

D.R. No. 2008-10

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

In the Matter of

COUNTY OF BURLINGTON

Public Employer,

-and-

PBA LOCAL 203,

Docket No. RO-2007-089

Petitioner.

-and-

CWA LOCAL 1034,

Intervenor.

SYNOPSIS

Based upon the Commission's decision in Warren Cty., P.E.R.C. No. 86-111, 12 NJPER 357 (¶17134 1986), the Director of Representation directed an election to sever "weights and measures" employees from a current non-law enforcement negotiations unit in the County of Burlington. The Commission's decision in Warren Cty. held that weights and measures employees were "policemen" within the meaning of the New Jersey Employer-Employee Relations Act. Focusing solely on the statutory arrest powers provided in the Weights and Measures Statute, the Commission determined that this "statutory duty" to make arrests was dispositive and ordered that weights and measures employees should be in a unit of law enforcement officials only.

Since the facts did not support that the affected employees exercised "arrest powers", however, the Director noted that the circumstances of this case may warrant a reassessment by the Commission of the rationale in Warren Cty.

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Appearances:

For the Public Employer,  
Peter H. Nelson, County Counsel  
(Kendall Collins, First Assistant Solicitor)

For the Petitioner,  
George O'Brien, Labor Consultant

For the Intervenor,  
John Lazzarotti, Assistant President

DECISION

On June 26, 2007, New Jersey State PBA Local 203 (PBA or PBA 203) filed a representation petition accompanied by an adequate showing of interest, seeking to represent all assistant superintendents and apprentice superintendents employed by the County of Burlington (County) in its weights and measures department. The petitioning employees are currently represented

by the Communications Workers of America, Local 1034 (Local 1034 or CWA) in a broad-based unit of all full-time County employees. Local 1034 intervened in this matter, based upon its expired 2003 through 2006 collective negotiations agreement with the County. N.J.A.C. 19:11-2.7. (A successor agreement now extends from January 1, 2007 through December 31, 2010.)

PBA Local 203 seeks to represent the petitioned-for titles in a separate unit. It asserts that in keeping with the statutory restriction prohibiting police employees from joining an employee organization that admits non-police employees to membership, the assistant superintendent and apprentice superintendents must be represented in a separate unit because CWA admits non-police employees to membership. N.J.S.A. 34:13a-5.3.

Both the County and CWA oppose the petition and do not consent to an election. The County objects to the formation of a new negotiations unit because it has an historical negotiations relationship with CWA, which has represented the two titles for many years. It also asserts that the employees holding the titles perform only regulatory duties, rendering them de facto civilian employees, and not "policemen" or law enforcement officers. The County maintains that it has the authority to restrict the disputed titles from exercising arrest powers and has done so. CWA agrees with the County and asserts that

apprentice superintendents cannot be defined as police or law enforcement employees.

We have conducted an administrative investigation into the petition. N.J.A.C. 19:11-2.2. The parties filed letters, certifications, and other documents supporting their respective positions. Our review of those materials reveals the following facts.

1. The County and CWA have signed a series of collective negotiations agreements which have included the weights and measures titles for more than 20 years. At some unspecified time, CWA Local 1044, the original negotiations representative, merged with the current representative, CWA Local 1034.

2. The County established a weights and measures department under the aegis of the Weights and Measures statute, N.J.S.A. 51:1 et. seq.

N.J.S.A. 51:1-1 provides in a pertinent part: "Nothing in this title shall be construed to abrogate or impair the power of the governing body of any municipality . . . to enforce any provisions . . . in any municipal charter, ordinance or regulations, not inconsistent with this Chapter . . ."

N.J.S.A. 51:1-2(f) provides in a pertinent part: "Weights and Measures official' or 'Weights and Measures officer,' . . . at the County and municipal levels, means the superintendent, deputy

superintendent, assistant superintendents of all grades, and Weights and Measures officers of all grades. . . ."

N.J.S.A. 51:1-106 provides in a pertinent part: "A weights and measures officer, on the violation of any of the provisions of this Title within his view or presence, may without warrant arrest the offender and conduct him before the court having jurisdiction."

N.J.S.A. 51:1-54 provides in a pertinent part: "The State Superintendent shall . . . have general supervision over the work of County and Municipal Superintendents. He shall make such rules for the administration . . . of the offices of the County and Municipal Superintendent as may be necessary for the enforcement of Title 51 . . . ."

3. County governments operate under a statutory grant of authority. N.J.S.A. 40:20-1, "Management vested in board of freeholders; delegation of powers and duties to county administrator", provides in a pertinent part:

The property, finances and affairs of every county shall be managed, controlled and governed by a board elected therein, to be known as 'the board of chosen freeholders of the County of Burlington,' and the executive and legislature powers of the county shall be vested in that board of chosen freeholders, except where by law any specific powers or duties are imposed or vested in a Constitutional officer.

The board of chosen freeholders of any county which has created the office of county administrator, pursuant to the provisions of

N.J.S.A. 40A:9-42, may, by, resolution, delegate to that office such executive and administrative powers, duties, functions and responsibilities as the board may deem appropriate.

N.J.S.A. 40:20-1.2, "Grant of powers; consistency with constitution and local government law; liberal construction; definition of county agencies," provides in a pertinent part:

The grant of powers under this amendatory and supplementary act is intended to be as broad as is consistent with the Constitution of the State of New Jersey and with general law relating to local government. The grant of powers shall be construed as liberally as possible in regard to the county's right to reorganize its structure and to alter or abolish its agencies, subject to the general mandate of performing services, whether they be performed by the agency previously established or by a new agency or another department of county government.

4. The County uses the New Jersey Department of Personnel job description for assistant superintendent of weights and measures for its employees in the department of weights and measures.

5. Renee Borsted, the County Director of Consumer Affairs, has supervised the County department of weights and measures for over 25 years.

6. The disputed employees test commercial scales, equipment, fuel storage tanks, pumps, food measuring devices and containers.

7. The Department of Personnel job description for assistant superintendent of weights and measures neither lists nor refers to any authority to make arrests. The description lists tasks including: conducting investigations of alleged or suspected violations; preparing reports of findings and action taken; appearing in court as an expert witness; investigates complaints; withholds seals; recommends corrective action; files papers for prosecution of violations; halts trucks to check for proper credentials . . . ; explains and interprets laws and regulations governing weights and measures; and inspects, tests and calibrates various types of equipment.

The educational and experience requirements for the assistant superintendent set forth in the civil service job specification include 3 years of experience in servicing, repairing, testing or calibrating various weighing and measuring devices; or 2 years of experience with 30 college credits in engineering, physics, mathematics, or electronics.

In the "knowledge and abilities" section, the job specification requires an assistant superintendent to be able to comprehend, interpret and explain basic laws and regulation procedures and standards applicable to weights and measures inspections; collect and compile evidence; act as a witness under oath; and ". . . to take a firm stand when controversies arise."

8. The petitioned-for employees did not attend any police academy. They do not carry firearms.

The County has prohibited assistant superintendents from making arrests. It is unaware of any weights and measures employee attempting an arrest of any person violating the weights and measures laws or regulations over the past 10 years.

If an incident arises involving an individual allegedly violating the weights and measures statute, the assigned County weights and measures assistant superintendent or apprentice superintendent is directed to immediately contact the local police department or County Prosecutor's office.

Assistant superintendents of weights and measures and apprentice superintendents are ineligible to enroll in the Police and Firemen's Retirement System.

Weights and measures officers are issued "badges" or identification cards after successfully completing a course of instruction under the direction of the State Superintendent of Weights and Measures. The identification card advises that the holder (an "apprentice") is authorized by the State Superintendent of Weights and Measures to enforce the New Jersey weights and measures statute. A badge issued for each title refers to "Special Assistant Superintendent Weights and Measures State of New Jersey." N.J.S.A. 51:1-64. Neither the



identification card nor the badge identifies the employee as a police officer.

### Analysis

The petition requires us to decide whether the assistant superintendent and apprentice superintendents of the County department of Weights and Measures must be severed from the existing unit because they are "policemen" within the meaning of the N.J.S.A. 34:13A-5.3. That section provides:

. . . except where established practice, prior agreement or special circumstances dictate the contrary, no policeman shall have the right to join an employee organization that admits employees other than policemen to membership.

In Warren Cty., P.E.R.C. No. 86-111, 12 NJPER 357 (¶17134 1986), the Commission overturned the Director of Representation in Warren County, D.R. No. 86-3, 11 NJPER 646 (¶16225 1985) and held that weights and measures employees are "policemen" within the meaning of the Act. The Commission relied upon Gloucester Cty. v. PERC, 107 N.J. Super. 150 (App. Div. 1969), aff'd. 55 N.J. 333 (1970), in which the Court overruled the Commission's finding that corrections officers were not police because they were unarmed and did not exercise police powers. The Court held that corrections officers were "policemen" because they had the statutory authority ". . . to act as officers for the detection, apprehension, arrest and conviction of offenders." N.J.S.A.

2A:154-4. Referring to that statutory provision, the Court wrote:

The quoted language is unambiguous and plainly vests in correction officers specific powers and duties commonly exercised by the police. When that statute is read with the aforementioned provision of N.J.S.A. 34:13A-5.3, we think it to be apparent that the Legislature was seriously concerned with preventing law enforcement officers, authorized to make detections, apprehensions and arrests, from joining an employees' union which might place them in a conflicting position and create circumstances for divided possible loyalty or split allegiance. Compare the analogous police fostered by 29 U.S.C.A. § 159(b), which precludes guards from joining a labor union if that organization includes member employees other than guards (citation omitted). [Gloucester Cty., 107 N.J. Super at 157]

The Director in Warren Cty., 11 NJPER 646, referred to Gloucester Cty. and concluded that the Warren County employees did not have "general law enforcement powers", presumably including arrest powers, and relying upon Sussex County, P.E.R.C. No. 76-14, 2 NJPER 1 (1975), held that the Warren County weights and measures employees were not police within the meaning of the Act. He, therefore, dismissed the petition to sever those employees from a civilian unit and allow them to create a unit represented by a police union. Referring to the Appellate Division's rationale in Gloucester Cty., however, the Commission in Warren Cty. overturned Sussex Cty. and focused upon statutory

arrest power, rather than whether the affected employees factually even exercised such power.<sup>1/</sup>

The Commission found that weights and measures employees have the statutory power to arrest within their jurisdiction.

N.J.S.A. 51:106. It wrote:

We believe that once there is a finding that an employee has power of arrest, it is not necessary to extend the inquiry into whether there is an actual or potential conflict of interest with non-police employees. The Legislature simply concluded that policemen were not to be in employee organizations with non-policemen. [12 NJPER 358]

Concluding that this "statutory duty" to make arrests was dispositive, the Commission ordered that the weights and measures employees ". . . should be in a unit of law enforcement officials." Id. at 358. See also, Union Cty., D.R. No. 96-11, 22 NJPER 149 (¶27078 1996).

The Commission's exclusive focus upon statutory arrest power in Warren Cty., rather than whether affected employees factually have any indicia of police, suggests that the weights and measures employees in this case, the disputed assistant superintendent and apprentice superintendents, must be severed from their current non-law enforcement unit, and given the

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<sup>1/</sup> The Commission has held that a lack of statutory arrest power weights heavily against a finding that an employee is a police officer under 5.3. See, e.g., Mercer Cty., P.E.R.C. No. 88-85, 14 NJPER 244 (¶19090 1988); Monmouth Cty., P.E.R.C. No. 88-10, 13 NJPER 647 (¶18244 1987), aff'd NJPER Supp. 2d 169 (¶170 App. Div. 1988).

opportunity to be represented in a unit admitting only "policemen" to membership. In my view, however, the circumstances of this matter warrant an assessment of the rationale in Warren Cty. In its Warren Cty. decision, the Commission seemed more focused upon whether there was an actual or potential conflict of interest with non-police than it was on whether the affected employees were trained as, acted like or exercised any police authority.

No facts here suggest that during the twenty years in which these weights and measures employees have been represented by CWA (with no indicia of instability or conflict), they ever exercised or attempted to exercise arrest power. The County has restricted that authority, directing the employees to refer any possible weights and measures arrest to local police departments or to the County prosecutor. Nor have these assistant and apprentice superintendents received police academy training and they do not carry firearms. Arrest power has had little or no practical meaning for these employees. The type of impermissible "conflict" described in Gloucester Cty. has not been possible in Burlington County. Even if the Commission reaffirms Warren Cty., the facts here might later implicate N.J.S.A. 34:13A-15 and its mandate that only those employees performing "police services" are entitled to interest arbitration. See Cherry Hill Bd of Ed., P.E.R.C. No. 2006-39, 31 NJPER 364 (¶146 2005), app. pending App

Div. Docket No. A-002262-0575; Camden Cty., P.E.R.C. No. 85-11, 10 NJPER 501 (¶15229 1984); New Jersey Institute of Technology, P.E.R.C. No. 84-47, 9 NJPER 666 (¶14289 1983). Consequently, I am not confident that the Commission's Warren Cty. decision should be completely dispositive of this case.

Nevertheless, applying N.J.S.A. 51:1-106 and the Commission's Warren Cty. decision to this matter, I am compelled to direct that the petitioned-for weights and measures employees be severed from their current non-law enforcement negotiations unit. It is for the County and/or the CWA to decide whether to bring this issue to the Commission. Therefore, I direct that a secret mail ballot election be conducted among all full-time and regular part-time weights and measures assistant superintendents and weights and measures apprentice superintendents of the County of Burlington. They shall vote on whether they wish to be represented for purposes of collective negotiations by PBA Local 203 or no representative.

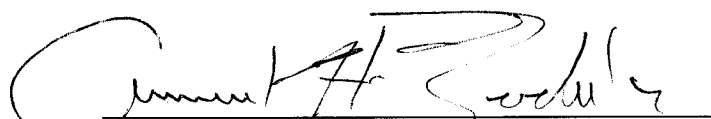
The election shall be conducted not later than thirty (30) days from the date of this decision. Those eligible to vote must have been employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, on vacation 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. 19:11-10.1, the public employer is directed to file with us an eligible list consisting of an alphabetical listing of the names of all eligible voters in the unit, together with their last know mailing addresses and job titles. In order to be timely filed, 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



Arnold H. Zudick, Director

DATED: May 16, 2008  
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by May 27, 2008