

D.R. NO. 99-8

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

In the Matter of

BOROUGH OF BERLIN,

Public Employer/Petitioner,

-and-

Docket No. CU-98-48

AFSCME COUNCIL 71, AFL-CIO,

Employee Representative.

**SYNOPSIS**

The Director of Representation clarifies a unit of municipal employees to exclude the deputy borough clerk, effective immediately. The deputy borough clerk frequently substitutes for the borough clerk, taking minutes at open and closed Council sessions and budget meetings in which labor matters are discussed. She also types negotiations proposals and memoranda concerning negotiations strategies. She serves as secretary to the Mayor, Council and borough administrator. Based upon these duties, the Director finds that the deputy borough clerk is a confidential employee.

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Appearances:

For the Public Employer  
Higgins, Long & Bonfiglio, attorneys  
(Howard Long, Jr., of counsel)

For the Employee Representative  
John Hemmy, Associate Director

**DECISION**

On May 26, 1998, the Borough of Berlin filed a Clarification of Unit Petition with the Public Employment Relations Commission seeking to exclude the title of deputy borough clerk from a unit of all full-time and part-time white collar employees and service workers of the Borough. AFSCME Council 71, AFL-CIO represents the unit.

The Borough seeks to exclude the deputy borough clerk on the basis that the person serving in that title is a confidential employee within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). Council 71 opposes the petition, claiming that the employee does not handle

confidential matters, nor does she have access to confidential materials.

We have conducted an administrative investigation into the instant matter. N.J.A.C. 19:11-2.2. The parties participated in an investigatory conference and were invited to submit affidavits and documentary evidence in support of their respective positions. The Borough submitted affidavits from Borough Administrator Robert Glass and Borough Clerk Barbara Gilbert. By letter dated November 9, 1998, we summarized the parties' positions and the evidence submitted, and advised the parties that, absent additional facts, we intended to find that the deputy borough clerk is confidential. No additional submissions were filed. Accordingly, our investigation has revealed the following facts.

On February 24, 1998, Council 71 was certified as the exclusive representative of the employee unit previously described. Prior to the February 13, 1998 representation election, the Borough raised the issue of the confidential duties performed by Deputy Borough Clerk Charlene Steere, and, at the election, the Borough challenged Steere's ballot on the basis of such alleged confidential status. The election results were not affected by the challenged ballot.

Borough Administrator Robert Glass directs and supervises all Borough departments and officers. He is involved in collective negotiations with all Borough negotiations units and is responsible for the initiation and enforcement of employee discipline.

Over the years, at Glass' direction, Steere has performed tasks directly related to negotiations and discipline. In his affidavit, Glass affirms that he has frequently and consistently assigned Steere to prepare and type drafts and confidential memoranda to Borough Council, the borough solicitor and the Borough's negotiations representative. These memoranda have included outlines of contract negotiation options and proposals for various negotiations units. Specifically, Steere prepared a December 12, 1995 initial draft response to the PBA's negotiations proposals, which constituted a working document for the Borough Council. The response contained the Borough's position and comments on proposals made by that Association. Glass asserts that he recently directed Steere to type a memorandum concerning the public works employees. The memorandum listed items to be proposed in negotiations, but which had not yet been provided to the union. The memorandum also outlined the Borough's negotiations strategy.

Steere also typed internal working documents and responses to union negotiations proposals for use by Borough officials. In 1992, Steere participated as recording secretary for the Borough during a negotiating session involving the Borough and the Teamsters, which then represented the public works employees.

Steere has also typed disciplinary letters to affected employees. Glass provided 27 examples of such letters extending from October 1993 to March 1998. In some of the cases, Steere was aware of the personnel actions before the Borough Council.

Steere substitutes for Borough Clerk Barbara Gilbert whenever she is absent. In that capacity, Gilbert affirms in her affidavit that Steere attends both public and closed executive sessions of the Borough Council and is responsible for recording the minutes of those sessions.

Gilbert provided 28 instances, since her employment began in 1980, when she was absent either from caucus, council and/or budget meetings. Gilbert asserts that during these absences Steere attended in her place, as needed, including at closed executive sessions. Additionally, Gilbert was absent from work for six weeks in early 1990. During that period, Steere performed her regular duties as deputy borough clerk and attended several caucus/council sessions and weekly and Saturday budget sessions. During these sessions, salary issues and negotiating strategies were discussed regarding existing negotiating units.

The official minutes of all Council sessions include a tape recording which Steere has access to and from which typed minutes are prepared by Steere. Steere also has access to tapes of the closed executive sessions.

On June 15, 1998, Steere attended a Council session, due to Gilbert's absence, and recorded the minutes of the public session. A determination was made to forego a closed session because Steere would have had to record the minutes, and the topic of that session was to be an update to Council on the contract proposal received from Council 71. On one occasion after Council 71's certification

as the negotiations representative, Steere listened to tapes of a Borough Council meeting and asked Gilbert whether her position with the Union had been discussed when Council went into executive session.

Neither Glass, Gilbert, the Mayor, nor the Borough Council has private, confidential secretaries. Steere presently serves in that capacity since she is considered by the Borough to be the only non-union employee, beside Glass and Gilbert, who is able to perform clerical duties.

Council 71 disputes the assertions by Glass and Gilbert as to the frequency and consistency with which she attends Borough Council meetings and types disciplinary letters. According to Council 71, during her employment, Steere sat in on Council meetings four to five times and whenever Council went into closed session she was asked to leave. During that time, Steere worked on four to five discipline cases, but claims she has not typed any negotiations proposals in the past two years. Council 71 also disputes that Steere typed proposals for the 1997 public works negotiations. Steere admits typing proposals three years ago during the Borough's negotiations with the police unit. Council 71 submitted no affidavits in support of its claims.

#### ANALYSIS

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

employees 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 applying this test, the Commission has used the approach outlined in 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):

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

In New Jersey Turnpike Authority v. American Federation of State, County and Municipal Employees, 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. [Id. at 358.]

Based on the above, I find that the deputy borough clerk, Charlene Steere, is a confidential employee within the meaning of the Act. Pursuant to statute, Steere acts in the capacity of the borough clerk when the borough clerk is absent. See, Wayne Tp. v. AFSCME Council 52, 220 N.J. Super. 340 (App. Div. 1987). As the Wayne Tp. Court explained:

We have no doubt that the Deputy Clerk's functional responsibilities and knowledge touching upon collective negotiations issues make membership in the bargaining unit with which petitioner negotiates incompatible with his or her official duties. Setting aside all else, PERC's finding that the Clerk is a confidential employee and that the Deputy Clerk may on occasion assume his "full authority" is enough to command this result. [Id. at 345-346.]

See also, Borough of Ringwood, D.R. No. 93-19, 19 NJPER 196 (¶24093 1993).

The Borough provided twenty-eight instances over the past eight years, when the Borough clerk was absent from caucus, Council and budget meetings and during these meetings, the deputy borough clerk attended in her place. Moreover, at a June 15, 1998 Council session attended by Steere in Gilbert's absence, the Borough was



forced to make a determination to forego a closed session because Steere would have had to record the minutes, and the topic of that session was to be an update to Council on the contract proposals from Council 71. Steere has access to disciplinary determinations before they are made public. She has typed negotiations proposals and has access to tape recordings of Council and executive sessions from which typed minutes are prepared. Steere serves as secretary to the Mayor, Council and borough administrator. Thus, under these circumstances, and notwithstanding Council 71's claims that Steere did not attend executive sessions or type proposals for the 1997 public works negotiations, I conclude that Steere's membership in the bargaining unit is incompatible with her official duties as the deputy borough clerk and with the various uncontested elements of the work which she performs. Wayne Tp.; Ringwood.

Based on the above, the deputy borough clerk is excluded from the existing unit immediately,<sup>1/</sup> as her functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make her membership in the negotiations unit incompatible with her official duties.

ORDER

The deputy borough clerk is excluded from the existing unit effective immediately.

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION

  
Stuart Reichman, Director

DATED: December 11, 1998  
Trenton, New Jersey

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<sup>1/</sup> Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977)