

D.R. NO. 2014-1

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

In the Matter of

GLOUCESTER COUNTY COLLEGE,

Public Employer,

-and-

Docket No. CU-2012-019

GLOUCESTER COUNTY COLLEGE DIRECTOR'S
GROUP NEW JERSEY EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Director of Representation clarifies a collective negotiations unit to exclude a newly created title of Director of Business Services. The Director concludes that the employee is confidential. In applying State of New Jersey, P.E.R.C. No. 86-10, 11 NJPER 507 (¶16179 1985), the Director finds that the intended duties of the employee included assistance in the confidential negotiations process, which would therefore compromise the employer's right to confidentiality concerning the negotiations process if the employee was included in the unit.

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Appearances:

For the PUBLIC EMPLOYER,
Archer & Greiner, attorneys
(David A. Rapuano, of counsel)

For the PETITIONER,
Selikoff & Cohen, attorneys
(Keith Waldman, of counsel)

DECISION

On February 17, 2012, the Gloucester County College Director's Group/New Jersey Education Association ("Association") filed a clarification of unit ("CU") petition seeking to add the newly-created title of Director of Business Services to its collective negotiations unit. Petitioner contends that the job duties of the title make it appropriate for inclusion in its unit comprised of all directors employed by Gloucester County College ("College"). It also argues that the College added collective negotiations duties to the job description for the sole purpose of excluding the newly-created title from its unit.

The College disagrees. It contends that the Director of Business Services will be actively involved in the collective negotiations process as to all College negotiations units and is, thus, a confidential employee not appropriate for inclusion in the Association's unit.

On June 6, 2012, the parties were asked to provide specific information by affidavit or certification regarding the title at issue. On July 30, 2012, the College submitted answers to the questions together with a certification of Vice President/Chief Operating Officer ("VP/COO") Dominick J. Burzichelli. On the same date, the Association submitted its answers together with certifications of Association President Jane Crocker and Director of Business Services Pratt.

On May 30, 2013, I wrote to the parties advising of my tentative findings and conclusions, and inviting responses. On June 10, 2013, the Association filed a response ("response"), along with a certification, disagreeing with my tentative determination that Ms. Pratt's position is "supervisory" or confidential. The Association contends that Ms. Pratt should be included in the unit because she is not a supervisor. The issue of whether Mr. Pratt was a statutory supervisor had not been previously discussed by either the Association or the College. Accordingly, I did not make a tentative determination that she was a supervisor who should be excluded from the unit. My

tentative determination was that Ms. Pratt was a confidential employee who should be excluded from the unit. Accordingly, I will not decide the "supervisory" issue. The Association's June 10, 2013 response is further addressed below.

I find these facts:

On September 14, 2001, a Certification of Representative was issued by the Public Employment Relations Commission ("PERC") to the Association for a unit including all regularly employed directors employed by the College. Subsequently, the Association and the College entered into a collective negotiations agreement with a term of June 23, 2011 through June 30, 2014. The recognition clause of the agreement states that the unit is comprised of all College Directors, as well as the titles of Associate Director, Director II, Director, and Senior Director. Art. I, §1.1.

VP/COO Burzichelli reports directly to the President of the College. The position description for VP/COO sets forth the duties of the title, which include acting as the leader in the "development and preparation of the annual operational plan for operations and the College budget, working collaboratively with the President, Cabinet, and other staff members." Burzichelli is involved in the collective negotiations process. He frequently holds meetings pertaining to confidential financial topics with his core financial management team, which is comprised of the

Executive Director of Financial Services, the Controller, and the Director of Business Services. The team for previous contract negotiations cycles was comprised of the Executive Director of Financial Services and Executive Director of Human Resources. The position of Director of Business Services was created following the previous negotiations cycle due to a realization by management that the Executive Director of Financial Services needed assistance and support with labor relations issues, including collective negotiations.

The Executive Director of Financial Services is currently Beth Hall. Ms. Hall reports to the VP/COO. Ms. Hall leads the development and preparation of the College budget and works collaboratively with the President of the College, cabinet, and other staff members. She supervises the Director of Business Services and the Controller, among others. Ms. Hall was a member of the College's negotiations team during the negotiations for the current negotiations agreements, and is directly involved with the labor relations process. She is responsible for the College's interpretation and implementation of the financial aspects of all collective negotiations agreements. Ms. Hall's responsibility for implementation of the budget involves access to and analyses of individual and aggregate confidential personnel and labor relations budgetary and cost data. Under Ms. Hall's direct supervision, the Controller is responsible for

preparing confidential materials for development of strategic management positions.

The revenue side of the College's budget is analyzed by a core financial management team which is comprised of the Vice President and Chief Financial Officer, the Executive Director of Financial Services, the Director of Business Services, and the Controller. The team discusses tuition and revenue projections for the next fiscal year and the impact any change in these projections would have on the College's budgetary operations. If deficits are projected, the team investigates and discusses strategies to balance the budget, which could include expenditure reductions and reduction strategies, including layoffs and reductions in force. During a negotiations cycle, the team discusses and evaluates the amount to be budgeted for salary increases for full-time employees, which informs the College's negotiating position.

The position of Director of Business Services was created in December 2011. The position description for this title states that the Director of Business Services reports to the Executive Director of Financial Services. One of the duties required of the Director of Business Services is the preparation of "confidential materials for development of a strategic management position for the collective bargaining process." Prior to her selection for her current position, Ms. Pratt served as the

College's Bursar. As Director of Business Services, she is now required to supervise the Bursar, Collections Representative, and Supervisor of College Services. Ms. Pratt's newly-created title is not identified in any grievance step of the collective negotiations agreement.

The Director of Business Services is also the backup for the Executive Director of Financial Services with respect to budget reporting. During Ms. Hall's leave, Ms. Pratt was responsible for preparing all the budget reports for the Board of Trustees meetings. The College asserts that she is not yet performing the full scope of her intended duties because of her uncertain confidential status due to the filing of this CU petition, and because, as of July 30, 2012, negotiations for the seven successor labor contracts, which expire on June 30, 2014, had not yet begun. If she is determined to be a confidential employee, Ms. Pratt will be involved in creating budget and financial scenarios related to managing or reducing expenditures. She would also be tasked with analyzing the financial impact of confidential labor relations matters; in order to perform this aspect of her job, she would access the full range of the College's financial data. Should Ms. Pratt not be determined to be confidential, the College asserts that the intended function of the Director of Business Services title could not be realized.

In its response, the Association asserts that, in its position statement of March 9, 2012, the College provided only one reason for not having Ms. Pratt involved in negotiations, i.e., there had been no opportunity to do so. The Association asserts that the College did not rely on the rationale of uncertainty of Ms. Pratt's status for not permitting her to work on her negotiations duties. It contends that "it would be pure speculation and conjecture at this point to make a determination on tasks that [Ms.] Pratt may be given in the future." I disagree.

As of March 9, 2012, we had not concluded our investigation. We had a conference with the parties on May 11, 2012, and on June 6, 2012 we asked the parties to submit evidence in the form of certifications or affidavits in answer to questions we posed. Accordingly, on July 30, 2012, the College submitted the affidavit of VP/COO Burzichelli. He certifies that Ms. Pratt "is not yet performing the full scope of her intended duties, in part due to the filing of the CU petition and her uncertain confidential status, and also in part due to the fact that the College is mid-contract." He further certifies that "once confirmed as a confidential employee, [Ms. Pratt] will be involved in creating budget and financial scenarios. . . ." Thus, the College has certified that while Ms. Pratt's status is

currently uncertain, it will give confidential tasks to Ms. Pratt if she is determined to be a confidential employee.

Association President Crocker certifies that "historically" all confidential financial analysis for negotiations was performed by the College's President and Chief Operating Officer based on information gathered by the Executive Director of Finance and other staff. No one from the Director's unit was engaged in gathering or analyzing financial information. Ms. Crocker also states that the previous collective negotiations agreement was negotiated by President Keating, VP/COO Burzichelli, and Executive Director for Human Resources Morganti, along with outside counsel. According to Ms. Crocker, the Executive Director of Finance is "only tangentially involved in negotiations as a resource person" and "sat in on negotiations as a financial resource person." To the extent that any portion of Ms. Crocker's certification reflects opinion, rather than fact, or is not based on personal knowledge, the information provided is of limited use. She states that no other director is excluded from the Association as confidential.

In its response, the Association reasserts that Association President Crocker had personal knowledge of the composition of the College's past negotiations team, as well as what transpired between the parties at the negotiations table. While she may have been present at past negotiations between the parties, it

cannot be said that she was aware of all the individuals involved in the in-house meetings who evaluated and analyzed information for the negotiations team. These past negotiations informed the College of the additional assistance that was needed for future negotiations, which led to the creation of the new position and duties at issue.

Two job descriptions for the position of Director of Business Services, both dated November 11, 2011, were prepared by the College. One was provided to Ms. Pratt when she was designated the Director of Business Services on or before December 2011. The second one was emailed to Association President Crocker on January 24, 2012 after she questioned why the Director of Business Services had not been placed in the unit. The second version of the job description is identical to the first, with the exception of the addition of the following language: "Prepares confidential materials for development of a strategic management position for the collective bargaining process."

Ms. Pratt certifies that she did not perform this duty in the last round of negotiations. Her current position and duties did not exist at the time of past negotiations; therefore, she could not have performed confidential duties. She also states that no one has explained what this job duty entails. She additionally certifies that the only items she has prepared for

the Board of Trustees meetings are cover letters and resolutions. Nevertheless, she also states that she performs some of the job duties previously performed by the Executive Director of Finance, her immediate supervisor, who is a confidential employee.

Ms. Pratt was previously the Bursar and was not a member of a collective negotiations unit. In the newly-created position of Director of Business Services, she not only continues to perform some of the duties of the Bursar, but also supervises the Bursar. At the time this petition was filed, she had an individual office with a door located in the Financial Services Suite. The other two individual offices with doors are occupied by the Executive Director and Controller, both of whom are confidential employees. There are also six cubicles for other Financial Services employees. According to Association President Crocker's certification, Ms. Pratt's door cannot be locked.

In its response, the Association notes that Ms. Pratt was removed from her office and relocated over one mile away from where top level administrators gather to discuss budgeting for contract negotiations. It contends that if the College intended for Ms. Pratt to be an integral part of the negotiations process, she would not have been moved. I disagree with the Association. The College's position is that it would wait for a determination on the CU petition before including Ms. Pratt in the negotiations discussions. As the Association itself concedes, the area where

Ms. Pratt's office was previously located in the "main hub" where top level administrators gather to discuss contract negotiations. Although Ms. Pratt's office has been moved to another building, the fact remains that her duties contemplate that she assist with confidential negotiations sessions. Office location is merely one indicator which may inform a determination about whether an employee is confidential.

I find that the Director of Business Services is a confidential employee.

The Employer-Employee Relations Act's standard for determining whether an employee of a public employer, other than the State of New Jersey, is "confidential" is set forth at N.J.S.A. 34:13A-3(g), which states, in pertinent part:

'Confidential employees' of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

In deciding confidential status, the Commission has used the approach described in 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):

We scrutinize the facts of each case to find for whom each employee works, what [the employee] does or 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 was included in a negotiating unit. [State of New Jersey, Id., 11 NJPER at 510]

In New Jersey Turnpike Authority v. American Federation of State, County and Municipal Employees, Council 73, 150 N.J. 331 (1997), the New Jersey Supreme Court approved the standards articulated in State of New Jersey, supra. The Court 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, 11 [NJPER] 507 (¶16179 [1985]) (holding that the 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]

The Commission narrowly construes the term confidential employee. State of New Jersey, supra, 11 NJPER at 514. A finding of confidential status is based upon what the employee actually does, and not duties which may be assigned or reassigned to her. State of N.J. (Office of Employee Relations) and Council of N.J. State College Locals, NJSFT-AFT, AFL-CIO, P.E.R.C. No. 90-22, 15 NJPER 596 (¶20244 1989) aff'd NJPER Supp.2d 246 (¶206 App. Div. 1991); Ringwood Bd. of Ed. and Ringwood Ed. Office Personnel Ass'n, P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd NJPER Supp.2d 186 (¶165 1988). However, confidential status will be found where the employee has the potential of coming in contact with confidential information, even though the she has not actually performed the duty. Twp. of Wayne v. AFSCME, 220 N.J. Super. 340, 345-46 (App. Div. 1987). If the future job functions to be performed are clear and implementation is certain, then future circumstances may be considered in the evaluation of confidential status. Montgomery Tp. Bd. of Ed., D.R. No. 93-12, 19 NJPER 96, 97 (¶24044 1993).

The College has refrained from assigning Ms. Pratt tasks regarding negotiations pending resolution of the clarification of unit petition. In Dennis Twp. Bd. of Ed., D.R. No. 2009-7, 4, 35

NJPER 28, 29 (¶10 2009), an employer refrained from assigning confidential duties to an employee due to his uncertain confidential status, but intended to have him prepare scatter gram projections and maintain the negotiations portal for the negotiating committee. Relying on several decisions, PERC determined that the employee was confidential because of the employer's intention to use the employee for confidential duties. Id., D.R. No. 2009-7 at 9, 35 NJPER at 30. See, Mt. Laurel Bd. of Fire Commissioners District One, P.E.R.C No. 2001-50, 27 NJPER 132 (¶32050 2001) (employee was confidential because employer represented that employee would be involved in future negotiations); Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339 (¶19128 1988) (employee was confidential because the employer planned to have her assist with the preparation of scatter grams); High Bridge Bd. of Ed., D.R. No. 2002-13, 28 NJPER 247 (¶33093 2002) (employee was confidential because she was expected to be involved with contract negotiations and administration). Finally, the Act "does not require that the assignment of duties of a confidential nature be regular and continuous as a condition for finding an employee to be confidential." In re Twp. of Scotch Plains, D.R. No. 84-11, 5, 9 NJPER 632, 633 (¶14270 1983) (citing In re Twp. of Dover, D.R. No. 79-19, 5 NJPER 61, 62 (¶10040 1979)).

Ms. Pratt was designated the Director of Business Services in December 2011 and the College intended that she be involved in confidential matters including negotiations. In January 2012, when the Association was informed of the designation, it filed a clarification of unit petition. All of the duties that are to be performed by Ms. Pratt as a director have not been implemented during the relatively short period of time she has been in her new position. This is due not only to the clarification of unit petition which brought into question her confidential status, but also because as of July 30, 2012, negotiations preparation for successor labor agreements had not yet begun. Thus, the College cannot at this juncture include Ms. Pratt in any confidential labor negotiations meetings concerning the negotiation of contracts which will not expire for over a year. Rather, Ms. Pratt continues to perform some of her previous Bursar duties, and also supervises the current Bursar.

Ms. Pratt is part of the core financial management team and reports to Executive Director of Financial Services Hall, who in turn reports to VP/COO Burzichelli. Both Ms. Hall and Mr. Burzichelli are confidential employees. The Controller, who also reports to Ms. Hall, is part of the core financial management team and a confidential employee. The intended purpose of the new director title was to have Ms. Pratt assist Ms. Hall in confidential matters such as negotiations. This purpose cannot

be carried out until resolution of the confidential status of Ms. Pratt's duties.

Ms. Pratt works directly for the Executive Director of Financial Services, a position which is intimately involved with confidential labor negotiations, and the College intended that she assist her supervisor in these matters. I find that the knowledge that Ms. Pratt will gain through her responsibilities in labor relations negotiations matters could compromise the College's right to confidentiality concerning the collective negotiations process if she was included in the Association. If she were not to be given the duties set forth in the job specifications she would not be able to accomplish a critical purpose of the newly-created position, which was to assist in the confidential negotiations process.

Literally applied, the label of "director" would result in inclusion into the Association. However, the test for determining confidential status is employee-specific; we scrutinize the facts of each case and do not mechanically rely on labels. The functional test set forth in N.J.S.A. 34:13A-3(g), and analyzed in State of New Jersey, supra, 11 NJPER at 510, addresses issues which must be considered in reaching a decision about whether Ms. Pratt should be excluded from unit membership. New Jersey Turnpike Auth., supra, 150 N.J. at 357-358. The intended job functions of the Director of Business Services

include preparing confidential materials for management to be utilized during, and in preparation for, the collective negotiations process. I find that the duties in the final job description are clear and it is intended that implementation is certain. Montgomery Twp. Bd. of Ed., supra, 19 NJPER at 97.

In its response the Association contends again that Ms. Pratt should be included in the unit because she holds the title of Director, a position recognized in the parties' collective negotiations agreement. It additionally asserts that Executive Director of Financial Services Hall "provides the level of confidentiality needed, not [Ms.] Pratt" and that "there would be no reason for [Ms.] Pratt to [use] information critical to negotiations." Citing to Monmouth Regional Board of Education, D.R. No. 94-10, 20 NJPER 16 (¶25009 1993), it also asserts that half of Ms. Pratt's time is not critical to setting negotiation strategies for the college.

I disagree that the Association can determine which employee or how many employees can provide the level of confidentiality needed in any position created by the College. I also disagree that Ms. Pratt should not be required to access or analyze internal college negotiations material, or assist in the information or evaluation of management positions simply because Ms. Hall is able to perform that task. I also do not agree that all of Ms. Pratt's duties must be confidential ones.

Furthermore, I disagree that the title of Director given to Ms. Pratt is dispositive of the issue of inclusion in the unit. Rather, in accordance with case law, I carefully examined the duties that the College envisioned for the new position.

The Association contends that the College cannot give confidential work to Ms. Pratt after it initially provided a job specification without any confidential duties. It asserts that the sole intent of assigning negotiations duties to Ms. Pratt in the second version of the job description was to exclude her from the unit.^{1/} The College asserts that its intent in creating the position was to have Ms. Pratt assist her supervisor, a confidential employee, with negotiations. It is well established that public employers have the managerial prerogative to create positions in order to meet operational needs. Piscataway Twp.

^{1/} PERC has held that distribution of confidential work to an employee is not appropriately raised in a clarification of unit petition. In re Twp. of Scotch Plains, D.R. No. 84-11 at 5, 9 NJPER 632, 633 (¶14270 1981); In re Bloomfield Bd. of Ed., E.D. No. 76-40 at 3, 2 NJPER 194 at 194 (1976); In re State of New Jersey, P.E.R.C. No. 50 at 8, NJPER Supp. 176, 178 (1971). Although PERC has the authority to determine whether a motive is improper under the Act, its decision would involve an analysis of N.J.S.A. 34:13A-5.4(a)(3), which issue would come before it as an unfair practice charge; such a charge is not before PERC in this instance. See, In re Sterling Bd. of Ed., supra, P.E.R.C. No. 80, fn. 11 NJPER Supp. 80 at fn. 11 (1974) (union alleged that position was created to remove position from unit), citing Burlington County Evergreen Park Mental Hospital v. Dorothy Cooper, 56 N.J. (1970) (improper motive violated N.J.S.A. 34:13A-5.4(a)(3)). Consequently, an improper motive may be alleged in an unfair practice charge, not a clarification of unit petition.

Bd. of Ed. V. Piscataway Twp. Principals and Supv. Ass'n, H.E. No. 87-63, 13 NJPER 419, 421(¶18163 1987); Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144, 284 (1978); Ramapo-Indian Hills Ed. Ass'n v. Ramapo-Indian Hills Reg. H.S. Dist. Bd. of Ed., 176 N.J. Super. 35, 43 (App. Div. 1980). I find that the intent for giving confidential work to Ms. Pratt was to have her assist Ms. Hall and is a managerial prerogative.

Based upon the facts of this case and our case law, I find that Ms. Pratt is a confidential employee and the unit is clarified to exclude the title of Director of Business Services.

Very truly yours,



Gayl R. Mazuco
Director of Representation

DATED: July 2, 2013
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 July 17, 2013.