

P.E.R.C. NO. 2023-44

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

QUEEN CITY ACADEMY CHARTER SCHOOL,

Public Employer,

-and-

Docket No. CU-2021-009

QUEEN CITY EDUCATION
ASSOCIATION,

Petitioner.

SYNOPSIS

The Commission denies the Queen City Education Association's request for review of a decision by the Director of Representation dismissing its clarification of unit (CU) petition. The Director found that certain administrative employees of the Queen City Academy Charter School whom the Association sought to include in its bargaining unit had functional responsibilities or knowledge of the collective negotiations process rendering them confidential within the meaning of the New Jersey Employer-Employee Relations Act, such that union membership would be incompatible with their official duties. The Commission finds that while the Association's linking of the employees' confidential status to an improper motive of the School to reduce Association membership may, if true, support a claim the School violated the Act's unfair practice provisions, that claim must be resolved not through a CU petition but an unfair practice proceeding, and the Association filed no such related charges. The Commission further rejects the Association's speculative argument that the School could reduce the number of confidential employees by re-assigning duties or changing the way it operates, because an employer's distribution of confidential work to employees is not challengeable in a CU proceeding.

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.

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Appearances:

For the Public Employer, Antonelli Kantor Rivera,
attorneys (Ramon Rivera, of counsel; John J.D. Burke,
on the brief)

For the Petitioner, Bergman and Barrett, attorneys
(Michael T. Barrett, of counsel)

DECISION

On February 24, 2023, the Queen City Education Association (Association) filed a request for review of D.R. No. 2023-10. In that decision, the Director of Representation dismissed the Association's clarification of unit (CU) petition which sought to include certain administrative and secretarial job titles in the Association's collective negotiations unit of non-supervisory certificated and non-certificated employees employed by the Queen City Academy Charter School (School).^{1/}

^{1/} The petitioned-for titles included: Administrative Assistant; Administrative Assistant/Development Associate;
(continued...)

The Director found the record presented no substantial, material factual disputes requiring an evidentiary hearing, and that the petitioned-for employees had functional responsibilities or knowledge of the collective negotiations process that made them confidential within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically N.J.S.A. 34:13A-3(d), such that their membership in the unit would be incompatible with their official duties. D.R. at 3, 16, 24.

In reaching that conclusion, the Director examined evidence submitted by the School including, among other things, the certifications of each of the petitioned-for employees and the School's chief executive officer (CEO), and conducted in-camera review of School exhibits, including employee evaluations and grievance responses prepared by administrative staff, and written warnings.^{2/} He found the CEO's certification provided specific examples of times when certain administrative staffers were present for internal negotiations strategy meetings with the School's labor counsel and mediation regarding the contract.

1/ (...continued)
Administrative Assistant/Business Office; and School Secretary.

2/ In making his factual findings, the Director did not rely upon the certification submitted by the Association, which he found consisted entirely of legal argument and comparisons of duties, job descriptions and job postings referenced in the School's submissions. D.R. at 3, n.1.

D.R. at 22, 23. He also found the School established that all the petitioned-for employees perform duties and work under circumstances that provide them with advance knowledge of the School's position on some grievances that is dependent on the School's interpretation of the collective negotiations agreement and the scope of the negotiations unit. D.R. at 20.

Among other things, the Director found the employees all have access to a "Union Negotiations Data" folder on the School's "R-Drive" containing material on collective negotiations, including confidential documents outlining internal negotiations strategy and grievance processing, and that they all handle and process mail that includes correspondence from labor counsel pertaining to labor relations. D.R. at 21-22. The Director further found the employees at issue all work together in a small open office, see the work performed by one another, overhear conversations involving labor negotiations and grievance processing, and fill in for one another, performing work such as:

- conducting the initial analysis of grievances
- preparing preliminary responses to grievances
- attending labor negotiations sessions, and strategy meetings with labor counsel
- preparing contract analyses and budgets with respect to labor negotiations
- preparing board packets by compiling information to be discussed in closed

session that is often related to labor negotiations and grievances

- providing assistance with labor negotiations, budgets and scattergrams relating to employee compensation
- preparing scattergrams pertaining to salary and healthcare
- assisting with negotiations and discussions around the strategy for healthcare
- preparing drafts for updated employment policies, with knowledge of contemplated changes prior to disclosure to the Association
- analyzing correspondence with labor counsel and other matters pertaining to labor relations in order to route it to the appropriate individual or office
- compiling labor-relations-related information to be discussed during closed sessions
- participating in grievance meetings and summarizing meeting minutes

[D.R. at 20-23.]

In its request for review, the Association acknowledges that while employees must be declared confidential when their regular and assigned duties require them to handle confidential information, that designation should be narrowly defined and judiciously applied. The Association questions the motivation of the School's CEO, contending she has done "everything she can to openly discourage association participation including a decertification filing with PERC." The Association asserts the

confidential status of the employees at issue is the result of a "thinly veiled effort" on the CEO's part to maximize the number of confidential employees and minimize the number of Association members by "stacking the deck" through the arrangement of office furniture.

The Association further argues that the various duties of the employees could be redistributed resulting in fewer confidential employees, and by filtering confidential information through fewer than five employees. The Association argues the School could reduce the number of confidential employees by changing the way in which these employees temporarily fill in for one other, so that confidential information is not shared with the temporary employee in the short term. The Association also suggests the CEO could easily remove herself from surrounding staff when discussing confidential matters.

The School responds that the Association fails to meet the threshold required for Commission review, as the Director's decision was well-reasoned, based upon substantial, undisputed evidence, and is consistent with relevant Commission precedent. The Association's contention that the school can hypothetically re-assign work to minimize the number of confidential employees regardless of the cost or resources required to make those changes is irrelevant, the School argues, and should not be entertained in a representation proceeding. The School argues

that as a small charter school, unlike a larger school district, it does not have the luxury to re-assign administrative duties among its administrative staff, and the fact that they work in a small, open space is by necessity, not design.

N.J.A.C. 19:11-8.2(a) states that a request for review will be granted only for one or more of these compelling reasons:

1. A substantial question of law is raised concerning the interpretation or administration of the Act or these rules;
2. The Director of Representation's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the party seeking review;
3. The conduct of the hearing or any ruling made in connection with the proceeding may have resulted in prejudicial error; and/or
4. An important Commission rule or policy should be reconsidered.

We deny the Association's request for review as it has not advanced any compelling reasons to review the Director's findings or conclusions. We find that the above four grounds for review are not met by either the Association's "stacking the deck" argument or its argument that the number of confidential employees could be reduced by redistributing work or managing employees differently. These arguments raise no substantial questions of law or factual errors concerning the Director's determination of the confidential status of the employees at issue. Nor do the Association's arguments compel a review of the

conduct of the hearing or reconsideration of a Commission policy.

We are satisfied that the Director thoroughly considered all of the undisputed facts in the record, and correctly determined that the petitioned-for titles are confidential employees within the meaning of N.J.S.A. 34:13A-3(d), which defines confidential employees as:

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

The Association's "stacking the deck" argument suggests the confidential status of the employees at issue is linked to an improper motive of the School's CEO to reduce Association membership. While such an allegation, if true, may support a claim that the School violated the Act's unfair practice provisions, that claim must be resolved not through a CU petition but an unfair practice proceeding. See, e.g., Trenton Bd. of Ed., P.E.R.C. No. 2015-78, 42 NJPER 39 (¶11 2015) (remanding related unfair practice charge for further processing where Director's CU finding that a position was in fact confidential did not preclude claim that position was created in retaliation for protected union activity); Morris Bd. of Ed., P.E.R.C. No. 89-42, 14 NJPER 681 (¶19287 1988), aff'd App. Div. Dkt. No. A-2191-88T2 (11/16/89). Here, the Association has not filed an unfair practice charge related to this dispute.

The Association next claims the School could reduce the number of confidential employees by reassigning duties or changing the way it operates. This argument is speculative and does not establish grounds for review of the Director's determination of the confidential status of the employees at issue. The proper focus of that determination, as the Director correctly noted, is "whether an employee's functional responsibilities or knowledge would make their membership in any appropriate negotiating unit incompatible with their official duties." D.R. at 17, quoting, New Jersey Turnpike Authority v. AFSCME, Council 73, 150 N.J. 331, 358 (1997). An employer has a managerial prerogative to assign confidential duties. Trenton Bd. of Ed., D.R. No. 2006-20, 32 NJPER 179, 181 and n.1 (¶79 2006), citing, e.g., Monroe Tp. Fire District, P.E.R.C. No. 98-158, 24 NJPER 347 (¶29165 1998); Gloucester Cty., P.E.R.C. No. 90-36, 15 NJPER 624 (¶20261 1989).

We have further held that an employer's distribution of confidential work to employees is not challengeable in a CU proceeding. Orange Bd. of Ed., L.D. No. 85-1, Docket No. CU-85-028 (1985), citing, Twp. of Scotch Plains, D.R. No. 84-11, 9 NJPER 632 (¶14270 1981) ("[t]he wisdom or the legality of the motivation of a management assignment decision cannot be attacked in a representation proceeding"); Bloomfield Bd. of Ed., 2 NJPER 194 (1976) (unit determination petition not appropriate vehicle

for reforming structure or functions of employers); State of New Jersey, P.E.R.C. No. 50, NJPER Supp. 176 (§50 1970) (“[u]nit determination . . . measures conditions as they are, not as they might be”). See also, Oakland Bd. of Ed., D.R. No. 99-9, 25 NJPER 66 (§30025 1998) (school board was within its rights to use “team” structure of confidential secretaries in order to maximize operational efficiency). Again, if the Association believes the School’s assignment of confidential work to its employees is linked to an illegal motive, an unfair practice proceeding is the appropriate forum for that dispute. Trenton, 42 NJPER 39; Morris, supra.

Based on the foregoing, the Association has not met the standard for Commission review.

ORDER

The Association’s request for review is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, and Papero voted in favor of this decision. Commissioner Voos voted against this decision.

ISSUED: April 27, 2023

Trenton, New Jersey