PSRA. No potential for damage to the collective bargaining process would exist if her position were included in the bargaining unit.

---

[14] Only Charbonneau testified at the hearing in this case.

FINDINGS OF FACT

1. The Washington State Department of Natural Resources (employer) is a general government agency of the state of Washington within the meaning of RCW 41.80.005(1).

2. The Washington Federation of State Employees (union) is an employee organization within the meaning of RCW 41.80.005(7).

3. Under an interim certification issued in this proceeding, the union is the exclusive bargaining representative all employees of the Department of Natural Resources covered under Chapter 41.80 RCW, excluding supervisors, confidential employees, WMS employees, and employees in existing bargaining units. The employer's assertion that certain individuals are "confidential" employees was the basis for supplemental proceedings in this case.

4. Program Budget Specialist 4 Robert Brauer and (based on the stipulation of the parties) similarly-situated employee Marcia Wendling assist, in a confidential capacity and in the regular course of their duties, employer officials responsible for the development of the labor relations policies of the employer, and have authorized access, on a regular and ongoing basis, to confidential information concerning the collective bargaining policies and strategies of the employer.

5. The disputed employees in the Program Budget Specialist 3 classification (Pouth Ing, Lori Anthonsen, and Phillip Aust) do not, in the regular course of their duties, assist the employer in a confidential capacity on labor relations policy issues, and do not have authorized access, in the regular

course of their duties, to material concerning the effectuation or review of the employer's collective bargaining policies.

6. The disputed employees working under the employer's communications director in the Public Information Officer 3 classification (Laura Jane Mottishaw Chavey and Blanche Sobottke), the Environmental Outreach Specialist 3 classification (Princess Jackson-Smith), and the Graphic Designer 2 classification (Nancy Charbonneau, Dena Scroggie, and Luis Prado) do not, in the regular course of their duties, assist in a confidential capacity on labor relations policy issues, and do not have authorized access, in the regular course of their duties, to material concerning the effectuation or review of the employer's collective bargaining policies.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.80 RCW and Chapter 391-25 WAC.

2. As described in paragraph 4 of the foregoing findings of fact, Program Budget Specialist 4 Robert Brauer is a "confidential" employee within the meaning of RCW 41.80.005(4).

3. Based exclusively on the stipulation of the parties as described in paragraph 4 of the foregoing findings of fact, Budget Program Specialist Marcia Wendling is a "confidential" employee within the meaning of RCW 41.80.005(4).

4. The employees holding the positions described in paragraphs 5 and 6 of the foregoing findings of fact are not "confidential" employees within the meaning of RCW 41.80.005(4).

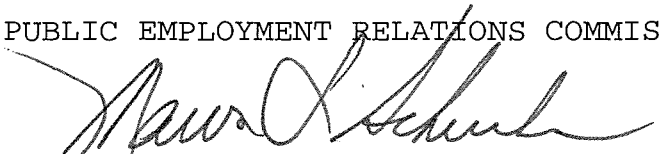
ORDER CLARIFYING BARGAINING UNIT

1. The positions held by Robert Brauer and Marcia Wendling are excluded from the appropriate bargaining unit for which the Washington Federation of State Employees has been certified as exclusive bargaining representative in this proceeding.

2. The incumbents of all other positions that remained at issue in this proceeding are included in the appropriate bargaining unit for which the Washington Federation of State Employees has been certified as exclusive bargaining representative in this proceeding.

Issued at Olympia, Washington, this 18th day of February, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-25-590.