

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

In the Matter of

WESTERN MONMOUTH UTILITIES
AUTHORITY,

Public Employer,

-and-

DOCKET NO. RO-81-251

HIGHWAY AND LOCAL MOTOR FREIGHT
DRIVERS, DOCKMEN AND HELPERS,
LOCAL UNION NO. 701,

Petitioner.

SYNOPSIS

The Director of Representation determines that the Authority's clerk is a confidential employee based upon her functional responsibility and knowledge in connection with the issues involved in the collective negotiations process, and sustains the challenge of the ballot cast by her in a representation election. The Director therefore voids the ballot, and finding that the Petitioner has received a majority of valid ballots issues a Certification of Representative.

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LOCAL UNION NO. 701,

Petitioner.

Appearances:

For the Public Employer
Kramer & Micheletti, P. A.
(E. Benn Micheletti of counsel)

For the Petitioner
Joseph Palughi, Organizer

DECISION

On June 3, 1981, a Petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission (the "Commission") by Highway and Local Motor Freight Drivers, Dockmen and Helpers, Local Union No. 701 (the "Local"), seeking to represent clerical employees of the Western Monmouth Utilities Authority (the "Authority"). Pursuant to an Agreement for Consent Election entered into by the parties on June 23, 1981, a secret ballot election was conducted among the clerical employees on July 17, 1981. The Tally of Ballots

indicated that three valid ballots were cast for the Local, and two valid ballots were cast against representation by the participating employee representative. The ballot of one voter was challenged by the Authority. ^{1/} The disposition of this challenge ballot is sufficient to affect the results of the election and is the subject of this determination.

Pursuant to N.J.A.C. 19:11-9.2(k), a hearing was held before Commission Hearing Officer Mark A. Rosenbaum, on September 14, 1981, in Trenton, New Jersey. At the hearing, all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and argue orally. Both parties waived the right to file post-hearing briefs.

The Hearing Officer thereafter issued his Report and Recommendations on November 6, 1981, a copy of which is attached hereto and made a part hereof. The Hearing Officer recommended that the challenge to the ballot, cast by the clerk to the Authority, be sustained and that the employee be found to be ineligible to vote in any representation election by reason of her confidential status. Neither party has filed exceptions to the report of the Hearing Officer. The undersigned has carefully considered the entire record herein including the Hearing Officer's Report and Recommendations, the transcript, and the exhibits and finds and determines as follows:

1. The Western Monmouth Utilities Authority is a public employer within the meaning of the New Jersey Employer-

^{1/} The Authority claims that this voter is a confidential employee.

Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), and is subject to its provisions.

2. Highway and Local Motor Freight Drivers, Dockmen and Helpers, Local Union No. 701 is an employee representative within the meaning of the Act and is subject to its provisions.

3. On June 3, 1981, the Local filed a Petition for Certification of Public Employee Representative with the Commission seeking an election for the purpose of representing a collective negotiations unit of clerical employees, including the titles of secretary, clerk, bookkeeper and assistant bookkeeper employed by the Authority and an election was held among employees in this unit on July 17, 1981. The unit composition excludes confidential employees. ^{2/}

4. At the election, the Authority challenged the ballot of Arlene Schwartz, the clerk to the Authority, asserting that she was a confidential employee, and may not be included in the collective negotiations unit. The Local disputes the contention of the Authority.

5. N.J.S.A. 34:13A-3(g) defines "confidential employees" as those "... 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 her position as clerk to the Authority, Arlene Schwartz is responsible for maintaining the official records of the Authority's public meetings and for performing various clerical

^{2/} See N.J.S.A. 34:13A-3(d)

and bookkeeping tasks. She frequently attends Authority executive sessions which are private and in which negotiations proposals involving the Authority's two negotiations units are substantively discussed by the Authority's Commissioners. She transcribes and types the notes of these sessions and even when she is not in attendance she still may be asked to transcribe the minutes, as taken by another person. All of the minutes to every executive session are kept in her stenographic notebook.

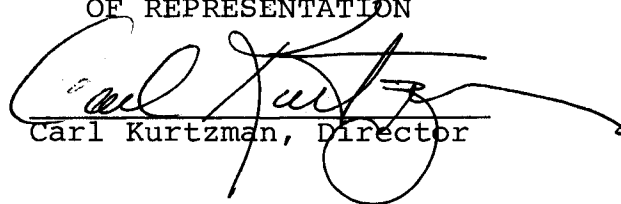
In light of these facts, the undersigned agrees with the Hearing Officer that the Authority's clerk is a confidential employee. The undersigned has found similarly situated employees to be confidential employees in In re Gloucester Cty. College, D.R. NO. 78-47, 4 NJPER 233 (¶ 4116 1978); and In re Orange Bd. of Ed., D.R. No. 78-28, 4 NJPER 1 (¶ 4001 1977).

The undersigned therefore finds that Ms. Schwartz's functional responsibilities and knowledge in connection with the issues involved in the collective negotiations process make her membership in any appropriate negotiating unit incompatible with her official duties.

Accordingly, for the above reasons and noting the absence of exceptions, the undersigned adopts the findings of fact and conclusions of law of the Hearing Officer and determines that the clerk to the Authority is a confidential employee within the meaning of the Act and is ineligible to vote in any representation election. The challenge to the ballot cast by Arlene Schwartz in the representation election held on July 17, 1981 is sustained.

Accordingly, having received a majority of valid ballots cast in the election, the undersigned shall issue the appropriate Certification of Representative (attached hereto and made a part hereof), to Highway and Local Motor Freight Drivers, Dockmen and Helpers, Local Union No. 701.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Carl Kurtzman, Director

DATED: January 26, 1981
Trenton, New Jersey



STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

Western Monmouth Utilities Authority,

Public Employer,

-and-

Highway & Local Motor Freight Drivers,
Dockmen & Helpers, Local Union No. 701,

Employee Organization.

DOCKET NO. RO-81-251

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the undersigned in accordance with the New Jersey Employer-Employee Relations Act, as amended, and Chapter 11 of the Commission's Rules and Regulations; and it appearing from the Tally of Ballots that an exclusive representative for collective negotiations has been selected; and no valid objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefore;

Pursuant to authority vested in the undersigned, IT IS HEREBY CERTIFIED that

Highway & Local Motor Freight Drivers, Dockmen & Helpers,
Local Union No. 701

has been designated and selected by a majority of the employees of the above-named Public Employer, in the unit described below, as their representative for the purposes of collective negotiations, and that pursuant to the New Jersey Employer-Employee Relations Act, as amended, the said representative is the exclusive representative of all the employees in such unit for the purposes of collective negotiations with respect to terms and conditions of employment. Pursuant to the Act, the said representative shall be responsible for representing the interests of all unit employees without discrimination and without regard to employee organization membership; the said representative and the above-named Public Employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment; when an agreement is reached it shall be embodied in writing and signed by the parties; and written policies setting forth grievance procedures shall be negotiated and shall be included in any agreement.

UNIT: All clerical employees employed by the Western Monmouth Utilities Authority excluding supervisors, maintenance, elected officials, members of boards or commissions, managerial executives and confidential employees.

DATED: Trenton, New Jersey
January 26, 1982


Carl Kurtzman, Director
of Representation

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

In the Matter of

WESTERN MONMOUTH UTILITIES AUTHORITY,
Public Employer,

-and-


Docket No. RO-81-251

HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS,
DOCKMEN AND HELPERS, LOCAL UNION NO. 701,
Petitioner.

ERRATA

The Hearing Officer's Report and Recommendations in the above-captioned matter which issued November 6, 1981, is hereby corrected as follows:

<u>Page</u>	<u>Line</u>	<u>Delete</u>	<u>Substitute</u>
3	10	Ernie	Eunice
5	8	Ernie	Eunice



Mark A. Rosenbaum
Hearing Officer

DATED: November 24, 1981
Trenton, New Jersey

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

In the Matter of

WESTERN MONMOUTH UTILITIES AUTHORITY,
Public Employer,

-and-

Docket No. RO-81-251

HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS,
DOCKMEN AND HELPERS, LOCAL UNION NO. 701,
Petitioner.

SYNOPSIS

A Commission Hearing Officer, considering the challenge by the Authority to one voter in a Commission conducted election, recommends that the challenge be sustained and that the appropriate certification issue. In so ruling, the Hearing Officer finds that the Clerk to the Authority is a confidential employee within the meaning of the New Jersey Employer-Employee Relations Act based on her exposure to the collective negotiations process, as well as her access to and knowledge of confidential labor relations material.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The Report is submitted to the Director of Representation who reviews the Report, and exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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DOCKMEN AND HELPERS, LOCAL UNION NO. 701,
Petitioner.

Appearances:

For the Public Employer
Kramer & Micheletti, P.A.
(E. Benn Micheletti of Counsel)

For the Petitioner
Joseph Palughi, Organizer

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

On June 3, 1981, Local Union No. 701 of the Highway and Local Motor Freight Drivers, Dockmen and Helpers (the "Local") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission (the "Commission"), seeking to represent clerical employees of the Western Monmouth Utilities Authority (the "Authority"). Pursuant to an Agreement for Consent Election entered into by the Local and the Authority before the Commission on June 23, 1981, an election was held in the petitioned-for unit on July 17, 1981. The results of the election indicated that a challenged ballot was sufficient to effect the results of the election. Pursuant to N.J.A.C. 19:11-9.2(k), the Commission's Director of Representation ordered an administrative investigation of the challenged ballot in the form of a hearing before the undersigned.

Pursuant to a Notice of Hearing dated July 30, 1981, a hearing was held before the undersigned Hearing Officer on September 14, 1981. At the hearing, all parties were given opportunities to examine and cross-examine witnesses, present evidence and argue orally. Both parties waived the right to file post-hearing briefs.

Based on the entire record in these proceedings, the Hearing Officer finds that:

1. The Western Monmouth Utilities Authority is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), and is subject to its provisions.

2. Local Union No. 701, of the Highway and Local Motor Freight Drivers, Dockmen and Helpers is an employee representative within the meaning of the Act and is subject to its provisions.

3. One challenged ballot which was cast in the representation election conducted by the Commission on July 17, 1981 among the Authority's clerical employees is determinative of the results of the election. The ballot cast by Arlene Schwartz was challenged by the Authority, which asserts that Schwartz is a confidential employee within the meaning of the Act and may not be included in any collective negotiations unit. ^{1/} Accordingly, a challenged ballot is determinative of the results of the election and the instant matter is properly before the undersigned for a report and recommendations.

^{1/} The Authority also asserts that N.J.S.A. 40:14B-18 precludes the inclusion of Arlene Schwartz in a collective negotiations unit. The cited statute is merely enabling legislation and does not, on its own, preclude collective negotiations under the Act.

4. N.J.S.A. 34:13A-5.3 excludes confidential employees from the protections and rights afforded by the Act. N.J.S.A. 34:13A-3(g) defines "confidential employees" as those "...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."

5. The Western Monmouth Utilities Authority is administered by its Commissioners, with the full-time assistance of its Executive Director, Russell Nerlick, and its General Manager, Ernie Bowers. Negotiations proposals for the Authority's two negotiations units are discussed and either approved or disapproved by the Authority's Commissioners. ^{2/} Such discussions are entered into during closed or executive sessions of the Commissioners, which are not open to the public. ^{3/}

6. Arlene Schwartz is the clerk to the Authority. In that position, she is responsible for maintaining the official records of the Authority's meetings, and performing various clerical and book-keeping tasks for the Authority. ^{4/} Both Schwartz and Bowers testified that Schwartz attends all public meetings of the Authority, as well as many executive sessions. ^{5/} Schwartz is often excused

^{2/} Transcript (Tr.) at pp. 131-137.

^{3/} Tr. at pp. 15, 25, and 97-98.

^{4/} Tr. at pp. 14, 83, and 91-93.

^{5/} Tr. at pp. 15, 23, 25-32, 37, 73, 93 and 98.

from executive sessions, due either to the lateness of the hour or the nature of discussions. ^{6/} When Schwartz does not attend particular executive sessions, she may still be asked to transcribe minutes of each executive session as taken by someone attending the sessions. ^{7/} All minutes to all Authority sessions, public and executive, are kept in Schwartz's stenographic notebook. ^{8/} This notebook is routinely in Schwartz's possession. ^{9/} Functionally, Schwartz serves as a secretary to the Authority as part of her official duties. ^{10/}

ANALYSIS

The undersigned has reviewed several cases dealing with positions similar to the position in question herein. In Gloucester County College, D.R. No. 78-47, 4 NJPER 233 (¶ 4116 1978), adopting H.O. No. 78-12, 4 NJPER 133 (¶ 4061 1978), secretaries to the Associate Dean of Student Services and the Associate Dean of Community Services were found to be confidential employees within the meaning of the Act because they typed minutes of meetings of the College's governing body and some of those minutes contained negotiations materials. In Orange Board of Education, D.R. No. 78-28, 4 NJPER 1 (¶ 4001 1977), the Office Manager/Payroll Clerk was found to be a confidential employee, based, in part, on the fact that she took minutes at closed sessions of the Board and had access to and knowledge of confidential labor relations material in the exercise of such duties.

^{6/} Tr. at pp. 15-16, 20-21, and 94-95.

^{7/} Tr. at pp. 40-41, and 101-103. The other employees who have taken notes for the Authority in executive sessions are the General Manager and the Executive Director.

^{8/} Id.

^{9/} Tr. at p. 69.

^{10/} Tr. at pp. 115-118.

The evidence contained in the record ^{11/} irrefutably establishes that Schwartz attended portions of executive sessions and was excused from portions of executive sessions. However, only conflicting testimony can be found concerning what was discussed in Schwartz's presence and absence. Such conflicts necessitate credibility judgments by the undersigned in order to resolve the underlying petition herein.

Ernie Bowers, General Manager of the Authority and Schwartz's immediate supervisor, ^{12/} testified that various topics related to collective negotiations were discussed in the presence of Schwartz during executive sessions, including fringe benefits for employees, hiring and firing of employees and grievances. ^{13/} Schwartz's testimony contradicted Bower's testimony in various ways. Schwartz denied sitting in on "...any closed session meetings relative to any collective bargaining negotiations or any confidential personnel information that was not already common knowledge." ^{14/} Schwartz admitted that she attended an Authority session wherein dental plans were discussed, but maintained that the entire office staff was familiar with such discussions, ^{15/} and further, could not remember whether the discussions

^{11/} The record consists of the transcripts and documents admitted at the hearing. An evidentiary submission by the Authority dated September 22, 1981, is not admissible and thus not part of the record herein.

^{12/} Tr. at p. 92.

^{13/} Tr. at pp. 97-98.

^{14/} Tr. at p. 15.

^{15/} Tr. at p. 31.

were held in public or executive sessions. Another conflict in the testimony concerned the Authority's discussion of its approach to negotiations with Local 701. Bowers testified that Schwartz attended a closed session wherein the Authority's approach was discussed 16/ while Schwartz testified that she could not remember being present during such discussions. 17/

The minutes of executive sessions held January 10, 1978 18/ and March 21, 1978 19/ indicate that the discussions referred to above did indeed occur during executive sessions as Bowers testified. Considering the exhibits, all the testimony and the demeanors of the witnesses, I credit Bowers' testimony and conclude that Schwartz did attend closed executive sessions wherein topics related to collective negotiations were discussed.

Assuming, arguendo, that Schwartz did not attend such executive sessions, nonetheless she had access to notes of such sessions 20/ and has transcribed notes of such sessions into typewritten minutes. 21/ While Schwartz maintained that everyone else in the Authority had access to the notes and minutes of executive sessions, 22/ this testimony was not supported anywhere in the record.

16/ Tr. at pp. 139-140.

17/ Tr. at pp. 50-51.

18/ Exhibit R-6.

19/ Exhibit R-5.

20/ Tr. at pp. 40-41, 69, and 101-102.

21/ Tr. at pp. 40-41 and 101-102.

22/ Tr. at. p. 53.

Local 701 contends that, even if Schwartz is found to be privy to confidential information, her primary duties are clerical and, therefore, she should be part of the negotiations unit. ^{23/} This argument is not persuasive. In Township of Dover, D.R. No. 79-19, 5 NJPER 61, 62 (¶ 10040 1979), the Director of Representation noted that "...the statutory definition does not make confidential status dependent upon regular involvement in labor relations." The undersigned is satisfied that the extent of Schwartz's access and exposure to the collective negotiations process renders her membership in any appropriate negotiations unit incompatible with her official duties.

RECOMMENDATION

For the above stated reasons, the undersigned recommends that:

1. The Clerk to the Authority be found a confidential employee within the meaning of the Act, and it is therefore recommended that Arlene Schwartz be found ineligible to vote in any representation election.
2. That the challenge to the ballot cast by Arlene Schwartz in the representation election held on July 17, 1981 should be sustained.
3. That the Director of Representation issue the appropriate certification.

Respectfully Submitted


Mark A. Rosenbaum
Hearing Officer

DATED: November 6, 1981
Trenton, New Jersey