

D.R. NO. 2004-2

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

In the Matter of

TOWNSHIP OF BRANCBURG,

Public Employer,

-and-

Docket No. CU-2002-45

FOP LODGE NO. 14A,

Petitioner.

**SYNOPSIS**

The Director of Representation dismisses as untimely a unit clarification petition filed by FOP. FOP sought to include in its unit the title of captain which was created and filled during negotiations for a successor agreement. The successor agreement did not expressly reserve the dispute concerning this title for Commission consideration after execution of the agreement. Therefore, the Director found that the unit clarification petition needed to be filed before the full execution of the successor agreement.

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Appearances:

For the Public Employer,  
Ruderman and Glickman, attorneys  
(Mark S. Ruderman, of counsel)

For the Petitioner,  
Brian M. Cige, attorney

**DECISION**

On June 5, 2002, FOP Branchburg Lodge 14A (FOP) filed a clarification of unit petition seeking to include a newly created captain position in a unit of superior officers holding the ranks of corporal, sergeant and lieutenant. The Township of Branchburg (Township) opposes the inclusion of the captain title on the grounds that the captain is a managerial executive and/or a confidential employee within the meaning of N.J.S.A. 34:13A-1 et seq. (Act).

After unsuccessful settlement negotiations, we conducted an administrative investigation pursuant to N.J.A.C. 19:11-2.2 and 2.6. Submissions by the parties were completed on April 28.

2003. By letter dated July 29, 2003, I advised the parties that I was inclined to dismiss the petition as inappropriate. I invited the parties to submit additional materials and argument for my consideration by August 11. On August 8, 2003, the FOP filed a supplemental submission. The administrative investigation reveals that there are no substantial material factual issues in dispute which would warrant convening an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. Based upon the investigation, I find the following:

**FINDINGS OF FACT**

FOP represents corporals, sergeants and lieutenants of the Township's police force. The FOP and the Township have negotiated a series of collective agreements, the most recent covering the period January 1, 2002 through December 31, 2004. Though the parties could not provide a dated, executed agreement, they did provide an undated, executed agreement and a Township Resolution, No. 2002-142, dated March 25, 2002, which authorized the mayor and municipal clerk to sign the agreement.

During negotiations leading to the 2002-2004 collective agreement, counsel for the FOP sent a letter to Township counsel stating in part that ". . . the contract must be clear that the municipality will be filing to clarify whether the rank of captain is included in this unit. . . ." This letter is dated

February 7, 2002. However, this provision was not included in the final, executed agreement.

Up until November 2001, the Township never had a police captain. In November 2001, Lieutenant David Young was promoted to the newly created position of captain.

**ANALYSIS**

The FOP argues that, while its recognition clause specifically includes only police lieutenants, sergeants and corporals, it represents all superior police officers employed by the Township. It contends that the title of captain is not mentioned in its recognition clause because it understood that the Township was to file a unit clarification petition.

Moreover, FOP argues that, as a lieutenant, David Young had been part of the negotiations unit and that the scope of his duties has not changed since his promotion to captain.

The Township asserts that Young's involvement in management policy making, implementation and labor matters has increased since his promotion to captain. Significantly, the Township contends that it is irrelevant when Young began serving as a managerial executive and/or confidential employee, since the performance of these duties makes him ineligible for representation under the Act, and the title is inappropriate for inclusion in the unit.

The threshold issue is whether the unit clarification petition is appropriate under the circumstances. In Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977), the then Director of Representation set forth the circumstances under which a unit clarification petition is appropriate. The Director stated:

Clarification of unit petitions are designed to resolve questions concerning the exact composition of an existing unit of employees for which the exclusive representative has already been selected . . . . Occasionally a change in circumstances has occurred, a new title may have been created . . . [or] the employer may have created a new operation or opened a new facility [which would make] a clarification of unit proceeding appropriate . . . . Normally, it is inappropriate to utilize a clarification of unit petition to enlarge or diminish the scope of the negotiations unit for reasons other than the above. 3 NJPER at 251.

In Wayne Bd. of Ed., P.E.R.C. No. 80-94, 6 NJPER 54 (¶11028 1980), the Commission held that a clarification of unit petition is not appropriate to add titles to the unit where the majority representative had "slept on its rights with regard to a particular title." In Wayne, the Commission stated:

In those cases where it is found that there had been an agreement to exclude or evidence of a waiver on the part of the majority representative, it will result in the conclusion that this petition raises a question concerning representation. If it is found with regard to a classification that a question concerning representation exists, that portion of the clarification petition relating to such classification will be dismissed.

In Rutgers University, D.R. No. 84-19, 10 NJPER 284 (¶15140 1984), the Director dismissed a petition to include titles created before execution of the existing collective negotiations agreement. The Director found that the majority representative had waived its rights to seek clarification of the existing unit. We held that the majority representative has the responsibility to identify and petition for new titles during the contractual period in which they are established and before executing its next succeeding contract. Rutgers. See also Vernon Tp., D.R. No. 2002-3, 27 NJPER 354 (¶32126 2001); Lacey Tp. Bd. of Ed., D.R. No. 89-12, 15 NJPER 106 (¶20051 1989). Alternatively, the parties could conclude negotiations for the successor contract but include a provision preserving the dispute for the Commission to decide. See Union Cty. Reg. H.S. District #1, D.R. No. 83-22, 9 NJPER 228 (¶14106 1983) (clarification granted where parties preserved issue in successor contract provision); compare, Atlantic Cty. College, P.E.R.C. No. 85-64, 11 NJPER 30 (¶16015 1984).

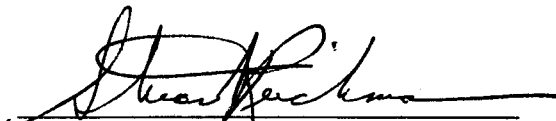
Here, the captain position was created in late 2001 and Lieutenant Young was appointed to the position in November 2001. The parties executed the successor contract on or about March 25, 2002. Thus, FOP had the responsibility of filing its petition before the execution of the 2002-2004 successor agreement. This petition was not filed until June, 2002. Moreover, the contract

contains no provision by which the parties preserved this issue for the Commission's determination. The FOP's February 7, 2002 letter only evidences that the issue of filing a unit clarification petition regarding the captain title was discussed. It does not establish that the parties agreed on this issue. The February 7 letter indicates that the Township was to file the petition presumably to exclude the title from the unit. In fact, it was the FOP that sought to clarify the composition of the unit by including the captain. At the very least, there was no mutual intent expressed by the parties to preserve the unit composition dispute for submission to the Commission. Accordingly, consistent with established precedent, I find that a clarification of unit petition is not appropriate under these circumstances. Having found that the petition is procedurally inappropriate, I need not decide the issue of whether the captain title should be included in the superior officers unit or whether Captain Young is a managerial executive or confidential employee within the meaning of the Act.

**ORDER**

The unit clarification petition is dismissed.<sup>1/</sup>

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION



Stuart Reichman, Director

DATED: August 21, 2003  
Trenton, New Jersey

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1/ The FOP is not prevented from filing a timely representation petition seeking to add the captain to the superior officers' unit. In the absence of an agreement between the parties, we would then consider the captain's managerial/confidential status.