

**STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

In re:

CSEC-LC LOCAL #4994

Petitioner,

v.

PELRB No. 308-18

LAS CRUCES PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, on a Petition for Clarification filed by CSEC-LC Local #4994 requesting to accrete the following positions into the existing classified employees bargaining unit: Computer Technician Level 2; District Computer Technician Level 1; District Computer Technician Level 2; District Instructional Technology Support Technician Level 2; and LCPS TV Operations Manager. In response the School District argued that each of the jobs identified for accretion are composed of confidential employees and are thus excluded from the Public Employee Bargaining Act ("PEBA") and that is the issue to be determined in this case. CSEC-LC Local #4994 has the burden of proof and the burden of going forward with the evidence on this issue pursuant to 11.21.1.22(A) NMAC. A hearing on the merits was held Tuesday, October 30, 2018. At the conclusion of the union's case-in-chief the School District moved for a "directed verdict" - a summary dismissal - for failure to make a *prima facie* case. That oral motion was denied and the District proceeded with its case-in-chief. At the conclusion of its case, the parties opted to submit closing briefs in lieu of oral argument. All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Timely closing briefs were submitted by both parties. Both briefs were duly

considered. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT:

The parties stipulated to the following facts:

1. The District is a public employer as defined under the PEBA.
2. CSEC-LC is the exclusive representative for all classified employees in the bargaining unit's certification.
3. A collective bargaining agreement is currently in place between the parties.
4. There has been a history of collective bargaining between the parties since at least 1996, when the parties began bargaining for the custodial unit. Since that time, the unit has expanded to include all Associate Librarians, Campus Security, Custodians, Educational Assistants, Library Assistants, Material Management Employees, Nutrition Services, Nutrition Services Warehouse Employees, Physical Plant Department Employees, and Secretarial/Clerical Employees (with the exception of those secretaries designated as confidential employees).
5. This matter is appropriately before the PELRB for determination of the accretion of the listed categories of employees into the existing bargaining unit.
6. The number of employees in the group sought to be accreted (approximately 20) is less than ten percent (10%) of the number of employees in the existing unit (over 1,100).
7. A showing of interest of greater than 30% in the group to be accreted has been demonstrated by the submission of sixteen (16) showing of interest cards.

8. Computer Technician Level 2 has been re-labeled as District Computer Technician Level 2. Thus, the job positions sought to be accreted are District Computer Technician Level 1; District Computer Technician Level 2; District Instructional Technology Support Technician Level 2; and the LCPS TV Operations Manager.
9. The parties have stipulated that the LCPS TV Operations Manager is not a confidential position.

In addition to the foregoing, the following facts have been established by the testimony of witnesses or documentary evidence submitted:

10. The job duties performed by District Computer Technicians Level 1 and District Computer Technicians Level 2 are the same; the only difference being their relative education or experience. (Compare Ex. J-1 to Ex. J-2; Testimony of Dawkins, Audio Record at 3:08:33.)
11. Matthew Dawkins is the Director of Information Technology for Respondent School District and the supervisor over the positions at issue. (Testimony of Dawkins, Audio Record at 1:01:09 – 1:04:26; 3:09:50 – 3:09:57; 3:10:00 – 3:11:25; organizational chart; Wylie Testimony 2:44:00 – 2:44:33.)
12. The District Computer Technicians either work at the help desk in the central administrative office part of each workweek but some are also assigned to individual schools on either a recurring or *ad hoc* basis (when they are referred to as “Field Technicians” (Testimony of Dawkins, Audio Record at 1:04:00-1:05:00; Andres Chavira Testimony, :00:19:00 – 00:20:00.)
13. Approximately four of the five District Computer Technicians assigned to the service desk are also assigned at least one day each week to individual schools as

Field Technicians. (Charles Cotton Testimony, 1:12:00-1:13:00; Andres Chavira Testimony, 00:19:00-00:20:00).

14. On a daily basis, District Computer Technicians work on a variety of hardware and software issues whether at the schools to which they are assigned or working from the help desk. (Testimony of Dawkins, Audio Record at 3:12:12- 3:13:20.)
15. When working at the service desk Computer Technicians do basically the same work as when they act as a Field Technician, accessing a user's computer remotely when appropriate. (Testimony of Dawkins, Audio Record at 3:12:22 – 3:13:33.)
16. When serving as "Field Technicians" the Computer Technicians report to the school's "tech contact" or "tech rep" who may be the school's principal or a vice-principal, teacher, secretary or other staff member assigned by the principal. (Testimony of Wylie, Audio Record at 2:35:22 – 2:36:20; Testimony of Geddes, Audio Record at 2:50:03 - 2:51:18.) Chavira Testimony, 24:00-26:00].
17. Reporting to a school's "tech contact" or "tech rep" means that the Computer Technicians, check-in to find out if there are any specific issues requiring attention that day and check-out afterward to report what they completed that day. (Chavira Testimony 00:24:00-00:26:00; Cotton Testimony 1:16:00-1:18:00).
18. Computer Technicians are not supervised on site by the principal or other tech contact. (Rick Geddes Testimony 2:50:00-2:51:00, Chavira Testimony 00:24:00-00:26:00; Cotton Testimony 1:16:00-1:18:00). To the contrary, Ms. Chavez-Villa testified that whenever Computer Technicians work on her computer, they are unsupervised because she leaves the room until they complete their work. (Id. 3:47:45)

19. According to Dawkins the Computer Technicians spend most of their time providing user assistance, such as setting up new computers, installing printers or software and trouble-shooting (Dawkins Testimony, 1:45:00-1:46:00) and most of their work orders are generated by teachers or tech contacts. (Dawkins Testimony 1:49:00-1:50:00.)
20. Most of the Computer Technicians' work time is spent on computers for staff and students, although they do occasionally work on a principal's or administrator's computer. (Testimony of Wylie, 2:33:19 - 2:37:00; Testimony of Geddes, 2:48:36 - 2:52:00; 2:55:00 - 2:56:00); Dawkins Testimony 1:04:00-1:05:00).
21. Dawkins testified that a fair estimate of the time an Employee spends assisting an individual in administration would be proportional to the number of administrators there are in comparison to the number of other employees. (Dawkins Testimony 1:50:00 -1:52:00; 3:28:00 – 3:29:25.)
22. I take administrative notice of the District Statistics and Reports on Respondent Employer's website <http://www.lcps.net/information-operations-and-data-research/district-statistics-and-reports/> that there are 24,863 students enrolled in the District and from <http://www.lcps.net/finance/wp-content/uploads/sites/10/2018/11/FY1718-Q4-ActualExpenditure.pdf>, that the number of administrators including the Superintendent and Administrative Assistants, Secretarial, Clerical and Technical Assistants total 14. Principals total 98. Two Administrative Associates are listed and 13.48 Administrative Assistants. Based on those numbers I estimate the total number of administrative staff to be approximately 114. Teachers, Education Assistants and Instructional Aides total 2,046.85 FTE. Comparing non-administrative Teachers, Education Assistants and Instructional Aides to

- administrative staff yields a ratio of approximately 20 to1, non-administrative clientele to administrative clientele serviced by the positions at issue.
23. The tasks performed by Instructional Technology Support Technicians are essentially the same as those performed by Computer Technicians except that emphasis is placed on classroom instructional technology, such as interactive whiteboards, televisions, projectors, etc. (Dawkins Testimony 1:37:48 – 137:59:00; Ex.J-3.)
 24. The Instructional Technology Support Technicians have the same computer access permissions as the Computer Technicians. (Dawkins Testimony 1:37:48 – 137:59:00; Ex.J-3.)
 25. Computer Technicians can log onto any of the District's computers using the user's account passcode with permission, using their own account passcode or using an elevated privileges account password and when logged in under the user's account passcode, the technician has the same access to the data on the computer that the user does. (Dawkins Testimony 3:10:44 - 3:11:30.)
 26. Technicians can also use administrator privileges while logged in under the user account, which gives them access to additional features as well as the user data. (Dawkins Testimony 3:13:05-3:15:19.)
 27. Although Computer Technicians may access all data and files on any given District employee's computer including any files that others might have created but that are stored on the computer. (Dawkins Testimony 3:13:05-3:15:19.)
 28. Ms. Chavez-Villa, an employee on Respondent's bargaining team testified that she keeps confidential bargaining information on her District Computer, such as drafts

of documents and notes on possible revisions. (Testimony of Chavez-Villa, 3:51:26 – 3:52:52.)

29. The management bargaining team includes some Principals as recommended by Petitioner. (Valdespino Testimony 2:19:44 – 2:20:55.)

REASONING AND CONCLUSIONS OF LAW:

I. DISTRICT COMPUTER TECHNICIANS LEVELS 1 AND 2, AND THE INSTRUCTIONAL TECHNOLOGY SUPPORT TECHNICIAN LEVEL 2, ARE NOT “CONFIDENTIAL” EMPLOYEES AS THAT TERM IS DEFINED BY NMSA 1978 SECTION 10-7E-4(G) EXEMPT FROM COLLECTIVE BARGAINING.

One of this Board’s duties is effectuate the right of public employees to form, join or assist a labor organization for the purpose of collective bargaining established by NMSA 1978 § 10-7E-5. An exception to the right to organize in § 5 exists for “confidential employees”. A significant part of fulfilling that duty is determining whether a petition for election seeks certification of a bargaining unit that is “appropriate”. See NMSA 1978 § 10-7E-13 (A). Section 10-7E-13 (C) expressly excludes from appropriate bargaining units, positions deemed to be confidential employees. The Public Employee Bargaining Act defines the term “confidential employee” to mean “a person who devotes a majority of his time to assisting and acting in a confidential capacity with respect to a person who formulates, determines and effectuates management policies”. See NMSA 1978 § 10-7E-4(G). Determination of an employee’s confidential status requires an analysis of both the duties of the employees in question and the duties of the person he or she allegedly assists. See, *AFSCME, Council 18, AFL-CIO v. Luna County*, PELRB No. 310-15, 09-PELRB-2016 (May 13, 2016); *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). Furthermore, the management functions with which an employee acts in a confidential capacity under the PEBA § 4(G), § 5

and § 13(C) relates to those managerial functions in the field of labor relations. See, *NEA & Jemez Valley Public Schools, supra*.

Criteria to be considered in establishing confidential status are whether the employee (1) is or could likely be on the employer's bargaining team; (2) is privy to the employer's labor-management policy or bargaining strategy; (3) has access to confidential financial or other data used in bargaining; or has input or involvement in the employer's contract proposal formulation. See *American Federation of Teachers Local 4212 and Gadsden Independent School District*, 03-PELRB-2006 (May 31, 2006); *NEA & Jemez Valley Public Schools, supra*.

Those criteria are consistent with the "labor nexus" test propounded by the NLRB and upheld by the United States Supreme Court. Under the labor nexus test, the term "confidential employee" encompasses only those employees who assist and act in a confidential capacity to those who exercise managerial functions specifically in the field of labor relations. See *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 189 (1981). The verbs formulate, determine and effectuate are to be read conjunctively; that is, all three conditions must be present. See *Greyhound Lines, Inc.*, 257 NLRB 477, 480 (1981); *Bd. of Educ., Dist. No. 230 v. Illinois Educational Labor Relations Bd.*, 518 N.E.2d 713, 723 (Ill. App.

1987). For example, in *Gadsden Independent School District*, 03-PELRB-2006 (May 31, 2006) this Board concluded that the District's Administrative Interns were confidential employees because by training closely with principals and administrators and attending monthly Administrator Meetings they are regularly exposed to the District's labor-management policy and discuss those policies with other administrators and principals regularly.

The preponderance of the evidence in this case supports a conclusion that the positions sought to be accreted are not confidential employees exempt from collective bargaining.

Unlike the Administrative Interns in the Gadsden School District none of the positions Petitioner seeks to accrete work closely with principals and administrators. Their work is not supervised by principals or any administrator other than their direct supervisor, Matthew Dawkins, the Director of Information Technology. Reporting to a principal or designee upon arrival and departure at a school does not rise to the level of working closely with or under the supervision of a principal or administrator. The Computer Technicians work at the help desk in the central administrative office part of each work-week and some are also assigned to individual schools on either a recurring or *ad hoc* basis. Whether working at the help desk or on-site at a school, most of the Computer Technicians' work time is spent on computers for staff and students, not principals or administrators at a ratio of approximately 20 to 1.

Based on the foregoing I conclude that the Union has established that the job positions of District Computer Technicians Levels 1 and 2 do not spend a majority of their worktime assisting and acting in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. Because the duties performed by the position of District Instructional Technology Support Technician Level 2 is essentially the same as those performed by District Computer Technicians Levels 1 and 2, except for its emphasis on classroom instructional technology, I likewise conclude that the Union has established that position also does not spend a majority of worktime assisting and acting in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.

A. Occassional, Incidental or Prospective Access to Confidential Financial or Other Data Used in Bargaining, Without More, Does Not Support a Finding That An Employee's Position is Confidential Pursuant to NMSA 1978 § 10-7E-4(G).

The District relies primarily on the proposition that because the positions to be accreted have access to confidential information used in bargaining, that fact justifies excluding them from the bargaining unit. As Point II of its closing brief states:

“District computer technicians have access to confidential information on a daily basis and are therefore confidential employees. In this case, whether the employees at issue are confidential depends on whether they have ‘access to confidential financial or other data used in bargaining.’ Respondent does not contend that these employees are or could likely be on Respondent’s bargaining team, or that they are privy to Respondent’s labor-management policy or bargaining strategy.”

The phrase “access to confidential financial or other data used in bargaining” quoted by the School District comes from *AFSCME, Council 18, AFL-CIO v. Luna County*, PELRB No. 310-15, 09-PELRB-2016, 2016 (PELRB May 13, 2016), wherein this Board set forth as one of the criteria that may be considered in determining confidential status whether the employee “has access to confidential financial or other data used in bargaining or has input or involvement in the employer’s contract proposal formation.”

The *Luna County* case does not stand for the proposition that the mere power to access such documents, whether or not it is utilized, requires a conclusion that an employee holding such power is necessarily an exempt confidential employee. Under the facts of this case, the “access” to confidential bargaining information by Computer Technicians and Instructional Technology Support Technicians is the mere possibility of actually viewing or downloading or otherwise acquiring such confidential financial or other data used in bargaining. All Technicians testifying stated that they have never in the past actually accessed or viewed any such records and to do so without authority would be unethical and would subject the Technician to disciplinary action. That at least one of Respondent’s bargaining team members testified that she keeps confidential bargaining information such as drafts of documents and notes on possible revisions on her District computer, does not leave the

District at the mercy of, or in total reliance on the honor of the Technicians not to access such documents without authority because, as their supervisor, Mr. Dawkins, testified security measures protecting such confidential information are readily available and easily applied. He testified that confidential bargaining information could be shielded from access by Technicians either by placing individual computers used by management's bargaining team in an isolated protected group, by storing such confidential information password protected folders, or by the team agreeing to store and share those files on a network based shared drive. (Dawkins Testimony 3:26:00 – 3:27:13; 3:29:28 – 3:30:05; 3:38:22 – 3:39:52; 3:40:40 – 3:41:41; 3:43:03 – 3:43:50.)

In light of the foregoing, I conclude that the Technicians' access to the District's confidential financial or other data used in bargaining is so occasional, incidental or prospective that it is more fairly described as the *power to access* such confidential information rather than actual access of such information. Without more, the preponderance of the evidence does not support a conclusion that the employees at issue are "confidential" employees as contemplated by NMSA 1978 § 10-7E-4(G).

~~I do not consider proffered examples of other bargaining units, whether supporting~~
inclusion or supporting exclusion and whether from within this jurisdiction or from other jurisdictions because there is no evidence that the other bargaining units are currently constituted as the proffers, no evidence of the bargaining history of those other units or whether inclusion of computer technicians was negotiated or actually litigated in those Districts and most importantly whether those technicians have same or similar job functions as the Las Cruces technicians.

This conclusion is consistent with NLRB cases dealing with the issue, particularly those cited in the Union's closing brief, *Inland Steel Co.*, 308 N.L.R.B. 868, 873 (1992) (citing to *Greyhound*

Lines, Inc., 257 N.L.R.B. 477, 480 (1981) and *Associated Day Care Services*, 269 N.L.R.B. 178, 180-181 (1984). Those cases stand for the proposition that mere access to confidential information, even confidential labor related material, does not confer confidential status.

B. The Employees at Issue Share a Community of Interest With the Other Employees in the Existing Unit and There is No Other Reason That Their Inclusion Would Render the Unit Inappropriate.

The parties have stipulated that if the LCPS TV Operations Manager is not a confidential position and accretion of that position would not render the unit inappropriate. See Stipulated Pre-Hearing Order ¶ 7. The parties also stipulated that if the District Computer Technicians Levels 1 and 2 and District Instructional Technology Support Technician Level 2 are found not to be confidential employees, their accretion would not render the unit inappropriate. *Id.* Finally, the parties have stipulated that the number of employees in the group sought to be accreted is less than ten percent of the number of employees in the existing unit and that more than 30% of the group to be accreted has demonstrated interest in being represented by the existing group, so that I may presume that their inclusion does not raise a question concerning representation requiring an election as permitted by NMAC 11.21.2.38 (B).

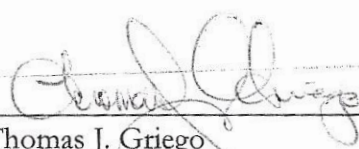
To satisfy myself that the parties' stipulations may appropriately result in accretion of the positions at issue I have examined the requirements of NMSA 1978, §10-7E-4(A) and NMSA 1978, §10-7E-1 in light of facts of this case. It is undisputed that the existing bargaining unit is an example of consolidating certified, blue collar, secretarial clerical, technical professional, paraprofessional, occupational groups, representing as it does all classified employees, custodial employees, Associate Librarians, Campus Security, Educational Assistants, Library Assistants, Material Management Employees, Nutrition Services, Nutrition Services Warehouse Employees, Physical Plant Department Employees,

and Secretarial/Clerical Employees. That fact alone weighs in favor of finding that the positions to be accreted share a community of interest with those already in the bargaining unit. All of the occupational groups in the bargaining unit receive similar benefits, work similar hours, and interact with other employees throughout the District's several sites in a similar fashion. (Valdespino Testimony 2:01:00-2:04:00.)

DECISION: For the reasons set forth above I find and conclude that the positions of District Computer Technician Level 1, District Computer Technician Level 2, District Instructional Technology Support Technician Level 2 and LCPS TV Operations Manager are not confidential employee positions as defined by NMSA 1978, §10-7E-4 (G) and therefore are not excluded from collective bargaining by the PEBA.

I further find and conclude that accretion of the District Computer Technician Level 1, District Computer Technician Level 2, District Instructional Technology Support Technician Level 2 and LCPS TV Operations Manager positions does not render the unit inappropriate. The instant accretion Petition should be granted and an Amended Certification of Representation should issue reflecting the accretion of those positions.

Issued, Thursday, November 29, 2018.



Thomas J. Griego
Hearing Officer
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