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Inside this Issue

Labor Nexus: When is a "Public Employee" Actually a "Confidential Employee"?

There may come a time when a fire district must determine whether certain employees have a right to be included in a bargaining unit or not. At such times, the employer may seek a unit clarification from the Public Employment Relations Commission (PERC). *See* WAC 391-35-020; RCW 41.56.090. The primary function of a unit clarification is to discern whether an employee should be afforded the right to be included in a collective bargaining unit. Under Washington law, "public employees" have a right to be included in a labor organization of their own choosing, and be represented by those organizations. *See* RCW 41.56.010. Certain employees are excluded from the definition of "public employee", under both federal and Washington law. The federal exclusion is broad: Federal law excludes "any individual employed as a supervisor" from the definition of "employee." 29 U.S.C. § 152 (3). Consequently, those persons who supervise subordinates might not be entitled to union representation under federal law, regardless of their relationship with management.

Washington law is more protective, and has a broad definition of who may constitute a "public employee" entitled to union representation. This term generally means "any employee of a public employer." RCW 41.56.030 (11). Additionally, Washington law poses narrow restrictions on who may not be deemed a "public employee." Excluded from this broad definition is an individual "whose duties as deputy, administrative assistant or secretary necessarily imply a

confidential relationship" with "the executive head or body of the applicable bargaining unit." RCW 41.56.030 (11)(c)(3) (emphasis added). An example of the executive head of a bargaining unit is the fire chief. Thus, an employee who stands in a confidential relationship with the fire chief is not a "public employee" entitled to union representation. PERC, along with our courts, has wrestled with this exclusion for some time, and has applied the "labor nexus" test to make such a determination. This test was first promulgated by our Supreme Court in *Local Union No. 469, International Firefighters Ass'n v. City of Yakima*, 91 Wn.2d 101 (1978).

In *Yakima*, the union challenged a decision by the trial court, which affirmed the Department of Labor and Industries, whose director found that battalion chiefs (BCs) were not "public employees." *Id*. at 102. The union appealed directly to the Washington Supreme Court, which reversed the trial court, and found that these BCs were public employees. In doing so, the Court noted that the Public Employees' Collective Bargaining Act, RCW 41.56, is remedial in nature, and therefore should be construed liberally in favor of the party seeking union representation. The Court stressed that our legislature included the narrow exclusion for confidential relationships, and therefore the "supervisory" exclusion under federal law was not controlling. Furthermore, the court opined that "the mere presence of supervisory responsibility is insufficient to warrant exclusion from the definition of public employees." Considering what it means to be a "fiduciary," or one who is in a position of "continuous trust," the Court reasoned that public officials should be able to have "full loyalty and control of intimate associates." For that reason, the legislature included a narrow exclusion.

Then the Court promulgated the rule establishing the "labor nexus" test:

> "We hold that in order for an employee to come within the exception of [former RCW 41.56.030 (2), now located at RCW 41.56.030 (11)], 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."

Yakima at 107. Applying this rule, the Court found that the BCs were public employees. Although the BCs participated in departmental reviews and prepared an annual budget for the fire chief, the Court found that nothing in the record demonstrated that they stood in a confidential relationship with the fire chief or had a role in the formulation of labor relations policy. Conceding that the duties of these BCs were intermingled with the official responsibilities of the fire chief, their duties did not "flow from" a fiduciary relationship. In other words, the duties of a "confidential employee" must have a nexus, or substantial connection to, the official duties of the fire chief. The duties of a confidential employee cannot merely be supervisory, or have some incidental role in the formulation of labor relations policy (such as sharing the occasional opinion). A fiduciary relationship is one of continuous trust, free from conflicts of interest, in which both parties constantly confide in one another with an expectation that those confidences will remain undisclosed to others. Although a BC ordinarily has a close relationship with a fire chief, that does not equate to a fiduciary relationship: He or she may not have final decision-making authority. He or she may not formulate labor-negotiations policy, and, more than likely is not regularly confided in by the fire chief. The Public Employment Relations Commission (PERC) has frequently weighed in on the "confidential employee" exclusion.

PERC, for which the Firehouse Lawyer was a commissioner for four years, has cited to *Yakima* in many cases. In *City of Lynden*, Decision 7527-B (2002), PERC, applying the labor nexus test established in *Yakima*, found that a chief of police was not a confidential employee, and was therefore a public employee. PERC began by noting that, when discerning the legislative intent behind what constitutes a "confidential relationship", the *Yakima* Court looked to RCW 41.59, the Educational Employment Relations Act. This statute contains a definition of "confidential employees" at RCW 41.59.020 (4)(c). Included within the definition of a confidential employee is one who participates "directly or on behalf of the employer in the formulation of labor relations policy," whose position "calls for the consistent exercise of independent judgment." *Id*. Furthermore, one who serves in a "confidential capacity" to such a person is also deemed a confidential employee. *Id*. Of course, the word "confidential" is not defined. PERC noted that the definition of "confidential employee" was further codified in WAC 391-35-320, an administrative code section promulgated by PERC. This section of the code defines "confidential employees" in substantially the same way as RCW 41.59.020 (4)(c). Consequently, PERC, in applying these definitions, looked to whether the chief of police consistently exercised independent judgment and whether his duties were directly related to the formulation of labor-negotiations policy. PERC found that he was a public employee, and did so for the following reasons:

First, the city administrator had general supervisory authority over all department heads, including the police chief. This may be analogized to how a fire chief has supervisory authority over all department heads within his or her fire department. Therefore, the police chief was essentially a subordinate.

Second, the city administrator was the sole negotiator in all collective bargaining sessions; at the hearing level, the former city manager testified that the chief provided suggestions for issues that could be addressed at upcoming negotiations. PERC conceded that this satisfied the "directly on behalf of" prong of the labor-nexus inquiry, but that this did not end the analysis. Still to be determined was whether the duties of the chief of police call for the "consistent exercise of independent judgment." Of great importance was the testimony of current and former city administrators that they solicited opinions from multiple department heads, including the police chief. PERC reasoned that the "chief's participation in the formation of labor relations policies and strategies was never more than indirect, away from the bargaining table." This kind of "general practice" did not rise to the level of a confidential relationship, for which the absence of conflicts of interest is a necessity.

Third, among the duties of the chief was "interpreting and applying the terms of the collective bargaining agreement," and the testimony elicited at the hearing demonstrated that the chief only exercised "routine supervisory duties." The chief provided recommendations for labor negotiations because of his knowledge and expertise as a department supervisor, not because of a confidential understanding of the city's labor-relations policies. In other words, his recommendations did not "flow from", or have a nexus to, any fiduciary relationship. Accordingly, the police chief did not operate as a fiduciary to the city administrator (the sole negotiator), but instead acted as a mere supervisor, and was a public employee with a right to union representation in a supervisory bargaining unit. It should be noted that this finding was appealed to the Washington Court of Appeals Division One, and was affirmed in an unpublished opinion. *See City of Lynden v. PERC*, No. 52113-6-1 (Div. One 2005).

What may be drawn from *Yakima* and *Lynden*? To begin, the term "public employee" is drawn much more broadly under Washington law than federal

law. Additionally, an employee must have a role which calls for the consistent exercise of independent judgment. This same employee must be able to act directly on behalf of the person or persons with the ultimate responsibility of formulating labor-relations policy. And this responsibility must stem from a fiduciary relationship between the employee in question and the person with ultimate authority. An employee's confidential status cannot be incidental to the employee's own expertise, but most flow from a relationship of "continuous trust": a nexus. Thus, our clients should not assume that, under Washington law, an employee who exercises substantial authority is automatically not a "public employee" entitled to union representation. A unit clarification would answer the question. But the client might not like the answer.

Case Note

Recently, the Washington Court of Appeals, Division Three, decided the case of *City of Wenatchee v. Chelan County Public Utility District No. 1*, No. 31195-3-111 (2014). The court reiterated the rule that municipalities may tax other municipal entities without a specific grant of statutory authority, on the condition that the activity or function being taxed is proprietary in nature, not governmental. The case involved the City of Wenatchee imposing a business-and-occupation tax on the Chelan Public Utility District (PUD) for domestic water sales. The court found that these sales served a proprietary function, and could therefore be subject to the B & O tax, without a specific grant of authority. As a side note, the legal definition of "proprietary" is "a municipality's conduct that is performed for the profit or benefit of the municipality, rather than for the benefit of the general public." BLACK's LAW DICTIONARY, second pocket edition (2001). Some examples of proprietary—not governmental—functions include remodeling a fire station and paying storm-water management fees.

City of Wenatchee reiterates the proposition that other municipalities may use statutes that give them general authority for taxation to impose a tax on the proprietary functions of fire districts.

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