

P.E.R.C. NO. 94-37

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BROOKLAWN,

Public Employer,

-and-

Docket Nos. RO-H-93-162  
RO-H-93-163

UNITED STEELWORKERS OF AMERICA,

Petitioner.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority granted to him by the full Commission in the absence of exceptions, adopts a Hearing Officer's recommendations that the Administrator/Clerk and Deputy Borough Clerk are confidential employees. The Chairman dismisses RO-93-162 and remands RO-93-163 to the Director of Representation to conduct an election consistent with those recommendations.

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RO-H-93-163

UNITED STEELWORKERS OF AMERICA,

Petitioner.

Appearances:

For the Public Employer, Davis, Reberkenny and Abramowitz,  
attorneys (Harry A. Horwitz, of counsel)

For the Petitioner, United Steelworkers of America  
(Andrew J. Charnick, Jr., representative)

DECISION AND ORDER

On April 15, 1993, the United Steelworkers of America filed two petitions seeking to represent employees of the Borough of Brooklawn. One petition, RO-93-162, seeks a negotiations unit of supervisors, including the Borough Administrator/Clerk. The other, RO-93-163, seeks a unit of nonsupervisory white collar employees, including the Deputy Borough Clerk. The Borough claims that the Administrator/Clerk and the Deputy Borough Clerk are confidential employees within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. and should be excluded from the proposed units.

On June 16, 1993, a Notice of Hearing issued. On August 4, Hearing Officer Regina A. Muccifori conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument and post-hearing briefs.

On September 27, 1993, the Hearing Officer issued her report and recommendations. H.O. No. 94-1, 19 NJPER \_\_\_\_ (¶\_\_\_\_ 1993). She concluded that the Administrator/Clerk and the Deputy Borough Clerk are confidential employees and should be excluded from the petitioned-for units. Since the petitioned-for unit in RO-93-162 would be left with one employee and would therefore be inappropriate, she recommended dismissal of that petition. She recommended that an election be conducted among the petitioned-for employees in RO-93-163, excluding the Deputy Borough Clerk.

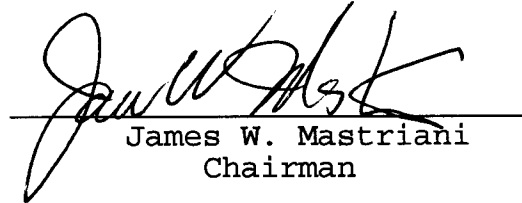
The Hearing Officer served her decision on the parties and informed them that exceptions were due October 12, 1993. Neither party filed exceptions or requested an extension of time.

Pursuant to authority granted to me by the full Commission in the absence of exceptions, I transfer this case directly to myself. I have reviewed the record. I incorporate the Hearing Officer's undisputed findings of fact. I also adopt the Hearing Officer's recommendations and remand this matter to the Director of Representation to conduct an election consistent with those recommendations.

ORDER

The Hearing Officer's recommendations are adopted and this matter is remanded to the Director of Representation to conduct an election consistent with those recommendations.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

DATED: October 21, 1993  
Trenton, New Jersey

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

In the Matter of

BOROUGH OF BROOKLAWN,

Public Employer,

-and-

Docket Nos. RO-H-93-162

RO-H-93-163

UNITED STEELWORKERS OF AMERICA,

Petitioner.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission finds that the Borough Administrator/Clerk and the Deputy Borough Clerk are confidential employees within the meaning of the Act. The Clerk attends, records, and participates in closed Executive Sessions of Mayor and Council at which labor relations matters are discussed. The Deputy assumes the Clerk's responsibilities at Executive Sessions in the Clerk's absence, and has attended and recorded sessions where labor relations matters have been discussed. Thus, the functional responsibilities of these individuals make their membership in any negotiations unit incompatible with their official duties.

Accordingly, the Hearing Officer recommends that the Borough Administrator/Clerk be excluded from the petitioned-for unit of supervisory employees and as such, recommends that the representation petition for the supervisory employees be dismissed, since the unit will only be left with one employee and a unit of one is inappropriate.

The Hearing Officer further recommends that an election be conducted among the remaining employees in the petitioned-for unit of non-supervisory employees, excluding the Deputy Borough Clerk.

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.

H.O. NO. 94-1

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

In the Matter of

BOROUGH OF BROOKLAWN,

Public Employer,

-and-

Docket Nos. RO-H-93-162  
RO-H-93-163

UNITED STEELWORKERS OF AMERICA,

Petitioner.

Appearances:

For the Public Employer  
Davis, Reberkenny and Abramowitz, attorneys  
(Harry A. Horwitz, of counsel)

For the Petitioner  
United Steelworkers of America  
(Andrew J. Charnick, Jr.)

HEARING OFFICER'S RECOMMENDED  
REPORT AND DECISION

On April 15, 1993, the United Steelworkers of America filed two Representation Petitions with the Public Employment Relations Commission seeking to represent two units of employees employed by the Borough of Brooklawn. The first petition, RO-93-162, seeks to represent a two-employee unit of supervisors employed by the Borough, specifically the Borough Administrator/Clerk and the Court Administrator. The second petition, RO-93-163, seeks to represent a unit of 4 non-supervisory white collar employees, including the Deputy Borough Clerk.

The Township opposes the inclusion of the Borough Administrator/Clerk in the supervisory unit and the inclusion of the Deputy Borough Clerk in the non-supervisory unit, claiming both are confidential employees within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The Steelworkers deny that these employees are confidential employees under the Act.

On August 4, 1993, I conducted a hearing at which the parties were given an opportunity to examine and cross-examine witnesses, to present evidence and argue orally. On August 20, a transcript of the hearing was received. No post-hearing briefs were submitted by either party.<sup>1/</sup>

Based on the entire record, I make the following:

#### FINDINGS OF FACT

1. Michael Mevoli has been the Mayor of the Borough of Brooklawn for the past three years. Prior to that, he had been a Councilman for the Borough (T12).<sup>2/</sup> There are presently two

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<sup>1/</sup> By letter dated August 9, Borough Attorney Harry A. Horwitz informed me that he and Steelworkers representative Andrew J. Charnick, Jr. waived their rights to submit post-hearing briefs, and that he, instead, relies upon the authorities and arguments set forth in his firm's May 12 and 13 letters to the agency.

<sup>2/</sup> "T" refers to the transcript of the August 4, 1993 hearing held in this matter. R- refers to the Respondent's exhibits and P- refers to the Petitioner's exhibits placed in evidence at the hearing.

bargaining units in the Borough - a police unit and a public works unit (T23).

2. Robin King has been the Borough Administrator/Clerk ("Clerk") for the past two years (T97). The Clerk reports to the Mayor and Council (T24). She runs the daily activities of the Borough. Specifically, she opens the Mayor's mail and copies and distributes it, including confidential mail relating to labor relations matters. In fact, she opened mail from the Borough Solicitor on the instant matter (T19-T20, T74-T75, T105). She also has communications with the Borough Solicitor and has access to confidential labor relations information, including information regarding the Borough's negotiation strategies (T20, T25, T109). She also assists in the preparation of the budget (T21, T110-T111).

3. Pursuant to N.J.S.A. 40A:9-133, and Borough ordinance, the Clerk attends and keeps notes at all council meetings, including Executive Sessions. Executive Sessions are not open to the public, and the minutes of those sessions are not available to the public. By virtue of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., Executive Sessions are only held for personnel and litigation matters (T13-T15, T19, T110-T111, R-1).

Personnel problems, union negotiations strategies, litigation strategies and proposed and tentative budget matters are discussed at Executive Sessions. The Borough's position on negotiations with its two units are discussed at Executive Sessions, including the Borough's position on the union's contract proposals,



pay increases, hours and other conditions of employment (T23-T24, T36-T40, T46, T52-T53, R-2). Employee contractual grievances are also presented and discussed at Executive Sessions, and the Clerk gives her input during these discussions (T24, T47, T77, T83). The union first makes its presentation of the grievance and then the Mayor, Council and Clerk adjourn and deliberate over the grievance. The grievant and the union representative are excluded from these deliberations (T26-T27, T107-T108).

4. King took the minutes at a January 13, 1992 Executive Session, where a disciplinary hearing for a police union member was discussed, and took the minutes at the March 2, 1992 and September 14, 1992 Executive Sessions where police union grievances and proposed pay increases for the police were discussed (T30-T31, T36-T37, R-2).

She also took the minutes at an April 6, 1992 Executive Session where a discussion occurred about whether an employee should be paid overtime (T32, R-2). Further, on June 8, 1992, King took minutes at an Executive Session where the suspension and other discipline of public works unit employees was discussed. At that meeting, the Borough Solicitor provided legal advice about the disciplinary action to the Mayor and Council (T33-T34, R-2).

King also took notes at a June 22, 1992 Executive Session where a public works union grievance was presented. After it was presented, the Mayor, Council and King withdrew and deliberated over the grievance and then the Council gave its decision to the union

(T34-T35, R-2). On March 1, 1993, King took the minutes at an Executive Session where the proposed police union contract was discussed with the Mayor, Council and the Borough Solicitor (T42-T44, R-2).

5. The Deputy Clerk ("Deputy") is vested by N.J.S.A. 40A:9-135, with the authority to handle the responsibilities and duties of the Clerk, when the Clerk is absent (T58-T59).

As such, she attends and takes minutes at Executive Sessions in the Clerk's absence. This includes attending the closed deliberations that take place on union grievances (T58, T107-T108). Specifically, the Deputy took notes at an August 3, 1992 Executive Session while the Clerk was on vacation. At that meeting, a discussion took place about the job performance of a public works employee, new rules and regulations for the police bargaining unit, and disciplinary action against an employee in that unit (T62-T63, R-3).

At an August 10, 1992 Executive Session, the Deputy again took notes in the Clerk's absence. At that session, the Borough Solicitor provided advice about disciplinary action for a unit employee and about a unit employee who did not possess the qualifications for his job (T63-T65, R-3). Further, on August 17, 1992, in the Clerk's absence, the Deputy took notes at an Executive Session where the placement of a unit employee, the interpretation of the public works contract, and pay adjustments for unit employees were discussed (T64-T65, R-3).

6. The Deputy is also involved in budget preparation, gathering information and formulating figures. The Deputy is further exposed to the type of confidential information that could lead to advance knowledge of the Borough's bargaining strategy or negotiations positions (T60, T67, T106-T107).

#### ANALYSIS

Confidential employees may not be included in any negotiations unit. N.J.S.A. 34:13A-5.3. N.J.S.A. 34:13A-3(g) defines confidential employees as those employees:

...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 Commission's policy narrowly construes the term confidential employee. See Brookdale Comm. Coll. D.R. No. 78-10, 4 NJPER 32 (¶4018 1977); 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); 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); Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339 (¶19128 1988). The burden of demonstrating confidentiality is therefore placed on the party seeking to remove an employee from the Act's protection. See State of New Jersey; State v. Professional Ass'n of New Jersey Dept. of Ed., 64 N.J. 231, 253 (1974), N.J. Const. Art. I ¶19. A finding of confidential status requires a

case-by-case examination of each alleged confidential employee's knowledge of information which could compromise the employer's position in the collective negotiations process. See River Dell Reg. Bd. of Ed., P.E.R.C. No. 84-95, 10 NJPER 148 (¶15073 1984), affm'g D.R. No. 83-21, 9 NJPER 180 (¶14084 1983); Ringwood. The key to confidential status is an employee's access to and knowledge of materials used in labor relations processes including contract negotiations, contract administration, grievance handling and assisting management in preparing for these functions. See State of New Jersey (Division of State Police), D.R. No. 84-9, 9 NJPER 613 (¶14262 1983).

I find that both the Borough Administrator/Clerk and the Deputy Clerk are confidential employees within the meaning of the Act. The Clerk opens, copies and distributes the Mayor's mail, including confidential labor relations materials from the Borough Solicitor. Most significantly, she attends and takes minutes at all Council meetings, including Executive Sessions which are closed to the public and which are limited to personnel and litigation matters. She has attended and recorded Executive Sessions where the discipline of unit employees, proposed collective bargaining agreements, and union grievances were discussed, and at which the Borough Solicitor provided advice. Moreover, the Clerk has participated in the closed deliberations of Mayor and Council at Executive Sessions that take place regarding union grievances. This functional responsibility, in attending, recording, and

participating in Executive Sessions, in conjunction with her knowledge of confidential labor relations materials from the Borough Solicitor, makes the Clerk's membership in any appropriate negotiations unit incompatible with her official duties. Tp. of Mine Hill, D.R. No. 91-33, 17 NJPER 315 (¶22139 1991); Tp. of Commercial, D.R. No. 91-9, 16 NJPER 511 (¶21223 1990); Tp. of Mullica, D.R. No. 90-1, 15 NJPER 455 (¶20185 1989); Sayreville 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). Accordingly, I find the Borough Administrator/Clerk to be a confidential employee within the meaning of the Act.<sup>3/</sup>

The Deputy Clerk must also be considered a confidential employee under the Act. By statute, she is vested with the authority to assume the Clerk's duties when the Clerk is absent, including attending, recording and participating in Executive Sessions. She has, in fact, recorded sessions where the discipline of unit employees, the interpretation of the public works agreement, new rules and regulations for the police department, and pay adjustments for unit employees were discussed and at which the Borough Solicitor provided advice. This functional responsibility, in attending, recording and participating in Executive Sessions in

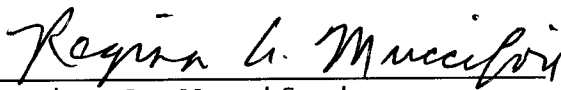
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<sup>3/</sup> At the hearing, the Steelworkers presented evidence as what the Clerk does not do; specifically, she does not sign collective bargaining agreements, does not attend police and public works negotiations, does not lay-off or discharge and is not a step in the grievance procedure. However, this evidence is not relevant to a finding that the Clerk is a confidential employee under the Act.

the Clerk's absence, makes her membership in any bargaining unit incompatible with her official duties. Wayne Tp. and AFSCME, Coun 52, 220 N.J. Super. 340 (App. Div. 1987); Mount Olive Tp., P.E.R.C. No. 85-113, 11 NJPER 311 (¶16112 1985); Bor. of Ringwood, D.R. No. 93-19, 19 NJPER 196 (¶24093 1993).

RECOMMENDATION

Based on the foregoing, I find that both the Borough Administrator/Clerk and the Deputy Borough Clerk are confidential employees within the meaning of the Act and thus, should be excluded from their respective petitioned-for units. Accordingly, I recommend that RO-93-162 be dismissed, since the petitioned-for unit will only be left with one employee and a unit of one is inappropriate<sup>4/</sup> As to RO-93-163, I recommend that an election be conducted among the remaining employees in the petitioned-for unit, excluding the Deputy Borough Clerk.

  
Regina A. Muccifori  
Hearing Officer

DATED: September 27, 1993  
Trenton, New Jersey

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<sup>4/</sup> Tp. of Byram, P.E.R.C. No. 84-96, 10 NJPER 149 (¶15074 1984); Borough of Shrewsbury, P.E.R.C. No. 79-42, 5 NJPER 45 (¶10030 1979), aff'd. 174 N.J. Super. 25 (App. Div. 1980), cert. den., 85 N.J. 129 (1980).