

D.R. No. 2009-11

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

In the Matter of

BERGEN COUNTY VOCATIONAL  
TECHNICAL BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. CU-2008-009

BERGEN COUNTY TECHNICAL  
SCHOOLS SECRETARIAL PERSONNEL  
ASSOCIATION,

Petitioner.

SYNOPSIS

The Director of Representation clarifies a negotiations unit composed of secretarial personnel to exclude the secretary to the district-wide supervisor of curriculum and instruction, where the supervisor is directly involved in the employer's preparation for collective negotiations. The Director concludes that the secretary is a confidential employee within the meaning of the Act based on the specific examples of her duties provided by the employer. The examples demonstrate the secretary's knowledge of the employer's negotiations strategies before they were disclosed to any union representative.

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Appearances:

For the Public Employer,  
Nowell Amoroso Klein Bierman, P.A.  
(William Soukas, of counsel)

For the Petitioner,  
Bucceri & Pincus, attorneys  
(Gregory Syrek, of counsel)

DECISION

On October 12, 2007, the Bergen County Technical Schools Secretarial Personnel Association (Association) filed a clarification of unit petition. The petition seeks to clarify a negotiations unit of all regularly employed secretarial personnel of the Bergen County Vocational Technical Board of Education (Board) to include the secretary to the district-wide supervisor of curriculum and instruction. The Board opposes the petition, claiming that the secretary 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). The Board specifically contends that the secretary has and will perform confidential duties because her supervisor assists the Board in collective negotiations.

We conducted an administrative investigation. N.J.A.C. 19:11-2.2 and 2.6. On July 31, 2008, I wrote to the parties, advising them of my findings and tentative conclusions and inviting their responses. On August 11, and October 1, 2008, the Board filed letters and certifications. On August 27, 2008, the Association filed a letter. The following facts appear.

1. For more than 20 years, the Board and Association have signed a series of collective negotiations agreements, the most recent of which expires on June 30, 2009.

2. The recognition provision of the parties' 2006-2009 agreement specifies that the Association represents "all regularly employed secretarial personnel, excluding secretaries in the Superintendent's Office, Deputy Superintendent's Office, School Business Administrator/Board Secretary's Office, Assistant Superintendent's Office, not inclusive of staff hired prior to 7/1/03." About eleven confidential secretaries employed by the Board are excluded from the Association's unit. Historically, all secretaries in the department of curriculum and instruction, including the former director's secretary, were in the Association's unit.

3. In 2002, the Board eliminated the director of curriculum and instruction title and created a district-wide supervisor of curriculum and instruction. Richard Panicucci is the current district-wide supervisor. Over time, the number of supervisors and secretaries in the department grew. Four secretaries are currently assigned to the department.

4. On about August 15, 2007, the Board posted a notice announcing a vacancy in a 12-month confidential secretarial position for school year 2007-2008, located in the office of curriculum and instruction at 327 E. Ridgewood Avenue, Paramus, NJ. On September 1, 2007, D. McFadden was appointed to the position and began working directly for Supervisor Panicucci.

5. McFadden's duties include scheduling evaluations and observations, producing an annual master schedule, maintaining a list of certified staff and tenured/non-tenured staff, obtaining and reviewing evaluations and observations, producing a summary, and earmarking evaluations for Panicucci.

6. In the fall of 2007, in addition to his curriculum - related duties, Panicucci began assisting the Board in preparing for upcoming collective negotiations. The Board's team had begun to formulate strategy for the upcoming negotiations with the two largest teachers' associations (vocational and special services). Panicucci assists all members of the Board's team, which consists

of Thomas Klemm, the human resources director and other managers in human resources.

7. The Board's certifications reveal that in the fall of 2007, Panicucci began preparations for collective negotiations with the Association. In September and October, 2007, McFadden created and accessed e-mails between Panicucci and other labor relations managers soliciting and distributing proposed Board strategies and ideas about collective negotiations subjects and provisions before any of them were disclosed to the Association. In one instance, McFadden received and accessed handwritten notes on selected printed pages of the current collective agreement (exchanged between Panicucci and Thomas Klemm, the Director of Human Resources) concerning anticipated or proposed budget and compensation issues, employee evaluations and other personnel matters. McFadden handled these notes prior to their being available to any employee organization.

8. The Board asserts that McFadden will continue to prepare and circulate documents for Panicucci related to upcoming negotiations. The Board provided specific examples of both the contents of these documents and when in the negotiations process McFadden handled them.

#### ANALYSIS

The Board contends that the secretary to the district-wide supervisor of curriculum and instruction is confidential within

the meaning of the Act because the position's job functions have expanded to accommodate the new negotiations-related duties performed by her supervisor. The Association disagrees, asserting that the secretary 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. Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 251 (1977). A challenge to an employer's unilateral assertion that a position is confidential is appropriately raised in a clarification petition.<sup>1/</sup>

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.

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<sup>1/</sup> Similarly, we have held that an employer never permanently waives its right to raise a statutory issue such as confidential status through a clarification petition. 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).

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, 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).

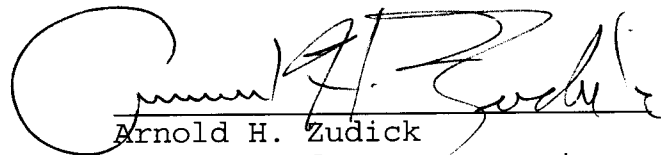
The Board submitted evidence, including documents and a certification, demonstrating McFadden's knowledge of facts or strategies which would compromise the Board's right to confidentiality in the collective negotiations process. Our case law requires that we carefully scrutinize the facts supporting the claimed confidential status. We have received, through Panicucci's certification, specific examples of the duties McFadden performed that gave her access to the Board's negotiations strategies and ideas before they were disclosed to any Association representative. These are not merely conclusory statements that this secretary will prepare and circulate



documents related to negotiations. Her knowledge and use of such information creates an impermissible conflict of interest; she would have to choose among her loyalties to both her employer and majority representative. Accordingly, I find that the secretary to the district-wide supervisor of curriculum and instruction is confidential within the meaning of the Act, and the Association's unit must be clarified to exclude that title.

ORDER

The Bergen County Technical Schools Secretarial Personnel Association's unit of secretarial personnel is clarified to exclude the secretary to the supervisor of curriculum and instruction, effective immediately.

  
Arnold H. Zudick  
Director of Representation

DATED: March 19, 2009  
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 March 30, 2009.