

D.R. NO. 2000-5

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

In the Matter of

TOWNSHIP OF EASTAMPTON,

Public Employer,

-and-

Docket No. CU-98-45

AFSCME COUNCIL 71,

Employee Representative.

SYNOPSIS

The Director of Representation dismisses in part a clarification of unit petition filed by the Township of Eastampton seeking to exclude various titles from the unit represented by AFSCME Council 71. The Director finds that the Township's community of interest argument is res judicata. The Director also determines that the tax collector, municipal court administrator and treasurer are not confidential employees. He also finds that the tax collector, municipal court administrator and treasurer are public employees and that the Township is a public employer within the meaning of the Act. The Director rejects the Township's argument that the municipal court administrator is an employee of the judiciary not the municipality. Finally, the Director finds that the Township provided no facts to support its argument that the petitioned-for employees are managerial executives under the modified requirements articulated in Turnpike Authority.

The Director finds that the secretary to the Township manager/Township clerk is a confidential employee and must be removed from the collective negotiations unit immediately.

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Appearances:

For the Public Employer
John E. Harrington, attorney

For the Employee Representative
Szaferman, Lakind, Blumstein, Watter & Blader, attorneys
(Sidney H. Lehmann, of counsel)

DECISION

On April 28, 1998 the Township of Eastampton (Township) filed a Clarification of Unit Petition with the Public Employment Relations Commission. The Township seeks to clarify the collective negotiations unit represented by the American Federation of State, County and Municipal Employees, District Council 71, AFL-CIO (AFSCME) to exclude the following titles: tax collector, municipal court administrator, secretary to the Township clerk/Township manager, chief financial officer, administrative officer, welfare director and treasurer.

The Township contends that the chief financial officer, the administrative officer, and the welfare director work less than eight hours a week and, therefore, are excluded under the terms of the recognition clause contained in the parties' collective agreement. It asserts that the tax collector, treasurer and municipal court administrator are officers of the municipal corporation, not Township employees, and therefore, not eligible for inclusion in the unit. It also contends that they lack a community of interest with the unit. It argues alternatively that the municipal court administrator is employed by the judiciary, not the Township. The Township also maintains that the municipal court administrator, the tax collector, and the treasurer are managerial and confidential under N.J. Turnpike Auth. and AFSCME, P.E.R.C. No. 94-24, 19 NJPER 461 (¶24218 1993), rev'd and rem'd 289 N.J. Super. 23 (App. Div. 1996), aff'd as mod. 150 N.J. 331 (1997). Finally, the Township contends that the secretary to the Township manager and Township clerk is a confidential employee and must be removed from the unit.

AFSCME has agreed to the removal of the chief finance officer, the welfare director, and the administrative officer from the unit. The parties' 1998-2000 collective agreement reflects the deletion of these positions from the recognition clause.

AFSCME opposes the remainder of the petition. It argues that all of the Township's present arguments were previously rejected by the Commission in Tp. of Eastampton, D.R. No. 94-1, 19

NJPER 404 (¶24178 1993) (Eastampton I). Therefore, the matter is res judicata. AFSCME further argues that under principles of good faith and estoppel, the Township should not be permitted to obtain through the Commission what it could not achieve in negotiations. In support of this argument, it cites the fact that it already agreed through collective negotiations to remove three positions (chief financial officer, welfare director and administrative officer) from the unit.

Finally, citing Bergen Pines, D.R. No. 80-20, 6 NJPER 61 (¶11034 1980), AFSCME argues that the Township failed to exercise due diligence in searching out employees who should be excluded from the unit before it entered into its second collective agreement. At the very least, AFSCME argues, the Township must demonstrate changed circumstances which it has not done. Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977).

We have conducted an administrative investigation into the above-captioned matter. N.J.A.C. 19:11-2.2 and 2.6. The parties participated in an investigatory conference with the Commission's staff agent and submitted facts in support of their respective positions. On October 1, 1999, I summarized the parties' submissions and arguments and advised the parties of my intention to dismiss the Township's petition.^{1/} I provided the parties with an additional opportunity to respond. AFSCME filed a

^{1/} I modify that position herein and for the reasons stated below do not dismiss the Township's petition entirely.

concurrence in support of dismissing the petition. The Township did not respond. I find that there are no substantial and material factual issues in dispute which would require a formal hearing. N.J.A.C. 19:11-2.6(b) and (d). Accordingly, the disposition of the petition is properly based on our administrative investigation, which has found the following facts.

AFSCME Council 71 has represented the Township's non-supervisory employees since 1993. On August 20, 1992, AFSCME petitioned the Commission to represent a unit of the Township's blue and white-collar employees. There were 21 employees in the proposed unit. The Township asserted that all but four of the employees should be barred from union representation. The Township asserted that certain employees held statutorily mandated positions and, therefore, were ineligible for representation; that certain employees were managerial executives and confidential employees within the meaning of the Act, including the treasurer, municipal court administrator and tax collector; and that the secretary to the Township manager was a confidential employee.

The Director of Representation considered the Township's arguments. Eastampton I. He found that employees appointed pursuant to statute are not excluded from representation rights merely because of their statutory appointment.

As to the assertion of managerial executive status, the Director determined that the statutorily mandated duties of the treasurer and tax collector did not support a finding of

managerial executive status and that the Township submitted no evidence that any department head--including the treasurer, the tax collector and the municipal court administrator--formulates policy which broadly affects the employer's mission. Id. at 406. Moreover, the Director specifically rejected the assertion of managerial status for the municipal court administrator stating that "[e]xercising limited discretion in carrying out the directives of the municipal judge is not an exercise of managerial authority." Id. at 407.

The Director also concluded that the Township presented no facts which demonstrated that the treasurer, municipal court administrator or tax collector is a confidential employee under the Act. Specifically, he determined that these employees had no role in the Township's negotiations which would give them pertinent, strategically useful knowledge of the Township's collective negotiations strategies before they are known to the union. Id. at 407. The Director also found that the secretary to the Township manager was not a confidential employee because the Township "submitted no information that suggests that the performance of [her] duties would give [her] advance knowledge of the Township's position on any labor-related issues in the negotiations or contract administration processes." Id. at 407.

Based upon these determinations, the Director ordered that an election be conducted in the petitioned-for unit. On August 10, 1993, AFSCME was certified as the majority representative.

AFSCME and the Township are parties to a collective negotiations agreement effective from January 1, 1998 through December 31, 2000. The prior contract was effective from January 1, 1995 through December 31, 1997.

Article I, Recognition, of the parties' current agreement provides that "[t]he employer recognizes the Union as the sole and exclusive representative regarding negotiated terms and conditions of employment for the following classes of employees...." The Article then lists various positions including the positions contested here. The Recognition clause provides that,

It is expressly understood that any current or future employee who is seasonal or temporary, or who works less than 8 hours per week on a regular basis, shall be excluded from the unit represented by the Union....

The Township asserts that the chief financial officer, the welfare director and administrative officer are each positions in which the employees work less than eight hours per week. During negotiations for the 1998-2000 agreement, the issue of the scope of the unit was discussed. The parties agreed to remove these positions. The 1998-2000 agreement specifically recognizes the deletion of these three positions from the unit.

The position of secretary to the Township manager/Township clerk has changed in the past several years. She now works exclusively for the Township manager/Township clerk. Although the manager does most of his own typing, the secretary's duties include copying and distributing the manager's correspondence to the

governing body. The correspondence includes negotiations and labor relations strategies. The secretary often reads the correspondence and corrects typographical errors.

ANALYSIS

AFSCME argues that the Commission's prior decision in Eastampton I is controlling here under the principle of res judicata. As to the Township's argument that the tax collector, municipal court administrator, treasurer and secretary to the Township manager/Township clerk lack a community of interest with the existing unit and are not eligible for inclusion in the unit, I reject this argument as res judicata.

The Township's argument that the tax collector, municipal court administrator and treasurer are statutory officers of the municipal corporation and not employees of the municipality had not been previously raised or litigated. Therefore, the argument cannot be rejected as res judicata.

N.J.S.A. 34:13A-3(d) defines "employee" and "public employee" as follows:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer unless this act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice and who has not obtained any other regular and substantially equivalent employment. This term, however, shall not include any individual taking the place of any employee whose work has ceased as aforesaid, nor shall it include any individual employed by his parent or spouse, or in the domestic service of any person in the home of the

employer, or employed by any company owning or operating a railroad or railway express subject to the provisions of the Railway Labor Act. This term shall include any public employee, i.e., any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, members of boards and commissions, managerial executives and confidential employees.

The Township has not claimed that the petitioned-for employees are elected officials or members of boards and commissions. Unless the tax collector, treasurer and municipal court administrator are managerial executives or confidential employees within the meaning of the Act, or covered by a specific statutory exemption, I find that these individuals are public employees.

N.J.S.A. 34:13A-3(c) defines "employer" and "public employer" as follows:

The term "employer" includes an employer and any person acting directly or indirectly, or on behalf of or in the interest of an employer with the employer's knowledge or ratification, but a labor organization, or any officer or agent thereof, shall be considered an employer only with respect to individuals employed by such organization. This term shall include "public employers" and shall mean the State of New Jersey, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board, or any branch or agency of the public service.

The Township has articulated no support for the proposition that as a municipality (or a municipal corporation), it is not a public employer under the Act. Therefore, I find that the Township is a public employer within the meaning of the Act.

Although an employer may waive its right to seek removal of employees based upon community of interest, "[A] public employer can never permanently waive the right to assert that certain employees are statutorily prohibited from inclusion in a negotiations unit." See County of Warren, H.O. No. 89-1, 14 NJPER 552 (¶19232 1988), adopted P.E.R.C. No. 89-66, 15 NJPER 30 (¶20013 1988); Borough of Madison, D.R. No. 99-1, 24 NJPER 441 (¶29203 1998); cf. Gloucester Tp. Bd. of Fire Commissioners, D.R. No. 91-6, 16 NJPER 521 (¶21228 1990). Therefore, the Township cannot be barred under res judicata from raising the issue of managerial executive or confidential status since such individuals are statutorily barred from inclusion in any unit. N.J.S.A. 34:13A-5.3. However, to the extent that the Township raised the issue of managerial executive or confidential status in Eastampton I and now presents no new facts or changed circumstances here, res judicata bars relitigation.^{2/}

Res judicata is inapplicable where significant legal decisions have changed the legal rights of parties so as to merit relitigation of the issue. Rutgers University, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981). The Township asserts that Turnpike Authority changed the definition of confidential employee and managerial executive and warrants a reexamination of the contested titles.

^{2/} Similarly, AFSCME's argument that the Township's earlier conduct during negotiations acted as a waiver of its right to seek clarification of the unit must be rejected in regard to the Township's claims of managerial or confidential status.

In Turnpike Authority, the Supreme Court approved the standards the Commission has traditionally applied in analyzing confidential employee cases. The Township has not submitted any new facts to support its argument that the tax collector and municipal court administrator are confidential employees within the meaning of the Act. Except for broad, conclusory statements that the treasurer is involved in negotiating salary and other terms and conditions of employment for Township employees, the Township has failed to submit materials in support of its claim of confidential status. In Evesham Tp. Fire Dist. #1, D.R. No. 99-4, 24 NJPER 503 (¶29233 1998), the Director rejected a claim of statutory exclusion where the employer failed to provide any documentation or examples demonstrating that the employee's asserted duties were actually performed. Here, the Township has provided neither affidavits in support of its contentions nor specific work samples. Therefore, for the reasons set forth in the Director's determination in Eastampton I at 407, I do not find that the municipal court administrator, the treasurer or tax collector are confidential employees. I conclude there is no basis to remove them from the unit.

However, the Township asserts that the duties of the secretary to the Township manager/Township clerk has changed since Eastampton I to the extent that she now has advance knowledge of negotiations and labor strategies because she is responsible for distributing and reviewing correspondence for the governing body. AFSCME does not dispute this assertion.

N.J.S.A. 34:13A-3(g) defines confidential employees as those employees of a public employer "...whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiations unit incompatible with their official duties." The key to confidential status is an employee's access to and knowledge of materials used in labor relations processes including contract negotiations, contract administration, grievance handling and assisting management in preparing for these functions. See State of New Jersey (Division of State Police), D.R. No. 84-9, 9 NJPER 613 (¶14262 1983). As indicated above, in correspondence dated October 1, 1999, I advised the parties that I was inclined to find that the secretary to the Township manager/Township clerk was not a confidential employee. Upon further review of the record while finalizing this decision, I find factual support for the Township's assertion that the secretary to the Township manager/Township clerk is, indeed, a confidential employee. The secretary to the Township manager/Township clerk reads and reviews correspondence prepared by the Township manager for the governing body which includes negotiations and labor relations strategies. Accordingly, I find that the secretary to the Township Manager/Township clerk is a confidential employee and should be removed from the collective negotiations unit immediately. Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977).

Next, the Township argues that Turnpike Authority modified the prior definition of managerial executive and that under this most recent definition the tax collector, municipal court administrator and treasurer are managerial executives and should be excluded from the unit. In that decision, the Supreme Court excised the requirement that a managerial executive possess organization-wide authority, modified Bor. of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980) and approved the following standards:

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. [Turnpike Authority at 356.]

This analysis is fact sensitive and conducted on a case-by-case basis. The Township has presented no facts in support of its argument that any of the petitioned-for employees is a managerial executive within the statutory definition, even as interpreted by the New Jersey Supreme Court in Turnpike Authority. Therefore, I find that the tax collector, municipal court administrator and treasurer are not managerial executives.

Finally, the Township argues that the 1994 reorganization of the Courts changed the status of the municipal court administrator in that she is now an employee of the judiciary not the Township. In support of this argument, the Township cites N.J.S.A. 2B:12-1 et seq. Specifically, N.J.S.A. 2B:12-10, Municipal Court Administrator and Personnel, provides in pertinent part:

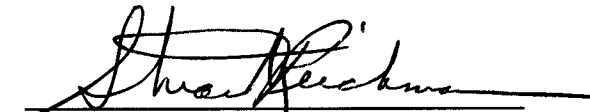
a. A county or municipality shall provide for an administrator and other necessary employees for the municipal court and for their compensation. With approval of the Supreme Court, an employee of the county or municipality, in addition to other duties, may be designated to serve as administrator of the municipal court.

A reading of the unambiguous language of the statute does not support the Township's contention that the municipal court administrator is not an employee of the Township. Moreover, in numerous previous cases, we have found that a municipal court administrator and/or municipal court clerk is a municipal employee and appropriately included in municipal collective negotiations units. Tp. of Barnegat, D.R. No. 94-26, 20 NJPER 251 (¶25124 1994); Bor. of Ringwood, D.R. No. 93-19, 19 NJPER 196 (¶24093 1993); Bor. of Edgewater, D.R. No. 92-27, 18 NJPER 230 (¶23103 1992); Tp. of Minehill, D.R. No. 91-33, 17 NJPER 315 (¶22139 1991); Bor. of Clayton, D.R. No. 89-26, 15 NJPER 223 (¶20093 1989).

ORDER

The secretary to the Township manager/Township clerk is a confidential employee and must be removed from the collective negotiations unit immediately. The Township's petition is dismissed with respect to all other titles.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Stuart Reichman, Director

DATED: November 10, 1999
Trenton, New Jersey