

D.R. NO. 98-6

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Public Employer,

-and-

Docket No. CU-97-12

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 68, AFL-CIO,

Petitioner.

SYNOPSIS

The Director of Representation clarifies a unit of operating engineers employed by Rutgers University to include all employees in the title of supervisor utility operations.

The Director rejects Rutgers' argument that collective, rotating participation on a hiring selection committee constitutes supervision within the meaning of the Act. The Director further finds that Rutgers has not demonstrated that these employees exercise the power to evaluate in a manner that renders them ineligible for unit inclusion, and that proffered examples of grievance and discipline involvement were not performed by the petitioned-for employees.

D.R. NO. 98-6

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Public Employer,

-and-

Docket No. CU-97-12

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 68, AFL-CIO,

Petitioner.

Appearances:

For the Public Employer,
Christine B. Mowry, Assistant Vice President
for Staff Affairs and Director, Office of
Employee Relations

For the Employee Organization,
William Goodman, Organizer

DECISION

On October 24, 1996, the International Union of Operating Engineers Local 68 filed a Petition for Clarification of Unit seeking to add four employees in the title of supervisor utility operations to its existing unit of operating engineers. Local 68 asserts that the duties of these employees are similar in function to positions in its existing unit. Rutgers opposes adding the disputed positions to the unit, contending that the employees are supervisors within the meaning of the Act and are, therefore, ineligible for inclusion in a unit with nonsupervisory employees.

A Commission Staff Agent conducted an investigatory conference in this matter on January 22, 1997. The parties submitted position statements and supporting materials by May 12, 1997.^{1/} The following facts appear.

Local 68 represents a unit of full-time employees in the following titles: Operating Engineer I, Operating Engineer II, Operating Engineer - Relief, Operating Engineer - Service (Seasonal), H.V.A.C. Operating Engineer - Newark, Operating Engineer HVAC and Energy Management Operator in the Department of Physical Plant employed by Rutgers University. The unit excludes the chief engineer, probationary employees, supervisors and employees represented in other negotiations units. There are 24 employees in the unit, and their work locations include the University's Newark, Camden, Busch and New Brunswick campuses. Local 68 and Rutgers are parties to a collective negotiations agreement that runs from July 1, 1995 to June 30, 1999. The supervisor utility operations title became effective in September 1995.

The employees in the supervisor utility operations title work in the cogeneration (cogen) plant on the Busch campus, which began operations in December 1995. Paul Meierdierck is the Director, Utilities Services. He supervises the central heating

^{1/} On July 31, 1997, I issued a tentative letter decision in this matter. The letter notified the parties that if either believed the findings were incorrect, they had a week to supply affidavits or other evidence demonstrating such inaccuracies. Rutgers was given extension to September 5, 1997 to submit such evidence but it did not do so.

plants on the New Brunswick campus and the cogen plant. Richard Bankowski is the manager of utilities operations. He oversees the day-to-day operation and maintenance of the central heating plants and the cogen plant. The five supervisors utility operations and the chief operating engineers^{2/} on the College Avenue and Cook/Douglass campuses report to Bankowski.

The cogen plant is a high technology facility that provides heating and electricity to university buildings, including research facilities. Rutgers determined that even though each shift at the cogen plant consists of only one operating engineer, safe and effective operation of the facility required a supervisor on each shift who can take charge of the plant in an emergency, issue instructions to the engineers and discipline on the spot if necessary. Rutgers contends that the five supervisors utility operations who work at the cogen plant are supervisors within the meaning of the Act because they have the authority to recommend hiring, perform evaluations, mete out discipline and make grievance determinations. It offers the following in support of its position.

Hiring

When the cogen plant opened, it was staffed with five of the seven operating engineers who worked in the New Brunswick

^{2/} Chief operating engineers are not included in Local 68's unit.

facility. To determine which five operating engineers would be sent there, Bankowski asked the two supervisors utility operations who were working at the time to form a team with him to interview the seven operating engineers, assess their abilities and decide which five would work at the cogen plant. Bankowski accepted the recommendations of the supervisors utility operations. Although budgetary considerations are made at a higher level and affirmative action considerations are reviewed by the affirmative action office, the recommendations of the supervisors utility operations as to the most qualified candidate are given significant weight. Meierdierck and Bankowski stated that in the future, supervisors utility operations will continue to recommend which candidate is the best qualified to be a cogen operating technician when vacancies occur and that those recommendations will be accorded significant weight.

The two supervisors utility operations who served on the team to select which operating engineers would work in the cogen plant also had input into the hiring of the other three supervisors utility operations by reviewing resumes, interviewing candidates and ranking them. The supervisors utility operations have authority to recommend candidates who have not formally applied to be interviewed for cogen operating technician and supervisor utility operations vacancies.

When asked to describe the hiring process specifically, Rutgers replied that in the utilities department, positions are posted internally and advertised in newspapers. The personnel

department screens resumes for meeting minimum job requirements and forwards them to the utilities department. A selection committee consisting of personnel from both within and outside of the department reviews the resumes and decides which candidates to interview. The selection committee interviews these candidates, checks references and selects the candidate it determines is best qualified. The resume of the selected candidate plus resumes of individuals from underutilized categories are forwarded to the affirmative action office, the department head, the assistant vice president for facilities, the associate vice president for facilities and the senior vice president and treasurer for signoff. If the affirmative action officer requires readvertising or if the assistant vice president for facilities believes a procedural flaw existed in the process, the matter is remanded back to the selection committee to reexamine the hiring process.

Rutgers provided two examples of hiring. An operating engineer position was filled by a selection committee consisting of two supervisors utility operations, the chief engineer and the manager of utilities operations. The committee reviewed 21 resumes, interviewed four candidates and selected one. The committee's selection was communicated to the director of utility operations, the assistant vice president, the associate vice president, the affirmative action director and the senior vice president. The candidate selected by the committee was accepted. A senior mechanic position was filled by a selection committee consisting of one

supervisor utilities operations who was different from the two participating in the previous example, the chief engineer and the water service supervisor. That committee's selection was also communicated to the director of utility operations, the assistant vice president, the associate vice president, the affirmative action director and the senior vice president. The candidate selected by the committee was accepted.

Rutgers states that all committee members have an equal voice but that the supervisors utility operations have greater expertise in understanding candidates' qualifications and therefore their judgment may influence the other committee members. The manager of utilities operations' opinion carries no greater weight than that of the other committee members. Rutgers further states that there are no steps between the selection committee and the formal offer of employment that assess which candidates are best qualified for the job.

Evaluation

The supervisors utility operations helped develop a test to determine which operating engineers in the cogen plant are qualified to become cogen operating technicians, a title that is included in the unit. The title will be filled after the testing is evaluated by the supervisors utility operations and the manager of utilities operations. Each supervisor utilities operations contributed questions relating to his area of expertise and the compilation of

these questions constituted the four part test. Part one of the test has been administered to the operating engineers by the supervisors utility operations; the supervisors utility operations are grading the tests. The process will continue until the engineers have been tested (and retested, if necessary) on the remaining parts.

Operating engineers who are evaluated as meeting the criteria will be reclassified into a new, higher title with a two range salary increase. Those operating engineers whom the supervisors utility operations determine are not qualified will not receive the increase. Rutgers contends that these evaluations are therefore instrumental in making significant personnel decisions.

Discipline

The supervisors utility operations working on the evening and night shifts have no higher level supervision at the facility during their shifts. They are responsible for the four operating engineers in the cogen plant represented by Local 68; these employees report to them directly. It is expected that the supervisors utility operations will apply progressive discipline to operating engineers who do not perform up to standards.

The supervisors utility operations have authority to discipline up to and including discharge of operating engineers in the existing unit. Because the cogen plant is relatively new and the engineers in the unit have been in a "training mode", there have been no occasions to discipline them.

Disciplinary authority is vested in and exercised by chief operating engineers, non-unit positions whose role and function Rutgers contends directly corresponds to the supervisors utility operations. Two of the current supervisors utility operations were chief operating engineers before the cogen plant opened. Rutgers submitted examples of written warnings and a termination given by chief operating engineers. Rutgers contends that the supervisors utility operations are vested with the same authority and are expected to mete out discipline to operating engineers and others whom they supervise when that becomes necessary.

Grievances

The chief operating engineers have the authority to make decisions concerning grievances which challenge their actions. Rutgers submitted examples of grievance answers issued by chief operating engineers. Rutgers contends that the supervisors utility operations are vested with the same authority and would be required to give testimony at grievance hearings or arbitration.

Rutgers contends that it has demonstrated that the supervisors utility operations are supervisors within the meaning of the Act and that including them in the existing unit of operating engineers would create a conflict of interest.

There are five supervisors utility operations who work at the cogen plant, but Local 68 seeks to add only four of them to its unit. Rutgers asserts that the duties of all five are

interchangeable, that there is no difference between any of the employees in the title and that Local 68 has not provided justification for differentiating one of the supervisors utility operations from the other four. Rutgers states that the fifth supervisor utility operations is required to act as the relief supervisor in the absence of the other four and works rotating shifts at the cogen plant just as the other four do.

* * * * *

Local 68 states that when the cogen plant was opened, it was staffed with four operating engineers and five supervisors utility operations. Local 68 states that the operating engineers and four of the supervisors utility operations share a community of interest. Local 68 does not seek to represent the fifth supervisor utility operations, whom it states functions as an acting day supervisor. Local 68 states that four of the supervisors utility operations and the operating engineers work 12 hour rotating shifts, perform similar job duties and get paid overtime for hours worked in excess of 40 per week. Before the cogen plant began operation, employees in both titles received the same training from the turbine manufacturer and General Electric. The four operating engineers have similar or identical operating licenses to the four supervisors utility operations Local 68 seeks to represent.

Local 68 characterizes the role of supervisors utility operations as assigning routine work. It states that they do not hire or layoff other employees and do not have the authority to

approve leave time. Local 68 contends that the occasional assignment of work to operating engineers and Rutgers' assignment of the title "Supervisor" to supervisors utility operations does not render them supervisors within the meaning of the Act. Local 68 agrees that the technical nature of the cogen plant requires that someone be responsible for its safe and efficient operation, but asserts that technical skills do not render employees statutory supervisors.

Local 68 notes that the director, utilities services, manager of utilities operations and acting day supervisor^{3/} are all responsible for supervision at the cogen plant. If the supervisors utility operations were found to be supervisors within the meaning of the Act, Local 68 states that there would be seven employees supervising four operating engineers at the facility.

When asked to discuss the hiring process specifically, Local 68 agreed that the selection committee interviews candidates and recommends them for hire. It stresses that although the committee can include supervisors utility operations, that it also has included the manager and director of the department. Local 68 contends that the candidate must receive final approval from the director at the department level and that the director sometimes meets with the candidate and other times accepts the recommendation

^{3/} Local 68 also refers to this employee as the "cogen operations lead supervisor". It appears that the employee in this position is the fifth supervisor utility operations, whom Local 68 does not seek to represent.

of the committee. Local 68 states that the candidate must then be approved by the department manager, department director, the vice president of facilities, the controller and the affirmative action office.

Local 68 provided three examples of hiring. It states that a candidate was recommended by the selection committee for the position of cogen operating technician. However, the director of utilities overrode the selection committee's recommendation and hired another candidate. The selection committee chose an external candidate for an instrument and control position, but that recommendation was disqualified by the director based on information obtained from a previous employer. Finally, a supervisor utility operations position was filled after the manager of utilities operations contacted a competitor's staff to solicit candidates. The selection committee was not involved in the hiring process for this position.

Local 68 also alleges that the manager of utility operations is no longer a member of the selection committee, but that the committee's recommendations go to him. It further asserts that recommendations from the committee are always subject to change by the director of utility operations.

* * * * *

N.J.S.A. 34:13A-5.3 affords public employees the right "to form, join and assist any employee organization..." However, under the Act, supervisors may not be placed into negotiations units with nonsupervisory employees. N.J.S.A. 34:13A-5.3 provides:

...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....

N.J.S.A. 34:13A-6(d) provides:

The division shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors....

Consistent with subsection 5.3, the Commission has defined a statutory supervisor as one having the authority to hire, discharge, discipline or effectively recommend the same. Cherry Hill Tp. Dept. of Public Works, P.E.R.C. No. 30, NJPER Supp. 114 (1970). A determination of supervisory status requires more than an assertion that an employee has the power to hire, discharge, discipline or effectively recommend these actions. An indication that the power claimed to be possessed is exercised is needed. "The mere possession of the authority is a sterile attribute unable to sustain a claim of supervisory status". Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358, 360 (1976).

According to Rutgers, the supervisors utility operations will be expected to discipline unit employees and make grievance decisions. Rutgers contends that the supervisors utility operations have the same authority in grievance and disciplinary matters as non-unit chief operating engineers. Significantly, all examples

regarding grievances and discipline that were provided came from non-unit chief operating engineers - none came from the petitioned-for title of supervisor utility operations. Rutgers contends that as the cogen plant is relatively new, the engineers there have been in a "training mode" and therefore, no occasions for discipline have arisen. However, I note that the cogen plant has been operating for a year and a half. Accordingly, I do not find that the supervisors utility operations have exercised any power in grievance or disciplinary matters to render them ineligible for inclusion in Local 68's unit.

Rutgers contends that the supervisors utility operations evaluate unit employees in that they helped develop a test to determine which employees are qualified for a promotional title. The title will be filled after the testing is evaluated by the supervisors utility operations and the manager of utilities operations. Each supervisor utility operations contributed questions for the test, administered and graded it. However, I find that this is merely an objective means to assess qualifications, rather than a subjective evaluation based on the opinions of the supervisors utility operations. Rutgers also stated that the testing will be evaluated by not only the supervisors utility operations, but by their supervisor, the manager of utilities operations. Therefore, to the extent that the petitioned-for employees participate in an evaluation process, it is not clear that their evaluations are effective, or cannot be superceded by the

manager of utilities operations. Evaluations alone do not necessarily create a sufficient conflict of interest warranting the removal of the evaluator from a unit, especially in instances where the evaluations do not result in adverse personnel actions.

Westfield Bd. of Ed., P.E.R.C. No. 88-3, 13 NJPER 635 (¶18237 1987). I therefore find that these employees do not exercise the power to evaluate in a manner that renders them ineligible for inclusion in Local 68's unit.

Rutgers contends that the participation of supervisors utility operations on its selection committee constitutes effective recommendation of hiring.^{4/} Based upon Rutgers' submissions alone, I do not find that the supervisors utility operations make effective hiring recommendations.

An effective recommendation is one that is adopted without independent review and analysis by a higher level of authority. Borough of Edgewater, D.R. No. 92-27, 18 NJPER 230 (¶231203 1992). Rutgers states that after the selection committee chooses the candidate it deems most qualified, the resume of that candidate plus resumes of individuals from underutilized categories are forwarded to the affirmative action office, the department head, the assistant vice president for facilities, the associate vice president for facilities and the senior vice president and treasurer for signoff. Rutgers characterizes the signoffs above the selection committee as

^{4/} Local 68 disagrees with Rutgers' characterization of the hiring process.

almost pro forma and states that candidates chosen by the committee are accepted. However, I note the resumes of individuals from "underutilized categories" that were not recommended by the selection committee or even reviewed by the selection committee are forwarded up the chain of command along with the candidate chosen by the committee. If the selection committee constitutes the final level of hiring authority, then the affirmative action office review and function would also be pro forma. Such extensive review does not seem pro forma. It is difficult to conceive that a candidate is reviewed and signed-off by six additional personnel levels merely for procedural consideration. Rutgers does admit that if the affirmative action officer requires readvertising or if the assistant vice president for facilities believes that a procedural flaw existed in the process, the matter is remanded back to the selection committee to reexamine the hiring process.

Most significantly, in the two examples of hiring provided by Rutgers, at least two employees in higher titles served on the selection committee with the supervisors utility operation.

In Atlantic County Department of Social Services, P.E.R.C. No. 90-21, 15 NJPER 594 (¶20243 1989), the Commission found that participation in a collective hiring process, on a rotating basis, was insufficient to constitute effective recommendation of hiring. The Commission held that when the employees acted collectively and made a joint recommendation, no individual employee whose status was in dispute was responsible for the hiring recommendation and that

employees who were higher in the chain of command also had a role in the hiring process. In Salem Community College, D.R. No. 88-35, 14 NJPER 426 (¶19173 1988), I found that chairing a search committee does not constitute effective recommendation of hiring when the entire committee has the authority to recommend a candidate and that there is no evidence that the petitioned-for employee exercises more authority than other committee member.

Rutgers' assertion that the supervisors utility operations' judgment about candidates may influence the judgments of other committee members does not indicate that these employees have more authority than other committee members.

Viewing the hiring role of supervisors utility operations in the light most favorable to Rutgers, I find that their rotating participation on the selection committee is insufficient to render them supervisors within the meaning of the Act, particularly since a contrary finding would result in a worksite with seven supervisors and four subordinates.

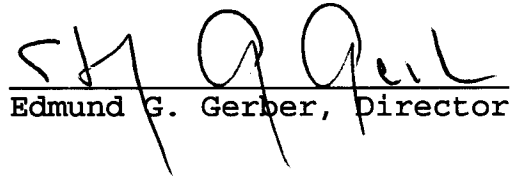
Finally, although there are five employees in the title supervisor utility operations, Local 68 seeks to represent only four of them. Rutgers contends that the duties of all five are interchangeable and that Local 68 has not provided any specific evidence that one is inappropriate for inclusion while the other four are. I agree.

Accordingly, I clarify Local 68's unit of operating engineers to include all employees in the title supervisor utility

operations. The clarification will be effective immediately.

Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977); Union
Cty. Reg. H.S. Dist. #1, D.R. No. 83-22, 9 NJPER 228 (14105 1983).

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Edmund G. Gerber, Director

DATED: September 9, 1997
Trenton, New Jersey