

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Docket No. RO-H-94-91
(Section Chiefs - Department
of Environmental Protection)

Petitioner.

SYNOPSIS

The Public Employment Relations Commission finds that certain titles which CWA, AFL-CIO petitioned to represent are not managerial executives. The State of New Jersey contends that these employees are managerial executives excluded from representation under the New Jersey Employer-Employee Relations Act. The Commission, fully considering the responsibilities of section chiefs in the Department of Environmental Protection, and applying the standards established in New Jersey Turnpike Auth. and AFSCME Council 73, 150 N.J. 331 (1997), concludes that these employees do not formulate management policies and practices or direct their effectuation.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Public Employer, Peter Verniero, Attorney General
(Michael L. Diller, Senior Deputy Attorney General)

For the Petitioner, Weissman and Mintz, attorneys
(Steven P. Weissman, of counsel)

DECISION

On December 17, 1993, March 29, 1994, and April 19, 1995, the Communications Workers of America, AFL-CIO filed a petition for certification and amendments to that petition. CWA seeks to represent a negotiations unit of about 275 employees employed by the State of New Jersey in various departments. The employer contends that all these employees are "managerial executives" excluded from representation under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On March 29, 1994, the Director of Representation ordered a hearing. The parties stipulated that hearings would be held and decisions issued on selected titles to answer questions about their status and to provide a basis for discussing and possibly resolving

the status of other titles. One title selected was section chief in the Department of Environmental Protection ("DEP").

Five days of hearing were held on these section chief titles. The hearings began on August 11 and ended on October 4, 1994. Hearing Officer Regina A. Muccifori conducted the first two days of hearings, but then took a leave of absence. Hearing Officer Susan Wood Osborn completed the hearings.^{1/}

After the hearings, the parties jointly asked the Commission to hold the case so they could discuss settlement possibilities. These discussions having been unsuccessful, the parties filed post-hearing briefs by December 11, 1996.

On March 7, 1997, Hearing Officer Osborn issued her report H.O. No. 97-3, 23 NJPER 278 (¶28130 1997). Applying the standards established by an Appellate Division panel in New Jersey Turnpike Auth. v. AFSCME, 289 N.J. Super. 23 (App. Div. 1996), she concluded that the DEP section chiefs are managerial executives.

The Supreme Court granted certification in the Turnpike Authority case so the parties agreed to hold this case until the Court issued its decision. That decision was issued on July 14, 1997. New Jersey Turnpike Auth. v. AFSCME, 150 N.J. 331 (1997).

This case was then reactivated. The parties received extensions of time to file exceptions and responses.

^{1/} The hearings also addressed the section chief title in the Department of Transportation ("DOT"), but the parties agreed to suspend that portion of the proceedings given post-hearing changes in DOT's organization.

On October 31, 1997, CWA filed exceptions. It asserted that under the Supreme Court's standards in Turnpike Authority, DEP section chiefs are not managerial executives. On February 18, 1998, the State filed a response asserting that they are.

Findings of Fact

We have reviewed the record. We adopt and incorporate the Hearing Officer's thorough findings of fact (H.O. 2-34), as supplemented or modified by the following findings.

We supplement finding no. 4, at the employer's request, to show that the titles of principal environmental specialist and principal environmental engineer (both at pay ranges 25 and 26) are included in the negotiations unit of primary level supervisors represented by a CWA affiliate (J-2, Appendix III) while the next higher titles of supervising environmental specialist (at pay ranges 28 and 29) and supervising environmental engineer (at pay ranges 27 and 28) are included in the negotiations unit of higher level supervisors represented by another CWA affiliate (J-3, Appendix III).^{2/} Some of these employees, however, do not actually

^{2/} According to the employer, these placements reflect an understanding that, with respect to compensation at least, the title of section chief at pay range 31 is higher organizationally than titles represented by CWA in the two present units of supervisors. We note, however, that CWA's unit of higher-level supervisors includes an OAL title at pay range 31 and its unit of professional employees includes titles at pay ranges 31, 32 and 98. An OER Employee Relations Coordinator so testified at the outset of the hearing on the overall petition (T44-T46).

supervise other employees (as opposed to projects) (2T110-2T111). As illustrated by the organizational charts (R-59, R-61, R-62, R-63, R-64, and R-65), section chiefs may serve as the first or second level of supervision within their section.

We supplement findings no. 5 and 6 concerning the creation of the section chief title.

In 1984, DEP sought to create a section chief title as a new first level of management within the Division of Water Resources (R-79; R-81). It was believed that a new level of management was needed to oversee sections composed of between seven and twelve professional employees working on matters that were too technical to have that many employees reporting to a bureau chief (R-80; 2T83).

DEP's supporting documentation (R-80) described the duties performed by the ground water bureau chief versus the duties to be performed by a section chief:

Bureau Chief	Section Chief
(1) Develops comprehensive ground water policy and procedures and monitors section's compliance.	(1) Implements policy and procedures, and monitors individual's compliance.
(2) Sets comprehensive ground water priorities for permit issuance among sections.	(2) Manages section priorities, staff and workload to conform to bureau priorities.
(3) Develops output and productivity quotas for sections.	(3) Manages staff and workload to maximize productivity and achieve quotas.
(4) Develops comprehensive ground water program goals and objectives.	(4) Manages staff to achieve goals and objectives.
(5) Identifies the need for new regulations or modifications to	(5) Develops new regulations or modifications in conformance

existing regulations to improve overall ground water management. Directs the nature of change.

with overall management needs and direction.

- (6) Provides managerial oversight to insure uniform regulatory control among sections.
- (7) Insures interagency and intergovernmental coordination.
- (8) Develops general ground water criteria and component parts for classes of permits.
- (9) Identifies tactics and strategy to be employed in litigation.

- (6) Provides managerial oversight to insure uniform regulatory control within section.
- (7) Insures interagency coordination.
- (8) Develops and directs the development of section permit terms and conditions on a case-by-case basis and for general class of permits within section jurisdiction.
- (9) Develops detailed technical, administrative or legal arguments regarding specific cases.

DEP's Assistant Commissioner of Finance and Budget described this document as a relatively accurate explanation of the differences between bureau chiefs and section chiefs throughout the department (2T53).

DEP asked that the section chief title be assigned a pay range of 31. That pay range would have placed the new title two ranges above the next lowest titles of supervising environmental engineer and supervising environmental specialist and two ranges below the next higher title of bureau chief (R-80). As the Hearing Officer found, obtaining a pay range of 31 for section chiefs was intended in part to cure an inequity of having professional employees who had been promoted to higher titles paid in the same pay range as other professional employees reporting to them (2T109-2T110).

To obtain a pay range of 31 for the section chief title, DEP had to have an accountability rating of 230 assigned to that title. (Accountability ratings are part of the Hay classification system). But the Director of Classification and Compensation in the Department of Personnel assigned the new title an accountability rating of 200 (equivalent to that assigned supervising environmental engineers and specialists) and a pay range of 30 (2T13; R-79 to R-82). DEP appealed that determination, asserting that an accountability rating of 230 (equivalent to that assigned bureau chiefs) was justified because section chiefs would have more decisionmaking responsibility and accountability in their highly technical areas than supervising environmental specialists and engineers (2T15), would have more freedom to act (2T101), and would be "responsible for getting things done" (2T99). The appeal specified these reasons for a higher accountability rating: section chiefs would "manage a combination of two or more separate but intricate and integrally common elements or functions staffed by 7 to 12 professionals which contribute to the resolution or support of a larger program of a bureau"; the section chiefs would have several supervising engineers and other professional employees with an accountability rating of 200 reporting to them; and the "Section Chief is accountable for his/her own staffing budget, program objectives and goals; will operate outside bargaining units; and has

sign-off responsibility over projects worth \$1 billion or more."
(R-86).^{3/}

DEP's appeal was upheld (R-87). The accountability factor was elevated to 230 to "describe the pressure for end results." A salary range of 31 was assigned.

We add to finding no. 10 the testimony of Gerald Nicholls, the Director of the Division of Environmental Safety, Health and Analytical Programs ("DESHAPS"), describing the difference between section chiefs and bureau chiefs. From his point of view,

the section chief provides the immediate judgment on an issue. The bureau chief looks at a larger number of issues and takes them as a group. The section chief is required to use his or her judgment on an individual day-by-day basis as to whether or not a work product has been fulfilled, whether priorities are being met. [1T75]

We also add that some performance plans call for section chiefs to prepare recommendations for bureau chiefs, assistant directors, and directors regarding administration activities, policies, objectives, programs and procedures, as well as personnel and resource needs (e.g. Reddy and Jennus). Others do not (Kosinski, Zoda).

Finding no. 14 concerns, in part, efforts to resolve the issue of integrity testing of tanks storing hazardous products. There were not enough consulting firms and it would have been too expensive to have every facility perform the most stringent tests within the legislated time frames. The bureau chiefs and the

^{3/} This dollar estimate was based on the aggregate of projects worked on by all section chiefs (2T103).

section chiefs together determined what was tested and how. Because of his more extensive on-site and enforcement experience, Darryl Jennus, the field verification section chief, played a bigger role than Beth Reddy, the acting chief for the engineering review section (1T67-68).^{4/} The recommendations of the section chief and bureau chiefs were reviewed by the assistant director and director and coordinated with the enforcement group (4T52-4T53).

Finding no. 16 concerns Reddy's role as acting chief of the engineering review section. We add these findings to the discussion concerning the requirement that businesses submit facility maps so DEP can evaluate their discharge containment and prevention safeguards. Absent legislation specifying the contents of the required maps, DEP considered a wide range of possibilities, ranging from road maps to computer-generated tapes and costing from a few hundred dollars to several million dollars. Meetings were attended by the commissioner, the assistant commissioner, the director and assistant director of DESHAPS, the bureau chief, and Reddy as the primary rule developer (1T47-1T48; 3T90-3T92). Commissioner Weiner and Reddy worked together on the package of rules because she "had a long experience of rule writing and provided a high degree of technical competence and clarity to the process" (1T72). The mapping guidelines were approved at the bureau chief level (4T36-4T37).

^{4/} As of the hearing, Reddy had not been appointed to the section chief title on a provisional, probationary, or permanent basis.

We add these observations to the discussion of the financial responsibility SOP (R-72) prepared by Reddy and approved by the bureau chief. The division director's approval was not necessary (1T78). At that time, N.J.A.C. 7:1E-4.5 (now N.J.A.C. 7:1E-4.4) already set forth the overall standards for financial responsibility, including standards concerning the maximum amounts of self-insurance. The document prepared by Reddy gave those standards more specificity (4T43-4T44).

We add these observations to the discussion of the SOP on "Tank Car/Truck Loading/Unloading Areas" (R-73) developed by Reddy and approved by the bureau chief. This document reflects a regulation, N.J.A.C. 7:1E-2.3, requiring owners or operators of major facilities to describe tank car and truck loading and unloading areas, along with a secondary containment or diversion system. The plan must also describe the hazardous substances to be loaded or unloaded; how cars and trucks are inspected to ensure outlets are secured; the system used to prevent departure of cars and trucks before transfer lines are disconnected; and the intervals tank cars are attended during loading and unloading. The policy is less specific than the regulation it implements; after meetings between industry representatives and the section chiefs, the bureau chief, and the assistant director, it was decided that it would be too burdensome to apply the regulation stringently (1T78;4T44-4T47). The loading/unloading issue was a highly technical one and the section chiefs lent their technical expertise

to the decisionmaking process. The assistant director and the section chiefs agreed on how to coordinate the efforts of bureaus and elements, but the assistant director bore the responsibility for that coordination (4T46-4T47). The loading/unloading question did not reach the level of an assistant commissioner because it was a highly technical area and "in general [assistant commissioners] would not become involved in the kind of technical decision making that was needed." (4T47).

The director testified that while the financial responsibility and tank loading issues "don't seem to be tremendous in nature, they require [a] significant amount of research and a fair amount of technical skill in putting them together in a reasonable fashion, so that they're understandable to the people in the bureau and to the regulated community" and "most importantly, [so] that they could be implemented in a consistent manner" (1T78-1T79).

Finding no. 17 concerns the duties of the field verification section chief. We add to the discussion of the annual audit SOP developed by Jennus and approved by the bureau chief that the SOP was worked on by professional staff who referred to regulations (4T48). We add to the discussion of the pipeline safety project that as the technical people on this program, the section chief and the bureau chief set the limits on the change order (1T68-1T69). The professional staff initially reviewed and concurred with the consultant's recommendation against additional regulations. This recommendation was then reviewed and accepted by

Jennus, the bureau chief, and the division director before being passed on to the commissioner. The director expects the commissioner, in conjunction with DEP management above the director level, to make the ultimate recommendation to the Legislature (1T69-1T71; 4T49-4T50).

Finding no. 18 concerns the implementation of the New Jersey Toxic Catastrophe Prevention Act by the Bureau of Release Prevention. This legislation induced industries to use less hazardous substances so the bureau has needed fewer employees than anticipated (3T7-3T9).

Finding no. 20 concerns the risk management SOPs (R-75; R-76; R-77; and R-78) recommended by a former section chief and approved by a bureau chief. Chemical safety engineers helped prepare three of these SOPs and quality assurance coordinators as well as the bureau chief approved all of them (4T60). The SOPs require chemical safety engineers to follow checklists in reviewing risk management statements, programs and work plans. The documents appear to be more procedural than substantive.

Finding no. 43 concerns budgeting. Section chiefs are not part of the management team that meets to put together a division budget by identifying "sums, targets, or broad large items" and fleshing out "the targets and the amounts as to how they will be utilized in the forthcoming year." (1T85-1T86; 3T56-3T58). Once the budget is approved, another process is used to implement or adjust the budget as needed (1T85-1T86). Budgeting of programs funded by

the Spill Fund "usually occurs pretty smoothly with budgets that are developed by the section chiefs and the bureau chief pretty much being implemented without change" (1T86). Programs with less well-determined funding characteristics are less fortunate; major modifications and reallocation of resources must be made given who is available to do what. A section chief is "the primary determiner of who does what in the section" (1T86). Some performance plans call for section chiefs to prepare section budgets or assist in preparing budgets (e.g. Reddy, Jennus and Honachefsky). Others do not (e.g. Kosinski and Zoda).

Analysis

Article I, ¶19 of the New Jersey Constitution guarantees public employees the right to organize and to choose a representative to present their proposals and grievances. The Employer-Employee Relations Act implements this guarantee by entitling the public employees it covers to form, join and assist employee organizations and to have their chosen representatives negotiate for them over their terms and conditions of employment. N.J.S.A. 34:13A-5.3; Lullo v. IAFF, 55 N.J. 409 (1970). The Legislature sought to promote the public interest in labor relations stability and to improve morale and efficiency by granting employees a special means of access to their employer over working conditions intimately and directly affecting them, most notably their compensation. Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 591 (1980); West

Windsor Tp. v. P.E.R.C., 78 N.J. 98, 113-114 (1978). The Legislature, however, also determined that the employer's interests in determining governmental and managerial policies without negotiations or the risk of divided loyalties in decisionmaking justified restricting negotiations over proposals or grievances that would significantly interfere with governmental policymaking; requiring that supervisors be placed in negotiations units apart from the employees they supervise; and excluding some employees from the Act's protections altogether. N.J.S.A. 34:13A-3e; Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 163 (1978); West Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971). The Legislature thus made choices and accommodations in seeking to protect both the interests of employees in negotiating over their own pay and other vital working conditions and the interests of governmental employers in having their policymaking deliberations uncompromised by divided loyalties.

N.J.S.A. 34:13A-3(d) defines public employees to "include any public employee, i.e. any person holding a position, by appointment or contract, or employment in the service of a public employer...." The only exclusions from the definition of "public employee" are "elected officials, members of boards and commissions, managerial executives and confidential employees."

Unless one of the four statutory exclusions applies, the Act permits professional employees and supervisors to organize. N.J.S.A. 34:13A-5.3; N.J.S.A. 34:13A-6(d). The category of

professional employees includes such employees as "attorneys, physicians, nurses, engineers, architects, teachers, and the various types of physical, chemical and biological scientists." N.J.A.C 19:10-1.1. Supervisors are defined as employees "having the power to hire, discharge, discipline or to effectively recommend the same." N.J.S.A. 34:13A-5.3. By permitting supervisors to organize, our Legislature implicitly accepted the viewpoint that employees can seek to negotiate over their own wages and working conditions without being disloyal in carrying out their supervisory responsibilities. See Packard Motor Car Co. v. NLRB, 330 U.S. 485, 19 LRRM 2397, 2399 (1947).

"Managerial executives" are excluded from the Act's coverage. N.J.S.A. 34:13A-3(f) defines "managerial executives" as:

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, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

Our Supreme Court examined this exclusion in New Jersey Turnpike Auth. and AFSCME Council 73, 150 N.J. 331 (1997). That case partially modified, but otherwise approved standards set forth in Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1981).

The Montvale standards had provided:

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 337. [Emphasis added].

The Supreme Court concluded that the underlined requirement was unduly restrictive, especially as applied to large organizations in which some managers might not possess "organization-wide power" yet still have "significant power, discretion and influence within their own departments." Excising that requirement, the Supreme Court approved these revised 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. Id. at 356.

While holding that a managerial executive need not possess organization-wide power, the Supreme Court also rejected portions of the lower court's opinion that would have expanded the managerial executive definition to exclude all employees above first-line supervisors and to adopt the private sector exclusion of all managerial employees who effectuate managerial policies. The Supreme Court reasoned that the problem of divided loyalties is of less concern in the public sector than in the private sector because public employees do not have a right to strike; public employees have a much narrower scope of negotiations; public employers are not seeking to maximize profits; and public employers and public employees share a stronger common interest in the mission of the organization. The Court also stressed that the Legislature had rejected a managerial executive definition, proposed by Governor Cahill, that would have excluded persons "effectuating and making operative" management policies and practices and had instead confined that part of the exclusion to persons "directing the effectuation" of such policies and practices."^{5/} The Court concluded that "directing the

^{5/} The Legislature simultaneously rejected several other proposals of Governor Cahill that would have contracted organizational rights to match the private sector model he favored. Those proposals included denying representation to supervisors; deleting the limitation of the managerial executive exclusion in the school board context to superintendent-level employees; and continuing to automatically deny representation to all heads and deputy heads of departments and agencies.

effectuation" connotes a higher level of authority than does "effectuating and making operative." Id. at 355.

Under Turnpike Authority, the line between managerial executives and lower-level employees must be located case-by-case. Our analysis in each instance will focus on the weight and interplay of multiple factors such as the employee's position in the hierarchy, functions and responsibilities, and extent of discretion. Our goal will be to determine whether the employee has the authority and accountability of a managerial executive to formulate or direct the effectuation of management policies and practices.

We now apply the Turnpike Authority standards to the facts of this case. We begin by examining the relative position of the section chiefs in DEP's hierarchy. We preface our discussion with some observations about this part of the Turnpike Authority standards.

An employee need not be at the top of an organization to be a managerial executive. But the higher an employee is in the hierarchy and the fewer levels of decisional review, the more likely it is that the employee has authority to formulate or direct the effectuation of management policies and practices. In examining the hierarchy, we will also consider the number and positions of employees reporting to an employee asserted to be a managerial executive; the more employees who report to a person and the higher and broader range of positions they hold, the more

likely it is that the person has managerial executive status.^{6/} And we will consider the extent to which an employee regularly participates in management-level committees convened to discuss and adopt managerial policies and strategies. Compare County of Rensselaer (Hudson Valley Community College), 18 N.Y. PERB 3001 (¶3001 1985) (Director of Learning Resources who participated in weekly meetings of college deans and served in president's cabinet formulated policy). We finally repeat that the Legislature contemplated the possibility that some employees holding managerial titles would be eligible for representation when it limited the managerial executive exclusion in the school board context to superintendent-level employees and when it limited that exclusion in other contexts to employees who formulate policies and practices or direct their effectuation. Thus, merely holding a managerial title does not make one a managerial executive.

The section chiefs are at the bottom of DEP's managerial hierarchy. Above them are the commissioner; assistant commissioners, each in charge of a cluster of programatic divisions; division directors; assistant directors, each in charge of a cluster or "element" of two or three bureaus, and bureau chiefs.

^{6/} We agree with the State, however, that a first-level supervisor or even a non-supervisor may still be a managerial executive.

In many instances, section chiefs are, from an organizational perspective, the first level of supervision over the professional employees in their sections. In other instances, they are, from that perspective, the second level of supervision. One reason for seeking a pay range of 31 for the section chief title was to cure a salary inequity that occurred when career professionals were promoted to supervising environmental specialists but were paid in the same salary range as professionals holding lower titles.

A variety of "management team" meetings are held in DEP. Assistant commissioners hold weekly meetings with the division directors to discuss hot issues. The assistant commissioner for the science and research division meets with division directors and staff from the Budget and Personnel Office to discuss budget preparation, fiscal account balances, financial difficulties, and administrative items such as salary increases. Meetings held to formulate budgets include bureau chiefs and higher-level managers. The DESHAPS director holds quarterly staff meetings with assistant directors and bureau chiefs to review programs and discuss such matters as budget initiatives. The director also meets with the assistant directors to review strategies and resources and to make programmatic decisions. Section chiefs do not attend any of these meetings.

The Division of Water Quality has created a management committee known as PIT (Program Improvement Team). This committee develops procedures for recommending and approving division

policies. The committee includes the director, assistant directors and bureau chiefs. Section chiefs are not included.

We next examine the functions and responsibilities of the DEP section chiefs. We preface our discussion with some observations about this part of the Turnpike Authority standards.

We agree with the State that it is right to focus on what an employer charges its employees with doing. Job descriptions are presumptively important and accurate indicators of an employee's authority and accountability. They are not, however, dispositive: we must look at the actual job responsibilities, authority, and relationship to management of the employees holding the job title in question. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); Montvale. But if employees in that title are charged with exercising managerial executive authority and are to be held accountable for misexercising that authority, then the fact that superiors occasionally override decisions or reject recommendations by some employees in that title will not lead to the loss of managerial executive status.

We reiterate Turnpike Authority's holding that a managerial executive need not exercise organization-wide power, especially in a large organization, if that employee has significant power, discretion and influence within a department. Accord Gloucester Cty., P.E.R.C. No. 90-36, 15 NJPER 624 (¶20261 1989). But breadth of authority is still a relevant consideration: the broader an employee's authority and the more closely related to the central mission of the organization, the

more likely it is that the employee is a managerial executive.^{7/}

We also note that the statutory definition of managerial executive does not require that an employee be responsible for formulating or directing the effectuation of labor relations policies. Compare Bell Aerospace (rejecting NLRB's adoption of such a test). But in applying the statutory definition, we believe it is proper to keep in mind the competing legislative concerns: the Legislature saw both a public interest in permitting a broad range of public employees to organize and negotiate over their own terms and conditions of employment and a public need to deny representational rights to managerial executives because of a concern about divided loyalties. The more power employees have over labor relations and personnel policies and such key matters as staffing, budgeting and financial determinations, the greater the concern about potential divided loyalties and the more likely it is we will find an employee to be a managerial executive.

Finally, we note that employees are not excluded from the Act simply because they have the authority normally exercised by a

^{7/} Compare NLRB v. Louisville Gas & Elec. Co., 760 F.2d 99, 119 LRRM 2069 (6th Cir. 1985) (pollution control analysts lacked sufficient authority over fundamental policy); Maccabees Mutual Life Ins. Co. v. NLRB, 757 F.2d 767, 118 LRRM 3173 (6th Cir. 1985) (claims representatives not managerial since authority limited to "relatively unimportant areas"); Iowa Elec. Light & Power Co. v. NLRB, 717 F.2d 433, 114 LRRM 2526 (8th Cir. 1983) (quality control inspectors lacked sufficient authority over fundamental policy).

supervisor or professional employee. Their responsibilities must reflect a greater degree of authority and accountability.

The job descriptions and performance plans charge section chiefs with performing largely supervisory responsibilities with respect to the professional staff beneath them. Section chiefs supervise section staff to make sure they carry out the work plans developed by section chiefs to meet the objectives set by bureau chiefs. Their supervisory functions include both functions specified by N.J.S.A. 34:13A-5.3 -- hiring, firing, and discipline -- and other functions commonly performed by supervisors such as assigning, prioritizing, and coordinating the work of section staff.^{8/} At the same time, the responsibility of these section chiefs to oversee their work unit as a whole and to ensure the adequacy of its work product can be seen as entailing a larger responsibility than simply supervising each individual employee reporting to them.

^{8/} The National Labor Relations Act excludes supervisors from its coverage and defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical in nature, but requires the use of independent judgment." 29 U.S.C. § 152 (11). (Emphasis supplied). Governor Cahill proposed adopting this broader definition of supervisors and then excluding all supervisors so defined from the Act. The Legislature rejected that proposal.

The document describing the differences in duties between bureau chiefs and section chiefs in the ground water bureau (quoted supra at pp. 4-5) is significant. This document indicates that it is the bureau chief's responsibility to develop policy, procedures, and priorities; develop output and productivity quotas; identify the need for new or modified regulations; insure uniform regulatory control among sections and coordination between agencies and governments; develop criteria for permits; and identify litigation tactics and strategy. By contrast, the section chief is expected to implement policy and procedures; manage the section to conform to bureau priorities; manage staff and workload to achieve the quotas, goals and objectives set by the bureau chief; develop new or modified regulations as directed by the bureau chief; ensure coordination within the section or agency; develop permit conditions case-by-case and for general classes of permits; and develop detailed technical, administrative, or legal arguments regarding specific cases. This document evidences a distinction between the authority to make policy exercised by bureau chiefs and the responsibility to effectuate policy assigned to section chiefs. Consistent with that distinction, all SOPs for a section must be approved by the bureau chief.

DEP section chiefs do not have effective power over labor relations policies or budgeting, staffing, and financial determinations. Decisions about these matters are made at

higher-levels of DEP's centralized, chain-of-command bureaucracy. While section chiefs submit information and establish work plans pertinent to making budgeting decisions, they are not part of the management staff that meets to formulate the budget and they do not make the decisions to contract or expand the budget. Section chiefs can assign existing staff within their sections, but do not determine staffing levels and have not been consulted about reductions in force. Section chiefs have no authority to commit agency funding and all purchase orders must be approved by division directors. On this record, there is little reason to fear that section chiefs, if permitted to organize, would be effectively negotiating with themselves or exercising budgeting, staffing, or financial power disloyally.

We next examine the discretion exercised by DEP section chiefs. We preface our discussion with some observations about this part of the Turnpike Authority standards.

A managerial executive need not have final responsibility for signing off on policies, provided his or her recommendations effectively control what policies will be adopted by establishing their key components. See Turnpike Authority v. AFSCME, 289 N.J. Super. 23, 36 (App. Div. 1996); Ocean Cty. Utilities Auth., P.E.R.C. No. 98-120, 24 NJPER 212 (¶29100 1998); Union Cty., P.E.R.C. No. 48, NJPER Supp. 166 (¶48 1970); NLRB v. Yeshiva Univ., 444 U.S. 672, 683 (1980). However, we will distinguish between a managerial executive's discretion to effectively

determine policy and the duty characteristic of lower-level positions to suggest courses of action or supply information. We will look to see who has the effective discretion and power to call the shots in formulating policies or directing their effectuation.

Unless a statutory exclusion applies, the Act covers supervisors, technical experts, and professional employees. Such employees may exercise substantial discretion and authority within their areas of expertise and responsibility, yet still be entitled to seek representation if they do not formulate or direct the effectuation of managerial policies and practices. Compare Yeshiva at 690 n.30; Flinkote Co., 217 NLRB No. 85, 89 LRRM 1295 (1975); General Dynamics Corp., 213 NLRB No. 124, 87 LRRM 1705 (1974); see also Rabban, Distinguishing Excluded Managers from Covered Professionals under the NLRA, 89 Columbia L. Rev. 495 (1989); Note, Collective Authority and Technical Expertise: Reexamining the Managerial Employee Exclusion, 56 N.Y.U. L. Rev. 694 (1981). Also, an employee may have considerable discretion, but not be a managerial executive if his or her exercise of that discretion must conform to established policy. Bell Aerospace Co., 219 NLRB No. 42, 89 LRRM 1664 (1975); Eastern Camera, 140 NLRB No. 569, 52 LRRM 1068 (1063). We thus will ordinarily look for a level of managerial discretion beyond that normally exercised by a supervisor, technical expert, or professional employee, or an employee implementing established policy.

The director of DESHAPS contrasted the discretion exercised by section chiefs with that exercised by bureau chiefs. A section chief makes an "immediate judgment" on an "individual day-by-day basis as to whether or not a work product has been fulfilled" and priorities have been met. A bureau chief "looks at a larger number of issues and takes them as a group." This distinction accords with the differences in duties between bureau chiefs and section chiefs previously discussed -- bureau chiefs develop policies and goals within their bureaus while section chiefs implement policies and see that goals and objectives are met within their sections.

The section chief title was created so as to insert a first level of management between professional employees with highly technical expertise and the bureau chief. In deciding which sections would be headed by a chief and which would continue to be headed by employees in supervising professional titles, the division director or assistant director looked to the number of professional staff (between 7 and 12) in the section, their technical sophistication, the complexity of the program, and the latitude of discretion to be exercised (as in programs involving enforcement powers). The accountability rating assigned to section chiefs reflects the extra level of discretion, expertise, and responsibility required of section chiefs as opposed to the professional employees they supervise. The record, however, does not demonstrate that section chiefs were meant to exercise or

displace the authority and discretion of bureau chiefs; rather section chiefs collect and channel highly technical information and recommendations to bureau chiefs so that bureau chiefs and higher-levels of review can decide what policies to adopt.

Section chiefs have authority to issue permits and approve site remediation agreements in some units; waive some procedural requirements or set procedural guidelines; and sign off on projects. However, risk-reduction consent agreements between DEP and regulated businesses must be approved by the bureau chief, the assistant director, and the enforcement group; if a consent agreement is not reached, it is the bureau chief who issues the administrative order. Further, a section chief can recommend that the enforcement group reduce a penalty, but cannot do so directly. In the construction area, a bureau chief must approve a consulting plan, authorize any change orders, and sign the final inspection report.

As already noted, bureau chiefs must approve all SOPs. Section chiefs make recommendations concerning SOPs based on their own technical expertise and the technical expertise of their professional staff. Two examples are the financial responsibility and tank loading issues, which the DESHAPS director testified "don't seem to be tremendous in nature," but do "require [a] significant amount of research and a fair amount of technical skill in putting them together." The SOPs also often track regulations or add specificity; examples are the financial

responsibility, annual audit, and tank loading procedures.

Compare Clark Tp., P.E.R.C. No. 85-105, 11 NJPER 283 (¶16104 1985) (construction code official following requirements established by statute not a managerial executive). The risk management SOPs recommended by a section chief were worked on by chemical safety engineers and approved by quality assurance coordinators as well as the bureau chief; these SOPs appear to be more procedural than substantive.

An example of a section chief's significant influence was the role of Beth Reddy, acting chief of the engineering review section, in helping to promulgate the facility mapping guidelines. Reddy served as the primary rule developer and the commissioner relied on her "long experience of rule writing" and "high degree of technical competence." But it was not Reddy's authority or discretion as a section chief that was important per se, but her experience and expertise in writing rules. The mapping guidelines were ultimately approved at the bureau chief level after meetings involving Reddy, the bureau chief, the assistant director and director, and the assistant commissioner and commissioner.

We also note the role that Reddy and Jennus played in making recommendations concerning the type and stringency of integrity testing of storage tanks. In this instance, Darryl Jennus, the field verification section chief, had more experience and expertise than Reddy so he played a greater role. The bureau

chiefs and the section chiefs together determined what was tested and how and their recommendations were then reviewed by the assistant director and director and coordinated with the enforcement group.

We finally note the pipeline safety project where a consultant recommended against additional regulations; professional staff in the field verification section agreed with the recommendation; and the section chief, bureau chief and division director then each approved the recommendation before passing it in to the commissioner to make the final decision. The section chief served more as a technical expert than a decisionmaker on the project.

Section chiefs have considerable technical expertise and that expertise is valued when higher-levels of authority consider their recommendations. But our review of the record does not persuade us that section chiefs effectively determine what policies will be adopted. The review by bureau chiefs and the management officials above them is a real exercise in decisionmaking, not a pro forma sign off.

Weighing these factors and considering their interplay, we conclude that DEP section chiefs neither formulate managerial policies and practices nor direct their effectuation. We find significant the exclusion of section chiefs from the various management committees deliberating on policy issues and their low-level placement in the managerial hierarchy and supervisory


chain. We find even more significant the factual record showing that bureau chiefs are responsible for formulating policies and objectives and coordinating their implementation while section chiefs are responsible for implementing those policies and objectives within the work units they oversee. Section chiefs lack the power to determine organizationally the means and resources that will be committed to addressing the policy objectives set by their bureau chiefs; they do not decide staffing levels, expand or contract the budget, or commit agency funding. The primary responsibilities of section chiefs involve supervisory functions of planning, organizing, prioritizing, and assigning work among staff members and making sure the work is done satisfactorily. And the scope of their discretion and the influence of their opinions appear to stem mostly from their professional and technical expertise in highly complicated areas rather than from an organizational decision or desire to have policy matters decided at the section chief level. Our review of the record leads us to apply the legal distinction drawn by the Legislature and the Supreme Court between managerial executives who are charged with the responsibility of directing the effectuation of management policies and practices and lower-level managers who are charged with the responsibility of effectuating such policies and practices and making them operative. We thus hold that section chiefs are not managerial executives as defined by N.J.S.A. 34:13A-3g.

ORDER

Section chiefs in the Department of Environmental Protection are not managerial executives as defined by N.J.S.A.

34:13A-3g.2/

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: December 17, 1998
Trenton, New Jersey
ISSUED: December 18, 1998

2/ Given the parties' agreement as to how the petition should be processed, we enter no further order.

H.O. NO. 97-3

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

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

Docket No. RO-H-94-91
(Section Chiefs - Department
of Environmental Protection)

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Petitioner.

SYNOPSIS

A Hearing Officer recommends that the Commission find that section chiefs in the State Department of Environmental Protection are managerial executives within the meaning of the Act. As low-level supervisors, the section chiefs have five levels of management above them in the Department's organizational hierarchy. They have no authority to adopt or recommend major Departmental policies. However, section chiefs do have significant input into formulating policies and procedures within their own programs. They also have discretion to implement policy affecting the regulated community. Therefore, under the Appellate Division's standards in N.J. Tpk. Auth., 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), certif. granted ___ N.J. ___ (1996), the section chiefs were found to be managerial executives.

This is an interlocutory Hearing Officer's Report on a petition to represent third-level supervisors employed by the State of New Jersey in various departments. Pursuant to the parties' pre-hearing stipulation, either party may now file interim exceptions in accordance with N.J.A.C. 19:11-7.3. Alternatively, the parties may choose to file exceptions with the Commission after hearings have been conducted and reports issued with respect to all of the petitioned-for titles.

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In the Matter of

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Docket No. RO-H-94-91
(Section Chiefs - Department
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COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Petitioner.

Appearances:

For the Public Employer
Peter Verniero, Attorney General
(Michael L. Diller, Senior Deputy Attorney General)

For the Petitioner
Weissman and Mintz, attorneys
(Steven P. Weissman, of counsel)

HEARING OFFICER'S REPORT AND
RECOMMENDED DECISION

On December 17, 1993, March 29, 1994, and April 19, 1995, Communications Workers of America, AFL-CIO filed a Petition for Certification and Amendments seeking to represent a collective negotiations unit of third-level supervisors employed by the State of New Jersey in various departments. CWA proposed to include about 275 employees in 62 titles in such a unit. The State objects to the proposed unit. It contends that all of these employees are managerial executives, and therefore, excluded from representation under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On March 29, 1994, the Director issued a Notice of Hearing. The parties stipulated that hearings would initially be conducted and decisions sequentially issued on certain groups of titles to answer the question of their alleged managerial status.

Hearings concerning the section chiefs in the Department of Environmental Protection, were conducted on August 11, 12 and 17, October 3 and 4, 1994. The parties presented documents, examined witnesses and filed post-hearing briefs by June 23, 1995. The State filed a reply brief by December 11, 1996.^{1/} This report and recommended decision, which is the second in the series, concerns the alleged managerial status of section chiefs in the Department of Environmental Protection.^{2/} Based upon the entire record,^{3/} I find as follows:

FINDINGS OF FACT

Organizational Structure

1. The Department of Environmental Protection (DEP) employs about 3,800 employees. DEP is headed by a commissioner who reports to the Governor. Six assistant commissioners report to the

^{1/} Following hearings, the parties requested we suspend processing of this matter to permit the parties to pursue settlement discussions. Settlement efforts have not been successful, however, and the matter is ripe for a decision.

^{2/} Hearings concerning section chiefs in the Department of Transportation are continuing.

^{3/} The transcripts of each successive hearing day shall be referred to as "1T," "2T" and so forth. The parties' joint exhibits shall be referred to as "J-," the Employer's exhibits as "R-," and the Petitioner's exhibits as "P."

commissioner; each assistant commissioner is in charge of a cluster of programmatic divisions, some of which are referred to as "offices."^{4/}

2. The Assistant Commissioner for Management and Budget, Ronald Tuminski, supervises the Division of Personnel and the Division of Financial Management and General Services. Assistant Commissioner Lewis Nagy supervises the Division of Science and Research, the Division of Environmental Safety and Analytical Programs, and the Division of Air Quality Management. Assistant Commissioner James Hall supervises the Division of Parks and Forestry, the Division of Green Acres and Recreation, the Division of Fish, Game and Wildlife, and the Division of Engineering and Construction. Assistant Commissioner John Weingart supervises the Office of Permit Assistance and Information, the Office of Pollution Prevention, the Division of Land Use Regulation, the Division of Water Quality, the Division of Hazardous Waste Regulation, the Division of Air Quality Regulation, and the Office of Land and Water Planning. Assistant Commissioner Richard Gimello manages the Office of Environmental Claims Administration, the Division of Responsible Party Site Remediation, and the Division of Publicly Funded Site Remediation. Assistant Commissioner Marlene Dooley manages the Division of Enforcement Field Operations, the Office of Enforcement

^{4/} In addition to the assistant commissioners, also reporting to the commissioner are the chief of staff, the director of communications and the director of legislative and intergovernmental affairs.

Coordination, and the Office of Coastal and Land Use Enforcement Management (R-59 through R-65).

3. Each division or office is headed by a division director. Divisions are composed of bureaus. A cluster of two or three bureaus, called an "element", is headed by an assistant director, also referred to as an administrator (4T94).

Each bureau is headed by a bureau chief, who holds the civil service title "manager 4." Some bureaus are further subdivided into sections. Some sections are supervised by a section chief, the title at issue here. The tables of organization show that section chief positions are found in nearly every division. There are a total of 92 section chief positions, 64 of which are currently filled (R-58 through R-65).

4. Section chiefs supervise professional employees, technical employees and clerical employees. The professional employees are highly specialized environmental and chemical scientists and researchers. All of the employees reporting to section chiefs are currently represented, primarily by CWA, in the State-wide units of professional employees, technical employees, clerical support employees, or supervisors. The levels of subordinate professionals' titles are determined primarily by their experience (J-1, J-2; 1T49).

History of Title

5. In 1984, the Department sought to create a title section chief for the Division of Water Resources, the then largest

Division with about 700 employees (2T12, 2T13, 2T50). The Division intended to give the new section chief title authority to make decisions on granting permits and on seeking reviews from other sections. In addition, the Division sought to have this new position declared "management" so that decisions being made by the section chiefs were made from the public interest, not from the employees' interests (2T102).

6. While the State Department of Personnel (DOP), then known as the Civil Service Commission, approved the title's creation, it initially disagreed over the proposed pay range. DOP created a classification profile for the title using a ratio of know-how and accountability scores (2T99). DEP requested a higher accountability factor -- one in line with the accountability attributed to bureau chiefs -- than civil service was willing to credit. The Department argued that because section chiefs supervise highly technical staff, they should have a higher accountability factor than supervising environmental engineers (2T15).

Typically professionals are promoted up to "supervisory" titles as a way of monetarily rewarding employees. There was a problem with promoting career professionals to supervising environmental specialists at pay range 29 because the professionals under that title are also paid at range 29. The creation of a section chief level between the bureau chiefs and range 29 professionals was intended to cure this inequity (2T110).

Eventually, DOP did grant the Department's request for a pay range 31 designation (2T24).^{5/}

7. The Department's use of the section chief title broadened in 1986 after it again reorganized and created new divisions. Some heads of sections then holding supervising environmental specialists titles were reclassified as section chiefs (2T26).

8. Whether a DEP section today is headed by a section chief or a supervising professional title may be by design or by historical accident (3T32). The division director or assistant director decides whether a section chief position is needed to manage the section or whether the employees will report directly to the bureau chief as the "first level of management." That decision is based upon the number and technical sophistication of the staff in the section, and the complexity of the program. Sections of a single unit of less than seven employees are supervised by supervising environmental engineers, whereas sections of multiple units and/or larger numbers of professional/technical staff are headed by section chiefs (2T68-2T69; R-58, R-61).

^{5/} Assistant Commissioner Tuminski testified that the then division director testified before the civil service hearing officer that the Governor had issued a directive that functions of management be separated from the actual performance of technical and professional work of these particular titles. This is double hearsay and unsubstantiated by other evidence. It is also more than 10 years since the title was initially created. Therefore, I find that this is not relevant to what section chiefs actually do today, nor relevant to the issue of their current managerial status.

The assignment of a section chief to supervise a program is also based upon the latitude the section chief is given in making discretionary decisions as would be required in a program with statutory enforcement powers (2T82-2T83, 4T91, 4T109). For example, the Nuclear Engineering Bureau has no section chiefs because it has no statutory enforcement powers. It monitors the environment surrounding nuclear power plants and works with the State Police Office of Emergency Management. Its professional staff members are supervised by a supervising nuclear engineer (3T31). The Bureau of Environmental Radiation is responsible for six small programs, none of which are large enough for a section chief position (3T33). In those sections, all staff report directly to the bureau chief, which is also the first level of management (3T34).

The Office of Quality Assurance, which is actually a section level entity, is headed by a section chief who is responsible for certifying and auditing about 900 laboratories that provide data to the Department (3T41-3T42). This Section requires a section chief because of the need to make judgmental decisions on the evaluations of the quality of the laboratories (3T43).

Conversely, the Planning and Compliance Section is not headed by a section chief because the Section has more administrative, routine responsibilities requiring less judgment (1T102).

9. The Certification and Registration Section in the Bureau of Pesticide Operations is headed by a supervising

engineering specialist (4T24). This Section is basically a "paperwork" operation; it reviews and approves applications for pesticide production and application. The section head performs administrative functions and organizes and assigns work to subordinates (4T22).

The Pesticide Evaluation and Monitoring Section is a technical unit which monitors pesticides in the environment, evaluates their impact on people, animals, and the environment (4T25-4T26). Research Scientist I Meyers performs similar responsibilities to other section heads with respect to supervising employees and developing the Section's work plans (4T27-4T29).

General Job Duties

10. Assistant Commissioner Tuminski stated that the Department views the section chiefs as the "first level of management." (2T31). Tuminski described section chiefs' responsibilities as:

...from a managerial standpoint, to direct and have oversight of the operations of...distinct organizational units...the section chief is responsible for planning and organizing and directing the work of the engineers and the specialist assigned to his or her office. They...do detailed work plans of the unit...assign staffs to the various components of that work unit, they would make a determination in terms of how the staff would be arranged...to carry out the work (2T33).

11. Tuminski believed that in some units, section chiefs have authority to make a final decision on permits and site remediation agreements (2T33). Section chiefs have a "level of

discretion and responsibility" to waive procedural requirements or set procedural guidelines in matters affecting the agency's clients and the general public (2T33).

12. Gerald Nicholls is the Director of the Division of Environmental Safety, Health and Analytical Programs (DESHAPS), a division under Assistant Commissioner Nagy (1T6). The DESHAPS Division, which was created through a 1990 reorganization, is composed of unique and self-sufficient programs which function independently from one another (1T29, 3T93). The DESHAPS Division is staffed with approximately 248 full-time positions. Nicholls testified about the duties and responsibilities of the section chiefs assigned within his Division.^{6/} The Division has four elements, each headed by an assistant director, and includes 11 bureaus (1T59). Nicholls manages and coordinates the elements within his Division (R-66, p. 4).

13. Allan Edwards, assistant director under Nicholls, heads the Release Prevention Element, which includes the Bureau of Hazardous Substances Information, the Bureau of Release Prevention and the Bureau of Discharge Prevention (R-66, p. 4; 1T30-1T32).

The mission of the Release Prevention Element is to identify the risks posed by the use and storage of hazardous

^{6/} The parties stipulated that testimony of Nicholls and the section chiefs called as witnesses, and documents placed into evidence, would be representative of the duties and responsibilities of all section chiefs in the Department (State brief at p. 35).

substances at 32,000 New Jersey facilities, and to prevent the release of those substances into New Jersey's waters and lands. This mission is mandated by the New Jersey Spill Compensation and Control Act, P.L. 1976, C. 141, and the New Jersey Toxic Catastrophe Prevention Act, P.L. 1985, C. 403 (R-66, pp. 45, 52).

Discharge Prevention Bureau

14. The Discharge Prevention Bureau has two sections: Engineering Review and Field Verification. Each Section is headed by a section chief, reporting to Bureau Chief Robert Kotch (1T38; R-66, pp. 48, 53). The Engineering Review Section reviews the discharge prevention, containment and countermeasure plans submitted by members of the regulated community. The Field Verification Section inspects those facilities for compliance with their plans.

This Bureau operates a new program (1T63). When this program first went into effect, the Bureau had to decide how to prioritize the review and approval process of the facility plans. This decision was made by the bureau chief with input from the two section chiefs. The decision was ultimately based on the relative risks to the environment; it was decided that the largest facilities or those handling the most hazardous substances would be evaluated first (4T39). Both section chiefs under this Bureau were initially involved with developing the blueprint for submission dates of facility plans (1T55-1T58). They will continue to plan for future facilities safety testing (1T55).

In addition, when the program was starting in 1993, the section chiefs were involved in resolving the complex technical issues needed to get the program implemented within a one-year target date (1T66-1T67). One such issue which needed resolution involved integrity testing of storage tanks to safely store hazardous products (1T67). In considering the range of testing which could be required of the regulated industry, consideration had to be given to expense and delay. The section chiefs made recommendations to the bureau chief over the type and stringency of the tests. The recommendations were accepted and the regulations were approved by Director Nicholls (1T68, 4T52).

15. There are between 800 and 1,000 regulated facilities which must submit plans to show how they would prevent or contain a release of hazardous substances into the State's waters and lands (1T39, 4T34). The plans must be reviewed and reapproved every three years, and include such specifics as booming capabilities, illumination requirements, leak detection, monitoring, emergency response, and containment procedures (1T43, 1T45). The types of regulated facilities include oil pipelines and storage facilities, vehicles, ships, and vessels which either hold or transfer hazardous substances (1T45). In the event of a discharge emergency, this unit also supports the Site Remediation Bureau's emergency responders (1T42).

16. Beth Reddy, a research scientist I,^{7/} is acting as

^{7/} The research scientist I title is represented by CWA.

section chief of the Engineering Review Section (3T44). Reddy supervises seven engineers, two engineering trainees and a clerical support employee. The levels of professional titles are based upon experience (1T49). Because of their advanced technical expertise, principal engineers may provide technical oversight, guidance and direction to less senior staff (1T50).

Reddy prioritizes and assigns facility plans to the engineering staff for review (1T52). In conducting the plans review, the staff is guided by established criteria as detailed in the Standard Operating Procedures (SOPs) and written guidelines. Reddy developed these SOPs and guidelines and the bureau chief approved them (4T35, 4T37). She is called upon to resolve disputes over the interpretation of the departmental requirements (1T44, 1T47). For example, one major issue facing this group involved the interpretation of what constituted an adequate facility map (1T47). Another issue arose over what constitutes permeable materials for a dike (1T48).

The section chief can overrule a judgment decision by one of the engineers. The section chief is responsible for consistency and continuity of the section's interpretations in reviewing a variety of facilities plans (1T51). When the facility's plan is to be approved, the bureau chief signs the approval letter based upon recommendations from the section chief (4T37).

In addition to the SOPs, Reddy has developed other policy documents for the bureau chief's approval. An example of the kinds

of documents Reddy prepared and, after approval, implemented is a document entitled "Financial Responsibility" which sets forth requirements for regulated facilities to demonstrate that they can clean up hazardous substance spills and restore the facility using their own financial resources (R-72; 1T77). Another such policy statement Reddy developed and, after approval, implemented is entitled "Tank Car/Truck Loading/Unloading Areas." This policy statement sets parameters for regulated facilities to transfer hazardous substances from vehicle to tank car (R-73). Reddy was asked to develop and implement this procedure, but to make certain it was done without undue financial burdens to the regulated industry (1T78-1T79).

17. The Field Verification Section performs field inspections to verify compliance with the plans the facilities have submitted (1T61). It also identifies regulated companies that failed to submit plans for approval and verification (1T62). Departmental regulations require facilities in the program to be audited annually.

Darryl Jennus is the section chief of the Field Verification Section (R-66; 1T62). He sets policies regarding inspections and develops checklists and SOPs for his Section (1T62-1T63). The SOP that details the procedures for the Section's annual audit of facilities was developed by Jennus and recommended to the bureau chief, who approved it (1T62-1T63).

Jennus prioritizes, assigns and reviews audit cases to the professional staff in his Section (1T63). Like Reddy, Jennus exercises judgment to interpret departmental regulations. Jennus reviews and approves reports of field inspections conducted by his staff; most reports are not required to be approved higher up unless the facility is complex, out of conformity with the plan submitted, or if the facility is also regulated under another program (1T74, 4T54).

Jennus also assigns staff as project managers to work with consultants contracted for a particular project. Jennus reviews the consultant's progress with the project manager (4T101). For example, the Field Verification Section oversaw a pipeline safety study performed by outside contractors. Based upon the study results, Jennus recommended, through his bureau chief to the division director that further administrative regulation of pipelines was unnecessary. That recommendation has not been acted upon because of a gas pipeline explosion in Edison (R-66, p. 46; 1T70, 4T49-4T50).

Bureau of Release Prevention

18. The mission of this Bureau is to administer the New Jersey Toxic Catastrophe Prevention Act (TCPA) by insuring that facilities that store hazardous substances are prepared to prevent the release of these substances and to respond to emergencies (R-66). About 140 facilities covered by the TCPA are required to submit risk management plans detailing how the facilities manage the

risks involved in storing and handling hazardous substances (R-66; 6T32-6T33).

The Bureau of Release Prevention contains two sections: the Risk Management Section, headed by a section chief, and the Planning and Compliance Section, headed by a supervising environmental specialist (R-66, p. 53).^{8/}

19. The Risk Management Section evaluates the regulated facilities' processes, recommends risk reduction measures, and verifies the facilities' plans to reduce risk. The purpose of the program is to prevent an incident at a facility that would cause death or severe harm to people living in the area.

The Risk Management Section chief is Reginald Baldini, although Baldini has also been acting as the bureau chief of the Release Prevention Bureau for the last four years. The Risk Management Section employs high level professional staff, including eight chemical safety engineers (4T55). The section chief assigns the work to the staff, evaluates their subordinates' performance, prepares work plans, and has some input into personnel decisions (4T58).

20. The SOPs for the Risk Management program (R-75, R-76, R-77, R-78) were developed by former Section Chief McCue and approved by the bureau chief (4T60). They include checklists for

^{8/} The Planning and Compliance Section manages data bases containing parameters of toxic materials present at the site. It does modeling to determine the extent of risk factors and potential effects on a community (1T99).

chemical safety engineers to verify safety equipment, and provide guidelines for approval of the facilities' plans (1T104). When the section chief approves the facility's plans, the bureau chief sends a letter of approval (1T106). When the facility plans are rejected, the safety engineer and the facility negotiate a "consent agreement", which is an agreement between the Department and the member of the regulated community to carry out a particular set of agreed-upon processes to reduce risk. The consent agreement must be approved first by the section chief, then the bureau chief, the assistant director, and the enforcement group (1T107, 4T62, 4T63). If no consent agreement is reached, then the bureau chief issues an administrative order to the facility (4T63).

Bureau of Pesticide Control

21. The Bureau of Pesticide Control employs one section chief (3T12, R-66, p. 27). Pesticide Control implements federal and State regulations regarding the use of pesticides in agricultural, commercial and residential settings in the State (3T13). The Bureau is responsible for registering pesticide products and licensing applicators. It investigates complaints and inspects to assure compliance with the State and federal laws (3T13). There is an SOP which details the criteria for writing a violation notice against a member of the regulated community (3T98-3T99).

The Bureau is divided into two geographic regions: the southern region is headed by Section Chief Robert Kosinski, who reports to Bureau Chief J. Orrok, who reports to Assistant Director

of the Pesticide Control Program, R. Ferrarin (R-66, p. 23, R-66, p. 27; 3T13, 3T21). The northern region is headed by a supervising professional.^{2/}

Pesticide Control is an enforcement program which handles judgemental, technical issues, for example, a recent bee kill involving the use of pesticides required an investigation by the southern region (3T17-3T18).

22. Section Chief Kosinski does not typically do routine inspections. He handles problem cases involving deaths and longstanding complaints (3T23-3T24). He also conducts enforcement conferences, which involve clients who have been cited as having violated the Department's regulations. The enforcement conference provides the client with an opportunity to argue for a penalty reduction (3T26). The section chief has no authority to reduce the penalty, but he may recommend a reduction to the enforcement group under Assistant Commissioner Dooley (3T26).

23. Kosinski is also responsible for the on-the-job training of new staff members and assigns work to his staff. The section chief is also in charge of preparing SOPs for the operations of the building in which the facility is housed (3T28).

^{2/} The southern region is managed by a section chief because of the complexity of pesticides in the southern region, which is more agricultural, making the level of decision-making greater (3T14).

Bureau of Water Monitoring

24. The Bureau of Water Monitoring is in the Division of Science and Research (R-58, R-61; 5T7, 5T12). This Bureau has two sections: Laboratory Operations, headed by Section Chief Korndoerfer, and Field Operations, headed by Section Chief William Honachefsky. Honachefsky has headed that Section since 1982, first as a supervising environmental engineer and more recently as a section chief (5T6). Honachefsky reports to a bureau chief of Water Monitoring, which is currently a vacant position; Korndoerfer and Honachefsky alternately act as bureau chief (5T6, 5T8, 5T29).

25. The Bureau of Water Monitoring is a support unit which provides water-related scientific information for other departmental programs (5T13). Korndoerfer's Section does biological monitoring; Honachefsky's Section does chemical monitoring (5T15-5T16). Honachefsky's Section includes a lakes management unit and a support service unit.

Lakes management group operates the federal Environmental Protection Agency (EPA) Clean Lakes program. Owen Cann, a supervising engineering specialist in the Lakes unit, compiles and ranks eligible public lakes which meet the EPA application criteria for the Clean Lakes grant program. Grant applications do not require section chief approval because regulations are so straightforward (5T19). EPA decides which grant applications to approve (5T19). The Clean Lakes unit then oversees expenditures of the grant money by the receiving municipality and Cann acts as the project manager (5T20). The section chief then approves work

performed and recommends approval of a voucher for reimbursement to the municipality (5T20-5T21). The voucher must be signed off by Honachefsky, the administrator, the division director and the assistant commissioner (5T20-5T21).

The Clean Lakes unit also responds to public inquiries about water quality and collects water samples from the field (5T22).

Honachefsky's section includes two units: one with five environmental specialists, and one with four environmental specialists. Korndoerfer also supervises a section with two units of five and four professional employees respectively (P-5).

26. P-6 describes Honachefsky's responsibilities as:

...plan, organize, direct, supervise and assign technical and administrative work for the field operations section.

Complete and implement the section's work plan.

Direct the development and implementation of coordinated monitoring program and water quality database.

The "coordinated monitoring" referred to in Honachefsky's job description involves consistency following federal, State and USGS regulations and guidelines for collecting and preserving samples (5T28).

27. Honachefsky decides daily how to most effectively use his staff to accomplish the Section's objectives (5T24). He meets with his two supervising environmental engineers early in the year to allocate staff to each program (5T24). New objectives are set by the bureau chief, or in his absence, the administrator (5T25).

Both section chiefs formulate work plans for their respective Sections. After he develops his work plan, Honachefsky submits it to the bureau chief, and it is consolidated with others and sent up the chain of command to the EPA for approval (5T26). The work plan may indicate a shortage in needed staff to complete the tasks required. These "shortfalls" have been reported in past work plans, but have not resulted in increased staffing (5T27).

Bureau of Engineering

28. The Bureau of Engineering North is a Bureau in the Division of Water Quality (P-11; R-63). Engineering North has two sections: Construction and Control, and Design. Construction and Control is headed by Section Chief Arthur Zoda, while the Design Section is headed by Section Chief S. Ahmad (R-63).^{10/} Zoda reports to Bureau Chief Stanley Cach (R-63).

29. The Bureau of Engineering supervises a program which grants municipalities low interest loans to upgrade their waste water treatment facilities. A municipality first submits its application to the Bureau of Administration and Management, where it is checked administratively (R-63; 5T92). The application is then given to the Engineering Bureau Design Section, which subcontracts with consultants to complete a facility plan (5T127).

30. Section Chief Zoda recommends approval of the consultant's plan to the bureau chief, and authorizes

^{10/} Zoda testified that the Bureau of Engineering South performs identical functions as the northern region (5T141).

advertisement. Zoda is responsible for overseeing the municipality's construction bid selection process and the construction process (5T93, 5T127).

Zoda receives a construction package from his bureau chief and assigns the projects among his five engineers in his Section based upon their workload and expertise (5T94). The assigned engineer follows the project through to completion, following the SOP, which controls all procedures from authorization award to final inspection (5T94, 5T96).

The assigned engineer conducts a pre-construction conference with the construction inspector to review federal and State regulations of the loan program (5T95). Once the contractor starts the project, interim inspections are performed (5T96). The assigned engineer will try to resolve any disputes at the job site. If the engineer cannot resolve a problem, he refers it to Zoda particularly when changes to the job plan are involved (J-12; 5T96, 5T102). Change orders must be authorized by the bureau chief (5T96). The Department's role in that dispute, which is between the owner and the construction contractor, is limited to whether the State will agree to participate in the additional funding of the change order (5T97). Upon completion of the job, Zoda's subordinate performs a final inspection and prepares an inspection report, which must be signed by the bureau chief (5T97-5T98).

31. Zoda's job description (P-12) states that this section chief "manages and directs efforts of construction engineers to

monitor steps in the projects during pre-construction contract periods" (P-12). Zoda ensures that engineers stay on track with the bidding process because State regulations require that the bid must be awarded within 60 days (5T100).

The job description further states that the section chief "directs the program to insure that bids received by the [lender]^{11/} are reviewed and the award is made in accordance with federal and State requirements." Federal and State guidelines to review bids are very detailed and specific. Requirements are detailed further in checklists contained in the SOPs (5T101). Zoda makes sure the engineers adhere to those guidelines (5T101).

Construction inspectors submit daily reports on the quality of construction to Zoda (5T105). Zoda ensures that the operation plan and maintenance manuals are reviewed for conformity with federal requirements. The operation plan shows how the facility, once completed, will be operated and maintained (5T106). Guidelines for its review are also set forth in an SOP (5T106). Zoda also assigns engineers to handle citizen inquiries during construction and recommends responses to the bureau chief (5T106-5T107).

Section Chief Zoda coordinates with the Design Section when necessary to remedy construction complications without unnecessary expense (5T108, 5T132-5T133).

^{11/} Zoda testified that the references in the job description to grants to municipalities should have been changed to refer loans to municipalities.

Staff Selections

32. Section chiefs interview candidates for vacant positions in their sections and make recommendations to the bureau chief or administrator. Hiring decisions require final approval by the division director (5T41, 5T76-5T77). Section Chief Reddy has interviewed applicants for engineering trainee positions along with the bureau chief and a senior staff member. The division director made the final selection (4T40). Zoda also interviews and recommends candidates for hiring to the bureau chief (5T112).

Promotion, Discipline

33. A section chief can recommend that a subordinate be promoted (1T83, 5T145, 5T147). Such a recommendation would be made to the bureau chief, who would recommend up the chain of command (1T81). The section chiefs' recommendations are sometimes followed and sometimes rejected.

Departmental policies control the disciplinary process (P-42; 5T41). Section chiefs can initiate employee discipline by making a recommendation through the bureau chief up the chain of command to the director (5T126, 5T113, 5T123, 5T41, 5T78). Honachefsky's only recommendation for employee discipline was rejected by the director (5T79).

Evaluations

34. Section chiefs are responsible for insuring that employees in their sections are given Performance Assessment Review (PAR) evaluations (1T84). Reddy evaluates her staff and signs their

PAR evaluations (4T41). Honachefsky prepares PAR evaluations for the supervising environmental specialists (5T30). Zoda prepares a PAR for all employees in his section (5T112).

Assignments

35. Section chiefs are responsible for assigning work to their section's staff. Reddy prioritizes, assigns and reviews the work of her subordinates (4T41). She reviews their work for consistency in applying the regulations (4T42).

Section Chief Honachefsky assigns work to each of the units in his Section. The supervising environmental specialists, who supervise each unit, make specific assignments to individuals in their respective units (5T43, 5T60).

Honachefsky has determined that the staff members in his Section will spend 80-90% of their time in the field. Honachefsky has included this factor in the criteria for staff evaluations (5T66-5T67).

Section Chief Honachefsky has an agreement with Section Chief Korndoerfer to borrow his staff for water sampling when necessary (5T44). At the time of the hearing, the staff from both sections were involved in a three-day water sampling event at the Whippany watershed, which was approved by the administrator (5T46-5T47).

Leave Time

36. Section chiefs approve sick and vacation leave requests (5T139). Planned overtime is approved by the bureau chief; incidental overtime can be approved by the section chief (1T94).

Staffing

37. Section chiefs have no control over staffing levels within their sections. They may only assign existing staff as appropriate (1T87).

Additional staffing requests must be approved by DEP's personnel office and by the Office of Management and Budget (4T21).

In some programs, the level of staffing is dependent upon revenues from fees and federal grants (4T16). For instance, the Office of Quality Assurance is about half the size it should be to meet requirements because fees have not been raised in some time (4T64). In the pesticide program, fees have been held stable for the last four years, and consequently, so have staffing levels (4T16-4T19).

Staffing levels of the Release Prevention Bureau were initially decided by the bureau chief when the Bureau was first created. This Bureau has many vacant positions because of the uncertainty of client population (4T31-4T32). The assistant division director recommended that the positions be included in the organizational structure, but left unfilled until the client levels stabilized (4T32).

Honachefsky has not recommended changes in staffing levels for his unit (5T87). Zoda has not been asked for recommendations concerning staffing levels (5T123).

Reductions in Force

38. The State Department of Personnel recently directed layoffs in the DEP. Nicholls made recommendations for staff cuts within his Division to Tuminski and OMB after talking to his assistant directors.^{12/} His recommendations were based upon an analysis by consequence. Section chiefs were not asked for input into which positions should be cut from the organization (1T82). The commissioner ultimately decided the number and location of staff cuts (4T78).

Equipment/Supplies

39. The senior section professional staff assign the vehicles with the approval of the section chief and the bureau chief (1T95).

Some of Honachefsky's staff are assigned State cars, others share pool cars (5T67-5T68). Honachefsky makes the decisions on vehicle allocations, based upon Treasury Department criteria (5T69).

Requests for equipment and supply purchases can come from the professional staff to the section chiefs for submission to the bureau chief (5T85). Section chiefs have no authority to commit agency funding. All purchase orders must be submitted up the chain of command to the division directors for approval (1T87). Zoda can recommend purchase of minor items such as work boots and hard hats (5T114). He has not been asked for input in budget preparation (5T114).

^{12/} Nicholls testified that the assistant director told him that some section chiefs had some input into the decision (4T104). This is uncorroborated hearsay and I do not credit it.

Rule Changes

40. The Department's administrative regulations are expanded and modified on a regular basis. There is a 19-step process for approval of regulations, which is outlined in a procedures memorandum (P-2). Anyone can suggest a rule change, but the suggestion must be brought up the chain of command through the section chief and bureau chief to the division director. If the division director agrees, a "launch meeting" occurs to start the formal process (3T77).

Occasionally, Honachefsky is asked to comment about proposed changes in regulations and their impact on day-to-day operations in his Section. He responds with written comments to the bureau chief (5T29, 5T64).

User Fees and Federal Grants

41. Recommendations about increasing user fees may come from the program itself or from the budget office. The commissioner must approve all user fee increases (3T65-3T66).

Grants

42. The decision on whether to apply for certain federal grants can be made at the program level. If the program decides to apply, then approval by financial management staff is necessary to insure that matching funding will be available and that the money expended is consistent with the Department's overall mission (3T68). The commissioner has final authority on the application of grants (3T68).

Budgeting

43. The budget preparation process is centralized in Division Director Tuminski's office (1T87).

Nicholls estimated that the budget for his division is about \$21 million. The process of formulating the budget begins with Policy and Planning Director Jim Johnson meeting with management staff (division directors, assistant directors and bureau chiefs) to provide information on target revenues and expenditures. Nicholls discusses anticipated revenues with members of his staff (3T58). Nicholls' Division is currently struggling with a \$300,000 shortfall and Johnson is meeting with Nicholls and members of his staff to develop plans to recoup those funds (3T58).

Nicholls has discretion to make adjustments in expenditures, e.g., to move money from consultant accounts to salary accounts (3T58). He may seek recommendations from his assistant directors concerning such issues (3T62). Section chiefs are only involved in this process if they are filling in for a bureau chief. Zoda has not been asked for budget recommendations (5T114). Section Chief Honachefsky has minimal input into the budget process: he is annually asked about replacement equipment and supplies, such as scientific equipment. That request goes to the bureau chief or, in his absence, the administrator (5T31).

Work Plans

44. All heads of sections prepare work plans. The work plan details and prioritizes the anticipated work for the coming

year (5T115). The work plan submitted by the section head to the bureau chief is merged with work plans by other sections, then other bureaus, to form a consolidated departmental work plan (5T63). A work plan is submitted as part of the EPA grant application. After the EPA approves the work plan, it goes back to the assistant commissioner to sign. The grant is managed by project activity codes listed on time sheets, which is submitted periodically to Tuminski's office, who submits it to EPA for reimbursement (4T25, 4T7).

45. Section Chief Zoda's work plan has never been modified by his superiors, although it could be (5T121). If the section chief needs to change an approved work plan, the section chief must obtain permission from the bureau chief or higher level of authority (5T62).

The section chief is responsible for assuring that the section meets the work commitments as set forth in the work plan. For example, if the work plan proposes to complete 12 inspections in the year, the section chief is expected to meet that commitment (5T30, 5T114-5T115).

46. Because of resource limitations, the Department ordinarily cannot meet all of the federal EPA requirements. As EPA regulations change, the Department must reevaluate its own programs. For instance, if the EPA changes its regulations regarding farm worker protection in the use of pesticides, the DEP would conduct a review to decide whether it should allocate

additional resources or modify its program. While the assistant division director would be responsible for coordinating such a review within his program, the decision would be a collegial process involving the assistant director, the bureau chief, and the section heads (4T8-4T12).

Policy Committee

47. PIT, the Program Improvement Team, is a management committee in the Division of Water Quality. PIT is developing procedures for recommending and approving policies on issues of general concern to the Division. P-13 is the first of a series of policy memoranda formulated by PIT and signed by Division Director Dennis Hart for all Division units. This first PIT memo, issued May 31, 1994, establishes that, "...management will refer to the director, all assistant directors and bureau chiefs in the Division [of Water Quality]" (P-13). It describes the procedure for recommending subjects for division policy by employees, namely, that the PIT committee will discuss and draft policy statements for comment by employees, and then to the director for his approval (P-13).

Monthly Reports

48. Each section chief submits a monthly report to the bureau chief. The bureau chief consolidates the monthly reports and forwards a consolidated report to the assistant division director. The assistant directors send monthly reports to their directors. They also send the directors weekly memos on "hot topics." The

director consolidates their memos and sends a weekly report to the assistant commissioner (3T87). Eventually, it becomes part of the DEP Department report to the Governor (5T73-5T74).

Hot items have included such issues as inquiries from elected officials and high levels of mercury found in fish tissue (5T35-5T36).

SOPs

49. The SOPs generally refer to statements or manuals which detail and interpret the standards as set forth in the administrative regulations (4T43). A bureau chief must sign off on all SOPs (4T48).

In the Engineering Bureau, SOPs were prepared by a committee of the bureau chief and the section heads (who were then supervising environmental engineers) (5T128). Subordinate engineers also assisted in developing the SOP manual (5T129). The task of updating the manual has been delegated to the engineers, and their suggested changes must be approved by the section chief and the bureau chief (5T130).

The Risk Management Bureau's SOP "financial responsibility for regulated community facilities" (R-72), sets specific standards a facility must meet to be deemed financially responsible (4T43). In the Release Prevention Bureau, R-73 is the SOP interpreting the regulations for loading and unloading tank trucks (4T44-4T45), which was developed by Section Chiefs Jennus and Reddy (4T47).

The SOPs detailing the process for annually auditing the facilities to insure ongoing compliance with the regulations is being created. The SOP used by the Bureau of Release Prevention (R-76) sets up the procedural structure for assuring compliance with the regulations (4T61, 4T62).

Staff Meetings/Policy Meetings

50. The assistant commissioners hold weekly "management team meetings" with the division directors to discuss hot issues (3T45-3T47). For instance, the management team recently discussed how to approach a problem with a contaminated well field and the community's reaction. Another hot issue involved broadening the use of a new voluntary dispute resolution process created to settle enforcement disputes without litigation (3T50). The team also recently discussed the Department's inability to sell two State-operated marinas (3T52), and the format for the monthly reports the Department sends to the Governor (3T53).

51. Assistant Commissioner Nagy also meets with his "senior staff," which includes division directors, directors and the administrative staff from the Budget and Personnel Office to discuss budget preparation, fiscal account balances, and anticipated financial difficulties. These meetings involve issues of concern to the divisions. Recent discussions in Assistant Commissioner Nagy's management team meetings have involved mercury levels in fish and administrative items such as salary increases (3T55-3T56).

The directors also update the assistant commissioner on issues arising in their divisions. For example, recent discussions have focused on pending regulatory changes, safety drills at nuclear power plants, enhanced inspections and a program with the air quality management group (3T70). Other than the exchange of information, these meetings often produce discussions which result in decisions being made on how to handle issues of the moment. For instance, one discussion held recently was about the appropriate extent of the agency's involvement in a controversy over the siting of a proposed storage facility for Oyster Creek's used nuclear fuel (3T71-3T72). Another issue discussed was whether Nicholls' Division should protest a negative federal evaluation of its emergency response team's accident drill (3T73).

52. In addition to the "management team" meetings, Nicholls also meets frequently with his assistant directors, both collectively and individually, to discuss their programs (3T80). In these meetings, decisions are made on the management of resources, such as how to allocate remaining vehicles after a recall; how to reallocate money to cover a necessary expense; and issues surrounding the recent reduction in staffing.

Nicholls holds quarterly staff meetings with his Division's assistant directors and bureau chiefs in each element to review their programs (3T80, 3T85). Section Chief Honachefsky only attends these meetings with management when he is acting as the bureau chief (5T37). These staff meetings are more informational in nature

(3T85-3T86). The discussion at two recent staff meetings focused on budget initiatives the commissioner seeks to implement, which would include all fees and all programs in the general departmental fund (P-3, P-4; 4T82). In separate meetings with his assistant directors, programmatic decisions are made. Examples of such decisions include a strategy to approach an assistant commissioner on a regulation package, use of resources within the program, whether to do a presentation before a particular board, whether EPA funding is adequate to cover expenses for its requirements, and if not, whether to protest to the EPA.

Section Chief Honachefsky meets with his staff biweekly to solicit comments about the general operations and to relay policy decisions from the administrator (5T37). Section Chief Zoda's bureau chief occasionally meets with his section chiefs to dispense information (5T116).

ANALYSIS

N.J.S.A. 34:13A-5.3 gives public employees the right "to form, join and assist any employee organization..." However, the statutory right to organize and negotiate collectively does not extend to managerial executives. N.J.S.A. 34:13A-5.3. The State asserts that section chiefs are managerial executives and therefore are ineligible for union representation.

The Act defines managerial executives as:

...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 Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980), the Commission discussed its standards for determining whether an employee formulates or directs the effectuation of policy within the statutory definition. It 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[;]

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..., [and,]

...possess[es] and exercise[es] a level of authority and independent judgment sufficient to affect broadly the organization's purpose or its means of effectuation of these purposes...
6 NJPER at 508, 509.

The Commission also added that the determination should focus upon the interrelationship 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..."
6 NJPER at 509.

Recently, however, in N.J. Tpk. Auth. and PERC 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), certif. granted ___ N.J. ___ (1996) [22 NJPER 114 (¶27060 App. Div. 1996)], the Appellate Division found that the Commission misconstrued the statutory definition of

"managerial executive" in finding the Turnpike's middle level managers not to be managerial executives and, therefore, eligible for union representation.

First, the Appellate Division approved that part of the Montvale test which defines "formulating" and "directing" policies, but added "practices." Second, the Court observed that a managerial executive "need not formulate policies and practices and be responsible for directing the effectuation of policies and practices. One or the other is sufficient." 289 N.J. Super. 36.

Third, the Appellate Division noted that "...the term 'formulate' is not the equivalent of 'adopt' and would seem to encompass the responsibility for recommending policies and practices, particularly where the manager's recommendations form a key component of the ultimate determination." 289 N.J. Super. 36.

However, the Court specifically rejected part three of the Montvale standard, requiring a managerial executive to "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." The Court said,

It is not only agency heads and their directors, i.e., the top level managers who possess the necessary statutory qualities. There is nothing in the definition of managerial executive which excludes middle level managers from its scope if those employees possess the necessary qualities....Whether or not an employee is a high level manager and whether or not what he or she does broadly affects the agency are not dispositive. 289 N.J. Super. 35.

Finally, the Court approved the Montvale factors that we generally look to in deciding managerial status: the employee's position in the hierarchy, functions and responsibilities, and extent of discretion.

Applying the statutory definition and the standards as set forth in Turnpike, I find as follows:

Position in the Hierarchy

The section chiefs are the sixth level in the Department's hierarchy. They supervise sections of small groups of highly skilled scientific, engineering and research professionals, technicians and support personnel. The CWA argues that the section chiefs are functionally the first or second-level supervisors of their sections. The facts show that section chiefs do organize, prioritize, assign, and review the work of their sections' subordinates. They supervise and evaluate the section employees, and make personnel recommendations. They are low-level supervisors over the employees in their sections, most of whom are highly skilled chemical and biological scientists.

However, the Appellate Division noted in Turnpike that, while position in the hierarchy is an appropriate factor, one need not be a higher level manager to be considered a managerial executive. Rather, the Court instructed us to look at whether the employees possess the necessary qualities. 289 N.J. Super. 35. The Court distinguished between "on-line supervisors" -- those who are authorized to hire, fire, discipline or effectively recommend --

with "middle-level managers," who may have managerial authority. The former has been given a statutory right to organize and negotiate collectively, while managers must be considered "part of the management team" and therefore, cannot be union members as well. 289 N.J. Super. 34.

Therefore, looking at the section chief's relative position in the hierarchy, I am not persuaded to view these employees as managerial executives. While first-level supervisors would not ordinarily be expected to be considered managerial, nothing in the statute provides that the terms are mutually exclusive. The other parts of the test must also be considered.

Policy Formulation

Section chiefs do not adopt policy. Major policy issues are discussed by the "management team" in staff meetings which do not include the section chiefs. Policies discussed at these meetings include "hot topics," such as rate fees, community concerns, a dispute resolution program, regulatory changes and specific programmatic concerns, such as mercury levels in fish, nuclear plant drills and contaminated wells. Section chiefs were not involved in adopting policies on any of these major issues, nor did they have any input.

However, section chiefs have had significant input into formulating certain Department policies and procedures affecting their own programs. For instance, the Engineering Review section chief in the Discharge Release Bureau developed and recommended a

financial responsibility policy requiring each regulated facility to demonstrate it has the financial resources to clean up a spill. This section chief also recommended a policy regulating the safe transfer of materials from tanks to trucks. Although these policies were approved by the bureau chief, it was the section chief who developed and recommended them.

The Field Verification section chief developed a policy regarding annual inspections of the regulated facilities. Section Chiefs Jennus and Reddy together developed and recommended a policy on integrity testing of storage tanks, which was also approved. Section Chief Jennus recommended a policy about further regulation of gas pipelines based upon the consultant's report.

While these examples of section chiefs' input into policy development all required a bureau chief or higher to sign off on the policy, under Turnpike, final responsibility for policy approval is not the critical factor. 289 N.J. Super. 33.

Policy/Procedure Effectuation

Section chiefs are responsible for implementing policies by developing SOPs, procedural outlines, and checklists for their sections. These SOPs detail the criteria for regulating the community. These SOPs have been approved by the bureau chiefs.

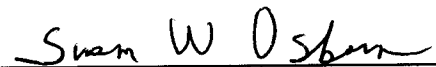
Section chiefs also occasionally substitute for the bureau chief in his or her absence. Honachefsky and Korndoerfer take turns substituting for the bureau chief.

Extent of Discretion

Subject to "sign off" approval by the bureau chief, section chiefs have discretion to implement policy by taking positive or negative actions against the regulated community. They may sign off on inspections, approve permits, conduct on-site conferences with the parties to resolve disputes, and recommend enforcement settlements.

CONCLUSION

The section chiefs in the Department of Environmental Protection have significant input into the formulating and effectuating policies and procedures within their bureaus. They also have discretion to act with regard to implementing policies involving enforcement of the regulated community. Therefore, under the standards set forth by the Appellate Division in Turnpike, I find that section chiefs-DEP are managerial executives within the meaning of the Act. I recommend that the Commission dismiss that portion of the CWA's petition.



Susan Wood Osborn
Hearing Officer

DATED: March 7, 1997
Trenton, New Jersey