

P.E.R.C. NO. 2015-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION,

Public Employer,

-and-

Docket Nos. CU-2014-002
CO-2014-028

TRENTON EDUCATIONAL
SECRETARIES ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission denies the Trenton Educational Secretaries Association's (TESA) request for review of the Director of Unfair Practice and Representation's dismissal of its clarification of unit petition, but remands TESA's related unfair practice charge to the Director for further processing. The Commission finds that the Director's finding that the Trenton Board of Education's newly created position is a confidential secretary who is ineligible for inclusion in the unit is supported by undisputed material facts and a thorough investigation, and that an evidentiary hearing was unnecessary. However, the Commission holds that a finding that the secretary is confidential does not preclude a finding of an unfair practice if the position was created in retaliation for TESA asserting its recall rights.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2015-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION,

Public Employer,

-and-

Docket Nos. CU-2014-002
CO-2014-028

TRENTON EDUCATIONAL
SECRETARIES ASSOCIATION,

Petitioner.

Appearances:

For the Public Employer, Kathleen Smallwood-Johnson

For the Petitioner, Selikoff & Cohen, attorneys
(Keith Waldman, of counsel)

DECISION

On April 3, 2015, the Trenton Educational Secretaries Association filed a request for review of D.R. No. 2015-7, ___ NJPER ___ (¶ ___ 2015).^{1/} In that decision, the Director of Representation dismissed TESA's clarification of unit petition and unfair practice charge, finding that a secretary in the superintendent's office is a confidential employee within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., rendering her ineligible for inclusion

^{1/} The Trenton Board of Education did not file an opposition brief.

in any collective negotiations unit. We deny TESA's request for review, but remand the unfair practice charge to the Director for further processing.

We briefly note as follows regarding the basis for our denial of TESA's request for review. TESA argues that the Director's "decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of [TESA]." N.J.A.C. 19:11-8.2a (1). Specifically, TESA argues that the Director erred in finding that there is enough work to keep two confidential secretaries busy, when historically there was an abundance of non-confidential secretarial work in the superintendent's office. The Director addressed this argument directly in her decision when she found as follows:

Specifically, Ann Sciarrotta, TESA Vice President asserts that Lenora Jefferson, a retired TESA member who worked full-time as an administrative II secretary to the superintendent, performed non-confidential job functions that were essential to the operation of the superintendent's office. TESA attached certifications from all TESA members that work in the Central Administration Building, except for two (2) TESA members that work in the Human Resources Office, stating that they do not perform the duties previously performed by Jefferson. The certifications state that because no other secretary is doing the non-confidential tasks formerly performed by Lorena Jefferson, a "logical inference" may be drawn that the confidential secretary to the superintendent performs the non-confidential tasks previously performed by Jefferson, and that therefore, the majority of her work is not confidential, within the meaning of the Act.

As will be discussed below, I find TESA's arguments to be unpersuasive. Even if I were to accept TESA's argument and infer that Williams has assumed non-confidential tasks previously performed by Jefferson, it would not and does not preclude a finding that Williams performs duties that are confidential within the Act's meaning.

[D.R. at 4].

In arriving at this conclusion, the Director relied on undisputed material facts supplied by the Board in the form of documents and certifications, and also considered over twenty certifications provided by TESA. We are satisfied that a thorough investigation of TESA's petition took place, and agree with the Director's conclusion that the petition should be dismissed because it did not present a valid question concerning the representation of employees. N.J.A.C. 19:11-2.2.

TESA further argues that it should have been entitled to an evidentiary hearing. However, a requirement for an evidentiary hearing is the existence of disputed material facts. N.J.A.C. 19:11-2.6f (1). TESA fails to identify any disputed material facts, but rather disagrees with the Director's conclusions. Thus, TESA was not entitled to an evidentiary hearing. Finally, TESA argues that because PERC is not a court, there was no basis for the "in camera" review of certain of the Board's documents that the Board's attorney certified were subject to the attorney-client privilege. TESA argues that those documents should have

been disclosed to it. In effectuating the purposes of the Act, PERC's agents can avail themselves of any of the procedures permitted under the Administrative Procedures Act.

N.J.S.A.34:13A-5.4c. Although the relevance of information creates a presumption of discoverability, that presumption can be overcome by a valid privilege, such as that the need for confidentiality outweighs the need for disclosure. Payton v. N.J. Tpk. Auth., 148 N.J. 524 (1997). The Director was satisfied that the documents that were reviewed "in camera" were subject to the asserted attorney-client privilege. If those documents were disclosed to TESA it would have undermined the basis of the procedure allowing for "in camera" review of documents when a valid privilege is asserted.

In addition to the clarification of unit petition, on July 23, 2013, amended on October 15, 2013 and March 20, 2014, TESA filed an unfair practice charge against the Board. The charge alleges violations of subsections 5.4a(1), (3), and (5)^{2/} of the

^{2/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

(continued...)

Act and asserts, among other things, that the Board's Executive Director of Human Resources "cautioned that if the Association did not allow the Superintendent to pick his . . . secretary the Board would just abolish [the position] and make it a . . . Confidential position." With regard to the unfair practice charge, the Director found as follows:

TESA has also filed an unfair practice charge contesting the Board's abolishment of the administrative II secretary position in the superintendent's office and creation of Williams' confidential secretary position. The charge essentially challenges the Board's decision to designate Williams as a confidential employee under the Act. In my March 9 letter, I advised of my intention to dismiss the charge if Williams' was determined to be a confidential employee whose duties may be determined by the public employer. In the absence of any additional facts comprising an amendment to the charge, I find that the further processing of the unfair practice charge is not warranted and dismiss it.

[D.R. at 17 - 18].

We disagree with the characterization of TESA's unfair practice charge in the Director's decision. A review of the unfair practice charge in its entirety reveals that essentially, TESA asserts that the Board threatened to abolish the administrative II secretary position if it asserted its recall rights under the collective negotiations agreement and did not allow the Superintendent to pick his own secretary. This

allegation, if true, may constitute an unfair practice. N.J.A.C. 19:14-2.1 (a). The Director's finding that the position that was created was in fact a confidential position does not preclude a finding that the Act's unfair practice provisions may have been violated if the position was created in retaliation for TESA asserting its rights under the Agreement. See Local 195, IFPTE v. State, 88 N.J. 393, 424 (1982) (Handler, J. concurring and dissenting). Therefore, we remand the unfair practice charge to the Director for further processing.^{3/}

^{3/} We note that an exploratory conference was conducted in this matter, however, it appears from the Director's decision that the focus of the conference was on the issues surrounding TESA's clarification of unit petition. D.R. at 2. We leave it to the Director's discretion as to whether another exploratory conference is necessary to further clarify the issues surrounding the unfair practice charge before deciding whether a complaint should be issued, or whether a complaint should be directly issued as a result of this remand.

ORDER

Trenton Educational Secretaries Association's request for review is denied. Its unfair practice charge is remanded to the Director for further processing in accordance with this decision.

BY ORDER OF THE COMMISSION

Docket No. CU-2014-002 - Chair Hatfield, Commissioners Boudreau, Eskilson, Voos and Wall voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Bonanni was not present.

Docket No. CO-2014-028 - Chair Hatfield, Commissioners Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: June 25, 2015

Trenton, New Jersey