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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

BARRINGTON SCHOOL COMMITTEE

V.

RHODE ISLAND STATE LABOR RELATIONS BOARD, ET AL

C.A. No. 89-0420

DECISION

BOURCIER, J. This is an appeal by the Barrington School Committee from a decision of the Rhode Island State Labor Board pursuant to § 42-35-15 R.I.G.L. Jurisdiction in this Superior Court is pursuant to that statute.

I

CASE TRAVEL - FACTS

In early 1988, NEARI/NEA, a labor organization (Union) filed with the State Labor Board (Board) a petition for certification of representation wherein it sought to be recognized as the collective bargaining agent for certain clerks, aides, bus drivers and secretaries employed by the Town of Barrington within the Barrington School Department. The Barrington School Committee (Committee) objected to the certification procedure alleging that certain employees; namely, the secretaries to the School Committee Business

Manager, and the Superintendent of Schools should not be included within the proposed certified bargaining unit.

On April 18, 1988 the Board, after formal hearing, ordered an election to determine certification. At that hearing, the Committee persisted in its objection regarding certification of the two secretary positions within the bargaining unit. The election was held on June 3, 1988 and the Union was selected as the collective bargaining representative. The Board thereafter issued its certification of representation to the Union.

Not having finally resolved the question of the status of the two secretaries within the bargaining unit, the Board thereupon scheduled and held two formal hearings thereon. Those hearings were held on September 22, 1988 and November 2, 1988. The Board thereafter, on December 28, 1988 made and filed its decision. It found that the position of Secretary to the Superintendent of Schools should be excluded from the bargaining unit as being a confidential position, but that the position of Secretary to the Business Manager was not a confidential position and should be included in the bargaining unit. Thereafter, a collective bargaining agreement was entered into between the parties.

In this appeal, the Committee claims that the Board erred in concluding the non-confidential nature of the Business Manager's secretary position.

II

APPELLATE REVIEW PURSUANT TO G.L. § 42-35-15

General Laws 1956, § 42-35-15, as amended, confers appellate jurisdiction in this Superior Court to review decisions of the various state administrative agencies. The scope of review permitted, however, is limited

by that statute. Fundamental in the statute is the basic legislative intention that this Court should not, and cannot, substitute its judgment on questions of fact for that of the respondent agency. Lemoine v. Department of Public Health, 113 R.I. 285, 291 (1974). This is so, even in those cases where this Court, after reviewing the certified record and evidence might be inclined to view the evidence differently than did the agency. Cahoone v. Board of Review, 104 R.I. 503 506 (1968); Berberian v. Department of Employment Security, 414 A.2d 480, 482 (1980). Judicial review on appeal is limited to an examination and consideration of the certified record to determine if there is any legally competent evidence therein to support the agency's decision. If there is such evidence, this Court is required to uphold the agency's factual determinations. Blue Cross & Blue Shield v. Caldarone, 520 A.2d 969, 972 (1987); Narragansett Wire Co. v. Norberg, 118 R.I. 596, 607 (1977); Prete v. Parshley, 99 R.I. 172, 176 (1965).

Where, however, the findings or conclusions made by an agency are "totally devoid of competent evidentiary support in the record" or by the reasonable inferences that can be drawn therefrom, then the findings made by the agency are not controlling upon this Court. Milardo v. Coastal Resources Management Council, 434 A.2d 266, 270 (1981); Millerick v. Fascio, 384 A.2d 601, 603 (1978); DeStefanis v. Rhode Island State Board of Elections, 107 R.I. 625, 627, 628 (1970).

The Administrative Procedure Act, G.L. 1956 § 42-35-15, permits this Court to reverse, modify or remand an agency decision only in those instances where it finds that substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are in violation of constitutional or statutory provisions; or in excess of the

statutory authority of the agency, or made upon unlawful procedure, or affected by other error of law, or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or is arbitrary or capricious or characterized by abuse of discretion or by a clearly unwarranted exercise of the agency's discretion.

III

JURISDICTION

Both the Board and the Union question the jurisdiction of this Court to review the Board's decision and Order pursuant to § 42-35-15 R.I.G.L. Each defendant claims that the plaintiff School Committee has failed to exhaust all of the administrative remedies available to it within the Department of Labor, and accordingly, is not aggrieved by a final decision of the Department of Labor. This contention is premised on our Supreme Court's holdings in McGee v. Local No. 682, 70 R.I. 200 (1944) and Local 494 v. Kelley, 89 R.I. 128 (1959). Each of those cases concluded that a decision by the Labor Board regarding certification of representation was not reviewable by the courts because such decisions lacked "finality". At first blush the defendant Board and Union's contention appears to have merit. However, when one examines the McGee and Local 494 holdings in the time frame context of their advent, the flaw in the defendant's contention becomes readily apparent.

Both McGee and Local 494 involved certification matters stemming from decisions made by the then Labor Board pursuant to § 28-7-29 R.I.G.L. which concerned unfair labor practice hearings. That specific section of the labor law made no provision for appeals from any certification questions, but instead, only from final decisions and orders pertaining to unfair labor practice charges. In that context, both McGee and Local 494 are both on proper target.

Some six years after the McGee and Local 494 case incidents, the General Assembly enacted the Administrative Procedures Act, and in particular § 42-35-15 therein, which provided for State agency and departmental final decision appeals. That Act became effective in January of 1964. § 42-35-18.

As one views the travel of the instant controversy, the Boards' decision, dated December 28, 1988, in the context of the Administrative Procedures Act, is a "final" decision from a State agency, board or department. That is because there is no appeal available to the plaintiff Committee from the Board's December 28, 1988 certification decision within the State Labor Department. Consequently it becomes a final decision from that Department and is appealable pursuant to § 42-35-15 R.I.G.L.

The defendant Board and Union's contention made in this appeal to the effect that in order for the December 28, 1988 decision and Order of the Board to become final, the Committee must first violate the certification order and then come before the Board on an unfair labor practice charge and defend its violation by challenging the propriety of the certification itself and then, if found to be in violation, appeal that finding, is worthy only of mention, not consideration. The Committee's appeal from the December 28, 1988 decision and Order of the defendant Board is here, properly, pursuant to § 42-35-15 R.I.G.L.

IV

THE STATE LABOR BORAD'S DECISION

In this appeal, the issue for this Court to consider and resolve is whether or not there is any legally competent evidence in the certified record to support the Board's decision. Blue Cross & Blue Shield v. Caldarone, 520 A.2d 969, 972 (1982). That decision, challenged here, centers

on the Board's finding that the position of secretary to the School Committee Business Manager is a non-confidential position and thus, to be included in the certified bargaining unit. The School Committee claimed before the Board, as it does here, that the position ought to be excluded from the certified bargaining unit because it is a confidential management position. There is no similar fact-case local precedent that echoes the issue here, and accordingly, reference to federal case law which concern the confidential vs non-confidential position question are of assistance. Our Supreme Court has recognized the "persuasive force" of such federal case law when dealing with questions not previously resolved here on the State level. Barrington School Committee v. R.I. State Labor Board, 120 R.I. 470, 479 (1978).

The burden of proving "confidential status" is on the party asserting it. Crest Mark Packing Co., 283 NLRB 999 (1987). Specifically, two categories of employees are recognized as "confidential" by the National Labor Relations Act. The first category comprises "those employees 'who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.'" N.L.R.B. v. Lorimar Productions, Inc., 771 F.2d 1294, 1298 (1985); B.F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956). The second category consists of "'those employees who, in the course of their duties, regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations.'' Lorimar, supra, at 1298; Pullman Standard Division, Inc., 214 N.L.R.B. 762, 762-63 (1974); Union Oil Co. v. NLRB, 607 F.2d 852, 853-54 (9th Cir. 1979). Consequently, to be considered a confidential employee, the employee must satisfy one of the above criteria. Regarding the second category, the test, also called the

"Labor nexus test" N.L.R.B. v. Hendricks City Rural Electric Corp., 454 U.S. 170, 173 (1981), is "whether the employee is in a confidential relationship with a specifically identifiable managerial employee responsible for labor policy." Lorimar, supra, at 1298. The pertinent inquiry for the second category is whether the employee has ". . . access to confidential information that might be used in future negotiations." Id. at 1299. The scope of such access under this second test is "regular access", Hendricks supra at 189; Pullman supra at 762-63 and such access only as it pertains to information concerning labor relations policies. Hendricks supra at 189.

In its December 28, 1988 "Decision and Order," the Board appeared to evaluate the confidential status of the disputed position of Secretary to the Business Manager by using the former inquiry, whether the secretary was ". . . acting in a confidential capacity with respect to persons exercising managerial functions in the field of labor relations". Pursuant to the limited scope of review permitted by § 42-35-15, this Court must review the entire certified record to determine whether there exists any legally competent evidence to support the Board's finding that the Secretary to the Business Manager is not a confidential employee under not only category one, which was ostensibly utilized by the Board, but also under category two, as well. Turner v. Department of Employment Security, 479 A.2d 740, 742 (1984). In so doing, this Court may not substitute its own judgment on factual determinations made by the Board, Narragansett Wire Co. v. Norberg, 118 R.I. 596, 607 (1977), even if the Court might be inclined to view the evidence differently than the Board. Cahoone v. Board of Review, 104 R.I. 503, 506 (1968).

A review of the certified record shows clearly the Board's reasoning

for rejecting the Committee's contention that the Secretary to the Business Manager should be excluded from the bargaining unit. The Board's decision (p. 2) states:

> There is no question that if it were to be shown that the employee occupying this particular position was exercising managerial functions or acting in a confidential capacity with respect to persons exercising managerial functions in the field of labor relations, the Board would, of necessity, have to exclude the position from the bargaining unit. However, the Board has not been shown that such is the case, and consequently, the Board finds that the duties involved are not of such a consequence to have the position classified as a "confidential" position thereby excluding it from the bargaining unit."

The legal rationale for excluding confidential employees from a certified bargaining unit is that:

> 'Management should not be required to handle labor relations matters through employees who are represented by the union with which the company is required to deal and who in the normal performance of their duties may obtain advance information of the company's position with regard to contract negotiations, the disposition of grievances, or other labor relations matters.'

Westinghouse Electric Corporation v. The NLRB (C.C.A. 6th) 398 F.2d 669, 670 (1968); The Hoover Company, 55 NLRB 1321, 1323 (1944).

Generally speaking, regular, not mere casual access to labor-related information is the major criterion utilized by the Federal Courts and by the N.L.R.B., in concluding the confidential nature of an employee's position. In 1956, the National Labor Relations Board re-examined its position regarding "confidential employees" that originated in the Ford Motor Company case, 66 NLRB 1317, and noted the expanded interpretation being given to that term. Secretaries to persons involved in handling labor grievances, and cashiers having access to labor relations policy data had been deemed confidential employees. The National Labor Relations Board in the B.F. Goodrich Company

case, 115 NLRB 722 (1956) at page 724 stated:

> "Consequently, it is our intention herein, and in future cases to adhere strictly to that definition (confidential employees) and thus limit the term "confidential" so as to embrace only those 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 National Labor Relations Board's intention, thus expressed in 1956, to cut down and narrow the expanding interpretations being given to the term "confidential employee" has been adhered to. See, e.g. Los Angeles New Hospital, 244 NLRB 960, 961 (1979); Dunn & Bradstreet, Inc., 240 NLRB 162 (1979); Ernst & Ernst National Warehouse, 228 NLRB 590, 591 (1977). In United States Postal Service, 232 NLRB 556 (1978) it was held that the typing of confidential labor relations memoranda did not, without more, imply confidential status. The "without more" qualification was later adequately explained in the Raymond Baking Company case, 249 NLRB 1100 (1980) wherein a typist for employees dealing in labor negotiations and grievance procedures was held to be a confidential employee. The clearest conclusion one can derive from a review of the federal case law, including decisions by the National Labor Relations Board is that each case turns upon its own peculiar facts, and that it is the party seeking a confidential employee's exclusion from a bargaining unit to prove the confidential nature of the employment. Crest Mark Packing Co., 283 NLRB 999 (1987); Union Oil Co. v. NLRB, 607 F.2d 852 (9th Circ. 1979); Weyerhaeuser Co., 173 NLRB 1170 (1968); NLRB v. Jaggers-Chiles-Stovall, Inc., 639 F.2d 1344 (5th Circ. 1981), Cert. denied 454 U.S. 826 (1981). The rationale behind excluding confidential employees from a bargaining unit is so that employees should not be placed in a position which can create, or does create, a potential conflict between the interests of the

employee and the union. NLRB v. Lorimar Productions, Inc., 771 F.2d 1294, 1298 (1985).

Turning now to the certified record in this case, and in particular to the evidence from which the Board found that the duties of the Secretary to the Committee's Business Manager "are not of such consequence to have the position classified as a confidential position thereby excluding it from the bargaining unit".

Ralph Malafronte, the Committee Business Manager testified that as part of his employment duties, he was responsible for handling all financial aspects of the school district operations including those financial matters pertaining to non-certified personnel. He also testified that he was responsible for all supervision of employee functions and labor relations (tr. 1, p. 11, 36-37, 40, 45). Those labor functions involved dealing with three (3) certified bargaining units, within the School Department, one of those units being NEARI/NEA representing the department clerical workers; another being the limited Steelworkers Union representing the custodians and maintenance workers and the third being the school teachers, also represented by NEARI/NEA. Mr. Malafronte testified that he assisted both legal counsel to the Committee and the School Superintendent in gathering all necessary information for employment grievance matters and arbitration hearings (tr. 1, p. 13-19, 26-28); and that he prepared and arranged financial information and recommendations for consideration by the Superintendent and Committee when taking up collective bargaining matters and contract negotiations with the unions (tr. 1, p. 36-49). He also testified that he serves as the School Committee's designee to hear grievances at the grievance level before arbitration for the custodian and maintenance workers (tr. 1, p. 18-19).

The Secretary to the Business Manager, a Mrs. Sandra Wittaker, also testified as to the nature of her duties. She testified that she typed most, if not all of the confidential information used by the Business Manager and Committee for collective bargaining purposes. These included preparing salary schedules for teacher contract negotiations (tr. 1, p. 20-25, 28, 49, 57); and for salary negotiations with the custodian and maintenance workers (tr. 1, p. 30, 45-48). She also testified that as Secretary to the Business Manager, she had regular access to all confidential materials including financial data, regarding labor relations and labor contract negotiations for the Barrington School Committee and School Department. That information, including the financial data, was most influential in shaping the course of the Business Manager's, and the Committee's, negotiations with the respective unions dealing with the Committee. For example, she knew, prior to contract negotiations between the Business Manager and the Steelworkers Union representing the custodian and maintenance workers that a six percent (6%) pay increase was authorized, but that such an offer was not made to the union (tr. 1, p. 30). Regarding teacher contract negotiations, with the union here concerned with the very question of her confidential status, (NEARI/NEA) she prepared the salary schedule worksheet used by the Committee, and which was not made available to the union. Regarding the clerical employees, now represented by the recently certified defendant union, NEARI/NEA she has in past years computed the proposed salary increases for those employees in preparation for the annual financial town meeting held in May of each year (tr. 1, p. 49).

In addition to her various financial duties, some of which are outlined above, the secretary testified that she typed out correspondence

concerning any disciplinary action against any clerical worker, bus driver or teacher aide, including any confidential disciplinary action regarding custodians (tr. 1, p. 31). She also testified that she filed work evaluations for all of the above employees (tr. 1, p. 21), and typed and filed employment grievances and handled all correspondence between the Business Manager and legal counsel. She also, according to her testimony, prepared collective bargaining proposals for negotiations with the Steelworkers Union, and she was fully aware of what recommendation the Business Manager was to make and what proposals would be presented to the union (tr. 1, p. 32). Regarding teacher contract negotiations she stated that she kept a file of the various proposals and counter-proposals made, and to be made, during the collective bargaining negotiations. (tr. 1, p. 42) With pertinent reference to the certification election that indirectly generated this litigation, she prepared all correspondence pertaining to the election, including strategy procedures, between the Business Manager and the School Superintendent; Assistant Superintendent; legal counsel and the Committee. In addition, she did research for the Business Manager to prepare for possible contract negotiations with the union (NEARI/NEA) that would be representing the clerical workers should it prevail in the certification election (tr. 1, p. 45).

Despite all of the above basically uncontradicted evidence in the certified record, the defendant Board concluded that the position of Secretary to the Business Manager was not a confidential position, but that the position of Secretary to the School Superintendent was of a confidential status. It appears from the certified record that the Business Manager's secretary had regular privy to more confidential collective bargaining information,

time wise, and volume wise, than did the Secretary to the School Superintendent. As noted earlier in this decision, this Court cannot substitute its judgment for that of the Board as to the weight of the evidence on questions of fact that were decided by the Board. However, as further specifically noted in R.I.G.L. 42-35-15 (g) 5, this Court may reverse a finding by the Board that is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record". The Board's finding in this case that the Business Manager's secretary is a non-confidential employee is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

The Business Manager's secretary, certainly is an employee who, in the course of her duties, has regular access to confidential information concerning collective bargaining matters and anticipated contract changes that may result from collective bargaining negotiations and she "should not be placed in a position which creates a potential conflict between the interests of her employer and the union". National Labor Relations Board v. Lorimar Productions, Inc., 771 F.2d 1294, 1298 (1985); Pullman Standard Division, Inc., 214 NLRB 762, 763 (1974); Intermountain/Rural Elect. Assoc., 277 NLRB 1 (1985); Union Oil Co. v. NLRB, 607 F.2d 852, 853-54 (1979); Raymond Baking Co., 249 NLRB 1100 (1980); Associated Day Care Services, 269 NLRB 1547 (1988).

For the reasons hereinabove set out, the Board's decision dated December 28, 1988, insofar as it pertains to the finding by the Board that the position of Secretary to the Business Manager is not a confidential position, is reversed.

Counsel will prepare the appropriate Judgment for entry by the Court.