

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN RE:

CAPITAL SCHOOL DISTRICT BENEFITS SPECIALIST

Representation Petition No. 94-09-103

Teresa C. Fariss, Esq., Young, Conaway, Stargatt & Taylor, for the Association
Raymond M. Kresge, Esq., Pepper, Hamilton & Scheetz, for the District

The Capital School District (“District”) is a public school employer within the meaning of §4002(n) of the Public School Employment Relations Act (“PSERA”), 14 Del.C. Chapter 40 (1983, 1989). The Capital Educational Secretaries Association, DSEA/NEA (“Association” or “CESA”) is the exclusive representative within the meaning of §4002(i) of the PSERA of the bargaining unit of District employees defined as:

All clerks and secretaries, excluding the Secretary to the Superintendent, the Administrative Secretary to the Assistant Superintendent, and the Administrative Assistant to the Chief Financial Officer.

The Association filed a representation petition with the Public Employment Relations Board (“PERB”) on September 26, 1994, at which time it requested clarification as to whether the Secretary to the Supervisor of Personnel and the Employee Benefits Specialist were included within the bargaining unit. By letter dated October 11, 1994, the parties advised the PERB that they had agreed to exclude the Administrative Secretary for Personnel Services from the bargaining unit, as a confidential position.¹ The remaining position of Employee Benefits Specialist is the subject of this decision.

¹ The October 11, 1994 letter was signed by the CESA President, the District Superintendent and the District Director of Personnel.

A hearing was held on February 24, 1995. The parties filed legal memorandum in support of their respective positions, with the final brief received on May 26, 1995.

ISSUE

IS THE POSITION OF “BENEFITS SPECIALIST” WITHIN THE BARGAINING UNIT REPRESENTED BY THE CAPITAL EDUCATIONAL SECRETARIES ASSOCIATION, DSEA/NEA?

PRINCIPAL POSITIONS OF THE PARTIES

The Association maintains that the position of Employee Benefits Specialist is within the bargaining unit. It argues that the position in question is actually that of Employee Benefits Secretary which clearly fits within the bargaining unit definition.

The District asserts that this is a confidential position and therefore cannot be included in any bargaining unit. The District argues, in the alternative, that if the position is not confidential it is otherwise inappropriate for inclusion in the bargaining unit because this position does not share a community of interest with other bargaining unit positions.

APPLICABLE STATUTORY PROVISIONS

“Confidential employee” means any employee whose essential job function and advanced knowledge about the issues involved in collective bargaining would make it unduly burdensome for the employer to negotiate effectively if the employee were a member of an appropriate bargaining unit. 14 Del.C. §4002(f).

OPINION

The Public School Employment Relations Act grants to public school employees the rights of organization and representation. The PERB has broadly construed employees' representation rights as a fundamental premise of the statute. The statute, however, denies the rights of organization and representation to employees who are confidential within the meaning of §4002(f). The confidential exclusion exists to protect both the employer and the employees

from inherent conflicts of interest which involve "advanced knowledge about the issues involved in collective bargaining". The test for confidentiality is whether that function or knowledge unduly compromises the employer's ability to effectively negotiate.

The PERB has addressed the issue of confidentiality under the PSERA in Board of Education of the Capital School District v. Capital Educational Secretaries Association, DSEA/NEA (Del.PERB, Rep.Pet. 90-10-056, Review of the Exec. Dir. Decision (12/16/91)). At the time of that decision, "confidential employee" was defined as:

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

The decision by the full Board on review reversed, in part, the determination of the Executive Director's that Senior Secretaries to Building Principals were not confidential employees within the statutory definition. The Board reasoned that

... 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'...

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. [p. 733, emphasis in original]

The Association petitioned the Superior Court of Delaware for a Writ of Certiorari, asserting the Board had erred in its construction of the statute. While this petition was pending, the General Assembly amended the statutory definition of "confidential employee". The definition was amended such that the previous "functional knowledge or responsibilities" became "essential job function and advanced knowledge", about the issues involved "in the collective bargaining process" became "in collective bargaining." Further, the determining conflict was shifted from an employee's membership in the unit being incompatible with his/her official duties, to membership creating an undue burden on the employer's ability to effectively negotiate.

There is no dispute that the General Assembly intended to further limit the exclusion of employees from coverage of the Public School Employment Relations Act when it narrowed the definition of a "confidential employee" in 1992. The synopsis of the bill amending this definition stated:

In Board of Education of the Capital School District v. Capital Educational Secretaries Association, DSEA/NEA (Del. PERB, Rep.Pet. No. 90-10-056), the Public Employment Relations Board held that by adding the word "process" to the term "collective bargaining", the General Assembly intended Section 4002(f) to include issues that related to matters beyond collective bargaining negotiations. The amendment is intended to limit the definition of "confidential employees" to any employee who has an essential job function or knowledge in connection with issues involved in the collective negotiations process. It also emphasizes that the reason for excluding confidential employees is to preserve the negotiating balance between the Employer and the Exclusive Bargaining Representative and to assure the understanding that employees simply processing personnel information or typing ordinary daily records or forms are not excluded as confidential.

The pending petition raises two issues. The first concerns eligibility. If the responsibilities of the Employee Benefits Specialist define this position as confidential under §4002(f) of the Act, it cannot be included in any bargaining unit and any employee holding this position falls outside of the coverage of the Act. If this position is not confidential, it must be clarified whether this position is within the existing bargaining unit definition.

Whether this position is appropriate for inclusion in the bargaining unit, as defined in §4010(d) of the PSERA is not, however, properly before the PERB. The question of appropriateness is raised by a modification or amendment petition. In order to modify the existing bargaining unit definition, a proper petition must be premised on either a substantial change in the duties and working conditions of a position(s) within the existing bargaining unit, the creation of a new position(s), or some other compelling reason. PERB Regulation 3.4(8). The issue presented seeks clarification as to whether this position is within the existing bargaining unit definition.

The determination of confidentiality is dependent upon the specific fact pattern in each case which is presented for resolution. In determining confidential status, the facts of each case

must be examined to determine for whom the employee works, what that employee does and what knowledge and/or exposure the employee has to issues involved in collective bargaining. Finally a determination must be made as to whether, based upon the essential job functions and advanced knowledge regarding collective bargaining, the inclusion of the position within a bargaining unit compromise the employer's negotiating positions and make it unduly burdensome for the employer to effectively negotiate.

The position of Employee Benefits Secretary was first posted on February 28, 1990. The position reported to District's Business Manager and was assigned a Financial Secretary salary classification.² The position was primarily responsible for maintaining and processing records as they pertain to: Salaries, Fringe Benefits (including health, dental and long term disability insurance, TSA/deferred compensation, and wage attachment calculations), Employee Attendance (including sick and vacation leave usage), Pension Calculations and processing of some State personnel documents. The position was also responsible for interpreting and explaining benefits to employees and communicating with employees, benefit companies and state agencies. Association Exhibit 6. Shelly V. Baker was hired as the District's first Employee Benefits Secretary and assumed these responsibilities on April 15, 1990.

At some point subsequent to the spring of 1990, the District reorganized its administrative staff, and Ms. Baker now reports to the Supervisor of Personnel, Diane Dunmon.³ Ms. Baker testified that she performs the functions described in the Employee Benefits Secretary job description. She further testified that she has never maintained attendance or leave records, and is involved in grievance handling only to the extent that she gathers information at her supervisor's request. Ms. Dunmon refers to this position as the "Employee Benefits Specialist", although she admits that she is unaware of any official Board or administrative action changing the position's title. For the purposes of this decision it is unimportant what the position is called

² Salaries for secretarial and clerical employees are determined under a matrix. These employees are paid under one of five salary classifications (Clerk, Secretary, Senior Secretary, Financial Secretary and Administrative Secretary) and receive additional compensation for each year of longevity.

³ Ms. Dunmon assumed her duties as the District's Supervisor of Personnel in August of 1992.

as it is clear that Ms. Baker's responsibilities have not changed significantly. It is evident that her five years of experience have deepened her knowledge, understanding and value to the District. The term "Benefits Specialist" is used to refer to this position throughout this decision.

While it is clear that the Employee Benefits Specialist also performs many of the responsibilities found within the Financial Secretary job description, the Hearing Officer notes that this position is separate and distinct from that of Financial Secretary.

It is undisputed that the Capital School District and the four DSEA/NEA affiliated locals which represent employees of this District meet annually, as contractually agreed, to discuss "... what money is available and how it should be spent in the areas of salaries and benefits". [Testimony of Supervisor of Personnel Dunmon (@ p. 64) and DSEA UniServe Director Crowley (@ p. 6 -8)]. Indeed the individual collective bargaining agreements contain a formula for the distribution of new moneys the District receives on an annual basis. The contractual language includes a definition for calculating the "new moneys" and proscribes percentages of these moneys which are available for distribution to each bargaining unit. Relevant portions of Article 19 of the 1991-1994 collective bargaining agreement between the District and the Association provide:

- 19:1 The Board agrees to continue the concept of disbursing new, continuing funds to all employee groups on a fair and equitable basis.
- 19:2 The amount to be disbursed will be calculated from the funds made available to the district from increases in Division 3, and current expense tax revenues.
 - 19:2.1 The Board and the Association will agree as to the amount to be disbursed.
 - 19:2.2 The amount to be disbursed will be calculated from the funds made available to the district from increases in Division 3 and current expense tax revenue subject to increases/decreases in employment costs including any adjustments to scales not effecting individual employees (pass through provisions). Employment costs may include, but are not limited to: movement on scale, premiums for long-term disability and dental insurance, pension costs, social security, worker's compensation and unemployment insurance.

- 19:2.3 The district will retain 24% of the amount determined as increases in Division 3 and Current Expense revenue to fund operating and capital expenditures.
- 19:3 The Board agrees that the Association's share of the funds resulting from 19:2.2 and 19:2.3 will be 4.00%....
- 19:5 For the term of this agreement, the Board will meet with the Associations each October to work out the formula. Once determined, all salary and fringe benefit adjustments will be retroactive to the previous July 1st.

[Association Exhibit #1 (emphasis added)]

Information typically supplied to the Association prior to the initiation of the annual negotiations includes:

- Scattergrams for all employee groups, listing the number of employees in each cell of each of the four negotiated salary matrices
- Distribution of employees in individual benefit plans and categories "with the usual supporting payroll information" (e.g., number of employees electing family dental coverage, number of employees in each medical benefit plan by plan and coverage type
- Current disability insurance rates
- Benefit premium rates for the new fiscal year
- Extra Pay for Extra Responsibilities schedule showing the amount paid for each position with the usual supporting payroll information
- Copy of the budget report for the end of the preceding fiscal year
- Copy of the proposed budget for the current fiscal year
- Supporting information showing the cost of items other than scheduled salary in the secretarial and custodial salary lines
- Copy of Chapter I proposal submitted to the State Board of Education
- Copy of Chapter I budget for the current fiscal year.

[Association Exhibit #2].

Much, of the information relied upon by the District is public information. Further, it is the established and customary practice in this district to openly exchange detailed financial data underlying salary and benefits calculations prior to entering into negotiations and annual discussions concerning the distribution of new moneys. This is an important factor in assessing the confidential nature of the Benefit Specialist's position. It is undisputed that one of the important functions of this position is to review the records and assemble information regarding the distribution of employees within the various benefit plans and to mathematically calculate a dollar cost impact of changes in premium rates.⁴ Under the existing open exchange practice, the record fails to establish that the assignment of these functions to a bargaining unit employee creates a situation in which it is unduly burdensome for the District to effectively negotiate.

Despite Ms. Baker's assertions that she does make recommendations regarding benefit proposals for negotiations, the record does not support this conclusion. The calculation of the benefit cost under various scenarios is only part of the information required to make effective recommendations on benefit proposals. In recommending "affordable" alternatives, it is critical that one also have a clear understanding of available funds and, in the context of collective negotiations, an understanding of the relative costs of other items being negotiated. Ms. Baker testified that she did not receive or review revenue projections or other budget information in developing her recommendations. [Baker testimony, p. 116]. She has never been part of any of the District's negotiation teams⁵, nor does the record establish that she discusses the data collected and calculations performed with anyone other than her supervisor, Supervisor of Personnel Dunmon.

Although the data which Ms. Baker assembles is used in negotiations, it is clear that she does not have advanced knowledge of the District's negotiation strategies and/or overall proposals. Her exposure to negotiations is limited to one area, namely benefits. Future cost

⁴ The parties do not dispute that locally funded benefits are subject to negotiation.

⁵ Ms. Baker did attend the 1994 discussions with the Association to discuss the distribution of new moneys, where she functioned as a resource person for explaining and reviewing cost calculations supporting the District's proposal to include a co-pay provision in employee insurance premiums.

projections, which are based upon public information, have little meaning without a clear understanding of the employer's financial or strategic constraints. Ms. Baker testified that she does not type nor have advanced knowledge of the District's specific benefits proposals. Her supervisor confirmed that the Benefits Specialist does not have advanced knowledge of the "final decision" on various benefit proposals.

Personnel Supervisor Dunmon expressed reservations that the work currently being performed by the Benefits Specialist could not be performed by a bargaining unit employee. Her concerns are not supported by the record. The information and data which Ms. Baker currently relies upon in projecting future benefit costs is primarily public information, and secondly is provided to the Association on a regular and open basis. Further, the statutory exclusion for confidential employees is limited to the issues involved in collective bargaining and the impact of their exposure on the ability of the employer to effectively negotiate. Consequently, Ms. Dunmon's concerns regarding preparation of benefit packages to go to bid are not relevant to consideration of the position's confidential status under the Act.

Further, the parties have agreed to exclude the Secretary to the Supervisor of Personnel from the bargaining unit, providing Ms. Dunmon with one confidential employee in her office staff of two. The record clearly establishes that it is this Secretary who gathers information regarding collective bargaining as it comes into the office, types and prepares proposals and counter proposals, retrieves documents relating to prior contracts from the computer, updates and prepares final contractual documents for printing, opens Ms. Dunmon's mail and assists her in grievance handling. The Superintendent, Assistant Superintendent and Chief Financial Officer also each have one confidential employee within their offices.

For these reasons, the Employee Benefits Specialist is not a confidential employee within the meaning of 14 Del.C. §4002(f).

The record further establishes that the work performed by this position is not inconsistent with that performed by Financial and other Secretaries and clerks in the bargaining unit. The position is classified for salary purposes as a Financial Secretary. It is inconsequential that the

job description for this position has not been appended to the collective bargaining agreement. A disagreement clearly existed as to the bargaining unit status of this position which is herein resolved according to the statutory and regulatory provisions of the PSERA. The Employee Benefits Specialist falls within the existing bargaining unit definition of "all clerks and secretaries..." and is, therefore, a bargaining unit position.

Finally the Hearing Officer notes the complete briefs and supporting case law submitted by counsel in this matter. Each submitted case was reviewed, as well as a number of supplementary cases. While the case law established by other administrative boards similar to the Delaware PERB in other jurisdictions (in this case, particularly the New Jersey Public Employment Relations Commission) do not bind the decisions of this Board, they do provide guidance and background that was considered in reaching this decision. That each party relied upon separate decisions of the New Jersey PERC in support of its respective position, is evidence of the limitations of representation decisions of this type to the specific factual circumstances of each individual case.

DECISION

For the reasons discussed, the Employee Benefits Specialist is not a confidential employee and is included within the bargaining unit represented by the Capital Educational Secretaries Association, DSEA/NEA.

CONCLUSIONS OF LAW

1. The Capital School District is a public school employer within the meaning of 14 Del.C. §4002(n).
2. The Capital Educational Secretaries Association, DSEA/NEA, is an employee organization within the meaning of 14 Del.C. §4002(h) and is the exclusive bargaining representative (§4002(i)) of the bargaining unit of all clerks and secretaries of the Capital School

District, excluding the Secretary to the Superintendent, the Administrative Secretary to the Assistant Superintendent, the Administrative Assistant to the Chief Financial Officer, and the Secretary to the Supervisor of Personnel.

3. The Employee Benefits Secretary is commonly referred to as the Employee Benefits Specialist.

4. The Employee Benefits Specialist is not a confidential employee within the meaning of 14 Del.C. §4002(f).

4. The Employee Benefits Specialist is included within the bargaining unit definition above.

IT IS SO ORDERED.

/s/Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPPARD
Principal Assistant/Hearing Officer
Public Employment Relations Board

/s/Charles D. Long, Jr.
CHARLES D. LONG, JR.
Executive Director
Public Employment Relations Board

Dated: September 5, 1995