

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
 : Case No. PERA-U-14-257-W
 : (PERA-R-87-70-W)
 :
 FORD CITY BOROUGH :

FINAL ORDER

On August 18, 2015, the United Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, Local 158-02 (Union) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to a Proposed Order of Unit Clarification (POUC) issued on August 3, 2015. In the POUC, the Board's Hearing Examiner granted the Petition for Unit Clarification filed by Ford City Borough (Borough) and concluded that the position of Borough Secretary is a confidential employe under Section 301(13)(ii) of the Public Employee Relations Act (PERA) and therefore is properly excluded from the bargaining unit represented by the Union. The Borough filed a brief in reply to the Union's exceptions on September 9, 2015.

The facts as found by the Hearing Examiner are summarized as follows. The Union is the exclusive bargaining agent for all full-time and regular part-time nonprofessional employes including the Borough Secretary, Assistant Secretary, Janitor, First Water Man, Water Meter Reader, Water Filter Plant Operator, Equipment Operator, Laborer and Licensed Water Plant Operator. The existing bargaining unit is a grandfathered unit pursuant to Section 602(b) of PERA.

In 1987, the parties litigated the issue of whether the Borough Secretary was a confidential employe pursuant to Section 301(13) of PERA. The Board found that the Borough Secretary was not a confidential employe under Section 301(13) of PERA and, therefore, the position was properly included in the unit.¹

Eden Ratliff is the Borough Manager and has held the position for approximately one year. There were no non-bargaining unit employes employed by the Borough prior to Mr. Ratliff assuming the position of Borough Manager. Lisa Bittner has been the Borough Secretary for approximately ten years, during which time she directed the administrative functions of the Borough. Prior to becoming Borough Secretary, Ms. Bittner held the position of Assistant Secretary for approximately fifteen years. Ms. Bittner now serves as Mr. Ratliff's employe and assists him in running the affairs of the Borough. Ms. Bittner and Mr. 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.

As Borough Secretary, Ms. 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 Borough Council meeting minutes. Ms. Bittner also maintains the personnel files for the Borough and is the only person who has access to the files other than Mr. Ratliff. The personnel files are contained in a locked file cabinet next to Ms. Bittner's desk.

¹ It is the Board's longstanding policy that positions that have been previously litigated will generally not be relitigated absent a showing of a change in the duties of the position. **Northeastern Educational Intermediate Unit 19**, 11 PPER ¶ 11232 (Nisi Order of Unit Clarification, 1980), **aff'd**, 13 PPER ¶ 13264 (Final Order, 1982). The Hearing Examiner concluded that the Borough's Petition for Unit Clarification in this matter was not barred because there had been a change in the facts, i.e. the creation of the Borough Manager position, resulting in a change in the duties of the Borough Secretary position in that she now works in a close continuing relationship with a member of the Borough's bargaining team (the Borough Manager). The Hearing Examiner also found that the Borough's Petition for Unit Clarification was not barred because there was a change in the law interpreting the definition of confidential employe under Section 301(13)(ii) of PERA since the prior litigation concerning the Borough Secretary position. **See North Hills School District v. PLRB**, 762 A.2d 1153 (Pa. Cmwlth. 2000), **petition for allowance of appeal denied**, 566 Pa. 653, 781 A.2d 150 (2001)(employe is confidential under Section 301(13)(ii) of PERA if works in close continuing relationship with a member of employer's bargaining team). We need not further review the Hearing Examiner's decision on this issue because it is not challenged in the Union's exceptions.

The Borough's collective bargaining agreement with the Union expired on December 31, 2014. The parties are currently engaged in bargaining over the terms of a new agreement. At the time of the hearing, there had been two bargaining sessions between the parties. Mr. Ratliff was on the Borough's bargaining team, along with the Borough's labor attorney and Council members. In connection with the negotiations, Ms. Bittner has compiled cost information at Mr. Ratliff's request in order for the Borough to prepare for bargaining and formulate its demands.

On August 3, 2015, the Hearing Examiner issued the POUC, concluding that the Borough Secretary is a confidential employe under Section 301(13)(ii) of PERA because the position works in a close continuing relationship with the Borough Manager, who is a member of the Borough's bargaining team. Therefore, the Hearing Examiner ordered that the certification at Case No. PERA-R-87-70-W be amended to exclude the Borough Secretary from the bargaining unit represented by the Union.

Initially, the Union does not challenge any of the Hearing Examiner's Findings of Fact in its exceptions. Therefore, the Hearing Examiner's findings are conclusive. **FOP Lodge #5 v. City of Philadelphia**, 34 PPER 22 n.3 (Final Order, 2003).

The Union alleges in its exceptions that the Hearing Examiner erred in concluding that the position of Borough Secretary has a close continuing relationship with the Borough Manager because these positions work independently of each other. Section 301(13) of PERA defines confidential employe as "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).

The definition of confidential employe under Section 301(13)(ii) of PERA has been interpreted by the Board and the Supreme Court as limited to those employes who work in a close continual relationship with managerial employes who formulate, determine or effectuate the employer's labor policy. **PLRB v. Altoona Area School District**, 480 Pa. 148, 389 A.2d 553 (1978). The Commonwealth Court further refined what is required to prove confidential employe status under Section 301(13)(ii) of PERA in **North Hills School District, supra**, where the issue was whether a secretary to an Assistant Superintendent was a confidential employe. In concluding that the secretary was a confidential employe under Section 301(13)(ii) of PERA, the Commonwealth Court stated as follows:

... PERA defines **two** distinct categories of confidential employes. Section 301(13)(ii) of the PERA, which applies here, defines a confidential employe in broad terms as "any employe who works ... 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)(ii) (emphasis added). Here, Santillo is a member of the School District's negotiation team, sits at the bargaining table during negotiations and has assumed an intense role in negotiations with the teacher's union, custodians and the Act 93 employes. (See PLRB's Findings of Fact, No. 17; R.R. at 78a.) Thus, Santillo indisputably qualifies as a "representative associated with collective bargaining" on behalf of the School District. Further, as Santillo's only secretary, Dougherty clearly has a close continuing relationship with Santillo and, thus, appears to have fully satisfied the PERA's second definition of a confidential employe.

...

[S]ection 301(13)(ii) of the PERA does not even mention the content of the information accessible to the employe; rather, in that second category of confidential employe, the focus is upon the level of association that the public officer or representative has with the employer's collective bargaining process.

...

Where an employee has a close relationship with such involved management personnel, the PERA appears to assume that that 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 1158-1159 (emphasis in original). Therefore, the Court concluded that Section 301(13)(ii) of PERA does not require a showing that the employee was privy to confidential information in order for the position to be excluded from the bargaining unit.

Here, the Hearing Examiner concluded that the Borough met its burden of establishing that the position of Borough Secretary is a confidential employee under Section 301(13)(ii) of PERA because the position works directly with the Borough Manager (a member of the Borough's bargaining team), shares an office with the Borough Manager, opens the Borough Manager's mail, has access to the Borough's personnel files and compiles cost information at the Borough Manager's request to prepare for bargaining. In its exceptions, the Union asserts that the Hearing Examiner's inference on page 5 of the PDO that the Borough Secretary opens Mr. Ratliff's mail is not supported by the record. The Hearing Examiner found that Ms. Bittner opens all the mail that is received by the Borough. (Finding of Fact (FF) 12). This finding was not contested by the Union and, in fact, the Union acknowledges that Ms. Bittner opens all of the Borough's mail as part of her duties as Borough Secretary. Based on this finding, the Hearing Examiner reasonably inferred that Ms. Bittner also opens any mail that is received by Mr. Ratliff. Therefore, the Union's exception is dismissed.

The Union additionally alleges that the Hearing Examiner erred in concluding that Ms. Bittner works for Mr. Ratliff because the record establishes that she does not prepare his correspondence, answer his e-mails, type bargaining proposals or prepare cost analysis of bargaining proposals. However, the uncontested findings of fact demonstrate that Ms. Bittner's relationship with Mr. Ratliff is close and continuing in that she assists Mr. Ratliff in running the affairs of the Borough, shares one side of a one-room office with Mr. Ratliff, assists Mr. Ratliff in preparing the budget by obtaining trending cost information, and has compiled cost information at his request in order for the Borough to prepare for bargaining and formulate its demands. (FF 10, 11, 12, 15).

The Union also asserts that Mr. Ratliff denied that Ms. Bittner was his assistant. When asked whether Ms. Bittner acted as his assistant, Mr. Ratliff stated as follows:

Q. Does [Ms. Bittner] serve in her capacity as the Borough Secretary as a personal assistant to you?

A. She's the Borough Secretary and she and I work together.

Q. But she doesn't serve as your personal administrative assistant?

A. I don't look at it that way. We run the borough together. That's the way I look at it.

(N.T. 28). Contrary to the Union's assertion, this testimony further supports the Hearing Examiner's conclusion that Ms. Bittner works in a close continual relationship with Mr. Ratliff.

Further, in **West Hanover Township v. PLRB**, 646 A.2d 625 (Pa. Cmwlth. 1994), the issue was whether a Township Secretary appointed pursuant to the Second Class Township Code, who was the custodian of all the township's files and whose duties included, among other things, maintaining the records of all township proceedings and personnel files and

processing of the payroll should be excluded from the nonprofessional bargaining unit as a confidential employe. In concluding that the position was a confidential employe under Section 301(13) of PERA, the Commonwealth Court stated as follows:

[B]ecause the township secretary is an officer of the municipal body, the inclusion of such an appointed officer within the bargaining unit for the township workers would be just as inappropriate as the inclusion of the corporate secretary of a business corporation within a workers' bargaining unit.

...

One need not await the occurrence of actual experience in collective bargaining to conclude that placing a township officer, who functions as its official secretary, in the bargaining unit would present an impossible situation disadvantageous to all involved.

...

The township secretary, as the official custodian of *all* files of the township, is obviously essential to performance of the bargaining function on behalf of the employer municipality.

646 A.2d at 632-633 (emphasis in original).² In **Borough of Ridley Park**, 27 PPER ¶ 27227 (Final Order, 1996), the Board excluded a Borough Secretary appointed pursuant to the Borough Code, who was the official custodian of all the borough's financial and personnel records, from the nonprofessional bargaining unit as a confidential employe under Section 301(13) of PERA, stating that the Court's holding in **West Hanover Township** required the exclusion of any appointed municipal Secretary whose duties include being the "official custodian of all files" of the municipality. Similarly, Ms. Bittner is responsible for processing the payroll, preparing the minutes of all Borough Council meetings and maintaining the personnel files for the Borough. (FF 12, 13). Therefore, the decisions in **West Hanover Township** and **Borough of Ridley Park** provide further support for the Hearing Examiner's conclusion that the position of Borough Secretary is confidential under Section 301(13) of PERA and should be excluded from the bargaining unit.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the Union's exceptions.

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Order of Unit Clarification be and the same are hereby dismissed.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member, this seventeenth day of November, 2015. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

² **West Hanover Township** was decided after the Board's conclusion in 1987 that the Borough Secretary position at issue in this case was not confidential within the meaning of PERA.