

D.R. No. 2010-16

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

In the Matter of

TOWNSHIP OF WOODBRIDGE,

Public Employer/Petitioner,

-and-

Docket No. CU-2010-012

AFSCME COUNCIL 73 LOCAL 3044,

Employee Representative.

SYNOPSIS

The Director of Representation clarifies a negotiations unit composed of secretarial personnel to exclude the secretary to the Director of Health and Human Services/supervising clerk typist, where the supervisor is directly involved in the employer's preparation for collective negotiations and contract administration. The Director concludes that the secretary is a confidential employee within the meaning of the Act based on the specific examples of her duties provided by the employer. The examples demonstrate the secretary's knowledge of the employer's negotiations strategies and grievance handling before they were disclosed to any union representative.

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Appearances:

For the Public Employer/Petitioner,
Genova, Burns & Vernioia, attorneys
(Nicholas Repici, of counsel)

For the Employee Representative,
Alice Weisman, attorney/staff representative

DECISION

On November 4, 2009, the Township of Woodbridge (Township) filed a clarification of unit petition seeking to clarify its broad-based unit of white collar and blue collar employees to exclude the title, secretary to the Director of Health and Human Services/supervising clerk typist (secretary). The Township asserts that the title 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 secretary is included in the unit represented by American Federation of State, County, and Municipal Employees, Council 73, Local 3044 (AFSCME).

AFSCME opposes the petition. It contends that the Township has not explained when the secretary assumed confidential duties, what those responsibilities are, and how they differ from the duties performed by other supervising clerk typists. It contends that the secretary to the Director of Health and Human Services/supervising clerk typist's duties are substantially the same as other supervising clerk typists, whose responsibilities include filing, answering telephones, scheduling appointments, supervising clerks, and sending purchase orders to the purchasing department. Finally, AFSCME asserts that the disputed secretary does not attend grievance hearings or negotiations sessions, nor type disciplinary decisions.

We have conducted an administrative investigation into this matter to determine the facts. N.J.A.C. 19:1-2.2. On April 14, 2010, I wrote to the parties advising them of my tentative findings and conclusions and inviting responses. Neither party filed a reply. The disposition of the petition is properly based upon our administrative investigation. No substantial material facts are disputed. N.J.A.C. 19:11-2.2 and 2.6. Based upon the administrative investigation, I find these facts:

The secretary reports to the Director of Health and Human Services (Director). The Director has negotiations and contract administration duties on behalf of the Township for three negotiations units which he also supervises. The department's

clerical employees are represented by AFSCME; the department's social workers and nurses are represented by USW Local 1426; and the department's health educator and animal control officers are represented by Teamsters Local 469.

The Director serves on the Township's negotiations committee during collective negotiations with USW and drafts new contract language and amendments for the Township in its negotiations with the Teamsters and AFSCME units. In the Township's administering of the USW and AFSCME collective negotiations agreements, the Director serves as the Step 2 grievance hearing officer. The Director also prepares his department's budget and issues recommendations on subcontracting, creating new positions, employee compensation, promotions, discipline, and hiring.

The secretary handles all correspondence and memoranda related to the Director's involvement in negotiations and contract administration, including typing, filing, and copying proposed contractual provisions and amendments to current agreements, grievance decisions, employee disciplines, and correspondence related to the hiring and termination of employees. She also receives and responds to telephone calls related to negotiations.

Specifically, the secretary has typed, filed, and/or had access to this correspondence: a February 24, 2006 letter from

the Director to an AFSCME shop steward responding to an allegation of harassment and an unfair practice charge; a November 26, 2007 grievance form setting forth the Township's Step 1 and Step 2 grievance determinations; an October 17, 2007 probation progress report regarding an employee's satisfactory performance; a June 19, 2008 written reprimand from the Director to an employee regarding the employee's failure to maintain identification placards on animal cages; a July 20, 2009 letter from a shop steward to the Director advising that the union was withdrawing a pending grievance; and a November 30, 2009 report filed with the State's Department of Personnel reporting a disciplinary action against an employee.

The secretary also drafts department policies and procedures, enters budget data into a database, calculates and issues payroll, and assists in the completion of grant applications, the money from which is used for employee compensation.

ANALYSIS

A clarification of unit petition is used to resolve questions concerning the composition of an existing collective negotiations unit. Clarification petitions are the appropriate means to seek a review of the proper unit placement of a title where circumstances, such as job duties, have changed. Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 251 (1977). A

challenge to an employer's unilateral assertion that a position is confidential is appropriately raised in a clarification petition.

AFSCME asserts that absent a changed circumstance the processing of the Township's petition is not appropriate. I disagree. We have held that an employer never permanently waives its right to raise a statutory issue, such as an employee's confidential status, through a clarification of unit petition. Warren Cty., P.E.R.C. No. 89-66, 15 NJPER 30 (¶20013 1988); Maplewood Tp., D.R. No. 2007-013, 33 NJPER 105 (¶36 2007).

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

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

In deciding confidential status, the Commission has used the approach described in 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):

We scrutinize the facts of each case to find for whom each employee works, what [the employee] does or 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 was included in a negotiating unit. [11 NJPER at 510]

In New Jersey Turnpike Authority v. American Federation of State, County and Municipal Employees, Council 73, 150 N.J. 331 (1997), the New Jersey Supreme Court approved the standards articulated in State of New Jersey. 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, 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. [Id. at 358]

The Commission narrowly construes the term, confidential employee. State of New Jersey, 11 NJPER at 514. A finding of

confidential status is based on what the employee actually does, not potential duties that may be reassigned to him or her. State of N.J. (Office of Employee Relations) and Council of N.J. State College Locals, NJSFT-AFT, AFL-CIO, P.E.R.C. No. 90-22, 15 NJPER 596 (¶20244 1989) aff'd NJPER Supp.2d 246 (¶206 App. Div. 1991); Ringwood Bd. of Ed. and Ringwood Ed. Office Personnel Ass'n., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd NJPER Supp.2d 186 (¶165 1988).

Our case law requires that we carefully scrutinize the facts supporting the claimed confidential status. The Township submitted evidence, including documents setting forth employee disciplines and responding to contractual grievances, demonstrating the secretary's knowledge of facts or strategies which would compromise the Township's right to confidentiality in the collective negotiations process. I find that the secretary's knowledge and use of these materials create an impermissible conflict of interest; she would have to choose among her loyalties to both her employer and majority representative. I disagree that an employee must attend grievance hearings or negotiations sessions in order to be considered a confidential employee.

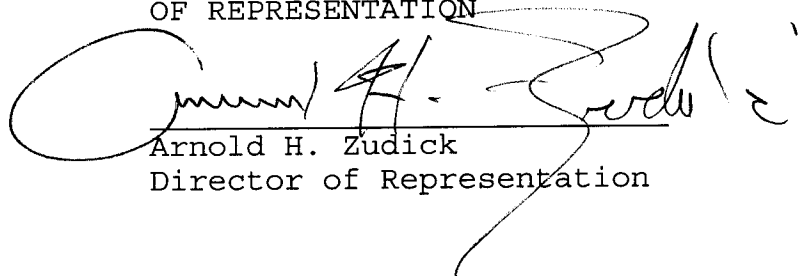
I find that the secretary to the Director of Health and Human Services/supervising clerk typist is confidential within the meaning of the Act, based upon our investigation.

Accordingly, I order that AFSCME's unit be clarified to exclude the title.

ORDER

The unit is clarified to exclude the secretary to the Director of Health and Human Services/supervising clerk typist, effective immediately.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

A large, stylized handwritten signature in black ink, appearing to read "Arnold H. Zudick". The signature is written over a horizontal line that separates it from the printed name below.

Arnold H. Zudick
Director of Representation

DATED: May 6, 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 May 17, 2010.