

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

Public School Employees of Washington

Employer

and

Case 19-UC-667

Public School Employees Staff Organization

Union-Petitioner

Decision and Order Clarifying Unit

Facts

The Employer is a union that represents about 20,000 non-certified employees of Washington public schools, such as maintenance and custodial employees. The Petitioner is a labor organization that represents a unit ("Unit") of about 30-35 of the Employer's 50 employees, such as field representatives and clerical employees. Two staff attorneys are represented in another unit ("Legal Unit"), by an independent organization.

By this petition, the Petitioner seeks to have a new employee, Karen Ponsness, in a newly [re-] created position, administrative assistant, clarified to be in the Unit. The Employer takes the position that she is a confidential employee. The parties stipulated that Ponsness is not a supervisory employee.

The Unit as set forth in the parties' 99-02 collective bargaining agreement ("Agreement") is:

All employees now and hereafter employed by Public School Employees of Washington except for substitutes, temporary employees and the following positions: Executive Director, Executive Assistant to the Executive Director; all Service Group Directors; Regional Managers; Special Projects Manager, Accounting Technician (1); Office Manager, and Field Lawyers.

The Employer is governed by a Board of Directors. The Executive Director is Randy Dorn. Reporting to him are Eric Nordloff, Director of Field Services ("FSD"), and Tom Plourde, Director of Administration. Dorn also has an Executive Assistant, Barbara Holst.

Plourde supervises the Office Manager, secretarial support employees, accounting technician, printer and receptionist.

The field operation, headed by Nordloff, is divided into western and eastern regions, each headed by a Region Manager. They in turn each supervise a cadre of Field Representatives and one or two secretarial employees. Nordloff also supervises the legal staff, directly. This group handles the Employer's legal work on behalf of those the Employer represents. They do not perform labor relations work regarding the Employer's own employees.

Between 1992 and 1994 there were three administrative assistants who worked to one degree or another with the then-FSD. None of these three were in the Unit (based on the Stipulation and un rebutted testimony). From 1994 to 1997, there was no FSD, and the three assistants left or moved into the Unit. The record does not reflect how the FSD functions were performed in this period.

In June 1997 Nordloff became FSD. From that date until Fall 1997, 2-3 Unit secretarial persons performed secretarial work for Nordloff. From the latter date until Fall 1999, a Unit secretarial person, Stromire, and non-Unit Executive Assistant Holst provided his secretarial and clerical assistance. The current Administrative Assistant position was discussed in Fall 1999; a job description was created about December 2, 1999. The position was filled by Ponsness about Feb. 1, 2000.

The record does not reflect the contractual Unit description for any period prior to the Agreement.

Before Dorn's hire in December 1999, his predecessor was a micro-manager who handled most details himself. Plourde had the latter's ear. Dorn is more of a "big picture"/delegator-style manager than his predecessor. He has handed off substantial responsibilities to Nordloff; Plourde's role in the management structure has decreased as Nordloff's has increased. Plourde was involved in the '99 negotiations, as was Nordloff.

Nordloff is in charge of the entire field operation, which comprises the majority of the Unit. He also serves as the "HR department" for his part of the Employer. As such, he handles all hiring, firing and discipline. In this role, he has become the administrator of the Agreement, handling all grievances beyond the first step, independently for all that the record shows. He is actively involved in negotiations for collective bargaining agreements, as well as the annual re-openers of the Agreement. Nordloff formulates collective bargaining proposals, which are worked out with Dorn. He and Dorn together establish the offers and the "bottom line". Dorn and Nordloff sit on the bargaining committee for the Unit negotiations, along with Holst. Currently, a re-opener on limited issues is under negotiation.

Nordloff has near total responsibility for the negotiation of the attorney contract, although Dorn also sits on the bargaining committee. Negotiations are in progress for an entire agreement.

Ponsness was an active member and local officer of the Employer before her hire, but had never worked for the Employer. She was hired by Nordloff not because of her typing skills - his were superior - but because of her experience as a member of the Employer. She would be attuned to the internal political and labor relations ramifications of Employer actions, input which he sought.

Ponsness has multiple duties. She handles inquiries from the membership. She takes care of the Employer's purchases of promotional trinkets and membership logoed apparel. Occasionally she helps out with routine secretarial duties, but she is not considered part of the pool; she cannot be assigned such tasks without clearance from Nordloff. Ponsness helps out in large scale efforts that likely require the participation of all available hands, such as convention registration activities or mass mail-outs.

With regard to more relevant matters, Ponsness is sitting in on the Legal Unit negotiations. She was privy to all Employer caucuses. She participated in a relatively brief pre-negotiation

strategy session, and knew the Employer's basic negotiating strategy vis a vis the attorneys. A proposal was given to the attorney union at the bargaining session that followed immediately; it likely was discussed at the "pre" meeting, but the record is not clear. Ponsness is not participating directly in the Unit re-opener; Holst is. Ponsness' role in future Unit negotiations has not yet been decided. However, she is privy to the bottom line in the Unit re-opener negotiations, as a result of her position and Nordloff's bringing her "into the loop".

Ponsness is privy to disciplinary decisions, often before the affected employee, always before the Union. She was due to draft a particular grievance response to the Union, drawing upon a similar response in a related matter. She sits in on disciplinary meetings with employees as an Employer witness.

Nordloff does most of his own typing, so Ponsness does not acquire confidential information by typing confidential drafts or documents in the way many confidential employees do. However, as noted, she was not hired for her typing skills; rather, to serve as an assistant for Nordloff. While she performs many non-confidential tasks for Nordloff, her counsel is often sought about possible Employer personnel, disciplinary or labor relations decisions, as a sounding board, because of her former leadership role in the Employer.

Currently the Employer is in litigation concerning the applicability of federal overtime regulations to business representatives. The Employer is making plans on how to react, operationally, to a possible loss in the litigation. Ponsness has been involved in the planning process of the Employer's response. It is not clear from the record if this reaction would require collective bargaining, or if the Employer could act unilaterally.

Ponsness' job description recites that she:

Consistently exercises independent judgment and discretion in dealing with confidential labor relations planning and personnel issues including preparation of contract proposals, preparation for labor relations litigation and all levels of grievance processing.

Analysis

The Board has a policy of excluding "confidential employees" from units, although the Act is silent on the matter. A confidential employee is one who assists and acts in a confidential capacity to persons who formulate, determine *and* effectuate management policies (herein interchangeably referred to as "assisted party", "assistee" or "qualifying person") with regard to labor relations, or regularly substitute for employees having such duties. *B. F. Goodrich Co.*, 115 NLRB 722, 724 (1956)

In addition, individuals who have regular access to confidential information, whether or not they assist a qualifying person, are excluded. Their confidential material must be labor relations information to which the individual has access ahead of the union, or information disclosure of which would prejudice the interests of the employer in collective bargaining, or information involved in a process which may produce changes as a result of collective bargaining negotiations. See *Inland Steel Company*, 308 NLRB 868, 872, 877 (1992).

These variations are described in the cases as two separate tests. It appears that in the former the issue is more the confidentiality of the relationship between the assister and the qualifying

person, although the confidentiality seemingly must pertain to labor relations in *some* way. In the latter test, there is no such assister/qualifying person relationship, but there is still regular access to labor relations material. In this latter case, the confidential material that the employee has access to is a narrower band of critical, secret, labor relations information. That information seems to be of a more significant, limited nature than the information to which one who confidentially assists a qualifying person need have access. However, the distinction between these two tests, in my view, is not always carefully maintained and distinguished in the cases.

On brief, the parties are in agreement that Nordloff is at least one of several managers who formulate, determine and effectuate collective-bargaining policies. Thus, Nordloff is a qualifying person.

The issue then is whether the assister, Ponsness, assists and acts in a confidential capacity to Nordloff. Contrary to the Petitioner's brief, it is not necessary that the assister act in a confidential capacity to the assistee with respect to the latter's formulating policy *and* determining policy *and* effectuating policy. Rather, the definition merely envisions that the assister act confidentially vis a vis such persons, albeit presumably, also said there must be some labor relations nexus in connection with the "acting in a confidential capacity."

Clearly Ponsness acts confidentially for Nordloff regarding a whole host of labor relations information. She sits in on negotiation caucuses, has access to the bottom line in negotiations, is privy to negotiating strategy, knows disciplinary decisions ahead of the Union, knows about Unit employees' appraisals before they or the Union do. Moreover, she assists Nordloff by giving him, at his request, feedback on the Unit's likely response to his intended actions, based on her particular experience. She herself was about to draft (not *type*) a grievance response at the time of the hearing.

It is true that Ponsness has not left a long trail of activity to qualify her as a confidential employee. This is largely because she had held the position only about 6 months as of the time of the hearing. However, in that brief time she had already engaged in the activities set forth in this Decision. There is every reason to believe that at least this level of activity will be maintained; it is not a temporary fluke. Moreover, it can reasonably be anticipated that her role will likely increase. Ponsness was hired to be something more than a typist or clerk, and something more than someone who takes charge of important, albeit non-confidential matters, such as ordering of the promotional items or arranging conferences or committee meetings. She was hired as a source of feedback on Employer policies vis a vis the Unit, and to get away from having Nordloff's (limited) need for clerical assistance being provided in many cases by Unit employees (in one case a Unit employee who served on the *Union's* bargaining committee). Nordloff's role in the organization, particularly labor relations, is increasing under Dorn's leadership style, and Nordloff clearly intends that Ponsness "grow" into her position.

Based on the foregoing, I conclude that Ponsness is a confidential employee and shall exclude her from the Unit.

Order

The Unit is hereby clarified to exclude the position of Administrative Assistant to the Field Services Director.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street N.W., Washington, D. C. 20570. This request must be received by the Board in Washington by October 27, 2000.

DATED at Seattle, Washington, this 13th day of October, 2000.

/s/ PAUL EGGERT

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