

D.R. NO. 87-26

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

In the Matter of

TOWNSHIP OF NEPTUNE,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-87-30

NEPTUNE TOWNSHIP EMPLOYEES  
ASSOCIATION,

Employee Organization.

SYNOPSIS

The Director of Representation determines that the position Recycling Coordinator is a professional, but not a supervisory position. Applying the control of labor relations test, the Director further determines that the Board of Health and the Township of Neptune is the public employer of the Secretary to the Board of Health. The Director excludes both positions from the Neptune Township Employees Association.

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Appearances:

For the Public Employer-Petitioner  
Frank A. Campione, Consultant

For the Employee Organization  
Eugene F. McEnroe, Esq.

DECISION

On December 4, 1986, a Petition for Clarification of Unit was filed with the Public Employment Relations Commission by the Township of Neptune ("Township"). The Township sought to exclude the positions of welfare director, road supervisor, superintendent of public works, sewer supervisor, recycling coordinator and clerk typist to the Board of Health from a collective negotiations unit of blue and white collar employees. The parties agreed to the exclusion of the welfare director, road supervisor, superintendent of public works and the sewer supervisor. On April 13, 1987 the Township withdrew the Petition with respect to these four positions. The Township contends that the recycling coordinator is

a supervisory and a professional employee within the meaning of the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et. seq. The Township also contends the clerk-typist to the Board of Health should not be included in the unit because the Board of Health, not the Township employs the person in that position. The unit is currently represented by the Neptune Township Employees Association ("NTEA").

We have conducted an administrative investigation in this matter. (N.J.A.C. 19:11-2.6). The Township and the NTEA submitted statements and documentary evidence. The administrative investigation reveals the following:

1. The Township of Neptune is a public employer within the meaning of the New Jersey Employer-Employee Relations Act and is subject to the Act's provisions.

2. The Neptune Township Employees Association is an employee representative within the meaning of the Act and is subject to its provisions. The NTEA is the majority representative of a negotiations unit comprised of all blue and white collar employees of the Township of Neptune. Professional employees are excluded from the unit under Article I of the parties' most recently expired agreement.

3. The Neptune Township Board of Health was created by local ordinance #574, effective January 1, 1962. By 1981, the Board of Health determined the salary of its employees by resolution. Board of Health Resolution #2, dated August 20, 1981 provides that

employees hired by resolution of the Board of Health be regulated by the same standards as Township employees. In that resolution, the Board of Health also designated itself to administer employee relations with respect to Board of Health employees. The Board of Health appoints its employees and provides the salaries of its employees by resolution. The Township represents that the Board of Health hired the newest clerk-typist.

Board of Health Resolution #3 is a salary resolution adopted January 10, 1985, providing salary increases for the clerk-typists of the same percentage as employees in the negotiations unit.

The clerk-typist to the Board of Health performs the same type of work for the Board of Health as Township clerk-typists perform for the Township. It is not disputed that all clerk-typists perform secretarial tasks such as typing, answering phones, filing, etc. The only difference is the Registrar of Vital Statistics (who is employed by the Department of Health) assigns work to the Board of Health clerk-typist and the Township clerk-typists work for the Township. Presently, the individual serving as the Registrar of Vital Statistics is Helen Riggs, the Township administrator. The Board of Health clerk-typist also serves as the Deputy Registrar of Vital Statistics.

4. The position of recycling coordinator, created by ordinance of April 21, 1986, reports to the Superintendent of Public Works. The recycling coordinator is responsible for creating a

recycling program and coordinating recycling efforts in the Township. In order to create the program, the recycling coordinator met with county and State officials, drafted a recycling plan for the Township, prepared a budget for the plan, sought funding from alternative sources, assessed available equipment and labor resources, and determined resource requirements for the program. The Township asserts that the recycling coordinator will keep records, monitor the program, prepare periodic reports, and review existing solid waste collection and disposal processes and available equipment and labor resources necessary to effectuate the program. To date, no employees work under the recycling coordinator.

Donald Swingle, the first person to hold the position, recently resigned. The Township is currently seeking to fill the position. Swingle applied for the recycling coordinator position by completing a standard Township employment application.

Swingle had an Associate of Arts degree in business administration from Brookdale Community College and a Bachelor of Arts degree in business administration from Stockton State College. There is no evidence that the Township required such degrees or any advanced education to qualify for the position.

Swingle was previously employed by the Township in the Public Works Department, and as a manager trainee at a department store in the camera department. The Township asserts Swingle was expected to make use of the perspective and experience he gained as a former employee of the Public Works Department to interact with volunteer groups, businesses and other governmental entities.

As the first recycling coordinator, Swingle initiated the establishment of a mandatory recycling program in the Township. It is anticipated that the recycling program will be operational by October 1, 1987. Swingle prepared and submitted drafts of the mandatory recycling program to be adopted by the Township in ordinance form. The final draft, submitted by Swingle on September 26, 1986 and revised as of October 10, 1986, includes the following information: (1) list of materials to be recycled; (2) collection and preparation schedule for curbside pickup of certain recyclable materials; (3) preliminary plans for the recycling of other materials; (4) listing of those individuals required to participate; (5) proposals for a recycling labor force; (7) proposals for recycling equipment; (8) education and awareness publicity; (9) Municipal Rider/Recycling Trust Fund; (10) possible markets; (11) recordkeeping; (12) handling of leaves and grass; (13) disposition of proposed equipment; and (14) disposition of recyclable products immediately after pickup.

#### ANALYSIS

The Township alleges that the position of recycling coordinator should be excluded from the unit because the position is both a supervisory and a professional position. The Association asserts that the status of the recycling coordinator is moot because Swingle, the individual holding the position resigned and the position is currently vacant. However, the employee representative represents the position as well as the individual. See, Galloway

Twp., 78 N.J. 1, 17-18 (1978) Therefore, the fact that the employee holding the position resigned does not moot the issue of whether the Association represents the position.

N.J.S.A. 34:13A-5.3 provides:

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.

A determination of supervisory status requires more than the assertion that an employee has or will have the authority to hire, discharge, discipline or effectively recommend same. In Somerset County Guidance Center, D.R. 77-4, 2 NJPER 358, 360 (1976), we noted:

[T]he bare possession of supervisory authority without more is insufficient to sustain a claim of status as a supervisor within the meaning of the Act. In the absence of some indication in the record that the power claimed possessed is exercised with some regularity by the employees in question, the mere "possession" of the authority is a sterile attribute unable to sustain a claim of supervisory status.

It is undisputed that Swingle never supervised any employee and that no one has ever worked under the recycling coordinator. According to the final draft of the recycling program prepared by Swingle, once the recycling program is operating, the recycling coordinator would supervise a variety of unit and non-unit employees. We cannot, however, rely on the statement in a final draft of a proposal that the recycling coordinator will exercise

supervisory authority at sometime in the future. The final draft requests two truck drivers and four laborers from the current work force be assigned recycling duties. It also suggests that the Township could use labor supplied by the Association for Retarded Citizens. It is not clear which alternative the Township will follow, or that the recycling coordinator will supervise unit employees in the future. At this time, the possibility of the recycling coordinator functioning as a supervisor is too tenuous to support a finding that the position is supervisory.

N.J.A.C. 19:10-1.1 provides as follows:

"professional employee" means 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 sciences, or in the field of learning. 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 also include any employee who has acquired knowledge of an advanced nature in one of the fields described above, and who is performing related work under the supervision of a professional person to qualify to become a professional employee as defined herein. 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 duties of a professional employee must be predominantly intellectual in character, involve the consistent exercise of discretion and judgment and require knowledge of an advanced nature. Jersey City Medical Center, D.R. No. 80-9, 5 NJPER 456 (¶10230 1979).



Since the position was created, the recycling coordinator's duties included a variety of tasks involving the use of discretion and judgment. Swingle drafted the recycling program proposal; wrote grant proposals; decided which equipment to purchase; communicated with businesses, volunteer groups and various governmental agencies; and provided publicity for the recycling program through community outreach and speaking engagements.

While Swingle had a college degree, there is no evidence that advanced education is a requirement for the position.

There is no specific information as to whether the recycling coordinator position is "predominantly intellectual in character". However, examination of Swingle's weekly activity report for the last two months of 1986 shows that he spent the majority of his time either researching, consulting with officials from other governmental agencies, examining recycling equipment for purchase, or publicizing the recycling program by speaking to community groups.

While the extent of the responsibilities of the recycling coordinator is not clear, it appears as though the position is professional in nature. The responsibilities of the recycling coordinator in creating a recycling program require the independent thought and action expected of a professional employee.

N.J.S.A. 34:13A-3(c) defines "employer" and "public employer" as follows:

(c) the term "employer" includes an employer and any person acting directly or indirectly, or on

behalf of or in the interest of an employer with the employer's knowledge or ratification, but a labor organization, or any officer or agent thereof, shall be considered an employer only with respect to individuals employed by such organization. This term shall include "public employers" and shall mean the State of New Jersey, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board, or any branch or agency of the public service.

In making determinations about who is the public employer of certain employees, the Commission has followed the private sector approach of focusing on who controls the hiring, firing, work schedules, promotion, discipline, performance evaluations, vacations, hours of work, scheduling, wages and benefits of employees and the funding of employees' compensation and benefits.<sup>1/</sup>

Applying this control of labor relations concept to this situation, it appears that the Board of Health and the Township are separate employers. Since 1981, the Board of Health has exercised its authority pursuant to N.J.S.A. 26:3-1 et. seq. to control labor

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<sup>1/</sup> See, Lullo v. International Assn. of Fire Fighters, 55 N.J. 409 (1970); Ocean County Prosecutor, D.R. No. 82-29, 8 NJPER 60 (¶13024 1981); Bonnie Bray Child Care Counselors Assn., D.U.P. No. 80-7, 5 NJPER 457 (¶10231 1979); Newark Housing Development and Rehabilitation, D.R. No. 80-2, 5 NJPER 328 (¶10175 1979); Bergen County Freeholders Bd. v. Bergen County Prosecutor, D.R. No. 78-34, 4 NJPER 104, (¶4110 1978), aff'd 172 N.J. Super 363 (App. Div. 1980); Mercer County Superintendent of Elections, D.R. No. 78-37, 4 NJPER 147 (¶4069 1978), aff'd P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978); Passaic County Board of Chosen Freeholders, D.R. No. 78-29, 4 NJPER 8 (¶4006 1977); Cape May County Guidance Center, D.R. No. 78-19, 3 NJPER 350 (1977); and ARA Services, Inc., E.D. No. 76-31, 2 NJPER 112 (1976).

relations with respect to its employees. <sup>2/</sup>It hired employees and determined the salaries of its employees by resolution. It adopted a resolution applying most of the Township's labor relations policies to Board of Health employees. The Board of Health chooses to control its employee by applying the same policies as the Township. Nonetheless, the Board of Health is exercising its statutory right to act as the employer of its employees. It appears that the newest clerk-typist was hired by the Board of Health. She takes orders from the Registrar of Vital Statistics and also functions as the Deputy Registrar of Vital Statistics. See, County of Morris, P.E.R.C. 86-15, 11 NJPER 491 (¶16175 1986).

The Board of Health exercises its statutory powers under N.J.S.A. 26:3-1 et. seq. as the employer of its employees, including its clerk-typists.

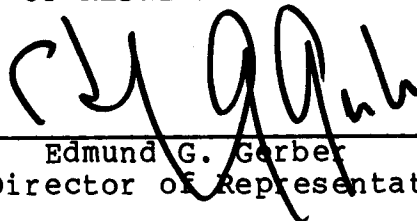
Since it appears that the clerk-typist to the Board of Health is employed by the Board and not by the Township, the Township has no authority to enter into agreement with the Association over her terms and conditions of employment.

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<sup>2/</sup> See Grosso v. City of Paterson, 55 N.J. Super. 164, 173 (1959), holding that the local board of health is a distinct entity from the municipality in which it is established.

Accordingly, we clarify the unit of Township employees to exclude the recycling coordinator and the clerk-typist to the Board of Health.

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION



Edmund G. Gerber  
Director of Representation

DATED: April 24, 1987  
Trenton, New Jersey