

D.R. NO. 89-25

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

In the Matter of

LAKWOOD HOUSING AUTHORITY,

Public Employer,

-and-

Docket No. RD-89-4

TRANSPORT WORKERS UNION,

Employee Organization,

-and-

MIRIAM PORTNOY,

Petitioner.

SYNOPSIS

The Director of Representation determines that a Tenant Interviewer and an Administrative Assistant are not confidential employees and directs that their ballots be opened and counted to determine the result of an election for decertification of the current majority representative.

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Appearances:

For the Public Employer  
Crivelli & Crivelli, Consultants  
(William Crivelli, Consultant)

For the Employee Organization  
Michael T. O'Brien, Int'l Rep.

For the Petitioner  
Miriam Portnoy, pro se

DECISION

On October 6, 1988, we conducted an election among the employees of the Lakewood Housing Authority ("Authority"). Seven of the nine voters on the eligibility list participated in the election. Three votes were cast in favor of continued representation by the Transport Workers Union ("TWU"), two votes were cast against representation and the two remaining voters' eligibility was challenged by TWU. Those challenges are

determinative of the outcome of the election. The positions of the parties are as follows.

The TWU challenges the eligibility of two employees: Tenant Interviewer Dina Hawkins ("Hawkins") and Administrative Assistant Susan DeGroat ("DeGroat"). It contends that Hawkins is a confidential employee and that De Groat is both a confidential and managerial employee.<sup>1/</sup> TWU bases its challenge of Hawkins on the assertion that she receives, opens and distributes all mail and attends Authority personnel meetings. It challenges DeGroat because she allegedly has access to confidential labor relations information, specifically that she handles labor relations materials, processes correspondence between the Housing Authority Director ("Director") and the Authority's labor relations consultant, and researches labor relations issues for the Director. It alleges that she has advance knowledge of salary figures proposed by the Director in budget preparations prior to negotiations. TWU

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<sup>1/</sup> In an earlier, related proceeding (Docket No. RD-88-6), TWU also alleged that DeGroat was a supervisory employee. After an administrative investigation, the Director of Representation concluded that "...nothing in the administrative investigation supports a finding of supervisory status for DeGroat." (Director's letter to parties -- August 18, 1988).

also characterizes DeGroat as an "agent of management", but offers no additional facts to support this contention.<sup>2/</sup>

The Authority contends that Hawkins routes mail and only opens it when necessary to determine the recipient. It states that her duties do not include reading or interpreting mail. The Authority states that all labor relations correspondence is handled directly by the Authority's labor relations consultant, except for correspondence sent by the union to the employer. The Association contends that most communications between the Authority's executive staff and the Authority's labor consultant are done in person or by telephone, rather than in writing. Any correspondence from the labor consultant to the Authority has not contained confidential material.

The Authority states that the Authority meetings Hawkins attends are open to the public. When personnel issues are discussed, the Authority goes into closed session and Hawkins is asked to step outside. The Authority contends that she has never participated in the preparations for collective negotiations or negotiations sessions. Negotiations correspondence and minutes are kept with other Authority files in the Executive Director's filing cabinet. The cabinets are not locked and all employees have access to them.

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<sup>2/</sup> TWU bases it's "agent of management" characterization on the allegation that DeGroat "...has access to all privy information and works side by side with the (Authority's) Executive Director Meir Hertz." These allegations, without more specific factual assertions, are insufficient to support a claim of managerial status pursuant to N.J.S.A. 34:13A-3(f).

Hawkins is secretary to the Executive Director and a tenant interviewer. Another employee is secretary to the Assistant Executive Director and a tenant interviewer. The status of this employee was not challenged by the union. On days when Hawkins is absent, the other employee assumes her duties, including opening the mail.

The Authority contends that DeGroat has neither processed nor had access to any confidential labor relations materials, including correspondence, minutes and HUD budget proposals. The Authority states that HUD budget proposals are typed by Miriam Portnoy, whose status was not challenged. The Authority asserts that DeGroat is not involved in any meetings between the executive staff and the union; the sole participants in such meetings are the Director, Assistant Director, labor consultant and union representative. The Authority states that she does not participate in the budget process or salary planning and negotiation, and has no advance notice of increment figures. The Authority asserts that the budget is prepared by the Director, Assistant Director and Fee Accountant, with input from the Authority's Commissioners. The Authority describes DeGroat's job duties as ensuring compliance with HUD regulations and deadlines. It also states that the Director and Assistant Director supervise all clerical employees.

N.J.S.A. 34:13A-3(g) defines confidential employees as those employees of a public employer "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 Commission strictly construes the term confidential employee. State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985); Brookdale Community College, D.R. No. 78-20, 4 NJPER 32 (¶4018 1977). In State of New Jersey, the Commission stated what it considers in determining employees' confidentiality:

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).

TWU's challenge of Hawkins is based on two of her duties: opening the mail and attending Authority meetings. The Authority states that Hawkins distributes the mail and opens it only when necessary to determine the recipient. It also states that the only labor relations material it does receive is from the union. The TWU has not noted any specific instances of Hawkins opening mail which was confidential. Distribution and opening of non-confidential mail is not indicative of confidential status. Morris Bd. of Ed., P.E.R.C. No. 89-42, 14 NJPER 681 (¶19287 1988); Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339 (¶19128 1988). In Mount Olive Tp., P.E.R.C. No. 85-113, 11 NJPER 311 (¶16112 1985), River

Dell Regional Bd. of Ed., D.R. No. 83-21, 9 NJPER 180 (¶14084 1983), aff'd P.E.R.C. No. 84-85, 10 NJPER 149 (¶15073) and Linden Free Public Library, D.R. No. 82-32, 8 NJPER 76 (¶13031 1981), employees who opened mail were found to be confidential. However, in each of those cases, the employee either read confidential materials as a result of opening mail or had other responsibilities that resulted in their knowing confidential information. In contrast, the Authority states that most communications with its labor consultant are by telephone, and that the only labor relations correspondence it receives is from the union. Opening mail from the union would not be incompatible with her inclusion in the negotiations unit.

TWU also asserts that Hawkins' attendance at Authority meetings indicates confidential status. However, the Authority states that she is asked to leave when personnel matters are discussed. Absent attendance at sessions where confidential personnel and/or labor relations matters are discussed, and absent evidence that she typed or filed notes of such sessions, Hawkins' presence at the public portion of Authority meetings does not render her confidential. Ringwood.

TWU alleges no other responsibilities that would result in Hawkins' knowledge of confidential information. Her functional responsibilities appear to be no different than those of the other clericals in the unit. There is no evidence that she types any labor relations documents or has prior knowledge of the Authority's negotiations positions. Her access to files is the same as that of

other unit employees and there is no indication that that her job responsibilities require her to examine confidential files. Mere access to unlocked labor relations files does not make an employee confidential. Ringwood, supra; Montague Tp. Bd. of Ed., P.E.R.C. No. 87-36, 12 NJPER 773 (¶17294 1986); Little Ferry Bd. of Ed., D.R. No. 80-19, 6 NJPER 59 (¶11033 1980).

TWU bases its challenge of DeGroat on alleged access to confidential information, including salary figures prepared for negotiations. However, it offered no specific examples of job duties that would require her to have knowledge of confidential information and no actual instances of such knowledge. In an earlier proceeding,<sup>3/</sup> the TWU submitted a statement of position dated August 16, 1988, that included statements DeGroat made at an investigatory conference. The TWU stated that DeGroat characterized her job responsibilities as: "...making sure all the cases are done correctly according to HUD regulations and make(ing) sure the figures are correct." TWU stated that DeGroat stipulated as follows:

She gives guidance to the other clerical staff and checks their cases and redoes their calculations to make sure they are accurate and correct. She explains federal housing regulations to the staff and makes sure that deadlines are met and provides overall guidance on processing the cases. She stated that she writes up work orders and gives them to the maintenance staff and said that if a problem arises, they call on her to handle it. She stated that 2 hours per week she may spend doing clerical duties such as updating information on a computer.

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3/ Docket No. RD-88-06.



TWU cites this description of her job as a direct statement from DeGroat. None of the duties contained therein indicate functional responsibilities that would require DeGroat to have knowledge of confidential information. The description cited by the TWU supports the Authority's description of DeGroat's duties and responsibilities. The description does not support any contention of confidentiality. The only allegations of confidentiality are general -- the processing of correspondence between the Director and the Authority's consultant. However, the Authority states that such correspondence is handled directly by its labor consultant, and that most of this communication is done by telephone. Nothing in the job description cited by the TWU indicates DeGroat's involvement in such matters.

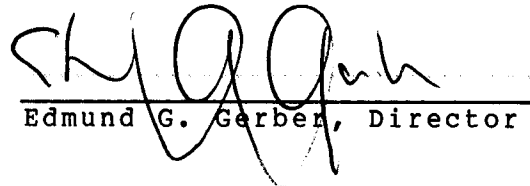
In its letter in support of its challenges dated October 21, 1988, TWU also alleged that DeGroat has advance knowledge of salary figures proposed by the Director in preparation of the Authority's budget, but did not indicate how she obtained such information. However, this responsibility does not appear in the position statement submitted by TWU dated August 16, 1988, and quoted above. That statement contains an extensive job description that the TWU attributes to DeGroat. The description does not contain any duties that would cause her to have advance knowledge of salary figures. The Authority stated that the only person other than the Director and Assistant Director who could obtain advance knowledge of salary figures is the person who types its HUD budget proposals, Miriam Portnoy.

TWU raises the issue of DeGroat's access to labor relations files. However, her access to confidential materials appears to be the same as that of the other clerical employees in the unit whose status was not challenged. Mere access alone does not support a finding of confidential status. Ringwood; Montague Tp.; Little Ferry Bd. of Ed., supra.

N.J.A.C. 19:11-2.6(c) provides, in pertinent part, that: "Action by the Director of Representation pursuant to (this section) may be either on the basis of administrative investigation or on the basis of a hearing...." N.J.A.C. 19:11-9.1(e) provides, in pertinent part, that "A challenged voter shall be permitted to vote and the ballot shall be sealed in ...an envelope. At the conclusion of the balloting, the parties may be provided the opportunity to resolve the challenged ballots...." Subsection (k) provides in pertinent part that "If challenged ballots are sufficient in number to affect the results of an election, the Director of Representation shall investigate such challenges. All parties to the election shall present documentary and other evidence, as well as statements of position, relating to the challenged ballots. After the administrative processing of the challenged ballots has been completed, ...the Director of Representation shall render an administrative determination which shall resolve the challenges and contain the appropriate administrative direction."

Based on the foregoing, we find that neither Hawkins nor DeGroat is a confidential employee, and direct that their ballots be opened and counted.

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION



Edmund G. Gerben, Director

DATED: March 29, 1989  
Trenton, New Jersey