

D.R. NO. 88-21

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

In the Matter of

PASSAIC CITY BOARD OF EDUCATION,

Public Employer-Petitioner,

-and-

Docket Nos. CU-87-63
CU-87-65

PASSAIC ASSOCIATION OF EDUCATIONAL
SECRETARIES, NJEA,

Employee Representative.

SYNOPSIS

The Director of Representation clarifies out of an existing unit the newly created title of Secretary to the Personnel Director of the Passaic City Board of Education where the Secretary's duties gave her actual knowledge of confidential negotiations information. The Director dismisses a clarification petition through which the Board of Education sought to clarify into an existing unit five titles, where there was evidence of mutual intent to exclude the titles for a lengthy period prior to the filing of the petition, and where there were no changed circumstances surrounding the titles.

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Appearances:

For the Public Employer-Petitioner
Matthew J. Michaelis, Esq.

For the Employee Representative
Klausner, Hunter and Oxfeld, Esqs.
(Stephen B. Hunter, of counsel)

DECISION

On May 5, 1987 the Passaic City Board of Education ("Board") filed two Petitions for Clarification of Unit (Docket Nos. CU-87-63 and CU-87-65) with the Public Employment Relations Commission ("Commission"). One of the petitions (Docket No. CU-87-63) seeks to remove the position of Secretary to the Personnel Director from the negotiations unit represented by the Passaic Association of Educational Secretaries ("Secretaries' Association" or "Association"). The other petition (Docket No. CU-87-65) seeks to add five positions to the Secretaries' Association unit. The Secretaries' Association objects to both Petitions.

An administrative investigation was conducted into these matters in order to determine the facts, in accordance with N.J.A.C. 19:11-2.2(a). Based upon this investigation, we make the following findings:

The disposition of this matter is properly based on our administrative investigation because we have not found any substantial and material factual disputes which may more appropriately be resolved at a hearing. See N.J.A.C. 19:11-2.6.

The Board and Secretaries' Association entered into a collective negotiations agreement on April 17, 1986, covering terms and conditions of employment for "Elementary, High School, Central Office Secretaries, Adult Learning Center, Secretary to the Superintendent, Secretary to the Assistant Superintendent and Clerk Typists" employed by the Passaic Board of Education. This agreement covers the period from September 1, 1985 through August 31, 1988.

In Petition Docket No. CU-87-63, the Board asserts that the Secretary to the Personnel Director should be removed from the Association's unit because that employee is a confidential employee within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The employee in this position, which was created in Fall 1986, functions as the secretary to the Personnel Director. The Personnel Director position is also a newly created position. Prior to 1986, the Board's personnel functions had not been administered by a separate organizational division.

One of the responsibilities of the Personnel Director is to operate a computer-based management information system ("MIS") to help prepare the Board for labor negotiations. The Personnel Director is part of the Board's negotiations team and consults with the Board's labor counsel concerning contract administration. The Personnel Director's secretary performs data entry and retrieval functions on the MIS as well as other, regular secretarial duties for the Personnel Director. These duties place the Personnel Director's secretary in direct contact with correspondence and other material generated by the Personnel Director or the Board's labor counsel and having to do with contract negotiations and administration.

The Secretaries' Association claims that this petition is untimely and should be dismissed. Specifically, it argues that there have been no changed circumstances to justify the mid-contract exclusion of the position performing secretarial duties for the Personnel Director. The Association disputes the fact that this secretary performs any confidential duties, noting that negotiations have not yet commenced for a new contract and that, accordingly, there has not yet been any need for such duties to be performed.

In Petition Docket No. CU-87-65, the Board seeks to add five positions to the Secretaries' Association unit. The positions sought are: Payroll Coordinator, Administrative Secretary, Assistant to the Business Administrator, Accounts Payable Clerk, and Bookkeeper. For reasons of efficiency, the Board seeks to reduce the

number of employees who are outside bargaining units and to place those employees who properly belong in units into the appropriate existing unit.

The Board notes that although the job responsibilities of the employees in these five positions have remained substantially the same over the past two contract terms, none of the five employees are confidential within the meaning of the Act nor are they in any other way exempt from coverage by the Act. It argues that even though the parties agreed in the past to exclude these titles, the principle which should prevail here is that parties may not agree to illegal exclusions and the Commission should correct these improper exclusions immediately.

The Association objects to the petition and requests that the Commission dismiss it inasmuch as the titles have been excluded from the unit for several years and there are no changed circumstances present here which would support a unit clarification at this time. The Association states that the instant "clarification of unit petition has been inappropriately utilized to add positions that were in existence at the time of the execution of the present collective negotiations agreement"

The parties agreed that the above positions were excluded from the Association's unit by mutual consent, for a period of at least 8 years. Although the parties have entered into at least three collective negotiations agreements, and over a period of 9 years have made slight changes in their recognition clauses, the

current agreement's recognition clause is silent as to the specific status of the titles which are the subject of the petitions here.

ANALYSIS

Secretary to the Personnel Director

The Board argues that the Personnel Director's Secretary is confidential and should be removed from the Association's unit. The Association maintains that she does not now perform confidential duties.

N.J.S.A. 34:13A-3(g) defines a confidential employee:

'Confidential employees' of a public employer means 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 policy of this Commission is to narrowly construe the term confidential employee. Brookdale Community College, D.R. No. 78-20, 4 NJPER 32 (¶4018 1977); State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985); mot. to reopen den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985); Cliffside Park Board of Education, H.O. No. 87-19, 13 NJPER 473 (¶18175 1987).

In State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), 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. Id. at 510.

In addition to having access to negotiations information, the secretary in the disputed position works directly for the Personnel Director who collects information to be used in contract negotiations and acts as consultant to the Board's labor counsel and negotiations team. The collected negotiations information is entered into, stored in, and retrieved from a computer. The Board has commenced its preparations for negotiations with those units with contracts which either have expired or will expire in 1988.

The secretary to the Personnel Director opens the Personnel Director's mail and types his correspondence -- this includes mail to and from the Board labor counsel. This gives her actual knowledge of confidential negotiations information. If she were to remain in the Association's unit, the employer's ability to maintain confidentiality with regard to the collective negotiations process would be compromised.

In Clearview Reg. Bd/Ed, D.R. No. 78-2, 3 NJPER 248 (1977), we stated:

The purpose of a clarification of unit petition is to resolve questions concerning the scope of a collective negotiations unit within the framework of the provisions of the Act ...

[This] statutory framework renders certain negotiations relationships improper. Persons identified as managerial executives and confidential employees are not employees under the Act.

Where the clarification of unit determination is that a particular employee is a managerial executive or a confidential employee, the clarification of unit determination shall be effective immediately.

Id., at 251.

Based upon the record in this matter and the foregoing discussion, we find that the secretary to the Personnel Director of the Passaic City Board of Education is a confidential employee within the meaning of the Act. Accordingly, we clarify the secretarial/clerical unit to exclude the position of secretary to the Personnel Director, effective immediately. See Clearview Reg. Bd/Ed, supra.

Payroll Coordinator, Administrative Secretary, Assistant to the Business Administrator, Accounts Payable Clerk, & Bookkeeper

The Board, through Petition Docket No. CU-87-65, seeks to add five employment positions to the collective negotiations unit, as it contends the positions are encompassed within the recognition clause of the parties' collective negotiations agreement. The Association argues that the petition should be dismissed because it is inappropriate here for the Commission to clarify the negotiations unit absent a demonstration of changed circumstances which would warrant the clarification sought.

We find that the clarification of unit petition filed herein (Docket No. CU-87-65) is inappropriate. The current collective negotiations agreement between the parties encompasses almost all of the Board's secretarial/clerical employees. The disputed classifications are not included in the

secretarial/clerical unit's contract recognition clause and these titles have not been included in the unit under any predecessor agreements. The Board acknowledged that no change in circumstances has occurred relating to the job content or reporting relationships of the titles at issue.

In Wayne Board of Education, P.E.R.C. No. 80-94, 6 NJPER 54 (¶10028 1980), D.R. No. 80-6, 5 NJPER 422 (¶10221 1979), the Commission indicated that it would be guided in evaluating clarification petitions by the adjudications and policies of the National Labor Relations Board ("NLRB").^{1/} The Commission has held that clarification petitions seeking to enlarge a unit are precluded where the titles sought existed at the time the negotiations unit was formed, or where a union had for a period of time "slept on its rights" concerning the unrepresented titles. In

^{1/} The New Jersey Supreme Court has sanctioned reliance on the experience of the Board under the NLRA in considering representation issues arising under our Act. See Lullo v. Firefighters Local 1066, 55 N.J. 409 (1970). In Gould Nat'l Batteries Inc., 157 NLRB 679, 61 LRRM 1436 (1966), the Board determined that a clarification petition was inappropriate where the petitioner sought to add two employee divisions to a third employee division. The third division comprised a separate unit of employees. Because the two divisions existed prior to the execution of the most recent contract covering the third division, a clarification petition was not an appropriate vehicle for adding positions to the existing unit. In Remington Rand Div. of Sperry Rand, 132 NLRB 1093, 48 LRRM 1478 (1961), the Board found that because certain computer coding titles existed at the time the clerical unit was certified and because no effort had been made by the union to represent the coding titles, the union could not then use a clarification petition to add the coding titles to the existing clerical unit.

Wayne, we set forth the criteria to be used in evaluating clarification petitions in this regard: (1) was there a mutual intent by the parties to include the disputed job classification in the unit; (2) where an intent to include the disputed classifications in the unit was initially present, did the parties' subsequent conduct demonstrate a mutual agreement to exclude the titles in question; and finally, (3) did subsequent conduct of the majority representative constitute an abandonment of the claim that the titles in issue are represented in the unit.

Here, there was historically no intent by either party to include the disputed titles in the Secretaries' Association unit. Subsequent conduct of both parties, up to the filing of this petition, appears to have been consistent with their original intent.

In Clearview, supra, the Director stated:

The purpose of a clarification of unit petition is to resolve questions concerning the scope of a collective negotiations unit within the framework of the provisions of the Act, unit definition contained in a Commission certification or as set forth in the parties' recognition agreement. Normally, it is inappropriate to utilize a clarification of unit petition to enlarge or to diminish the scope of the negotiations unit for reasons other than the above.

Id., at 251.

Subsequent Commission cases have addressed unit clarification petitions filed by a majority representative seeking to include or exclude a particular title from a unit, or by a public employer seeking to remove a title(s) from a unit. See Bergen Pines County Hospital, D.R. No. 80-20, 6 NJPER 61 (¶11034 1980) (Union

must exercise due diligence in searching out employees who are within definitional scope of its collective negotiations unit. Execution of second collective negotiations agreement precluded the union from later seeking to add employees to unit through clarification petition); Rutgers University, D.R. No. 84-19, 10 NJPER 284 (¶15140 1984) (Union's petition to clarify the unit to include titles created prior to execution of existing agreement dismissed). In our decision in Belleville Board of Education, D.R. No. 86-23, 12 NJPER 482 (¶17184 1986), we found an employer-filed clarification petition -- seeking to redefine the unit based on an alleged lack of community of interest among unit titles -- to be inappropriate where the petition was filed one month after the Commission had certified an appropriate unit, absent a change in circumstances.

There is additional support for applying the Wayne standards to clarification petitions filed by employers as well as to those filed by majority representatives in NLRB decisions. In Logan Memorial Hospital, 231 NLRB No. 119, 96 LRRM 1063 (1977), an employer's petition for unit clarification was dismissed as untimely where the employer executed a collective bargaining agreement and thereafter immediately petitioned the NLRB to exclude covered job titles. In Northwest Publications, Inc., 197 NLRB No. 32, 80 LRRM 1296 (1972), the NLRB dismissed the employer's clarification petition where the employer filed the petition shortly after the execution of a new contract; the new contract was silent as to

coverage of supervisors under the Act; and the parties had submitted to arbitration related disputes concerning which job classes were covered by the agreement.

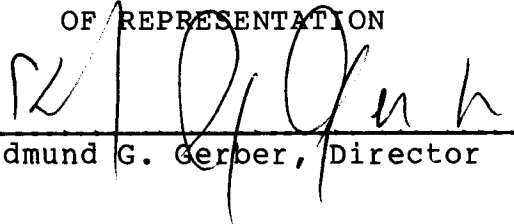
Finally, in Warren Township, D.R. No. 82-10, 7 NJPER 529 (¶12233 1981), we found the union's clarification petition inappropriate where the disputed title existed at the time the unit was originally certified and there was no evidence of mutual intent to include it in the unit.

Accordingly, here, the Board and Association knew of the disputed job classes' existence when each of the three most recent collective negotiations agreements were entered into by the parties. Their mutual intent (until the present time) was to exclude the five titles from the Association's unit. Finally, there are no allegations of changed circumstances which would otherwise warrant the processing of this clarification petition. The Board should have raised this issue at the time of the formation of the secretarial/clerical unit; it may not now use a clarification petition to change the scope of the Secretaries' Association unit.

* * *

Based upon the factual record in this matter and the foregoing discussion, Petition Docket No. CU-87-65 is dismissed and, Docket No. CU-87-63, the secretarial/clerical unit is clarified to exclude the position of Secretary to the Personnel Director.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Edmund G. Gerber, Director

DATED: December 22, 1987
Trenton, New Jersey