

D.R. NO. 2001-11

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

In the Matter of

TOWNSHIP OF HOWELL,

Public Employer,

-and-

Docket No. CU-2000-28

TWUA LOCAL 225 BRANCH 4,

Employee Organization.

SYNOPSIS

The Director of Representation grants Howell Township's petition for clarification of unit which seeks to remove the secretary to the township manager and the administrative assistant from a unit of Township employees represented by TWUA. The Township asserts that both positions are confidential within the meaning of the Act. The Director finds that each position requires performance of job duties and knowledge of issues involved in the collective negotiations process. While the Director recognizes that the duties of the secretary to the township manager do not constitute a significant involvement in personnel/labor issues, they do involve more than mere access to confidential labor materials. Therefore, the Director finds that the continued inclusion of either position in the negotiations unit would compromise the confidentiality of the Township's collective negotiations process. Both positions are ordered immediately excluded.

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Appearances:

For the Public Employer
Ruderman & Glickman, attorneys
(Joel G. Scharff, of counsel)

For the Employee Organization
Brodie & Rubinsky, attorneys
(Michael Brodie, of counsel)

DECISION

On January 19, 2000, the Township of Howell (Township) filed a petition for clarification of unit seeking to remove the administrative assistant and the secretary to the township manager from the collective negotiations unit represented by the Transport Workers Union of America, AFL-CIO, Local 225, Branch 4 (TWU). The unit of approximately 180 employees includes white collar, secretarial, clerical and police dispatcher employees. TWU had a collective agreement covering the unit for the period January 1, 1998 through December 31, 2000.

The Township asserts that both positions are confidential within the meaning of the New Jersey Employer-Employee Relations

Act, N.J.S.A. 34:13A-1 et seq. (Act) and, therefore, should be excluded from the unit.

TWU objects to the petition. It asserts that neither employee has access to confidential labor relations materials; neither has knowledge of the significance of any labor relations materials they arguably might handle; and neither has functional responsibility for labor relations matters. Thus, the TWU argues that the duties performed by employees in these two positions do not meet the Act's definition of "confidential" duties.

We have conducted an administrative investigation into the instant matter. N.J.A.C. 19:11-2.2 and 2.6. On February 16 and March 23, 2000, the parties participated in an investigatory conference and presented facts and documentary evidence concerning the duties performed by these two employees. By letter dated March 16, 2001, I summarized the parties' positions and accompanying evidence and advised the parties of my intention to grant the Township's petition on the grounds that the positions of administrative assistant and secretary to the manager are confidential positions. I provided the parties an opportunity to respond and to forward additional materials. Neither party has responded or submitted supplemental material. As a result of our administrative investigation, I make the following:

FINDINGS OF FACTAdministrative Assistant

The administrative assistant is Frances Schneider. She was formally promoted to this position in early 1999, but had been performing the duties of the position since December 1998. Prior to becoming the administrative assistant, Schneider was a clerk typist.

Schneider's work station is part of a three-office suite where the human resources director and the township manager are also located. Schneider's desk is in the middle office outside the township manager's office, along with Assistant to the Township Manager Gail Guttman, an undisputed confidential employee. Human Resources Director Kathy Fenton and additional clerical employees are located in the front office of the suite. The doors between the first two offices are generally kept open and the door to the township manager's office is frequently open. There is a central phone system and a central facsimile machine located in the suite. The Township provided a job description for the administrative assistant to the township manager, which lists the relevant duties of the position as follows:

GENERAL STATEMENT OF DUTIES

Assists head of a major department by performing a variety of frequently complex administrative tasks requiring the exercise of independent judgment and handling significant problems. Works under the direction of a department head who assigns work and reviews for effective completion.

ILLUSTRATIVE EXAMPLES OF WORK

Conducts assigned special investigations as directed; collects and analyzes data needed as a basis for administrative decisions; assists in collecting and analyzing data for annual budget preparation.

Assists in preparing required statistics and reports on department activities.

Maintains Confidential Employee Personnel Files.

Maintains confidential negotiations, grievance and labor relations files.

Prepares Township Manager's negotiation proposals and grievance replies, and transmits confidential labor related material to elected officials, department heads and labor counsel.

May directly supervise all or designated phases of maintaining financial and/or personnel records and compile related statistical and other data;

Establishes and maintains records and files, prepares appointment schedules, collects and records payments, order supplies, processes personnel records, and performs other office functions.

The job description also lists the following relevant qualifications for the position:

KNOWLEDGES, SKILLS AND ABILITIES

Wide knowledge of Township policies and procedures, and of the internal organization and established policies, procedures and regulations relative to the work of the department.

Ability to prepare and supervise the preparation of statistical and other reports containing findings, conclusions, and recommendations.

Ability to supervise the establishment and maintenance of records and files.

Schneider reports directly to the township manager. In the absence of the manager, she reports to the chief financial officer. She routinely receives, opens and scans all mail addressed to the manager except mail stamped "do not open." Among the mail she handles is correspondence to the manager from the mayor and council,

the chief financial officer, the department heads, and the township's labor counsel. She also takes telephone messages for the manager, noting who called, when, and the purpose of the call. These calls have included calls from labor counsel regarding employee discipline and negotiations items. It is unusual for mail or calls for the manager not to go through Schneider.

Schneider has typed township proposals on an employee buy-back of health insurance plan and double coverage reimbursement. She has typed first drafts of the manager's proposals for collective negotiations between the Township and the blue-collar negotiations unit represented by the Teamsters. She also has typed the Township's counter-proposal to the Teamsters' contract proposal during the last negotiations, where the issues included, for example, changes in bereavement time, benefits and educational stipends.

She is aware of proposed disciplinary actions and schedules disciplinary meetings among department heads, the subject employee and the manager. In some instances she is aware of the proposed disciplinary action before the involved employee or the employee representative is informed. On at least one recent occasion, she was aware of a Township request for a psychological evaluation of a unit employee who was about to be disciplined, and she typed one of the drafts of the disciplinary notice prior to the employee's or TWU's knowledge of the discipline. She has also faxed proposed discipline notices to the township's labor counsel for review. From

time to time, department heads discuss personnel/labor relations issues with regard to specific employees in her presence, particularly when they are waiting to see the manager on the same issues. Finally, with regard to disciplinary matters, Schneider has received and faxed data on discipline/employee records to and from the manager and the department heads and the labor counsel. She is also aware of discipline matters which are discussed by department heads or the manager with the human resources manager. As a result of her work location, Schneider overhears telephone calls between the human resources manager and other parties concerning employee discipline.

Schneider apparently does not attend disciplinary conferences, nor has she been involved in negotiations sessions or executive sessions of the township council. Schneider has prepared data for the township budget and presented it to the township manager.

Finally, Schneider has access to employees' files and has frequently pulled files or placed material in those files, some of which involved disciplinary matters.

Secretary to the Township Manager

The secretary to the manager position is currently held by Maria Hesselbarth. She has held that position since approximately December 1, 1999. Her work station is located in the front office of the township manager's suite described earlier. Hesselbarth also reports directly to the township manager.

The job description for the secretary to the manager lists the duties of the position as follows:

General Statement of Duties: Performs secretarial and general clerical work for the Township Manager which follows well established procedures; does related work as required.

Distinguishing Features of the Class: Work is performed in accordance with a prescribed routine. This employee is required to take dictation at a working rate of speed in conjunction with the performance of varied clerical tasks. Detailed instructions are given at the beginning of work and on subsequent new assignments; however, after employee becomes familiar with policies and procedures, they are expected to work with some independence. Work involving more varied tasks is given more supervision than that which is repetitive in nature. Work is normally reviewed and verified upon completion.

Examples of Work: (Illustrative Only)

Takes and transcribes dictation of letter, memoranda, reports and other materials;

Types letters, memoranda, reports, statistical charts, forms, questionnaires, and other materials from clerk copy and rough drafts, and cuts stencils as necessary;

Assists the Administrative Assistant in the typing of labor negotiations, proposals and grievance replies;

Assists in maintaining personnel, labor relations and grievance files;

Copies labor sensitive materials and assists telephonic and facsimile contacts between labor counsel, Township Manager and Human Resources Administrator;

Acts as receptionist by answering written and oral requests and inquiries for routine information;

Receives telephone and personal callers and routes them to the proper employees;

May serve as switchboard operator for limited periods;

Keeps routine records of financial, statistical or accounting information and prepares standard reports from such records;

Receives and distributes incoming and outgoing mail;

Sorts and files correspondence and other material alphabetically or by other predetermined classification;

Answers telephones and relays messages;

Assists in processing vouchers and accounts payable;

Researches needed information;

Operates varied types of office equipment.

Twice daily Hesselbarth picks up the township mail and delivers it, unopened, to the township manager's office or the mayor's office as appropriate. She does open interoffice correspondence for the human resources manager which includes such items as time sheets and vacation schedules. This correspondence does not include negotiations proposals, grievances or disciplinary memoranda. Additionally, Hesselbarth is responsible for copying internal and external correspondence and filing it appropriately. If she receives any correspondence or memorandum concerning discipline she gives it to Schneider or Guttman, the confidential assistant to the township manager. Unlocked employee personnel files are located in her office area, but she does not normally go into those files.

In addition, Hesselbarth is responsible for typing responses to public requests for meetings, scheduling meetings between members of the public and the manager, and internal/departmental meetings with the manager. She faxes meeting notices and memoranda to other township departments, infrequently types memoranda for the manager, and does various other typing and projects assigned to her by Schneider and/or Guttman. She has not been assigned research projects in preparation for negotiations. Hesselbarth states that she has done nothing in her position involving negotiations proposals, and if she handles any grievance/disciplinary correspondence she believes that it has already been received by the involved employee. Hesselbarth contends that she has not actually typed memoranda dealing with other employees. However, the township presented one typed recommendation for a demotion of a unit employee made by the public works director to the manager dated February 1, 2000. This was prior to the employee learning of the proposed discipline. The document shows that Hesselbarth typed it. The "Preliminary Notice of Disciplinary Action" is attached to the recommendation and also dated February 1, 2000. There were no other similar instances presented.

As to Hesselbarth's handling of negotiations proposals, in the Township's recent negotiations with the Teamsters' unit, an initial draft of township proposals with changes made by the manager and noted on the proposal was typed. The Township asserts that

Schneider assigned Hesselbarth to type at least part of the draft prior to it being provided to the Teamsters. The draft itself was not presented in this matter. No other evidence of Hesselbarth's responsibility for typing or handling of discipline notices or negotiations matters was presented.

Hesselbarth's duties also include the preparation of packets for Council's regular meetings. This involves copying and assembling materials, including budget materials. Hesselbarth also took notes at a Council meeting concerning the pending budget in December 1999.

Finally, Hesselbarth occasionally answers the telephones including calls for the manager from labor counsel and directs calls appropriately or takes messages.

ANALYSIS

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. 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., H.O. No. 87-19, 13 NJPER 473 (¶18175 1987), adopted, P.E.R.C. 88-108, 14 NJPER 339 (¶19128 1988); Brookdale Comm. College, D.R. No. 78-20, 4 NJPER 32 (¶4018 1977).

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.]

See River Dell Reg. Bd. of Ed., D.R. No. 83-21, 9 NJPER 180 (¶14084 1983), req. for rev. den. P.E.R.C. No. 84-95, 10 NJPER 148 (¶15073 1984).

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 (Div. of State Police), D.R. No. 84-9, 9 NJPER 613 (¶14262 1983).

Employees in clerical 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 Comm. Coll., P.E.R.C. No. 88-71, 14 NJPER 136 (¶19054 1988); River Dell. An employee who performs such tasks will be determined to be confidential within the meaning of the Act.

Access to negotiations and grievance documents through typing and photocopying them and maintaining files containing them may indicate confidential status. See Sayreville Bd. of Ed., P.E.R.C. No. 88-109, 14 NJPER 341 (¶19129 1988), aff'd NJPER Supp.2d 207 (¶182 App. Div. 1989); Montague Bd. of Ed., P.E.R.C. No. 87-36, 12 NJPER 773 (¶17294 1986); Mt. Olive Tp., P.E.R.C. No. 85-113, 11 NJPER 311 (¶16112 1985); River Dell. However, mere access to materials contained in personnel files, even if confidential in nature, is insufficient to warrant a finding of confidential status. Thus, in New Jersey 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 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, 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.]

Applying the standards to the facts in this matter, I find that the administrative assistant assigned to the township manager is a confidential employee. Many of Schneider's duties give her access to and knowledge of confidential labor relations matters which could compromise the Township's position in negotiations.

For example, she regularly opens and reads the manager's mail, including correspondence from department heads which has involved proposed disciplinary action against an employee. Schneider thus has advance knowledge of such discipline. She has typed township negotiations proposals and responses to union negotiations proposals and, therefore, has advance knowledge of the Township's negotiations positions.

She has learned of the manager's personnel decisions before they have been presented to the affected employee or the negotiations representative. Also, department heads have discussed personnel issues in her presence. Finally, she has prepared and faxed proposed disciplinary notices from the manager to the township's labor counsel for his review. These types of duties have been found to establish that an employee is confidential within the meaning of the Act. See W. Milford; Salem Comm. Coll; River Dell; Sayreville.

Based upon all of the foregoing, if Schneider were to remain in the TWU unit, the Township's ability to maintain confidentiality with regard to the collective negotiations process would be compromised. Therefore, I find that the administrative assistant to the township manager, Frances Schneider, is a confidential employee within the meaning of the Act. In light of this determination, she is excluded from the existing unit immediately,^{1/} as her functional responsibilities and knowledge of issues involved in the collective negotiations process make her continued membership in the negotiations unit incompatible with her official duties.

With regard to Maria Hesselbarth, while her routine duties appear to be largely clerical and not confidential, she has been exposed to information related to grievance situations and to negotiations proposals. She shares an office suite with other confidential employees including the human resources director and the assistant to the manager, which in part has led to her exposure to confidential information related to the negotiations process and, thus, may be found to support a finding of confidential status. See Salem; River Dell; Mt. Olive. Hesselbarth has a close working relationship with Schneider, who has assigned her tasks including typing of draft negotiations proposals and proposal changes made by the manager in response to negotiations demands. These assignments

^{1/} Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977).

establish confidential status. See Cliffside Park; Orange Bd. of Ed., D.R. No. 78-28, 4 NJPER 1 (¶4001 1977). Also, when Hesselbarth receives correspondence which concerns discipline of an employee she forwards it to Schneider or Guttman. While she does not respond to the correspondence on her own initiative, she does see it and is aware that the topic concerns a labor relations issue. Moreover, exposure to the collective negotiations process does not have to be a regular or continuous pattern to be considered confidential under the Act. See Cliffside Park; Tp. of Dover, D.R. No. 79-19, 5 NJPER 61, 62 (¶10040 1979).

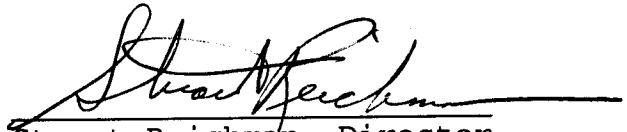
While Hesselbarth's involvement with personnel/labor issues has not been shown to constitute a significant portion of her duties, she has more than mere access to confidential labor materials. Hesselbarth's functional responsibilities include typing proposed employee discipline recommendations, collective negotiations proposals and responses prior to the employee's or collective negotiations representative's knowledge of the matter. She has a close working relationship with Schneider and Guttman which is likely to continue to expose her to confidential labor materials. She handles communications between the manager and township labor counsel dealing with disciplinary matters. The totality of these circumstances creates a situation where Hesselbarth's continued inclusion in the unit will compromise the Township's ability to maintain confidentiality with regard to the negotiations process and is incompatible with her official duties.

Based upon all of the foregoing, I find that Hesselbarth, as secretary to the township manager, is a confidential employee within the meaning of the Act and must be removed from the collective negotiations unit currently represented by the TWU, effective immediately.

ORDER

The Township's petition is granted. The administrative assistant and the secretary to the township manager are removed from the TWU white collar negotiations unit immediately.^{2/}

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Stuart Reichman, Director

DATED: March 29, 2001
Trenton, New Jersey

^{2/} As noted in the decision, Hesselbarth's routine duties for the most part are not confidential within the meaning of the Act. Should Hesselbarth's occasional confidential duties cease, the majority representative may file a new clarification of unit petition seeking a reexamination of her status based upon changed circumstances.