

D.R. No. 2010-4

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

In the Matter of

BOROUGH OF WEST WILDWOOD,

Petitioner,

-and-

Docket No. CU-2009-010

TEAMSTERS LOCAL 331,

Employee Representative.

SYNOPSIS

The Director of Representation clarifies a negotiations unit of non-supervisory blue and white collar employees to exclude the title, supervisor of public works. The Director finds that it is the Borough's intention to use the recently-appointed employee working in that title in the same capacity as the employee's predecessor, whose duties would have warranted the title's exclusion from the unit.

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Appearances:

For the Petitioner,
Gruccio, Pepper, De Santo & Ruth, P.A.
(William G. Blaney, of counsel)

For the Employee Representative,
Willig, Williams & Davidson, attorneys
(Laurence M. Goodman, of counsel)

DECISION

On September 11, 2008, West Wildwood Borough (Borough) filed a clarification of unit petition seeking to clarify a negotiations unit of non-supervisory blue and white collar employees to exclude the title, supervisor of public works. The unit is represented by the International Brotherhood of Teamsters, Local 331 (Local 331). The Borough asserts that the supervisor of public works is a supervisor within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The Association objects to the petition, disputing that the title is supervisory.

We have conducted an administrative investigation into this matter to determine the facts. N.J.A.C. 19:1-2.2. By letter dated June 29, 2009, I advised the parties of my tentative findings and conclusions and invited responses. Local 331 was granted an extension of time through July 16, 2009 to file a response. On July 20, Local 331 filed a certification of former supervisor of public works, James Fox. I could not consider that untimely filed document. Otherwise, neither party filed additional submissions. The disposition of the petition is properly based upon our administrative investigation. No substantial material facts in dispute require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. Based upon the administrative investigation, I make the following:

On May 29, 2007, the Borough and Local 331 signed a collective negotiations agreement effective January 1, 2007 through December 31, 2011. The agreement defines the unit to include the titles of clerk, treasurer/tax collector, deputy clerk/assistant tax collector, computer clerk, public works employee, laborer, and maintenance/janitor. About seven employees are included in the unit. The title, "supervisor of public works" is not set forth in the agreement. The Borough asserts however, that negotiations unit member Francis Pellegrino is the supervisor of public works and performs supervisory duties.

Borough Commissioner Gerard McNamara is currently in charge of the public works department. McNamara certifies that at the time this petition was filed, negotiations unit member James Fox was the supervisor of public works. Fox was suspended for disciplinary reasons from about September 17, 2008 until January 21, 2009, when he was terminated.

During his tenure as supervisor, Fox never imposed nor recommended discipline. He never discharged an employee nor recommended that an employee be discharged. Fox, however, authorized the hiring of public works employees. Specifically, he authorized the rehiring of John Peters on March 27, 2007; the rehiring of Joseph W. Merschen on May 7, 2007; and the hiring of Rachel Harwood on August 29, 2007. Documents submitted by the Borough show that Fox had also instructed a clerk to advertise for a full-time public works laborer position.

The Borough does not formally evaluate its public works employees. The supervisor of public works is expected to monitor the work of subordinates and take corrective action or impose discipline when necessary.

The supervisor is the designated employer representative at steps 1 and 2 of the parties' four-step contractual grievance procedure culminating in binding arbitration. Step 1 requires the grievant, through his or her union representative, to "institute action" to informally resolve the dispute with the

supervisor. If the dispute remains unresolved, Step 2 permits the grievant, through his union representative, to present a written grievance to the supervisor, who will issue a written answer within five work days.

During the period of Fox's suspension and afterwards, the supervisor's duties were assigned to Francis Pellegrino. Pellegrino's duties are substantially similar to those performed by Fox, except Pellegrino is a part-time employee and does not perform manual labor. Pellegrino has neither imposed nor recommended discipline. Nor has he discharged an employee or recommended that an employee be discharged. He has not authorized the hiring of public works employees or advertised for vacant public works positions.

ANALYSIS

A clarification of unit petition is used to resolve questions concerning the composition of an existing collective negotiations unit. In circumstances where a petition seeks to exclude supervisors from a non-supervisory unit, a clarification of unit petition is appropriate. See Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 251 (1977). If the petition regarding an asserted supervisor is filed during the term of a collective agreement, and the disputed employee is found to be a supervisor, the negotiations unit will be clarified when the agreement expires. Clearview.

Under our Act, supervisors cannot be included in negotiations units with non-supervisory employees. N.J.S.A.

34:13A-5.3 provides:

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

Local 331 argues that the supervisor of public works is not a supervisor within the meaning of the Act because he does not have the power to hire, discharge, discipline, or to effectively recommend those actions.

Former supervisor of public works James Fox's duties, however, included authorizing the hiring of public works employees and advertising for vacant positions. His title was also contractually designated as the Borough's representative at steps 1 and 2 of the negotiated grievance procedure. I find that the supervisor of public works, as Fox performed those duties, is a supervisor within the meaning of the Act.

We have determined that a negotiations unit title held by a recently-appointed employee could be excluded from the unit based in part upon the employer's intention to use the employee in the same capacity as the employee's predecessor, provided that the predecessor's duties would have warranted the title's exclusion

from the unit. See Tp. of Vernon, D.R. No. 2002-3, 27 NJPER 354 (¶32126 2001).

The Borough has assigned James Fox's duties to Francis Pellegrino. The Borough certifies that Pellegrino's duties are substantially similar to those performed by Fox, except Pellegrino is employed in a part-time capacity and does not perform manual labor. I infer that Pellegrino will authorize the hiring of public works employees and advertise for vacant positions. These duties render Pellegrino a supervisor within the meaning the Act.

The supervisor of public works is contractually obligated to represent the Borough at steps 1 and 2 of the grievance procedure. That function connotes the title's "intimate relationship with management and policy making" at the same time that the title is included in the unit with a grievant. Pellegrino's service in such a capacity is another indicia of a supervisory function. See Ogdensburg Bor. Bd. Of Ed., D.R. No. 91-25, 17 NJPER 175 (¶22075 1991). In order to avoid any potential for conflict, I find that the unit be clarified to exclude the title, supervisor of public works.

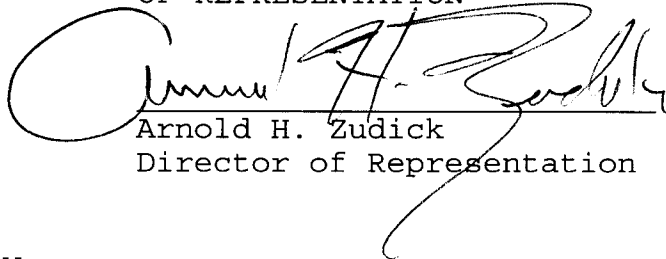
Local 331 contends that even if we find that the supervisor of public works is a supervisor within the meaning of the Act, "the recognition agreement and collective bargaining agreement constitute the type of 'prior agreement'" contemplated by N.J.S.A. 34:13A-5.3 which permits the title's continued inclusion in the bargaining unit.

Under Section 5.3 of the Act, a "prior agreement" is one that was signed by the public employer and the majority representative before the 1968 enactment of the New Jersey Employer-Employee Relations Act. West Paterson Bd. of Ed. and West Paterson Ed. Ass'n, P.E.R.C. No. 77 (1973) and P.E.R.C. No. 79 (1973). No facts suggest that the parties have a collective negotiations relationship dating to earlier than 1968. Nor is the title, "supervisor of public works" included in the recognition clause of the most recent collective agreement, or any agreement to our knowledge.

ORDER

The unit is clarified to exclude the supervisor of public works, effective December 31, 2011.^{1/}

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Arnold H. Zudick
Director of Representation

DATED: July 31, 2009
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 August 10, 2009

^{1/} Teamsters Local 331 may file its own clarification of unit petition prior to December 31, 2011 based upon changed circumstances.