D.R. No. 2013-4

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

In the Matter of

BOROUGH OF FAIR LAWN,

Public Employer,

-and-

FAIR LAWN 911 OPERATORS ASSOCIATION, IAFF,

Docket No. RO-2011-041

Petitioner,

-and-

WHITE AND BLUE COLLAR EMPLOYEES' ASSOCIATION OF FAIR LAWN,

Intervenor.

SYNOPSIS

The Director of Representation dismisses a petition for certification filed by the Fair Lawn 911 Operators Association, IAFF, seeking certification by authorization cards to represent a unit of 911 operators/dispatchers represented by the White and Blue Collar Employees' Association of Fair Lawn. IAFF challenged, inter alia, the Association's status as majority representative and asserted that the 911 operators/dispatchers lacked a community of interest with non-essential, non-public safety Borough employees. The Director found that the dispatchers were already represented by virtue of a de facto collective negotiations relationship between the Township and the Association. Thus, IAFF's petition appeared to seek severance of these employees from a broad based unit. The Director found that severance was unwarranted pursuant to the high standard set forth in Jefferson Tp. Bd. Of Ed., P.E.R.C. No. 61, NJ. Supp 248 (¶16 1971). Moreover, the Director found the proposed unit to be inappropriately narrow and counter to the Commission's preference for broad-based units.

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Appearances:

For the Public Employer,
Giblin & Giblin, attorneys
(Brian T. Giblin, of counsel)

For the Petitioner,
Keith Kemery, President

For the Intervenor,
Steve Wendowski

DECISION

On December 20, 2010, the Fair Lawn 911 Operators Association, IAFF (IAFF) filed a representation petition for certification by authorization cards of a collective negotiations unit of about nine 911 operators employed by Fair Lawn Borough

(Borough). On December 30, it filed an amended petition seeking certification of the petitioned-for unit by an election.

On January 11, 2011, the Borough wrote to us, consenting to an election and advising that the petitioned-for employees are included in a unit represented by the White and Blue Collar Employees' Association of Fair Lawn (Association). The Borough and the Association signed a collective negotiations agreement extending from January 1, 2006 through December 31, 2009. The recognition provision of the agreement identifies only full-time blue collar employees and white collar employees. Article XII (Holidays) C provides: "The Police Dispatchers, which job designation is covered by this agreement, are permitted to take holidays the actual day of the holiday instead of the date that the Borough celebrates it." Article XIID articulates a policy for "police dispatcher" overtime and compensatory time off.

On January 24, 2011, we issued a letter to the Association inviting it to intervene in the above-captioned matter. On February 1, 2011, the Association's request to intervene was approved.

IAFF asserts that an election should be conducted for several reasons. It contends that the public employer does not oppose the proposed unit; that the Association is not a recognized exclusive representative under N.J.A.C. 19:10.1; that the collective agreement does not include a recognition provision identifying the Association as the negotiations representative

for any Fair Lawn employees; and voluntary recognition was not perfected under N.J.A.C. 19:13-1(b)1, rendering the request to intervene violative of N.J.A.C. 19:11-2.7(b). Finally, the IAFF contends that the 911 operators are essential public employees working twenty four hours per day, seven days a week, and do not share a community of interest with municipal employees who work daytime hours on weekdays.

We have conducted an administrative investigation into this matter to determine the facts. N.J.A.C. 19:1-2.2. On September 4, 2012, I wrote to the parties, advising of my tentative findings and conclusions and inviting responses by the close of business on September 13, 2012. On September 13, the Borough filed a letter concurring with my tentative determination. Also on September 13, hours after the close of business, the IAFF filed a letter requesting an extension of time until September 21 to file a response. No other party received a copy of the request. On September 21, IAFF filed a response.

The disposition of the petition is properly based upon our administrative investigation. No substantial material facts in dispute require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. Based upon the administrative investigation, I find the following facts.

The Borough of Fair Lawn and the White and Blue Collar Employees' Association signed a collective negotiations agreement extending from January 1, 2006 through December 31, 2009. The

agreement covers certain full-time white collar and blue collar employees, and sets forth provisions addressing, among other things, salary, health benefits, leave time, employee and Borough rights, and a four step grievance procedure culminating in binding arbitration. Article XII of the agreement specifically identifies "police dispatchers" as ". . . covered by this agreement." The agreement was signed by representatives of the Borough and the Association.

On February 1, 2011, Steven Wendowski, a Borough employee, sought to intervene in the petition on behalf of the White and Blue Collar Employees' Association. Attached to the request was a copy of the collective negotiations agreement, an Association membership list of 140 employees, including 12 public safety employees, and a Borough table of organization. On the same date, we issued a letter approving the request to intervene. N.J.A.C. 19:11-2.7.

On February 9, 2011, at its general membership meeting, the Association conducted a vote by secret ballot on whether to release the dispatchers for the purpose of enabling their separate representation by IAFF. On February 10, Wendowski wrote to us, advising that the Association had voted not to release the dispatchers from the unit.

IAFF objects that the Association is not a bona fide employee representative because it failed to provide upon request copies of its constitution, by-laws, meeting minutes, table of

organization and election records. IAFF also questions the legitimacy of the meeting at which Association members voted not to disclaim representation of the dispatchers; the authority of Wendowski to intervene in the representation petition on the Association's behalf and the validity of the documents supporting the Association's intervention request. IAFF asserts that other than its representation petition, no facts indicate that the 911 operators/dispatchers belong to or pay dues to any union; no 911 operator/dispatcher has ever been advised that Association "representation" was mandatory; and that no evidence shows that the 911 operators/dispatchers have ever had the opportunity to choose a collective negotiations representative.

In its September 21 submission, IAFF included a November 9, 2009 memorandum from Fair Lawn Police Chief Erik Rose to the Borough Manager, purportedly memorializing an agreement between the Chief and two representatives of the 911 operators/dispatchers concerning double pay for dispatchers on Election Day. IAFF asserts that ". . . the White and Blue Collar Association was not involved in any aspect of these negotiations," and further asserts that the memorandum is evidence that the Association is not the exclusive representative of the 911 operators/dispatchers.

IAFF also wrote that in 2010, the 911 operators/dispatchers, along with the Borough's police officers, were exempted (as essential public safety employees) from furlough days required of

all other employees. Thus, IAFF reiterates, 911 operators/dispatchers lack a community of interest with non-essential, non-public safety Borough employees.

ANALYSIS

N.J.S.A. 34:13A-3(e) defines "representative":

> The term "representative" is not limited to individuals but shall include labor organizations, and individual representatives need not themselves be employed by, and the labor organization serving as representative need not be limited in membership to the employees of, the employer whose employees are represented. This term shall include any organization, agency or person authorized or designated by a public employer, public employee, group of public employees, or public employee association to act on its behalf and represent them.

The Commission has found that employee organizations, acting as representatives, are not required to have specific attributes, i.e., mailing address, stationery, officers or representatives, in order to file representation petitions; organizations are only required to not have illegal structures. City of Camden, P.E.R.C. No. 82-89, 8 NJPER 226, 227, n. 2 (¶13094 1982); Trenton Housing Auth.; Passaic Cty. Youth Ctr., D.R. No. 89-32, 15 NJPER 265 (¶20113 1989). No facts suggest that the Association has an illegal organizational structure. The Commission's policy is to refrain from interfering in an employee organization's internal affairs. See Camden Police Dept., P.E.R.C. No. 82-89, 8 NJPER 226 (¶13094 1982); Passaic Cty. Youth Ctr. See also, Danese v. Ginesi, 280 N.J. Super. 17

(App. Div. 1995); Calabrese v. PBA Loc. 76, 157 N.J. Super. 139 (Law Div. 1978); Barnhart v. United Automobile, 12 N.J. Super. 147 (App. Div. 1951); City of Newark and the Ass'n of Government Attorneys, D.R. No. 2000-11, 26 NJPER 234 (¶31094 2000), review den. P.E.R.C. No. 2000-100, 26 NJPER 289 (¶31116 2000), aff'd 346 N.J. Super. 460 (App. Div. 2002) (Commission declined City's request that it "investigate" whether petitioner was a valid employee organization); Elizabeth Housing Authority, D.R. No. 89-37, 15 NJPER 385 (¶20162 1989) (election directed where incumbent refused to consent to election alleging petitioner was not a valid employee representative within the meaning of the Act; in support of important public policy of affording the widest opportunity to public employees to choose their own representatives); Passaic Cty. Youth Ctr.

IAFF also challenges the Association's status as the majority representative of ". . . any Fair Lawn employees." N.J.A.C. 19:11-3.1 ("Recognition as exclusive representative") provides a mechanism by which a public employer may recognize an employee organization as the exclusive representative of a majority of the employees in an appropriate collective negotiations unit without Commission intervention. N.J.A.C. 19:11-3.1(a). The Commission has observed that although " . . . (p)arties may best ensure the protections of the Act by utilizing [our] certification or recognition procedures to achieve status as the majority representative of a collective

negotiations unit . . . nothing in the Act requires parties to use those procedures." Gloucester Cty., P.E.R.C. No. 2011-69, 37 NJPER 141, 143 (¶42 2011) (accretion of EMTs into existing, County-wide, broad-based unit was appropriate; by virtue of the County and CWA signing the collective negotiations agreement on November 15, 2007 with the EMT title included in the contractual recognition clause, the parties achieved voluntary recognition of the EMTs as members of the County-wide, broad-based unit.)

In Collingswood Board of Ed., P.E.R.C. No. 86-50, 11 NJPER 694 (¶16240 1985), the Commission held that a de facto negotiations relationship arose between a board of education and a principals association, even absent formal recognition or certification, pursuant to N.J.A.C. 19:11-3.1, where the board had engaged in voluntary negotiations with the association over a compensation plan. The Commission found that an employee group:

> . . . could gain de facto status as a majority representative...[in accordance with] the holding of cases under the Labor-Management Relations Act, 29 U.S.C. §141 et seq. ("LMRA") that recognition need not be formal and may be inferred from conduct and circumstances. [Id., 11 NJPER at 696]

See also, Morris, The Developing Labor Law, at 507 (2nd ed. 1983); Employment Co-ordinator, ¶LR-26,604 (RNA); Laclede Cab Co., 236 NLRB 206, 98 LRRM 1426 (1978).

Although we do not know the evolution of the relationship between the Borough and the Association, they have a de facto

collective negotiations relationship, evidenced by a mutually-signed written agreement covering full-time white collar employees and blue collar employees for a finite term, setting forth terms and conditions of employment, i.e., salary, health benefits, leave time, employee and borough rights, and a four step grievance procedure. Our Act covers "homegrown" employee organizations whose procedures may not seem as established or formalized as other organizations, so long as a negotiations relationship in fact exists. Collingswood.

The agreement provides, ". . . substantial terms and conditions of employment to the degree necessary to stabilize the parties' bargaining relationship" and would suffice to bar an untimely representation petition under N.J.A.C. 19:11-2.8c. See Mercer Cty. Supt. of Elections, D.R. No. 82-40, 8 NJPER 157 (¶13069 1982) (contract bar attached where parties executed successor agreement containing new salary provisions, grievance procedure, provision for dues deductions, a duration clause, and providing for continuation of all other terms of expired agreement); Middlesex Cty., P.E.R.C. No. 81-29, 6 NJPER 439 (¶11224 1980); In re City of Jersey City, E.D. No. 79 (1975); see also Appalachian Shale Products, 121 NLRB 1160, 42 LRRM 1506 (1958); contrast Egg Harbor City, D.R. No 91-2, 16 NJPER 424 (¶21178 1991) (letter memorializing parties' tentative agreement, but requiring formal ratification by both parties, did not constitute a final written agreement barring representation

petition); City of Pleasantville, D.R. 86-10, 12 NJPER 70 (¶17027 1986) (no contract bar where both parties did not formally ratify and sign tentative agreement prior to filing of representation petition by rival union); and City of Newark, D.R. No. 84-23, 10 NJPER 369 (¶15172 1984), req. for rev. denied, P.E.R.C. 85-1, 10 NJPER 456 (¶15206 1985) (memorandum without agreement concerning non-economic items lacked sufficient substantial terms and conditions of employment to provide stable labor relationship between parties and did not constitute contract bar).

We infer that the petitioned-for title, "911 operator" is synonymous with "police dispatchers," as set forth in the 2006-2009 collective negotiations agreement. Our inference is confirmed by the Association's and IAFF's conduct in the processing of this petition and by the Borough's representations. We believe that the IAFF's petition seeks to "sever" the 911 operators/police dispatchers from the broad-based white collar and blue collar unit.

In Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61, NJ Supp. 248, (¶16 1971), the Commission described its concerns about "severance" petitions:

> 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 a 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 [Id., NJ Supp. at 249].

Severance is appropriate only where there is a record of unstable labor-management relations, or where the majority representative has not responsibly represented its unit employees. For example, the Commission has found instability where the existing unit includes employees supervising other unit employees, creating a conflict of interest. See, Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1988) (petition to sever superior officers into separate unit was granted where superior officers' authority to initiate disciplinary action against subordinate unit officers created substantial conflict of interest).

The Commission favors structuring negotiations units along broad-based lines and has been reluctant to find appropriate units structured along occupational or departmental lines. The New Jersey Supreme Court first articulated this policy in State v. Professional Association of N.J. Dept. of Ed., 64 N.J. 231 (1974). The Court directed that a balance must be struck between the rights of public employees to choose a collective negotiations representative and the rights of public employers

not to be burdened with an undue proliferation of negotiations units. The Commission has often rejected narrowly defined units where a broad-based unit was available. See, e.g., Jersey City, D.R. No. 84-6, 9 NJPER 556 (¶14231 1983)(unit composed exclusively of four sanitary inspectors found inappropriately narrow); NJIT, D.R. No. 88-29, 14 NJPER 148 (¶19060 1988)(narrow unit of security guards rejected where college had consistently maintained broad-based unit structure); Warren Cty., D.R. No. 95-14, 21 NJPER 43 (¶26026 1994) (proposed unit of 15 dispatchers inappropriate); Wall Tp., D.R. No. 94-24, 20 NJPER 209 (¶25101 1994)(proposed unit of six or seven dispatchers inappropriate); E. Windsor Tp., D.R. No. 97-2, 22 NJPER 348 (¶27180 1996), adopted P.E.R.C. No. 97-68, 23 NJPER 51 (¶28035 1996)(proposed unit of four emergency medical technicians found to be inappropriately narrow); Pennsauken Tp., D.R. No. 2000-2, 25 NJPER 398 (¶30172 1999) (proposed unit of four emergency medical technicians found to be inappropriately narrow). Cf. UMDNJ, P.E.R.C. No. 84-28, 9 NJPER 598 (¶14253 1983)(residual faculty unit found appropriate where union twice before disclaimed interest in representing petitioned-for faculty); but See, City of Passaic, D.R. No. 2004-1, 29 NJPER 393 (¶125 2003)(unit consisting of one title warranted where petitioned-for employees were unrepresented for a period of time, the unit would not risk further unit proliferation, and the incumbent representative had

not expressed a willingness to represent the petitioned-for employees).

In contested matters, the Commission has been particularly reluctant to establish negotiations units limited to one job title. In Egg Harbor Tp., D.R. No. 2009-5, 34 NJPER 416 (¶128 2008), the Director of Representation dismissed a petition for certification seeking to represent a unit of emergency medical technicians (EMTs). The Director found that the proposed unit, defined along occupational lines, was inappropriately narrow, inasmuch as the scope of that unit would conflict with the Commission's preference for broad-based units and cause unnecessary unit proliferation.

In E. Windsor Tp., the Commission sustained the Director of Representation's dismissal of a representation petition seeking to represent four emergency medical technicians (EMTs). There, the Township opposed the petition, asserting that it already negotiated with five negotiations units and the addition of another unit would create an administrative burden. It maintained that if the EMTs desired representation, they should be represented by the employee representative certified to represent all other civilian employees in the Township's police department. In upholding the Director's decision, the Commission affirmed the community of interest found to exist among the petitioned-for employees and other public safety civilian unit employees (including dispatchers); reiterated its policy favoring

broad-based units and found narrowly defined units of one occupational group generally inappropriate.

The Director found that the facts pertaining to and the functions of the dispatchers in Egg Harbor were analogous to those in E. Windsor Tp. Like the dispatchers and EMTs in E. Windsor Tp., the Egg Harbor EMS responders shared a community of interest with the dispatchers in the UWU unit by supporting the public safety mission of the Township and providing services 24 hours-per-day, 7 days-per-week. In Egg Harbor, the Director concluded that he would not deviate from precedent and policy in which the Commission determined that a separate unit of EMTs was ". . . inappropriately narrow," citing E. Windsor Tp. See also, Woodbridge Tp., D.R. No. 2006-1, 30 NJPER 382 (¶121 2004) (severance of telecommunicators from broad-based unit after 27 years was inappropriate; assertion of differing negotiations concerns did not abrogate community of interest); Somerville Bor., D.R. No. 2005-2, 31 NJPER 208 (¶82 2005) (severance of fire suppression titles was unwarranted where it would cause undue unit proliferation and existing representative opposed severance).

Applying these standards to this case, I find that severance is unwarranted. The White and Blue Collar Employees' Association appears to have represented the 911 operators/dispatchers employees for at least the last several years. No facts suggest that the negotiations relationship between the Borough and the

Association is unstable, and no evidence indicates that the Association has failed to responsibly represent the petitioned-for titles. Although these titles may have specific negotiations concerns, a majority representative has broad discretion in deciding how to address those matters in collective negotiations. See, Vaca v. Sipes, 386 U.S. 171 (1967); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

IAFF asserts that a 2009 agreement between the Borough and representatives of the 911 operators/dispatchers concerning Election Day pay, achieved without the Association's participation, shows the Association is not the exclusive representative of these employees. This contention was included in a reply filed beyond the provided deadline. We are not obligated to consider it. However, assuming arguendo that the IAFF's reply is timely, I observe that no facts indicate that the Association knew of the purported agreement and waived its right to negotiate compensation. Our Act generally prohibits an employer from dealing directly with individual employees in a negotiations unit to fix terms and conditions of employment. See Matawan-Aberdeen Reg. Dist. Bd. of Ed., P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989); Gloucester Cty. College, H.E. No. 2004-002, 29 NJPER 344 (¶109 2003). Even if the Association tacitly authorized the pay adjustment and tacitly waived a negotiable effect of a furlough exemption, that conduct in and of itself

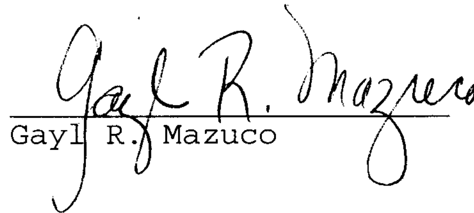
would not meet the high standard for severance set forth in Jefferson Tp. Bd. of Ed.

I find that the petitioned-for titles are included in the Association's broad-based negotiations unit and that the facts do not indicate that a severance of that unit is warranted. Accordingly, I dismiss the petition.

ORDER

The petition is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Gayl R. Mazuco

DATED: October 2, 2012
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 12, 2012.