

H.O. NO. 2010-1

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OLD BRIDGE TOWNSHIP FIRE DISTRICT 2,

Public Employer-Petitioner,

-and-

Docket No. CU-2008-013

OLD BRIDGE TOWNSHIP CAREER FIRE
FIGHTERS ASSOCIATION, LOCAL 3311, IAFF,

Employee Organization.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that the secretary to the Board employed by the Old Bridge Township Fire District 2 is not a confidential employee within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-3(g). The Hearing Officer determined that although the secretary to the Board has typed minutes for Board meetings, the title is not privy to confidential labor relations materials that would compromise the Board's right to confidentiality in the collective negotiations process.

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Appearances:

For the Public Employer-Petitioner,
Ruderman & Glickman, attorneys
(Steven S. Glickman, of counsel)

For the Employee Organization,
Kroll & Heineman, attorneys
(Raymond G. Heineman, of counsel)

HEARING OFFICER'S REPORT
AND RECOMMENDED DECISION

On December 5, 2007, the Old Bridge Township Fire District 2 (District) filed a clarification of unit petition with the Public Employment Relations Commission (Commission) seeking to exclude the secretary to the Board of Fire Commissioners from the collective negotiations unit represented by the Old Bridge Township Career Fire Fighters Association, Local 3311, IAFF (Local 3311). The unit consists of a bookkeeper and the

secretary at issue. The District asserts that the secretary is a confidential employee within the meaning of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq. Local 3311 denies that the secretary is confidential.

On April 21, 2009, the Director of Representation granted the District's petition, clarifying the unit to exclude the secretary as a confidential employee. Old Bridge Tp. Fire District 2, D.R. No. 2009-13, 35 NJPER 163 (¶61 2009). On May 1, 2009, Local 3311 requested Commission review of the Director's decision. The Commission granted Local 3311's request for review, finding a factual dispute that required an evidentiary hearing. The Commission remanded the case to the Director of Representation for further processing. Old Bridge Tp. Fire District 2, P.E.R.C. No. 2009-70, 35 NJPER 212 (¶75 2009). A notice of hearing issued on June 29, 2009. I conducted a hearing on January 15, 2010. The parties examined witnesses and introduced documents.^{1/} Post-hearing briefs and replies were simultaneously submitted by the parties on March 19, 2010 and March 26, 2010, respectively.

^{1/} Commission exhibits are marked "C", Petitioner exhibits are marked "P", exhibits jointly submitted by the parties are marked "J", all of which were received into evidence at the hearing. The transcript of the hearing is referred to as "T" and the number following the "T" represents the page.

The parties stipulated the following facts:

1. The District is a public employer within the meaning of the Act (T5).

2. Local 3311 is an employee representative within the meaning of the Act (T5).

3. The District and Local 3311 are parties to a collective negotiations agreement signed on February 16, 2007, which covers the period of January 1, 2007 through December 31, 2009 (J-1).

4. The District's Board of Fire Commissioners (Board) hired Barbara Rizzolo as secretary to the Board on or about September 22, 1997. Rizzolo is in a collective negotiations unit with the District's bookkeeper. Currently, one person works in each unit title. Rizzolo has a key to a filing cabinet in the District's administrative office that contains personnel records of all District employees.

5. The Board consists of five members. The current members of the Board are Phillip Monchik, Eleanor Walker, Linda Seiler, Jason Farrington, and Robert Lawson. The Board has a number of committees. The committee relevant to labor relations is the personnel committee. The Board meets twice per month.

I find these facts:

6. The Board has an agenda meeting and a regular meeting each month. At each meeting, the Board may have an executive session to discuss personnel matters, labor matters, and any

other issues that require discussion in a non-public setting (T15; T33; T39; P-1, Tab 4; P-1, Tab 6). The executive session portion of the meeting is not open to the public (T38).

7. Prior to Rizzolo's employment, the secretary to the Board attended regular meetings and executive sessions, created the minutes for those meetings from notes and/or a tape recording of the meetings, typed other correspondence, and took care of other general secretarial tasks (T13-T14).

8. In 1997, then Commissioners George Barrett and Bruce Walker interviewed Rizzolo for the secretary to the Board position. Barrett and Walker drafted Rizzolo's employment contract. Rizzolo's contract provides, in pertinent part, "Non-union Position: Due to confidentiality of position and Executive Board sessions attendance" (T14-T15; P-1, Tab 2).

9. The secretary to the Board performs tasks for the Bureau of Fire Prevention and the Board. Approximately ninety-five percent of Rizzolo's duties are for the Bureau of Fire Prevention and the Fire Marshall. These duties include scheduling fire inspections, creating reports for the Fire Marshall, and typing letters. Rizzolo's Board duties include preparing meeting agendas, attending regular Board meetings, recording and transcribing regular meeting minutes, and handling any other Board correspondence (T72).

10. One of the five commissioners serves as the Board secretary clerk, and is charged with creating minutes for all Board meetings. The Board secretary clerk works with Rizzolo to complete this task (T17-T19; T81-T89).

11. All executive session minutes from 1999 to 2007 are in the same format. Rizzolo created the executive session minute template, which contains her initials in the bottom left corner (T84; P-1, Tab 4; P-1, Tab 6). The Board secretary clerk signs the minutes and his typed initials appear on the bottom, left corner of the minutes, next to the typed, as opposed to signed, initials "br". For example, Barrett's initials are GBB. At the bottom, left corner of his meeting minutes the following appears, "GBB/br" (P-1, Tab 4; P-1, Tab 6).

12. Throughout Rizzolo's employment, her meeting minute duties have varied, depending on who served as Board secretary clerk (T17-T19; T78; T81-T89). Jason Farrington is the current Board secretary clerk. Farrington types the executive session minutes, puts them in an envelope marked "personal and confidential", and then places them in each commissioner's mailbox at the Commission office. Rizzolo has no contact with executive session minutes that Farrington prepares (T95-T96).

Commissioners Barrett, George Gillard, and Joseph Boscia have also served as Board secretary clerks during Rizzolo's tenure (T82-T84; T95; P-1, Tab 4; P-1, Tab 6). Like Farrington,

Gillard typed his own executive session minutes from a template Rizzolo provided him. After typing the minutes, Gillard then distributed the minutes to the Board or forwarded the typed minutes to Rizzolo for her to proofread, correct typographical errors, and distribute the minutes (T83-T84; T89; P-1, Tab 4; P-1, Tab 6). Unlike Farrington or Gillard, Barrett would give Rizzolo his handwritten executive session minutes to type (T82). Finally, Boscia would provide Rizzolo a summary of what was discussed at executive sessions, either in writing or orally, and she would then format and type the minutes (T86).

13. Rizzolo confirms that she began attending agenda meetings in 2005 (T40). During those meetings, Rizzolo takes notes and creates minutes from her notes (T16; T40; T95-T96). However, during the executive session portion of agenda meetings, Rizzolo explains she was generally sent home (T44). Since March 2007, Rizzolo has not attended an executive session of an agenda meeting (T90; T96).

Although Rizzolo admits she has attended executive sessions of regular meetings in the past, she testified that she never attended an executive session where the Board discussed labor relations or personnel issues (T79; T80; T86). Since March 2007, Rizzolo has not attended any regular meeting executive session (T90; T96).

14. Bruce Walker served as a commissioner from 1994 to 2003 (T13). Walker disagrees that Rizzolo was generally sent home for the executive sessions and that the "br" initials at the bottom of minutes only signify that Rizzolo created the original template for the minutes. Walker testified that the "br" at the bottom of executive session minutes denoted either Rizzolo's presence at the executive session or that she had created the minutes for the executive session from a tape of the session and the Board secretary clerk's notes (T18-T20).

Walker, however, was unable to recall any specific executive session that Rizzolo attended. Walker recalled the substance of the executive session on February 2, 1999, but - beyond assuming Rizzolo's presence from the initials at the bottom of the minutes - had no specific recollection of Rizzolo's presence at the meeting (T25; T30-T31). Moreover, Walker admits he never saw Rizzolo listening to a tape of an executive session and never saw the Board secretary clerk's notes given to Rizzolo to create session minutes (T26-T28). I do not credit Walker's testimony regarding Rizzolo's attendance and/or participation at executive sessions, because his testimony was vague, and he had limited recollection of events regarding Rizzolo's attendance and note taking.

Additionally, Robert Weiss, who served as a commissioner from 1998 to 2007, corroborates Rizzolo's testimony. He

testified that the Board generally released Rizzolo from its meeting when the commissioners went into executive session (T37; T41). Weiss testified that he had no direct knowledge of who typed the minutes or of the information provided to Rizzolo to create minutes (T42-T43; T51).

Based on Rizzolo's and Weiss' testimony, I find that the "br" at the bottom of executive session minutes only supports that Rizzolo created the template for the executive session minutes not, as Walker suggests, that she either attended the meeting or took notes from a recording. It is uncontested that Rizzolo did not attend every executive session after 2003 and none since 2007. It is also uncontested that she did not type all the minutes of the meetings she did attend, but her typed initials appear at the bottom of those minutes whether or not she attended or created the minutes.

15. Weiss headed the personnel committee from 1998 to 2006 and served on the Board's negotiations committee (T39; T62). Weiss typed and handled all documents concerning negotiations proposals to and from the Board during this time frame (T45; T64). The Board's attorney typed draft collective negotiations agreements. Once the terms of an agreement were finalized, Rizzolo would correct typographic errors within the agreement (T63; T76-T77).

Rizzolo also typed memoranda establishing negotiations meetings dates (T45). Additionally, on November 13, 2005, Weiss directed Rizzolo to complete a form to request the Commission's mediation services. Weiss provided Rizzolo with information to complete the form, including: the dates and duration of previous negotiations sessions, that salaries and health benefits for retirees were the principal items in dispute, and that Local 3311's current agreement did not contain retiree health benefits (P-1, Tab 5). Rizzolo was not provided any additional information to complete the form (T43-T44). Rizzolo did not have access to Weiss' notes from negotiations sessions or Board proposals or strategies (T63; T68-T69).

16. There are three locked file cabinets in the room next to Rizzolo's office. She has a key to these cabinets. They contain general Board files, petty cash, and a contract file containing past personnel committee paperwork, including handwritten committee notes on past negotiations.

In 2007, when the Board excluded Rizzolo from future executive sessions, the Board purchased another locking cabinet, which is located in the commissioners' office. The Board president and Board secretary clerk have keys to this cabinet; Rizzolo does not have a key. This cabinet contains executive session minutes. Prior to the Board purchasing this cabinet,

executive session minutes were kept in one of the three files to which Rizzolo has access (T73-T76; T89-T91).

ANALYSIS

The District maintains that the secretary to the Board is a confidential employee within the meaning of the Act and must be excluded from the Local 3311's negotiations unit. For the following reasons, I disagree that the functional duties of the secretary to the Board make it a confidential position.

N.J.S.A. 34:13A-5.3 affords public employees the right "to form, join and assist any employee organization." Confidential employees, however, are excluded from the Act's definition of "employee" and do not enjoy its protections. N.J.S.A. 34:13A-3(d).

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.

We do not decide confidential status on speculation, but use 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, and not potential duties which may be assigned or 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); Lacey Tp. Bd. of Ed., P.E.R.C. No. 90-38, 15 NJPER 628 (¶20263 1989); 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).

The Commission, however, will find confidential status where the duties the employer intends to assign are clear and the implementation is certain. Mt. Laurel Bd. of Fire Commissioners District One, P.E.R.C. No. 2001-50, 27 NJPER 132 (¶32050 2001), (Commission found business manager to be confidential employee on employer's representation that he would be involved in future negotiations); Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339 (¶19128 1988), (Commission determined that a bookkeeper was confidential because board planned to have her assist the accounts payable clerk in preparing scattergrams).

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. See, Pompton Lakes Bd. of Ed., D.R. No. 2005-16, 31 NJPER 73 (¶33 2005); State of New Jersey (Div. of State Police), D.R. No. 84-9, 9 NJPER 613 (¶14262 1983).

The nature of the secretary to the Board position has changed over time. Rizzolo's 1997 employment contract indicates that the District expected her to attend executive sessions and expected that Rizzolo would be exposed to confidential information. Walker has not been a commissioner since 2003. Even if I had credited his testimony and found that Rizzolo attended or listened to a tape of executive sessions, Rizzolo's attendance at executive session meetings seven years ago is irrelevant to finding her confidential status today. Since 2007, Rizzolo has not attended an executive session meeting and has not had access to or knowledge of confidential matters discussed in executive session.

Regarding the development of executive session minutes, Rizzolo may have been exposed to confidential information when working with past Board secretary clerks. However, since 2007, Farrington has created executive session minutes without Rizzolo's assistance. To further insure that Rizzolo is not exposed to confidential information or executive session minutes,

the District purchased a locking cabinet to hold confidential information.

Outside of potential exposure to confidential information during past executive sessions, Rizzolo's knowledge of the District's labor relations has been limited to correcting typographical errors in collective negotiations agreements after their terms have been finalized and completing a form to request the Commission's mediation services. This information was not confidential. The majority representative would have been privy to the terms of the agreement prior to Rizzolo correcting typographical errors. Regarding the mediation request, the majority representative would have been aware of past negotiations sessions, the principal items in dispute, and the terms of its collective negotiations agreement. Furthermore, the secretary to the Board has not been privy to negotiations strategies or proposals.

No evidence has been proffered to establish that the secretary to the Board has knowledge of the District's labor relations process. Specifically, the secretary to the Board has not been privy to negotiations strategies or proposals. And, the District presented no evidence to indicate its intent to assign Rizzolo confidential duties or to demonstrate implementation of those duties.

RECOMMENDATION

I recommend that the Commission find that the secretary to the Board, Barbara Rizzolo, is not a confidential employee within the meaning of the N.J.S.A. 34:13A-3(g) and dismiss the petition.



Melissa Ferrara
Hearing Officer

DATED: April 20, 2010
Trenton, New Jersey

Pursuant to N.J.A.C. 19:11-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:11-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:11-7.4(c).

Any exceptions are due by May 3, 2010.