D.R. No. 2010-6

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

In the Matter of

SUSSEX COUNTY,

Public Employer,

-and- Docket No. CU-2008-005

CWA LOCAL 1032,

Petitioner.

SYNOPSIS

The Director of Representation denies the union's request to dismiss a clarification of unit petition based upon an established practice, pre-1968 exception. If an investigation of job duties performed by unit employees reveals the employees are supervisory, the unit shall be clarified to exclude them.

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Appearances:

For the Public Employer
Knapp, Trimboli & Prusinowski, LLC
(James T. Prusinowski, of counsel)

For the Petitioner
Weissman & Mintz, attorneys
(Annmarie Pinarski, of counsel)

DECISION

On September 10, 2007, Sussex County (County) filed a clarification of unit petition seeking to clarify a broad-based unit of about 550 employees to exclude about 58 of them it claims are supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

On February 2, 2009,[1/] CWA filed a letter motion requesting that the petition be dismissed, together with a supporting brief

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1/ Between the filing of the petition and this motion, the parties met on three occasions in an attempt to amicably resolve the matter and also engaged in the exchange of extensive information regarding the titles in dispute. It was then agreed, by mutual consent, that the within motion be filed and that a decision on the limited issue of "established practice" would further the case to a final resolution.

and documents. CWA asserts that the negotiations unit it represents was formed before the Act was passed, demonstrating a statutory "established practice" exception to the prohibition against supervisors being included in the same negotiations unit with non-supervisory employees.[2/]

N.J.S.A. 34:13A-5.3 provides in a pertinent part:

> . . .[N]or, except where established practice, prior agreement or special circumstances dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership. . . .

The statutory exception of established practice relates solely to a pre-Act (i.e., pre-1968) negotiations relationship between a public employer and a majority representative. Any party asserting an established practice exception must demonstrate by clear and convincing evidence something more than a historical relationship. As set forth in Middlesex Cty. College, P.E.R.C. No. 29 (1969), the benchmark is not;

> the solicited or unsolicited submission by the employee representative of wage and fringe benefits demands without more nor does it mean a limited "history" of an employee organization's relationship with the public employer. There must be the give and take of negotiations including a bilateral relationship rather than a unilateral establishment of terms and conditions of employment. . . [Rutgers Univ., P.E.R.C. No. 90-69, 16 NJPER 135 (¶21053 1990), citing

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2/ CWA does not waive or relinquish its right to challenge the supervisory status of each title should the motion be denied.

Middlesex Cty. Coll., P.E.R.C. No. 29 (1969); Tp. of Teaneck, E.D. No. 23 (1969).]

CWA has demonstrated that it represents a county-wide negotiations unit which has existed for more than 50 years. County employees were represented by Civil Service Employees Association, Council #20 (Council 20) before July 1, 1968, the date of the inception of the Act. For example, as early as 1953, and 1954 through 1960, Council 20 demanded on behalf of its members a reduced workweek, wage increases and changes in titles, meal allowances, health insurance benefits, etc. In various Freeholder meetings during those years, the County (i.e. the Board) passed resolutions adjusting the terms and conditions of employment in response to Council 20's demands. On May 20, 1970, the County passed a resolution formally and voluntarily recognizing Council 20 as the exclusive bargaining agent of its employees. In 1990, CWA became the successor bargaining representative.

An "established practice" exception however, is not absolute. See West Paterson Bd. of Ed., P.E.R.C. No. 77, NJPER Supp. 333 (¶77 1973). The Commission has held that units of supervisors and non-supervisors would not automatically remain together whenever an established practice is found. The Commission has held, consistent with West Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971), that our statutory mandate to "decide in each instance which unit of employees is appropriate" requires a case-by-case review of the circumstances to determine whether

the requisite community of interest exists. West New York Tp., P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1987).

N.J.S.A. 34:13A-5.3 provides that supervisors have the power to hire, discharge, or discipline other public employees or who can effectively recommend those personnel actions. Supervisors have the right to negotiate collectively, except that N.J.S.A. 34:13A-5.3 and 6(d) prohibit the certification of new collective negotiations units comprised of supervisors and non-supervisors. Also, our Supreme Court has determined that where a "substantial actual or potential conflict of interest exists among supervisors with respect to their duties and obligations to the employer in relation to each other," then a unit which includes all supervisors with non-supervisors is not appropriate. West Orange Bd. of Ed. v. Wilton, 57 N.J. 404, at 427. Reviewing Wilton in the context of a pre-Act established practice, we have found that "the experiential factor, rather than the speculative factor," should be used to determine the potential for substantial conflict in the future. City of Trenton, D.R. No. 83-33, 9 NJPER 382 (¶14172 1983). The Director quotes from West Paterson Bd. of Ed.:

> Future contingencies are an acceptable and, in fact, generally controlling consideration in most determinations concerning supervisors because, in the absence of a history, there is only expectation and probability that the interests of supervisors and those supervised will clash, to the detriment of some right entitled to protection. But where past experience exists, such can obviously be a more accurate gauge of probabilities than

> mere speculation not benefitted by hindsight. [City of Trenton, 9 NJPER 384, citing W. Paterson Bd. of Ed., NJPER Supp. 337]

In this case, CWA represents a county-wide unit of over 500 employees. The County has identified approximately 50 titles, the job duties of which include hiring, firing, disciplining or effectively recommending those actions. The County Director of Central and Shared Services certified that in 1989, the County had nine (9) departments. By 2002, the County consolidated to only three (3) departments, and by 2007, it had five (5). The County initially relied upon the department heads to perform the supervisory duties specified in the Act. As the number of department heads shrank concomitantly with the number of departments, those supervisory duties have been delegated to the employees it now seeks to exclude from the broad-based unit. The County has provided examples dating from 2003 through 2008 in which contested employees have performed supervisory functions in the public works department, the road department, juvenile detention, homestead department, the library, the office of transit, the youth shelter and the correctional facility. The affirmations indicate an actual conflict of interest emanating from the performance of those duties and the continued inclusion of the disputed titles in the county-wide unit.

The County also asserts that many of the titles it now seeks to exclude from the unit were created in the past ten years. The County asserts that the assistant supervising maintenance

repairer, low-pressure, assistant supervisor of roads, chief engineer, chief inspector mosquito exterminator, chief librarian, director of food services, senior youth aide, supervising librarian-reference, supervisor of buildings-service work low pressure, assistant supervising maintenance repairer, low-pressure, assistant supervisor of roads, chief engineer, chief inspector mosquito exterminator, director of food services, senior youth aide, and supervisor of buildings-service work low pressure did not exist until after 1998, exempting them from any possible preference under the pre-1968 "established practice" exception.

Under these circumstances, I deny the CWA's request to dismiss the petition based upon an established practice defense. The staff agent shall conduct an investigation of job duties performed by contested unit employees in order to determine if they are supervisors as defined by the Act. N.J.S.A. 34:13A-5.3. If they are supervisors, the unit shall be clarified to exclude them.

Arnold H. Zudick
Director

DATED: September 22, 2009
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 October 2, 2009.