

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

MERCER COUNTY WELFARE BOARD,

Public Employer,

-and-

DOCKET NO. CU-81-14

LOCAL 2285, AMERICAN FEDERATION
OF STATE, COUNTY & MUNICIPAL
EMPLOYEES, AFL-CIO,

Petitioner.

SYNOPSIS

The Director of Representation determines that Training Technicians employed by the Mercer County Welfare Board may not be placed in a unit of the Board's nonprofessional and professional employees represented by AFSCME. The Training Technicians' duties are to train the Board's professional employees. They have separate lines of supervision. Although the Training Technician title is newly created, a training function existed within the Board prior to the creation of this new title, and was provided by employees who were not placed in either a nonsupervisory or supervisory unit. Clarification of a new title into a negotiations unit may be achieved where the new title either "entail[s] job functions similar to functions already covered by the unit ..." or where there is a "new operation ... with employees who function similarly to currently represented employees." In re Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (¶ 10229 1977). Neither of these circumstances were demonstrated in the factual record.

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Appearances:

For the Public Employer
Thomas J. McGann, attorney

For the Petitioner
Carlton Steger, Staff Representative, Local 2285
American Federation of State, County & Municipal
Employees, AFL-CIO

DECISION

A Petition for Clarification of Unit was filed on September 18, 1980, with the Public Employment Relations Commission ("Commission") by Local 2285, American Federation of State, County & Municipal Employees, AFL-CIO ("AFSCME"). AFSCME is the exclusive representative of a unit of certain nonsupervisory employees of the Mercer County Welfare Board ("Welfare Board") and a dispute has arisen concerning the inclusion or includability of Training Technicians in AFSCME's negotiations unit.

Pursuant to a Notice of Hearing, a hearing was conducted before Commission Hearing Officer Joan Kane Josephson on March 29, 1981, at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Thereafter, the Hearing Officer, on September 30, 1982, issued her Report and Recommendations, a copy of which is attached hereto and made a part hereof.

AFSCME and the Welfare Board filed exceptions to the Hearing Officer's Report and Recommendations, the last of which was received on December 8, 1982.

The undersigned has carefully considered the entire record herein, including the transcript, the exhibits, the exceptions and the Hearing Officer's Report and Recommendations, and finds and determines as follows:

1. The Mercer County Welfare Board is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), is subject to its provisions, and is the employer of the employees who are the subject of this proceeding.

2. Local 2285, American Federation of State, County and Municipal Employees, AFL-CIO is an employee representative within the meaning of the Act and subject to its provisions.

3. AFSCME has filed a Petition for Clarification of Unit seeking a determination concerning the composition of the nonsupervisory professional and nonprofessional negotiations unit

of Welfare Board employees which it represents. ^{1/} Specifically, AFSCME asserts that the title of Training Technician should be included in its unit. The Welfare Board, objecting to the inclusion of the title in the unit, states: (1) the title should not be included in AFSCME's unit because AFSCME waived any rights to include the position in its unit when AFSCME did not object to the Welfare Board's exclusion of the title until more than one year after its creation; (2) the Training Technicians do not share a community of interest with the members of the AFSCME negotiations unit; and (3) a conflict of interest precludes the inclusion of the Training Technician title in AFSCME's negotiations unit.

4. The Hearing Officer recommended that the negotiations unit represented by AFSCME be clarified not to include the Training Technician title. The Hearing Officer recommended a finding that a conflict of interest exists which precludes the inclusion of the Training Technicians with the other members of the negotiations unit, based on the Training Technician's responsibilities to train and to evaluate employees at the direction of management.

5. In its exceptions, the Welfare Board maintains its argument, rejected by the Hearing Officer, that AFSCME waived its right to claim the Training Technician title when it did not

^{1/} While the present recognition clause describes AFSCME as the exclusive majority representative for "Non-Supervisory and Non-Professional Employees" of the Board, the undersigned agrees with the Hearing Officer's finding that AFSCME's unit includes professional employees. This inclusion is supported by the testimony cited by the Hearing Officer, as well as by the inclusion of professional titles such as Social Worker in the unit.

object to the Welfare Board's position on the title until one year after its creation. The Welfare Board also objects to AFSCME's exceptions as being untimely.

6. AFSCME objects to the Hearing Officer's finding that a conflict of interest exists between the Training Technicians and other members of AFSCME's negotiations unit which compels the exclusion of the Training Technicians from AFSCME's negotiations unit.

Turning first to the Welfare Board's exceptions, the undersigned finds no valid objection to the timeliness of AFSCME's exceptions in this matter. On November 4, 1982, the undersigned granted AFSCME's request for an extension of time to file exceptions in this matter. The undersigned granted an extension of time to November 12, 1982, and notice of this extension was served at the same time on the Welfare Board. Thereafter, AFSCME's exceptions were received on November 12, 1982 and are therefore timely.

The undersigned also finds that the Welfare Board's other exception is without merit. The Welfare Board argued that AFSCME waived its right to file the Petition in this matter by failing to object to the Welfare Board's placement of the title outside the negotiations unit for more than one year after the creation of the title. Upon review of the record, the undersigned adopts the Hearing Officer's finding of fact and conclusions of law with respect to this issue. The unrefuted testimony of AFSCME's Chief Steward indicates that AFSCME sought to resolve this issue

through negotiations with the Welfare Board prior to the filing of the instant Petition. Under the circumstances presented, which do not support a finding of a petitioner who has "slept on his rights," the undersigned concludes that the instant Petition was appropriate and timely filed. See In re Clearview Reg. H/S Dist. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977); Bergen Pines Hospital, D.R. No. 80-20, 6 NJPER 61 (¶ 11034 1980); and In re Tp. of East Brunswick, D.R. No. 82-42, 8 NJPER 187 (¶ 13080 1982).

The undersigned now proceeds to consider AFSCME's exceptions in this matter. As noted above, the Hearing Officer recommended the exclusion of the Training Technicians from the negotiations unit represented by AFSCME based on her finding that the Training Technicians have a conflict of interest with other members of AFSCME's negotiations unit.

In its exceptions AFSCME states that: "[n]owhere in any Court or PERC decision is there any exclusion based on conflict of interest for anyone other than a supervisor." Moreover, AFSCME states "[t]he only proper exclusions are those listed in the statute -- managerial, supervisors, or confidentials."

Preliminarily, the undersigned notes that the Court's ^{2/} admonition concerning conflicts of interest in negotiations units in the public sector certainly exists along with the statutory exclusions referenced by AFSCME. AFSCME contends that the Wilton

^{2/} Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971), rev'g and remanding P.E.R.C. No. 8 (July 2, 1969).

admonition has not been applied in those situations where the issue of conflict arises solely among fellow nonsupervisory employees. AFSCME's contention is without merit. Soon after Wilton was decided, the Commission observed:

The supervisor v. nonsupervisor distinction is not the only boundary to be considered when diagramming the area of common interest on an organization chart. One may have various authorities over other employees, still not be a supervisor as the Commission defines that term, yet be disqualified from the unit inclusion because by their nature and exercise such authorities preclude a common bond. Seen from another view, such authorities, though not legally supervisory in character, may nevertheless be so intimately related to service of the management interest that failure to recognize such in making a unit determination would tend to or would in fact compromise that interest.

In re City of Camden, P.E.R.C. No. 52 (1971).

Accordingly, the undersigned rejects AFSCME's contention that a conflict of interest cannot be found among nonsupervisory employees.

The undersigned now proceeds to review the merits of the petition. AFSCME seeks to add a newly created title to its negotiations unit. In Clearview, supra, the undersigned noted that a clarification of unit petition can effectuate the inclusion of a new title into an existing negotiations unit if the new title:

... entail[s] job functions similar to functions already covered by the unit ... [or, where]

the employer may have created a new operation or opened a new facility, and then staffed the operation or facility with employees who function similarly to currently represented employees. 3 NJPER at 251; See also Fairlawn Bd. of Ed., D.R. No. 78-22, 3 NJPER 389 (1977).

The record reveals that neither of the above-described circumstances applies to the instant matter. As to the latter circumstance, the Board did not create a new operation when it created the Training Technician position; indeed, three witnesses at the hearing, including the Board's current Director of Welfare, functioned as "Training Supervisors" for more than eleven years before the creation of the "Training Technician" title. Training Supervisors were not and are not included in AFSCME's negotiations unit. Moreover, the Training Supervisors were not and are not included in the separate Supervisor's unit. Thus, notwithstanding the existence of a training function at the Board prior to the creation of the Training Technician title, the record reveals that a collective negotiations unit has never encompassed that job function.

The undersigned has reviewed the several collective negotiations agreements between AFSCME and the Board, in order to determine whether there is any similarity between the newly created title, under examination herein, and the titles covered by the agreement. The recognition clauses in these agreements list all titles covered by the agreements; these lists of titles are duplicated in the salary guide (Appendix I) of each agreement. Thus,

while the recognition clauses also contain general language describing the breadth of AFSCME's unit, the undersigned concludes that the unit is actually defined by the titles listed in the recognition clauses and salary appendices. A review of these titles indicates that AFSCME has never represented any title with solely training functions. Furthermore, the evidence in the record fails to establish that the job functions of the newly created title resemble in any way the job functions of any title in the existing unit. ^{3/} Indeed, the record supports a finding that, due to their exclusive training functions and separate lines of supervision, which run directly to management, the Training Technicians do not share a community of interest with the employees represented by AFSCME. ^{4/}

Accordingly, the undersigned concludes that the Petition for Clarification of Unit filed by AFSCME fails to establish the requisite community of interest between the petitioned-for title and the unit titles. AFSCME has failed to demonstrate that the new title, Training Technician, either "entails job functions which are similar to functions already covered in the existing unit . . .," or is a new operation created by the Welfare Board with

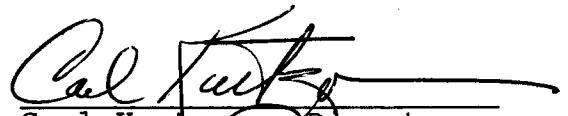
^{3/} The attempt by AFSCME to compare the Training Technicians with Investigators, who are in the unit, is misplaced. The record shows that Investigators are primarily concerned with client fraud while the Training Technicians are responsible for the training and retraining of staff personnel.

^{4/} Having concluded that AFSCME's Petition must be dismissed for the above reasons, the undersigned does not reach the conflict of interest issue raised by the Board, nor does the undersigned adopt or reject the Hearing Officer's analysis with respect to that issue.

employees who function similarly to currently represented employees.
Clearview, supra. ^{5/}

Accordingly, for the above reasons, the undersigned determines that the title of Training Technician may not be included in the negotiations unit represented by AFSCME.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Carl Kurtzman, Director

DATED: May 5, 1983
Trenton, New Jersey

^{5/} At the same time, the record reveals that the Training Technicians are neither managerial executives nor confidential employees, but are public employees within the meaning of the Act. Accordingly, the undersigned concludes that, while the Training Technicians are ineligible for representation in the Petitioner's unit, they would be eligible for representation under the Act in an appropriate unit.

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SYNOPSIS

A Commission Hearing Officer recommends dismissal of a Petition for Clarification of Unit seeking a determination that the title Training Technician is included in the petitioner's professional and non-professional clerical, non-supervisory unit. She found that since the Training Technician trained and evaluated these employees on a daily basis, their inclusion in a unit with these employees would present a conflict of interest as defined in Bd/Ed of West Orange v. Wilton, 57 N.J. 404 (1971).

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The report is submitted to the Director of Representation who reviews the Report, any exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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For the Petitioner
Carlton Steger, Staff Representative, Local 2285
American Federation of State, County and Municipal
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HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

On September 18, 1980 Local 2285 of the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") filed a clarification of unit petition with the Public Employment Relations Commission (the "Commission") seeking a determination that the title of Training Technician is included within the collective negotiations unit they represent. The public employer, the Mercer County Welfare Board (the "Welfare Board") responded that Training Technicians should not be included in the AFSCME unit because they lack a community of interest with the employees in that unit and further that a conflict of interest exists between the

Training Technicians and the employees in the petitioner's unit.

Pursuant to a notice of hearing issued January 26, 1981 by the Director of Representation, a hearing was held on March 29, 1981. Post-hearing briefs were filed by October 30, 1981. Based on the entire record the Hearing Officer makes the following findings of fact:

The Mercer County Welfare Board is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), and subject to its provisions and is the employer of the employees who are the subject of this proceeding.

Local 2285, American Federation of State, County and Municipal Employees, AFL-CIO is an employee organization within the meaning of the Act and subject to its provisions.

AFSCME is the exclusive majority representative for employees described in the recognition clause of the contract between the parties as "non-supervisory and non-professional employees" of the Mercer County Welfare Board. The basic description of this unit has remained unchanged since at least 1977 (C-3 in Evidence). While the unit is described as non-professional, both Welfare Board Personnel Officer Carl Muehleisen (Tr 122) and Union Chief Steward Frank Sisto (Tr. 12) testified that professional employees are included in this collective negotiations unit. Also, the specific titles listed under the recognition clause include titles that are generally considered "professional" titles, e.g., social worker and income maintenance worker. ^{1/}

^{1/} Inclusion of professional titles in this unit was not in question.

In May 1979 the Mercer County Welfare Board created the title of Training Technician. On April 16, 1979 Personnel Officer Muehleisen met with an AFSCME representative and a representative of a unit of supervisors employed at the Welfare Board advising them that the title was being created. At that meeting Muehleisen also advised the union representatives that the employer considered this title to be an "administrative or managerial position" not to be included in any bargaining unit (Tr. 114). While Muehleisen apparently felt at that meeting that the representatives did not disagree with the Welfare Board's placement of the titles, AFSCME felt differently. Union Steward Sisto requested of Director of Welfare Patrick J. Magee that the title be included in the AFSCME unit, but the request was denied. ^{2/} (Tr. 12) The Union did not agree to the exclusion and again requested inclusion of Training Technicians in the AFSCME unit in subsequent contract negotiations in the spring of 1980. Throughout these negotiations the employer would not agree to place the Training Technician title in the recognition clause of the contract. (Tr. 129) On June 20, 1980 an overall agreement on the contract was reached and the Union indicated they would pursue the title dispute through PERC (Tr. 17 and 128).

Three Training Technicians were appointed. They joined the Staff Development and Training Section headed by the Training Supervisor and an Assistant Training Supervisor (C-5 in Evid.).

The three Training Technicians, the Training Supervisor and the Welfare Director all testified without contradiction as to the scope of the Training Technicians' duties. Training Technicians

^{2/} Sisto testified that Magee felt the issue should be discussed at the next negotiations session.

conduct orientation, in-service and remedial training. It is an internal staff position devoted exclusively to training functions. The Training Technicians determine the content of the training to be given and evaluate the employee in training.

All new employees hired by the Welfare Board go through an initial orientation by the training staff. The Welfare Board employes approximately 450 people.

Length of initial training varies depending on the trainee's position. Employees in income maintenance receive four to five weeks of training. Since the new employee does not have a staff assignment or line supervisor during this initial training period, the evaluation of that employee which is required after the first 30 days is completed by the Training Technicians (various specialists among the three Training Technicians and two Training Supervisors may contribute to the training and evaluations). The trainer comments on the employee's performance in training but does not make recommendations as to retention or non-retention of employees. The employee is shown the training evaluation, initials the evaluation and it is placed in the employee's permanent personnel folder (Tr. 71, 81, 92, 162).

In orientation training the Training Technician explains to the new employee their terms and conditions of employment which are covered under the negotiations agreement and explains the choice the employee has as to union membership (Tr. 70, 102, 169).

Training Technicians also conduct remedial training. If a supervisor identifies an employee problem the supervisor may

request remedial training. The assigned Training Technician has access to the employee's personnel file to use in designing a remedial training plan together with the employee's supervisor. After the training, the Training Technician meets with the employee and goes over the employee's evaluation. (Tr. 97, 163) The remedial training report is placed in the employee's personnel file. (Tr. 29)

Additionally, Training Technicians train employees who are promoted and employees who are reassigned. The Training Supervisor, Noe LaFramboise, testified:

We've been doing ongoing training, which we normally do for each department each month. So we are looking to address problems that we encounter organizationally monthly in each department, too. (Tr. 165)

Training Technician Janet M. Hughes testified she gave group remedial training in the food stamp area. The technician gave a presentation and the employees then did an exercise. The exercise was evaluated by the technician and discussed by the technician with the employee. The exercise was placed in the employees' personnel files (Tr. 38).

Article XXX of the collective negotiations agreement between AFSCME and the Welfare Board provides:

- A. A duplicate copy of the evaluation by the immediate Supervisor which is required for probationers shall be given in its entirety to the respective employee. Evaluations are grievable.
- B. Each employee shall be notified of an evaluation of his or her performance and receive a copy of this evaluation and have an opportunity to review such evaluation with his or her Supervisor. Evaluations are grievable.
- C. An employee, by request for appointment and with the approval of the immediate Supervisor,

shall have access to examine his or her own personnel file during office hours at reasonable time set by management and may be accompanied by a Union Representative.

D. The signature of the employee affixed to any document does not indicate in any way that the employee agrees with the contents of the document or the file. Employee's signature is affixed to show only that the file has been reviewed in accordance with this agreement. The employee shall have the right to respond in writing to any document in the file. Such response shall become part of the personnel file unless as a result of the response, the questioned document is removed and destroyed. The employees reserve the right to grieve any material in this file.

E. The provisions of Article XXX, Personnel Files and Evaluations, are subject to the grievance procedure up to the third step which is final and binding on all parties." (C-2 in Evidence)

There have not been any grievances filed concerning training evaluations.

Discussion and Analysis

The employer argues that the clarification of unit petition should be dismissed because AFSCME abandoned its claim by not exercising due diligence in filing the CU petition. The union was notified that the position was being created on April 4, 1979 and no petition was filed until September 18, 1980. The undersigned does not agree that the union abandoned its claim. While the clarification of unit petition could have been filed when the position was created, the employer had notice that the employee organization felt the title should have been included within the definition of the AFSCME unit. Prior to filing the petition the Union attempted to resolve the dispute directly with the employer. The Commission does

not require that clarification of unit petitions be filed at a particular time upon penalty of waiving the right to file such petition. N.J.A.C. 19:11-1.5 and 19:11-2.8; see also Clearview Reg. H.S. Bd/Ed and Clearview Ed/Assn, D.R. No. 78-2, 3 NJPER 248 (¶10229 1979). ^{3/}

The Union argues that since these employees are neither supervisors within the meaning of the Act nor confidential employees within the meaning of the Act, they should be included in the AFSCME broad-based collective negotiations unit. The employer argues that the nature of their administrative support work associated with personnel functions negates any community of interest that Training Technicians might otherwise share with other members of the bargaining unit. Additionally, the employer argues that given the evaluative nature of their work, membership in the AFSCME unit would create a conflict of interest. The employer relies on Bd/Ed of West Orange v. Wilton, 57 N.J. 404 (1971).

The undersigned agrees that these employees are not supervisors within the meaning of N.J.S.A. 34:13A-5.3 "having the power to hire, discharge, discipline or effectively recommend the same...." Nor are they confidential employees under N.J.S.A. 34:13A-3(g) "involved in the collective negotiations process." ^{4/}

^{3/} The Director, commenting on Clearview in In re Twp. of East Brunswick, D.R. No. 82-42, NJPER (¶ 1982) pointed out that when "one party has properly noticed the other party of a unit composition dispute prior to the execution of a collective negotiations agreement, the appropriate unit configuration may be obtained during the life of the contract." The employer was aware of the unit composition dispute herein.

^{4/} While the Training Technicians explain in orientation training contractual benefits and advise employees of their option to join or not join the union, I do not consider this to be sufficient involvement in the collective negotiations process to require a finding that these employees are confidential employees.

The undersigned does feel, however, that the day-to-day duties of the Training Technicians would present a conflict of interest if they were to be included in this negotiations unit.

The Supreme Court in Bd/Ed of West Orange v. Wilton, supra, held that if the good faith performance of the obligation to the employer arising from the authority delegated the employee places that employee in a position of actual or potential conflict of interest with other personnel, that employee may not be included in negotiations units with the employees with whom they have a conflict. The court asked (at p. 417) "Are the duties, authority and actions of the employee in question, vis-a-vis the other employees in the Association, primarily related to the management function?" See also the Director of Representation's decision in East Brunswick, supra.

The Training Technicians, their supervisor and the Director of Welfare all testified they felt their inclusion in this unit would present a conflict with the other personnel in the unit. They have a unique staff role among the Welfare Bureau's 450 employees. They are developing training, and training and evaluating employees for management on a daily basis. This is their only function, while the other employees of the Welfare Bureau deliver services to the public. ^{5/} This evaluation is not used directly by management in making decisions as to hiring, firing or discipline. The evaluation becomes part of an employee's overall personnel file which is used by supervisors in making such determinations. The petitioner has

^{5/} Investigators in the unit do not conduct internal investigations as was suggested but rather investigate welfare fraud.

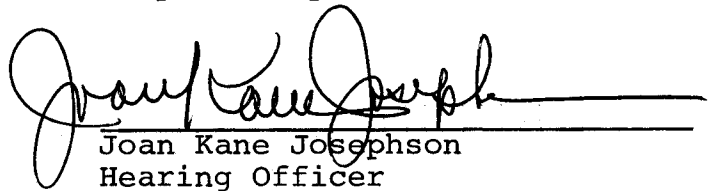
embodied in its contract concern over evaluation of employees and items placed in personnel files. Under the contract language quoted above training evaluations may be grieved. While there have been no grievances filed concerning training evaluations, this is the kind of conflict of interest the court was concerned about in Wilton. "[S]he would have to defend against a complaint made by an organization of which she was a member." (at p. 286)

Based on the above the undersigned concludes that inclusion of Training Technicians in a negotiations unit with employees that they train and evaluate at the direction of management would place them in the type of conflict with those employees that the Supreme Court envisioned in Wilton.

Recommendations

Accordingly, based on the record and the above finding the undersigned recommends that the negotiations unit represented by AFSCME be clarified to not include the title Training Technician.

Respectfully submitted,


Joan Kane Josephson
Hearing Officer

DATED: September 30, 1982
Trenton, New Jersey