

D.R. NO. 2016-4

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

In the Matter of

TOWNSHIP OF JACKSON,

Public Employer,

-and-

Docket No. RO-2015-004

JACKSON TOWNSHIP MUNICIPAL SUPERVISORS,

Petitioner.

SYNOPSIS

The Deputy Director of Representation certifies by card check a unit of supervisory employees of the Township of Jackson (Township). The Township objected to the petition and raised objections to the inclusion of several job titles in the petitioned-for unit on the grounds that those titles were confidential, managerial executives or that their inclusion in the unit created an impermissible conflict of interest. Specifically, the Township contended municipal department heads or directors such as the Director of Public Works and Director of Community Development were managerial executives and had supervisory authority over other unit employees. The Township also asserted the Chief Financial Officer (CFO), Township Clerk and Deputy Township Clerk were confidential employees. The Deputy Director agreed with the Township that the CFO and clerks were confidential employees who had direct access to and knowledge of economic data and negotiations strategies used by the Township during collective negotiations. However, the Deputy Director rejected the Township's managerial executive and conflict of interest claims, finding that municipal directors did not formulate or implement Township policies and, while they played a limited role in evaluating unit employees, there was no evidence their evaluations were relied on by the Township in making personnel decisions.

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Appearances:

For the Public Employer,
Gilmore & Monahan, P.C., attorneys
(Andrea E. Wyatt, of counsel)

For the Petitioner,
Daniel Burke, pro se

DECISION

On August 27 and September 8, 2014, and May 15, 2015, the Jackson Township Municipal Supervisors ("JTMS" or "Petitioner") filed a representation petition and amended petitions accompanied by signed authorization cards.^{1/} The petition, as amended, seeks certification by card check authorization of JTMS as the majority representative of an unrepresented group of about 17 supervisory

^{1/} The August 27 petition and September 8 amended petition identify the petitioner as the "Jackson Township Professional, Technical and Managerial Employees' Association." On May 15, 2015, the petitioner re-named its organization as the "Jackson Township Municipal Supervisors", and submitted new authorization cards setting forth that name.

employees of the Township of Jackson (Township).^{2/} The Township objects to JTMS's petition and declines to sign a Stipulation of Appropriate Unit form.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2(a). The disposition of the petition is properly based upon our administrative investigation. No disputed substantial material factual issues warrant our convening an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. Based upon the administrative investigation, I make the following:

FINDINGS OF FACT

The Township employs approximately two hundred and fifty (250) employees. Most of the employees are organized into the following negotiations units: a non-supervisory white collar employee unit; a non-supervisory blue collar employee unit; a unit of public safety telecommunications operators; a rank and file police officers unit and a superior officers unit. The American Federation of State, County and Municipal Employees, Local 3304-C (AFSCME) represents the Township's white collar unit

^{2/} The petitioner describes the petitioned-for employees as "supervisors" and the Township does not object to this unit description. Our administrative investigation does not establish that these employees are statutory supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et. seq. (hereinafter "Act"). See N.J.S.A. 34:13A-5.3. That is, these employees do not have the authority to hire, fire or discipline other employees, or effectively recommend the same.

and the Transport Workers Union of America, AFL-CIO Local 225 (TWU) represents the Township's blue collar unit. The Commission's staff agent sent letters to the TWU and AFSCME advising them that they may wish to intervene and assert a right to represent the petitioned-for employees. AFSCME and TWU declined to intervene. N.J.A.C. 19:11-2.7.

On May 15, 2015, Daniel Burke, the Township's Municipal Engineer and Director of Community Development (DCD), filed a representation petition on behalf of JTMS seeking to represent the Township's "supervisors." Burke submitted with its petition signed authorization cards from a majority of petitioned-for unit employees. The cards set forth clear language designating the JTMS as the exclusive majority representative of unit employees for purposes of collective negotiations over terms and conditions of employment.

On May 18, 2015, the assigned staff agent sent a copy of the petition to the Township and requested information, including a list of employees in the petitioned-for unit and statement of position regarding the petition. N.J.A.C. 19:11-2.4. On June 12, 2015, the Township filed a letter objecting to the petition, together with a list of employees (see chart below) fitting the unit description and specific objections to the inclusion of several titles in the unit. For ease of reference, all petitioned-for titles together with the Township's response are

charted below. The Township has objected to the inclusion of certain titles for the reasons that the employees are either confidential within the meaning of the Act, managerial executives, or their inclusion in the unit would generate an impermissible conflict of interest.

<u>Job Title</u>	<u>Employer Objection</u>
Personnel Officer	Confidential
Deputy Municipal Clerk	Confidential
Township Clerk	Confidential
Principal Accountant	Confidential
Chief Financial Officer	Confidential
Senior Computer Service Technician	Confidential
Tax Collector	Managerial executive, conflict of interest.
Tax Assessor	Managerial executive, conflict of interest
Director of Community Development	Managerial executive, conflict of interest
Zoning Officer	No objection
Construction Code Official	Conflict of interest
Electrical Subcode Official	No objection
Building Subcode Official	No objection
Plumbing Subcode Official	No objection
Fire Protection Subcode Official	No objection
Supervisor of Public Works	No objection

Director of Public Works	Managerial executive, conflict of interest
Assistant Recreation Supervisor	No objection
Recreation Program Administrator	No objection
Assistant Municipal Treasurer	Confidential
Municipal Court Judge	Not an employee of Township.

The Township also objects to the validity of JTMS's authorization cards, asserting the cards were solicited by Burke and the Director of Public Works, Fred Rasiewicz, and that their status as directors over several unit employees was "inherently coercive."

The Township also enclosed with its June 12 letter a Certification of Posting. The Certification states that a Notice to Public Employees of JTMS's petition was posted in places where Township employee notices are normally posted and will remain posted for ten days. The Notice was posted on June 1, 2015. N.J.A.C. 19:11-2.4(c). No other labor organization has claimed interest in representing the petitioned-for employees.

Following an investigatory conference, the parties signed a side-bar agreement on June 29, 2015. The agreement provided for the inclusion of the assistant recreation supervisor and recreation program administrator in JTMS's unit and the exclusion of the business administrator from JTMS's unit. Although JTMS

does not concede that the personnel officer, assistant municipal treasurer and senior computer service technician are confidential employees, it agrees with the Township that these employees should be excluded from the unit and asserts that it no longer seeks to represent them. Absent a question concerning representation, we do not decide whether these three employees are confidential within the meaning of the Act. N.J.S.A. 34:13A-5.3.^{3/} The parties were unable to reach agreement on the remaining titles.

In response to the Township's June 12 objections, the staff agent sent the Township a letter dated July 1, 2015, which set forth forty-two (42) questions about the petitioned-for titles based upon the Township's objections. The letter also requested that the Township produce evidence to support its objections, including affidavits, work samples, etc., to support its position that several of the job titles are confidential, managerial, or whose inclusion in the petitioned-for unit would create a conflict of interest. The letter also requested specific examples demonstrating that the petitioned-for employees performed confidential duties, exercised supervisory authority, or formulated and/or implemented Township policies.

^{3/} This statute provides, in pertinent part, that the "Commission shall not intervene in matters of recognition and unit definition except in the event of a dispute." N.J.S.A. 34:13A-5.3.

On July 31, 2015, the Township filed a letter accompanied by certifications from Helene Schlegel, the Township Administrator, and Kathleen Green, the Township Personnel Officer. The Township did not submit certifications or affidavits in support of its allegation that unit employees were coerced by Burke and Rasiewicz into signing authorization cards. We have not received any communications from unit employees indicating they were coerced, harassed, or misled into signing cards. The Township also submitted no document(s) to support its objections to the inclusion of these petitioned-for titles: principal accountant, tax collector, and tax assessor.

In the July 31 letter, the Township reiterates objections to the validity of JTMS's authorization cards and urges us to conduct a secret ballot election in lieu of certification by card check. The Township further contends Burke and Rasiewicz are managerial executives and have supervisory authority over petitioned-for employees that would engender an impermissible conflict of interest. The Township asserts that Burke has a "supervisory conflict of interest" with subordinates in the unit, including the zoning officer, construction code official and subcode officials. The Township asserts that Rasiewicz's inclusion in the unit would create a conflict of interest since he is the "direct superior" to the Supervisor of Public Works, Jose L Garcia. Finally, the Township contends Construction Code

Official Barry Olejarz has a supervisory conflict of interest over subordinate subcode officials and that the municipal judge may not be included in the unit as a matter of law.

Kathleen Green certifies that the Township is a Mayor-Council form of government under the Faulkner Act. Of the approximately 250 employees of the Township, Green asserts that the Director of Public Works, the Business Administrator, the Director of Community Development and the Chief of Police are managerial executives. She certifies the Township employs twelve (12) confidential employees. Green's certification does not specify which employees are confidential and does not provide specific examples or work samples demonstrating what confidential duties are performed by these employees. Moreover, Green's certification does not explain or provide examples of what Township policies the Directors of Community Development and Public Works formulated or implemented.

Schlegel certifies that Burke, as DCD, oversees and controls several divisions within the Township's Department of Community Development, including the divisions of code enforcement, conservation and natural resources, construction and inspections services, economic development, engineering and land use regulation. Burke also recommends "short and long range goals" for the improvement of the Township and recommends policy changes within his department. As Director, he also prepares

departmental budgets and presents the same to Schlegel for review and approval in the Township's budget; makes recommendations for Township purchases on large construction projects; and can recommend changes to a collective negotiations agreement and identify vacant positions needed to be filled in his department. No specific examples or work samples are provided by Schlegel indicating what Township policies Burke has formulated or implemented.

Schlegel also certifies that Burke interviews and recommends job candidates for his department, recommends major discipline for departmental employees and has the "authority and frequently imposes minor discipline" of departmental employees. Schlegel asserts Burke "may" hear a first step grievance; can determine work schedules, leave time and work assignments for departmental employees; and "directly supervises" and evaluates the zoning officer, construction code official and subcode officials. No specific examples or work samples have been provided establishing when Burke has disciplined or evaluated employees, approved leave requests, set work schedules, interviewed or hired job candidates, or answered grievances filed by Township employees. Schlegel acknowledges that Burke's superiors in the Township's organizational hierarchy are the Township's Administrator and Mayor.

Schlegel certifies that the Director of Public Works (DPW) Rasiewicz has "management control" over the public works department and its divisions, including the divisions of vehicles services and equipment, recycling, and buildings and groundskeeping. Rasiewicz develops and administers public works programs, implements departmental policies and prepares departmental budgets for the Township Administrator's review and approval. Schlegel certifies Rasiewicz "can" recommend changes to a collective negotiations agreement; "can" interview and recommend candidates for hire in the Department of Public Works; and "can" recommend the discipline and promotion of departmental employees. Schlegel certifies Rasiewicz has the authority to impose minor discipline and can recommend discipline of and evaluate the Supervisor of Public Works. In addition, Schlegel asserts Rasiewicz determines work schedules and work assignments for departmental employees; "handles" large purchasing projects for the Township; assigns and approves overtime for departmental employees and may respond to a grievance filed by a Township unit employee at step 1 of the grievance procedure. Schlegel has not provided specific examples or work samples demonstrating instances in which Rasiewicz has disciplined employees, approved leave requests, set work schedules, interviewed or hired job candidates, formulated and implemented Township policies or respond to grievances filed by Township employees. Schlegel

acknowledges that, on behalf of the Township, she responds to grievances at step 2 of the grievance procedures collectively negotiated with the TWU and AFSMCE. She avers that Rasiewicz responds at Step 1 and that she is Rasiewicz's superior in the Township's organizational hierarchy.

Under the grievance procedures set forth in the 2010-2014 collective negotiations agreements between the Township, TWU and AFSCME, neither the DPW nor the DCD is designated as the Step 1 decision-maker. Instead, the grievance procedure provides that a verbal grievance may be presented at Step 1 to an employee's "supervisor." The grievance procedure also provides that the Township Administrator may hear a grievance appeal of a supervisor's grievance determination at Step 2 of the grievance procedure. Step 3 of the procedure gives the Mayor the authority to decide the grievance and Step 4 provides for binding arbitration in the event the grievant is unsatisfied with the disposition at Step 3.

Barry Olejarz is the Township's Construction Code Official (CCO). Schlegel certifies Olejarz supervises the daily activities of subcode officials and may be called to testify at disciplinary hearings involving subcode officials. Olejarz may recommend hiring and promotions within the Township's Building Department and can review disciplinary determinations and personnel files of subcode officials. Olejarz conducts

evaluations of subcode officials, assigns work to subcode officials and determines work schedules and leave times for these officials. No examples or work samples were provided demonstrating instances in which Olejarz has disciplined or approved leave time requests of subordinates. Schlegel's certification does not provide that the Township ever relied on a recommendation by Olejarz in disciplining, hiring, firing, promoting or demoting Township personnel.

Schlegel references two exhibits in support of her assertion that Olejarz exercises supervisory and disciplinary authority over subordinate officials. The first exhibit is a memorandum dated February 23, 2004 from Olejarz to "all department personnel." The Township's Personnel Officer and Administrator were carbon copied on the memo. The memo's subject concerns the use of offensive language in the Building Department and provides, in pertinent part:

The use of offending language will be handled first verbally, but documented, second infraction will be a written notice and a third infraction will be directed to the Administrator [for] disciplinary action.

No evidence or examples are provided in which Olejarz actually or effectively recommended discipline of a Township employee.

The second exhibit consists of three evaluation forms dated September 22, 2014, and completed by Olejarz. It is unclear who was evaluated by Olejarz. No evidence has been provided by the

Township indicating the Township relied on these evaluations in acting on a personnel matter.

Schlegel also asserts that the Chief Financial Officer (CFO), Sharon Pinkava, is a confidential employee. The CFO reports directly to Schlegel and Schlegel is "ultimately responsible for negotiating union contracts." According to Schlegel, Pinkava plays a "crucial role in developing the Township's bargaining positions in all contract negotiations with Township unions." The CFO prepares financial positions for Township negotiations, provides Schlegel with a cost analysis of union negotiations proposals, prepares financial data for the Township during collective negotiations, and is directly involved in the formulation of the Township's budget. The CFO does not share office space with any other Township employee.

The CFO's job duties and responsibilities are also codified in Township Administrative Code Section 3-61, which provides that the Township's Division of Finance, "under the direction and supervision of the Chief Financial Officer," shall engage in the following activities pertinent to our investigation:

- (A) Assist the Mayor and Business Administrator in the preparation of and supervision of the administration of the municipal operating budget for submission to the Township Council;
- (B) Using economic data, prepare long range financial projections of expenditures for particular services and submit this

information to the Township Council,
Mayor and Business Administrator;

- (C) May serve on the Township negotiations team as a fiscal advisor;
- (D) Establish and supervise a program of contract cost administration;
- (E) Evaluate and make budgetary recommendations for various Township programs; and
- (F) Conduct a continuing performance audit for municipal operations for determining quality of work and devising improvements in efficiency and economy.

Ann Marie Eden serves as the Township's Clerk. According to Schlegel, Eden is a confidential employee who should not be included in JTMS's unit. Eden records the meeting minutes of all Township Council executive sessions, including sessions where the Council discusses collective negotiations positions, contract administration, grievances, and arbitrations. The clerk is also responsible for maintaining records of all of these matters and is required to attend Township Council Committee meetings. Eden also, as part of her job duties, reports directly to the Township Council and does not share office space with other Township employees.

Janice Kristy serves as a Deputy Township Clerk. Schlegel asserts Kristy is also a confidential employee. Schlegel certifies Kristy reports directly to the Township Clerk and assists the Clerk with her duties. Like the Clerk, Kristy has

access to Township Council executive session minutes concerning union-related matters and is responsible for maintaining records of those sessions. Kristy assumes the Clerk's duties when Eden is absent and has attended an executive session on August 11, 2015 during which union contract negotiations were discussed amongst the Council and Mayor. Kristy has also attended executive sessions on February 11 and 25, 2015; March 11 and 25, 2015; May 15, 2015 and June 24, 2015.

Finally, Schlegel asserts the Township's Municipal Court Judge, a Daniel Sahin, is not an employee of the Township and should not be included in JTMS's unit.

On August 5, 2015, the Commission's staff agent forwarded the Township's certifications to JTMS. On August 14, 2015, the staff agent also sent JTMS a letter setting forth thirty-three (33) questions about the petitioned-for titles and requested its responses to the Township's objections. On September 11, 2015, Burke filed a letter on behalf of JTMS in response to the Township's objections, along with his certification and certifications from Rasiewicz and Olejarz. The following facts may be gleaned from these certifications.

Burke was hired as a Municipal Engineer for the Township in 2002. In March of 2007, the Township appointed Burke to the part-time position of Director of the Department of Community Development (DCD). The DCD position is the only Township

director position that is not full-time. Burke works both as the Township's Municipal Engineer and part-time as the DCD.

Burke certifies that he does not have the authority to hire, fire or discipline Township employees. According to Burke, the Township Administrator has the "final say" in all matters pertaining to Township personnel, purchasing, budgeting and finance within his department. Although Burke and other Township directors can recommend changes to Township policies, no Township policy may be changed without the approvals of the Mayor and Administrator. Burke and other directors are not permitted to communicate directly with Township Council members about policy and/or personnel matters without the Township Mayor's permission.

Burke also certifies that the Township Administrator, Mayor and Council have not relied on his recommendations in making personnel decisions or formulating Township policies. For instance, on or about December 16, 2013, Burke submitted to the Township Personnel Manager and Administrator documents reporting poor work performance of an employee in his department and recommending that the employee be replaced. In lieu of adopting Burke's recommendation, the Township promoted the employee. Moreover, over the past three years, the Township's Administrator and Mayor have filled several positions within Burke's department without Burke's consent or approval. These positions included: the plumbing subcode inspector, the code enforcement/housing

inspector, and three clerical positions. One clerical position was filled in contradiction to Burke's recommendation. Burke has also never been asked by the Township for his suggestion(s) for collective negotiations and has never participated in grievance proceedings involving his departmental staff.

The most severe discipline Burke has imposed in his eight years as DCD was a letter of reprimand. During that eight-year period, Burke only once conducted evaluations of three staff members at the request of the Township Administrator. The Township did not rely on those evaluations in making a personnel decision affecting those employees.

Burke certifies he does not have final decision-making authority over departmental budgeting, purchasing and overtime requests. Burke submits an annual budget request for his department at the request of the Township Administrator. The Administrator and Mayor prepare a budget for the Council's review and approval. Burke asserts that the Administrator and Mayor have never presented a budget recommendation he made to the Township Council. Moreover, the Administrator and Mayor do not need his consent or approval to make a budget request to the Council for his department. All overtime and purchasing requests in Burke's department are subject to review and approval by the Township Administrator.

Burke certifies that the Township on or about April 15, 2015, adopted Ordinance 09-15 (ordinance), which effectively relegated Township directors to "3rd tier" managers. Prior to the ordinance's passage, Township directors could report directly to the Township Mayor without also reporting to the Township Administrator. Under the ordinance, Township directors must now report to the Administrator, who in turn reports to the Mayor on departmental matters.

Rasiewicz and Burke each certify that they did not coerce employees to sign authorization cards in support of JTMS's petition. Instead, a majority of employees in the petitioned-for unit freely chose to sign cards in support of JTMS. Rasiewicz certifies that although he is responsible for "...organizing and directing activities within the public works department", he does not have control over the formulation or implementation of Township policies. Rasiewicz certifies that only the Township's Mayor and Administrator have the managerial authority to hire, fire, promote, discipline, and determine the qualifications and performance standards of Township employees.

As the CCO, Olejarz certifies he does not have the authority to discipline subcode officials. According to Olejarz, the discipline and standards of performance for subcode officials are governed by the State's Uniform Construction Code (UCC). Olejarz asserts all requests for disciplinary action are "...forwarded to

the Administration/Personnel Office for appropriate action" and that "all UCC matters are reported to the Office of Regulatory Affairs to be investigated with notification to the Administration/Personnel's Office." Olejarz certifies that all disciplinary determinations are made by the Township Administrator and Personnel Office and that he has neither reviewed any personnel files nor rendered a disciplinary decision. When needing additional staff, Olejarz submits a request to the Administrator for such hiring and "...if the Personnel Director approves the request, the position is advertised and interviews are scheduled." Although Olejarz may, along with the Personnel Director, participate in hiring interviews, he does not have authority to decide who is hired and how many employees should be added to the building department. Beginning two years ago, the Township requested Olejarz to conduct evaluations of subcode officials on Township-provided forms. He forwarded the evaluations to the Township's Personnel Manager and no facts suggest that they were relied upon in making any personnel decisions.

JTMS does not dispute the CFO consults with the Township about bargaining unit negotiations and that the Township Clerk and Deputy Clerk record and have access to the minutes of Township negotiations strategy sessions. Despite this, JTMS asserts this conflict may be resolved by having the Township's

auditor record the minutes of Township negotiations strategy sessions.

ANALYSIS

The Township objects to JTMS's petition and challenges the validity of JTMS's authorization cards. The Township also asserts that several petitioned-for titles are confidential, managerial executives, and would, if included in JTMS's unit, generate a conflict of interest. Moreover, the Township argues the Municipal Court Judge is not a Township employee and cannot be included in JTMS's unit. JTMS disagrees. For the reasons explained below, I dismiss the Township's challenge to JTMS's authorization cards; find that the CFO, Township Clerk and Deputy Township Clerk are confidential employees within the Act's meaning; that the municipal judge may not be included in JTMS's unit; dismiss the Township's objections to the remaining petitioned-for titles and certify a collective negotiations unit.

Authorization Cards

The Township contends that Burke and Rasiewicz coerced unit employees into signing authorization cards and that the cards submitted by JTMS are therefore unreliable. In lieu of certification based on JTMS's authorization cards, the Township urges us to conduct an election. Since the Township's challenge is not supported by competent evidence, we reject this position and certify JTMS, based on its authorization cards.

We have repeatedly denied requests for a Commission-directed election based on challenges to authorization cards that are not supported by substantial, reliable evidence that calls into question the validity of the cards. Paterson Charter School for Science & Tech., D.R. No. 2015-9, 42 NJPER 74 (¶19 2015), aff'd P.E.R.C. No. 2016-4, 42 NJPER 99 (¶27 2015); Mt. Ephraim Bd. of Ed., D.R. No. 2007-3, 32 NJPER 293 (¶121 2006); Roxbury Tp., D.R. No. 2013-13, 40 NJPER 85 (¶32 2013); Berlin Tp., D.R. No. 2011-3, 36 NJPER 379 (¶148 2010). Challenges to authorization cards must be supported by evidence from individuals with personal knowledge of events or circumstances giving rise to the challenge. Paterson Charter School for Science & Tech.; Berlin Tp.

Here, the Township has not presented competent evidence to substantiate its claim that Raisiewicz and Burke coerced unit employees to sign authorization cards. Moreover, we have not received any communications from unit employees indicating that they were coerced, harassed or misled into signing JTMS's cards. Although the Township asserts that Raisiewicz's and Burke's status as departmental directors are "inherently coercive", no evidence indicates that either employee used their positions to coerce employees to sign cards. Rasiewicz and Burke certified that unit employees freely chose to join JTMS. Absent competent evidence substantiating the Township's accusation of coercion, we

deny its challenge to JTMS's cards. Paterson Charter School for Science & Tech.; Berlin Tp.

Confidential Employee Discussion

The Township contends that the Township Clerk, Deputy Township Clerk, Principal Accountant, and CFO are confidential employees. JTMS disagrees. I find that the CFO, Deputy Township Clerk and Township Clerk are confidential employees under our Act. I reject the Township's contention that the Principal Accountant is confidential because the Township has not provided evidence or facts to prove confidential status.

Confidential employees are excluded from the Act's definition of "employee" and do not enjoy the Act's protections. N.J.S.A. 34:13A-3(d). N.J.S.A. 34:13A-3(g) defines "confidential employees" of public employers other than the State 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.

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, we explained our approach in determining whether an employee is confidential:

We scrutinize the facts of each case to find for whom each employee works, what he does, and what he 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. [Id. at 510]

See also, Ringwood Bd. of Ed., Supra. 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 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 and 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.]

In evaluating confidential status claims, we have consistently applied strict standards of proof. Absent a proffer of specific duties and a demonstration that the purported confidential duties are actually performed, we will not find confidential status. City of Camden Housing Authority, D.R. No. 2014-7, 40 NJPER 219 (¶84 2013); Phillipsburg Bd. of Ed., D.R. No. 2010-12, 36 NJPER 75 (¶35 2010); 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); Tp. of Eastampton, D.R. No. 2000-5, 26 NJPER 43 (¶31014 1999); Evesham Tp. Fire Dist. #1, D.R. No. 99-4, 24 NJPER 503 (¶29233 1998).

If an employee has access to and knowledge of economic data used by an employer in collective negotiations or has knowledge of an employer's negotiations strategies in advance of their implementation, we have found that the employee is confidential. Town of Kearny, P.E.R.C. No. 89-55, 15 NJPER 10 (¶20002 1988); Wayne Tp., D.R. No. 97-12, 23 NJPER 251 (¶28121 1997); Teaneck Tp., D.R. No. 2009-3, 34 NJPER 268 (¶96 2008), aff'd P.E.R.C. No. 2009-25, 34 NJPER 379 (¶122 2008). For instance, in Wayne, we

found that a township assistant financial officer was confidential where that employee had "possessed information about the Township's [negotiations] position before it was disclosed to the union" and had "attended at least one meeting with Township officials where negotiations strategies were discussed" before they were employed. 23 NJPER at 252.

Similarly, in Teaneck, we found that a chief financial officer, deputy township manager and township clerk were confidential within the Act's meaning because they had access to and knowledge of economic data used by the employer in collective negotiations and they attended township executive sessions where negotiations strategies were discussed. 34 NJPER at 270-271. In the instances of the deputy township manager and municipal clerk, we also noted that although they did not share the same access to economic data as the chief financial officer, they were nonetheless confidential since they attended executive sessions of the township's council where employee discipline, labor negotiations, and other personnel matters were discussed in advance of final decisions being made. 34 NJPER at 271.

Similar to confidential employees in Wayne and Teaneck, the Township's CFO, Clerk and Deputy Clerk have direct knowledge of the Township's negotiations strategies and direct access to data used by the Township in collective negotiations. The CFO reports directly to the Township Administrator, helps the Administrator

develop Township negotiations positions, prepares financial positions and data for use in Township negotiations, and provides the Administrator and Township Council with a cost analysis of union negotiations proposals. The CFO is actively involved in the formulation and administration of the Township's budget and, using economic data, directs the preparation of "long range financial projections of expenditures for particular services and submits this information to the Township Council, Mayor and Business Administrator" (quoting Township Code Section 3-61). Moreover, JTMS concedes that the Township consults with the CFO about financial matters concerning union negotiations. These facts are clear indicia of confidential status.

Although the Township Clerk and Deputy Township Clerk are less involved in negotiations than the CFO, but they too are confidential employees because they have access to and direct knowledge of a range of collective negotiations matters. The Township Clerk regularly attends and records the meeting minutes of Township Council executive sessions at which collective negotiations positions are developed and, contract administration, grievances and pending arbitrations are discussed. The Clerk is also responsible for maintaining records of these negotiations strategy sessions and regularly reports to the Township Council about related issues. The Deputy Clerk assists the Clerk with these duties and has attended executive

sessions where contract negotiations are discussed amongst the Mayor and Council, including one session as recent as August 11, 2015. When the Clerk is absent, the Deputy Clerk assumes the duties of the Clerk in attending executive sessions concerning collective negotiations and recording and maintaining records of these meetings. JTMS does not dispute that the Clerk and Deputy Clerk records the minutes of Township negotiations strategy sessions, but asserts this exposure to confidential info may be eliminated by assigning the Township's auditor the responsibility of recording the minutes of these sessions. We are not aware of any circumstance that might mandate such a change. We find that the clerk and deputy clerk are confidential employees.

The Township has not presented any facts or evidence to prove its claim that the principal accountant is a confidential employee. I therefore reject this claim. Camden Housing Authority.

Accordingly, I find that the CFO, Township Clerk and Deputy Township Clerk are confidential employees within the meaning of the Act.

Managerial Executive Discussion

The Township argues that the DCD, DPW, Tax Collector and Tax Assessor are managerial executives and must be excluded from JTMS's unit. JTMS disagrees. I disagree with the Township's

arguments and find that the DCD, DPW, Tax Collector and Tax Assessor are not managerial executives.

N.J.S.A. 34:13A-3(f) defines "managerial executive" of any public employer other than the State in the pertinent part:

[M]anagerial executives of a public employer means persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices.

N.J.S.A. 34:13A-3(f).

In New Jersey Turnpike Authority v. AFSCME Council 73, 150 N.J. 331 (1997); the New Jersey Supreme Court adopted this test to determine managerial authority:

A person formulates policies when he develops a particular set of objectives designed to further the mission of [a segment of] the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. [Turnpike Authority at 356]

As with confidential status claims, we have applied strict standards of proof to managerial executive status claims: absent a proffer of specific duties and a demonstration that the

purported managerial duties are actually performed, we will not find managerial executive status. Camden Housing Authority. In applying this standard, we have declined to find that an employee is a managerial executive where that employee does not have independent decision-making authority over the formulation and implementation of employer policies. See, Hopewell Tp., D.R. No. 2011-14, 38 NJPER 165 (¶48 2011); State of New Jersey, P.E.R.C. No. 99-59, 25 NJPER 48 (¶30021 1998), recon. den. P.E.R.C. No. 2000-34, 25 NJPER 461 (¶30200 1999).

In Hopewell, the Deputy Director of Representation found that a municipal housing liaison (MHL) did not meet the definition of a managerial executive since the MHL did not formulate or effectuate township policies. The Township contended the MHL was a managerial executive because he made influential recommendations and provided input to the township's Affordable Housing Committee on affordable housing policies and the implementation of those policies. Citing Turnpike Authority, the Deputy Director rejected these contentions, noting that the recommendations and advice by the MHL were subject to review and approval by the Township and that "an employee's mere capacity to recommend management policies is not part of the statutory definition of managerial executive" under Turnpike Authority. Hopewell; 38 NJPER at 166.

In the specific context of municipal department heads, we have rejected claims of managerial executive status where the employer has not presented evidence or examples of department heads exercising broad, independent discretion in formulating municipal policies. Teaneck Tp., 34 NJPER at 272; Eastampton Tp., D.R. No. 94-1, 19 NJPER 404 (¶24178 1993). In Teaneck, the Commission affirmed the Director's decision rejecting a claim by the township that department heads were managerial executives. 34 NJPER at 272. The Director noted that, within the township's organizational hierarchy, the "relative position of the department heads requires that they report directly to the Township Manager" and that the township manager's "narrative certification" did not show that "department heads formulate policy or possess and exercise the broad discretion over Township policies demonstrating managerial executive status." Id.; cf. Eastampton Tp., 19 NJPER at 406 (Director finds township did not submit sufficient facts demonstrating two department heads exercised the "type of broad discretion over Township policies to support a finding of managerial status.").

In this case, the Township has not submitted sufficient evidence or facts demonstrating that the DPW, DCD, Tax Collector and Tax Assessor exercise broad discretion and control over the formulation of Township policies. In the case of the Tax Collector and Assessor, no evidence has been submitted to support

the Township's managerial executive status claims. The Township's narrative certification by Schlegel provides that Burke has issued recommendations on "short and long range goals" for policy changes (Schlegel Cert., Paragraph 6). That advisory function, alone is insufficient to establish managerial executive status. Hopewell Tp. Moreover, like the department heads in Teaneck, the DPW and DCD report directly to the Township Administrator on all policy matters and the record indicates the Township Administrator and Mayor exercise independent review and control over Township policy-making. Absent specific examples in which the DPW and DCD formulated or implemented Township-wide policies, we cannot find these employees meet the definition of managerial executives under the Act.

Accordingly, I find that the DPW, DCD, Tax Collector and Tax Assessor are not managerial executives.

Conflict of Interest Discussion

The Township contends the inclusion of the DPW, DCD, CCO, Tax Collector and Tax Assessor in JTMS's unit would engender an impermissible conflict of interest. JTMS disagrees. I disagree with the Township's conflict of interest claim.

Our Act prohibits supervisors and non-supervisors from being represented in the same collective negotiations unit. N.J.S.A. 34:13A-5.3. However, supervisors may be represented in a separate unit provided there is no actual or potential

substantial conflict of interest. Id.; West Orange Bd. of Ed. v. Wilton, 57 N.J. 417, 425-26 (1971). Our Supreme Court has explained the standards by which we determine whether an impermissible conflict of interest exists in a supervisors' unit:

If performance of the obligations or powers delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of a particular supervisor and the other included employees, the community of interest required for inclusion of such supervisor is not present. [Wilton, 57 N.J. at 426]

We decide whether there is an impermissible conflict under Wilton on a case-by-case basis after a close examination of the facts. Peripheral or *de minimis* conflicts are permitted under our Act. Wilton; Monmouth Cty. Sheriff, D.R. No. 2015-6, 41 NJPER 508 (¶159 2015).

An employee's role in the evaluation and/or grievance process is a significant factor in ascertaining whether there is an actual or potential substantial conflict. Monmouth Cty. Sheriff; Wilton, 57 N.J. at 423; Somerset Cty. Library Comm'n, D.R. No. 96-18, 22 NJPER 189 (¶27098 1996). We have consistently held that a supervisor's evaluations must be closely tied to a personnel action or disciplinary decision in order to find a Wilton conflict. Watchung Hills Bd. of Ed., P.E.R.C. No. 85-116, 11 NJPER 368 (¶16130 1985); Westfield Bd. of Ed., P.E.R.C. No. 88-3, 13 NJPER 635 (¶18237 1987); Burlington Cty. Bd. of Social

Services, D.R. No. 96-15, 22 NJPER 180 (¶27095 1996); Somerset Cty. Library Comm'n; Monmouth Cty. Sheriff. Where there is no evidence that an evaluation has led to a personnel action or disciplinary determination, we have declined to find a Wilton conflict. Monmouth Cty. Sheriff (finding the inclusion of captains in a unit of sergeants and lieutenants did not create a conflict of interest, since captains' evaluations of unit employees did not result in personnel actions); Burlington Cty. Bd. of Social Services (Director finds that a assistant training supervisor's evaluations of unit employees did not generate a conflict of interest, since the evaluations were not used in personnel action); Westfield Bd. of Ed., 13 NJPER at 637(Commission emphasizes that "evaluations alone do not necessarily create a conflict of interest sufficient to exclude the evaluator from the unit" and that the Commission has looked to whether the evaluation "relates to other actions such as renewal, tenure, promotion or salary").

In the specific context of municipal department heads, the Commission has held that evidence of department heads having "initial disciplinary responsibilities and an unspecified involvement in grievance processing" does not justify the finding of a Wilton conflict. Teaneck Tp., 34 NJPER at 273, aff'd P.E.R.C. No. 2009-25, 34 NJPER 379 (¶122 2008). Even where a department head recommends the hiring, firing or discipline of a

unit employee, we will not find a Wilton conflict if no facts suggest that the employer is bound by or has followed those recommendations. Id. In Teaneck, the Director found no conflict where the record evidence indicated the township manager, and not the township's department heads, had "final discretion" over hiring, firing and disciplinary decisions. Id.

The facts in this case do not support the Township's position that including the DPW, DCD, CCO, Tax Collector and Tax Assessor in JTMS's unit would generate an impermissible conflict of interest. No evidence has been provided that supports a finding that the inclusion of the Tax Collector and Assessor in the petitioned-for unit will create a Wilton conflict. The Township has not any examples in which the Township Administrator, Mayor or Council have relied on an evaluation or recommendation by the CCO, DPW and DCD in rendering a disciplinary decision or implementing a personnel action. The fact that the CCO, DPW and DCD have, on rare occasion, evaluated an employee does not, by itself, create a Wilton conflict. Westfield Bd. of Ed.; Burlington Cty. Bd. of Social Services. Also no examples have been provided which suggest that the DPW, DCD or CCO entertained a grievance by a unit employee. Unspecified involvement grievance processing is insufficient to justify a finding of a Wilton conflict. Teaneck Tp.

Like the Director found of the township manager in Teaneck, the record here demonstrates that the Township Administrator and Mayor have independent, final decision-making authority over personnel matters impacting JTMS unit employees. Burke, Rasiewicz and Olejarz certify the Township Administrator and Mayor have final decision-making authority over decisions to hire, fire, discipline, promote or demote employees. By ordinance, the DPW and DCD are subordinate to the Administrator and Mayor and are obligated to report directly to the Administrator about policy and personnel matters. On multiple occasions, the Administrator has disregarded personnel recommendations by the DCD and decided to hire and promote employees in the DCD's department without the DCD's consent. In one instance, an employee who the DCD recommended be discharged was instead promoted by the Administrator. Significantly, neither the DCD nor DPW may communicate with the Township's Council without the Mayor's permission. In sum, the record shows that the Township Administrator and Mayor have almost exclusive control over personnel matters impacting JTMS unit employees and the DPW, CCO and DCD have little to no influence over the Township's personnel decisions.

Accordingly, I do not find the inclusion of the DPW, CCO, DCD, Tax Collector or Tax Assessor in JTMS's unit would create a impermissible conflict of interest.

Municipal Court Judge

Finally, the Township asserts the Municipal Court Judge is not an employee of the Township and should not be included in JTMS's unit. I agree. Municipal judges are subject to the rules and policies promulgated by the New Jersey Supreme Court for the administration of New Jersey's court system. Thurber v. N.J. Judiciary et al., 387 N.J.Super. 279, 296 (App. Div. 2006); CWA Local 1044 v. Assignment Judge, 118 N.J. 495 (1990); Passaic Cty. Probation Officers Ass'n v. Passaic Cty. Judges, 73 N.J. 247 (1977). They are not subject to our Act. Id. I therefore exclude the Municipal Court Judge from JTMS's unit.

CONCLUSION

Based on the foregoing, I find that the following unit is appropriate for collective negotiations:

Included: All regularly employed, supervisory employees of the Township of Jackson, including but not limited to the director of community development, director of public works, supervisor of public works, tax assessor, tax collector, zoning officer, construction code official, electrical subcode official, building subcode official, plumbing subcode official, fire protection subcode official, assistant recreation supervisor, recreation program administrator and principal accountant.

Excluded: Managerial executives, confidential employees, and non-supervisory employees; craft employees, casual employees, chief financial officer, township clerk, deputy township clerk, municipal court judge, business administrator, senior computer service technician, assistant municipal treasurer, personnel officer and all other employees employed by the Township of Jackson.

JTMS has satisfied the Act's requirements for certification based upon its authorization cards from a majority of unit employees. N.J.S.A. 34:13A-5.3.

ORDER

I certify the Jackson Township Municipal Supervisors as the exclusive majority representative of the unit described above, based upon its authorization cards.^{4/}

BY ORDER OF THE DEPUTY DIRECTOR OF REPRESENTATION

/s/Deirdre K. Hartman

Deirdre K. Hartman
Deputy Director of
Representation

DATED: December 7, 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 December 17, 2015.

^{4/} A Certification of Representative will issue with this decision.