

D.R. NO. 90-8

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

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

Docket Nos. RO-89-15,
RO-89-119 and CU-89-11

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Employee Organization.

SYNOPSIS

The Director of Representation orders a secret ballot election to be conducted among the Chiefs of Dental Services employed by the State of New Jersey. The State contended that the chiefs were managerial executives within the meaning of the Act, but the Director concluded that the record did not establish that the Chiefs are managerial executives. Finally, the Director concluded that the petition raised a valid question concerning representation and was not time barred.

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Appearances:

For the Public Employer
Frank Mason, Director

For the Employee Organization
Willie Thompson, Staff Rep.

DECISION AND DIRECTION OF ELECTION

On August 24, 1988, the Communications Workers of America, AFL-CIO, ("CWA") filed a Petition for Certification of Public Employee Representative (Docket No. RO-89-15) with the Public Employment Relations Commission ("Commission"), seeking to represent a negotiations unit composed of approximately 14 employees in the title Chief of Dental Services ("chief dentists") employed by the State of New Jersey ("State"). On September 14, 1988 CWA filed an amendment to its representation petition seeking to represent the chief dentists within its existing unit of professional employees. On July 25, 1989 the CWA filed a second representation petition (Docket No. RO-89-119), through which it seeks to represent the

chief dentists in its primary level supervisors unit. Docket No. RO-89-119 is supported by an adequate showing of interest. On September 8, 1988, CWA filed a Clarification of Unit Petition (Docket No. CU-89-11) seeking to clarify its existing non-supervisory professional employees' unit to include the chief dentists.

The State objects to the petitions. It argues that CWA is barred by laches from seeking to represent these employees because the title has existed since 1973 and CWA has represented the professional unit since 1981. Further, the State contends that chief dentists are managerial executives within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1.1 et seq. ("the Act") and N.J.A.C. 19:10-1.1, and therefore, are not appropriate for representation in any collective negotiations unit.

We have conducted an administrative investigation into the allegations and issues raised in this matter to determine the parties' positions and the relevant facts. N.J.A.C. 19:11-2.6. The following facts appear.

1. CWA represents four units of State employees: a non-supervisory administrative/clerical unit; a non-supervisory professional unit; a primary level supervisors unit; and a higher level supervisors unit. The State and CWA have executed three successive contracts for each of these units, beginning in 1981.

2. The title Chief of Dental Services was created in 1973 and was designated a managerial executive position by the State.

3. The State employs 3 dentist II's, 31 dentist I's and 14 chief dentists. The dentist II's are included in the non-supervisory professional unit. The dentist I's are included in the primary level supervisors unit.

4. The chief dentist job description provides:

Under general direction of a medical director, superintendent, or other supervisory officer at a state institution, department of human services, [chief dentist] is responsible for planning, directing and supervising both clinical and administrative aspects of a comprehensive dental services program, and performs related work as required.

Examples of work as described in the job description, include:

Directs and supervises the implementation of all dental service program policies and procedures of a dental program or department.

Supervises, evaluates and monitors work performance of all professionals and clericals engaged in implementation of the dental services program.

Implements and administers all aspects of a third party dental program including supervision of dental consultants and related personnel

...Supervises the work operations and/or functional programs and has responsibility for effectively recommending the hiring, firing, promoting, demoting and/or disciplining of employees.

Provides all dental and preventive dental services . . . within a community hospital or institutional setting.

5. The chief dentists spend 50% of their time providing dental services.

ANALYSIS

The State asserts that the first two petitions filed, Docket Nos. RO-89-15 and CU-89-11, should be dismissed on the basis of laches, because the Chief of Dental Services title was created in December 1973 and CWA and the State have negotiated and executed three contracts between the certification of the CWA and the filing of these petitions.

I agree with the State as to the clarification of unit petition. Where the titles being sought have existed for several contract periods, a clarification petition may not be used to enlarge the existing unit absent a recent change in circumstances, e.g., a change in job responsibilities, the creation of a new title, or a change in reporting relationships. Where a title exists outside the unit for a significant period of time, the majority representative waives its right to clarify its unit with respect to those titles. See Clearview Reg. Bd. of Ed., D.R. No. 78-2, 4 NJPER 244 (1978) and Wayne Bd. of Ed., D.R. No. 80-6, 5 NJPER 422 (¶10221 1979), aff'd P.E.R.C. No. 80-94, 6 NJPER 54 (¶11028 1980). Generally, the majority representative must seek a unit clarification promptly after a change in circumstances occurs. Here, it appears that the title has been in existence since 1973, prior to the time CWA was certified to represent its units of State employees. The chief dentists were not included in the unit at that time. The CWA has negotiated three contracts for each of its units since its certification. Accordingly, I find that CWA has waived its right to seek to add

these unrepresented employees to its unit by a unit clarification proceeding and dismiss petition Docket No. CU-89-11.

Wayne Bd. of Ed. provides that where the employee representative has waived its right to clarify its unit to include unrepresented employees, it may file a timely representation petition for those employees. Such a petition creates a question concerning representation and the unrepresented employees will then be given an opportunity to vote on whether they wish to be represented by the petitioning employee organization. The State asserts that CWA may not now seek to represent these employees because it never sought to do so before. This argument is not persuasive.^{1/}

The State asserts that chief dentists are managerial executives pursuant to the responsibilities enumerated in their job description. The Act defines managerial executive as:

[P]ersons 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.

N.J.S.A. 34:13A-3(f)

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

^{1/} The Commission recently ordered an election among certain part-time "special services" employees who had not previously been included in a unit of State employees. State of New Jersey, P.E.R.C. No. 86-24, 11 NJPER 556 (¶16193 1985).

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 509.

Although the State proffered a job description to support its contention that chief dentists are managerial executives, it failed to submit any specific facts concerning the actual, day-to-day functioning of the chief dentists. CWA asserts that while the job description emphasizes the supervisory and administrative roles of the chief dentists, their primary role is to treat patients. However, CWA acknowledges that chief dentists function as department heads and have supervisory responsibilities.

Absent evidence to the contrary, I find that chief dentists are not managerial executives. However, based upon the State's assertion that the chief dentists work under the above-cited job description, which includes the authority to supervise, and CWA's acknowledgement that chief dentists in fact possess supervisory authority, I find that chief dentists are supervisors within the meaning of the Act. Therefore, I find that the chief dentists are

not appropriate for inclusion in a unit of non-supervisory professional employees. Accordingly, I dismiss petition Docket No. RO-89-15 because it appears that the chief dentists are supervisors within the meaning of the Act and are thus not appropriate for inclusion in CWA's non-supervisory professional unit.

However, Docket No. RO-89-119 seeks to represent these employees in an appropriate supervisory unit. The petition seeks to add chief dentists to the existing, primary level supervisors unit represented by the CWA. Accordingly, pursuant to petition Docket No. RO-89-119, I order that a secret ballot election be conducted among the chief dentists employed by the State to determine whether they wish to be represented by the CWA for purposes of collective negotiations.

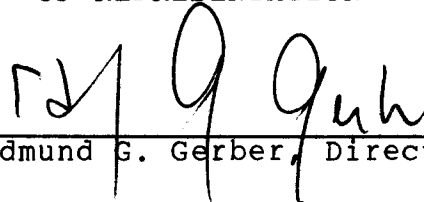
The election will be conducted by mail ballot. The election shall commence no later than thirty (30) days from the date of this decision. Those eligible to vote must have been employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, on vacation or temporarily laid off, including those in the military service. 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. 19:11-9.6, the public employer is directed to file with us an eligibility list consisting of an

alphabetical listing of the names of all eligible voters holding the title of Chief Dental Services, 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 commencement of the mail ballot 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



Edmund G. Gerber, Director

DATED: October 13, 1989
Trenton, New Jersey