

D.R. NO. 2015-7

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

In the Matter of

TRENTON BOARD OF EDUCATION,

Public Employer,

-and-

Docket Nos. CU-2014-002
CO-2014-028

TRENTON EDUCATIONAL
SECRETARIES ASSOCIATION,

Petitioner.

SYNOPSIS

The Director finds that the Board has provided sufficient facts establishing that a secretary in the superintendent's office is a confidential employee within the meaning of the Act, rendering her ineligible for inclusion in any collective negotiations unit. The Director also dismisses an unfair practice charge contesting the Board's decision to designate the secretary as a confidential employee under the Act.

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Appearances:

For the Public Employer
Kathleen Smallwood-Johnson

For the Petitioner
Selikoff & Cohen, attorneys
(Keith Waldman, of counsel)

DECISION

On July 23, 2013, the Trenton Educational Secretaries Association ("TESA") filed a Clarification of Unit Petition seeking to clarify its secretarial unit to include the administrative II secretary to the superintendent. According to the petition, the Trenton Board of Education ("Board") abolished that title and then created a second confidential secretary position in the superintendent's office.^{1/} The Board opposes the

^{1/} This petition was filed after a number of employees in administrative II secretary titles, who had been subject to a reduction in force, were recalled. TESA and the Board
(continued...)

petition, contending that the confidential secretary in the superintendent's office is confidential within the meaning of the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-1 et seq., rendering the position ineligible for inclusion in any negotiations unit.

We have conducted an investigation of the facts concerning this petition. N.J.A.C. 19:11-2.2. The parties attended an exploratory conference and presented facts about the duties performed by the confidential secretary to the superintendent. Unable to reach a voluntary resolution, we requested that both parties submit responses to questions concerning the duties, functions, access to confidential information, and knowledge and understanding of this information for the title of confidential secretary. Both parties submitted briefs and certifications in support of their respective positions in March 2014.

In addition to the Clarification of Unit Petition, on July 23, 2013, amended on October 15, 2013 and March 20, 2014, TESA filed an unfair practice charge against the Board with the New Jersey Public Employment Relations Commission ("Commission")

1/ (...continued)
utilize a bidding process for recalled employees. TESA was informed by the Board that no administrative II secretary could bid into the administrative II secretary position that had existed in the superintendent's office, as that title would no longer be used in the superintendent's office. Instead, the Board informed TESA that it intended to utilize the title "confidential secretary" in the superintendent's office.

alleging that the Board violated subsections 5.4a(1), (3), and (5)^{2/} of the Act. The charge, Docket No. CO-2014-028, alleges that the Board abolished the administrative II secretary position and created a second confidential position for the superintendent's office. TESA alleges that the Board's actions constitute unfair practices under the Act.

On March 9, 2015, I issued a letter setting forth tentative findings of fact, conclusions of law and a tentative determination that the petitioned-for confidential secretary in the superintendent's office is a confidential employee within the meaning of the Act, rendering her ineligible for inclusion in any negotiations unit. I invited the parties to file responses by the close of business on March 18, 2015.

On March 17, 2015, TESA filed a response, including twenty two supplemental certifications. TESA's response asserts that the certifications set forth substantial and material factual disputes, which entitle it to an evidentiary hearing, pursuant to

^{2/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

N.J.A.C. 19:11-2.6. Specifically, Ann Sciarrotta, TESA Vice President asserts that Lenora Jefferson, a retired TESA member who worked full-time as an administrative II secretary to the superintendent, performed non-confidential job functions that were essential to the operation of the superintendent's office. TESA attached certifications from all TESA members that work in the Central Administration Building, except for two (2) TESA members that work in the Human Resources Office, stating that they do not perform the duties previously performed by Jefferson. The certifications state that because no other secretary is doing the non-confidential tasks formerly performed by Lorena Jefferson, a "logical inference" may be drawn that the confidential secretary to the superintendent performs the non-confidential tasks previously performed by Jefferson, and that therefore, the majority of her work is not confidential, within the meaning of the Act.

As will be discussed below, I find TESA's arguments to be unpersuasive. Even if I were to accept TESA's argument and infer that Williams has assumed non-confidential tasks previously performed by Jefferson, it would not and does not preclude a finding that Williams performs duties that are confidential within the Act's meaning.

The disposition of the Clarification of Unit Petition is properly based upon our administrative investigation. No

substantial material factual disputes exist that would require an evidentiary hearing. N.J.A.C. 19:11-2.6. The following facts appear.

TESA and the Board are parties to a collective negotiations agreement covering the period July 1, 2009 through June 30, 2012. The recognition clause of the agreement, Article I, shows that TESA's unit includes all "personnel regularly employed under contract, or on leave from the Board, but excluding: Trenton Administrators and Supervisors, Trenton Education Association, Attendance Officers, Security Officers, Executive Secretarial Unit, Business & Technical Unit, Cafeteria, Para-Professional Unit, Mechanics and Laborers, and Custodian Unit." The recognition clause does not specifically identify any titles included in the unit; however, Article I, paragraph "D" notes that ". . . the terms 'employee' and 'secretary' when used hereinafter in this Agreement shall refer specifically to those employees identified in the negotiating unit defined herein."

Celeste Williams, the petitioned-for employee, holds the title of confidential secretary in the superintendent's office. Williams works in close physical proximity to Superintendent Francisco Duran, the state monitor, and Confidential Secretary Dollie Mann-Wells. According to the certification of TESA Vice President Ann Sciarrotta, which was submitted by TESA as part of our investigation, the work site location for the position in

question has not changed from when the position was included in the negotiations unit as an administrative II secretary, and is within fifteen (15) feet of the other "confidential secretary," who sits within a few feet of the Superintendent's office.

Williams reports directly to Superintendent Duran.

Sciarrotta concedes that TESA can only speculate as to the nature of the work performed by Williams, but certifies that since the filing of the clarification of unit petition, the Board's negotiating team has brought Williams to two (2) mediation sessions. Sciarrotta states that prior to the filing of the representation petition, no confidential secretary in the superintendent's office has been involved in negotiations.

TESA's March 17, 2015 response and supplemental certifications argue that Jefferson performed non-confidential, essential job functions in the superintendent's office and that because TESA could find no other TESA member who currently performs such tasks, the only logical inference that can be drawn is that Williams currently performs such tasks. TESA attached certifications from all TESA members that work in the Central Administration Building, except for two (2) TESA members that work in the Human Resources Office, stating that they do not perform the non-confidential duties previously performed by Jefferson.

The Board submitted the certification and amended certification of Sybil R. Trotta, Esquire, the Manager of Policy, Labor Relations, Negotiations, and Legal Affairs for the Board. Trotta certifies that Williams performs general clerical job responsibilities at the request of Superintendent Duran; she further states that Williams has access to sensitive information both by virtue of her proximity to the superintendent's office and because she receives information for the superintendent via email and facsimile. Trotta certifies that during meetings attended by the superintendent, members of the Board's Leadership Team, and School Development Authority, information is placed on the "white board." After the meetings, Williams is responsible for taking pictures of the white board and preparing meeting notes from such information. The information is then erased from the white board to protect its confidentiality.

Trotta certifies that Williams personally delivers information from the superintendent to other administrators. Williams attends meetings that only managerial executives attend. Williams has access to negotiations information and understands its significance. Specifically, Williams has access to the Board's negotiations proposals, is privy to grievance responses in advance of their disclosure to the union, participates in meetings where confidential data is gathered and communications are made, serves as the support person for the negotiations team,

attends all negotiations and mediation sessions to take notes, disseminates negotiations meeting minutes, remains with the negotiations team during caucuses, coordinates the gathering of information or data needed for negotiations or compiles the data herself, attends Leadership Team Meetings at which the Board's managerial executives discuss personnel and other Board issues, disseminates minutes for Leadership Team Meetings, receives documentation and "conducts any follow-up to issues raised" in the Leadership Team Meetings.

Trotta provided and certified to the accuracy of documents that indicate that Williams attends weekly Leadership Team Meetings and is the "note taker" at them. At the request of the Board, we have conducted an in camera review^{3/} of such documents for the purpose of evaluating Williams' alleged confidential status. TESA has not been provided those documents, in light of the asserted privilege.

A review of the documentation reveals that Leadership Team Meetings are attended by the Superintendent, State monitor, school business administrator, assistant superintendents, executive directors, and Williams. At the meetings, personnel matters were discussed, including resignations, transfers,

^{3/} In the certification of the Board's former outside labor counsel Elizabeth Garcia, Esquire, discussed further, below, Garcia states that email correspondence in this matter is protected by the attorney client privilege and submitted by the Board for in camera review.

hirings, terminations, leaves of absence, salary adjustments, and contractual entitlements under collective negotiations agreements. The Board also provided documents showing that Williams had access to and involvement in contract administration discussions; specifically, documents memorializing efforts to resolve an issue that arose in October 2013 over the length of the paraprofessional workday. The documents reveal that Williams has assisted outside counsel in gathering documents in response to potential grievances, been privy to email correspondence concerning (current) negotiations proposals, gathered data supporting such proposals, and received negotiations proposals prior to their presentation to TESA. Williams also has been privy to Board responses to TESA proposals prior to the responses being given to TESA. The Board provided Williams' negotiations notes, which she took during negotiations with TESA on August 1, 2013, October 15, 2013, and February 12, 2014. The Board also provided Williams' strategy session notes from August 6, 2013 and September 11, 2013. Strategy sessions were attended by the Board's negotiations team in advance of negotiations with the Trenton Business and Technical Association, wherein the team discussed, among other things, a salary guide proposal. The Board submitted the certification of Williams, who certifies that the Board submitted true and accurate copies of her handwritten and

typed notes, taken during negotiations, mediation,^{4/} and strategy sessions. Strategy sessions were attended by the Board's negotiations team in advance of negotiations with TESA.

The Board further provided the certification of Elizabeth Garcia, Esquire, who served as the Board's lead negotiator for all collective negotiations. Garcia certifies that Williams serves as secretary to the negotiations team, taking notes during negotiations team strategy sessions, as well as negotiations and mediation sessions; Williams also drafts minutes for negotiations team members. Garcia certifies that at numerous mediation and strategy sessions, Williams was present during Board caucuses, as well as meetings between the Board and the mediator. Garcia states that Williams not only takes notes, but serves as Garcia's resource for gathering data on negotiations proposals, planning, and strategy, in addition to gathering information for contract administration and grievances. A review of the documentation provided by the Board corroborates Garcia's claim that Williams communicates with Garcia concerning substantive negotiations issues and contract administration.

Williams' immediate supervisor, Superintendent Duran, plays an integral role in the budget formation process. Duran is

^{4/} A review of Commission records reveals that the Commission assigned a mediator on June 28, 2013 to assist the Board and TESA in negotiating a successor collective negotiations agreement. That matter is docketed as I-2013-208 and as of the date of this writing, has not yet been resolved.

responsible for reviewing all budgetary items prior to submission for Board approval. The superintendent's office where Williams works is restricted to the superintendent, business administrator, and the business administrator's confidential secretary; the superintendent's office also houses confidential personnel and labor relations cost data to which Williams has access; Superintendent Duran is involved in the collective negotiations process on behalf of the Board; he approves proposals, negotiations strategies and policies; is consulted about contract administration issues; and is Step 2^{5/} of the grievance process. He is also consulted during grievance arbitrations. Superintendent Duran's input and approval is required to resolve grievances, unfair practice charges, representation petitions, and all other issues related to contract administration.

Trotta certifies that Williams' involvement with the collective negotiations process commenced immediately upon her employment in the confidential secretary position in June 2013. Specifically, she certifies that at that time, the Board was

5/ While Trotta certifies that the superintendent serves as Step 3 of the grievance procedure, the collective negotiations agreement between the Board and TESA reveals that the superintendent is Step 2 of the grievance procedure. The collective negotiations agreement is consistent with Sciarrotta's certification, which states that grievances are brought to the superintendent at Step 2 of the grievance procedure.

negotiating successor agreements with several collective negotiations units and Williams was privy to all proposals, strategies, and communications dealing with collective negotiations. Draft proposals and deliberative materials are never shared with TESA. Williams sometimes has knowledge of collective negotiations materials immediately, as the Superintendent relies upon Williams to convey the materials to outside counsel and Board managers, and outside counsel and Board managers rely upon Williams to convey material to the Superintendent. TESA is only privy to final communications from the Board.

Williams is expected to continue in her present role involving duties that expose her to collective negotiations and labor relations materials which are not final communications shared with TESA.

ANALYSIS

TESA asserts that the confidential secretary to the superintendent is not confidential because, in the past, the position was never responsible for any duties associated with collective negotiations, and thus never had any knowledge related to collective negotiations. TESA further contends that the superintendent's office already has an employee serving as a confidential secretary and can use, and historically has used,

that confidential secretary to provide clerical assistance during the collective negotiations process.

TESA also posits that Williams assumed the duties of retired administrative II secretary to the superintendent and TESA member Jefferson, who performed non-confidential job functions that were essential to the operation of the superintendent's office.

The Board argues that the title was changed from administrative II secretary to confidential secretary because the superintendent relies upon Williams to perform confidential labor relations duties, giving her access to and knowledge of confidential labor relations and contract administration material. The Board also asserts that Williams began performing such duties immediately upon her appointment to the confidential secretary position, and that Williams will continue to perform such duties.

The Act defines confidential employees of public employers, other than the State, as those 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. N.J.S.A. 34:13A-3(g).^{6/}

^{6/} Effective January 18, 2010, the New Jersey legislature modified the statutory definition of confidential employee for State of New Jersey employees. That modification does not apply here because the employee at issue is not a state employee.

In State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507, 510 (¶16179 1985), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985), the Commission explained the approach taken 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 was included in a negotiating unit.

In New Jersey Turnpike Authority v. AFSCME, Council 73, 150 N.J. 331 (1997), our 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 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 the 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.

New Jersey Turnpike Authority, 150 N.J. at 358.

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

I find that the Board has provided sufficient and undisputed material facts upon which I can base a conclusion that Williams is a confidential employee. The Board submitted ample evidence, including documents and certifications, demonstrating Williams' knowledge of confidential facts or strategies used by the Board in the collective negotiations process.

We have received specific examples of the duties Williams performed that give her access to the Board's negotiations strategies and ideas before they are disclosed to any of the

units representing Board employees. Williams appears to have access to negotiations proposals and grievance responses as they are being developed, and attends Team Leadership Meetings where personnel matters, collective negotiations, and Board policy are discussed. Williams is included in confidential discussions with Board employees and outside counsel. Labor counsel for the Board communicates directly with Williams, who provides data to counsel for use in responding to grievances, negotiations proposals, and development of the Board's negotiations proposals. The documentation provided by the Board includes specific examples of Williams' knowledge and use of confidential Board information that would likely compromise the Board's right to confidentiality if Williams were included in a negotiations unit. New Jersey Turnpike Authority, 150 N.J. at 358. Finding otherwise would likely place Williams in the position of choosing between her loyalties to the Board and TESA. I therefore find that the confidential secretary to the superintendent is confidential within the meaning of the Act and should not be included in TESA's unit.

TESA objects to Williams' confidential status, yet concedes that it is unaware of Williams' job duties or role in negotiations and contract administration. Although Sciarrotta's certification states that the administrative II secretary to the superintendent has never been used in the past to handle

sensitive information, it is apparent from Board certifications and from documents provided that Williams currently performs confidential duties. In addition, even if I were to accept TESA's suggested inference that Williams must be performing non-confidential duties previously performed by Jefferson, it would not rebut my findings that Williams currently performs confidential duties. The Board has a managerial prerogative to determine duties to meet operational needs, and is therefore entitled to have Williams provide clerical assistance to the Board's negotiations team, as well as to the Leadership Team, and further to designate Williams as the contact person for outside labor counsel. See Piscataway Twp. Bd. of Ed. v. Piscataway Twp. Principals and Supv. Ass'n, H.E. No. 87-63, 13 NJPER 419, 421(¶18163 1987) (citing Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144, 284 (1978); Ramapo-Indian Hills Ed. Ass'n v. Ramapo-Indian Hills Reg. H.S. Dist. Bd. of Ed., 176 N.J. Super. 35, 43 (App. Div. 1980).

Accordingly, I find that the Board has provided sufficient facts establishing that Williams is a confidential employee within the meaning of the Act, rendering her ineligible for inclusion in any collective negotiations unit. As a result, I conclude that TESA's petition must be dismissed.

TESA has also filed an unfair practice charge contesting the Board's abolishment of the administrative II secretary position

in the superintendent's office and creation of Williams' confidential secretary position. The charge essentially challenges the Board's decision to designate Williams as a confidential employee under the Act. In my March 9 letter, I advised of my intention to dismiss the charge if Williams' was determined to be a confidential employee whose duties may be determined by the public employer. In the absence of any additional facts comprising an amendment to the charge, I find that the further processing of the unfair practice charge is not warranted and dismiss it.

/s/ Gayl R. Mazuco
Gayl R. Mazuco
Director of Unfair Practices
and Representation

DATE: March 25, 2015
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 April 6, 2015.**

** The final day to file a timely request for review would normally fall on April 3, 2015, which is a State holiday. Accordingly, the request for review must be filed by April 6, 2015, the next business day after April 3.