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
	)	
Involving certain employees of:	)	DECISION 8458-B - PSRA
	)	
WASHINGTON STATE - NATURAL RESOURCES	)	DECISION OF COMMISSION
	)	
	)	

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

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

This case comes before the Commission on a timely appeal filed by the Washington State Department of Natural Resources (employer) seeking to overturn certain findings of fact, conclusions of law, and order issued by Executive Director Marvin L. Schurke.[1] The Washington State Federation of State Employees (union) supports the Executive Director's decision. We affirm.

PROCEDURAL HISTORY

On October 15, 2003, the union filed a petition seeking certification as the exclusive bargaining representative of certain employees of the employer. During an investigation conference conducted by Representation Coordinator Sally Iverson, the employer

[1] *Department of Natural Resources*, Decision 8458-A (PSRA, 2005).

claimed 11 individuals to be confidential, and argued for their exclusion from the bargaining unit. The disputed employees held positions in the Program Budget Specialist 4, Program Budget Specialist 3, Public Information Officer 3, and Graphic Designer 2 classifications. The union prevailed in the representation election and on September 9, 2004, Hearing Officer Christy L. Yoshitomi conducted a hearing to resolve the eligibility issues. On February 18, 2005, the Executive Director issued his decision to include all the disputed employees except the Budget Specialist 4 classification in the bargaining unit. The employer filed this appeal seeking review of the decision to include the Budget Specialist 3 and Public Information Office 3 classifications within the bargaining unit.

ISSUE PRESENTED

Did the Executive Director err in his interpretation of confidential employees as used within the Personnel System Reform Act of 2002 (PSRA) when he allowed certain employees to be included within the proposed bargaining unit?

DISCUSSION

Standard of Review

This Commission reviews conclusions and applications of law, as well as 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 in turn support the Executive Director or Examiner's conclusions of law. *C-Tran*, Decision 7088-B (PECB, 2002). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair minded, rational person of the truth of the declared premise. *Renton Technical College*, Decision 7441-A (CCOL, 2002); *World Wide Video Inc. v.*

Tukwila, 117 Wn.2d 382 (1991). The Commission attaches considerable weight to the factual findings and inferences made by its examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001).

Personnel System Reform Act's Definition of Confidential Employee

The Personnel System Reform Act of 2002 (PSRA) amended and restructured the administration of collective bargaining for state employees. Beginning with the collective bargaining agreements negotiated to go into effect July 1, 2005, state employees collectively bargain their wages, hours, and working conditions, directly with the Governor or the Governor's designee. Once the parties reach an agreement, the Governor is statutorily required to submit the agreement as part of the Governor's proposed operating budget. RCW 41.80.010. The result of these changes was to create a negotiating system for state employees that more closely resembled traditional collective bargaining. The PSRA also transferred jurisdiction over the administration of that collective bargain process, including the unit determination process, from the Department of Personnel to this Commission. RCW 41.80.070.

RCW 41.80.005(6) provides that certain types of employees are excluded from the provision of the PSRA. Excluded employees include confidential employees, as defined by RCW 41.80.005(4). That statute reads:

> "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.[2]

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[2] RCW 41.80.005(4) also contains a fourth, specific, definition for employees who assist the assistant attorney generals in the representation of labor relations related actions and state tort actions.

This Commission's Statutory Charge Requires Uniformity

The crux of the employer's argument centers around its assertion that by adopting a definition for confidential employees that does not exactly parallel the definition adopted within *International Association of Fire Fighters, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978), Commission precedent, and other collective bargaining statutes, the Legislature intended the PSRA to break from the traditional labor nexus test applied since the *City of Yakima* opinion. To support it argument, the employer points out that the PSRA by its very title represents a "reform" of the state civil service laws, and the Legislature therefore specifically intended a change in the analysis of confidential employees by giving them their own specific meaning. We recognize that the definition adopted within the PSRA is somewhat different than the one traditionally used by this Commission. We nevertheless disagree with the employer that the Legislature intended RCW 41.80.005(4) to supplant the labor nexus test this Commission has traditionally applied.

The statutory mission of this Commission found in Chapter 41.58 RCW provides compelling evidence that the Legislature did not envision this Commission breaking from its own precedents when interpreting the PSRA. RCW 41.58.005(1) states:

> It is the intent of the legislature by the adoption of chapter 296, Laws of 1975 1st ex. sess. to provide, in the area of public employment, for the more *uniform* and impartial (a) adjustment and settlement of complaints, grievances, and disputes arising out of employer-employee relations and, (b) *selection and certification of bargaining representatives* by transferring jurisdiction of such matters to the public employment relations commission from other boards and commissions. It is further the intent of the legislature, by such transfer, to achieve more efficient and expert administration of public labor relations administration and to thereby ensure the public of quality public services.

(emphasis added). One of the processes in certifying an exclusive bargaining representative for a group of employees is the determination of which employees actually belong within the proposed bargaining unit. The courts of appeal have also recognized this agency's expertise in the administration of collective bargaining statutes, and the courts afford the Commission's interpretations and conclusions great deference. *Public Employment Relations Commission v. City of Kennewick*, 99 Wn.2d 832 (1983).

When the Legislature transferred administration of state civil service collective bargaining to this Commission, it undoubtedly was aware of its previous direction that this Commission be as uniform as possible in the administration of the collective bargaining laws and aware that the courts grant deference to the Commission's interpretations of law, including the Commission's application of the labor nexus test. Without any indication of an intention within the PSRA to discontinue use of the labor nexus test or to amend RCW 41.58.005, we can presume that the Legislature still intends for this Commission to be as uniform as possible in its administration of collective bargaining laws.

Commission Precedent on Establishing Confidential Employees

Before 2001, this Commission, using established case precedent, applied a labor nexus test to determine the confidential status of employees to be included or excluded from a bargaining unit. That test, which has its origin in *International Association of Fire Fighters, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978) and was decided under the Public Employees' Collective Bargaining Act (PECB), Chapter 41.56 RCW, 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.

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. 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. For this reason, the *City of Yakima* is one of the Commission's oldest precedents and has been applied unchanged to unit determination cases issued by the Commission since the Washington Supreme Court announced it in 1978.

In August of 2001, the Commission adopted WAC 391-35-320 which codified the confidential employee test announced in *City of Yakima* into its own rules. WAC 391-35-320 reads:

> 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.

In *City of Lynden*, Decision 7527-B (PECB, 2002), the Commission, commenting about the application of WAC 391-35-320, noted that although previous decisions of the Commission were decided without the benefit of the new rule, the confidential employee test applied in those cases was exactly the same test as the one codified in WAC 391-35-320. Thus, the Commission gave its stamp of approval for previous decisions applying the labor nexus test to act as precedent for cases decided under WAC 391-35-320. In an unpublished opinion, the Court of Appeals affirmed the Commission's *City of Lynden* decision.

PSRA Represents a Move Towards Traditional Collective Bargaining

The employer's argument that the PSRA represents a reform of state collective bargaining laws, thus precluding the Commission from its traditional labor nexus test, is misplaced and ignores the Legislature's intent in passing the act. Although certain differences exist between the PSRA and the PECB, the individual provisions enacted within the PSRA closely mimic the PECB and demonstrate a consistency with other collective bargaining laws such as the National Labor Relations Act (NLRA).[3]

- The unfair labor practice provisions in RCW 41.80.110 resemble RCW 41.56.140 and .150. Both require employers and union to bargain in good faith, both prohibit employers and unions from discriminating against employees, both prohibit employers from interfering with employees, and both prohibit

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[3] The Legislature based the PECB on the NLRA. The courts of appeal endorse reliance upon the precedents of the NLRA where the state law(s) this Commission administers are similar to the NLRA. *Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24 (1984). The National Labor Relations Board applies a labor nexus test that is substantially similar to the test adopted and used by this Commission. See, *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189 (1981).

unions from inducing employers to commit unfair labor practices.[4]

- The provisions granting this Commission authority to remedy unfair labor practices and issue remedial and cease and desist orders found in RCW 41.80.120 and RCW 41.56.160 are nearly identical. Both provide for a six-month statute of limitations, both allow the Commission to order monetary awards and to reinstate employees, and both allow the Commission to petition the superior courts to enforce its orders.

- The unit determination provisions found RCW 41.80.070 and RCW 41.56.060 are nearly identical. Both require reasonable notice to all parties, and both grant the Commission the authority to determine the appropriate bargaining units, taking into consideration the employees' duties, skills, and working conditions, the history of collective bargaining, the extent of organization and the desires of the employees.[5]

These parallels make clear the Legislature's intention to embrace the traditions and principles of collective bargaining within the PSRA. Any deviation from the past practice and precedent of the Commission would have otherwise been clearly set forth. For example, we recently demonstrated this principle in *State - Transportation*, Decision 8317-B (PSRA, 2005). In that case, we held that the Legislature specifically exempted employees who perform "internal audits" from bargaining units. In coming to that

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[4] Although the language of RCW 41.80.80.110(2)(b) is substantially narrower than RCW 41.56.150(2), the classic scenario where enforcement of RCW 41.56.150(2) occurs when a union induces the employer to discriminate against an employee based upon union membership. *See, e.g., Port of Seattle*, Decision 3295-B (PECB, 1992).

[5] Unlike RCW 41.56.060, RCW 41.80.070 also requires the Commission to consider avoiding "excessive fragmentation" as a factor to be considered.

conclusion, we found that the Legislature left open the definition of "internal auditor" and that other specific agencies and job titles contained within the RCW 41.80.005(6) exemption signified the Legislature's *specific intention* that we not follow our traditional analyses when it comes to internal auditors. Without a specific direction from the Legislature for this Commission to do otherwise, the suggestion that by enacting the PSRA the Legislature intended the Commission to break from its established practice of applying the labor nexus test for confidential employees is not well taken.

Confidential Status of Employees is Determined by Actual Duties

The Executive Director ruled that Commission precedent prevented him from considering speculative arguments about the future duties of an employee's confidential relationship within the employer's workplace. We agree.

In *City of Redmond*, Decision 7814-B (PECB, 2004), the Commission held that any decision about the confidential status of an employee must be based upon the evidence presented within the record about the employee's actual duties. In reaching this conclusion, the Commission noted that although job descriptions and duties are not static entities, and the duties of employees may change as an organization evolves and faces new challenges, only current job duties may be considered.

The Administrative Procedure Act, Chapter 34.05 RCW (APA) also supports our decision not to consider speculative testimony in unit determination cases. RCW 34.05.461(4) states:

> Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the

> conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. *However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence.* The basis for this determination shall appear in the order.

(emphasis added). Testimony based upon the speculation of witnesses inherently deprives the opposing party the right to confront the witness and rebut the testimony because neither party has a window into the future to know exactly what the duties and tasks of the employees in dispute will be.

If we adopted the employer's speculation of future duties, employers could potentially exclude all employees from their collective bargaining rights by merely implying that the employee's duties may touch the employer's collective bargaining stance. This Commission avoids interpretations of the statutes it regulates that would produce absurd results. *See State - Transportation*, Decision 8317-B (PSRA, 2005). To exclude employees based upon speculation about future duties would produce a result that would support neither the purpose of the state's collective bargaining laws nor the APA.

Public Information Officer 3s Are Not Confidential Employees

The record supports the Executive Director's findings and conclusions that Laura Jane Mottishaw Chavey and Blanche Sobottke, employees in the Public Information Officer 3 classification, are not confidential employees. In the regular course of their duties, neither employee performs collective bargaining related work that would require them to be excluded from the bargaining unit. At the hearing, the employer failed to prove by a preponderance of the evidence that either employee was privy to confidential information

essential for the employer's relations with the union. Furthermore, the employer's argument that the Public Information Officer 3s duties will require them to formulate the employer's response to communications sent to the bargaining unit by the union is speculative and unpersuasive. Based upon the record presented, we agree with the Executive Director's conclusion that the potential for damage to the collective bargaining process is not high enough to warrant exclusion of employees in this job classification from the bargaining unit.

Budget Specialist 3s Are Not Confidential Employees

The record supports the Executive Director's findings and conclusions that Pouth Ing, Lori Anthonsen, and Phillip Aust, employees in the Budget Specialist 3 classification, are not confidential employees. Budget Specialist 3s do some work for the agency that requires a specific level of confidentiality, but none of that work warrants exclusion of those employees from the bargaining unit. The employer failed to demonstrate how any conflict of interest exists between the regular duties of the employees and the employer's collective bargaining proposals and policies. The Executive Director correctly found that while these employees may have some input into collective bargaining proposals, this is not sufficient for a finding of confidential status. Nothing presented at hearing or on appeal warrants reversal of the Executive Director's decision as to the employees in this job classification.

NOW, THEREFORE, it is

ORDERED

The Findings of Fact, Conclusions of Law, and Order issued by Executive Director Marvin L. Schurke is the above-entitled case are

AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

Issued at Olympia, Washington, the 8th day of July, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ ROBBIE DUFFIELD

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