

D.R. NO. 2014-7

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

In the Matter of

CITY OF CAMDEN HOUSING AUTHORITY,

Public Employer,

-and-

Docket No. CU-2013-029

AFSCME COUNCIL 71, LOCAL 3974,

Petitioner.

SYNOPSIS

The Director of Representation dismissed a clarification of unit petition (petition) filed by the City of Camden Housing Authority (Authority) to exclude property managers from an existing collective negotiations unit. The Authority asserted that the property managers were confidential employees and managerial executives under the Act. Since the Authority did not submit adequate and sufficient evidence to support its positions that property managers were confidential and were managerial executives, the Director rejected the Authority's arguments and dismissed its petition. In reaching this decision, the Director noted that the Authority should have submitted certifications, sworn affidavits or other competent evidence demonstrating that the property managers actually performed confidential duties or were managerial executives as defined by the Act.

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Appearances:

For the City of Camden Housing Authority,
(Lisa Richardson, of counsel)

For AFSCME Council 71, Local 3974,
(Joseph Waite, Staff Representative)

DECISION

On April 29, 2013, the City of Camden Housing Authority (Authority) filed a clarification of unit petition (petition) seeking to clarify a collective negotiations unit of all regularly employed supervisory employees, including but not limited to executive assistants, principal housing managers, senior housing managers, housing managers, assistant housing managers, homemaker service supervisors, tenant selection supervisors, supervising account clerks, senior maintenance repairers, supervising maintenance repairers, boiler supervisors, boiler specialists and warehouse supervisors currently represented by AFSCME Council 71, Local 3974 (AFSCME). The

Authority asserts that property managers (formerly known as housing managers, principal housing managers and senior housing managers) should be excluded from the supervisory unit because they are managerial executives and confidential employees within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1.1 et seq. (Act).

AFSCME opposes the Authority's petition. It contends property managers were appropriately included in a unit of regularly employed supervisors.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. By letter dated August 16, 2013, I advised the parties of my tentative findings and conclusions and invited responses. No response was filed. No disputed substantial material facts require us to convene an evidentiary hearing. Based upon the administrative investigation, I find the following facts:

On April 24, 2012, AFSCME filed a representation petition for card check certification (RO-2012-58) seeking to represent a unit of supervisors employed by the Authority. AFSCME amended the petition on May 4 and June 15, 2012. On September 7, 2012, the Director of Representation (Director) certified AFSCME as the majority representative of the following negotiations unit:

Unit included:

All regularly employed supervisory employees, including but not limited to executive assistants, principal housing managers, senior housing managers, housing managers, assistant housing managers, homemaker service supervisors, tenant selection supervisors, supervising account clerks, senior maintenance repairers, supervising maintenance repairers, boiler supervisors, boiler specialists, and warehouse supervisors employed by the Housing Authority of the City of Camden.

Unit excluded:

Managerial executives, confidential employees, non-supervisory employees, professional employees, police, casual employees, craft employees and all others employed by the Housing Authority of the City of Camden.

See City of Camden Housing Authority, D.R. No. 2013-2, 39 NJPER 230 (¶79 2012). The Public Employment Relations Commission (Commission) denied the Authority's request for review of D.R. No. 2013-2 on January 31, 2013. P.E.R.C. No. 2013-51, 39 NJPER 230 (¶79, 2012).

On April 29, 2013, the Authority filed a clarification of unit petition (petition) seeking to exclude property managers from the unit certified by the Director on September 7, 2012. The petition notes that property managers were formerly known as housing managers, principal housing managers, and senior housing managers.^{1/} The petitioner explains that property managers

^{1/} For ease of reference, property managers, housing managers, principal housing managers and senior housing managers may be referred to collectively as "managerial employees" or "managerial titles."

should be excluded from the certified negotiations unit because they are both confidential employees and managerial executives under the Act. The petition does not identify a change in circumstance since the Director's September 7 decision that justifies the exclusion of property managers from the existing negotiations unit.

On May 16, 2013, a Commission staff agent sent an investigatory letter to the Authority and AFSCME. The May 16 letter set forth approximately sixty-two (62) questions centered on the following issues:

(1) Why were the job titles of housing manager, senior housing manager and principal housing manager changed to property manager?

(2) What were the job duties and responsibilities actually performed by housing managers, senior housing managers, principal housing managers and property managers?

(3) How were the job duties and responsibilities of property managers different from those of housing managers, senior housing managers, or principal housing managers?

(4) How did the managerial employees access and use confidential information in connection with collective negotiations, grievance processing, or contract administration?

(5) How did the managerial employees participate in

collective negotiations, grievance processing or contract administration?

(6) Where did the managerial employees fall within the Authority's organizational hierarchy and what role do these employees play in the formulation and implementation of Authority policies?

In each instance, the Commission staff agent requested specific examples of work performed by all of the managerial employees that would demonstrate managerial executive and confidential status. The staff agent emphasized in the letter that "all facts must be presented in certifications or sworn affidavits and include attached exhibits and sample work performed."

On June 11, 2013, the Authority filed a letter, an organizational chart, two (2) collective negotiations agreements, and a job description for property managers. The Authority did not file a certification or affidavit and did not provide any sample work products for any of the managerial employees. Moreover, the Authority did not respond to many of the questions posed in our May 16 letter.

Specifically, the Authority did not explain why the titles of housing manager, senior housing manager, and principal housing manager were no longer in use and were changed to property managers. We specifically requested information on what duties and responsibilities principal housing managers, senior housing

managers, and housing managers actually performed and how those duties and responsibilities differed from property managers. The Authority responded as follows:

The Housing Managers, Principal Housing Managers; Senior Housing Managers are obsolete and not in use. The Site Director title has not been in use since March 2007. This responds to Questions 5(a)-(f), 9, 11, 13, 15, 18, 20, 22, 24 and 26 with regard to Housing Managers, Principal Housing Managers, Senior Housing Managers, and Site Director.

The Authority did not provide information on what housing managers, principal housing managers and senior housing managers did and how their duties differed from property managers.

On June 14, 2013, the Commission staff agent sent another letter to the Authority providing it an additional two (2) weeks to supplement its June 11 response to the May 16 letter. The June 14 letter reiterated that all facts must be presented in certifications or sworn affidavits and include attached exhibits and sample work performed.

On June 28, 2013, the Authority filed a letter with no attachments, certifications or affidavits. Its letter provided no information on what housing managers, principal housing managers and senior housing managers did, why these titles were no longer in use, and why property managers were formerly known as housing managers. It merely repeated its response set forth in its June 11 letter.

According to the Authority, the title of Property Manager was created in March of 2007. Susan Fisher is the Property Manager in the Ablett Village, a residential community run by the Authority. Barbara Richardson is the Kennedy, Mickle and Westfield Towers Property Manager. The Property Manager title for the Branch Village is vacant.

According to the Property Manager job description, property managers work under the direct supervision of the Authority's Deputy Executive Director/Asset Manager. Property managers oversee and manage all operations and programs at the Authority's public housing developments to ensure the Authority's residential properties are financially viable, physically maintained, and safe. They are responsible for touring and inspecting the Authority's residential properties for safety and maintenance concerns, overseeing residential site budgets, ensuring tenants' rent is collected, limiting the number of total vacancies in Authority rental units to five percent (5%) of all units, and supervising assigned staff at residential sites to ensure their timely completion of work orders. The Property Manager also works closely with local law enforcement to develop anti-crime strategies designed to respond to site-specific safety concerns. In discharging their responsibilities, property managers must comply with the United States' Department of Housing and Urban

Development's (HUD) regulations and guidelines, along with Authority policies and procedures.

Prior to March 2007, AFSCME and the Authority entered into a collective negotiations agreement extending from January 1, 2005 through December 31, 2006 (05-06 Agreement). Under the recognition clause of the 05-06 Agreement, the title of "Housing Manager" was recognized by the Authority as part of the collective negotiations unit represented by AFSCME. The recognition clause does not refer to property managers, senior housing managers, or principal housing managers. AFSCME and the Authority subsequently entered into a collective negotiations agreement extending from January 1, 2007 through December 31, 2011 that did not recognize property managers, housing managers, senior housing managers or principal housing managers as part of the collective negotiations unit represented by AFSCME.

The Authority contends property managers are "directly involved with any and all labor relations, collective bargaining negotiations, contract administration and grievance processing" for employees under their supervision. On July 25, 2011, copies of "labor agreements" were sent to property managers for their review and the Authority "requested their [property managers] input for negotiations for Local 3441 and 3974."^{2/} The Authority

^{2/} AFSCME Local 3441 is the majority representative of a unit of non-supervisory employees of the Authority.

scheduled negotiation team meetings with property managers on September 15, 2011 and October 11, 25 and November 29, 2011. Property managers provided written concerns for consideration during the negotiations and "were contacted to discuss issues that arose during Local 3441's 2012 and 2013 negotiations sessions."

The Authority also asserts that property managers have "access and knowledge of labor activities concerning the local bargaining union", access to published information on Authority budgets and are involved in "labor relations activities." According to the Authority, property managers work with the Executive Director, Human Resources and General Counsel on all matters related to labor relations, including collective negotiations and grievance processing. Property managers also aid in preparing budgets for their respective residential sites and have access to staff members' salary and health benefits costs in connection with this responsibility. It is unclear whether property managers have any knowledge of the Authority's negotiations strategies and what property managers actually do in connection with collective negotiations, contract administration and grievance processing.

Property managers are also asked to regularly assist the Executive Director, Deputy Executive Director, and Board of Commissioners in the formulation of Authority policies. However,

property managers do not have independent decision-making authority and all of their recommendations concerning Authority policies are subject to review and approval by the Authority's Executive Director and Board of Commissioners. If a property manager believes an alternative course of action in policy implementation is warranted, the manager must consult with the Authority's Executive Office and General Counsel's Office. The Authority's Executive Office includes the Executive Director and the Deputy Executive Director/Asset Manager. The Deputy Executive Director works under the supervision of the Executive Director.

ANALYSIS

The Authority contends that property managers should be excluded from AFSCME's negotiations unit because they are confidential employees and managerial executives who are statutorily exempt from the protections of the Act. I reject these claims and dismiss the Authority's petition.

An employer may seek clarification to remove statutorily exempt employees from a unit at any time, notwithstanding the parties' prior acquiescence to a title's inclusion in that unit. Borough of Madison, D.R. No. 99-1, 24 NJPER 441 (¶29203 1998); Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977). A determination that an employee is a managerial executive or confidential employee becomes effective immediately. Clearview.

Confidential Employees

N.J.S.A. 34:13A-5.3 affords public employees the right "to form, join and assist any employee organization." Confidential employees, however, are excluded from the Act's definition of "employee" and do not enjoy the Act's protections. N.J.S.A. 34:13A-3(d). N.J.S.A. 34:13A-3(g) defines "confidential employees" of public employers other than the State as:

[E]mployees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

The Commission's policy is to narrowly construe the term, confidential employee. Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd NJPER Supp.2d 186 (¶165 1988); State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985). In State of New Jersey, we explained our approach in determining whether an employee is confidential:

We scrutinize the facts of each case to find for whom each employee works, what he does, and what he knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit.
[Id. at 510]

See also Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd NJPER Supp.2d 186 (¶165 1988).

In New Jersey Turnpike Authority v. AFSCME, Council 73, 150 N.J. 331 (1997), our Supreme Court approved the standards articulated in State of New Jersey and explained:

The baseline inquiry remains whether an employee's functional responsibilities or knowledge would make their membership in any appropriate negotiating unit incompatible with their official duties. N.J.S.A. 34:13A-3(g); see also State of New Jersey, supra, 11 NJPER 507 (¶16179 1985) (holding that final determination is 'whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit.') Obviously, an employee's access to confidential information may be significant in determining whether that employee's functional responsibilities or knowledge make membership in a negotiating unit inappropriate. However, mere physical access to information without any accompanying insight about its significance or functional responsibility for its development or implementation may be insufficient in specific cases to warrant exclusion. The test should be employee-specific, and its focus on ascertaining whether, in the totality of the circumstances, an employee's access to information and knowledge concerning its significance, or functional responsibilities in relation to the collective negotiations process make incompatible that employee's inclusion in a negotiating unit. We entrust to PERC in the first instance the responsibility for making such determinations on a case-by-case basis. [Id. at 358.]

In evaluating confidential status claims, we have repeatedly applied strict standards of proof. Absent a proffer of specific duties and a demonstration that the purported confidential duties are actually performed, we will not find confidential status.

Phillipsburg Bd. of Ed., D.R. No. 2010-12, 36 NJPER 75 (¶35 2010); See also, City of Newark, D.R. No. 2000-11, 26 NJPER 234

(¶31094 2000), req. for rev. den. P.E.R.C. No. 2000-100, 26 NJPER 289 (¶31116 2000), aff'd 346 N.J. Super. 460 (App. Div. 2002); Tp. of Eastampton, D.R. No. 2000-5, 26 NJPER 43 (¶31014 1999); Evesham Tp. Fire Dist. #1, D.R. No. 99-4, 24 NJPER 503 (¶29233 1998). This standard of proof has been applied with equal force in evaluating managerial executive status claims. See, City of Newark, 26 NJPER at 238 (employer must make a particularized showing that employees actually perform those duties which make the titles managerial).

In Eastampton, the Director rejected claims made by the township that a tax collector and municipal court administrator were confidential employees because the employer did not provide sufficient and adequate evidence to support their confidential status claims. The Director, in reaching this determination, explained that the township's submissions contained conclusory statements about the tax collector's and court administrator's involvement in negotiating salary and other terms and conditions of employment. However, since these claims were not supported by affidavits or work samples, they were dismissed by the Director. Eastampton, 26 NJPER at 45.

Similarly, the Director in Evesham Fire Dist. rejected claims by the employer that the clerk and deputy clerk were confidential employees since the employer did not submit work samples demonstrating that these employees actually performed

confidential duties. Evesham Fire Dist., 24 NJPER at 505. There, the employer asserted that the clerk and deputy clerk were responsible for typing negotiation proposals and negotiations strategy meeting minutes, as well as the minutes of closed session negotiations meetings. Id. However, since the employer did not submit work samples demonstrating these employees actually performed these job duties, the Director rejected the employer's contentions. Id.; See also Jamesburg Bd. of Ed., D.R. No. 2002-2, 27 NJPER 344 (¶32123 2001) (Director dismisses an employer's confidential status claims concerning support staff because the employer did not submit specific factual information demonstrating how the support staffs' duties resulted in knowledge of the employer's confidential negotiations strategies).

Here, the Authority's submissions provided too few facts about job duties and only conclusory statements that do not establish the confidential status of property managers. While the Authority alludes to property managers' involvement in some activities related to collective negotiations, it has not submitted affidavits, certifications or other evidence that demonstrate what specific duties property managers perform with respect to collective negotiations and how the performance of those duties compromises the employer's right to confidentiality in collective negotiations. Absent a proffer of specific duties

property managers actually perform and competent evidence, such as work samples, sworn affidavit(s) or certification(s) attesting to the confidential job duties property manager perform, I find that property managers are not confidential employees.

The Authority has also failed to provide information about what job duties housing managers, principal housing managers, and senior housing managers actually performed and how those duties differ from a property manager's duties. The Authority's petition references the fact that property managers were formerly housing managers, senior housing managers, and principal housing managers. However, the Authority does not explain how these job titles' differ and why the title of housing manager was changed to property manager. Ultimately, the burden of producing adequate evidence in support of its petition rests with the Authority. Jamesburg Bd. of Ed.; Evesham Fire Dist., Eastampton.

Accordingly, I find that property managers are not confidential employees within the meaning of the Act.

Managerial Executives

I am also dismissing the Authority's claim that property managers are managerial executives under the Act. The Authority's submissions do not establish the managerial executive status of property managers. Instead, the Authority's assertions support the view that property managers are not managerial executives.

The statutory definition of "managerial executive" of any public employer other than the State reads, in pertinent part:

"[M]anagerial executives" of a public employer means persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices

N.J.S.A. 34:13A-3(f). In New Jersey Turnpike Authority v. AFSCME Council 73, 150 N.J. 331 (1997); the New Jersey Supreme Court adopted this test to determine managerial authority:

A person formulates policies when he develops a particular set of objectives designed to further the mission of [a segment of] the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. [Turnpike Authority at 356]

In applying this standard, we have declined to find an employee is a managerial executive where that employee does not have independent decision-making authority over the formulation and implementation of employer policies. See Tp. of Hopewell, D.R. No. 2011-14, 38 NJPER 165 (¶48 2011); State of New Jersey,

P.E.R.C. No. 99-59, 25 NJPER 48 (¶30021 1998), recon. den.

P.E.R.C. No. 2000-34, 25 NJPER 461 (¶30200 1999).

In Hopewell, the Deputy Director of Representation found that a municipal housing liaison (MHL) did not meet the definition of a managerial executive since the MHL did not formulate or effectuate township policies. The Township contended the MHL was a managerial executive because he made influential recommendations and provided input to the township's Affordable Housing Committee on affordable housing policies and the implementation of those policies. Citing Turnpike Authority, the Deputy Director rejected these contentions, noting that the recommendations and input by the MHL were subject to review and approval by the Township and that "an employee's mere capacity to recommend management policies is not part of the statutory definition of managerial executive" under Turnpike Authority. Hopewell; See also, State of New Jersey, 25 NJPER at 53 (Drawing the distinction for purposes of defining managerial executives between the employee who has effective discretion and power to dictate what policies are formulated versus lower-level supervisory employees who do not have independent discretion to set policy but who suggest courses of action that are subject to review and approval by higher authorities within the employer's organization).

Here, property managers do not formulate Authority policies and do not direct the effectuation of Authority policies. Property managers must act at all times in conformity with Authority policies. Within the Authority's organizational hierarchy, property managers serve and report to the Deputy Executive Director and Executive Director, who in turn report to and are accountable to the Authority's Board of Commissioners. The Authority concedes in its submissions that all decisions made by property managers in implementing Authority policies are subject to review and approval by the Executive Director. Moreover, property managers must consult with the Deputy Executive Director and Executive Director before pursuing alternative courses of action that deviate from Executive Office policy directives. Property managers do not possess the power, independence and control over policymaking characteristic of managerial executives.

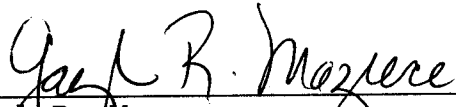
Accordingly, I find that property managers are not managerial executives under the Act.

Based on the foregoing, I find that property managers are neither confidential employees nor managerial executives under the Act.

ORDER

The Authority's petition is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Gayl R. Mazuco
Director of Representation

DATED: September 13, 2013
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 September 23, 2013.