

D.R. No. 2005-17

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

In the Matter of

BOROUGH OF SOMERVILLE,

Public Employer,

-and-

Docket No. CU-2004-017

OPEIU LOCAL 32,

Petitioner.

SYNOPSIS

The Director of Representation clarifies a supervisory negotiations unit represented by Local 32 by including the new title of Community Development Director. The remainder of the clarification of unit petition was dismissed on the ground that it was an inappropriate filing by which to attempt to include the Public Works Manager in the unit. A timely filing of a representation petition would be the correct means.

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Appearances:

For the Public Employer,
Ruderman & Glickman, attorneys
(Steven S. Glickman, of counsel)

For the Petitioner,
Mark C. Rushfield, attorney

DECISION

On February 2, 2004, the Office and Professional Employees International Union, AFL-CIO, Local 32 (OPEIU) filed a Clarification of Unit Petition with the Public Employment Relations Commission. The petition seeks to add two titles, the Director of Community Development (Director) and the Public Works Manager (Manager) to its collective negotiations unit of white and blue-collar supervisory employees of the Borough of Somerville (Borough).

The Borough opposes the petition and asserts that both titles are managerial executives and therefore, inappropriate for inclusion in the unit. Additionally, as to the Public Works

Manager, the Borough contends that there was a 1999 agreement between it and OPEIU to remove this title from the existing unit. OPEIU maintains that both titles are supervisors and therefore, are appropriate to include in its supervisory unit.

We have conducted an administrative investigation concerning the petition in accordance with N.J.A.C. 19:11-2.2. An investigatory conference was held on September 24, 2004. The parties submitted written positions and supporting documentation on January 3, 2005. By letter dated April 19, 2005, I informed the parties that I was inclined to clarify the unit to include the Director of Community Development and dismiss the remainder of the petition. I gave the parties until April 29, 2005 to submit additional information for my consideration. No other materials have been filed. The following facts appear.

FINDINGS OF FACT

OPEIU and the Borough are parties to a collective negotiations agreement covering the period January 1, 2003 through December 31, 2005. The current agreement was not signed until June 8, 2004. The predecessor agreement covered the period of January 1, 2000 until December 31, 2002 and was signed in October of 2000. The recognition clause of both agreements states:

The Borough of Somerville hereby recognizes the union as the sole and exclusive bargaining agent for all full-time and regularly employed part-time white collar and

blue collar supervisory employees employed by the Borough, including the court administrator, assistant engineer, superintendent of public works, **public works manager**, superintendent of fire and parking meter maintenance, assistant superintendent of fire and parking meter maintenance, tax assessor, community service coordinator, building inspector, deputy treasurer, welfare director, plumbing sub-code official, zoning officer, deputy zoning officer, fire inspector, construction code official, electrical inspector, recreation director, assistant to the recreation director, health officer, environmental officer and records management director and excluding the borough clerk-administrator, treasurer/chief financial officer/tax collector, director-public library, non-supervisory employees, confidential employees, managerial executives, police, craft employees and professionals, in all those matter specifically provided for herein pertaining to wages, hours and conditions of employment. (Emphasis supplied)

Public Works Manager

The position of Public Works Manager was created by Township Resolution on August 3, 1992. According to the Borough's job description, the Public Works Manager is "responsible for the administration, supervision, and operations of the Public Works Department." The Public Works Manager reports directly to the Borough Administrator and the Public Works Committee. Job duties include, but are not limited to, "preparation and oversight of capital and operating budgets for parks, sewers and public works; training of personnel; employee evaluations and recommendations

for site plan improvements." No information has been provided to show any change in circumstances or job duties in that position.

By letter dated December 29, 1999, Gregory Feeney, Business Representative for OPEIU, forwarded a letter to Peter Hendershot, Borough representative, advising that the Union no longer recognizes the title of Public Works Manager in the collective bargaining agreement between the Union and the Borough. Specifically, the letter states, "as of the writing of this letter, the title mentioned above shall be removed from the recognition clause of the contract."

Although the recognition clause in the parties' collective bargaining agreement did not change since OPEIU's December 29, 1999 letter, it appears that since that time the title of Public Works Manager has been excluded from the unit.

The Director of Community Development

By Ordinance adopted March 22, 2001, the Borough established a Department of Community Development, the head of which is the Director of Community Development. The Director also serves in the position of Code Enforcement Officer and is responsible for the general administration of the department, for the supervision of all personnel thereunder and the enforcement of all statutes, codes and ordinances. The offices, agencies and personnel assigned under the Department of Community Development include the Uniform Construction Code Enforcing Agency, the Fire Official

and other personnel responsible for the enforcement of the Uniform Fire Safety Act and the Uniform Fire Code, the planning board, the zoning board of adjustment, and all other officers and employees of the Borough designated to enforce statutes, codes and ordinances concerning land development, zoning occupancy of premises, use of land or premises, safety of land or premises, property maintenance and housing. By Resolution adopted August 20, 2001, the Borough appointed its first director of that department.

ANALYSIS

The threshold issue is whether the unit clarification petition is the appropriate vehicle by which to include the above titles in the unit. The Commission's case law concerning the appropriate use of a unit clarification petition is well settled. In New Jersey Transit, P.E.R.C. No. 2000-6, 25 NJPER 370 (¶30160 1999), aff'g H.O. No. 99-1, 25 NJPER 251 (¶30106 1999), the Commission observed:

The purpose of a clarification of unit petition is to resolve questions concerning the scope of a collective negotiations unit within the framework of the Act or as set forth in the unit definition in a Commission certification or the parties' recognition agreement. Normally, it is inappropriate to use a clarification of unit petition to enlarge or diminish the scope of a negotiations unit for reasons other than the above. Typically, a clarification is sought as to whether a particular title is contemplated within the scope of the unit definition. Clearview Reg. Bd. of Ed., D.R.

No. 78-2, 3 NJPER 248 (1977). If a clarification of unit petition is not appropriate or timely, employees may be added to an existing unit through the filing of a representation petition. See N.J.A.C. 19:11-1.1.

As further explained in Clearview, the clarification of unit process is intended to resolve ambiguities concerning the composition of an existing negotiations unit as it relates to the identification of titles within a general classification for employees. Additionally, the clarification of unit process is appropriate where circumstances have occurred which change a title's job functions or a new title has been created, from which we might find that the changed or new title could be identified within the parties' described unit. However, absent changed circumstances, where the parties specifically agree to exclude titles from the unit, a clarification of unit petition is inappropriate to subsequently add those same titles to the unit, and, it will be dismissed. Wayne Tp. Bd. of Ed., P.E.R.C. No. 80-94, 6 NJPER 54 (¶11028 1980); Warren Tp., D.R. No. 82-10, 7 NJPER 529 (¶12233 1981). As we explained in Clearview,

. . . if the parties have negotiated a contract that includes [or excludes] without reservation certain persons or titles, the Commission must assume that the written agreement is the result of good faith negotiations in which the parties have imparted finality to their give and take. This agreement to include or to exclude certain persons or titles in a contract may have involved concessions by both parties in the negotiation of the final terms and

conditions of employment. A party to the agreement should not be permitted to gain additional profit from resort to the Commission's processes after the contract is executed. 3 NJPER at 251-252.

Additionally, where there is a new title or change in circumstances, a petitioner must act promptly to seek unit clarification; absent specific preservation of the dispute, the parties' execution of a successor contract will ordinarily act as a waiver of the petitioner's right to seek unit clarification. Rutgers Univ., D.R. No. 84-19, 10 NJPER 284, 285 (¶15140 1984).

If it is determined that a unit clarification petition is appropriate, we must next ascertain whether an employee is a managerial executive. The analysis is fact sensitive and conducted on a case-by-case basis.

The Act defines a managerial executive 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 . . .
N.J.S.A. 34:13A-3(f)

The Commission established the standards for determining managerial executive status in Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980). More recently, in New Jersey Turnpike Authority v. American Federation of State, County and Municipal Employees, Council 73, 150 N.J. 331 (1997), the Supreme Court reviewed the Montvale standard. It excised the requirement that an employee must exercise organization-wide power in order

to fit within the managerial executive exception and approved the following test as formulated in Montvale:

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. [Footnotes eliminated]
New Jersey Tpk. Authority, 150 N.J. at 356.

Public Works Manager

Based upon Clearview and Warren Tp., it appears that the instant petition is not appropriate for including the Public Works Manager title. Mr. Feeney's letter of December 29, 1999, evinces OPEIU's intent to remove the title of Public Works Manager from the unit. OPEIU now asserts that Feeney did not have the authority to remove the Public Works Manager from the bargaining unit and therefore, it has no force or effect. However, OPEIU presents no facts to show that it did not intend to exclude the Public Works Manager from the unit and has produced no evidence to indicate that it has represented that title since December 1999, nor evidence why it took so long to

reclaim the title. Moreover, there is no allegation of a change in circumstances in any of the functions of the position since its exclusion in 1999, as contemplated in Clearview.

In light of OPEIU's specific intent to exclude the title of Public Works Manager from the existing unit, I find that the instant clarification of unit petition is not the appropriate mechanism by which to include that title in the existing unit. A representation petition is more appropriate. Therefore, I dismiss the unit clarification petition as to the Public Works Manager.^{1/}

The Director of Community Development

The unit clarification petition appears to be appropriate and timely, however, with regard to the inclusion of the Director of Community Development. The first Director was appointed by Borough resolution on August 20, 2001. The instant petition was filed on February 2, 2004 --subsequent to creation of the title but before the parties signed the next successor agreement. As such, OPEIU timely filed its unit clarification petition, thus preserving its right to assert that the Director should be included in its supervisory unit.

The Borough has not demonstrated that the Director is a managerial executive within the statutory definition, even as

^{1/} Based on the evidence submitted, I would not be inclined to find that the Public Works Manager is a managerial executive within the meaning of the Act.

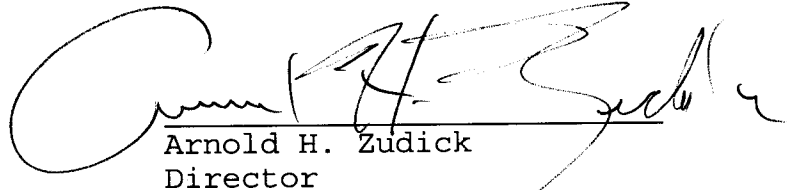
interpreted by the Supreme Court in New Jersey Turnpike Authority. Although the Borough asserts that the Director is responsible for formulating policies and practices and is charged with the responsibility of directing the effectuation of such management policies and practices, the Borough has not submitted any facts to support such findings. The evidence it has provided - that the Director is the head of the Department of Community Development, that he also serves in the position of Code Enforcement Officer and is responsible for the general administration of the department, for the supervision of all personnel thereunder and the enforcement of all statutes, codes and ordinances - indicates that this title has supervisory responsibilities and therefore could be appropriately included in the OPEIU supervisory unit. The submissions do not establish, however, that the Director of Community Development is a managerial executive and should be excluded from the unit as a matter of law. Accordingly, based upon the above, I clarify OPEIU's supervisory unit to include the Community Development Director.

ORDER

Effective immediately, OPEIU's supervisory unit is clarified

to include the Community Development Director. The remainder of Docket No. CU-2004-017 is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Arnold H. Zudick
Director

DATED: May 9, 2005
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by May 23, 2005.