

D.R. NO. 2024-4

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Public Employer,

-and-

Docket No. CU-2022-013

HEALTH PROFESSIONALS ALLIED
EMPLOYEES AFT/AFL-CIO,

Petitioner.

SYNOPSIS

The Director of Representation clarifies petitioner HPAE Local 5094's unit to include user support services specialists, unit computing specialists, telecommunications analysts, and system administrators employed by Rutgers, the State University of New Jersey (Rutgers) in the Office of Information Technology at the Rutgers Camden campus. In the absence of objections, the petitioned-for employees were found to be performing unit work.

Rutgers argued that the employees were confidential within the meaning of the Act and that their inclusion would create a conflict of interest because of their duties and responsibilities related to confidential labor relations information. The Director found that the employees were not confidential, because there was no documentary evidence or certified statements in the record detailing specific instances where the employees were exposed to confidential labor relations information or establishing that their exposure is clearly certain and imminent. The record also did not show that they were exposed to advance disciplinary information, and, regardless, the Director found that such exposure would not have established confidential status.

The Director also declined to follow the reasoning of a hearing examiner's recommended decision cited by Rutgers that found a conflict of interest between employees who had the technical potential to access (but not authorization to or a record of accessing) confidential labor relations information and employees without such access that required the former (despite not being confidential employees) to be in a separate negotiations unit. The Director found that no other agency decision had cited the recommended decision for that proposition, that subsequent decisions (including one reviewed by the Commission) had reached the contrary legal conclusion, and that the recommended decision was inconsistent with a New Jersey Supreme Court decision.

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Appearances:

For the Respondent,
(Timothy D. Cedrone, Esq.)

For the Petitioner,
(Lisa Leshinski, Esq.)

DECISION

On May 5, 2022, Health Professionals and Allied Employees Local 5094, AFT, AFL-CIO (HPAE), filed a clarification of unit petition seeking to have its existing collective negotiations unit clarified to include user support services specialists, unit computing specialists, telecommunications analysts, and system administrators employed by Rutgers, the State University of New Jersey (Rutgers) in the Office of Information Technology (OIT) at the Rutgers Camden campus (IT titles/employees).

On June 20, 2022, HPAE submitted a position statement with exhibits including the 2018-2022 collective negotiations

agreement (CNA) and existing unit title list. HPAE maintains that the IT employees perform unit work because the unit already includes employees in other IT titles, including "Info Systems, Telecomm Analyst, System Programmer, SR database Analyst, SR IT Sec[urity] Risk Analyst, User Support and Web employees".

A phone conference was held with the parties and a staff representative on June 22, 2022, during which Rutgers indicated that it was potentially opposing the inclusion of some employees as confidential, supervisory, or creating a conflict of interest. The same day, we sent a list to the parties with the petitioned-for employees' names and titles and advised the parties that, absent objection, the list would be considered final as to the employees being petitioned-for and at issue in the CU-2022-013 petition and the employees would be considered to be performing unit work, with the record closed as to that issue (but not yet as to any applicable statutory exclusions).

We also requested Rutgers, by July 13, 2022, file and serve certifications providing information to support its confidential and supervisory status claims. We advised Rutgers to indicate any employees over whom the petitioned-for employee had supervisory authority or else the petitioned-for employees would be found not to be supervisory or have supervisory conflicts of interest. Rutgers was also advised that July 23, 2022, was the deadline for raising any other objections.

The parties agreed to remove two people from the original list and, with no objections raised, the fourteen employees remaining on the list are deemed to be performing unit work: Unit Computing Specialist Edwin Alicia; Telecommunications Analysts Christopher Faas and Edward O'Keefe-Gorman; System Administrators James Gaither, Victor Gomes, Scott Kuhnel, and Raymond Nieves; and User Support Service Specialists Robert Gorman, Rawle Hines, William Corwin (Cory) Labbree, Ken (Cyanworth) Morris, William Slaven, Ron Thornton, and David Tran.

On July 13, 2023, Rutgers provided a certification from Director of Information Technology Thomas Ryan ("Ryan 1st Cert.") stating that the petitioned-for employees have duties and responsibilities related to labor relations, and Rutgers argued that the employees were confidential under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). Rutgers also contends inclusion in HPAAE's unit would create a conflict of interest because of their duties and responsibilities related to labor relations. Rutgers did not identify any of the petitioned-for employees as having supervisory authority or raise any other objection.^{1/}

Another conference was held with the parties on August 11,

^{1/} The record does not support a finding of statutory supervisory status or a supervisory conflict of interest. Accordingly, since the petitioned-for employees are performing unit work, they will be included in the unit if they are not confidential. N.J.S.A. 34:13A-5.15.

2022. On August 18, 2022, we sent the parties a schedule requesting briefs and advising that the failure to provide certifications from persons with actual knowledge stating sufficient detail of specific instances in which relevant duties were performed and supporting documentary evidence may result in an adverse determination.

On October 7, 2022, Rutgers filed and served its first brief; a second certification with exhibits^{2/} from Thomas Ryan ("Ryan 2nd Cert."); a certification with exhibits from David Cohen, Vice President for University Labor Relations and Special Counsel for Labor Affairs ("Cohen Cert."); a certification with exhibits from Michele Norin, Senior Vice President and Chief Information Officer in the Office of Information Technology ("Norin Cert."); and a certification from Roxanne Huertas, Director of Human Resources in the Office of Human Resources at Rutgers University - Camden ("Huertas Cert.").

On November 4, 2022, HPAAE filed and served its first brief (HPAAE 1st Br.) and a list of the certification exhibits it was submitting. Included were a certification with exhibits from HPAAE Representative Christine Munck (Ex. A) and certifications from some of the petitioned-for employees: Edwin Alicia (Unit Computing Specialist) (Ex. B); Edward Gorman (Telecommunications

^{2/} A corrected version of the exhibits was filed and served by Rutgers on October 10, 2022.

Specialist) (Ex. C); James Gaither (System Administrator) (Ex. D); Robert Gorman (User Support Services Specialist) (Ex. E); Rawle Hines (User Support Services Specialist) (Ex. F); Cory Labbree (User Support Services Specialist) (Ex. G); William Slaven (User Support Services Specialist) (Ex. H); and David Tran (User Support Services Specialist) (Ex. I).

On November 8, 2022, Rutgers requested leave to file a reply brief with supporting documents, which was granted and limited to the specific issues raised in its request. On November 23, 2022, Rutgers filed and served its second brief; a third certification of Thomas Ryan ("Ryan 3rd Cert."); and a certification of Ellen Law, Associate Vice President of Enterprise Application Services in the Office of Information Technology ("Law Cert.").

On November 28, 2022, HPAE requested leave to file a reply, which was granted and limited to the issues in Rutgers' submission. On December 19, 2022, HPAE filed and served its second brief (HPAE 2nd Br.) and a list of the certification exhibits it was submitting from petitioned-for employees. Included were a certification from Chris Faas (Telecommunications Analyst) (Ex. AA); second certifications from Edwin Alicia (Ex. BB), Edward Gorman (Ex. CC), James Gaither (Ex. DD), Robert Gorman (Ex. EE), Rawle Hines (Ex. FF), Cory Labbree (Ex. GG), William Slaven (Ex. HH), and David Tran (Ex. II); and certifications from Scott Kuhnel (System Administrator) (Ex. JJ)

and Victor Gomes (System Administrator) (Exhibit KK).^{3/}

SUMMARY OF LEGAL STANDARDS

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.^{4/}

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,

^{3/} In response to Rutgers' criticism of the certifying language used in the petitioned-for employees' first certifications, the certifications submitted with HPAE's second brief indicated that they were based on the personal knowledge (not belief) of the certifying employees. The second certifications from petitioned-for employees clarified that the statements contained within their first certifications were based on their personal knowledge. Accordingly, references to statements from the first certifications in this decision are understood as being based on the personal knowledge of the certifying employees, even if the second certification is not also cited.

^{4/} Rutgers and HPAE do not dispute that the separate definition applicable to confidential employees of the State of New Jersey is not applicable to Rutgers. See Rutgers, H.E. No. 2015-6, 41 NJPER 277 (¶94 2014) (Rutgers and URA), citing State, CNJSCL, and CWA, P.E.R.C. No. 2013-52, 39 NJPER 301 (¶101 2013), aff'd 41 NJPER 357 (¶113 App. Div. 2015).

37 NJPER 153 (¶47 2011). "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 personal 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., D.R. No. 2007-6, 32 NJPER 383 (¶159 2006), citing Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339 (¶19128 1988).

The party asserting the confidential status of the employees bears the burden of establishing it. See City of Burlington, H.O. No. 2002-1, 28 NJPER 1 (¶33000 2001) (holding that the party seeking application of a statutory exemption bears the burden of proving its applicability), citing NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 711-12 (2001) (finding that the Board's burden rule was reasonable and consistent with the National Labor Relations Act because it was supported by the general rule that the burden of proving applicability of a special exception

generally rests on the one who asserts it and because practicality favored placing the burden on the asserter where it was easier to prove the exercise of any relevant duties than to disprove their exercise), cited in NJ Transit, P.E.R.C. No. 2024-18, 50 NJPER 264 (¶59 2023); State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985) ("This policy is consistent with the Supreme Court's declaration that the Act's public policy favors the organization of all employees desiring collective negotiations: the burden must therefore be on the party seeking to place an employee outside the Act's protection."), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985).

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 elaborating on this evidentiary standard, we have explained:

[W]hile a mere certification that the duties of a job description are performed is generally not enough to establish confidential status, and while documentary evidence of sample work actually performed and showing the relevant confidential information is preferred, sufficient details in certifications regarding specific duties and examples of times that work involving confidential labor relations materials were actually performed can lead to a finding of confidential employee status.

Queen City Academy Charter School, D.R. No. 2023-10, 49 NJPER 378 (¶92 2023), req. for rev. den. P.E.R.C. No. 2023-

44, 49 NJPER 528 (§125 2023)]

See also Evesham Township Fire District #1, D.R. No. 99-4, 24 NJPER 503 (§29233 1998) (“[M]ost significantly, although the Board submitted an affidavit from one of its members attesting that these are the duties of these individuals, it failed to provide any documentation or examples demonstrating that said duties are actually performed.”); Franklin Tp., D.R. No. 2019-14, 45 NJPER 333 (§89 2019) (flex clerks found not to be confidential despite Township certification that they were slated as backups for the Township Clerk to attend executive sessions, as no specific examples were provided of them actually attending executive sessions where collective negotiations were discussed).

We generally do not find confidential status based on speculation and conjecture, but where job functions are clear and their implementation and exposure to confidential labor relations information is certain and imminent, we may find confidential status despite the duties or exposure not yet having reasonable time to occur. See Hopewell Tp., D.R. No. 2011-14, 38 NJPER 165 (§48 2011) (“Although the Township expects that the municipal housing liaison will have duties related to collective negotiations and contract administration in the future, it has not demonstrated that these duties are to be assigned imminently.”); Roxbury Tp. Bd. of Ed., D.R. No. 2014-10, 40 NJPER 272 (§103 2013); Glassboro Boro., D.R. No. 2008-12, 34 NJPER 127

(¶55 2008). Cf. Sterling Bd. of Ed., P.E.R.C. No. 80, NJPER Supp. 80 (1974) (stating that a determination based on what duties will be rather than what they have been would be subject to reexamination if the duties were not performed within a reasonably sufficient time).

The mere technical ability to access computer information without permission, without evidence that an employee has actually obtained knowledge of confidential labor relations information, does not make that employee a confidential employee under the Act. Downe Tp. Bd. Of Ed., D.R. No. 2005-3, 30 NJPER 388 (¶125 2004); Camden Cty. Library, D.R. No. 2008-4, 33 NJPER 298 (¶114 2007), req. for rev. den. P.E.R.C. No. 2008-35, 33 NJPER 319 (¶121 2007).

FINDINGS OF FACT

No disputed substantial material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. Based upon my administrative investigation, I make the following findings of fact.

The University's Board of Governors is the governing body of the University. (Cohen Cert. 10). It is vested generally with the government, control, conduct, management, and administration of the University. (Id.). Jonathan Holloway is the President of the University and its chief executive officer. (Id. at 9). He and his administration are responsible for managing and

administering the policies of the University and have oversight of the relations of the university with governmental, community, philanthropic, and business institutions. (Id. at Exhibit B). President Holloway oversees all of the University's locations. (Id.). Rutgers also has four Chancellors who report to President Holloway and implement strategic plans for their respective campuses. (Id.). The Chancellors are the principal University officers for their campuses. (Id.).

Senior Vice President and Chief Information Officer Michele Norin leads the Office of Information Technology (OIT). (Norin Cert. 1). Norin oversees all aspects of OIT and its constituent units, including but not limited to the Rutgers University-Camden Information Technology (RUCIT) Office. (Id. at 4). Her chief responsibility is to provide leadership in the strategic adoption and use of IT in support of the University's vision for excellence in research, teaching, outreach, and lifelong learning. (Id.). She serves as the University's primary advocate and spokesperson for IT strategies and policies; defines and communicates a University-wide vision for technology; and provides University-wide oversight for IT-related issues and strategic planning. (Id.). She has numerous other responsibilities as well, including but not limited to overseeing the IT functions relating to electronic discovery and searches for electronically stored information requested by various

University offices, including but not limited to the Office of the General Counsel (OGC) (in connection with litigation, labor arbitrations, information requests from labor unions, etc.), University Ethics and Compliance (in connection with investigations of University employees and other employee-related matters); and the Office of Employment Equity (in connection with investigations of University employees and other employee-related matters). (Id.).

OIT provides University-wide services and support and collaborates with department and unit information technology professionals on projects and initiatives for the University. (Id. at 3). OIT is divided into multiple divisions and maintains distributed information technology ("IT") staff in various University schools, departments, centers, and other units to provide service and support to faculty, staff, and students. (Id.). OIT's services include numerous technology-based services, such as help desk technology support, high-speed network and wireless internet, email, research computing, antivirus and security software, tools for safe computing, network and computing infrastructures, and risk management. (Id.).

The RUCIT Office is part of OIT. (Ryan 2nd Cert. 4). Among other things, it directly supports student computer labs, enhanced classroom technology, University email services, campus

web services, and Unix/Linux timeshare services on the RU-C campus. (Id.). In addition, it works with IT groups to support network infrastructure, video conferencing, desktop client applications and software licensing. (Id.).

OGC is responsible for addressing legal issues arising out of the activities of the University and its schools and units. (Cohen Cert. 10). OGC consists of in-house attorneys and support staff, and it partners with outside law firms, which provide legal advice and representation to the University. (Id.). OGC represents the University in all legal proceedings and provides legal advice to the president, Board of Governors, and administration on a broad array of legal issues, including labor and employment matters. (Id.). Under the President of the University, the OGC manages and supervises all legal affairs for the University; serves as the general legal officer of the Board of Governors and the University; and serves as legal adviser to the Board of Governors, the President, and other administrative officers of the University. (Id.). OGC also retains and designates outside counsel to fulfill these functions as needed. (Id.). With respect to the labor relations process, OGC has a team of in-house labor and employment attorneys who provide legal advice to the University, its schools, and units on all labor and employment law issues and all aspects of the labor relations process. OGC's in-house attorneys also provide representation to

the Office of University Labor Relations in collective negotiations and serve as counsel to the University in labor arbitrations, and administrative agency proceedings before PERC and other state and federal administrative agencies. (Id.).

Office of University Labor Relations (OULR) is a presidential-level office within the Office of the President of the University. (Cohen Cert. 11). It was formed by combining the former Office of Labor Relations and the former Office of Academic Labor Relations. (Id.). OULR supports the University community by advancing collegial relations between staff, management, and the University's 22 labor unions. (Id.). OULR is responsible for managing University-wide labor relations for Rutgers faculty and staff, which includes negotiating, administering and interpreting the collectively negotiated agreements with all of the University's 22 labor unions; providing advice to departments, schools, units, and administrators with respect to interpretation and application of certain University policies; providing support and training to supervisors with respect to discipline; administering the grievance process; managing the scheduling of grievance hearings; providing guidance to supervisors on how to present information and preside over hearings during the grievance process; serving as hearing officers in grievances; facilitating labor/management meetings between departments and labor unions; facilitating

compliance with certain Federal and State laws related to employment; developing overall university labor strategy; ensuring compliance with applicable labor laws and University policy; and oversight of disciplinary and grievance arbitrations and proceedings before certain federal and state agencies. (Id.).

David Cohen is Vice President of University Labor Relations and Special Counsel for Labor Affairs. (Cohen Cert. 1). Cohen leads OULR in the negotiation, administration, and interpretation of the faculty and staff collective negotiation's agreements between the University and the labor unions representing University faculty and staff; supervises the faculty and staff labor relations specialists, who support him in the administration of the University's labor relations policy; serves as the President's liaison in collective negotiations with each of the University's unions; and serves as special labor counsel in OGC. (Id.). As Special Counsel for Labor Affairs, he also is the principal legal advisor, through the Senior Vice President and General Counsel, on labor policy issues and decisions affecting the University. (Id. at 5).

Ellen Law is the Associate Vice President of Enterprise Application Services in OIT. (Law Cert. 1). She has responsibility for all aspects of the enterprise ServiceNow platform used across the University. (Id. at 2). ServiceNow is the platform of choice for service management systems at Rutgers.

(Id.). The ServiceNow for IT Service Management modules ("ServiceNow ITSM") support the University's goals to unify service and support to the Rutgers community. (Id.). Over time, ServiceNow ITSM will be the replacement ticketing system for pre-existing ticketing systems used throughout the Rutgers information technology ("IT") community. (Id.).

Tickets are generated in ServiceNow for some situations in which University users seek OIT's help (including the help of Rutgers-Camden Information Technology Office). (Id. at 3). Law certifies that not all interactions with OIT are recorded in ServiceNow and that confidential labor relations matters are purposely not recorded in ServiceNow and, therefore, no tickets for such matters exist. (Id.). Law certifies that ServiceNow does not track all work performed by OIT employees and that the University's electronic discovery process (including requests to search for electronically stored information by the Office of the General Counsel made in connection with litigation, labor arbitrations, and unions' information requests) is not tracked in ServiceNow. (Id.). Law states that ServiceNow also contains confidential labor relations information that is marked as private and shielded from view of other users who do not have access to the information as part of their job duties and responsibilities, and that among the offices which use ServiceNow in order to conduct their operations and whose information is

kept confidential are University Human Resources, the Office of University Labor Relations, the Office of Employment Equity, and University Ethics and Compliance. (Id. at 4). Rutgers does not provide documentation showing that the petitioned-for employees have viewed confidential labor relations information on ServiceNow.

Director of Information Technology Thomas Ryan certifies that within the RUCIT Office, communications often occur via phone calls and work assignments are distributed in a variety of forms, including emails, phone calls, Microsoft Teams communications, and face-to-face communications. (Ryan 3rd Cert. 3). He certifies that, with respect to tickets related to the termination of employees, the tickets typically originate from Human Resources for staff employees and from schools for faculty members and are often received by the RUCIT Office in advance of an employee's actual termination. (Id. at 4). He certifies that the tickets are visible to all RUCIT staff who use ServiceNow. (Id.). He also asserts that the information in the tickets can include the anticipated termination date, equipment pickup details, and details on disabling ID card access to buildings and rooms. (Id.). He also certifies that equipment may be retrieved in advance of the anticipated termination date based on instructions from the department which submitted the ticket and that assistance in performing the work related to the ticket can

span across all teams within the RUCIT Office. (Id.).

Rutgers does not provide documentation showing that petitioned-for employees have seen tickets that show that employees are being terminated for disciplinary reasons. Rutgers also has not provided documentary evidence of emails, Microsoft Teams communications, or certified statements regarding instances of verbal communications to petitioned-for employees showing that they were exposed to confidential labor relations information or advance disciplinary information.

Roxanne Huertas, the Director of Human Resources in the Office of Human Resources at Rutgers University-Camden, certifies that prior to an unnamed employee's termination in January 2022 for disciplinary reasons and prior to that employee's pre-termination conference, she contacted the RUCIT Office so it would be prepared to block access to IT systems. (Huertas Cert. 8). She also certifies that when in October 2020, when her office was planning to terminate an unnamed employee for disciplinary reasons and prior to that employee's pre-termination conference, she contacted the RUCIT office to prepare to block access to IT systems, although the employee resigned prior to the pre-termination conference. (Id. at 9). No documentation or details are provided showing that any specific petitioned-for employee was made aware of the disciplinary reasons for the requests to block access.

University Policy 70.1.7 (Rutgers Provisioning / Deprovisioning Policy) defines deprovisioning as "The process of removing access rights of all employees and external parties to information and information processing facilities upon termination of, or change to, their employment, contract, or agreement." (Norin Cert. Ex. B). The policy states that the responsibilities of "Information or System Owner Responsibilities" include, with respect to deprovisioning, having access rights of employees to IT systems reduced or removed before or upon employment termination or change. (Norin Cert. Ex. B).

University Policy 70.1.1 (Acceptable Use Policy for Information Technology Resources), applicable to users of the University's IT systems generally, states that the "University" may access or monitor records to avert threats and hazards to IT resources (e.g., scanning to detect viruses); as required by legal or contractual obligations; in connection with legal proceedings in which the Office of General Counsel, the Office of Employment Equity, or University Ethics and Compliance is involved; when there is reasonable cause to believe that the employee has engaged in misconduct, violated University policies or regulations, or used University resources improperly and that the information and records to be accessed or monitored are relevant to the misconduct or violation in question; or when the

University otherwise has legitimate need. (Norin Cert. Ex. A).

Rutgers provides no documentation or certified statements showing specific instances in which specific petitioned-for employees, pursuant to these policies, viewed specific confidential labor relations information or advance disciplinary information.

HPAE is seeking inclusion of the following employees of Rutgers holding the following job titles: Unit Computing Specialist Edwin Alicia; Telecommunications Analysts Christopher Faas and Edward O'Keefe-Gorman; System Administrators James Gaither, Victor Gomes, Scott Kuhnel, and Raymond Nieves; and User Support Service Specialists Robert Gorman, Rawle Hines, William Corwin (Cory) Labbree, Ken (Cyanworth) Morris, William Slaven, Ron Thornton, and David Tran.

Edwin Alicia, Chris Faas, Edward Gorman, and Victor Gomes are part of the Telecom and Infrastructure Group that reports to Pierre Cadras, who reports to Curtis Saal, who reports to Tom Ryan. (HPAE 2nd Br. Ex. KK 5). Edwin Alicia is the sole unit computing specialist and is assigned to the telecommunications and installation group. (HPAE 1st Br. Ex. B 1). He certifies that he gets tickets through ServiceNow for new hires; he installs computers and phones for staff/faculty, making sure they are on the internet without issue. (Id. at 5). He may also move phones if someone moves offices (phones are digital) and programs

door locks. (Id.). He certifies that he does not have the permissions to turn off ID card access. (Id. at 8). He does not receive advance notices that employees are being terminated. (Id.). He may pick up computer equipment for an employee who is no longer with the University, but is not privy to any information about why the employee left Rutgers. (Id. at 7-8). He used to perform the same job functions as user support services specialists at the Help Desk and did not read user files (Id. at 4, 10). He certifies that he does not have access to confidential computer systems or HR information about personnel matters and does not have remote access to a user's computer as part of his job. (Id. at 10, 14).

Edward Gorman and Chris Faas are in the same title of telecommunications (telecom analyst) and have identical classification and recruitment forms ("CARFs"). They work with the wired/wireless network and phones; move create, update, and delete phones; create, update, and delete voicemail accounts; create, update, and delete IP reservations, DHCP/DNS, troubleshoot end user and device data jacks, request networks, verify correct VLANS are in place, deal with physical access points, and troubleshoot why a wireless signal is not working. (HPAE 1st Br. Ex. C 5). They are notified when there is a user who needs assistance because they receive a "ticket" through the ServiceNow ticketing system. (Id. at 6-7). If they were to

receive a verbal request, they would create a ticket, so all work is documented (Id. at 7; HPAE 2nd Br. Ex. AA 15).

Telecom analysts do not have access to the swipe card system and they cannot sever a person's physical swipe card access. (Id. at 13; HPAE 2nd Br. Ex. AA 23). They do not have access to confidential computer systems for units or departments. (HPAE 1st Br. Ex. C 9). They do not have administrative passwords to get into the system and cannot access the data of HR, the General Counsel's office, or high-level University leaders such as the Chancellor and Deans. (Id.; HPAE 2nd Br. Ex. AA 12). If a user is having an issue with voicemail, they would give the user a new pin and would have no reason to listen to a user's voicemail. (HPAE 2nd Br. Ex. AA 16).

They have not been asked, verbally or in writing, to turn off someone's phone access because the person's employment was being terminated, or to pick up equipment prior to a person's employment being terminated. (HPAE 2nd Br. Ex. AA 17-20; CC 11-12). They do not provide meeting support. (HPAE 2nd Br. Ex. AA 8, 21; CC 14). They are not privy to any HR information including hiring, firing, or discipline of employees. (HPAE 2nd Br. Ex. AA 24). They do not access information about staff evaluations and do not have access to their own ticket feedback. (HPAE 2nd Br. Ex. AA 25).

Alicia and Gomes can only access data other than their own

by remotely accessing a user's machine with their permission, and they do not read the data. (HPAE 2nd Br. Ex. KK 9-10). Alicia does not have authorization to turn off ID card access and does not receive notices that employees are being terminated. (HPAE 1st Br. Ex. B 8). Gomes has access to terminate physical access cards and has turned off access because a user lost their card, but he has not turned off access because he was told someone was being terminated. (HPAE 2nd Br. Ex. KK 23-25). Gomes does not attend confidential meetings to provide event support. (Id. at 18).

James Gaither, Scott Kuhnel, and Raymond Nieves are System Administrators. Gaither and Kuhnel report to Dennis Moffett, who reports to Associate Director Curtis Saal, who reports to Tom Ryan. (HPAE 2nd Br. Ex. JJ 6). System administrators cannot access user data on OneDrive. (Id. at 17). They can restore but do not read user data. (Id. at 19).

System administrators service computer hardware and software, resolving issues for students, faculty, and staff. (HPAE 1st Br. Ex. D 6). If a machine is broken, it would be repaired or replaced, and software must be appropriately updated. (Id.). Gaither certifies that requests to deprovision accounts go through Tom Ryan and/or RUCIT's manager's group, that the requests often come long after the employees have left their position, and that he has never been asked to deprovision an

account immediately because a person is being separated from the university. (Id. at 26). He further certifies that he has no knowledge of personnel matters and that in his position he does not access staff evaluations or disciplinary actions (Id. at 25).

Gaither explains that if a student or employee loses a file, it can be restored from the cloud. (Id. at 7). He does not view files to restore them. (Id. at 19-22). During cloud migration, one file was missing, but he was able to copy it back from the old server at an earlier restoration point and put the file in a subdirectory called "recovered". He did not and does not check the contents of the files. He has the user check the data for themselves. He certifies that he is simply doing a file search and is not accessing documents. (Id.).

Gaither certifies that before data can be accessed remotely, the system will require authentication through a Net ID and approval via phone or app before data can be accessed. (Id. at 14). Gaither has never been asked to access electronically stored information for a University attorney. He certifies that the person who would access such information is Tom Ryan, the Director of Information Technology, but Gaither is not aware of the process. (Id. at 24). Kuhnel has never been asked to participate in the discovery process and does not know who the University attorneys are. (HPAE 2nd Br. Ex. JJ 23).

System administrators do not access the computer system

without express authorization to do so. (HPAE 1st Br. Ex. D at 15-16). Service tickets and logging into the system creates an audit trail and unauthorized access could subject an employee to discipline under University policies. (Id. at 13, 15, 16, 17, 23).

Gaither has not attended meetings where confidential information was discussed. (Id. at 27). At a conference about six years ago in the Camden Campus Center, he ensured that the Powerpoint Slides and projector were working correctly and then stood outside in the hallway for the entire meeting and was not invited to attend the meeting or have access to any confidential information (Id.). Kuhnel also does not attend confidential meetings. (HPAE 2nd Br. Ex. JJ 25).

Kuhnel certifies that if a user emails or calls asking for help but he does not get a ticket, he will create a ticket (HPAE 2nd Br. Ex. JJ 12). He is not aware of a confidential or private ticketing system for confidential matters. (HPAE 2nd Br. Ex. JJ 14). He has not been asked to do anything outside of a ticketing system based on it allegedly being a confidential labor relations matter. (HPAE 2nd Br. Ex. JJ 15). He does not have access to the OneDrive server. (HPAE 2nd Br. Ex. JJ 17). He might be asked to disable rights on the H drive (because a person in a department left the University and can restore data if necessary, but he does not read a user's data. (HPAE 2nd Br. Ex. JJ 18-19). The

only ticket he has seen for terminating access (not terminating employment) was for someone who already left Rutgers, and the department terminated access to the H drive. (HPAE 2nd Br. Ex. JJ 20). A ticket could come to Kuhnel saying that a person is no longer with the University and asking for permission to the H drive to be removed, but he would not know if the person was fired or decided to leave for another job. (HPAE 2nd Br. Ex. JJ 22).

Robert Gorman, Rawle Hines, William (Cory) Labbree, William (Bill) Slaven, Cyanworth (Ken) Morris, Ron Thornton, and David Tran are employed by Rutgers as a user support services specialists in the Rutgers University Camden Information Technology office ("RUCIT"). (HPAE 2nd Br. Ex. EE 1, FF 1, GG 1, HH 1-4, II 1-4). Rawle Hines, Cory Labbree, Ken Morris, and Ron Thornton primarily work at the help desk. (HPAE 1st Br. Ex. F 5-6; G 5). User Support Services Specialists Bill Slaven and David Tran work classroom/event support and user support/help desk. (HPAE 1st Br. Ex. H 5-7; I 5-7). Robert Gorman works at the help desk and classroom/event support. (HPAE 1st Br. Ex. E 7).

Rawle Hines, Cory Labbree, Ken Morris, Robert Gorman, and Ron Thornton report directly to Lisa Saal, who reports to Tim DiVito, who reports to Tom Ryan. (HPAE 2nd Br. Ex. EE 3, FF 3, GG 3). Rawle Hines, Cory Labbree, Ken Morris, Ron Thornton, and Robert Gorman do similar work and are in the same work group.

(HPAE 2nd Br. Ex. EE 4, FF 4, GG 5). David Tran and Bill Slaven report to Unit Computing Manager Michale Burke, who reports to Lisa Saal, who reports to Tim DiVito, who reports to Tom Ryan. (HPAE 2nd Br. Ex. II 3). Burke manages classroom and event support. (HPAE 1st Br. Ex. H 5). David Tran and Bill Slaven are both assigned to classroom support and provide classroom and events support for faculty and staff. David Tran also supports Help Desk Tier 2 and Tier 1. (HPAE 2nd Br. Ex. II 5).^{5/} Slaven does more Tier 2 support and ASAP team work, while Tran does more Tier I support like printer issues and preliminary assessment. (HPAE 1st Br. Ex. H 7, HPAE 1st Br. Ex. I 7). Tran can address these issues in person or will guide a user in how to fix the problem over the phone. (HPAE 1st Br. Ex. I 10). Ken Morris works only at the Help Desk. (HPAE 2nd Br. Ex. II 6).

University data has been kept on two servers: the U drive and H drive. The U drive has contained users' personal files. The H drive was for departmental shared information. The U drive is now in the cloud through OneDrive, and not a local server. The H drive is also mostly in the cloud, through a cloud-based system called Box. There is also folder redirection data. If a user is logged into camdenlaw or rad domains their desktop and

^{5/} Tier 1 tickets involve less serious issues, like software installation. Tier 2 tickets usually involve more serious issues, like internet connection problems or broken equipment. (HPAE 1st Br. Ex. I 10).

documents folder are synced to the server, primarily to OneDrive. (HPAE 2nd Br. Ex. JJ 16).

All user support services specialists have the same level of limited access to data. (HPAE 2nd Br. Ex. GG 6-8). They cannot access servers, files on the U drive, H drive, OneDrive or Box, except their own files. (Id. at 12; HPAE 2nd Br. Ex. HH 5). If a user needs assistance, they can remotely access the user's computer with that user's express authorization and oversight. (HPAE 2nd Br. Ex. GG 14; EE 6 FF 5, II 8). The users can watch from their computers, whether the troubleshooting is done remotely or in person. (HPAE 2nd Br. Ex. HH 6, II 9). When user support specialists remotely access a user's computer, they does not look at file contents but may see file names. (HPAE 2nd Br. Ex. GG 15). They remotely access with their net Ids and their access is logged. (HPAE 1st Br. Ex. 16-18).

User support services specialists do not have advance knowledge of disciplinary actions being taken by the University. (HPAE 2nd Br. Ex. EE 7, FF8, HH9, II 15). Termination of access tickets go to managers, not staff, and termination of access does not necessarily mean termination of employment. (Id; GG 16; HH 8, II 10). User support services specialists do not have the ability or knowledge to terminate access and have not received requests to do so. (HPAE 2nd Br. Ex. EE 8, FF 7, HH 8, II 10). Although Net IDs can be locked, this can be because a user's

account was compromised. (HPAE 2nd Br. Ex. GG 16).

Although user support services specialists can retrieve equipment, such as when a user is getting new equipment, they have not been told their retrieval was due to someone being terminated for disciplinary reasons. (HPAE 2nd Br. Ex. EE 9, FF 11, GG 17, HH 12, II 13).

The user support specialists do not have access to confidential information. (HPAE 2nd Br. Ex. EE 5, GG 8-12). They have not received requests, verbal or written (e.g., through the ticket system), to do something while being informed that it was confidential. (HPAE 2nd Br. Ex. EE 12; FF 9, 10; GG 18-20, HH 13, II 14). (HPAE 2nd Br. Ex. GG 18-20).

The user support specialists have not attended meetings while confidential labor relations information was discussed. (HPAE 2nd Br. Ex. EE 11; 13; FF 13; HH 11). If they provide support for meetings that will have a closed portion, they are not present during the closed portions but remain available as necessary. (HPAE 2nd Br. Ex. FF 14; HH 11; II 12, 17-21). They receive and load up non-confidential slideshow files and other files for the open public portions of meetings but do not receive files for closed sessions. (HPAE 1st Br. Ex. I 22; H 22).

They do not have access to and have not been involved in the retrieval of electronically stored information for the general counsel's office or otherwise related to litigation (HPAE 2nd Br.

Ex. EE 10; FF 12; G 15; HH 10; II 11).

Employees only back up their own functional groups, and user support services employees do not provide back-up support to system administrators or telecom analysts and are not trained to perform their functions (HPAE 2nd Br. Ex. HH 7, II 7).

On behalf of Rutgers, Ryan states that the user support specialists provide support to the Office of the Chancellor, Human Resources, and Deans' offices. (Ryan 2nd Cert. 20-25). He states that they have access to confidential computer systems that "may" be required to be accessed. (Id.). He states that they review requests to block employee access to IT systems in connection with or in anticipation of employees being terminated prior to the employee or their union knowing. (Id.). He states that they provide support to events and meetings requiring IT or audio/visual support, including meetings held by the Board of Governors, Office of the Chancellor, and Cabinet of the President during which confidential labor relations information is at some point discussed. (Id.). He states that they assist in preparing responses to requests for electronically stored information for litigation by Rutgers' attorneys. (Id.). He also states that they provide backup support for each other. (Id.). He references William Slaven providing support to a meeting of the Cabinet of the President on September 19, 2022; David Tran and William Slaven providing support to a meeting of the Chancellor's Cabinet

on July 27 and August 30, 2022, respectively; David Tran providing support to a meeting of the Board of Governors on October 6, 2021; and David Tran and William Slaven providing support to a meeting of the Board of Governors on October 6, 2022. (Id.).

However, Rutgers does not provide any documentary evidence showing or certified statements detailing any specific instances in which the petitioned-for employees have been exposed to specific confidential labor relations information or advance disciplinary decisions. Requests for blocking access sent to the RUCIT office, which may have originated both for disciplinary and non-disciplinary reasons, are not shown to have the reasons visible to the petitioned-for employees. There is no documentary evidence or certified statements showing that the petitioned-for employees who may have initially set up meetings or attended their public portions and waited outside closed doors were in attendance during the confidential portions and exposed to confidential labor relations information. I therefore do not find that user support specialists are exposed to confidential labor relations information or advance disciplinary information during their duties.

Similarly, the statements from Rutgers that system administrators provide support to the same offices, block computer and physical (e.g., identification card swipe) access to

employees including those being terminated for disciplinary reasons, and respond to requests for electronically stored information for litigation are not supported with documentary evidence or certified statements detailing specific instances in which system administrators were exposed to confidential labor relations information or advance disciplinary information. Therefore, I do not find that they are exposed to such information.

The statements from Rutgers regarding the unit computing specialist blocking physical card swipe access are not supported by documentary evidence or certified statements detailing specific instances in which the unit computing specialist was exposed to confidential labor relations information or advance disciplinary information. Therefore, I do not find that the unit computing specialist is exposed to such information.

The statements from Rutgers regarding the telecommunications analysts blocking physical telecommunications access are not supported by documentary evidence or certified statements detailing specific instances in which the telecommunications analysts were exposed to confidential labor relations information or advance disciplinary information. Therefore, I do not find that they are exposed to such information.

ANALYSIS

Confidential status for the petitioned-for employees has not

been established. See City of Burlington; NLRB v. Ky. River Cmty. Care, Inc.; State of New Jersey. In Queen City Academy Charter School, D.R. No. 2023-10, 49 NJPER 378 (¶92 2023), req. for rev. den. P.E.R.C. No. 2023-44, 49 NJPER 528 (¶125 2023), the employer submitted documentary evidence in camera of specific grievance documents prepared by one employee. The employer submitted certified statements from all the alleged confidential employees that they handled materials, with enough details given to demonstrate that those materials would have contained confidential labor relations information. 49 NJPER at 382. Certified statements showed that they accessed a particular network drive containing a negotiations data folder, which was corroborated with screenshots. Id. Detailed certified statements also referenced specific instances where the employees were present for negotiations strategy meetings. Id.

Here, however, Rutgers has not provided documentary evidence of any labor relations information that has been accessed by the petitioned-for employees. The certifications that Rutgers provides from the higher-level supervisors only generally state duties without any references to specific instances showing that these duties have actually been performed by the petitioned-for employees and with enough details for the Commission to find that the information the petitioned-for employees accessed was confidential labor relations information. See Evesham Township

Fire District #1, D.R. No. 99-4, 24 NJPER 503 (¶29233 1998)

("[M]ost significantly, although the Board submitted an affidavit from one of its members attesting that these are the duties of these individuals, it failed to provide any documentation or examples demonstrating that said duties are actually performed.").

Also, given that reasonably sufficient time has passed and there is a lack of specific instances in the record showing the performance of confidential duties and exposure to confidential labor relations information, Rutgers' assertions that these employees may encounter such information (e.g., through computer access or providing support at meetings) is speculative and not clearly certain and imminent. Hopewell Tp.; Roxbury Tp. Bd. of Ed.; Glassboro Boro.; Sterling Bd. of Ed.

I find that advance knowledge of disciplinary determinations would not make these employees confidential within the meaning of the Act. See Queen City Academy Charter School (finding that employees' knowledge obtained through their involvement with the process of hiring, evaluations, non-renewals, and discipline did not involve confidential labor relations strategies and positions regarding collective negotiations confidential labor relations strategies and positions regarding collective negotiations); W. Milford Tp. Bd. of Ed. P.E.R.C. No. 56, NJPER Supp 218 (¶56 1971) (secretaries were not confidential despite having information

regarding supervisors' recommendations for personnel decisions on who to recruit because such information was not used in making labor relations policy); Passaic Cty., D.R. No. 2015-3, 41 NJPER 296 (¶98 2015) (employees responsible for handling sensitive information for various personnel matters, including resignations, retirements, and discipline found to not be confidential), citing Camden Bd. of Ed. Cf. Lincoln Park Nursing & Convalescent Home, Inc., 318 N.L.R.B. 1160, 1164, 151 L.R.R.M. 1075, 318 NLRB No. 123 (September 18, 1995) (typing of warnings, termination notices, disciplinary matters, and other material relating to personnel problems does not render an employee confidential); B.F. Goodrich Co., 115 N.L.R.B. 722, 725, 37 L.R.R.M. 1383, 115 NLRB No. 103 (March 7, 1956) (secretaries to managers who had responsibilities such as hiring, discharging, disciplining, promoting, and granting merit increases to employees found to not be confidential); In Re of Automatic Elec. Co., 78 N.L.R.B. 1057, 1059, 22 L.R.R.M. 1335, 78 NLRB No. 146 (August 17, 1948) (secretaries who overheard discussions on disciplinary actions affecting other employees found to not be confidential).

As noted in Queen City:

[O]ur Act provides that supervisory employees having the power to hire, discharge, and discipline, or to effectively recommend the same (and thus who discuss potential discipline internally) may be in their own collective negotiations units. N.J.S.A. 34:13A-5.3,-5.10(b) (1), -6(d). It would be inconsistent with legislative intent to find

that such duties render an employee confidential and excluded from the coverage of the Act. If the supervisory employees making such personnel decisions and recommendations are not thereby confidential, it follows that their secretarial and clerical support staff are not confidential merely from having advance knowledge of these decisions and recommendations.

[Queen City Academy Charter School, D.R. No. 2023-10, 49 NJPER 378 (¶92 2023) at Footnote 2, req. for rev. den. P.E.R.C. No. 2023-44, 49 NJPER 528 (¶125 2023)]

If supervisors discussing and making disciplinary decisions and their secretarial staff being privy to this information are not thereby confidential, then it follows that information technology employees are not confidential from their even more tenuous connection with disciplinary information. The IT employees here could at most make assumptions that the reason they were being asked to deprovision accounts and eliminate computer and keycard access for other employees was because those employees were being terminated for disciplinary reasons, but they would not know the reasoning for the terminations. Even if they did, like supervisors and their secretarial staff, that would not be enough for confidential status, as labor relations strategies and positions regarding collective negotiations are not involved.^{6/}

^{6/} As found in this decision, Rutgers has not shown that the petitioned-for employees have advance knowledge of disciplinary decisions and, regardless, such advance knowledge would not make them confidential within the meaning of the Act. Accordingly, I decline to address HPAAE's argument based on Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (Loudermill), that IT employees should not
(continued...)

Rutgers argues that user support services specialists are confidential because of their support with meetings in which confidential labor relations information is discussed. Although Rutgers provides examples of particular employees supporting particular meetings, Rutgers fails to provide any documentary evidence or detailed certified statements showing particular instances in which the employees received confidential labor relations information. Certifications from the employees show that while they may set up equipment before the meetings start, they do not stay in the rooms during the confidential portions of the meetings, if at all. Although they may be called back in if technical issues arise, Rutgers identifies no particular instances in which they received confidential labor relations information while they addressed the technical issues before leaving again.

Rutgers argues that the petitioned-for employees are confidential because of the access they have to the network and computers that may have confidential information. In Downe Tp. Bd. Of Ed., D.R. No. 2005-3, 30 NJPER 388 (¶125 2004), a technology trainer with mere access to all of the files stored in the Board's automated systems, including confidential

6/ (...continued)
receive information regarding termination determinations before the affected employees have had their pre-termination Loudermill meeting.

information, was found to not be a confidential employee because there was no evidence she actually accessed and used any information related to the conduct of negotiations or contract administration that would compromise the Board's position in those activities. This case was cited in Camden Cty. Library, where another IT employee's computer access was analyzed in the context of a confidential analysis:

. . . [The] IT Manager is not a confidential employee. Masud Paul has no involvement with collective negotiations. Specifically, she does not sit on the Employer's negotiating committee or have any responsibility for developing labor relations strategy, analyzing negotiations proposals, or costing out possible Employer proposals. The Employer is most concerned that her role as the IT Manager gives her possible access to all computers in the library system. But Masud Paul has not accessed anyone's computer without permission. Mere "access" to computerized information, without any responsibility to pay attention to its contents, does not necessarily give the employee knowledge of confidential information. See Downe Tp. Bd. Of Ed., D.R. No. 2005-3, 30 NJPER 388 (§125 2004) (computer technician with system-wide access not confidential).

The Library contends that Masud Paul has "unfettered access" to electronic records on personnel matters, and to information about employee investigations and sexual harassment charges. These materials are not the type of information with which we are concerned in excluding confidential employees from representation rights. The test is whether the employee's inclusion in the unit would potentially compromise the employer in negotiating and administering the contract because the employee would have advanced knowledge of its negotiations strategies which might be shared with the employee representative. The Library further maintains that Masud Paul has computer access to all e-mails and electronic memoranda. But the Library has not provided any specific examples of the content of e-mails or memoranda which contain sensitive negotiations information. Masud Paul's job responsibilities have not provided her advanced knowledge of the Employer's negotiations strategies or other confidential labor

relations information.

[Camden Cty. Library, D.R. No. 2008-4, 33 NJPER 298 (¶114 2007), req. for rev. den. P.E.R.C. No. 2008-35, 33 NJPER 319 (¶121 2007)]

Rutgers argues that Camden Cty. Library was about "possible" access and that the record in the instant case goes beyond possible access. Given that Rutgers has not provided documentary evidence of confidential labor relations materials actually accessed by the petitioned-for employees or certified statements sufficiently detailing specific instances where they accessed such materials, Camden Cty. Library cannot be distinguished on this ground. In that case, the record showed that the IT Manager did access the network, but there was no evidence that she accessed confidential labor relations information. While she had the technical ability to possibly access that information without permission, she never did.

Here, the petitioned-for employees access the computer network, but no evidence has been presented of instances in which they have actually accessed confidential labor relations information. The employees also have limited access permissions enabled on the network. They only get access as needed and cannot remotely access computers without a two-step authentication process with user approval. Their Net IDs would also create a log and audit trail, which would lessen the likelihood that they would access confidential labor relations

information without permission and increase the likelihood that any authorized access that has already occurred could be shown through documentary evidence, which has not been provided. The possibility that they could access confidential labor relations information is even less than in Camden Cty. Library (where the IT Manager appeared to have "unfettered access") and this hypothetical cannot be used in lieu of evidence of past access to establish confidential status.

Based on the foregoing, I find that Rutgers has not shown that the petitioned-for employees are confidential under the Act.^{7/}

Rutgers also argues that the potential to access confidential information creates a conflict of interest with and warrants exclusion from HPAE's unit, citing to Middletown Tp. Bd.

^{7/} As Rutgers has not provided documentary evidence or sufficient certified statements regarding specific instances of exposure to confidential labor relations information for any of the petitioned-for employees, certified statements that some of them may be backed up by other employees is not sufficient to establish that the latter are confidential either. Moreover, even if there was evidence that some employees have performed confidential duties, certified statements that other employees may back them up might not be sufficient to establish that the latter are confidential employees in the absence of specific examples of times those employees performed confidential duties during the back up. See Franklin Tp., D.R. No. 2019-14, 45 NJPER 333 (¶89 2019) (flex clerks found not to be confidential despite Township certification that they were slated as backups for the Township Clerk to attend executive sessions, as no specific examples were provided of them actually attending executive sessions where collective negotiations were discussed).

of Ed., H.E. No. 2004-17, 30 NJPER 243 (¶90 2004) (Middletown HE). In that recommended decision, the hearing examiner found that the technology specialists (more colloquially known as network administrators or domain administrators or computer specialists) had unfettered access to all areas of computer networks but were not statutorily excluded as confidential employees under the "traditional access test" because there was no evidence that they accessed, or even that they were required in the regular course of their job duties to access, confidential labor relations materials stored on the computer system.

Nevertheless, without citing any decisions from this agency for the specific proposition, the hearing examiner recommended excluding employees with unfettered access to confidential labor relations materials from units with employees who do not have such access, but indicated that they could be represented in a separate unit.^{8/} Although the predecessor title had previously been clarified as included in the unit in Middletown Tp. Bd. of Ed., D.R. No. 95-31, 21 NJPER 253 (¶26163 1995) (Middletown DR), the hearing examiner in Middletown HE reasoned that the Board had moved from a decentralized technology and expanded its computer capabilities to draft, analyze, and communicate regarding labor relations materials, which would require significant logistics

^{8/} Rutgers has not indicated whether it would be willing to agree to have HPAE represent the petitioned-for employees in a separate unit.

for the Board to alter its methods to mitigate the possibility that the technology specialists might abuse their positions.

The hearing officer's recommended decision became final in the absence of exceptions, meaning the Commission never reviewed it. No case has cited Middletown HE for its confidential-like conflict of interest argument. That argument is also inconsistent with the Supreme Court's decision in New Jersey Turnpike Authority v. AFSCME, Council 73, 150 N.J. 331 (1997), where it rejected the Appellate Division's suggestion in Township of Wayne v. AFSCME, 220 N.J. Super. 340, 532 A.2d 255 (App Div. 1987) that mere access to confidential labor relations information creates sufficiently conflicting loyalties to exclude an employee from a unit.^{9/} Accordingly, I decline to follow the reasoning of Middletown HE.^{10/}

^{9/} Middletown HE also conflicts with the subsequent decisions in Downe Tp. Bd. Of Ed. and Camden Cty. Library which reached different legal conclusion regarding mere but unfettered access to computer systems. Indeed, the Commission itself, in its decision on the request for review of the Director's decision in Camden Cty. Library, reiterated that mere access to and availability of confidential information to an employee does not render that employee confidential, and the Commission found that there was no substantial question of law raised by the Director's conclusions regarding the IT Manager's access to the computer network. Camden Cty. Library, P.E.R.C. No. 2008-35, 33 NJPER 319 (¶121 2007).

^{10/} The logistical issues raised in Middletown HE are also of less concern here, as Rutgers already utilizes electronic access permissions that can limit employees from accessing specific folders and files without user approval and create

(continued...)

Therefore, I clarify HPAAE's unit to include user support services specialists (Robert Gorman, Rawle Hines, William Labbree, Ken Morris, William Slaven, Ron Thornton, David Tran), unit computing specialists (Edwin Alicia), telecommunications analysts (Chris Fass, Edward O'Keefe-Gorman), and system administrators (James Gaither, Victor Gomes, Scott Kuhnel, Raymond Nieves).

ORDER

HPAAE Local 5094's unit is clarified to include the unit computing specialists, user support services specialists, telecommunications analysts, and system administrators in the Office of Information Technology at the Rutgers Camden campus.

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

DATED: January 31, 2024
Trenton, New Jersey

10/ (...continued)
log and audit trails that would indicate abuse.

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 February 12, 2024.