

D.R. NO. 94-1

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

In the Matter of

TOWNSHIP OF EASTAMPTON,

Public Employer,

-and-

Docket No. RO-93-25

AFSCME COUNCIL 71, AFL-CIO,

Petitioner.

SYNOPSIS

The Director of Representation orders an election among a unit of blue collar and white collar municipal employees. The Director rejects the Township's arguments that the employees generally lack a community of interest; certain statutorily appointed employees should not be eligible for representation; and part-time employees are too casual for unit inclusion. Further, the Director dismisses the Township's unsupported assertions that certain employees are ineligible for unit inclusion on the basis of alleged confidential, managerial, supervisory and/or professional status.

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Appearances:

For the Public Employer,
Dyer & Harrington, attorneys
(John E. Harrington, of counsel)

For the Petitioner,
John Hemmy, Associate Director

DECISION AND DIRECTION OF ELECTION

On August 20, 1992, the American Federation of State, County and Municipal Employees, District Council 71, AFL-CIO filed a Petition for Certification with the Public Employment Relations Commission. Council 71 seeks to represent a unit of blue collar employees and white collar employees employed by the Township of Eastampton.

The Township objects to the petitioned-for unit. At an investigatory conference conducted by a Commission staff agent, the Township provided a list of 23 employees it believed might be part of the proposed negotiations unit. The Township asserts that all

but four of the employees are ineligible for representation in the proposed unit.^{1/}

The Township contends that (1) the employees in the proposed unit generally lack a community of interest with one another; (2) certain employees are statutory appointees and therefore, should not be eligible for representation; (3) the heads of each municipal department are confidential and managerial; (4) professional employees should be excluded from the unit; (5) some employees are supervisors; and (6) part-time employees are too casual for unit inclusion.

AFSCME agrees that the Township manager and the Township clerk are managerial and confidential employees respectively, and should be excluded from the unit. It asserts that the remaining 21 employees comprise an appropriate unit.

The Commission is charged with resolving questions concerning representation and determining the appropriate unit. N.J.S.A. 34:13A-6. N.J.S.A. 34:13A-5.3 requires that negotiations units be defined "with due regard for the community of interest among the employees concerned." The Township asserts that there is no community of interest among the petitioned-for employees.

^{1/} After the conference, the parties engaged in a series of attempts to resolve the matter through a recognition agreement. However, we were advised that the parties were unable to come to an agreement on a unit recognition acceptable to both parties. While the Township took certain positions in settlement discussions, since the parties' efforts did not produce a full resolution of this matter, we assume the Township has returned to its original position on the proposed unit.

AFSCME has proposed a broad-based unit of all non-supervisory, blue collar and white collar municipal employees. The Commission has frequently found such unit structures appropriate. See, for example, Commercial Tp., D.R. No. 91-9, 16 NJPER 511 (¶21223 1990); Winslow Tp., D.R. No. 87-24, 13 NJPER 208 (¶18087 1987); Borough of Clayton, D.R. No. 89-26, 15 NJPER 223 (¶20093 1989); and Point Pleasant Beach, D.R. No. 87-4, 12 NJPER 657 (¶17247 1986).

Further, the Commission has long favored broad-based units, organized along generic lines rather than occupational or departmental lines. The Courts have endorsed the concept of broad-based units. State of New Jersey and Professional Association of New Jersey, 64 N.J. 231 (1974).

The petitioned-for unit is a small group of municipal employees, working both in and out of the municipal complex. All of the employees ultimately report to the Township Manager, who reports to the Mayor and Council. Their salaries, benefits, hours, and other working conditions are all controlled by the Township administration. Were I to find that these employees lack a community of interest among themselves, the result would be to deprive them of their statutory right to representation. This result is not consistent with the purposes of the Act, which include affording representation rights to all employees who are entitled to it under the law. Therefore, I find that the proposed unit of all blue collar employees and white collar employees is appropriate.

The Township also contends that certain employees -- the chief finance officer, treasurer, tax collector, tax assessor, and construction code official -- are statutory officers and therefore should not be eligible for representation. It argues that the Township has only limited control over these employees' duties, which are set by statute. Employees appointed pursuant to statute are not excluded from representation rights merely because of their statutory appointment. A statute or regulation will preempt employee rights guaranteed by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. only when it sets terms and conditions of employment expressly, specifically and comprehensively. See State of New Jersey v. State Supervisory Employees Ass'n., 78 N.J. 54, 80 (1978) and N.J. College Locals v. State Board of Higher Education, 91 N.J. 18, 30 (1982). The fact that certain employees' duties may be set by statute does not make them ineligible for representation. See Bergen Cty. Util. Auth., D.R. No. 91-20, 17 NJPER 130 (¶22052 1991); and Borough of Leonia, D.R. No. 86-24, modified P.E.R.C. No. 86-143, 12 NJPER 523 (¶17195 1986). Moreover, the assignment of work duties are generally not subject to negotiation.^{2/}

^{2/} See Ramapo-Indian Hills Ed. Ass'n. v. Ramapo-Indian Hills Reg. H.S. Dist. Bd. of Ed., 276 N.J. Super 35 (App. Div. 1980), in which the court held that management has the right to unilaterally create a new position and establish the employees' duties.

The Township also seeks to exclude professional employees from the proposed unit. The Act contains no prohibition upon the inclusion of professional employees in units with non-professional employees. Rather, it requires only that the Commission afford professional employees an option to choose representation in the same negotiations unit as non-professionals. N.J.S.A. 34:13A-5.3 and 6.^{3/}

The Township has identified its treasurer, chief financial officer, construction code official, tax collector, tax assessor, the tax collector's assistant and the tax assessor's assistant as professional employees. Both the treasurer and chief financial officer hold certifications from the New Jersey State Department of Community Affairs. The tax collector also holds a State certification. The Township further contends that the tax assessor is required to have an advanced education. AFSCME takes no position on whether these employees are "professional" as defined by the Commission's Rules. N.J.A.C. 19:10-1.1(21) defines professional employee as:

any employee whose work is predominantly intellectual and varied in character, involves the consistent exercise of discretion and judgment, and requires knowledge of an advanced nature in the field of physical, biological or social science, or in the field of learning.

^{3/} N.J.S.A. 34:13A-6(d) provides that "...no unit shall be appropriate which includes...both professional and non-professional employees unless a majority of such professional employees vote for inclusion in such a unit...." (emphasis added).

The Commission will also consider whether the work is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time...The term shall include, but not be limited to, attorneys, physicians, nurses, engineers, architects, teachers and the various types of physical, chemical and biological scientists.

The Township has not submitted any evidence to support the conclusion that the titles should be classified as professional employees under the Act. A State certification or license is not necessarily indicative of professional status. Additionally, even if these employees are required, as condition of their employment to have some advanced education, their specialized knowledge does not appear to be in the fields contemplated by the Commission's Rule definition.

Based upon the information supplied, and applying our definition of professional employee as cited above, I find that none of these employees are professional employees. Accordingly, I see no reason to exclude them from the unit or require a professional option ballot for them.

The Township further asserts that its department heads--the treasurer, chief financial officer, tax assessor, tax collector, court administrator, and the construction code official--and the assistant tax collector and assistant tax assessor are managerial executives and confidential employees under the Act.

N.J.S.A. 34:13A-3(f) defines managerial executives as those employees of a public employer "...who formulate management policies

and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices..." Managerial executives do not have the right to form, join or assist an employee organization. N.J.S.A. 34:13A-5.3

In Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980), the Commission adopted a standard for determining whether a person formulates policy or directs its effectuation (and therefore, is a managerial executive). There, the Commission said,

Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes. Whether or not an employee possess this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. 6 NJPER at 508-509.

The Commission narrowly construes the term "managerial executive" and claims of managerial status are reviewed on a case-by-case basis. Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977).

In Tp. of Ringwood, D.R. No. 93-19, 19 NJPER 196 (¶24093 1993), I found that that borough's chief financial officer/treasurer was neither a managerial executive nor a confidential employee within the meaning of the Act. There, I found that the statutes reciting the chief financial officer's duties alone do not support a finding that the employee exercises the scope of authority or independence required by the Act to support a finding of managerial

status. The Township here has not submitted any facts to show that its chief financial officer or treasurer possess the type of broad discretion over Township policies to support a finding of managerial status.

The statutorily mandated responsibilities of the tax collector, tax assessor and the construction official do not qualify any of these titles as managerial executives within the meaning of the Act. In Commercial Tp., I found that the tax collector/assistant treasurer was appropriate for inclusion in the proposed unit. In Borough of Clayton, I determined that the tax collector was not a managerial executive because he was a revenue officer without policy-making authority. In Town of Kearny, P.E.R.C. No. 89-55, 15 NJPER 10 (¶20002 1988), the Commission found that the tax assessor was not a managerial executive because he had no policy-making authority and he was not involved in the effectuation of policy objectives. In Tp. of Clark, P.E.R.C. No. 85-105, 11 NJPER 283 (¶16104 1985), the Commission found that a construction official was not a managerial executive because the legislatively-mandated objectives of the construction code preempt the construction official from formulating policy or exercising significant discretion. The Township here has not submitted evidence that the department heads formulate policy which broadly affects the employer's mission. Accordingly, I find that these department heads are not managerial executives under the Act.

I also conclude that the court administrator is not a managerial executive. Exercising limited discretion in carrying out the directives of the municipal judge is not an exercise of managerial authority.

Additionally, the Township has not presented facts which would show that any of the department heads are confidential employees under the Act. N.J.S.A. 34:13A-3(g) defines confidential employees as those employees of a public employer "...whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiations unit incompatible with their official duties."

The term "confidential employee" has also been narrowly construed by the Commission. Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339 (¶19128 1988). In State of New Jersey, the Commission explained its approach in determining whether an employee is confidential:

We scrutinize the facts of each case to find for whom each employee works, what he does, and what he knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the collective negotiations process if the employee was included in a negotiating unit. 11 NJPER at 510.

A finding of confidential status requires a case-by-case examination of each employee's knowledge of information which would compromise the employer's position in the collective negotiations process. River Dell Reg. Bd. of Ed., P.E.R.C. No. 84-95, 10 NJPER

148 (¶15073 1984), affm'g D.R. No. 83-21, 9 NJPER 180 (¶14084 1983); and Parsippany-Troy Hills Bd. of Ed., D.R. No. 80-35, 6 NJPER 276 (¶11131 1980).

The Township has not submitted any facts to support its argument that the department heads are confidential employees. It has not demonstrated that any of its department heads have any advisory functions to the Borough's negotiations team which would give them pertinent, strategically useful knowledge of the Borough's collective negotiations strategies before they are known to the union.^{4/} Accordingly, I find that the department heads -- the treasurer, chief financial officer, tax assessor, tax collector, court administrator and the construction code official -- are neither confidential employees nor managerial executives, and are appropriate for inclusion in the proposed unit. Further, since I have determined that the department heads are not confidential or managerial, there is little basis for concluding that the assistant tax collector or assistant tax assessor are managerial or confidential.

The Township asserts that the Township manager's secretaries (Kelly Lewis and Sharon Poinsett), as well as the Planning/Zoning Board secretary (Traci Mackler) and the land use coordinator (Cathy Zulker) are confidential employees. While the

^{4/} Cf. Town of Kearny, where the Commission found that the Town's treasurer had knowledge of the Town's negotiations strategies before they were public and hence found her to be confidential.

Township manager appears to be the key managerial figure and the likely liason between the governing body and any union representing the Township's employees, the fact that Lewis and Poinsett are assigned to perform duties such as answering calls, typing and filing for the manager is not sufficient, standing alone, to establish confidential status for either of them. The Township has submitted no information that suggests that the performance of their duties would give them specific, advanced knowledge of the Township's position on any labor-related issues in the negotiations or contract administration processes. Additionally, neither the Planning/Zoning Board secretary nor the land use coordinator appear to have duties which would give them access to confidential information concerning the Township's labor relations strategies. Based upon what has been placed before me, I find that these four positions are not confidential.

The Township further argues that the public works foreman (Richard Parks) is a supervisor and should be excluded from the unit. The Commission has determined that, under the Act, a supervisory employee is one having the authority to hire, discharge, discipline or to effectively recommend any of the foregoing. Cherry Hill Dept. of Public Works, P.E.R.C. No. 30 (1970). For a determination of supervisory status, there must also be evidence that such supervisory authority is regularly excercised. Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358 (1976). There is no evidence that Parks, as foreman, has regularly excercised

authority to hire, discharge or discipline. Although the Township asserts that he was involved with interviewing and recommending a candidate for a public works position, there is no indication that his recommendation was acted upon without independent review of the Township Administrator or Township Council. Further, alleged supervisory authority must be exercised with some regularity. Mere possession of such authority is insufficient to sustain a claim of supervisory status. Hackensack Bd. of Ed., P.E.R.C. No. 85-59, 11 NJPER 21 (¶16010 1984). Accordingly, I find that the foreman is not a supervisor within the meaning of the Act and he will be included in the proposed unit.

Finally, the Township asserts that the three sub-code officials are not sufficiently regularly employed to have a community of interest with other employees. It submits that the fire sub-code official (Tom Layou), the plumbing sub-code official (Joseph Rubin) and the electrical sub-code official (Robert Tassone) each work approximately 10 hours per week. In deciding whether to place part-time employees in a unit with "regular" employees, we focus on whether their employment demonstrates a fair degree of regularity and continuity, as opposed to those casual employees who perform an occasional job for a temporary purpose or are hired for a special engagement. See Clearview Reg. Dist Bd. of Ed., D.R. No. 76-24, 2 NJPER 63 (1976). Where a part-time employee's work hours are less than one-sixth of the hours of regular full-time employees, the community of interest between the part-time employee and the

rest of the unit may be so slight as to warrant exclusion. See Mt. Olive Bd. of Ed., P.E.R.C. No. 82-66, 8 NJPER 102 (¶13141 1982). Part-time employees regularly working an average of 10 hours per week are eligible for inclusion in the unit. Tp. of North Brunswick, D.R. No. 85-16, 11 NJPER 155 (¶16068 1985). Accordingly, the subcode officials will be included in the petitioned-for unit.

Based upon all of the foregoing, I find that the petitioned-for unit is appropriate for collective negotiations and I direct that an election be conducted among the employees in the unit, as follows:

Included: All white collar employees and blue collar employees employed by the Township of Eastampton, including clerical employees, laborers, administrative employees, tax assessor, tax collector, chief financial officer, treasurer, construction code official, court administrator, assistant tax assessor, assistant tax collector, planning/zoning secretary, secretaries to the Township Manager, and public works foreman

Excluded: All managerial executives, supervisors within the meaning of the Act, professional employees, craft employees, police employees, confidential employees, Township Manager and the Township Clerk.

The employees in the unit described above shall vote on whether they wish to be represented for purposes of collective negotiations by AFSCME Council 71, AFL-CIO.

The election shall be conducted no later than thirty (30) days from the date of this decision. Those eligible to vote must have been employed during the payroll period immediately preceding the date below, including employees who did not work during that

period because they were out ill, on vacation or temporarily laid off, including those in the military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Pursuant to N.J.A.C. 19:11-9.6, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the names of all eligible voters in the units, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by us no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously provided to AFSCME Council 71 with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

The exclusive representative, if any, shall be determined by a majority of the valid votes cast in the election. The election shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Edmund G. Gerber, Director

DATED: July 2, 1993
Trenton, New Jersey