

D.R. NO. 2016-3

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

GOLDEN DOOR CHARTER SCHOOL,

Public Employer,

-and-

Docket No. CU-2015-025

GOLDEN DOOR EDUCATION ASSOCIATION/NJEA,

Petitioner.

SYNOPSIS

The Director finds that Golden Door Charter School has not provided sufficient facts establishing that the Enrollment and Truancy Officer employed by the Golden Door Charter School is a confidential employee within the meaning of the Act, rendering her ineligible for inclusion in any collective negotiations unit.

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Appearances:

For the Public Employer,
Barger and Gaines, attorneys
(Paul Barger, Esq., of counsel)

For the Petitioner
Oxford Cohen, P.C., attorneys
(Randi Doner April, Esq., of counsel)

DECISION

On March 24, 2015, the Golden Door Charter School Education Association ("Association") filed a Clarification of Unit Petition seeking to clarify its unit to include the Enrollment and Truancy Officer ("ETO"), employed by the Golden Door Charter School ("School"). The school opposes the petition, contending that the ETO is confidential within the meaning of the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-1 et seq., rendering the position ineligible for inclusion in the negotiations unit.

We have conducted an investigation of the facts concerning this petition. N.J.A.C. 19:11-2.2. On April 17, 2015, the school submitted a position statement, which did not include certified facts. The parties attended an exploratory conference on April 30, 2015, and presented facts about the duties performed by the ETO. Unable to reach a voluntary resolution, we requested that both parties submit responses to questions concerning the duties, functions, access to confidential information, and knowledge and understanding of this information for the title of ETO. Both parties submitted certifications in support of their respective positions in June 2015. On August 11, 2015, we forwarded a tentative decision to the parties and requested that the parties file responses by August 20, 2015. We received no responses.

The disposition of the Clarification of Unit Petition is properly based upon our administrative investigation. N.J.A.C. 19:11-2.2. After reviewing the parties' submissions, no disputed substantial and material facts warrant a formal hearing. N.J.A.C. 19:11-2.6(f). The following facts appear.

The school is a public employer within the meaning of the Act. N.J.S.A. 34:13A-1 et seq.

The Association contends that its petition is appropriate because the ETO is neither supervisory nor confidential, and thus the ETO should be included in its collective negotiations unit,

which includes, "[a]ll regularly employed non-supervisory certificated and non-certificated employees employed by" the School. The school argues that the ETO is confidential, and therefore cannot be included in this or any unit.

A copy of a document entitled "Job Responsibilities - Enrollment and Truancy Officer," adopted at a school Board meeting on February 20, 2014, was submitted by both the Association and the school. This document lists five general categories of ETO responsibilities: "General Office duties," "Admissions and Enrollment," "Attendance and Truancy," "Public Relations and Community Outreach," and "Student Activities." Under "General Office duties," along with five general clerical duties such as "[a]nswer phone calls and doorbell," the document lists a sixth duty that states, "[p]erforms any other tasks and assumes such responsibilities that may be assigned by the Business Administrator or Chief Academic Officer." Other than this sixth "any other tasks" duty, there are no labor relations duties included in this document.

In support of its petition, the Association submitted an affidavit by Cindy Brown, the current ETO. In her affidavit, Brown states that her duties as ETO mainly relate to student enrollment and truancy, consistent with her title "Enrollment and Truancy Officer" and consistent with the ETO "Job Responsibilities" document. She states that she is responsible

for recording student attendance and generating truancy notices/letters for students with five or more absences. Once students have ten or more absences, she is responsible for meeting with parents and making home visits. In cases of persistent truancy, Brown is responsible for filing a truancy complaint in Jersey City municipal court and representing the school in that legal proceeding. Brown also stated that her responsibilities regarding enrollment involve administering a lottery for open spots, which involves publishing public notices of the lottery, creating and maintaining a lottery database with the names of students who wish to attend, pulling names from a bingo barrel for the actual lottery, creating an acceptance list and a wait list, processing acceptances, and processing enrollment packets from new students.

Brown further states that in addition to her enrollment and truancy duties, she also handles clerical work including handling re-registration forms from current students, transfer forms, creating graduation invitations and diplomas, and coordinating busses for school field trips. Brown also states that she volunteers to chair the "fall and fun festivals."

With regard to confidential duties, Brown states that she has never been assigned any. She states that she does not supervise or evaluate any employees, and that in the past, when she has attended administrative meetings to discuss "office

administrative, enrollment and calendar matters," she was excluded when confidential employee matters were discussed. She also states that she has never had access to personnel files.

Brown further states that the ETO title was created in February 2014, and that her previous title was Office Administrator, beginning in 2004. She states that she is not sure why the title was changed, but that her duties now as ETO are the same as in her previous title, with a few exceptions. Specifically, these exceptions are that as ETO she no longer participates in administrative meetings; she no longer proof reads documents for the Chief Academic Officer; she is no longer used as a translator for Spanish-speaking parents; she is no longer responsible for arranging for copier service or maintenance; she is no longer responsible for staff parking lot issues; she no longer coordinates street closings for student arrival, dismissal or recess; and she is no longer allowed access to the main school building, teacher classrooms or the Assistant Director's office.

Finally, Brown states that she is "not involved in any aspects of labor relations, collective negotiations, contract administration or grievance processing," nor does she "know how many collective negotiation sessions have occurred between the Board and the Union." She also states that she is "uninvolved with any formulation or adoption of the Board's budget."

The school disagrees and argues that the ETO is confidential, and the ETO's confidential duties are reflected in the sixth duty on the ETO's "Job Responsibilities" document that states, "[p]erforms any other tasks and assumes such responsibilities that may be assigned by the Business Administrator or Chief Academic Officer." The school argues that the ETO had been treated "as a member of the administrative team" and is expected to "work closely with the administration" to "assist with school operations." According to the school, some of the confidential tasks assigned to the ETO in the past included preparing and mailing "confidential letters," and handling, copying and filing employee evaluations. However, the school states that "because of a breakdown of trust between the [ETO] and the administration," Brown has not been assigned confidential duties or worked closely with the administration in recent months. But, the school argues, "[w]ere the position held by another individual, both the Chief Academic Officer and the Business Administrator would immediately assign work" to the ETO and "would allow him/her access to confidential information."

The school also argues that because it has lost confidence in Brown's ability to handle confidential duties and to "keep confidential information from third parties," the Chief School Administrator does not assign Brown any confidential duties at this time. The school argues that the confidential duties not

currently assigned to Brown, but that could be assigned to her successor, include tasks such as being included in administrative meetings, "translating English and Spanish for the benefit of staff members and parents," completing and providing enrollment reports which are "used by the [Business Administrator] and Chief Academic Officer to formulate the budget," "gathering information and data requested by the [Business Administrator] to perform the annual budget analysis and preparation," having "direct access to confidential information," and having "access to labor relations materials on an as needed basis to complete assignments given by the Business Administrator and Chief Academic Officer."

Also, the school notes that because the Association was just recently certified as the majority representative for the unit, "[t]here have not yet been any labor relations activities between the Board and the union." However, the school further argues that if the ETO position is included in the unit, the School "would be forced to change job descriptions and staff responsibilities," as the Association would have "effectively forced the [School] to change employee job descriptions to suit the needs of the union." The school further argues that a ruling that the ETO is confidential would "allow for the inclusion of a position in the union as a direct result of an employee's inability or unwillingness to carry-out the basic job responsibilities of that position."

The Act defines confidential employees of public employers, other than the State, as those 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. N.J.S.A. 34:13A-3(g).^{1/}

In State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507, 510 (¶16179 1985), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985), 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 was included in a negotiating unit.

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

^{1/} Effective January 18, 2010, the New Jersey Legislature modified the statutory definition of confidential employee for State of New Jersey employees. That modification does not apply here because the employee at issue is not a state employee.

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 the 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.

New Jersey Turnpike Authority, 150 N.J. 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 preparation for these processes." Pompton Lakes Bd. of Ed., D.R. No. 2005-16, 31 NJPER 73 (¶33 2005); See also, State of New Jersey (Div. of State Police), D.R. No. 84-9, 9 NJPER 613 (¶14262 1983).

I find that the school has not provided sufficient and undisputed material facts upon which I can base a conclusion that the ETO is a confidential employee. The school did not submit evidence, including documents and certifications, demonstrating the ETO's knowledge of confidential facts or strategies that would be used by the school in the collective negotiations process.

The documentation provided by the school does not include specific examples of Brown's knowledge and use of confidential school information that would likely compromise the school's right to confidentiality if Brown were included in a negotiations unit. New Jersey Turnpike Authority, 150 N.J. at 358.

To the contrary, and as the school admits, Brown does not currently perform confidential duties. Brown asserts that she has never been assigned confidential duties, and the school admits that even if Brown had been assigned confidential duties in the past, the school has purposefully not assigned Brown confidential duties in the most recent few months and will not assign her confidential duties in the future. In addition, even if I were to accept the school's assertion that any successor to Brown as ETO would be assigned confidential duties in the future, it would not rebut my findings that Brown does not currently perform confidential duties. The school has a managerial prerogative to determine duties to meet operational needs, and

has determined that it would not assign Brown confidential duties. See Piscataway Twp. Bd. of Ed. v. Piscataway Twp. Principals and Supv. Ass'n, H.E. No. 87-63, 13 NJPER 419, 421(¶18163 1987) (citing 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). Furthermore, Brown's certification and the ETO's "Job Responsibilities" document make it clear that the ETO's duties are overwhelmingly related to student enrollment and truancy, which are not confidential.

Accordingly, I find that the school has not provided sufficient facts establishing that the ETO is a confidential employee within the meaning of the Act, rendering her ineligible for inclusion in any collective negotiations unit. As a result, I find that the Association's petition must be granted.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

/s/ Gayl R. Mazuco

Gayl R. Mazuco

DATED: August 21, 2015
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 August 31, 2015.

