

P.E.R.C. NO. 89-42

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MORRIS SCHOOL DISTRICT BOARD
OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-H-88-43 &
CU-H-88-5

EDUCATION ASSOCIATION OF MORRIS,

Charging Party-Petitioner.

SYNOPSIS

The Public Employment Relations Commission finds that the Morris School District Board of Education violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act by unilaterally removing secretary Catherine Tomasulo from the Education Association of Morris' negotiations unit. All other allegations in the Complaint are dismissed. The Association's unit is clarified to exclude confidential secretary Eileen Jost.

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EDUCATION ASSOCIATION OF MORRIS,

Charging Party-Petitioner.

Appearances:

For the Respondent, Wiley, Malehorn & Sirota, Esqs.
(Robert Goldsmith, of counsel)

For the Charging Party, Bucceri & Pincus, Esqs.
(Sheldon Pincus, of counsel)

DECISION AND ORDER

On July 27, 1988, the Education Association of Morris ("Association") filed an unfair practice charge and clarification of unit petition. The Association alleges that the Morris School District Board of Education ("Board") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),^{1/} when it unilaterally removed two secretaries, Eileen Jost and Catherine Tomasulo, from the Association's collective negotiations unit and returned their

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

union dues and representation fees. At the hearing, the Association amended its charge to allege the Board violated subsection 5.4(a)(3)^{2/} by assigning Jost certain job duties solely to defend against this charge. The Association filed the unit clarification petition to clarify the status of these secretaries.

On October 15, 1988, the charge and petition were consolidated and a Complaint and Notice of Hearing issued. On October 22, the Board filed its Answer claiming the two secretaries are confidential employees and therefore it did not commit an unfair practice.

On February 10 and April 16, 1988, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On July 22, 1988, the Hearing Examiner issued his report and recommendations. H.E. No. 89-1, 14 NJPER _____ (¶ _____ 1988). He found that both employees were confidential and therefore the

1/ Footnote Continued From Previous Page

rights guaranteed to them by this act; and (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."

2/ This subsection prohibits public employers, their representatives or agents from: "(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."

Board did not commit an unfair practice when it unilaterally removed them from the unit. Specifically, he found that one of Jost's primary responsibilities is to maintain the personnel agenda for presentation to the Board and that she reviews the "pink sheets" which contain discussions of the Board's negotiations strategy and status. While he found that Tomasulo's primary duties were typing and working with substitute teachers' files, he also found that Tomasulo had access to and worked with the "pink sheets." He based that finding on the testimony of Janet Jones, Administrative Assistant of Personnel Services. Jones testified that all secretaries had access to and assignments with the "pink sheets." He also found that the Board did not make assignments involving confidential labor relations matters solely as a defense to the charge.

On August 25, 1988, after an extension of time, the Association filed exceptions. It argues that the Hearing Examiner's conclusions are against the weight of the evidence and that neither secretary has functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process.

On September 16, 1988, after an extension of time, the Board filed an answering brief urging adoption of the Hearing Examiner's recommendations. It argues that both positions are confidential, citing Wayne Tp. v. AFSCME, Council 52, 220 N.J. Super. 340 (App. Div. 1987).

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-11) are generally accurate. We incorporate them with this modification. Substitute secretary Kogler has performed the duties of Tomasulo, Stiner and Roccamo.

N.J.S.A. 34:13A-5.3 guarantees public employees the right to decide whether or not to form, join or assist an employee organization. Confidential status automatically excludes employees from the Act's rights and thus warrants careful review of the facts of each particular case.

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

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

The Legislature rejected a broader definition requiring mere access to confidential materials. Hearings on S-1087 before Senate Conference and Coordinating Committee, at 17, 68-69, 118-119A (5/7/74).

In State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), we explained how we determine 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., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd App. Div. Dkt. No. A-4740--86T7 (2/18/88).

We hold that Eileen Jost is confidential. She regularly works with confidential labor relations material including the Board's personnel agenda and the "pink sheets".

Under the unusual circumstances of this case, we hold that Catherine Tomasulo was not a confidential employee. Tomasulo primarily typed and worked with substitute teachers' files. She never worked for the Board's negotiator or attended negotiations. Nor was she privy to negotiations discussions. She never typed negotiations minutes or memoranda, did not know what a scattergram is, and did not know where negotiations materials were kept in the personnel office. In addition, Tomasulo had no involvement with grievances. Jones testified that all the secretaries may be assigned to work with the "pink sheets," but there is no evidence that Tomasulo ever did. Jones' general statement does not outweigh Tomasulo's specific testimony that indicates she had no confidential duties. We are also not convinced that Koegler's working with the "pink sheets" transforms Tomasulo's position into a confidential one. Koegler is a substitute secretary who has replaced Stiner and Roccamo as well as Tomasulo (TA117-TA124). Both Stiner and Roccamo's positions are confidential. The record does not support a finding that Koegler was doing Tomasulo's job when she was working with confidential materials.^{3/}

This case is unusual in that it involves a vacant position. Tomasulo resigned one month after Jones notified the Association that the two secretaries would be excluded from the

^{3/} Contrast Wayne Tp., finding confidential an employee authorized and expected to assume the full authority of a confidential employee.


unit. Based on this record, particularly the testimony about Tomasulo's duties, we are reluctant to find a future employee confidential. If the Board fills the vacant position and believes the duties have changed sufficiently to warrant a reexamination of its confidential status, it may file a clarification of unit petition.

As for the unfair practice charge, we dismiss the allegations involving Jost. Passaic Cty. Reg. H.S. Dist. No. 1 Bd. of Ed., P.E.R.C. No. 77-19, 3 NJPER 34 (1976). We also dismiss the subsection 5.4(a)(3) allegations for the reasons stated by the Hearing Examiner (pp. 16-18). While the unilateral removal of Tomasulo from the Association's unit violated the Act, she has resigned so we order no affirmative relief.

ORDER

The Morris School District Board of Education violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act by unilaterally removing Catherine Tomasulo from the Education Association of Morris' negotiations unit. All other allegations in the Complaint are dismissed. The Association's unit is clarified to exclude secretary Eileen Jost.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. Commissioners Reid and Bertolino abstained. None opposed.

DATED: Trenton, New Jersey
October 20, 1988
ISSUED: October 21, 1988

H.E. NO. 89-1

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

In the Matter of

MORRIS SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-H-88-43
CU-H-88-5

MORRIS EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Morris School District Board of Education did not violate section 5.4(a) (1), (3) and (5) of the New Jersey Employer-Employee Relations Act when it unilaterally removed two employees working in the personnel office from the collective negotiations unit represented by the Morris Education Association. The Hearing Examiner found that both employees were confidential within the meaning of the Act and, therefore, pursuant to Passaic Co. Reg. H.S. Dist. No. 1 Bd. of Ed., the Board did not commit an unfair practice when it unilaterally removed the employees from the unit.

The Hearing Examiner also found that the Board did not make assignments involving confidential labor relations matters to one of the secretaries at issue here solely for the purpose of establishing a defense to this unfair practice charge.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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Appearances:

For the Respondent

Wiley, Malehorn & Sirota, Esqs.
(Robert Goldsmith, of counsel)

For the Charging Party

Bucceri & Pincus, Esqs.
(Sheldon Pincus, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On July 27, 1988, the Morris Education Association ("Association") filed an Unfair Practice Charge and Clarification of Unit Petition with the Public Employment Relations Commission ("Commission"). The Association alleges that the Morris School District Board of Education ("Board") violated subsections 5.4(a)(1) and (5) and later, by motion, amended its charge to allege a

violation of subsection (a)(3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Association alleged that the Board violated the Act when it unilaterally removed two secretarial positions in the Personnel Department from the collective negotiations unit represented by the Association and returned union dues and representation fees to those secretaries. The Association contends that the Board violated subsection (a)(3) by deliberately assigning one of the secretaries certain job duties solely for the purpose of defending against this charge. The Association filed the unit clarification petition in order to clarify the status of the two secretaries at issue in the unfair practice charge. Moreover, the Association contends that the Board has refused to negotiate with respect to terms and conditions of employment concerning the secretaries at issue.

A Complaint and Notice of Hearing and Order consolidating the unfair practice and unit clarification cases were issued on October 15, 1987. On October 22, 1987, the Board filed an answer generally denying the charge's allegations and relying upon its

^{1/} These subsections 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."

September 10, 1987 statement of position and affirmative defenses. The Board contends that the secretaries are confidential employees within the meaning of the Act and, in any event, are excluded pursuant to express language contained in the parties' collective agreement.

On February 10 and April 6, 1988, I conducted a hearing. The parties examined witnesses and introduced exhibits. The Association and the Board submitted briefs on June 13 and 23, 1988, respectively.

Upon the entire record, I make the following:

FINDINGS OF FACT

The Morris School District Board of Education is a public employer and the Morris Education Association is an employee representative within the meaning of the Act (TA8).^{2/}

In June 1987, the Board's personnel office consisted of the following secretarial positions: Secretary to the Assistant Superintendent of Administration and Supervision (Gail Stiner), Secretary to the Administrative Assistant of Personnel Services (Dolores Roccamo),^{3/} and two secretaries (Catherine Tomasulo and Eileen Jost). Roccamo was personal secretary to Janet Jones, Administrative Assistant of Personnel Services (TA152). Tomasulo and Jost also reported to Jones. Stiner was secretary to Dr.

^{2/} TA8 refers to the transcript dated February 10, 1988, page 8. TB refers to the transcript dated April 6, 1988.

^{3/} Dolores Roccamo died in January 1988 (TA96).

McIver, then the Assistant Superintendent of Administration and Supervision. Employees serving in the titles Secretary to the Assistant Superintendent of Administration and Supervision and Secretary to the Administrative Assistant of Personnel Services are excluded from the unit represented by the Association pursuant to an express provision in the collective agreement (J-1).^{4/}

On June 10, 1987, Janet Jones sent a memorandum (J-2) to James Frendak, Association President, advising him that Tomasulo and Jost were excluded from the unit and that they would be refunded any money deducted from their salaries for dues or representation fees.^{5/}

Catherine Tomasulo began working in the personnel office in December 1985, and resigned in July 1987 (TA35). When Tomasulo was hired, Gail Stiner told her that she (Tomasulo) might be asked to substitute for Stiner or one of the other secretaries (TA51). While on a few occasions Tomasulo substituted for Stiner, she did not know

^{4/} Joint Exhibits are marked "J"; Charging Party's exhibits are marked "CP" and Respondent's Exhibits are marked "R".

^{5/} In addition to Catherine Tomasulo and Eileen Jost, the personnel office is staffed by Alice Koegler and Betsy Nunn. The Board argues that the confidential status of Koegler and Nunn should also be determined in this proceeding. In a June 14, 1988 letter, a copy of which went to the Board, the Association opposed any review of Koegler's and Nunn's status on the basis that the Board has never asserted that they are confidential employees. I note that the unfair practice charge and unit clarification petition filed in this case concern only Tomasulo and Jost. Since it was never made clear at any time prior to or during the hearing that Koegler's and Nunn's status was at issue, the scope of this report will be limited to Tomasulo and Jost.

whether Stiner had access to information regarding grievances, negotiations or budgets (TA51).

Tomasulo's primary duties included typing (TA39) and working with substitute teacher files to ensure that they possessed the proper credentials and completed paperwork necessary for them to work (TA47). Tomasulo examined the personnel files to verify salary and social security numbers for credit checks (TA55). Normally, Tomasulo did not open the mail; Stiner or Roccamo did (TA37). However, in Stiner's absence, Tomasulo would open mail (TA51). When Tomasulo came across an envelope marked "confidential", she would place that envelope on Stiner's desk, unopened (TA38).

Tomasulo knew the Board's professional negotiator, James Rigasso, however she never did any work for him (TA39). Tomasulo never attended any negotiation sessions nor was she privy to discussions regarding negotiations proposals or strategy (TA39, TA44, TA53). While Tomasulo took Jones' dictation, she never typed negotiations minutes or memoranda (TA42). She did not know where negotiations materials were kept in the personnel office (TA43) and she never saw negotiations proposals before they were presented across the table (TA43).

Once when Stiner was absent, Tomasulo spent about one hour conducting a telephone survey of other school districts to gather salary information (TA40, TA56). Tomasulo does not know what a

scattergram is (TA42) and has never "costed-out" a negotiations proposal (TA43).

During her employment, Tomasulo never saw the Board's grievance forms, attended a grievance hearing or typed notes or memoranda regarding the outcome of the grievance procedure (TA45).

Eileen Jost began working for the Board in the personnel office in April 1986 (TA63). From the beginning of her employment, Jost worked closely with Delores Roccamo, Jones' personal secretary (TA93-TA94). Roccamo began receiving therapy for an illness in or about September 1986. The therapy resulted in Roccamo's periodic absence for a day or more. As Roccamo's illness worsened, her absences occurred more frequently and for longer periods. When Roccamo was absent, Jost was assigned her work (TA95). In or about May 1987, Jost began working on the agenda for Board meetings (TA96). In September 1987, Jones told Jost that she would become more involved with the agenda and other matters and in October 1987, when Roccamo's illness prevented her from returning to work, she (Jost) became fully responsible for the agenda (TA96).

In preparation for collective negotiations, Jost has conducted surveys of other boards of education in order to gather data concerning preparation time and the number of day and evening meetings held (TA69). Once she worked directly with a Board member on a telephone survey to collect information regarding raises and durations of agreements (TA71). After gathering and typing the

data, Jost had no further involvement in terms of the application of the information (TA72).

Jost typed the longevity clause for Mr. Rigasso, the Board's negotiator. The clause was typed before the contract was concluded and reflected changes from the clause in the predecessor agreement (TA68, TA73). Jost also typed two Memoranda of Agreement reached at the conclusion of negotiations (TB64). The first Memorandum was basically reflective of the language agreed to at the negotiations table (TB64). Jost did not type the first Memorandum until after the parties reviewed and agreed to its contents. The second Memorandum reflected only minor modifications in wording, grammar and/or punctuation (TB64). Jost never attended a negotiations session (TA67) or any meeting at which negotiations were discussed (TA79).

While it was Roccamo's responsibility to open Jones' mail, in her absence, Jost performed that function (TA64). Jost gave envelopes marked "confidential" to Jones, unopened (TA65).

Jost never prepared a scattergram, a proposed salary guide or calculated the cost of an Association demand (TA74). On one brief occasion, Jost assisted Stiner with salary calculations, however, she did not know to what they related (TA75).

Jost recognized but never typed grievance forms. She has never attended a grievance hearing or typed notes pertaining to a grievance (TA80). In performing what was part of Roccamo's job, Jost is now responsible for checking a "recall" file which shows the

date by which a grievance file must be reviewed by management. In order to ensure the retrieval of the correct grievance file, Jost looks inside the file "...to see what it is about..." (TA81). Jost is not required to conduct a full review of the file (TA81).

Jones maintains a three-ring binder containing all of her negotiations materials. On one occasion during the fall 1987, Jones showed Jost information contained in the binder (TA78).

Jost knows where the files containing information referring to grievances and negotiations are maintained and, when required by the task assigned, has worked with such files. Jost knows these files to contain confidential information (TA84-TA85).

One of Jost's primary responsibilities is to maintain the agenda relating to personnel matters for presentation to members of the Board. The agenda shows all of the proposed personnel actions going before the Board that month. Such actions include hearings, terminations, leaves of absence requests and retirements (TA83). Also included in the agenda packet are "pick sheets" (TB47-TB48). All matters of a sensitive and private nature are provided to the Board members on pick sheets. For example, letters with negative implications sent to the Board from a citizen, or sanctions brought against an employee by the Board are placed on pink sheets (TB56). Also, minutes of the closed Board sessions and discussions concerning negotiations strategy and status are placed on pink sheets (TB5-TB6, TB50).

After the Board meeting, Jones will review the pink sheets in order to follow-up on actions taken by the Board. Jones has worked with Jost, and provided her with background information so that Jost will fully understand Jones' instructions concerning the implementation of the Board's directions on a particular matter (TB59). Jones, Stiner and Jost have their own copies of the agenda, including pink sheets (TB47, TB59). Jost routinely works with the pink sheets (TB48).

All of the secretaries have access to the pink sheets and may be assigned to work with them (TB6-TB7, TB29). For example, Roccamo has worked on pink sheets with Jost and Koegler (TB58). All secretaries have worked with pink sheets after a Board meeting to obtain salary information (TB60).

Prior to her assignment in the personnel office, Alice Koegler worked for the Board as a substitute secretary. She started in the personnel office on a continuous basis in August 1987 (TA103). Her responsibilities included assisting Stiner and Roccamo, logging and filing recruitment applications and coordinating substitutes (TA105).

Koegler recognized grievance forms and knew where they were kept but has had no other involvement with the grievance process (TA106-TA107). She has opened the mail but has never opened mail marked "confidential" (TA107, TA120). Koegler has never typed anything for Mr. Rigasso nor has she attended negotiations sessions (TA108). She has assisted Stiner with a telephone survey concerning

salaries. After completing the survey, Koegler gave Stiner the information and had no further involvement in that assignment (TA108-TA110). Koegler has adjusted a salary guide by a given percentage and typed the adjusted guide. She does not know whether this assignment was given to her before or after an agreement on salaries had been reached (TA110-TA111). Koegler knows where negotiations information and grievances are kept, but she never examined those files (TA112, TA116-TA117). Koegler was never privy to any discussions concerning negotiations strategy or proposals (TA112-TA113). She has access to staff personnel files and has filed staff evaluations (TA117). As Roccamo's health deteriorated, Koegler was called upon to perform certain tasks which Roccamo previously handled (TA117).

Betsy Nunn began working in the personnel office in November 1987 as a substitute secretary (TA125). Once, Nunn opened the mail. Pursuant to Stiner's instructions, she placed mail marked "confidential" on Stiner's desk (TA127-TA128). She has not dealt with negotiations materials or typed negotiations minutes or proposals and does not know the Board's negotiator (TA128, TA132-TA133). Once, Nunn was asked to file grievance forms, but she didn't reivew their content (TA128-TA129). Nunn never attended a grievance hearing (TA131).

Nunn's primary responsibilities include maintaining the records pertaining to the use of professional days and responding to employment verification inquiries (TA131). While Nunn has occasion

to examine all staff personnel records, it is normally for the purpose of filing material, or obtaining the employee's salary or social security number for verification purposes (TA135).

On an organization chart, Roccamo's and Tomasulo's positions would appear as vacancies, filled only by temporary staff (TB144). In effect, however, Jost has picked up Roccamo's job and Koegler is performing Tomasulo's work (TA99, TB46).

Janet Jones has held the position of Administrative Assistant for Personnel Services for approximately 3 1/2 years (TA147). Jones serves on the Board's negotiations team, hears grievances at the Superintendent's level, implements and administers the collective agreement, conducts research in preparation for negotiations and assists in developing negotiations strategy (R-1; TA147-TA150). Jones reviews and analyzes staff evaluations and assists the Assistant Superintendent in determining whether further action should be taken concerning an evaluation (TA152).

Jones was responsible for supervising the maintenance of the personnel files (TA151). Personnel files are found along two walls of the personnel office (R-2). The files are unlocked each morning and re-locked at around 4 p.m. (TA157). All of the secretaries have access to the personnel files, including files containing negotiations and grievance materials (TA157-TA158, TB7).

ANALYSIS

N.J.S.A. 34:13A-5.3 states in relevant part:

Except as hereinafter provided, public employees shall have, and shall be protected in the

exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to elected officials, members of boards and commissions, managerial executives, or confidential employees....

N.J.S.A. 34:13A-3(d) provides the following:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer unless this Act explicitly states otherwise.... This term shall include any public employee, i.e., any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, members of boards and commissions, managerial executives and confidential employees.

N.J.S.A. 34:13A-3(g) defines a confidential employee of a public employer as an employee

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

In Wayne Tp., H.O. No. 86-8, 12 NJPER 568 (¶17215 1986), adopted in part, mod. in part P.E.R.C. No. 87-82, 13 NJPER 77 (¶18035 1986), rev'd. on other grounds 220 N.J. Super 340 (App. Div. 1987), the Hearing Officer said:

Within the concept of confidentiality, the balance of two somewhat competing goals must be achieved. The employer has the right to confidentiality in collective negotiations in order to ensure the stable, good faith negotiations that the Act was designed to promote. On the other hand is the Act's goal of providing representational rights to public employees. The Act looks to the work an employee does and the knowledge of labor relations issues

the employee has as the basis to a determination of confidentiality. In recognition of this latter goal, the Commission has a well-established policy of strictly construing the term confidential employee. In re Brookdale Community College, D.R. No. 78-20, 4 NJPER 32 (¶4018 1977) adopting H.O. No. 77-7, 3 NJPER 108 (1977); In re State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), mot. to reopen den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985). "This policy is consistent with the Supreme Court's declaration that the Act's public policy favors the organization of all employees desiring collective negotiations; the burden must therefore be on the party seeking to place an employee outside the Acts' protection. State v. Professional Assn. of New Jersey Dept. of Ed., 64 N.J. 231, 253 (1974). See also N.J. Const. Art. 1, ¶ 19." In re State of New Jersey, 11 NJPER at 510.

Wayne Tp., 12 NJPER at 571.

In State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), the Commission set forth the approach to resolving disputes regarding confidential employees. It said:

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.]

Applying the above definitions and cited case law, I find Eileen Jost to be a confidential employee. One of Jost's primary responsibilities is to maintain the personnel agenda for presentation to the Board. The agenda shows all personnel actions awaiting Board action.

Jost also works with the "pink sheets." She is provided with her own set. The minutes from closed Board sessions which pertain to discussions of negotiations strategy and status are shown on pink sheets. Jost and Jones review the pink sheets so that follow-up action can be taken by the personnel office. So that Jost will understand the nature of the follow-up action, Jones provides Jost with background information concerning the particular matter. Jost also knows where the files containing confidential labor relations materials are kept and has been assigned to work with and have knowledge of such information.

While Jost has not officially been placed into Roccamo's position, the evidence shows that she is effectively doing Roccamo's work. The parties have agreed in the contract that Roccamo's position is confidential. Accordingly, I find that Jost's functional responsibilities and knowledge in connection with the issues involved in the collective negotiations process make her membership in the negotiations unit incompatible with her official duties.

The confidential status of Tomasulo's position presents a closer case. Tomasulo's testimony established that her primary duties were typing and working with staff personnel files. There is no evidence that she typed anything involving confidential labor relations information. It is well established that mere access to personnel files does not make an employee confidential. Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd.

App. Div. No. A-4740-86T7 (2/18/88); West Milford Bd. of Ed., P.E.R.C. No. 56 (1971). Further, knowledge of raw data, even if collected for use in negotiations, will not deem the employee confidential. See State of New Jersey, supra.

However, Jones gave uncontroverted testimony that Tomasulo, along with all of the other secretaries in the personnel office, had access to the pink sheets and received assignments requiring them to work with the pink sheets. While Tomasulo was never asked whether she worked with pink sheets, Koegler, the substitute secretary effectively performing Tomasulo's job now, has worked with pink sheets under Roccamo's direction. Accordingly, since the employee holding Tomasulo's position must work with the pink sheets, I find Tomasulo's position to be confidential and properly excluded from the unit.

In Passaic Cty. Reg. H.S. Dist. No. 1 Bd. of Ed., P.E.R.C. No. 77-19, 3 NJPER 34 (1976), the Commission encouraged employers seeking determinations regarding the confidential status of employees to file unit clarification petitions rather than unilaterally removing such employees from the unit. The Commission regarded "...the filing of a Petition for Clarification of Unit as the most appropriate method of resolving disputes as to unit placement and as the method best suited to the promotion of stable and harmonious employer-employee relations in the public sector." Id. at 35. The Commission reasoned that "[i]f the matter is resolved by means of a unit clarification proceeding...as opposed to

an unfair practice proceeding, the possibility of an adverse decision in an unfair practice proceeding would be precluded and the dispute would be resolved in the context of a non-adversarial representation proceeding." Id.

The Commission also found in Passaic Cty. Reg. that an employer can unilaterally remove an employee from the unit, provided such employee is, in fact, a confidential employee within the meaning of the Act. However, the Commission warned that in unilaterally removing an employee, the employer acts as its peril. If after review it is determined that the employer's action was not appropriate, even an employer's good faith belief that such employee is confidential will not serve as a defense to an unfair practice charge. Id.

The Board unilaterally removed Tomasulo and Jost from the unit on the grounds that they are confidential employees. I have found both employees to be confidential employees. Accordingly, pursuant to Passaic Cty. Reg., I find that the Association's allegation that the Board violated subsections 5.4(a)(1) and (5) by unilaterally removing the employees from the unit should be dismissed.

During the hearing, I granted the Association's motion to amend its unfair practice charge to include an allegation that the Board modified Eileen Jost's job duties after the filing of the charge solely for the purpose of establishing its defense. The Association contends that the Board's action constitutes a violation

of section 5.4(a)(3) of the Act. The Commission has held that an unfair practice charge is the proper forum in which to question whether the employer has intentionally distributed confidential work to an employee in order to exclude that employee from an otherwise appropriate unit. See River Dell Reg. Bd. of Ed., P.E.R.C. No. 84-95, 10 NJPER 148 (¶15073 1984); Scotch Plains Tp., D.R. No. 84-11, 9 NJPER 632 (¶14270 1983).

From the beginning of Jost's employment in April 1986, she worked closely with Roccamo. The parties mutually recognized that Roccamo was working with confidential labor relations materials and expressly excluded her from the unit in their agreement. When Roccamo began receiving therapy for her illness in September 1986, Jost was assigned to fill-in during her absences. As Roccamo's illness worsened and her absence lengthened, Jost was assigned more of Roccamo's work. In May 1987, two months before this charge was filed, Jost began working on the agenda for Board meetings.

Roccamo's work was also distributed to secretaries other than Jost. Alice Koegler testified that because of Roccamo's illness she was also required to perform certain tasks which she was not normally assigned.

Accordingly, the evidence establishes that the Board began assigning Roccamo's work to Jost, and others, long before this charge was filed. The Board's decision to assign the bulk of Roccamo's work to Jost, the secretary who served as Roccamo's assistant, was operationally logical. The evidence does not show

that when the Board assigned Jost portions of Roccamo's work or other tasks involving confidential labor relations information, such assignments were the result of any illegal motivation. Consequently, I find no violation of section 5.4(a)(3) and recommend this count of the unfair practice charge be dismissed.

Accordingly, based upon the entire record and the analysis set forth above, I make the following:

CONCLUSIONS OF LAW

(1) Catherine Tomasulo and Eileen Jost are confidential employees within the meaning of the New Jersey Employer-Employee Relations Act.


(2) The Morris School District Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally removed Catherine Tomasulo and Eileen Jost from the collective negotiations unit represented by the Morris Education Association on the grounds that they are confidential employees within the meaning of the Act.

(3) The Morris School District Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(3) by assigning Eileen Jost job duties which exposed her to confidential labor relations matters. Such duties were not assigned primarily for the purpose of establishing a defense to this charge.

RECOMMENDED ORDER

I recommend that the Commission ORDER that the complaint

issued in this matter and the Petition for Unit Clarification be dismissed.^{6/}


Stuart Reichman, Hearing Examiner

DATED: July 22, 1988
Trenton, New Jersey

^{6/} The Association's Unit Clarification Petition seeks to clarify the unit to include Jost's and Tomasulo's positions. Since I have found Jost and Tomasulo to be confidential employees and the Board has already removed those positions from the unit, an order clarifying the unit to exclude Jost and Tomasulo from the unit is now unnecessary.