

D.R. NO. 2001-6

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

In the Matter of

CITY OF ASBURY PARK,

Public Employer,

-and-

Docket No. CU-2000-35

AFSCME COUNCIL 73,

Petitioner.

SYNOPSIS

The Director of Representation finds that, absent facts demonstrating that the employee's current duties give him access to or knowledge of confidential labor relations matters or negotiations strategies, the Supervisor of Accounts/Purchasing Agent is not a confidential employee within the meaning of the Act. The Director of Representation orders the title included in a unit of supervisory and professional employees represented by AFSCME, Council 73, effective immediately.

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Appearances:

For the Public Employer
Murray, Murray & Corrigan, attorneys
(Adam Herman, of counsel)

For the Petitioner
Don Dileo, Staff Representative

DECISION

On February 24, 2000, the American Federation of State County and Municipal Employees, Council 73 (AFSCME) filed a Petition for Clarification of Unit with the Public Employment Relations Commission (Commission) seeking to include the Supervisor of Accounts/Purchasing Agent in its negotiations unit of supervisory and professional supervisory employees in the City of Asbury Park (City). AFSCME states that when the unit was created, the employee holding the title of Supervisor of Accounts/Purchasing Agent also acted as the Chief Financial Officer, a confidential position. AFSCME asserts that since the Supervisor of Accounts/Purchasing Agent no longer performs the confidential duties of Chief Financial Officer, the Supervisor of Accounts/Purchasing Agent should be included in the unit.

The Borough objects to the petition. It argues that the duties performed by the Supervisor of Accounts/Purchasing Agent provide him with access to and knowledge of sensitive and confidential information concerning the administrative and financial operations of the City, as well as confidential personnel files. Therefore, the City argues, the title should continue to be excluded from the unit as a confidential employees within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1.1 et seq. (Act).

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2(a) and 2.6. By letter of January 12, 2001, I advised the parties that I was inclined to find that the Supervisor of Accounts/Purchasing Agent is not a confidential employee within the meaning of the Act, and order the position be included in the unit, effective immediately. I explained the basis for that conclusion and provided the parties an opportunity to respond. AFSCME did not file a response. By letter of January 23, 2001, the City advised that it would not contest the issuance of a decision to include the Supervisor of Accounts/Purchasing Agent in the supervisors unit represented by AFSCME. Based upon the investigation, I find the following facts:

AFSCME was certified to represent a unit of "all blue-collar and white-collar supervisory, professional and non-professional employees" in October, 1994. It prevailed against a decertification election in 1996, and was recertified to represent

the supervisory unit on October 17, 1996. At the time of the filing of this petition for unit clarification, AFSCME's most recent contract with the City expired on December 31, 1998.

Ricardo Diaz holds the title Supervisor of Accounts/Purchasing Agent. At the time the negotiating unit was originally formed, Diaz also served as the acting Chief Financial Officer, a title which the parties agreed to exclude from the unit as confidential within the meaning of the Act.

In 1998, the City hired Vicky DeMarinis as the permanent Chief Financial Officer, and as of March 1998, Diaz ceased performing the Chief Financial Officer duties. Diaz now reports to DeMarinis.

Diaz certifies that his job duties include those enumerated in the New Jersey Department of Personnel job specification for Supervisor of Accounts, as follows:

Under direction of a supervisory official, supervises a unit of clerical employees engaged in maintenance of a system of accounts; or performs highly responsible or difficult clerical work involving record keeping of financial accounts; does other related duties as required.

Diaz certifies that he also performs the following responsibilities: authorizes and approves purchase orders; prepares various bid documents, specifications and subsequent recommendations to award proposals; negotiates, prepares and reviews various professional, commodity and service invoices; reviews and analyzes claims for worker's compensation, liability and automobile insurance and makes appropriate recommendations; administers the data processing and

communications systems; reviews and analyzes the sewer utility billing, and determines credits and debits to commercial and residential accounts. Diaz acknowledges that he has access to personnel files and documents involved in litigation. Diaz certifies that at no time did he assist in any collective negotiations.

The City submits that Diaz's responsibility for supervising and/or performing highly responsible clerical work regarding financial accounting records gives him "access to sensitive and confidential information concerning the administration and financial operations of the City." The City also asserts that Diaz participates in the preparation and submission of the municipal budget -- a duty which exposes him to budgetary information often used by the City in collective negotiations. Diaz acknowledges that he "provides guidance" with regard to departmental budget items, primarily relating to procurement. Diaz's April 12, 2000 certification indicated that he "assists in the preparation and submission of the municipal budget." However, his November 1, 2000 submission to the Commission states that he "[does] not assist in the preparation of the budget."

ANALYSIS

The threshold issue is whether the Unit Clarification Petition is appropriate under the circumstances. I find that it is. In Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 251 (1977), the Director of Representation outlined the appropriate uses of unit clarification petitions:

The purpose of a clarification of unit petition is to resolve questions concerning the scope of a collective negotiations unit within the framework of the provisions of the Act, the unit definition contained in a Commission certification, or as set forth in the parties' recognition agreement. Normally, it is inappropriate to utilize a clarification of unit petition to enlarge or to diminish the scope of the negotiations unit for reasons other than the above, and... [the question] relates primarily to identification....

Where the parties mutually agree to exclude employees from a unit, neither party may seek the position's reentry into the unit through a unit clarification petition unless circumstances change. Warren Tp., D.R. No. 82-10, 7 NJPER 529 (¶12233 1981). Further, if the title remains outside the unit for a period of time, the employee representative waives its right to seek unit inclusion through a Unit Clarification unless there is a change in circumstances. New Jersey Transit, P.E.R.C. No. 2000-6, 25 NJPER 370 (¶30160 1999); Rutgers University, D.R. No. 84-19, 10 NJPER 284 (¶15140 1984).

Here, there appears to have been a change in circumstances; the issue of the Supervisor of Accounts' inclusion in the unit became ripe when Diaz stopped performing the duties of acting chief financial officer. AFSCME filed prior to the execution of its next successor contract to the 1998 agreement. Rutgers.^{1/} Accordingly, I find that the unit clarification petition here is procedurally appropriate.

^{1/} In Rutgers, the Director found that, even where a change in circumstance is shown, the execution of the parties' next successor contract after such change acts as a waiver of the right to seek inclusion of a title through a Clarification of Unit Petition. The union bears the burden of searching out potential members. Rutgers at 285.

The second issue is whether the Supervisor of Accounts/Purchasing Agent has stopped performing confidential duties, making Diaz unit eligible. N.J.S.A. 34:13A-3(g) defines confidential employees as:

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.

The policy of this Commission is to narrowly construe the term confidential employee. Brookdale Community College, D.R. No. 78-20, 4 NJPER 32 (¶4018 1977); 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); Cliffside Park Bd. of Ed., P.E.R.C. 88-108, 14 NJPER ¶19128 (1988).

In State of New Jersey, the Commission explained the approach taken in determining whether an employee is confidential. The Commission stated:

We scrutinize the facts of each case to find for whom each employee works, what [the employee] does, and what [the employee] knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee [were] included in a negotiating unit. [Id. at 510.]

In N.J. Turnpike Authority v. AFSCME, 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 State of New Jersey, supra, 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. [Turnpike Authority at 358.]

The key to confidential status is an employee's access to and knowledge of materials used in labor relations processes including contract negotiations, contract administration, grievance handling and the preparation for these processes. See State of New Jersey (Division of State Police), D.R. No. 84-9, 9 NJPER 613 (¶14262 1983). Employees in support positions are often deemed confidential due to their superior's role in the labor relations process and their own performance of clerical support duties which

expose them to confidential matters. See W. Milford Bd. of Ed., P.E.R.C. No. 56, NJPER Supp. 218 (¶56 1971); Salem Community College, P.E.R.C. No. 88-71, 14 NJPER 136 (¶19054 1988); River Dell. However, as Supervisor of Accounts/Purchasing Agent, it does not appear that Diaz is currently performing any duties that should be classified as confidential. While the City asserts that Chief Financial Officer DeMarinis, Diaz's immediate supervisor, is involved in the collective negotiations process, it is not apparent that any of Diaz's current duties give him any access to or knowledge of confidential labor relations matters which could compromise the City's position in negotiations.

Diaz apparently has access to personnel files. When the Legislature adopted the definition of "confidential employee", it rejected a broader definition which would have excluded employees with "access to confidential personnel files or information concerning the administrative operations of the public employer." State of New Jersey at n. 3, p. 576. Mere access to personnel files, or even knowledge of employee personnel information, does not render an employee confidential as that term is defined by our Act. Montaque Bd. of Ed., P.E.R.C. No. 87-36, 12 NJPER 73 (¶17294 1986).

The City also argues that Diaz has some involvement with budget preparation, and, therefore, he knows about budget data which the City uses in negotiations. Absent a proffer of specific duties, and a demonstration that the claimed duties are actually performed, we will not find confidential status. 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), app. pending App. Div. Dkt. No. A-006106-99T2; Evesham Tp. Fire Dist #1, D.R. No. 99-4, 24 NJPER 503 (¶29233 1998); Monmouth Reg. Bd. of Ed., D.R. No. 94-10, 20 NJPER 16 (¶25009 1993). The City has not provided us with any information about what role Diaz specifically plays in the preparation of the budget. Further, it has not identified the kind of budget data Diaz learns about which is assertedly related to confidential negotiations strategies. Much of the information that comprises a municipal budget is public information, and much of it is not in any way connected with collective negotiations. It is only when the employee's involvement with budget data gives the employee knowledge of the employer's negotiations strategies -- for instance, what budget increases might be planned for employee salaries -- that confidential status may be found. Access to budget information which is not specifically relevant to the employer's bargaining position does not implicate confidential status. See Cliffside Park; Orange Tp., D.R. No. 85-23, 11 NJPER 317 (¶16115 1985). We will not find confidential status when an employer fails to specifically identify facts demonstrating that the employee's budget participation results in that employee knowing confidential negotiations strategies. Evesham; Monmouth Reg. Bd. of Ed. Here, the City has not submitted any specific information to demonstrate that Diaz's budget involvement, if any, results in his knowledge of the City's confidential negotiations strategies.

Accordingly, I find that the Supervisor of Accounts/Purchasing Agent is not a confidential employee within the meaning of the Act.

ORDER

I order the inclusion of the Supervisor of Accounts/Purchasing Agent in the AFSCME unit, effective immediately.^{2/}

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Stuart Reichman, Director

DATED: January 31, 2001
Trenton, New Jersey

^{2/} Under Clearview, a determination to include the disputed title is effective immediately, provided there was no current agreement in effect when the petition was filed.