

P.E.R.C. NO. 89-93

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF CUMBERLAND,

Public Employer,

-and-

Docket No. RO-H-88-124

PBA LOCAL 203,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission determines that the County superintendent of weights and measures of the County of Cumberland's Department of Weights and Measures is a supervisor within the meaning of the New Jersey Employer-Employee Relations Act. It further finds that the deputy superintendent is not a supervisor. The case is remanded for an election consistent with this decision.

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POLICEMEN'S BENEVOLENT
ASSOCIATION, LOCAL 203,

Petitioner.

Appearances:

For the Public Employer, Ivan M. Sherman, Esq.

For the Petitioner, Schneider, Cohen, Solomon, Leder &
Montalbano, Esqs. (Bruce D. Leder, of counsel)

DECISION AND ORDER

On January 22, 1988, Policemen's Benevolent Association, Local 203 ("PBA") filed a Petition for Certification of Public Employee Representative. It seeks to represent certain employees of the County of Cumberland's ("County") Department of Weights and Measures. The County objects to the inclusion of the County superintendent of weights and measures and deputy County superintendent in the proposed unit, alleging that these positions are supervisory within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On June 14, 1988, a Notice of Hearing issued. On August 9, Hearing Officer Elizabeth J. McGoldrick conducted a hearing. The parties examined witnesses, introduced exhibits, and argued orally. They waived post-hearing briefs.

On October 27, 1988, the Hearing Officer found that the superintendent is a supervisor because he effectively recommends hiring decisions. She further found that the deputy is not a supervisor because he does not have the power to hire, fire, discipline or effectively recommend the same. H.O. No. 89-4, 14 NJPER 50 (¶20018 1988). The Hearing Officer recommended that the Commission conduct an election in a unit including the deputy and assistant superintendent and excluding the superintendent and investigator, consumer protection.^{1/}

On December 1, 1988, the PBA filed exceptions. It contends that: (1) the Hearing Officer erred in finding that the superintendent met the statutory definition of supervisor based on one effective hiring recommendation in 28 years and (2) any conflict of interest between the superintendent and other employees would be de minimis. On January 19, 1989, the County filed a reply urging adoption of the Hearing Officer's recommendation.

We have reviewed the record. The Hearing Officer's findings of fact (pp. 2-8) are accurate. We incorporate them here.

The superintendent is a supervisor within the meaning of the Act. N.J.S.A. 34:13A-5.3 provides:

nor except where established practice, prior agreement or special circumstances dictate the contrary, shall any supervisor having the power to hire, discharge, discipline or effectively recommend the same have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership.

^{1/} The investigator, consumer protection title is not in dispute.

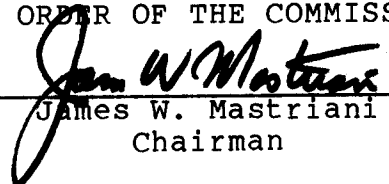
The superintendent effectively recommended the assistant superintendent's hiring and participated in the deputy's hiring. In addition, the superintendent evaluates the performance of subordinates. Because the department is small, there were only a few instances where the superintendent exercised supervisory authority. However, he will presumably continue to exercise that authority when the need arises. Warren Cty., P.E.R.C. 89-66, 15 NJPER 30 (¶20013 1988) (superintendent of weights and measures is supervisor).

In the absence of exceptions on this issue, we adopt the Hearing Officer's recommendation regarding the deputy superintendent.

ORDER

We remand the case to the Director of Representation to conduct an election consistent with this decision.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Smith and Ruggiero voted in favor of this decision. None opposed. Commissioners Bertolino and Wenzler were not present.

DATED: Trenton, New Jersey
March 9, 1989
ISSUED: March 10, 1989

H.O. NO. 89-4

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF CUMBERLAND,

Public Employer,

-and-

Docket No. RO-H-88-124

PBA LOCAL 203,

Petitioner.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that the Commission order an election to determine whether a unit of Weights and Measures department employees wish to be represented by the Policeman's Benevolent Association. The Hearing Officer concluded that the County Superintendent is a supervisor within the meaning of the New Jersey Public Employer-Employee Relations Act and should be excluded from the petitioned-for unit. The Hearing Officer concluded that the Deputy Superintendent is not a supervisor, and should be included in the unit.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommendations, any exception thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law.

H.O. NO. 89-4

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
COUNTY OF CUMBERLAND,

Public Employer,

-and-

Docket No. RO-H-88-124

PBA LOCAL 203,

Petitioner.

Appearances:

For the Public Employer
Schneider, Cohen, Solomon, Leder & Montalbano, Esqs.
(Bruce D. Leder, of counsel)

For the Petitioner
Ivan M. Sherman, Esq.

HEARING OFFICER'S RECOMMENDED
REPORT AND DECISION

On January 22, 1988 the Policemen's Benevolent Association Local 203 ("PBA") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission ("Commission") seeking to represent certain employees employed by the County of Cumberland ("County") in its Department of Weights and Measures. The County objects to the inclusion of the County Superintendent of Weights and Measures ("Superintendent") and Deputy County Superintendent of Weights and Measures ("Deputy") in the proposed unit, alleging that these positions are supervisors within the meaning of the New Jersey

Employer-Employee Relations Act, N.J.S.A. 34:13A et seq. as amended ("Act") and must, therefore, be excluded from the proposed unit. The PBA disagrees.

A Notice of Hearing was issued on June 14, 1988. I conducted a hearing on August 9, 1988. The parties were given the opportunity to examine and cross-examine witnesses, present evidence, and argue orally. The transcript was received on August 22, 1988. The parties waived post-hearing briefs.

Based on the entire record I make the following:

FINDINGS OF FACT

1. The County is the employer of the Department of Weights and Measures employees.

2. The County and PBA stipulated that the employees who are the subject of this petition are police employees within the meaning of the Act; that none are managerial executive or confidential employees within the meaning of the Act; and that a unit of Weights and Measures department employees is, generally, an appropriate unit for collective negotiations (T8-9).^{1/}

3. The PBA is a public employee organization within the meaning of the Act; and is an appropriate organization to represent these police employees.

^{1/} "T" refers to the transcript dated August 9, 1988.

4. The Department of Weights and Measures is a combined department consisting of the departments of Weights and Measures and Consumer Protection. It is comprised of the Superintendent, George Franks ("Franks"); the Deputy, Frank Gamba ("Gamba"); the Assistant County Superintendent, Jonas E. Townsend, Jr. ("Townsend"); and the Investigator, Consumer Protection, Louis Moreno ("Moreno") (T17, T18, T71, T80). The parties stipulated that the first three employees named above are presently unrepresented, are the subjects of this petition, and that Moreno's title is not the subject of this dispute (T8).^{2/}

5. Weights and Measures department employees are responsible for investigating and inspecting all business establishments in the county which sell goods by weight, measure or count to insure compliance with weights and measures laws (T28, T29, J-1)^{3/}

6. The County is managed by seven Freeholders, each of whom chair departmental oversight and policy committees. The Law and Public Safety Committee oversees the Weights and Measures Department, as well as the Emergency Management and Sheriff's

^{2/} I take administrative notice of the fact that the Deputy and Assistant Superintendents of Weights and Measures were previously represented by District Council 65, UAW; that the Commission notified District Council 65 of the filing of the instant petition and that District Council 65 has asserted no claim to represent these employees.

^{3/} The parties submitted three job descriptions: J-1 is the Superintendent's description; J-2 is the Deputy's job description; J-3 is the Assistant Superintendent's description.

departments. There are monthly meetings of this Committee and all subordinate department heads to discuss various problems and policies which affect their operations (T63-T71). The Personnel Committee consists of the Personnel Director, Sumner N. Lippincott; three Freeholders; the County Administrator, Mr. Vain; and the County counsel, Ivan M. Sherman (T61).

7. The County is a civil service employer, and uses eligibility lists promulgated by the State Department of Personnel in its hiring process. However, within that system discretion is left to the County to select which candidate it prefers. In some instances a selection is made before a test is given and a list promulgated. The County has a formal procedure to be followed whenever a personnel change is required. The procedure is initiated by the department head's submission of a form entitled "Request for Personnel Action." This form is submitted to the Personnel office, the Administrator, and the Director of the Board of Freeholders, all of whom review and approve it. The County Board of Freeholders makes ultimate hiring and discharge decisions (T16, T51, T53, T54, T85).

8. Personnel activity in the Weights and Measures department indicates that the department is very stable. There have been few staff changes, low turnover and no disciplinary actions or discharges over a long period (T55, T23, T43, T44, T80).

9. The Superintendent has been involved in the hiring of Weights and Measures employees; he has interviewed prospective

candidates either alone or in a committee, and he has made and is required to make employment recommendations (T16, T18, T19, T39-T43, T53, T62, T75).

10. During Franks' tenure as Superintendent three employees were hired into Weights and Measures. Franks recommendation was effective in at least one of the three situations. Gamba was hired in 1972; Townsend was hired in 1980; and Moreno was hired in 1985. Gamba was interviewed by a committee of about six, including Franks and several freeholders. Townsend was not hired from a list; he contacted a freeholder and was directed to speak to Franks. Franks then interviewed Townsend, recommended to Lippincott that Townsend be hired, and subsequently Townsend was informed that he had the job. Townsend passed a test and became permanent in the title two and a half years after accepting the assistant superintendent position.^{4/} Moreno was interviewed by Franks, Lippincott, and Charles Fisher, the Director of the Board of Freeholders. These three made a joint decision to hire Moreno (T16-T19).

11. The Department has employed temporary employees under a federal grant program in the past. When these programs end, Franks decides whether the employees assigned to Weights and Measures should be retained (T19-T21).

^{4/} Franks testified that he thought Lippincott, the Personnel Director, had also interviewed Townsend at the time of his hire, but because this was not corroborated by Townsend's testimony I do not credit this part of Franks' testimony.

12. The Superintendent has the authority to recommend the termination of employees in his department. Such recommendations however, would be reviewed and not "rubber-stamped" by the Personnel Committee. In the 28 years that Franks has been employed in the Department of Weights and Measures, there have been no termination recommendations (T16, T17, T43, T44, T49, T61, T62, T80).

13. The Superintendent also has the authority to recommend disciplinary action. The process involves several steps. The recommending department head contacts the Personnel Director who discusses the matter with the department head, and if necessary, consults members of the Personnel Committee. As with terminations, the disciplinary process involves review, rather than routine endorsement, of the initial recommendation. Although Franks stated that he may have disciplined someone in the distant past, he could not recall any specific instance of having done so, and I conclude that no such recommendations have been made during the past sixteen years (T23, T43, T44, T47, T61, T62, T80).

14. The County has an informal performance evaluation system. Although the County does not mandate that written evaluations be prepared, it expects each department to evaluate employees in some form, and leaves the specific method of evaluating to the department head's discretion. Franks is responsible for that decision in the Weights and Measures department. He observes the quality and quantity of the other

employees' work. He would meet and discuss their performance with them if there were a problem, but there has never been an occasion to do so (T21, T24, T52, T53, T84).

15. The Superintendent is responsible for assigning work, but he does not routinely assign inspections. The staff often "self" assigns the work. Gamba and Townsend refer cases to Franks for handling if they are within his area of expertise or within a certain geographical area. Franks spends approximately 90% of his time performing on-site inspections of businesses in the county. Special assignments are made by Franks. He also decides when to conduct "all-out" "showdown" inspections, and personally handles investigations which lead to prosecution (T29-T37, T48, T49, T72-T74, T76, T82-T84, J-1).

16. Franks is ultimately responsible for the submission of the department's annual budget. This budget is initially prepared by the entire staff. In the preparation of the most recent budget, Townsend authored the small capital budget and typed two-thirds of the budget. There has been no disagreement among the staff as to what should be requested, but if there were, Franks would resolve the dispute. The budget request is submitted to the Law and Public Safety Committee chairman, and the Finance Committee. It is then passed on to the full Board of Freeholders, who approve it. At one or more stages of the approval process the recommendations may be altered. The Superintendent is responsible for ensuring that the department's

expenditures adhere to the budget's parameters (T24-T27, T38, T39, T55, T56, T75, T83).

17. Gamba acts as the department head in Franks' absence. Although Gamba testified that he believes he has the authority to discipline other employees, I find that he has never exercised this authority. Gamba has been the deputy since 1976. Prior to that time he was an assistant superintendent. Upon being placed in the deputy title, his duties did not significantly change. In the most recent year and a half Gamba has acted as department head several times. Gamba has no input into the hiring of new weights and measures employees (T14, T71-T75, T77, T78, T80).

ANALYSIS AND RECOMMENDATION

The primary issue here is whether the Superintendent is a supervisor within the meaning of the Act; the secondary issue is whether the Deputy is a supervisor. The PBA seeks to represent a unit of all Weights and Measures police employees; the County objects to the inclusion of the Superintendent and Deputy in the proposed unit because it asserts they are supervisors within the meaning of the Act. But for certain exceptions not present here, supervisory employees cannot be in units with non-supervisory

employees. N.J.S.A. 34:13A-5.3 ^{5/} Thus, in order to include the Superintendent and Deputy Superintendent in the proposed unit they must be found to be non-supervisory employees. If I find that both are supervisors, then the only remaining employee subject to the PBA's petition is the Assistant County Superintendent, and because units of one are not appropriate, Township of Byram, P.E.R.C. No. 84-96, 10 NJPER 149 (¶15074 1984); Borough of Shrewsbury, P.E.R.C. No. 79-42, 5 NJPER 45 (¶10030 1979), aff'd. 174 N.J. Super 25 (App. Div. 1980), certif. den. 85 N.J. 129 (1980), I would recommend that the petition be dismissed.

The County has retained the final authority to hire, discharge and discipline. The critical question is whether the Superintendent has the power to "effectively recommend" such personnel actions. "Effective recommendation" occurs when the recommendation is adopted without independent review and analysis by a higher level of authority. See, Teaneck Bd. of Ed., E.D. No.23 (1971); Borough of Avalon, P.E.R.C. No. 84-108, 10 NJPER 207 (¶15102 1984).

^{5/} This subsection provides, in relevant part: "...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 non-supervisory personnel to membership,..."

Here, there were three instances where Franks was involved in the hiring of unit employees. With respect to both Gamba and Moreno, there was a joint hiring decision, and it is impossible to conclude that the Superintendent's recommendation alone was "effective." However, Franks alone interviewed and recommended Townsend for a position and his recommendation was effective in Townsend's initial employment. The record shows that the Superintendent interviews and recommends applicants, and that these recommendations are followed. Finally, Franks has decided whether certain temporary employees hired through a federal employment program would be retained (T16, T19-21, T62).

Although Franks has been delegated the authority to recommend discipline and discharge, he has never had an occasion to exercise that authority. Franks has conclusively met the statutory definition of a supervisor by his effective recommendations in hiring, and since I found that he possesses the authority to recommend discipline and discharge, his not having had the need to exercise that authority does not negate his ability to recommend such actions. 6/

6/ Franks' authority to assign work and give performance evaluations, two elements not specifically mentioned in the Act, are factors used to determine whether a conflict of interest exists with the inclusion of a certain title in a proposed unit. See, Roselle Park Bd. of Ed., P.E.R.C. No. 87-80, 13 NJPER 73 (¶18033 1987); Paramus Bd. of Ed., D.R. No. 82-7, 7 NJPER 556 (¶12247 1981) The evidence regarding those elements here does not invalidate the fact that Franks has already met the statutory definition of a supervisor.

The County asserts that the Deputy is a supervisor within the meaning of the Act and should be excluded from the unit; the PBA disagrees. Based upon the record here I conclude that the Deputy is not a supervisor within the meaning of the Act. The County relies upon the Deputy's role as the substitute in the Superintendent's absence. Although the Deputy has acted as department head in the Superintendent's absence, and has attended department head meetings, he does not possess effective recommending power to discipline, discharge, or hire employees. A determination of supervisory status requires more than the assertion that an employee has or will have the authority to hire, discharge, discipline or effectively recommend such action. In Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358, 360 (1976), we noted:

[T]he bare possession of supervisory authority without more is insufficient to sustain a claim of status as a supervisor within the meaning of the Act. In the absence of some indication in the record that the power claimed possessed is exercised with some regularity by the employees in question, the mere "possession" of the authority is a sterile attribute unable to sustain a claim of supervisory status.

Unlike Franks, who exercises the authority to effectively recommend hiring, Gamba has never exercised any supervisory authority. The mere fact that he might do so at some time, is not enough to find that he is a supervisor at this time.

The PBA acknowledges that Franks is perceived as the head of the department and as its supervisor, but claims his

responsibilities do not meet the statutory criteria of hiring, discharging, disciplining, or effective recommendation of the same. The PBA relies on our decisions in Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶ 18115 1987) and South Plainfield Borough, D.R. No. 78-18, 3 NJPER 349 (1977) to support its argument that any conflict between the superintendent here and other unit employees is de minimis, and that he should not be excluded from the unit.

Our decision in South Plainfield held that in police department units the superior officers will normally be severed from rank and file personnel unless an exceptional circumstance dictates a different result. Where the superior officer is found to be a supervisor, inquiry into the existence of exceptional circumstances or conflicts of interest is unnecessary because of the statutory prohibition against placing supervisors and non-supervisors in the same units. In this case, having already found that Franks is a supervisor within the meaning of the Act, it is unnecessary to consider whether exceptional circumstances exist. The Commission in West New York held that the severance of superior officers is appropriate, even in the absence of direct evidence of actual conflict, where uniformed public safety employees are involved. Contrary to the PBA's assertion, these decisions favor severance of superior officers, where the disputed position is found to be a statutory supervisor.

Based upon the entire record and the foregoing discussion I make the following:

CONCLUSION AND RECOMMENDATIONS

1. The County Superintendent, George Franks, is a supervisor within the meaning of the Act and should be excluded from the petitioned-for unit.

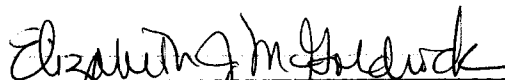
2. The Deputy County Superintendent, Frank Gamba, is not a supervisor within the meaning of the Act and should be included in the petitioned-for unit.

3. The petitioned-for unit of Weights and Measures department employees, excluding the Investigator, Consumer Protection, is an appropriate unit.

Accordingly, I recommend the Commission direct the conduct of an election in a unit as follows:

Included: the Deputy and Assistant County Superintendents of Weights and Measures employed by the Cumberland County Department of Weights and Measures.

Excluded: all other employees, the County Superintendent of Weights and Measures, the Investigator, Consumer Protection, managerial executives, confidential employees, craft employees, professional employees, and supervisory employees within the meaning of the Act.


Elizabeth J. McGoldrick
Hearing Officer

DATED: October 27, 1988
Trenton, New Jersey