

D.R. No. 2013-5

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

In the Matter of

NEW JERSEY JUVENILE JUSTICE COMMISSION,
DEPARTMENT OF LAW AND PUBLIC SAFETY,
Public Employer,

-and-

Docket No. CU-2011-015

NEW JERSEY LAW ENFORCEMENT COMMANDING
OFFICERS ASSOCIATION,
Petitioner,

-and-

NEW JERSEY INVESTIGATORS ASSOCIATION
FOP LODGE 174,

Intervenor.

NEW JERSEY DEPARTMENT OF CORRECTIONS,
Public Employer,

-and-

Docket No. CU-2011-016

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SYNOPSIS

The Deputy Director of Representation clarifies NJLECOA, a unit of supervisory law enforcement personnel, as including the titles, assistant chief investigator (DOC) and chief investigator (JJC), secured facilities. In doing so, he finds that the assistant chief investigator (DOC) and chief investigator (JJC), secured facilities are supervisors within the meaning of the Act and share a community of interest with members of the NJLECOA. He further determines that no Wilton conflict of interest exists among the current NJLECOA unit members and the assistant chief investigator (DOC) and chief investigator (JJC), secured facilities.

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Appearances:

For the Public Employer,
Jeffrey S. Chiesa, Attorney General
(Sally Ann Fields, Senior Deputy Attorney General)

For the Petitioner,
Reinaldo Moll, President

For the Intervenor,
Thomas A. Cushane, attorney

DECISION

On November 23, 2010, the New Jersey Law Enforcement
Commanding Officers Association (NJLECOA) filed two clarification

of unit petitions seeking to include the titles, chief investigator, secured facilities at the NJ Juvenile Justice Commission (JJC) and assistant chief investigator, secured facilities at the NJ Department of Corrections (DOC) in its collective negotiations unit of supervisory law enforcement personnel.^{1/} The two titles are currently unrepresented.

FOP Lodge 174 New Jersey Investigators Association (FOP) has intervened on both petitions, asserting that the disputed titles belong in its Special Investigations Division (SID) unit, noting that they perform internal affairs functions and may be required to investigate allegations of misconduct of employees in the NJLECOA unit, which would create an impermissible conflict of interest if the titles were included in that unit.

The State of New Jersey (State) has filed a letter and certifications asserting that both petitioned-for titles share a community of interest with the NJLECOA unit. It argues that if

^{1/} NJLECOA initially requested that the chief investigator, secured facilities be included in the NJLECOA/ Chiefs Sub-Unit. On July 31, 2012, it filed an Amendment of Certification Petition (AC) seeking a change in the name of the majority organization from the New Jersey Law Enforcement Commanding Officers Association/Chiefs Sub-Unit to the New Jersey Law Enforcement Commanding Officers Association. While the above-captioned matters were processed, NJLECOA did not pursue its AC petition and withdrew it on September 14, 2012. On the same date, and in order to perfect its first petition (dkt. No. CU-2011-015), NJLECOA filed an amendment listing the majority organization as the New Jersey Law Enforcement Commanding Officers Association.

either title was placed in FOP's SID unit, it would create a conflict of interest under West Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971), (Wilton) because they effectively supervise employees in FOP's SID unit.

We have conducted an investigation of the facts concerning the petition. N.J.A.C. 19:11-2.2. The NJLECOA, FOP and State have submitted letters and documents, including certifications, supporting their respective positions. On September 4, 2012, I wrote to the parties, advising that we were inclined to clarify the unit represented by NJLECOA to include the titles, assistant chief investigator and chief investigator, secured facilities. The parties were provided an opportunity to reply. On September 11, 2012, the State filed a response. Neither NJLECOA nor FOP filed a response. Our review of all the submissions reveals the following facts.

NJLECOA represents command law enforcement personnel in the ranks of correction majors, JJC correction captains, supervising conservation officers, and supervising parole officers employed by the State. The State and NJLECOA signed a collective negotiations agreement extending from July 1, 2007 through June 30, 2011.

FOP represents investigators who serve as internal affairs officers at the DOC, the JJC, and the State Parole Board. The FOP and the State signed a collective negotiations agreement

extending from July 1, 2007 through June 30, 2011. The recognition provision covers the titles, investigator, secured facilities, senior investigator, parole and secured facilities, and principal investigator, parole and secured facilities.

The New Jersey Civil Service Commission job specification for the title of chief investigator, secured facilities, provides in a pertinent part:

DEFINITION

Under administrative direction, manages an internal investigation unit for adult correctional or juvenile treatment facilities, county correctional facilities, or other investigations involving parolees and the facilities/contractors providing services to parolees; establishes investigative policy for the department of assignment; does related work as required.

EXAMPLES OF WORK:

Plans, organizes, and assigns the work of the organizational unit and evaluates employee performance and conduct, enabling the effective recommendation of the hiring, firing, promoting, and disciplining of subordinates.

Directs the activities of investigations assigned to an Internal Affairs Unit.

Reviews and evaluates allegations of criminal acts and administrative violations committed by staff, inmates and visitors to secured facilities, and supervises the conduct of investigations.

Supervises the conduct of investigations of complaints involving the agency.

Reviews and evaluates complaints filed by

staff, inmates and visitors to secured facilities, and supervises the conduct of investigations.

Supervises the training, development and evaluation of investigators.

Wimson Crespo is currently employed as chief investigator, secured facilities at the JJC.^{2/} NJLECOA has provided a certified letter from Crespo. Crespo attests that as part of his job responsibilities, he “. . . plan[s], organize[s], and assign[s] the work of the organizational unit.” He also “. . . evaluate[s] the assistant chief investigator, principal investigator, senior investigators, and investigators.” He is “. . . responsible for recommendations of hiring, firing, promoting, and disciplining of subordinates.” He certifies that he exercises these powers over assistant chief investigators, principal investigators, senior investigators, and investigators. Crespo provides specific examples of his authority, including “. . . every six months [he] perform[s] a PARS evaluation on each investigator assigned to the unit and also the civilian staff assigned.” He also recently recommended the termination of a senior investigator who was criminally charged with several offenses. Upon Crespo's recommendation, the charged investigator

^{2/} Jeffery Flora is the current acting assistant chief investigator at the JJC. Kevin Bolden is the current acting chief investigator at the DOC. Employees acting positions are ostensibly represented by the majority representative that currently represents their permanent title(s).

was dismissed from service. Crespo also attests that he has recently verbally counseled and trained a senior investigator ". . . who had time and attendance issues." He also recommended that the investigator be reassigned from his work location to the main office to provide better supervision. These recommendations were adopted and implemented.

Crespo further certifies that he is responsible for the oversight and direction of JJC investigations, but has not personally conducted an investigation of "a chief or captain who is assigned to the NJLECOA." He submits that "[t]hese investigations along with all other types of investigations are assigned to either a principal investigator, senior investigator, or investigator."

The senior investigators are represented by FOP. Crespo wrote of his preference to be in a unit ". . . separate from the majority of the subordinates [he] supervise[s] and evaluates, specifically to avoid any potential perception of union influence related to these responsibilities." He submits that an "unintentional consequence" of having managers, like himself, attend FOP union meetings would be "a reluctance by the other FOP members to engage in candid conversation" about issues relating to management.

Ellis Allen is the DOC employee currently employed in the title, assistant chief investigator, secured facilities.

The New Jersey Civil Service Commission job specification for the title provides in a pertinent part:

DEFINITION

Under direction of the Chief Investigator, assists in the management of an internal investigation unit for adult correctional or juvenile treatment facilities, or county correctional facilities; does related work as required . . .

EXAMPLES OF WORK:

Exercises all powers and rights of enforcement to function as a law enforcement officer for the detection, apprehension, arrest, custody and prosecution of offenders against the law.

Supervises the activities of investigations conducted by an internal affairs unit . . .

Reviews and evaluates allegations of criminal acts and administrative violations committed by staff, inmates and visitors to secured facilities, and supervises the conduct of investigations.

Supervises investigations of complaints involving the department's District Parole Offices . . .

Plans, organizes, and assigns the work of the organizational unit and evaluates employee performance and conduct, enabling the effective recommendation of the hiring, firing, promoting, and disciplining of subordinates . . .

The State provided a certification of Kenneth C. Green, the Director of Employee Relations for the DOC. Green certifies that assistant chiefs are within "the highest level of management" for the SID unit and "routinely function as the head of SID on any

given day," in the absence or unavailability of the chief investigator. He attests that ". . . their function is supervisory, and their primary function is to insure the delivery of services provided by SID." The assistant chief investigator has disciplinary authority over several titles within the SID, including principal investigators, senior investigators and all clerical and support staff. Green attests that employees are promoted into SID, rather than hired by it and the assistant chief ". . . may have input in the ultimate selection of an employee if [he or she] is the highest ranking of available SID staff." Assistant chiefs also have ". . . the power to initiate/recommend minor discipline, and at the minor disciplinary level, that initiation/recommendation may be approved without review." They may also ". . . recommend major discipline and in certain disciplinary situations, that recommendation may be approved with substantive review." When the assistant chief is functioning as the head of SID, he ". . . has authority to initiate minor discipline and recommend major discipline." In those instances, "the minor discipline would be approved without review and the major discipline may be approved without significant review, [albeit] in certain disciplinary situations, that recommendation may be approved with substantive review."

Green also certifies that although assistant chiefs do not conduct internal affairs investigations, they are responsible for supervising and reviewing them. Their involvement in the investigation is determined on a case-by-case basis, depending on the operational issues (such as timeliness, subject matter content, policy review, legal review, and liaison responsibilities with outside agencies) associated with each matter.

The President of FOP Lodge 174, Kevin Koch, submitted a certification. He attests in a pertinent part:

[T]he chain of command as it relates to both of the positions is as follows: investigators and senior investigators perform the specific work of the work units. The cases are disseminated by the principal investigators to the investigators and senior investigators. The principal investigators supervise, review and approve the work of the investigators and senior investigators. The principal investigators also manage the individual units, with input and guidance from the assistant chief investigators or chief investigators. The assistant chief investigators and chief investigators have final review of the work performed by investigators and senior investigators.

Koch certifies that the assistant chief investigator and chief investigator are ". . . essentially 'supervisors of supervisors' in that they are paid at the managerial level while simultaneously representing management." He asserts that ". . . the assistant chief, secured facilities at the DOC does not have the authority to hire, discharge, or discipline, except where the

chief investigator may have a conflict and confers such authority upon the assistant chief to do so." He is aware that the "chief investigator, secured facilities makes all final decisions except in those cases in which he designates final authority." Koch certifies that the "assistant chief, secured facilities has conducted internal affairs investigations in the past on a limited basis." He had no knowledge of whether the chief investigator, secured facilities has conducted any internal affairs investigations.

Koch asserts that FOP is the "most appropriate bargaining unit to represent the titles of both chief investigator and assistant chief investigator" because it "appreciates and understands the type of work performed and specific issues affecting investigative-series-title employees." Koch opines that since a "common employer" covers the other titles represented by FOP, it is in the "unique position" to effectively represent these titles in the law enforcement community.

ANALYSIS

The purpose of a clarification of unit petition is to resolve questions concerning the scope of a collective negotiations unit within the framework of the Act or as set forth in the unit definition in a Commission certification or the parties' recognition agreement. Typically, a clarification is sought as to whether a particular title is contemplated within

the scope of the unit definition. Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977). The Commission is charged with determining in each instance what unit is appropriate. N.J.S.A. 34:13A-6. Where more than one unit is potentially appropriate, the Commission must determine which unit configuration is most appropriate. State v. Professional Association of N.J. Dept. of Ed., 64 N.J. 231 (1974).

N.J.S.A. 34:13A-5.3 provides in a pertinent part:

. . . except where established practice, prior agreement or special circumstances dictate the contrary, [] any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, [shall not] have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership.

A determination of supervisory conflict of interest requires more than a job description or bald assertion that an employee has authority to hire, discharge, discipline, assign, evaluate, or promote other employees. The Commission requires evidence that the authority is regularly exercised. See City of Burlington, D.R. No. 2004-7, 29 NJPER 501 (¶158 2003).

In Wilton, our New Jersey Supreme Court held that public employees who exercise significant power and responsibilities over other (supervisory) personnel should not be included in the same negotiations unit as their subordinates. The conflict of interest between those employees and their subordinates negates

the community of interest those groups may otherwise share.

In Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1988), the Commission reaffirmed its long line of cases holding that we will ordinarily find a conflict of interest between superior officers and rank-and-file officers in a police department. In Union City, P.E.R.C. No. 70, NJPER Supp. 295, 297 (¶70 1972), cited in West New York, the Commission observed that a paramilitary organization, with its strict observance of the chain of command, is distinguishable from other governmental services. When asked to draw negotiations unit parameters in these cases, we consider whether an actual or a substantial potential conflict of interest exists. In West New York, the Commission observed:

[W]here these [conflicts of interest] are real rather than merely apparent, it would be difficult indeed to conclude, in contested cases, that a community of interest exists between the lowest ranking subordinate and his superior, absent exceptional circumstances. We do not intend that this observation extend to those cases where the points of division are so few and so insignificant as to be termed de minimis,...
[Id., 13 NJPER at 297]

The above-cited principles concerning the separation of superior officers from rank and file personnel and from other superior officers under Wilton rationale are no less applicable when they involve a proposed separation of chief investigators and assistant chief investigators from the balance of a

collective negotiations unit comprised of line staff (investigators, senior investigators) and primary level supervisors (principal investigators).

The Civil Service Commission job specifications for an assistant chief investigator, secured facilities and chief investigator, secured facilities require that the employees working in those titles perform largely supervisory responsibilities. An example of work listed for each one - ". . . evaluates employee performance and conduct, enabling the effective recommendation of the hiring, firing, promoting, and discipline of subordinates" - announces the hallmarks of a supervisor as defined by N.J.S.A. 34:13A-5.3. The certifications of Green and Crespo specify that supervisory functions are regularly performed by both Crespo and Allen.

Allen, the assistant chief investigator, secured facilities, within the DOC is responsible in part, for supervising and reviewing internal affairs investigations. He has disciplinary authority over the staff within the SID other than the chief investigator. Green certifies that assistant chief investigators are ". . . part of the highest level of management for the SID unit and routinely function as the head of SID on any given day." When the chief investigator is unavailable, the assistant chief investigator participates in the final selection of an employee promoted into SID.

Crespo, the chief investigator, secured facilities, within the JJC is responsible in part, for directing the investigation activities performed by investigative units, teams, or specialized investigators. He has the power to recommend the hiring, firing, promoting, and disciplining of employees within the Office of Investigations, many of whom are included in the FOP unit. Chief investigator Crespo certifies that he exercises these supervisory responsibilities. He provided a recent example of his recommendation to terminate a senior investigator; the recommendation was approved and the senior investigator was dismissed from service.

Both Crespo and Allen are responsible for overseeing their work unit and to ensure the adequacy of the unit's work product. It seems to me that this responsibility encompasses and perhaps supercedes their oversight of each employee in the unit. These supervisory duties place them in direct conflict with the employees represented by the FOP.

FOP does not dispute that the individuals holding the titles of assistant chief investigator and chief investigator are supervisors. It concedes that they are "essentially 'supervisors of supervisors' in that they are paid at the managerial level while simultaneously representing management."

FOP maintains however, that its unit is "most appropriate" to represent these titles because it "sufficiently appreciates

and understands the type of work performed and specific issues affecting investigative-series-title employees." It also asserts that it would be inappropriate for NJLECOA to represent employees whose job responsibilities include investigating alleged wrongdoing by other employees also represented by NJLECOA. FOP has not presented any examples illustrating that problem, nor has it provided examples rebutting the certifications of Crespo and Green asserting that the disputed titles do not perform such investigations.

I find that the assistant chief investigator, secured facilities at the DOC (Allen) and chief investigator, secured facilities at the JJC (Crespo) are supervisors within the meaning of the Act and share a community of interest with the members of the NJLECOA. The disputed titles are more organizationally equivalent to members of the NJLECOA unit than to members of the FOP unit. I disagree with the FOP that a substantial conflict of interest exists between the assistant chief investigator and chief investigator and the other members of NJLECOA unit. FOP has not presented facts indicating that any potential conflict of interest between the disputed titles and the NJLECOA unit members is substantial, thereby warranting their exclusion from that negotiations unit. The job specifications for the assistant chief investigator, secured facilities and chief investigator, secured facilities, as well as the certifications of Green and

Crespo all provide that the two titles do not conduct investigations of NJLECOA unit members. No facts indicate that they conduct internal affairs investigations. Accordingly, I do not believe that a Wilton conflict will arise if the assistant chief and chief investigator are placed in the negotiations unit represented by NJLECOA. In my view, it would be inappropriate to place them in the same unit as employees they supervise, i.e., the unit represented by the FOP.

Consequently, the unit represented by NJLECOA is clarified as including the titles, assistant chief investigator (DOC) and chief investigator (JJC), secured facilities. These clarifications are effective immediately.

Jonathan Roth
Deputy Director of Representation

DATED: October 3, 2012
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by October 15, 2012.