

D.R. NO. 2005-3

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

DOWNE TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. CU-2004-013

DOWNE TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Director of Representation dismisses the Downe Township Board of Education's clarification of unit petition which seeks to remove the technology trainer from a broad-based unit represented by the Downe Township Education Association/Concerned About Real Education, NJEA. The Director finds that the trainer's mere access to all computer files in the district is insufficient to make her a confidential employee within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

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Appearances:

For the Petitioner,
Frank DiDomenico, attorney

For the Respondent,
Thomas G. Myers, Field Representative

DECISION

On December 24, 2003, the Downe Township Board of Education (Board) filed a Clarification of Unit Petition with the Public Employment Relations Commission, seeking to clarify the broad-based non-supervisory unit represented by the Downe Township Education Association/Concerned About Real Education, NJEA (Association) to exclude the technology technician/trainer (trainer). The Board alleges that the trainer is a confidential position within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., and, therefore, ineligible for membership in any negotiations unit. The

Association objects to the petition and disputes the assertion that the trainer is confidential.

We have conducted an administrative investigation into the issues raised by the petition. In correspondence dated August 24, 2004, we notified the parties of our findings and invited their responses. Neither party has responded. N.J.A.C.19:11-2.2. These facts appear.

Findings of Fact

The district is a one-school, elementary district. The Board's administrative offices consist of the superintendent, business manager, accounting clerks and secretary to the superintendent. In the principal's office are the principal, principal's secretary and transportation coordinator.

The Board and Association have a current collective agreement^{1/}, which defines the Association's unit as:

Teachers and certified personnel, aides, bus drivers, cafeteria/food service workers and custodial/janitorial staff, and full or part-time secretaries employed by the Board. Excluded are confidential secretaries, accounting clerks, per diem employees, cafeteria supervisor, custodial supervisor and other supervisory employees.

On April 24, 2003, prior to the expiration of the previous agreement with the Association, the Board adopted the trainer

^{1/} The contract which was in effect at the time this petition was filed was effective from July 1, 2001 through June 30, 2004. In the spring of 2004, the parties concluded negotiations for a new contract but also agreed to continue the processing of this petition.

title and job description, with the requirements that applicants be qualified as faculty members with strong instructional technology backgrounds, and demonstrate effectiveness in the use of computers for learning, business and instruction. In July 2003, the Board appointed Sharon Chance to the position.

The trainer job description adopted by the Board lists 26 responsibilities; the trainer's overall goals are: maintaining all hardware, software and communication links for effective instructional use and providing computer and other technological training for faculty and staff. Illustrative duties from the job description include:

1. Assists in developing, maintaining and implementing an articulated Pre-K to 8 computer/technology education program.
3. Assists small groups of students in the Computer Lab Center and/or other instructional setting as needed.
4. Facilitates cooperative planning and dialogue in terms of all aspects of the instructional program within area(s) of responsibility. Coordinates development of computer curriculum and serves as a resource for subject area curricular changes.
11. Responsible for software installation, the maintenance and integrity of user data (back up/virus free, etc).
17. Serves as the primary link between the district and outside resources, including vendors. Makes arrangements for the preview of technological equipment and materials for educational purposes with vendors.
19. Coordinate training for the professional staff related to all phases of technology use.

Chance works with teacher William Gauntt, in a classroom containing 40 computer stations. Her duties include instructing groups of students in the use of computers, developing technology programs for faculty and staff, assisting in developing technology curriculum for students, trouble-shooting all problems with the school's computers, and entering data into the information system. Beginning in school year 2004-2005, all of the Board's internal reports and documents will be automated, which could involve Chance's preparation of reports for the Board on negotiations issues.

The Board's negotiations team consists of four Board members and the business manager. The business manager may consult with the trainer on any problems with the Board's computer system. The superintendent does not participate in negotiations. Chance reports to the superintendent. The Association has filed no grievances since the position was created, and there have been no disciplinary actions since September 2003. To date, Chance has not participated in negotiations on the Board's behalf. She was not present at negotiation sessions for the Board, nor did she attend any of the Board's pre-negotiations strategy meetings or participate in the Board's development of counterproposals. There is no evidence that she is (or was) aware of the Board's positions before they were disclosed to the Association. The Board states that it intends to use the trainer to cost-out

negotiations proposals in the future. There is no evidence that this assignment would result in Chance having knowledge of the Board's positions prior to their disclosure to the Association. The trainer has access to all of the files stored in the Board's automated systems, which may include the Board's confidential labor relations positions and strategies.

ANALYSIS

The Board argues that the trainer's job duties and access to files make her a confidential employee and inappropriate for inclusion in the Association's negotiations unit. The Association asserts that Chance does not perform any functions that make her confidential within the meaning of the Act.

A clarification of unit petition is appropriate to resolve questions concerning the scope of a collective negotiations unit within the framework of the provisions of the Act, the unit definition contained in a Commission certification, or set forth in the parties' recognition agreement. A petition seeking to exclude alleged confidentials is appropriate at any time.

Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 251 (1977). Accordingly, I find that the petition is procedurally appropriate. However, based upon the above facts, I find that the newly created trainer is not a confidential position.

N.J.S.A. 34:13A-3(g) defines confidential employees as:

employees whose functional responsibilities or knowledge in connection with issues involved in the

collective negotiations process would make their membership in any appropriate negotiations unit incompatible with their official duties.

The Commission's policy is to narrowly construe the term confidential employee. Ringwood Bd. of Ed. P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd NJPER Supp.2d 186 (¶165 1988); State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985). In State of New Jersey, the Commission explained the approach taken in determining whether an employee is confidential:

[w]e scrutinize the facts of each case to find for whom each employee works, what [the employee] does, and what [the employee] knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee [were] included in a negotiating unit. [Id. at 510.]

In New Jersey Turnpike Authority v. AFSCME, Council 73, 150 N.J. 331 (1997) ("N.J. Turnpike Auth."), our Supreme Court approved the standards articulated in State of New Jersey and explained:

The baseline inquiry remains whether an employee's functional responsibilities or knowledge would make their membership in any appropriate negotiating unit incompatible with their official duties. N.J.S.A. 34:13A-3(g); see also State of New Jersey, supra, 11 NJPER 507 (¶16179 1985) (holding that final determination is 'whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit.'). Obviously, an employee's access to confidential information may be

significant in determining whether that employee's functional responsibilities or knowledge make membership in a negotiating unit inappropriate. However, mere physical access to information without any accompanying insight about its significance or functional responsibility for its development or implementation may be insufficient in specific cases to warrant exclusion. The test should be employee-specific, and its focus on ascertaining whether, in the totality of the circumstances, an employee's access to information, knowledge concerning its significance, or functional responsibilities in relation to the collective negotiations process make incompatible that employee's inclusion in a negotiating unit. We entrust to PERC in the first instance the responsibility for making such determinations on a case-by-case basis. (emphasis added) [Id. at 358.]

See also River Dell Reg. Bd. of Ed., D.R. No. 83-21, 9 NJPER 180 (¶14084 1983), req. for rev. den. P.E.R.C. No. 84-95, 10 NJPER 148 (¶15073 1984) ("River Dell").

Thus, the key to confidential status is an employee's knowledge of materials used in the labor relations process including contract negotiations, contract administration, grievance handling, and the preparation for these processes. See State of New Jersey (Div. of State Police), D.R. No. 84-9, 9 NJPER 613 (¶14262 1983). Employees may be found to be confidential where their supervisor's role in the labor relations process and their own duties expose them to confidential matters.^{2/}

2/ See W. Milford Bd. of Ed., P.E.R.C. No. 56, NJPER Supp. 218 (¶56 1971); Salem Comm Coll., P.E.R.C. No. 88-71, 14 NJPER 136 (¶19054 1988); River Dell.

The Commission has been cautious in finding confidential status because such a finding exempts the employee from the rights and protections of the Act. N.J.S.A. 34:13A-5.3. Where such a determination relies upon "speculation or conjecture as to job function," the Commission has found that such circumstances are insufficient to warrant excluding the employees from the unit. Lacey Tp. Bd. of Ed., P.E.R.C. No. 90-38, 15 NJPER 628 (¶20263 1989); Wayne Tp., P.E.R.C. No. 87-82, 13 NJPER 77 (¶18035 1986).

Applying the above standards to this case, I find that the Board's intention to use the trainer to cost-out proposals in negotiations, and her mere access to the Board's files, is too speculative to base a finding of confidential status. Chance did not participate in the most recent negotiations in 2003-2004 for a successor agreement even though she was not a member of the Association's unit. If the Board calls upon Chance to assist in preparing for the next negotiations, it is not clear what that input might be or whether she might come to know the Board's strategies and negotiations positions prior to their disclosure to the Association. We will not find confidential status based upon this type of speculation. See Lacey Tp. Bd. of Ed.; Commercial Tp., D.R. No.91-9, 16 NJPER 511 (¶21223 1990).

The Board argues that another basis for Chance's confidential status is her access to all of the files stored in

the Board's automated systems, including confidential information. No evidence here shows her use of any information related to the Board's conduct of negotiations or contract administration which would compromise the Board's position in those activities. Mere access to information is not a sufficient basis for finding confidential status. See N.J. Turnpike Auth.; Evesham Tp. Fire District No. 1, D.R. No. 99-4, 24 NJPER 503 (¶29233 1998); Ringwood Bor., D.R. No. 93-19, 19 NJPER 196 (¶24093 1993); Little Ferry Bd. Of Ed., D.R. No. 80-19, 6 NJPER 59 (¶11033 1980); Cf. Oakland Bd. Of Ed., D.R. No. 99-9, 25 NJPER 66 (¶30025 1998).

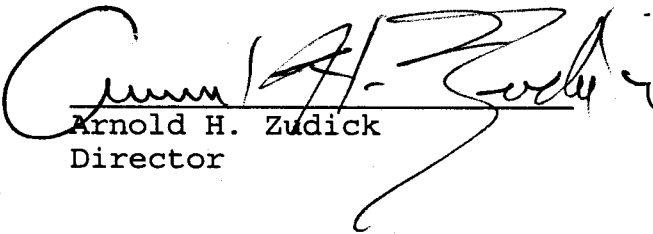
For the foregoing reasons, I conclude that the evidence here does not support the allegation that the trainer's position involves participating in collective negotiations or administering the collective negotiations agreement. The trainer falls within the unit description; teaching is part of her responsibilities and the Board has not objected to including her in the Association's broad-based unit on any basis other than her alleged confidential status. It appears that the essence of the trainer's job is teaching computer skills; facilitating the teaching of such skills, personally instructing teachers in computer skills; and troubleshooting, maintaining and upgrading the Board's computer and information system.

Accordingly, I find that the trainer title is appropriate for inclusion in the Association's existing unit.

ORDER

The petition is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Arnold H. Zudick
Director

DATED: September 24, 2004
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by October 7, 2004.