

D.R. NO. 2024-2

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

In the Matter of

TOWNSHIP OF UNION,

Public Employer,

-and-

Docket No. CU-2023-006

TEAMSTERS LOCAL 469,

Petitioner.

**SYNOPSIS**

The Director of Representation dismisses a clarification of unit petition filed by the Township of Union, which sought to exclude the public works foreman from the negotiations unit represented by Teamsters Local 469 on the basis of statutory supervisory status and/or a substantial supervisory conflict of interest.

The Director found that the Township did not submit evidence showing that the foreman regularly decided or effectively recommended personnel actions, and thus, did not establish statutory supervisory status nor a substantial conflict of interest. The Township did not provide examples of personnel actions being decided through the grievance process by the foreman, whose role under the previous non-union personnel manual procedure would have been informal and lacking independent judgment. The examples provided of the foreman's participation in the disciplinary and hiring process showed that recommendations were made through committees where other people also exercised independent judgement. The Township also did not establish that recommendations by the foreman as to whether probationary employees should be retained or discharged would be without further independent judgment from others, and thus, had not met the standard for them to be considered effective recommendations.

Having found that the Township did not establish statutory supervisory status nor substantial conflict of interest nor changed circumstances since previously agreeing to include the foremen in the unit, the Director found that the Township's remaining allegation of a lack of community of interest could not alone be a basis for excluding the foreman through the clarification of unit petition.

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Appearances:

For the Respondent,  
Kroll, Heineman, Ptasiwicz & Parsons, attorneys  
(Seth B. Kennedy, of counsel)

For the Petitioner,  
Cleary Giacobbe Alfieri Jacobs, LLC, attorneys  
(Adam S. Abramson-Schneider, of counsel)

**DECISION**

On December 13, 2022, the Township of Union (Township), in the County of Hunterdon, filed a clarification of unit petition which seeks to exclude the public works foreman from the negotiations unit represented by Teamsters Local 469 (Teamsters). A Certification of Representative was issued on the Teamster's unit with language including "all blue-collar employees and forepersons" and excluding supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The Township argues that the foreman, Kory Fleming, is a supervisor within the meaning of the Act and/or should be

excluded from the unit because of a substantial actual or potential supervisory conflict of interest with other unit members.

The parties submitted position statements on January 2, 2023. The Township submitted a brief and certification of Chief Financial Officer and Personnel Administrator Grace Brennan (GB Cert.) on January 25. Teamsters submitted a brief and certification of Fleming (KF Cert.) on February 1. The Township also submitted a reply brief, certification of Township Committee Member and Deputy Mayor Page Stiger (PS Cert.), and supplemental certification of Brennan (GB Supp.) on February 14. The Teamsters also submitted a reply brief and supplemental certification of Fleming (KF Supp.) on February 27.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. No disputed substantial material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. My findings of fact are included in the analysis below.

### **ANALYSIS**

N.J.S.A. 34:13A-5.3 and N.J.S.A. 34:13A-6(d) provide that, except where dictated by established practice, prior agreement, or special circumstances (not present here), supervisors "having the power to hire, discharge, discipline, or to effectively

recommend the same" shall not be represented in collective negotiations in the same unit as nonsupervisors.

Additionally, we may review whether an employee's roles in evaluation or grievance processes result in the employee deciding or effectively recommending personnel actions of other unit members and thus creating a substantial conflict of interest and negating a community of interest. Westfield Bd. of Ed., P.E.R.C. No. 88-3, 13 NJPER 635 (¶18237 1987) ("While evaluating alone is not one of the statutory criteria, we have looked to it as it relates to other actions such as renewal, tenure, promotion and salary. . . . We consider a supervisor's role in evaluations because evaluations can serve as effective recommendations for the statutorily mandated criteria.") contrasting Wilton v. West Orange Bd. of Ed., 57 N.J. 404 (1971) ("If performance of the obligations or powers delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of a particular supervisor and the other included employees, the community of interest required for inclusion of such supervisor is not present. . . . [A] conflict of interest which is de minimis or peripheral may in certain circumstances be tolerable[.]"); Mainland Reg. Bd. of Ed., P.E.R.C. No. 87-79, 13 NJPER 72 (¶18032 1986) ("While the first step of the negotiated grievance procedure raises the possibility that a principal may

informally resolve the grievance of another unit member, we do not believe that this possibility under the facts of this particular case warrants removing the principal from that unit.").

Determination of a supervisory conflict of interest requires more than a job description or bald assertion that an employee has authority to hire, discharge, discipline, assign, evaluate, or promote other employees; the Commission requires evidence that the authority is regularly exercised. City of Burlington, D.R. No. 2004-7, 29 NJPER 501 (¶158 2003). Any conflicts of interest between a person making personnel recommendations and other unit members are de minimis where independent analysis and judgment from another person occurs before any personnel decision is implemented. New Jersey Turnpike Auth., P.E.R.C. No. 94-23, 19 NJPER 459 (¶24217 1993) (finding any conflict between toll plaza supervisors and the higher assistant section chiefs to be de minimis when few, if any decisions, were not subject to independent analysis by section managers or even higher authority) citing Teaneck Tp., E.D. No. 23, NJPER Supp. 465, 466 (¶114 1971) ("The mere rendering of an opinion which is subject to independent analysis . . . does not constitute the high order of reliance necessary to meet the test of effective recommendation."); State of New Jersey (State Police), P.E.R.C. No. 2010-13, 35 NJPER 335 (¶114 2009) (finding, contrary to

hearing officer, that executive officers who directed captains, approved or disapproved their requests, and participated in management sessions where performance was evaluated did not have a substantial potential conflict of interest because they did not effectively recommend personnel actions), remanded App. Div. Dkt. No. A-0907-09T1 (May 25, 2010) (ordering supplemental hearing after statutory amendment to definitions of managerial executive and confidential for state employees); Hanover Tp., E.D. No. 41, NJPER Supp 516 (¶132 1971) (finding that even "serious" consideration of an opinion which is nevertheless subject to independent analysis does not meet the test of "effective recommendation"; "emergency action" of sending out-of-uniform employees home is not disciplinary authority when a higher authority independently determines whether loss of pay results; any conflict from directing employees to work locations is de minimis), cited in Carteret Boro., P.E.R.C. No. 2023-16, 49 NJPER 266 (¶61 2022) appeal pending. See also Fairfield Tp., P.E.R.C. No. 92-115, 18 NJPER 299 (¶23127 1992) (foremen who overstepped his authority and tried to discipline without the normal higher independent review was not a statutory supervisor thereby; immediate suspensions for safety are qualitatively different from decisions to impose penalties for misconduct; recommending probation for improvement is not considered a recommendation of discipline).

Acting in a lead capacity; assigning, scheduling, guiding, directing, and overseeing the work of others; authorizing payments and performing administrative functions; and submitting reports of work completed or evaluations of others without effective recommendations for personnel actions are not duties that establish supervisory status under the Act nor a substantial conflict of interest. City of Linden, D.R. No. 2011-12, 38 NJPER 159, 160 (¶46 2011); Academy Urban Leadership Charter High School, D.R. No. 2018-16, 44 NJPER 253 (¶72 2018); State of New Jersey (Dept. of Law and Public Safety), D.R. No. 93-25, 19 NJPER 385 (¶24169 1993); Jackson Tp., D.R. No. 2020-6, 46 NJPER 133 (¶30 2019).

In the instant matter, I find that the Township has not established that the foreman regularly exercises power to decide or effectively recommend personnel actions affecting unit employees, and thus has not established that he is a statutory supervisor nor that his inclusion in the unit creates a substantial actual or potential conflict of interest.

Fleming manages staff, assigns work, adjusts employee schedules including how many people are on a shift, oversees the day to day operations of his department, and provides guidance and instructions to employees on how to perform functions and assignments and on issues they may have with other employees and members of the public. (GB Cert. 14, 16). He acts, as described

in Teamster's position statement, as a "lead man". However, these duties do not establish statutory supervisor status or create a substantial conflict of interest. City of Linden; Academy Urban Leadership Charter High School; State of New Jersey (Dept. of Law and Public Safety); Jackson Tp.

The Township characterizes some issues that are brought by employees to Fleming as "grievances" and asserts that Fleming would be the first step in the grievance process and determine the appropriate way to handle it. (GB Cert. 17). However, no examples of such grievances were provided, let alone facts that show Fleming decided personnel actions through this process and exercised this authority regularly. City of Burlington.

This is a new unit and a collectively-negotiated grievance process has not yet been established. During a phone conference, the Township provided the staff agent and Teamsters with a copy of the Township's personnel manual, in which the grievance procedure section states "A grievance submitted by a union employee will be addressed pursuant to [the] grievance procedure set forth in the applicable bargaining unit agreement" and then sets forth the procedure for non-union employees. So that procedure is no longer indicative of any role Fleming might play, which would be speculative.

Moreover, the non-union procedure says that, for Step 1, the employee would communicate to their supervisor who would discuss



the matter with the Personnel Administrator, after which the supervisor would communicate the decision to the employee, with the actual written grievance being submitted to the Personnel Administrator at Step 2, detailing the facts and relief requested. Step 1 is an informal oral presentation of the issue, and since it requires the supervisor to discuss it with the Personnel Administrator, it seems the supervisor would not be exercising independent judgment, but rather, relaying a preliminary pre-written grievance decision from the Personnel Administrator. We have found the possibility that the grievance of another unit member may be resolved informally at the first step to not establish statutory supervisory status or create a substantial conflict of interest. Mainland Reg. Bd. of Ed. See also Middlesex Cty., H.O. No. 78-13, 4 NJPER 143 (¶4067 1978) (“In the grievance procedure, foremen are not called upon to make any decisions but rather confer informally with shop stewards as to possible resolution of problems. This duty does not on its face indicate a conflict of interest. . . . Any real action would seem to emanate from . . . higher authority. . . . [T]herefore . . . foremen are not supervisors within the meaning of the Act.”), adopted D.R. No. 79-8, 4 NJPER 396 (¶4178 1978).

With respect to disciplinary authority, the facts do not show that Fleming has the power to discipline or “effectively recommend” discipline. The Township Council is actually making

the final decision with respect to discipline. So the issue is whether Fleming has "effectively recommended" discipline. Personnel Administrator Brennan states that if Fleming were to come to her and recommend that an employee be suspended, she would take the recommendation to the Township Council for approval. (GB Cert. 15). The Township has not provided a specific example of this, and the only example provided by the Township of Fleming's involvement in the disciplinary process shows that there is more to this process.

In February 2019, Fleming advised Brennan of concerns he had with the conduct of Sam Becker. (KF Cert. 9, 10). Brennan convened and led a personnel committee consisting of herself, two Township Council members, and Fleming. (KF Cert. 10). The committee conducted investigatory interviews with employees and deliberated about what disciplinary action might be appropriate. Brennan states that the other members of the committee "heavily relied upon" Fleming's recommendation. (GB Cert. 10). The recommendation presented to the full Township Council came from the personnel committee and was not presented in the name of Fleming. (KF Cert. 12).

Whether recommendations are "effective" does not depend on how often they are followed or how much weight they are given, but on whether there is non-ministerial independent judgment and analysis (even on other issues) from any other person which is

relied upon by the decision-maker before signing off on a personnel action. New Jersey Turnpike Auth.; Teaneck Tp.; State of New Jersey (State Police); Hanover Tp.; Fairfield Tp.

This is not a situation where the foremen conducted the investigatory interviews "alone" and made a recommendation that was relied upon because no one else exercised independent review. Concurrent independent analysis occurred from other members of the personnel committee because they attended the investigatory interviews as well. They exercised their own judgment from what they saw for themselves and in how much weight to give Fleming's opinion. The recommendation that was given to the Township Council was not Fleming's, but the personnel committee's.

To the extent the full Township Council did not conduct further independent review, the personnel committee's recommendation was effective. But the Council was in some ways conducting independent review, as two Council members were on the personnel committee conducting the investigatory interviews, and this would be understood by the full Council and not seen by the Council as relying entirely on the recommendation of Fleming. Since the Council did not use a process in which only Fleming conducted an investigation and only his independent judgment and analysis was relied upon, it cannot be said that his recommendation met the high standard to be considered effective. His involvement in the disciplinary process therefore does not

establish that he is a statutory supervisor or that he has a substantial conflict of interest with the rest of the unit.

Similarly, Fleming's involvement with the hiring process also does not establish statutory supervisory status or a substantial conflict of interest, because hiring committees made the recommendations to the Township Council. The examples discussed by the Township were the hiring of Becker's replacement, Gary Magyar, and, upon the latter's retirement, Jack Sabol. (GB Cert. 11, 12). Like the committee involved in investigating discipline, the hiring committee consisted of Brennan, two Township Council members (including Page Stiger), and Fleming. (GB Cert. 11, PS Cert. 9). Fleming "participated" in the review of applications and attended the interviews with the other committee members. (PS Cert. 6, GB Cert. 11) (the Township's first brief states that Fleming "determined which individuals should be invited in" but there are no certified statements establishing that Fleming alone made this determination). Fleming's opinion was heavily relied upon as the "subject matter expert" for his department and the skills required for the job. (Id.). However, the ultimate recommendations given to the full Township Council came from the personnel committee, not in Fleming's name. (KF Cert. 5, 6). As the Township Council did not use a process in which only Fleming conducted interviews and only his independent judgment and

analysis was relied upon, it cannot be said that his recommendations regarding hiring are effective.

Township Councilmember Stiger says that, in the event that the committee (on which he was a member) disagreed on what to recommend to the full Council, he would give more weight to the recommendation of the individual who would be managing the applicant, which would be Fleming. (PS Cert. 12). Brennan also states that Fleming's recommendation would be given more weight than other members of the personnel committee due to his position and expertise. (GB Supp. 4). However, I view this as the independent judgement of the other committee members as to how much weight to give Fleming on a case by case basis. The fact remains that they independently reviewed the applicants by attending the interviews and "seeing them for themselves" rather than relying on a recommendation from Fleming conducting the interviews alone.

Moreover, exactly how a split recommendation would be handled is hypothetical, as it has never occurred and no written procedures were established ahead of time that would have informed Fleming that he effectively decided who would or would not be hired such that a conflict of interest might therefore arise. In the absence of a written procedure ahead of time, it is impossible to tell whether agreement by the committee is because Fleming has been influential in bringing about consensus, because

the committee simply deferred to his judgment, or because the other committee members have simply happened to reach the same conclusion as to each applicant so far. This is one of the reasons that the standard for effective recommendation utilized by the Commission is practical. We are not utilizing a subjective "substantial weight" or "highly relied upon" measure of someone's recommendation, but a more objective consideration: whether the process involves any independent analysis and judgement from other people. The facts presented do not show that the Township Council relies upon the independent judgment and analysis of Fleming alone.

The Township references a situation in which the hiring committee, for a mowing services job, interviewed Michael Malecki, who requested the ability to work outside normal hours. (Ps Cert. 8, GB Supp. 3). As characterized by the Township, Fleming opposed this and consideration of the applicant "immediately ceased at that time due to Mr. Fleming's recommendation." (Id.). The Township further states that "Mr. Fleming essentially vetoed the applicant and consideration of the applicant ceased based solely on Mr. Fleming's recommendation." (Id.). The Township does not characterize this as a "decision" of Fleming, but a recommendation, implying that he was not actually exercising a veto power, but that his recommendation as the subject matter expert of his department's operations with

regard to the feasibility of an alternative schedule substantially influenced the other committee members into ceasing further consideration of the applicant, such that, in the end, his recommendation "essentially" had the effect of a veto. This does not equate to an effective recommendation as it is meant by the Commission.

I further note that generally when employees act collectively and make a joint recommendation, we find that none of the employees have made an effective recommendation. See Rutgers University, D.R. No. 98-6, 23 NJPER 528 (¶28256 1997) (reviewing caselaw finding that one's participation in a collective hiring process is insufficient to constitute an effective recommendation); Rutgers University, H.O. No. 99-2, 25 NJPER 377 (¶30165 1999) (explaining that when employees act collectively and make a joint recommendation, no individual employee whose status was in dispute is responsible for the hiring recommendation), adopted P.E.R.C. No. 2000-31, 25 NJPER 446 (¶30197 1999); Trenton Comm. Charter. Sch., D.R. No. 2000-10, 26 NJPER 187 (¶31076 2000) (stating that we will not speculate as to whether teachers, who collectively attended employment interviews of prospective teaching staff members, assessed qualifications, and made recommendations, made those recommendations by consensus, majority rule, or other method, and

finding that this diffuse authority was too attenuated to be indicative of an effective recommendation).

Brennan certifies that Magyar and Sabol were subject to a three-month probationary period when hired and that Fleming is the one who recommends whether a probationary employee is removed or becomes a permanent employee. (GB Cert. 13). Fleming certifies that when an employee completes their probationary period, the Township Council makes the decision as to whether an employee will be retained; that the Council has sometimes asked Fleming, as well as other employees, for an opinion on whether a probationary employee in his department should be retained, but that the Council has not asked Fleming every time; and that he has not been specifically instructed that it is his responsibility as foreman to determine whether an employee has passed their probationary period. (KF Supp. 1-5).

A recommendation regarding retention may create a conflict of interest if it constitutes an effective recommendation without further independent review. Compare Brookdale Community College, D.R. No. 2017-10, 43 NJPER 216 (¶66 2016) (substantial conflict found where sergeants evaluated whether a patrol officer's performance during a probationary period was acceptable and where it was provided that, if performance was unacceptable, the patrol officer "shall be terminated"); NJIT, D.R. No. 80-37, 6 NJPER 304 (¶11145 1980) (finding that where a coordinator evaluated a



specialist at the end of the latter's probationary period and made a recommendation regarding retention/dismissal that was relied upon by a director without further personal review of performance, but where the coordinator had no other employees reporting to him to evaluate at the end of their probationary periods and no ongoing evaluation responsibilities over the specialist, any potential conflict of interest was de minimis).

Here, the Township has not actually provided any specific examples of when Fleming provided recommendations or opinions regarding probationary employees. Even if it had, it has not established that any recommendation of Fleming would have been without further independent judgment and review from others, and thus, has not established that he makes effective recommendations regarding the personnel actions of retention or discharge.

Accordingly, the Township has not established that Fleming is a statutory supervisor or that his inclusion in the blue-collar unit creates a substantial conflict of interest. The Township also argues that there is a lack of community of interest between the foreman and the rest of the unit. The Township's argument is primarily based on arguing that there a supervisory conflict of interest that negates the community of interest. Since I have found that there is no substantial conflict of interest, I reject the Township's community of interest argument.

In Belleville Bd. of Ed., D.R. No. 86-23, 12 NJPER 482 (¶17184 1986), where no statutory exclusion or conflict of interest was at issue, the Director dismissed the employer's clarification of unit petition seeking to exclude an existing unit title for an alleged lack of community of interest, because no allegation of changed circumstances or a substantial change in job duties after the parties' signing of a stipulation of appropriate unit was raised.

Here, the parties signed a stipulation of appropriate unit that explicitly included the foreman, and the Township has not argued that the foreman's job duties have since changed to allow community of interest reasons alone to be an assertable basis for removing the title from the unit. Belleville Bd. of Ed. Cf. Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61, NJ Supp. 248, (¶16 1971) ("To hold otherwise would leave every unit open to re-definition 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.").

For the reasons stated above, I dismiss the Township's clarification of unit petition.

**ORDER**

The Township's clarification of unit petition is dismissed.

/s/ Ryan M. Ottavio

Ryan M. Ottavio

Director of Representation

DATED: August 14, 2023

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 August 24, 2023.**