

D.R. No. 2008-13

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

In the Matter of

BLOOMFIELD TOWNSHIP BOARD OF HEALTH,

Public Employer,

-and-

OPEIU LOCAL 32,

Docket No. CU-2007-026

Employee Organization,

-and-

TOWNSHIP OF BLOOMFIELD,

Intervenor.

SYNOPSIS

The Director of Representation orders severance of Board of Health employees from a Township municipal negotiations unit represented by OPEIU Local 32. The Director finds that pursuant to N.J.S.A. 26:3-1 which establishes boards of health for every New Jersey municipality, the Bloomfield Township Board of Health is the employer of the employees at issue, not the Township. The responsibility for setting salaries, work hours and benefits belong to the Board and not to the municipality even though certain health employees have been covered by the OPEIU contract for many years.

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Appearances:

For the Bloomfield Township Board of Health,
Barbarula Law Offices, attorneys
(John M. Barbarula, of counsel)

For the OPEIU Local 32,
Mets, Schiro & McGovern, attorneys
(Kevin McGovern, of counsel)

For the Township of Bloomfield
Weiner Lesniak, attorneys
(Brian Aloia, of counsel)

DECISION

On April 3, 2007, the Bloomfield Township Board of Health (Board) filed a Petition for Clarification of Unit seeking to clarify a negotiations unit currently of Bloomfield Township (Township) employees to exclude approximately 15 health employees. The Board contends that it, and not the Township, is

the public employer of the health employees who are currently included in a mixed negotiations unit of about 50 blue collar, white collar and professional employees in a Township unit represented by Office and Professional Employees International Union Local 32 (OPEIU).

The Township has intervened in this matter and supports the petition. OPEIU objects to the proposed clarification, asserting that the health employees are properly employed by the Township and appropriately included in its negotiations unit. In the alternative, OPEIU asserts that the Board and Township are joint employers.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2 and 2.6. On February 5, 2008, I wrote a letter to the parties, advising that I was inclined to issue a decision ordering that the Board of Health employees must be removed from the Township's municipal employees' negotiations unit because the Township lacks statutory authority to negotiate terms and conditions of employment for the health employees. The parties were provided an opportunity to reply to my letter.

On February 28, 2008 OPEIU filed a response, offering several corrections to facts set forth in my February 5 letter. On March 14, 2008 the Board of Health filed a reply. Our review of all documents submitted reveals the following facts.

OPEIU represents a collective negotiations unit of white-collar employees, certain blue-collar employees, professional employees, inspectors, certain maintenance titles, and animal control officers.^{1/} This unit of about 50 employees has existed for at least 17 years. OPEIU became the successor majority representative following an affiliation by Essex Council No. 1. OPEIU is the signatory majority representative on collective agreements with the Township dating to 1990. Its most recent collective agreement with the Township extended from January 1, 2002 through December 31, 2005. Negotiations for a successor agreement are continuing, and the parties are engaged in fact-finding. The unit has historically included health employees in the specific titles of animal control officer, and sanitary inspector.

The Board of Health is comprised of five board members, appointed by the Township mayor and council. It has never participated in collective negotiations, nor signed a negotiated agreement. The agreements have always been negotiated and signed by the Township.

^{1/} The recognition clause of the most recent agreement describes the unit as ". . . employees in titles listed in Appendix A." The referenced appendix lists about 70 titles, including clerical titles, dispatchers, laborers, drivers, parking officers, social workers, nurses, meter readers, maintenance employees, inspectors, code enforcement officers, engineers, computer operators, accountants, and animal control officers.

The Board is responsible for creating and implementing health policies consistent with the State statutes and regulations. Under bylaws it adopted March 5, 2005 and amended March 8, 2007, the Board of Health:

. . . shall exist as is required by such authority to pass, alter or amend ordinances and make rules and regulations pertaining to the health of the residents and occupants of this municipality and to establish appropriate policy and procedure for the Department of Health and Human Services.
[Article II, Purpose]

Under the bylaws, the Board may enact health ordinances and pass resolutions concerning personnel matters. The Board meets once per month. Trevor Weigle, the Health Director for the past four years, reports to the Board of Health. As the chief executive officer of the Board, he is responsible for carrying out Board policies.

The Township's web site includes a department of health. The Township letterhead Weigle uses for correspondence also sets forth the caption, "Department of Health and Human Services", and lists the Board of Health members at the top. The Township's organizational chart for health services, dated December 18, 2006, is captioned, "The Township of Bloomfield, Department of Health and Human Services." The top box on the chart depicts the Board of Health as the head of the "department" and sets forth Weigle's name directly under the Board as director of health and human services. The minutes of the Board of Health's meetings

refer to the operation as the department of health and human services.

Three division heads report to Weigle. Chief Sanitary Inspector Vincent Nicosia is the head of the environment health division and six to eight employees report to him. Social Work Supervisor Karen Lori is in charge of the human services division and three employees report to her. Public Health Nurse Supervisor Donna Williams is in charge of the nursing division and four to six employees report to her. Finally, a senior clerk typist, a registrar and a health educator report to Weigle. Weigle and most of the health employees maintain offices located in Bloomfield Town Hall. One employee works in the animal shelter facility.

The Township funds the Board of Health operations. The health employees are on the Township payroll and the Township issues their paychecks. The Township deducts dues and agency fees, respectively, from its unit employees' paychecks (and those of certain health employees) and transmits them to OPEIU. The salaries and benefits of the unit health employees are established by the OPEIU contract. About 10 health employees are not included in the unit and their salaries are set by the Board of Health. In May 2007, for example, the Board voted to increase salaries of unrepresented employees by 6.61 percent.

Weigle prepares a draft budget for the Township's health operations with assistance from the division heads. The proposed budget is then submitted to the Board of Health for review, changes, and adoption. After the Board adopts the budget, Weigle presents it to the Township for approval or modification. If the Board objects to the Township's budgeted amount, it may appeal to the courts.

The Board of Health hires its own employees in both unit and non-unit titles. Bloomfield Township is a civil service employer, and the Board of Health is the "appointing authority" under New Jersey Department of Personnel guidelines. Weigle makes staffing recommendations to the Board. If the Board approves his recommendations, he formulates the job description(s), notifies the State Department of Personnel of the Board's intention to fill a position, and obtains a list of eligible candidates. If necessary, he advertises the position. Weigle interviews applicants, selects the candidate and makes a hiring recommendation, including starting salary, to the Board. If the Board approves his recommendation, he advises the Township administrator, finance director and personnel office so that the Township will process the documents needed to place the employees on the payroll and provide them with benefits. The Township personnel office has no more than a ministerial function in the hiring process.

Weigle writes performance evaluations of the health employees, and recommends merit wage increases (for non-unit titles). He first discusses the employees' performance with the respective division head. After completing the written evaluations, Weigle submits them to the Board of Health for approval. Weigle is currently revising the evaluation forms provided by the Township to better reflect the Board's needs.

In 2006, Weigle recommended to the Board of Health that Senior Sanitary Inspector Vincent Nicosia be promoted to chief sanitary inspector. The Board passed a resolution adopting his recommendation on June 21, 2006. It has also changed another employee's title and compensation, following a State Department of Personnel classification audit.

In 2006, Director Weigle suspended a named control officer one day and five days, respectively, for separate disciplinary incidents. On June 28, 2006, Weigle wrote to the Township Director of Finance, (and issued a copy to the Township Administrator), advising of the dates of suspensions and requesting that the control officer's pay be appropriately adjusted. In February 2007, Weigle suspended another named animal control officer for one day. He advised the Board of Health about both of the disciplinary actions. Under the OPEIU contract, Article III, Grievance Procedure, the first step in the grievance procedure is decided by the employee's immediate supervisor; the second step by the Department Head; the third

step by the Township Administrator and the fourth step by the Mayor and Council.

The twice-suspended officer filed contractual grievances over the disciplinary actions. The Township personnel director forwarded the grievances to Weigle, who met with the union to hear the grievances. Weigle refused to lessen the discipline, and reported the status of the grievance to the Board of Health. The grievances advanced to the Township administrator. After OPEIU filed for arbitration over the grievances, counsel for the Board and for OPEIU negotiated a settlement. The Board of Health approved the settlement agreement on June 14, 2007. The agreement was signed on the same date by the President of the Board of Health and on July 18, 2007 by then-counsel for OPEIU and the employee/grievant. Although the introductory paragraph identifies the Township as the "employer," neither the Township Administrator nor the Mayor and Council are signators on the agreement. After the Board approved the settlement, Weigle directed the Township finance director to credit the employee with back pay in accordance with its terms.

In April 2006, OPEIU filed a grievance concerning overtime pay for animal control officers. The grievance was denied by Weigle, and advanced to the Township Administrator, who requested the opinion of the Township Director of Personnel. The Director of Personnel in turn reviewed the grievance with Weigle before denying it. The matter was eventually scheduled for grievance

arbitration. Before the hearing, counsel for the OPEIU and the Board negotiated a proposed settlement naming the Township as the payor of agreed-upon stipends. The signatory titles inscribed on the proposed settlement are: "for OPEIU Local 32," a representative of Local 32 and OPEIU Counsel; and "for the employer," the President of the Board of Health and Board of Health Counsel. Before the representatives signed the agreement, the Township attorney informed Weigle that the Board of Health had no authority to sign an agreement either naming or binding the Township or one which has ostensibly been negotiated on behalf of the Township.

The Board of Health has the authority to enter into contracts with vendors. It had a contract with Friends of Bloomfield Animal Shelter (FOBAS) to operate its animal shelter. In mid-2007, it voted to terminate the contract. The termination resulted in a lawsuit filed against the Board of Health by a citizen claiming a violation of the Open Public Meetings Act.

ANALYSIS

The Board of Health and the Township contend that the Board is a separate autonomous body and that it, not the Township, has lawful control over the salaries and working conditions of the health employees. The Board also argues that even if it opts to apply most or all of the Township's labor relations policies it would remain a statutorily autonomous Board and the employer of its own Board of Health employees. The Township also argues that

it has no legitimate control over the salaries and other working conditions of the health employees; that it has no legal power to negotiate a collective agreement covering them, and they must be removed from the OPEIU unit. OPEIU disagrees, contending that the health employees are employed by the Township and their continued inclusion in the unit is appropriate. Alternatively, OPEIU maintains that the Township and the Board of Health are joint employers of the health employees, by virtue of the Township's asserted control over Board of Health finances which effects the terms and conditions of employment of the health employees.

The threshold issue is, who is the employer of the health employees? N.J.S.A. 34:13A-3C defines "employer:"

[T]he term employer includes an employer and any person acting directly or indirectly, or on behalf of or in the interest of an employer with the employer's knowledge or ratification This term shall include 'public employers' and shall mean the State of New Jersey, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board, or any branch or agency of the public service.

In identifying a public employer in contested cases, the Commission considers who controls the hiring, discipline, performance evaluations, firing, promotions, vacations, hours of work, scheduling, wages and benefits of employees and the funding of employees' compensation and benefits. See Bergen County Prosecutor and Mercer County Prosecutor, P.E.R.C. No. 78-77, 4

NJPER 220 (¶4110 1978), 178 N.J. Super 363, 411 (App. Div. 1980);
Morris Cty., P.E.R.C. No. 86-15, 11 NJPER 491 (¶16175 1985);
Neptune Tp., D.R. No. 87-26, 13 NJPER 386 (¶18155 1987).

N.J.S.A. 26:3-1 provides,

There shall be a board of health in every municipality in this state, which board shall consist of members appointed or designated, or both, as provided by this chapter, *except that in a municipality operating under laws establishing a form of government for such municipality under which the full powers of the local board of health cannot be exercised by a local board of health so appointed or designed*, the respective functions of a local board of health shall be exercised by such board's body or officers as may exercise the same according to law. (italics added).

The Township asserts that it has not adopted a form of government described in the statute's "exception." Under a Faulkner Act form of government (N.J.S.A. 40:69A-1 et seq.), a municipality has broad centralized powers to determine the organization of departments, set policies, control personnel, set compensation and, with regard to health matters, to perform the functions otherwise exercised by a local board of health. See Myers v. Township of Cedar Grove, et al., 36 N.J. 51 (1961).

In Sholty v. Township of Bloomfield, 93 N.J.A.R.2d (CSV) 221 (1993), an administrative law judge found that Bloomfield Township does not have a form of government that would permit it to qualify as a statutory exception described in N.J.S.A. 26:3-1. In that case, the ALJ found that the Bloomfield Board of Health is a separate and distinct entity with autonomous powers

independent of the Township governing body. A claim that the Township acted in bad faith because of a hiring decision by the Board of Health was dismissed.

N.J.S.A. 26:3-19 also provides that the appointed health officer, as the chief executive officer of the local board, is responsible for enforcement of a Board's ordinances and the State's sanitary laws. He or she is responsible for evaluating the health problems of the community, planning appropriate activities to meet the health problems of the citizens, and "developing necessary budget procedures to cover these activities and directing the staff of the local board to carry out these activities efficiently and economically." Finally, this section requires that "any other duly appointed person shall be the agent of the local board appointing him for the performance of such services . . ."

Weigle is responsible for the functions of his staff. He makes recommendations to the Board on staffing needs; determines job functions; evaluates the health employees and submits his evaluations to the Board; disciplines employees; and makes salary recommendations.

The Township and Board contend that the Board of Health is responsible for all personnel decisions, including hiring, promotions, discipline, and compensation. N.J.S.A. 26:3-19 provides:

The local board may employ such personnel as it deems necessary to carry into effect the

powers vested in it. It shall fix the duties and compensation of every appointee and, as to local boards which shall not be operating under the provisions of Title 11A, Civil Service, of the New Jersey Statutes, fix the term of every appointee.

In Sagarese v. Board of Health of Town of Morristown, 27 N.J. Super. 400 (App. Div. 1953), the Court found that this statute required that a town plumbing inspector was hired by the board of health, not the municipality, and dismissed the inspector's claim of improper pay and benefits under a municipal ordinance. The Court found that the town had no authority to set his compensation under the statute.

In this matter, certain health employees have been covered by the OPEIU contract salary rates and benefits for many years. The statute provides, nevertheless, that the responsibility for setting salary, work hours and benefits belongs to the Board of Health, and not to the municipality. That the Board has evidently designated the Township administration to handle day-to-day matters, such as payroll, record keeping, personnel forms, and even negotiating on its behalf with the employees' representative, does not waive or divest the Board's statutory authority to control its personnel matters, including hiring and the setting of compensation and benefits. The Board has exercised statutory employment authority over its "unrepresented" employees, i.e., part-timers and management, by setting their salaries and deciding wage increases.

Considering all health employees, I observe that many of the current personnel practices are consistent with the statutory scheme. The Board decides whether to fill positions; Weigle interviews candidates and makes a recommendation to the Board; and the Board passes a resolution appointing the employee to the position and sets the compensation rate. Weigle recommended that a senior inspector be promoted to the non-unit position of chief inspector; the Board adopted his recommendation. Weigle disciplines employees without consulting the Township. That grievances contesting discipline were processed through the contractual grievance procedure does not negate the Board's statutory authority to direct and control labor relations. When one of the grievances was resolved informally by counsel for the OPEIU and the Board, the document was signed by the Board president and approved by the Board. In recent efforts to informally resolve a grievance concerning over-time issues raised by the OPEIU, the employer was represented by Board counsel. Upon learning of the proposed settlement, the Township cautioned that the Board had no authority to agree to a settlement naming the "Township" as payor. It reiterated that it was not the employer of the health employees.

The Board has independent authority to enter into contracts with outside vendors. For instance, in 2007, it voted to terminate its contract with the Friends of Bloomfield Animal Shelter.

The Township funds the Board of Health operations. N.J.S.A. 26:3-41 and 43 provide that a board of health shall present an estimate to its governing body of the appropriations believed necessary for health purposes and that the "governing body shall appropriate the amount of such estimate or such other amount as it may determine." Section 26:3-42 requires that every expenditure of a board of health be presented by an itemized bill, approved by the board president and secretary of the board of health, to the township's dispersing officer ". . . who shall pay the same." Weigle, with the assistance of his department heads, formulates a proposed health budget and submits it to the Board of Health for discussion and approval. After the Board adopts a proposed budget, Weigle presents it to the Township mayor and council. The council may adopt or modify the proposed budget. If the Board of Health believes it is not being properly funded, it may file an action in Superior Court, seeking an order that the municipality fund its operations. See Grosso v Paterson, 33 N.J. 477, 486 (1960) (our Supreme Court found "clear and strong legislative support for the view that the Board of Finance was legally bound to appropriate for the salary increments provided for in the ordinances adopted by the Board of Health").

Considering the statutory mandate establishing the Board of Health and granting its authority, together with the facts and the supporting case law, I find that the Bloomfield Township

Board of Health is a separate and autonomous public employer within the meaning of the Act, and is the employer of all health employees.

Is Severance Appropriate?

The Township and the Board of Health argue that, as employees of the separate employer, the health employees must be severed from the current unit of Township employees. The OPEIU maintains that even if the Board is found to be the employer, the long history of stable labor relations, and the Commission's preference for broad-based units dictate the continuation of the present unit structure. The OPEIU also contends that the Township waived its right to argue for severance of the health employees because it has included them in its broad municipal unit for many years.

N.J.S.A. 34:13A-6 provides the Commission with authority to determine the appropriate unit, giving due regard to community of interest among the employees. The Commission and the courts have long favored broad-based negotiations units to promote the legislative desire for labor relations stability. State v. Prof. Ass'n. of New Jersey Dept. Of Ed., 64 N.J. 231 (1974). Absent a showing of irresponsible representation or unit instability, the Commission is not normally inclined to sever employees from an existing unit, especially where the unit has a lengthy history. Jefferson Bd. Of Ed., P.E.R.C. No. 61, NJPER Supp. 246 (1971).

The Commission, however, has ordered severance of employees from existing units when they are found to be employed by separate and autonomous employers, holding that the employees lack a basic element of community of interest - a common employer. Bergen and Mercer Prosecutors; Mercer Cty. Supt. Of Elections, P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978), aff'd 172 N.J. Super 406 (App. Div. 1980); Morris Cty Bd. Of Social Services, P.E.R.C. No. 86-15, 11 NJPER 491 (¶16175 1985) (employees employed by Morrisview nursing home severed from unit of county employees); Camden Cty. Health Services Center Bd. Of Managers, D.R. No. 89-36, 15 NJPER 379 (¶20161 1989) (health services center board of managers with authority to direct and control hospital employees is autonomous employer and their employees must be in their own unit); Bor. of Bloomingdale, D.R. No. 88-4, 13 NJPER 689 (¶18258 1987) (local board of health and library board were autonomous employers and their employees cannot be included in unit of borough employees); Ocean Cty., D.R. No. 79-25, 5 NJPER 128 (¶10076 1979) (county board of health employees removed from county-wide unit).

Neptune Tp., D.R. No. 87-26, 13 NJPER 386 (¶18155 1987) is on point. In Neptune, we held that the Township's board of health is statutorily empowered to establish terms and conditions of employment and found it to be a separate and autonomous employer. We ordered the board of health employees removed from the Township unit.

In Ocean Cty., P.E.R.C. No. 99-70, 25 NJPER 117 (¶30051 1999), the Commission found that an existing unit comprised of employees of different employers was an appropriate (multi-employer) unit. The Commission found that the parties had a lengthy, stable relationship, and that the separate employers wished to continue their multi-employer relationship. In this case, by contrast, both employers seek to end the inclusion of the Board of Health employees in the Township unit. The Board of Health wishes to assume control over its own employees in order to set their salaries, benefits and other terms and conditions of employment. It recognizes that these employees may choose to be represented by OPEIU or another organization for the purpose of negotiating their terms and conditions of employment. As a matter of law, the Township does not have statutory authority to negotiate over the health employees. In order to effectuate the statutory authority of the Board to set its employees' terms and conditions of employment, both employers in this case seek to remove the Board of Health personnel from the combined Township unit.

OPEIU correctly notes that we will not ordinarily permit an employer to raise a community of interest argument to justify dividing a unit after it has existed for many years. Absent a change in circumstances or a statutory claim, we would hold that the employer has waived its right to claim that the employees lack a community of interest if the unit has existed for a period

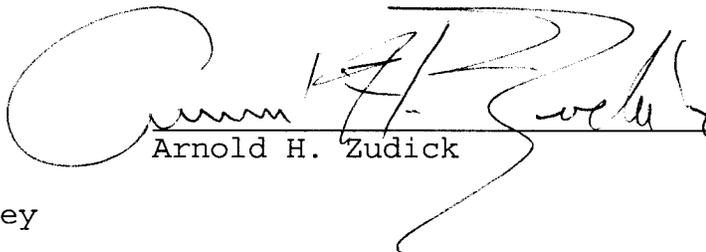
of time. Belleville Bd. Of Ed., D.R. No. 86-23, 12 NJPER 482 (¶17184 1986). However, we will permit the employer to raise statutory issues at any time. Borough of Madison, D.R. No. 99-1, 24 NJPER 441 (¶29203 1998).

In this matter, both the Township and the Board of Health assert that the Township lacks statutory authority to negotiate terms and conditions of employment for the health employees. I agree.

ORDER

The Board of Health employees must be removed from the Township's municipal negotiations unit, effective upon the issuance of my decision.^{2/}

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Arnold H. Zudick

DATED: June 17, 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 June 27, 2008.

^{2/} Nothing prohibits OPEIU or any other labor organization from filing a representation petition seeking a separate appropriate unit of Board of Health employees.