D.R. NO. 2000-9

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

In the Matter of

TOWNSHIP OF FLORENCE,

Public Employer,

-and-

WATER & WASTEWATER WORKERS OF FLORENCE TOWNSHIP,

Docket No. RO-2000-47

Petitioner,

-and-

C.W.A. LOCAL 1044, AFL-CIO,

Intervenor.

SYNOPSIS

The Director of Representation dismisses a Petition for Certification filed by an independent association seeking to sever water and wastewater department employees from an Township-wide blue and white-collar unit.

Applying Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61, NJPER Supp. 248, 249 (¶61 1971) the Director found that the petitioner had not demonstrated that the existing unit is unstable or that the incumbent representative had not responsibly represented the petitioned-for employees.

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Appearances:

For the Public Employer
Richard Brook, Township Administrator

For the Petitioner
Jeffrey Hammell, Representative

For the Intervenor
John Lazzarotti, President

DECISION

On October 4, 1999, the Water and Wastewater Workers of Florence Township (WWWFT) filed a timely Petition for Certification of Public Employee Representative seeking to represent a unit of approximately 11 employees of Florence Township (Township) who are regularly employed in its water and wastewater department. These employees are currently represented by Communications Workers of America, AFL-CIO, Local 1044 (Local 1044) in a broad-based

collective negotiations unit which also includes blue collar and white collar employees in various other Township departments.

WWWFT asserts that the petitioned-for employees should be severed from the existing unit because Local 1044 has failed to recognize their special circumstances and diverse community of interest. According to the WWWFT, this alleged lack of recognition of their circumstances is evidenced by the failure of Local 1044 to obtain terms in collective negotiations agreements which address these asserted differences. Additionally, the Petitioner asserts that Local 1044 has not administered the terms of the negotiated agreement in a diligent manner as to the WWWFT group.

Local 1044 intervened in this matter based upon its existing collective negotiations agreement covering the petitioned-for employees for the period January 1, 1997 to December 31, 1999. N.J.A.C. 19:11-2.7. Local 1044 seeks dismissal of the petition. It argues that the community of interest for the entire unit was established at the beginning of its collective negotiations relationship with the Township and the asserted differences between the water and wastewater workers and the remainder of the unit employees are not sufficient to disturb the existing unit. Local 1044 also argues that any asserted lack of diligence on its part in administering the collective negotiations agreement was not intentional or discriminatory.

The Township has taken no position in this matter.

We have conducted an investigation of the facts and allegations concerning the petition. N.J.A.C. 19:11-2.2 and 2.6. The parties were afforded an opportunity to present their positions at an investigatory conference on October 18, 1999. At the conference, WWWFT provided examples of their asserted special circumstances and Local 1044's alleged failure to represent them. All positions and documentation have been considered. On February 18, 2000, I sent the parties a letter summarizing their positions and setting forth the apparent facts in this matter. I advised the parties that absent additional facts, I intended to dismiss WWWFT's petition. No additional submissions were made by either party. I find the following facts.

Negotiations History and Negotiation Agreement Provisions for WWWFT Employees

Since at least 1984, CWA (or its predecessor, Burlington Council 16, NJCSA) has negotiated collective agreements with the Township covering blue and white collar workers employed in all Township departments including the water and wastewater departments. The petitioned-for positions are included in Appendix "A" of the current collective agreement entitled "1997 Hourly - Payable Weekly." Their rates of pay are set forth along with the rates for all other unit positions. Several provisions of that agreement pertain specifically to water and wastewater employees' special circumstances. Article XXVII permits on-call opportunities solely for employees in the water and sewer department; Article XVIII grandfathers family plan health benefits

for at least two of the water and sewer employees; Article XXIX provides for salary increases for water and wastewater employees who qualify and obtain special operator licenses; and Article V recognizes special work hours and lunch break provisions for the petitioned-for employees. None of the contract provisions provide for fewer benefits than other unit employees receive.

Alleged Divergent Community of Interest

The WWWFT asserts that job duties of the petitioned-for employees distinguishes them from other unit employees. For example, according to the WWWFT, the petitioned-for employees are "responsible for the public health while no other segments under [the] existing contract are." They are required to operate the water and wastewater systems pursuant to regulations set forth by federal and state environmental protection agencies. They routinely work around bacteria, viruses, chemicals and other hazards. They are, or have been considered essential personnel subject to 24 hour call-in or shift holdover for emergencies. Water and wastewater laborers operate the water and wastewater systems on weekends and holidays while other unit laborers employed in different departments have no parallel responsibilities. Some of the petitioned-for employees need to keep current with continuing education and licensing not needed by other unit employees. Finally, their department is a seven-day-a-week operation while other departments are not.

As a result of these asserted differences in duties and requirements between the petitioned-for employees and the rest of the CWA unit, WWWFT argues that the unique community of interest among petitioned-for employees requires their severance from that unit.

Alleged Lack of Responsible Representation

WWWFT further argues that the representation provided by Local 1044 has not met the standard for responsible representation required of a majority representative. In this regard, WWWFT provided the following examples to support its contention. In late 1996, the Township created a new position, senior water and sewer repairer. During collective negotiations in 1997, the CWA did not negotiate the same wage increase for the new position as provided other positions. When approached by the employee in that title, the local shop steward allegedly told the employee that "CWA and the Town" did not feel that he should get the same increase because that would put him too close to the wage rate of the department's assistant supervisor, also a unit position. The CWA allegedly told the senior water/sewer repairer that it would not fight for him but would not fight against him either. The employee then negotiated on his own with a Township representative and obtained the raise which is reflected in the current agreement.

WWWFT also asserts that in 1990, a unit member requested that CWA "come up with a maternity policy" for employees. The then current collective agreement provided for sick leave and

leave of absence without pay, but not specifically for maternity leave. The employee was allegedly told by a CWA field representative to "work something out and get back to us." The employee hired a private attorney and was able to obtain an accommodation with the Township.

WWWFT further contends that during a 1996 blizzard, water and wastewater employees were called in as "essential employees", but were not given extra compensation while office employees received a paid day off. The WWWFT asserts that the Township approached CWA prior to the blizzard to determine how to handle the potential situation, but that the CWA did not respond before the blizzard. The CWA did subsequently file a grievance to secure the employees' payment for the day. The Township denied the grievance allegedly due to the CWA's failure to discuss the matter with the Township prior to the blizzard.

Finally, the WWWFT states that in or about August 1999, several water and wastewater department employees observed Township public works workers with CWA T-shirts, while water and wastewater department employees were not offered T-shirts.

ANALYSIS

After reviewing the arguments and submissions presented by the parties as set forth above, I find that the petitioned-for unit is inappropriate.

N.J.S.A. 34:13A-6(d) provides that the Commission shall determine the appropriate unit for collective negotiations. In

making unit determinations, we must consider the general statutory intent of promoting stable and harmonious employer-employee relations. Where there is a dispute, the Commission is charged with the responsibility of determining the most appropriate unit. State v. Prof. Assn. of N.J. Dept. of Ed., 64 N.J. 231 (1974).

The Commission has long held that severance from broad-based units may only occur under very limited circumstances. In Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61, NJPER Supp. 248, 249 (¶61 1971) the Commission stated:

> The underlying question is a policy one: Assuming without deciding that a community of interest exists for the unit sought, should that consideration prevail and be permitted to disturb the existing relationship in the absence of a showing that such relationship is unstable or that the incumbent organization has not provided responsible representation. We think not. To hold otherwise would leave every unit open to redefinition simply on a showing that one sub-category of employees enjoyed a community of interest among themselves. Such course would predictably lead to continuous agitation and uncertainty, would run counter to the statutory objective and would, for that matter, ignore that the existing relationship may also demonstrate its own community of interest.

In other words, there exist strong policy concerns and statutory objectives for establishing predictable, stable labor relationships between public employers and public employee representatives. The benefit of this stability runs not only to the two parties to the relationship and their constituencies, but also to the public at large. A petitioner seeking to redefine the negotiations relationship has a heavy burden. In this regard, the

petitioner must show that what is assumed to be a stable relationship between the recognized parties is in fact unstable, and thus does not support the statutory objectives; or that the incumbent negotiations representative has failed to provide its constituency with responsible representation. A petitioner's claim of irresponsible representation will be carefully scrutinized in the context of the entire existing relationship rather than isolated occurrences. Passaic Cty Tech. & Voc. H.S. Bd. of Ed., P.E.R.C. No. 87-73, 13 NJPER 63 (¶18026 1986); Middletown Tp. Bd. of Ed., D.R. No. 99-5, 25 NJPER 1 (¶30000 1998).

Here, WWWFT raises no allegation of unit instability. Rather, it alleges that Local 1044 has not responsibly represented the petitioned-for employees and that the petitioned-for employees have their own community of interest which differs from that of the existing broad-based unit.

Responsible Representation

WWWFT's claim that Local 1044 has failed to provide the petitioned-for employees with responsible representation must be carefully scrutinized in the context of the entire relationship between Local 1044, the Township and the petitioned-for employees. Passaic Cty. supra. In this regard, Section 5.3 of the Act empowers an organization to negotiate on behalf of all unit employees and to represent all unit employees in the administration of the collective agreement. Section 5.3 specifically links that obligation to negotiate and administer the agreement with the duty to represent

all unit employees "without discrimination and without regard to employee organization membership." The standards in the private sector for measuring a union's compliance with the duty of fair representation were articulated in Vaca v. Sipes, 386 U.S. 171 (1967). Those standards have been adopted in the public sector. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976).

The duty of fair representation as described in Vaca is reviewed differently depending on the nature of the parties' filings before the Commission. There is a difference between the review required in determining whether a statutory violation has occurred in the unfair practice context and the review triggered by a petition to sever employees from an existing collective negotiations unit. In the first instance we examine isolated incidents; in the latter context we look to the entirety of the parties' relationship. Moreover, even a finding that the employee representative has breached its duty of fair representation on one occasion, and perhaps more, does not necessarily mean that employees must be severed from the existing unit. If this were the case, units would be constantly subject to redefinition and labor instability would inevitably result. Passaic Cty; Middletown Bd. of Ed., D.R. No. 99-5, 25 NJPER 1 (¶30000 1998).

In W. Milford Bd. of Ed., P.E.R.C. No. 56, NJPER Supp. 218, 219, (¶56 1971), the Commission stated:

> The measure of fair representation is ultimately found at the negotiating table, in the

> administration of the negotiated agreement and in the processing of grievances.

The assertions made by WWWFT appear to focus on Local 1044's performance in collective negotiations and processing of grievances. Accordingly, those areas are addressed in this determination.

In part, WWWFT has based its claim of irresponsible representation upon Local 1044's failure to negotiate into the collective agreement items dealing specifically with concerns held by the petitioned-for unit members. Namely, these items include the negotiation of a wage increase for a recently created water and wastewater department job title which was not the same amount of increase negotiated for other unit employees in different titles, and the absence of a clause in the negotiations agreement providing a "maternity policy". The request for such a clause was made by a water and wastewater employee but did not seek to limit such coverage to the petitioned-for employees. In both of these instances, the respective affected WWWFT employees negotiated their own raise and maternity coverage without Local 1044 assistance or interference.

In State v. Prof. Assoc. of N.J., the Court recognized that differences and problems as set forth above may exist where "discrete categories" of employees are members of a common unit. However, the Court also found that "it must be assumed...that the common representative will perform its duty fairly in respect of all within the unit and exercise good faith judgment as to when or

whether different characteristics within the group warrant different demands." Id. at 258. In a particular case, the burden is on the petitioner seeking to disturb the existing broad-based unit to show that the incumbent representative's activity or lack of activity in the negotiations process with regard to the petitioned-for unit employees was done in such bad faith or was so irresponsible that the existing unit should be redefined.

In this regard, the Commission and the Courts have long recognized that unions have broad power to represent unit members and to negotiate their terms and conditions of employment. The mere fact that one group of employees or one employee within a group is not completely satisfied with what a majority representative presents or obtains in negotiations does not establish that the representative has either breached its duty to the minority group or has acted irresponsibly in negotiations. Camden Cty. Council No. 10 NJCSA, P.E.R.C. No. 89-54, 14 NJPER 420 (¶19172 1988); Belen v. Woodbridge Tp. Bd. of Ed.; Cty. of Mercer, P.E.R.C. No. 89-112, 15 NJPER 277 (¶20121 1989); Clifton Bd. of Ed., D.R. No. 80-18, 6 NJPER 38 (¶11020 1980). Moreover, the existence itself of competing interests between the employee groups within an existing unit does not establish irresponsible representation by a collective negotiations representative, when one group's interests are met and the others are not.

Additionally, where a petitioner argued, in part, that the terms of a recently expired collective agreement favored one group

over the other, a petition to sever one group from another was denied for several reasons including a finding that a negotiated agreement, the terms of which resulted in less of a benefit to one group of employees than another, did not constitute a breach of the duty of fair representation or otherwise compel severance. Gloucester Cty. Sheriff, D.R. No. 93-17, 19 NJPER 183 (¶24090 1993) and Gloucester Cty. Sheriff, D.R. No. 96-14, 22 NJPER 153 (¶27081 1996). Rather, a majority representative has broad discretion and a "wide-range of reasonableness" in negotiations. S. Brunswick Tp., D.R. No. 91-13, 17 NJPER 9 (¶22006 1990).

The findings and rationale of the cases cited above are particularly applicable to the instant case. In this regard, when a water and wastewater employee questioned Local 1044 concerning the lesser wage increase for the newly created senior water and sewer repairer compared to the increase for other unit employees, the local shop steward explained that a higher wage for the new position would put the position in conflict with another unit position in the same department and that Local 1044 and the Township did not feel this would be appropriate. Thus, the decision by Local 1044 not to seek an equivalent increase for the new position was based upon a stated concern for the overall effect on other unit positions and thus did not constitute either a breach of the duty of fair representation or an act of irresponsible representation. See Clifton, 6 NJPER at 40; Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). The negotiations decisions made by Local 1044 were within

their authority to make as "...compromises which adversely affect some members of a negotiations unit, while resulting in greater benefits for other members." Camden Cty. Council 10, 14 NJPER at 423, citing Jersey City, P.E.R.C. No. 87-56, 12 NJPER 853 (¶17329 1986).

As to the second matter regarding a water and wastewater employee's request to Local 1044 to "come up with a maternity policy", the request was made while a collective negotiations agreement was in place. While Local 1044 did not seek to negotiate such a benefit at that time, it did not interfere with the individual employee's attempt to obtain such a benefit for herself. Local 1044's reluctance to negotiate a new provision during the term of an existing contract does not rise to the level of bad faith or irresponsible representation of the petitioned-for employees necessary to reestablish the existing unit. State v. Prof. Assoc. supra. I also note that this issue arose nearly 10 years before the filing of the instant petition.

Finally, regarding WWWFT's focus on Local 1044's alleged failure to properly process grievances and thus its asserted failure to provide responsible representation, the following 1996 incident is offered. Prior to a 1996 blizzard, the Township assertedly approached the Local 1044 representative to discuss how to deal with payment of water and wastewater employees who might be called in as essential personnel, should the blizzard occur. There assertedly was no response from Local 1044 and a subsequent grievance was

denied by the Township on grounds that Local 1044 should have discussed the matter before the blizzard occurred. As a result, certain unit employees received pay for the blizzard day while water and wastewater employees who were called in did not. While these facts suggest that Local 1044 may have been remiss in not discussing a potential problem when the Township offered to do so, this arguable lack of diligence does not constitute the type of irresponsible representation envisioned by the Courts or the Commission as sufficient to sever one group of employees from others in the historical unit. Moreover, in the instant case, Local 1044 did process a contractual grievance concerning the parties' dispute although it was ultimately unsuccessful.

Divergent Community of Interest

The WWWFT also argues that several job requirements and responsibilities common to water and wastewater employees distinguish them from other unit employees and establish the petitioned-for employees' unique community of interest which supports their request for severance from the broad-based unit. Even if we assume the existence of the asserted differences in certain responsibilities, e.g., requirements for knowledge and application of state and federal regulations, number of days of operation for the water and wastewater department, and the need for certain petitioned-for employees to keep current with licenses and continuing education, and if we assume, without deciding, that a community of interest exists among the employees in the

petitioned-for unit, the WWWFT still has a heavy burden in overcoming policy concerns when seeking to redefine a long-existing negotiations relationship.

In this regard, our State Supreme Court in State v. Professional Association of New Jersey recognized that negotiations units should be established with due regard for community of interest among employees. However, the Court went on to emphasize that our own statute manifests a special concern with regard to the negotiations relationships and interests where the employer is a public sector employer, not a private sector employer. Thus, where the broad-based unit has been in existence for over 15 years, WWWFT's assertion of a special community of interest among themselves is insufficient to overcome statutory objectives emphasizing stability in maintaining established broad-based units.

Accordingly, I find that the WWWFT has not met the criteria as set forth in Jefferson for severance of the petitioned-for employees from the long established broad-based unit. Additionally, I find that even assuming that a community of interest exists among the petitioned-for employees, the petitioned-for unit is not the most appropriate unit.

ORDER

The petition for certification is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Stuart Reichman, Director

DATED: March 8, 2000
Trenton, New Jersey