



§4002(f). On October 21, 1991, the District requested PERB review of the Executive Director's decision of October 10 insofar as the Determination holds that Senior Secretaries assigned to Building Principals in the District are not "confidential employees" within the meaning of 14 Del.C. §4002(f). The parties have filed memorandum in support of their respective positions. This is the decision of the Board on that appeal.

#### FACTS

The Executive Director's decision fully sets forth the parties' positions in this dispute (pp. 705-707) and will not be repeated here.

#### DECISION

The Board denies the District's request for an opportunity to respond to the Hearing Officer's letter of November 21, 1991. The request is untimely. The Board met on December 2, 1991 to review and discuss the record in this matter and to then arrive at a decision. Both parties have been provided a full and complete opportunity to present their respective facts, arguments and conclusions together with post-hearing and reply briefs. This established record and the submissions of the interested parties provide the basis for this decision. (The post-hearing comments of the Hearing Officer were not considered in reaching this decision). The Board is primarily concerned with the creation of a complete factual record below without infringement on the procedural due process rights of the parties. The Board believes that it has not only a right, but also a duty to present and support its position, whenever necessary, to assure a consideration of all relevant facts, at any level of the appellate process, by individuals who do not participate in the decision-making process at that or any subsequent level of appeal. Lake Forest

The Board upholds that part of the Executive Director's decision dated October 10, 1991, which held that the Administrative Secretary to the Assistant Superintendent and the Administrative Secretary to the Chief Financial Officer of the Capital School District are confidential employees within the meaning of §4002(f) of the Act and therefore ineligible for inclusion in the existing bargaining unit.

The Board does not agree with the Executive Director's determination that the Senior Secretaries assigned to Building Principals in the Capital School District are not confidential employees within the meaning of 14 DeL.C. §4002(f). The Board finds the Senior Secretaries in fact to be confidential employees within the meaning of §4002(f) of the Act and therefore ineligible for inclusion in the existing bargaining unit. Accordingly they are hereby excluded from the unit.

House Substitute 1 to House Bill 541 of May 29, 1990, was the bill ultimately passed to amend Title 14 to bring non-certificated public school employees under the PSERA, and to define confidential employees. The wording of Section 4002, Chapter 40, Title 14, of the Delaware Code as amended in 1990 reads:

(f) "Confidential employee" means any employee whose functional responsibilities or knowledge in connection with issues involved in the collective bargaining process would make membership in an appropriate bargaining unit incompatible with the employee's official duties.

Representative Richard F. Davis, State Representative from the 26th District, testified that the functional responsibilities were "... responsibilities that are part of that person's job description". (Transcript, p. 24). Further, that "... the laws that were enacted by the legislature were not intended to prohibit a School District from assigning work that may be confidential to employees" (Transcript, p. 22); and that "... it was not the intent of the legislature to put school districts in a position where they would not give employees specific information because they were part of the bargaining unit". (Transcript, p. 22). The Executive Director found it unnecessary to rely upon the testimony of Representative Davis in construing this section of the

statute. We disagree. The statute has not been the subject of prior judicial review and accordingly is subject to differing interpretations as evidenced by the filing of this petition. Accordingly, legislative history helps provide some measure of insight into legislative intent. Likewise, other state public employment board interpretations of similar language provide guidelines and background that was considered by the Board in arriving at this decision.

Paragraphs 15, 16 and 17 of the Executive Director's Findings of Fact in the October 10, 1991 decision (pp. 703-704) enumerate the duties of the building principals; discuss the composition of the District's bargaining teams and list the principal duties of the Senior Secretaries who report directly to the nine building principals.

Both the Association and the District agree the State of New Jersey's statutory definition of "confidential employee" is almost identical to Delaware's. The applicable New Jersey statute §34:13A-3(g) reads:

(g) "Confidential employees" of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

The parties have cited numerous cases from various states in support of their respective positions. This Board must decide whether the legislature, in our opinion, intended a narrow interpretation of "confidential employee" as the Association and the Executive Director argue or a broader interpretation as proposed by the District. In River Dell Regional Board of Education (10 NJPER §15045), the New Jersey PERC held that the secretary to the assistant superintendent was a confidential employee because of her typing and filing responsibilities for the assistant superintendent, who helped prepare negotiation proposals and who was involved in school personnel and budget matters. In the same decision, the NJPERC held that the second secretary to the superintendent was also confidential because of her typing of negotiation

updates and typing of correspondence to and opening of correspondence from the board's attorney regarding labor grievances. While the degree of the secretaries' access and exposure to confidential material may not have been substantial, the NJPERC Representation Division Director's decision, quoting Township of Dover (D.R. No. 79-19, 5 NJPER 61 (§10040)(1979)), observed:

... although the record may not conclusively demonstrate a continuous pattern of exposure to the collective negotiations process, the statutory definition does not make confidential status dependent upon regular involvement in labor relations ....  
[Emphasis added]

By adding the word "process" to the term "collective bargaining", the legislature intended to include issues that relate to matters beyond the collective bargaining negotiations. Had the legislature intended to limit the exclusion, it would not have modified the term "collective bargaining" in the statutory definition of "confidential employee". The New Jersey statute uses the term "collective negotiations process" whereas the Delaware statute uses the term "collective bargaining process". It is our judgment the term "collective bargaining process" in daily usage implies a broader scope of activities than the term "collective negotiations process". When an employee's job duties involve access to confidential information and/or material, that employee is entitled to confidential status. The decision in Scotch Plains (D.R. no. 84-11, NJPER §14270 (1983)) stated:

... The Act does not require that the performance of confidential duties be regular and continuous... In summary, the relevant consideration is whether or not the individuals in question have access to information that has a direct bearing on collective negotiations and the labor relations function of the public employer... [Emphasis added]

In Oakland Board of Education (16 NJPER §21220 (1990)), the Director stated:

... 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 preparation for these processes... Employees in clerical positions are often deemed confidential due

to their boss' role in the labor relations process and their own performance of clerical support duties which expose them to confidential matters. [Emphasis added]

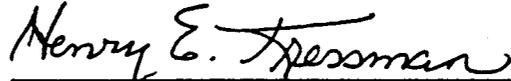
The Board firmly believes that each case must be considered on its own individual facts. In the present case, the Board does not believe the legislature, when adopting House Substitute No. 1 for House Bill 541, amending Title 14, intended to create a situation wherein a school principal would be without a single secretarial employee in his/her building who could be entrusted with confidential information relating to the collective bargaining process. Such a result would be totally unrealistic and intolerable.

IT IS SO ORDERED.



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ARTHUR A. SLOANE, Chair



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HENRY E. KRESSMAN, Member



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R. ROBERT CURRIE, JR., Member

DATE: December 16<sup>th</sup> 1991