

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO,

Employee Organization,

and

State of Ohio,

Respondent.

Case No. 2000-REP-11-0241

DIRECTIVE DISMISSING PETITION FOR AMENDMENT OF CERTIFICATION
(OPINION ATTACHED)

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:
February 28, 2002.

On November 3, 2000, the State of Ohio ("Employer") filed a Petition for Amendment of Certification seeking to exclude an Office Assistant 2 position in the Office of the Director of the Department Administrative Services from the bargaining unit represented by the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO ("Employee Organization"). On July 19, 2001, the State Employment Relations Board ("Board") directed this matter to hearing to determine whether the amendment is appropriate and for all other relevant issues.

On September 26, 2001, a hearing was held. After the parties filed post-hearing briefs, the Administrative Law Judge's Recommended Determination was issued on November 28, 2001. On December 10, 2001, the Employer filed exceptions to the Recommended Determination and a motion for oral arguments. On December 20, 2001, the Employee Organization filed a response to the exceptions and a memorandum in opposition to the motion. On January 24, 2002, the Board granted the motion for oral arguments. The parties presented their oral arguments to the Board on February 7, 2002.

After reviewing the record, the parties' exceptions, response to exceptions, all other filings in this case, and the parties' oral arguments, the Board amends Finding of Fact No. 14 to read: "On occasion, Ms. Frye copies documents that are not available for public viewing."; adopts the Findings of Fact, as amended, and Conclusions of Law in the Recommended Determination; finds that the Office Assistant 2 employed in the Office of the Director of the Department of Administrative Services is not a "confidential employee" pursuant to Ohio Revised Code §§ 4117.01(C)(6) and (K), is not an employee who "acts

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in a fiduciary capacity" pursuant to Ohio Revised Code § 4117.01(C)(9), and is a "public employee" as that term is defined in Ohio Revised Code § 4117.01(C); dismisses the Petition for Amendment of Certification; and issues the attached Opinion, incorporated by reference.

It is so ordered.

POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member, concur.



SUE POHLER, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 119.12, by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the Franklin County Court of Common Pleas within fifteen days after the mailing of the State Employment Relations Board's directive.

I certify that a copy of this document was served upon each party's representative by regular U.S. Mail this 28TH day of FEBRUARY, 2002.



SALLY L. BARAILLOUX, EXECUTIVE SECRETARY

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

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Case No. 2000-REP-11-0241

OPINION

POHLER, Chairman:

This representation case comes before the State Employment Relations Board ("Board") upon the filing of exceptions and response to exceptions to the Administrative Law Judge's Recommended Determination issued on November 28, 2001, and upon the oral arguments presented to the Board by the parties on February 7, 2002. For the reasons below, we find that the Office Assistant 2 employed in the Office of the Director of the Department of Administrative Services is not a "confidential employee" pursuant to Ohio Revised Code ("O.R.C.") §§ 4117.01(C)(6) and (K), is not an employee who "acts in a fiduciary capacity" pursuant to O.R.C. § 4117.01(C)(9), and is a "public employee" as that term is defined in O.R.C. § 4117.01(C). As a result, the Petition for Amendment of Certification filed by the State of Ohio ("State") must be dismissed.

I. SUMMARY OF FACTS

The Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO ("OCSEA") is the exclusive representative for a bargaining unit of State employees,

including Office Assistant 2s. The State and OCSEA are parties to a collective bargaining agreement effective March 1, 2000 through February 28, 2003.

Ms. Amanda Frye is employed by the State of Ohio, Department of Administrative Services ("DAS") as an Office Assistant 2. Ms. Frye works in the suite of offices of Scott Johnson, the Director of DAS ("Director"). She has worked in her current position since May 2000. The staff in the Director's Office consists of a legal counsel, two Assistant Directors (Carol Drake and Greg Jackson), two Administrative Assistant 4s (Julie Trackler and Katrina Flory), one Executive Secretary (Rose Steward), one administrative staff person, a college intern, and the Office Assistant 2 position held by Ms. Frye. On the table of organization, Ms. Frye's position is the lowest full-time permanent position in the Director's Office. Ms. Frye reports directly to Ms. Trackler. Ms. Frye provides clerical support to the Director and to Assistant Directors Drake and Jackson. The positions held by Ms. Trackler, Ms. Steward, and Ms. Flory are not bargaining-unit positions.

Ms. Frye performs general clerical tasks in the Director's office. She answers phones, sorts and distributes incoming mail, maintains a log-in book for contracts, land leases, and controlling board requests, helps put together and distribute meeting packets, makes and distributes copies, checks the fax machine, delivers fax copies, and orders supplies. If an envelope is designated "personal" or "confidential," Ms. Frye gives it directly to the addressee unless she is given permission to open it. Ms. Frye's involvement in letter writing is limited to occasional proofreading. Ms. Frye does not have access to the Director's e-mail, nor can she sign for him except for packages or mailings. Ms. Frye attends weekly team meetings, which include all staff members and interns in the Director's Office. Ms. Frye does not attend the monthly senior team meetings at which the Director may solicit proposals from his senior staff concerning collective bargaining. On occasion, Ms. Frye copies documents that are not available for public viewing. Ms. Frye takes incoming calls, ascertains the caller's identity, and the nature of the call. She then takes a message or directs the call to the appropriate person.

The Office of Collective Bargaining (“OCB”) is in the Division of Human Resources of DAS. Assistant Director Charles Wheeler oversees the Human Resources Division.

DAS completed a predicate study to determine if minority female businesses received disparate treatment. This study was deemed to be confidential until it was delivered to and released by the Ohio General Assembly. Ms. Frye’s role with regard to the predicate study was to make copies, throw away duplicate copies, and make airplane and hotel reservations for persons traveling to Georgia in connection with the study.

II. DISCUSSION

The State contends that the Office Assistant 2 position in the Director’s Office is a “confidential employee” as defined by O.R.C. § 4117.01(K) and is a “fiduciary employee” as described by O.R.C. § 4117.01(C)(9). The burden of proof to establish an employee’s exclusion from a bargaining unit is placed upon the party seeking the exclusion. *In re Poland Twp, Mahoning Cty*, SERB 2002-001 (1-25-2002); *In re Franklin Local School Dist Bd of Ed*, SERB 84-008 (11-8-84) *rev’d on other grounds*, Franklin Co. Ct. C.P. (4-30-87). The exclusions set forth in O.R.C. Chapter 4117 should be narrowly construed to facilitate employees’ rights to organize and bargain collectively. See O.R.C. §§ 4117.03 and 4117.22; *Poland Twp, Mahoning Cty, supra*; *In re University of Cincinnati*, SERB 86-023 (6-5-86) (“*Cincinnati*”).

A. The Office Assistant 2 position is not a “confidential employee”

O.R.C. § 4117.01(C)(6) excludes confidential employees from the definition of public employees. O.R.C. § 4117.01(K) defines a “confidential employee” as follows:

“Confidential employee” means any employee who works in the personnel offices of a public employer and deals with information to be used

by the public employer in collective bargaining; or any employee who works in a close continuing relationship with public officers or representatives directly participating in collective bargaining on behalf of the employer.

The statutory definition of “confidential employee” in O.R.C. § 4117.01(K) has two alternative aspects. The first alternative excludes “any employee who works in the personnel offices of a public employer and deals with information to be used by the public employer in collective bargaining.” The second alternative refers to an employee who works in a “close, continuing relationship with public officers or representatives directly participating in collective bargaining on behalf of the employer.” An employee who meets either of these tests is a “confidential employee.”

The concept of excluding confidential employees from a bargaining unit for purposes of collective bargaining exists in the private sector, but without the benefit of express statutory definition. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, L.R.R.M. 2945 (1974). The general intent behind this exclusion is to prevent employees with access to the employer’s confidential labor relations information from passing it onto the union to which they belong. *Westinghouse Elec. Corp. v. NLRB*, 398 F. 2d 669, 68 L.R.R.M. 2849 (6th Cir. 1968). Following the rationale in the federal cases, if an employee, by virtue of working in a personnel office and dealing with information to be used by the employer in collective bargaining or by virtue of the employee’s relationship with a public officer or representative who is directly participating in collective bargaining on the employer’s behalf, could act as a conduit of collective bargaining information to an employee organization, then that employee is a “confidential employee” as defined by O.R.C. §§ 4117.01(C)(6) and (K).

The first alternative under O.R.C. § 4117.01(K) excludes employees who work in the employer’s personnel offices and deal with information to be used by the public employer in collective bargaining. DAS’ Human Resources Division serves as the

personnel office for the State. Unlike the employer in *Cincinnati, supra*,¹ DAS, with its hundreds of employees and multiple functions, did not seek a blanket exclusion based on that criterion. As we found in *Cincinnati, supra*, such a blanket exclusion would be inappropriate. DAS also has its Office of Employee Services that serves as the personnel office for its own employees. Although Ms. Frye does not work directly in the Human Resources Division or the Office of Employee Services, due to DAS' unique responsibilities whereby both operations report to the Director, the Office Assistant 2 position works in the "personnel office of a public employer."

The State rested much of its case on sensitive documents such as briefing statements to the Governor's office, memoranda concerning negotiation strategies, reports, or studies before they are released to the general public to demonstrate the type of document that *might* pass through the office of the Director and that Ms. Frye *may* handle. But the key documents containing "information to be used by the public employer in collective bargaining," such as the Director's weekly reports to the Governor that included collective bargaining negotiation strategy and the "Recap of Issues Likely to be Considered Most Important by OCSEA and the State" sent from OCB to the Director in 1999, were transmitted *before* Ms. Frye assumed her current position or even before the position was created by the State. Of the documents that were received after Ms. Frye became an Office Assistant 2, the record failed to establish that she composed, typed, studied, copied, or gave input on any document related to collective bargaining. Consequently, at this point

¹In that case, the employer requested an exclusion of 44 persons from the bargaining unit as confidential because these employees had access to grievances, disciplinary actions, promotions, tenure decisions, and other matters relating to the administration of the collective bargaining agreement. The Board interpreted the language in O.R.C. § 4117.01(J) as applying to those persons directly participating in *collective bargaining negotiations*. *Id.* at 290. As a result, the Board excluded only four employees as confidential: the secretary to the Director of Personnel, two secretaries in Employee/Labor Relations, Personnel, and the secretary to the Director of Compensation and Acting Director of Benefits, Personnel.

in time, the Office Assistant 2 position's involvement with documents involving collective bargaining information is speculative.

The second alternative prong of O.R.C. § 4117.01(K) refers to employees working in a close, continuing relationship with public officers or representatives who are directly participating in collective bargaining on the employer's behalf. Under O.R.C. § 4117.10(D)(1), OCB is charged with assisting the Director in "formulating management's philosophy for public collective bargaining as well as planning bargaining strategies." The Director has regular contact with OCB. Although the Director may not be personally present at the bargaining table, the Director oversees all bargaining activity and, therefore, directly participates in collective bargaining on behalf of the State.

Ms. Frye's working relationship with the Director cannot be described as a "close continuing relationship." Ms. Frye reports directly to Ms. Trackler, an Administrative Assistant 4. Ms. Frye performs general clerical tasks in the Director's office. Her primary responsibilities are to answer phones, to sort and distribute incoming mail, and to maintain a log-in book for contracts, land leases, and controlling board requests. If an envelope is designated "personal" or "confidential," Ms. Frye gives it directly to the addressee unless she is given permission to open it. Ms. Frye's involvement in letter writing is limited to occasional proofreading. Ms. Frye does not have access to the Director's e-mail, nor can she sign for him except for packages or mailings. Ms. Frye attends weekly team meetings that include all staff members in the Director's Office, including interns. Ms. Frye does not attend the monthly senior team meetings at which the Director may solicit proposals from the senior staff concerning collective bargaining. On occasion, Ms. Frye copies documents that are not available for public viewing. Ms. Frye takes incoming calls, ascertains the caller's identity, and the nature of the call; she then takes a message or directs the call to the appropriate person. While the Office Assistant 2's duties may be integral to the office operations, this position cannot be described as being in a "close continuing relationship"

with the DAS Director based upon the record before us. The record does not establish that the Office Assistant 2 position could act as a conduit of confidential collective bargaining information to an employee organization. Therefore, the Office Assistant 2 position is not a “confidential employee” under O.R.C. §§ 4117.01(C)(6) and (K).

B. The Office Assistant 2 position is not a fiduciary employee

O.R.C. Chapter 4117 does not define “act in a fiduciary capacity.” *In re SERB v. Fulton County Engineer*, SERB 96-008 (6-24-96). The phrase “act in a fiduciary capacity” indicates that the mere designation of an employee as a fiduciary is insufficient to warrant exclusion from the definition of “public employee”; as with cases involving supervisors, management level employees, and confidential employees, it must be proved that the employee’s actual job duties meet the test for finding an employee to be a fiduciary. *Id.* at 3-76 – 3-77. When determining whether an individual is a fiduciary employee, the focus should be on whether the assigned job duties require a high degree of trust, confidence, reliance, integrity, and fidelity, above and beyond whatever technical competence the position may require. *Id.* A high degree of discretion in carrying out assigned duties indicates a trust relationship.

Based on a review of the record before us, Ms. Frye’s position as an Office Assistant 2 does not rise to the level of a fiduciary employee and, therefore, should not be excluded from the definition of “public employee” in O.R.C. § 4117.01(C). She performs basic clerical duties for her employer. Sorting and distributing mail, answering the phone, and faxing, while vital in any office operation, do not “require as essential qualifications, over and above technical competency requirements, a higher degree of trust, confidence, reliance, integrity, and fidelity.” *State ex rel. Charlton v. Corrigan* (1988), 36 Ohio St.3d 68, 71. The duties are routine. Even with DAS’ predicate study, Ms. Frye’s role was to make copies, throw away duplicate copies, and make airplane and hotel reservations for persons

traveling to Georgia in connection with the study. The Office Assistant 2 has not been given a great degree of discretion in the performance of these duties, not because of any lack of ability on her part, but simply because the level of the duties assigned to her does not require her to exercise discretion. The record does not contain any facts to show that the relationship of an Office Assistant 2 with the Director is “more than the ordinary relationship of employer and employee.” *Id.* The State has not proven by a preponderance of the evidence that Ms. Frye, as an Office Assistant 2, meets the criteria for a fiduciary employee. Thus, this position should not be excluded from the bargaining unit.

III. CONCLUSION

For the reasons above, we find that the Office Assistant 2 position in the Office of the Director of the Department of Administrative Services is not a “confidential employee” pursuant to O.R.C. §§ 4117.01(C)(6) and (K), is not an employee who “acts in a fiduciary capacity” pursuant to O.R.C. § 4117.01(C)(9), and is a “public employee” as that term is defined in O.R.C. § 4117.01(C). As a result, the Petition for Amendment of Certification filed by the State of Ohio is hereby dismissed.

Gillmor, Vice Chairman, and Verich, Board Member, concur.