

D.R. NO. 91-30

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

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

Docket No. RO-91-98

COMMUNICATIONS WORKERS OF AMERICA,

Petitioner.

SYNOPSIS

The Director of Representation orders an election to determine the representational desires of Environmental Scientist Is employed by the State of New Jersey.

The Director dismisses the State's argument that Environmental Scientist Is are managerial executives. The Director finds that Environmental Scientist Is are supervisory employees and that representation in CWA's Primary Level Supervisors Unit is appropriate.

D.R. NO. 91-30

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

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

Docket No. RO-91-98

COMMUNICATIONS WORKERS OF AMERICA,

Petitioner.

Appearances:

For the Public Employer
Robert J. DelTufo, Attorney General
(Michael L. Diller, Deputy Attorney General)

For the Petitioner
Calvin Money, Staff Representative

DECISION AND DIRECTION OF ELECTION

On October 26, 1990, the Communications Workers of America ("CWA") filed a Petition for Certification of Public Employee Representative (Docket No. RO-91-98), supported by an adequate showing of interest, with the Public Employment Relations Commission ("Commission"). CWA amended the petition on April 3, 1991. The CWA seeks to add 12 employees in the title Environmental Scientist I to its existing unit of primary level supervisory employees employed by the State of New Jersey ("State"). The State does not consent to a secret ballot election because it alleges that the petitioned-for employees are managerial executives and are therefore inappropriate for inclusion in any negotiations unit.

It appears that there are no substantial and material factual issues in dispute which may more appropriately be resolved through the conduct of a formal hearing. N.J.A.C. 19:11-2.6 (b). Accordingly, the disposition of the petition is properly based on our administrative investigation. These facts appear.

Ten of the twelve petitioned-for employees work for the New Jersey Department of Environmental Protection ("DEP"). Six report to DEP bureau chiefs. The hierarchy above the bureau chiefs is assistant director, deputy director, director, assistant commissioner, deputy commissioner and commissioner. One Environmental Scientist I reports to the Director of the Division of Water Resources. Environmental Scientist I Floyd Genicola works in the Office of Quality Assurance. According to an organizational chart provided by the State, Genicola reports to a Manager 4 in the Office of Quality Assurance. Environmental Scientist I Frank Cosolito is the Acting Chief of DEP's Bureau of Operations. According to an organizational chart provided by the State, Cosolito reports to the Assistant Director of the Division of Environmental Quality, Operations and Administrative Services Element. There is one other Environmental Scientist I in DEP that neither party offered information about. The remaining two Environmental Scientist Is are in other departments. The parties believe that the

two employees work in the Treasury and Health Departments but did not provide information about them.^{1/}

Steven Lubow ("Lubow") has been an Environmental Scientist I for three years. Lubow discussed information about seven of the Environmental Scientist Is, including himself. All seven work in DEP. Six report to bureau chiefs and one reports to the director's office in the Division of Water Resources and coordinates activities between that division and the Division of Hazardous Waste. According to Lubow, the latter employee is filling a position that is not on the organizational chart as requiring an Environmental Scientist I. Of the six employees who report to bureau chiefs, four have filled in for bureau chiefs when the latter are out of the office.^{2/}

Lubow stated that five of the seven Environmental Scientist Is he is familiar with put together options and recommendations for "programatic policies." Lubow defined programatic policies as policies for permit limitations and compliance with Federal guidelines such as implementation of Federal Clean Water Act provisions. Although there is no written directive to do so, there

^{1/} At the exploratory conference, the State requested time to file an additional position statement. The statement it filed included the above information about Genicola and Cosolito but did not address Environmental Scientist Is who are assigned to a department other than DEP.

^{2/} Lubow stated that Environmental Scientist IIs have also filled in for bureau chiefs and that the work of Environmental Scientist Is and IIs is similiar.

is an operational understanding that the Environmental Scientist Is submit the policies to their respective bureau chiefs for approval before they are implemented or acted upon. Lubow stated that over one-half of policies are decided at the bureau chief level. The remainder are submitted to the next levels of supervision -- assistant director, deputy director and director. Bureau chiefs are responsible for deciding if programatic policies must be reviewed by thier supervisors.

Lubow stated that Environmental Scientist Is have no involvement in setting adiminstrative policies or procedures, including written policies for day-to-day operation of the division. Lubow also stated that Environmental Scientist Is cannot select from alternate courses of action when putting policies into effect and that programatic policies provide few choices or options. Final policy decisions are made at the bureau chief level or above and the Environmental Scientist Is are responsible for implementing the policies selected by their superiors.

Lubow develops, reviews, revises and evaluates State surface water quality regulations and recommends such regulations to DEP bureau chiefs. He is also responsible for seeing proposals through the regulatory process to enactment, including setting up hearings on proposed regulations and responding to public comments. Any questions about permits or enforcement or coordination among bureaus are referred to directors or assistant directors.

Environmental Scientist Is have no purchasing authority. Purchase orders must be signed by bureau chiefs. Environmental Scientist Is make recommendations for supplies and anticipated workload and make recommendations for the funding necessary to accomplish work that needs to be done, but bureau chiefs or their superiors have financial decision making authority. Environmental Scientist Is also provide budget input to bureau chiefs but the bureau chiefs are responsible for budget development. Lubow stated that both Principal Environmental Specialists and Environmental Specialist IIs also provide budget input to bureau chiefs.

Environmental Scientist Is have no involvement in the collective negotiations process and do not prepare negotiations proposals. They have no responsibility for contract administration.

The first step in the State-CWA contractual grievance procedure is the grievant's immediate supervisor. Where Environmental Scientist Is supervise a grievant, they are the first step in the procedure. They are never higher than grievance step I and have no discretion to adjust grievances. Lubow once testified at a step II hearing as an employer witness, but has never presented or heard a case at that level on behalf of the employer. Since that instance, the grievance procedure has changed and Environmental Scientist Is could be called upon to present the employer's position at a grievance hearing. However, since the procedure changed, no Environmental Scientist I has had to present a case for management

as part of the grievance process. Such presentations have been handled by Patricia Mahon, who is a Personnel Assistant III in DEP.

Environmental Scientist Is approve vacation and administrative leave time for their subordinates. They cannot approve leaves of absence. Their only role in pay adjustment is through the Performance Assessment Review ("PAR") process. They have no role in Salary Adjustment Committee matters and cannot set starting salaries for new department employees.

Prospective employees are interviewed in groups by one to twelve department employees. In the Divison of Water Resources, interviews are carried out by employees in principal titles, including Principal Planner, Principal Engineer and Project Specialist. Lubow has been a part of the group interview process and has made hiring recommendations to the DEP Office of Administrative Services. His recommendations have been followed, but employees who are interviewed are already on a list to be hired by the department and the interviews provide a means for departments and divisions within DEP to compete for qualified personnel. Lubow's recommendations are verbal and instantaneous. He has the authority to represent his section of the water resources division when making such recommendations.

Lubow is in charge of the Natural Estuary Program of DEP. He directly supervises a Research Scientist I who is in CWA's professional unit, and an Environmental Scientist trainee. Lubow evaluates these employees through the PAR system and approves

vacation and personal leave time for them. The personnel supervision responsibilities of other Environmental Scientist Is vary. Some supervise Environmental Scientist IIs or IIIs, others supervise lower level professional titles or clerical employees and some have no direct supervisory responsibilities. Such supervision includes day-to-day work assignments and evaluation through the PAR procedure. However, PAR ratings given by Environmental Scientist Is are reviewed by bureau chiefs. Environmental Scientist Is do not fire employees or conduct one-on-one interviews for hiring. Hiring and firing are done at the director level.

Lubow discussed one instance of an Environmental Scientist I's involvement in discipline. An Environmental Scientist I wrote a memo on the disciplinary history of an employee and made a disciplinary recommendation. Although the recommendation was followed, Lubow stated that it was one of many factors considered in the disciplinary decision. The standard disciplinary procedure is that recommendations must be approved by bureau chief, deputy director and director. Final decisions are made collectively by the head of DEP's Labor Relations Office, the director of the employee's division and the Assistant Director of Administrative Services. Lubow personally recommended discipline once, but his recommendation was never carried out.

Lubow also discussed the Environmental Scientist I job description. That job description states that Environmental Scientist Is are directed by the DEP commissioner to "provide

direction, advice, assistance and consultation on specialized scientific programs and problems...." Lubow stated that Environmental Scientist Is do not take direction from the Commissioner. Usually, direction is from bureau chiefs, occasionally from asistant directors and rarely from directors.

The job description states that Environmental Scientist Is develop and organize new environmental protection programs. Lubow stated that program ideas come from Federal legislation and the Environmental Scientist Is recommend methods for implementing ideas and levels of regulation. The job description states that Environmental Scientist Is prepare statements of DEP goals, but Lubow states that he performs no such function. Any advice or recommendations on ecological questions or responses to proposed legislation are submitted to bureau chiefs or assistant directors. Although the job description refers to Environmental Scientist Is developing "basic conceptual plans from which courses of action may be derived to treat the environment and solutions to environmental problems as a whole," Lubow stated that most conceptual guidance comes from the Federal government. Environmental Scientist Is then recommend approaches to carry out or modify Federal mandates. Lubow stated that Environmental Scientist Is develop and participate in submission of research proposals, although some proposals are prepared by Research Scientists whom Lubow supervises.

Although the job description states that Environmental Scientist Is prepare papers on environmental problems, most are

prepared by the Division of Science and Research, which does not contain any Environmental Scientist Is. Although the job description states that Environmental Scientist Is review unsolicited research proposals and recommend necessary courses of action, Lubow stated that if such proposals are received, they are addressed by Environmental Scientist IIs or Research Scientists.

Advisory functions referred to in the job description are limited to advice on program areas. The job description states that Environmental Scientist Is "Provide(s) determinations on priority and policy problems." Lubow stated that Environmental Scientist Is evaluate problems and provide information and suggestions on areas that need to be addressed, but that ultimate decisions on what gets done or addressed are made by bureau chiefs and directors.

The job description refers to development of new projects and ideas, but Lubow pointed out that the present workload of Environmental Scientist Is leaves no time for such functions. Environmental Scientist Is do act as liasons between DEP and other agencies, present papers at conferences, develop mathematical models and draft technical and other correspondence. Although Environmental Scientist Is prepare reports of environmental problems which contain findings, conclusions and recommendations, Lubow stated that such reports are also prepared by Environmental Scientist IIs and IIIs, Research Scientists and employees in "principal" titles.

CWA contends that nothing in the above duties requires a finding that Environmental Scientist Is are managerial executives. The State contends that the title was conceived as a managerial title and that if the employees in it are not performing managerial functions, only the New Jersey Department of Personnel can determine that the title is not managerial based on a desk audit. In support of this contention, the State notes that Environmental Scientist I Frank Cosolito is "functionally" Chief of the Bureau of Operations in a DEP division and therefore is "...clearly being utilized as a manager." The State also contends that Environmental Scientist I Floyd Genicola "...appears to be managing" the quality assurance section of the Office of Quality Assurance, and has four professional staff members reporting to him. The State offered only these statements and two organizational charts showing the positions of Cosolito and Genicola in support of its position.

If the Environmental Scientist Is are "managerial executives" within the meaning of the Act, the petition must be dismissed since managerial executives do not have the right to form, join or assist an employee organization. N.J.S.A. 34:13A-5.3.

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

Managerial executives of a public employer means 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.

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

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

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

A person formulates policies when he develops a particular set of objectives designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means and extent for reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or means of effectuation of these

purposes. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. Id. at 509. Emphasis added.

In Bergen Pines Cty. Hosp. and Council No. 5, NJCSA, D.R. No. 83-8, 8 NJPER 525 (¶13245 1982), the three titles in question were found not to be managerial although they were in the fourth step of the chain of command. Here, the Department of Environmental Protection is headed by the Commissioner and most of the Environmental Scientist Is are seven levels beneath him.^{3/}

Although Environmental Scientist Is put together options and recommendations for programatic policies, those policies are formulated to comply with federal guidelines and therefore, there are few choices or options involved in formulating such policies. Environmental Scientist Is submit policies to their respective bureau chiefs for approval before they can be implemented and such policies are often submitted to the next levels of supervision for further review. Environmental Scientist Is cannot select from alternative courses of action when putting programatic policies into effect and are not involved in setting any administrative policies

^{3/} Most of the Environmental Scientist Is report to DEP bureau chiefs. The hierarchy above bureau chiefs is assistant director, deputy director, director, assistant commissioner, deputy commissioner and commissioner. An Environmental Scientist I who reports to a deputy director is five levels below the Commissioner and an Environmental Scientist I who reports to a director is four levels below the Commissioner.

or procedures. Accordingly, I find that Environmental Scientist Is do not have a sufficiently wide discretion in formulating or implementing policy sufficient to require a finding of managerial status.

Environmental Scientist Is do not directly assist in preparation for or conduct of collective negotiations. The Environmental Scientist Is non-involvement in collective negotiations and in the preparation for collective negotiations further support finding them not to be managerial executives. Tr. of Kearny, P.E.R.C. No. 89-55, 15 NJPER 10 (¶20002 1988); Borough of Madison, P.E.R.C. No. 85-76, 11 NJPER 61 (¶16032 1985).

The Environmental Scientist Is do not make purchases or spend money on behalf of the State. Environmental Scientist Is do not prepare the budget, although they offer suggestions for the budget to bureau chiefs. Their lack of involvement in budget preparation and their lack of authority to make purchases are further support for concluding that Environmental Scientist Is are not managerial. Kearny.

The Environmental Scientist Is duties involve primarily administrative and supervisory responsibilities. Their supervisory responsibilities include evaluating employees in CWA's professional unit, approving employee leave time and participating in some group interviews for employee placement within the division. There is at least one instance of an Environmental Scientist I making an effective disciplinary recommendation.

Environmental Scientist Is may resolve grievances informally at the first step of the grievance procedure. Environmental Scientist Is could be called upon to represent management at some grievance hearings -- although this is a newly added responsibility and has not happened to date.

Environmental Scientist Is do not have the requisite level of discretion to support a determination of managerial status. They are not managerial executives within the meaning of the Act and are entitled to representation. Environmental Scientist Is are supervisory employees. Therefore, representation in the petitioned-for Primary Level Supervisors Unit is appropriate.^{4/}

Accordingly, I direct that an election be conducted among the petitioned-for employees to determine their representational desires in a unit described as follows:

Included: All Environmental Scientist Is employed by the State of New Jersey, to be added to the existing unit of Primary Level Supervisors represented by the Communications Workers of America.

^{4/} The State also contends that there is insufficient information to make a unit eligibility and placement decision for all employees in the Environmental Scientist I title. Each party was provided ample time to submit additional facts, affidavits and documents on Environmental Scientist Is. Without solid information to the contrary, we assume that those employees about whom little or no information was provided are employees within the meaning of the Act and are eligible for representation in an appropriate unit.

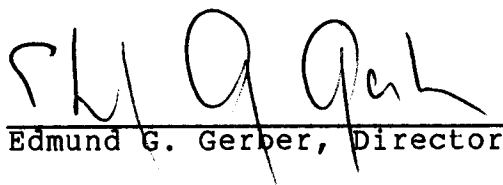
Excluded: Managerial executives, confidential employees, non-supervisory employees, police employees, craft employees, non-primary level supervisors and non-primary level supervisory professional employees, classifications designated within other recognized and appropriate units of State employees and all other employees employed by the State of New Jersey.

The election shall be conducted no later than thirty (30) days from the date of this decision. Those eligible to vote must have been employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, on vacation or temporarily laid off, including those in the military service. Ineligible to vote are employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Pursuant to N.J.A.C. 19:11-9.6, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the names of all eligible voters in the units, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by us no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously provided to the employee organization with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

The exclusive representative, if any, shall be determined by a majority of the valid votes cast in the election. The election shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Edmund G. Gerber, Director

DATED: May 1, 1991
Trenton, New Jersey