

D.R. NO. 96-5

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

In the Matter of

WOODBIDGE TOWNSHIP
HOUSING AUTHORITY,

Public Employer,

-and-

Docket No. RO-95-206

TEAMSTERS LOCAL UNION NO. 469, IBT,

Petitioner.

SYNOPSIS

The Director of Representation orders an election among non-supervisory white collar employees and non-supervisory blue collar employees of the Woodbridge Township Housing Authority. The public employer contended that one employee in the petitioned-for unit was confidential and that two others were supervisors.

The Director determined that the clerk/typist to the Executive Director is a confidential employee and could not be included in the petitioned-for unit. He also determined, that while the senior housing assistant technician and principal accounts clerk were not supervisors, their duties (i.e., evaluating unit employees) may place them in a substantial conflict of interest with their subordinates, pursuant to Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971). He ordered that these two positions may vote, subject to Commission challenge.

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Appearances:

For the Public Employer
Apruzzese, McDermott, Mastro & Murphy, attorneys
(James L. Plosia, Jr., of counsel)

For the Petitioner,
Margolis & Hott, attorneys
(Timothy R. Hott, of counsel)

DECISION AND DIRECTION OF ELECTION

On April 17, 1995, Teamsters Local Union No. 469, IBT, AFL-CIO, filed a representation petition seeking to represent about 19 non-supervisory employees of the Woodbridge Township Housing Authority. The petition was accompanied by an adequate showing of interest. N.J.A.C. 19:11-2.1.

On May 19, 1995, the Authority filed a letter, arguing that three petitioned-for titles were not appropriately included in the unit because they were supervisors or confidential employees.

It contends that the clerk/typist to the Executive Director is confidential and that the senior housing assistant technician and principal accounts clerk are supervisors within the meaning of the Act. The Teamsters argue that the positions are neither confidential nor supervisory and are eligible for inclusion in the petitioned-for unit. The parties' position statements were filed by June 19, 1995.

On August 4, 1995, I issued a letter tentatively determining that the clerk/typist is a confidential employee but the senior housing assistant technician and principal account clerk are not supervisory and should be included in the petitioned-for unit.

On August 14, 1995, the Authority filed a response, arguing that the clerk and technician are supervisory employees. The Authority analogized these employees to supervisors in public schools, who have no power to impose discipline other than reprimands, but who are typically excluded from units with classroom teachers. It also enclosed an affidavit by the Authority Chairperson which asserts that the principal accounts clerk is the primary evaluator of four subordinate employees but has filed no written evaluations since none have been required until recently. Deardorff's written evaluation of a subordinate employee, in particular, states that no action has been taken because the Authority is "in the midst of reorganization." He also asserts that Deardorff's evaluations have been used to grant raises to subordinate employees.

On September 7, 1995, the Authority filed another affidavit by the Chairperson, advising that he and the Authority's Executive Director reviewed the evaluations filed by Deardoff, acknowledged that the evaluations were "very good", and reached a decision to recommend 4% salary increases to the employees (employees with unsatisfactory evaluations would receive less than 4% increases). The Chairperson also certified that DiTomasso, the other disputed employee "will be the primary evaluator for at least three subordinate employees" and evaluations will be used in the "same fashion" as described with respect to Deardoff (certif. p. 4).

The Act defines confidential employees as those,

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

[N.J.S.A. 34:13A-3(g)].

The Commission narrowly defines the term, "confidential employee." See State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER (¶16179 1985); mot. to reopen den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985). "A determination that an employee is confidential and therefore excluded from the Act's protections, N.J.S.A. 34:13A-5.3, should not be based on speculation...." Lacey Tp. Bd. of Ed., P.E.R.C. No. 90-38, 15 NJPER 628 (¶20263 1989). The Commission has frequently stated its inquiry:

We scrutinize the facts of each case to find for whom each employee works, what he does and what he knows about collective negotiations

issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit. [State of New Jersey, 11 NJPER 507].

See also State of NJ (OER) and Council of NJ State College Locals, P.E.R.C. No. 90-22, 15 NJPER 596 (¶20244 1989), aff'd App. Div. Dkt. No. A-1445-89T1 (1/22/91); Sayreville Bd. of Ed., P.E.R.C. No. 88-109, 14 NJPER 341 (¶19129 1988), aff'd App. Div. Dkt. No. A-4297-87T1 (4/21/89); Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd App. Div. Dkt. No. A-4740-86T7 (2/18/88).

The disputed confidential employee, a "clerk-typist" under a Department of Personnel job description, has been employed as "confidential secretary" to the Housing Authority's Executive Director for two years. Andrea Lubriano opens all mail from labor counsel to the Director, types all correspondence from the Director and mails it to counsel and Authority Commissioners. She is currently preparing typed proposed revisions of Authority personnel policies. Conceding that no unit currently collectively negotiates with the Authority, the employer asserts that the disputed position will be opening correspondence from labor counsel and Commissioners to the Director concerning negotiations and grievances (assuming that the Teamsters become the majority representative). She will also type negotiations proposals in advance of their presentation at the negotiating table.

The Teamsters contend that all labor relations matters are "handled by outside counsel."

The Teamsters argument does not distinguish litigation matters from routine personnel issues. Even accepting the Teamsters argument as true, I cannot conceive that that responsibility would be exercised without consulting the Executive Director and soliciting his views. The Executive Director position is typically responsible for oversight of labor relations matters, and Authority resolution #986 makes this case no exception to that general rule.

The June 6, 1994 resolution first repeats the old policy that except for "key" employees, the Executive Director has the authority to "appoint, promote, transfer, demote, suspend and separate personnel." The new resolution states that a committee of the Executive Director and two Commissioners appointed by the Chairperson will have those employment responsibilities, subject to approval by the Board.

The Teamsters have not disputed any of the alleged current duties of the clerk/typist to the Executive Director, including those concerning access to and typing of labor relations materials. See Montague Tp. Bd. of Ed., P.E.R.C. No. 87-36, 12 NJPER 773 (¶17294 1986). Since neither party objected to the tentative finding in my August 4, 1995 letter, I conclude that the clerk/typist to the Executive Director is a confidential employee and not eligible for inclusion in a negotiations unit.

Supervisors may not be placed into negotiations units with

non-supervisory employees. N.J.S.A. 34:13A-5.3 provides:

...except where established practice, prior agreement or special circumstances dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership....

N.J.S.A. 34:13A-6(d) provides:

The division shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and non-supervisors....

Consistent with subsection 5.3, the Commission has defined a statutory supervisor as one having the authority to hire, discharge, discipline or effectively recommend the same. Cherry Hill Tp. Dept. of Public Works, P.E.R.C. No. 30, NJPER Supp. 114 (1970). A determination of supervisory status requires more than an assertion that an employee has the power to hire, discharge, discipline or effectively recommend these actions. An indication that the power claimed to be possessed is exercised is needed. Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358, 360 (1976).

The principal account clerk job description promulgated by the Department of Personnel states that responsibilities include "computing, classifying, verifying and recording numerical data and reconciling accounts...." The position "may supervise a small group of employees in the maintenance of accounting records...." The

position also "recommends the hiring, firing, promotion and disciplining of employees."

The organizational chart of the Authority is topped by the Executive Director, followed by the deputy director and Modernization Coordinator. The Director of Administration is next on the chart, followed by the hierarchically-equivalent, principal account clerk and senior housing assistant technician. The principal account clerk appears to supervise four clerical titles.

The Authority concedes that Kathy DiTomasso, the principal account clerk, does not effectively recommend hiring. It also states that she performs written evaluation of subordinates, but again concedes that formal evaluations were "only recently begun" and she "has not yet signed an evaluation." It contends that her recommendations "will be crucial in the Director's decision(s)...."

The Union denies that DiTomasso hires, discharges, disciplines or effectively recommends such actions. It also argues that she is not involved with even "emergency" suspensions or discipline cases, or even charged with investigating such cases.

The senior housing assistant technician "takes the lead" over other technicians in determining applicants' eligibility for public housing. The disputed employee, Deborah Deardorff, purportedly exercises authority over two subordinates. The Authority has enclosed a copy of a "performance appraisal" completed by Deardorff on March 29, 1995. It is an evaluation of a housing assistant technician with a recommendation for promotion. The

Authority has not offered any evidence of the result of the recommendation.

The Teamsters contend that only the Executive Director and Commissioners have actual authority to discipline, etc., as memorialized in the June 6, 1994 resolution 986 approved by the Commissioners.

DiTomasso and Deardorff hold the highest level positions in their respective series and appear to be involved with evaluating account clerks and housing technicians. However, the Authority has provided no evidence demonstrating the exercise of supervisory authority. Nevertheless, its best evidence, the evaluation, is probative of a potential and substantial conflict of interest which may justify the exclusion of the accounts clerk and assistant technician from the petitioned-for unit.

If their job responsibilities place these employees in a substantial conflict of interest with their subordinates, they cannot be included in one unit with them. Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971). Evaluations of subordinate staff may impact on matters such as salary increases and promotions, creating an impermissible conflict. Atlantic Cty. Welfare Div., D.R. No. 94-2, 19 NJPER 408 (¶24179 1993).

In light of the Union's position that these employees possess no responsibilities which justify their exclusion from the unit, I order an election among the petitioned-for titles neither including nor excluding the technician and accounts clerk and

excluding the clerk/typist. Specifically, I order that these two titles be permitted to vote in a secret ballot election, subject to challenge by the Commission election agent. This decision is consistent with other cases in which elections are ordered, despite a lingering dispute over a relatively small percentage of eligible voters. See Borough of Leonia, P.E.R.C. No. 86-143, 12 NJPER 523 (¶17195 1986); Borough of Edgewater. D.R. No. 92-27, 18 NJPER 230 (¶23103 1992).

If a majority of ballots cast votes in favor of representation, and challenges are not determinative of the outcome, a certification will issue for the petitioned-for unit which does not include the disputed titles, pending a final determination on the eligibility of those titles. Either party may file a petition for clarification of unit to commence that process. If challenged ballots are determinative of election results, post-election mechanisms are available to resolve the challenge, including an investigation or hearing to determine the status of the challenged voter(s).

Employees will vote on whether they wish to be represented for purposes of collective negotiations by Teamsters Local Union No. 469, IBT. The election is ordered among all full-time and regular part-time non-supervisory white collar employees and blue collar employees of the Authority. Excluded are all supervisors, police officers, firefighters, craft employees, professional employees, confidential employees including clerk/typist to the Executive

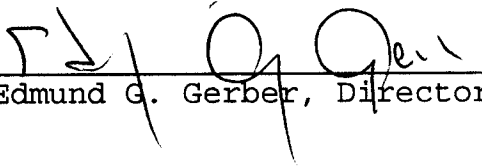
Director, and managerial executives within the meaning of the Act.

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

Pursuant to N.J.A.C. 19:11-10.1, 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. I 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: September 12, 1995
Trenton, New Jersey