

D.R. No. 2005-16

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

In the Matter of

POMPTON LAKES BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. CU-2004-026

POMPTON LAKES EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Director of Representation grants a Clarification of Unit Petition filed by the Pompton Lakes Board of Education. The Director determined that the Secretary to the Board Secretary/Business Administrator was a confidential employee within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. Specifically, the Director concluded that inclusion of the employee in the Association's bargaining unit compromises the Board's position at the negotiations table. The Association agrees with this conclusion and concedes that her duties make the Secretary to the Board Secretary/Business Administrator confidential, but objects to the Petition because it asserts that it was led to believe another employee was performing the confidential duties. Based on this belief the Association agreed to exclude that employee from the unit. The Director determined that this objection does not prevent the finding that the Secretary to the Board Secretary/Business Administrator is a confidential employee. He found that the procedure by which a previously excluded employee can be added to the existing unit may be by Clarification of Unit Petition, but there is no petition before him at this time.

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Appearances:

For the Petitioner,
Sills, Cummis, Epstein & Gross, attorneys
(Philip E. Stern, of counsel)

For the Respondent,
Bucceri Pincus, attorneys
(Mary J. Hammer, of counsel)

DECISION

On June 8, 2004, the Pompton Lakes Board of Education (Board) filed a Clarification of Unit Petition with the Public Employment Relations Commission (Commission) seeking to exclude the positions of Payroll Supervisor/Bookkeeper, Data Processor/Computer Operator/Accounting Clerk, Board Office Secretary and Secretary to the Board Secretary/Business Administrator from the existing collective negotiations unit consisting of teachers and other professionals as well as clerical employees represented by the Pompton Lakes Education

Association (Association).^{1/} The Board contends the four employees holding the disputed positions are confidential employees within the meaning of N.J.S.A. 34:13A-3(g). The Association opposes the Petition.

We have conducted an administrative investigation into the issues raised by the Petition. N.J.A.C. 19:11-2.2 and 2.6. By letter dated July 1, 2004 and at the investigatory conference on August 10, 2004, the Board was requested to provide specific information to support its Petition. On October 7, 2004, the Board submitted affidavits from the four employees holding the petitioned-for titles. A telephone conference with the parties was conducted on October 14, 2004, to discuss the Board's submissions. Afterwards, additional questions were submitted to the Board for response by October 28, 2004, and a follow-up conference with the parties was scheduled for November 23, 2004. At the request of the parties the conference was rescheduled to January 21, 2005. On December 16, 2004 the Board submitted supplemental affidavits from the petitioned-for employees as well as affidavits from Maureen Kennedy and Sharon Weintrob, confidential employees currently working in the Board office. On

^{1/} On October 22, 2002 the Board filed a Clarification of Unit Petition under Docket No. CU-2003-017 seeking to exclude these same four positions from the Association's bargaining unit asserting that the positions were confidential under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The petition was dismissed by the Director pursuant to N.J.A.C. 19:11-2.3 on September 22, 2003.

January 13, 2005, the Association submitted its position statement together with an affidavit from Association President John DeMarco in response to the Board's submissions. After the January 21, 2005 follow-up conference, the Board was requested to provide additional information regarding the employees it sought to remove from the Association's bargaining unit. On January 28, 2005, the Board withdrew its Petition as to all positions except the Secretary to the Business Administrator. On March 7, 2005, we notified the parties of our tentative findings regarding the Secretary to the Business Administrator and invited responses. Neither party filed a response. N.J.A.C. 19:11-2.2 and 2.6. There being no substantial or material factual issues in dispute, the disposition of this matter is based on the following:

Background

The Association represents a broad-based unit of certificated and non-certificated employees of the Board. There are approximately one hundred fifty (150) certificated employees and thirty-six (36) non-certificated employees represented by the Association. Of the non-certificated employees there are fourteen (14) clerical employees assigned as follows: three clerical employees in the high school, four clerical employees in the middle school, three clerical employees in the two elementary schools and four clerical employees in the Board office. The Board and Association are parties to a collective negotiations agreement covering the period July 1, 2003 through June 30, 2006.

The contract specifically excludes the titles of Assistant Board Secretary held by Sharon Weintrob and Secretary to the Superintendent held by Maureen Kennedy. Both positions are assigned to the Board office.

The District consists of two elementary schools (kindergarten through fifth grade), one middle school (grades six through eight) and one high school. The student population is approximately 1600. The Board office is in a separate building adjacent to the middle school. All four employees which the Board originally sought to exclude from the Association's unit work in the Board office.

The Board office houses both the offices of the Superintendent Dr. Terrance Brennan, and the School Board Secretary/Business Administrator Theresa McHale. In the building is also a large meeting/conference room used by the Board for its bi-monthly meetings as well as contract negotiations.

On the Superintendent's side of the building there are two offices for Brennan's sole use. His secretary, Maureen Kennedy, has her own office. Kennedy is a confidential employee, not included in the Association's unit.

On the Business Administrator/Board Secretary's side of the building is McHale's office. Gerda Bilello, secretary to the Business Administrator, sits in the large office space at the entrance to McHale's area of the building. She acts as the receptionist and performs secretarial functions for McHale. The

file cabinet containing McHale's correspondence as well as the negotiations files are in the office space occupied by Bilello and are maintained by her. Across the hall from McHale's office is a separate office for Assistant Board Secretary Sharon Weintrob. She also reports directly to McHale and is a confidential employee, not in the Association's unit.

Having office space in McHale's wing of the building is also Payroll Administrator/Bookkeeper Pauline Walenciak, and Accounting Clerk/Computer Operator/Data Processor Jeanne Earl. The offices are separate but in close proximity to each other.

The Board office receptionist Ella Figliuolo, Walenciak, Earl, and Bilello are in the Association's bargaining unit. Kennedy and Weintrob are the only employees in the Board office currently holding confidential positions.

During the last round of negotiations, the Board's team consisted of Board President/Negotiations Chair Mary Curran; Board members Bill Baig, Fred Goddard, and Joel Bernstock; Business Administrator/Board Secretary McHale and Board Attorney Philip Stern. The Association's negotiations team consisted of Association President John DeMarco, Chief Negotiator Ron Bivona, Assistant Chief Negotiator Chris Patrick, one representative for the clerical staff, one representative for the custodial/maintenance staff, four representatives for the certificated staff (one from each building) and NJEA Uniserv Representative John Roper.

Secretary to the Business Administrator

Gerda Bilello has held the position of secretary to the Board Secretary/School Business Administrator for 7 ½ years. Her responsibilities include opening all of Board Secretary/Business Administrator McHale's mail, answering McHale's telephone and preparing all of her correspondence. Bilello's position makes her privy to confidential information concerning negotiations. For example, Bilello answers all telephone calls and prepares all correspondence to Board members and the Board attorney during negotiations, including but not limited to negotiations proposals, scattergrams, and settlement information.

In the last round of negotiations, Bilello was privy to all Board negotiations strategies and proposals. The Board provided the negotiations file from the last round of negotiations in support of its Petition. Examination of the file reveals that Bilello typed each document contained therein.

During the last round of negotiations Bilello discussed with McHale, Brennan, Weintrob and Kennedy matters directly related to the Board's interests during negotiations. Specifically, she assisted in the preparation and distribution of a letter from Board President Curran to the Association membership which presented the Board's response to what the Board perceived to be the Association's mis-characterization of its position in regard to the negotiation of salary guides. The Board considered the content of the letter, as well as the timing of its mailing, to

be sensitive and did not want the Association leadership to have advance knowledge of its content.

Bilello is a member of the Association, but asserts that in her position as secretary to McHale, the Association leaders have refrained from revealing information to her for fear that she would share it with McHale. She contends that she has also not been informed of Association meetings. Bilello explains that during the last round of negotiations she was informed of at most two out of numerous job actions undertaken by the Association membership. Bilello describes a general atmosphere of mistrust between her and the Association.

Association President John DeMarco provided an affidavit. DeMarco has been president since July 2001. He disputes that Bilello or the three other Association members in the Board office were excluded from Association business or treated differently from other Association members. He contends that the Association has invited the Board office employees to have a representative on the governing board, but none were interested.

The Association also disputes that Bilello was excluded from information given to other Association members.

ANALYSIS

The Association concedes that Bilello's duties make her confidential, but objects to the Petition because it claims it was led to believe that Assistant Board Secretary Weintrob was performing these (Bilello's confidential) duties for McHale.

Based on its belief, the Association agreed to exclude Weintrob from its unit. The Association contends, therefore, that Weintrob is no longer a confidential employee.

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.

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. [*Id.* At 358.]

The key to finding confidential status is the 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).

The Commission exercises caution in finding confidential status because such a finding removes the employee from the rights and protection of the Act. Thus, the Commission will not base such a finding on speculation or conjecture as to job functions and responsibilities. Lacey Tp. Bd. of Ed., P.E.R.C. No. 90-38, 15 NJPER 628 (¶20263 1989).

Here, the Association concedes that Bilello's job duties and responsibilities make her a confidential employee. I agree. Bilello reports directly to McHale who was on the Board's negotiation's team. Bilello prepared all of McHale's correspondence containing communications between the negotiation's team and its attorney during the last round of negotiations. The negotiations file is kept in Bilello's office, and one of her functional responsibilities is to maintain that file. Bilello had advance notice of Board strategy and proposals. Bilello's inclusion in the Association's bargaining unit compromises the Board's position at the negotiations table. The Association does not disagree with this conclusion. Therefore, I find her to be a confidential employee and remove her from the Association's unit.

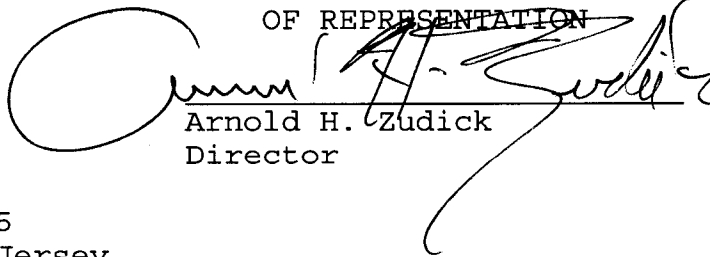
Regarding the Association's contention that Weintrob is no longer a confidential employee based on her current duties and responsibilities, this assertion does not prevent the finding in this matter that Bilello is a confidential employee. The procedures by which a previously excluded employee can be added to the existing unit may be a clarification of unit petition, depending on the circumstances. There is no petition before me at this time regarding Weintrob.

Based on the foregoing, I grant the Board's Petition.

ORDER

Effective immediately, the Association's unit is clarified to exclude the Secretary to the Board Secretary/Business Administrator.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Arnold H. Zudick
Director

DATED: March 23, 2005
Trenton, New Jersey

A request for review of this decision by the Commission maybe 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 April 5, 2005.