

D.R. NO. 2015-1

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

In the Matter of

TOWNSHIP OF PEMBERTON,

Petitioner,

-and-

Docket No. CU-2013-038

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1040,

Respondent.

SYNOPSIS

The Director of Representation clarifies a white-collar, supervisors unit to exclude the titles of supervising clerk typist, public works superintendent and supervisor of recreation. The Director finds that the supervising clerk typist is directly involved in collective negotiations and the grievance process, and therefore, confidential. The Director also finds that the public works superintendent and supervisor of recreation are managerial executives because they formulate and implement management policies for the Township. Finally, the Director finds that the inclusion of the public works superintendent in the unit impermissibly creates a potential, substantial conflict of interest, but the inclusion of the supervisor of recreation only creates a *de minimis* conflict. Accordingly, the Director orders the petitioned-for titles to be removed from the unit, effective immediately.

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Appearances:

For the Petitioner
Archer & Greiner, attorneys
(David A. Rapuano, of counsel)

For the Respondent
Weissman & Mintz, attorneys
(Rosemarie Cipparulo, of counsel)

DECISION

On June 20, 2013, the Township of Pemberton (Township) filed a clarification of unit petition seeking to clarify a collective negotiations unit of supervisors represented by the Communications Workers of America, Local 1040 (CWA) to exclude the titles, supervising clerk typist, supervisor of recreation, and public works superintendent. The Township claims that the supervising clerk typist is a confidential employee, and that the supervisor of recreation and the public works superintendent are managerial executives within the meaning of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.,

rendering those employees ineligible for inclusion in any negotiations unit. The Township also asserts that the supervisor of recreation and the public works superintendent should be excluded from the unit because their job duties include supervising other titles in the supervisors' unit, creating an impermissible conflict of interest. CWA opposes the petition.

On October 29, 2013, we conducted an exploratory conference with the parties. They were unable to reach a voluntary resolution. By letter dated November 4, 2013, we requested both parties to provide certifications or sworn affidavits in support of their respective positions. N.J.A.C. 19:11-2.2.

The Township provided the certifications of Dennis Gonzalez, the Township's business administrator, and David A. Rapuano, Esquire, the Township's special labor counsel. CWA submitted certifications from Paula Kosko, the Township's recreation supervisor, and Harold P. Sager, the Township's public works superintendent. In its letter brief accompanying the certifications, CWA conceded that its investigation revealed that the supervising clerk typist is a confidential employee within the meaning of the Act.

By letter dated August 12, 2014, I advised the parties of my tentative findings and conclusions. I invited the parties to respond in writing by the close of business on August 19, 2014, if they believed my tentative determinations were incorrect or

that there were new material facts that should be brought to my attention. As of the date of this decision, neither party submitted a response.

The disposition of this petition is properly based upon our administrative investigation. No substantial material factual disputes exist that would require an evidentiary hearing.

N.J.A.C. 19:11-2.6. I find the following facts.

On February 8, 2006, we issued a certification of representative based upon authorization cards for the following unit: "All full time and part time supervisory employees in the following titles: UEZ coordinator, tax collector, streets and road supervisor, supervisor clerk typist, public works supervisor, superintendent, supervising mechanic, construction official, court administrator and director of recreation and senior services employed by the Township of Pemberton." The current negotiations agreement extends from January 1, 2012 through December 31, 2014. Eleven (11) employees are included in the negotiations unit. Harold Sager is the public works superintendent and has been employed by the Township since the 1990s. Paula Kosko is the recreation supervisor, which is also known as the director of the department of recreation and senior services. She has been employed in this position since 2002. Michele Brown is employed as the supervising clerk typist, which

is now referred to by its civil service title, keyboarding clerk
4.

The Township has a mayor-council form of government pursuant to the Faulkner Act, N.J.S.A. 40:69A-31 et seq. The mayor is vested with the executive power. N.J.S.A. 40:69A-39. The mayor is responsible for supervising all municipal departments. N.J.S.A. 40:69A-40. The mayor can appoint all department directors with the advice and consent of the Township's council and remove them at any time at the Mayor's discretion. N.J.S.A. 40:69A-43. The mayor is also empowered to negotiate all of the Township's contracts subject to final approval by the Township's council. N.J.S.A. 40:69A-40.

In accordance with the Faulkner Act, the business administrator serves as the head of the Township's administration department. N.J.S.A. 40:69A-44. The business administrator has "the authority and power to investigate the organization and operation of any and all departments, to prescribe standards and rules of administrative practice and procedure and to consult with the heads of the departments under his jurisdiction." N.J.S.A. 40:69A-44(e); Pemberton Code §3-13(c)(6). Dennis Gonzalez has been the business administrator for the Township since May 2012.

The offices of the mayor and business administrator are located in the Township's main municipal building. Business

Administrator Gonzalez certifies that the office of the public works superintendent is located in a separate building within walking distance of the main municipal building, and the office of the recreation supervisor is located approximately four (4) miles away from the main building at Country Lakes Clubhouse, 69 Tensaw Drive. The office for the supervising clerk typist is also located in the Township's main building, and is situated between the business administrator's office and the mayor's office.

The Township organizational chart sets forth six departments: administration, public works, community development, police, fire, recreation and senior services. Harold Sager, the public works superintendent, serves as the head of the public works department. Beneath Sager is the supervisor of public works, who in turn, oversees the following four divisions: water, streets and roads, buildings and grounds, and fleet. Paula Kosko, the recreation supervisor, serves as the head of the recreation and senior services department. Kosko supervises the recreation coordinator, recreation clerk, senior center program aides, omnibus driver and senior center clerk.

Administrator Gonzalez certifies that his title, the petitioned-for titles, the Chief of Police, Chief Financial Officer, and the Director of the Department of Community

Development, all regularly participate in policy formulation for the Township.

The Township also negotiates collectively regarding employees in three other units. Superior officers and rank-and-file officers are represented by the Patrolmen's Benevolent Association in two separate units. AFSCME Council 71 represents the Township's non-supervisory employees.

The Township asserts the titles of recreation supervisor and public works superintendent should be excluded from the supervisory unit represented by CWA. The Township contends that the mayor and business administrator rely on the subject matter expertise of these department heads in formulating management policies, and they also delegate to them the responsibility for the effectuation of those policies in their respective departments. The Township also argues that these titles should be excluded because they supervise other titles in the negotiations unit represented by CWA, which results in an impermissible conflict of interest. CWA denies that the employees are managerial executives and that their job duties create an impermissible conflict of interest. No dispute appears to exist regarding the asserted confidential status of the petitioned-for title, supervising clerk typist.

Supervising Clerk Typist

The Township provided certifications from Business Administrator Gonzalez and the Township's special labor counsel, David A. Rapuano, Esq., in support of its position that the supervising clerk typist is a confidential employee. Gonzalez certifies that Michele Brown, the supervising clerk typist, is the primary assistant to the mayor and to him. Brown reports directly to both positions. Gonzalez certifies that Brown regularly assists him with handling grievances, drafting internal memos and final grievance decisions, and with collective negotiations. Specifically, Gonzalez and the Township's labor counsel rely on Brown to gather information to be used by the Township in labor matters. Gonzalez certifies that Brown has advance notice of Township's decisions and proposals contemplated by the Township. Rapuano certifies that he has been special labor counsel to the Township since 2007, and during that time has frequently worked with Brown regarding all types of labor relations issues. Rapuano's certification identifies a number of examples in which he relied on Brown to gather information necessary to develop negotiations proposals or grievance responses and attached exhibits of electronic correspondence to and from Brown regarding such issues. For example, during the most recent CWA negotiations, Brown provided the costs incurred by the Township from the contractual sick leave buyback and

educational reimbursement provisions. Rapuano certifies that this information was used by the Township to create negotiations proposals.

Public Works Superintendent

CWA disputes that the public works superintendent is a managerial executive. To support its position, CWA provided the certification of Harold Sager, who is currently employed as the public works superintendent for the Township. He certifies that he is not involved in determining work schedules of the titles he supervises. Instead, the public works supervisor, building and grounds supervisor, water division supervisor all make their own schedules. These supervisors also handle the day-to-day operations of their respective divisions within the public works department. Sager certifies that he gives initial approval to leave requests, but subsequently directs them to the business administrator for final approval. He also certifies that he performs the duties of his subordinate supervisors if they are on leave. Sager certifies that he is not aware of any job performance evaluation policies and does not participate in any evaluations. He can be called to testify in disciplinary matters involving fellow bargaining unit employees. Although Sager participates in job interviews and makes hiring recommendations, he certifies that the business administrator makes the final determinations.

Sager certifies that purchases under \$2000.00 are approved by himself, the chief financial officer and the mayor, while purchases over \$2000.00 need the Township council's final approval. Sager certifies that he assists in developing budgets, like all department heads. He annually prepares a total of four budgets for the following divisions: streets and roads, building and grounds, water, and fleet. He seeks input from all staff when creating budget proposals. Sager certifies that he submits his budget proposals to the business administrator and mayor, who in turn create the final versions that are submitted to Township Council for approval.

Sager certifies that he does not have ultimate responsibility in administering the collective negotiations agreements. He acknowledges that nonsupervisory Township employees represented by AFSCME present their grievances to him at the first step in their negotiated procedure. Sager certifies that no employee in the supervisors' unit represented by CWA has presented a grievance to him for a response. He certifies that if such an employee does file a grievance with him for a response, he would direct it to the business administrator.

Sager certifies that he informs the business administrator and mayor that a policy needs to be created, and that if they agree with his policy assessment, he will provide information and suggestions. He is responsible for implementing the policy as

appropriate in his department. Sager certifies that he cannot identify a single instance where he formulated any policy and that he has no discretion in choosing among possible courses of action to put policies into effect without the prior approval of the business administrator.

In contrast, the Township asserts that the title of public works superintendent is a managerial executive. Business Administrator Gonzalez certifies that Sager, as a department head, is responsible for all functions assigned to his department; he manages all of its employees and develops personnel policies specific to his department. He oversees forty-three employees in twenty different titles. The following five titles are supervised by Sager and are also included in the same negotiations unit with him: supervisor of public works, supervisor of water, building & grounds supervisor, supervising mechanic, streets & roads supervisor. Each title is currently occupied by a single employee, except for streets & roads Supervisor, which is presently vacant. The supervisor of public works sits directly beneath the public works superintendent on the Township's organizational chart. The other four supervisor titles sit directly beneath the title of supervisor of public works.

Sager has the authority to grant leave, and determine work schedules and assignments for employees within his department.

He can interview applicants for department titles, and can discipline department employees, subject to consultation with the Business Administrator. Gonzalez certifies that Sager cannot unilaterally adjust the pay rate of negotiations unit members, but would be expected to make recommendations regarding such adjustments to the business administrator where appropriate.

Gonzalez certifies that department heads provide the Township's response at the first step of the grievance procedure, provided that the grievance does not involve a dispute over contract interpretation. Gonzalez certifies that such grievances are decided by the mayor or business administrator because interpretation decisions typically impact multiple departments. Gonzalez certifies that Sager, as department head, typically responds at the first step in the grievance procedure on behalf of the Township. He also certifies that Sager, as public works superintendent, initiates disciplinary action against employees when appropriate and testifies against charged employees within his department, including fellow negotiations unit members. Gonzalez provided the names of twelve public works employees that have been disciplined by Sager or his immediate subordinate, the supervisor of public works. Of these twelve public works employees, eight belong to the Township's broad-based unit of non-supervisors, while two are fellow members of the supervisors unit represented by CWA.

Gonzalez certifies that Sager can evaluate all employees in his department, including fellow negotiations unit members. He further certifies that department directors of larger departments may involve mid-level supervisors to assist with evaluating other negotiations unit members. Like all department heads, Sager can be evaluated by the business administrator. Gonzalez certifies that he has not evaluated department directors since he started serving as business administrator one and a half years ago, but he intends to evaluate department directors within the next six months.

As a department director, Sager prepares the budget, and his recommendations are considered, although the mayor retains final authority over the budget. The Township provided a copy of an October 24, 2014 email from Sager to Gonzalez, which attached Sager's request for the public works department's 2014 budget. Gonzalez certifies that Sager, as a department director, has the authority to make purchases within the adopted budget, but the mayor and Township council make the final decisions for major purchases.

The Township contends that the title, public works superintendent, has a role in the policy formulation process. For example, Gonzalez certifies that Sager has developed and authored several policies, including ones regarding the use of Township equipment; the wearing of Township uniforms; and

employee conduct during lunch and break periods. Gonzalez certifies that Sager has discretion to determine methods for construction, repair and maintenance in the public works department, to allocate staff among the department's several divisions, based on his assessment of operational needs and priorities, and to decide when outside assistance should be sought to accomplish the department's duties.

The Township also maintains that the public works superintendent can select among alternate courses of action in putting policies into effect. Gonzalez certifies that upon Sager's analysis and recommendation, the Township purchased one million dollars worth of road paving equipment to enable public works employees to conduct road paving operations. Gonzalez also certifies that this purchase marked a major change in Township policy because the Township previously outsourced all road construction, other than minor pot hole repair. Furthermore, during inclement weather and other emergencies that impact roads and facilities, Sager has full discretion over all operational, deployment and staffing decisions necessary to protect public safety on streets and roads.

Recreation Supervisor

CWA denies that the recreation supervisor is a managerial executive and that inclusion in the union presents an impermissible conflict. Recreation Supervisor Kosko certifies

that she supervises the following titles in her department: recreation coordinator, recreation clerk, senior center program aides, omnibus driver, senior center clerk and temporary employees. She is also responsible for evaluating employees in those titles and for determining their work schedules and assignments. Kosko certifies that she is not aware of any personnel actions that are linked to job evaluations.

CWA notes that many of Kosko's decisions as Recreation Supervisor are subject to final approval by the business administrator, mayor and/or council. For example, Kosko certifies that the business administrator must give final approval of leave requests that she grants to employees in her department. Kosko certifies that the business administrator must approve education and training for all employees. She also certifies that although she interviews applicants, the business administrator and/or mayor make the final hiring decisions for applicants seeking full-time positions. All purchases in any Township department must be approved by the chief financial officer and the mayor. Kosko certifies that although she annually prepares two separate budget proposals for recreation and senior services, the mayor makes adjustments to her proposals, sometimes without her input, and then the modified budgets are submitted to council for further changes and approval.

Kosko certifies that she does not have ultimate responsibility in contract administration for any collective negotiations unit. As a department head, Kosko provides the Township's response at the first step of the grievance procedure for non-supervisory employees in her department, who are represented by AFSCME Council 71. If the grievance is not resolved at the first step, it proceeds to the business administrator. Kosko certifies that no grievances filed by supervisors in her department have been brought to her attention, and that, in the event she did receive a grievance filed by a fellow CWA negotiations unit member, she would forward the grievance to the business administrator. Kosko certifies that she, like any Township employee, can be called upon to testify in disciplinary proceedings against another employee. Kosko further certifies that she does not have the authority to change the salary of negotiation unit members, nor does she have a role in such decisions.

CWA claims that the recreation supervisor's role in policy formulation and implementation is limited to providing information and suggestions regarding policy content and potential procedural challenges with implementation. Like Sager, Kosko certifies that she informs the business administrator and mayor that a policy needs to be created, and she will provide information and suggestions if they agree with her policy

assessment. Kosko is responsible for implementing the policy as appropriate in her department. However, Kosko also certifies that she cannot identify a single instance in which she formulated any policy or exercised discretion in choosing among possible courses of action to put policies into effect. She asserts that the business administrator directs her regarding the timing and manner in implementing policies.

The Township asserts that the title recreation supervisor is a managerial executive and that its inclusion in the supervisors' unit presents an impermissible conflict of interest. Business Administrator Gonzalez certifies that as a department director, Kosko is responsible for all functions assigned to her department; for managing all of its employees and for developing personnel policies specific to her department. As recreation supervisor, Kosko oversees thirteen year-round employees in eight different titles, in addition to forty lifeguards and counselors employed during the summer. One subordinate title, recreation coordinator, is included in the same CWA negotiations unit as Kosko. One employee is currently holding that title. As mentioned above, this title sits directly below the recreation supervisor on the Township's organizational chart.

As recreation supervisor, Kosko grants leave requests, and determines work schedules and assignments for employees in her department. She can and has disciplined department employees

subject to consultation with the mayor or business administrator. Gonzalez certifies that Kosko also has the discretion to determine staffing levels. He further certifies that as recreation supervisor, Kosko conducts interviews for titles in her department, and hires temporary and seasonal staff for her department. Gonzalez certifies that Kosko cannot unilaterally adjust the pay rate of bargaining unit members, but would be expected to make recommendations regarding such adjustments to the business administrator where appropriate.

Gonzalez certifies that Kosko is responsible as recreation supervisor for initiating disciplinary action against employees when appropriate and testifying against charged employees within her department, including fellow negotiations unit members that she supervises. The Township attached as an exhibit an email from Kosko to Gonzalez dated August 5, 2013, wherein Kosko forwarded disciplinary actions against two employees within her department for Gonzalez's approval.

Gonzalez certifies that evaluations in the Township are not disciplinary, but instead used to determine an employee's performance status and history. Kosko, as recreation supervisor, is subject to performance evaluations by the business administrator. However, Kosko has not been evaluated by Gonzalez since he took office.

Gonzalez certifies that while the mayor retains final authority over the budget, the opinions and expressed needs set forth by the department directors are "substantially considered" in the final presentation to the Township's council. The Township provided as an exhibit, an email dated November 18, 2014, from Kosko to Gonzalez, that attached Kosko's request for the recreation department's 2014 budget. Gonzalez certifies that as a department director, Kosko has the authority to make purchases within the adopted budget, but the mayor and Township council make the final decisions for major purchases.

The Township contends that the recreation supervisor is regularly involved in policy formulation and administration. Gonzalez certifies that Kosko engaged in policy formulation when she conceived, authored and recommended substantial amendments to the Township's code regarding the use of public property and the Township's lakes. These recommendations were ultimately adopted by the Township's council with minor changes. The Township provided a copy of email exchanges between Kosko and Gonzalez during the Spring of 2013, regarding her drafts of the Township's facilities use ordinance, which it claims demonstrate that Kosko spearheaded its development. The Township also provided as an exhibit, a memo from Kosko to the mayor and business administrator dated September 25, 2012, where Kosko recommends the institution of a boat launch permit program as a way to

protect dock and ramp areas at Township-owned launch sites and provided information regarding similar programs in other municipalities. Gonzalez certifies that Kosko, as recreation supervisor, has also conceived of, drafted and recommended policies regarding after-school programs, Township concession stands and the rental of Township buildings.

On January 13, 2014, the Township submitted a supplemental certification from Gonzalez, in which he identifies a January 8, 2014, memorandum to him from Kosko as a recent example of Kosko's authority to formulate policy. Gonzalez certifies that Kosko's memorandum recommends that the purview of her department be expanded to include the supervision of Township youth sports, and that the Township hire a part-time sports program coordinator to achieve this goal. Gonzalez certifies that this proposal was formulated only by Kosko, and that she would have the responsibility for directing its effectuation should she receive budget approval.

Kosko's January 8 memorandum to the business administrator and the mayor advises that the Department of Recreation & Senior Services operates as two separate units, but is united by her position as department director. Kosko then reports that there is a demand for her department to begin administering the youth sports program. Kosko wrote that "[a]fter 12 years in my position, I feel even more strongly that the Recreation

department should play a more active role in the youth sports programs . . .", and therefore, anticipates the need to create a new year-round part-time position of Sports Program Coordinator in 2015. Kosko maintains that if approved, the creation of this new position will enable her to devote more time to the senior center. Kosko explained that she "feel[s] strongly that to be truly successful as a Director of a Senior Center, there needs to be a relationship with the seniors served."

The Township further contends that the recreation supervisor is regularly involved in policy administration, where Kosko must exercise discretion and choose among alternative courses of action. Gonzalez certifies that Kosko has discretion in determining the times and frequency of programs and services offered by her department. Kosko can hire temporary and seasonal staff to accomplish department goals. Gonzalez certifies that Kosko has the authority to evaluate ongoing programs within her department, and amend or discontinue them based on her assessment of their value and cost. Lastly, she is responsible for implementing and enforcing Township policies in her department, and can alter policies which do not serve their intended purpose.

ANALYSIS**Confidential Employee Status**

I find that the title, supervising clerk typist, is confidential, and therefore, is inappropriate for inclusion in a collective negotiations unit. N.J.S.A. 34:13A-3(g) defines confidential employees of public employers, other than the State, as those:

whose functional responsibilities or knowledge in connection with issues involved in the collective negotiations process would make their membership in any appropriate negotiations unit incompatible with their official duties.^{1/}

The Township's certifications demonstrate sufficient facts from which to conclude that the supervising clerk typist is confidential. Brown's job duties fall within the confidential labor relations process, and include tasks such as drafting final grievance decisions in advance of their disclosure to the designated majority representative and calculating costs of various negotiations proposals on behalf of the Township. These specific duties render Brown's title inappropriate for inclusion in any unit. CWA's concession that the title is confidential further supports this conclusion.

1/ Effective January 18, 2010, the New Jersey legislature modified the statutory definition of confidential employee for State of New Jersey employees only by creating a more stringent test to establish confidential status. That modification does not apply here because the employee at issue is not a State employee.

Managerial Executive Status

I am inclined to find that the public works superintendent and recreation supervisor are managerial executives.

N.J.S.A. 34:13A-5.3 grants public employees the right to organize and collectively negotiate. N.J.S.A. 34:13A-3(f) specifically exempts managerial executives from that right and defines managerial executives of any public employers other than the State of New Jersey as:

persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices . . .

"A managerial executive need not formulate policies and practices and be responsible for directing the effectuation of policies and practices. One or the other is sufficient." In re New Jersey Turnpike Auth., 289 N.J. Super. 23, 36 (App. Div. 1996), aff'd as mod. in 150 N.J. 331 (1997).

In re New Jersey Turnpike Auth., 150 N.J. 331 (1997), sets forth the following test adopted by our Supreme Court to determine managerial authority:

A person formulates policies when he develops a particular set of objectives designed to further the mission of a segment of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means and extent of reaching a policy objective and thus oversees or coordinates policy implementation

by line supervisors. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. [Id. at 356.]

Our Supreme Court derived this test by modifying the Commission's decision in Montvale Bor., P.E.R.C. No. 81-52, 6 NJPER 507, 509 (¶11259 1980). Specifically, it eliminated as too restrictive the requirement set forth in Montvale Bor. that managerial executives be able "to affect broadly the organization's purposes or its means of effectuation of these purposes." N.J. Turnpike Auth., 150 N.J. at 356. It explained that ". . . the requirement that a managerial employee be one who broadly affects the agency's mission should not be a condition of exclusion, but merely an example of a manager who should be excluded." Id.

The Court, however, rejected broader interpretations of the managerial executive definition. It explained that during the course of amending the Act, the Legislature had rejected a managerial executive definition that would have excluded persons "effectuating and making operative" management policies and practices and had instead confined that part of the exclusion to persons "directing the effectuation" of such "policies and practices." Id. at 347-48. The Court concluded that "directing

the effectuation" connotes a higher level of authority than does "effectuating and making operative." Id. at 355.

The title of public works superintendent appears to formulate policy and direct its effectuation. Gonzalez's certification that the Township purchased about one million dollars of road paving equipment based on Sager's analysis and recommendation demonstrates that the public works superintendent possesses and has exercised managerial executive authority. Gonzalez's certification that Sager has authored numerous policies, particularly policies pertaining to the use of Township equipment, Township uniforms and the conduct of department employees during break time, also supports this finding. Additionally, Sager has determined the methods for construction, repair and maintenance projects in his department, including whether assistance from outside the Township should be sought. He determines proper staffing levels and allocation among the public works divisions based on his independent assessment of operational needs and priorities in order to maintain public safety on the Township's streets and roads, particularly during emergencies. Sager sits directly beneath the business administrator on the Township's organizational charts, along with the other department heads. Therefore, the above facts, taken together, support a finding that the public works superintendent is a managerial executive.

Kosko, as recreation supervisor, also formulates policy. Kosko's January 8 memorandum to the business administrator and mayor, in which she proposes a significant expansion of her department's purview, specifically demonstrates her managerial authority. Kosko's letter clearly identifies a particular set of objectives designed to further the mission of her department; she sets forth her dual goals of enlarging the scope of her department to include an active role in administering youth sports and building better personal relationships with the seniors served by the Township's senior center. Kosko's letter also clearly identifies a particular course of action to achieve those goals. She urges the creation of a new year-round, part-time coordinator position in her department that would be responsible for administering youth sports programs, thereby enabling Kosko to spend more consistent time at the senior center, and a modification of the recreation coordinator's job duties to accommodate her proposed change in the department's scope. Kosko's letter demonstrates she arrived at her proposal after she made an independent assessment of an unmet Township need, and an independent assessment of the appropriate approach her department should take to rectify that need. Kosko's letter reveals that her strong feelings regarding the Township's role in youth sports and the importance of building personal

relationships with the Township's seniors motivated her policy proposal.

Administrator Gonzaelz's certification that Kosko drafted a number of policies dealing with the use of Township property that were subsequently adopted with minor changes, also show that the recreation supervisor possesses and has exercised the authority of a managerial executive. Kosko's ability to hire all temporary and seasonal employees for her department without final approval and her position directly beneath the business administrator on the Township's organizational chart further reinforce her title's managerial status. Therefore, the above facts, taken together, support a finding that the recreation supervisor is a managerial executive.

While both Sager and Kosko generally deny having ever formulated policy and choosing among alternative courses of action, their certifications lack sufficient detail to demonstrate the extent to which their decisions are limited by the mayor, business administrator and/or council. Moreover, both Sager and Kosko concede in their certifications that they have initiated policy formulation by "inform[ing] the business administrator and mayor that a policy needs to be created" and subsequently providing information and opinions regarding the policy's content, if the administrator and mayor agree with their need assessment. This job responsibility demonstrates that Sager

and Kosko independently assess which needs of their respective departments are not being met, and they then develop a policy proposal for the business administrator and mayor that, in their independent judgments, would remedy the unmet policy need. And although both Sager and Kosko have their policy proposals subject to approval by the Township, final decision-making authority is not a requirement for managerial executive status. In re New Jersey Turnpike Auth., 289 N.J. Super. 23, 33 (App. Div. 1996), aff'd as mod. in 150 N.J. 331 (1997).

I also find to be unpersuasive CWA's claim that the Sager and Kosko are not managerial executives because they supervise a relatively small staff. Supervision of a limited number of employees does not preclude a finding of managerial executive status, particularly where sufficient facts establish an employee's input serves as a crucial component in accomplishing a governmental mission. See e.g. Gloucester Cty., P.E.R.C. No. 90-36, 15 NJPER 624, 626 (¶20261 1989) (finding that program coordinator supervising approximately five employees is a managerial executive). Here the relatively limited number of employees under Sager's and Kosko's supervision does not outweigh the above evidence demonstrating their authority to formulate or effectuate policy for the Township.

I also disagree with CWA's contention that our determination in Hunterdon Cty., D.R. No. 2010-1, 35 NJPER 303 (¶105 2009) is

analogous to the instant matter. In Hunterdon Cty., the Director found a unit comprised of the county's department heads to be appropriate because the titles were not managerial executives as the County contended. Id. at 310. The Director explained that the County failed to provide any specific examples of instances where the department heads exercised managerial authority to support its position. Id. at 308. The other decisions cited by CWA as favorable to its position all involve the same defect; specifically, a party claiming managerial status and failing to provide enough facts demonstrating that status. See Teaneck Tp., P.E.R.C. No. 2009-25, 34 NJPER 379, 380 (¶122 2008) (denying request for review of Director's certification of a supervisors' unit where Township provided conclusory statements and recitations of duties contained in job descriptions to support its managerial executive claims); Eastampton Tp., D.R. No. 94-1, 19 NJPER 404, 406 (¶24178 1993) (declining to find certain department heads are managerial executives where Township failed to support assertions). In contrast, the Township in the instant matter provided specific and sufficient facts to find that the public works superintendent and recreation supervisor are managerial executives.

Conflict of Interest

I also find that the public works superintendent is inappropriate for inclusion in the existing unit because the

position's job duties create an impermissible conflict of interest, while no such conflict exists to justify the recreation supervisor's exclusion from the unit. Our Act generally affords public employees, both supervisors and non-supervisors, the right to form, join and assist employee organizations. N.J.S.A. 34:13A-5.3. It also charges the Commission with the obligation to resolve disputes regarding unit definition and composition. N.J.S.A. 34:13A-6(d). See also Clearview Reg'l Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 251 (1977) (distinguishing clarification of unit petitions from other representation petitions). In so doing, the Commission must give "due regard for the community of interest among the employees concerned." N.J.S.A. 34:13A-5.3.

Other than in very limited circumstances, the Act expressly prohibits supervisors and non-supervisors from being represented in the same collective negotiations unit. N.J.S.A. 34:13A-5.3. However, a proposed unit comprised solely of a public employer's supervisors does not necessarily establish an appropriate unit with the requisite community of interest. West Orange Bd. of Ed. v. Wilton, 57 N.J. 417, 425-26 (1971). As our Supreme Court in Wilton explained:

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 substantial conflict between the interests of a particular supervisor and the other included employees, the community of interest

required for inclusion of such supervisor is not present. [Id. at 426.]

To determine whether such conflicts exist, we must examine the facts of each particular case. Id. Any conflicts greater than peripheral or *de minimis*, are against the public interest. Id. An employee's role in evaluations or grievance procedures are significant factors in determining whether an actual or potential substantial conflict exists. Id. at 423. See also Somerset Cty. Library Comm'n, D.R. 96-18, 22 NJPER 189, 190 (¶27098 1996). Another consideration in determining if an actual or potential substantial conflict exists is whether the historical relationship between the supervisor and other included employees reveals compromised interests or rights. See West Paterson Bd. of Ed., P.E.R.C. No. 77 (explaining "where past experience exists, such can obviously be a more accurate gauge of probabilities than mere speculation not benefitted by hindsight.")

CWA argues that neither the public works superintendent nor the recreation supervisor meets the definition of supervisor and therefore, should be permitted to remain in the supervisors unit. The Township contends that the titles' direct supervision of other unit members renders them ineligible for inclusion in the unit.

I find that the inclusion of the public works superintendent creates a potential, substantial conflict among employees in the

existing unit, while the inclusion of the recreation supervisor creates only a *de minimis* conflict.

As a department head, Sager serves as the first step in the grievance procedure for employees in their respective departments. Because Sager, as the public works superintendent, supervises five (5) subordinate titles that are represented by CWA, there is the potential for a conflict of interest should he have to process a grievance filed by a fellow unit member against his own actions.

This potential conflict is not *de minimis* or peripheral. As the above managerial executive analysis makes clear, Sager is a high-level supervisor with a significant degree of control over his subordinates' daily activities. It is undisputed that Sager sets work assignments, implements Township policies relating to his respective departments, conducts interviews, and can make hiring recommendations to fill departmental vacancies, including those titles represented by CWA. Furthermore, Sager can discipline all employees in their respective departments, including his fellow CWA unit members. Business Administrator Gonzalez certifies that Sager recently exercised this authority. He identified twelve public works employees who were disciplined by Sager and his immediate subordinate, the supervisor of public works. Two of the twelve disciplined public works employees are included in the same CWA unit as Sager.

Considering the degree and nature of the authority Sager exercises over several of his subordinate supervisors in CWA's unit, he would have to defend against a grievance filed by the organization that also represents him. The public works superintendent's role with respect to grievances and disciplines is a sufficient basis to support a finding of a potential, substantial conflict.

Although Sager and the Township disagree concerning whether CWA grievances have been brought to his attention, a conflict need not be actual in order to warrant exclusion from the unit.

Wilton, 57 N.J. at 428. While Sager certifies that he would direct a grievance to the business administrator, such action does not eliminate the potential conflict because he may have to testify or bear witness against fellow CWA unit members.

Although CWA correctly argues that all employees may be placed in a position where they have to testify in matters involving other unit members, the crucial distinction is that Sager would likely have to testify in defense of his own decisions that he made pursuant to the authority delegated to him by the Township.

While much of the above analysis also applies to Recreation Supervisor Kosko, I find, however, that no potential, substantial conflict exists sufficient to warrant her title's exclusion from the unit. Sager as public works superintendent supervises five subordinate titles that are represented by CWA, while Kosko as

recreation supervisor supervises only one title--the recreation coordinator--that is represented by CWA. The Township identified two instances in which Sager disciplined his fellow CWA unit members, but did not submit any evidence that demonstrates Kosko ever disciplined or had a conflict with the recreation coordinator. Kosko has served as recreation supervisor for the past twelve years, the instant negotiations unit has existed for the past eight years, and no facts suggest that the recreation coordinator is a recently-created title. The historical absence of any identifiable conflict of interest between the Recreation Supervisor Kosko and the recreation coordinator tends to support the conclusion that any conflict of interest is *de minimis*, and therefore, tolerable under the Wilton standard. See e.g. Burlington Cty. Bd. of Social Services, D.R. No. 96-15, 22 NJPER 180, 183 (¶27095 1996) (concluding assistant training supervisor should remain in supervisors negotiations unit where its inclusion over five years produced no examples of conflict).

However, I find that the roles of Sager and Kosko in evaluations do not provide a sufficient, additional basis to establish a potential, substantial conflict. While the parties agree that Kosko as recreation supervisor evaluates the subordinate title of recreation coordinator that is represented by CWA, Sager denied in his certification that he evaluates any employees in his department. Furthermore, our caselaw requires

evaluations to be closely connected to personnel actions. See e.g., Roselle Park Bd. of Ed., P.E.R.C. No. 87-80, 13 NJPER 73 (¶18033 1986); Westfield Bd. of Ed., P.E.R.C. No. 88-3, 13 NJPER 635 (¶18237 1987); Atlantic Cty. Welfare Div., D.R. No. 94-2, 19 NJPER 408 (¶24179 1993). The Township established only that its evaluations are non-disciplinary and used to identify negative or positive job performance. Therefore, the Township did not provide a sufficient factual basis to conclude that this particular job responsibility of Kosko and Sager would create anything more than a *de minimis* conflict.

Accordingly, I find that the petitioned-for titles of supervising clerk typist, public works superintendent and supervisor of recreation should be removed from the unit represented by CWA. The Township has provided sufficient facts to find that the supervising clerk typist is a confidential employee, and that the public works superintendent and supervisor of recreation are managerial executives within the meaning of the Act. Additionally, I find that the Township has provided sufficient facts to conclude that the inclusion of the public works superintendent in the CWA's unit impermissibly creates a potential substantial conflict of interest.

ORDER

The unit is clarified to exclude the petitioned-for titles of supervising clerk typist, public works superintendent and supervisor of recreation, effective immediately.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

/s/ Gayl R. Mazuco

Gayl R. Mazuco

DATED: August 27, 2014
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 September 11, 2014.