

D.R. NO. 2000-11

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

In the Matter of

CITY OF NEWARK,

Public Employer,

-and-

Docket No. RO-2000-19

ASSOCIATION OF GOVERNMENT
ATTORNEYS,

Petitioner.

SYNOPSIS

The Director of Representation orders an election to be conducted among certain attorneys employed by the City of Newark including attorneys employed in the office of corporation counsel/law department, public defenders office and zoning. The Director rejects the City's collateral attack on the Association of Government Attorneys' (AGA) showing of interest. The Director also finds that public sector attorneys in New Jersey generally have the right to organize and in this case, are not exempt as managerial executives or confidential employees. The Director also finds that the petitioned-for attorneys are not supervisors within the meaning of the Employer-Employee Relations Act.

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Appearances:

For the Public Employer
Genova, Burns & Vernoia, attorneys
(Angelo J. Genova, of counsel)

For the Petitioner
Anthony M. Supino, Attorney
(Robert J. Rudy, III, of counsel)

DECISION AND DIRECTION OF ELECTION

On September 3, 1999, the Association of Government Attorneys (AGA) filed a Petition for Certification with the Public Employment Relations Commission (Commission). The AGA seeks to represent a unit of attorneys employed by the City of Newark (City).^{1/}

^{1/} On September 14, 1999, the AGA filed an unfair practice charge (Docket No. CO-2000-51) alleging violations of the Act related to employees' rights to organize. At the AGA's request, processing of its charge has been held in abeyance pending resolution of this petition.

The City of Newark opposes the petition. It contends that (a) the petition is not supported by an adequate showing of interest; (b) the AGA does not exist as an employee organization; (c) municipal attorneys should not be permitted to organize; (d) all City attorneys are managerial executives, supervisors and/or confidential employees within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) and therefore, may not be represented; (e) first assistant corporation counsels (FACCs) and section chiefs are managerial executives; and (f) attorneys assigned to the law department's^{2/} labor section, water department and development department are confidential employees.

The AGA requests an election among all eligible employees holding attorney positions with the City. It agrees that FACCs and section chiefs are appropriately excluded from the unit. It also concedes that assistant corporation counsels (ACCs) assigned to the labor section are confidential employees and should be excluded from the proposed unit.

We have conducted an administrative investigation of this matter in accordance with N.J.A.C. 19:11-2.2 and 2.6.^{3/} By letter

^{2/} The City law department is also referred to as the Office of the Corporation counsel.

^{3/} Processing of this petition was slowed by a number of events. The assigned staff agent conducted an investigatory

dated March 22, 2000 we advised the parties of our understanding of the relevant facts and our intention to direct an election. The parties were given until April 3, 2000 to contest our factual and legal determinations.

On April 3, 2000, the City filed a response. The City submitted additional information regarding the organizational structure of the law department. The City advises that the HCDA federal program is a funding source, not a separate sub-section of the law department contract section. The City also advises that municipal prosecutors, workers' compensation and tax are three separate sections of the law department and each has a designated section chief.

As to the proposed unit, the City concedes that it employs public defenders and the zoning attorneys but contends that these titles are not supervised or managed by the corporation counsel and, therefore, may not be included in the petitioned-for unit.

3/ Footnote Continued From Previous Page

conference with the parties on October 5, 1999. The City appeared at the conference but declined to participate in the investigation until it hired special labor counsel. On November 17, the City's special labor counsel filed an appearance, but requested additional time to submit a position statement and supporting documents. On December 6, the City made a formal request that the Commission disclose the language of the AGA's showing of interest accompanying its petition. Thereafter, we solicited the AGA's position concerning the disclosure issue. On January 7 and 17, 2000, the AGA independently, voluntarily disclosed the language (but not the employees' names) used in its showing of interest authorizations. On January 26, 2000 the City submitted its supplemental position statement and documents.

Additionally, the City contends that attorneys assigned to the water and development departments handle personnel matters. As support for its position, the City attached a March 24, 2000 memorandum from an assistant corporation counsel who was in attendance at a March 6, 2000 departmental disciplinary hearing. The City also attached the disciplinary hearing decision.^{4/} The City asserts that this example provides sufficient information to determine that attorneys assigned to the water and development departments handle personnel matters and, therefore, should be excluded from the proposed unit -- presumably based on the confidential employee exemption of the Act.

The AGA's response to the City's April 3 letter was to note that it previously agreed that section chiefs were properly excluded from the petitioned-for unit. The AGA notes that despite the City's correction of the organizational chart, the number of section chiefs (seven) excluded in our March 22, 2000 letter was and remains accurate. The AGA also stipulates that the assistant corporation counsel assigned to the development department may be excluded as a confidential employee. As to the public defenders and zoning attorneys, however, the AGA contends that it petitioned for all attorneys employed by the City, not just those working in the law department. It contends that the public defenders and zoning attorneys should be included in the proposed unit.

^{4/} Read together, it is not clear from the attachments whether the assistant corporation counsel participated in the hearing or whether such participation is a normal or customary part of her job responsibilities.

Despite the City's clarification of its organizational chart and supplemental evidence, we have not found any substantial or material factual dispute which may more appropriately be resolved at a hearing. N.J.A.C. 19:11-2.6(d). Based upon our investigation, we make the following:

FINDINGS OF FACT

Procedure

The City contends that the AGA has abused the Commission's representation process because the showing of interest is defective and the AGA, as an organization, does not exist. On or about September 10, 1999, the City submitted a document, signed by employees, entitled "Withdrawal of Petition for Representation" which states:

A petition pursuant to N.J.A.C. 19:11-1.4 was recently filed seeking certification of our unit. At this time, the petition should be withdrawn, without prejudice. The attached signatures represent over thirty-percent (30%) of our unit. Thank you for your time and attention.

Page two of the document consists of a list of names and signatures. The City also submitted a "Personal & Confidential Memorandum" dated September 10, 1999, addressed to the City's business administrator and corporation counsel, and purportedly signed by seven City attorneys, stating that they believed the purpose of their signing the showing of interest was merely to obtain more information about the organizing process.

As to the showing of interest, the City contends that, of the 21 attorneys employed in the corporation counsel/law department, there are seven (7) section chiefs and four labor section attorneys that could not properly be included in the proposed unit. It reasons that since twelve employees signed the "Withdrawal Petition for Representation" document, the AGA cannot meet the thirty percent showing of interest requirement of N.J.A.C. 19:11-1.2. Moreover, it contends that the seven attorneys who signed the "Personal & Confidential Memorandum" did not understand the nature of, or were misled into signing the showing of interest petition. The City contends that both documents reflect that the petitioned-for employees do not wish to be represented by the AGA.^{5/}

N.J.A.C. 19:11-2.1 provides:

The showing of interest shall not be furnished to any of the parties. The Director of Representation shall determine the adequacy of the showing of interest and such decision shall not be subject to collateral attack.

Where a decision is required as to the validity of a showing of interest, one must look to the plain language on the face of the showing of interest card or petition. Essex Cty., D.R. No. 85-25, 11 NJPER 433 (¶16149 1985). Moreover, in Jersey City Medical Center, D.R. No. 83-19, 8 NJPER 642, 643 (¶13308 1982), we found:

^{5/} Exhibit E attached to the City's supplemental position statement is an affidavit by an assistant corporation counsel who contends that she never consented or authorized the AGA to represent her interests. The affidavit more specifically responds to allegations raised by the AGA's unfair practice charge (Docket No. CO-2000-51).

The submission of a showing of interest by a Petitioner is an administrative requirement for the purpose of ensuring that sufficient interest exists among employees on behalf of the petitioner to warrant the expenditure of Commission resources in processing the petition. In re Woodbury Tp. Bd. of Ed., D.R. No. 77-9, 3 NJPER 26 (1977).^{6/} It is uniquely an administrative concern, and questions relating to its validity must be raised in a proper manner. Unless good cause exists to the contrary, challenges questioning the validity of showing of interest are to be raised prior to the informal conference and should be embodied in the challenging party's response to the Commission's initial request for positional statements.

The showing of interest submitted by the AGA clearly, plainly and unambiguously states the purpose of the document. It is signed by at least thirty percent of the employees in the proposed unit based upon the list of petitioned-for employees provided by the City on October 5, 1999. The showing of interest, for the Commission's administrative purposes, otherwise conforms in every respect with the requirements of N.J.A.C. 19:10-1.1 and 19:11-1.2.

The City requests that we investigate the alleged claims of irregularities in the manner in which the AGA obtained signatures in support of its organizing effort. As we stated in Trenton Housing Auth., D.R. No. 98-11, 24 NJPER 39, 41 (¶29024 1997):

^{6/} Please note, the citation published in Jersey City Med. Ctr. is in error. The case name is Woodbridge Tp. Bd. of Ed., not Woodbury Tp. Bd. of Ed.

We are not inclined to open up claims of card collection irregularities or misrepresentations to the scrutiny of an investigation or the hearing process. To do so would undermine employee confidence in the right to sign confidential union cards in any election campaign situation. Rather, it is the Commission's long-held position that the best method to test employee representation desires is the secrecy of the election booth.

Based upon the foregoing, I find that the showing of interest is adequate to support the petition. Questions concerning the representational desires of the employees, including the ACCs who signed the "Withdrawal Certification", the "Personal & Confidential Memorandum" and the affidavit, can best be answered by the conduct of a secret ballot election. Bor. of Harvey Cedars, D.R. No. 99-10, 25 NJPER 151 (¶30068 1999); Bor. of Red Bank, D.R. No. 99-6, 25 NJPER 6 (¶30001 1998).

The City also asserts that the AGA does not exist as an employee organization. It contends that the person who filed the petition disassociated from the AGA, the AGA has no mailing address, stationery, officers or representatives. The City requests that the Commission investigate whether the AGA is an organization and whether it has "officially retained counsel."

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

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.

Based on the foregoing definition, it is irrelevant whether the person who filed the petition disassociated from the AGA. The petition was filed by a "representative", which in this case is an organization. As to the attributes of the organization, the Commission has previously 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.; Cty. of Passaic, D.R. No. 89-30, 15 NJPER 265 (¶20113 1989). There is no evidence or allegation of an illegal organizational structure in this matter.

As to whether the AGA "officially retained counsel", the Commission has found that "[b]eyond enforcing the Acts specific prohibitions, we will not interfere in a petitioner's internal affairs." Id. With rare exceptions that are not present in this matter, the Commission and the Courts of this State typically do not get involved in internal union affairs. 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).

Unit Determination

The proposed unit consists of approximately 21 attorneys: 16 ACCs assigned to the corporation counsel/law department; one ACC assigned to the department of development, one ACC position (currently vacant) assigned to the water department, one attorney working part-time for the City zoning board, and two public defenders. The parties have stipulated that two FACCs and seven section chiefs are managerial executives or supervisors within the meaning of the Act and, therefore, are excluded from the proposed unit. In addition, the parties have stipulated that four attorney positions in the law department labor section are confidential employees within the meaning of the Act. The parties also agree that the ACC assigned to the development department should be excluded as a confidential employee.

The organizational chart provided by the City shows that the corporation counsel heads the City's law department. The law department follows a basic pyramid structure. The corporation counsel reports to the mayor and city council. Two FACCs report directly to the corporation counsel. They oversee seven sections: civil litigation, contracts, real property, labor/personnel, municipal prosecutors, workers' compensation, and tax. No information was provided by the parties regarding who or where the public defenders and zoning attorneys report. The parties agree, however, that these titles are employed by the City.

In the law department, each section consists of a section chief, between two and four attorneys and support personnel.

There is also one ACC assigned to the development department, and one ACC assigned to the water department.^{7/} The water department ACC position is currently vacant. There are no other attorneys employed by the City.

Attorney Job Duties

The job description for attorneys employed in the law department provides:

The following is a listing of the duties and responsibilities applicable to all attorneys employed by the Office of the Corporation Counsel and is not intended to be exhaustive but merely illustrative of these professional responsibilities. All assistant corporation counsels shall, in addition to the duties regularly assigned to such assistants, possess such of the powers and perform such of the duties of the Corporation Counsel as assigned and by virtue of the Corporation Counsel's official status of attorney of record for the City of Newark shall assist in same.

1. Negotiate terms of settlement.
2. Draft legal opinions.
3. Advise departments and agencies on implementation of ordinances, statutes and legality of policy.
4. Draft legislation which reflects legislative intent and advances legislative policies.
5. Advise, review and interpret policies of the City of Newark on a daily basis.
6. Advocate the interest of the City of Newark.
7. Defend City's interest and policies.

^{7/} It is unclear to whom these ACC's report.

8. Conduct legal research and develop legal strategies to advance legislative and administrative policies.

9. Provide seminars to managers and other personnel on relevant legal issues.

10. Represent City as a client through appearances in judicial and administrative forums and draft correspondence to that aim.

11. Advise departments within the City as to what conduct and policies are legally permissible.

12. Recognize and identify any issues of conflict in representation as well as policy.

13. Conduct legal review and investigations of departmental actions vis-a-vis disciplinary, contract interpretation, bidding openings, foreclosures, bankruptcies, workers' compensation claims, municipal tax issues, redevelopment issues, contract negotiations, etc.

14. At all times maintain an attorney-client relationship in accordance with the well-established guidelines set forth in the Rules of Professional Conduct.

The aforementioned responsibilities and duties of assistant corporation counsels is in addition to their specifically designated assignments as set forth in the job descriptions identified in accord with the legal disciplines as follows:

Litigation, Real Estate, Tax, Contracts, Municipal Prosecution, Worker's (sic) Compensation and Labor.

Section specific job duties are as follows:

Litigation/Title 59 Practice: preparation and filing of civil complaints and other pleadings, discovery, motion practice, arbitration, settlement, trial, appellate practice.

Real Estate: review resolutions/ordinances, tax foreclosure, tenancy proceedings, bankruptcy proceedings, tax abatement proceedings.

Contract Section: prepare and review contracts, resolution and ordinances, litigate various contract claims.

Municipal Prosecutors: prosecute municipal court matters.

Labor Section: represent City in employment litigation in various administrative and judicial forums, review and/or negotiate union contracts.

ANALYSIS

Attorneys' Rights to Organize

The City asserts that all of its attorneys are managerial executives, supervisors, and/or confidential employees and should not be permitted to organize. The Commission recently discussed the competing interests of public employers and public employees and the balance which the State Constitution, statutes and regulations attempt to find between these interests. In State of New Jersey (Public Defender's Office), P.E.R.C. No. 99-60, 25 NJPER 55 (¶30022 1999) (Public Defender's Office), the Commission instructed that:

Article I, ¶19 of the New Jersey Constitution guarantees public employees the right to organize and to choose a representative to present their proposals and grievances. The Employer-Employee Relations Act implements this guarantee by entitling the public employees it covers to form, join and assist employee organizations and to have their chosen representatives negotiate for them over their terms and conditions of employment. N.J.S.A. 34:13A-5.3; Lullo v. IAFF, 55 N.J. 409 (1970). The Legislature sought to promote the public interest in labor relations stability and to improve morale and efficiency by granting employees a special means of access to their employer over working conditions intimately and directly affecting them, most notably their compensation. Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81

N.J. 582, 591 (1980); West Windsor Tp. v. P.E.R.C., 78 N.J. 98, 113-114 (1978). [Public Defender's Office, 25 NJPER at 57.]

The Commission noted, however, that the right to organize is not unfettered.

The Legislature,...determined that the employer's interests in determining governmental and managerial policies without negotiations or the risk of divided loyalties in decision making justified restricting negotiations over proposals or grievances that would significantly interfere with governmental policy making; requiring that supervisors be placed in negotiations units apart from the employees they supervise; and excluding some employees from the Act's protections altogether. N.J.S.A. 34:13A-3(e); Ridgfield Park Ed. Ass'n v. Ridgfield Park Bd. of Ed., 78 N.J. 144, 163 (1978); West Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971). The Legislature thus made choices and accommodations in seeking to protect both the interests of employees in negotiating over their own pay and other vital working conditions and the interests of governmental employers in having their policy making deliberations uncompromised by divided loyalties. [Public Defender's Office, 25 NJPER at 57.]

The statutory definition of public employees, therefore, reflects the Legislature's balancing of competing interests: N.J.S.A. 34:13A-3(d) defines public employees to "include any public employee, i.e., any person holding a position, by appointment or contract, or employment in the service of a public employer...." The only exclusions from the definition of "public employee" are "elected officials, members of boards and commissions, managerial executives and confidential employees."

The Commission further instructed in Public Defender's Office, 25 NJPER at 57, that:

Unless one of the four statutory exclusions applies, the Act permits professional employees and supervisors to organize. N.J.S.A. 34:13A-5.3; N.J.S.A. 34:13A-6(d). The category of professional employees includes such employees as "attorneys, physicians, nurses, engineers, architects, teachers, and the various types of physical, chemical and biological scientists." N.J.A.C. 19:10-1.1. [Emphasis added.]

Managerial Executives

"Managerial executives" are excluded from the Act's coverage. N.J.S.A. 34:13A-3(f) defines "managerial executives" as:

persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

Our Supreme Court examined this exclusion in New Jersey Turnpike Auth. and AFSCME Council 73, 150 N.J. 331 (1997) (Turnpike Authority). That case partially modified, but otherwise approved standards set forth in Bor. of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1981). The Supreme Court approved these revised criteria for determining managerial status:

A person formulates policies when he develops a particular set of objectives designed to further the mission of a segment of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of

three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. [Turnpike Authority. at 356.]

Under Turnpike Authority, our analysis of managerial status is done on a case-by-case basis, focusing on the employee's position in the hierarchy, functions and responsibilities, and extent of discretion. We determine whether the employee has the authority and accountability of a managerial executive to formulate or direct the effectuation of management policies and practices. Public Defender's Office.

The AGA stipulates that the law department's FACCs and section chiefs should be excluded from the proposed unit on the basis of their managerial executive and/or supervisory employee status. It also stipulates that the four ACCs assigned to the law department's labor section and the one ACC assigned to the development department should be excluded as confidential employees. No further determination on these titles is necessary.^{8/} We confine our analysis, therefore, to the remaining ACCs, public defenders and zoning attorneys.

The Act permits professional employees to organize. N.J.S.A. 34:13A-5.3. The definition of professional employee

^{8/} As to the vacant water department ACC position, it is Commission policy not to determine the unit status of vacant positions; accordingly, the status of this position will not be considered here. Town of Secaucus, D.R. No. 95-25, 21 NJPER 149 (¶26090 1995).

specifically includes "attorneys." N.J.A.C. 19:10-1.1. We have interpreted both the statute and the regulation to allow attorneys to organize.^{9/}

An affirmative statement of attorneys' rights to organize can be found in Newark Housing Auth., P.E.R.C. No. 93-10, 18 NJPER 432, 436 (¶23195 1992). There, the Commission rejected the employer's defense to an unfair practice charge, and concluded that a senior associate counsel in a five-attorney, in-house legal department was neither a managerial executive nor a confidential employee. In that matter, the in-house attorneys provided legal opinions and guidance to Authority directors and administrators on matters relating to Authority policy and operations. The senior counsel in that case represented the Authority as an attorney by preparing legal opinions, reviewing contracts, litigating landlord-tenant and handling building code violations matters. Settlements of litigation were required to be approved by the general counsel.

Additionally, we found that assistant county prosecutors in Union County were not confidential employees. Union Cty. Prosecutor's Off., D.R. No. 98-3, 23 NJPER 442 (¶28203 1997). There, the County prosecutor had died and an assistant attorney

^{9/} The City contends that attorneys in the State of Florida are excluded by that State's Constitution from the class of public employees allowed to organize. No such Constitutional exclusion exists in New Jersey and for the reasons discussed herein, I reject the City's policy argument for the creation of such an exclusion.

general was appointed acting prosecutor for the County. Assistant county prosecutors were sworn-in as acting assistant prosecutors/special deputy attorneys general. Deputy attorneys general are, by statute, N.J.S.A. 52:17A-7, confidential employees within the meaning of the Act. In that case, we found that despite being sworn as State deputy attorneys general, the State was not the employer and, therefore, the prosecutors were not confidential employees.

Here, the City contends that ACCs function as managerial employees and formulate management policies and practices and/or are charged with the responsibility of directing the effectuation of management policies and practices in the following manner:

1. ACCs "stand in the shoes" of the corporation counsel as legal representatives of the City, writing legal briefs, opinion letters and memoranda and appearing in court, administrative and departmental proceedings.
2. ACCs may be appointed as acting or temporary corporation counsel in the event of emergent circumstances.^{10/}
3. Corporation counsel may assign and/or reassign attorneys within the various law department sections; at any time, therefore, an ACC may be involved in a case or matter effecting labor relations.
4. ACCs manage their cases and assignments independently.

^{10/} The City's position statement refers to a "recent hurricane emergency" which "forced the appointment of an ACC to an acting Corporation Counsel."

5. As licensed attorneys, ACCs operate as legal advisors effecting the day-to-day activities and practices of various City departments.

6. As licensed attorneys ACCs are governed by the Rules of Professional Conduct (RPC).

With regard to the ACCs relative position in the City hierarchy, they report to a section chief who reports to a FACC who in turn reports to the corporation counsel. ACC job assignments are filtered through at least the section chiefs, but may also be made by the corporation counsel or FACCs.

With regard to ACC functions and responsibilities and the extent of their discretion, in order to sustain its claim that ACCs are managerial within the meaning of the Act, the City must make a particularized showing that ACCs actually perform those duties which make the titles managerial. See generally, New Jersey Tpk. Auth.; 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); Evesham Tp. Fire Dist. #1, D.R. No. 99-4, 24 NJPER 503, 505 (¶29233 1998) (directed election; employer failed to submit evidence that confidential job duties were actually performed). Here, the City merely alleges that ACCs may be appointed acting corporation counsel and as an example alluded to one afternoon during a recent hurricane. While the City indicates that an ACC was temporarily appointed to serve as corporation counsel, it does not state whether that individual exercised any managerial authority while holding the appointment.

While the City concludes that ACCs "effect management policy" by their daily interaction with various department heads, directors and administrative personnel, the City does not state how this alleged daily interaction actually "effects" management policy. I find that the ACC's job responsibilities listed above set forth the duties of a professional, not a managerial executive. Moreover, the City specifically noted that the corporation counsel holds ultimate responsibility for all ACC legal opinions.

While ACCs may exercise some independent discretion in handling cases, conducting research and interacting with City personnel, the City acknowledges that the corporation counsel is ultimately responsible for the ACCs work product.^{11/} See Newark Housing Auth., 18 NJPER at 185 (senior associate counsel who handled her own docket of cases but required general counsel's approval of all settlements found not to be managerial).

Additionally, the senior counsel's job duties in Newark Housing Auth., are similar to the general job duties of the non-labor section ACCs. In fact, they are virtually identical to the law department's litigation, real estate and contract section-specific job duties. Those job duties were found to be

^{11/} Exhibit C to the City's supplemental position statement is an advisory memorandum from an ACC to a councilman regarding the ACC's interpretation of what the City's demolition hearing procedures should contemplate. In light of the corporation counsel's oversight, this memorandum is insufficient as an indication of an ACC's authority or accountability in directing or effectuating management policies or practices.

insufficient indicia of managerial status. Newark Housing Auth., 18 NJPER at 192.

The City offered no other information regarding the public defenders or the part-time zoning attorney. Also, as to the City's contention that attorney conduct is governed by the Rules of Professional Conduct, it is unclear what correlation that has with the application of the managerial exclusion or the right to organize.

Based upon the foregoing, I find that ACCs, public defenders and zoning attorneys employed by the City are not managerial executives.

Confidential Employees

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." The Commission's policy is to narrowly construe the term confidential employee. In applying this test, the Commission has used the approach outlined 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):

We scrutinize the facts of each case to find for whom each employee works, what [the employee] does or what [the employee] knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit.

In Turnpike Authority, the New Jersey Supreme Court approved the standards articulated in State of New Jersey. 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. N.J.S.A. 34:13A-3(g); see also State of New Jersey, supra, 11 [NJPER] ¶16179 (holding that final determination is 'whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit.') Obviously, an employee's access to confidential information may be significant in determining whether that employee's functional responsibilities or knowledge make membership in a negotiating unit inappropriate. However, mere physical access to information without any accompanying insight about its significance or functional responsibility for its development or implementation may be insufficient in specific cases to warrant exclusion. The test should be employee-specific, and its focus on ascertaining whether, in the totality of the circumstances, an employee's access to information, knowledge concerning its significance, or functional responsibilities in relation to the collective negotiations process make incompatible that employee's inclusion in a negotiating unit. We entrust to PERC in the first instance the responsibility for making such determinations on a case-by-case basis. [Turnpike Authority at 358.]

The City asserts that any ACC may be assigned to handle cases from the labor section if labor section attorneys are not available. It also maintains that the basic job duties of an attorney representing the City create the potential for any or all ACCs to possess intimate knowledge of essential information which may pertain to collective negotiations.

The City has proffered no examples of non-labor section ACCs actually being assigned any labor section matters. It has not provided particularized examples of any ACC, who is not assigned to the labor section, who came to possess intimate knowledge of essential information which may pertain to any collective negotiation issues. In the absence of examples of non-labor section ACCs actually performing labor section job duties, and in the absence of examples of non-labor section ACCs actually possessing knowledge of information pertaining to labor relations, the City has not established that non-labor section ACCs are confidential employees. Moreover, merely working in the law department and thus having theoretical or potential access to confidential labor relations and collective negotiations materials is insufficient to warrant a finding of confidential status. See generally, Turnpike Authority; State of New Jersey. Likewise, merely possessing the potential to perform job duties which may be confidential is insufficient to warrant a finding of confidential status. Evesham Tp. Fire Dist. #1.

The City offered no other information regarding public defenders or the part-time zoning attorney.

Based upon the foregoing, I find that non-labor section ACCs, public defenders and zoning attorneys employed by the City are not confidential employees.^{12/}

Supervisory Employees

The City contends that all of its attorneys supervise support staff including paralegals, administrative assistants and interns, and may orally reprimand and effectively recommend hiring, firing, and disciplining of support staff. The City apparently contends that because attorneys may be supervisors, they are precluded from representation.

Absent specific facts, the City's broad assertion, without supporting evidence of supervisory authority is insufficient to determine that attorneys are supervisors within the meaning of the Act. City of Margate, P.E.R.C. No. 87-146, 13 NJPER 500 (¶18184 1987); Cherry Hill Tp., P.E.R.C. No. 30, NJPER Supp 114 (¶30 1970); Pine Valley Bor., D.R. No. 99-15, 25 NJPER 269 (¶30114 1999); Ridgefield Bd. of Ed., D.R. No. 98-12, 24 NJPER 89 (¶29048 1997); Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358 (1976).

Even assuming, without finding, that attorneys are supervisors, N.J.S.A. 34:13A-5.3 and 34:13A-6(d) specifically provide that supervisors are accorded the various protections of the Act including the right to organize. Public Defender's Office.

^{12/} As previously discussed, since the AGA stipulates to the confidential employee status of labor section ACCs and the ACC assigned to the development department, no further determination is necessary.

("[u]nless one of the four statutory exclusions applies, the Act permits professional employees and supervisors to organize."). While supervisors may be represented for purpose of collective negotiations, generally, they may not be included in units that admit non-supervisors as members. See generally, Rutgers University, P.E.R.C. No. 90-69, 16 NJPER 135, 137 n. 2 (¶21053 1982) (contrasting provisions of the Act with the National Labor Relations Act, 29 U.S.C. ¶141). No issue concerning the co-mingling of supervisors with non-supervisors is raised here.

Finally, the City contends that public defenders and zoning attorneys are not supervised by the corporation counsel and, therefore, may not be included in the petitioned-for unit. The AGA's petition seeks to represent all attorneys employed by the City, not just those employed as ACCs supervised by the corporation counsel. The City does not dispute that it employs public defenders and zoning attorneys. The Commission has favored structuring negotiations units along broad-based, functional lines and has been reluctant to find appropriate units which are structured along occupational or departmental lines. See State of New Jersey, P.E.R.C. No. 68, NJPER Supp 273 (¶68 1972), South Plainfield Bd. of Ed., P.E.R.C. No. 46, NJPER Supp 160 (¶46 1970); Bergen Cty. Bd. of Freeholders, P.E.R.C. No. 69, NJPER Supp 289 (¶69 1972); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 88-124, 10 NJPER 272 (¶5134 1984); Bordentown Reg. Bd. of Ed., P.E.R.C. No. 84-126, 10 NJPER 276 (¶15136 1984), aff'd 11 NJPER 337 (¶16122 App. Div. 1985); Ridgewood

Bd. of Ed., P.E.R.C. No. 82-14, 7 NJPER 462 (¶12204 1981). Based on the foregoing, I find that ACCs, public defenders and zoning attorneys are properly included in the proposed unit.

CONCLUSION

Based upon all of the foregoing, I direct an election be conducted in the petitioned-for unit as follows:

Included: All regularly employed attorneys employed by the City of Newark including assistant corporation counsels in the law department, public defenders and zoning attorneys.

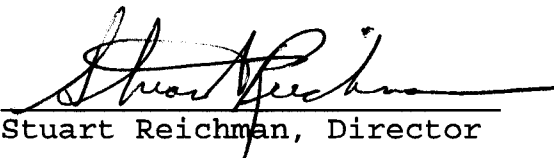
Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, police employees, non-professional employees, casual employees, first assistant corporation counsel, section chiefs in the law department, assistant corporation counsel assigned to the labor section and development department and all other employees.

The election shall be conducted no later than thirty (30) days from the date of this decision. Those eligible to vote must have been employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, on vacation or temporarily laid off, including those in the military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Pursuant to N.J.A.C. 19:11-10.1, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the names of all eligible voters in the units, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by us no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously provided to the employee organization with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

The exclusive representative, if any, shall be determined by a majority of the valid votes cast in the election. The election shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Stuart Reichman, Director

DATED: April 18, 2000
Trenton, New Jersey