

D.R. NO. 86-24

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

In the Matter of

BOROUGH OF LEONIA,

Public Employer,

-and-

DOCKET NO. RO-86-110

LOCAL 29, RETAIL AND WHOLESALE  
DISTRIBUTIVE WORKERS UNION,  
AFL-CIO,

Petitioner.

Synopsis

The Director of Representation finds that the construction code official/zoning officer is neither a managerial executive nor a supervisor within the meaning of the Act, and therefore she is eligible to vote in an election with other municipal, white-collar employees. The Director orders an election to be conducted among the employees in the unit, including one professional employee, the Public Health Nurse, who is eligible to vote a professional option ballot.

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION  
DIVISION OF REPRESENTATION AND UNFAIR PRACTICES

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Public Employer,

-and-

LOCAL 29, RETAIL AND WHOLESALE  
DISTRIBUTIVE WORKERS UNION,  
AFL-CIO,

DOCKET NO. RO-86-110

Petitioner.

Appearances:

For the Public Employer:  
McGuire and Regan, Esqs.  
(Robert Regan, of counsel)

For the Petitioner  
Reitman, Parsonnet, Maisel & Duggan, Esqs.  
(Jesse Strauss, of counsel)

DECISION AND DIRECTION OF ELECTION

On February 18, 1986, Local 29 R.W.D.S.U., AFL-CIO ("Local 29") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission ("Commission") seeking to represent certain white collar employees of the Borough of Leonia ("Borough"). The Borough declined to consent to an election among the employees in the unit sought by the Petitioner.

I have caused an administrative investigation to be conducted into the issues raised by the parties to determine the facts. On the basis of the administrative investigation, I make the following findings:

1. The disposition of this matter is properly based upon the administrative investigation herein, it appearing that no substantial and material factual issues exist which may more appropriately be resolved after an evidentiary hearing. (See N.J.A.C. 19:11-2.6).

2. The Borough of Leonia is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") and is the employer of the employees who are the subject of this petition. The employees are not represented for purpose of collective negotiations by any employee organization.

3. Local 29 filed a valid petition, accompanied by an adequate showing of interest, seeking to represent a unit described in the petition as:

Included: All white collar employees in the Borough in the following Departments: Recreation, Police, Board of Health, Administration, Finance and Municipal Court.

Excluded: All police, all blue collar employees and all managerial, confidential and supervisory employees within the meaning of the Act.

4. On March 5, 1986, the assigned staff agent convened an informal conference during which the parties advanced their respective positions concerning the petitioned-for unit. The parties have agreed that the appropriate unit shall be defined as follows:<sup>1/</sup>

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<sup>1/</sup> The parties agreed that the following titles are appropriate for inclusion in the unit: Senior Account Clerk II's, Principal Account Clerk II's, Deputy Court Clerk, Community Development Service Clerk, Purchasing Clerk, Part-Time Clerk

Included: All full-time and regularly employed part-time white collar employees employed by the Borough of Leonia.

Excluded: Police, managerial executives, supervisors within the meaning of the Act, confidential employees, all blue-collar employees, casual employees, employees of the Leonia Public Library.

Further, the parties have agreed that employees who work less than an average of 20 hours per week on a regular and recurring basis are not appropriate for inclusion in the unit. The parties have also agreed that the public health nurse is a professional employee as defined by the Commission's rules (N.J.A.C. 19:10-1.1), and therefore, pursuant to N.J.S.A. 34:13A-5.3, she is entitled to vote a professional option to decide whether she wishes to be included in the unit with nonprofessional employees.

5. The parties disagree on whether Gwen Thomas is appropriate for inclusion in the unit. Ms. Thomas holds the dual status of construction code official and zoning officer. The Borough maintains that, as head of the community development department, she is a managerial executive and a supervisory

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1/ Footnote Continued From Previous Page

(Tax Collector's Office), Part-Time Clerk (Municipal Court), Welfare Director/Clerk to the Borough Clerk, Public Health Nurse; the parties agreed that the following titles met one or more of the statutory excluded categories: Secretary to Township Administrator, Secretary to Chief of Police, Supervisor of Accounts/Deputy Tax Collector, Secretary to Recreation Superintendent, Township Administrator, Tax Assessor, Tax Collector, Court Clerk, Borough Clerk, Recreation Director, Assistant Recreation Director.

employee. The Borough therefore, requests that the Commission render a determination as to Thomas' eligibility prior to conducting an election. Local 29 disagrees that the employee should be excluded from the unit, but requests that a determination on the issue should not serve to delay an election.

At the informal conference conducted by the assigned staff agent and by submissions dated March 7, 1986, the Borough asserted the following facts with regard to Ms. Thomas' duties:

a) She holds the title of construction code official by appointment of the mayor and Borough Council, pursuant to N.J.A.C. 5:23-2.1 et seq., the State Uniform Construction Code Act.

b) As construction code official, Thomas is head of the community development department. As a department head, she reports to the township administrator. She has one full-time clerical employee assigned to her department. She directs the work of that employee. The Borough also employs certain outside contractors on an hourly basis, as needed, to fill the capacity of electrical sub-code official, plumbing sub-code official, and fire sub-code official. Thomas is responsible for overseeing their work and, pursuant to N.J.A.C. 5:23-2.1, she has the authority by statute to make a final determination in the event of inconsistent determinations by the various sub-code officials.

c) As the primary person responsible for enforcement of the Construction Code, she makes on-site inspections, conducts tours of the town, interfaces with the fire department on fire hazard

violations. With the borough engineer and borough attorney, he reviews and approves plans, issues permits and certificates of occupancy. She also represents the Borough in local and county court, issues summonses, and attends planning board meetings and site plan meetings.

d) Ms. Thomas also holds the position of zoning officer, which is a year-to-year appointment. In this capacity, she acts as secretary to the Board of Adjustment, seeks out and issues summonses to all illegal conversions, reviews and evaluates site plans to assure compliance with prescribed requirements and reviews zoning variation requests.

e) By letter dated April 23, 1986, we reviewed the positions of the parties, including the factual allegations proffered by the Borough. I advised the parties that under the statute and the relevant case law, there appeared to be no factual basis to conclude that Ms. Thomas's position with the Borough is either managerial or supervisory within the meaning of the Act., and that the facts presented to date do not demonstrate a need for a formal evidentiary hearing. That letter afforded the parties seven days to present additional statements of position together with relevant factual assertions. Subsequently, the Borough responded with additional statements of position dated April 25, 1986 and May 1, 1986, which, in sum, reiterated the facts the Borough previously asserted and made legal arguments. It also alleged for the first time that Thomas is a supervisor because "She may and in fact has

ruled that certain individuals be hired, discharged or disciplined.... She also has responsibility for evaluating employees under her jurisdiction, including the sub-code officials and the department secretary." In support of all of its allegations of fact, the Borough relies heavily upon a description of duties submitted by Ms. Thomas herself.

#### Managerial Executive Issue

N.J.S.A. 34:13A-3(f) 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, except that in any school district this term shall only include the superintendent or other chief administrator, and the assistant superintendent of the district.

In In re Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507, 508-509 (¶11259 1980), the Commission elaborated on the types of responsibilities necessary for a finding of managerial executive status:

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 for 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 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.

Id. at 509.

The Borough distinguishes the Construction Code Official in Leonia from the findings in In re Township of Clark, P.E.R.C. No. 85-105, 11 NJPER 283 (¶16104 1985), wherein the Commission found that the construction official in that town is neither a managerial executive nor a supervisor within the meaning of the Act. The Borough notes that unlike the Construction Code Official in Clark, Ms. Thomas is not under the jurisdiction of a department head, but rather, is the head of the Department of Community Development. The Borough notes that, as head of the department, Thomas is responsible for directing personnel and is required to make rulings whenever there are inconsistencies or discrepancies between determination made by the various sub-code officials. However, the status of municipal department head, in and of itself, does not automatically render the employee a managerial executive. Thomas' position on the organizational table shows that she reports to the Borough Administrator<sup>2/</sup> who, in turn, reports to the Mayor and Council. Thomas does not formulate or effectuate management policies.

There is no evidence presented which suggests that the construction code official possesses the kind of independent

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2/ The parties have agreed that the Borough Administrator, as the chief executive officer, is a managerial executive.



discretion or authority as outlined in Montvale, supra. In fact, the policies (construction and zoning) that she is responsible for enforcing, are set forth in various statutes and are regularly created by a regulatory (Zoning Board of Adjustment) body. The fact that she may over-rule a sub-code official's determination is not an indication of managerial executive authority. She has the authority to make such rulings pursuant to the appropriate statute. Moreover, the sub-code officials are not public employees within the Act.

#### Supervisory Status Issue

The Act defines a supervisor as one having the power to hire, discharge, discipline or effectively recommend the same, N.J.S.A. 34:13A-5.3. The Borough alleges that Thomas directs the work of one clerical employee and oversees the activities of sub-code officials. However, the work relationship with the Borough of the subcode officials is too irregular for them to be eligible for membership in the bargaining unit. The Commission has previously held that overseeing work product is not dispositive of supervisory status as our Act defines that term. In re County of Middlesex, D.R. No. 79-8, 4 NJPER 396 (¶ 4178 1978).

In its most recent submission, the Borough suggests for the first time that Thomas "may and has ruled on hirings, discharge or discipline within her department...". This is not a specific allegation of fact, but rather is a conclusory statement that parrots the statutory criteria for determining supervisory status. The Borough makes no specific allegations of fact as to whom she has

hired, whom she has disciplined, or whom she has discharged or when such actions occurred. The Commission looks beyond the bare assertion of such claims of authority and looks to evidence of those responsibilities being exercised on a regular basis. In re Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358 (1976). Even assuming Thomas has the authority to hire, discharge and discipline, there are no facts proffered to demonstrate that such authority has been regularly exercised. Moreover, by the Borough's own allegations, only the Mayor and Council is vested with the authority to hire or discharge employees. Additionally, while the Borough now asserts that Thomas is responsible for the evaluation of her departments' employees, there is only one employee under her jurisdiction who possesses a sufficient regularity of employment to be considered a public employee - that being the clerk. The sub-code officials' employment relationship with the Borough is too ephemeral to be classified as public employees. There is no evidence in this record to establish a nexus between any evaluation Thomas has performed (or might perform) as to the Community Development Clerk and that clerk's terms and conditions of employment.

Lastly, nothing contained in the statement prepared by Thomas describing her responsibilities (on which the Borough relies in support of its claim) indicates that she regularly exercises authority to hire, discharge or make effective recommendations regarding same. Thomas' statement shows merely that she directs the activity of employees in her department.

Based upon the foregoing, I find that the petitioned-for unit, including the construction code official/zoning officer, is appropriate for collective negotiations and hereby order that an election be held therein.

DIRECTION OF ELECTION

Accordingly, I direct that a mail ballot election be conducted among the employees described above, pursuant to N.J.S.A. 34:13A-2.6(b)(3).

Those eligible to vote are the employees set forth above who were employed during the payroll period immediately preceding the date of this decision, including employees who did not work during that period because they were out ill, on vacation, temporarily laid off, or in military service. Employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date are ineligible to vote.

I direct the Public Employer to simulataneously file with me and with the Petitioner, an eligibility list consisting of an alphabetical listing of the names of all eligible voters together with their last known mailing addresses and job titles, pursuant to N.J.A.C. 19:11-9.6. The Public Employer shall also file with me an accompanying proof of service of the eligibility list upon the Petitioner. I must receive the eligibility list no later than ten (10) days prior to the date of the mailing of the ballots. I shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

The professional employee(s) (Public Health Nurse) shall vote on whether she wishes to be included in a unit with non-professional employees (all other eligible voters). Should the professional employees vote in favor of inclusion with non-professional employees, then her ballot will be tallied together with non-professional employees, and a single certification shall issue covering professional and non-professional employees together.

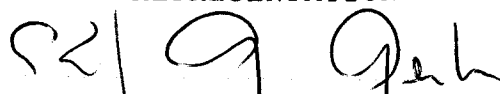
If the professional employee votes against inclusion in a unit with non-professional employees, then her ballot shall not be counted with regard to the choice of union representation, and a certification shall issue covering only non-professional employees.

Ballots shall be mailed by the Commission to the eligible voters on June 13, 1986. Ballots must be received by the Commission by 9:00 a.m. on June 30, 1986. Ballots shall be counted by the Commission at 9:30 a.m. on June 30, 1986.

Those eligible to vote shall vote on whether they wish to be represented for the purpose of collective negotiations by Local 29, R.W.D.S.U., AFL-CIO.

The exclusive representative, if any, shall be determined by the majority of valid ballots cast by the employees voting in the election. The election shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION

  
Edmund G. Gerber, Director

DATED: May 27, 1986  
Trenton, New Jersey