

P.E.R.C. NO. 90-79

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PATERSON,

Petitioner,

-and-

Docket No. CU-H-88-60

MANAGEMENT COMMITTEE OF WEIGHTS
& MEASURES SUPERVISORS, a/w POLICEMEN'S
BENEVOLENT ASSOCIATION LOCAL 203,

Employee Representative.

SYNOPSIS

The Public Employment Relations Commission determines that the superintendent of the department of weights and measures employed by the City of Paterson is not a supervisor within the meaning of the New Jersey Employer-Employee Relations Act.

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BENEVOLENT ASSOCIATION, LOCAL 203,

Employee Representative.

Appearances:

For the Petitioner, Gerald L. Dorf, Esq.

For the Employee Organization, Loccke & Correia, Esqs.
(Richard D. Loccke, of counsel)

DECISION AND ORDER

On June 8, 1988, the City of Paterson petitioned for clarification of a two person negotiations unit represented by the Management Committee of Weights and Measures Supervisors associated with Policemen's Benevolent Association, Local 203 ("PBA"). The City contended that the superintendent of the Department of Weights and Measures supervises the deputy superintendent and therefore should be removed from the nonsupervisory unit. N.J.S.A. 34:13A-5.3. The PBA contended that the unit should not be disturbed because the superintendent is not a supervisor.

On February 17, 1989, a Notice of Hearing issued. On May 19, 1989, Hearing Officer Margaret A. Cotoia conducted a hearing.

The parties stipulated certain facts, introduced exhibits and examined witnesses. They waived oral argument but filed post-hearing briefs by August 9, 1989.

On November 17, 1989, the Hearing Officer issued her report recommending dismissal of the petition. H.O. No. 90-2, 16 NJPER 53 (¶21026 1989). She found that the superintendent did not exercise sufficient control over the deputy to warrant supervisory status.

On December 21, 1989, the City filed exceptions. It contends that the Hearing Officer erred in finding that the superintendent is not a supervisor and by not properly weighing all the evidence.

Our definition of supervisor derives from N.J.S.A. 34:13A-5.3: a supervisor is one who hires, discharges, disciplines or effectively recommends the same. Mere possession of authority to do so is not enough. Westfield Bd. of Ed., P.E.R.C. No. 88-3, 13 NJPER 358 (¶18237 1987). We must review all the circumstances of a case to determine whether the employee has and regularly exercises such power. City of Margate, P.E.R.C. No. 87-146, 13 NJPER 500 (¶18184 1987); Cherry Hill Tp. DPW, P.E.R.C. No. 30, NJPER Supp. 114 (¶30 1970).

The superintendent has no say in hiring or firing. While he "thinks" he may have the power to discipline the deputy, he was not sure of the extent of that power and has never exercised it. In fact, the director of the Department of Human Services testified that she and the mayor would ultimately decide any disciplinary

actions. Thus, on this record, any potential role the superintendent has in the disciplinary process is insufficient to warrant our finding supervisory status.

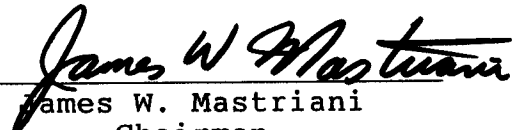
W. Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971) does not apply. That case addresses conflicts between supervisors. There is no inherent conflict of interest in having these two nonsupervisory employees in the same unit.

Accordingly, we find that the superintendent is not a supervisor under section 5.3.^{1/}

ORDER

The superintendent of the City of Paterson's Department of Weights and Measures is not a supervisor within the meaning of N.J.S.A. 34:13A-5.3.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
February 28, 1990
ISSUED: March 1, 1990

^{1/} The City has submitted an affidavit from its personnel director stating that the deputy has taken a leave of absence, he is not expected to return and any replacement would be in a different title. It contends that a unit of one employee is per se inappropriate. That general rule of law is correct. Bor. of Shrewsbury, P.E.R.C. No. 79-42, 5 NJPER 45 (¶10030 1979), aff'd 174 N.J. Super. 25 (App. Div. 1980), certif. den. 85 N.J. 129 (1980). We will not, however, speculate as to what will happen when the leave of absence expires. Nor can we decide in this clarification of unit proceeding whether the leave of absence reduces this to a one person unit.

H.O. NO. 90-2

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

In the Matter of

CITY OF PATERSON

Petitioner,

-and-

Docket No. CU-H-88-60

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BENEVOLENT ASSOCIATION LOCAL 203,

Employee Representative

SYNOPSIS

A Hearing Officer recommends that the Commission find that the Paterson Superintendent of Weights and Measures is not a supervisor within the meaning of the Act and that inclusion of the Superintendent in a unit with the Deputy Superintendent presents no actual conflict of interest and no more than a de minimis potential conflict. Accordingly, the Hearing Officer recommends that the Commission dismiss the City's Unit Clarification Petition.

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

H.O. NO. 90-2

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Appearances:

For the Petitioner, Gerald L. Dorf, Esq.

For the Employee Organization, Loccke & Correia, Esqs.
(Richard D. Loccke, of counsel)

HEARING OFFICER'S REPORT
AND RECOMMENDED DECISION

On June 8, 1988, the City of Paterson ("City") filed a Petition for Clarification of Unit with the Public Employment Relations Commission ("Commission") seeking to exclude the Superintendent of Weights and Measures ("Superintendent") from the unit represented by the Management Committee of Weights and Measures Supervisors. The Committee is affiliated with Policemen's Benevolent Association Local 203 ("PBA"). The unit consists of the Superintendent and Deputy Superintendent of Weights and Measures ("Deputy Superintendent").

The City contends that the Superintendent supervises the Deputy Superintendent and that the two employees are not

appropriately included in the same unit. The PBA objects to the petition and contends that the Superintendent does not supervise the Deputy Superintendent.

A Notice of Hearing was issued on February 17, 1989. A hearing was conducted on May 19, 1989. The parties stipulated certain facts, submitted exhibits and examined witnesses. The parties waived oral argument and filed briefs by August 9, 1989.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The parties stipulated that the City is a public employer within the meaning of the Act, is the employer of the Superintendent and Deputy Superintendent and that the New Jersey PBA Local 203 is an employee representative within the meaning of the Act.

2. The first collective bargaining agreement between the parties covering the weights and measures unit was executed in 1986 (J-1). ^{1/}It recognizes the Management Committee of Weights and Measures Supervisors as the negotiations representative of the Superintendent and the Deputy Superintendent within the Department of Human Resources and the City of Paterson. The agreement was amended to cover 1987 (J-2), but there is no subsequent contract.

^{1/} Exhibits are designated as follows: Commission exhibits are "C," joint exhibits are "J," the City's exhibits are "P" and the P.B.A.'s exhibits are "R."

3. The parties stipulated that the Superintendent and Deputy Superintendent are employees engaged in performing police services^{2/} pursuant to N.J.S.A. 34:13A-15 (T8-9)^{3/} The parties also stipulated that the Superintendent and Deputy Superintendent are neither managerial nor confidential employees (T8).

4. William Caffrey ("Caffrey") is the Superintendent. He has been employed by the Department of Weights and Measures for twenty years. Caffrey was Assistant Superintendent from 1969 to 1977, served as Deputy Superintendent for a short time thereafter until his promotion to Superintendent in 1977 (T67-68).

5. Italo Torchiani ("Torchiani") is the Deputy Superintendent. He has been employed by the Department of Weights and Measures since 1975 (T111). Torchiani was hired as Assistant Superintendent and promoted to Deputy Superintendent in 1979 (T113-114).

6. Caffrey and Torchiani are the only weights and measures employees (T67-68). Caffrey performs day-to-day weights and measures functions including testing, inspecting and sealing equipment exactly the same as Torchiani does. Torchiani knows the job as well as Caffrey does and needs no instruction in how to perform work duties (T56-58, 60). Caffrey and Torchiani both use

^{2/} Weights and measures officers are police employees under the Act. County of Warren, P.E.R.C. No. 86-111, 12 NJPER 357 (¶17134 1986)

^{3/} 'T' refers to the transcript dated May 19, 1989.

identical equipment, technology and methods (T58, T116-117). Caffrey does not direct Torchiani's work (T93), although he acknowledges that the civil service job description states that the superintendent supervises the deputy in performance of work. The job description (P2) is signed by Caffrey (T94).

7. Weights and Measures work assignments are determined by legal requirements and convenience. Caffrey and Torchiani arrive at work at the same time, review records of what needs to be done that day and decide together how they will divide or share work locations and assignments (T59-60, T88-89). Caffrey does not have the final say over work assignments and he and Torchiani divide their work equally (T120-121, T117). One does not do more or different types of work than the other, except that Torchiani performs jobs that require heavy lifting because he is more physically able to do so (T117-118, T122-123).

8. Caffrey and Torchiani have both completed basic and pharmaceutical weights and measures training courses (R7). They attend the same courses and technical training programs (T41). Caffrey and Torchiani both write summonses for weights and measures violations and have the same power to arrest and sign complaints. Both testify in court when required (T104-105).

9. Torchiani prepares some of the weights and measures paperwork. He prepared and signed a vehicle inventory and reporting form (R12) that was addressed to Division/Program Directors and copied to Caffrey. The form was submitted to the Department of

Human Resources by Torchiani (T52). Caffrey does not remember directing Torchiani to fill out the form but thinks that Torchiani did so on his own (T83). The Department of Human Resources requires a monthly report of weights and measures inspection data. It is prepared by either Caffrey or Torchiani (T53-54). Reports for October 1988 and 1987 (R-13 and R-14) were prepared and signed by Torchiani. Caffrey normally signs the reports and is responsible for their content (T97-98) although there is no policy requiring that a specific employee sign such reports.

10. Both Caffrey and Torchiani are interchangeable in all reporting (T56), but according to the letterhead, Caffrey is responsible for documents (T84). Caffrey believes that he is responsible for responding to forms or requests for information that are addressed to the Office of Weights and Measures and is not sure if he can delegate those duties to Torchiani (T84-85). Caffrey was told verbally prior to Director of Human Resources Nellie Pou's ("Pou") administration that all paperwork had to have his name on it and believes that he is responsible for any paperwork signed by Torchiani because the letterhead bears his name (T87).

11. Hours of work are reported on weekly time sheets (R10) signed daily by both Caffrey and Torchiani and submitted weekly to the chief clerk at the department of Human Resources (T47-48, T50-51, T132). Weekly time sheets are combined into bi-weekly time sheets. The bi-weekly timesheets are sent to division directors or office supervisors to sign, are signed by Pou and submitted to the

personnel office. Caffrey signs the bi-weekly time sheets as approving both his and Torchiani's time records (P4) (T132-134), although Caffrey does not submit any document that certifies the time records as accurate (T82).

12. Prospective City employees are interviewed by individual office supervisors, recommendations are submitted to Pou's office and Pou submits them to personnel for processing. Mayor Graves has final hiring authority (T141). Termination procedure commences with citation of disciplinary actions by a supervisor, submission of the written citation to Pou and issuance of warning notices prior to a recommendation of discipline or termination. Termination procedures for provisional employees are governed by either civil service or the personnel office (T142). All matters pertaining to hiring or discharge are submitted to Mayor Graves. He sometimes makes such decisions and other times delegates them to the department directors (T142-143). Pou has not used City hiring and discharge procedures for any weights and measures employees since she has been director (T144).

13. When Caffrey was hired in 1969, he was interviewed by then Mayor Cramer. He had no contact with any other City employees, including weights and measures employees prior to being hired (T18-19). When Caffrey was promoted from Assistant to Deputy Superintendent, he was promoted by then Director of Human Resources John Bell. There was no test or interview for the promotion (T22-23). Caffrey's promotion forms (R1) were signed by Bell, then

Business Administrator Larry Worth and the personnel officer. The documents are not signed by any weights and measures employees (T24-26). When Caffrey was promoted from Deputy to Superintendent he did not interview with anyone. The superintendent retired and Caffrey was promoted by Bell (T20-21).

14. Since Caffrey has been Superintendent, he has not hired or participated in the interviewing, hiring or promotion of any weights and measures employees, including Torchiani (T17-19, 113). Torchiani was hired by then Mayor Cramer as Assistant Superintendent of Weights and Measures and promoted to Deputy Superintendent in 1979 by then Director of Consumer Protection Ray Behrman and then Director of Human Resources William Gardner (T112-114). There have been no weights and measures employees hired since Torchiani (T100-101).

15. No weights and measures employees have been fired, demoted, disciplined or reprimanded in the twenty years Caffrey has worked for the department (T19, 23, 69). Caffrey has never disciplined Torchiani nor had reason to do so (T100).

16. Caffrey has no formal procedures for hiring, discharge or discipline of weights and measures employees and is not familiar with the City's procedures (T105). If Torchiani required discipline, Caffrey believes he could impose it, although he has never been apprised of this power (T105, 106). Caffrey does not enforce the City's personnel rules and regulations with respect to Torchiani (T106-107). If Torchiani violated weights and measures

rules or the law, Caffrey would report him (T109). Torchiani would report Caffrey for any violation of law, standards or procedures, although there has never been occasion to do so (T115-116).

17. Although Caffrey is the person most familiar with Torchiani's work, he has never evaluated Torchiani's work or performance and does not believe that he has the power to do so (T106, T109-110). Caffrey has never been evaluated formally. Pou stated that there has been no formal evaluation procedure since she has been director of Human Resources (T144).

18. There is no grievance procedure in the Office of Weights and Measures. Caffrey has never participated in a grievance from Torchiani. If there is a problem with pay, benefits or vacation, both Caffrey and Torchiani go directly to the Department of Human Resources. Torchiani is not required to go to Caffrey first with any problems (T63-64).

19. Vacation request forms (R3) are processed by the Department of Human Resources. Caffrey has no authority to grant or deny vacation requests. Both he and Torchiani follow an identical procedure to request vacation time from the Department of Human Resources (T30-32, T72-73).

20. Requests for travel authorization (R5) and reimbursement to attend State sponsored training sessions (R6) and

the annual weights and measures conference^{4/} are approved by the Department of Human Resources and the Business Administrator (T36-39, T76-77, T138). Both Caffrey and Torchiani must obtain approval from the Department of Human Resources to attend training seminars or conferences. Caffrey has no power to release Torchiani for those purposes (T38).

21. Personnel policies (R8) such as use of sick and vacation leave are formulated and administered by the Director of Personnel (T42-44). Pou implements such policies and does not seek input from division directors or office supervisors, including Caffrey (T135-137).

22. The weights and measures budget is prepared by the Department of Human Resources. Pou asks Caffrey for budget input, recommendations and changes (T98-100, 130). Both Caffrey and Torchiani prepare Weights and Measures budget requests. Torchiani prepared at least one request, which Caffrey presented to the Department of Human Resources (T27-28).

23. City memoranda addressed to Division/Program Directors or Department Heads/Division Directors are given to Caffrey, not Torchiani. Examples of such memoranda are those addressing vacation

^{4/} Caffrey has attended the annual State Weights and Measures Conference for twenty years, predating his appointment as superintendent (T107). There is only enough money in the budget for one employee to attend the conference. Caffrey stated that he goes because Torchiani does not want to attend (T74-76). Torchiani almost never attends the conference because its scheduling conflicts with his evening job (T118-119).

requests (R3), vehicle policy (R4), personnel policy (R8) and scheduling of vacation leave (R9). Caffrey's name appears on memoranda with his title. Torchiani's name and title never appear on memoranda.

24. Pou oversees several divisions, including the Division of Consumer Protection, which contains the Office of Weights and Measures (T128-129). Caffrey attends Pou's monthly meetings and is considered an office supervisor or director. Torchiani is not invited to attend such meetings (T97, 129-130).

25. Monthly weights and measures reports are submitted on department letterhead bearing Caffrey's name and title. Only division directors and office supervisors are entitled to personalized letterhead (T130-131). Deputies are permitted to submit reports on behalf of division heads or superintendents, although Pou testified that it is unlikely and unusual for them to do so (T131). If there is a problem with a report submitted by Torchiani, Pou would go to Caffrey for resolution (T101).

ANALYSIS

The City contends that Caffrey is a supervisory employee. It cites Caffrey's job description, his attendance at monthly management meetings and his responsibility for monthly reports as indicia of supervision. The City notes that Caffrey has exclusive and substantial input into the budget, responds to requests for budget information from the Department of Human Resources and signs

all bi-weekly timesheets. The City also contends that Caffrey's inclusion in a unit with Torchiani creates an impermissible conflict of interest since he has the authority to discipline Torchiani.

The PBA contends that Caffrey is not a supervisory employee. It states that he has never hired, promoted, disciplined or interviewed any weights and measures employees or recommended same, and has no authority to evaluate or enforce work rules or regulations. The PBA notes that Caffrey has no authority to grant vacation requests, control use of city equipment or require attendance at training sessions or conferences. The PBA contends that Caffrey does not direct Torchiani's work. It states that their work is interchangeable and their training is identical. It also notes that they both prepare the department paperwork and budget requests and use the same procedure for dispute resolution.

I first consider whether Caffrey is a supervisor within the meaning of the Act. N.J.S.A. 34:13A-5.3 defines a supervisor as "...having the power to hire, discharge, discipline, or to effectively recommend the same." All the circumstances of a particular case must be reviewed to determine whether an employee has such power and regularly exercises it. City of Margate, P.E.R.C. No. 87-146, 13 NJPER 500 (¶18184 1987); Somerset Cty. Guidance Center, D.R. No. 77-4, 2 NJPER 358 (1976); Cherry Hill Tp. DPW, P.E.R.C. No. 30 (1970). The bare possession of supervisory authority without more is insufficient to sustain a claim of supervisory status within the meaning of the Act, Somerset Cty. Guidance Center.

Caffrey has never hired, discharged or disciplined any weights and measures employees or recommended same since he was promoted to Superintendent in 1977. The authority to hire and discharge Paterson employees is held by Mayor Graves, who may delegate it to department directors and has never delegated it to Caffrey. I find that Caffrey is not a supervisor within the meaning of the Act. Compare Cumberland Cty., P.E.R.C. No. 89-93, 15 NJPER 251 (¶20101 1989) (Weights and Measures Superintendent effectively participated in and recommended hiring); Warren Cty., P.E.R.C. No. 89-66, 15 NJPER 30 (¶20013 1988) (Weights and Measures Superintendent effectively recommended promotion, discipline and hiring).

Caffrey's job description states that he supervises the Deputy. However, that description refers to supervision of the Deputy's work, rather than to hiring, discharge or discipline. Mere direction of work is not sufficient to support a finding of supervisory status. Hackensack Bd. of Ed., P.E.R.C. No. 85-59, 11 NJPER 21 (¶16010 1985); Middlesex Cty. Welfare Bd. and CWA, P.E.R.C. No. 10 (1969); Union Cty. Bd. of Social Services, D.R. No. 87-29, 13 NJPER 509 (¶18190 1987); Ewing Twp. Bd. of Ed., D.R. No. 87-22, 13 NJPER 195 (¶18083 1987); County of Middlesex, D.R. No. 79-8, 4 NJPER 396 (¶4178 1978).

If a conflict of interest exists between the Superintendent and the Deputy Superintendent, their inclusion in the same unit is inappropriate even absent a finding of statutory supervision. Where

supervisors exercise significant supervisory authority over other supervisors, including hiring, termination, discipline or evaluation, their inclusion in the same unit would result in an impermissible conflict of interest. Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971). However, a conflict of interest which is de minimis or peripheral may be tolerable in certain circumstances. Wilton, 57 N.J. at 425-26. Since Caffrey has no power to hire or terminate Weights and Measures employees, any actual or potential conflict of interest would have to be based on the authority to evaluate or discipline.

Caffrey never evaluated Torchiani. Neither the City nor the Office of Weights and Measures has employee evaluation procedures. Therefore, evaluations present no actual or potential conflict of interest.

Caffrey stated that he believed he had the power to discipline Torchiani, although he has neither been apprised of this power nor exercised it. Although this presents, at most, a potential conflict of interest, the conflict is de minimis when balanced against the existence of the unit since 1986 without any actual conflict.^{5/} Speculation about potential conflicts of interest is insufficient to split a unit when the employees have

^{5/} In Hackensack Bd. of Ed., P.E.R.C. No. 85-59, 11 NJPER 21 (¶16010 1984), the Commission found no conflict of interest existed when there were actual instances of one unit member recommending discipline of another where there were only two examples of effective recommendation over a ten year negotiations history.

experienced no actual conflicts of interest over the course of their negotiations history. Roselle Park, P.E.R.C. No. 87-80, 13 NJPER 73 (¶18033 1986); City of Trenton, D.R. No. 83-33 9 NJPER 382 (¶14172 1983).

The court in Wilton also examined whether "...the duties, authority and actions of the employee in question vis-a-vis the other [unit members] [are] primarily related to the management function." Wilton, 57 N.J. at 417. Caffrey does not exercise management-type powers over Torchiani. He does not dictate Torchiani's work assignments or locations and cannot approve Torchiani's travel or vacation requests. Caffrey has never participated in a grievance from Torchiani, and there is no office grievance procedure requiring his involvement. Torchiani assists Caffrey with other management-like tasks such as preparing department reports and budget requests. Caffrey and Torchiani perform the same job tasks, have identical day-to-day responsibilities and equal training. The only duties Caffrey has that could be considered management-like are signing bi-weekly time sheets, attending monthly meetings, receiving policy memoranda and submitting office reports on a letterhead that bears his name. Although Pou relies on these duties to characterize Caffrey as a department head, they are insufficient to demonstrate that Caffrey exercises management-like functions over Torchiani. Pou exercises management-like functions over both Caffrey and Torchiani; Caffrey does not exercise same over Torchiani. There is no actual conflict


of interest between Caffrey and Torchiani and the potential for conflict is de minimis. Boro of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980).

Inclusion of superior officers in a police unit that contains rank and file personnel may also present a conflict of interest. Although superior officers will normally be severed from rank and file personnel, an exception exists for departments "...in which there is a very small force, where superior officers perform virtually the same duties as (rank and file employees) and where any conflict of interest is de minimis in nature." In re Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977) at 350. Caffrey and Torchiani's duties are virtually identical and they are a unit of two. The Commission has applied the small force exception to units of 25, 16 and 10 officers.^{6/} The size of the unit and the similarity of its members' duties defeat a contention that severance is appropriate because the superintendent may be equivalent to a superior officer.

^{6/} In re Twp. of Hanover, E.D. No. 41 (1971) (unit of 25); In re Borough of Avalon, E.D. No. 76-23, 2 NJPER 59 (1976) (unit of 16); In re Borough of Rockaway, E.D. No. 43 (1972) (unit of 10); In re Borough of Merchantville, D.R. No. 80-38, 6 NJPER 305 (¶11146 1980) (unit of 10)

RECOMMENDATION

I recommend that the Commission dismiss the City's unit clarification petition.

A handwritten signature in cursive script, reading "Margaret A. Cotoia".

Margaret A. Cotoia
Hearing Officer

DATED: November 17, 1989
Trenton, New Jersey