

P.E.R.C. NO. 87-164

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CHERRY HILL BOARD OF FIRE
COMMISSIONERS, DISTRICT NO. 2,

Public Employer,

-and-

Docket No. CU-87-9

CHERRY HILL FIRE FIGHTERS, LOCAL
2663, INTERNATIONAL ASSOCIATION
OF FIRE FIGHTERS,

Petitioner.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, clarifies a firefighters negotiations unit represented by the Cherry Hill Fire Fighters, Local 2663, International Association of Fire Fighters to include the fire marshal and fire inspector. The Chairman further finds that the unit should not include the administrative assistant because he is a "confidential" employee.

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Petitioner.

Appearances:

For the Public Employer, Laskin & Botcheos, Esqs.
(Lee Laskin, of counsel)

For the Petitioner, Schlesinger, Schlosser, Foy &
Harrington, Esqs. (Thomas P. Foy, of counsel)

DECISION AND ORDER

On September 26, 1986, the Cherry Hill Firefighters, Local 2663, International Association of Fire Fighters ("Association") filed a Petition for Clarification of Unit. The Association seeks to include the administrative assistant, fire marshal and fire inspector in the negotiations unit of fire fighters employed by the Cherry Hill Board of Fire Commissioners, District No. 2 ("Board"). The Board objects to their inclusion, contending that these employees are "supervisors" and "managerial executives". N.J.S.A. 34:13A-3(b); N.J.S.A. 34:13A-5.3.

On January 28, 1987, a Notice of Hearing issued.

On February 24, 1987, Hearing Officer Joyce M. Klein conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On May 8, 1987, the Hearing Officer issued her report and recommended decision. H.O. No. 87-15, 13 NJPER ____ (¶ 1987). She found that the administrative assistant was a "confidential" employee within the meaning of the Act, N.J.S.A. 34:13A-3(g) and therefore should not be included in the negotiations unit. She further found, however, that the fire marshal and the fire inspector have a community of interest with the other unit members and are neither "supervisors" or "managerial executives." She therefore recommended that they be included in the unit.

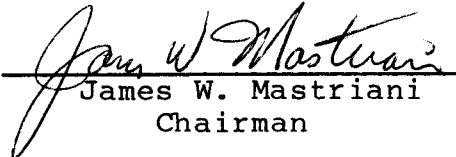
The Hearing Officer served her report on the parties and informed them that exceptions were due on or before May 21, 1987. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Officer's findings of fact (pp. 2-8) are accurate. I adopt and incorporate them here. Under all the circumstances of this case, and acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I also adopt her recommendation that the negotiations unit be clarified to include the fire marshal and the fire inspector.

ORDER

The Cherry Hill Firefighters, Local 2663, International Association of Fire Fighters negotiations unit is clarified to include the fire marshal and fire inspector.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
June 24, 1987
ISSUED: June 25, 1987

H.O. NO. 87-15

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

In the Matter of

CHERRY HILL BOARD OF FIRE COMMISSIONERS
DISTRICT No. 2,

Public Employer,

-and-

Docket No. CU-87-9

CHERRY HILL FIRE FIGHTERS, LOCAL 2663,
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,

Petitioner.

Synopsis

A Hearing Officer of the Public Employment Relations Commission finds the administrative assistant employed by the Cherry Hill Board of Fire Commissioners, District No. 2 is a confidential employee, but not a supervisor or managerial executive within the meaning of the Act. She also finds the fire marshal and the fire inspector employed by the Cherry Hill Board of Fire Commissioners, District No. 2 are not supervisory or managerial executive employees within the meaning of the Act and should appropriately be included in a unit of firefighters.

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. 87-15

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

In the Matter of

CHERRY HILL BOARD OF FIRE COMMISSIONERS
DISTRICT No. 2,

Public Employer,

-and-

Docket No. CU-87-9

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INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,

Petitioner.

Appearances:

For the Public Employer,
Laskin & Botcheos
(Lee Laskin of counsel)

For the Petitioner,
Schlesinger, Schlosser, Foy & Harrington,
(Thomas P. Foy of counsel)

HEARING OFFICER'S
REPORT AND RECOMMENDATION

On September 26, 1986, the Cherry Hill Fire Fighters, Local 2663, International Association of Fire Fighters ("Association") filed a Petition for Clarification of Unit. The Association seeks to include the positions of administrative assistant, fire marshal/fire official ("fire marshal") and fire protection inspector in a unit of fire fighters employed by the Cherry Hill Board of Fire Commissioners, District #2 ("Board"). The Board contends the positions are not appropriate for inclusion in the unit because they are supervisory and managerial executive within the meaning of the

New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et. seq., specifically subsections 3(f) and 5.3.

I conducted a hearing on February 24, 1987. The parties examined witnesses and introduced exhibits. The parties waived oral argument and submitted briefs. The Association submitted materials summarizing the number of fires fought by each individual from January 1986 through February 1987. The record was closed on May 4, 1987.

Findings of Fact

1. The Cherry Hill Board of Fire Commissioners, District No. 2 is a public employer within the meaning of the Act and is subject to its provisions. It is the employer of the employees who are the subject of this petition.^{1/}

2. The Cherry Hill Fire Fighters, Local 2663, I.A.F.F. is a public employee organization within the meaning of the Act and is subject to its provisions. The Association represents the Board's fire rescue and maintenance employees. The Board granted voluntary recognition to the Association in 1984. The parties are currently negotiating their first agreement.

3. The fire district is one of seven such districts in the Township of Cherry Hill. It, together with the Earlton Fire

^{1/} In Parks v. Board of Fire Commissioners, Cherry Hill District No. 2, Dkt. No. A-4698-84T1 (5/12/86), the Appellate Division found that the Board has comprehensive and autonomous authority over fire district personnel.

Company, a volunteer fire company, is responsible for fire protection and prevention in the Earlton section of Cherry Hill. In July and September 1986, the Board passed resolutions creating the positions of fire marshal and fire inspector, pursuant to its authority under N.J.S.A. 40A:14-81.1 et. seq. (P-6, P-8). ^{2/}

The Board controls the fire district. There are five fire commissioners, each elected to a three year term (T16). Since the fire district was reorganized in December, 1986, the fire chief, the fire marshal and the administrative assistant report directly to the commissioner who functions as the director of personnel (T33, 34). The four fire rescue and maintenance employees report to the chief and the fire inspector reports to the fire marshal. The fire marshal, fire inspector and administrative assistant reported to the chief until January 1, 1987 (T34, T163-T165).

The fire district and the Earlton Fire Company are closely intertwined. The chief of the fire district is automatically chief

^{2/} Oughton v. Bd. of Fire Comm., 168 N.J. Super. 434 (Law Div. 1979), 178 N.J. Super. 565 (App. Div. 1981), 178 N.J. Super. 633 (Law Div. 1981) and N.J.S.A. 52:27D-126.1 raise the issue of who is the proper employer of the fire inspector. In Oughton, the court found the municipality to be the employer of the fire prevention subcode official. Neither the Board nor the Association, however, question whether the Board is the employer of the fire inspector. Since the Appellate Division found that this Board has comprehensive and autonomous authority over fire district personnel, I do not address that issue, Parks v. Bd. of Fire Comm.; In re Monmouth Cty. Bd. of Recreation Commissioners, E.D. No. 76-36, 2 NJPER 127 (1976), setting forth the factors relevant to determine the identity of the public employer under N.J.S.A. 34:13A-3(c).

of the volunteer fire company (T162). The administrative assistant, fire marshal and fire inspector are all members of the Earlton Company (T179). All three respond whether the fire bell rings during working hours or at any other time (T179). The Board informed the chief that he could use these employees to respond to fires in emergencies (T91, T182, T183). They are paid to fight fires during the workday. A further example of the symbiotic relationship between the fire district and the Earlton Company is that William Harry, the director of personnel, is a volunteer fire inspector. When he functions as a volunteer he is supervised by the fire inspector. When he functions as the director of personnel, he supervises everyone (T158).

4. Daniel DiRenzo, the administrative assistant, is required to provide clerical services and information to the Board. He does the Board's office work, including typing, filing, accounting, billing, collecting fees and computer services. He also answers inquiries regarding the fire district, prepares district publications and responds to requests for information from the public and the media. He arranges Board meetings (R-1). As a condition of his employment contract with the Board, he must be a member of the Earlton Company (P-2). Because the administrative assistant processes personnel and insurance forms for paid employees, he has access to the Board's copies of their personnel files (R-1, T224). The chief has personnel files on the fire rescue and maintenance employees, that do not contain test results and other information included in the Board's files (T166).

5. The fire marshal is responsible for the Fire Prevention Bureau. James Banner is the current fire marshal and has been employed by the fire district since December, 1986 (T151). He has been a member of the Earleton Company for eleven years and an assistant inspector since 1983 (T147). He has also fought fires (T148). He reports to the director of personnel about fire prevention activities. He is authorized to assign the fire inspector to perform inspections but has not done so (T144, 154). He retains ultimate responsibility for inspections, investigations, complaints and permits under the Bureau's jurisdiction including administration of the Uniform Fire Safety Act (R-3, T150). The fire marshal's enumerated responsibilities include: formulating and administering the Fire Prevention Bureau budget; assigning and directing fire inspectors and other fire personnel assigned to the Bureau; training fire inspectors; initiating and maintaining all fire prevention programs; and coordinating various fire prevention activities and programs with other area fire prevention officials (R-3).

He prepares the budget proposal that the Bureau submits to the Board and then meets with the commissioners to discuss the budget (R-3). The commissioners review his proposal and use it to create a budget (T106).

6. Jerome Walters, the fire inspector, performs fire inspections, reports violations and gathers information on buildings for fire fighting preparation and prevention. His job description

requires him to "assist in fire/rescue efforts when requested by the Fire Chief in an emergency" (R-2). His reports go through the fire marshal to the director of personnel (T155). He has the authority to recommend the use of volunteers (T155). Volunteers work under Walters to assist in fire inspection and prevention. He does not have authority over paid personnel (T64). Walters does not deal with the budget (T158). He has not purchased anything for the fire district. If he ever needs to make a purchase, he will request it through the director of personnel (T158). He has not suggested improvements in the fire inspection and prevention systems (T157).

7. The commissioners determine Board policy. John Long, chairman, informed the fire marshal that the Board wanted to expand the fire prevention programs. The fire marshal was not involved in that decision. The commissioners have not consulted the fire marshal about the method of expansion (T146). Neither the fire inspector nor the administrative assistant participated in the expansion of the fire prevention program.

8. The commissioners receive information for the budget from the chief, the fire marshal and the administrative assistant. The chief prepared a 1987 budget covering the purchase of uniforms, turnout gear, fireman training, gas, oil, diesel fuel, equipment and communication repairs, replacement parts, aid, training and new equipment (T185). The administrative assistant prepares the budget for office supplies and necessary equipment. The fire marshal prepares a budget for the Fire Prevention Bureau. The commissioners

who prepare the Board's budget meet individually with the chief, the administrative assistant and the fire marshal to review their budget proposals and use their submissions to create the budget (T106). Only the Board has authority to use the petty cash fund (T186).

9. The Board does not use fire district employees to negotiate with the Association (T188). The Board asks the administrative assistant to prepare a comparative salary and benefit survey of fire districts in Cherry Hill and in cities and departments throughout the State (T93, T94, T224). The administrative assistant does not participate in discussions of counteroffers and strategies, but is aware of the counteroffers before they are presented (T225, T226). He does not participate in the resolution of grievances (T197). The fire marshal and the fire inspector do not participate in negotiations or in grievance processing (T93, T158). As the parties are currently negotiating their first contract, no grievance procedure is in place.

10. Only the Board has the authority to hire or discharge a paid employee of the fire district. The Board does not have an evaluation system (T108). The Board solicits applications, interviews prospective employees and makes hiring decisions (T109). Before Banner was hired as fire marshal, his predecessor suggested the commissioners consider Banner for a fire inspector's position. The commissioners, not the previous fire marshal, interviewed and hired Banner for that position (T104). Neither the administrative assistant nor the fire inspector have any role in the hiring process.

Chairman Long testified that the fire marshal has the authority to recommend the hiring or termination of the fire inspector, but not the fire rescue and maintenance workers (T-42, T43). The fire marshal believes he has the authority to recommend discipline of the fire inspector, but not to recommend his employment or discharge (T143). He has not attempted to discipline any Board employee. The fire inspector and the administrative assistant do not have the authority to recommend the hiring, termination or discipline of any employee (T94).

Analysis

The Association seeks to include the fire marshal, the fire inspector and the administrative assistant in a unit of fire fighters. In order to include these positions in the unit, I must find they have a community of interest with the fire fighters and they are not statutorily excluded from this unit. Any title(s) sharing a community of interest with the fire fighters will be included in the unit unless they are supervisory, managerial executive or confidential. N.J.S.A. 34:13A-5.3 provides:

Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to elected officials, members of boards and commissions, managerial executives, or confidential employees, except in a school district the term managerial executive shall mean the superintendent of schools or his equivalent, nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power

to hire, discharge, discipline or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership,...

The Board has asserted that the petitioned-for titles are supervisory and managerial, but has not asserted that they are confidential within the meaning of the Act.

As the hearing officer charged with the duty to determine the status of the disputed positions under the Act, I am obliged to "inquire fully into the facts as they relate to the matter under consideration," N.J.A.C. 19:11-6.3(a). In River Dell Bd. of Ed., P.E.R.C. No. 78-85, 4 NJPER 252 (¶4128 1978), the Commission noted:

...[A] representation proceeding is quasi-legislative, as opposed to quasi-judicial in nature, and no burden of proof is attached thereto. In such a proceeding, a Hearing Officer is charged with developing a full and complete evidentiary record upon which the Commission or its designee may base its decision. The Hearing Officer's duties are not confined to resolving the conflicting factual contentions raised by the parties and his [sic] recommendations are not delimited by the proposed findings and legal theories expounded by the parties.

Whether the petitioned-for titles are appropriate for inclusion in the fire fighters' unit is at issue. Since testimony supports a finding that the administrative assistant is a confidential employee, I consider that issue.

N.J.S.A. 34:13A-3(g) defines "confidential employees" as those:

[W]hose functional responsibilities or knowledge in connection with the issues involved in the

collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

The administrative assistant prepares surveys and other data for the Board's use in negotiations. He sees counterproposals before they are presented to the Association. He has routine access to the negotiations files and to the Board's copies of employee personnel files. As administrative assistant, DiRenzo has access to and advance knowledge of the collective negotiations proposals and counteroffers, as well as access to the data including salary and benefit surveys used by the Board in formulating its negotiations strategies.

Accordingly, I find that the administrative assistant is a confidential employee within the meaning of the Act and recommend clarifying the Association's unit to exclude that title.^{3/}

In City of Hackensack, D.R. No.79-27, 5 NJPER 150 (¶10085 1979), req. for review den., P.E.R.C. No. 79-94, 5 NJPER 235 (¶10130 1979), the Director of Representation clarified a unit of fire fighters to include fire inspectors, finding that fire suppression and fire prevention activities are simply different aspects of fire fighting. That holding applies here. As Fire Prevention Bureau employees, the fire marshal and fire inspector are engaged in fire

^{3/} Because I find the administrative assistant to be confidential, I do not find it necessary to determine whether he shares a community of interest with the unit of fire fighters.

prevention activities. I therefore find they share a community of interest with the fire rescue and maintenance employees engaged in fire suppression activities and are eligible for inclusion in a unit of fire fighters, provided they are not supervisors or managerial executives within the meaning of the Act.

N.J.S.A. 34:13A-5.3 provides:

Nor, except where established practice, prior agreement or special circumstances dictate to the contrary shall any supervisor having the power to hire, discharge, discipline or effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership.

Determination of supervisory status requires more than a job description or bald assertion that an employee has the authority to hire, discharge, discipline or effectively recommend such action. The Commission requires evidence that the authority is regularly exercised. "The mere possession of the authority is a sterile attribute unable to sustain a claim of supervisory status." Somerset Cty. Guidance Center, D.R. No. 77-4, 2 NJPER 358, 360 (1976).

The fire marshal, fire inspector and administrative assistant do not exercise authority to hire, evaluate, discipline or discharge the fire suppression and maintenance employees. The fire marshal may have the authority to discipline the fire inspector. It is not clear that he has the authority to terminate the fire inspector. In any event, the current fire marshal has never disciplined, discharged, or recommended such action be taken against

the fire inspector or any other employee. Nor is there evidence that the previous fire marshal exercised his authority to discipline or discharge any employee.

The previous fire marshal suggested the Board consider Banner for a fire inspector's position when the job was created. The Board, however, advertised, solicited resumes and interviewed the prospective applicants, including Banner. Effective recommendation requires more than the "mere rendering of an opinion which is subject to independent analysis by the hiring authority." Op. of Teaneck, E.D. No. 23 (1971).

There is no evidence that either the administrative assistant or the fire inspector have exercised supervisory authority over any fire district employee. Nor is there evidence that they have authority to hire, terminate, discipline or recommend such action with respect to any fire district employee. Even if they have the authority, neither of them have employees working under them to supervise. For these reasons, I find that the administrative assistant, the fire marshal and the fire inspector are not supervisory employees within the meaning of the Act.

N.J.S.A. 34:13A-3(f) defines managerial executives as:

[P]ersons who formulate management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

This definition was applied initially in Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977). There, a lifeguard captain

was found not to be a managerial executive although he prepared the beach operations budget, authorized and modified rules and regulations, created the disciplinary system, authorized changes in the work week, added guards to the payroll in emergencies, participated in management meetings, influenced the Borough and mayor's policies, trained and scheduled all guards, managed the beach and supervised guards daily.

In Borough of Montvale, P.E.R.C. 81-52, 6 NJPER 507, 508-09 (¶11259 1980), the Commission stated:

A person formulates policies when he develops a particular set of objectives designed to further the mission 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. 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 effectuation of these purposes. 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 509.

In Montvale, the Commission found the Borough's police chief was not a managerial executive.^{4/} The Borough's mayor and

^{4/} The Legislature later amended N.J.S.A. 40A:14-118 to broaden the powers and duties of police chiefs. The Commission then

commissioners had almost complete control over the department. The chief had no discretion to hire, assign overtime, promulgate policies or plan schedules. He also had no effective control over the budget and deployment and discipline of personnel. The Commission concluded that the chief played no role in the formulation of policy and little role in directing its effectuation in any but routine matters.

Here, the Board formulates "management policies and practices." The Board, not the fire marshal or fire inspector decided to expand the fire prevention program. There is no evidence in the record indicating other participation in policy decisions by the fire marshal or fire inspector.

The administrative assistant provides information, research and clerical services to the Board, the public and other fire district employees. There is no indication that he is involved in making policy decisions, beyond providing the necessary background information.^{5/}

4/ Footnote Continued From Previous Page

held that police chiefs are, as a matter of law, managerial executives. Egg Harbor Tp., P.E.R.C. No. 85-46, 10 NJPER 632 (¶15304 1984); Jersey City, D.R. No. 85-22, 11 NJPER 341 (¶16124 1985).

5/ Because it is not relevant to his present position, I do not consider policy decisions DiRenzo may have made during his tenure as a fire commissioner including his involvement in drafting the fire marshal's job description.

Neither the fire marshal nor the fire inspector are involved in the negotiations process on the Board's behalf. The administrative assistant researches salary and benefits data and prepares salary surveys for the Board's use. He does not attend negotiations strategy meetings or participate in the preparation of counteroffers. ^{6/}

The Board determines the budget. The fire marshal prepares a budget for the Fire Prevention Bureau. The administrative assistant also prepares a budget proposal. They meet individually with the commissioners responsible for the budget and discuss their proposals. The commissioners, using these proposals, then prepare a final budget. The fire inspector does not deal with budgetary matters.

Although the commissioners are part-time and are not always at the fire house during working hours, they maintain tight control over the day-to-day operations of the district. No employee including the chief, has authorization to do anything as extraordinary as spending petty cash funds without first clearing it with one of the commissioners. Only the chief has the authority to order any employee to fight a fire. The fire marshal has the authority to assign the fire inspector to inspections or other fire prevention activities, but has never done so. Neither the fire

^{6/} Since the parties are in the process of negotiating their first contract no grievance procedure is in place.

inspector nor the administrative assistant have the authority to assign work to any fire district employee.

The Board determines when to create new positions. It determines who to train and what training is required. The fire marshal's job description lists training and education of fire inspectors as his responsibility, but there is no evidence that either Banner or the previous fire marshal have participated in education and training decisions. There is no indication that the fire inspector or the administrative assistant play any role in training decisions.

On balance, the fire marshal, the administrative assistant and the fire inspector are not involved in the day-to-day implementation of Board policy requiring exercise of managerial discretion.

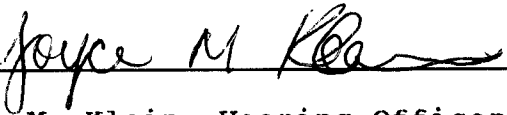
Applying the above standards, I find that the fire marshal, the fire inspector and the administrative assistant are not managerial executive employees within the meaning of the Act.

RECOMMENDATION

I recommend that the Commission find that the administrative assistant is a confidential employee, but not a managerial executive or supervisor.

I further recommend the Commission find that the fire marshal and the fire inspector share a community of interest with

the fire fighters and are not supervisors or managerial executives and should appropriately be included in the unit with fire fighters, effective immediately. See Clearview Regional Bd. of Ed., D.R. 78-2, 3 NJPER 248 (1978).



Joyce M. Klein, Hearing Officer

DATED: May 8, 1987

Trenton, New Jersey