D.R. NO. 81-34

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

In the Matter of

STATE OF NEW JERSEY,

Petitioner,

-and-

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Intervenor,

DOCKET NOS. RE-81-2
RE-81-3
RE-81-4
RE-81-5

-and-

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,

Intervenor,

-and-

NEW JERSEY STATE EMPLOYEES ASSOCIATION, a/w AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Intervenor,

-and-

NEW JERSEY CIVIL SERVICE ASSOCIATION,

Employee Representative.

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioner,

DOCKET NOS. RO-81-126
RO-81-127
RO-81-128
RO-81-129

-and-

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,

Intervenor,

-and-

NEW JERSEY STATE EMPLOYEES ASSOCIATION, a/w AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Intervenor,

-and-

NEW JERSEY CIVIL SERVICE ASSOCIATION,

Employee Representative.

SYNOPSIS

The Director of Representation, on the basis of an administrative investigation, determines that employees whose votes were challenged by the State in recently conducted elections among four units of white collar employees are judiciary employees and their votes should not be counted. The Director noting a Supreme Court decision in Passaic Cty. Probation Officers' Assn. v. Cty. of Passaic, et al., states that the Commission, as a creation of the Legislature, does not have authority to dispute the assertions by the judiciary branch of government that judiciary employees are not included within any of the four negotiations units.

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Intervenor,

-and-

NEW JERSEY CIVIL SERVICE ASSOCIATION,

Employee Representative.

Appearances:

For the State of New Jersey
Frank A. Mason, Director

For Communications Workers of America, AFL-CIO
Kapelsohn, Lerner, Reitman & Maisel, attorneys
(Sidney Reitman, of counsel)

For the American Federation of State, County and Municipal Employees, AFL-CIO
Sterns, Herbert & Weinroth, attorneys
(John M. Donnelly, of counsel)

For the New Jersey State Employees Association, AFT
Fox & Fox, attorneys
(David I. Fox, of counsel)
Miller, Cohen, Martens & Sugarman, attorneys
(Nancy Schiffer, of counsel)

DECISION

Pursuant to a decision of the Public Employment Relations Commission (the "Commission"), [1/] secret ballot elections were conducted by mail among State of New Jersey employees in four negotiations units -- Administrative & Clerical Services Unit; Professional Unit; Primary Level Supervisors Unit; and Higher Level Supervisors Unit -- during a balloting period commencing February 17, 1981 and concluding March 9, 1981. Employees in each unit were provided the opportunity to designate either the Communications Workers of America, AFL-CIO ("CWA"), or the American Federation of State County & Municipal Employees, AFL-CIO ("AFSCME") or the New Jersey State Employees Association, affiliated with American Federation of Teachers, AFL-CIO ("SEA/AFT") (or certain separate supervisory employee affilates thereof) as their exclusive representative or to choose no representative. Ballots were counted and tallied during the period of March 10 thru March 12, 1981. Pursuant to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. and the rules of the Commission, N.J.A.C. 19:11-1 et seq., such designation must be made by a majority of unit employees voting in an election, and in the absence thereof, a runoff election between the two leading ballot positions is required. N.J.A.C. 19:11-9.3. The election tallies in three of the

1/ In re State of New Jersey, D.R. No. 81-20, 7 NJPER 41 (¶12019 1980), aff'd P.E.R.C. No. 81-94, 7 NJPER 105 (¶12044 1981), motion for reconsideration denied P.E.R.C. No. 81-95, 7 NJPER ___ (¶ 1981); appeal pending App. Div. Docket No. A-2310-80T2.

units -- the Administrative & Clerical Services Unit, Primary Level Supervisors Unit, and the Higher Level Supervisors Unit -- indicate that challenged ballots are sufficient in number to affect the results of the elections.

On March 25, 1981, the undersigned issued a decision with respect to certain challenged ballots. 2/ The instant decision is issued with respect to the votes of certain employees whose eligibility was challenged by the State at the count on the basis that these employees were "judiciary employees" and not included within the units in question.

N.J.A.C. 19:11-9.2(k) provides:

> If challenged ballots are sufficient in number to affect the results of an election, the director of representation shall investigate such challenges. All parties to the election shall present documentary and other evidence, as well as statements of position, relating to the challenged ballots. After the administrative processing of the challenged ballots has been completed, or where appropriate, the hearing process has been completed, the director of representation shall render an administrative determination which shall resolve the challenges and contain the appropriate administrative direction.

On Monday, March 16, 1981, the parties to the elections attended a conference which was convened at the Commission's

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2/ In re State of New Jersey, D.R. No. 81-32. In this election the undersigned stated: "A determination will subsequently be made concerning the eligibility of judiciary employees, if the votes of these employees **are** determinative of the results of the election." As of the date of this decision, challenged ballots are sufficient in number to affect the results of the election and, therefore, this decision is now being issued.

offices as part of the Commission's investigation of the outstanding challenged ballots involved in the elections. The parties were advised of their obligations to submit any documentary evidence and briefs or statements of position with respect to the "judiciary employees" by March 23, 1981. An additional period of time, until March 25, 1981, was subsequently granted for the submission of such material.

Positional statements have been provided to the Commission by the Office of Employee Relations ("OER"), SEA/AFT, AFSCME, and a representative of the judiciary. Certain documentary materials were attached to the positions of the OER, SEA/AFT, and the judiciary. Attached hereto and made a part hereof are various memoranda issued by the Administrative Director of the Courts which relate to judicial employees.

The administrative investigation reveals the following:

1. On January 22, 1973, during the balloting period which eventually concluded in the establishment of the first white collar negotiations unit (Administrative & Clerical Services Unit), the Administrative Director of the Courts issued a memorandum to employees of the Judicial Branch of State Government. This memorandum stated the position of the Court that administrative and clerical employees in the Judicial Branch "are not included within the bargaining unit composed of administrative and clerical employees of the Executive Branch of Government ... " On February 27, 1981, during the balloting period for the instant

elections in all four white collar units, the Administrative Director advised judiciary employees that its position, enunciated in 1973, remained unchanged.

2. During the balloting period the OER advised the Commission that it intended to challenge the votes cast by any employee assigned to the Judiciary. At the count, the State did assert challenges to the employees in question based on this ground. Employees so challenged have the payroll identification "750".

This payroll identification number refers to a budgetary account assigned to the Judicial branch and in which employees assigned exclusively to the Judiciary are placed. Although given the opportunity, none of the parties has proferred documentation or legal argument to place in dispute the conclusion that all employees in budgetary account #750 are assigned exclusively to the Judiciary.

3. The OER and the Judiciary agree that the challenged employees are Judiciary personnel and are not and cannot be included in the negotiations units involved in the elections.

4. SEA/AFT asserts that the employees in question have in the past been represented by the exclusive representative of the State units, that grievances have been filed for these employees, and that the employees have received the same contractual benefits afforded to all other employees. SEA/AFT maintains that the employees have been included in the negotiations units and that a 1977 memorandum from the Administrative Office of the Courts does not express any intention to remove the employees from the units. SEA/AFT further argues that

certain contemporaneous communications with the OER in 1977 "confirmed the understanding with the State that these employees will remain in the units in question...." SEA/AFT states that the employees are not appointed by judges and that their employment is governed by Civil Service. SEA/AFT urges that the Commission conduct an "inquiry as to the precise duties performed by these employees" and extend the inquiry into "the history of the treatment of these employees."

5. AFSCME has requested that a hearing be conducted in the instant matter and argues that a record of the unit relationship between the courts and these employees should be established so that the "Judiciary can render a decision which will resolve this question."[3/]

Passaic Cty Probation Officers' Assn v. Cty of Passaic, et al., 73 N.J. 247 (1977), is the touchstone for the analysis of issues relating to judicial employees vis-a-vis rights arising under the New Jersey Employer-Employee Relations Act. In Passaic Cty Probation Officers, the Supreme Court held that the Judicial branch of government "possesses plenary authority with respect to all matters touching the administration of the court system of New Jersey", 73 N.J. at 252; and that this authority "transcends the power of the Legislature to enact statutes governing these public employees properly considered an integral part of the court system." Id. at 255.

3/ It is unclear as to whether AFSCME suggests that a PERC hearing should examine this relationship. It submits "that this matter should be resolved through the accepted hearing process developed by the Court with appropriate appeals to the Superior Court, Appellate Division, as provided by the Court Rules."

That case involved county probation officers. The Court identified probation officers as employees who "come within the regulatory control and superintendance of this Court." Id. at 253. Based upon this initial conclusion the Court held:

> Thus we reach the important issue as to whether, while subject to judicial supervision resting upon a constitutional mandate, probation officers can also be subject to N.J.S.A. 34:13A-1 et seq., the New Jersey Employer-Employee Relations Act. Stated more generally, can the control of probation officers and of the whole statewide system of probation, seemingly entrusted to the Judiciary by the terms of the Constitution, be in any way diluted or modified by legislation? Subject to what is set forth below, we think it clear that it cannot.

The Court did go on to note that its practice has been to adopt and implement for the Judiciary and its employees the policies and programs established by the Legislature in its enactments which do not interfere with the Judiciary's constitutional obligation to administer the court system. Civil service, pension and workers' compensation statutes were cited as specific examples of bodies of legislation, and presumably administrative agency implementation, which affect public employees who are part of the court system, which the Judiciary has adopted. Id. at 254. However, the Court clearly states that its acceptance of these legislative arrangements is as a matter of "comity and respect for other branches" and not as a matter of superceding authority. Id. at 255.

The Court then went on to affirm the lower court's holding that a memorandum issued by the Administrative Director of the Courts established that the hours of work of probation officers

would be considered a non-negotiable item as a matter of Supreme Court policy. As such, this memorandum superceded the right the employees might have otherwise had under N.J.S.A. 34:13A-5.3 to negotiate their hours as a term and condition of employment. Id. at 255 to 256. 4/

The undersigned has reviewed SEA/AFT's position and supporting materials which seek to establish that employees of the Judiciary have been included in the various units in question. However, the undersigned's review of the Administrative Director's memoranda and the other documentation leads to the conclusion that the Judiciary has followed a policy of according to its employees many of the benefits gained by unit members, but has consistently held that these employees are not includable in any of the units in question. The most recent memorandum from the Judiciary confirms its continued position that these employees are not included in the units involved in these elections.

4/ Since Passaic County Probation Officers the Commission and the undersigned have concluded that the Judicary must be considered as a separate public employer, from a labor relations perspective, of employees within its regulatory control and superintendance. In re Atlantic County Probation Dept., D.U.P. No. 78-14, 4 NJPER 237 (¶4119 1978). Given the unique legal status of these employees, vis-a-vis the Employer-Employee Relations Act, the Commission has only asserted jurisdiction over disputes involving employees of the courts where it has been advised that the Judiciary acquiesces as a matter of comity to the submission of the matter to the Commission.

The position statements and documents submitted by the State and the representative of the Administrative Office of the Courts confirm that both the State and the Judiciary maintain that all employees paid from the 750 budgetary account are employees assigned to the administration of the court system and that the Judicary considers itself to be the employer of these employees. This position is asserted by the Judicary as part of its mandate to control and supervise the administration of the court system of New Jersey, and the Judiciary does not accept the jurisdiction of PERC to make a unit determination with regard to these employees. This position was confirmed by an oral communication from a representative of the Administrative Office of the Courts after consultation with the Administrative Director of the Courts.

Based on the above, and the holding in Passaic County Probation Officers, the undersigned must conclude that even if the material submitted did present a legitimate question concerning representation as to whether these employees had been within the units in question, which it has not, neither he nor the Commission possesses the authority to dispute the Judiciary's position that it is the employer of these employees and they should not be in these units. Therefore given the unique legal status of these employees, as well as the information submitted, the undersigned orders that the ballots cast by the employees of the judiciary shall be voided.

BY ORDER OF THE DIRECTOR OF REPRESENTATION

Carl Kurtzman, Director

DATED: April 3, 1981

ADMINISTRATIVE OFFICE OF THE COURTS

EDWARD B McCONNELL
ADMINISTRATIVE DIRECTOR

STATE HOUSE ANNEX
TRENTON
NEW JERSEY
08625

January 22, 1973

TO EMPLOYEES OF THE JUDICIAL BRANCH OF STATE GOVERNMENT

This is to advise you that employees of the Judicial Branch of State Government are not included within the bargaining unit composed of administrative and clerical employees of the Executive Branch of Government for which an election of the bargaining representative is presently in progress.

It is the intention of the Judicial Branch, however, to request that administrative and clerical employees in the Judicial Branch be afforded the same benefits in terms of salary and working conditions as are negotiated for employees in the Executive Branch, providing the same are not inconsistent with established policies fixed by the Supreme Court governing Judicial Branch employees.

Edward B. McConnell

ADMINISTRATIVE OFFICE OF THE COURTS
STATE OF NEW JERSEY

ARTHUR J. SIMPSON, JR.
JUDGE SUPERIOR COURT
APPELLATE DIVISION
ACTING ADMINISTRATIVE DIRECTOR OF THE COURTS

STATE HOUSE ANNEX
TRENTON
NEW JERSEY
08625
609 292-4636

July 22, 1977

MEMORANDUM TO: MELVIN E. MOUNTS, DEPUTY ATTORNEY GENERAL

RE: Judiciary Employees

At its administrative conference 7/20/77 I advised the Supreme Court as to certain recommendations by Frank Mason and Melvin E. Mounts, as well as communications from David I. Fox, Esq.

The Court has determined that at this time it would be inappropriate to execute any "Letter of Agreement" or render any advisory opinions for the benefit of the Public Employment Relations Commission, Mr. Fox, or anyone else. Although the substance of the January 22, 1973 memorandum of former Administrative Director Edward B. McConnell remains in effect, nothing would appear to preclude any pending cases from going forward before PERC or for the Attorney General to render the opinion previously requested by Mr. Mason if he still desires same.

Mr. Fox has requested a conference with me, and I think this is a good idea and suggest that all recipients of this memo try to arrange for a meeting in my office August 15, 16, 17 or 18. Otherwise I suggest August 31 or September 1. Some of the questions may be moot, inasmuch as Mr. Mason has concluded a contract as to most State employees and the Supreme Court will of course extend the benefits thereof to Judiciary employees providing same are not inconsistent with established policy fixed by the Supreme Court governing Judicial Branch employees. No one has suggested any such inconsistency to date.

The foregoing would all appear to accord with the Passaic Probation Officers Case, but if anyone disagrees, I

hope they will bring same to my attention promptly. Although I don't believe anyone has yet suggested it, the Supreme Court can in no case be bound by any provisions of any contracts providing for binding arbitation, in view of the constitutional obligations of the Supreme Court for the New Jersey judicial system.

A.J.S., Jr.

cc: Frank A. Mason, O.E.R.
Barry N. Steiner, O.E.R.
Guy Michael, D.A.G.
Ted Winard, A.A.G.
David I. Fox, Esq.

/r

ADMINISTRATIVE OFFICE OF THE COURTS
STATE OF NEW JERSEY

ROBERT D. LIPSCHER
ADMINISTRATIVE DIRECTOR OF THE COURTS

STATE HOUSE ANNEX
CN 037
TRENTON, NEW JERSEY 08625
609 984 0275

February 27, 1981

MEMORANDUM TO: ALL EMPLOYEES OF THE JUDICIAL BRANCH OF STATE GOVERNMENT

It has come to my attention that in the last several days some employees of the Judiciary have received a ballot to vote in the forthcoming state election to determine union representation for purposes of carrying on collective negotiations with the Executive Branch pursuant to the provisions of the New Jersey Employer-Employee Relations Act (N.J.S.A. 34:13A-1, et seq., as amended). I also understand that some employees may have raised questions relative to the Judiciary's position on employee participation in that election.

For your information and guidance, I have included herewith a copy of a memorandum that was circulated among all Judiciary employees in 1973, setting forth the Judiciary's policy on this matter. That policy remains unchanged. However, our reiteration of that policy should not be misconstrued to mean that the Judiciary is opposed to the organization and representation of judicial employees for collective bargaining purposes. If and when the Judiciary receives an appropriate petition for recognition and representation purposes, we will respond accordingly.

Robert D. Lipscher

Robert D. Lipscher

Enclosure