

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

MARINE ENGINEERS' BENEFICIAL  
ASSOCIATION

Involving certain employees of:

WASHINGTON STATE FERRIES

CASE 128459-E-16

DECISION 12754-B - MRNE

ORDER ON ELIGIBILITY

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L.L.P., for the Marine Engineers' Beneficial Association.

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Ferguson, for the Washington State Ferries.

The Marine Engineers' Beneficial Association (union) seeks to represent a bargaining unit of port engineers, the senior port engineer, and the project engineer/CMMS administrator (CMMS administrator) working in the Marine Transportation Division of the Washington State Department of Transportation (Washington State Ferries or employer). This is the third decision involving the union's petition. See *Washington State Ferries, Decision 12680 (MRNE, 2017)*, and *Washington State Ferries, Decision 12754-A (MRNE, 2018)*. This decision addresses the issue of whether the senior port engineer has a confidential relationship with the employer and, if so, whether that confidential relationship precludes the senior port engineer from exercising collective bargaining rights under Chapter 47.64 RCW.

Chapter 47.64 RCW does not specifically exempt confidential employees from collective bargaining. However, an employee who meets the traditional confidential employee labor nexus test should be excluded from the bargaining unit under community of interest standards. In this instance, the senior port engineer does not have a labor nexus to the other employees in the bargaining unit and maintains a community of interest with the bargaining unit.

PROCEDURAL HISTORY

On September 26, 2016, the Marine Engineers' Beneficial Association (union) filed a petition to represent a bargaining unit of port engineers, the senior port engineer, and the CMMS administrator working at the Marine Transportation Division of the Washington State Department of Transportation. Representation Case Administrator Dario de la Rosa conducted an investigation conference in which the parties agreed upon the agency's jurisdiction, the timeliness of the petition, and the qualifications of the union. The parties also agreed to the appropriateness of the petitioned-for bargaining unit configuration. The parties disagreed about the eligibility of the port engineers, the senior port engineer, and the CMMS administrator to exercise collective bargaining rights under Chapter 47.64 RCW because those employees are members of the Washington Management Service (WMS). The employer also claimed that the senior port engineer and the CMMS administrator were not eligible for inclusion in the proposed bargaining unit because the senior port engineer was both a supervisory and confidential employee and the CMMS administrator lacked a community of interest with the port engineers.

On April 12, 2017, the port engineers were determined to be eligible to collectively bargain under Chapter 47.64 RCW. *Washington State Ferries*, Decision 12680. On July 28, 2017, an interim certification was issued certifying the union as the exclusive bargaining representative of the port engineers. *Washington State Ferries*, Decision 12754 (MRNE, 2017). The case remained open for resolution of the eligibility issues concerning the senior port engineer and the CMMS administrator.

The representation case administrator conducted a hearing on October 25, 2017. On March 28, 2018, a decision was issued finding that the CMMS administrator shared a community of interest with the port engineers bargaining unit and that the senior port engineer was not a supervisory employee. *Washington State Ferries*, Decision 12754-A. The parties were asked to submit additional briefs on the confidential issue because Chapter 47.64 RCW does not specifically preclude employees who have an intimate fiduciary or "confidential" relationship with

their employer from exercising collective bargaining rights. The parties submitted supplemental briefs.

### BACKGROUND

The senior port engineer oversees the vessel maintenance program and is responsible for oversight of engine crews and the direction of the engine and maintenance budget. Three port engineers, two engine room training positions, and the digital systems port engineer report to the senior port engineer. The senior port engineer also oversees approximately 350 (licensed and unlicensed) engine room personnel. The senior port engineer reports to the director of maintenance. Wesley Sweet has occupied the senior port engineer position since May 2015.

The senior port engineer directs the efficient and effective use of vessel engineering plants; develops service, operating, and maintenance standards; and develops a means of measuring compliance and performance. The position is also responsible for the Port Engineer Office's labor and nonlabor budgets and manages the vessel maintenance schedules and out-of-service time.

The senior port engineer participates in the collective bargaining process for the licensed and unlicensed engine room personnel and spends about 5 percent of his time working with his team or independently on the collective bargaining process, which equates to approximately 5 meetings a year. The senior port engineer provides the bargaining team with essential input and information for negotiations based on his knowledge of department functions. He gives information on past agency practices as well as on past and current contract language. In this position, Sweet has reviewed proposals prior to their disclosure to the union and understands that these proposals are confidential among his negotiating team. During one negotiation Sweet submitted a proposal of his own to the bargaining team, though his proposal did not make the final version.

## ANALYSIS

### Applicable Legal Standards

The history and evolution of the Marine Employees' Act, Chapter 47.64 RCW, was explained in *Washington State Ferries*, Decision 12680, and is incorporated by reference. Important for this decision is the definition of "ferry employee." RCW 47.64.011(6) defines a ferry employee as "any employee of the marine transportation division of the department of transportation who is a member of a collective bargaining unit represented by a ferry employee organization and does not include an exempt employee pursuant to RCW 41.06.079."

In *Washington State Ferries*, Decision 12680, the plain language of the RCW 47.64.011(6) was relied upon in holding that ferry employees in the WMS are eligible to exercise collective bargaining rights. While the collective bargaining law for state civil service employees, Chapter 41.80 RCW, specifically precludes WMS employees from exercising collective bargaining rights, Chapter 47.64 RCW does not. *Washington State Ferries*, Decision 12680. The only ferry employees specifically precluded from exercising collective bargaining rights are those exempt employees identified by RCW 41.06.079. *Id.*

### *Confidential Employees—Generally*

Almost all of the collective bargaining laws administered by this agency contain specific provisions precluding confidential employees from exercising collective bargaining rights.<sup>1</sup> A labor nexus test is used to determine whether an employee is confidential under the applicable statute. The agency examines the employee's duties for a labor nexus and to determine whether the employee's actual duties imply a confidential relationship that flows from an official intimate fiduciary relationship with the executive head of the bargaining unit or public official. *International Association of Fire Fighters, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978). This test originated for employees covered by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, but has been adopted and applied to employees covered by Chapter

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<sup>1</sup> See, e.g., RCW 41.56.030(11)(c), RCW 41.59.020(4)(c), RCW 41.76.005(10), and RCW 41.80.005(4) and (6).

41.80 RCW and Chapter 41.59 RCW. *See, e.g., State – Natural Resources*, Decision 8458-B (PSRA, 2005); *Tacoma School District*, Decision 652 (EDUC, 1979).

The nature of the close association between the employee and the executive head of the bargaining unit or public official must concern the official and policy responsibilities of the executive head or public official, including formulation of labor relations policy. *International Association of Fire Fighters, Local 469 v. City of Yakima*, 91 Wn.2d at 106–107. If the employee’s official duties require ongoing and regular interaction with the executive head or public official regarding the employee’s collective bargaining position, that employee should not be placed in a situation where that employee’s loyalties are tested. The confidential employee exclusion prevents potential conflicts of interest between an employee’s duty to his or her employer and the employee’s status as a union member. *Walla Walla School District*, Decision 5860 (PECB, 1997).

General supervisory responsibility is insufficient to place an employee within the confidential exclusion. *International Association of Fire Fighters, Local 469 v. City of Yakima*, 91 Wn.2d at 107. Supervisors can provide valuable information if asked questions such as “What do you think of the nonsupervisory union’s proposal?” or “How much will our insurance company charge for medical insurance next year?” and still not be aware of an employer’s bargaining position. *Pierce County*, Decision 8892-A (PECB, 2006). Such discussions do not necessarily involve the employer’s own sensitive labor relations materials, even if the employer bases its strategy on the employee’s answer. *Id.* It is important to determine whether confidential information flowed down to the employee, not whether useful information or recommendations flowed up to the bargaining team. *Id.* The quality and quantity of employees’ input and recommendations do not make employees confidential unless they also have been privy to the employer’s sensitive labor relations information. *Id.*

#### *Confidential Employees—Under Chapter 47.64 RCW*

Collective bargaining laws are remedial in nature and are entitled to a liberal construction to effectuate their purpose. *See Nucleonics Alliance v. Washington Public Power Supply System*, 101 Wn.2d 24, 29 (1984). Because a liberal construction is required, exceptions to the law are to be narrowly confined. *Id.*

Chapter 47.64 RCW covers *any* ferry employee who is not an exempt employee pursuant to RCW 41.06.079. RCW 47.64.011(6). Unlike employees covered by other statutes this agency administers, ferry employees who satisfy the labor nexus test and act in a confidential capacity are not automatically precluded from exercising collective bargaining rights. Although ferry employees with confidential duties may exercise collective bargaining rights, employees exercising confidential duties must still share a community of interest with the other employees in the bargaining unit to ensure that bargaining unit's appropriateness.

The creation and maintenance of appropriate bargaining units is a function of this agency. *Tacoma Community College*, Decision 12543 (PECB, 2016). The purpose of this function is to ensure there is a community of interest among the employees sufficient to enable them to bargain effectively with their employer. *Central Washington University*, Decision 9963-B (PSRA, 2010); *Quincy School District*, Decision 3962-A (PECB, 1993). When determining the appropriateness of a bargaining unit, this agency considers the duties, skills, and working conditions of the employees; the history of collective bargaining; the extent of organization among the employees; the desires of the employees; and the avoidance of excessive fragmentation. *Washington State Ferries*, Decision 12559 (MRNE, 2016).

A confidential ferry employee who performs labor relations duties concerning a bargaining unit lacks a community of interest with that bargaining unit. The potential for conflicts of interest between the employee's duty to his or her employer and the employee's status as a union member precludes any community of interest.

#### Application of Standards

The senior port engineer may appropriately be included in the port engineers bargaining unit. No evidence demonstrates that the senior port engineer participated in the confidential personnel matters or labor relations processes on behalf of the employer with respect to the port engineers. Some of the senior port engineer's duties have a labor nexus but not with respect to any bargaining unit employees. The senior port engineer's current labor relations duties only concern the licensed and unlicensed engine room personnel that are in a different bargaining unit. Nothing in

the record suggests that a conflict of interest would be created if the position were included in the port engineers bargaining unit.<sup>2</sup>

#### FINDINGS OF FACT

1. The Washington State Department of Transportation is an employer within the meaning of RCW 47.64.011(4).
2. The Marine Engineers' Beneficial Association (union) is a ferry employee organization within the meaning of RCW 47.64.011(7).
3. The union represents a bargaining unit of port engineers working in the employer's Port Engineers' Office.
4. The senior port engineer oversees the vessel maintenance program and is responsible for oversight of engine crews and the direction of the engine and maintenance budget. Three port engineers, two engine room training positions, and the digital systems port engineer report to the senior port engineer. The senior port engineer also oversees approximately 350 licensed and unlicensed engine room personnel. The senior port engineer reports to the director of maintenance.
5. The senior port engineer directs the efficient and effective use of vessel engineering plants; develops service, operating and maintenance standards; and develops a means of measuring compliance and performance. The position is also responsible for the Port Engineer Office's labor and nonlabor budgets and manages the vessel maintenance schedules and out-of-service time.
6. The senior port engineer participates in the collective bargaining process for the licensed and unlicensed engine room personnel and spends about 5 percent of his time working with

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<sup>2</sup> If conflicts of interest arise in the future, either party may file a unit clarification petition under WAC 391-35-020(e) requesting that this agency review the nature of the port engineer's position.

his team or independently on the collective bargaining process, which equates to approximately 5 meetings a year. The senior port engineer provides the bargaining team with essential input and information for negotiations based on his knowledge of department functions. The senior port engineer gives information on past agency practices as well as on past and current contract language. In this position, the senior port engineer has reviewed proposals prior to their disclosure to the union and understands that these proposals are confidential among his negotiating team. During one negotiation the senior port engineer submitted a proposal of his own to the bargaining team, though his proposal did not make the final version.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 47.64 RCW and Chapter 391-25 WAC.
2. An employee whose actual duties imply a confidential relationship that flows from an official intimate fiduciary relationship with the executive head of the bargaining unit or public official is deemed to be confidential in nature.
3. A confidential ferry employee who performs labor relations duties concerning a bargaining unit lacks a community of interest with that bargaining unit. The potential for conflicts of interest between the employee's duty to his or her employer and the employee's status as a union member precludes any community of interest.
4. Based upon findings of fact 4, 5, and 6, the senior port engineer is not a confidential employee who has a conflict of interest with the bargaining unit described in finding of fact 3.



ORDER

The senior port engineer in the Marine Transportation Division of the Washington State Department of Transportation is appropriately included in the port engineers bargaining unit describing in finding of fact 3.

ISSUED at Olympia, Washington, this 22nd day of August, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MICHAEL P. SELLARS, Executive Director

This order may be appealed by filing  
timely objections with the Commission  
under WAC 391-25-660.



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### RECORD OF SERVICE - ISSUED 08/22/2018

DECISION 12754-B - MRNE has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

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