

D.R. NO. 2022-3

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

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

Docket No. CU-2021-002

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 30,

Petitioner.

**SYNOPSIS**

The Director of Representation clarifies a managers unit to include employee Twanna McKenzie-Waters (McKenzie-Waters), who was previously deemed confidential by the State of New Jersey and unilaterally removed from the negotiations unit. The Director finds that McKenzie-Waters is not a confidential employee as the State failed to provide any documents or facts demonstrating McKenzie-Waters' knowledge and use of confidential information.

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Appearances:

For the Public Employer,  
Matthew J. Platkin, Acting Attorney General  
(Jana R. DiCosmo, Deputy Attorney General)

For the Petitioner,  
O'Brien, Belland & Bushinsky LLC, attorneys  
(Kevin Jarvis, of counsel)

**DECISION**

On September 11, 2020, the International Brotherhood of Electrical Workers, AFL-CIO, Local 30 (IBEW 30) filed a clarification of unit petition (petition) contesting reclassification of three of its unit members employed by the State of New Jersey (State) as "confidential" employees. On January 20, 2021, IBEW 30 withdrew its petition with respect to two of the three employees. IBEW 30 asserts that the remaining employee, Twanna McKenzie-Waters ("McKenzie-Waters"), was deemed confidential by the State and unilaterally removed from the collective negotiations unit of managers, although she does not

perform confidential duties. The State opposes the petition, contending that McKenzie-Waters must be excluded from the unit because she performs the job duties of a confidential employee within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

On November 24, 2020, an investigatory conference was convened. On January 25, 2021, a Commission staff agent sent a letter to the parties requesting responses to a series of questions (soliciting facts) regarding McKenzie-Waters's job duties and related matters. The staff agent requested certifications or affidavits of individuals with personal knowledge of such responsibilities, together with other documents supporting of the parties' respective positions.

On April 1, 2021, IBEW 30 filed and served on the State a certification with exhibits from McKenzie-Waters, the petitioned-for employee and a certification, with exhibits of Alfred C. Laubsch (Laubsch), Business Manager of IBEW 30. McKenzie-Waters certifies that she handles ". . . a variety of human resources-related tasks . . ." but that she has "never participated in labor relations activities, such as collective negotiations, contract administration, or in the processing of IBEW grievances." She also certifies to have ". . . never played any role in the handling or processing of a disciplinary or personnel matter."

Also on April 1, 2021, the State filed and served on IBEW 30 the certifications with exhibits of Camille Warner (Warner), Employee Relations Coordinator, Office of Employee Relations of the New Jersey Governor's Office and Melica Blige (Blige), Administrator of Employee Relations at the New Jersey Department of Law and Public Safety (LPS). Additional certifications were received from a number of other Directors/Administrators with knowledge of the title, Human Resources, Manager 2, although none possessed specific knowledge of the duties performed by McKenzie-Waters<sup>1/</sup>. As Administrator of Employee Relations at the New Jersey Department of LPS, the department in which McKenzie-Waters is employed, Blige is "familiar with the confidential status of Department employees, including those who hold the title Human Resources Manager 2." Blige certifies that McKenzie-Waters

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<sup>1/</sup> Certifications were provided by Jason Strapp, Administrator of Employee Relations at the New Jersey Department of Environmental protection; Antis Pinkas, Director of Employee Relations at the New Jersey Department of Human Services; Michele Shapiro, Director of the Division of Human Resources at the New Jersey Department of Transportation; Kimberly Wilkins, Administrator of Employee Relations at the New Jersey Department of the Treasury; Kenyatta Nobles, Administrator of Employee Relation at the New Jersey Board of Public Utilities; Susan Sweeney, Administrator of Employee Relations at the New Jersey Department of Military and Veterans Affairs; Michael Carneval, Managing Legal Specialist at the New Jersey Department of Corrections; Douglas Banks, Director of Employee Relations at the New Jersey Department of Children and Families; and Mary Scarborough, Employee Relation's Coordinator at the New Jersey Motor Vehicle Commission.

". . . serves employee disciplinary actions and may be called as a witness for management for disciplinary hearings." She also certifies that McKenzie-Waters ". . . is aware of personnel determinations prior to the union and employee being notified."<sup>2/</sup> These notices include contractual furloughs, employee confidential status determinations, discipline actions, employee reassignment, promotions, demotions and salary adjustments. Also, Blige certifies that McKenzie-Waters ". . . directly participates in negotiations as she provides information to management to determine which employee should be included in various bargaining units."

On April 12, 2021, IBEW 30 requested to file a response to the State's submission. The request was approved. On May 14, 2021, IBEW 30 filed its reply with supplemental certifications from Laubsch and McKenzie-Waters. In her supplemental certification, McKenzie-Waters certifies that ". . . she never prepared nor issued disciplinary actions of the staff at the Division or Consumer Affairs" and has "never actually been called as a witness for management . . . ." She also certifies that she ". . . never provided information to management to determine an employee's bargaining unit . . . ."

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<sup>2/</sup> This claimed awareness or duty is averred to be shared among IBEW unit employee not subject to this petition and among other collective negotiations unit(s) in the Department of LPS, Division of Consumer Affairs.

On July 23, 2021, the State filed a reply with additional certifications from Warner and Blige.

On August 5, 2021, we requested additional information from IBEW 30 regarding a specific exhibit provided by the State. That exhibit was a printed copy of an email identifying McKenzie-Waters as a potential witness in a disciplinary hearing. On August 20, 2021, IBEW 30 filed its response with a supplemental certification from McKenzie-Waters. McKenzie-Waters certifies that she was never asked to testify about any disciplinary matters identified in the email (or any disciplinary matter), nor was she aware of having been identified as a possible witness because she was not copied on such an email.

On March 23, 2022, I issued a 7-day letter to the parties advising of my tentative findings and conclusion that McKenzie-Water was not a confidential employee within the meaning of the Act. I invited the parties to respond if they believed the determinations in the 7-day letter were incorrect or required additional evidentiary material to be reviewed. The parties were asked to file a response by March 28, 2022, if they so elected. By email dated March 22, 2022, the State requested a one-week extension in which to file a response to the 7-day letter. The State's request for an extension was promptly approved, providing it until the close of business on April 4, 2022 in which to respond. On April 4, 2022, the staff agent conducted a telephone

conference in which the parties discussed possible settlement and mutually requested that a formal decision be pended so that they could continue their settlement discussions. On May 4, 2022, the State advised that settlement was no longer possible and asked to submit its response to the 7-day letter by May 6, 2022. The State's request was approved and on May 6, 2022, the State submitted certifications of Maryann S. Sheehan (Sheehan), Chief of Staff at the New Jersey Department Division of Consumer Affairs in the Department of LPS and Danielle Amari, Director of Human Resources Management at the Department of LPS.

Sheehan certifies that McKezie-Waters is "the chief personnel officer" at the Division of Consumer Affairs and reports directly to her. Sheehan certifies that McKenzie-Waters is responsible for "determining whether to grant certain request for benefits" and "certain aspects of the promotional process such as appointments and selections, which includes eligibility determinations." Sheehan also certifies that the State plans on creating an independent Human Resources Officer at DCA, that McKenzie-Waters would manage; however, that plan has not yet been implemented, but is expected to be completed by the end of July, 2022. Amari certifies that McKenzie-Waters, as the Human Resources Manager for the Department of Consumer Affairs, ". . . is the highest-ranking personnel officer in the Department, and determines 'which applicants are eligible' to

move to the next step in the promotional process, [that] involves interviews and final decisions.”

We conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. Our review of the parties' submissions does not present substantial and material factual issues requiring an evidentiary hearing. N.J.A.C. 19:11-2.6(f). I find the following facts.

The State and IBEW 30 are parties to a collective negotiations agreement (CNA) extending from July 1, 2019 through June 30, 2023. Article I, Recognition and Representation, identifies IBEW 30 as the exclusive representative of all managers employed by the State with “&” Employee Relations Group titles. Excluded from the negotiations unit are “confidential employees” within the meaning of the Act.

Human Resources, Manager 2 is one of the titles included in IBEW 30's unit. In or around September, 2016, McKenzie-Waters became a Human Resources, Manager 2 for LPS, Division of Consumer Affairs. Currently, five employees, including McKenzie-Waters, assigned to the Division of Consumer Affairs, hold the Human Resources, Manager 2 title. Blige certifies that the Human Resources, Manager 2 position at the LPS performs “extensive personnel duties”; “may participate in the discipline and grievance processes by serving as management’s representative or hearing officer at hearings”; “prepares collective bargaining



agreement negotiation materials", all of which are set forth in the title's job description. McKenzie-Waters certifies that although she handles a variety of human-resources related tasks<sup>3/</sup>, she does not perform any confidential duties.

N.J.S.A. 34:13A-5.3 affords public employees the right "to form, join or assist any employee organization." Confidential employees, however, are excluded from the Act's definition of "employee" and do not enjoy the Act's protections. N.J.S.A. 34:13A-3(d). N.J.S.A. 34:13A-3(g) defines "confidential employees" of the State of New Jersey as:

[E]mployees who have direct involvement in representing the State in the collective negotiations process making their membership in any appropriate negotiating 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, we explained our approach in determining whether an employee is confidential:

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<sup>3/</sup> Examples of the duties McKenzie-Waters certifies that she performs, and that are also included in the job description, are onboarding of new employees; extending employment offers to candidates; processing payroll, promotions, new titles and job classifications; coordinating employee training and seminars; and conducting exit interviews and payout for employees leaving State service.

We scrutinize the facts of each case to find for whom each employee works, what he does, and what he 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. [11 NJPER at 510]

See also, Ringwood Bd. of Ed., supra. 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 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). Obviously, an employee's access to confidential information may be significant in determining whether that employee's functional relationship 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 and knowledge concerning its significance, or functional responsibilities in relations to the collective negotiations process make incompatible that employee's inclusion in a negotiating unit. We entrust PERC in the first instance the responsibility for making such determinations on a case-by-case basis. [Id. at 358]

In evaluating confidential status claims, we have consistently applied strict standards of proof. Absent a proffer of specific duties and a demonstration that the purported confidential duties are actually performed, we will not find confidential status. City of Camden House Authority, D.R. No. 2014-7, 40 NJPER 219 (¶84 2013).

In addition, the Commission has held that mere access to personnel files, or advance knowledge of employee personnel information unrelated to management's handling of grievances or the negotiations process, does not render an employee confidential, as that term is defined by our Act. Bloomfield Public Library; See also Camden Bd. of Ed., D.R. No. 2007-6, 32 NJPER 383 (¶159 2006) (clerk's mere access to background information gathered in support of grievances and his or her mere access to sensitive information in the office did not establish that the employee had advanced knowledge of the decisions management rendered).

The Commission has found confidential status when the employer intends to use an employee in the labor relations process and the performance of confidential duties is imminent. Mt. Laurel Bd. of Fire Commissioners District One, P.E.R.C. No. 2001-50, 27 NJPER 132 (¶32050 2001) (business manager found to be confidential on employer's representation that he would be involved in future negotiations); Dennis Twp. Bd. of Ed., D.R.

No. 20096-7, 35 NJPER 28 (¶10 2009) (employee was deemed confidential when the employer intended to but refrained from assigning employee certain confidential duties due to pending clarification petition).

I find that McKenzie-Waters is not a confidential employee within the meaning of the Act. The State hasn't provided any documents or facts demonstrating McKenzie-Waters' knowledge and use of confidential information.

Although McKenzie-Waters's title of Human Resources, Manager 2 can be tasked with preparing, recording or otherwise administering labor relations matters or materials in advance of their disclosure to the majority representative, no facts indicate that she actually performs such duties. McKenzie-Waters certifies that she has never participated in labor relations activities or in the processing of grievances. Blige certifies that McKenzie-Waters "directly participates in negotiations as she provides information to management to determine which employees should be included in various bargaining units" and that she ". . . is currently assessing which employees should be within the CWA bargaining unit." McKenzie-Waters denies ever to have provided information to management regarding an employee's bargaining unit eligibility. The State has omitted to provide any documents that support or corroborate Blige's contention that McKenzie-Waters is "currently" performing that duty. McKenzie-

Waters has provided documents showing that she was invited to one meeting in January, 2021, the subject of which was "VWXY Confidential-DCA<sup>4/</sup>". The meeting occurred after the State had deemed McKenzie-Waters confidential and had unilaterally removed her from the unit. Documents provided by the State demonstrate that at the time of that meeting, the employees under discussion had previously been deemed "confidential." No facts suggest that McKenzie-Waters played any role in the State's determination that those employees were "confidential." Also, McKenzie-Waters certifies that after attending that meeting she ". . .wasn't directed to provide any follow-up information . . . ."

Blige certifies that McKenzie-Waters has advanced knowledge of contractual furloughs<sup>5/</sup>. Numerous documents provided by the State concern McKenzie-Waters's role in implementing furloughs, including notifications to employees that they were to be furloughed; the scheduling of employees' furlough days; and notification to those exempted from furlough days. However, no facts suggest that McKenzie-Waters has any advanced notice or knowledge regarding discussions or negotiations of furloughs or their implementation with the majority representative(s). All of the examples provided by the State show that McKenzie-Waters did

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4/ Employees in employee relations groupings units V, W, X and Y, who are represented by the CWA.

5/ Contractual furloughs are those agreed to by the State and a majority representative.

not have any knowledge of the furloughs until after the State notified and/or discussed them with the majority representative(s) of the specific collective negotiations units.

No facts suggest that McKenzie-Waters plays any role in the handling or processing of disciplinary or personnel matters. The State hasn't provided any documents showing McKenzie-Waters prepares proposed disciplinary notices for review, or that she learns of personnel decisions before they are forwarded to the affected employee or the negotiations representative. Compare Township of Howell, D.R. 2001-11, 27 NJPER 199 (¶32068 2001) (The Director found that the secretary to the township manager and the administrative assistant were both confidential positions because they perform job duties and have knowledge of issues involved in the collective negotiations process. Those job duties included their knowledge of proposed disciplinary actions before the affected employee or the employee representative was informed; typing drafts of disciplinary notices that were initially received by the employee or union representative; having access to employees' files and having pulled files or placed material in those files, including disciplinary matter and handling communications between the employer and labor counsel dealing with disciplinary matters).

No facts suggest that the role McKenzie-Waters plays, or will play, in the promotional process would exclude her from IBEW

30's unit. State representative Sheehan certifies that McKenzie-Waters and her staff “. . . are, or will be, responsible for” determining which candidates meet the eligibility requirements for a promotion, a process that involves “some discretion.” Although the Commission has found that an employee may be deemed confidential based on the imminent assignment of confidential duties, the duties related to the promotion process in this matter that the State certifies will be assigned to McKenzie-Waters are not confidential duties. It appears that McKenzie-Waters and her staff are or will be responsible for applying pre-determined criteria to a candidate's qualifications to determine whether they are eligible to be considered for a promotion. After the person is deemed eligible, McKenzie-Waters will play no role in determining whether the candidate is promoted.

The State has shown that individuals in the title of Human Resources, Manager 2 may perform confidential duties, including participation in both collective negotiations and disciplinary and personnel matters. It hasn't submitted facts demonstrating that McKenzie-Waters performs such confidential duties. Accordingly, I find that McKenzie-Waters is not a confidential employee within the meaning of the Act.

ORDER

IBEW's petition for clarification of unit, as it pertains to McKenzie-Waters, is granted.

/s/ Jonathan Roth  
Jonathan Roth  
Director of Representation

DATE: May 25, 2022  
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 June 6, 2022.**