

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF :
:
PROVIDENCE SCHOOL COMMITTEE :
:
:
-AND- :
:
R.I. COUNCIL 94, AFSCME, AFL-CIO :
:

CASE NO: EE- 1707A
Unit Clarification: Confidential
Executive Assistant

DECISION & ORDER

TRAVEL OF CASE

The above-entitled matter came on to be heard before the Rhode Island State Labor Relations Board (hereinafter "Board") on a Request for Petition for Unit Clarification and/or Accretion/Exclusion (hereinafter "Petition") for the position of Confidential Executive Assistant. R.I. Council 94, AFSCME, AFL-CIO filed the Petition with the Board on October 17, 2007. An informal hearing was initially scheduled for November 14, 2007 and was postponed on several occasions. The parties, on or about January 28, 2009, submitted written statements. The formal hearing in this matter was originally scheduled for April 6, 2010 and was rescheduled on several occasions. The hearing was finally held on October 17, 2010. In arriving at the decision herein, the Board has considered the testimony and evidence submitted at the formal hearing and has reviewed the briefs of both Unions.

SUMMARY OF FACTS & TESTIMONY

On June 6, 1969, Rhode Island Council 94, AFSCME-AFL-CIO, Local 1399 was certified to represent all non-teaching personnel including secretaries, clerks and drivers, but excluding all other employees employed by the Providence School Committee. Several changes to the bargaining unit have occurred over the years, both including and excluding various positions.

In support of its petition, the Union presented the testimony of its President, Ms. Joanne Micheletti. She testified that she had been employed as a Secretary in the Providence School Department for twenty-five (25) years. (TR., p. 7) She testified that

for as long as she had been employed, the position of Secretary to the Director of Human Resources had been a part of the bargaining unit. (TR. p. 7) Ms. Micheletti testified that in approximately 2002, the Superintendent of Schools left, her replacement, Melody Johnson, did not want to have the existing secretary work for her, and she brought in her own secretary. (TR. p. 8) Ms. Micheletti testified that at the time of this change, the Union indicated that it was going to file a grievance because the position of Secretary to the Director of Human Resources had always been a Union position. Ms. Micheletti further testified that more than one person filled the position and that the name of position was changed to a "confidential" secretary when the Union told the Employer that the Union was planning to have the position put back into the Union. (TR. pgs. 8-9)

Ms. Micheletti testified that the Union objected to the secretarial position being called "confidential" and therefore, wanted to include the position into the bargaining unit, due to the lack of confidentiality in the position. She testified that although the secretary to Human Resources will see copies of written grievances, those grievances are, in fact, typed up by another Union secretary in another building. (TR. pgs. 10-12) She further testified that a Union secretary worked for the Director of Labor Relations who would also see grievances and other information. (TR. p. 11) Finally, when the grievance moves on to the Chief Operations Officer (COO) or the Human Resource Director, the bargaining unit secretaries see all that information as well. (TR. p. 12) She testified that prior to the position being removed when Ms. Johnson became Superintendent, the secretary to the Director of Human Resources was a Union secretary and she performed the same duties that are now being performed by the "confidential" secretary. (TR. p. 13)

Ms. Micheletti further testified that at a date uncertain, Ms. Debbie DeCarlo was promoted from the position of Principal at Central High School to the position of COO of the Providence School Department. According to Ms. Micheletti, Ms. DeCarlo wanted to bring her Central High School secretary with her to the Administration Building. The Union explained that the job was filled by seniority, that the job would have to go out to bid, and that her secretary would have to bid on the position. Ms. Micheletti testified that Ms. DeCarlo wanted to get around this problem to have the secretary she wanted and

that a deal was struck for a “swap.” Ms. DeCarlo agreed to take the “confidential” position, in exchange for her releasing a Union position. The Union also showed Ms. DeCarlo how her secretary would be “protected” because there was a clause in the Collective Bargaining Agreement that allowed a member to take a position outside the bargaining unit for two (2) years and still come back into the bargaining unit. (TR. p. 15) Ms. Micheletti stated that Ms. DeCarlo said, “That’s great. I’ll go upstairs. I’ll speak to the Superintendent. That doesn’t need to be a confidential position. I’ll take it out of the Union. This way here I can take Ann Marie from Central, bring her over here and give her that title. So that way, I have the secretary I want and you guys can have the position back.” (TR. pgs. 15-16) Therefore, according to Ms. Micheletti, the confidential secretarial position was to go to the COO and the Union secretarial position was to go to the Director of Human Resources. (TR. p. 16) On further direct examination, Ms. Micheletti testified that of the 240 secretarial positions in the Providence School Department, all but the position in question were currently members of the bargaining unit.

On cross-examination, Ms. Micheletti testified that the “swap” did not come to fruition, however, because Mr. Zimmerman, the Human Resource Director (at one point) put up a “stink” about the swap. (TR. p. 18) She further testified on cross as to the duties of Ms. Emily Cohen, the current incumbent “confidential” secretary. (TR. pgs. 18-19) Ms. Micheletti testified that Ms. Cohen sets up meetings for grievance hearings, files, types, answers the phone and schedules grievances. (TR. p. 19) On cross-examination, Ms. Micheletti acknowledged not having previously seen the job description for the position of “Confidential Executive Assistant.” (TR. p. 21) After reviewing the job description, Ms. Micheletti stated that the Union secretaries performed most of the duties on the job description. Ms. Micheletti was rather emphatic that the office procedures in the Office of Human Resources have been pretty much the same for twenty-five (25) years, only the technology and the people holding the positions have changed. (TR. p. 24)

On further cross-examination, Ms. Micheletti testified that the Union was not notified in advance that a secretarial position in the Office of Human Resources was going to be removed from the Union and that the Union found out about it afterwards.

(TR. p. 26) She stated that Margaret (Maggie) Psilopolous filled the vacant position, but that she was not in the Union. After Maggie vacated the position, it was filled by Kevin Gibson, a gentleman from a temporary agency. (TR. p. 31) According to Ms. Micheletti, it was around this time that the Union filed the petition to accrete the position into the bargaining unit.

The School Department presented the testimony of Dr. Tomas Ramirez, the Acting Assistant Superintendent for the Office of Human Resources and Labor Relations. (TR. p. 34) Dr. Ramirez's office is primarily responsible for student learning and supporting students in their academic achievement, by establishing an efficient consumer service organization, and human resources, both for existing employees and potential new hires. (TR. p. 35) His office handles advertisement and recruitment, hiring and retention of employees. It includes employee services, such as change of addresses, changing salaries, changing assignments, and employee relations. (TR. p. 35) The office also deals with records retention and data warehousing. (TR. p. 36)

Dr. Ramirez testified that his office is responsible for handling all grievances from all bargaining units, from beginning to end. (TR. p. 36) He testified that his office attempts to informally resolve grievances, but if that is unsuccessful, his office will process the grievances, hold hearings, and eventually he will make a decision on behalf of the Superintendent. (TR. p. 36) Dr. Ramirez's office also deals with all employee discipline matters. (TR. p. 37)

Dr. Ramirez serves as a member of the Superintendent's Negotiation Team to recommend contractual language. (TR. p. 38) Dr. Ramirez testified that he recommends policies and procedures in the area of labor relations to the Superintendent. (TR. p. 38)

Dr. Ramirez testified that in 2003, there was a reorganization of the Department of Human Resources and that as a result, Donald Zimmerman was brought in as the Senior Director of Human Resources. Prior to his appointment, Mr. Zimmerman had been a consultant making recommendations for changes within the Department. It was Mr. Zimmerman who made the determination that a Confidential Executive Assistant position should be created in the office as a non-Union position. (TR. p. 40) Dr. Ramirez

further testified that there is at least one other confidential assistant in the office of the Superintendent of schools. (TR. pgs. 40-41)

Dr. Ramirez testified that he was personally familiar with the duties and terms and conditions of employment of the confidential executive assistant position currently held by Ms. Emily Cohen. He stated that her hours of work are 8:00 am to 4:30 pm, but that she may stay longer without overtime or compensatory time. She does not have a shortened workweek in the summer month like other clerical staff. (TR. p. 42) Dr. Ramirez testified that he is very familiar with the job description because he is the one who implemented it. He stated that Ms. Cohen's duties included routine clerical duties, as well as the handling of confidential information; particularly as it pertains to contract negotiations and grievance resolutions. (TR. p. 43) He testified that Ms. Cohen has access to information as it pertains to the advance resolution of grievances and proposed contract language. (TR. p. 43) Dr. Ramirez testified that Ms. Cohen has keys to his office and that she maintains the filing systems. (TR. p. 44) Ms. Cohen has access to Dr. Ramirez's email, as well as regular mail. (TR. p. 44) Dr. Ramirez testified that Ms. Cohen helps to formulate policies and recommendations and researches possible resolutions. (TR. p. 44)

Dr. Ramirez testified that over the course of a few years, Ms. Cohen has become a valued member of the team of people he relies on to discuss grievances including those within the clerical union. (TR. p. 45) Ms. Cohen's desk is located just outside Dr. Ramirez's door; located approximately 8-10 feet away from two other clerks. (TR. pgs. 46-47) Dr. Ramirez testified that there are seventeen (17) clerical employees in the Office of Human Resources, but that only Ms. Cohen has access to information concerning contract negotiations, grievances, and disciplinary matters. (TR. pgs. 47-48) Dr. Ramirez testified that he receives confidential/privileged communications from Attorneys relative to contract negotiations and emails concerning grievance and disciplinary matters and that Ms. Cohen has access to all of this information. (TR. p. 49) Finally, Dr. Ramirez testified that his former position of Assistant Superintendent for Labor Relations consisted primarily of handling grievances and labor relations matters and that his office consisted of two (2) people, Dr. Ramirez and his Union secretary, Ms. Nancy D'Amico. (TR. p. 52) In his current position of Superintendent for Human

Resources and Labor Relations, Dr. Ramirez oversees twenty-two (22) people in the office, servicing 3,500 employees. He stated that grievances are only one aspect of this position. (TR. p. 52) Dr. Ramirez stated that he was very familiar with the job description for the position of Confidential Executive Assistant. (TR. p. 53) Dr. Ramirez also stated that he believes that the job duties of that position are unique to that position. (TR. pgs. 54-55)

On cross-examination, Dr. Ramirez agreed that grievances have always been heard by the Director of Human Resources; and that as it pertains to grievances, all of Ms. Cohen's functions have always been performed, in regards to grievances, by Union employees. (TR. p. 55-56) Dr. Ramirez acknowledged that Ms. Cohen had no specific background in labor relations, nor does she make any decisions about grievances. (TR. p. 56) Dr. Ramirez acknowledged that he is the one who makes and effectuates management policies, not Ms. Cohen. (TR. p. 57) Dr. Ramirez acknowledged that "for the most part" the items on Ms. Cohen's job description are items that one would find for any job description of any secretary in the Providence School Department. (TR. p. 57) Dr. Ramirez testified that some grievance decisions that he makes must be reviewed by the COO and/or other Administrators, all whom have Union secretaries. (TR. p. 60) Dr. Ramirez also testified that the COO, Mr. Jones, and the CFO, Mr. Clarkin, participate with Dr. Ramirez in contract negotiations and that both of those gentlemen have secretaries in the union; although he did not know how much information either of these gentlemen shared with their secretaries. (TR. p. 62)

DISCUSSION

The issue presented in this case is whether the position of Confidential Executive Assistant is eligible for inclusion with the proposed bargaining unit or whether it must be excluded as a "confidential" position, as that term is defined under labor law. In Barrington School Committee v. Rhode Island State Labor Relations Board, 694 A.2d 1185 (R.I. 1992) the Rhode Island Supreme Court considered the question of what employees qualify as "confidential" and held:

"Two categories of employees are recognized as confidential under the test and are therefore excluded from collective bargaining. The first category comprises those confidential employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. ... The second category consists of employees who, in the course of their duties, regularly have access to confidential information

concerning anticipated changes which may result from collective bargaining negotiations. (Barrington at p. 1136, quoting NLRB v. Hendricks County Rural Electric Membership Corp, 454 U.S. 170 at 189)

This two-prong test of confidentiality is commonly referred to as the "labor-nexus" test. In the case presented, the position in question is not viewed in a vacuum, but rather within the totality of the circumstances and in relation to other administrative positions. The Union argued that the bulk of what is performed by Ms. Cohen, in her position as Confidential Executive Assistant, was no more than what had been performed by other Union secretaries for years and years. On cross-examination, Dr. Ramirez acknowledged that for years and years, he and his Union secretary were the ones who handled all grievances. So, it certainly seems to this Board that there has not ever been any expectation that "confidential" in the labor nexus test in this setting, should mean that no Union member should ever have knowledge about grievance resolution. Indeed, the nature of labor relations is inherently clerically top-heavy. There is much need, for both parties, for a well-documented paper trail. Since Union secretaries have been entrusted for decades in the Providence School Department to file, answer phones concerning grievance matters, set up hearings, and type correspondence and decisions, there is not an expectation that the concept of "confidential" applies in this particular setting. All of these secretaries have had "advance" knowledge of grievance resolution. We see no reason to upset the balance of labor relations and suddenly declare these clerical duties as confidential, simply because they touch on the resolution of labor relations issues; and we respectfully decline to do so in this matter.

This does not end the inquiry here, however, because there has been an argument that Ms. Cohen is a confidential employee because she assists and acts in a confidential capacity to a person who formulates, determines, and effectuates management policies in the field of labor relations. On direct examination, Dr. Ramirez was asked, "Now in the area of labor relations, do you, yourself, formulate labor policies and procedures? He replied:

"Yes, I actually make recommendations for the Superintendent as a result of actually seeing many of the different issues, the surface, as a result of the grievances. I actually, it is one of my duties and responsibilities to formulate recommendations for the Superintendent and actually for my immediate supervisor, who happens to be the Chief Operations Officer, for them to then formulate policies that could perhaps be entered into our contract language." (TR. pgs. 38-39)

When testifying about Ms. Cohen's level of access, Dr. Ramirez stated, "She [Ms. Cohen] also helps to formulate some of the different policies and recommendations upon my direction. She will research it and come back with some type of recommendation that I can then take forward to my immediate supervisor and Superintendent." (TR. p. 44)

Dr. Ramirez did not testify that *he* is the one who formulates, determines and effectuates management policies for the Providence School Department. He testified quite clearly that he "formulates recommendations" for the *Superintendent and his immediate Supervisor*. There's a significant difference between formulating a recommendation for a superior's consideration and having the authority to formulate and implement management policies without oversight. The Board does not find that Dr. Ramirez's testimony established that he was a person who formulates, determines, and effectuates management policies in the field of Labor Relations, as required under the first prong of the labor-nexus test. Likewise, there was no testimony or evidence that Ms. Cohen's involvement, as Dr. Ramirez's assistant, rose to that of Dr. Ramirez's level to make recommendations or that she, herself, acted in a confidential capacity to either the Chief Operating Officer or the Superintendent. Therefore, Ms. Cohen is not excluded from collective bargaining under this prong of the labor nexus test.

Our inquiry now turns to whether or not Ms. Cohen category qualifies as an employee who, in the course of her duties, regularly has access to confidential information concerning anticipated changes, which may result from collective bargaining negotiations. The testimony before the Board on the issue of "anticipated changes which may result from collective bargaining" was limited. Dr. Ramirez testified that he "serves as a member of the Superintendent's Negotiation Team, as they occur. "For example, I serve on the negotiation teams for the Unions, for the Providence Teachers' Union, for the Clerical Union, as well as Union1033." (TR. p. 37) The specific example that Dr. Ramirez provided indicated that over the course of years, there may be a pattern to grievance problems that may need to be addressed in contract negotiations. He further stated, "I actually serve as someone who provides information and research to the Superintendent as the need arises. ... One of my goals as being a member of that team is to bring recommendations to the Superintendent that perhaps make contractual language recommendations that could be negotiated and entered into a contract." (TR. p. 38)

This testimony did not state that Dr. Ramirez regularly makes recommendations that could reasonably be construed as anticipated changes which may result from collective bargaining negotiations. The only issue that he spoke about was grievances. More critically, however, the testimony is devoid of what happens during and after the contract negotiations. Are any and all proposals sent back and forth through his office? Does his office have a role in the compilation of the agreements, or is that accomplished elsewhere, perhaps at the solicitor's office? Does Ms. Cohen have knowledge of the bargaining sessions and the contents therein? Does Ms. Cohen assist Dr. Ramirez at the negotiation table or prepare packets for his review or that of other negotiating team members? The thin record on this issue has not convinced the majority of this Board that Ms. Cohen does or will regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations. As such, we find that Ms. Cohen's position is not excludable from collective bargaining as confidential under the second prong of the labor nexus test.

Finally, we turn our attention to the community of interest with the proposed bargaining unit. There was limited testimony on the various factors, but it was sufficient for purposes of accretion. The position in question is located within an office with seventeen (17) other clerical employees, some of whom have their desks in close proximity. While the hours of work are not identical with the rest of the bargaining unit, they are sufficiently close (within one half hour). Her job duties are similar to other clerical employees, as established by Ms. Micheletti testimony and the job descriptions. Finally, a large portion of the duties of the position, which dealt with employee grievances, had been performed for decades by members of the bargaining unit. The Board does not find that the limited extra duties, such as preparing drafts of grievance decisions, under the direction of Dr. Ramirez, performing research or preparing visual presentation, are so strikingly different in a modern office environment to warrant exclusion. These various office duties share enough of a similarity to warrant inclusion in the bargaining unit. As such, the Board finds that the position of Confidential Executive Assistant shall be and is hereby accreted into the bargaining unit in Case No. EE-1707A.

FINDINGS OF FACT

- 1) The Respondent is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.
- 2) Both Unions are labor organizations which exist and are constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers in grievances or other mutual aid or protection and as such are "Labor Organizations" within the meaning of the Rhode Island State Labor Relations Act.
- 3) On June 7, 1967, Rhode Island Council 94, AFSCME-AFL-CIO, Local 1399 was certified to represent all non-teaching personnel including secretaries, clerks, and drivers, but excluding all other employees employed by the Providence School Committee.
- 4) The Office of Human Resources and Labor Relations is responsible for human resources, both for existing employees and potential new hires. The office handles advertisement and recruitment, hiring and retention of employees. The office includes employee services, such as change of addresses, changing salaries, changing assignments and employee relations. The office also deals with records retention and data warehousing.
- 5) The Office of Human Resources and Labor Relations is responsible for handling all grievances from all bargaining units, from beginning to end. The office also deals with all employee discipline matters.
- 6) Dr. Tomas Ramirez is the Superintendent for Human Resources and Labor Relations. As part of his duties, Dr. Ramirez serves as a member of the Superintendent's Negotiation Team to recommend contractual language. Dr. Ramirez recommends policies and procedures in the area of Labor Relations to the Superintendent.
- 7) Ms. Emily Cohen is a Confidential Executive Assistant in the Office of Human Resources and Labor Relations. Ms. Emily Cohen's job description was entered as an Exhibit. Ms. Cohen has keys to Dr. Ramirez's office and maintains the filing systems. Ms. Cohen has access to Dr. Ramirez's email, as well as regular mail.

- 8) Ms. Cohen works from 8:00 am to 4:30 pm, but sometimes stays longer without overtime or compensatory time. Ms. Cohen does not have a shortened workweek in the summer month like other clerical staff.
- 9) For over thirty (30) years, until 2002, the clerical work, involving the processing of grievances, had been performed by Union employees. There are 240 secretarial positions in the Providence School Department, all except one in the bargaining unit.
- 10) Ms. Cohen's desk is located just outside Dr. Ramirez's door, located approximately 8-10 feet away from two other clerks. There are seventeen (17) clerical employees in the Office of Human Resources, but only Ms. Cohen has access to information concerning contract negotiations, grievances, and disciplinary matters. Ms. Cohen has no specific background in Labor Relations, nor does she make any decisions on grievances.
- 11) Dr. Ramirez agreed that grievances have always been heard by the Director of Human Resources; and that as it pertains to grievances, all of Ms. Cohen's functions have always been performed, in regards to grievances, by Union employees. Dr. Ramirez acknowledged that "for the most part" the items on Ms. Cohen's job description are items that one would find for any job description of any secretary in the Providence School Department.
- 12) Dr. Ramirez testified that some grievance decisions that he makes must be reviewed by the COO and/or other Administrators, all whom have Union secretaries. Dr. Ramirez also testified that the COO, Mr. Jones, and the CFO, Mr. Clarkin, participate with Dr. Ramirez in contract negotiations and that both of those gentlemen have secretaries in the Union.

CONCLUSIONS OF LAW

- 1) The position of Confidential Executive Assistant is not excludable from collective bargaining as a confidential employee, under either prong of the labor-nexus test.
- 2) The position of Confidential Executive Assistant shares a community of interest with other positions of Local 1399's bargaining unit.

ORDER

- 1) The petition to accrete the position of Confidential Executive Assistant to the bargaining unit certified by Case No EE 1707A is hereby granted.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni

Walter J. Lanni, Chairman

Frank J. Montanaro

Frank Montanaro, Member

Gerald S. Goldstein

Gerald S. Goldstein, Member

Ellen L. Jordan

Ellen L. Jordan, Member (Dissent)

John R. Capobianco

John R. Capobianco, Member

Member did not participate in vote.

Elizabeth S. Dolan, Member (Dissent)

Entered as an Order of the
Rhode Island State Labor Relations Board

Dated: APRIL 8, 2011

By: Robyn H. Golden
Robyn H. Golden, Administrator

