

L.D. NO. 96-1

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEST MILFORD,

Public Employer,

-and-

WEST MILFORD TOWNSHIP SUPERVISORS  
ASSOCIATION,

Docket No. RO-95-31

Petitioner,

-and-

AFSCME, COUNCIL 52, LOCAL #2259, AFL-CIO,

Employee Representative.

Appearances:

For the Public Employer,  
Johnson, Murphy, Hubner, McKeon, Wubbenhorst  
& Appelt, attorneys  
(Martin F. Murphy, of counsel)

For the Petitioner,  
Thomas J. Trochan, President

For the Employee Representative,  
Kathleen Mazzouccolo, attorney

DECISION

On September 22, 1994, the West Milford Township Supervisors' Association filed a Petition seeking to represent all blue collar supervisors in the Recreation and Public Works Departments of the Township of West Milford. The petitioned-for

employees are currently represented by AFSCME Local 2275 in a unit of the Township's blue-collar employees.<sup>1/</sup>

AFSCME objects to the proposed removal of these employees from its unit, and claims they are not supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13-1.1 et seq. The Township takes no position in this matter.

On June 30, 1995, all parties to this matter signed an agreement to submit this dispute to the Commission's Litigation Alternative Program ("LAP"). The issue submitted to LAP is whether the petitioned-for foremen are supervisors within the meaning of the Act. If found to be supervisors, the petition will be processed and if not found to be supervisors, it will be dismissed. The parties stipulated that my decision will be based upon facts presented by the parties at the fall 1994 investigatory conference and by their subsequent written submissions.

The Mechanical Foreman and four District Foremen are in the Department of Public Works and report to the Director of Public Works Gerald Storms. A Mechanic and Mechanics Helpers report to the Mechanical Foreman. Employees in Equipment Operator, Repairman, Truck Driver and Laborer titles report to the District Foremen. The

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<sup>1/</sup> The unit includes the following titles: foreman (all titles), heavy equipment operator, equipment operator, truck driver, laborer, mechanical repairman helper, sewer repairman, senior building maintenance worker, building maintenance worker, senior recreation maintenance worker and recreation maintenance worker. The unit excludes supervisory employees, managerial executives, confidential employees and all other Township employees.

Recreation Foreman works in the recreation department. The Association contends that the foremen are supervisors because they effectively recommend discipline. It submitted the following examples in support of its contention.

In January 1983, Foreman Robert Kochka recommended that disciplinary action be taken against a truck driver for sanding roads without authorization from his foreman, damaging his truck and making sarcastic remarks to the foreman over the two-way radio. Kochka made the recommendation to then Director of Public Works Jack Sterling. Department Head Andrew Lycosky issued the truck driver a written reprimand.

In February 1984, Kochka recommended disciplinary action against a truck driver for leaving the district in a Township truck without permission to take a dinner break in the middle of a snow storm. The recommendation was made to Sterling. Lycosky gave the truck driver a two-day suspension.

In January 1985, Foreman Charles Wood recommended disciplinary action against a truck driver for using abusive language. The recommendation was made to then Director of Public Works Henry Schott. Lycosky issued a two-day suspension.

In 1990, Foreman Thomas Trochan recommended to Lycosky that no action should be taken against a truck driver and a laborer for being in an unauthorized place. Lycosky followed Trochan's recommendation and no discipline was imposed.

As a result of a June 1990 discussion among Foreman Adrian Birdsall, Foreman Ferdinand VanStrander, Public Works Director Gerald Storms and Lycosky, a truck driver received a one day suspension for damaging a Township vehicle.

In July 1990, Foreman Stanley Struble recommended that disciplinary action be taken against a truck driver for failing to call in when not reporting to work. The recommendation was made to Storms and Lycosky imposed a half-day suspension.

In May 1994, Foreman Paul Reilly recommended that action be taken against a truck driver for using abusive language against his foreman. The recommendation was made to Storms and Lycosky issued a written reprimand.

AFSCME responded to these examples, contending that the foremen did not play a significant role in some of the disciplinary incidents cited by the Association. AFSCME alleges that the June 1990 truck accident was witnessed by Foreman Birdsall, who was only used as a witness and that Foreman VanStrander assessed the damage and estimated a repair cost. Neither Foreman recommended or took disciplinary action - Lycosky initiated the action leading to the one day suspension. AFSCME contends that Struble initiated no disciplinary action in the July 1990 employee absence incident. Struble advised DPW Director Storms that an employee was absent without calling in and answered questions, but Storms initiated the discipline. In May 1994 Reilly called Storms to request another driver to replace one who had walked off the job. Storms issued a warning to the driver, Reilly was not present.

According to local President Bob Dunleavy, the incidents submitted by the Foremen's Association do not comprise a complete history of discipline against unit members. Dunleavy attends an average of 12 to 15 disciplinary hearings a year - the foremen do not. Dunleavy further states that Department Head Lycosky generally handles all discipline; very few disciplinary matters are handled by Public Works Director Storms. Foremen are also not part of the grievance procedure, which commences with the department head.

Both AFSCME and four of the foremen submitted letters opposing a separate supervisory unit. Foremen James Miller stated that he never supported the formation of a foremen's unit. He stated that foremen are only lead men and don't recommend discipline, the disciplinary actions cited in support of supervisory status are infrequent and exaggerated and that foremen are not present for disciplines and have no input into them. He felt that AFSCME represented him in a fair and democratic way. Miller also believed that the foremen were misled when asked to sign the showing of interest in support of the petition. They now realize they made a critical mistake by signing the letter asking for exclusion. "I certainly do not want to be excluded from membership in Local 2275."

Foreman Adrian Birdsall stated that the foremen do not discipline, the directors or department heads do. Although they may be asked about incidents, they are not asked for input into discipline. Birdsall believed that signing the showing of interest

meant "...a separation for contract negotiations salary only, from my local union.". When he read the text of the Director's letter and understood that the foremen would be excluded from the union completely, he realized the mistake he made. He asked the Director to reconsider his decision and allow the foremen to remain in AFSCME. Birdsell stated that:

"I would at this time, appeal to you to withdraw this decision in my name based on the fact that I was misled and did not understand that I would be excluded completely from my union representation. I understood that I was signing a letter to allow me to negotiate on our salary separate from the rest of the union members only."

Foreman Stanley Struble stated that he has no say in discipline other than to explain the circumstances surrounding the incident. The director or the department head make disciplinary decisions. Struble asked the Director to allow the foremen to remain in Local 2275.

Foreman Paul Reilly stated that he supported the foremen's petition without realizing that he was seeking total exclusion from AFSCME. Reilly stated that he thought he was asking for "...the right to negotiate our salary only, as a separate unit from the members of the union." Reilly also expressed the desire to remain in AFSCME.

There were seven examples cited of foremen effectively recommending discipline of their subordinates. AFSCME disputed three specific incidents. However, the three foremen involved in the incidents AFSCME contested did not discuss them specifically.

The individual foremen commented generally that their involvement in the disciplinary process was infrequent, they only provided input and they did not believe they had the authority to recommend discipline. It is clear that there is some dispute as to the extent and authority of foremen to effectively recommend discipline.

However, there is one common, undisputed theme among the correspondence submitted directly by four of the foremen. They all expressed a misapprehension of the effects of severance on their right to be represented by AFSCME. Miller stated that he did not wish to be excluded from Local 2275. Struble also expressed a desire to remain in Local 2275. Birdsall stated that he misunderstood the petition and did not realize that if successful, the foremen would be completely excluded from union representation. He thought he was supporting an effort to negotiate separately on salary only. Reilly also stated a desire to remain in AFSCME. He stated that he did not understand that the Association was seeking total exclusion from AFSCME and that he thought he was merely seeking to negotiate the foremen's salary independently of Local 2275.

These foremen believed that supporting the Association's petition would have a limited impact on their AFSCME membership. They mistakenly believed that they were solely seeking to bargain for their salaries separately from Local 2275. Their letters also share a common concern that if successful, the petition would result in no representation and their forced separation from AFSCME.

I find that the misapprehension of the effects of severance in the foremen's letters may have been influenced by either a misunderstanding or misrepresentation of the process and its outcome. I further find that their letters and AFSCME's response are not sufficient to refute the foremen's involvement in the disciplinary process, which I believe rises to the level of effective recommendation in some circumstances.

The Act defines supervisors as employees having the power to hire, discharge, discipline or to effectively recommend the same. N.J.S.A. 34:13A-5.3. AFSCME contends that seven examples of foremen recommending discipline in 11 years is not regular enough to find supervisory status under the Act. While not frequent, I am not persuaded that the occurrences are so irregular as to negate statutory supervision. The disciplinary recommendations occurred as recently as May 1994 and are not confined to one or two foremen, but involve eight different foremen, including five of the six whom the Association seeks to represent. Therefore, I conclude that although infrequently exercised, all of the foremen have the authority to recommend discipline, and when made, their recommendations were followed. To allow the foremen to remain in a unit with employees for whom they effectively recommend discipline would create an impermissible conflict of interest. Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971).

Based upon the foregoing, I find that the foremen are supervisors within the meaning of the Act and that the



petitioned-for unit is appropriate. Pursuant to the parties' LAP agreement, an election will be conducted to determine the representational desires of the petitioned-for employees in the unit described as follows:<sup>2/</sup>

Included: All regularly employed foremen employed by the Township of West Milford.

Excluded: Non-supervisory employees, confidential employees, managerial executives, craft employees, professionals, police and employees included in other negotiations units.

AFSCME shall notify me within 10 days whether it is willing to represent the foremen in a separate supervisory unit. If AFSCME notifies me that it desires to participate in the election and submits a "Camden Affidavit" stating that it will be a separate supervisory organization, an election will be conducted between AFSCME and the Association to determine which organization shall represent the foremen in a separate negotiations unit.

The election shall be conducted no later than thirty (30) days from the date of this decision. Those eligible to vote must have been employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, on vacation or temporarily laid off, including those in the military service. Employees must appear

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<sup>2/</sup> Absent an election for a supervisory unit, there is nothing in the Act that permits me to order separate negotiations for a group of foremen who remain for all other purposes within a larger bargaining unit.

in person at the polls in order to be eligible to vote. Ineligible to vote are 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.

Pursuant to N.J.A.C. 19:11-10.1, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the names of all eligible voters in the units, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by us no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously provided to the employee organization with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

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

  
Margaret A. Cotoia

DATED: October 13, 1995  
Trenton, NJ