

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WAYNE,

Public Employer-Petitioner,

-and-

Docket No. CU-85-63
SN-85-95

AFSCME, COUNCIL 52,
LOCAL 2192,

Employee Representative.

SYNOPSIS

The Public Employment Relations Commission dismisses a Clarification of Unit Petition filed by the Township of Wayne and declines the Township's request to restrain binding arbitration of a grievance which AFSCME, Council 52, Local 2192 had filed. The petition asserts that Phyllis Aaronson, the Township's deputy clerk, is a confidential employee and a supervisor who should be removed from the negotiations unit represented by Local 2192. The grievance asserts that the Township's failure to reappoint Aaronson as deputy clerk violated a non-discrimination clause in the collective negotiations agreement. The Commission finds that Aaronson is neither a confidential employee nor a supervisor and that she may contest her non-reappointment at arbitration under the disciplinary amendments to N.J.S.A. 34:13A-5.3.

P.E.R.C. NO. 87-82

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Docket No. CU-85-63
SN-85-95

AFSCME, COUNCIL 52,
LOCAL 2192,

Employee Representative-
Respondent.

Appearances:

For the Public Employer, Gerald L. Dorf, P.A.
(Lawrence Henderson, of counsel)

For the Employee Representative, Oxfeld, Cohen & Blunda,
Esqs. (Sanford R. Oxfeld, of counsel)

DECISION AND ORDER

On April 30, 1985, the Township of Wayne ("Township") filed a Petition for Scope of Negotiations Determination and a Petition for Clarification of Unit. The scope petition seeks a restraint of binding arbitration of a grievance which AFSCME, Council 52, Local 2192 ("Local 2192") had filed; that grievance asserts that the Township's failure to reappoint Phyllis Aaronson to the position of Deputy Clerk violated a non-discrimination clause in the collective negotiations agreement. The clarification of unit petition asserts that Aaronson is a confidential employee and a supervisor who should be removed from the negotiations unit represented by Local 2192.

On August 15, 1985, following a hearing, a Commission designee restrained arbitration pending the Commission's final determination.

On September 5, 1985, the Director of Representation consolidated the petitions and issued a Notice of Hearing.

On November 26, 1985, Hearing Officer Judith E. Mollinger conducted a hearing. The parties examined witnesses, introduced exhibits and filed post-hearing briefs.

In March 1986, Hearing Officer Mollinger left the Commission's employ. Hearing Officer Stuart Reichman was assigned pursuant to N.J.A.C. 19:11-6.4 to issue a report and recommended decision.

On June 30, Hearing Officer Reichman issued his report. H.O. No. 86-8, 12 NJPER ____ (¶ ____ 1986) (copy attached). He concluded that the Township had a managerial prerogative to refuse to reappoint Aaronson and that decision could not be contested in binding arbitration under Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983). He also concluded that Aaronson was neither a confidential employee nor a supervisor.

On July 8, Local 2192 filed exceptions asserting that Teaneck does not preclude binding arbitration of a grievance alleging that political discrimination motivated a refusal to reappoint an employee.

On July 14, the Township filed exceptions asserting that Aaronson was a confidential employee.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-10) are uncontested and accurate. We adopt and incorporate them here.

We first consider whether Phyllis Aronson is a confidential employee and therefore not entitled to the protection afforded under our Act. N.J.S.A. 34:13A-3(g) defines such employees:

"Confidential employees" of a public employer means 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.

Just recently, in State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), we explained the approach we take in determining whether an employee is confidential:

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]

We have reviewed the record in light of these principles and conclude, in agreement with the Hearing Officer, that Aaronson is not a confidential employee. She simply does not have "functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process." We do not look to the employee's title in making that determination or even to potential job responsibilities; rather, we look to what that employee actually

does. Accordingly, we adopt the Hearing Officer's analysis at pp. 14-17. We also agree with the Hearing Officer's unchallenged conclusion that she is not a supervisor within the meaning of the Act.

We now consider whether the Township's decision not to reappoint Aaronson may be contested through binding arbitration. We hold, for the following reasons, that it may. We start with what we believe to be the crucial fact: the decision, couched as a "non-reappointment," may, under existing case law, be considered a discharge. Wright v. Bd. of Ed. of City of East Orange, 99 N.J. 112 (1985) (provision in collective negotiations agreement granting tenure to custodians after three years of employment is not barred by statute giving board the discretion to appoint for a fixed term); see also Plumbers & Steamfitters v. Woodbridge Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978). Aaronson was deputy clerk for 11 years and no longer has a job. Her union has claimed that the discharge was because of politics and seeks an independent review of that decision. Further, Wayne is not a Civil Service community: Aaronson cannot pursue the justness of her discharge before another agency. Given these circumstances, our Legislature has spoken. The disciplinary amendments to N.J.S.A. 34:13A-5.3 were designed to permit employees such as Aaronson to utilize negotiated clauses dealing with discharge. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984), certif. den. 99 N.J. 169 (1984); East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd App. Div. Dkt. No. A-5596-83T6, certif. denied 101 N.J. 280 (1985). See

generally Wright v. Bd. of Ed. of City of East Orange, 99 N.J. 112 (1985).


Teaneck is distinguishable. There, the Supreme Court held that a decision not to appoint a teacher to an extracurricular position as a basketball coach could not be submitted to binding arbitration despite allegations of racial discrimination. The Court ruled that the school board had a managerial prerogative to make this decision without an arbitrator's review and that the teacher should instead submit his claim to the Division on Civil Rights. Unlike Teaneck, this case involves a complete loss of employment, not simply an extra, subsidiary position, and there is no administrative forum for reviewing the justness of the termination claim. It may, therefore, be submitted to binding arbitration.^{1/}

^{1/} We have reviewed the statute governing appointments of deputy clerks. N.J.S.A. 40:145-32. It does not preempt negotiations because it does not speak in the imperative and leave nothing to the discretion of the public employer. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978). Rather, it grants to the Board the discretion to fix the term of office. The discretion can be exercised through the instant negotiated agreement. Wright. Compare Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-___, NJPER ___ (¶ ___ 1986) (also decided today) (non-renewal of a non-tenured teacher after the third year of employment may not be submitted to binding arbitration). The issue whether the expiration of her term justified the discharge relates to the merits of the grievance and is for the arbitrator to decide.

ORDER

The Township's request for a restraint of binding arbitration of Local 2192's grievance is denied. The clarification of unit petition is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson and Smith voted in favor of this decision. Commissioners Reid and Wenzler were opposed.

DATED: Trenton, New Jersey
December 22, 1986
ISSUED: December 23, 1986

H.O. No. 86-8

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WAYNE,

Public Employer-Petitioner,

-and-

Docket Nos. CU-85-63

SN-85-95

A.F.S.C.M.E., COUNCIL 52,
LOCAL 2192,

Employee Representative.

SYNOPSIS

A Hearing Officer recommends that the Public Employment Relations Commission find that Phyllis Aaronson, an employee serving in the title Deputy Township Clerk for the Township of Wayne, is not a confidential employee within the meaning of the Employer-Employee Relations Act. The Hearing Officer also finds that a grievance challenging Ms. Aaronson's non-reappointment to the Deputy Township Clerk's position implicates the Township's inherent managerial prerogative to make or refuse to make appointments, and, consequently, can not be submitted to binding arbitration.

H.O. No. 86-8

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Appearances:

For the Public Employer-Petitioner
Gerald L. Dorf, P.A.
(Lawrence Henderson, of counsel)

For the Employee Representative
Oxford, Cohen & Blunda
(Sanford R. Oxford, of counsel)

HEARING OFFICER'S
REPORT AND RECOMMENDED DECISION

On April 30, 1985, the Township of Wayne ("Township") filed petitions for Clarification of Unit and Scope of Negotiations with the Public Employment Relations Commission ("Commission"). In its Clarification of Unit petition, the Township asserts that the employee serving in the title of Deputy Township Clerk is confidential within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. and is not properly included in the non-supervisory negotiations unit represented by the American Federation of State, County and Municipal Employees,

Council 52, Local 2192 ("AFSCME"). Accordingly, the Township seeks a decision removing the title of Deputy Township Clerk from the unit.

In response to the grievance filed by AFSCME on or about January 10, 1985, challenging the propriety of the Township's failure to reappoint Ms. Aaronson to the Deputy Township Clerk position, the Township filed a scope of negotiations petition. The Township takes the position that the decision not to reappoint Ms. Aaronson as Deputy Township Clerk is a legitimate exercise of its non-negotiable managerial prerogative and that the grievance filed by AFSCME on Aaronson's behalf may not properly be submitted to binding arbitration.

On or about January 1, 1985, the Wayne Township Council did not reappoint Ms. Phyllis Aaronson to her position as Deputy Township Clerk after the December 31, 1984 expiration of her four year appointment. Subsequently, AFSCME filed a grievance concerning Ms. Aaronson's non-reappointment. In accordance with the terms of the parties' collective agreement, the grievance was ultimately appealed to binding arbitration. The Township filed for interim relief with the Commission requesting that the scheduled arbitration hearing be temporarily restrained pending the outcome of the Commission's proceedings in regard to the petitions filed by the Township. Following an August 15, 1985 hearing before a Commission Designee, the Township's request for an order restraining the arbitration was granted.

On September 5, 1985, the Director of Representation issued a Notice of Hearing and order consolidating the Unit Clarification and Scope of Negotiations matters. On November 26, 1985, Hearing Officer Judith E. Mollinger, conducted a hearing at the Commission's offices in Newark, New Jersey. The parties were given an opportunity to examine and cross-examine witnesses, present relevant oral and documentary evidence and to argue orally. A briefing schedule was established. Briefs from the Township and AFSCME were received by the Commission on January 24 and January 27, 1986, respectively. The Township filed a letter brief in reply to AFSCME's post-hearing brief on February 4, 1986. Hearing Officer, Mollinger left the Commission's employ on March 6, 1986. Pursuant to Commission rules this matter was transferred to me on March 26, 1986 for the issuance of a hearing officer's Report and Recommended Decision. Upon review of the entire record in this matter, I make the following:

FINDINGS OF FACT

1. The Township of Wayne is a public employer within the meaning of the Act and is subject to its provisions. (T-3).^{1/} The American Federation of State, County and Municipal Employees, Council 52, Local 2192, AFL-CIO is a public employee representative within the meaning of the Act and is subject to its provisions. (T 3-4).

^{1/} Transcript citations are as follows: 'T 1' refers to the transcript page 1; 'T 3' refers to the transcript page 3, and so forth

The parties stipulated that the Township's employment practices are not covered by Civil Service law, rule or regulation. (T 91).

The Township called Mr. John R. O'Brien to testify. O'Brien has been Township Clerk ("Clerk") for five years. (T 5). For three years prior to his appointment as Township Clerk, O'Brien had served as a Councilman in the Township; an elected position. (T 5).

O'Brien stated that it is the responsibility of the Clerk to prepare the agenda for Township Council ("Council") meetings. The agenda indicates the anticipated topics to be discussed in the Council meeting. (T 23; P-2).^{2/} The Clerk is also responsible for taking the minutes at the council meetings. (T 10; P-2). The minutes show the items discussed and any action taken by Council on the item. (T 10). The minutes also show if Council went into closed session, the issues raised in closed session and the roll call vote closing the session. (T 24; T 31). Minutes concerning what transpires in the closed session are not kept (T 31), however, both the open and closed sessions are tape recorded. (T 9-10). O'Brien stated that by law, the Deputy Township Clerk ("Deputy Clerk") is authorized and required to act as the Township Clerk when the Township Clerk is unavailable. (T 20).

^{2/} "P-1" represents Petitioner exhibit 1 admitted in evidence.
"P-2" represents Petitioner exhibit 2 admitted in evidence,
and so forth.

O'Brien testified concerning the manner in which labor relations information was communicated to the Council and the development of labor relations strategies to be employed at the negotiations table. O'Brien stated that Council goes into closed session in order to discuss personnel and labor relations matters. In the closed session, Council provides the Township's negotiators with guidelines on negotiations positions. The Clerk is required to attend and tape record these closed sessions. (T 9; T 21). The closed sessions are recorded on the same tape as the open sessions. (T 21). The tape recording of the Council session, open or closed, is not transcribed. (T 23-24). In the event the Clerk was unable to attend a Council session, the Deputy Clerk must take his place. If Council went into closed session, the Deputy Clerk, acting as Clerk, would also go into the closed session in order to tape record the meeting. (T 20). Between 1981 and 1984, Deputy Clerk Aaronson attended approximately ten council meetings when Clerk O'Brien was unable to attend. (T 18; P 4 through P 7). No discussion of labor relations matters took place at any of those Council sessions and Aaronson has never attended a closed session of Council since her appointment to the Deputy Clerk position in January 1973. (T 20-21; T 62). Most of the tapes of the Council sessions are in the Council Conference Room, adjacent to the Clerk's Office. (T 11). Only employees of the Clerk's Office ^{3/} are authorized to have access

^{3/} The Clerk's Office is comprised of the Clerk, Deputy Clerk and two clerk typists. (T 49-50).

to the tapes, however, certain Council members and maintenance employees also have keys to the conference room and, therefore, as a practical matter, also have access. (T 11).

O'Brien testified that the open session portions of the tapes may be listened to by Council members, employees or members of the public. (T 22; T 44-45). The tapes are stored in boxes which are marked to show the dates of the meetings recorded thereon. A person wishing to listen to a tape contacts the Deputy Clerk. The Deputy Clerk would refer to the agenda and the date on the box containing a tape in order to find the proper location on the tape of the portion sought. (T 24). However, in order to find the precise section of the tape which the listener has requested to hear, the Deputy Clerk must actually listen to portions of the tape. (T 22). In this manner, it is possible, by happenstance, for the Deputy Clerk and the other listener(s) to overhear portions of a closed Council session. (T 22; T 44-45). Nonetheless, O'Brien testified that every precaution has been taken to avoid having any listener overhear even a portion of a discussion which occurred in a closed session of Council, and with the exception of the Deputy Clerk, it would be impossible for a member of the public or an employee to listen to a closed session in its entirety. (T 45; T 54-55).

O'Brien testified that he kept tapes containing recordings of closed Council sessions in which negotiations strategies and objectives were discussed in his office desk rather than in the

Council Conference Room with the rest of the tapes. This was designed to limit Aaronson's access to these tapes. However, O'Brien stated that in his absence, Aaronson and the two Clerk Typists would have complete access to his desk. (T 30; T 45; T 47). Nonetheless, O'Brien admitted that he was not aware of a single instance of Aaronson coming in contact with information concerning labor relations strategies or plans. (T 47).

O'Brien stated that all mail delivered to the Clerk's Office was given directly to him. O'Brien opens and reads all the mail and then gives it to the Deputy Clerk for further distribution to the appropriate party for proper disposition. (T 24-25). Some documents received in the mail and distributed by the Deputy Clerk pertain to contract negotiations; however, it is unclear whether the Deputy Clerk has knowledge of the contents of such mail. (T 25-26). The mail would be delivered directly to the Deputy Clerk only when the Clerk is not present at the time the mail is delivered to the office. (T 49).

O'Brien testified that the Deputy Clerk is responsible for the distribution of work to the two clerk typists in the office. The Deputy Clerk is also involved in scheduling the clerk typist's days off and lunch periods. (T 28). While the Clerk and Deputy Clerk may occasionally have informal discussions about a clerk typist's work performance, neither performs a formal evaluation. (T 28-29).

O'Brien testified concerning his role in hiring subordinate employees. When a vacancy arose in a clerk typist position; the Clerk conducted the interviews of the candidates and made his recommendation to Council. Council made the appointment. (T 50-51). Council also appoints the Deputy Clerk. (T-50). The Deputy Clerk has no role in the hiring process. (T 50-51).

Employees in the Clerk's Office have neither been disciplined nor discharged. (T 51).

AFSCME called Phyllis Aaronson to testify. Aaronson has served as Deputy Clerk from January 1973 until December 1984 when she was not reappointed by Council. (T 62; T 66). As Deputy Clerk, she would assume all duties and authority of the Clerk in his absence. (T 83-84; T 87). During the 11 years Aaronson served as Deputy Clerk, her job duties and responsibilities have not changed. (T 67). Aaronson testified that in her job as Deputy Clerk, and even prior to such appointment, she never had occasion to discuss the Township's labor relations strategy with anyone or have papers pertaining thereto come across her desk. (T 71). Additionally, as Deputy Clerk, she has never attended a closed Council session. (T 69).

Aaronson has also been active in the employee organization. In September 1972, Aaronson became a Trustee of the Board of Directors of the Wayne Township White Collar Association; AFSCME's predecessor employee organization. (T 63). In approximately 1977, the White Collar Association affiliated with

AFSCME, and Aaronson remained a Trustee on the Board of Directors of the affiliated organization. (T 65). In or about 1978, Aaronson became a member of the Executive Board and in late 1982 or early 1983, she became President of AFSCME, Local 2192. (T 66). As President of the local, Aaronson would be directly involved in collective negotiations between the Township and AFSCME. (T 79).

Aaronson testified with respect to her role in the playing of tapes recorded during Council sessions. Anyone who wishes to hear a portion of the recorded Council session would contact the Clerk's Office, identify the date of the particular Council meeting and make an appointment to hear the tape. When the person requesting to hear the tape arrived, Aaronson would retrieve the tape, set up the tape recorder for play back, search for the appropriate section on the tape, start the machine and leave the room. (T 61, T 81). If the Deputy Clerk and the Clerk were not present at the time the person arrived to listen to the tape, one of the clerk typists would set up the tape and play it for the person. Aaronson stated that she never listed to a tape without the person who requested to hear the tape being present. (T 62).

Aaronson testified that she never heard a recording of any part of a closed session of Council; not even while she searched through a tape to find a particular portion of a session. (T 77-78). Aaronson explained that she never heard a recording of a closed Council session because closed sessions were normally scheduled for conference meetings, not regular meetings of Council,

and since no official action was taken at conference meetings, she had no occasion to listen to the recordings of them. (T 77-78). Aaronson stated that until the instant petition was filed with the Commission, she did not even know that O'Brien kept tapes containing Council's closed session labor relations discussions in his desk. In the event Aaronson could not find a tape, she would tell O'Brien it was missing and ask him to check his records. Later, O'Brien would give Aaronson the tape. O'Brien never told her that those tapes contained recordings of closed session labor relations discussions or admonish her not to listen to any particular portion of the tape. When she was finished with the tape, Aaronson would place it in its appropriate place on the shelf with the other tapes in the Council Conference Room. (T 74-73).

Aaronson testified that she has neither interviewed nor hired a new employee, disciplined nor recommended the discipline of a subordinate employee, nor has she ever fired an employee. (T 74-75). Since employees in the Clerk's Office are not evaluated, Aaronson has never performed an evaluation on an employee. (T 76). When an employee requests a day off, Aaronson indicated that the Clerk may consult with her in terms of the anticipated work level in the office for the day of the requested leave, however, only the Clerk had the authority to grant the day off. (T 76-77).

ANALYSIS

Issue I: Whether Deputy Clerk Aaronson is a confidential employee?

N.J.S.A. 34:13A-3(d) states in relevant part:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer unless this Act explicitly states otherwise.... This term shall include any public employee, i.e., any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, members of boards and commissions, managerial executives and confidential employees.

N.J.S.A. 34:13A-3(g) defines a "Confidential Employee of a public employer as an employee

...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.

Within the concept of confidentiality, the balance of two somewhat competing goals must be achieved. The employer has the right to confidentiality in collective negotiations in order to ensure the stable, good faith negotiations that the Act was designed to promote. On the other hand is the Act's goal of providing representational rights to public employees. The Act looks to the work an employee does and the knowledge of labor relations issues the employee has as the basis to a determination of confidentiality. In recognition of this latter goal, the Commission has a well-established policy of strictly construing the term confidential employee. In re Brookdale Community College, D.R. 78-20, 4 NJPER 32 (¶ 4018 1977) adopting H.O. NO. 77-7, 3 NJPER 108 (1977); In re State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶ 16179 1985), mot. to reopen den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶ 16249 1985). "This policy is consistent with the Supreme Court's

declaration that the Act's public policy favors the organization of all employees desiring collective negotiations; the burden must therefore be on the party seeking to place an employee outside the Acts protection. State v. Professional Assn. of New Jersey Dept. of Ed., 64 N.J. 231, 253 (1974). See also, N.J. Const. Art. 1, ¶ 19." In re State of New Jersey, 11 NJPER at 510.

Thus, the Commission's long-standing approach to resolving disputes regarding confidential employees has been to scrutinize the facts of each case to find (1) for whom the employee works, (2) what she/he does, and (3) what she/he knows about collective negotiations issues. Then, a determination is made as to whether the functional responsibilities or knowledge of the employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee were included in a negotiating unit. See, State of New Jersey, supra.

In In re Township of Dover, D.R. No. 79-19, 5 NJPER 61 (¶ 10040 1979), the secretary to the Chief of Police was found to be a confidential employee. The Chief submitted written proposals to and participated in negotiations strategy meetings with regard to three separate units; prepared and administered the budget; participated in the grievance procedure and formulated labor relations policies pertaining to various terms and conditions of employment. Id. at 62. The Chief's secretary was responsible for virtually all of his typing and filing requirements including matter involving grievances and negotiations. The secretary had keys to files containing

confidential materials. Id. In concluding that the Chief's secretary was a confidential employee, the Director of Representation said:

Although the record may not conclusively demonstrate a continuous pattern of exposure to the collective negotiations process, the statutory definition does not make confidential status dependent upon regular involvement in labor relations. Id.

However, it is important to note that under the fact of Dover, the Director did find clear evidence of the secretary's access and exposure to the collective negotiations process.

In re River Dell Regional Board of Education, D.R. No. 83-21, 9 NJPER 180 (¶ 14084 1983), is another case in which the Director of Representation found the secretary to the Assistant Superintendent and the second secretary to the Superintendent of schools to be confidential employees. The Director found that both the Superintendent and the Assistant Superintendent, like the Chief of Police in Dover, supra, were directly involved in the collective negotiations process. The Director stated:

It is not inconceivable that an employee would be exposed to confidential material and would be of a certain mindframe that would not involve consciously absorbing the contents of the material. The element of exposure is in itself sufficient to ascribe confidentiality if the employee is in any way expected to pay attention to the contents of the material in order to perform the job function. In re River Dell Reg. B/E, 9 NJPER at 181, n.2.

Applying the facts in this case to the standards set forth above, I find that Aaronson is not a confidential employee within the meaning of the Act. The Deputy Clerk substitutes for the Clerk in his absence and assumes full authority. Since the Clerk must record the closed session of Council during which Council members candidly discuss strategies and objectives concerned with collective negotiations, it is undisputed that his functional responsibilities provide him with access and exposure to the collective negotiations process. However, while the Clerk must certainly be considered a confidential employee, his role in the process is a passive one and clearly distinguishable from that of the management representatives in Dover and River Dell. Thus, O'Brien does not hear grievances, develop negotiations proposals, establish labor relations policies or in any other way actively participate in the employer's labor relations program; he merely overhears discussions regarding those matters as he makes a record of the Council meeting. Accordingly, his relationship to the Deputy Clerk is different than the relationships that existed between the Chief of Police, in Dover, Superintendent and Assistant Superintendent in River Dell, and their respective secretaries. O'Brien does not generate work which would be considered confidential in a labor relations sense. Therefore, the Deputy Clerk's only involvement in the labor relations process is through her access to the tape recordings of the closed Council sessions.

I find that Aaronson has access to confidential labor relations material. The facts indicate tapes containing recordings of closed sessions of Council are kept either in the Council Conference Room or in O'Brien's desk. Even tapes kept in O'Brien's desk are given to the Deputy Clerk upon request and, subsequent to use, stored on a shelf in the Council Conference Room. In O'Brien's absence, the Deputy Clerk and the two clerk typists have access to O'Brien's desk.

However, under Commission cases, access to confidential labor relations materials is not enough to find an employee to be confidential; the employee must also have knowledge of or exposure to such materials. See State of New Jersey, River Dell, and Dover, supra, Willingboro Bd/Ed, D.R. No. 84-4, 9 NJPER 527 (¶ 14215 1983). I hold that Aaronson is lacking the element of knowledge or exposure required so as to find her to be a confidential employee. The record is completely devoid of any evidence that Aaronson heard the recorded discussions on labor relations issues which took place during a closed session of Council. Indeed, the record demonstrates that she has not heard such discussions. Aaronson never personally attended a closed Council session. O'Brien testified that precautions are taken in order to avoid having anyone overhear a recording of a closed session of Council. She testified that she never overheard even a portion of a closed Council session while searching for an open Council session to play to an interested party. Indeed, even Clerk O'Brien stated that he was not aware of a

single instance of Aaronson coming in contact with information recorded during a closed Council session. (T 47).

Had there been a single example of Aaronson actually coming in contact with confidential labor relations material and a showing that such contact could recur, I would probably have reached a different result in this case. The Township's bottom-line argument regarding the Deputy Clerk's confidentiality is that in performing her job, she has the potential of coming in contact with confidential information. However, as stated above, the Act requires an evaluation of the work the employee in this particular case actually performs. A finding that an employee may have some potential involvement in the labor relations process is not sufficient to designate such an employee as confidential.

The parties cite In re Mount Olive Township, P.E.R.C. No. 85-113, 11 NJPER 311 (¶ 16112 1985). In Mount Olive, the Hearing Officer found that the Deputy Clerk was a confidential employee and, consequently, must be excluded from the unit. In re Mount Olive Township, H.O. No. 85-11, NJPER ___ (¶ _____ 1985). In affirming the Hearing Officer's report and recommendation, the Commission noted that the Deputy Clerk

...is required, as part of her daily responsibilities; to open and read all correspondence that comes into the Clerk's Office. Included in that correspondence are materials pertaining to collective negotiations. The Deputy copies and files the materials. She and the Clerk have access to the materials after they are filed. Additionally, the Deputy is vested by Township ordinance with the authority to perform all the Clerk's responsibilities and

is required to do so in the Clerk's absence. This authority has been exercised and resulted in the Deputy's presence at a Council executive session meeting at which the collective negotiations agreement with the Association to which she belongs was adopted. It is apparent from the record that the Deputy will again be called on to fill in for the clerk. Mount Olive Twp., 11 NJPER at 312, quoting H.O. No. 85-11, slip. op. at 6.

This case is easily distinguishable from Mount Olive.

Here, it is the Clerk who receives and opens all the mail delivered to the Clerk's Office. The Deputy Clerk only gets the mail given to her by the Clerk for distribution and disposition. While there is some evidence that the Clerk gives the Deputy Clerk documents received in the mail which pertain to labor relations, there is no clear evidence that she is aware of the contents. While both Deputy Clerks are vested by ordinance with the authority to perform all of the Clerk's responsibilities in his absence, the Mount Olive Deputy Clerk has exercised this authority by attending an Executive Session of Council during which confidential labor relations matters were discussed. Aaronson has never attended such a meeting in her 11 years as Deputy Clerk, and, consequently, has not had exposure to confidential labor relations information in that regard.

Finally, I find Aaronson is not a supervisor within the meaning of the Act.

NJSA 34:13A-5.3 provides in relevant part:

...nor, except where established practice, prior agreement or special circumstances, dictate to the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to

be represented in a collective negotiations unit by an employee organization that admits non-supervisory personnel to membership.

The above-quoted provision has been interpreted to contain the statutory definition of supervisor; that being an employee having the authority to hire, discharge, discipline or effectively recommend the same. In re Cherry Hill Department of Public Works, P.E.R.C. No. 30 (1970).

In this case, the record clearly shows that Aaronson does not hire, discharge, discipline or effectively recommend same. Aaronson does not evaluate employees. The most that can be said is that Aaronson distributes work to the clerk typists in the office and that function does not come close to raising to the level of a supervisor within the meaning of the Act.

Accordingly, I recommend that the Commission find that Phyllis Aaronson is not a confidential employee or a supervisor within the meaning of the Act and refuse to exclude her from the unit on those grounds.

Issue II: Whether the grievance filed by AFSCME contesting the Township's decision not to reappoint Phyllis Aaronson as Deputy Township Clerk after the expiration of her term on December 31, 1984, can proceed to binding arbitration?

FACTS

The Wayne Township ordinance Article V§4-10(A) provides that the Deputy Clerk shall be appointed by the Council for a term of 4 years....(P-1). Phyllis Aaronson's term of office as Deputy Clerk expired on December 31, 1984. Aaronson was not reappointed to

the Deputy Clerk position, and, instead, on or about January 1, 1985, the Council appointed another person to that position. On or about January 10, 1985, AFSCME filed a grievance contesting the Council's failure to reappoint Aaronson as Deputy Clerk. AFSCME contends that the Township violated Article XV of the collective agreement. (J-1). Article XV, Equal Treatment, reads as follows:

The Township agrees that there shall be no discrimination or favoritism for reasons of sex, nationality, race, religion, age or marital status, political affiliation, union membership or union activity.

The Township denied the grievance and AFSCME subsequently sought to have the dispute resolved in binding arbitration, pursuant to the Parties' negotiated grievance procedure. On August 15, 1985, a Commission designee granted the Township's application to stay the arbitration.^{4/}

The Township takes the position that the grievance filed by AFSCME concerning Aaronson's non-reappointment is not arbitrable. Pursuant to N.J.S.A. 40A:145-32^{5/} the Township passed Article

^{4/} The Commission designee did not issue a written decision.

^{5/} N.J.S.A. 40A:145-32 reads as follows:

In every Township of this State now or hereafter having a population of more than twenty-four thousand inhabitants, as ascertained by the preceding Federal census, the governing body is authorized to create by ordinance the Office of Deputy Township Clerk and to fix the term and compensation, and to prescribe the duties, of such official.

VS4-10(A) of the Township Code. (P-1). The Township argues that N.J.S.A. 40A:145-32 and Township Code Article VS4-10(A), taken together, indicate that the Deputy Clerk's term of office is for a fixed duration of four years, and, absent Council action to reappoint, the person serving in that position must vacate it when the term expires.^{6/}

AFSCME argues since the Township is not an employer covered by Civil Service statute, rules or regulations, Aaronson is not afforded any alternative statutory appeal mechanism by which she may have disciplinary actions taken against her by the Township reviewed. AFSCME contends that Aaronson's termination from the Deputy Clerk position is in violation of Article XV, Equal Treatment, of the agreement. (J-1). AFSCME asserts that "[w]hether or not the public employer has a defense to this action or whether or not Aaronson can prove her allegations certainly are not to be argued before the Commission in a scope proceeding." AFSCME Brief p. 12.

At the outset of the analysis, I must point out the narrow boundaries of the Commission's scope of negotiations jurisdiction to which I am bound. In Ridgefield Park Ed. Assn. v. Ridgefield Park

^{6/} The Township cites N.J.S.A. 40:145-2 which, in relevant part, states:

No Township officer whether elected or appointed shall hold over in his office after the expiration of the term for which he was elected or appointed.

Bd. of Ed., 78 N.J. 144 (1978), the New Jersey Supreme Court, quoting from In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), said the following:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts. Id. at 154.

Thus, in determining whether the grievance filed by AFSCME can proceed to binding arbitration; I can only consider the abstract issue of whether the Township's actions constitute the exercise of an inherent managerial prerogative.

I find that the underlying personnel action involved in this case concerns the reappointment of Phyllis Aaronson to her position as Deputy Clerk. The courts in this State have clearly established that the determination of whether to reappoint an employee to a position is an inherent managerial prerogative. See, Teaneck Board of Education v. Teaneck Teachers Assn., 94 N.J. 9 (1983); Wyckoff Twp. Bd. of Ed. v. Wyckoff Ed. Assn., 168 N.J. Super, 497 (App. Div. 1979), certif. den. 81 N.J. 349 (1979). In Teaneck, supra, the Supreme Court held that where a claim of discrimination implicates an inherent managerial prerogative, such dispute cannot be submitted to binding arbitration. Likewise, in

this case, since the dispute regarding whether the Township violated Article XV of the agreement amounts to a claim of discrimination and implicates the inherent managerial prerogative of reappointment, it cannot be submitted to binding arbitration.^{7/}


Accordingly, I recommend that the Commission grant the Township of Wayne's request for a permanent restraint of binding arbitration of the grievance at issue in this case.

RECOMMENDATIONS

I recommend the following:

(1) The Commission find that Phyllis Aaronson is not a confidential employee or supervisor within the meaning of the New Jersey Employer-Employee Relations Act.

(2) The Township of Wayne's request for a permanent restraint of binding arbitration of the grievance at issue in this case be granted.



Stuart Reichman
Hearing Officer

DATED: June 30, 1986
Trenton, New Jersey

^{7/} Since in the resolution of the scope of negotiations issue it is unnecessary for the grieving party to disclose the type of discrimination alleged to have been practiced, e.g., sex, racial, union activity, etc., the record, not surprisingly, is silent. However, as Teaneck points out, even though the dispute may not be submitted to binding arbitration, the grievant can make application before other fora of proper authority (e.g., Division of Civil Rights, Public Employment Relations Commission, and/or the courts) provided such application is timely.