

P.E.R.C. NO. 84-95

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RIVER DELL REGIONAL BOARD
OF EDUCATION,

Public Employer,

-and-

Docket No. CU-81-59

THE SECRETARIAL UNIT OF THE
RIVER DELL EDUCATION ASSOCIA-
TION, N.J.E.A./N.E.A.,

Petitioner.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, adopts the recommendation of a Commission Hearing Officer that a secretary/switchboard operator employed by the River Dell Regional Board of Education is a confidential employee. The secretary/switchboard operator is therefore excluded from the unit of full-time and part-time secretaries represented by the Secretarial Unit of the River Dell Education Association.

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Petitioner.

Appearances:

For the Public Employer, Stein, Joseph & Rosen, Esqs.
(Marc Joseph, of Counsel)

For the Petitioner, Bucceri & Pincus, Esqs.
(Louis P. Bucceri, of Counsel)

DECISION AND ORDER

On April 28, 1981, the Secretarial Unit of the River Dell Education Association, N.J.E.A./N.E.A. ("Association") filed a Petition for Clarification of Unit with the Public Employment Relations Commission. The Association seeks a determination that the secretary to the assistant superintendent, the second secretary to the superintendent, and the secretary/switchboard operator be included within the negotiations unit of all full-time and part-time secretarial and clerical employees of the River Dell Board of Education ("Board").

Pursuant to N.J.A.C. 19:11-2.6, the Director of Representation commenced an investigation. The Board asserted that

each of these secretaries 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") and thus should be excluded from the Association's unit.

On September 22, October 9 and October 23, 1981, Hearing Officer Judith E. Mollinger conducted a hearing. The parties examined witnesses and introduced exhibits. They also filed post-hearing briefs.

On August 4, 1982, the Hearing Officer issued her report and recommended decision. H.O. No. 83-2, 8 NJPER (¶ 1982). She found that the secretary to the assistant superintendent was a confidential employee and that the second secretary to the superintendent and secretary/switchboard operator were not confidential employees.

On February 16, 1983, the Director of Representation issued a decision. D.R. No. 83-21, 9 NJPER 180 (¶14084 1983). He ruled that the secretary to the assistant superintendent and second secretary to the superintendent were confidential employees and therefore excluded from the unit. He also remanded the case for a further hearing concerning the role of the secretary/switchboard operator in typing negotiation and grievance materials, reviewing Board mail, and filing materials related to negotiations and grievances.^{1/}

^{1/} There was no appeal of the Director's determination concerning the secretary and second secretary. Accordingly they were removed from the unit and their positions are not in question now.

On May 18, 1983, the Hearing Officer conducted the hearing on remand. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On December 16, 1983, the Hearing Officer issued her report. H.O. No. 84-7, 9 NJPER ____ (¶ ____ 1983) (copy attached). She recommended that the position of secretary/switchboard operator be found to be confidential and thus excluded from the unit.

On December 27, 1983, the Association filed exceptions. The Association contends that the employee's typing of certain documents is irrelevant and insufficient to make her a "confidential" employee. The Board filed a letter memorandum supporting the recommended decision.

Pursuant to N.J.S.A. 34:13A-6(f), the full Commission^{2/} has delegated authority to me to apply well-settled law to this case. I have reviewed the record. The Hearing Officer's findings of fact are generally accurate. I adopt and incorporate them with the modifications noted below.^{3/} Based on these findings and my

^{2/} Pursuant to N.J.A.C. 19:11-8.8, the Commission has transferred this case to itself for appropriate action.

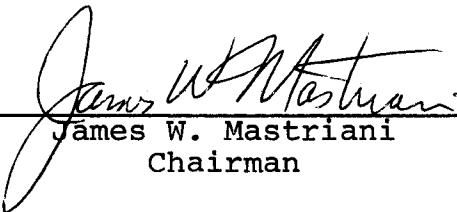
^{3/} I modify finding #3 by adding that the secretary/switchboard operator has continued access along with other employees to Board files maintained in the assistant superintendent's office.

review of the record, I agree with the Hearing Officer that the secretary/switchboard operator is a confidential employee who must be excluded from the collective negotiations unit.^{4/}

ORDER

The secretary/switchboard operator is a confidential employee and is therefore excluded from the unit of full-time and part-time secretaries represented by the River Dell Education Association.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
January 30, 1984

4/ The question of employer distribution of confidential work intended to exclude an employee from an otherwise appropriate negotiations unit must be raised in an unfair practice proceeding pursuant to N.J.A.C. 34:13A-5.4. In re Township of Scotch Plains, D.R. No. 84-11, 9 NJPER 632 (¶14270 1983).

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
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In the Matter of

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-and-

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RIVER DELL EDUCATION ASSOCIATION
N.J.E.A./N.E.A.,

Petitioner.

SYNOPSIS

On remand for hearing on a CU petition filed by the Secretarial Unit of the River Dell Education Association, N.J.E.A./N.E.A., a Hearing Officer of the Public Employment Relations Commission finds that the Secretary/Switchboard Operator is a confidential position. This secretary serves as the second secretary to the Business Administrator/Board Secretary. She types, files, and photocopies documents related to collective negotiations, budget matters and grievances; she has continual exposure and access to labor relations material and files.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommendations, any 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.

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Appearances:

For the Public Employer, Stein, Joseph & Rosen, Esqs.
(Marc Joseph, Esq.)

For the Petitioner, Bucceri & Pincus, Esqs.
(Louis Bucceri, Esq.)

HEARING OFFICER'S
REPORT AND RECOMMENDATIONS

On April 28, 1981, the secretarial unit of the River Dell Education Association, N.J.E.A./N.E.A. ("Association") filed a Petition for Clarification of Unit with the Public Employment Relations Commission ("Commission").^{1/} This petition sought a determination that the Secretary of the Assistant Superintendent, the Second Secretary to the Superintendent and the Secretary/Switchboard Operator were included within the negotiations unit of all full-time and part-time secretarial and clerical employees of the River Dell Regional Board of Education ("Board"). However, the Board asserted that each secretary is a confidential employee

1/ Commission exhibits will be designated C- , Joint exhibits J- , Association exhibits P- , and employer exhibits ER- .

within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") and should be excluded from the negotiations unit.

On August 4, 1982, the undersigned Hearing Officer submitted her recommendations that the Secretary to the Assistant Superintendent was a confidential employee and should be excluded from the unit; however, she found that the Second Secretary to the Superintendent and Secretary/Switchboard Operator were not confidential employees and were therefore included in the unit. ("H.O. No. 83-2")

On February 16, 1983, the Director of Representation issued a decision in this matter, D.R. No. 83-21, 9 NJPER 180 (¶14084 1983) ("D.R. 83-21"). He ruled that both the Secretary to the Assistant Superintendent and the Second Secretary to the Superintendent were confidential employees and therefore excluded from the unit. Further, he remanded the matter to the undersigned Hearing Officer for examination of the Secretary/Switchboard Operator's duties regarding the negotiation and grievance materials typed, the review of Board mail, and filing.

On May 18, 1983, a hearing was held at which the parties were given the opportunity to examine witnesses, to present evidence and to argue orally. The parties waived oral argument. On July 20, 1983, the Association submitted a post-hearing brief. On September 21, 1983, the Board filed its reply brief. On September 26, 1983, the Association filed a letter memorandum in lieu of a reply brief. The record closed September 26, 1983. ^{2/} The issue here is the confidential status of the Secretary/Switchboard Operator.

^{2/} Extensions were granted to the Board for submission of post-hearing briefs.

Findings of Fact

Based on the record evidenced in this proceeding the Hearing Officer makes the following findings of fact:

1. The River Dell Regional Board of Education is a public employer within the meaning of the Act, is subject to its provisions and is the employer of the employees who are the subject of this proceeding. (H.O. No. 83-2)

2. The Secretarial Unit of the River Dell Education Association N.J.E.A./N.E.A. is an employee representative within the meaning of the Act and is subject to its provisions. The recognition clause of the current collective agreement between the parties establishes the Association as the exclusive representative for all secretarial and clerical personnel employed by the Board on a ten or twelve month basis as follows: "Secretaries, clerks, switchboard operator, administrative secretaries, bookkeepers, payroll clerks, AVA technicians." Specifically excluded are "the Secretary to the School Superintendent, the Secretary to the Board of Education Secretary and such temporary, hourly personnel that may be needed in an emergency situation and/or as summer replacements." (H. O. No. 83-2)

3. Dorothy Savage, the Secretary/Switchboard Operator, is employed full time, 8 a.m. - 4 p.m. daily (T 55, 64-65) ^{3/} by the Board. She works in the office of the Board Business Administrator, Paul Chieff, (T 3). ^{4/}

^{3/} Transcript references are as follows: May 18, 1983, T.

^{4/} Chieff also serves as School Board Secretary. (D.R. No. 83-21, Slip opinion, p. 8)

4. Chieff, as Business Administrator, holds a managerial executive position as it is defined in the Act. (H.O. No. 83-2, Slip. opinion pp. 18-19). His duties include, inter alia, maintaining the minutes for all Board meetings, costing out the Association contract proposals, assisting in the formulation of the Board's counter-proposals, and acting as the Board's representative at step 2 of the grievance procedure for secretarial and maintenance employees. (H.O. No. 83-2, Slip opinion p. 8).

5. Ms. Elizabeth McPherson is confidential secretary to Chieff (H.O..No. 83-2, p. 7; T 7). She and Savage share the major portion of work assigned by Chieff (T 7, 10-17). Secretarial tasks are assigned indiscriminately (T 55, 59-60). Chieff makes no distinction between labor relations or negotiation-related assignments and other secretarial tasks. McPherson also fails to make this distinction when she assigns work to Savage (T 7, 41, 43). These assignments are made on the basis of time availability and work volume rather than on the nature of the work (T 50, 72).

6. Savage has free access to all office files, including those for collective negotiations (there are five collective negotiation units), for grievances, and for minutes of non-public Board meetings (T 7, 8, 19, 55, 59, 60). She has a key to Chieff's private office (T 51), thus she has access to the grievance files (T 50) and to minutes and records of non-public Board meetings (T 18 and 19). Negotiation files are located in the secretarial area immediately adjacent to Chieff's office (T 50, 59).

7. Savage is also responsible for typing the following:

the agenda for non-public Board meetings (T 31-33, 72-73); transmittal letters for grievance materials sent to the Board attorney (ER-14, ER-16; T 18); drafts of the Board's budget proposals and revisions of these (H.O. No. 83-2, Slip opinion p. 10); the Board's salary offer(s) to the various negotiation units during collective negotiations (T 38, 56, 65-67); and the Board's minutes and reports (T 32, 51-52, 62-63, 73). Savage photocopies the agenda for the non-public Board meetings and any other material which accompanies it (T 60-63); she prepares, seals and tapes agenda packets for each Board member. (These are then delivered by custodial employees to each Board member personally (T 66)). She stores the used stencils in a vault (T 68).

8. Savage has continual access to files of all documents that she has typed and photocopied as well as to any files she has used in doing her work (T 7, 8, 19, 35, 37, 54, 55, 60). In preparing letters and other documents, Savage needs general access to files and may have cause to peruse various files at any time (T 19, 34, 36, 53, 57, 68, 71). When McPherson is busy or unavailable, Savage files materials concerning collective negotiations (T 35, 36). Filing may also include the filing of Chief's mail after she has opened and sorted it (T 73, 74).

9. Additionally, Savage prepares transmittal letters to the Board attorney and other managerial executives concerning Commissioner of Education Appeals (ER-14; T 24), parents' complaints regarding teachers (ER-15, 16), and various grievances (T 25, 44; ER-13).

10. Finally, Savage processes employee reimbursements under the Board prescription plan, provides switchboard relief (lunch/ break time) and substitutes for absent secretaries (D.R. No. 83-21, Slip opinion p. 8).

Applicable Law

The Act, in section 13A-3(d) defines employee as follows:

This term [employee] 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.

Confidential employees are defined in section 13A-3(g) 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.

Confidential employees are excluded from the protections and rights offered under the Act and consequently they are not eligible for inclusion in a collective negotiations unit.

The Commission has determined that a finding of confidential status requires a close examination of the facts in each case. ^{5/} Additionally, in Brookdale the Director of Representation

^{5/} Several decisions established the contours of legal analysis for a finding of confidential status, In re Passaic Cty. Reg. High School Dist. No. 1 Bd/Ed, P.E.R.C. No. 77-19, 3 NJPER 34 (1976) ("Passaic"); In re Bd/Ed Twp. of West Milford, P.E.R.C. No. 56 (1970) ("West Milford"); In re Woodbridge Twp. Bd. of Fire Commissioners Dist. No. 1, P.E.R.C. No. 51 (1974); Willingboro Bd/Ed, D.R. No. 84-4, 9 NJPER 527 (¶14215 1983); Linden Free Public Library Bd. of Trustees, D.R. No. 82-32,

(continued)

determined that the definition of confidential employee should be narrowly construed because those employees are excluded from the Act's benefits and protection. (§5.3)

The following determinations have been made regarding the type of duties considered to be those of a confidential nature. In West Milford, the Commission concluded that the secretary and assistant secretary to the Superintendent and Board/Administrator/Secretary were confidential employees because they

...all work for and with those at a management level who share with the Board responsibility for personnel and labor relations policies and by virtue of that relationship these three secretaries have in the course of their normal duties, access to and knowledge of such policy information. (Slip opinion, p. 4)

The Director of Representation further clarified that the phrase "access and knowledge" is used interchangeably with the phrase "access and exposure." The elements of access and exposure to labor relations material are of tantamount importance. (Rahway; River Dell, D.R. No. 83-21, fn. 2, Slip opinion, p. 7) The Act does not require that the performance of confidential duties be regular and continuous. (Dover; Scotch Plains, D.R. No. 84-11,

5/ (continued)

8 NJPER 76 (§13031 1981) ("Linden"); Old Bridge Twp., D.R. No. 82-17, 7 NJPER 639 (§12287 1981); In re Jersey City, D.R. No. 80-36, 6 NJPER 278 (§11132 1980); In re Twp. of Parsippany-Troy Hills Bd/Ed, D.R. No. 80-35, 6 NJPER 276 (§11131 1980); In re Little Ferry Bd/Ed, D.R. No. 80-19, 6 NJPER 59 (§11033 1980); In re Dover, D.R. No. 79-19, 5 NJPER 61 (§10040 1979) ("Dover"); In re Jersey City Bd/Ed, D.R. No. 80-15, 5 NJPER 533 (§10273 1979); In re Rahway Bd/Ed, D.R. No. 80-12, 5 NJPER 506 (§10261 1979) ("Rahway"); Mercer County Community College, D.R. No. 80-13, 5 NJPER 507 (§10262 1979); Brookdale Community Coll., D.R. No. 78-10, 4 NJPER 32 (§4018 1977) ("Brookdale"); In re Jersey City, D.R. No. 78-35, 4 NJPER 139 (§4065 1978); Orange Bd/Ed, D.R. No. 78-28, 4 NJPER 1 (§4001 1977); Cranford Bd/Ed, D.R. No. 78-20, 3 NJPER 352 (1977); In re Springfield Bd/Ed, E.D. No. 52 (1974); In re Plainfield Bd/Ed, E.D. No. 1 (1970) ("Plainfield").

NJPER (¶ 1983). 6/

Therefore, as the Executive Director in Plainfield found:

It is axiomatic that those charged with the responsibility for negotiations or the formulation of labor relations policy may not be included in the same unit as those affected by such negotiations or such policy. To include both sides of the negotiating table in one unit would be the clearest conflict of interest and would effectively interfere with the purpose of this Act which provides for good faith negotiations. Similarly, secretarial employees who act in a confidential capacity to a member of management's team who is involved in the formulation of labor relations policy and who is privy to information concerning such matters would have the same conflict of interest. Slip Op. pp. 2-3.

In summary, the relevant consideration is whether or not the individuals in question have access to information that has a direct bearing on collective negotiations and the labor relations function of the public employer.

Analysis

The analysis, therefore, is twofold. Firstly, we must determine the managerial and labor relations functions of the immediate supervisor to the Secretary/Switchboard Operator. Secondly, we must determine whether the secretary acts in a confidential capacity to a member of management's team.

6/ The Association argues that the Board's need for Savage to perform confidential duties is minimal and "a sham." It contends that McPherson, Chieff's confidential secretary who actually spends most of her time performing non-confidential duties, could easily perform all the confidential tasks (Br. p. 11). However, the question of the distribution of confidential work is not appropriately raised in a CU proceeding to determine the status of employees based on their current duties and responsibilities; the wisdom of a management assignment cannot be attacked in a representation proceeding. Scotch Plains, D.R. No. 84-11, Slip op. p. 8.

In the instant case, as Business Administrator, Chieff holds a managerial executive position in accordance with the Act's definition. As part of management's team, his labor relations duties include the initial critique of the Association's contract proposals and the development of the Board's counter-proposals. He is singularly responsible for costing out various contract proposals (the Board's as well as the Association's); for keeping minutes and records of all non-public Board meetings; and for representing the Board at step 2 of the secretarial and maintenance employees' grievance procedures.

As Chieff's second secretary, Savage is involved in a variety of duties closely involved with Chieff's labor relations functions. Her duties are to type, file and photocopy documents, regardless of their nature. Consequently, she has continual exposure and access to confidential material: grievances, budget proposals, collective negotiations matters, and written communications to the Board attorney concerning such confidential matters. Therefore, she clearly serves in a confidential capacity to the Business Administrator. ^{1/}

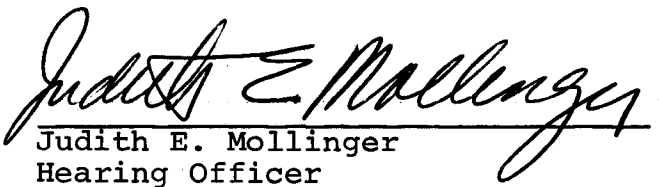
Recommendations

Based on the foregoing discussion, I recommend the following:

^{1/} In a representation proceeding to determine the status of an employee an examination of the employee's current duties is appropriate. Savage's job responsibilities provide her with continuous exposure to confidential material. A finding of confidential status based on Savage's current duties does not foreclose re-evaluation of her status after a reasonable period of time if she no longer performs confidential duties. Clearview Reg. H.S. Dist. Bd/Ed, D.R. No. 78-2, 3 NJPER 248 (1977).

The position of Secretary/Switchboard Operator is confidential within the meaning of the Act and should not be included within the collective negotiations unit.

Respectfully submitted,


Judith E. Mollinger
Hearing Officer

Dated: December 16, 1983
Trenton, New Jersey