

D.R. NO. 2019-14

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

In the Matter of

TOWNSHIP OF FRANKLIN (GLOUCESTER COUNTY),

Public Employer,

-and-

Docket No. CU-2019-004

AFSCME COUNCIL 63, LOCAL 3574,

Petitioner.

SYNOPSIS

The Director of Representation clarifies a collective negotiation unit of blue and white collar employees to include flex clerks but exclude the administrative assistant. The employer argued both job titles were confidential under the New Jersey Employer-Employee Relations Act. The Director agreed the administrative assistant was confidential because she had advanced knowledge and insight into the employer's positions on unit grievances, but found that flex clerks did not perform confidential duties. Since flex clerks also shared duties in common with unit employees, the Director also found they performed bargaining unit work and should be included in the unit under the Workplace Democracy Enhancement Act.

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Appearances:

For the Public Employer,
(Nancy Kennedy Brent, attorney)

For the Petitioner,
(Theresa Triola, Staff Representative)

DECISION

On August 13, 2018, the American Federation of State, County and Municipal Employees, Council 63, Local 3574 (AFSCME or Petitioner) filed a clarification of unit petition (petition) seeking to clarify its collective negotiations unit of blue collar employees and white collar employees of the Township of Franklin (Township) to include the job titles, flex clerk and administrative assistant. AFSCME asserts that the petitioned-for employees do unit work and should be added to its unit. The Township opposes the petition, contending that the administrative assistant and flex clerks are confidential employees within the

meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. On December 18, 2018, the staff agent investigating the petition sent a letter to the parties requesting certifications and other documents in support of their positions. On January 18, 2019, the Township filed and served on AFSCME a certification with exhibits from Nancy Kennedy Brent, Esq., the Township's Administrator and Acting Solicitor (certification hereinafter referred to as the "Brent Cert."). In response to the December 18 letter, AFSCME filed and served on the Township several certifications from unit employees and petitioned-for employees attesting to the job duties they perform, along with job descriptions and copies of collective negotiations agreements between AFSCME and the Township.^{1/} The parties were afforded an opportunity to file replies by January 25, 2019. They did not.

^{1/} The most recent collective negotiations agreement covering this negotiations unit extends from January 1, 2013 through December 31, 2017. The parties to that agreement are AFSCME Council 71, Local 3574 and the Township. AFSCME asserts that AFSCME Council 71 was reorganized into AFSCME Council 63 and that AFSCME Council 63, Local 3574 is now the majority representative of this collective negotiations unit. The Township does not dispute this assertion. AFSCME Council 63 maintains that the Township has treated AFSCME Council 63 as the unit's majority representative. In light of these circumstances, I will assume AFSCME Council 63 is the majority representative of the collective negotiation unit covered by the 2013-2017 collective agreement.

By letter dated March 19, 2019, I advised the parties of my tentative findings and conclusions and invited responses. No response was filed. No disputed, substantial material facts require us to convene an evidentiary hearing. Based upon the administrative investigation, I find the following facts:

Representatives of AFSCME and the Township signed a collective negotiations agreement (Agreement) extending from January 1, 2013 through December 31, 2017. Article I of the Agreement sets forth a recognition clause that defines AFSCME's negotiations unit. Article I(A) provides:

The Township recognizes the Union [AFSCME] as the bargaining agent for the purpose of collective bargaining concerning salaries, wages, hours and other terms and conditions of employment for all full-time and part-time (as defined below) employees in the classifications listed in Appendix A, but excluding probationary employees, managerial executives, craft [employees], professional employees, supervisors, police and all other Township employees.

Appendix A to the Agreement lists thirty-two (32) blue collar and white collar job titles, including the following white-collar titles:

- (1) assistant administrative clerk - temp
- (2) assistant administrative clerk- probation
- (3) assistant administrative clerk - starting
- (4) assistant administrative clerk
- (5) administrative clerk

- (6) senior administrative clerk
- (7) construction clerk- probation
- (8) construction clerk
- (9) senior construction clerk
- (10) zoning board secretary
- (11) planning board secretary

AFSCME and the Township also signed a predecessor collective negotiations agreement, extending from January 1, 2009 through December 31, 2012.

In 2010, the Township created the flex clerk job title.^{2/} (Brent Cert., Response to Question 1).^{3/} On April 11 and 18, 2016, the Township hired Antoinette DiGrazio and Stefanie Garofolo as flex clerks. (Brent Cert., Response to Question 3). The Township also hired Tiffany Schemely, Jim Rohrer, Jen Metzger and Leiha Caselli as flex clerks on May 2, 2016; July 31, 2017; January 9, 2018 and September 26, 2018, respectively. (Brent Cert., Response to Question 3). Deanna Tyciak was hired as a temporary flex clerk on February 10, 2015. (See July 14, 2015 Township Resolution attached to Brent Cert.). No facts indicate that the Township hired a flex clerk before February 10, 2015.

2/ The Township asserted it was unable to determine when the administrative assistant title was created.

3/ Numbered questions refer to the questions in our December 18, 2018 investigatory letter.

The Township Administrator certifies that the flex clerk job title “. . . was designed so that we could get confidential help for various administrative offices, primarily the Administrator and the Clerk’s office, so various employees of part-time hours could serve multiple functions.” (Brent Cert., Response to Question 4). Flex clerks “. . . act as a back-up to our Clerk and perform registrar functions, act as administrative support for our DPW [Department of Public Works] Director and Administrator, take taxes, help manage the senior lunch program, serve as receptionists, [and] type negotiations documents (for negotiating with various unions including AFSCME and the PBA).” (Brent Cert., Response to Question 4). Flex clerks also provide clerical assistance in the Township’s Planning and Zoning departments, at the Township’s compost center, assist with video recording public meetings and “[s]ome of them are slated as back-ups to attend executive sessions, which are extremely confidential and often involve confidential issues of personnel.” (Brent Cert., Response to Question 4).

The Township also adopted an ordinance setting forth the duties of a flex clerk. (Chapter 55 of Township’s ordinances, attached to Brent’s certification). The ordinance provides that the “primary purpose of flex clerk is to handle the daily administrative duties of various Township offices” and that the flex clerk may be assigned administrative duties deemed necessary

by the Township Administrator to assist other Township departments. (Chapter 55-3 of Township Ordinance). The ordinance also lists examples of duties that a flex clerk may perform, including:

- (1) answering incoming phone calls (except not for the police department and municipal court);
- (2) taking messages for the Mayor, Township Committee and Fire Official;
- (3) sorting incoming mail;
- (4) typing and completing forms for submission to the county;
- (5) sending and following up on municipal licensing renewals;
- (6) making copies of correspondence and preparing folders with correspondence for members of the Township Committee for their meetings;
- (7) attending Township Committee meetings in absence of Deputy Clerk and type minutes from those meetings;
- (8) typing Township Committee meeting minutes into a minute book;
- (9) filing Township resolutions and ordinances in appropriate books;
- (10) maintaining files on correspondence concerning a variety of municipal matters;
- (11) maintaining the copier (such as clearing jams of the copy machine); and
- (12) performing any other procedures related to the operation of the Township Administrator's office or any other offices temporarily assigned to.

The ordinance specifies that qualifications for the title include, ". . . successful completion of a course in business or

office procedures", as well as ". . . at least one year of secretarial experience or two years if no business course was taken."

The Township asserts that some of its flex clerks perform "confidential" duties. Stefanie Garofolo and Tiffany Schemele ". . . have both typed our proposed contracts and forms for use at the bargaining table for AFSCME and for the PBA." (Brent Cert., Response to Question 11). Flex clerks in the administrative building are also ". . . slated to back up our clerk if she cannot attend executive session, wherein many issues of personnel and negotiations are discussed." (Brent Cert., Response to Question 12). Brent also certifies that Leiha Caselli ". . . very recently helped to compile answers to these questions supplied by PERC." (Brent Cert., Response to Question 13).

On July 14, 2015, the Township appointed Deanna Tyciak to the job title, "administrative assistant" for the department of public works (DPW). (July 14, 2015 resolution attached to Brent Cert.). Tyciak's ". . . primary function has been as the confidential assistant and aide to Charles Bosco, our DPW Director." (Brent Cert., Response to Question 6). She ". . . has been instrumental in dealing with grievances, compiling information regarding employee discipline, and has been given confidential information by Mr. Bosco." (Brent Cert., Response

to Question 6). Tyciak has specifically compiled information to answer grievances filed by unit employees Frank Panzino, Matthew Gemenden and Eddie Anderson and ". . . has discussed management positions on same with Charles Bosco for two years." (Brent Cert., Responses to Questions 11 and 13). Tyciak has direct knowledge of Bosco's positions on grievances because she types grievance responses for Bosco and communicates on his behalf with Brent to facilitate resolution of AFSCME grievances. (Brent Cert., Response to Question 15). Bosco, as head of the DPW, is designated under the parties' grievance procedure as a "Step Two" decision-maker on grievances concerning DPW employees. (See Article V, Section C of the Agreement).^{4/}

The administrative assistant in DPW is also responsible for preparing reports related to recycling and solid waste tonnage, answering incoming phone calls to DPW, handling correspondence and filing necessary DPW reports with the New Jersey Department of Environmental Protection and County of Gloucester; handling DPW correspondence; issuing work orders and purchase orders for DPW projects and supplies; and logging and keeping records of

4/ Step Two of the grievance procedure provides: "If no agreement is reached orally within five (5) working days of the initial discussion with the immediate supervisor, the employee or the Union may present the grievance in writing within five (5) working days thereafter to the Superintendent or Department Head. The Superintendent or Department Head shall answer the grievance in writing within five (5) working days of receipt of the grievance."

hours of work, pay scales, vehicle usage, overtime usage, and other safety and work-related incidents involving DPW employees. (Certification of Deanna Tyciak). These and other DPW-related duties are performed under the direction and supervision of the DPW Superintendent (Bosco) and the DPW Assistant Superintendent. (Tyciak Certification).

Flex clerks and the administrative assistant share duties in common with unit employees. For instance, flex clerks share secretarial and clerical duties in common with senior administrative clerks and assistant administrative clerks (both of which are unit titles), such as typing and filing correspondence and departmental reports, processing departmental mail, keeping records of departmental transactions on a wide range of municipal matters, and answering phone calls for various municipal departments. (Brent Cert., Response to Question 9; certifications of Karen Eckhardt, Margaret Caldwell, Jaqueline Pace and Nakida Williams). The administrative assistant and administrative clerk's (a unit title) job descriptions and duties are also similar. Both answer phone calls to the DPW, prepare and file DPW reports regarding recycling and solid waste tonnage data and handle various bookkeeping duties for recycling and solid waste disposal. (Tyciak certification and job description for administrative clerk).

ANALYSIS

The Township contends that the administrative assistant and flex clerks are confidential employees. AFSCME disagrees. I agree with the Township that the administrative assistant is confidential within the meaning of the Act, but disagree that flex clerks are confidential. I also agree with AFSCME that flex clerks perform unit work and should be included in AFSCME's unit.

The Workplace Democracy Enhancement Act (WDEA), N.J.S.A. 34:13A-5.11 to 5.15, provides, in a pertinent part:

All regular full-time and part-time employees of the public employer who perform negotiations unit work shall be included in the negotiations unit represented by the exclusive representative employee organization.

Negotiations unit work means work that is performed by any employees who are included in a negotiations unit represented by an exclusive representative employee organization without regard to job title, job classification, or number of hours worked, except that confidential employees or managerial executives, as those terms are defined by section 1 of P.L. 1941, c.100 (C.34:13A-3), or elected officials, members of boards or commissions, or casual employees, may be excluded from the negotiations unit. Casual employees are employees who work on average of fewer than four hours per week over a period of 90 calendar days.

[N.J.S.A. 34:13A-5.15]

Confidential employees 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 (¶165 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, 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., supra. In New Jersey Turnpike Authority v. AFSCME, Council 73, 150 N.J. 331 (1997), 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 and 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]

In evaluating confidential status claims, we have consistently applied strict standards of proof. Absent a proffer of specific duties and a demonstration that the purported confidential duties are actually performed, we will not find confidential status. City of Camden Housing Authority, D.R. No. 2014-7, 40 NJPER 219 (¶84 2013).

Advanced knowledge and preparation of grievance responses are indicia of confidential status. Sayreville Bd. of Ed.,

P.E.R.C. No. 88-109, 14 NJPER 341 (¶19129 1988), aff'd NJPER Supp.2d 207 (¶182 App. Div. 1989)(clerk-secretary working with Superintendent who had advanced knowledge of grievance responses found to be confidential); Town of Kearny, D.R. No. 96-20, 22 NJPER 220 (¶27117 1996)(secretary to town administrator who typed administrator's grievance decisions and prepared negotiations strategy session minutes found to be confidential). However, compiling and accessing information used in formulating grievance responses, without functional knowledge or insight into the employer's position on a grievance, is not sufficient to find that an employee is confidential. Sayreville Bd. of Ed. (payroll processor who compiled and prepared materials for use by an administrator in deciding grievances was not deemed confidential since she did not know how information was used in formulating a grievance response). Moreover, a ". . . finding of confidential status is based on what the employee actually does, not potential duties that may be reassigned to him or her." Evesham Tp. Fire Dist., D.R. No. 99-4, 24 NJPER 503, 505 (¶29233 1998), citing State of New Jersey (Office of Employee Relations), P.E.R.C. No. 90-22, 15 NJPER 596 (¶20244 1989), aff'd NJPER Supp.2d 246 (¶206 App. Div. 1991). The potential to perform a duty, by itself, does not justify a finding of confidential status. Evesham, 24 NJPER at 505 (claim that township clerk and deputy clerk "may"

type closed session meeting minutes pertaining to negotiations does not warrant a finding of confidential status).

I find that the administrative assistant, Deanna Tyciak, is a confidential employee. Tyciak works with Bosco -- the step two decision-maker under the Agreement's grievance procedure -- on the preparation of grievance responses concerning AFSCME unit employees and has direct knowledge and insight into Bosco's positions on grievances in advance of any disclosure to AFSCME or the grievant. Tyciak has also communicated on behalf of Bosco with Brent about strategies for resolving AFSCME grievances. Tyciak's direct involvement in and knowledge of the Township's positions on grievances concerning unit employees renders her position confidential within the meaning of the Act. Sayreville Bd. of Ed.; Town of Kearny. Given the confidential status of her position, I deny AFSCME's request to include Tyciak in its unit.

However, I find that the flex clerk title is not confidential within the Act's meaning. Flex clerks do not perform duties that have compromised the Township's right to confidentiality in collective negotiations and/or in the administration of the parties' Agreement. The Township asserts that flex clerks have "typed our proposed contracts and forms for use at the bargaining table" (Brent Cert., Response to Question 11), but has not demonstrated how the preparation of these documents give flex clerks access to or knowledge of the

Township's negotiations strategies or other, confidential information pertaining to collective negotiations. Access to a contract, by itself, does not justify a finding of confidential status. State of New Jersey (Montclair University), D.R. No. 2018-15, 44 NJPER 244 (¶70 2018), request for review denied at P.E.R.C. No. 2018-42, 44 NJPER 398 (¶111 2018)(Director notes that a collective agreement is, by statute, a public document that can be accessed by the public and that access alone does not justify a finding of confidential status). Although the Township certifies that some flex clerks are "slated" as "back-ups" for the Township Clerk to attend executive sessions, no specific examples are provided of flex clerks actually attending executive sessions where collective negotiations were discussed, nor have any specific examples been provided of confidential duties being performed by flex clerks.^{5/} The possibility of attending an executive session does not justify a finding of confidential status. Evesham Tp. Fire District. Absent specific examples of flex clerks performing confidential duties, I find that they are not confidential employees under the Act. Evesham Tp. Fire District; Camden Housing Authority.

^{5/} The Township's ordinance provides that flex clerks may be asked to type Township Committee meeting minutes. No specific examples and/or work samples have been provided demonstrating that this duty was performed by a flex clerk. That flex clerks may perform this duty is not sufficient to justify a finding of confidential status. Evesham Tp. Fire District.

The remaining question is whether flex clerks perform negotiations unit work justifying their inclusion in AFSCME's unit under N.J.S.A. 34:13A-5.15. I find that flex clerks do perform unit work. They share in several secretarial and clerical duties with other unit employees, such as answering phone calls, typing and filing correspondence and departmental reports, processing mail and other clerical tasks. Since flex clerks share duties in common with unit employees and thus perform unit work, I clarify AFSCME's unit to include flex clerks.

Based on the foregoing, I find that the administrative assistant is a confidential employee and that flex clerks are not confidential employees within the meaning of the Act. I also find that flex clerks perform negotiations unit work justifying their inclusion in AFSCME's unit.

ORDER

AFSCME's unit is clarified to exclude the administrative assistant and to include flex clerks, effective immediately.

/s/ Jonathan Roth
Jonathan Roth
Director of Representation

DATED: April 1, 2019
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 April 11, 2019.