

D.R. NO. 94-26

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

In the Matter of

TOWNSHIP OF BARNEGAT,

Public Employer,

-and-

Docket No. RO-94-78

BARNEGAT TOWNSHIP MANAGEMENT
ASSOCIATION,

Petitioner.

SYNOPSIS

The Director of Representation orders an election among department heads employed by Barnegat Township. The Township opposed the petition, but the Director found that none of the disputed employees are either managerial executives or confidential employees within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

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Appearances:

For the Public Employer
Hiering, Hoffman, Garvey & Gannon, attorneys
(Thomas G. Gannon, of counsel)

For the Petitioner
Deborah A. Spettel, Representative

DECISION AND DIRECTION OF ELECTION

On December 2, 1993, the Management Association of Barnegat Township filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission, seeking to represent all department heads employed by Barnegat Township. The petition was timely filed and supported by an adequate showing of interest. The Township opposes the petition and refuses to consent to a secret ballot election. The Township contends that 5 of the 7 petitioned-for titles are either managerial executives or confidential employees within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., and are thus ineligible for membership in any negotiations unit.

The Township also alleges that the statutes governing the terms and conditions of employment of certain of the titles would make the duty to negotiate over their terms and conditions impossible.

We have conducted an administrative investigation into the petition and make the following findings. N.J.A.C. 19:11-2.2.

Barnegat Township has ten functional departments: the clerk's office, finance department, tax collection, tax assessment, police department, public works department, utilities department, code department, recreation department and municipal court. By its petition, the Association seeks to represent the following titles: tax collector, tax assessor, supervisor of public works department, superintendent of water and sewer utility, zoning officer, recreation director and municipal court administrator. The Township objects to the inclusion in the petitioned-for unit of all these employees except the zoning officer and recreation director.

Tax Collector (Kathleen D'Agostino)

The tax collector directs the work and personnel of the tax collection department and prepares a proposed annual department budget. The proposed budget prepared by D'Agostino is for supplies and equipment and does not include salary recommendations. It is reviewed and ultimately approved by the township committee. She also formulates tax collection department policy for approval by the township committee.

N.J.S.A. 40A:9-141 authorizes the appointment of a tax collector and defines tenure and qualifications of tax collectors.

N.J.S.A. 40A:9-145.5 provides that tax collectors' certificates can be revoked or suspended by a request made by a municipal governing body to the director of the division of local government services. N.J.S.A. 40A:9-165 provides that, during their terms, neither tax collectors' nor tax assessors' salaries shall be reduced, nor shall they be denied salary increases given to all other municipal employees, without good cause.

Tax Assessor (Deborah Spettel)

The tax assessor directs the work of the tax assessing department and prepares the budget for that department for approval by the township administrator and township committee. This proposed budget does not include salary recommendations. N.J.S.A. 40A:9-146 authorizes the appointment of a tax collector and states: "the governing body, by ordinance, shall determine the amount of compensation of such assessors." (emphasis added). As noted above, N.J.S.A. 40A:9-165 also applies to tax assessors.

Supervisor of Public Works Department (Ed Richard)

The supervisor of the public works department directs the daily operation of the department which includes refuse and recycling collection, street paving, repair and cleaning and the maintenance of streets, buildings, grounds and parks. The supervisor directs the work of all department personnel, and supervises the purchase and use of equipment, materials and supplies. He prepares a proposed budget and formulates departmental policies which are approved by the township administrator and township committee.

The Township alleges that the supervisor makes recommendations with regard to the blue collar unit contract, though his input was not solicited this year. The Association disputes that the supervisor has had input into negotiations. The supervisor is not a member of the Township's negotiations team.

Superintendent of Water and Sewer Utility (Frederick Burfiend)

The superintendent of water and sewer utility directs the daily operation of the water and sewer utilities. He supervises all personnel and formulates policies and a budget for approval by the municipal administrator and township committee. During negotiations, the superintendent is consulted about the impact of negotiations proposals. The superintendent is the final departmental step in the blue collar unit grievance procedure. These grievances are then decided by the township committee.

Municipal Court Administrator (Nancy Ferguson)

The municipal court administrator provides administrative support to the municipal court. She supervises the work of the deputy court administrator and violations clerk who sign criminal complaints and motor vehicle summonses, docket and schedule cases for hearing and collect fees and fines. Ferguson prepares financial and statistical reports. Ferguson has not been consulted during any collective negotiations nor heard or answered any grievances.

* * * * *

The Township alleges that the contested positions are all either managerial executives or confidential employees within the

meaning of the Act. The Township also argues that statutes governing the tax assessor and tax collector limit or preempt meaningful negotiations over these "statutory" terms and conditions of employment and consequently, their membership in the proposed unit is inappropriate. The Association argues that the disputed titles are neither managerial executives nor confidential, and disagrees that the cited statutes prohibit unit membership of the tax collector and tax assessor.

I find that none of the above positions are either managerial executives or confidential employees within the meaning of the Act. Further, I find that negotiations are not statutorily preempted for either the tax collector or the tax assessor.

The statutory definition of managerial executive is:

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)

In Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977), the Commission found that a lifeguard captain was not a managerial executive although he prepared the beach operations budget, authorized and modified work rules, created a disciplinary system, authorized workweek changes, added lifeguards to the payroll in emergencies, participated in management meetings, influenced the Borough's and Mayor's policies, trained, scheduled and supervised all guards, and managed the beach on a day-to-day basis. The Commission stated:

[T]he term "managerial executive" shall be narrowly construed, and...the relevant National Labor Relations Board precedent...indicates that a wider range of discretion than that possessed by [the lifeguard captain] is needed. [He] was clearly a supervisor and in that capacity could be said to be effectuating management policy, but the Act clearly distinguishes managerial executives --excluded from coverage-- from supervisors--eligible to be represented in appropriate units.
Id. at 374. (emphasis added).

In Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507, 508-09 (¶11259 1980), the Commission stated:

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 for 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 broadly affect the organization's purposes or 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. (emphasis added).

In Bergen Pines Cty. Hosp. and Council No. 5, NJCSA, D.R. No. 83-8, 8 NJPER 525 (¶13245 1982), three titles were found not to be managerial although they were the fourth tier of the chain of command. The positions had only department-wide authority, not hospital-wide authority.

Confidential employees, like managerial executives, are excluded from the Act's definition of "employee" and do not enjoy the Act's protections. N.J.S.A. 34:13A-3(d). N.J.S.A. 34:13A-3(g) defines confidential employees as:

employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

Because a finding of confidential status denies any of the Act's protections, the Commission closely scrutinizes such claims and narrowly construes the term confidential employee.^{1/} A finding of confidential status requires a case-by-case examination of an employee's knowledge and use of information which could compromise the employer's position in the collective negotiations process.

Here, the Township claims that the superintendent of water/sewer and the supervisor of public works are managerial executives. However, applying the above standard, neither of these supervisors possess authority outside their own department and neither can broadly affect the mission or objectives of the entire Township. Further, although each initiates policies and rules affecting their respective departments and each prepares a proposed budget, such policies and budgets must be reviewed and approved by the Township Business Administrator and the Township Committee

^{1/} See Brookdale Comm. College, D.R. No. 78-10, 4 NJPER 32 (¶4018 1977); Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339 (¶19128 1988).

before they are effected. Both the supervisor and the superintendent are high-level supervisors with responsibility for important municipal services; however, they do not possess the level of independent authority characteristic of managerial executives within the meaning of N.J.S.A. 34:13A-1(f). They are similar to the positions examined in Avon and Bergen Pines Cty. Hospital.

The Township asserts that it has consulted both the supervisor and the superintendent regarding collective negotiations proposals. In addition, the superintendent of water/sewer is a grievance procedure step, but not the final step, for utility department grievances. There is no evidence or allegation that either is a member of the Township's negotiations team or that in being consulted, they were privy to the Township's negotiations or grievance strategies or proposals prior to their disclosure to the union. Mere solicitation of negotiations proposals and counterproposals does not endow an employee with confidential status within the meaning of the Act. The expression of opinion about negotiations matters does not, without more, make membership in an appropriate negotiations unit incompatible with these duties. Compare, Tp. of Scotch Plains, D.R. No. 84-11, 9 NJPER 632 (¶14270 1983) where the senior bookkeeping operator was found confidential where she had advance knowledge of the township's final negotiations position. See also, Old Bridge Tp. Bd. of Ed., D.R. No. 82-17, 7 NJPER 639 (¶12287 1981) (research assistant confidential where he had advance knowledge of the board's maximum salary proposal and had prepared initial negotiations proposals).

Based upon the above, I find that the supervisor of public works and the superintendent of water and sewer utility are neither managerial executives nor confidential employees and, therefore, they are included in the proposed unit. Accord, Bor. of Manasquan, D.R. No. 90-28, 16 NJPER 353 (¶21143 1990) (superintendent of public works not a managerial executive).

The statutorily mandated responsibilities of the tax collector and tax assessor do not qualify either of these titles as managerial executives within the meaning of the Act. These positions are each responsible for managing one municipal function. Accordingly, their scope of control is narrow. Neither of them exercises a level of authority and independent judgment sufficient to broadly affect the township's purposes or means of effectuating those purposes. They do not formulate policy or budget recommendations independent of the authority of the Township Business Administrator or the Township Committee. In Borough of Clayton, D.R. No. 89-26, 15 NJPER 223 (¶20093 1989), we determined that the tax collector was not a managerial executive because he was a revenue officer without policy-making authority. In Town of Kearny, P.E.R.C. No. 89-55, 15 NJPER 10 (¶20002 1988), the Commission found that the tax assessor was not a managerial executive because he had no policy-making authority and he was not involved in the effectuation of policy objectives. These cases are directly on point. Here, as in Clayton and Kearny, the tax assessor and tax collector do not have authority to make policies independent

of higher-level approval. I find that neither title is a managerial executive within the meaning of the Act.

Although the Township argued that these positions are confidential within the meaning of the Act, it provided no facts to support its argument. Therefore, I find that these positions are not confidential within the Act's meaning.

The Township also contends that these employees are statutory officers and therefore should not be eligible for representation. It argues that the Township has only limited control over these employees' duties, which are set by statute. Specifically, the Township cited N.J.S.A. 40A:9-141, 145.5, 146 and 165 as supporting this assertion. However, by their plain language, these statutes give the Township authority to appoint, request suspension and set salaries. That N.J.S.A. 40A:9-165 provides for a limitation on salary reduction and parity with other municipal employees' increases does not preempt negotiations.^{2/}

Employees appointed pursuant to statute are not excluded from representation rights merely because of their statutory appointment. A statute or regulation will preempt employee rights guaranteed by the Act only when it sets terms and conditions of employment expressly, specifically and comprehensively. See State

^{2/} This subsection provides: "The governing body of a municipality...shall fix and determine salaries...paid to the officers of the municipality....No such [salary] ordinance shall reduce the salary or deny without good cause an increase...given to all other officers...to any tax collector...tax assessor...."

of New Jersey v. State Supervisory Employees Ass'n., 78 N.J. 54, 80 (1978) and N.J. College Locals v. State Board of Higher Education, 91 N.J. 18, 30 (1982). The fact that certain employees' duties may be set by statute does not make them ineligible for representation. See Bergen Cty. Util. Auth., D.R. No. 91-20, 17 NJPER 130 (¶22052 1991); and Borough of Leonia, D.R. No. 86-24, mod. P.E.R.C. No. 86-143, 12 NJPER 523 (¶17195 1986). In fact, under the above statutory scheme, the Township retains much discretion and authority over the terms and conditions of employment of these titles and it is incorrect to say that its control is so limited as to make collective negotiations meaningless.

Based on all of the above, the tax collector and tax assessor are appropriate for inclusion in the proposed unit.

Finally, the Township asserts that the municipal court administrator is inappropriate for inclusion in the unit because she could file a grievance against the municipal judge and this would make her position untenable with the judge. Even if this assertion is true, it does not bar the administrator from membership in an appropriate collective negotiations unit. Under the New Jersey Constitution, Article 1, paragraph 19, the administrator has a right to "present grievances to [her] employer". Accordingly, in the absence of any facts indicating managerial executive or confidential status, I find that the municipal court administrator is appropriate for inclusion in the proposed unit.

Based upon all of the above I order that an election be conducted in the unit described below:

Included: All department heads employed by Barnegat Township.

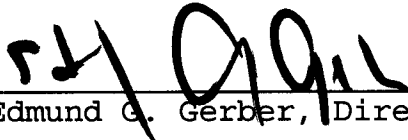
Excluded: All other employees, all employees represented by other negotiations units, non-supervisory employees, police, firefighters, confidential employees, managerial executives and craft employees.

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 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. 19:11-9.6, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the names of all eligible voters 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.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Edmund C. Gerber, Director

DATED: May 13, 1994
Trenton, New Jersey