

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 : PERA-U-14-257-W
 : (PERA-R-87-70-W)
FORD CITY BOROUGH :

PROPOSED ORDER OF UNIT CLARIFICATION

On July 31, 2014, Ford City Borough (Borough or Employer) filed a Petition for Unit Clarification with the Pennsylvania Labor Relations Board (Board) seeking to exclude the position of Borough Secretary from a unit of nonprofessional employes, certified by the Board at Case No. PERA-R-87-70-W, as a confidential employe pursuant to Section 301(13) of the Public Employee Relations Act (PERA or Act).

On August 28, 2014, the Secretary of the Board issued an Order and Notice of Hearing, assigning the matter to conciliation, and designating March 18, 2015, in Pittsburgh, as the time and place of hearing, if necessary.

The hearing was necessary and was held as scheduled on March 18, 2015 before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Borough filed a post-hearing brief in support of its position on June 12, 2015. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union, AFL-CIO-CLC, Local 158-02 (Union) filed a post-hearing brief in opposition to the Petition on July 8, 2015.

The Examiner, on the basis of the evidence presented at the hearing, and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Borough is a public employer within the meaning of Section 301(1) of PERA. (N.T. 4)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 4)
4. The Union is the exclusive bargaining agent for "all full-time and regular part-time nonprofessional employees, including but not limited to Borough Secretary, Assistant Secretary, Janitor, First Water Man, Water Meter Reader, Water Filter Plant Operator, Equipment Operator, Laborer, Licensed Water Plant Operator and excluding management level employees, supervisors, first level supervisors, confidential employees and guards as defined in the Act." (Joint Exhibit1)
5. The existing bargaining unit is a grandfathered bargaining unit pursuant to Section 602(b) of the Act. **Ford City Borough**, 19 PPER ¶ 19117 (Final Order, 1988).
6. In 1987, the parties litigated the issue of whether the Borough Secretary was a confidential employe pursuant to Section 301(13) of the Act. The Board found that the Borough Secretary was not a confidential employe pursuant to Section 301(13) of the Act, and therefore, the position was properly included in the unit. **Ford City Borough**, 18 PPER ¶ 18134 (Order Directing Submission of Eligibility List, 1987), 19 PPER ¶ 19117 (Final Order, 1988).¹
7. Eden Ratliff is the Borough Manager and has held the position for approximately one year. (N.T. 6)

¹ During the 1987 litigation, the exclusive bargaining agent was the Aluminum, Brick and Glass Workers, International Union, AFL-CIO, CLC, Local 172. However, on April 23, 1999, the certification was amended to name the Union as the exclusive representative following a merger between the two employe organizations. **In the Matter of the Employes of Ford City Borough**, 30 PPER ¶ 30096 (Proposed Order of Amendment of Certification, 1999).

8. Lisa Bittner has been the Borough Secretary for approximately ten years and works for Ratliff. Prior to becoming Borough Secretary, Bittner held the position of Assistant Secretary for approximately 15 years. (N.T. 6, 31)

9. Prior to Ratliff's hiring as Borough Manager, there were no non-union employees of the Borough. Bittner directed the administrative functions of the Borough. (N.T. 8)

10. Bittner now serves as Ratliff's employe and assists him in running the affairs of the Borough. (N.T. 7-8)

11. Bittner and Ratliff share one side of a one-room office in the Borough building. The only other person in the office is the Assistant Secretary who sits in the front of the room. (N.T. 7)

12. As Borough Secretary, Bittner opens all the Borough mail, is responsible for payroll, monitors employe vacation, sick and personal days, assists in preparing the budget by obtaining trending cost information, attends Borough Council meetings, and prepares the minutes for Borough Council meetings. (N.T. 8-12)

13. Bittner also maintains the personnel files for the Borough and is the only person who has access to the files other than Ratliff. The personnel files are contained in a locked file cabinet next to Bittner's desk. (N.T. 14, 26-27)

14. The Borough's collective bargaining agreement (CBA) with the Union expired on December 31, 2014. The parties are currently engaged in bargaining over the terms of a new CBA. At the time of the hearing, there had been two bargaining sessions between the parties, during which Ratliff was on the bargaining team for the Borough, along with the Borough's labor attorney and Council members. (N.T. 16-18, 27-28)

15. In connection with the negotiations, Bittner has compiled cost information at Ratliff's request in order for the Borough to prepare for bargaining and formulate its demands. (N.T. 17-19, 51-52, 55, 62-63)

DISCUSSION

In its brief, the Employer contends that the Borough Secretary is a confidential employe within the meaning of Section 301(13)(i) and (ii) of the Act. The Union, however, opposes the Petition for Unit Clarification on the grounds that the Borough Secretary is not a confidential employe pursuant to the Act.

Section 301(13) of PERA provides as follows:

"Confidential employe" shall mean any employe who works: (i) in the personnel offices of a public employer and has access to information subject to use by the public employer in collective bargaining; or (ii) in a close continuing relationship with public officers or representatives associated with collective bargaining on behalf of the employer.

43 P.S. § 1101.301(13).

As a preliminary matter, it is well settled that a lack of asserted change in job duties will bar subsequent unit clarification proceedings where the status of employes was previously litigated and there was a factual resolution of the dispute on the record. **Northeastern Educational Intermediate Unit 19**, 11 PPER ¶ 11232 (Nisi Order of Unit Clarification, 1980). In this case, there has been a change in facts and law, despite the prior litigation surrounding the Borough Secretary position in 1987-1988. The record shows that there is now a Borough Manager, who the Borough Secretary assists in running the affairs of the municipality, and who was not there when the Borough Secretary's status was litigated previously. Similarly, the Commonwealth Court handed down a decision in **North Hills School District v. PLRB**, 762 A.2d 1153 (Pa. Cmwlth. 2000), which was

subsequent to the previous litigation regarding the Borough Secretary, and which altered the analysis for confidential employees pursuant to Section 301(13)(ii). Therefore, the Borough's Petition for Unit Clarification is not barred and will be considered on the merits.

To begin, the Employer has not sustained its burden of proving that the Borough Secretary is a confidential employee under Section 301(13)(i) of the Act. Although the record clearly shows that Bittner works in the personnel offices of the Borough and that she actually maintains the personnel files in a locked file cabinet next to her desk, there is no evidence that she has access to information subject to use by the public employer in collective bargaining.

In **Bangor Area School District**, the Board explained as follows:

The second criteria of sub-part (i) is 'an employee who has access to information subject to use by the public employer in collective bargaining.' Our Commonwealth Court recently determined in **Columbia/Snyder/Montour/Union Mental Health/Mental Retardation Program v. PLRB**, 383 A.2d 546 (1978), that an employee who had access to personnel records and fiscal information such as budgets, proposed allocations of funds toward the employer's programs, salaries, and memoranda concerning proposed salary increments to specific employees was not a 'confidential employee' under the first test of Section 301(13) of the Act since the employee enjoyed no access to information subject to use by the employer which could be considered outside the 'public record.' The Board has similarly held that an employee does not have access to confidential collective bargaining information when (s)he simply takes basic data and compiles reports which may eventually be used in negotiations as the position of the employer when the person who compiles the basic data has no information which would be considered confidential as a result of that compilation. It is only when an employee is privy to the relevant determinations of the employer's policy that that person may be found to be confidential. The collective bargaining information must be of such a definite nature that the union would know of the employer's plans if said information is revealed. See **West Jefferson Hills School District**, 5 PPER 65 (1978); and **Northgate School District**, 9 PPER ¶ 9121 (1978).

The record here does not show that the Borough Secretary is privy to the relevant determinations of the Borough's labor policy, nor does she have access to collective bargaining information of such a definite nature that the Union would know of the Borough's plans if said information is revealed. The Borough has simply not presented any evidence to satisfy the second prong of the test for confidential employees under Section 301(13)(i). As Borough Secretary, Bittner opens all the Borough mail, is responsible for payroll, monitors employee vacation, sick and personal days, assists in preparing the budget by obtaining trending cost information, attends Borough Council meetings, and prepares the minutes for Borough Council meetings. However, there is no evidence that she types or sees bargaining proposals or performs any sort of analysis of the same. Likewise, she is not privy to communications between members of the Borough's bargaining team. (N.T. 25). On this record, the Borough Secretary is not a confidential employee under Section 301(13)(i) of Act.

The Borough, however, has sustained its burden of proof under Section 301(13)(ii) of the Act. As the Board further explained in **Bangor Area School District**:

Sub-part (ii) of Section 301(13) concerns an employee who works in a 'close continuing relationship with public officers or representatives associated with collective bargaining on behalf of the employer.' We interpret this phrase to embrace only those employees who assist or act in a confidential capacity to persons who formulate, determine and effectuate management's policies in the field of labor relations. See **West Shore School District**, 3 PPER 1 (1973); and **Northgate School District**, *supra*.

Significantly, the Pennsylvania Supreme Court has held that the exclusion under Section 301(13)(ii) is specifically limited to those employees who work in a close continual relationship with managerial employees who actually formulate, determine or effectuate the employer's labor policy. **PLRB v. Altoona Area School District**, 389 A.2d 553, 557 (Pa. 1978). The Commonwealth Court has found individuals to work in a close continuing relationship with a management official where the employees are part of the management official's personal staff and have access to his or her office files, or where the employees work directly for members of the employer's bargaining team and/or perform work related to collective bargaining on a regular basis. **Neshannock Educational Support Professionals Ass'n v. PLRB**, 22 A.3d 1103 (Pa. Cmwlth. 2011) *citing* **Altoona Area School District, supra; North Hills School District v. PLRB**, 762 A.2d 1153 (Pa. Cmwlth. 2000); **Commonwealth ex rel. Gallas v. PLRB**, 636 A.2d 253 (Pa. Cmwlth. 1993) *aff'd*, 665 A.2d 1185 (1995). In **North Hills**, the Court expressly stated that "[w]here an employee has a close relationship with such involved management personnel, the PERA appears to assume that the employee would have access to confidential information, so that their 'inclusion in the bargaining unit would seriously impair the public employer's ability to bargain on a fair and equal footing with the union.'" *Id.* at 1159 *citing* **PLRB v. Altoona Area School District**, 389 A.2d 553, 557 (Pa. 1978).

In this case, the record shows that the Borough Secretary works directly for the Borough Manager, who is a member of the Borough's bargaining team and qualifies as a public officer associated with collective bargaining.² The Borough Secretary works right next to the Borough Manager in the same office, opens his mail, has access to the personnel files with him, and compiles cost information at his request to prepare for bargaining. This is strong evidence of the sort of close continual relationship with a public officer associated with collective bargaining, which is contemplated under Section 301(13)(ii) of the Act. As a result, the Borough Secretary must be excluded from the bargaining unit consistent with **North Hills**.

CONCLUSION

The Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The Borough is a public employer within the meaning of Section 301(1) of PERA.
2. The Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The Borough Secretary position is a confidential employe and thereby properly excluded from the bargaining unit.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the Hearing Examiner

HEREBY ORDERS AND DIRECTS

that the bargaining unit of employes certified by the Board at PERA-R-87-70-W is amended to exclude the Borough Secretary as a confidential employe.

² Post-petition evidence is admissible where there has been no showing that the employer changed job duties merely to influence the Board's determination regarding the placement of the position in question. **In the Matter of the Employes of Housing Authority of the City of Shamokin**, 42 PPER 32 (Proposed Order of Unit Clarification and Proposed Order of Amendment of Certification, 2011) *citing* **In the Matter of the Employes of Westmoreland County**, 40 PPER 35 (Final Order, 2009). There is no indication that the post-petition evidence in this case, the Borough Manager's inclusion on the Employer's bargaining team during negotiations following the expiration of the CBA, was suspicious in any way or designed to influence these proceedings.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this order shall be and become absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this third day of August, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

JOHN POZNIAK, Hearing Examiner