

D.R. NO. 2003-16

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

In the Matter of

WASHINGTON TOWNSHIP FIRE
DISTRICT #1,

Public Employer,

-and-

Docket No. RO-2003-15

IAFF LOCAL 4204-B,

Petitioner.

SYNOPSIS

The Director of Representation orders an election among three fire captains employed by a municipal fire district. The Director finds that none of the captains are managerial executives within the meaning of N.J.S.A. 34:13A-1 et seq. The Director also finds that though the petitioner's parent organization represents non-supervisory employees of the district, the petitioner is qualified to represent these supervisory employees. The petitioner certified that it is a separate organization from any non-supervisory organization, that it contains no non-supervisory members, and that it will conduct negotiations and administer its contract separately from any organization representing non-supervisory employees.

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Appearances:

For the Public Employer
Littler Mendelson, attorneys
(Ronald I. Tisch, of counsel)

For the Petitioner
Keith Kemery, Business Agent

DECISION AND DIRECTION OF ELECTION

On September 3, 2002, IAFF Local 4204-B (IAFF) filed a Petition for Certification with the Public Employment Relations Commission (Commission) seeking to represent three full-time fire captains employed by the Washington Township Fire District #1 (District). The petitioned-for employees are unrepresented. The petition was supported by an adequate showing of interest.

The District opposes the petition and refuses to consent to an election. It asserts that this IAFF local is prohibited from

representing the District's superior officers since the same organization also represents the District's rank-and-file firefighters. The District also asserts that the captains are managerial executives within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), and are ineligible to join any collective negotiations unit.

We have conducted an administrative investigation of this matter in accordance with N.J.A.C. 19:11-2.2 and 2.6. The Commission's assigned staff agent convened an investigatory conference on October 7, 2002. The parties provided information at the conference and submitted additional information, documents and argument. On January 15, 2003, I wrote to the parties, informing them of my tentative findings and conclusions and inviting their responses. On January 31, February 5 and March 6, 2003, the parties submitted responses. There being no substantial and material factual issues in dispute, the disposition of this matter is based on the following:

FINDINGS OF FACT

The District operates six fire stations and is staffed by a combination of paid personnel and volunteer firefighters. The District is managed by a five-member, elected Board of Fire Commissioners. It employs a full-time fire chief, three fire captains, one fire official, four firefighters, two firefighter/inspectors, two firefighter/mechanics, a business

administrator and secretary. Chief Everett Hoffman is the chief executive officer.^{1/} Currently reporting directly to Chief Hoffman are Fire Captains Alex Borgia and James Lee.^{2/} Borgia and Lee supervise the work at two fire stations in the Township and have other district-wide responsibilities. Also reporting directly to the chief is Captain/Training Coordinator Patrick Dolgos. Dolgos' full-time job is to coordinate and manage the district's training program.

Captains who manage fire stations assign work; conduct roll-call; hold briefings; instruct, observe and correct the work of subordinate fire fighters; may impose discipline; train fire fighters; and maintain reports and records. Captains in charge of stations also assist or perform investigations; provide input into the budget preparation, and, as needed, take command at fire scenes.

The District's annual budget is subject to voter approval. In October of each year, Captain Borgia compiles and develops the information needed for the annual budget. Borgia solicits suggestions and requests from the other captains and reviews the expenditures, operating budget and ongoing contracts from the

1/ The Board of Fire Commissioners recently considered but decided against creating a full-time deputy chief position.

2/ At the time the petition was filed Lee's position was occupied by Captain Rex Rostrom.

previous year. He prepares and submits a proposed budget to the chief who reviews Borgia's proposals, amends and adjusts them and presents the budget to the commissioners for discussion and approval. Each February, the public votes on the proposed budget. Once approved, the captains recheck quotes for services and repairs and submit requisitions for repairs/supplies with vendors. If an item is subject to formal bid (as determined by the dollar value) then, after formal bidding procedures are followed, the commissioners vote on which bids to accept.

The captains have input into the operational costs associated with staffing in that they notify the chief of their staffing needs. The chief and commissioners decide the staffing levels. On a daily basis, the captains coordinate the deployment of firefighters to ensure appropriate staffing levels are maintained. Captains have authority to repair vehicles in the chief's absence but must obtain approval for most other expenditures.

Captain Lee is in charge of the maintenance and repair of the District's fire fighting equipment and vehicles. He submits a proposed budget to cover these expenses. The mechanics report to Lee.

Captain Dolgos is responsible for coordinating and conducting the District's training program. He researches training programs and grants, drafts proposals for submission to the chief, formulates the training schedule, develops manuals, conducts

classes, develops materials, arranges for training aids, submits an annual training budget, coordinates the use of facilities for training, evaluates training effectiveness, and may develop individualized training. Dolgos has authority to make most of the decisions about the training program with little oversight by the chief.

There are three types of policies in the district. The first are standard operating procedures/policies for rescue calls, operational procedures, fire ground operations and fire scene management. Second, there are administrative policies. Third are employee policies regarding work rules, hours of work, vacation leave policies, personal injury policies, etc. The captains have input into all of these but most are subject to the final approval of the chief and commissioners.

Recently, Captain Rostrom resigned and was replaced by Fire Captain James Lee. Captains Dolgos and Borgia did not participate in or make recommendations to the chief in the District's promotion of Captain Lee.

On October 16, 2002, IAFF Local 4204-B submitted a certification signed by Captain Dolgos certifying that:

This organization understands that if elected, it will comply with the requirement that it be and act as a separate organization from any other organization which represents or may represent non-supervisory employees employed by Washington Township Fire District #1.

Dolgos also pledged in the certification that Local 4204-B, not Local 4204, will control the negotiations and administration of any collective agreements for supervisors, and that Local 4204-B has no non-supervisory members.

On January 7, 2003, Chief Hoffman designated volunteer Fire Chief Rob Borkowski as acting chief in Hoffman's absence for vacation. Captain Dolgos was appointed as the supervisor of all paid employees during the same period-- from January 10th through January 20, 2003.

ANALYSIS

There are two issues presented by the petition: whether the captains are managerial executives within the meaning of the Act, and whether IAFF Local 4204-B is an appropriate organization to represent the District's fire captains.

The District asserts that the captains are managerial executives within the meaning of the Act and, therefore, not entitled to representation. It further maintains that this IAFF Local may not represent these employees because Local 4204 already represents the District's rank-and-file firefighters. It contends that permitting this local to be the certified representative of the fire superiors would violate the prohibition against the same organization representing both supervisory and non-supervisory employees. The District points to the presence of one of Local 4204's firefighter members at our investigatory conference as

evidence of potential rank-and-file interference with the supervisors' organization.

Managerial Executive Status

The Act entitles public employees the right 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, however, also determined that the employer's interests in making policies without the risk of divided loyalties in decision-making justified requiring that supervisors be placed in negotiations units apart from the employees they supervise; and excluding some employees from the Act's protections altogether. The Act thus accommodates the interests of employees in negotiating over their terms and conditions of employment and the interests of governmental employers in having their policy-making deliberations uncompromised by divided loyalties.

N.J.S.A. 34:13A-3(d) defines public employees as ". . . any person holding a position, by appointment or contract, or employment in the service of a public employer. . . ." The only exclusions from this definition are "elected officials, members of boards and commissions, managerial executives and confidential employees."

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 Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980).

The Montvale standards provide:

A person formulates policies when he develops a particular set of objectives designed to further the mission 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. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes. 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. [Id. at 337. Emphasis added.]

The Supreme Court concluded that the underlined requirement was unduly restrictive, especially as applied to large organizations in which some managers might not possess "organization-wide power" yet still have "significant power, discretion and influence within

their own departments." Excising that requirement, the Supreme Court approved these revised standards:

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. Id at 356.

While holding that a managerial executive need not possess organization-wide power, the Supreme Court also rejected portions of the lower court's opinion that would have expanded the managerial executive definition to exclude all employees above first-line supervisors and to adopt the private sector exclusion of all managerial employees who effectuate managerial policies. The Supreme Court reasoned that the problem of divided loyalties is of less concern in the public sector than in the private sector because public employees do not have a right to strike; public employees have a much narrower scope of negotiations; public employers are not seeking to maximize profits; and public employers and public employees share a stronger common interest in the mission of the organization. The Court also stressed that the Legislature had rejected a managerial executive definition,

proposed by Governor Cahill, that would have excluded persons "effectuating and making operative" management policies and practices and had instead confined that part of the exclusion to persons "directing the effectuation of such policies and practices." The Court concluded that "directing the effectuation" connotes a higher level of authority than does "effectuating and making operative." Id. at 355.

Under Turnpike Authority, the line between managerial executives and lower-level employees must be located case-by-case. Our analysis in each instance focuses on the weight and interplay of multiple factors such as the employee's position in the hierarchy, functions and responsibilities, and extent of discretion. Our goal is to determine whether the employee has the authority and accountability of a managerial executive to formulate or direct the effectuation of management policies and practices.

I find, based on the facts presented here, that the captains are not managerial executives and may vote on whether they wish to be represented for purposes of collective negotiations. The captains have input into many of the District's policies and operations but do not have sufficient independent authority to satisfy the Act's requirements. Their authority with respect to most standard operating procedures, administrative policies and personnel policies is circumscribed by sets of written policies.

In its response, the District restated its position: "Captain Borgia is the principal author of the . . . annual budget, a task that requires him to solicit suggestions and requests, review expenditures, operating budgets, and existing contracts, and submit a final proposal to the chief." This statement invites us to believe that Borgia has more authority over the District's budget and commitment of funds than he actually does. Soliciting requests, reviewing past expenditures and converting these into a budget document to be submitted to higher levels for approval does not evidence "the development of objectives designed to further the mission of a segment of the governmental unit . . . or the [development] of the methods, means or extent of reaching a policy objective." Turnpike Authority at 356. Captain Borgia's level of authority is limited in that the chief and commissioners can alter the budget proposal, and they ultimately decide what is submitted for a vote by the municipal voters.

The District argues that Borgia and Lee "work directly with the chief to determine staffing levels and coordinate deployment. These job functions . . . require that the captains assume important oversight responsibilities and exercise independent judgment and discretionary authority on a regular basis." These duties are typical of a high level supervisor and alone do not signal managerial executive status. In addition, the District argues that they occupy preeminent positions in the District's

hierarchy and therefore satisfy all of the criteria articulated in Turnpike Authority. In Turnpike Authority, the Court specifically noted that it "viewed the requirement that managerial executives 'possess a level of authority and independent judgment sufficient to affect broadly the organization's purposes or means of effectuation of those purposes' as unduly restrictive, particularly as applied to large organizations such as the Authority in which managers may have significant power, discretion and influence within their own departments and yet not "affect broadly the organization's purposes or its means of effectuation of those purposes." 150 N.J. 356. The District is not a large organization; the chief's and commissioners retain significant authority to broadly affect the managerial direction of the District. In this context, based on these facts, the extent of discretion exercised by the captains is too limited by the chief's and commissioners' authority. Their input into the budget is not determinative or authoritative, but subject to review and approval by the chief and commissioners. This input is too diffuse to be indicative of a high degree of autonomy which is characteristic of managerial executives.

The captain in charge of training appears to possess the most independence, however, it is not clear from the facts here that he has the authority to commit funds independently from the normal district budget process. His authority is also circumscribed by

the chief's oversight and the discretion he exercises concerns only one aspect of the management of a fire district.

The District argues that our decision in Monroe Tp. Fire District No. 2, P.E.R.C. No. 98-158, 24 NJPER 347 (¶29165 1998) (Monroe Tp.) is on point. I disagree. There, the Commission, adopting a Hearing Examiner's Recommendation, H.E. No. 98-12, 24 NJPER 45 (¶29030 1997), found a fire captain qualified as a managerial executive. That case is distinguishable. There, unlike here, the unit was very small--three firefighters and one acting lieutenant. There, unlike here, the district had problems with the lieutenant's performance, withdrew his appointment and created an executive director/captain, which in its design was intended to be a managerial executive and confidential employee. There, unlike here, the Board needed an employee "to advise it on managerial policies and negotiations confidences" Id. at 348. There, unlike here, the district chose to centrally assign all the administrative functions which are decentralized in this district. Here, the chief is more like the executive director/captain in Monroe Tp.; he created many of the existing policies and advises the Board on confidential negotiations matters, reviews and presents the budget to the Board, and thus, he retains authority and discretion over the substantive areas delegated to the captains. The captains here are first-line supervisory employees who also perform administrative functions necessary to the

operation of a medium-sized fire district. The captain who was also titled executive director in Monroe Tp. is the chief's equivalent here.

Accordingly, based upon all of the above, I conclude that the captains are employees within the meaning of the Act and may vote on representation.

Organizational Structure

N.J.S.A. 34:13A-5.3 provides that, except for unusual circumstances not relevant here, supervisors are prohibited from representation by an organization with non-supervisory employees as members. In City of Camden, P.E.R.C. No. 82-89, 8 NJPER 226 (¶13094 1982) (Camden), the Commission recognized the need for safeguards against the possibility that a rank-and-file police organization could interfere with or dominate the organization representing superior officers, where the two organizations were affiliated with the same parent organization. Accordingly, it created a procedure for an organization seeking to represent supervisors to acknowledge its responsibilities under the Act. The organization must certify that it has a statutorily valid structure and it must agree to certain specific provisions as a condition of certification. Camden. The policy has been applied consistently in cases where this issue has arisen and has been approved by the New Jersey courts. See Hudson Cty., D.R. No. 84-21, 10 NJPER 293 (¶15144 1984), election objections dismissed and certification issued D.R.

No. 85-7, 10 NJPER 623 (¶15297 1984), aff'd NJPER Supp.2d 157 (¶138 App. Div. 1985); Jackson Tp., D.R. No. 92-32, 18 NJPER 317 (¶23134 1992) (certification amended for police superior officers unit); see also, City of Union City, D.R. No. 2000-16, 26 NJPER 319 (¶31129 2000) (certification amended for police superior officers unit), N.J. Institute of Technology, D.R. No. 2003-1, 28 NJPER 354 (¶33127 2002) (conjecture about police union's future conduct did not warrant dismissal of petition, where union certified it would represent supervisors separately from rank-and-file officers).

Here, the District argues that the Commission's acceptance of the Camden certification violates the spirit of the Act. It contends that the presence of a rank-and-file firefighter at the investigatory conference is evidence that the supervisors local and the rank-and-file local have failed to establish independence from one another. However, we are guided by Hudson Cty., where the Court noted that where a petitioner submits prima facie evidence that the representation it will provide will comply with N.J.S.A. 34:13A-5.3, a certification of representative should be issued. The Court found that the claim that the supervisory unit would be dominated by the non-supervisory unit members was premature. Accord, Essex Cty. Voc-Tech. Bd. of Ed., D.R. No. 94-6, 19 NJPER 522 (¶24242 1993), rev. den., P.E.R.C. No. 94-48, 19 NJPER 584 (¶24278 1993), aff'd 21 NJPER 63 (¶26045 App. Div. 1995), certif. den. 141 N.J. 96 (1995).

As to the District's concerns that Local 4204 and 4204-B will not maintain sufficient independence from one another, we will not speculate about the majority representative's future conduct. In UMDNJ, D.R. No. 98-2, 23 NJPER 440 (¶28202 1997), rev. den., P.E.R.C. No. 98-7, 23 NJPER 455 (¶28214 1997), we found that once an employee organization submits a Camden certification promising to represent supervisors and rank-and-file employees separately, we will presume that it will act in conformance with that certification. Further, in UMDNJ, we specifically rejected the argument that a supervisors' union was disqualified from representing superior officers because another local of the same union represented the department's rank-and-file police. Accordingly, we declined to speculate on possible post-certification conduct.

Here, no circumstances exist which persuade us to find otherwise. The petitioner has completed a certification agreeing to the Act's requirements. Specifically, it agrees that it will be and act as a separate organization from any non-supervisory organization representing District employees; that it, rather than the non-supervisory organization, will control the negotiations for and the administration of its contract; and, finally, that it has no non-supervisory members.

With regard to the District's concerns that the two IAFF locals might use the same negotiations representatives, that

assertion is also speculative. Both the Commission and the New Jersey courts have found that the use of the same attorney or business agent as a negotiations representative does not necessarily violate the principals set forth in the Act or in the Camden case; Hudson Cty; UMDNJ. While an employee organization is generally free to select its own negotiations committee members, an employer may refuse to negotiate with a negotiations team purportedly representing supervisors, but in fact illegally dominated by non-supervisors. Rutgers Univ., P.E.R.C. 99-44, 25 NJPER 10 (¶30004 1998); Bor. of Somerville, P.E.R.C. No. 88-77, 14 NJPER 218 (¶19077 1988), aff'g H.E. No. 88-33, 14 NJPER 102 (¶19037 1988). If the supervisors' organization illegally permits a non-supervisory affiliate to control its negotiations or contract administration, there are remedies available through the Commission's unfair practice procedures. See Town of Kearny, P.E.R.C. No. 81-137, 7 NJPER 339 (¶12153 1981) (police union committed unfair practice by requiring that superiors officers' negotiations team be appointed by the officers they supervised).

Based upon all of the foregoing, I find that the fire captains are not managerial executives, and that IAFF Local 4204-B is qualified to seek to represent these employees. Accordingly, I direct that an election be conducted among the employees in a unit defined as follows:

Included: all regularly employed superior fire officers, including fire captains employed by Washington Township (Gloucester County).

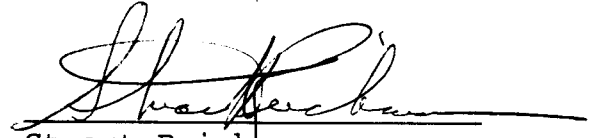
Excluded: managerial executives, confidential employees and non-supervisory employees within the meaning of the Act; police, professional employees, craft employees, casual employees, employees represented in other negotiations units, and the fire chief.

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 in the unit 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.

A handwritten signature in black ink, appearing to read "Stuart Reichman", written over a horizontal line.

Stuart Reichman
Director of Representation

DATED: March 28, 2003
Trenton, NJ