

**BEFORE THE STATE BOARD OF MEDIATION
STATE OF MISSOURI**

SPRINGFIELD OFFICE PROFESSIONALS/)
MSTA,)
)
Petitioner,)
)
v.)
)
SCHOOL DISTRICT OF SPRINGFIELD R-12,)
)
Respondent,)
)
and)
)
SPRINGFIELD NATIONAL EDUCATION)
ASSOCIATION)
)
Intervenor.)

Public Case No. R 2008-021

DECISION

In this case, the Springfield Office Professionals/Missouri State Teachers Association (MSTA) petitioned to represent a bargaining unit of clerical workers employed by the School District of Springfield R-12 (District). Thereafter, the Springfield National Education Association (SNEA) intervened in the case and itself sought to represent the same bargaining unit of clerical workers. This Board conducted an election the result of which could turn on whether the ballot of one challenged voter is opened and counted. The challenged ballot is that of a voter that SNEA contends is a confidential employee excluded from the bargaining unit. MSTA asserts this voter is not a confidential employee under the Board's labor-nexus test. The District takes no position.

The Board concludes the challenged voter is a confidential employee and that a majority of the votes were thereby in support of SNEA. The Board certifies SNEA as the exclusive bargaining representative of the bargaining unit.

Jurisdictional and Procedural Background

MSTA filed its petition to represent a bargaining unit of the District's clerical workers, including primarily (if not entirely) secretaries, on May 27, 2008. SNEA filed its petition to intervene, seeking to represent that unit, on November 19, 2009. All parties stipulated to a description of the unit. The parties could not agree on whether Helen LoPiccolo, secretary to one of the District's Associate Superintendents, should be included within the unit and allowed to vote, but they did agree to proceed with the election and that Ms. LoPiccolo could cast her vote as a challenged ballot. The Board's Chairman approved these stipulations and conducted an election in the unit on October 7, 2010. The election's outcome could turn on whether or not Ms. LoPiccolo's challenged ballot is opened and counted.

The question in this case is whether or not Ms. LoPiccolo is a confidential employee. If she is, she is part of the bargaining unit and her vote will count. If she is not, she is not part of the unit and her vote will not count. The answer to this question will determine whether the election in this case establishes majority support for one of the labor organizations seeking to represent the unit. As the dispositive question here is one that relates to determination of whether a labor organization has majority status, it is one within the jurisdiction of this Board to decide. § 105.525, RSMo.

The Board held a hearing in St. Louis, Missouri, on February 8, 2011, to allow the parties to provide testimony and other evidence regarding the issue at hand. Board Chairman Jim Avery and Employee Member Robert Miller were present in person to hear the case. Employer Member Emily Martin reviewed the entire transcript of the hearing and all exhibits. Representatives of MSTA, SNEA, and the District attended the hearing and had a full opportunity to present evidence and make arguments. MSTA and SNEA also took advantage of the opportunity they were given to file post-hearing briefs. The District takes no position on the issue in this case.

Based on its review of the whole record, including the evidence presented, arguments made, and briefing filed, the Board issues these Findings of Fact, Conclusions of Law, and Order.

Findings of Fact

I. Dr. Anita Kissinger

The School District of Springfield R-12 is the public school district centered in Springfield, Missouri. Dr. Anita Kissinger is the District's Associate Superintendent of Educational Services. She is a member of the Superintendent's Cabinet, which is the senior leadership team of the District. The Cabinet consists of the heads of the District's six main divisions – Operations, Educational Services, Special Education and Title I, Community Relations and Strategic Planning, Finance, and Human Resources. Dr. Kissinger reports directly to the District's Superintendent. The Superintendent is the chief executive of the District. The Superintendent is directly responsible to the District's Board of Education. All members of the Cabinet are required to attend the meetings of the Board of Education.

The Superintendent's Cabinet works collaboratively. The members discuss the issues before them to try to reach a common understanding of the situation and then attempt to reach a consensus position to recommend to the Superintendent. The final decision is the Superintendent's to make. Among the matters coming before the Cabinet are ones related to collective bargaining with unions representing various units of District employees. Typically this involves little more than the District's Director of Human Resources reporting that meetings with the unions have occurred and when the next meeting is scheduled. Although the Human Resources Director does not usually discuss the details of the labor negotiations being conducted, the other Cabinet members may ask for that information at the Cabinet meetings. On at least one occasion, Dr. Kissinger and the other Cabinet members did discuss a proposed collective bargaining policy and had the opportunity to comment on it and to suggest modifications. The Cabinet also considers and makes recommendations regarding District

staffing levels and staff work schedules. For example, the Cabinet on one occasion recommended that information technology technicians be employed for ten months per year instead of the previous nine months per year and it generally assesses the number of support positions that are needed at each school facility.

As Associate Superintendent of Educational Services, Dr. Kissinger oversees the District's Departments of Curriculum and Instruction, Information Technology, Staff Development (including Leadership Development and Teacher Development sections), and Quality Improvement and Accountability (primarily responsible for accreditation issues). Dr. Kissinger and the heads of the Departments under her supervision formulate a budget for the Educational Services Division. They examine the available resources and determine whether budget cuts are necessary or whether some program expansion may be possible. If cuts are required, Dr. Kissinger and her team make recommendations regarding where those cuts should be made. Or if some expansion is possible, they identify the most pressing needs of the District and develop proposals to meet those needs. In either situation, the recommendations could involve changes in the number of clerical personnel employed in the Educational Services Division, their salaries, and their assignments.

The Superintendent's Cabinet, including Dr. Kissinger, also prepares a budget for the District as a whole to be presented to the Board of Education for its approval or modification. The recommended District budget could call for the addition or elimination of staff positions. All budget discussions are kept confidential.

Dr. Kissinger may recommend to the Superintendent plans for the reorganization of, or restructuring within, the Departments under her supervision. Her recommendations have been accepted, including the restructuring of a secretarial position into an analyst position. Dr. Kissinger's recommendations, when adopted, can affect secretarial salaries, duties, supervision, physical location, and employment benefits. She also takes part in the decision making process relating to personnel matters within the Educational Services Division along with the direct

supervisor of the employee at issue and, if discipline is involved, the District's Human Relations Division. She writes or reviews reports embodying the decisions made and the reasons for the personnel decisions.

II. Helen LoPiccolo

Ms. LoPiccolo is Dr. Kissinger's secretary. Ms. LoPiccolo testified that she has not been involved in any issues related to labor organizations while performing her duties as Dr. Kissinger's secretary. She recalls having seen no documents relating to negotiations over salary or other terms and conditions of employment.

There are restrictions on Ms. LoPiccolo's computer access to the District's human relations information. With regard to such information, she may only access contact information and salaries of District employees. She has access to the salary information because she assists Dr. Kissinger in preparing the application for an annual state professional development grant that is used in part to cover the salaries of certain District employees.

Ms. LoPiccolo assists Dr. Kissinger in the process of posting notices of job openings and completes personnel action forms. Personnel action forms reflect changes to a District employee's job, such as salary changes, changes in duties, transfers, and resignations and leaves of absence.

To aid Dr. Kissinger in the organization, distribution, and filing of paperwork, Ms. LoPiccolo is sometimes copied on memoranda and e-mail messages between Dr. Kissinger and other District administrators. She also occasionally receives copies of administrative proposals under consideration, including those concerning funding for staff, staff reassignments, addition or elimination of staff positions, and the restructuring of existing positions. She proofreads documents drafted by Dr. Kissinger, including confidential proposals relating to personnel and the District budget and documents concerning employee disciplinary issues.

Ms. LoPiccolo also proofreads the agendas of meetings called by Dr. Kissinger, including the regular meetings Dr. Kissinger has with the heads of the Departments under her

supervision. Ms. LoPiccolo copies all handouts for those meetings. These meetings may include discussion of personnel policies and issues and updates on the status of collective bargaining.

Ms. LoPiccolo does not type up the hand-written notes Dr. Kissinger takes during Cabinet meetings. Neither does she have access to the file in which Dr. Kissinger keeps these notes. Ms. LoPiccolo does have access to proposals through which Cabinet members request expansions or reductions of staff. She understands that an important part of her job is to maintain confidentiality of information and documents she has access to, including items related to budget and staffing.

III. The Representation Election

The District and the competing unions in this case stipulated, with the Board Chairman's approval, to the conduct of a representation election among District employees in a unit described as including:

All full-time and regular part-time office clerical employees.

The parties also stipulated to the exclusion from the unit of:

All confidential employees, Human Resources Department clerical employees and analysts, Administrators, managerial employees, supervisors, guards and watchmen and all other District employees and District students.

The parties could not agree on whether or not Helen LoPiccolo is a confidential employee. If she is not a confidential employee, she is a member of the unit and she may vote in the election. If she is a confidential employee, she is excluded from the unit and may not vote in the election. The parties agreed to go ahead with the election without resolving this question, with Ms. LoPiccolo voting by challenged ballot.

At the election, 36 voted in support of SNEA, 25 voted in support of MSTA, and 10 voted for neither. Ms. LoPiccolo voted, but as her ballot was challenged, it was not opened and counted. Not counting Ms. LoPiccolo, 71 individuals voted. The 36 voting in favor of SNEA constitute a majority of these 71 ballots cast. But if Ms. LoPiccolo is properly to be included in

the bargaining unit, there are a total of 72 ballots and the 36 voting in favor of SNEA do not constitute a majority of the voters.

If Ms. LoPiccolo is a confidential employee, then she is not included in the unit, her ballot will not be opened and counted, the election will show majority support within the unit for SNEA, and the Board will certify SNEA as the exclusive bargaining representative of the unit.

But if Ms. LoPiccolo is not a confidential employee, then her ballot must be opened and counted. If she voted in favor of SNEA, then SNEA retains its majority and will be certified as the exclusive bargaining representative for the District's clerical unit. If she voted in favor of MSTA or for neither union, then SNEA did not demonstrate majority support through this election and a runoff election between just SNEA and MSTA will need to be conducted. See 8 CSR 40-2.170.

Conclusions of Law

I. General Principles

As stated above, the dispositive issue in this case is whether Helen LoPiccolo, secretary to an Associate Superintendent of the School District, is a confidential employee. The Public Sector Labor Law, §§ 105.500 to 105.530, RSMo, does not expressly exclude any class of employees from inclusion in any bargaining unit that the Board may establish. But the Board has long held that there are some employees whose duties tie them so closely to the interests of their employer that they should be excluded from an otherwise appropriate unit "because their inclusion could create conflicts of interest in the performance of their duties or because they lack sufficient community of interest with other workers." *Missouri NEA v. Missouri State Bd. of Mediation*, 695 S.W. 2d 894, 897-98 (Mo. banc 1985). See also *Parkway School Dist. v. Parkway Ass'n of Educ., Support Personnel, PA-ESP, Local 902/MNEA*, 807 S.W.2d 63, 67-68 (Mo. banc 1991); *State Federal Soldiers' Home v. Local 1810*, Case No. 41, at 2 (SBM 1971).

Among the classes of employees generally excluded from an otherwise appropriate unit are confidential employees. *Missouri NEA*, 695 S.W.2d at 898. Excluding confidential

employees from a bargaining unit safeguards the “employer’s right to conduct its labor relations through employees whose interests are aligned with those of management, rather than risk having confidential information handled by people with conflicting loyalties who may be subjected to pressure from fellow bargaining unit members.” *Int’l Ass’n of Fire Fighters, Local 3133 v. City of Harrisonville*, Case No. R 2002-011, at 35 (SBM 2002).

In determining whether particular employees are confidential employees, the Board applies the labor-nexus test in its examination of their duties. *Id.* This test focuses attention not just on whether or not there is a confidential relationship between an employee and a managing officer of the employer, but also on whether that confidential relationship extends into the sphere of labor relations. As the Missouri Supreme Court explained in *Parkway School Dist.*, 807 S.W.2d at 67:

Under the . . . labor nexus test it is not sufficient to show that an employee has responsibility for protecting the confidences of management, or has access to confidential information. The test applies only to employees having access to advance information about management's strategy and tactics in labor matters which might be used to the detriment of management.

If the employee has such a close relationship with one or more of the officers that manage the employer’s labor relations policies that the employer would be prejudiced by the employee’s inclusion in the bargaining unit, the employee should be excluded from the unit. *Id.* at 68. But an employee is not a confidential employee merely because he or she has some ability to access or may occasionally file confidential labor relations material; the employee must have actual access to such confidential material as part of his or her ordinary employment responsibilities. *IBEW, Local Union No. 753 v. City Utilities*, Case No. 79-025, at 7 (SBM 1979).

The labor-nexus test calls for two determinations to be made about an employee that is asserted to be a confidential employee:

- (1) Does the employee work for a person that formulates, determines, and effectuates labor relations policy for the employer?

- (2) Does the employee assist this person that formulates, determines, and effectuates labor relations policy by serving in a confidential capacity to the person in connection with the performance of these duties?

City of Harrisonville, Case No. R 2002-011, at 35. If both these question are answered in the affirmative, and only then, the employee is a confidential employee that will be excluded from the bargaining unit. *Id.*

II. Assessment of Whether Ms. LoPiccolo Is a Confidential Employee

- (1) *Does Dr. Anita Kissinger, the person for whom Ms. LoPiccolo works, formulate, determine, and effectuate labor relations policy for the School District?*

As a member of the Superintendent's Cabinet, Dr. Kissinger is one of the seven most senior executive decision makers of the District. Although a high level policy review body, the Cabinet seems to have little direct role in collective bargaining negotiations. The District's Director of Human Resources, also a Cabinet member, reports to the Cabinet when meetings with unions representing District employees have occurred and provides notice when upcoming meetings are scheduled, but there is no evidence that substantive discussions regarding bargaining positions and tactics occur in the Cabinet meetings.¹

The formulation, determination, and effectuation of labor relations policy, however, involve more than just engaging in the nuts and bolts of labor negotiations. Successful negotiations require the support of strong personnel and budget analysis. Without the underpinning provided by a firm grasp of available budget resources, competing personnel demands, the specific services the employer needs to fulfill its mission, and the relative importance of the various services needed, labor negotiations cannot be effective.

¹ On one occasion, the Cabinet, including Dr. Kissinger, did discuss a proposed collective bargaining policy and had the opportunity to comment on it and to suggest modifications. There was no evidence, however, as to even the general nature of that policy. Neither was there evidence as to whether Cabinet members made any suggestions, whether any suggested modifications were incorporated, or whether that policy, or another collective bargaining policy, has ever been adopted by the District.

It is just this basic support function that the Superintendent's Cabinet, including Dr. Kissinger, provides to the District's negotiation specialists. The Superintendent's Cabinet prepares the District's annual budget to present to the Board of Education for its approval. The budget will determine how many persons the District will employ and which departments and facilities they will be assigned to. The Cabinet also evaluates the changing needs of the District. It may fashion concrete proposals calling for the addition or elimination of jobs, modifications in the duties of existing positions, reallocation of staff members among the District's facilities, changes in salary and benefits, and modifications in the way employees are supervised. These proposals may be targeted to specific employees or groups of employees or may be elements of larger proposals to create or eliminate whole programs or to reorganize existing programs. Cabinet proposals are more than merely advisory. Given the collaborative decision making process engaged in by the Superintendent and Cabinet members, Cabinet proposals play a key role in defining the contours of District policy. The Cabinet's role in the creation of District policy relating to staff size, duties, assignments, supervision, salaries, and benefits will often govern and will always directly affect the District's collective bargaining posture.²

Possession of fore knowledge of these important elements of collective bargaining puts the Cabinet in a very similar position to that of the production cost estimation department examined by the National Labor Relations Board in *Pullman Standard Div.*, 214 N.L.R.B. 762

² We are not swayed by our dissenting colleague's view that the budgets and organizational plans formulated within the Superintendent's Cabinet are matters of public knowledge and that, for this reason, employees cannot be considered to be confidential employees based on their awareness of such matters. The evidence in this case does not clearly identify the nature of the Superintendent's Cabinet, but it seems to be an informal advisory body maintained by the Superintendent to assist him in making fully informed decisions rather than a body formally established at the direction of the Board of Education. We do not think the Cabinet is covered by the Sunshine Law because it does not appear to us that such an informal body comes within the definition of a public governmental body subject to the Sunshine Law. See § 610.010(4), RSMo. In fact, the Cabinet does keep its budget discussions confidential. Although final decisions will be made at public meetings of the Board of Education, the proposed budgets and organizational restructurings developed in Cabinet meetings will have significant impact on the collective bargaining process before either Cabinet proposals or collective bargaining agreements make it to the Board of Education for its review and approval, rejection, or modification.

(1974).³ The employees in this department of the Pullman Company were provided with exact labor costs, including the future wage rates that the company would be willing to pay, so that they could better estimate manufacturing costs of producing new products. *Id.* at 762. The NLRB ruled that the employees in this department could not appropriately be included in any bargaining unit because of their awareness of the precise wage rates the company would be willing to agree to in the bargaining process and the prejudice to the company's bargaining position that would result if that information were to be disclosed. *Id.* at 763. Dr. Kissinger's knowledge of budget figures that the District is likely to settle on may not be as specific as the Pullman employees' knowledge of acceptable wage rates, but the overall amount of funds available for salaries of District employees is exactly the kind of information that would allow a union to know whether to push hard for raises or to moderate its demands. Any less precision in the information Dr. Kissinger possesses as compared to that of the employees in the *Pullman* case is also more than balanced by her position closer to the center of employer decision making. Any strengthening or weakening in employer positions could be ascertained more quickly, and thus have a greater impact on bargaining, from someone with knowledge derived from Dr. Kissinger than from a production unit several layers below the employer's decision makers.

Based on the fundamental support role played by the Superintendent's Cabinet in the bargaining process and the prejudice to the District's bargaining position that would result from disclosure of information the Cabinet is privy to, the Board concludes that Dr. Kissinger, through her membership in the Cabinet, does formulate, determine, and effectuate District labor relations policy.⁴

³ Although decisions of the NLRB are not binding on this Board, it often looks to them for guidance and may follow them when it finds them persuasive. *Baer v. Civilian Personnel Div., St. Louis Police Officers Ass'n*, 747 S.W.2d 159, 162 (Mo. App. W.D. 1988); *SEIU, Local 1 v. City of St. Joseph*, Public Case No. AC 2011-005, at 5 (SBM 2011).

⁴ The Board does not place significant weight on Dr. Kissinger's role in administering the District's Educational Services Division in reaching its conclusion that she formulates,

In reaching this decision, we emphasize that the Cabinet is the District's highest executive body. It works collaboratively with regard to matters of importance to the District and generally reaches a consensus before making its recommendations directly to the Superintendent, who is the senior executive of the District, answerable only to the Board of Education. If instead, Dr. Kissinger's role was with a body with a more specialized jurisdiction or a body whose decisions or recommendations were subject to filtering through other levels of supervision before reaching the actual decision makers of the District, our conclusion would very likely be different. See *Parkway School Dist.*, 807 S.W.2d at 69.

(2) *Does Ms. LoPiccolo assist Dr. Kissinger by serving her in a confidential capacity in connection with her duties relating to the formulation, determination, and effectuation of labor relations policy?*

Ms. LoPiccolo testified that she has not performed any duties for Dr. Kissinger or seen any documents relating to labor organizations or to negotiations over salary or other terms and conditions of employment. But Ms. LoPiccolo does proofread documents drafted by Dr. Kissinger, including confidential proposals relating to personnel and budgeting. She is regularly copied on memoranda and e-mail messages between Dr. Kissinger and other District administrators. These communications include copies of administrative proposals to be considered by the Superintendent's Cabinet, including those concerning funding for staff, staff reassignments, addition or elimination of staff positions, and the restructuring of existing positions. Ms. LoPiccolo understands that it is important that she maintain the confidentiality of the information she has access to through her work with Dr. Kissinger.

determines, and effectuates labor relations policy. Being in charge of one of an employer's operational divisions, no matter how significant, does not in itself mean that the division chief is engaged in labor relations policy. A division chief can have a significant role in an employer's business without necessarily having much, if any, role in the formulation, determination, and effectuation of labor relations policy. The National Labor Relations Board has specifically held that to the extent department or division managers handle labor relations matters within their own area of managerial responsibilities, but not on a plant-wide or company-wide basis, they do not formulate, determine, and effectuate labor relations policy for the employer. *Westinghouse Elec. Corp. v. N L R B*, 398 F.2d 669, 670 (6th Cir. 1968) (citing NLRB decisions).

As explained above, proposals before the Superintendent's Cabinet concerning the personnel and budget policy of the District are necessarily and directly relevant to the District's labor relations policy and its collective bargaining strategy. If the union negotiating with the District were to have advance knowledge of such proposals being considered by the District's top leadership team, it would have a window into the District's thought processes, goals, and concerns that would give it an unfair negotiating advantage. For example, if a union knew the actual budget proposals under District consideration, it could discern whether statements made by District representatives in collective bargaining negotiations regarding the availability of funds for raises, or even for retention of existing employees, were serious or mere posturing. Or if the union was aware of District reorganization plans, it could modify its proposals accordingly or begin active opposition to such plans at an earlier stage (when it might be easier to stop or modify the plans) than it otherwise could.

Through her work as Dr. Kissinger's secretary, Ms. LoPiccolo has access to this type of information that, if shared with union negotiators, would prejudice the District in labor negotiations. Because Ms. LoPiccolo has "access to advance information about management's strategy and tactics in labor matters which might be used to the detriment of management" as a part of her ordinary job duties, the Board concludes that she is a confidential employee.⁵ See *Parkway School Dist.*, 807 S.W.2d at 67-68.

⁵ Ms. LoPiccolo's access to the salaries of District employees, her role in completing personnel action forms that reflect changes to District employees' job status, and her occasional proofreading of some (but not all) documents prepared by Dr. Kissinger relating to employee discipline had no influence on the Board's determination that she is a confidential employee. These duties, although resulting in Ms. LoPiccolo having access to confidential employment information, are not duties that make an employee a confidential employee under the Public Sector Labor Law. Public employee salaries are often public information and, regardless, many secretarial and other clerical employees who have little or nothing to do with labor relations and collective bargaining may have duties requiring access to salary information. The changes reflected on personnel action forms are generally mundane matters of more interest to accounting staff than to labor negotiators. Moreover, many other secretaries will also be completing personnel action forms for the job status changes of personnel within other District subdivisions. And having some sporadic access to confidential disciplinary matters is not sufficient to make an employee a confidential employee. See *City Utilities*, Case No. 79-025, at

As a confidential employee, Ms. LoPiccolo is excluded from membership in the clerical unit stipulated to by the parties to this case.

III. Election Result

Because Ms. LoPiccolo is a confidential employee excluded from clerical unit as stipulated to by the parties, her ballot will not be opened and her vote will not be counted. Without this vote, SNEA received the votes of 36 of 71 voters. The election thus establishes that SNEA has majority support within the unit and it will be certified as the unit's exclusive bargaining representative.

ORDER CERTIFYING EXCLUSIVE BARGAINING REPRESENTATIVE

An election having been conducted in this case under the supervision of the Chairman of the State Board of Mediation in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that an exclusive bargaining representative has been selected; and all objections to the Tally of Ballots furnished to the parties or to the conduct of election having been resolved by the Board:

IT IS HEREBY CERTIFIED that the Springfield National Education Association has been designated and selected by a majority of the employees of the School District of Springfield R-12 in the unit described below as their exclusive bargaining representative. Pursuant to § 105.525, RSMo, the Springfield National Education Association is the exclusive representative of all the employees in such unit for the purpose of discussions with respect to salaries and other conditions of employment.

Unit: All full-time and regular part-time office clerical employees; excluding all confidential employees, Human Resources Department clerical employees and analysts, Administrators, managerial employees, supervisors, guards and watchmen and all other District employees and District students.

7. This is especially so when the access is due to the employee's work for a supervisor whose role in the discipline process is "not significantly different from those of other supervisors generally[.]" See *Parkway School Dist.*, 807 S.W.2d at 69.

Signed this 31st day of October, 2011.

STATE BOARD OF MEDIATION,

A handwritten signature in black ink, appearing to be 'J. G. Avery', written in a cursive style.

James G. Avery, Chairman

(SEAL)

Dissenting Opinion
Robert Miller, Employee Member

A handwritten signature in black ink, appearing to be 'Emily Martin', written in a cursive style.

Emily Martin, Employer Member

DISSENTING OPINION

I fully agree with the general statement of the law regarding confidential employee's set out in Part I of the Conclusions of Law of the decision in this case. I respectfully dissent, however, from my colleagues' determination, based on their application of this law to the facts of this case, that Helen LoPiccolo is a confidential employee who should, for that reason, be excluded from membership in the bargaining unit agreed to by the parties and approved by the Board's Chairman. An employee cannot be a confidential employee unless he or she works for a person that formulates, determines, and effectuates labor relations policy for the employer. Ms. LoPiccolo does not work for a person with these responsibilities.

Ms. LoPiccolo works for Dr. Anita Kissinger, the District's Associate Superintendent of Educational Services. Dr. Kissinger is a member of the Superintendent's Cabinet, a body comprised of the District's six most senior executives other than the Superintendent. The Cabinet provides advice and recommendations to the Superintendent on issues of matters of high importance to the District. But neither the Cabinet, as a body, nor Dr. Kissinger herself, has any significant involvement in District labor relations policy. Labor negotiations are conducted outside the Cabinet's purview. Dr. Kissinger testified that, although the District's Director of Human Resources (another member of the Cabinet) reports when meetings with the unions have occurred and when the next meeting is scheduled, he does not relate to the Cabinet details about the negotiations or even mention what issues are on the table at negotiation sessions. She also stated that Cabinet members could ask for more detail regarding negotiations, but that "doesn't necessarily mean we would get a response."

The Cabinet did once review a "collective bargaining" policy, but there was no evidence concerning the nature of that policy or what effective role, if any, that the Cabinet had in that policy's formulation, determination, or effectuation. In fact, it is not even clear whether any such

policy has actually been put into place. That the Cabinet may have had some undefined role in the promulgation of some policy related to collective bargaining that may or may not have been adopted is not sufficient to establish that it has a role in the formulation, determination, or effectuation of labor relations policy.

Dr. Kissinger also testified that she has never met with the District's Director of Human Resources regarding collective bargaining with teachers and that she has never provided any information to the Human Resources Director or anyone else for purposes of collective bargaining. Neither is she aware what information, including budget information, is used for collective bargaining purposes.

As my colleagues discuss, the Cabinet does provide substantial input into the formulation of the District's budget and into the structural organization of the District's operations. While I agree that the District's budget and organizational plans can be matters of significance to labor relations policy, I disagree that such matters are such necessary determinants of labor relations policy that a management official's involvement in them can, in isolation from any direct connection to actual labor-management activities, amount to the formulation, determination, and effectuation of labor policy.

Possession of even detailed information showing connections between an employer's budget and collective bargaining salary proposals is not sufficient to prevent an employee from inclusion in a bargaining unit, much less the secretary of such a person. *Washington Post Co.*, 254 N.L.R.B. 168, 196-97 (1981) (senior budget analyst having access to nearly all company records and whose job included long range budget forecasts and determination of the impact on payroll of wage packages being considered by the company's labor relations section not a confidential employee to be excluded from unit).

Unlike my colleagues, I do not consider the information Dr. Kissinger is privy to through her role in formulation of the District's budget to be comparable to that of the product cost estimation employees determined to be confidential employees in *Pullman Standard Div.*, 214

N.L.R.B. 762 (1974). In order to estimate manufacturing costs, the employees in *Pullman* obtained from the company officials in charge of labor negotiations the precise labor rates to which the company would be willing to agree in future collective bargaining agreements. *Id.* at 763. These *Pullman* employees were excluded from any bargaining unit because premature disclosure of that information would reveal the company's anticipated ultimate settlement figures. *Id.* In contrast, no evidence was presented in this case indicating that the District budgets prepared with Dr. Kissinger's input contain wage rate estimates nearly as precise as those at issue in *Pullman*. I disagree with my colleagues' conclusion that *Pullman* can still apply here because the less exact information known to Dr. Kissinger is counterbalanced by her higher position in the employer's hierarchy relative to the position of the employees at issue in the *Pullman* decision. The NLRB has strictly limited application of *Pullman* only to cases involving very exact information related to the specific bargaining strategy or positions of the employer. *E.g.*, *Bakersfield Californian*, 316 N.L.R.B. 1211, 1213 (1995); *Inland Steel Co.*, 308 N.L.R.B. 868, 873 (1992).

Further, as a public body, the budgets and organizational plans of the School District are matters to be aired before the public. See Chapter 610, RSMo (the Sunshine Law). I think it unlikely that the exemption permitted for information relating to preparations for negotiations with employee groups, § 610.021(9), can be interpreted so broadly as to exempt from public disclosure either a public body's annual budget discussions and documents or any discussions and plans it has to reorganize its operations and change the way it provides its services to the public. Even if the Superintendent's Cabinet does not fall within the Sunshine Law's definition of a public governmental body (§ 610.010(4)), the Board of Education does and it is the final decision maker for the District. Where an employee has access only to information already publicly available, he or she is not a confidential employee. *Washington Post Co.*, 254 N.L.R.B. at 197.

I agree with my Board colleagues that Dr. Kissinger's activities as the Associate Superintendent of Educational Services, as she described them at the hearing, do not involve her in any meaningful way in labor relations policy. She may need to deal with personnel issues on occasion (including the consideration and imposition of disciplinary sanctions), but that is not the focus of her job nor is that role any different from that of any other supervisory official that must manage a staff as a necessary consequence of his or her direction of a program for the District. A program manager's unavoidable involvement in personnel matters will generally, as in this case, have such a diffuse connection to the employer's labor relations policy that it cannot be said to amount to the formulation, determination, and effectuation of such policy. As my colleagues note, this is the position of the National Labor Relations Board. See *Westinghouse Elec. Corp. v. N L R B*, 398 F.2d 669, 670 (6th Cir. 1968) (citing NLRB decisions). See also *Parkway School Dist. v. Parkway Ass'n of Educ., Support Personnel, PA-ESP, Local 902/MNEA*, 807 S.W.2d 63, 69 (Mo. banc 1991).

I conclude that Dr. Kissinger does not formulate, determine, and effectuate District labor relations policy. For that reason, Dr. Kissinger's secretary, Ms. LoPiccolo, is not a confidential employee that should be excluded from the bargaining unit. See *Int'l Ass'n of Fire Fighters, Local 3133 v. City of Harrisonville*, Case No. R 2002-011, at 35 (SBM 2002).

Although it is the Board's independent responsibility to determine the confidential status of an employee when that is a matter raised by any party, I do find ample support for my conclusion that Ms. LoPiccolo is not a confidential employee from the School District's decision to take no position on this question. The primary purpose of excluding confidential employees from a bargaining unit is to prevent the prejudice to the employer that would result from a bargaining unit member disclosing to his or her union information that is related to the employer's confidential bargaining strategy. *Parkway School Dist.*, 807 S.W.2d at 67-68. The District's decision not to assert that Ms. LoPiccolo is a confidential employee is a strong indication that the employer here does not think it will be prejudiced by her inclusion in the unit.

I would include Ms. LoPiccolo in the agreed bargaining unit in this case, count her vote in the representation election, and, if the counting of her vote resulted in the failure of SNEA to obtain a majority of the votes in its favor, direct a runoff election.

A handwritten signature in black ink that reads "Robert Miller". The signature is written in a cursive style with a large initial "R" and a long, sweeping underline.

Robert Miller, Employee Member