

D.R. No. 2009-13

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

In the Matter of

OLD BRIDGE TOWNSHIP FIRE
DISTRICT #2,

Petitioner,

-and-

Docket No. CU-2008-013

OLD BRIDGE TOWNSHIP CAREER FIRE
FIGHTERS ASSOCIATION,
LOCAL 3311, IAFF,

Employee Organization.

SYNOPSIS

The Director of Representation clarified a collective negotiations unit of a bookkeeper and a secretary to the Board of Fire Commissioners to exclude the secretary because it is a "confidential employee" within the meaning of the Act. The Director found that the secretary's typing of executive session minutes memorializing Board discussions of upcoming collective negotiations, interest arbitration, and a pending unfair practice charge makes her "confidential" within the meaning of the Act. The Director also found that the secretary's responsibility to type the Board of Fire Commissioners' executive session minutes renders the title's inclusion in any negotiations unit incompatible with its official duties.

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Appearances:

For the Petitioner,
Ruderman & Glickman, P.C., attorneys
(Steven S. Glickman, of counsel)

For the Employee Organization,
Kroll Heineman, attorneys
(Raymond G. Heineman, of counsel)

DECISION

On February 11, 2009, I issued a decision in this matter, Old Bridge Twp. Fire District #2, D.R. No. 2009-8, 35 NJPER ____ (¶____ 2009). Later that day, I learned that I had not considered all of the facts presented by the parties. I wrote a letter to them, advising of my omission and providing a period of time for their full exchange of materials and submission of replies. This decision is based upon my review of all of the available facts.

On December 5, 2007, the Old Bridge Township Fire District #2 (Fire District) filed a clarification of unit petition seeking

to clarify a collective negotiations unit of a bookkeeper and a secretary to the Board of Fire Commissioners to exclude the secretary because it is a "confidential employee" within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The majority representative, the Old Bridge Township Career Fire Fighters Association, Local 3311, IAFF (Association), opposes the petition, asserting that the title has never performed confidential duties.^{1/}

We have conducted an administrative investigation of the facts pertaining to the petition. N.J.A.C. 19:11-2.2 and 2.6. The parties have filed letters, briefs and certifications. On September 15, 2008 I issued a letter, tentatively dismissing the petition. On October 23, 2008, the Fire District filed a reply, together with documents and affidavits. On January 12, 2009, the Association filed a reply. On January 15, 2009, the parties were asked to exchange the letters, briefs, and certifications which had been submitted to me in support of their respective positions. Both parties filed replies to the exchanged materials. On February 11, 2009, I issued a decision, D.R. No. 2009-8, finding that the secretary to the Board of Fire Commissioners was a confidential employee. Later that day,

^{1/} The Association has filed a related unfair practice charge and an amended charge (Dkt. No. CO-2008-180) alleging that the Fire District violated sections 5.4a(1), (3), and (5) of the Act by directly approaching the secretary to the Board of Fire Commissioners, asking her to "resign" from the Association. The charge was conferenced together with this petition on April 16, 2008. The charge is being held in abeyance pending resolution of this petition.

after discovering that I had not considered certain facts, I wrote an acknowledging letter to the parties, advising that the issued decision was not "final" and that I would review all of the facts. I also requested that the Association provide the unconsidered materials to the District. On March 3, 2009, we received a reply. The parties' submissions reveal the following facts.

The negotiations unit represented by the Association is comprised of two titles: 1) bookkeeper and 2) secretary to the Board of Fire Commissioners. One person is employed in each title.

The Fire District's Board of Fire Commissioners is comprised of five members who are elected to staggered three-year terms. The Board holds one business meeting per month, which has a public session and an executive session, if an executive session is required. The Board holds one agenda meeting per month, except none is held in the months of July and August. The agenda meeting also has a public session and an executive session, if an executive session is required.

The unit employees are assigned to the Fire District's administration offices. Also stationed there are the fire marshal and three fire inspectors. For most of any workday, the fire marshal and fire inspectors are "out in the field," leaving the bookkeeper and the secretary to the Board of Fire Commissioners as the only employees regularly staffing the administration offices.

A job description for the secretary to the Board of Fire Commissioners provides in a pertinent part that the secretary types all correspondence; records and types minutes for business meetings, agenda meetings, and special meetings; maintains files and prepares reports; and assists with the preparation of the budget and audit.

Barbara Rizzolo has been employed as the secretary to the Board of Fire Commissioners for more than 10 years. She performs secretarial duties, including answering phones, preparing correspondence, typing and filing minutes of Board meetings, and preparing unspecified reports. We reviewed Rizzolo's certification dated June 4, 2008, her January 27, 2009 certification in response to the certifications filed by fire commissioners Linda Seiler and Eleanor Walker and former fire commissioner Bruce Walker.

Before March, 2007, Rizzolo attended Board business meetings and between 2005 and 2007 she attended Board agenda meetings. She was sometimes present for the executive sessions. When Rizzolo attended executive sessions, she took notes and typed executive session minutes. When she was not present, she sometimes typed the minutes from the handwritten notes prepared by the Board secretary (i.e., an elected member of the Board). The lower-case initials, "br" appear at the end of minutes typed by Rizzolo. From 1999 through 2002, and from 2004 through 2007, Rizzolo typed the executive sessions minutes of at least 16

meetings at which labor relations matters were discussed. Among those meetings, and on the specified dates, Rizzolo typed:

1) March 16, 2004 - 'As of this meeting, the firefighters have not filed for arbitration. Discussion took place as to whether the Board should file for arbitration. No action was taken.'

2) March 15, 2005 - 'After reviewing the Board's file regarding the NFIRS grievance incident, attorney Braslow advised everything in the file was okay to be released to the union as per their request. Pres. Zipp advised that he wants to look over the file prior to releasing it. It will be given to them after his review. . . . The Board discussed having a longer contract period, perhaps four years, removing the Chief from the language in the contract, a cost of living increase, review and update step class training levels, review F/O qualifications and possible medical co-pay options.'

3) September 20, 2005 - (regarding a conference at PERC on an unfair labor practice matter) - 'Comm. Weiss indicated that atty. Biviano felt the grievance would be dismissed.'

In March 2007, the Fire District directed Rizzolo not to attend executive sessions and she hasn't attended a session since then because of the labor relations matters discussed at the sessions. She also has not typed executive session minutes since that time. In its December 18, 2007 letter, the Fire District noted that it has not assigned those duties to the secretary, pending the outcome of this petition. I infer that the Fire District intends to reassign the duties of attending executive sessions and typing executive session minutes to Rizzolo if her

title is determined to be confidential within the meaning of the Act.

ANALYSIS

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 set forth in a Commission certification, or in the parties' recognition agreement. A petition seeking to exclude an assertedly confidential employee is appropriate at any time.

Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 251 (1977). Accordingly, this 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:

We 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 11 NJPER 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]

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).

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).

Applying these standards to this matter, I find that the secretary to the Board of Fire Commissioners is a confidential employee within the meaning of the Act.

The Fire District has submitted the typed minutes from 48 executive sessions convened between 1999-2002 and 2004-2007. Labor relations matters were discussed at 16 of those sessions, most notably in the March 15, 2005 executive session when the Board discussed its objectives in upcoming collective negotiations with the Association. The lower-case initials "br" appear at the end of the typed minutes of that session and on the minutes of sessions in March, 2004 and September, 2005, at which the District contemplated filing for interest arbitration, and received its attorney's advice on a pending unfair practice charge.

On January 12, 2009, the Association filed a letter advising that the initials, "br" appearing at the end of the minutes

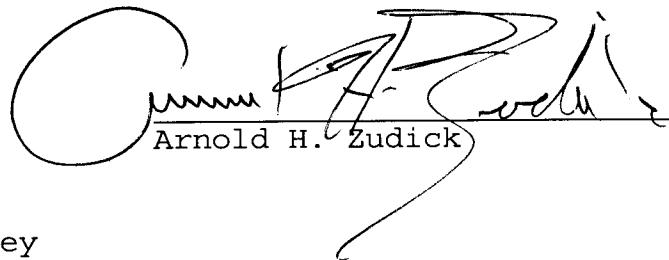
". . . do not necessarily indicate that they were typed by Barbara Rizzolo." Rizzolo has certified however, that she has typed executive session minutes from notes taken by commissioners.

The Fire District has submitted affidavits from fire commissioners Eleanor Walker and Linda Seiler and from former fire commissioner Bruce Walker. They each certified that the initials "br" appearing at the end of the executive session minutes identify Rizzolo as the typist. Rizzolo's certifications do not contest their representation. I find that Rizzolo typed the minutes of the proffered executive sessions.

I also find that the secretary's responsibility to type the Board of Fire Commissioners' executive session minutes renders the title's inclusion in any negotiations unit incompatible with its official duties. Rizzolo's typing of minutes memorializing Board discussions of upcoming collective negotiations, interest arbitration and a pending unfair practice charge makes her position "confidential" within the meaning of the Act. See, Greenwich Tp. Bd. of Ed., P.E.R.C. No. 93-27, 18 NJPER 490 (¶23224 1992) (secretary to business administrator who, among other responsibilities, typed executive session minutes from the business administrator's notes found to be confidential); Oakland Bd. of Ed., D.R. No. 91-8, 16 NJPER 500 (¶21220 1990) (assistant secretary to the superintendent who, among other responsibilities, typed executive session minutes from the business administrator's notes found to be confidential).

The unit is clarified to exclude the secretary to the Board of Fire Commissioners. I assume that the Fire District intends to and will promptly reassign executive session duties to Rizzolo.

BY ORDER OF THE DIRECTOR OF
REPRESENTATION



Arnold H. Zudick

DATED: April 21, 2009
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 May 1, 2009.