

D.R. NO. 2023-11

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

In the Matter of

CUMBERLAND COUNTY UTILITIES AUTHORITY,

Public Employer,

-and-

Docket No. CU-2021-010

COMMUNICATIONS WORKERS OF AMERICA,  
AFL-CIO, LOCAL 1085,

Petitioner.

**SYNOPSIS**

The Director of Representation grants a clarification of unit petition (petition) filed by Communications Workers of America, AFL-CIO, Local 1085 (CWA) to include the Business Administrator in its existing collective negotiations unit of supervisory employees employed by the Cumberland County Utilities Authority (Authority). The Authority asserted that the Business Administrator was a confidential employee and managerial executive under the Act. The Director found that the Authority did not submit specific examples demonstrating that the Business Administrator actually performed confidential duties as defined by the Act. Also, the Director found that the Business Administrator does not formulate policy or direct its effectuation. Therefore, the Business Administrator is not a managerial executive within the meaning of the Act.

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Appearances:

For the Public Employer,  
Chance & McCann, attorneys  
(Kevin P. McCann, of counsel)

For the Petition,  
Weismann & Mintz, attorneys  
(Annmarie Pinarski, of counsel)

**DECISION**

On May 7, 2021, Communications Workers of America, AFL-CIO, Local 1085 (CWA) filed a clarification of unit petition (petition) seeking to include the position of Business Administrator in its already existing unit of supervisory employees employed by the Cumberland County Utilities Authority (Authority). The Authority opposes the petition, contending that the Business Administrator must be excluded from the unit because he or she performs the job duties of a managerial executive and confidential employee within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

On August 9, 2021, an investigatory conference was held. On February 24, 2022, a Commission staff agent sent a letter to the Authority and CWA requesting responses to a series of questions as to the Business Administrator'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 in support of the parties' positions.

On April 1, 2022, the Authority filed and served on the CWA a letter without a certification answering the questions laid out in the February 24 letter.

On May 11, 2022, CWA filed a letter stating that they are unable to provide a certification from the Business Administrator. However, CWA also contends that the Authority failed to provide a sworn affidavit or certification, and therefore, a hearing should be scheduled.

On July 8, 2022, in response to CWA's letter of May 11, 2022, the Authority submitted a certification from Robert Carlson (Carlson), Executive Director of the Authority. Carlson certified that after reviewing the Authority's letter of April 1, 2022, "all of the information" contained in the letter was "true and correct to the best" of his "ability and knowledge."

On February 4, 2023, I issued a 7-day letter to the parties advising of my tentative findings and conclusions that the

Business Administrator was not a confidential employee or managerial executive within the meaning of the Act. I invited the parties to respond if they believed the determinations were incorrect or required additional evidentiary material to be reviewed. The parties were asked to respond by February 14, 2023. Neither party filed a response to the 7-day letter.

We have 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 Authority and CWA Local 1085 are parties to a collective negotiations agreement (CNA) extending from January 1, 2021 through December 31, 2023. Pursuant to the Recognition Clause of the parties' CNA, CWA Local 1085 is the exclusive majority representative of all regularly employed supervisory employees employed by the Authority. Excluded from the bargaining unit are "managerial executives and confidential employees" within the meaning of the Act.

Carlson certifies that the Business Administrator is tasked with overseeing all human resource management decisions, including being consulted on all disciplinary decisions and being present during all investigations and interviews involving

personnel. Further, Carlson certifies that the Business Administrator maintains and updates all personnel files.

Carlson also certifies that the Business Administrator has "intimate knowledge of management's positions regarding collective negotiations." As the confidential assistant to the Executive Director, the Business Administrator also participates in collective negotiations. However, Carlson and the Authority failed to provide any specific examples of confidential duties actually performed by the Business Administrator. The Business Administrator assists in the formation of policies for the Authority, including the planning and administering of all policies related to human resources management.

### **Confidential Employees**

Confidential employees 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 public employers other than the State as:

[E]mployees whose functional responsibilities or knowledge in connection with issues involved in the collective negotiations process would make 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.

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. Id. 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 relation 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 Housing 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, D.R. No. 2011-09, 37 NJPER 153 (¶47 2011); See also Camden Bd. of Ed., D.R. No. 2007-6, 32 NJPER 383 (¶159 2006) (clerk's mere access to background information they gathered in support of grievances and their mere access to sensitive information in the office did not establish that the employee had advanced knowledge of the decisions management rendered). "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). This type of knowledge must be distinguished from "knowledge of information which is confidential in the traditional sense or definition because it concerns security or personnel matters," since the latter understanding on its own "is not sufficient to remove employees based upon the definition of a confidential employee within the meaning of the Act." Camden Bd. of Ed., citing Cliffside Park Bd. of Ed. P.E.R.C. No. 88-108, 14 NJPER 339 (¶19128 1988); State of New Jersey, 11 NJPER at 510.

I find that the Business Administrator is not a confidential employee. As certified by Carlson, the Business Administrator has been tasked with overseeing all human resource management decisions. This includes being consulted on all disciplinary decisions and being present during all investigations and interviews involving personnel. Further, the Business Administrator maintains and updates all personnel files. However, knowledge of personnel or security matters unrelated to advance knowledge of grievances or collective negotiations strategies is not sufficient to designate a position confidential. Camden Bd. of Ed.; Cliffside Park, P.E.R.C. No. 88-108, 14 NJPER 339 (¶19128



1988); Queen City Academy Charter, D.R. No. 2023-10, \_\_\_ NJPER\_\_\_ (¶\_\_\_ (although the secretaries at issue had involvement in the process of hiring, evaluations, non-renewals, and discipline, their knowledge obtained through those duties did not involve confidential labor relations strategies and positions regarding collective negotiations, and therefore, those duties alone were not enough to make them confidential). Further, access to information, here personnel files, that is confidential for other purposes, but not related to collective negotiations, is not a basis for excluding an employee from the protections of the Act. State of N.J., P.E.R.C. No. 86-18, supra.

Here, the Authority's submission fails to provide any specific examples of confidential duties actually performed by the Business Administrator. See City of Camden Housing Authority, (Director found that the employer's submissions provided too few facts about job duties and only conclusory statements that did not establish confidential status); Evesham Tp. Fire Dist. #1, D.R. No. 99-4, 24 NJPER 503 (¶ 29233 1998) (Director rejected claims by the employer that the clerk and deputy clerk were confidential employees since the employer did not submit work samples demonstrating that these employees actually performed confidential duties). With respect to collective negotiations, Carlson certifies that as confidential assistant to the Executive Director, the Business Administrator has "intimate knowledge of

management's positions regarding collective negotiations." The only example provided of the Business Administrator's participation in collective negotiations included their involvement in discussions related to "the formation of the current collective bargaining agreement." However, no details were provided with respect to the "discussions". No facts show whether the "intimate knowledge" the Business Administrator has of the Authority's positions regarding collective negotiations is before their disclosure to the union or whether the Business Administrator has any other direct involvement in the Authority's conduct of negotiations. See Trenton Bd. of Ed. D.R. 2015-7, 41 NJPER 515 (¶161 2015) (Director found that the secretary to the superintendent's office was a confidential employee because she had access to negotiation proposals and grievance responses as they were being developed and she attended Team Leadership meetings where personnel matters, collective negotiations and Board policies were discussed). Further, no facts suggest that Business Administrator attends executive sessions where collective negotiations are discussed. Township of Franklin, D.R. No, 2019-14, 45 NJPER 333 (¶89 2019) (Director found that flex clerks were not confidential because no specific examples were provided showing that they actually attend executive sessions where collective negotiations were discussed).

As discussed above, while the Business Administrator has knowledge of issues involved in personnel matters, including being consulted on all disciplinary decisions; being present during all investigations and interviews involving personnel; and maintaining and updating all personnel files, no facts have been presented to show that the Business Administrator has knowledge of issues involved in the collective negotiation process that would make their membership in the union incompatible with their official duties. Therefore, I find that the Business Administrator is not a confidential employee within the meaning of the Act.

### **Managerial Executive**

Under N.J.S.A. 34:13A-3(f), a "managerial executive" of any public employer other than the State is defined as follows:

[M]anagerial executives of a public employer means persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices.

In New Jersey Turnpike Authority v. AFSCME Council 73, 150 N.J. 331 (1997), the New Jersey Supreme Court adopted this test to determine managerial executive status:

A person formulates policies when he develops a particular set of objectives designed to further the mission of [a segment of] the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged

with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. [Turnpike Authority at 356]

The term "managerial executive" is narrowly construed because the consequence of finding that an employee is a managerial executive is to deny that employee the benefits and protections of the Act. N.J.S.A. 34:13A-5.3; State of New Jersey (Trenton State College), P.E.R.C. No. 91-93, 17 NJPER 246, 247 (¶22112 1991).

The burden of demonstrating that an employee is a managerial executive falls "on the party seeking to place an employee outside the Act's protection." 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); Willingboro Bd. of Ed., D.R. No. 97-15, 23 NJPER 358 (¶28169 1997). We have applied strict standards of proof to managerial executive status claims: absent a proffer of specific duties and a demonstration that the purported managerial duties are actually performed, we will not find managerial executive status. Teaneck Tp., D.R. No. 2009-3, 34 NJPER 268 (¶96 2008), req. for rev. den. P.E.R.C. No. 2009-25, 34 NJPER 379 (¶122 2008) (employer's certification lacked

sufficient, specific examples of department heads actually formulating or directing the effectuation of policies); City of Newark, D.R. No. 2000-11, 26 NJPER 234 (¶31094 2000), req. for rev. den. P.E.R.C. No. 2000-100, 26 NJPER 289 (¶31116 2000), aff'd 346 N.J. Super. 460 (App. Div. 2002) (employer claiming managerial executive status must make a particularized showing that employees actually perform those duties which make the titles managerial); City of Camden Housing Authority (Director rejects the employer's managerial executive and confidential status claims because the employer did not produce affidavits setting forth sufficient facts and examples of work performed by the petitioned-for employees that demonstrated managerial authority or confidential status).

I find that the Authority has failed to provide sufficient material facts to establish that the Business Administrator is a managerial executive.

Carlson certifies that the Business Administrator assists in the formation of policies for the Authority, including the planning and administering of all policies related to human resources management. Further, the Business Administrator has the authority to rewrite job descriptions "to more closely fit the desired role for that position within the organization." Further, Carlson certifies that "[a]ll phases of management policy and decision making are shared with the Business

Administrator through the Executive Director and Deputy Director. See State of New Jersey (DEP), P.E.R.C. No. 99-59, 25 NJPER 48 (¶30021 1998), recon. den. P.E.R.C. No. 2000-34, 25 NJPER 461 (¶30200 1999) (Commission rejected claim that section chiefs in Department of Environmental Protection were managerial executives, noting that while section chiefs were responsible for effectuating management policies, they did not direct the effectuation of such policies, but instead acted at the behest of higher-level administrators). However, no facts suggest that the Business Administrator actually formulates policy or directs its effectuation. Carlson certifies that the Business Administrator "assists in" policy making and policy making is "shared with the Business Administrator through the Executive Director and Deputy Director." Therefore, like in State of New Jersey (DEP), the Business Administrator is acting at the "behest of higher-level administrators" (here the Executive Director and Deputy Director). Under these circumstances, I find that the Business Administrator is not a managerial executive within the meaning of the Act.

**ORDER**

CWA's petition for clarification of unit to include the position of Business Administrator in its existing unit of supervisory employees is granted.

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION

/s/ Ryan M. Ottavio  
Ryan M. Ottavio  
Director of Representation

DATED: February 24, 2023  
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 March 6, 2023.**