

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYEES OF :
: :
: : Case No. PERA-U-04-369-W
: : (PERA-R-87-196-W)
DERRY TOWNSHIP :

FINAL ORDER

On September 26, 2005, Derry Township (Township) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to a Proposed Order of Dismissal (POD) issued by a Board hearing examiner on September 9, 2005. In the POD, the hearing examiner concluded that the clerical position held by Patricia Thomas is not confidential within the meaning of the Public Employee Relations Act (PERA). Accordingly, the hearing examiner dismissed the Township's petition seeking the exclusion of that position from an existing bargaining unit of nonprofessional employees represented by Teamsters Local Union No. 30 (Union) as certified by the Board of Case No. PERA-R-87-196-W.

In its exceptions, the Township contends that the hearing examiner erred in (1) concluding that the clerical position was not confidential within the meaning of the PERA; (2) Finding of Fact 11 that Ms. Thomas has not been used in a confidential capacity for the Township; (3) Finding of Fact 13 that Ms. Thomas has not been given advance exposure to the Township's bargaining proposals; and (4) in failing to find in Finding of Fact 16 that Ms. Thomas participated in the negotiation of the pension plan re-opener and that she interacted with the pension administrators with respect to the pension plan re-opener.

Section 301(13) of PERA defines "confidential employee" as one 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 lead case in interpreting the confidential exclusion under PERA is PLRB v. Altoona Area School District, 480 Pa. 148, 389 A.2d 553 (1978), in which the Pennsylvania Supreme Court affirmed the Board's adoption of a narrow construction of the confidential exclusion stating that the Board was correct in reading the confidential exclusion in PERA to "exclude only those employees whose inclusion in the bargaining unit would seriously impair the employer's ability to bargain on a fair and equal footing with the union." 389 A.2d at 557.

The record in this case revealed that Ms. Thomas works as a clerical employee in the Township office. Her duties include typing letters, maintaining personnel files, answering the phones, assisting visitors to the Township building, providing information to visitors, processing invoices for payment and preparing the payroll. In her career, Ms. Thomas has not been part of any discussion among the Township Supervisors relating to collective bargaining. She has not been given advanced exposure to the Township's collective bargaining proposals. The most recent collective bargaining agreement contained a re-opener provision for pensions and Ms. Thomas once retrieved a fax document that contained information requested by the Township Manager about the Township's pension plan. At the time, the Township was gathering information to prepare a proposal involving the pension provision reopener. Ms. Thomas picked up the fax because the fax machine is next to her desk and she gave that fax to a Township Supervisor. It is not clear from the record what information was contained in that fax. However, the record is clear that Ms. Thomas did not type the Township's proposal regarding the pension re-opener or any other bargaining proposal formulated by the Township.

We have examined the Findings of Fact made by the hearing examiner and conclude that they accurately reflect the job duties of the clerical position at issue. The record clearly supports the hearing examiner's findings that Ms. Thomas has not been exposed to any of the Township's confidential collective bargaining information. Further, while the Township is correct that Ms. Thomas participated in the bargaining over the pension re-opener, she participated not on behalf of the Township, which would support a confidential exclusion, but she participated on behalf of the Union. Accordingly, we will neither amend nor supplement the hearing examiner's findings.

In its brief in support of its exceptions, the Township contends that Ms. Thomas meets the tests contained in both Section 301(13)(i) and (ii) for confidential status under PERA. With respect to the test under 301(13)(i), the Board has interpreted the information to which an employe must be privy in order to be excluded as a confidential employe as follows:

It is only when an employe is privy to the relevant determination of the employer's policy that the person may be found to be confidential. The collective bargaining information must be of such a definitive nature that the union would know of the employer's plan if said information is revealed.

Bangor School District, 9 PPER ¶ 9295 (Nisi Decision and Order, 1978). The Board and the Courts have required a definitive showing that an employe is actually exposed to confidential collective bargaining information to support a confidential exclusion. Penn Township, 15 PPER ¶ 15015 (Final Order, 1983); Northgate School District, 9 PPER ¶ 9220 (Final Order, 1978); Washington Township Municipal Authority v. PLRB, 569 A.2d 402 (Pa. Cmwlth. 1990), petition for allowance of appeal denied, 525 Pa. 652, 581 A.2d 577 (1990). The Township contends that Ms. Thomas was privy to a fax involving the pension plan re-opener that she picked up from the fax machine and gave to a Township Supervisor. However, the Township failed to prove what specific information was contained in the fax from the Township's pension provider to which Ms. Thomas was exposed and, consequently, whether it was of such a nature that the Township's bargaining strategy would have been revealed to Ms. Thomas. Further, contrary to the assertion of the Township in its Brief in Support of its Exceptions, there is no support in the record for a finding that Ms. Thomas types the Township's collective bargaining proposals. Further, even if the record supported the fact that Ms. Thomas types correspondence from the Township Supervisors to the Union and others, this is not in and of itself proof that she has access to information that would reveal the Township's collective bargaining strategy. Indeed, in Altoona Area School District, the Supreme Court rejected the notion that typing correspondence regarding grievances was activity that would be sufficient to render an employe confidential. Given these facts and the established case law, the Township has failed to carry its burden that Ms. Thomas is exposed to confidential information that would justify her exclusion from the unit.

The Township next contends that Ms. Thomas works in a close continuing relationship with the Township Supervisors who in turn formulate the Township's labor relation policies so as to meet the test for confidential employe in Section 301(13)(ii). However, the Township has failed to substantiate the notion that the relationship between the Township Supervisors and Ms. Thomas is such that her inclusion in the bargaining unit would "seriously impair the public employer's ability to bargain on a fair and equal footing with the union." Altoona Area School District, 389 A.2d at 557. Ms. Thomas is not designated as the personal secretary to any of the Township Supervisors and, indeed, the Township failed to adduce any evidence that the Township Supervisors spend significant time working in the building where Ms. Thomas works. The Supervisors are also road masters, which would result in at least a portion of their workday spent in the field. Further, the fact that this record reveals that the Township Supervisors have exposed Ms. Thomas to no advance information regarding their collective bargaining strategies in dealing with the Union would lead to the conclusion that Ms. Thomas does not share a close and continuing relationship with any of the Township Supervisors. Accordingly, the Township cannot be said to be in any way prejudiced by her inclusion in the unit. The Township has failed to carry its burden to prove that the confidential exclusion applies to Ms. Thomas, thereby justifying the denial of her ability to exercise bargaining rights under PERA.

After a thorough review of the exceptions and all matters of record, the Board will dismiss the exceptions filed by the Township and affirm the Proposed Order of Dismissal issued by the hearing examiner.

ORDER

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

HEREBY ORDERS AND DIRECTS

that exceptions filed by to the Proposed Order of Dismissal in the above-captioned matter be and the same are hereby dismissed and that the Proposed Order of Dismissal be and the same is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this thirteenth day of December, 2005. 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.