

D.R. NO. 2014-10

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

In the Matter of

ROXBURY TOWNSHIP BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. CU-2013-033

ROXBURY EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Roxbury Township Board of Education filed a clarification of unit petition seeking to clarify a broad-based negotiations unit of certificated and support personnel to exclude the title, benefits/insurance secretary. The Board asserts that the benefits/insurance secretary is a confidential employee within the meaning of the Act. The Director of Representation found that the Board's intention to use the benefits/insurance secretary to prepare scattergrams with projected health benefits costs and salary increases prior to negotiations with the Association, which were set to begin in early 2014, warrants a finding of confidential status.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Public Employer
Adams, Gutierrez & Lattiboudere, attorneys
(Adam Herman, of counsel)

For the Petitioner
Oxford Cohen, LLC, attorneys
(Gail Oxford Kanef, of counsel)

DECISION

On May 14, 2013, Roxbury Township Board of Education (Board) filed a clarification of unit petition seeking to clarify a broad-based collective negotiations unit of all regularly employed certificated and support personnel to exclude the title, benefits/insurance secretary. The unit is represented for purposes of collective negotiations by the Roxbury Education Association (Association). The Board contends that the benefits/insurance secretary is a confidential employee within

the meaning of the New Jersey Employer-Employee Relations Act N.J.S.A. 34:13A-1, et seq. The Association opposes the petition, claiming that the title is not confidential.

The Association represents a unit comprised of regularly employed athletic trainers, basic skills teachers, classroom teachers, ESL teachers, enrichment specialists, guidance counselors, learning disabilities teacher consultants, media specialists, microcomputer teachers, occupational therapists, school nurses, school psychologists, social workers, speech language specialists, supplemental teachers, teachers of the handicapped, secretaries, paraprofessionals, coaches, and extracurricular advisors. The parties' current collective negotiations agreement extends from July 1, 2011 through June 30, 2014. The disputed title has existed for many years and is currently included in the unit. We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2.

On May 28, 2013, a Commission staff agent issued a letter to the parties requesting detailed facts about the functions and responsibilities of the benefits/insurance secretary, as well as the functions and responsibilities of the benefits/insurance secretary's supervisor.

On June 12, 2013, the Association filed a certification of Davida Nitka (Nitka), the now-former president of the Association, and a certification from Joanne Rogers (Rogers), the accounts receivable secretary, whose work location was near that of the disputed employee for a period of time. These certifications did not provide answers to many of the questions posed in the May 28th letter. The Board did not file a response.

On August 2, 2013, following an exploratory conference among the parties at which our request for information was renewed, the Board filed a position statement, together with the job description for the benefits/insurance secretary, and a certification from John Gomez (Gomez), the Board's Business Administrator/Board Secretary.

On August 15, 2013, the Association filed a second certification from Nitka, responding to questions raised in the May 28th letter. Nitka certifies that the benefits/insurance secretary ". . . will not have access to confidential labor relations materials." She certifies that neither "scattergrams" nor "benefits cost-outs" are "confidential labor relations material." She denies that Martin has ever performed any confidential duties and has not worked in the title "during a time when the parties were actively negotiating a collective bargaining agreement." Her certification does not reveal the

foundation of her personal knowledge of the disputed title's duties, particularly in her status as former Association president. No facts indicate that Nitka has personal knowledge of the type or distribution of work in the Board business office.

Unit employee Rogers certifies that from August 2011 until July 2012, Martin worked in close physical proximity to her in the Board office. In July 2012, Martin's "work space" was moved "upstairs" where employee "medical information" assertedly "could be kept private." Rogers certifies that negotiations for the current agreement were completed immediately before or after Martin assumed her duties in the disputed title.

Naoma Martin (Martin) has been employed as the benefits/insurance secretary since August 22, 2011. She reports to the business administrator and the assistant business administrator. On May 2, 2013, the Board promulgated a job description for the disputed title indicating that its responsibilities include maintaining records, ". . . required by policy, regulation or law;" implementing all Board health benefit programs; "assisting in preparation of budget and negotiations materials"; and assisting with accounting and payroll functions. Among the specific duties under the third category are:

- a. prepares reports of annual benefit cost estimates for budget and negotiations including scattergrams for health benefits;
- b. updates monthly report of projected health benefits costs to review budget balance;

- c. reports monthly benefit costs for food service employees and tracks contribution to health premium billing notices;
- d. maintains a list of benefit options and eligibility requirements by bargaining unit. . . .

Business Administrator Gomez, together with the Board superintendent represent the Board during collective negotiations. Gomez is also involved with the budget formulation and adoption process. Gomez certifies that in preparing for negotiations, the benefits/insurance secretary prepares scattergrams, projects health benefits costs, and works with him and health insurance brokers developing employee benefits options and premium savings proposals for the Board. He certifies that the benefits/insurance secretary is privy to "labor relations cost data," including "projected increases for year with contract not settled." The disputed title also has access to and knowledge of ". . . projected salary increases and benefit option proposals" developed and recommended by Gomez. The benefits/insurance secretary becomes aware of the labor relations strategies and policies, "shortly after management."

N.J.S.A. 34:13A-5.3 affords public employees the right "to form, join and assist any employee organization." Confidential employees, however, are excluded from the Act's definition of "employee" and do not enjoy the Act's protections. N.J.S.A.

34:13A-3(d). N.J.S.A. 34:13A-3(g) defines "confidential employees" of public employers other than the State as:

[E]mployees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

The Commission's policy is to narrowly construe the term, confidential employee. Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd NJPER Supp. 2d 186 (¶166 1988); 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). In State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), we explained our approach 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]

See also Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd NJPER Supp. 2d 186 (¶165 1988).

In New Jersey Turnpike Authority v. AFSCME, Council 73, 150 N.J. 331 (1997) (N.J. Turnpike Auth.), our Supreme Court approved the standards articulated in State of New Jersey and explained:

The baseline inquiry remains whether an employee's functional responsibilities or knowledge would make their membership in any appropriate negotiating unit incompatible with their official duties. N.J.S.A. 34:13A-3(g); see also State of New Jersey, supra, 11 NJPER 507 (¶16179 1985) (holding that final determination is '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.'). Obviously, an employee's access to confidential information may be significant in determining whether that employee's functional responsibilities or knowledge make membership in a negotiating unit inappropriate. However, mere physical access to information without any accompanying insight about its significance or functional responsibility for its development or implementation may be insufficient in specific cases to warrant exclusion. The test should be employee-specific, and its focus on ascertaining whether, in the totality of the circumstances, an employee's access to information, knowledge concerning its significance, or functional responsibilities in relation to the collective negotiations process make incompatible that employee's inclusion in a negotiating unit. We entrust to PERC in the first instance the responsibility for making such determinations on a case-by-case basis. [Id. at 358]

See also River Dell Reg. Bd. of Ed., D.R. No. 83-21, 9 NJPER 180 (¶14084 1983), adopted P.E.R.C. No. 84-95, 10 NJPER 148 (¶15073 1984).

The key to confidential status is an employee's knowledge of materials used in the labor relations process including contract negotiations, contract administration, grievance handling, and the preparation for these processes. See State of New Jersey (Div. of State Police), D.R. No. 84-9, 9 NJPER 613 (¶14262 1983). Employees may be found to be confidential where their supervisor's role in the labor relations process and their own duties expose them to confidential matters. See W. Milford Bd. of Ed., P.E.R.C. No. 56, NJPER Supp. 218 (¶56 1971); Salem Comm Coll., P.E.R.C. No. 88-71, 14 NJPER 136 (¶19054 1988); River Dell.

The Commission is cautious in finding confidential status because the disputed employee will be exempt from the rights and protections of the Act. N.J.S.A. 34:13A-5.3. Where such a determination relies upon "speculation or conjecture as to job function," the Commission will not exclude the disputed employee from the unit. See Lacey Tp. Bd. of Ed., P.E.R.C. No. 90-38, 15 NJPER 628 (¶20263 1989); Wayne Tp., P.E.R.C. No. 87-82, 13 NJPER 77 (¶18035 1986). In addition, an employee's mere access to information is not a sufficient basis for finding confidential status. See N.J. Turnpike Auth.; Downe Tp. Bd. of Ed., D.R. No. 2005-3, 30 NJPER 388 (¶125 2004); Evesham Tp. Fire District No. 1, D.R. No. 99-4, 24 NJPER 503 (¶29233 1998); Ringwood Bor., D.R. No. 93-19, 19 NJPER 196 (¶24093 1993); Little Ferry Bd. of

Ed., D.R. No. 80-19, 6 NJPER 59 (¶11033 1980); Cf. Oakland Bd. of Ed., D.R. No. 99-9, 25 NJPER 66 (¶30025 1998).

Cliffside Pk. Bd. of Ed., P.E.R.C No. 99-18, 14 NJPER 339, 340 (¶19128 1988) is instructive. There, the Commission agreed that an accounts payable clerk who ". . . had advanced knowledge of the Board's negotiations positions through her role in preparing scattergrams" was confidential within the Act's meaning. The Hearing Officer found that the scattergrams showed ". . . existing costs for base salaries [and] subsequent ones show projected increases. They are prepared using various percentage levels that [the Board Business Administrator/Secretary] gives them." Cliffside Pk. Bd. of Ed., H.O. No. 87-19, 13 NJPER 473, 477 (¶18175 1987).

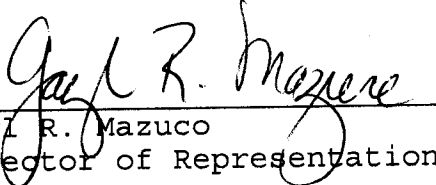
I find that Gomez's certification about the scattergram assignment given to the benefits/insurance secretary closely approximates the duties assigned to the accounts payable clerk in Cliffside Pk. Bd. of Ed. Nitka's certification that ". . . scattergrams are not confidential labor relations material" does not appear to be rooted in specific facts or personal knowledge.

The Commission has also recently reaffirmed a line of cases finding confidential status based upon a public employer's intention to assign a disputed employee confidential duties. Gloucester Cty. Col., PERC No. 2014-12, 40 NJPER ____ (¶____

2013) ("If the future job functions to be performed are clear and implementation is certain, then future circumstances may be considered in the evaluation of confidential status.") (slip opinion at 3); Montgomery Tp. Bd. of Ed., D.R. No. 93-12, 19 NJPER 96, 97 (¶24044 1993); see also, Cliffside Pk. Bd. of Ed., (bookkeeper also found to be confidential because employer planned to have her assist the accounts payable clerk in preparing scattergrams); High Bridge Bd. of Ed., D.R. No. 2002-13, 28 NJPER 247 (¶33093 2002) (secretary to board superintendent/middle school principal found to be confidential based upon expectation that holder of title will type confidential memoranda, etc., in advance of disclosure to majority representative).

No facts demonstrate that Martin has yet prepared scattergrams and materials associated with projected health benefits costs and salary increases in advance of such disclosures to a majority representative in collective negotiations. Business Administrator Gomez certifies that Martin performs these duties but no facts suggest that a collective negotiations process has commenced in which Martin will be required to perform confidential duties. However, one can reasonably infer that negotiations shall commence sometime in early 2014 because the current agreement will expire on June 30, 2014. Following our statute and case law, and under the

circumstances presented in this case, I find that the title, benefits/insurance secretary is confidential within the meaning of the Act.


Gayl R. Mazuco
Director of Representation

DATED: December 9, 2013
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by December 19, 2013.