

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

In the Matter of

COUNTY OF MIDDLESEX,

Public Employer,

-and-

MIDDLESEX COUNTY PARKS AND ROADS
DEPARTMENT SUPERVISORS ASSOCIATION,

DOCKET NO. RO-77-122

Petitioner,

-and-

MIDDLESEX COUNCIL #7, NEW JERSEY
CIVIL SERVICE ASSOCIATION,

Intervenor.

SYNOPSIS

The Director of Representation dismisses a Petition for Certification of Public Employee Representative seeking the severance of certain Parks Department Foremen and other similar employees from a countywide blue and white collar collective negotiations unit and the creation of a separate collective negotiations unit comprised of these employees. The Director determines, in agreement with the findings and recommendations of the Hearing Officer, that the petitioned-for employees are not supervisors within the meaning of the Act and that the evidence does not demonstrate a substantial potential for conflict of interest with other unit employees to warrant their severance from the certified countywide negotiations unit.

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Appearances:

For the Public Employer,
Mr. William Jackson, County Personnel Department

For the Petitioner,
Robert M. Washburn, Esq.,

For the Intervenor,
Fox and Fox, Esqs.
(David I. Fox, of Counsel)

DECISION

A Petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission (the "Commission") on January 25, 1977, by the Middlesex County Parks and Roads Supervisors Association (the "Petitioner") with

respect to a proposed collective negotiations unit consisting of all foremen, assistant foremen, the golf course manager and his assistant employed by the County of Middlesex (the "County"). Middlesex Council #7, New Jersey Civil Service Association (the "CSA"), the certified representative of a collective negotiations unit including the personnel in the unit proposed by the Petitioner, is an intervenor in the instant proceeding. Pursuant to a Notice of Hearing, hearings were held before Commission Hearing Officer, James F. Schwerin, on September 27, October 28 and December 6, 1977, at which all parties were afforded the opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. Although a representative appeared on behalf of the County, the County did not state a position in this matter and did not take an active role in the proceedings. Post-hearing briefs were submitted by Petitioner and CSA by February 15, 1978. The Hearing Officer issued his Report and Recommendations on March 16, 1978. Petitioner filed exceptions to the Hearing Officer's Report on March 29, 1978. The CSA filed a letter response in answer to Petitioner's exceptions on April 12, 1978.

Based upon the entire record in this matter including the transcripts, briefs, exceptions, and the response to the exceptions, the undersigned finds and determines as follows:

1. The County of Middlesex is a Public Employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., as amended (the "Act"), is the employer

of the employees involved herein, and is subject to the Act's provisions.

2. The Middlesex County Parks and Roads Department Supervisors Association and Middlesex Council #7, New Jersey Civil Service Association are employee organizations within the meaning of the Act and subject to its provisions.

3. A Petition for Certification of Public Employee Representative having been filed, and the incumbent employee organization having objected to said Petition, there exists a question concerning the representation of public employees and the matter is properly before the undersigned for a determination.

4. Since 1970 CSA has been the certified representative of a unit of all employees in the Parks, Highway and Bridge and Property Departments, to and including road foremen level, but excluding, among others, supervisors within the meaning of the Act. Petitioner seeks to sever from this unit roads and park foremen, assistant foremen, the golf course manager and his assistant on the grounds that employees in these titles are supervisors, or in the alternative, their duties create a substantial potential conflict of interest with other unit members.

5. The Hearing Officer recommended dismissal of the Petition, finding that the titles in question are not supervisors within the meaning of the Act, N.J.S.A. 34:13A-5.3, and finding the absence of any conflict of interest which would warrant a severance under the standards enunciated in Board of Education of West Orange

v. Elizabeth Wilton, et al., 57 N.J. 404 (1971). Additionally, the Hearing Officer recommended the rejection of CSA's claim that "established practice", pursuant to N.J.S.A. 34:13A-5.3, warrants continuation of the present unit should the foremen be found to be supervisors.

Petitioner's exceptions dispute the Hearing Officer's recommended findings that the disputed titles are not supervisors within the meaning of the Act and that there is no conflict of interest as defined in Wilton, supra. The undersigned has reviewed these exceptions and finds them to be without merit.

The "supervisory" duties ascribed to some disputed titles by Petitioner are essentially allegations and unsupported in the record by examples of the regular exercise of such duties. ^{1/} The undersigned agrees with the Hearing Officer and adopts his findings and conclusions as to this issue substantially for the reasons cited by him in his Report.

The undersigned also agrees with the Hearing Officer that in light of the successful seven year negotiations relationship

^{1/} Testimony on behalf of Petitioner concerning the ability of foremen to recommend the hiring of probationary employees, discipline other employees, etc., was vague in nature and cited few, if any, specific examples citing names, dates, and specific action taken. Further, undisputed testimony shows that such matters are governed by applicable Civil Service procedures in which Petitioner admits no direct role. The record reveals that the Parks Department foreman is not involved in a required formal step in the contractual grievance procedure nor does he play a significant role in the interpretation of the collective negotiations agreement on behalf of the employer. The undersigned finds that these and related matters were properly addressed by the Hearing Officer in his Report. The record evidence in its entirety fails to illustrate real supervisory authority (i.e., the ability to hire, discharge or discipline or effectively recommend same) on the part of the Roads Department Foremen.

between the County and CSA, the Petitioner's arguments speculating as to a potential for a substantial conflict of interest are too remote to require a determination in favor of severance. Of special significance is the fact that the employer is content with the existing unit composition and does not allege that the unit structure has created a divided loyalty problem, interfering with the proper administration of the department. ^{2/}

Based upon the foregoing and having completely reviewed the record and the Petitioner's exceptions, the undersigned adopts the Hearing Officer's findings of fact and conclusions of law. ^{3/} Accordingly, the instant Petition for Certification of Public Employee Representative is hereby dismissed.

BY ORDER OF THE DIRECTOR


Carl Kurtzman, Director

DATED: September 14, 1978
Trenton, New Jersey

^{2/} The Petitioner's reference to a claimed unit "sick-out" in 1974 or 1975 (T. 12/6/77 pp. 78-81) is devoid of any assertion or testimony alleging coercion or intimidation of foremen resulting in a test of loyalty between fellow unit members and the County.

^{3/} In view of this finding the undersigned finds it unnecessary to address the Intervenor's additional arguments concerning "established practice."

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MIDDLESEX COUNCIL #7, NEW JERSEY
CIVIL SERVICE ASSOCIATION,

Intervenor.

SYNOPSIS

A Commission Hearing Officer recommends dismissal of a Representation petition seeking to sever foremen and assistant foreman from a county-wide blue collar unit. The Hearing Officer finds that the foremen do not have the power to hire, fire, discipline or effectively recommend the same, and therefore are not supervisors within the meaning of the New Jersey Employer-Employee Relations Act. He also finds no conflict of interest that would warrant severance under the standards of Board of Education v. Wilton, 57 N.J. 404 (1971).

The Hearing Officer also rejects a claim by the intervenor that an established practice exists that would warrant continuation of the present unit should the foremen be found to be supervisors. The lack of proof as to the employer's intent in pre-1968 meetings is fatal to this claim.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The Report is submitted to the Director of Representation who reviews the Report, any exceptions 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. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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Appearances:

For the Public Employer, William Jackson, County Personnel Department

For the Petitioner, Robert M. Washburn, Esq.

For the Intervenor, Fox and Fox, Esqs. (David I. Fox, of Counsel)

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

A Petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission ("Commission") on January 25, 1977, by the Middlesex County Parks and Roads Supervisors' Association ("Petitioner" or "Supervisors' Association") for a unit of all Foremen, Assistant Foremen, the Golf Course Manager and his assistant employed by Middlesex County ("County"). By virtue of being the certified employee representative of a unit including the personnel sought in the petition, Middlesex Council #7, New Jersey Civil Service Association ("Council #7" or "C.S.A.") was granted intervenor status. Pursuant

to a Notice of Hearing, a hearing was held before the undersigned Commission Hearing Officer on September 27, October 28, and December 6, 1977, at which all parties had the opportunity to examine and cross-examine witnesses, present evidence, and argue orally. ^{1/} Briefs were submitted by Petitioner and C.S.A. by February 15, 1978.

Upon the entire record in this proceeding, the Hearing Officer finds that:

1. Petitioner and C.S.A. are employee organizations within the meaning of the New Jersey Employer-Employee Relations Act ("Act") and subject to its provisions.

2. The County is a public employer within the meaning of the Act and is subject to its provisions.

3. A Petition for Certification of Public Employee Representative having been filed to sever employees from an existing unit, and the incumbent employee organization having interposed objections to the appropriateness of the proposed unit, there is a question concerning representation and the matter is properly before the Hearing Officer for a Report and Recommendations.

Council #7 was certified, after an election in 1970, as the representative of a unit of all employees of the Parks, Highway and Bridge, and Public Property Departments to and including the Road Foreman level and excluding, among others, supervisors within the meaning of the Act. Petitioner now seeks to sever out Roads and Park foremen, assistant foremen, the golf course manager (who is at a level equivalent to a foreman) and his assistant.

Petitioner asserts that the titles sought are supervisory and therefore not properly included in the existing unit due to N.J.S.A. 34:13A-5.3 which bars

^{1/} Although Mr. William Jackson of the County Personnel Office was present, he stated that the County wished to remain neutral and would not take any active role in the proceedings.

combined supervisor/non-supervisor units in the absence of established practice, prior agreement or special circumstances. C.S.A. responds by denying that foremen or assistant foremen are supervisors within the meaning of the Act, and alternatively argues that even if they are supervisors, an established practice exists that would condone the continuation of the existing unit.

Section 5.3 defines a supervisor as one having the power "to hire, discharge, discipline, or to effectively recommend the same." Board of Education of the Town of West Orange v. Wilton, 57 N.J. 404 (1971). The only witness presented by Petitioner was Phillip Schiff, a Parks foreman. Schiff testified that hiring and firing is through Civil Service and he has no direct role. He did state that he could recommend bringing an employee up for a Civil Service hearing as to firing. However, the only example he gave involved his bringing the poor attendance record of one man to his Superintendent's attention and speaking against firing. After one hearing the man was retained, but continued absence led to a second hearing and dismissal without any further involvement by Schiff that was indicated on the record herein. Schiff testified that he could send a man home for intoxication resulting in loss of pay. He also makes recommendations as to whether to retain probationary employees, although the effect is difficult to gauge given that he has always recommended retention. Testimony as to whether his other recommendations in general are followed was somewhat self-contradictory. ^{2/} He represents the informal first step of the grievance procedure and attended a course on grievance and disciplinary procedure.

Highway and Bridge Inspector Harold Boehm testified on behalf of C.S.A. as to the Roads Department foreman on the basis of his regular dealings with them as well as temporary assumption of that position. Roads foremen apparently lack any real power as to discipline with the Superintendent of Roads making all

^{2/} Compare T2, p. 10 with T2, pp. 96-97.

the decisions subject to possible overruling by a freeholder(s). Nothing can be initiated without recourse to the Superintendent.

From Mr. Boehm's unrebutted testimony it is clear to the undersigned that Roads Department foremen are not supervisors within the meaning of the Act. All effective power resides with the Superintendent and even he may be disregarded by a freeholder. Nothing was presented that would in any way lead the undersigned to find a conflict of interest under Wilton, supra, that warrants severance even without proof establishing supervisory status.

A much closer question arises in regard to Parks Department foremen. Schiff once sent a man home for intoxication, an act of discipline on his own. In In re Jersey City, E.D. No. 76-18, 2 NJPER 25 (1976), the Executive Director sustained a Hearing Officer who found Recreational Center Directors not to be supervisors even though they possessed the power to send home intoxicated employees. The undersigned will be guided by that decision, and notes that only one actual occurrence was asserted by Mr. Schiff, not enough to establish any regular pattern of disciplinary action.

As to firing, the only specific referred to involved the one employee fired for absenteeism, and Mr. Schiff did not recommend firing but only called the problem to the attention of a supervisor, and only after a second hearing was the man fired. This does not constitute an effective recommendation of firing and in the absence of further hard evidence the undersigned cannot find that Parks foremen possess that power.

In the grievance procedure, foremen are not called upon to make any decisions but rather confer informally with shop stewards as to possible resolution of problems. This duty does not on its face indicate a conflict of interest to this Hearing Officer. Any real action would seem to emanate from the Super-

intendent of Parks or higher authority. It is the undersigned's conclusion, therefore, that Parks foremen are not supervisors within the meaning of the Act.

Under Wilton, supra, severance might still be the proper course if there is a sufficient actual or potential conflict of interest. Herein, however, the undersigned does not find that to be the case. The unit has been certified for approximately eight years and there was absolutely no testimony to indicate any actual conflicts that have arisen since then. While it could be argued that there may be a potential for conflict arising from the grievance procedure and the fact that foremen oversee the work of laborers, the fact that the unit has been in place for a substantial period of time makes any such potential appear to be at most de minimus. The only testimony at all going to show potential conflict was a statement by Mr. Schiff that he thought a problem would arise if a grievance was brought against him. That situation would create the same problem whether or not Mr. Schiff was in the unit and is insufficient to warrant severance.

Given that the undersigned finds that Parks and Roads foremen are not supervisors and do not have a conflict of interest with other employees in the current unit, ^{3/} a fortiori that finding also applies to assistant foremen.

Assuming, arguendo, that foremen were to be found supervisors, or a Wilton conflict of interest were found to exist, there then would be the need to confront Council #7's claim of an established practice. In re West Paterson, P.E.R.C. No. 77, set the Commission's standards on this issue. To demonstrate established practice, there must be a pre-1968 relationship with:

"An organization regularly speaking on behalf of a reasonably well-defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) with an employer who engaged in the process with an intent to reach agreement." ^{4/}

^{3/} In the absence of evidence specifically going to the two general foremen, this finding is being applied to them also, as well as the golf course manager.

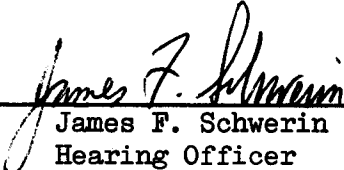
^{4/} P.E.R.C. No. 77 at p. 10.

The undisputed testimony of Council #7 president Cumi Mandeville was that for many years prior to 1968, Council #7 met with the County Freeholders to present demands relating to terms and conditions of employment and would go through as many as nine or ten sessions each year in attempting to convince the Freeholders to grant additional benefits. Furthermore, many new benefits were granted during those years. Mr. Schiff in his testimony basically corroborated Mrs. Mandeville. Nevertheless, the undersigned believes that a necessary element for a finding of an established practice is absent. No testimony or admissible evidence was presented to show the employer's intent in these meetings with C.S.A. The fact that benefits may have been granted is not sufficient to show that the County had an intent to reach agreement that would raise the meetings between the parties to the level of negotiations as opposed to consultation. Although an inference as to the employer's intent might be drawn, the undersigned will not do so when there is nothing in the record to directly support it.

RECOMMENDATION

Based upon the entire record and the above-stated findings, the undersigned recommends that the petition be dismissed.

Respectfully submitted,



James F. Schwerin
Hearing Officer

DATED: Trenton, New Jersey
March 16, 1978