

P.E.R.C. NO. 95-93

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MONROE,

Public Employer,

-and-

Docket No. CU-H-94-37

UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL 1360,

Petitioner.

SYNOPSIS

The Chairman of the Public Employment Relations Commission dismisses a clarification of unit petition filed by the United Food and Commercial Workers, Local 1360. The petitioner seeks to clarify its negotiations unit of supervisory employees of the Township of Monroe to include the welfare director of the Monroe Local Assistance Board. In the absence of exceptions, the Chairman accepts the Hearing Officer's recommendation that, given the Board's statutory and regulatory authority over the terms and conditions of employment of the welfare director, that position should not be included in a negotiations unit of Township supervisors.

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Appearances:

For the Public Employer, Louis Rosner, attorney

For the Petitioner, Tomar, Simonoff, Adourian & O'Brien
(Mary Crangle, of counsel)

DECISION AND ORDER

On January 28, 1994, the United Food and Commercial Workers, Local 1360 petitioned to clarify its negotiations unit of supervisory employees of the Township of Monroe to include the welfare director of the Monroe Local Assistance Board ("LAB"). The Township opposes the petition contending that the welfare director is employed by the LAB.

On May 10, 1994, a Notice of Hearing issued. On June 28, Hearing Officer Susan Wood Osborn conducted a hearing. The LAB declined to intervene. The parties examined witnesses and introduced exhibits. The UFCW filed a post-hearing brief.

On February 9, 1995, the Hearing Officer issued her report and recommendations. H.O. 95-1, 21 NJPER 98 (¶26061 1995). She

found that although the Township has significant control over the welfare director's terms and conditions of employment, New Jersey statutes and regulations give exclusive authority over certain terms and conditions of employment to the LAB. They include the power to appoint and remove. The Hearing Officer concluded that the Township and the LAB jointly employ the welfare director and recommended dismissing the petition.

The Hearing Officer served her decision on the parties and informed them that exceptions were due February 23, 1995. Neither party filed exceptions.

Pursuant to N.J.A.C. 19:11-8.8 and authority granted to me by the full Commission in the absence of exceptions, I have reviewed the record. I incorporate the Hearing Officer's undisputed findings of fact (H.O. at 2-11). Given the LAB's statutory and regulatory authority over the terms and conditions of employment of the welfare director, I accept the Hearing Officer's recommendation that the welfare director not be included in a negotiations unit of Township supervisors.

ORDER

The clarification of unit petition is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: May 11, 1995
Trenton, New Jersey

H.O. NO. 95-1

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MONROE,

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-and-

Docket No. CU-H-94-37

UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL 1360,

Petitioner.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission finds that the Monroe Township Welfare Director is jointly employed by the Township and the Local Assistance Board, since neither entity has complete control over her terms and conditions employment. The Hearing Officer recommends that the Commission dismiss the Union's petition to clarify her into the Township supervisors' unit.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommendations, any exception thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law.

H.O. NO. 95-1

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MONROE,

Public Employer,

-and-

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Appearances:

For the Public Employer
Louis Rosner, attorney

For the Petitioner
Tomar, Simonoff, Adourian & O'Brien
(Mary Crangle, of counsel)

HEARING OFFICER'S REPORT AND
RECOMMENDED DECISION

On January 28, 1994, the United Food and Commercial Workers Local 1360 filed a Petition for Unit Clarification with the Public Employment Relations Commission seeking to include the Welfare Director in its collective negotiations unit of supervisory employees of Monroe Township. The Township opposes the proposed clarification and contends that the Welfare Director is employed by the Monroe Local Assistance Board, not the Township.

On May 10, 1994, the Director of Representation issued a Notice of Hearing. I conducted a hearing on June 28, 1994^{1/} at which the parties examined witnesses and presented evidence.^{2/} The UFCW filed a post-hearing brief on August 5, 1994. The Township did not file a brief.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. United Food and Commercial Workers Local 1360 represents the Township's supervisors. This Commission's initial certification of Local 1360 described the unit as "All supervisory employees of the Township of Monroe..," including certain specific titles and excluding others. The Welfare Director was neither included nor excluded from the unit as described by the certification. Local 1360 and the Township entered into a successor collective negotiations agreement for this unit around April, 1991 covering the period January 1, 1991 through December 31, 1993. The parties signed their next agreement on April 29, 1994, covering the period January 1, 1994 through December 31, 1994. The contract recognition clauses describe the UFCW unit as:

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- ^{1/} The Monroe Township Local Assistance Board was invited to formally intervene in this matter, but declined to do so. However, its Chairperson testified at the hearing on behalf of the Township.
- ^{2/} The transcript of the hearing is referred to as "T- ." Exhibits received in evidence marked as "ER" refer to Employer exhibits; those marked "P" refer to Petitioner's exhibits. Those exhibits marked "J" refer to joint exhibits.

"full-time and regular part-time white collar and blue-collar supervisory employees in accordance with the [PERC certification].

Local 1360 also represents the Township's non-supervisory employees in a separate negotiations unit (T11; T28).

2. When Local 1360 first organized, it represented only "full-time" supervisors, i.e., those working 20 or more hours a week. The Welfare Director was a part-time position, held by Priscilla Gilbert, until April, 1991.^{3/} Because of her part-time status, Gilbert was never included in the unit (T26; T23).

3. In 1991, Gilbert was replaced by Lorraine (Lori) Smith Bryan, who was hired for 30 hours a week. Although Local 1360 made no formal demand to negotiate Gilbert's starting salary, Local 1360 shop steward and vice-president Terry Bonzella discussed the salary for the Welfare Director position with Township Administrator Benedetti.^{4/}

4. Soon after she was hired, Bryan asked Bonzella if she could be included in the supervisors unit. Bonzella conveyed this

^{3/} According to the unrefuted testimony of Local 1360 shop steward and vice-president Terry Bonzella, the parties have defined full-time employment as 20 or more hours weekly (T66). The 1984 salary ordinance (P-4), shows the Welfare Director was then paid on a salary range of \$5,000 to \$7950, a salary rate indicative of part-time status (T23, T26). By 1991, Gilbert was working approximately 20 hours a week (T62, T65).

^{4/} Bonzella's testimony was unclear as to whether the salary was discussed with her as a Local 1360 representative or as a member of the employer's selection committee to hire a new employee for the position (T56; T63).

request to Township Administrator Bruce Benedetti. Benedetti suggested that the issue wait until Bryan finished her probationary period. When replaced Benedetti as the Township Administrator in early 1992, Local 1360 reiterated its request to include the Welfare Director in the unit. Smith agreed,^{5/} and the Township processed Bryan's union dues authorization card for payroll deductions. Local 1360 thought it had an agreement to include Bryan in its unit, although nothing was reduced to writing (T30-T32; T45-T46).

5. When members of the Local 1360 supervisors' unit received a six percent contractual salary increase in January, 1993, Bryan questioned Bonzella as to why she had not received the raise. When Bonzella raised this with Smith, he responded that the Township believed Bryan's position should not be included in the supervisors unit. (ER-3; T33-T34; T48; T76; T78-T80; T99-T100).

6. Local 1360 again raised the issue of Bryan's unit eligibility in late 1993-early 1994 during negotiations for its successor contract. When the Township continued to refuse, Local 1360 filed this petition in January, 1994 (T35-T36).^{6/}

CONTROL OF LABOR RELATIONS

Structure:

7. N.J.S.A. 44:8-115 provides:

Each local assistance board shall be composed of three or five persons as shall be fixed by the

^{5/} This fact is found based upon Bonzella's unrefuted testimony (T32).

^{6/} The parties subsequently signed a successor contract for 1994 (P-3), which does not address the issue of the Welfare Director's status.

governing body of the municipality and at least one of them shall be a woman and they shall be appointed by the chief executive of the municipality upon the approval of the governing body...

The Monroe Township Local Assistance Board is composed of five members who are appointed by the Township Mayor with the approval of the Township Council. Two are members from the community, one is an employee of the Township Police Department, one is a local clergyman, and Township Council member Helene Reed is the Board Chairperson. Board members serve without compensation. The LAB meets four times a year (T66; T67; T87; T104).

N.J.S.A. 44:8-114 provides,

The State shall provide, through each municipality, public assistance to the persons eligible therefor, residing therein or otherwise when so provided by law, which assistance shall be fully funded by the State and administered by a local assistance board and with such rules and regulations as may be promulgated by the [Department of Human Services] Commissioner.

8. The State has recently changed its funding procedures for the LAB. The Township now distributes assistance checks and is fully reimbursed by the State for assistance dollars. The Welfare Department's budget, which must be approved by the Township Council, covers salaries and benefits for the Welfare Director and the Welfare Clerk (T75; T76; T88).

Hiring/Firing:

9. The Monroe Township Welfare Director is hired and fired by the LAB with the advice of the Township Administrator. N.J.S.A. 44:8-117 provides,

Each local assistance board shall...appoint a director of welfare who shall be the first executive and administrative officer of the board. He shall hold office for a term of five years from the date of his appointment....

N.J.A.C. 10:85-2.2(d) prescribes rules concerning the appointment and removal of the welfare director:

(d)(1) Under the law, the LAB is solely responsible for the appointment and reappointment of a director of welfare. Appointment shall be by formal action of the board at a regular or special meeting.

(d)(3) Term of appointment: The director of welfare shall be appointed for a full term of five years or a temporary term not to exceed 90 days. Appointment for any other period is prohibited.

(d)(3)(iii.) Reappointment: Reappointment of an incumbent director at the expiration of a current five-year term is solely the responsibility of the LAB.

(d)(3)(iv.) Removal from office: Removal of the director from office must be by official action of the LAB and based upon appropriately documented evidence of mismanagement or wrongdoing.

In April, 1991, LAB Chairperson Helene Reed learned that there were improprieties in the Welfare Board's financial records. Welfare Director Gilbert was arrested. The LAB met to discuss Gilbert's possible termination. Benedetti assigned Bonzella to take over the Welfare office until someone could be hired (T27, T39; T53-T54; T71).

After the LAB held a hearing with Gilbert concerning her work performance, it voted to terminate her and it so advised her. The LAB also passed a resolution the same day appointing former Welfare Director Nan Heiser as acting Welfare Director. It then authorized appointment of a selection committee to find new Welfare Director. The selection committee consisted of the Township Administrator Benedetti, Bonzella, and Reed (T30; T53; T69-T70; T93).

10. Heiser served as acting Welfare Director for about a month. The LAB then appointed Bonzella as acting Welfare Director, and she served in that capacity until August, 1991. While acting as Welfare Director, she maintained her status as a Township employee and member of Local 1360's non-supervisory unit (T27-T29; T40-T41; T49; T55).

11. Benedetti advertised to fill the Welfare Director position and posted the vacancy announcement on Township bulletin boards. Lorraine Bryan, a member of the Township Police Department support staff, discussed the vacancy with Benedetti, and applied for the job. Benedetti screened applications and forwarded them to the selection committee for review. The selection committee conducted interviews and recommended the top three candidates, including Bryan, to the LAB. The LAB, together with Benedetti, Bonzella, and Township Council Member Duffy, conducted a second interview. The LAB voted to hire Bryan (T60; T73; T96; T107; T122; T105-T106; T123).

Salary/Hours:

12. N.J.S.A. 44:8-117 provides that,

the director of welfare...shall be paid such salary as may be fixed by such board subject to approval by the governing body.

N.J.A.C. 10:85-2.2(e) provides,

The salary of the director of welfare shall be set by the LAB, subject to approval of the municipal governing body. The setting of salaries of other employees shall be the responsibility of the governing body.

Reed discussed the salary range for the new Welfare Director with Benedetti several times. She also discussed it with

other council members. Reed's recommendation for a new salary range was approved by the LAB and by the Township Council (T74-T75; T98).

13. Bryan was initially hired for 30 hours a week. Bryan's hours were subsequently increased because her workload grew. Reed discussed the increased hours with Bryan, with the LAB, and with the Township Council. In January, 1992, Bryan attended a budget hearing before the Council and discussed her salary and hours. The Council agreed to increase her hours to 35 and to increase her salary from \$15,680 to \$21,000 (T108; (T109-T110; T125-T126; T137; T150).

14. Bryan received a 4% salary increase for 1993. Although Reed knew Bryan was unhappy with the amount of the increase, the LAB did not discuss the issue further (T117).

N.J.A.C. 10:85-2.2(f) provides,

(f) the LAB is responsible for establishment of the official municipal welfare agency office and designation of hours of operation.

(2) Days and hours: The office of the municipal welfare department shall be open to the public during the five-day work week at hours specified by the LAB. Additional arrangement shall be instituted by the LAB to ensure that persons in need of assistance are served without delay at times other than normal office hours.

15. The Monroe Welfare Office is open to the public from 9:00 a.m. to 3:00 p.m. daily. Bryan works four days a week from 9:00 a.m. to 6:00 p.m. Bryan notifies the LAB and the Township Administrator of any deviation in her work hours (T129).

Bryan sent a memorandum to the LAB and the Township Administrator proposing to change the welfare office hours to a four-day week with no Friday office hours. Bryan discussed the proposed new work week with Reed and with the LAB, and neither objected. When the Mayor learned of Bryan's memo about the new office hours, he called Reed to discuss it. Reed then called Bryan and strongly suggested that the office remain open five days a week with the two employees rotating hours to provide coverage. Bryan agreed to Monday through Friday office hours, with the two employees staggering their workweek (T81; T82; T114; T130).

Benefits

16. The Township issues the Welfare Director's paycheck . The Township provides her with the same health care plan that other non-union Township employees enjoy. Bryan receives the same vacation benefits as other Township supervisors. She receives the same sick leave allotment, personal days and vacation leave as other Township employees. Her holidays off are set by the Mayor (T88; T89; T130-T134).

17. She is covered under a Township policy permitting employees to "buy back" unused sick days. The Township Administrator has advised her that she is entitled to compensatory time for any overtime worked (T133; T141).

To use personal time, Bryan must send a memorandum to the LAB and to the Township Administrator notifying them that she would be out and how the office will be covered. Bryan calls in sick time

to the Township Administrator or the Mayor's office. To select vacation time, she is required to complete a vacation request form and submit it to the Mayor's office. Bryan also informs Reed when she will be taking time off. She requested a medical leave of absence through the Mayor's office. (P-6; P-7; P-8; P-9; P-10; P-11; P-13; T84; T135; T151)

Supervision

19. Although the Township is a civil service employer, the Welfare Director is an unclassified title. The LAB has not adopted any personnel policies and the Welfare Director is not evaluated (T103; T106; T115).

20. Bryan receives memoranda addressed to all Township department heads (P-12, P-4) and she attends department head meetings with the Township Administrator. Like other Township department heads, Bryan prepares the annual proposed budget for the Welfare Department, and she attends budget hearings before the Council. Bryan also supervises Welfare Clerk Candy Bates (T13; T112; T126; T139, T140; T142; T146).

21. N.J.A.C. 10:85-2.2(5) provides,

Duties and Responsibilities: ... The director of welfare is accountable to the LAB....

Bryan reports to Reed and the LAB for matters concerning clients. Bryan and Reed periodically speak by telephone concerning welfare

office business; these discussions usually involve clients.^{7/}

ANALYSIS

The threshold issue is whether the Unit Clarification petition is appropriate under the circumstances. I find that it is. In Clearview Reg. Bd/Ed, D.R. No. 78-2, 3 NJPER 248 (1977), the then Director outlined the appropriate uses of unit clarification petitions:

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 provisions of the Act, the unit definition contained in a Commission certification, or as set forth in the parties' recognition agreement. Normally, it is inappropriate to utilize a clarification of unit petition to enlarge or to diminish the scope of the negotiations unit for reasons other than the above, and ..[the question] relates primarily to identification....

Where the parties mutually agree to exclude positions from the unit, neither party may seek the position's reentry into the unit through a unit clarification petition unless there is a change in circumstances. Warren Township, D.R. No. 82-10, 7 NJPER 529 (¶12233

^{7/} Bryan testified that her contact with Reed is "periodic, at least once a month." Reed testified that, on average, she is in contact with Bryan weekly, sometimes as often as three times a week. However, Reed's testimony demonstrated a general lack of familiarity with the welfare office operations--Reed did not know what the Welfare employees' office hours are, the name of the welfare clerk, or who was signing the welfare checks before Bryan was hired (T85; T87; T94, T95). Accordingly, I credit Bryan's testimony as more reliable on this point (T83; T104; T136; T149).

1981). Further, where the union has, for a period of time, omitted a position from the unit, the union will be found to have waived its right to seek unit inclusion through the CU processes, unless there is a change in circumstances. Wayne Bd. of Ed., P.E.R.C. No. 80-94, 6 NJPER 54 (¶11028 1980); Rutgers University, D.R. No. 84-19, 10 NJPER 284 (¶15140 1984).

Here, there was a change in circumstances; the issue of the Welfare Director's inclusion in the unit became ripe when the position's hours were increased to full-time status. The evidence shows that this occurred when Bryan was hired in August, 1991. Local 1360 filed its petition prior to execution of its next successor contract (the 1993-96 agreement). Rutgers. Accordingly, I find that the Unit Clarification Petition is procedurally appropriate.

The second issue is whether the Welfare Director is employed by the Township. Absent such a finding, the position cannot be clarified into the Township's supervisory unit.^{8/} Neptune Township, D.R. No. 87-26, 13 NJPER 386 (¶18155 1987).

To identify the employer, the Commission focuses on which entity generally controls the employees' hiring, performance evaluations, promotions, discipline, firing, work schedules, vacation, hours of work, wages, benefits, funding and expenditures. Cty. of Morris, P.E.R.C. No. 86-15, 11 NJPER 491 (¶16175 1985),

^{8/} The parties agree that the title is supervisory.

adopting H.O. No. 85-12, 11 NJPER 418 (¶16146 1985); Bergen Cty. Freeholder Bd. v. Bergen Cty. Pros'r and Mercer Cty. Freeholder Bd. and Mercer Cty. Pros'r, D.R. No. 78-34, 4 NJPER 104 (¶4047 1978), aff'd P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978), aff'd 172 N.J. Super 363 and 172 N.J. Super 411 (App. Div. 1980); Mercer Cty. and Mercer Cty. Superintendent of Elections, P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978), aff'd 172 N.J. Super. 406 (App. Div. 1980).^{9/}

Applying the control of labor relations test, I find that neither the Township nor the LAB has complete control over the Welfare Director's terms and conditions of employment.

The Township has control over the Welfare Director's health insurance benefits package, holidays, overtime compensation, and sick and vacation leave allotment. It has exercised final authority over setting the total number of hours weekly she works. As the funding agent for the Welfare Department's administrative costs, including salaries, it must approve the Welfare Department's budget and more importantly, it has final authority over the Welfare Director's salary. It had to approve Bryan's initial starting salary when she was hired, and it approved her increase in salary

9/ See also, Bergen Cty. Sheriff, P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984); Ocean Cty Pros'r, D.R. No. 82-29, 8 NJPER 60 (¶13024 1981); Bonnie Bray Child Care Counselors Assn., D.U.P. No. 80-7, 5 NJPER 457 (¶10231 1979); Newark Housing Development and Rehabilitation, D.R. No. 78-34, 4 NJPER 328 (¶10175 1979); Passaic Cty Bd. of Chosen Freeholders, D.R. No. 78-29, 4 NJPER 8 (¶4006 1977); Cape May Cty. Guidance Center, D.R. No. 78-19, 3 NJPER 350 (1977) and ARA Services, Inc., E.D. No. 76-31, 2 NJPER 112 (1976).

and hours after she appeared before the Township Council during its 1992 budget review. It also granted her the 1993 4% salary increase. This exercise of this approval authority is consistent with the requirement of the administrative code that the LAB sets the welfare director's salary subject to the municipal governing body's approval. Finally, the Township also exercises control over the Welfare Director's supervisory authority vis-a-vis the Welfare Clerk, by requiring her to participate in periodic Township supervisors' meetings.

However, the Township's authority is incomplete. The statute and the Administrative Code has specifically given certain authorities exclusively to the LAB. The LAB has authority to appoint the Welfare Director for a temporary appointment or for a five-year term, to reappoint the Welfare Director, and to discharge the employee for cause. Further, the LAB has actually exercised these authorities. While the Township Administrator, as a designated member of the LAB's selection committee, recommended candidates for the position, ultimately the LAB exercised its authority to make the final selection and formal appointment. Further, the LAB has exercised its authority to terminate when it conducted a disciplinary hearing and discharged the former Welfare Director.

Additionally, the Welfare Director is statutorily responsible to the LAB for the performance of her duties concerning the clients. The LAB has exercised some day-to-day control over the Welfare Director's performance.

The Administrative Code also gives the LAB authority to set the Welfare Department's hours of operation. Bryan's work hours were approved both by the LAB and the Township Mayor. She must report any use of her leave time to the Township and to the LAB.

Based upon the foregoing, I must conclude that neither entity has absolute control over the Welfare Director's terms and conditions of employment. In such cases, the Commission has found that both entities are joint employers over the employees in question. See Bergen Cty., P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984); Monmouth Cty. Bd. of Recreation Commissioners, E.D. No. 76-36, 2 NJPER 127 (1976), Union Tp., D.R. No. 95-9, 21 NJPER 14 (¶26008 1994). In Bergen, the Commission found a joint employer relationship between the County Freeholders and the County Sheriff based upon the shared statutory authority over the Sheriff's officers and corrections officers' terms and conditions of employment. As the Commission noted in that matter, one entity cannot effectively negotiate with the majority representative over employees' terms and conditions of employment if it is not empowered to act as an employer over all aspects of the employment relationship. Here, the Township lacks complete control over the Welfare Director's hours, salary, hiring, firing and performance of her duties to the Welfare clientele. It cannot effectively negotiate with Local 1360 absent such control. Therefore, the Welfare Director position cannot be included in the unit with Township supervisors.

RECOMMENDATION

Based on the foregoing, I find that the Monroe Township Welfare Director is jointly employed by the LAB and by the Township. Accordingly, I recommend that the Commission dismiss the Unit Clarification Petition.

Susan W. Osborn

Susan Wood Osborn
Hearing Officer

DATED: February 9, 1995
Trenton, New Jersey