Clark County, Decision 7921 (PECB, 2002)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

JUDITH E. GOUTHRO, Complainant,	CASE 16229-U-02-04152
vs.	DECISION 7921 - PECB
CLARK COUNTY, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Judith E. Gouthro appeared pro se.

Arthur D. Curtis, Prosecuting Attorney, by *Dennis M. Hunter*, Senior Deputy Prosecuting Attorney, for the employer.

On February 11, 2002, Judith E. Gouthro filed a complaint charging unfair labor practices with the Commission under Chapter 391-45 WAC, naming Clark County (employer) as the respondent. A preliminary ruling was issued under WAC 391-45-110 on March 8, 2002, finding a cause of action to exist on allegations summarized as:

> Employer discrimination in violation of RCW 41.56.140(1), by failing to include an office assistant position in risk management occupied by Judith Gouthro in a bargaining unit represented by OPEIU, Local 11.

The employer was directed to file and serve its answer within 21 days following the issuance of the preliminary ruling. Senior Human Resources Representative Carol R. Chislett filed a letter on March 14, 2002, responding to the Gouthro allegations. On April 8,

2002, Chislett filed an affidavit and a motion for acceptance of an amended answer. The hearing in this matter was held on May 29, 2002, before Examiner Walter M. Stuteville. The amended answer was accepted at the hearing, without objection from Gouthro, and the parties presented testimony and documentary evidence. The parties filed briefs to complete the record.

The Examiner finds Gouthro has not sustained her burden of proof to establish that the employer has discriminated against her. In asserting that the position occupied by Gouthro is excludable as "confidential" the employer has been acting in a good faith belief that certain elements of the responsibilities include handling confidential employee information related to administering the collective bargaining agreement, and it credibly excluded Gouthro's position from the bargaining unit. The complaint is dismissed.

BACKGROUND

Judith Gouthro is presently employed in an "office assistant II" position in the employer's Office of Risk Management. She has been an employee of this employer since 1999.

Office and Professional Employees International Union, Local 11 (union), represents a large bargaining unit encompassing multiple classifications of Clark County employees in at least 11 departments. Generally, positions in the "office assistant II" classification are included in that bargaining unit. Gouthro was represented by Local 11 while working in criminal records administration for the Clark County Sheriff's Department.

The union and employer are parties to a collective bargaining agreement. Article 1.3 of that contract contains a list of the

departments covered, but the Office of Risk Management is not included on that list. Article 1.4 of that contract contains a list of positions that are specifically excluded from the bargaining unit, but the "office assistant II" position in the Office of Risk Management is not mentioned on that list.

Gouthro applied for her present position during or about November of 2000. The job description for the position describes the office, as follows:

> The Risk Management office is somewhat like an "insurance" company that handles claims filed against the county (Liability) and employee injuries (Worker's Compensation). In addition, we have Occupational Health & Safety.

The manager of the office, Ed Pavone, sent a letter to Gouthro on November 7, 2000, offering her the position. That letter did not mention the collective bargaining status of the position. Gouthro accepted the offer of what amounted to a lateral transfer for her, and she began work in her present position on November 13, 2000.

The job description for Gouthro's present position includes the following summary of the position's responsibilities:

> Work includes various duties involving different and unrelated processes and methods such as receiving, checking, verifying, coding and routing document; taking and transcribing dictation; organizing and maintaining general office files and records; acting as time and attendance clerk; and performing over-the-counter clerical services.

Taken together, the job description for Gouthro's present position and the testimony presented at the hearing depict a conventional

office-clerical position calling for receptionist, docketing, data entry, and secretarial skills.

Subsequent to taking her present position, Gouthro contacted Michael Richards, a business agent for Local 11.[1] Specifically, Gouthro inquired about whether her new position was included in the bargaining unit represented by the union.

On March 19, 2001, Richards sent a request to Chislett, concerning the inclusion of Gouthro's position in the bargaining unit:

> It has recently been brought to our attention that the Office Assistant II position in Risk Management is not included in the classifications represented by OPEIU #11.
>
> We understand the history of the exclusion of this position; however, the evolution of Risk Management away from the Human Resources department, in our opinion, makes this position eligible for union membership.
>
> By way of this letter, we ar [sic] asking Clark County to recognize the Office & Professional Employees International union, Local #11 as the bargaining representative of the Office Assistant II position in Risk Management.

Chislett replied on March 22, 2001, stating as follows:

> RE: Office Assistant II in Risk Management
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> This acknowledges your email letter of March 19, 2001 seeking representation of the above noted position.

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1 A representative of Local 11, Michael L. Richards, was present at and participated in the hearing in this matter.

> This position has historically been excluded from representation. It is our practice and philosophy that if a bargaining unit wishes to add positions to a unit they should do so through contract negotiations or petition to PERC. The question you raised, however, resulted in a broader discussion within Human Resources about the issue of positions such as this one.
>
> We can agree that for existing positions in departments specified within the agreement, and for whom there is no specific exclusion, we are willing to include them in the unit at the point in time that they become vacant. For positions such as the one you have requested, which were historically excluded for reasons not longer pertinent, this is an appropriate solution.

The passage of time from March to September of 2001 is not fully explained in this record.

On September 14, 2001, Richards sent an e-mail message to Gouthro, as follows:

> Judy: Thank you for your continued interest in Union membership. I have requested (both in writing and verbally) to Carol Chislett that your position should be a Union position.
>
> Ms. Chislett has replied that the County would be willing to include this Risk management position in the future, but not the current holder of the position. We will include your position in our next contract proposal as well as other positions that have evolved throughout the years.
>
> Without the County's agreement to include your position, we are not able to include you in our ranks at this time. . . .

Gouthro sent a letter to the Clark County Human Resources Department on September 20, 2001, with a copy to Richards, in which she

renewed her request that her position be included in the bargaining unit represented by Local 11.

Chislett reconfirmed the employer's position in a letter sent to Gouthro on September 26, 2001, as follows:

> RE: Your Request for Local 11 Representation
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> You have requested that your position be included in Local 11, OPEIU. As we have told Mike Richards, the Labor Relations Specialist for Local 11 and the Office and Professional Employees Unit with Clark County, this position has historically been excluded from representation. Adding or excluding positions from a bargaining unit occurs through the contract negotiation process or a petition to the Public Employment Relations Commission and is initiated by the bargaining unit.
>
> Additionally, you need to understand that while we consider your interests, our interaction is of necessity with the bargaining unit and its business representative rather than directly with employees on matter such as this. The Public Employment Relations Commission addresses issues such as the inclusion or exclusion of positions within bargaining units when the parties disagree.
>
> You are welcome to apply for a transfer to a department with positions represented by a bargaining unit. Additionally, you are welcome to discuss with me any particular problems you may be having in your workplace. Please let me know if I can help.

In February of 2002, Gouthro filed the complaint to initiate this unfair labor practice proceeding.

In the employer's response to the unfair labor practice complaint filed on March 12, 2002, Chislett indicated a potential change of the employer's position, stating in part:

> While we indicated to Local 11 that we would consider including the position in the bargaining unit if/when it became vacant, further consideration of the function of the position and the unit in which it resides, leads the County to believe that it is more appropriate to continue the historical expectation that it be unrepresented.

The employer has thus sought to characterize the position held by Gouthro as "confidential" in this proceeding.

POSITIONS OF THE PARTIES

Gouthro argues that her present position should not be excluded from collective bargaining rights as a "confidential" employee. She asserts that her job responsibilities are comparable to those of other Clark County employees who are represented for purposes of collective bargaining. She further asserts that the Clark County Office of Risk Management is not now, and never has been, involved in labor-management negotiations or in the processing of employee grievances. She alleges that the involvement of the office in civil litigation (including claims generated out of employee actions or decisions) does not fall within the definition of "confidential" in RCW 41.56.020(i), (ii). Based on those assertions, she argues that the employer has improperly excluded her from union representation and thereby discriminated against her by denying her statutorily protected right to be represented for purposes of collective bargaining.

The employer defends its actions on historical and factual grounds. It contends that the office assistant position in risk management has historically been excluded from union representation under a series of collective bargaining agreements between the employer and

Local 11. It points out that the current collective bargaining agreement was finalized in May of 2001, and that the union did not raise the issue concerning the subject position during the negotiations for that contract. It asserts that the incumbent of the position is exposed to materials and information which is adverse to represented employees, in both liability and worker's compensation cases, and that the position often participates in activities or handles confidential communications which directly affect the rights of existing employees or become a component of future labor-management negotiations.

DISCUSSION

Clark County and its employees are subject to the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, which includes the following provisions:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE. No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter.
>
> . . . .
>
> RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be an unfair labor practice for a public employer:
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> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
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> (2) To control, dominate or interfere with a bargaining representative;

> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
>
> (4) To refuse to engage in collective bargaining.

Under RCW 41.56.160, the Commission hears and determines unfair labor practice complaints and issues appropriate remedial orders where violations are found.

Standards for "Interference" and "Discrimination" - The Commission has articulated the standard of proof for determining "interference" claims in a number of cases: Employer conduct is unlawful under RCW 41.56.140(1) if it is reasonably perceived by employees as a threat of reprisal or force or promise of benefit associated with the exercise of statutory collective bargaining rights.

The standard applied to claims of "discrimination" is more complex, but is directly drawn from the decisions of the Supreme Court of the State of Washington in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991):

> The complainant has the burden of proof in unfair labor practice proceedings. WAC 391-45-270. To establish "discrimination", a complainant must prove: (1) Exercise of a statutorily protected right, or communicating an intent to do so; (2) being deprived of some ascertainable right, status or benefit; and (3) a causal connection between the exercise of the legal right and the discriminatory action. If that burden is met, the respondent is called upon to articulate non-discriminatory reasons for its actions. The burden of proof remains on the complainant, but it may prevail by showing either: (4) that the reasons asserted were pretextual; or (5) union

> animus was nevertheless a "substantial motivating factor" behind the disputed action.
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> *Educational Service District 114*, Decision 4631-A (PECB, 1994).

WAC 391-45-270(1)(a) also assigns the burden of proof to the complainant in any unfair labor practice case.

Application of Standards

Gouthro is asserting that the employer has interfered with her exercise of statutory collective bargaining rights. She claims that the employer has incorrectly classified her position as an excluded "confidential" employee, and has therefore denied her access to the bargaining unit and union representation.

The evidence does not support finding an independent "interference" violation, because there is no indication that the employer either made any threat of reprisal or force or made any promise of benefit that Gouthro could have reasonably associated with exercise of her collective bargaining rights. It is clear that she applied for the job in the risk management operation, and a fair reading of the recognition clause of the collective bargaining agreement between the union and employer would have forewarned Gouthro that the job she was seeking was excluded from union representation. Indeed, it appears that she accepted the offered position long before she ever inquired about the bargaining unit status of the position.

The evidence also fails to support Gouthro's "discrimination" claim. The first prima facie case element that Gouthro needed to establish was that she exercised a statutorily protected right or communicated an intent to do so. There is no such evidence here. Moreover, no Commission precedent is cited or found for a proposition that employers commit unfair labor practices by refusing to

expand a bargaining unit to include a position that has historically and credibly been excluded from that unit. In *City of Port Townsend*, Decision 6351 (PECB, 1998), unfair labor practice charges against an employer were dismissed at the preliminary ruling stage, as failing to state a cause of action.

This case is also factually distinguished from *City of Port Townsend*, Decision 6433-B (PECB, 1998), where the union involved in the previously-cited case was found to have committed an unfair labor practice violation by denying union representation to a part-time employee who had actually met the contractual qualifications for inclusion in the bargaining unit. In the case now before the Examiner, Gouthro has not cited any contractual provision allegedly overlooked or ignored by the employer, or any facts controverting the historical exclusion of her present position from the bargaining unit represented by Local 11. Even Local 11 framed its request as such, rather than as an assertion of any contractual or statutory right to have the risk management job added to the unit at mid-contract.

The employer refused the union's request, but it did not altogether preclude future consideration of that request,[2] and it even pointed the union to the Public Employment Relations Commission as a forum for resolving the controversy.[3] In light of the long-standing

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[2] In saying this, the Examiner does not condone or ratify the employer's stated willingness to address the position while continuing to exclude the present incumbent for unspecified reasons. No basis for such a distinction was cited by the employer or is known to the Examiner.

[3] Chapter 391-35 WAC sets forth procedures for "clarifying" existing bargaining units where no question concerning representation exists. WAC 391-35-020 imposes limitations on the timing and results of unit clarification proceedings.

principle that unit determination is not a subject for bargaining in the usual mandatory/permissive/illegal sense,[4] the employer cannot be faulted for pointing the union to the dispute resolution mechanism appropriate to the particular controversy.

The employer has subsequently argued that the disputed position should remain excluded as a "confidential" employee. Even though the details presented concerning the current responsibilities and activities of the disputed position might warrant close examination in a unit clarification proceeding under Chapter 391-35 WAC, details as to the historical basis for exclusion are lacking. In a unit clarification proceeding the Commission's Hearing Officer may ask questions, may call witness, and may request information, as deemed necessary to obtain a full and complete factual record for the Commission to exercise its exclusive jurisdiction to determine or modify the bargaining unit under RCW 41.56.060. This record thus falls somewhat short of the clear facts presented in *Port Townsend*, Decision 6433-B (where the employee had clearly met the contractual qualification for inclusion in the bargaining unit) and *Richland School District*, Decision 2208-A (PECB, 1985) (where an employee who had properly been excluded as "confidential" had clearly lost all of the duties that had qualified her for that exclusion).

Although the employer acknowledges that the disputed position is not directly involved in collective bargaining on behalf of the employer, it defends that the disputed position handles details of settlements in cases which involve bargaining unit employees, including sexual harassment claims, workers' compensation, and contractual grievances. It asserts that the handling and securing

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[4] *City of Richland*, Decision 279-A (PECB, 1978), *aff'd,* 29 Wn. App. 599 (1981), *review denied,* 96 Wn.2d 1004 (1981).

of grievance settlements could conceivably put the disputed position in a conflict of interest situation. The Examiner deems it unnecessary to embark on analysis of a new basis for the "confidential" exclusion defined in WAC 391-35-320 and explained in *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978), because Gouthro has not provided any facts or statistics to back up her response that such incidents are de minimus. Thus, that debate is left for resolution in unit clarification proceedings that may be possible in the future, where the claim of "confidential" status would be directly before the Commission.

Gouthro argues that other represented positions perform substantially the same tasks as she performs, and have responsibilities similar to those of her position. She called an administrative assistant to the Clark County Treasurer, an administrative assistant to the Clark County Auditor, and the purchasing administration supervisor, all of whom testified concerning the responsibilities of their positions. Gouthro then asserted that her position is similar and therefore, by comparison, her position should also be included. However similar those position might be, they are not identical. At a minimum, they lack the access to money settlements involving bargaining unit members relied upon by the employer here.

An additional reason for hesitation in this case grows out of the statute of limitations established in RCW 41.56.160. Although Gouthro's complaint filed in February of 2002 made reference to her exchange with the employer in September of 2001, it is now evident that this controversy dates back much farther. Her exclusion from the bargaining unit commenced when she started work in her present job in November of 2000, and the six month period for complaint about that exclusion would thus have expired in May of 2001. Even if the onset of the dispute were tied to her request to the union

and the exchange between the union and employer in March of 2001, the six month period for complaint about that denial would have expired in September of 2001.

In summary, this Examiner is not in possession of enough information to determine whether the disputed position is currently (or has historically been) improperly excluded from the bargaining unit. In an unfair labor practice procedure the complainant must carry the burden of proof and provide evidence and testimony that discrimination and interference have taken place. Such evidence is not present in this case. Where a burden of proof is applicable, tie scores and deficient facts weigh against the complainant. Her unfair labor practice complaint must, therefore, be dismissed.

FINDINGS OF FACT

1. Clark County is a public employer within the meaning of RCW 41.56.030(1).

2. Judith E. Gouthro is currently employed by Clark County as an office-clerical employee in the employer's Office of Risk Management. She applied for and accepted that position without inquiring as to its bargaining unit status, and has held the position since November of 2000.

3. Office and Professional Employees International Union, Local 11, a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of a large bargaining unit of Clark County employees in mixed classifications and various departments.

4. The employer and union are parties to a collective bargaining agreement. While the bargaining unit covered by that contract

includes office-clerical employees in the same classification as the position held by Gouthro, the Office of Risk Management is not (and apparently never has been) among the covered departments listed in that contract.

5. Responding to a request made by Gouthro during or about the same month, the union sent correspondence to the employer on March 19, 2001, requesting that the employer recognize the union as exclusive bargaining representative of the office-clerical position held by Gouthro in the Office of Risk Management and add that position to the coverage of the parties' collective bargaining agreement. The employer denied that request on March 22, 2001.

6. On September 20, 2001, Gouthro sent the employer a request that her position be included in the bargaining unit represented by the union. On September 22 and September 26, 2001, the employer replied and repeated its denial of that request.

7. Judith Gouthro has not established historical or current facts clearly warranting her inclusion in the bargaining unit represented by the union.

8. The employer has cited the historical exclusion of the disputed position from the bargaining unit, impliedly with the consent of the union, and has cited current duties of the position as a basis for its refusal to include the disputed position in the bargaining unit.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. Judith Gouthro did not carry her burden of proof with respect to her claim that she reasonably perceived the exclusion of the office assistant position in the employer's Office of Risk Management as contrary to law, so that no "interference" violation has been established under RCW 41.56.140(1) in this case.

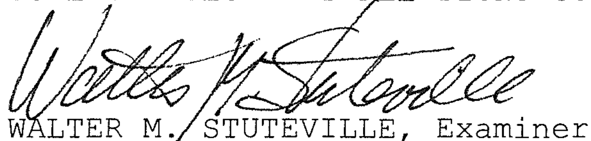
3. Gouthro did not carry her burden of proof with respect to her claim that the employer discriminated against her by continuing to assert that her position of office assistant II in the employer's Office of Risk Management is a confidential position excluded from the bargaining unit represented by Local 11, so that no prima facie claim of "discrimination" or violation of RCW 41.56.140(1) has been established in this case.

ORDER

The complaint charging unfair labor practices filed in the above-entitled matter is DISMISSED.

Issued at Olympia, Washington, this 2nd day of December, 2002.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



WALTER M. STUTEVILLE, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.