

D.R. NO. 2002-2

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

In the Matter of

JAMESBURG BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. RO-2001-73

JAMESBURG OFFICE PERSONNEL ASSOCIATION,

Employee Representative.

SYNOPSIS

The Director of Representation directs an election in a unit of all clerical employees employed by the Jamesburg Board of Education. The Director finds that individual employment agreements entered into by the Board and certain clerical employees do not constitute "written agreements" which effectively bar the filing of a timely representation petition. Citing West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973), modified, P.E.R.C. No. 79, NJPER Supp. 333 (¶77 1973), the Director finds that the individual agreements did not establish a de facto bargaining relationship between the Board and the clerical employees.

The Director further finds that the Board has proffered insufficient evidence concerning the duties performed by the support staff in the business administrator's office to support a factual finding that these employees are confidential. Due to insufficient factual evidence concerning the level of her access to confidential information, the Director makes no finding concerning the confidential status of the assistant to the business administrator, and directs that employee may vote subject to the Commission's challenge ballot procedure.

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Appearances:

For the Public Employer
Schwartz, Simon, Edelstein, Celso & Kessler, attorneys
(Allan P. Dzwilewski, of counsel)

For the Employee Representative
Zazzali, Fagella & Nowak attorneys
(Jason E. Sokolowski, of counsel)

DECISION

On April 2, 2001, the Jamesburg Office Personnel Association (Association) filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission, seeking to represent all clerical employees of the Jamesburg Board of Education (Board). The petition was supported by an adequate showing of interest.

The Board does not consent to a secret ballot election. It asserts that it has a collective agreement with its secretarial staff

covering three school years from 1999 through June 2002, which bars the filing of this petition. Additionally, the Board maintains that certain petitioned-for secretaries are confidential employees and receive an additional stipend as a specific quid pro quo for performing such confidential duties.

We have conducted an administrative investigation into the petition. N.J.A.C. 19:11- 2.2 and 2.6. On July 27, 2001, I advised the parties that I was inclined to direct an election in the petitioned-for unit and invited the parties to submit additional evidentiary materials in support of their positions. The Board's response reiterated its argument that a contract bar exists, and further asserted that the clerical employees are estopped from proceeding to an election because they have already accepted salary increases pursuant to a multi-year salary agreement with the Board. No response was filed by the petitioner. I find the following facts.

The Jamesburg Board of Education employs the following clerical employees in the listed positions: Rita Ceras, secretary to the superintendent, Betty Broglio, assistant to the business administrator/Board secretary; Maureen Brown, Dara Valiant, and Nancy Lomonaco, clerical assistants in the Board central office; Carol Heindel, principal's secretary; and Ruth Wolfe, special services secretary.

The Board has provided several documents in support of its contention that it has an agreement with the secretarial staff which constitutes a contract bar to the petition: an Addendum to the Board's

May 27, 1999 public meeting agenda, containing a schedule of salaries and additional compensation for secretarial staff members Heindel, Ceras, Wolfe and Broglio, covering school years 1999 through 2002; and a copy of a two-page contract proposal pertaining to secretarial staff, stating the duration of the contract as three years (1999-2002). The remainder of the proposal contains sections entitled as follows: "Changes in this contract;" "Salary settlement;" "Vacation time;" and "Personal Days." The contract proposal does not contain a recognition clause or grievance procedure.

The Board has also provided five unsigned individual employment contracts pertaining to employees Heindel, Ceras, Wolfe, and Broglio. Two employment contracts pertained to Broglio, one for to the position of secretary to the board, and one for the position of assistant to business administrator. Each contract includes the following articles: term, duties, compensation, benefits, termination/renewal/nonrenewal, and miscellaneous. Each contract references the position of "confidential secretary" for the Board with an execution date in June 1999. The contracts pertaining to Broglio refer to execution dates in June and October 1999, respectively. There is no dispute that the Board and Heindel, Ceras, Wolfe and Broglio signed and executed the contracts; it is unclear whether the three remaining employees in the position of clerical assistant also did so.

The Board asserts that since being "promoted" to the position of "assistant to the business administrator," Broglio has a "direct

and closer working relationship" with the business administrator than would a secretary, and therefore must be considered confidential. The Board asserts that Broglio "works on the budget (and) its formulation, including payroll and various aspects of health benefits and purchase orders... (and) verifies proposed salary guides and develops spreadsheets related to the economic costs of proposals." The Board does not, however, provide more specific examples or samples of work performed by Broglio. The Board further asserts that Broglio is "privy" to all closed, executive session minutes of the Board including portions related to negotiations and grievances, and could also attend Board meetings, including executive sessions, if the business administrator is unavailable. However, the Board does not indicate whether Broglio has ever attended any such meetings.

The Board further contends that the three additional clerks in the Board's central office (1) regularly work with the school business administrator on financial matters affecting negotiations, (2) have access to confidential negotiations materials, and (3) have full access to all of the information relating to negotiations preparations and executive session discussion. However, the Board does not provide any specific examples or samples of the work performed, or whether these business office secretaries use these materials in the course of performing their assigned duties.

ANALYSIS

Timeliness of the Petition

The Board argues that it has a current agreement with the secretarial staff covering school years 1999 to 2002, inclusive; therefore, the petition is contractually barred.

N.J.A.C. 19:11-2.8 provides as follows:

Timeliness of petitions

(a) Where there is no recognized or certified exclusive representative of the employees, a petition for certification of public employee representative will be considered timely filed provided there has been no valid election within the preceding 12-month period in the requested negotiations unit or any subdivision of the unit.

* * *

(c) During the period of an existing written agreement containing substantive terms and conditions of employment and having a term of three years or less, a petition for certification of public employee representative will not be considered timely filed unless:...(3) In a case involving employees of a school district, the petition is filed during the period between September 1 and October 15, inclusive, within the last 12 months of such agreement.

The Board submits that the petition is untimely pursuant to N.J.A.C. 19:11-2.8(c) since it was not filed between September 1 and October 15 of the last year of the agreement. Additionally, the Board asserts that certain terms and conditions of employment in the agreement pertaining to the secretaries were agreed upon as a specific quid pro quo for current staff members, and that the individual employment contracts, signed by Wolfe, Heindel, and Broglio, reflect an additional stipend for these employees' status

as "confidential secretar[ies] for the Board." The Association asserts that there is no "recognized or certified exclusive representative of the employees" and therefore, section 2.8(a), above, should be applied here.

Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977), explained the rationale for the temporal restrictions on the filing of representation petitions set forth in N.J.A.C. 19:11-2.8, including the Commission's contract bar rule:

A contract bar has...been established which limits the filing of petitions during the period in which employees are covered by a written agreement. The adoption of the contract bar rule represents the Commission's concern that the filing of a petition raising a question concerning representation often disrupts the stability and the predictability of the negotiations relationship which the parties sought to create by agreement. While the ability to select or to refrain from selecting an employee representative is a matter within the public interest, so too is the public concern that an existing negotiations relationship not be subject to continuous and untimely disruptions. Therefore, the Commission has constructed a contract bar rule to provide for the protection of both parties during the period of an existing written agreement. The Commission rule limits the filing of petitions seeking to change the negotiations unit or its representative to a prescribed period shortly before the agreement expires. [Clearview, 3 NJPER at 251.]

The Board asserts that a formal, or at least de facto, negotiations relationship exists between the parties. The Board also contends that the secretaries constitute a "reasonably well defined group...(with which) the Board engaged in a process (of negotiations) with an intent to reach agreement and, in fact, reached agreement," pursuant to West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973), modified, P.E.R.C. No. 79, NJPER Supp. 333 (1977 1973).

The New Jersey Employer-Employee Relations Act defines the term employee "representative" as follows:

e) The term "representative"...shall include any organization, agency or person authorized or designated by a public employer, public employee, group of public employees, or public employee association to act on its behalf and represent it or them. N.J.S.A. 34:13A-3(e).

An employee representative need not be certified by this Commission nor even formally recognized under N.J.A.C. 19:11-3.1 to be considered a "representative" under our Act. In Collingswood Bd. of Ed., P.E.R.C. No. 86-50, 11 NJPER 694 (¶16240 1985), the Commission held that a de facto negotiations relationship could arise even absent formal recognition or certification, where there was:

...an organization regularly speaking on behalf of a reasonably well-defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) with an employer who engaged in the process with an intent to reach agreement. [Collingswood, 11 NJPER at 697, citing West Paterson.]

In Collingswood, a school board was bound by a compensation agreement resulting from its collective negotiations with an informally recognized employee representative, where the evidence showed that a collective negotiations relationship existed. To determine whether negotiations has occurred, we focus on whether there was the give and take of a bilateral relationship, through proposal and counterproposal directed towards consummation of a mutually acceptable agreement.

The Board misperceives the West Paterson definition of a negotiations relationship. The Board argues that the "give and

take" process it engaged in with its individual secretaries, resulting in individual employment contracts, amounts to a negotiations relationship which should bar this petition. Collective negotiations, by its nature, is the antithesis of negotiating directly with individual employees. What is absent here is an employee representative speaking on behalf of the employees. Therefore, I find that the Board's individual employment contracts with its secretaries do not constitute collective negotiations agreements, and therefore, cannot act as a contract bar under section 2.8(c).

Moreover, even if a collective negotiations relationship existed between the Board and a representative of the secretaries, a collective agreement must contain substantive terms and conditions of employment sufficient to stabilize the parties' bargaining relationship.^{1/} It must also be in writing and signed by the parties.^{2/}

^{1/} Mt. Olive Bd. of Ed., D.R. No. 83-29, 9 NJPER 633 (¶14271 1983); Moonachie Bd. of Ed., D.R. No. 82-28, 8 NJPER 58 (¶13023 1981).

^{2/} See City of Egg Harbor, D.R. No. 91-2, 16 NJPER 424 (¶21178 1990); City of Pleasantville, D.R. No. 86-10, 12 NJPER 70 (¶17027 1985); Bergen County Superintendent of Elections, D.R. No. 84-10, 9 NJPER 629 (¶14269 1983); Mercer Cty. Superintendent of Elections, D.R. No. 82-40, 8 NJPER 157 (¶13069 1982); Transport of N.J., D.R. No. 82-38, 8 NJPER 154 (¶13067 1982); County of Middlesex, D.R. No. 81-1, 6 NJPER 355 (¶11179 1980), req. for rev. den. P.E.R.C. No. 81-29, 6 NJPER 439 (¶11224 1980); Appalachian Shale Products Co., 121 NLRB No. 149, 42 LRRM 1506 (1958).

Based upon the foregoing, I find that the May 1999 agreements between the Board and certain members of its secretarial staff do not constitute "written agreements" which effectively bar the filing of a timely representation petition. The agreements were signed by the Board and each individual employee. As such, these agreements cannot be considered "collective negotiations agreements." While the agreements contain certain terms and conditions of employment, they appear to lack other substantive terms, such as a recognition clause or grievance procedure, sufficient to stabilize the parties' bargaining relationship. Appalachian Shale Products Co. The agreement is not signed by a negotiations representative on behalf of the employees. Accordingly, I find that there is no contract bar in effect here, and the petition is timely filed.

As to the Board's claim that the secretaries are estopped from seeking representation now because they accepted raises for this year, I find that the employees' statutory right to organize is not waived by the acceptance of earlier pay increases.

Confidential Employees

The Board asserts that the secretary to the superintendent, the secretary to the business administrator/board secretary, and the remaining support staff in the board secretary's office are confidential employees and ineligible for the negotiations unit. The Association concedes that Rita Ceras, the secretary to the superintendent, is confidential; it argues that none of the other clerical employees are confidential.

N.J.S.A. 34:13A-3(g) defines confidential employees as:

employees whose functional responsibilities or knowledge in connection with issues involved in the collective negotiations process would make their membership in any appropriate negotiations unit incompatible with their official duties.

The Commission's policy is to narrowly construe the term confidential employee. N.J. Turnpike Authority v. AFSCME, Council 73, 150 N.J. 331 (1997); Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339 (¶19128 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 507 (¶16249 1985); Brookdale Community College, D.R. No. 78-20, 4 NJPER 32 (¶4018 1977).

In State of New Jersey (Div. of State Police), D.R. No. 84-9, 9 NJPER 613 (¶14262 1983), the Commission explained the approach taken in determining whether an employee is confidential. The Commission stated:

We scrutinize the facts of each case to find for whom each employee works, what [the employee] does, and what [the employee] knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee [were] included in a negotiating unit.

In N.J. Turnpike Authority, the New Jersey Supreme Court approved the standards articulated in State of New Jersey, P.E.R.C. No. 86-18. The Court explained:

The baseline inquiry remains whether an employee's functional responsibilities or knowledge 'would make their membership in any appropriate negotiating unit incompatible with

their official duties.' N.J.S.A. 34:13A-3(g); see also State of New Jersey, supra, 11 NJPER ¶16179 (holding that final determination is 'whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit.') Obviously, an employee's access to confidential information may be significant in determining whether that employee's functional responsibilities or knowledge make membership in a negotiating unit inappropriate. However, mere physical access to information without any accompanying insight about its significance or functional responsibility for its development or implementation may be insufficient in specific cases to warrant exclusion. The test should be employee-specific, and its focus on ascertaining whether, in the totality of the circumstances, an employee's access to information, knowledge concerning its significance, or functional responsibilities in relation to the collective negotiations process make incompatible that employee's inclusion in a negotiating unit. We entrust to PERC in the first instance the responsibility for making such determinations on a case-by-case basis. [Turnpike Authority at 358.]

Employees in support positions are often deemed confidential due to their superior's role in the labor relations process and their own performance of clerical support duties which expose them to confidential matters. See Salem Community College, P.E.R.C. No. 88-71, 14 NJPER 136 (¶19054 1988); River Dell Reg. Bd. of Ed., D.R. No. 83-21, 9 NJPER 180 (¶14084 1983), aff'd P.E.R.C. No. 84-95, 10 NJPER 148 (¶15073 1984); W. Milford Bd. of Ed., P.E.R.C. No. 56, NJPER Supp. 218 (¶56 1971).

Here, the Board has not submitted any specific information demonstrating how the duties of the support staff in

the Board secretary's office results in these employees' knowledge of the Board's confidential negotiations strategies. The Board has not provided us with any information about what role the assistant to the business administrator specifically plays in the preparation of the budget. Nor has the Board submitted any specific information to demonstrate that the support staff's budget involvement, if any, results in knowledge of the Board's confidential negotiations strategies. Further, it has not identified the kind of budget data these employees learn about which is related to confidential negotiations strategies. Much of the information that comprises a school district budget is public information, and much of it is not in any way connected with collective negotiations. It is only when the employee's involvement with budget data gives the employee knowledge of the employer's negotiations strategies -- for instance, what budget increases might be planned for employee salaries -- that confidential status may be found.

Absent a proffer of specific duties, and a demonstration that the claimed duties are actually performed, we will not find confidential status. 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), app. pending App. Div. Dkt. No. A-006106-99T2; City of Asbury Park, D.R. No. 2001-6, 27 NJPER 119 (¶32043 2001); Evesham Tp. Fire Dist. #1, D.R. No. 99-4, 24 NJPER 503 (¶29233 1998); Monmouth Reg. Bd. of Ed., D.R. No. 94-10, 20

NJPER 16 (¶25009 1993). Moreover, where the employer asserts that the alleged confidential employee participates in budget preparation, we will not find confidential status when an employer fails to specifically identify facts demonstrating that the employee's budget participation results in that employee knowing confidential negotiations strategies. Asbury Park; Evesham; Monmouth Reg. Bd. of Ed. Access to budget information which is not specifically relevant to the employer's bargaining position does not implicate confidential status. See Cliffside Park; City of Newark; Asbury Park; Orange Tp., D.R. No. 85-23, 11 NJPER 317 (¶16115 1985).

Therefore, I find that the clerical assistants in the office of the Board secretary/business administrator are not confidential employees within the meaning of the Act and are eligible for representation in the petitioned-for unit.

However, I do not make a specific finding concerning the eligibility of Broglio, the assistant to the business administrator. In Tp. of Wayne v. AFSCME Co. 52, Local 2192, 220 N.J. Super. 340, 345 (1987), the Superior Court of New Jersey found that knowledge of the employer's negotiations strategies via access to closed session Board minutes would render an employee confidential; however, in Cliffside Park, we found that mere access to the file cabinets where such minutes are stored would not render an employee confidential. The Board asserts that Broglio is "privy" to all closed, executive session minutes of the

Board including portions related to negotiations and grievances, and could also attend Board meetings, including executive sessions, if the business administrator is unavailable. The Board has not presented us with sufficient information to make a factual finding concerning the level of Broglio's access to and knowledge of the contents of those closed sessions of the Board which would include confidential discussions about negotiations or contract administration strategies.

Therefore, the unit status of only one employee in a voting unit of six remains at issue. This dispute need not be resolved prior to the election. Where the number of employees in disputed titles is small relative to the total number of eligible voters in the unit, and the unit sought is otherwise appropriate, we will proceed with the election and permit the disputed employee to vote subject to challenge ballot. Borough of Leonia, P.E.R.C. No. 86-143, 12 NJPER 523 (¶17195 1986); State of New Jersey (N.J. Civil Service Assn.), D.R. No. 81-20, 7 NJPER 41 (¶12019 1980), req. for rev. den., P.E.R.C. No. 81-94, 7 NJPER 105 (¶12044 1981); Tp. of Middletown, D.R. No. 91-10, 16 NJPER 532 (¶21234 1990); County of Morris Park Commission, D.R. No. 80-17, 6 NJPER 37 (¶11019 1979).

If the challenged ballot is determinative of the election results, post-election mechanisms are available to resolve the challenge, including an investigation to determine the status of the challenged ballot. If the challenged ballot is not

determinative and assuming that a Certification of Public Employee Representative issues, the parties may voluntarily resolve the status of the challenged employee or either party may file a Petition for Clarification of Unit to determine the proper unit placement of the challenged employee. Leonia.

Accordingly, I find that the petition is timely and I direct that a mail ballot election be conducted among the employees in the following unit:

Included: All clerical employees employed by Jamesburg Township Board of Education.

Excluded: All managerial executives, confidential employees, and supervisors within the meaning of the Act; professional employees, craft employees, police, secretary to the superintendent, and all other employees.

I further direct that the assistant to the school business administrator/Board secretary may vote subject to the Commission's challenge ballot procedure.

The election shall commence no later than thirty (30) days from the date of this decision. Those eligible to vote must have been employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, on vacation or temporarily laid off, including those in the military service. Ineligible to vote are employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Pursuant to N.J.A.C. 19:11-10.1, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the names of all eligible voters in the units, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by us no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously provided to the employee organization with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

The exclusive representative, if any, shall be determined by a majority of the valid votes cast in the election. The election shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Susan Wood Osborn
Acting Director of Representation

DATED: August 15, 2001
Trenton, New Jersey