

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF KEARNY,

Public Employer,

-and-

Docket No. RO-H-87-157

ASSOCIATION OF DEPARTMENT HEADS
AND ASSISTANT DEPARTMENT HEADS,

Employee Organization.

SYNOPSIS

The Chairman of the Commission, pursuant to authority delegated by the full Commission and in the absence of exceptions, adopts a Hearing Officer's recommendations to remand this case to the Director of Representation for an election to determine whether a unit of department heads and assistant department heads employed by the Town of Kearny wish to be represented by the Association of Department Heads and Assistant Department Heads.

The Association petitioned to represent several positions. The Chairman adopts the Hearing Officer's recommendations that the town clerk, assistant town clerk, and treasurer are confidential employees and should not be included in the proposed unit; that the general superintendent of public works and the health officer are managerial executives while the tax assessor and library director are not; that a substantial conflict of interest could arise if these titles were in the same unit: construction code official and subcode officials, general superintendent of public works and assistant superintendent of public works, and town clerk and assistant town clerk; and that the tax collector and assistant tax collector are not confidential employees and their inclusion in the same unit would not result in a conflict of interest.

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Employee Organization.

Appearances:

For the Public Employer, Doyle and Brady, Esqs.
(Norman A. Doyle, Jr., of counsel)

For the Employee Organization, Jerome J. LaPenna, Esq.

DECISION AND ORDER

On June 25, 1987, the Association of Department Heads and Assistant Department Heads ("Association") filed a petition for certification of public employee representative. It seeks to represent a unit of department heads and assistant department heads employed by the Town of Kearny ("Town").

The Association seeks to represent these positions: town clerk; assistant town clerk; tax collector; assistant tax collector; town treasurer; welfare director; health officer; chief operator of the sewage treatment plant; superintendents of recreation, park and shade trees, and water; assistant superintendents of water, public works, and buildings and grounds; assistant code officials; the assistant health officer; general superintendent of public works; construction code official; library director, and the tax assessor.

The Town objected to an election. It contends that these positions have conflicting interests: the town clerk and assistant town clerk; tax collector and assistant tax collector; construction code official and subcode officials; general superintendent of public works and assistant superintendent of public works, and health officer and assistant health officer. It also contends that the town clerk, assistant town clerk, tax collector, assistant tax collector and town treasurer are confidential employees, and that the general superintendent of public works and the health officer are managerial executives.

On October 27, 1987, a Notice of Hearing issued. On April 20 and 29 and May 19, 1988, Hearing Officer Joyce M. Klein conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by August 5, 1988.

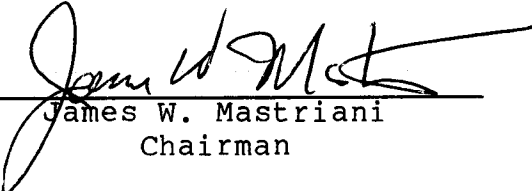
On October 5, 1988, the Hearing Officer issued a report recommending that the Commission order an election to determine whether a unit of department heads and assistant department heads wish to be represented by the Association. H.O. No. 89-3, 14 NJPER ____ (¶ ____ 1988). She determined that the town clerk, assistant town clerk, and treasurer are confidential employees and should not be included in the proposed unit. See N.J.S.A. 34:13A-3(a). She also determined that the general superintendent of public works and the health officer are managerial executives while the tax assessor and library director are not. N.J.S.A. 34:13A-3(f). She also determined that a substantial conflict of

interest could arise if these titles were in the same unit: construction code official and subcode officials; general superintendent of public works and assistant superintendent of public works; and town clerk and assistant town clerk. The Hearing Officer also determined that the tax collector and assistant tax collector are not confidential employees and their inclusion in the same unit would not result in a conflict of interest.

The Hearing Officer served her report on the parties and informed them that exceptions were due on or before October 19, 1988. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Officer's findings of fact (pp. 3-22) are accurate. Acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I adopt the Hearing Officer's recommendations and remand the case to the Director of Representation for proceedings consistent with this decision.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
November 18, 1988

H.O. NO. 89-3

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

In the Matter of

TOWN OF KEARNY,

Public Employer,

-and-

Docket No. RO-H-87-157

ASSOCIATION OF DEPARTMENT HEADS
AND ASSISTANT DEPARTMENT HEADS,

Employee Organization.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that the Commission order an election to determine whether a unit of department heads and assistant department heads wish to be represented by the Association of Department Heads and Assistant Department heads.

The Hearing Officer concluded that the town clerk, the assistant town clerk and the treasurer are confidential employees. She concludes the general superintendent of public works and the health officer are managerial executives, but the tax assessor and the library director are not.

The Hearing Officer further concludes that including the following positions in the same unit would result in a substantial potential conflict of interest: the construction code official and the subcode officials; the general superintendent of public works and the assistant superintendent of public works; and the town clerk and the assistant town clerk. The Hearing Officer concludes the tax collector and the assistant tax collector are not confidential employees and their inclusion in the same unit would not result in a potential substantial conflict of interest.

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. 89-3

STATE OF NEW JERSEY
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Appearances:

For the Public Employer
Doyle and Brady, Esquires
(Norman A. Doyle, Jr., Esquire)

For the Employee Organization
Jerome J. LaPenna, Esquire

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

On June 25, 1987, the Association of Department Heads and Assistant Department Heads ("Association") filed a Petition for Certification of Public Employee Representative seeking to represent a unit of department heads and assistant department heads employed by the Town of Kearny ("Town"). The Association initially petitioned for the following positions: town clerk; assistant town clerk; tax collector; assistant tax collector; town treasurer; welfare director; health officer; chief operator of the sewage treatment plant; superintendents of recreation, park and shade trees

and water; assistant superintendents of water, public works, and buildings and grounds; assistant code officials and the assistant health officer. (C-1).^{1/} At the hearing, the Association amended its petition to include the general superintendent of public works, construction code official, library director and the tax assessor (TA9).^{2/} The Town initially objected to an election. It contended that including department heads and assistant department heads in one unit would create a conflict of interest.^{3/} After the hearing the Town modified its position. It now contends that only the following positions have conflicting interests: the town clerk and assistant town clerk; the tax collector and assistant tax collector; the construction code official and subcode officials; the general superintendent of public works and assistant superintendent of public works; and the health officer and assistant health officer. The Town also asserts that the town clerk, assistant town

^{1/} Commission exhibits are designated as "C"; Joint exhibits are designated as "J". Citations to the transcript of April 20, 1988 are designated as "TA"; April 29, 1988 as "TB" and May 19, 1988 as "TC".

^{2/} The Association's amendment sought to include the assistant tax assessor. Since the Town does not have an assistant tax assessor and previous discussion concerned the tax assessor, I assume the Association intended to amend its petition to include the tax assessor.

^{3/} The following positions are department heads: construction code official, park and shade tree superintendent, recreation supervisor, welfare director, water superintendent, general superintendent of public works, health officer, library director, tax collector, tax assessor, treasurer and town clerk.

clerk, tax collector, assistant tax collector and the town treasurer are confidential employees, and that the superintendent of public works and the health officer are managerial employees.^{4/}

I conducted hearings on April 20 and 28, and May 19, 1988. The parties examined witnesses and introduced exhibits. The parties waived oral arguments and submitted briefs. The record was closed on August 22, 1988.

Findings of Fact

1. The Town of Kearny employs the employees who are the subject of this petition. It is governed by a Mayor and eight-member council. The Mayor and council have instituted several committees including finance, water, streets, shade tree, recreation, and buildings. The finance committee controls the budget and other administrative functions. Department heads report directly to committees. Issues reach the Mayor and council after committee consideration. Council members are part-time and receive a \$6000 annual stipend (TA27). The Board of Health and the Library Board are appointed by the Town (TB61).^{5/}

^{4/} The Town initially asserted the library director and the tax assessor were managerial executives. In modifying its position, the Town did not discuss the library director or the tax assessor. I assume the Town still asserts that the positions are managerial.

^{5/} Neither party asserted that the Board of Health or the Library Board of Trustees are separate employers or joint employers with respect to library and health department employees. Nonsupervisory library and health department employees are in a unit with other Town employees.

2. The Town's blue and white collar employees are represented by Civil Service Council 11 ("Council 11"). Article XX of Council 11's agreement with the Town provides that department heads or their assistants are the first step in the grievance procedure (J-1, J-2).

The Police and fire employees are organized into rank and file and superior officer units. Crossing guards are also organized.

3. Ken Davie, the Town's labor counsel, has represented the Town at negotiations since 1984. He meets with the Mayor and council in closed session, discusses union proposals and formulates counterproposals (TB110). Davie testified that he writes to department heads asking for suggestions about contract language, wages, hours and conditions of employment when he negotiates with Council 11 (TB125). The only such letter in evidence is dated February 23, 1988 (J-7). The current agreement with Council 11 was adopted by ordinance on May 27, 1987 (J-2, TB155). Since this petition was filed on June 25, 1987, I find that Davie's letter to the department heads was sent in anticipation of this proceeding.^{6/}

^{6/} Davie stated that he received information about negotiations from several department heads by mail and telephone. He stated he received information from Richard Ferraiolli, the general superintendent of public works and Phillip Martone, the recreation superintendent. Martone responded to Davie's February 23 letter with proposals for a department head's contract. Because he received it only after Council 11's

Davie testified that department heads contact him with questions about grievances and discipline (TB125). I find that Davie may have counseled department heads about grievances and disciplinary actions, but has not consulted them about negotiations. I also find that the Town does not ask department heads for suggestions during negotiations.

4. Dennis Sherry has been the treasurer since 1977. He writes paychecks, administers the Town's benefit plans and prepares the budget.

Department heads submit to Sherry annual budget requests for salaries, operating and other expenses and additional staff (TA32). Sherry collates the requests by department and gives copies to the Mayor and council, the auditor and the town clerk. After the Mayor and council examine and modify the budget, the finance committee, with Sherry and the auditor, prepare the final budget (TA34).

Salaries are determined by negotiated agreements. When the Town has not reached an agreement with one of its negotiating units, the Mayor and council give Sherry an estimated

6/ Footnote Continued From Previous Page

contract was settled, Martone assumed Davie referred to the department heads. (TB156, J-8). Ferraiolli testified that has suggestions for contract language changes, but no one contacted him (TA84). The remaining department heads testified that they had never been consulted during negotiations with Council 11. I credit the department heads' testimony.

figure and then adopt the budget with that figure (TA37). The police and fire chiefs and deputies were negotiating with the Town when the last budget was adopted. Sherry knew the amount allotted for their salaries (TA36).^{7/} The budget includes lines for wages and salaries and negotiations. The negotiations line is a contingent fund for raises that are not determined when the budget is created (TA41). Sherry knows the amount allotted for negotiations and what figure to include in the budget when labor contracts are not settled before the budget is adopted (TA35).

Davie testified that he asks Sherry to cost out salary proposals for negotiations. Davie, does not remember however, whether he tells Sherry whose proposal he is costing out. Davie testified that he keeps Sherry informed of progress in negotiations so that Davie knows how much the Town can afford. According to Davie, Sherry generally knows the Town's bottom line and its effect on the budget (TB126). Sherry testified that he is not consulted about negotiations (TA35). I find that Sherry is aware of the Town's bottom line because he knows how much will be allocated for salaries in the budget. I find that Sherry is not asked to assist in negotiations.

Sherry prepares paychecks and administers the Town's pensions and insurance policies (TA37). Several years ago the Town changed insurance carriers. Though the insurance director shops for

^{7/} I note that the police and fire chiefs are not public employees under N.J.S.A. 34:13A-5.3.

new carriers, Sherry gathered cost information from carriers. He determined the costs of current insurance and of each prospective carrier (TA45). He gave that information to the town attorney. Sherry maintains information concerning cost and expenditures on pensions, health and dental insurance, and the prescription drug plan.

The treasurer's office bookkeeping, administrative and data control clerks and clerk typist are represented by Council 11 (TA39).

5. The assistant tax collector, the senior cashier and two account clerks work in Charles Connolly, the tax collector's office. The senior cashier and the account clerks are represented by Council 11 (TA49). Connolly is not involved in the hiring process (TA51). The assistant tax collector was appointed by the Mayor and council based on the results of a civil service exam. If workload increased, Connolly could recommend a new position be added, but that recommendation might not be followed. Connolly does not have the authority to discharge an employee, but has given the bookkeeping machine operator a one day suspension for insubordination (TA52). Connolly believes that he is responsible for disciplining the assistant tax collector, but has never done so (TA53). He assigns work to the assistant tax collector and other employees in the office.

The tax collector bills taxpayers, mails tax bills and collects the payments. He also collects taxes for the water department and performs tax searches.

Connolly knows how much money the Town collects daily, but does not know how it is spent. He is not involved in negotiations (TA54). Davie asks Connolly what effect the total cost of the union's proposals will have on tax rates (TB115, 127). Connolly prepares budget recommendations for his office.

As tax collector since 1980, Connolly reports to the finance committee chairman.^{8/} Information from Connolly's office reaches the Mayor and council through the finance committee (TA55). Connolly reports monthly to the Mayor and council.

6. Helen Kurszywcz has been the assistant municipal tax collector for eight years. She assists the tax collector in administering the office. She plans weekly schedules, compiles reports and prepares billings and collections. She is responsible for tax appeals from the County Tax Board, judgments, refunds, recordkeeping, resolutions, delinquent taxes and senior citizens property tax deductions (TC12-14).

Kurszywcz has never been involved in the collective negotiations process or attended a council meeting where negotiations were discussed (TC13). She types the tax collector's office budget after he prepares it (TC14).

Connolly is Kurszywcz's supervisor, but he has never evaluated or disciplined her. Since the tax collector position was vacant when Kurszywcz was promoted to assistant tax collector, the tax collector was not involved.

^{8/} Before Connolly was appointed tax collector he sat on the Town council as the finance chairman from 1977-1979.

7. James Cantlon has been the town clerk for twelve years. He reports to the Mayor and council, through the finance committee chairman (TA63). The assistant town clerk, an administrative secretary and a senior clerk typist work for Cantlon. Cantlon was not involved in their hiring. Cantlon's staff has not been disciplined. Cantlon evaluates these employees for promotional purposes. Each member of Cantlon's staff has been promoted at his recommendation (TA63). Under the Council 11 contract, Cantlon is a step in the clerical employees' grievance procedure, but no grievances have been filed.

Cantlon attends all council meetings, including closed sessions where negotiations are discussed. At closed sessions he hears about negotiations (TA66). Cantlon receives copies of all correspondence from Davie to the Mayor and council (TB123).

Cantlon prepares his office's budget, which includes anticipated operating expenses and salaries for the next year. Clerical salaries are contained in the Council 11 contract. Cantlon makes policy decisions for the Town concerning election procedures. Those policies, however, are the responsibility of the County Board of Elections. 9/

9/ Under Title 19 the municipal clerk is the statutory election officer. Election officer is an administrative position assisting the Board of Elections in running elections. The requirements are statutory. As election officer, Cantlon does not take instructions, directions, orders or suggestions from the Town. He reports only to the Board of Elections.

8. Loretta Conlon has been the assistant town clerk for six years. She is also the Mayor's secretary. As the Mayor's secretary, Conlon handles his appointments and correspondence and arranges wedding ceremonies (TC4). She types the Mayor's letters and opens his mail, date stamps it and puts it in his office (TC5, TC10). She does not read it. If the envelope is marked "confidential", she does not open it (TC5). She remembers the Mayor receiving mail from the Town attorney's office (TC6, TC10).^{10/} Conlon has not noticed correspondence concerning negotiations or grievances (TC7).

In Cantlon's absence, Conlon assumes his responsibilities, which include taking the minutes at both open and closed council meetings. Conlon's difficulty in climbing the stairs has prevented her from attending meetings for the last three years. If Cantlon could not attend, she would go to the meeting (TC9). Before her health deteriorated, Conlon attended closed sessions where negotiations were discussed (TC8).

Conlon enters cash receipts, makes deposits and closes out the Clerk's office books each month (TC9). She is also involved in election preparations.

9. Richard Ferraiolli was appointed director of the department of public works in 1985. He subsequently resigned, but maintained the positions of water superintendent and plumbing

^{10/} Davie sends all correspondence to the Mayor and council through the clerk's office (TB129).

subcode official, which he has held since 1976. Ferraiolli was reappointed the general superintendent of public works in January 1988 (TA74).

The Town adopted the ordinance creating the Department of Public Works and the general superintendent position on March 23, 1988 (J-3).^{11/} Under the ordinance, the general superintendent reports to the Mayor and council or one of its committees. The general superintendent administers, plans and organizes public work operations and supervises department heads within the public works department (J-3). The department heads of the recreation, street, parks and shade tree, buildings and grounds, water and sewer treatment plant divisions report to Ferraiolli. The ordinance lists the following examples of work required of the general superintendent:

1. Coordinates and implements operating policies and procedures for the effective utilization of funds, personnel, equipment, materials and supplies.
2. Directly supervises the work of superintendents in the various sections of the Public Works organization.
3. Coordinates and reviews budget requirements for the various Public Works sections as initially submitted by the Superintendents of these sections.
4. Manages the expenditures of the various public works sections to insure consistency with goals and objectives.

^{11/} The petition was amended to include that position on April 20, 1988.

5. Initiates standards for equipment and material used, and establishes a system of forms control.

6. Develops suitable work and safety programs for the various sections of the organization.

7. Makes recommendations to superiors concerning disciplinary measures, promotions and appointments.

8. Prepares necessary reports and recommendations concerning the operations of the various sections of the organization.

9. Maintains necessary records and files.

Ferraiolli makes hiring recommendations to the Mayor and council (TA75). A street sweeper was hired at Ferraiolli's recommendation. The Mayor and council have followed Ferraiolli's recommendations for promotions. Recently a recreation department maintenance worker was promoted to a senior maintenance worker at his recommendation (TA78). The supervisor of recreation expressed his opinion, but could not veto the decision. Ferraiolli's recommendation that the general foreman of the streets division be demoted to public works foreman was also followed.

Ferraiolli has not terminated anyone since January 1988. According to Ferraiolli, he has the authority to recommend discharge and may discipline unilaterally. Under the new ordinance, all disciplinary actions in the public works department must be approved by Ferraiolli. In 1985, he reprimanded and suspended employees with the Town's approval. There are no formal evaluations but Ferraiolli evaluates employees for his own use.

Ferraiolli transfers employees (TA79). Previously, approval was required from the employee or the union, and the department head or the governing body. Now Ferraiolli transfers unilaterally. He has transferred employees from the sewerage plant to the street department and from the street department to the recreation department and from the recreation to the water department. When transferring, he consults with department heads but does not necessarily follow their recommendations (TA80).

Ferraiolli resolves grievances informally. If Ferraiolli can't resolve it, the grievance is forwarded to the appropriate committee, and if necessary, to the Mayor and council (TA84). Ferraiolli has not been consulted about negotiations but has asked the Mayor and council to be included (TA84). He has not discussed his role in future negotiations with the Mayor and council

Each department head prepares a budget. In the public works department, budget proposals are given to Ferraiolli, who makes recommendations and changes. Each department head meets separately with the finance committee before the budget is finalized. Ferraiolli attends these meetings.

Ferraiolli approves department expenditures over \$300 (TA86). Under bidding laws, three price quotes are required for purchases between \$500 and \$8400. For purchases over \$8400, bids are required. Kearny recently bought a plow for \$1975. Ferraiolli obtained three quotes and received approval from the finance committee chairman. Ferraiolli could have bought the plow without

discussing it with the finance committee, but he consulted the chairman as a matter of courtesy. The Town allocates funds (TA87).

Since becoming general superintendent, Ferraiolli approves time records, overtime and vouchers (TA86). He is starting to implement consistent procedures throughout the public works department. Department heads continue to determine vacation schedules (TA82).

In response to a suggestion from the chairman of the shade tree commission, Ferraiolli called the superintendent of shade trees and told him to plant trees on Kearny Avenue (TA88).

There is a playground in Kearny that is not used often. The Mayor and council asked Ferraiolli for an opinion. Ferraiolli suggested they replace the playground with a parking lot. No action has been taken.

10. The construction code official enforces the New Jersey Construction Code and the fire, electric, plumbing and mechanical subcodes for all residential, commercial and industrial buildings in Kearny (TB2). Jerome Wagner has been the construction code official for eleven years. He reports to the Mayor and council through the building committee chairperson.

The building and plumbing subcode officials are full time employees.^{12/} The fire subcode official is a part-time employee and enforcement of the electric subcode is subcontracted to

12/ Ferraiolli is the plumbing subcode official.

a third party. Wagner issues permits after review and inspection by the subcode officials. His staff includes two inspectors, the building subcode official, the assistant building subcode official, the building inspector and two clerical workers. The clerical employees are represented by Council 11.

Wagner prepares his department's budget. He submits vouchers and department budget proposals to the building committee chairman. Wagner's budget includes the salaries and proposed salary increases for his staff and overtime, supplies and equipment (TB6).^{13/} Wagner's salary recommendations for increases for code officials have been cut (TB33). Since the administrative clerks are in the bargaining unit, Wagner does not recommend their salary increases (TB34).

When Wagner hires a new subcode official, he advertises for state licensed applicants and interviews them. He then makes a recommendation to the Mayor and council. It is usually followed. When the Uniform Construction Code was adopted in 1977, Wagner followed this procedure to hire subcode officials and reorganize the department. In 1977, Wagner was the construction official, building subcode official and the building administrator. Wagner recommended reorganizing the department and promoting Norwood, the building inspector, to assistant construction official/subcode official (TB12). The Town followed Wagner's recommendation.

13/ Wagner's budget includes only funds for construction and building, not for zoning and planning.

Wagner has never disciplined his staff. If necessary, he would consult with the Mayor and council before disciplining or discharging individuals (TB10). He does not evaluate his employees.

Wagner has not been involved in collective negotiations (TB12). No one has asked his opinion on contract provisions. He does not believe that he is involved in the grievance procedure, but no grievances have been filed in his department (TB12).

Special training is required by the State to become a construction code official. Wagner acquired his licenses before training was mandated, so he was not required to take special classes. Wagner's staff goes to training sessions regularly and is required to renew special licenses every two years (TB25). Wagner determines who receives special training and which sessions they attend (TB26).

11. Edward Grosvenor, the health officer for eight years, reports directly to the seven member Board of Health (TB51). Though one member is a doctor, the Board does not have specific expertise in public health. Board of Health committees include finance, personnel, inspection, and nursing. Grosvenor reports at committee meetings (TB57-58). Grosvenor directs the work of the assistant health officer and twenty-one other health department employees.

Since Grosvenor became the health officer, no Board of Health employee has been hired or promoted without his recommendation (TB61). The Mayor and council does not participate

in hiring Health Department employees (TB49). Grosvenor interviews the top three candidates from the Civil Service list for full time positions. He selects one and recommends that individual to the Board. The Board follows his recommendations. The assistant health officer was hired and promoted at Grosvenor's recommendation (TB36, TB39). The sanitary inspector was promoted to environmental technician and a trainee to public health investigator at Grosvenor's recommendation.

Grosvenor has placed disciplinary letters in a clerk typist's file and in the sanitary inspector's file. Though he has not done so, Grosvenor has the authority to unilaterally suspend health department employees including the assistant health officer. Grosvenor could recommend an employee's discharge to the Board of Health. Grosvenor does not evaluate his staff, but he schedules vacations.

Grosvenor has not been consulted about negotiations with Council 11 (TB40). He formulates the Health Department's budget by examining the previous year's expenditures in each line item and requesting increases where necessary. He changes priorities and alters funding for programs from year to year (TB40). Grosvenor introduces new programs into the budget by requesting the necessary funding.

Grosvenor has not recommended increases for himself or the assistant health officer (TB41). When preparing salary requests

for other employees, he uses the amounts provided in the Council 11 contract. He may ask for additional money for new positions or promotions. When a new contract is not available, Grosvenor uses the previous year's figures. When there was no contract, the Mayor and council told Grosvenor to put in a six or six-and-one-half percent increase and he complied (TB42). Grosvenor does not know if the Town was in negotiations with Council 11.

Grosvenor purchases commercial and medical supplies, office and computer equipment, cars, hot water heaters and maintenance items. He recommends the purchase of a certain vehicles with special equipment to the Board. It generally agrees and bids are presented to the Mayor and council (TB43).

Grosvenor examines bids, then makes recommendations through the town clerk to the Mayor and council. Grosvenor's recommendations are usually followed. For example, the purchase of a copy machine would be included in Grosvenor's budget proposal. He obtains prices and selects the equipment. Though he has the authority to purchase the equipment, he informs the Board when he's purchasing large office equipment (TB44).

Grosvenor orders office and medical supplies and equipment. He decided the department needed a computer and obtained the Board's permission to hire a consultant to evaluate the department's needs. The consultant recommended specific software. Grosvenor consulted the Board members and they evaluated the recommendation and used a state contract to purchase a computer

(TB45). The Mayor and council were consulted. Because bids were not used, the purchase went through the Board without authority from the Mayor and council (TB46).

Grosvenor establishes new programs as required by the State Department of Health. He has set up discretionary programs such as eye screening by the Commission for the Blind (TB52). The department also has a "baby keep well" program where mothers bring their babies in for mental and physical examinations and immunizations until they are school age (TB55). Grosvenor's assistant set up an AIDS educational program (TB56). New programs must receive Grosvenor's approval. Grosvenor determines which programs continue to be funded and whether or not the department can afford the specific programs each year.

Grosvenor has not received directives from the Board since he has been health officer (TB61). He attends every Board meeting and is advised of events. Most of the department's activities are State mandated (TB46). Grosvenor's duties are defined by a local ordinance.^{14/}

Health officers are licensed by the State (TB50). A masters' degree from an accredited school and four or five years of supervisory experience in a municipal health department are required (TB51). Grosvenor meets those requirements.

14/ That ordinance was not placed in evidence.

12. Gerald Pontrelli has been the tax assessor since October 1987. As a State certified tax assessor, he determines, locates and describes property for tax purposes (TB64). The assessor appraises every piece of property. He reports to the finance committee, but attends their meetings only when necessary. The assessor trainee and the assessing clerk work in the assessor's office. Both have worked there for several years and are represented by Council 11. Though Pontrelli has not done so, he believes that he could discipline them and could recommend their discharge. If there was a vacancy in his office, he would interview and recommend a candidate to the Mayor and council (TB65). Pontrelli determines vacation schedules.

Pontrelli has not been consulted about negotiations (TB68). Employees in his office have not filed grievances during his tenure.

Pontrelli purchased a new copy machine for his office with the approval of the finance committee. He is recommending a property reassessment and plans to recommend that the Town implement a computer system (TB68).

As assessor, Pontrelli takes directions from the County and the Town. The County could instruct Pontrelli to undertake a reassessment without Town's the approval (TB95).

13. Rona Pearl was appointed library director in November 1987. She reports to the seven member Library Board of Trustees. The non-salaried Board includes five appointed members and the Mayor

and superintendent of schools or their designees (TB140-141). Pearl attends their monthly meetings. She has a masters degree in library science and a professional librarian's certificate.

Pearl supervises eleven full-time and nine part-time employees, including two assistant librarians, seven library assistants, two building maintenance workers, pages and security employees. At the direction of the Board, she hired a page. Pearl believes that the Board would be more involved in hiring a higher level employee. The Board has the final power to hire and fire (TB149). Pearl is the first step in Council 11's grievance procedure for library employees, though no grievances have been filed since she became library director (TB137).

In March 1988, Pearl received a letter from Ken Davie, the Town's labor attorney about negotiations with Council 11 (TB138, J-8). She presented the letter to the Board. They advised her to contact Davie. He told her that it concerned negotiations with Council 11. She is not aware of what happens in negotiations with Council 11 (TB139).

Pearl creates the library budget. Some recommendations are followed, but others are not (TB139). When Pearl needs to purchase equipment for the Library, she includes it in the budget as a line item and requests funding from the Board. For example, she asked the Board to purchase a dehumidifier system, but the request was denied (TB140).

Pearl determines what books the library purchases. She held a book sale, instituted an amnesty week for overdue books and started an afternoon concert series.

Analysis

The Association petitioned for a unit of department heads and assistant department heads. The Town admits that they may appropriately be included in one unit. It argues however, that certain department heads supervise their assistants and their inclusion in the same unit would result in an impermissible conflict of interest. The Association asserts that there is no conflict of interest between the department heads and their assistants.

The Supreme Court in Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404, 427 (1971) held:

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. While a conflict of interest which is de minimus or peripheral may in certain circumstances be tolerable, any conflict of greater substance must be deemed opposed to the public interest. [Id. at 425-426].

In City of Trenton, D.R. No. 83-33, 9 NJPER 382 (¶14172 1983), the Director of Representation noted that a history of the absence of conflicts in a collective negotiations relationship can be used to gauge the possibility of future conflicts. Here, as in Wilton, there is no collective negotiations history, so I examine the potential for substantial conflicts arising from the inclusion of department heads and their assistants in the same unit.

N.J.S.A. 34:13A-5.3 affords public employees the right "to form, join and assist any employee organization." Confidential employees, however, are excluded from the Act's definition of "employee" and do not enjoy its protections. N.J.S.A. 34:13A-3(d). The Town asserts the town clerk, the assistant town clerk, the treasurer, and the tax collector and the assistant tax collector are confidential employees.

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

[E]mployees whose 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 Commission's policy strictly construes the term "confidential employee." Brookdale Community College, D.R. No. 78-20, 4 NJPER 32 (¶ 4018 1977); State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), mot. to reopen den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶ 16249 1985) ("State of New Jersey"). In State of New Jersey, the Commission explained its approach in determining whether an employee is confidential:

We scrutinize the facts of each case to find for whom each employee works, what he does, and what he knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit. [Id. at 510]

See also Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987) affirmed App. Div. Dkt. No. A-4740-86-T7 (February 18, 1988).

Finding confidential status requires a case-by-case examination of each employee's knowledge of information which would compromise the employer's position in the collective negotiations process, River Dell Regional Board of Education, P.E.R.C. No. 84-95, 10 NJPER 148 (¶15073 1984), affm'g D.R. No. 83-21, 9 NJPER 180 (¶14084 1983); Parsippany-Troy Hills Board of Education, D.R. No. 80-35, 6 NJPER 276 (¶11131 1980). Therefore, I examine each position.

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.^{15/} The Borough's mayor and commissioners had almost complete control over the department. The chief had no discretion to hire, assign overtime, promulgate policies or plan schedules. He did not have effective control over the budget and deployment and discipline of personnel. The Commission concluded that the chief played no role in policy formulation and little role in directing its effectuation in any but routine matters.

The parties agree that the petitioned-for positions are supervisory. At issue is whether certain department heads supervise their assistants creating a conflict prohibited by Wilton. While

^{15/} The Legislature later amended N.J.S.A. 40A:14-118 to broaden police chiefs' powers and duties. The Commission then 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).

the department heads generally share a community of interest with the assistant department heads, inclusion of certain positions in the same unit would result in substantial conflicts of interest.

Cantlon, the town clerk, was not involved in hiring Conlon, the assistant town clerk, but Cantlon evaluates Conlon for promotional purposes. His recommendation that she be promoted to assistant town clerk was followed. I find that their inclusion in the same unit would create a potential substantial conflict of interest. I also find that both should be excluded from any unit because they are confidential employees.

The town clerk attends all council meetings and takes minutes. Cantlon attends closed sessions where the council discusses negotiations. He is privy to all of the Town's discussions about negotiations and is aware of counterproposals before they are made to the unions. Cantlon's functional responsibilities, including attending closed meetings where negotiations are discussed, makes his membership in any appropriate negotiations unit incompatible with his official duties. Western Monmouth Utilities Authority, D.R. No. 82-36, 8 NJPER 140 (¶13061 1981).

Conlon, the assistant court clerk has similar responsibilities. She attends council meetings when the clerk was unavailable. Recently, poor health has prevented her from doing so, but she would attend meetings if necessary. Conlon is the Mayor's secretary. She types his correspondence and opens his mail

including mail from Ken Davie, labor counsel. I conclude that Conlon's responsibilities as assistant municipal clerk and the Mayor's secretary makes her inclusion in a negotiations unit incompatible with her official duties. Sayreville Bd. of Ed., P.E.R.C. No. 88-109, 14 NJPER 134 (¶19129 1988); Mt. Olive Tp., P.E.R.C. No. 85-113, 11 NJPER 311 (¶16112 1985).

The Town asserts that the tax collector supervises his assistant and therefore their inclusion in the same unit would create a substantial conflict of interest. I find that Connolly directs Kurszywcz's work but does not have supervisory authority over her. He did not play a role in her appointment. The Mayor and Council interviewed, hired and promoted Kurszywcz. Connolly does not evaluate Kurszywcz and does not have the authority to discharge her. Connolly could discipline Kurszywcz if necessary, but has not done so in his eight years as tax collector. I find the possibility that Connolly might discipline Kurszywcz is too remote to constitute a substantial potential conflict of interest.

The Town also asserts that the tax collector and his assistant are confidential employees. The tax collector bills taxpayers and collects payments. He knows how much money the Town takes in each day. He does not, however, know how it is spent. Connolly is not involved with negotiations with any unit. Davie, the Town's labor counsel, testified that he asks Connolly how the unions' proposals would effect tax rates. Assuming that Davie asked for that information, knowledge of a union's proposals would not

compromise the Town's position at negotiations. If an employee knows the employer's strategies or is able to infer them from other contemporaneous events, that employee may be confidential, Northern Highlands Regional Bd. of Ed., D.R. 88-2, 13 NJPER 629 (¶18234 1987). Connolly's knowledge of the unions' proposals and their effect on tax rates, is not sufficient to infer knowledge of the Town's counterproposals or other confidential information.

Connolly's involvement with the budget is limited to preparation of his departmental budget each year. Since Sherry adds the figure for negotiations into the Town's budget after Connolly submits his proposal, Connolly does not know how much the Town is allotting for raises in a year where negotiations are continuing through the budget process.

Kurszywcz assists the tax collector in administering the office and billing and collecting taxes. Her only exposure to the budget is to type the tax collector's budget request for the department. She does not attend council meetings. She is not involved in negotiations and is not exposed to confidential information.

Since neither Connolly's or Kurszywcz's functional responsibilities result in knowledge of information likely to compromise the Town's position in the collective negotiations process, I find that the tax collector and the assistant tax collector are not confidential employees.

The Town contends that inclusion of the construction code official in a unit with the subcode officials would result in a potential substantial conflict of interest. After the New Jersey Uniform Construction Code was passed in 1977, Wagner, the construction code official, expanded and reorganized the department. He recommended that Norwood, the building inspector, be promoted to assistant construction code official. The Town followed Wagner's recommendation. The Town has also hired and promoted other subcode officials at Wagner's request. Wagner has the authority to discipline subcode officials, though he has not had the occasion to do so. I conclude that Wagner's inclusion in the same unit with the subcode officials would present substantial conflicts of interest.

The Town asserts the general superintendent of public works is a managerial executive and that his inclusion in the same unit with his assistants would create a substantial conflict of interest.

As the general superintendent of public works, Ferraiolli controls the public works department. In March 1988, the Town passed an ordinance giving the general superintendent broad authority over personnel, the budget, spending and other policy and procedures within the public works department. Under the ordinance, Ferraiolli has the power to coordinate and implement public works policies and procedures. Ferraiolli's powers include supervising the work of the other department heads, reviewing their budgets, initiating standards and controls for recordkeeping and insuring consistent goals and objectives for purchases.

Ferraiolli makes recommendations to the Mayor and council concerning discipline, promotions and appointments. He now approves all time records, including overtime. He has the authority to transfer employees between departments and may discipline any employee in the public works department. He approves all disciplinary actions taken by department heads. He effectively recommends hiring and promotions. He needs the Town's approval to discharge.

Ferraiolli has not participated in negotiations with Council 11, but has asked to participate in future negotiations.

Under the ordinance, department heads submit budget proposals to Ferraiolli. Ferraiolli makes suggestions and changes and forwards them to Sherry. The Finance Committee holds meetings to consider the budget proposals of each department. Ferraiolli attends all of these meetings. Under the ordinance, Ferraiolli has the authority to unilaterally purchase equipment unless the purchase is large enough to go through the bidding procedure. Within the department, Ferraiolli approves all purchases over \$300.

Ferraiolli directs policy within the public works department. The Mayor and council recently consulted him about the future of a playground. Ferraiolli suggested they replace it with a parking lot. No decision has been made. Ferraiolli has implemented policies suggested by committee members. When a member of the Shade Tree Commission suggested that trees be planted on Kearny Avenue, Ferraiolli assigned the task to the superintendent of shade trees.

To date, Ferraiolli has not played a large role in creating or effectuating new policies. He has however, begun to change policies within the department. For example, Ferraiolli now approves overtime and expenditures. He is implementing consistent policies within the department.

The ordinance gives Ferraiolli power to make decisions on the Town's behalf that may be distinguished from that exercised by other department heads. I find the general superintendent of public works is a managerial employee. Cf., Borough of Madison, P.E.R.C. No. 85-75, 11 NJPER 60 (¶16031 1984).

Ferraiolli has authority to make recommendations to the Mayor and council concerning disciplinary measures, promotions and appointments. That authority is not limited to members of Council 11's unit, but includes assistant superintendents of public works and the heads of the public works departments. I therefore find that Ferraiolli's inclusion in a unit of department heads and assistant department heads would create a substantial potential conflict of interest.

The Town asserts that the health officer is a managerial executive and that his inclusion in the same unit as his assistant would result in an impermissible conflict of interest. Grosvenor's authority over the health department parallels Ferraiolli's authority over the public works department. Grosvenor reports to the Board of Health. The members of the Board are not public health experts. Grosvenor is a state licensed health officer. He

supervises over twenty employees in the department. Grosvenor is responsible for all personnel decisions including the appointment of the assistant health officer.

Grosvenor creates the department's budget and decides which programs it will offer. Many programs are State mandated, but Grosvenor determines the level of funding they receive. Grosvenor also decides which discretionary programs to introduce or continue. Neither the Board or the Mayor and council interfere with Grosvenor's decisions. Grosvenor has the authority to broadly affect the means and manner in which the health department provides services to the community. While the Town provides the funds, Grosvenor decides how to allocate the funds among required and discretionary programs.

I conclude that Grosvenor has sufficient authority and discretion to affect all aspects of the health department and find that he is a managerial employee.

As health officer, Grosvenor, recommended hiring and promoting the assistant health officer. Grosvenor also has the absolute authority to discipline him and may recommend that the Town terminate the assistant health officer. Therefore, I find inclusion of the health officer and the assistant health officer in the same unit would create a substantial potential conflict of interest.

In Kearny, like Montvale, the Mayor and council have virtually complete control over policy matters. The Mayor and council control each department through committees or boards. The

committee chairpersons determine policy and decide which issues reach the governing body. Under Kearny's form of government, the Mayor and council, not the department heads, make policy and formulate the overall budget.

As librarian, Pearl supervises the day-to-day operations of the library. She does not, however, formulate new library policies. The Library Board plays an active role in all but routine matters.

She has hired a library page at the direction of the Board, but the Board is more involved in hiring higher level employees. Pearl is the first step in Council 11's grievance procedure for library employees, but is not involved in negotiations. Pearl creates the library budget in the same manner that other departments create their budgets. The Board reviews and modifies it. Some of her budget recommendations are followed--others are not. Pearl can not purchase library equipment without prior approval by the Board. She sets library policy to the extent that she decides what books the library purchases and holds library programs like amnesty week and an afternoon concert series.

I find that these responsibilities do not rise to the level of a managerial executive. Pearl drafts a budget which the library board revises each year. She makes personnel recommendations, but has no role in negotiations. She resolves grievances at the lowest step of the procedure--as an immediate supervisor. While she, in conjunction with the Board, determine what programs and books the

library will provide, she carries out the wishes of the Board, but does not independently implement new programs or procedure.

Pontrelli, the tax assessor, determines, locates, describes and appraises property for tax purposes. He supervises his staff. He is not consulted about negotiations. He purchase office equipment with the finance committee's approval. He is recommending a reassessment and plans to recommend that the Town implement a computer system.

Pontrelli's duties do not involve the effectuation of policy objectives. He does not have effective control over his department's budget, and has no control over the Town's budget. His authority is limited to supervising the two employees in his office and making suggestions to the finance committee to expedite property appraisal in the Town. I conclude that Pontrelli is not a managerial employee and may appropriately be included in a unit of department heads and assistant department heads.

Finally, the Town asserts that the treasurer is a confidential employee. As treasurer, Sherry prepares the Town's budget and administers its benefit plans. Benefit administration is primarily a ministerial task that does not expose Sherry to information which would compromise the Town's position in negotiations. Sherry maintains information concerning costs and expenditures for existing benefits. When the Town changed insurance carriers, he gathered cost information from various carriers and forwarded that information to the Town's attorney. He was not aware

of the Town's choice of carrier or its position in negotiations as a result of gathering the raw data.

Sherry meets with the finance committee and the auditor to review budget submissions from the department heads and create a Town budget. As a result, he knows how much the Town allots for increases when contracts are not settled. These amounts are generally included in the budget as a separate line from salaries.

Sherry's responsibilities include formation of the budget. That requires knowledge of the amount the Town allots for salary increases before that information is made available to the union or the public. Since Sherry has that information in during negotiations, his knowledge and responsibilities render him ineligible for inclusion in any unit. cf. Linden Free Public Library Bd. of Trustees, D.R. 82-31, 8 NJPER 76 (¶13031 1981); Brookdale Community College, D.R. No. 78-10, 4 NJPER 35 (¶4018 1977).^{16/}

Recommendations

1. I recommend the Commission direct an election among a unit of department heads and assistant department heads employed by the Town of Kearny to determine whether they wish to be represented

^{16/} The Town initially alleged that Sherry was also a managerial-executive. It is not clear if the Town still maintains that allegation. Since I find Sherry excluded from any unit as a confidential employee it is not necessary to decide whether he is managerial. There is no evidence, however, that Sherry has managerial responsibilities. See pp. 5-7, infra.

by the Association of Department Heads and Assistant Department Heads for the purposes of collective negotiations.


2. I conclude that the town clerk, assistant town clerk and the treasurer are confidential employees. I recommend that they be excluded from a unit of department heads and assistant department heads.

3. I conclude that the tax collector and assistant tax collector are not confidential employees and their inclusion in the same unit would not result in a potential substantial conflict of interest. I recommend that they be included in the unit of department heads and assistant department heads.

4. I conclude that the general superintendent of public works and the health officer are managerial employees. I conclude that including the general superintendent of public works in the same unit as the assistant superintendent of public works would result in a substantial potential conflict of interest. I recommend that the general superintendent of public works and the health officer be excluded from the unit of department heads and assistant department heads.

5. I conclude that the library director and the tax assessor are not managerial employees. I recommend that they be included in a unit of department heads and assistant department heads.

6. I conclude that including the construction code official in a unit with the subcode officials would result in a potential substantial conflict of interest. I recommend that the construction code official be excluded from a unit of department heads and assistant department heads.



Joyce M. Klein
Hearing Officer

DATED: October 5, 1988
Trenton, New Jersey