

P.E.R.C. NO. 90-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COUNTY DEPARTMENT OF
SOCIAL SERVICES, DIVISION OF WELFARE,

Public Employer,

-and-

Docket No. CU-H-89-3

AMERICAN FEDERATION OF STATE,
COUNTY, AND MUNICIPAL EMPLOYEES,
COUNCIL 71, Local 2302,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission clarifies a unit of non-supervisory employees of the Atlantic County Department of Social Services, Division of Welfare to include the new title of case manager, REACH. The unit is represented by the American Federation of State, County, and Municipal Employees, Council 71, Local 2302.

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Appearances:

For the Public Employer, Pachman & Glickman
(Evelynn Caterson, of counsel)

For the Petitioner, Emanuel Murray, Staff Representative

DECISION AND ORDER

On August 29, 1988, the American Federation of State, County, and Municipal Employees, Council 71, Local 2302 ("Council 71") filed a petition for clarification of unit. Council 71 seeks to include the new title of case manager, REACH in its unit of non-supervisory social service employees of the Atlantic County Department of Social Services, Division of Welfare ("County"). The County opposes inclusion of the case managers, claiming that they are supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On September 15, 1988, a Notice of Hearing issued. On November 3, 1988 and March 6, 1989, Hearing Officer Elizabeth J.

McGoldrick conducted a hearing.^{1/} The parties examined witnesses and introduced exhibits. Council 71 argued orally and both parties filed post-hearing briefs.^{2/}

On July 13, 1989, the Hearing Officer issued her report. H.O. 90-1, 15 NJPER ___ (¶ ___ 1989). She concluded that the case managers were supervisors within the meaning of the Act.

On August 3, 1989, after an extension of time, the County filed exceptions to certain dicta in the Hearing Officer's analysis. It claims that the Act does not require that supervisory duties be exercised, but only that the supervisors have the power to do so. It also claims that power to discipline is sufficient to establish a conflict of interest under W. Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971).

On August 7, 1989, after an extension of time, Council 71 filed exceptions. It disagrees with the Hearing Officer's conclusion that a majority of the case managers effectively recommended the hiring of the clerk typist and data entry machine operator. It also claims that the hiring was not done at the bottom of the chain of command and that a management specialist's decision not to review the case managers' recommendation does not undercut the need for his review. Council 71 attached four documents not in the record.

^{1/} When the County requested that additional information be included in the record, the Hearing Officer reopened the record and conducted the second day of hearing.

^{2/} This matter was transferred to us pursuant to N.J.A.C. 19:11-8.8.

On August 11, 1989, the County filed a reply. It objects to the submission of two Council 71 attachments and argues that a case cited by Council 71 is irrelevant.

We have reviewed the record. The Hearing Officer's findings of fact (H.O. at 2-5) are accurate. We incorporate them here with these additions.^{3/}

The day before the hearing started, the case managers were officially informed that they would collectively be interviewing applicants for clerk typist and data entry machine operator. At the first day of hearing, the deputy director of welfare explained that after the interviews, the case managers would discuss their recommendations with Forrest Gilmore, a management specialist for the REACH program. Gilmore would ask appropriate questions, if necessary, and he and Dalila Goven, a supervisor employment specialist for the REACH program, would assist the case managers in narrowing the choices (1T59). At the second day of hearing, after the interviews had taken place, Gilmore testified that the case managers forwarded to him a recommendation signed "case managers", but not by any individual case managers. He sent that recommendation through channels for processing (2T30, 2T52, 2T53). The two people recommended were hired. He also testified that each case manager now has "supervisory" responsibility on a rotating basis for a two week period (2T24).

^{3/} We will not consider any documents not in the record before the Hearing Officer.

We have derived our definition of supervisor from N.J.S.A. 34:13A-5.3: those who hire, discharge, discipline or effectively recommend the same. We are not convinced, after a thorough review of the record, that these case managers are supervisors within the meaning of the Act. Although they were involved in the hiring of unit employees, that involvement does not rise to the level of effective recommendation. First, they acted collectively. There are now nine case managers. They interviewed in pairs and made one joint recommendation. The record does not indicate whether they acted by consensus, by majority rule, or by some other means. No individual case manager appears to be responsible for the hiring recommendation. Second, the deputy director explained that the management specialist and the supervisor employment specialist would have a role in the hiring process. These case managers are too far removed from the ultimate decision makers for us to view their collective input as nine effective recommendations commanding supervisory designation.

As a general matter, we do not dispute that under certain circumstances supervisory duties need not have already been exercised before we will find supervisory status. But this case is unusual. The County has offered a plan where each case manager will supervise for "two weeks" and then the authority will pass to another. We are unfamiliar with such an arrangement and will not speculate as to just how these employees will discharge, discipline or effectively recommend the same. We do not yet know whether the

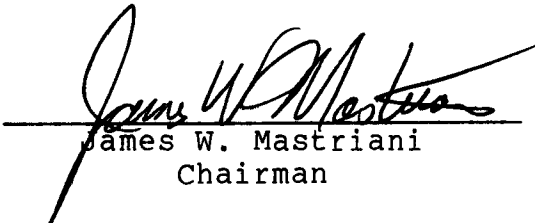
alleged supervisors, during their two week tenure, will be able to independently recommend discipline, whether it will have to be by consensus, or whether a supervisor employment specialist or management specialist will have to independently evaluate discipline decisions. We cannot speculate on how the relationship between the nine case managers and the two employees whom they will allegedly supervise will operate in practice.

Under all these circumstances, we order that the case managers be included in Council 71's unit.

ORDER

Council 71's unit of non-supervisory employees of the Atlantic County Department of Social Services, Division of Welfare is clarified to include case managers, REACH.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Wenzler, Johnson, Bertolino and Reid voted in favor of this decision. None opposed. Commissioner Ruggiero abstained. Commissioner Smith was not present.

DATED: Trenton, New Jersey
September 29, 1989
ISSUED: October 2, 1989

H.O. NO. 90-1

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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AMERICAN FEDERATION OF STATE,
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COUNCIL 71,

Petitioner.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that the Commission dismiss a petition seeking to add the Case Managers, R.E.A.C.H. to a broad based non-supervisory unit, represented by AFSCME Council 71, Local 2302, employed by Atlantic County Department of Social Services, Division of Welfare. The Hearing Officer concluded that the case managers are supervisors within the meaning of the New Jersey Public Employer-Employee Relations Act and should be excluded from the petitioner's unit.

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

H.O. NO. 90-1

STATE OF NEW JERSEY
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Appearances:

For the Public Employer Pachman & Glickman
(Evelynn Catterson, of counsel)

For the Petitioner AFSCME, Council 71
Emanuel Murray

HEARING OFFICER'S RECOMMENDED
REPORT AND DECISION

On August 29, 1988 the American Federation of State, County, and Municipal Employees, Council 71, Local 2302 ("Council 71") filed an amended Petition for Clarification of Unit with the Public Employment Relations Commission ("Commission"), seeking to include the new title Case Manager, REACH ("case manager") in its unit of non-supervisory social service employees, employed by the Atlantic County Department

of Social Services, Division of Welfare ("County").^{1/} The County objects to including the case managers in Council 71's unit because it alleges the title is supervisory within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A et seq., as amended ("Act"). Council 71 asserts that the title is not supervisory.

A Notice of Hearing was issued on September 15, 1988. I conducted hearings on November 3, 1988 and March 6, 1989.^{2/} The parties examined and cross-examined witnesses, presented evidence, and argued orally. The parties filed post-hearing briefs by April 28, 1989.

Based on the entire record I make the following:

FINDINGS OF FACT

1. The County is the employer of the case managers. The County uses State Department of Personnel (formerly Civil Service) testing and eligibility lists for hiring. When no lists are available the County recruits and hires on its own. Final hiring, discharge, and disciplinary authority resides in the County personnel department and

^{1/} By a petition filed on July 21, 1988 Council 71 sought the inclusion of the child support worker and child support specialist. In a letter following the Notice of Hearing, September 23, 1988, the Director of Representation dismissed that part of the petition concerning the child support specialist. On November 3, 1988, Council 71 and the County entered into a settlement agreement concerning the child support worker, and the petition was withdrawn as to that title. The only title remaining in dispute is the case manager.

^{2/} On January 10, 1989 the County requested that additional information be included in the record; this request was treated as a motion to reopen the record; this motion was granted, and a second day of hearing was held on March 6, 1989.

the County departmental directors (1T56, 1T57, 1T122, 2T46, 2T47, 2T56-2T61).^{3/}

2. The County and Council 71, Local 2302 have a collective negotiations agreement effective January 1, 1986 through December 31, 1988, covering a broad-based unit of non-supervisory employees (J-1).^{4/}

3. REACH is a State mandated, County administered program designed to help welfare clients by providing support services such as transportation and child care. In Atlantic County the REACH program, and the REACH case manager positions were created in Spring 1988 (1T15-1T16). Rhonda Jones, Tyrone Page, Joyce Shepherd, Patricia Williams and Daniel D'Imperio were hired as case managers on April 18, 1988 (1T51-1T54). Four additional case managers -- George Lowery, Bonnie Gutman, Carl Kirshmeyer, and Debra Carmichael -- were hired on February 14, 1989. The REACH unit consists of one management specialist, Forrest Gilmore, who is in charge of the unit; two supervising employment specialists, Dale Lloyd and Dahlila Govans, who supervise the nine case managers; one data entry machine operator ("DEMO,") Gelaine Williams; and one clerk-typist, Laverne Williams (1T52-1T54, 2T49). The data entry machine operator and clerk typist are included in Council 71's unit (J-1).

^{3/} The transcripts will be referred to as "1T," hearing November 3, 1988; and "2T," hearing March 6, 1989.

^{4/} "C" refers to Commission exhibits; "J" refers to joint exhibits; "R" refers to County exhibits; "P" refers to Council 71 exhibits.

4. The County plans to have the case managers supervise REACH unit support staff (1T32, 1T51, 1T59, 1T68, 1T69, R-5). All nine case managers attended a training session during February and March 1989, which included a segment on supervisory skills (2T21, 2T22, 2T59). The case managers have been encouraged to help develop the REACH unit. They prepared a staffing plan setting forth their recommendations as to what type of positions are necessary to assist them in providing REACH services (1T42, 1T44, 1T93, 1T110, 1T120).

5. The five case managers who were hired initially participated jointly in hiring the clerk typist and DEMO (2T36, 2T24). The County's personnel office provided a group of 26 applications which the case managers screened. The case managers selected ten applicants for interviews. Applicants were interviewed by two case managers at a time. All five case managers interviewed all ten applicants during a two-day period (2T22-2T24, 2T48). It is not clear in what manner or sequence the screening and interviewing occurred, but the credible testimony was that the choice of ten to be interviewed and two to be hired were joint decisions (2T24). The case managers then sent their recommendation to Gilmore, who without further independent review, forwarded it to the Division's administrative supervisor for personnel for processing (2T30, 2T52, 2T53). Gilmore did not participate in the screening or hiring of these positions in any other way. The two applicants chosen by the group were hired (2T24). The clerk typist began work on January 9, 1989 and the DEMO began shortly after that (2T47, 2T48, 2T51). No other REACH employees have been hired. The

four recently hired case managers have not participated in the hiring process (2T22-2T24).

6. The five case managers who interviewed the REACH unit support staff jointly supervise them on a rotating basis (2T24-2T26).^{5/} Supervisory responsibilities include leave approval, performance rating, work assignment and discipline (2T30, 2T35). To date, no performance evaluation, disciplinary or discharge actions have been initiated or carried out by any case managers (1T59, 1T61, 1T102, 1T103, 1T115, 2T35).^{6/}

ANALYSIS AND RECOMMENDATION

Council 71 seeks to include case managers in its non-supervisory unit. The County objects to their inclusion because it asserts they are supervisors within the meaning of the Act. The primary issue here is whether the case managers are supervisors within the meaning of the Act. I conclude that they are and should be excluded from petitioner's unit.

Supervisory employees cannot be placed in units with non-supervisory employees except in certain circumstances, not present

^{5/} The four newer case managers were still in a training period at the time of the hearing in March 1989, and were not at that time assigned to the rotating supervision of the two clerical employees.

^{6/} Gilmore testified that disciplinary action paperwork was in the process of being prepared by the case managers. I cannot, however, rely on this testimony as proof case managers effectively recommend discipline because no other corroborating evidence or information about the case managers' role in the process was offered either on direct or cross-examination.

here. N.J.S.A. 34:13A-5.3. This subsection provides, in relevant part:

"...nor, 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 non-supervisory personnel to membership..."

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 (1970). Here, the County retains the final authority to hire, discharge and discipline. Thus, the critical question is whether the case managers have the power to "effectively recommend" the hiring, discipline or discharge of other employees. "Effective recommendation" occurs when the recommendation is adopted without independent review and analysis by a higher level of authority. See Teaneck Bd. of Ed., E.D. No. 23 (1971); Borough of Avalon, P.E.R.C. No. 84-108, 10 NJPER 207 (¶15102 1984).

The County is a "civil service employer" and uses the state Department of Personnel's job classification and testing procedures to assign job titles and to hire employees. However, when no official eligibility lists exist, the County delegates the solicitation, screening, interviewing and selection of employees to its managers and supervisors.

Here, case managers were involved in the hiring of unit employees. Both the clerk typist and DEMO, hired in early 1989, were interviewed by five case managers. The group forwarded a joint recommendation to the REACH unit supervisor, who, without further review, forwarded the recommendation to the County officials responsible for final hiring decisions. The two applicants selected by the case managers group were then hired. Although not all of the case managers now in the unit participated in the process, the majority of the group did. The entire group's participation is not necessary to conclude that case managers as a group have effective recommending power in hiring. The four most recently hired case managers have not participated in hiring any unit employees because no employees have been hired since they joined the REACH staff. The case managers work is undifferentiated within the title. This is evidenced by the shared planning, screening, and interviewing of job applicants, and rotation of authority over the support staff.

Council 71 asserts that the case managers have not exercised any effective recommendation in hiring, discipline, or discharge.^{7/}

^{7/} In Somerset Cty. Guidance Center, D.R. No. 77-4, 2 NJPER 358, 360 (1976), we noted:

[T]he bare possession of supervisory authority without more is insufficient to sustain a claim of status as a supervisor within the meaning of the Act. In the absence of some indication in the record that the power claimed possessed is exercised with some regularity by the employees in question, the mere "possession" of the authority is a sterile attribute unable to sustain a claim of supervisory status.

The facts here do not support Council 71's claim. A majority of the case managers did effectively recommend the hiring of the REACH clerk typist and DEMO. Their choice was not independently reviewed by anyone. This constitutes effective hiring. If experience shows that case managers do not make similar effective recommendations in hiring, discipline or discharge, or that these duties are not exercised regularly enough to be effective under Somerset, then Council 71 may file a new petition based upon that experience. However, it appears that case managers have made a recent effective recommendation in hiring, and have met the statutory definition of a supervisor. See also Cty. of Cumberland, P.E.R.C. No. 89-93, 15 NJPER 251 (¶20101 1989).

Although the case managers have been delegated the authority to recommend discipline and discharge of the clerk typist and DEMO, they have never had an occasion to exercise that authority.(1T59, 1T61) However, the rotating supervision by case managers over clerical employees supports the assertion that case managers would make effective recommendations about disciplinary action if necessary. I infer that the only reason the four most recently hired case managers have not been assigned to the rotating supervision schedule is because they are new, and that the County intends to assign them the same responsibilities as the other case managers.^{8/}

^{8/} Consideration of the issues of effective recommendation of discharge and discipline is not necessary to the conclusion already reached here, that these employees meet the statutory definition of a supervisor by their effective recommendation in hiring.

The County argues that the case managers' role with respect to evaluation, work assignment, and control of leave puts them in a potential conflict of interest with the DEMO and clerk typist sufficient to justify exclusion from petitioner's unit.^{9/} Effective recommendation of discipline may be found where an employee has primary responsibility for evaluating and such evaluations are instrumental in other personnel actions. Borough of Avalon, P.E.R.C. No. 84-108, 10 NJPER 207 (¶15102 1984); Roselle Park Bd. of Ed., P.E.R.C. No. 87-80, 13 NJPER 73 (¶18033 1987). Evaluations alone, however, do not necessarily create a conflict of interest sufficient to exclude the evaluator from a unit. See, e.g., Roselle Park Bd. of Ed., P.E.R.C. No. 87-80, 13 NJPER 73 (¶18033 1987). There is no evidence that the performance evaluations to be given here will be instrumental in effecting other personnel actions such as pay increases, retention, or promotions. Accepting that case managers will evaluate the support staff here, I cannot conclude this is evidence of impermissible conflict of interest because there is no evidence these evaluations are tied to other personnel actions. This

^{9/} The principles of conflict of interest were explained by the New Jersey Supreme Court in Bd. of Ed. of W. Orange v. Wilton, 57 N.J. 404 (1971):

If performance of the obligations or powers delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential conflict between the interest of a particular supervisor and the other included employees, the community of interest required for inclusion of such supervisors is not present. 57 N.J. at 425-426.

does not affect the finding that case managers are supervisors under the Act.

Based upon the entire record and the foregoing discussion I make the following:

CONCLUSION AND RECOMMENDATIONS

1. The case managers, REACH employed by Atlantic County Department of Social Services, Division of Welfare, are supervisors within the meaning of the Act and should be excluded from the non-supervisory unit represented by AFSCME, Council 71, Local 2302.

Accordingly, I recommend the Commission dismiss the petition.

Elizabeth J. McGoldrick
Hearing Officer

DATED: July 13, 1989
Trenton, New Jersey