

D.R. NO. 2005-4

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

In the Matters of

EGG HARBOR TOWNSHIP,

Public Employer/Petitioner,

-and-

Docket No. CU-2004-001

CWA LOCAL 1032,

Employee Representative,

EGG HARBOR TOWNSHIP,

Public Employer/Petitioner,

-and-

Docket No. CU-2004-002

IBEW LOCAL 210,

Employee Representative,

SYNOPSIS

The Director of Representation dismisses in part and grants in part a petition for clarification of unit filed by Egg Harbor Township which sought to clarify certain positions from a rank-and-file negotiations unit represented by IBEW. The Director found that the police records supervisor, communications supervisor, two (2) deputy court clerks and four (4) public works division managers, are supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., and clarified these positions from the unit. The Director found that the deputy treasurer and deputy tax collector were not supervisors within the meaning of the Act, and thus, their placement in the unit was appropriate.

D.R. NO. 2005-4

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

In the Matters of

EGG HARBOR TOWNSHIP,

Public Employer/Petitioner,

-and-

Docket No. CU-2004-001

CWA LOCAL 1032,

Employee Representative,

EGG HARBOR TOWNSHIP,

Public Employer/Petitioner,

-and-

Docket No. CU-2004-002

IBEW LOCAL 210,

Employee Representative,

Appearances:

For the Public Employer/Petitioner,
Peter J. Miller, Administrator

For the CWA,
Paul Pologruto, Staff Representative

For the IBEW,
Cohen Leder Montalbano & Grossman, LLC
(Bruce Leder, of counsel)

DECISION

On July 8, 2003, the Township of Egg Harbor (Township) filed two inter-related Clarification of Unit Petitions with the Public Employment Relations Commission. Docket No. CU-2004-2, ("the IBEW petition"), seeks to have approximately ten positions

clarified out of a non-supervisory unit represented by IBEW Local 210 (IBEW), and clarified into a supervisors unit represented by CWA Local 210 (CWA). The Township claims that these positions are supervisors within the meaning of the New Jersey Employee-Employer Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), and that they supervise other IBEW unit employees, thus creating a conflict of interest. The Township further asserts that these positions more appropriately belong in CWA's supervisors unit.

In Docket No. CU-2004-1 ("the CWA petition"), the Township seeks to clarify CWA's supervisors unit to exclude those positions which would supervise the positions added as a result of the IBEW petition, Docket No. CU-2004-2. It seeks to have the court administrator, director of public works, and tax collector removed from CWA's unit because they and their subordinates will be in a conflict of interest.^{1/} Finally, the Township argues that the director of public works is a confidential employee and should be excluded from any negotiations unit.

IBEW opposes the "IBEW petition" and removal of titles from its unit. It claims there has been a longstanding stable negotiations relationship with the Township, the unit has always included the titles at issue, and the Township has not produced sufficient justification for their removal from the unit. CWA

^{1/} In Wilton v. West Orange Board of Ed., 57 N.J. 404 (1971), the Court found an impermissible conflict of interest between Wilton and other unit supervisors.

opposes the "CWA petition" and argues that this longstanding unit should not be disturbed and asserts that there are no changes in circumstances which warrant removal of the court administrator, director of public works or tax collector from its unit. It also argues that the public works director is not a confidential employee.

We have conducted an administrative investigation into the petitions. N.J.A.C. 19:11-2.2 and 2.6. The parties attended an investigatory conference and submitted statements of position on July 30, 2003, August 1, 2003, August 12, 2003, April 13, 2004 and June 7, 2004. In correspondence dated September 2, 2004, I advised all parties that I was inclined to dismiss the CWA petition and to clarify the IBEW unit in part. I provided the parties with an opportunity to respond. None of the parties filed a response. Based on the administrative investigation, I make the following:

Findings of Fact

The Township and IBEW have a current collective negotiations agreement, signed by the parties in December 2002 and effective through December 31, 2005, which defines the unit:

Included: all full-time and regular part-time employees of the Township employed in the following classifications: clerks, police records' supervisors, communications officers, laborers, truck drivers, heavy equipment operators, deputy court clerks, deputy tax collector, deputy treasurer, assistant to the director of recreation, division managers, zoning officer, maintenance workers, mechanics, communications

supervisor, grounds foreman, and all other white collar employees employed by the Township.

Excluded: all department heads, managerial executives, supervisors, confidential employees, craft, professional and police employees within the meaning of the Act.

The IBEW unit was certified on November 27, 1985. At that time there were approximately 40 unit members; today there are approximately 100. The Township seeks to exclude: the communications supervisor, deputy court clerks, deputy treasurer, division managers, deputy tax collector and police records supervisor.

The Township and CWA also have a current collective negotiations agreement, effective through December 31, 2006, which includes: director of communications, fire sub-code official, director of board of planning & adjustment, director of recreation, director of licensing and zoning, construction official, welfare director, court clerk, tax collector, tax assessor, and director of public works. Excluded are non-supervisory employees. CWA's negotiations unit was certified on November 1, 1988.

Communications Supervisor

The communications supervisor assigns work to and reviews the performance of 13 dispatchers in the police department. She is responsible for guiding, training, observing and documenting the dispatchers' work performance on a continuous basis. She

also prepares and signs the dispatchers' annual performance evaluations. These are also signed by the police chief or communications director but no evidence presented suggests that the director of communications or police chief independently reviews the performance of the dispatchers. If an employee's performance is unsatisfactory, she meets with him/her individually. The communications supervisor also has the authority to impose oral and written reprimands without approval from a higher level supervisor and she has exercised this authority. Suspensions are sometimes signed by the communications supervisor or chief. The communications supervisor recommends the length of suspensions. She has also interviewed applicants for dispatcher positions and made recommendations to the police captain and chief, and the Township as adopted these recommendations "nine times out of ten." The mayor and Township committee have final approval authority of all hiring. I find that this employee has the authority to effectively recommend the hiring and discipline of dispatchers, and is, therefore, a supervisor within the meaning of the Act.

Deputy Court Clerks

There are two deputy court clerks who oversee the municipal court's clerical staff. The clerks are in IBEW's unit. Both deputies report to the court clerk who is in CWA's supervisory negotiations unit. The deputy clerks handle criminal matters and

traffic court matters, such as docketing, maintaining the agenda, receiving and logging payments, preparing and maintaining records and documents necessary for case disposition, and preparing, maintaining and processing records concerning motor vehicle points. They give assignments, and train and correct the performance of subordinate court clerks. The deputy clerk for criminal matters has two subordinate clerks; the traffic court deputy clerk has two full-time and one part-time subordinate clerk-typists. The deputy clerks observe these employees' work, prepare performance evaluations and, when necessary, take corrective disciplinary action. The deputy clerks have the authority to impose oral and written reprimands without higher level approval. For greater discipline, the court clerk would rely on the deputy court clerks' recommendations.

On September 3, 2003, the two deputy court clerks sent a letter to the Township's administrator, stating,

1. As supervisors of subordinate clerks in the court, we are responsible to give job assignments which have on occasion been ignored or refused by those employees in the same IBEW union.
2. We are responsible for performance evaluations on the subordinate clerks, although we are in the same union.
3. It is our responsibility to correct our employees when errors are made, as well as take disciplinary corrective action when necessary.
4. Recently, as you are aware, four employees filed a grievance against the Judge, Court Administrator, and us.

For the above reasons, which cause us to be ineffective as supervisors, we respectfully request to be removed from the IBEW union and moved into the CWA union. (Memo September 3, 2003 from Deputy Court Clerks Curlott and Collins).

I infer from the above that the deputy clerks have found it necessary to impose minor forms of discipline on the clerks in the municipal court, and that their subordinates have refused to acknowledge their authority.

Deputy Treasurer

The deputy treasurer reports to the Township's treasurer/chief financial officer (CFO), and supervises three clerks on a daily basis. The CFO has other duties and also assigns and oversees the work of three other employees. The deputy has evaluated employees and made promotional recommendations. While the deputy treasurer has the authority to impose oral and written reprimands, she has in fact, not imposed any discipline.

Public Works Division Managers

There are four division managers in the public works division. At the time the unit was formed, there were 20 public works unit members and now there are 50, divided into 4 divisions. The equipment/maintenance division manager has 4 subordinates; the solid waste division manager has 18 subordinates; the buildings and grounds division manager has 10 subordinates, and the roads division manager has 10 subordinates. Division managers and their subordinates are included in IBEW's non-supervisory unit. All division managers have the authority to issue oral and written reprimands without prior approval and all

have done so. Discipline that includes suspension without pay or more progressive discipline is first reviewed by the public works director before it is presented to the employee by the division manager. Annually, division managers prepare performance evaluations of their subordinates based upon their daily observations of these employees, and present them to the employees. The public works director has had to counsel and orally reprimand the division managers because of their reluctance to impose discipline on subordinates.

Deputy Tax Collector

Under the direction of the tax collector, the deputy tax collector supervises the daily operations of the tax office, including assigning work to three clerks who are also in IBEW's unit. He has the authority to issue oral and written reprimands but has been reluctant to do so. Annually, the deputy tax collector prepares performance evaluations of the clerks based upon his observations of their work.

Police Records Supervisor

The police records supervisor directs the work of nine clerical employees. These clerical employees and the supervisor are included in IBEW's unit. The supervisor assigns work, corrects and trains the work of these clerical employees and prepares their annual performance evaluations. She observes, documents, trains and corrects the work of the police records

clerical employees. The police records supervisor has the authority to impose oral and written reprimands without prior approval, and has imposed these forms of discipline. For more serious discipline, prior approval is needed.

Director of Public Works

The director meets with the mayor and administrator to discuss personnel issues and future planning issues, but these duties do not appear to involve responsibilities with the collective negotiations process.

ANALYSIS

The threshold issue is whether the unit clarification petitions are appropriate. Both CWA and IBEW argue that the Township's longstanding acceptance of the units' composition make these petitions inappropriate. However, where there have been changes in job responsibilities over time, or the employer raises a statutory issue such as the inclusion of supervisors in non-supervisory units, a petition seeking to exclude supervisors from a non-supervisory unit is always appropriate. Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977). To the extent that the IBEW petition, Docket No. CU-2004-2, seeks to exclude supervisors, I find that it is appropriate. However, to the extent it seeks to add historically excluded positions into CWA's unit, I find that it is inappropriate.

Clearview set forth the circumstances under which a unit clarification petition is appropriate. There, the Director stated:

Clarification of unit petitions are designed to resolve questions concerning the exact composition of an existing unit of employees for which the exclusive representative has already been selected. . . . Occasionally a **change in circumstances** has occurred, a new title may have been created . . . [or] the employer may have created a new operation or opened a new facility [which would make] a clarification of unit proceeding appropriate. . . . Normally, it is inappropriate to utilize a clarification of unit petition to enlarge or diminish the scope of the negotiations unit for reasons other than the above. 3 NJPER at 251. (Emphasis added)

Applying these standards, I find that the IBEW petition (Docket No CU-2004-2), which addresses the combination of supervisors with non-supervisors in the same negotiations unit raises a statutory issue and is appropriate. Where the petition is filed during the term of an existing contract, we will remove the supervisors from the unit when the current contract expires, which is January 1, 2006. Clearview. Raising a statutory issue is an appropriate use of a clarification of unit petition. There are no time restrictions on filing clarification of unit petitions. N.J.A.C. 19:11-1.5 and 2.8. An employer can never permanently waive the right to assert that employees are statutorily prohibited from inclusion in a negotiations unit. See County of Warren, P.E.R.C. No. 89-66, 15 NJPER 30 (¶20013

1988) and Bor. Of Madison, D.R. No. 99-1, 24 NJPER 441 (¶29203 1998).

The aspect of the IBEW petition which seeks to add titles to CWA's unit is an inappropriate use of a clarification petition, because it seeks to enlarge the scope of CWA's unit. Clearview.

N.J.S.A. 34:13A-6(d) provides:

Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, . . . except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership. . . .

The Commission has defined a statutory supervisor as one having the authority to hire, discharge, discipline or effectively recommend the same. We review the unique facts of each case in determining supervisory status. See City of Margate, P.E.R.C. No. 87-146, 13 NJPER 500 (¶18184 1987) (finding supervisory the chief of lifeguards who had enforced tardiness/attendance rules by sending home late lifeguards); Westfield Bd of Ed., P.E.R.C. No. 88-3 , 13 NJPER 635 (¶18237 1987) (positions not supervisory where they had not effectively recommended the discipline, discharge or hiring of other employees); Cherry Hill Tp. Dept. of Public Works, P.E.R.C. No. 30, NJPER Supp. 114 (1970) ("Cherry Hill Tp."). A determination of supervisory status requires more

than an assertion that an employee has the power to hire, discharge, discipline or effectively recommend these actions. An indication that the power claimed to be possessed is actually exercised is needed. Cherry Hill Tp.; Somerset Cty. Guidance Center, D.R. No. 77-4, 2 NJPER 358, 360 (1976) ("Somerset Cty."). Here, the communications supervisor, deputy court clerks, police records supervisor and public works division managers possess the authority to independently impose oral and written reprimands and to recommend periods of suspension. The evidence indicates that they have each exercised this authority over IBEW unit employees. The communications supervisor has made effective recommendations with respect to hiring. Thus, I conclude that these petitioned-for employees are supervisors within the meaning of the Act, and I clarify them out of IBEW's non-supervisory unit.

Deputy Tax Collector and Deputy Treasurer

The record here shows that though the deputy tax collector and deputy treasurer possess the authority to impose minor forms of discipline, they have never exercised that authority. Assigning work and performance evaluations do not satisfy the statutory definition of supervisor. I find that they are not supervisors within the meaning of the Act. As the above case law mandates, some evidence that the authority is actually exercised is necessary to find supervisory status. Cherry Hill Tp.; Somerset Cty. See also, Milltown Bd. Of Ed., D.R. No. 2001-7, 27

NJPER 157 (¶32054 2001); Delran Sewer Auth., D.R. No. 95-28, 21 NJPER 185 (¶26119 1995).

Based upon the above, I approve in part and dismiss in part Docket No. CU-2004-2, to clarify IBEW's unit to exclude: the police records supervisor, communications supervisor, two (2) deputy court clerks and four (4) public works division managers. These titles have imposed discipline as part of their assigned responsibilities. However, I dismiss that part of the petition Docket No. CU-2004-2 which seeks to exclude the deputy treasurer and deputy tax collector since no evidence suggests that these positions have imposed discipline on other unit employees. The mere possession of such authority is insufficient to sustain a claim of supervisory status. See Hackensack Bd. of Ed., P.E.R.C. No. 85-59, 11 NJPER 21 (¶16010 1984); Cherry Hill Tp.; Somerset Cty. Moreover, I dismiss that part of the petition which seeks to add titles to another unit because it seeks to enlarge the scope of an existing unit.

The CWA Petition

Finally, I dismiss Docket No. CU-2004-1. To date, there have been no changes to CWA's unit composition and no present conflict of interest exists. I will not speculate about future potential conflicts of interest. An appropriate representation petition can be filed if CWA seeks to add these titles to its unit.

I also find that no alleged facts support the Township's argument that the director of public works is a confidential employee. N.J.S.A. 34:13A-3(g) defines confidential employees as:

employees whose functional responsibilities or knowledge in connection with issues involved in the collective negotiations process would make their membership in any appropriate negotiations unit incompatible with their official duties.

Our policy is to narrowly construe the term confidential employee and carefully scrutinize the facts of each case to determine the employee's involvement in the collective negotiations process.^{2/} In N.J. Turnpike Authority v. AFSCME, Council 73, 150 N.J. 331 (1997), the New Jersey Supreme Court approved the standards articulated in State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985). The Court explained:

The baseline inquiry remains whether an employee's functional responsibilities or knowledge would make their membership in any appropriate negotiating unit incompatible with their official duties. [Turnpike Authority at 358.]

Here, no facts suggest that the director of public works has such knowledge or functional responsibility. Accordingly, I

2/ See Brookdale Community College, D.R. No. 78-20, 4 NJPER 32 (¶4018 1977); Cliffside Park Bd. of Ed., P.E.R.C. 88-108, 14 NJPER 339 (¶19128 (1988)).

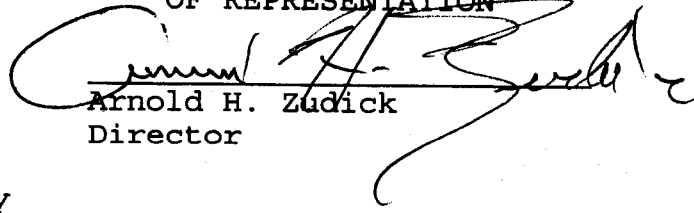
conclude that he is not a confidential employee within the meaning of the Act.

Accordingly, based upon the above, I clarify the IBEW's unit to exclude the police records supervisor, communications supervisor, two (2) deputy court clerks and four (4) public works division managers, and to dismiss the remainder of Docket No. CU-2004-2 and all of Docket No. CU-2004-1.

ORDER

Effective December 31, 2005,^{3/} the IBEW's unit is clarified to exclude the police records supervisor, communications supervisor, two (2) deputy court clerks and four (4) public works division managers. The remainder of Docket No. CU-2004-2 and all of Docket No. CU-2004-1 are dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Arnold H. Zudick
Director

DATED: September 24, 2004
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by October 7, 2004.

^{3/} Where the petition to remove superiors is filed during the period of an existing collective negotiations agreement, the decision to remove them takes effect upon the expiration of the contract. Clearview.