

D.R. No. 2008-12

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

In the Matter of

BOROUGH OF GLASSBORO,

Public Employer/Petitioner,

-and-

Docket No. CU-2007-023

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, LOCAL 1085,

Employee Representative/Respondent.

SYNOPSIS

The Director of Representation clarifies a unit of non-supervisory municipal employees to exclude the deputy borough clerk because she will perform confidential duties. The Director finds that the deputy clerk's new duty of typing the minutes of all closed sessions of the borough council, including those concerning labor relations issues, will place her in an impermissible conflict between her official duties and her membership in any collective negotiations unit. The Director finds that though the deputy clerk's new duties are prospective, under the facts here their implementation is certain, and, therefore, the deputy clerk is a confidential position.

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Appearances:

For the Petitioner,
Brown & Connery, attorneys
(Diane Kane, of counsel)

For the Respondent,
Richard A. Dann, President

DECISION

On February 13, 2007 the Borough of Glassboro (Borough) filed a clarification of unit petition seeking to clarify a negotiations unit of white collar employees represented by the Communications Workers of America, AFL-CIO Local 1085 (CWA or Local 1085) to exclude the deputy borough clerk. The Borough asserts that the deputy clerk is confidential within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) and ineligible for membership in any unit. CWA opposes the petition, contending that the deputy clerk has not performed confidential duties.

We have conducted an administrative investigation into the issues raised by the petitions. N.J.A.C. 19:1-2.2. By letter dated May 16, 2008, I advised the parties of my tentative findings and conclusions and invited responses. CWA responded on May 27, 2008; the Borough responded on May 28, 2008. Having considered the petition and all of the parties' submissions, I find the following:

FINDINGS OF FACTS

1. The Borough and CWA have signed a series of collective negotiations agreements, the most recent of which is effective from January 1, 2005 through December 31, 2008. The deputy clerk has been included in CWA's unit since 1997.

2. The Borough Council, comprised of six members and the mayor, meets twice monthly and once monthly for work sessions. Throughout the year, the Council holds special meetings. Council meetings are attended by the mayor, council members, borough administrator, and the borough clerk, or in the clerk's absence, the deputy borough clerk.

3. In more than half of its regular meetings, the Council goes into closed executive session(s) to discuss employment and personnel issues, including hiring, firing, discipline, grievances, litigation, and contractual matters (Affidavit of Chief Financial Officer Jo Myers, April 17, 2007, Paragraph 7). When successor agreements are negotiated, the Council has added closed meetings to discuss contractual issues, and negotiations developments and strategy (Myers Affidavit, paragraph 7). CWA

argues that any discussion of sensitive labor relations issues is exceedingly rare, and doubts that any such discussions have occurred at all since Ms. Hull became deputy clerk or that they concern CWA's issues. However, paragraph 19 of the Myers' affidavit, indicates there were such discussions since Hull became deputy clerk, and that at least one of them concerned two CWA unit employees. In paragraph 22 of her affidavit, Meyers also noted that the deputy clerk will be expected to take the minutes at all closed Council sessions. Confidential status may be determined regardless of whether the confidential information concerns employees represented by different labor organizations than the one representing the disputed title.

4. N.J.S.A. 40A:9-133 provides:

e. The municipal clerk shall:

. . . (2) act as secretary to the governing body, prepare meeting agendas at the discretion of the governing body, be present at all meetings of the governing body, keep a journal of the proceedings of every meeting, retain the original copies of all ordinances and resolutions, and record the minutes of every meeting.

N.J.S.A. 40A:9-135, "Deputy municipal clerk", provides:

a. The governing body of any municipality, by ordinance, may create the office of deputy municipal clerk and provide for appointments thereto, his compensation, term thereof and the powers, duties and functions of such office. During the absence or disability of the municipal clerk, the deputy municipal clerk shall have all the powers of the municipal clerk and shall perform the functions and duties of such office.

5. The borough clerk is entitled to four weeks vacation, five personal days and ten sick days annually.

6. Maryann Ashenfelter was the borough clerk between 2003 and 2004. From July 1, 2003 to June 30, 2004, Ashenfelter was absent due to an extended medical leave. During this period, the then-deputy borough clerk assumed Ashenfelter's duties, including attending, recording and preparing notes of 43 council meetings. The deputy clerk attended closed meetings on April 27, May 6, and June 22, 2004, at which confidential personnel matters were discussed (Myers Affidavit, paragraph 14). CWA argues that the Borough's characterization of the matters as "confidential personnel matters" does not demonstrate a labor relations nexus. However, CWA does not refute that the deputy clerk attended closed meetings, and Meyers affidavit paragraphs 7 and 19 demonstrate that such meetings can involve confidential matters.

7. On December 11, 2006, the Borough appointed Gail Hull as deputy clerk. Hull is vice president of Local 1085, and has participated in contract negotiations and processed grievances on behalf of Local 1085.

8. From September 1, 2006 through January 1, 2007, Borough Clerk Pat Frontino was absent on disability leave. On December 12, 2006 and January 23, 2007, Hull substituted for Frontino by taking minutes at Council meetings. Hull did not substitute for Frontino between September 1, 2006 and December 12, 2006, because her appointment to deputy clerk was effective on December 11, 2006.

9. On December 12, 2006, the Council went into a closed executive session to allow the borough administrator to update the mayor and council members on personnel issues involving two unit employees who were members of Local 1085. Ms. Hull was asked to leave the meeting because of her position as vice president of Local 1085. The CWA argued that it has not been shown that Hull's presence would have compromised the Borough's interests in responding to those grievances. I infer, however, that Hull's required presence in such meetings as a unit member and union officer would compromise the confidentiality the Borough is entitled to have in that setting.

10. At the January 23, 2007 Council meeting, the borough administrator wished again to go into closed executive session to update the mayor and council members on the status of the same personnel matters. The Council did not oblige because only Hull was available to take and record the minutes, and the members believed that she had a conflict of interest. The CWA argued that those facts do not necessarily prove there was a conflict. While I believe that those facts do not establish that the particular update that was planned would have been confidential, it demonstrates the conflict the Borough and deputy clerk will continue to have unless the Borough can rely upon the confidentiality of the deputy clerk.

11. The borough clerk has recently assumed new time-consuming responsibilities: filling the Open Public Records Act ("OPRA") requests made of the Borough, requiring the location,

extraction and redaction of information; filling requests for certified marriage licences necessitated by the Division of Motor Vehicles identification requirements, and performing work associated with the Borough's zoning of a redevelopment area. Finally, the number of the Borough Council's resolutions and ordinances has tripled within the past few years.

12. As a result of the increased responsibilities placed on the borough clerk, Council has decided that the deputy clerk will type the minutes of all Council meetings, including closed session meetings, at which confidential labor relations information is likely to be discussed. (Meyers Affidavit, paragraph 22.)

13. In 2008, many of the Township's collective negotiations agreements will expire and successor agreements will be negotiated. All negotiation issues are discussed at Council meetings. Hull will be expected to type all minutes.

CWA refutes the findings in paragraphs 12 and 13 above arguing that Hull has not typed the minutes of closed session meetings and submitted an affidavit signed by Hull on May 27, 2008, attesting that she has not typed the minutes of closed sessions, nor been privy to any confidential discussions. The Borough responded it has refrained from giving her these duties until she is formally found to be confidential. I find based upon Meyer's affidavit paragraphs 22 and 24 that the Borough will assign her these duties. It has attempted to avoid any conflict until this case was resolved. Its decision to assign the deputy

clerk the typing of all council meeting notes and minutes, including those closed session meetings at which it will discuss labor relations issues will inevitably make her presence at those meetings a confidential employee.

14. As of June 13, 2007, Hull had not learned any information or been privy to any discussion that would be considered confidential during her tenure as deputy borough clerk.

ANALYSIS

The Borough contends that the deputy clerk is now confidential within the meaning of the Act because the position's job functions have changed. CWA disagrees, asserting that the deputy clerk has neither performed any confidential duties, nor been exposed to confidential information.

A clarification of unit petition is used to resolve questions concerning the composition of an existing collective negotiations unit. Clarification petitions are the appropriate means to seek a review of the proper unit placement of a title where circumstances, such as job duties, have changed over time. Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 251 (1977). An employer can never permanently waive its right to raise a statutory issue such as confidential status through a clarification petition.^{1/}

^{1/} Warren Cty., P.E.R.C. No. 89-66, 15 NJPER 30 (¶20013 1988); Maplewood Tp., D.R. No. 2007-013, 33 NJPER 105 (¶36 2007).

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 deciding confidential status, the Commission has used the approach described 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.

[11 NJPER at 510]

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]

Where prospective job functions are clear and the implementation of a change in duties is certain, the Commission may determine that a position is confidential. Cinnaminson Tp. Bd. of Ed., D.R. No. 81-39, 7 NJPER 274 (¶12122 1981); West Paterson Bd. of Ed., NJPER Supp. 333 (¶77 1973). Here, I found that the Borough has decided to assign the typing of all closed session Council meetings, including those where confidential labor relations matters will be discussed, to the deputy clerk because of the additional burdens placed on the borough clerk. CWA objects to that result, arguing that Hull's duties are not certain, but the above facts and cases support a conclusion finding a position confidential when the duties assigned to the position, while not yet performed, are imminent.

The Borough contends that it has added the responsibility of typing the minutes of all Council meetings, including closed session meetings, to the functions of the deputy borough clerk. These meetings may involve sessions where confidential employment and personnel issues are discussed, including hiring and firing, disciplinary matters, grievances, litigation, negotiation strategy, and contractual issues. In typing the minutes from these meetings, the deputy borough clerk will be exposed to confidential matters. Ms. Hull asserts that she has not had any exposure to confidential information during her tenure as deputy borough clerk.

The Borough notes that every municipality is required by law to have a clerk. See N.J.S.A. 40A:9-133. Subsection (2) of N.J.S.A. 40A:9-133(e) provides that the clerk shall:

[a]ct as secretary to the governing body, prepare meeting agendas at the discretion of the governing body, be present at all meetings of the governing body, keep a journal of the proceedings of every meeting, retain the original copies of all ordinances and resolutions, and record the minutes of every meeting.

The Borough further notes that municipalities are also statutorily authorized to create the office of deputy clerk, provide for appointments to such position, his or her compensation, term, powers, duties and functions. During the absence of the municipal clerk, the deputy municipal clerk shall have all the powers of the municipal clerk and shall perform the functions and duties of such office. N.J.S.A. 40A:9-135.

A disputed employee's close working relationship with a confidential employee, including the circumstance of employees substituting for each other or providing "back up" support may indicate confidential status. See Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339 (¶19128 1988).

Ms. Hull acts in the capacity of the borough clerk when the borough clerk is absent. In Wayne Tp. v. AFSCME Council 52, 220 N.J. Super. 340 (App. Div. 1987), the Court found that a deputy clerk was confidential because she "substitutes for the clerk in his absence and assumes full authority" and among the clerk's duties were "recording the closed session of Council during which Council members candidly discuss strategies and objectives concerned with collective negotiations". Id. At 345. The Court wrote:

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). CWA disputes Wayne's reliability arguing that the confidentiality of each deputy clerk position must be assessed on a case-by-case basis. I have not cited Wayne as dispositive for every deputy clerk. I agree a case-by-case analysis is necessary.

That analysis here, however, shows Hull will be exposed to confidential information on a regular basis. Wayne simply supports finding her position confidential because her official duties will "touch upon collective negotiations" in a way that will make her membership in CWA's unit incompatible with her duties. Wayne at 345.

Based upon the above facts and law, I exclude the deputy borough clerk from the unit of all white-collar employees of the Borough of Glassboro because she is or will imminently become a confidential employee within the meaning of the Act. The deputy borough clerk will be typing the Council meeting minutes, including closed session meetings, which will expose her to confidential information.

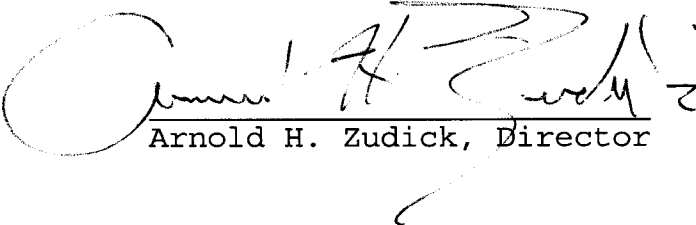
Deputy Clerk Hull acts in the capacity of the borough clerk when the borough clerk is absent. After her appointment as deputy borough clerk on December 11, 2006, Hull has twice substituted for the borough clerk at Council meetings. On both occasions, her inclusion in the CWA unit affected the Borough's ability to conduct business. Since many contracts will be renegotiated between the Borough and its represented units in 2008, negotiation issues will likely be a frequent topic of discussion at closed Council meetings. Finally, if the deputy borough clerk remains in the unit represented by CWA, the Borough's ability to maintain the confidentiality of its incipient proposals or tactics in collective negotiations will be compromised because the deputy borough clerk

will regularly attend closed sessions where such information will be discussed.

ORDER

The unit is clarified to exclude the title of deputy borough clerk.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Arnold H. Zudick, Director

DATED: June 9, 2008
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 June 19, 2008.