

D.R. No. 2006-3

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

In the Matter of

TOWNSHIP OF BORDENTOWN,

Public Employer/Petitioner,

-and-

Docket No. CU-2005-018

CWA LOCAL 1034,

Respondent.

**SYNOPSIS**

The Director of Representation dismisses a clarification of unit petition filed by Bordentown Township seeking to clarify a non-supervisory negotiations unit to exclude the deputy court administrator (DCA) position. The Communications Workers of America, the majority representative of the DCA, opposes the petition. Between the filing of the petition and submission of all position statements, the position became vacant. Relying on the Commission's longstanding policy and caselaw to refrain from deciding the negotiations unit status of vacant positions, the Director declines to decide the proper unit placement of the position and dismisses the petition.

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Appearances:

For the Public Employer/Petitioner,  
Hartsough, Kenny & Chase, attorneys  
(Gregory Sullivan, of counsel)

For the Respondent,  
Szaferman, Lakind, Blumstein, Blader, Lehmann  
& Goldshore, attorneys  
(David B. Beckett, of counsel)

**DECISION**

On December 27, 2004, Bordentown Township (Township) filed a clarification of unit petition with the Public Employment Relations Commission (Commission) seeking to have the deputy court administrator (DCA) employed by the Township removed from the negotiations unit represented by the Communications Workers of America, Local 1034, AFL-CIO (CWA). The Township asserts that the DCA's duties place her in a potential conflict of interest with other unit employees. CWA opposes the petition arguing that the DCA's duties have not changed, and that she is not a supervisor within the meaning of the New Jersey Employer-Employee

Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), or in a conflict with other unit employees. CWA also argues that the petition is untimely and should be dismissed.

We have conducted an investigation into the petition. N.J.A.C. 19:11-2.2 and 2.6. The parties submitted position statements.<sup>1/</sup> On April 27, 2005, I wrote to the parties informing them of my findings and intended decision. Upon receiving an extension, on May 31, 2005, the Borough responded to the notice with an affidavit, which included new facts. CWA requested and, with the agreement of the Borough, was granted several extensions to respond to the new facts, and filed its response on August 3, 2005. Additional information was sought and received by August 5, 2005. Based on our investigation, these facts appear:

#### **FINDINGS OF FACT**

The Township and CWA are parties to a series of collective negotiations agreements, the most recent of which was effective from January 1, 2002 through December 31, 2004, covering non-supervisory white-collar employees. The unit was certified on October 17, 1994. The DCA has been included in CWA's unit since its inception. The unit also includes all full-time and regular part-time white-collar employees and school crossing guards.

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<sup>1/</sup> CWA requested and, with the Township's agreement, received two extensions to file a position statement, which was received on March 21, 2005.

Excluded are employees in other negotiations units, professional employees, secretary to the Township administrator, confidential employees, police officers, firefighters, craft employees, supervisors, and managerial executives within the meaning of the Act. The municipal court administrator (MCA), the position which is the immediate supervisor of the DCA, has never been included in CWA's unit.

The Township is a civil service municipality. Under the New Jersey State Department of Personnel job description, the deputy court administrator's duties include assisting the court administrator in implementing procedures for the efficient operation of the municipal court, assigning work to court personnel, instructing court staff, scheduling or preparing the court calendar, operating recording machines, accepting complaints, and taking oaths in accordance with court rules. Robyn Modugno held the position of deputy court administrator from November 25, 2002 until June 14, 2005. Between 2002 and 2005, Modugno reported directly to the MCA who was absent due to illness for extended intermittent periods of time. The MCA retired in May 2005. On June 14, 2005, Modugno was provisionally promoted to municipal court administrator(MCA), and holds that title in an acting capacity. As acting MCA, Modugno is not included in CWA's unit. Modugno's permanent civil service title technically is still deputy court administrator, but presently,

she is not performing the DCA duties. Thus, the current staffing of the municipal court consists of the municipal judge, the acting municipal court administrator, and two court clerks. The Township asserts that the DCA position is not vacant because Modugno's permanent title is DCA. However, in view of her provisional promotion, and that she is performing the higher level duties of the MCA as she did for many periods over the past three years when the former MCA was absent due to illness, and because Modugno is being paid as an MCA, not as a DCA, and the Township refers to her as the Acting MCA and she is not currently included in CWA's unit, the DCA position is ostensibly vacant. The Township asserts that the DCA position "would be filled as soon as possible."

On January 17, 2005 and May 31, 2005, Municipal Court Judge Martin A. Vanhise, Jr., submitted a certified statement in which he stated that the DCA has the authority to supervise other employees and has performed such duties. CWA disputes these statements and argues that such performance was during a period when Modugno was acting as MCA in the extended absence of the MCA.

#### **ANALYSIS**

A clarification of unit petition is used to resolve questions concerning the composition of an existing collective negotiations unit. Such a petition is appropriate during the

term of an existing collective negotiations agreement when circumstances change the job duties or functions of a title, for example, as a result of a reorganization. See Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 251 (1977). However, the Commission's policy is not to determine the unit status of vacant positions. Determinations about the unit eligibility of positions turn on actual duties and reporting relationships. For this reason, such decisions must be based on the most recent and accurate information about such factors as actual duties performed by an employee(s) serving in the position, reporting relationships, supervisory responsibilities, and degree of independent authority.

Unit clarification petitions result in determinations which define employee rights to collective representation and the other protections of the Act. Such determinations should not be based on speculation, solely on a written job description, or the manner in which an employee formerly performed the job. For example, it is possible that if the DCA position were filled with a new employee, the performance of duties by that person would be similar to the duties performed at the time the Township consented to include that title in CWA's non-supervisory unit about ten years ago.

While Modugno technically may not have been removed from the DCA position, the Township has acted as if she has been promoted

and removed from that title. Thus, for purposes of this decision, I consider the position vacant. The policy of refraining from issuing decisions on vacant positions avoids the inappropriate consequences of guesswork. We have consistently applied this policy. See, N.J. Tpk. Auth. and PERC and AFSCME, P.E.R.C. No. 94-24, 19 NJPER 461 (¶24218 1993), rev'd and rem'd 289 N.J. Super. 23 (App. Div. 1996), aff'd as mod. 150 N.J. 331 (1997) (Commission approves Hearing Examiner's recommendation declining to include vacant supervising engineer and assistant purchasing director positions in new unit where last incumbents retired); Trenton Bd. of Ed., D.R. No. 2001-009, 27 NJPER 197 (¶32066 2001) (Director dismisses petition seeking to include newly created vacant paralegal assistant position into clerical unit); City of Newark, D.R. No. 2000-11, 26 NJPER 234 (¶31094 2000) (Director declines to determine status of several vacant positions in city's law department); Ridgefield Park Bd. of Ed., D.R. No. 98-12, 24 NJPER 89 (¶29048 1997) (Director declines to decide whether the high school social studies department chairperson is a supervisor because the position was abolished and remains vacant); and Town of Secaucus, D.R. No. 95-25, 21 NJPER 149 (¶26090 1995) (Director declines to consider status of vacant position, assistant to construction official).

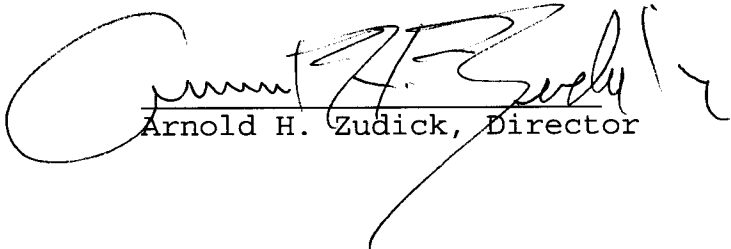
Here, it is undisputed that the Township has not hired anyone to perform the DCA duties. No extraordinary circumstances

exist in this case which warrant an exception to our longstanding policy of refraining from ruling upon the unit status of vacant positions. Accordingly, the unit eligibility of Bordentown Township's deputy court administrator will not now be determined. Should the Township employ someone to perform the duties of this position, either party may file an appropriate unit clarification petition. Accordingly, based on the above findings and analysis, I issue the following:

**ORDER**

The Association's petition for certification is dismissed.

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION



Arnold H. Zudick, Director

DATED: September 9, 2005  
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 September 22, 2005.