

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BARRINGTON,

Respondent,

-and-

Docket No. CO-H-89-186

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
COUNCIL 71,

Charging Party.

BOROUGH OF BARRINGTON,

Public Employer,

-and-

Docket No. CU-H-89-28

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
COUNCIL 71,

Petitioner.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, in the absence of exceptions, dismisses a Complaint based on an unfair practice charge filed by the American Federation of State, County and Municipal Employees, Council 71 against the Borough of Barrington. The charge alleged that the Borough violated the New Jersey Employer-Employee Relations Act by terminating the court clerk and deputy court clerk. The Chairman also clarifies AFSCME's unit to include the deputy court clerk, but to exclude the court clerk.

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COUNCIL 71,

Petitioner.

Appearances:

For the Respondent-Public Employer, Capehart &
Scatchard, P.A. (Alan R. Schmoll, of counsel)

For the Charging Party-Petitioner,
Emanuel Murray, AFSCME Staff Representative

DECISION AND ORDER

On January 6, 1989, the American Federation of State,
County and Municipal Employees Council 71 ("AFSCME") filed an unfair
practice charge and clarification of unit petition. The charge
alleges that the Borough of Barrington violated the New Jersey
Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,
specifically subsections 5.4(a)(3), (4) and (7),1/ by terminating

1/ These subsections prohibit public employers, their representatives
or agents from: "(3) Discriminating in regard to hire or tenure

the court clerk and deputy court clerk because they advocated the establishment of a negotiations unit. The petition seeks to clarify AFSCME's unit to include the court clerk and deputy court clerk titles.

On March 1, 1989, the charge and petition were consolidated and a Complaint and Notice of Hearing issued. On March 16, the Borough filed an Answer denying it terminated the employees because of protected activity and claiming that both were managerial executives and/or supervisors within the meaning of the Act.

On April 2, 1989, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties were afforded the opportunity to examine witnesses and introduce exhibits. The Hearing Examiner granted the Borough's motion to dismiss the Complaint, but not the petition. The Borough filed a post-hearing brief.

On August 11, 1989, the Hearing Examiner issued his written recommendation. H.E. No. 90-6, 15 NJPER ____ (¶____ 1989). He recommended dismissing the Complaint because no evidence was presented to prove the allegations. He then found that neither employee is a managerial executive but that the court clerk is a supervisor. He recommended inclusion of the deputy court clerk in AFSCME's unit.

1/ (footnote continued from previous page)

of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

The Hearing Examiner served his report on the parties and informed them that exceptions were due August 24, 1989. Neither party filed exceptions or requested an extension of time.


I have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-6) are accurate. I incorporate them here.

Acting pursuant to authority granted to me by the full Commission in the absence of exceptions, I agree that the Complaint should be dismissed and AFSCME's unit clarified to exclude the court clerk but to include the deputy court clerk.

ORDER

The Complaint is dismissed. AFSCME's unit is clarified to exclude the Borough of Barrington's court clerk but to include the deputy court clerk.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
September 19, 1989

H.E. NO. 90-6

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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BOROUGH OF BARRINGTON,

Respondent,

-and-

Docket No. CO-H-89-186

AFSCME COUNCIL 71,

Charging Party.

BOROUGH OF BARRINGTON,

Public Employer,

-and-

Docket No. CU-H-89-28

AFSCME COUNCIL 71,

Petitioner.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Borough of Barrington did not violate the New Jersey Employer-Employee Relations Act by the manner in which certain employees were discharged. The Hearing Examiner granted a motion to dismiss when the Charging Party failed to prove the elements of the Charge.

In the consolidated Clarification of Unit Petition, the Hearing Examiner concluded that the Court Clerk and Deputy Court Clerk were not managerial executives within the meaning of the Act, but that the Court Clerk was a supervisor within the meaning of the Act. The Hearing Examiner therefore recommended that the unit represented by AFSCME be clarified to exclude the Court Clerk but include the Deputy Court Clerk.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 90-6

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BARRINGTON,

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AFSCME COUNCIL 71,

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Petitioner.

Appearances:

For the Respondent-Public Employer
Capehart & Scatchard, P.A.
(Alan R. Schmoll, of counsel)

For the Charging Party-Petitioner
Emanuel Murray, AFSCME Staff Representative

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An Unfair Practice Charge (Charge) and a Petition for Clarification of Unit (Petition) were filed with the Public Employment Relations Commission (Commission) on January 6, 1989 by American Federation of State, County and Municipal Employees, Council #71 (AFSCME). In the Charge, AFSCME alleged that the Borough of Barrington (Borough) violated subsections 5.4(a)(3), (4)

and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act)^{1/} by terminating employees Pat Sullivan and Linda Cooper allegedly because of their exercise of protected activity. In the Petition, AFSCME seeks to clarify its negotiations unit to include the titles Court Clerk (Clerk) and Deputy Court Clerk (Deputy).

An Order Consolidating the Charge and Petition and a Complaint and Notice of Hearing (C-1) were issued on March 1, 1989. The Borough filed an Answer (C-2) on March 16, 1989 denying that it terminated Sullivan and Cooper because they engaged in protected activity, and asserting that both the Clerk and Deputy were managerial executives and/or supervisors within the meaning of the Act and therefore inappropriate for inclusion in AFSCME's unit.

A hearing was conducted on April 2, 1989.^{2/} During the hearing the Borough moved to dismiss the Charge and Petition. The motion was granted regarding the Charge, but denied regarding the

1/ These subsections prohibit public employers, their representatives or agents from: "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

2/ The transcript from the hearing will be referred to as "T."

Petition (T62-T68). The Borough filed a post-hearing brief on June 23, 1989.^{3/}

Based upon the entire record I make the following:

Findings of Fact

Procedural Background

At the commencement of the hearing the parties were advised that AFSCME had the burden of proof in the Charge, but that I had the burden to make the record regarding the Petition (T3-T4). I then instructed the parties that:

...because this is a consolidated matter, we will treat it...more or less as an unfair practice matter requiring the Charging Party to proceed first with the unfair practice elements of the Charge to the extent possible. But if we have a witness who is going to be testifying as to both issues, there is no need to recall a witness at a later time. I want to proceed with each witness as we go with respect to all of the issues. (T4).

The parties made opening remarks. AFSCME alleged that Sullivan and Cooper were terminated in December 1988 because they supported the Union and AFSCME sought their reinstatement and placement in the unit (T8). The Borough denied any anti-union motive for terminating the employees and argued that the titles should not be included in the unit.

^{3/} I received the transcript on May 9, 1989. By letter of that date I notified the parties that the transcript had been received and that post-hearing briefs were due by June 9, 1989. By letter of June 5, 1989 AFSCME requested an extension of time until June 23, 1989, for filing a post-hearing brief. I granted the request applicable to both parties. On June 23rd I received the Borough's brief; AFSCME did not submit a brief.

AFSCME called both Sullivan and Cooper as witnesses and questioned them regarding the duties of the Clerk and Deputy, but despite my procedural instructions, AFSCME never questioned the witnesses about their exercise of protected activity or the circumstances surrounding their termination (T13-T61). When the questioning of those witnesses was completed AFSCME indicated that it had no other witnesses and it rested its case (T61).

Once AFSCME rested, the Borough moved to dismiss the Complaint arguing that AFSCME failed to develop any evidence to support the Charge (T62). In response to the motion AFSCME acknowledged its mistake in not addressing the Charge, but requested another opportunity to question the witnesses regarding the Charge and another opportunity to present an additional witness thereon (T65-T67). I denied AFSCME's request and granted the Borough's motion. No facts were presented to support the allegations in the Charge.

The CU Petition

1. On May 5, 1988, AFSCME filed a Petition for Certification of Public Employee Representative (RO-88-176) seeking to represent all blue and white collar employees employed by the Borough excluding managerial employees, supervisory employees and other designations. The Borough argued that the Clerk and Deputy (as well as other titles) were managerial and/or supervisory employees and not appropriate for inclusion in the unit. The names Pat Sullivan and Linda Cooper, the Clerk and Deputy at that time,

were not on the Employer provided eligibility list. Sullivan and Cooper voted challenged ballots at the election, but the challenges were not determinative, thus their votes were not counted. On June 20, 1988, the Director of Representation certified AFSCME as the majority representative of all blue and white collar Borough employees. The parties were never able to resolve the issue regarding the placement of the Clerk and Deputy in the unit and this Petition ensued.

2. Exhibit R-1, the Barrington Municipal Code, sets forth the duties and responsibilities of the Clerk and Deputy. The Clerk assists the Municipal Court Judge by performing clerical work, speaking to prospective complainants, maintaining court financial records, attending court, handling bail bonds, issuing summonses and other related court matters.

The Deputy works under the direction of the Clerk or Judge, assists the Clerk and Judge by performing clerical work, and performs other duties as required by the Clerk and fills in for the Clerk.

3. Sullivan became Clerk in 1985. She never interviewed prospective employees nor recommended hiring or discipline of an employee (T13-T14, T34, T41). She was never told she could discipline, hire or fire an employee (T43), and she did not control the Deputy's vacation or leave time (T42). She was responsible to make certain that the employee hired to maintain the court sound and recording system (the sound recording monitor) properly performed

that job (T30-T31). It was also her responsibility to make certain the Deputy properly performed her job and to report any problems to the Judge (T33).

4. Cooper was Deputy for about three years and although she worked with Sullivan, she (Cooper) was not aware that Sullivan was her immediate supervisor (T44, T58-T61). Cooper did not interview any employees for hiring, did not recommend any employees be hired, fired or disciplined, and did not evaluate any employees (T45-T46, T55). She was not responsible for the sound system or sound monitor, and when the Clerk was absent, she (Cooper) never supervised anyone (T54, T61).

5. Donna Hill was employed by the Borough as Clerk in January 1989 (T70). She holds a certification for court clerk from Stockton State College (T72). When she was hired she was told she would supervise the Deputy and the sound monitor (T83). Both the Deputy and sound monitor report to her and she directs the Deputy's daily work (T76, T80).

A new Deputy had been hired prior to Hill's employment. Once Hill was hired she evaluated the Deputy's performance over several weeks (T84), and in February 1989 she recommended to the Borough that the Deputy be discharged because of his poor skills and inability to follow directions. The recommendation was followed and the Borough asked the Deputy to resign (T73-T74). Hill did not make any recommendation regarding the hiring of a new Deputy (T90).

In Hill's absence, the new Deputy would assume the Clerk's duties including the supervision of the sound monitor (T88).

ANALYSISThe Charge

Pursuant to N.J.A.C. 19:14-6.8 a charging party has the burden to prove the allegations of the complaint (charge) by a preponderance of the evidence. Here, at the commencement of the hearing, AFSCME was advised of the procedure to present its evidence, yet it failed to present any evidence to support the Charge on the direct presentation of its case. Once AFSCME rested, the motion to dismiss was made; it was then procedurally inappropriate and unfair to give AFSCME another opportunity to present its case on the Charge. Since no evidence was presented to prove the allegations in the Charge, the motion was granted. Thus, I recommend that the Complaint be dismissed.

The Petition

Section 13A-3(f) of the Act defines managerial executives as:

...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,...

Section 13A-5.3 of the Act defines a supervisor as an employee:

having the power to hire, discharge, discipline, or to effectively recommend the same....

See also Op. of Cherry Hill, P.E.R.C. No. 30 (1970).

Neither the Clerk nor the Deputy are managerial executives within the meaning of the Act, but the Clerk is a supervisor within the meaning of the Act and should be excluded from AFSCME's unit.

The Deputy is not a supervisor and is appropriate for inclusion in the unit.

In Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980), the Commission established guidelines to determine whether an employee was a managerial executive. It held

A person formulates policies when he develops a particular set of objectives designed to further the mission 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. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes. 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.

6 NJPER at 508-509.

The Borough argued that Hill formulates and directs the effectuation of policy consistent with Montvale to support a finding that she is a managerial executive. I do not agree. Hill neither formulates nor directs the effectuation of policy to the extent required by Montvale. She merely carries out the duties of her office, takes direction from the Municipal Court Judge and supervises the Deputy and sound monitor. The performance of her duties does not require her to formulate policy and she does not exercise independent judgment that broadly affects the governmental purpose.

Hill's discretion is limited. She does not have independent authority to hire or discharge employees, she does not negotiate on behalf of the Borough and she was not even given the opportunity to make a recommendation about the selection of her own Deputy. The Deputy's authority is even more limited than the Clerk's. There was no evidence that she is involved in policy formulation or its effectuation. In sum, the duties of the Clerk and Deputy do not rise to the level of a managerial executive.


Although Hill is not a managerial executive, she is a supervisor within the meaning of the Act. On a regular basis she directs the Deputy and sound monitor, she evaluates them, and can, and has, made an effective recommendation regarding discharge.

The Deputy, however, does not have supervisory authority. There was no evidence that the Deputy has the authority to hire, discharge, discipline or effectively recommend the same, or that any Deputy has ever exercised such authority. Although the Deputy temporarily assumes the Clerk's responsibilities in her absence, including temporary supervision of the sound monitor, she is only acting in a caretaker role and does not, and has not, exercised any independent supervisory authority. The bare possession of supervisory authority on a temporary basis, in the absence of some actual exercise of that supervisory authority with some regularity, is not enough to sustain a claim of supervisory status. Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358, 360 (1976). See also Union County Board of Social Services, D.R. No. 87-29, 13 NJPER 509 (118190 1987).

Accordingly, based upon the above findings and analysis, I make the following:

Recommendations

1. I recommend that the Complaint in CO-H-89-186 be dismissed.
2. I recommend that AFSCME's unit be clarified to exclude the Court Clerk but to include the Deputy Court Clerk.


Arnold H. Zudick
Hearing Examiner

Dated: August 11, 1989
Trenton, New Jersey