

H.O. NO. 87-16

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

In the Matter of

NEW JERSEY HIGHWAY AUTHORITY,

Public Employer-Petitioner,

-and-

Docket No. CU-86-30

LOCAL 196, INTERNATIONAL FEDERATION  
OF PROFESSIONAL AND TECHNICAL  
ENGINEERS, AFL/CIO

Employee Representative.

Appearances:

For the Public Employer  
Apruzzese, McDermott, Mastro & Murphy  
(Melvin Gelade, of Counsel)

For the Petitioner  
Oxford, Cohen & Blunda  
(Nancy Iris Oxford, of Counsel)

HEARING OFFICER'S  
REPORT AND RECOMMENDED DECISION

On November 12, 1985, Local 196, International Federation of Professional and Technical Engineers, AFL-CIO ("Local 196") filed a Petition for Clarification of Unit with the Public Employment Relations Commission ("Commission") seeking to include Assistant District Supervisors, Grade 11 ("ADS-11s"), in its existing collective negotiations unit of non-supervisory, blue-collar employees of the New Jersey Highway Authority ("Authority"). The Authority objects to the proposed unit clarification, contending that: (a) the ADS-11s are supervisors within the meaning of the New

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., ("Act"); (b) the ADS-11s lack a community of interest with members of the existing unit; and, (c) Local 196's Petition is untimely and/or inappropriate.

On February 27, 1986, the Director of Representation issued a Notice of Hearing.<sup>1/</sup> On May 12, 1986, I held a hearing. The parties presented relevant evidence and examined witnesses. Both parties filed post-hearing briefs by August 4, 1986.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The New Jersey Highway Authority is a public employer within the meaning of the Act and is subject to its provisions. The Authority employs the employees who are the subject of this proceeding.

2. Local 196, International Federation of Professional and Technical Engineers, AFL-CIO is an employee representative within the meaning of the Act and is subject to its provisions. Local 196 is the exclusive representative of a collective negotiations unit described in the recognition clause of its current agreement with the Authority as follows:

All employees including toll collectors,  
maintenance person I, maintenance person general,

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<sup>1/</sup> This matter was originally consolidated with a Unit Clarification Petition filed by the Authority on November 22, 1985 (Docket No. CU-86-36). The Authority subsequently withdrew its Petition and the matter was severed from this case.

maintenance forepersons, mechanical forepersons, mechanic 1, mechanic 2, sign fabricator, shop forepersons, sign fabricator, excluding temporary employees or part-time employees, assistant plaza supervisors, and plaza supervisors [Exhibit J-1].<sup>2/</sup>

The current collective agreement between the parties (Exhibit J-1) covers the period July 1, 1985 through June 30, 1987.

3. The Highway Authority operates the Garden State Parkway, a 180-mile toll road running from Cape May to the New York State border. The Authority is organizationally divided into two divisions: tolls and maintenance, each with its own line of supervision (T12).<sup>3/</sup> The maintenance division, which consists of 273 employees, is headed by the director of maintenance. Under the director is an assistant director of maintenance. Next in the descending chain of command is the roadway superintendent (T20). Under the roadway superintendent are the northern and southern superintendents, who are each responsible for the supervision of three maintenance districts (T13). Each of the six maintenance districts is headed by a district supervisor, either grade 13 or 14 (T14, T15, T19, T25).

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<sup>2/</sup> Exhibits are designated as follows: Commission Exhibits are designated as "C"; Joint Exhibits are designated as "J"; Employer Exhibits are designated as "ER"; and Petitioner Exhibits are designated as "P".

<sup>3/</sup> References to the transcript of the May 12 hearing are designated "T".

4. Prior to 1985, each of the three southern districts and one northern district were headed by a district supervisor, grade 13. Two other districts were headed by district supervisors, grade 14, and each of these latter district supervisors were assisted by one assistant district supervisor ("ADS"), grade 13. Until 1985, these were the only two ADSs. The next lower level in each district was foremen (T15, T17). District supervisors had the responsibility of completing the district's paperwork, determining maintenance needs, and planning and supervising work. This proved to be too much for one supervisor, particularly in the southern districts where one supervisor was in charge of a 30-mile section of roadway. The Authority determined that district supervisors needed several assistants to share these responsibilities and to strengthen discipline (T18).

5. In early 1985, the Authority created additional assistant district supervisor positions: four ADS-12s and fifteen ADS-11s <sup>4/</sup> (T15, T17, T20, T21). The Authority posted notices for the new positions in January or February 1985.

6. John Stevens, Business Agent for Local 196, learned in January or February 1985 that the Authority was creating a new ADS classification. He asked John Simonse, Authority Operations Manager, if the new ADS classification would be a bargaining unit title. Simonse was not sure but told Stevens that the title would

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<sup>4/</sup> Local 196 does not seek to include ADS-12s in its unit.

be paid at grade 11. Stevens requested a job description for the new title (T74). When he received the job description (Exhibit P-1), Stevens noted that it indicated no responsibility for hiring, firing or discipline. He notified Simonse of the Union's position that the ADS-11 title should be included in its unit and that negotiations should commence concerning salary for the new title (T76, T79).

Simonse later advised Stevens that, after consulting with the Authority's attorney, the Authority had decided to add supervisory responsibility to the job description, and the Authority had promulgated a new job description (Exhibit ER-1) (T78, T106-T107). The Union filed a grievance which was denied (T79).

Negotiations for the successor collective agreement (J-1) began in April and concluded in July 1985. During these negotiations, Local 196 proposed to add the ADS-11 title to its unit but the Authority refused, maintaining that the title was supervisory (T72-T73; T95-T99). Local 196 withdrew its proposal and stated that it would do what it had to do, but Local 196 did not specifically indicate that it intended to file a Petition. The parties executed J-1 on August 15, 1985 (T109-T110).

7. Local 196 decided not to attempt to add the new ADS-11 title to its unit until it could determine whether employees holding it would, in fact, exercise supervisory responsibilities.

8. The ADS-11 job description provides that ADS-11s are responsible for: "supervising an assigned area". This includes

seeing that policies and procedures are followed by employees, training employees; preparing work schedules; making recommendations on probationary employees; recommending disciplinary action; recommending personnel changes, issuing commendations or reprimands, and coordinating maintenance work between contractors and employees (Exhibit ER-1).

9. There are currently 15 ADS-11's assigned to the Authority's six districts. Each is assigned to oversee the maintenance needs of a specific section of the Parkway (T21). Helmut Dzugay, for example, is assigned to a five-mile section of roadway in district two. Dzugay is responsible for inspecting work performed by maintenance crews in his area, determining what work needs to be done, checking on litter patrols and other maintenance functions. Dzugay, like other ADS-11s, prepares daily sheets listing work, (e.g., repairing potholes, fencing and landscaping) that needs to be done in his section.<sup>5/</sup> ADS-11s are also responsible for trip tickets and completing equipment check-out sheets. ADS-11s may also be designated as the "dutyman", to be responsible for responding to emergencies arising on any section of the Parkway (T133-T134; T112-T115; T165-T170).

ADS-11s are assigned Parkway vehicles and are permitted to take them home on work nights and over the weekend.

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<sup>5/</sup> One of the 15 ADS-11s also prepares daily work schedules for crews in his section. This task is typically performed by district supervisors or ADS-12s.

ADS-11s are never required to perform manual labor, but do occasionally instruct maintenance persons on how to perform a particular task. Maintenance workers are responsible for repairing damaged guardrails, cutting grass, planting or cutting trees and minor road repairs. Work crews are typically directed by foremen. When ADS-11s stop to check on a job, they usually deal with the foreman. If an ADS-11 sees that a work rule is being violated, he will instruct the foreman to correct the problem (T49-51; T28-29). Unlike members of the maintenance crews, ADS-11s do not wear uniforms and are salaried employees (T170-171; T116-117).

District supervisors meet with the ADS's every afternoon and discuss their daily reports. They also occasionally discuss the performance the maintenance crews. If an ADS has observed a work-rule violation, that would also be reported to the district supervisor at these meetings (T167-T169).

10. There are currently six ADS-12s employed by the Authority. They perform many of the same duties as the ADS-11s, such as inspecting the work and writing up work orders. They also prepare overtime sheets and monthly reports describing the work done in the district, total work hours, and leave time (T165). ADS-11s report to ADS-12s, who report to district supervisors. ADS-12s have filled in for absent district supervisors, and ADS-11s have filled in for absent ADS-12s. On one occasion an ADS-11 filled in for an absent district supervisor (T25, T33, T57-T58, T125, T134, T158).

11. ADS-11s are not involved in hiring or firing Authority employees. The Authority has no formal evaluation procedure for employees in Local 196's unit (T132).

12. Disciplinary matters are typically referred by foremen or ADS's to the district supervisors, who then decide the appropriate discipline (T54, T29-T30, T42, T62-T63). The most common infractions involve either absenteeism or failure to be properly uniformed. A "reminder of performance" slip is a form of written reprimand about an employee's performance. It is given to the employee and to the supervisor; the supervisor then evaluates it (T152).

The district four shop steward<sup>6/</sup> testified that, in his experience, only district supervisors and ADS 12's have "written employees up" (T64-T65). For instance, Drusba, an ADS-12 sent an employee home for altering his uniform. (Exhibit ER-5; T159-T163). Smith, an ADS-11, has never issued a written disciplinary action, although he has orally reminded employees about wearing safety vests (T145-T146). Smith was not aware of any other ADS-11s being involved in any disciplinary matters (T152).

On May 5, 1986, (six months after Local 196 filed its Petition and one week before the hearing in this case) David Cowell, an ADS-11, issued a reminder of performance to Charles Johnson, citing a failure to pick up supplies (Exhibit P-3). Cowell's name

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<sup>6/</sup> District 4 is probably the largest district, with 84 men.



also appears on a letter dated May 8, 1986 notifying Johnson of a disciplinary hearing on a charge of insubordination for his alleged failure to pick up supplies (Exhibit P-4). John Stevens, Local 196 Business Agent, creditably testified that in his seven years of handling grievances for the Parkway unit, this was the first time that a notice of charge had ever been signed by an ADS-11; they are usually signed by a district supervisor (T73; T81-T83).

Disciplinary hearings are proceedings where an appointed hearing officer hears the facts of the alleged charges against the employee and then makes a recommendation as to what discipline, if any, will be taken against the employee (T88-T90). Disciplinary hearings are typically attended by the district supervisor or the ADS-12 (T68-T69).

On or about April 7, 1986, ADS-11 Dzugay reported an acting foreman to his district supervisor for refusing to follow a request to send a crew member to another site. As a result, Dzugay issued a reminder of performance slip and filed a statement of the incident with his district supervisor (Exhibits ER-3 and ER-4). A disciplinary hearing was conducted, at which Dzugay testified (T117-T120, T130-T131). He wasn't sure what the outcome of the hearing was, but thinks something was submitted to the director of maintenance (T142-T143). The acting foreman was apparently given a three-day suspension. Local 196 filed a related grievance (T103-T104). Dzugay has not reprimanded anyone else (T122).

13. ADS-11s occasionally talk to their district supervisors about the performance of probationary maintenance employees (T140-T141).

Employees appointed to ADS positions first serve in that capacity on a six-week trial basis, during which they are assigned to ride with ADS-12s and/or ADS-11s. The ADS-12 or ADS-11 then discusses the performance of the new appointee with their district supervisor. If the employee is then also favorably evaluated by the district supervisor, the director of maintenance and the operations manager, he is then put in the position on a probationary period for one year (T146-T148; T160-T164).

14. The district supervisor is the first step of the contractual grievance procedure. ADS-11s have had no involvement in grievances (T80, T155, T93-T94).

#### ANALYSIS

The issue here is whether the existing unit can appropriately be clarified to include assistant district supervisors, grade 11. Local 196 argues that its unit should be clarified to include the title because the employees are not supervisory, and otherwise share a community of interest with unit members. It also argues that under the circumstances, its Clarification Petition is timely and appropriate.

The Authority maintains that the ADS-11s are not appropriate for inclusion in the unit because they are supervisors within the meaning of the Act, and they lack a community of interest

with members of the existing unit. It also asserts that the Clarification Petition is untimely and inappropriate.

I find that the ADS-11s are not supervisors within the meaning of the Act. N.J.S.A. 34:13A-5.6 contains the Commission's mandate to find the appropriate unit:

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

N.J.S.A. 34:13A-5.6 provides in relevant part:

...Nor, except where established practice, prior agreement or special circumstances, dictate to 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 a collective negotiations unit by an employee organization that admits nonsupervisory personnel to membership be included in a unit with non-supervisory employees ..."

This provision has been interpreted to contain the statutory definition of supervisor: an employee having the authority to hire, discharge, discipline or effectively recommend the same.

Cherry Hill Department Public Works, P.E.R.C. No. 30 (1970).

At first glance, the employees in this new title might appear to be supervisors. They are titled assistant district supervisor, the position was created for the expressed purpose of "strengthening discipline", and the amended job description adopted by the Authority specifically includes the responsibility to recommend disciplinary action. A determination of supervisory

status however, requires more than a title, job description, or assertion that employees have the power to hire, discharge, discipline or effectively so recommend. An indication that the power claimed to be possessed is exercised with some regularity is needed. "The mere possession of the authority is a sterile attribute unable to sustain a claim of supervisory status."

Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358, 360 (1976).

The ADS-11s have no role in hiring or firing employees. There is no formal evaluation procedure. What remains then is whether they discipline or effectively recommend it.

I find the ADS-11s are not regularly involved in the disciplinary process. The record in this case contains sparse evidence that ADS-11s impose discipline on maintenance employees. Discipline is usually initiated at the district supervisor level and occasionally by ADS-12s. At most, the record evidence indicates that two reminder of performance slips were given to employees. Moreover, the record does not suggest that the reminder of performance slips are part of any progressive discipline or that the reminder of Performance slips are even placed in the employee's personnel file.

There are 15 ADS-11s and 273 employees. The employees began occupying the ADS-11 positions in early 1985, over a year prior to the hearing; yet there were only two occasions in the record that these slips were issued by ADS-11s. Both of those

instances occurred within a few weeks prior to the hearing. Therefore, I find that even if the reminder of performance slip amounts to a form of discipline, the ADS-11s are not regularly involved in their issuance.

Two ADS-11s also filed written "charges" against maintenance employees. An effective recommendation occurs when a lower-level supervisor indirectly imposes a decision, e.g., a suspension, on the employee, by making a recommendation to the higher level supervisor that such action should be taken, provided the recommendation is not subject to scrutiny and independent review. Twp. of Teaneck, E.D. No. 23 (1971).

Here, I find that neither the reminder of performance slip nor the notification of charges against the employee, amount to recommendations for discipline. Both only cite an infraction, and make no recommendation concerning what form of discipline, if any, is appropriate. In any event, the district supervisor or even a higher level supervisor, then independently reviews the facts and determines what action, if any, will be taken.

The role of the ADS-11s could best be described as the eyes and ears of the district supervisor. They inspect and report to him on the work -- what is to be done, what is being done, and whether it is done satisfactorily. In that sense, they might be characterized as quality control inspectors, but not supervisors as defined by the Act.

It is true that the ADS-11s have certain elements of community of interest with the maintenance employees: as members of the same department, they share a common goal of well-maintained, safe and attractive roadways; they report to the same supervisors; they work out of the same facilities. However, they have terms and conditions of employment which are dissimilar. The ADS-11s are paid an annual salary -- the maintenance employees are paid an hourly rate. The ADS-11s are not eligible for overtime except in emergencies -- maintenance employees get overtime by contract on an overtime equalization basis. ADS-11s are not uniformed, maintenance employees are required to wear a regulation Parkway uniform. ADS-11s are assigned a Parkway car which they are permitted to take home -- maintenance employees are not.

But most significantly, maintenance employees are routinely engaged in manual labor, operating equipment requiring particular knowledge or training. ADS-11s are out on the road performing inspections and are never asked to do maintenance work. I find that the maintenance employees are blue-collar workers, while the ADS-11s are white-collar employees.<sup>7/</sup>

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<sup>7/</sup> I take administrative notice of the fact that on September 20, 1977, this Commission conducted an election among a unit of Authority white-collar employees, in which the white-collar unit voted against representation by Local 196. (Commission docket number R0-87-184). Included among that presently unrepresented unit are district clerks and inspector titles.

The ADS-11s share a certain measure of community of interest with members of the existing unit.<sup>8/</sup> I recognize that where, as here, a community of interest can be found among the employees, the Commission and the courts have expressed a preference for units structured along broad-based lines rather than units limited to occupational lines or departmental lines. See State v. Prof. Assn. of N.J. Dept. of Ed., 64 N.J. 231 (1974).

However, interests in common are not enough to clarify this new title into the existing unit. I conclude that Local 196's Petition for Clarification of Unit is inappropriate and should be dismissed. The issue presented here concerns a representation question more appropriately resolved through the Commission's certification process.

In Clearview Regional Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977), the watershed case of appropriate uses of unit clarification petitions, the Director observed,

The Commission's clarification of unit process is intended to resolve confusion concerning the composition of an existing collective negotiations unit....within the framework of the provisions of the Act, the unit definition

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<sup>8/</sup> I find that no finding that a conflict of interest, as contemplated by the New Jersey Supreme Court in Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971), exists between the interests of the ADS-11s and other Local 196 unit members, sufficient to destroy their community of interest with one another. The ADS-11s are not involved in the grievance process, do not formerly evaluate Local 196 unit members, and their participation in the authority's process of making personnel decisions does not appear to rise above the level of contributions of oral observations on work performance.

contained in a Commission certification, or as set forth in the parties recognition agreement. Normally, it is inappropriate to utilize a clarification of unit petition to enlarge or to diminish the scope of the negotiations unit for reasons other than the above. Typically, a clarification is sought as to whether a particular title is contemplated within the scope of the unit definition and the matter relates primarily to identification.

Occasionally, a change in circumstances has occurred...[or] a new title may have been created by the employer entailing job functions similar to functions already covered by the unit...In these circumstances, a clarification of unit proceeding appropriate (Emphasis added).

A circumstance similar to this matter arose in Barnegat Twp. Bd/Ed, D.R. No. 84-15, 10 NJPER 54 (¶ 15029 1983), in which a union filed a clarification of unit petition attempting to add the library technicians to an existing unit of secretarial employees. In Barnegat the Director found that it is insufficient to say that the title shares a community of interest with the existing unit. The titles to be clarified as included in the unit must be identified as being within the scope of the existing unit. The Director concluded that the union could not add the library technician to its existing unit, even though it was a new title, because the duties performed by the library technicians were different from those performed by existing unit members. The Director held,

"It thus appears that the Federation's desire in the instant matter is to expand the definitional scope of its unit beyond the secretaries it presently represents. As noted above, if the Federation is seeking to redefine its unit, the proper means to seek this objective is through



the filing of a certification petition in accordance with Commission rules." 10 NJPER at 55.

Similarly, the ADS-11s in this matter cannot be identified as being within the scope of this existing unit. Although the unit description begins "All employees including...", it is clear that this unit only includes toll collectors and blue-collar maintenance workers, and does not, for instance, include clerical employees in maintenance.

The character of the unit cannot be altered through a Unit Clarification Petition.<sup>9/</sup> By its petition, Local 196, seeks to alter the composition of its unit by adding employees who simply do not perform bargaining unit work. It seeks to add a white-collar title to a blue-collar unit. The record indicates that the ADS-11s are mainly inspectors -- they do not do roadway maintenance work. Their term and conditions of employment are dissimilar in many ways to those members of the existing unit. This is not to say that the ADS-11s do not share a community of interest with titles currently

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<sup>9/</sup> I do not find that the Petition is "untimely". First, the Commission's Rules do not place filing time restrictions on CU Petitions. See Clearview, supra. Second, it is not logical to suggest that Local 196 should have filed its Petition prior to execution of its successor contract (See, e.g., Rutgers University, D.R. No. 84-19, 10 NJPER (¶ 15140 1984), Bergen Pines County Hospital, D.R. No. 80-20, 6 NJPER 61 (¶ 11034 1980)), since at that juncture, in the absence of a track record to the contrary, the Union could only conclude that the new title was supervisory, based upon the employer's representation to the Union and the job description. Once the employees began to demonstrate a lack of supervisory status, then the circumstances have changed and a CU is ripe to be brought.

included in Local 196's unit; the point is that their clarification into the unit would alter character of the unit.<sup>10/</sup>

In Wayne Bd/Ed, P.E.R.C. No. 80-94, 6 NJPER 54 (¶ 11028 1980), the Commission stated:

If it is found with regard to a classification that a question concerning representation exists, that portion of the clarification petition relating to such classification will be dismissed.

Based upon the foregoing, I find that the ADS-11s cannot appropriately be added to the existing unit through a unit clarification proceeding, but rather, potentially raises a question concerning representation which may more appropriately be resolved by the Commission's certification process.

#### CONCLUSIONS AND RECOMMENDATION

Based on the foregoing, I make the following conclusions:

1. That the record does not support a finding that the ADS-11s title is either supervisory or that persons holding that title possess an actual or potential conflict of interest with members of Local 196's collective negotiations unit.

2. The Local 196 Petition for Clarification of unit is inappropriate, however, because it seeks to change the character of an existing unit. Local 196 raises a question concerning

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<sup>10/</sup> While I find that th ADS-11s possess sufficient community of interest to be appropriate for inclusion in unit with the blue collar maintenance employees and toll collectors, the issue of the most appropriate unit for their representation is not before me in this context.

representation which is more appropriately resolved through the Commission's certification process.

Based on the above I recommend that Local 196 petition be dismissed.

*Susan Wood Osborn*

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Susan Wood Osborn  
Hearing Officer

DATED: May 13, 1987  
Trenton, New Jersey