

H.O. NO. 96-2

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

In the Matter of

BROOKDALE COMMUNITY COLLEGE,

Respondent,

-and-

Docket No. CU-H-93-16

BROOKDALE COMMUNITY COLLEGE
ADMINISTRATIVE ASSOCIATION,

Petitioner.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that the Director of Academic Computing employed by Brookdale Community College is a confidential employee within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-3(g). The Hearing Officer concluded that the Director's responsibilities as a member of the vice president's senior staff group and role as a consultant for the College during the College's formulation of its positions on grievances could compromise the College's right to confidentiality concerning the collective negotiations process.

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 exception 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 Respondent, Murray, Murray & Corrigan
(Karen A. Murray, of counsel)

For the Petitioner, Klausner & Hunter, attorneys
(Stephen B. Hunter, of counsel)

HEARING OFFICER'S RECOMMENDED
REPORT AND DECISION

On August 31, 1992, the Brookdale Community College Administrative Association filed a Clarification of Unit Petition with the Public Employment Relations Commission seeking to clarify the director of academic computing into its existing unit of administrative employees.^{1/} The College opposes the inclusion of

^{1/} The Association initially sought to add the director of information technologies as well, but later withdrew the petition as to this title (T15-T16). The transcript of the hearing is referred to as "T-"; exhibits received in evidence marked as "C-" refer to Commission exhibits; those exhibits marked "J" refer to joint exhibits; those marked "R" refer to subparts of J-1.

the director because it alleges this position is confidential within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On August 19, 1994, the Director of Representation determined that substantial and material disputed factual issues warranted an evidentiary hearing. A hearing was conducted on October 20, 1994. The parties examined witnesses and introduced exhibits. The parties waived oral argument and submitted post-hearing briefs and reply briefs, the last of which was received on May 2, 1995.^{2/} Based upon the entire record I make the following:

FINDINGS OF FACT

1. The College and Association have a collective negotiations agreement effective from July 1, 1992 through June 30, 1995 (T11). The unit includes 55 titles of administrators employed by the College (T11).^{3/}

^{2/} Both the Association and College requested and were granted extensions of time to file briefs.

^{3/} Excluded from the unit are: the president, vice-president, deans, executive director-public affairs, executive assistant to the president, administrative assistant to the president, assistants to the vice-president, director-safety and security, administrative assistant-public affairs, lieutenant-safety and security, comptroller, internal auditor, director of accounting, director of personnel, director of computer services, director of campus services, director of physical plant, director of research, director of information services and chief accountant (T11).

2. The director of academic computing is not among those listed in the parties 1992-95 agreement, but was included in the unit during the previous contract term, 1989-1992 (T11). Joann Levey has been the director of academic computing at the College for ten years (T136). Levey reports directly to Vincent Gorman, vice president, administration and operations (T136). Levey plans, budgets and manages all instructional computing activities, builds computer labs, helps faculty find new software, recommends technologies for faculty use and provides support as they learn the software (T149). She is also responsible for all staff training, including personal computer training and basic computer training of faculty and learning assistants (T149-T150). Each faculty member has between one and five learning assistants who help students use the computer technology (T150).

3. On February 1, 1992, the College formally reorganized part of its administrative structure, resulting in the elimination of the vice president, business and treasurer, and the creation of the vice president, planning and development, and Gorman's position of vice president, administration and operations (T11).^{4/} These positions report directly to the president of the College (T11).

4. On January 31, 1992, Gorman directed that Levey's position would report directly to him (T30, R-9). One of Gorman's objectives in the reorganization was to recognize the importance of

^{4/} Planning for the reorganization began in 1991, well before the formal adoption by the Board of Trustees (R-1).

the technology areas by elevating the heads of those areas to third tier positions, reporting directly to the vice president (T30-T31, T47-T49).^{5/} On March 17, 1992, Gorman approved a revised job description for the director of academic computing (T11).

5. In addition to Levey, directly reporting to Gorman are the director of information technologies, the director of physical plant, the comptroller/dean of business services, and the director of safety and security (R-7, T37, T136, T138). Gorman regards this group as his senior executive staff with whom he regularly meets to discuss management issues and policies (T51). All of these positions are excluded from the Association's unit and have participated in formulating proposals for collective negotiations, strategy and contract interpretation (T51-T52). After the reorganization in February 1992, Gorman directed his staff to be more sensitive to the provisions in the various labor agreements at the College in carrying out their daily administrative duties (T136-T137, T141).

Collective Negotiations and Contract Administration

6. There are four negotiations units at the College: administrators, faculty, learning assistants and police (T108). The College's negotiating team consists of: Joann Kolbran, vice

^{5/} The director of information technologies, a position responsible for voice/data communications, administrative computing and computer operations also reports to Gorman under the reorganization.

president for educational services, Dean Palumbo, dean of student services, Olga Vasquez-Clough, director of employee and labor relations, and Ralph McMillan, director of compensation (T70, T97-T98, T80). Gorman was on the College's negotiations team for the 1992 negotiations with the FOP (T97-T100).

7. Director of Employee and Labor Relations

Vasquez-Clough, has been with the college for 12 years, as director for two years (T106-T108). She is the College's point person and historian for matters concerning the collective negotiations agreements. During the life span of agreements, she informs other managers as to the prior interpretation of contract articles (T108-T109). She maintains records of articles that have presented problems for use in subsequent rounds of negotiations (T109).

8. Before negotiations begin, Vasquez-Clough sends copies of agreements to college officers for their comments and recommendations (T109-T110). Upon receipt of comments, Vasquez-Clough prepares recommendations for cabinet level discussions (T110).^{6/} She researches items for the Cabinet and apprises the College's labor counsel of all developments (T110). Vasquez-Clough observed that there is a more collaborative and collegial style in the College's current approach to negotiations than existed in the past when its approach was authoritarian (T115).

^{6/} The Cabinet consists of the three vice presidents, dean of business services, dean of human resources, dean of student development, dean of community services and his executive assistant (T125).

9. Prior to negotiations, the College's team meets with the president and are given "marching orders" (T111). Vasquez-Clough prepares fact sheets for the president's meeting with the Board of Trustees (T111). The final financial parameters come from the Board (T111). She provides Gorman with this fact sheet so that Gorman can consult with his senior staff, including Levey, to discuss ways to accomplish the Board's objectives (T114).

10. Gorman asks each of the senior staff to review the contracts and identify language changes which they feel would be beneficial (T53, T137). The group, including Levey, formulates a position which Gorman presents to Vasquez-Clough and to the president for development of the College's negotiations strategies (T53-T54, T57-T58, T137).

11. During the three negotiations which have occurred since the 1992 reorganization, Levey was input and advice about contract language (T141). In preparation for negotiations with the administrators' unit, Levey reviewed the contract to identify language changes which would be appropriate for management (T142). During the most recent negotiations for the learning assistants and police units Levey participated in discussions about health insurance other negotiations issues (T142).

12. Prior to the reorganization Levey was only asked for input on contract proposals likely to be raised in bargaining. However, since the reorganization, Levey participates in senior staff discussions where negotiations issues are discussed and

proposals developed (T143). Levey stated: "Since [Gorman's] become vice president, this is the first time that during the actual negotiations topics involved in negotiations have been discussed around his staff table" (T143).

13. Levey communicates regularly with the other senior staff who report to Gorman on issues affecting terms and conditions of employment, and in carrying out her day-to-day functions, gives attention to whether an administrative action deviates from the negotiations agreements at the College (T137-T138).

14. Levey has also been consulted on the College's most appropriate response to certain grievances (T130). A number of informal and formal grievances have arisen since the reorganization which are discussed in Gorman's senior staff meetings -- both the specific circumstances and the more general policy implications of grievance decisions (T54). Levey, as a one-fifth member of the senior staff has participated in these discussions (T57-T58).

15. According to Gorman, issues that involve the College's business practices and that have the potential for resulting in grievances arise in his staff discussions. Examples are: environmental quality, indoor air quality, other health issues which require compliance with federal, state and local regulations (T56). These issues place the College in conflict between maintaining costs, complying with government regulations and providing a safe and healthy workplace. Gorman believes discussions about such issues have to be kept confidential, because rumors may spread

misinformation and can be damaging to the process of understanding the problem and the solution(s) (T55-T56). Gorman believes that the College may be vulnerable in a particular circumstance and it is unfair to have misinformation spread around before the College can appropriately address an issue (T56).

16. Another example is privatization (T56-T57). Levey participated with Gorman's four other directors in discussions about the privatization of cleaning services (T92-T93). The discussion also concerned other areas that might be considered appropriate for privatization (T93-T95). This topic would potentially have a very direct impact on the staff and the organization for which privatization is under consideration (T57).

17. If Levey were in a unit position, Gorman would be constrained from including her in the normal operations of his senior executive staff group and this would negatively affect the reorganization and the way the division operates (T61). There was a short period in 1992 when Gorman did exclude Levey from certain discussions but he found this unworkable (T77). Since 1993, Levey has functioned as a full participant in the senior executive staff group and has been included in discussions about negotiations matters and contract interpretation (T63-T65).

18. The formal grievance process consists of three steps. In addition to the three format steps, grievances are resolved informally (T88-T89). The division vice president is the second step and usually there is consultation with human resources at the

first step. There have been ten to twelve grievances in Gorman's division in his two years as vice president (T89). Levey could be designated as the College's named representative at the second stage of the grievance process for any of the College's four units, but Gorman has not done so (T87). About two of the grievances filed in Gorman's division have reached the arbitration stage (T90).

Before issuing written decisions on the ten or twelve grievances filed, Gorman consulted with the College's labor counsel and to varying degrees with the president, and personnel in Human Resources (T90-T91).

19. Vasquez-Clough also advises management on the consistent application of contract issues in processing greivances (T111). Recently, Vasquez-Clough consulted with Gorman and Levey over a sensitive issue which was proceeding to grievance arbitration involving computerization (T112). She consulted Levey for her expertise to insure that the college's needs would be defined and protected in the handling of the grievance (T112, T113, T122-T123). Vasquez-Clough solicited Levey's input both because of her technical knowledge about the computer systems and also because of Levey's knowledge of the College's philosophy and expectations for the delivery of the instructional services (T126, T128-T130). Levey has thus had input into the College's objectives as they were raised in the grievance, from both a technical and instructional objectives viewpoint (T128-T130).

20. Vasquez-Clough has consulted with Levey on other grievances that were directly related to her area (T130). Vasquez-Clough consults Levey to advise, seek and confirm information and resolve grievance issues informally (T131, T135).

ANALYSIS

The College asserts that the director of academic computing is a confidential position and must be excluded from the Administrators' Association. The Act defines confidential employees as those:

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.
N.J.S.A. 34:13A-3(g)

A determination that an employee is confidential and, therefore, excluded from the Act's protections, N.J.S.A. 34:13A-5.3, should not be based on speculation:

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. [State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985)]

See also Wayne Tp. v. AFSCME, Council 52, 220 N.J. Super. 340 (App. Div. 1987); Sayerville Bd. of Ed., P.E.R.C. No. 88-109, 14 NJPER 341 (¶19129 1988), aff'd App. Div. Dkt. No. A-4297-87T1 (4/21/89); 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).

Before and after the reorganization in February 1992, Joann Levey's general job duties included managing academic computing: planning, budgeting and managing computer labs, acquiring new software for faculty, recommending technologies and training. Both before and after the reorganization Levey was asked for input into the College's proposals for collective negotiations. However, because of the reorganization which resulted in the elevation of her position, Levey was brought into a core senior executive staff group. As a result, she has been exposed to specific college concerns, strategies, and goals before these are disclosed to the unions with which the College negotiates. Since 1992, she was present at management negotiations discussions for the learning assistants and police units. She has reviewed the Administrators' Association contract to identify suggestions for changes. She is required to be cognizant of the College's compliance with the agreements on an ongoing basis.

The remainder of the senior staff group have always been excluded from any negotiations unit, and have been exposed to specific College negotiations strategies before their disclosure to the unions. I find that since the reorganization, Levey has also

been privy to the College's collective negotiations objectives and strategies.

Further, Levey was consulted by Director of Labor Relations, Olga Vasquez-Clough, on a sensitive grievance concerning computerization to such an extent that Levey became an inside advocate for the College's position on the issue. Levey was involved in this matter and privy to the College's positions and options at a time prior to the choice of options being selected and disclosed to the grievants.

It is significant that Gorman excluded Levey for a while early on in the reorganization, but found this unworkable. She is at the same level in the hierarchy as the rest of the senior staff, manages a college-wide area of responsibility, and it was necessary to include her in this group.

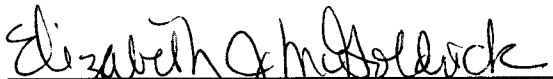
Based on the above, I conclude that Joann Levey's duties place her in a confidential status within the meaning of the Act. Her responsibilities and knowledge of the College's negotiations objectives in collective negotiations and contract administration make her inappropriate for inclusion in any negotiations unit. Since Levey has been made a full member of the vice president's senior staff group, and since she is often consulted on grievances during the College's formulation of its positions, her inclusion in the Association's unit could compromise the College's right to confidentiality concerning the collective negotiations process.

Accord, State of N.J. (Office of Employee Relations) and Council of

N.J. State College Locs, NJSFT-AFT, AFL-CIO, P.E.R.C. No. 90-22, 15 NJPER 596 (¶20244 1989), aff'd NJPER Supp.2d 246 (¶206 App. Div. 1991) (Commission found confidential college administrator who worked on draft of changes in faculty evaluation procedures; college had interest in keeping early versions of procedures confidential before presenting them to faculty union) and Commercial Tp., D.R. No. 91-9, 16 NJPER 511 (¶21223 1990) (township clerk was confidential where her duties include attendance at all closed and open sessions of the township council; Clerk will continue to attend meetings during conduct of negotiations when Council members will discuss collective negotiations)

RECOMMENDATION

I recommend that the Commission find that the Director of Academic Computing, Joann Levey, is a confidential employee within the meaning of N.J.S.A. 34:13A-3(g) and exclude her position from the Brookdale Community College Administrative Association's unit.


Elizabeth J. McGoldrick
Hearing Officer

DATED: June 24, 1996
Trenton, New Jersey