

D.R. NO. 2019-8

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

In the Matter of

COUNTY OF BURLINGTON,

Public Employer,

-and-

Docket No. RO-2018-038

INTERNATIONAL ASSOCIATION OF  
FIRE FIGHTERS, LOCAL 3091,

Petitioner.

**SYNOPSIS**

The Director of Representation certifies a unit comprised of the fire marshal and assistant fire marshal employed by the County of Burlington, based upon authorization cards submitted by the International Association of Fire Fighters, Local 3091. The two titles had been unrepresented for purposes of collective negotiations. The public employer contested that both titles were ineligible for inclusion in any collective negotiations unit, claiming that they were managerial executives within the meaning of the Act.

The Director determined that the County did not demonstrate that either title actually formulates or directs the effectuation of policies, warranting a finding that they were ineligible for representation in a negotiations unit.

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Appearances:

For the Respondent,  
Capehart and Scatchard, attorneys  
(Primo J. Cruz, of counsel)

For the Petitioner,  
Spear Wilderman, PC, attorneys  
(James Katz, of counsel)

**DECISION**

On April 26, 2018, the International Association of Fire Fighters, Local 3091 (IAFF) filed a representation petition and amended petition seeking certification as the public employee representative by check of authorization cards of a collective negotiations unit comprised of the fire marshal and assistant fire marshal employed by the County of Burlington (County). The petition acknowledges that the two titles are currently

unrepresented for purposes of collective negotiations. It also provides that CWA Local 1036 may have an interest in the matter.

The County contends that both titles are managerial executives within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) and cannot be included in any collective negotiations unit. The County asserts that the titles are responsible for formulating and/or directing or effectuating management policies and practices - specifically pertaining to fire prevention, training, safety and investigations - thereby warranting their exclusion from any collective negotiations unit.

On May 3, 2018, the Communication Workers of America, Local 1036 (CWA) filed a letter seeking to intervene on the petition for the purpose of adding the assistant fire marshal to either of its extant County-wide collective negotiations units of non-supervisory employees or supervisory employees. CWA did not provide any document(s) showing that it is the exclusive representative of the petitioned-for title, nor has it submitted an authorization card or showing of interest, as required under N.J.S.A. 19:11-2.7. On May 4, 2018, a letter issued over my signature mistakenly granting intervenor status to CWA. CWA has not intervened on the petition for certification of public employee representative, pursuant to N.J.A.C. 19:11-2.7.

On May 8, 2018, the parties met with a Commission staff agent investigating the petition. The parties did not agree upon an appropriate unit. They were afforded the opportunity to submit documents and certifications supporting their respective positions. On May 16 and 18, 2018, the parties submitted position statements and replies, including certifications. IAFF submitted certifications of Robert Carr, Jr., Fire Marshal and Stephen Woods, Jr., Assistant Fire Marshal. The County submitted certifications of John Drinkard, County Director of the Department of Public Safety and Howard Black, Deputy Director of the Department.

We have conducted an administrative investigation of the facts regarding the petition. No disputed substantial material facts require the convening of an evidentiary hearing. N.J.A.C. 19:11-2.6. Based upon that investigation, the following facts were revealed.

The Office of the Fire Marshal was initially created in 1927. In October 2002, it was merged into the County's newly created Department of Public Safety Services. On December 8, 2010, the County created the petitioned-for titles, pursuant to N.J.S.A. 40A:14-1, et seq. The Resolution (No. 840-2010) designates the Fire Marshal as the chief fire enforcement officer for the County (Drinkard Cert., ¶ 2; Woods Cert., ¶ 8). Neither title has ever been included in any collective negotiations unit

(Carr Cert. at ¶ 3; Woods Cert. at ¶ 2; Black Cert. at ¶ 2-4). The County table of organization shows that the Fire Marshal reports directly to the Director of Public Safety (Black Cert., ¶ 2-4).

The County Fire Marshal may be called upon as the primary response unit for those County municipalities that do not employ a Fire Marshal (Woods Cert., ¶ 8). The Resolution also authorizes the Fire Marshal to establish additional permit or inspection requirements beyond those set forth in the New Jersey Uniform Fire Safety Act, N.J.S.A. 52:27D-192, et seq. (Drinkard Cert., ¶ 3; see also, Carr and Woods Cert., ¶ 9, respectively). In September, 2015, the County appointed Robert Carr as Fire Marshal, following his service as Assistant Fire Marshal since 2010. Steven Woods is now appointed as Assistant Fire Marshal.

The Fire Marshal and Assistant Fire Marshal carry out identical functions (Carr Cert., ¶ 12). They are statutorily required to enforce the New Jersey Uniform Fire Safety Code, N.J.A.C. 5:70-1.1, et seq. (Id., ¶26; Drinkard Cert., ¶ 4). They investigate the origin and cause of fires and explosions in Burlington County; conduct fire safety inspections and fire prevention programs for County-owned and leased properties (Carr and Woods Cert., ¶ 10, respectively; Drinkard Cert., ¶4); and, respond to fire alarms and participate in extinguishing fires, when needed. (Id.)

The IAFF has provided examples of their responsibilities. They engage in pre-fire and post-fire suppression work; respond to two to four fires per week; the Fire Marshal has performed over 250 fire investigations over the past eight years and the Assistant Fire Marshal has alone performed 50 such investigations during the last two years; assist and work with local firefighters at the scene of a fire; render decisions in applying the provisions of the Uniform Fire Safety Act, N.J.S.A. 52:27d-192, et seq., which entails working closely with fire and law enforcement officials at all levels of government; and, provide training.

All policies concerning the Office of the Fire Marshal must be authorized and approved by the Director of Public Safety. (Drinkard Cert., ¶ 5). The Fire Marshal may recommend policies or plans but the Director determines the course of action and has exclusive authority to approve policies (Id.; Carr Supp. Cert., ¶ 32). The Director alone is empowered to communicate and make recommendations directly to the County Freeholders and Administrator (Carr Supp. Cert., ¶ 5 and 22). The Director has sole authority regarding the Office of the Fire Marshal's budget and funding (Carr Supp. Cert., ¶ 7 and 20); oversight of the bidding process and the ability to enter into purchase contracts (Id., ¶ 28 and 29, ¶ 8); promulgate and direct the implementation of policies regarding fire prevention, safety and

inspection (Id., ¶ 16 and 19); enter into shared services arrangements with municipalities as authorized by the County Freeholders (Id., ¶ 25); render operational recommendations to any outside agency (Id., ¶ 6 and ¶ 10); and, hire and fire employees (Id., ¶ 5 and 22).

The County claims that both the Fire Marshal and Assistant Fire Marshal perform supervisory and policy-making duties. For example, County Policy No. 18-01, issued May 14, 2018, provides a standardized method for the completion and filing of reports by the Fire Marshal (Drinkard Cert., ¶ 5). The policy was signed and approved by the Director of Public Safety. In February, 2017, a fire alarm activated in a County-owned office was investigated by the Fire Marshal. He provided instructions to prevent future occurrences that were disseminated to the County employees in that office (Drinkard Cert., ¶ 9 and 10).

On January 24, 2018, Fire Marshall Carr emailed the Director of Public Safety, recommending that the County Freeholders support Assembly Bill A-135 concerning proposed fire safety standards for certain residential construction, which was then-pending before the New Jersey General Assembly (Drinkard Cert., ¶ 6). In March, 2016, the Assistant Fire Marshal participated with a municipal fire department to provide carbon monoxide and smoke detectors to residents (Drinkard Cert., ¶ 13 and 14). In an April 3, 2018 email to the County Director of Public Works, Carr

recommended a specific number of fire extinguishers needed in a certain County buildings and commented on a bid to provide a fire suppression system (Drinkard Cert., ¶ 13 and 14).

### ANALYSIS

Under N.J.S.A. 34:13A-3(f), a "managerial executive" of any public employer, other than the State, is defined as follows:

[M]anagerial executives of a public employer means 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.

In New Jersey Turnpike Authority v. AFSCME Council 73, 150 N.J. 331 356 (1997), the New Jersey Supreme Court adopted this test 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.

The term "managerial executive" is narrowly construed because the consequence of finding that an employee is a



managerial executive is to deny that employee the benefits and protections of the Act. N.J.S.A. 34:13A-5.3; State of New Jersey (Trenton State College), P.E.R.C. No. 91-93, 17 NJPER 246, 247 (¶22112 1991).

The burden of demonstrating that an employee is a managerial executive falls "on the party seeking to place an employee outside the Act's protection." State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507, 510 (¶16179 1985), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985); Willingboro Bd. of Ed., D.R. No. 97-15, 23 NJPER 358 (¶28169 1997). We have applied strict standards of proof to managerial executive status claims: absent a proffer of specific duties and a demonstration that the purported managerial duties are actually performed, we will not find managerial executive status. Teaneck Tp., D.R. No. 2009-3, 34 NJPER 268 (¶96 2008), req. for rev. den. P.E.R.C. No. 2009-25, 34 NJPER 379 (¶122 2008) (employer's certification lacked sufficient, specific examples of department heads actually formulating or directing the effectuation of policies); City of Newark, D.R. No. 2000-11, 26 NJPER 234 (¶31094 2000), req. for rev. den. P.E.R.C. No. 2000-100, 26 NJPER 289 (¶31116 2000), aff'd 346 N.J. Super. 460 (App. Div. 2002) (employer claiming managerial executive status must make a particularized showing that employees actually perform those duties which make the title managerial); City of Camden Housing Authority, D.R. No. 2014-7,

40 NJPER 219 (¶84 2013) (Director rejected the employer's managerial executive and confidential status claims because the employer did not produce affidavits setting forth sufficient facts and examples of work performed by the petitioned-for employees that demonstrated managerial authority or confidential status).

We have found that an employee who does not have independent, decision-making authority over the formulation and implementation of employer policies is not a managerial executive. State of New Jersey, P.E.R.C. No. 99-59, 25 NJPER 48 (¶30021 1998); Hopewell Tp., D.R. No. 2011-14, 38 NJPER 165 (¶48 2011). An employee's offering of opinions and recommendations is not a defining characteristic of a managerial executive. Camden Housing Auth.

In Matter of Cherry Hill Bd. of Fire Comm's District No. 2, H.O. No. 87-15, 13 NJPER 429 (¶18165 1987), aff'd P.E.R.C. No. 164, 13 NJPER 602 (¶18225 1987), we determined that a fire marshal and a fire inspector were neither managerial executives nor supervisors, and were properly included in a rank and file collective negotiations unit. The hearing officer determined: ". . . On balance, the fire marshal, . . . and the fire inspector are not involved in the day-to-day implementation of Board policy requiring exercise of managerial discretion." Id., 13 NJPER at 432. Neither title engaged in any policy-making because the

municipality's Board of Fire Commissioners formulated management policies and practices.

Applying these standards to the facts of this case, I find that the Fire Marshal and Assistant Fire Marshal are not managerial executives within the meaning of the Act. The County has not submitted facts sufficient to demonstrate that either Carr or Woods perform duties that can be classified as managerial executive in nature.

The County asserts that both the Fire Marshal and the Assistant Fire Marshal are managerial executives because they purportedly create and effectuate policy on behalf of the County. Drinkard directs the Office of the Fire Marshal to "prepare policy recommendations" regarding fire code compliance and gives considerable deference to such recommendations (Drinkard Cert., ¶ 7). He may rely upon the particularized knowledge of the Office of the Fire Marshal when creating policies and direct that office to take action in furtherance of their fire safety duties. The Director of Public Safety retains sole authority to approve any policy regarding the Office of the Fire Marshal (Id., ¶ 8 and 11).

Under Turnpike Authority, the Commission delineates managerial executives from lower-level employees on a case-by-case basis. The analysis in each instance focuses on the weight and interplay of the employee's position in the hierarchy, his or

her functions and responsibilities, and extent of discretion. The goal is to determine whether the employee has the authority and accountability of a managerial executive to formulate or direct the effectuation of management policies and practices.

In Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980), the Commission adopted a standard for determining whether a person formulates policy or directs its effectuation (and therefore, is a managerial executive). The Commission wrote:

Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuating of these purposes. Whether or not an employee possess 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. [6 NJPER at 508-509]

The Commission narrowly construes the term "managerial executive" and claims of managerial status are reviewed on a case-by-case basis. Borough of Avon, P.E.R.C. No.78-21, 3 NJPER 373 (1977).

In this matter, the County has not provided any documents demonstrating that the Fire Marshal or Assistant Fire Marshal exercise the scope of authority or independent discretion demanded of employees asserted to be managerial executives.

Ringwood Tp., D.R. No. 93-19, 19 NJPER 196 (¶24093 1993).

Little of Drinkard's certification shows that the titles

formulate policy or possess and exercise the broad discretion over County policies demonstrating managerial executive status. The Fire Marshal and Assistant Fire Marshal have regulatory enforcement duties, pursuant to the Uniform Fire Safety Code, requiring them to investigate the cause of fires and to publicly promote fire prevention measures.

In support of its position that the titles are managerial executives, the County references a shared services proposal, as set forth in two emails from Carr to the Director and Deputy Director of Public Safety (Drinkard Cert., ¶ 7 and 8). The printed emails reveal only the Fire Marshal's reporting on the status of various alarms, detectors and inspections (under uniform Fire Safety Code) within the community. Nothing indicates that Carr possessed the authority to create a policy and implement its terms on his own volition.

The County also asserts that Woods effectuated community fire prevention policies without prior approval from the Director of Public Safety (Drinkard Cert., ¶ 13). The ostensible support for that finding provided by the County consists of an email from Woods to both Drinkard and Black, regarding a municipality's announced distribution of smoke and carbon monoxide detectors to its community, and suggestions about the appropriate number of fire extinguishers needed for a County-owned building. In the email, Assistant Fire Marshal Woods also asks his superiors to

alert the media in order to promote the distribution. I do not believe that the email demonstrates policy formulation or directing effectuation of policy within the meaning of managerial executive status.

The County also submitted a letter from Carr to a County employee regarding an alarm activation in the County Administration Building. Carr warned employees that they must be vigilant while heating their food so as not to activate the smoke alarms (Drinkard Cert., ¶ 10). An instruction to employees about their attentiveness to cooking food without triggering the fire alarm is not a defining characteristic of County policy illustrating managerial executive status.

The County also provided a copy of its Policy No. 18-01 regarding reporting requirements for record retention under the New Jersey Uniform Fire Code (Drinkard Cert., ¶ 5; Black Supp. Cert., ¶ 3). That policy was approved and issued by Drinkard; no facts demonstrate that Carr had exercised any authority in implementing or effectuating this County policy (Drinkard Cert., ¶ 5).

The County has not proffered evidence sufficient to show that either the Fire Marshal or the Assistant Fire Marshal have created any policies or that they have authority to offer such policies. The record before me demonstrates that they are fulfilling their mandated duties under the Uniform Fire Safety

Act and that policy determinations regarding the Office of the Fire Marshal are approved and implemented by the Director of Public Safety.

Accordingly, I find that the County has not met its burden of demonstrating that either the Fire Marshal or Assistant Fire Marshal are managerial executives under the Act. It has not argued that a unit comprised of these titles only creates an undue proliferation of County negotiations units. The Commission determines in each instance the appropriate collective negotiations unit. N.J.S.A. 34:13A-6. In comparing the County-provided list of unit employees with the number of valid authorization cards filed by IAFF Local 3091, I have determined that a majority of petitioned-for employees have designated Local 3091 as their representative for purposes of collective negotiations. N.J.A.C. 19:11-2.6(b). Local 3091 is entitled to certification, despite the County's refusal to sign a Stipulation of Appropriate Unit agreement (See, City of Perth Amboy, D.R. No. 2010-2, 35 NJPER 243 (¶87 2009)).

I find that the following unit is appropriate for collective negotiations:

**Included**: The Fire Marshal and Assistant Fire Marshal employed by the County of Burlington.

**Excluded**: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, professional employees, police, casual employees and all other employees employed by the County of Burlington.

ORDER

IAFF Local 3091 has met the requirements of the Act, and it is entitled to certification based upon the authorization cards from a majority of the employees in the petitioned-for unit.

I certify the International Association of Firefighters, Local 3091 as the exclusive representative of the unit described above based upon its authorization cards.<sup>1/</sup>

By Order of the Director of  
Representation

/s/ Jonathan Roth  
Jonathan Roth  
Director of Representation

DATED: November 15 , 2018  
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 November 27, 2018.

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<sup>1/</sup> Certification by Card Check is attached.