

D.R. No. 2010-12

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

In the Matter of

PHILLIPSBURG BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. CU-2009-040

PHILLIPSBURG EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Phillipsburg Education Association filed a clarification of unit petition seeking to clarify a negotiations unit of secretarial and clerical personnel to include the title, secretary to the director of research, planning, and evaluation. The Board asserts that the secretary is a confidential employee within the meaning of the Act. The Director of Representation found that while the secretary in performing her job duties is privy to personnel information that may be characterized as sensitive, the information is unrelated to the Board's handling of grievances and to the negotiations process. The Director clarified the unit to include the secretary to the director of research, planning, and evaluation, finding that the secretary is not a confidential employee within the meaning of the Act.

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Appearances:

For the Respondent,
Florio Perrucci Steinhardt & Fader, L.L.C.
(Jessica L. Cardone, of counsel)

For the Petitioner,
Oxford Cohen, P.C.
(Gail Oxford Kanef, of counsel)

DECISION

On June 15, 2009, the Phillipsburg Education Association (Association) filed a clarification of unit petition seeking to clarify a negotiations unit of secretarial and clerical personnel to include the title, secretary to the director of research, planning, and evaluation (secretary).^{1/} The Phillipsburg Board of Education (Board) objects to the petition, asserting that the secretary is a confidential employee within the meaning of the

^{1/} The Association's petition identifies the title as the "secretary to the director of research, planning, and development." The parties' subsequent correspondence provides that the disputed title is the secretary to the director of research, planning, and evaluation.

New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

We have conducted an administrative investigation into this matter to determine the facts. N.J.A.C. 19:1-2.2. On January 28, 2010, I wrote a letter to the parties, advising that I was inclined to find that the disputed secretarial title was not confidential within the meaning of the Act. I also invited replies. Neither party responded. 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 the administrative investigation, I make the following:

The Board and Association signed a collective negotiations agreement which extended from July 1, 2005 to June 30, 2008. The Board has five other bargaining units - an administrative unit, a teachers unit, a paraprofessional unit, a security guard unit, and a custodial/maintenance unit. The Board is currently negotiating successor agreements with all units except the administrative unit. Negotiations for the latter unit are scheduled to begin in March 2010.

Tonette Simonetta has been employed as the secretary since January 2009, when the title was created. She reports to the director of research, planning, and evaluation. According to the director's job description, the director ". . . assists the Superintendent by providing leadership to the professional staff

by planning, directing, and implementing an ongoing program of development and evaluation to enable the district to continually upgrade and improve its effectiveness in meeting the educational needs of students." Dr. Marian Trapani is employed as the Director.

The goal of the secretary to the director of planning, research, and evaluation set forth in the job description is to perform secretarial and clerical duties of a "complex and/or confidential nature" for all staff. Specific duties include:

- 1) assisting with the coordination and maintenance of confidential personnel files of administrative, teaching, and support staff in the district;
- 2) assisting with the coordination and maintenance of confidential student assessment and testing data information;
- 3) preparing and disseminating confidential personnel and student correspondence and information;
- 4) maintaining and editing the district policy manual; and,
- 5) processing bill forms and purchase orders.

Another document specifying the "job responsibilities/tasks" of the secretary provides that the title gives "support as needed for (the) secretary to the assistant superintendent or superintendent", which "...could include processing confidential personnel matters"; is privy to confidential superintendent

correspondence; and works on "curriculum and instruction"; recognition programs; supplemental funding; and mentoring program, etc.

Simonetta certifies that the duties she actually performs include answering phones, preparing correspondence, and ordering supplies; processing bill forms, purchase orders, district bulk mailings, and personnel evaluations. She copies, collates, and files materials. She schedules and prepares agendas for monthly directors' meetings, and helps prepare in-service day agendas for the district. Simonetta prepares the Superintendent's weekly Friday update reports that are provided to the central office administrators and to the Board members. She assists in tracking student assessment data. She helps develop the district calendar, district newsletters, and recognition programs. She works with Director Trapani to develop budget spreadsheets as requested by the assistant superintendent and business administrator. Simonetta has typed budget appeals in which the Board requests supplemental funding to prevent the elimination or reduction of programs, positions, or services. Simonetta also performs back-up duties for the secretaries to the Superintendent and assistant superintendent.

Trapani certifies that Simonetta, in the course of performing her duties, is privy to management determinations regarding new hires, salaries, transfers, and non-renewals before

such decisions are made known to majority representatives or the affected individuals.

Simonetta works in the central office administration department in an office adjacent to the offices of the Superintendent and assistant superintendent. She works near to their respective secretaries, who are considered confidential employees by the parties and are not included in the secretarial negotiations unit.

The employer representatives who have access to confidential labor relations information are the Superintendent, assistant superintendent, business administrator, and the assistant business administrator. They represent the Board in collective negotiations.

ANALYSIS

A clarification of unit petition is appropriately filed where the majority representative has identified and petitioned for newly-created titles or positions during the contract period in which the new title was established and prior to the execution of the next succeeding contract. New Jersey Transit, P.E.R.C. No. 2000-6, 25 NJPER 370 (¶30160 1999); Rutgers University, D.R. No. 84-19, 10 NJPER 284 (¶15140 1984); Bergen Pines Hospital, D.R. No. 80-20, 6 NJPER 61 (¶11034 1980); Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977). The disputed title, secretary to the director of research, planning, and evaluation

was created in January 2009 and the most recent collective negotiations agreement between the Board and the Association expired on June 30, 2008. Accordingly, the petition is procedurally appropriate and timely.

N.J.S.A. 34:13A-3(g) defines confidential employees as those “. . . 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. Ringwood Bd. of Ed. P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd NJPER Supp.2d 186 (¶165 1988); State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985). In State of New Jersey, the Commission explained its approach in determining whether an employee is confidential:

[W]e 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 New Jersey Turnpike Authority v. AFSCME, Council 73, 150 N.J. 331 (1997) (N.J. Turnpike Auth.), our Supreme Court approved the standards articulated in State of New Jersey and explained:

The baseline inquiry remains whether an employee's functional responsibilities or knowledge would make their membership in any appropriate negotiating unit incompatible with their official duties. N.J.S.A. 34:13A-3(g); see also State of New Jersey, supra, 11 NJPER 507 (¶16179 1985) (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. [Id. at 358.]

Applying this standard to the facts of this case, I find that the secretary to the director of research, planning, and evaluation is not a confidential employee within the meaning of the Act.

Superintendent Mark B. Miller certifies that Simonetta knows the Board's negotiations proposals before they are conveyed to the majority representatives of the Board's negotiations units. He certifies that Simonetta has access to and knowledge of information relating to ongoing negotiations, including the Board's offers/counter-offers, strategy, policy, budgetary information and correspondence regarding impasse procedures. Miller, Trapani, and Simonetta all certify that she is "involved" with budget preparation. Miller certifies that Simonetta types Title I and "No Child Left Behind" school budgets which identify monies set aside for salary increases during negotiations. Miller certifies that Simonetta is privy to this information on a "sustained basis."

Absent a proffer of specific duties, and a demonstration that the claimed duties are actually performed, we will not find confidential status. See Asbury Park, D.R. No. 2001-6, 27 NJPER 119 (¶32043 2001) (employer argued that supervisor of accounts/purchasing agent participated in budget preparation and had knowledge of budget data which the City used in negotiations; Director held that without a proffer of specific duties and a demonstration that the claimed duties are actually performed, the Commission will not find confidential status). See also, City of Newark, D.R. No. 2000-11, 26 NJPER 234 (¶31094 2000), req. for rev. den. P.E.R.C. No. 2000-100, 26 NJPER 289 (¶31116 2000),

aff'd 346 N.J. Super. 460 (App. Div. 2002) (employer must make a particularized showing that employees actually perform those duties which make the titles managerial); Evesham Tp. Fire Dist. #1, D.R. No. 99-4, 24 NJPER 503 (¶29233 1998) (directed election; employer failed to submit evidence that confidential job duties were actually performed).

The only specific duty which Miller certifies that Simonetta performs regarding budget preparation is the typing of Title I and "No Child Left Behind" school budgets. He certifies that the "information" in them is "directly used in contract negotiations and identifies monies set aside for salary increases." No example of the document(s) was provided; Miller did not cite any specific documents that Simonetta prepared; and did not certify that the budget figures are not accessible to the public or to the majority representative or that a recommended delineation of portion(s) of those monies set aside for negotiations is accessible to Simonetta.

Simonetta certifies that she has typed budget appeals. Specifically, she typed Board requests for supplemental funding to prevent the elimination or reduction of programs, positions, or services. The Board filed one page each from the 2008-2009 and the 2009-2010 budget appeals. The documents set forth positions that may be eliminated without supplemental funding; the money that would be saved by eliminating the positions; the

rationale for selecting the positions chosen for elimination; and, the effect that eliminating the positions would have on meeting student needs.

When the Legislature adopted the definition of "confidential employee", it rejected a broader definition which would have excluded employees with "access to confidential personnel files or information concerning the administrative operations of the public employer." State of New Jersey at n. 3, p. 516. Mere access to personnel files, or even 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. Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER (¶19128 1988); Montague Bd. Of Ed., P.E.R.C. No. 87-36, 12 NJPER 73 (¶17294 1986). The personnel information in the budget appeal documents is unrelated to the Board's handling of grievances or the negotiations process, and though it may be characterized as sensitive, it is not confidential within the meaning of the Act.

The Board filed a copy of Miller's Friday update report, with attachments, that Simonetta prepared for October 23, 2009. Miller certifies that the report includes "updates and strategy regarding ongoing contract negotiations" and that the attachments are, "confidential interoffice memorandums, correspondence to be sent out and offers/negotiations." The attachments to the report

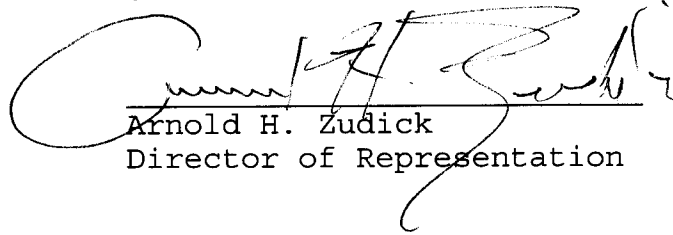
are a Notice of Impasse filed by the Association and an accompanying cover letter to Superintendent Miller. Neither document is confidential within the meaning of the Act. Most of the information in the report does not concern the collective negotiations process; the only items pertaining to negotiations are proposed dates for scheduling Board meetings and negotiations sessions. Neither are confidential within the meaning of the Act.

Miller certifies that Simonetta and the other three confidential secretaries are interchangeable and regularly cover for each other, depending on workload. Simonetta and Trapani certify that as secretary, she performs "back-up" duties for the confidential secretaries. A disputed employee's close working relationship with a confidential employee, including the circumstance of employees substituting for each other or providing "back-up" support may indicate confidential status. See Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339 (¶19128 1988). The Board, however, has not provided any example of an instance when Simonetta performed back-up duties for a confidential secretary which either concerned confidential information or resulted in her exposure to it. Applying our statute and case law to the facts, I find that the secretary to the director of research, planning and evaluation is not a confidential employee.

ORDER

The Phillipsburg Education Association's unit of secretarial and clerical personnel is clarified to include the secretary to the director of research, planning and evaluation.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Arnold H. Zudick
Director of Representation

DATED: February 18, 2010
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by March 1, 2010.