

P.E.R.C. NO. 89-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF WARREN,

Public Employer-Petitioner,

-and-

Docket No. CU-88-21

WARREN COUNTY WEIGHTS AND MEASURES
P.B.A. LOCAL 203,

Employee Organization-Respondent.

SYNOPSIS

The Public Employment Relations Commission clarifies a collective negotiations unit represented by the Warren County Weights and Measures PBA Local 203 to exclude the Superintendent of the Warren County Weights and Measures Department. The Commission finds that title to be supervisory.

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Respondent.

Appearances:

For the Petitioner, David A. Wallace, Esq.

For the Respondent, Loccke & Correia, Esqs.
(Michael J. Rappa, of counsel)

DECISION AND ORDER

On October 19, 1987, Warren County filed a Clarification of Unit Petition. The County seeks to exclude the superintendent of the Weights and Measures Department from a negotiations unit represented by Warren County Weights and Measures P.B.A. Local 203. The County argues that this employee is a managerial executive or a supervisor and has a conflict of interest with other unit employees. The PBA contends that the employee is neither a supervisor nor a managerial executive.

On January 8, 1988, the Director of Representation issued a Notice of Hearing. On April 11, 1988, Hearing Officer Marc Stuart conducted a hearing. The parties examined witnesses, introduced exhibits and filed post-hearing briefs.

On August 2, 1988, the Hearing Officer recommended that the superintendent, although not a managerial executive, is a supervisor and that he be removed from the negotiations unit. H.O. No. 89-1, 14 NJPER 552 (¶19232 1988). He based his findings on the superintendent's role in budget processes and in decisions to hire, discipline, evaluate and promote.

On August 17, 1988, the PBA filed exceptions. It contends that the Hearing Officer erred in: (1) applying the term "effectively recommends" as it relates to hiring, discharging and disciplining; (2) finding that the superintendent had the authority to promote; (3) finding a conflict of interest, and (4) not finding that the County waived objection to the superintendent's inclusion by recognizing the PBA as the majority representative.

We have reviewed the record. The Hearing Officer's findings of fact (pp.2-10) are accurate. We incorporate them here.

In the absence of exceptions we find that the superintendent is not a managerial executive. Under N.J.S.A. 34:13A-3(f), managerial executives are:

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

The superintendent does not exercise any managerial responsibility, nor does he "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." Bor. of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507, 509 (¶11259 1980).

We find, however, that the superintendent is a supervisor 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 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 non-supervisory personnel to membership.

The superintendent makes effective recommendations on decisions to promote, discipline and hire. Although his recommendations may be reviewed, his decisions are essentially final. Since 1984, the superintendent has hired, disciplined, and promoted the current assistant County superintendent. Compare City of Margate, P.E.R.C. No. 87-146, 13 NJPER 500 (¶18184 1987) (chief of lifeguards a supervisor); see also State of New Jersey, Department of Higher Education, (Thomas A. Edison State College), P.E.R.C. No. 87-147, 13 NJPER 502 (¶18185 1987). The two other department employees were promoted as a result of the superintendent's recommendations and evaluations. Because the department has only two subordinates, there were only a few instances where the superintendent exercised supervisory authority. However, he will presumably continue to exercise that authority when the need arises.

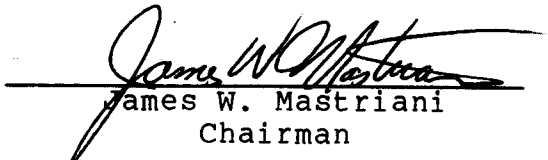
The PBA argues that the County waived its right to contest the superintendent's inclusion in the unit. There are no time restrictions on the filing of a unit clarification petition. N.J.A.C. 19:11-1.5; 11-2.8; see also Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977). The PBA also argues that the County's

motives should be examined because of the petition's timing. The County's motivation is not at issue. Any objection by the PBA would have to be presented through an unfair practice charge.

ORDER

The Superintendent of the Warren County Weights and Measures Department is a supervisor within the meaning of the Act. The unit represented by PBA Local 203 is clarified to exclude that title.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
November 22, 1988
ISSUED: November 23, 1988

H.O. NO. 89-1

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

In the Matter of

COUNTY OF WARREN,

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-and-

Docket No. CU-88-21

WARREN COUNTY WEIGHTS AND MEASURES
P.B.A. LOCAL 203,

Employee Organization-Respondent.

SYNOPSIS

A Hearing Officer recommends that the Public Employment Relations Commission find that the Superintendent of Weights and Measures is a supervisor within the meaning of the Act and should be removed from a unit composed of all nonsupervisory Weights and Measures employees of the County of Warren. Additionally the continued inclusion of the superintendent together with other nonsupervisory employees would result in both the existence of and the potential for substantial conflict of interest. Bd. of Ed. of W. Orange v. Wilton, 57 N.J. 404 (1971); Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1987); City of Asbury Park, D.R. No. 85-26, 11 NJPER 475 (¶16171 1985).

The Hearing Officer finds no pre-Act bargaining history which would prevent the Superintendent's removal from the bargaining 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.

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For the Employee Organization-Respondent,
Loccke & Correia, Esqs.
(Michael J. Rappa, of counsel)

HEARING OFFICER'S REPORT AND RECOMMENDATION

On October 21, 1987, the County of Warren ("County") filed a Clarification of Unit ("CU") Petition with the Public Employment Relations Commission ("Commission") seeking to exclude the title of County Superintendent ("Superintendent") from a collective negotiations unit represented by Warren County Weights and Measures, P.B.A. Local 203 ("PBA"). The County argued that the Superintendent was a managerial executive or a supervisor within the meaning of the Act and had to be removed from the PBA's unit. The PBA opposed the Petition and argued that the Superintendent is neither a managerial executive nor a supervisor within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

A Notice of Hearing issued on January 8, 1988. A pre-hearing conference was held on February 8, 1988. As a result of the conference both parties submitted position statements and proposed findings of fact by March 1, 1988. A hearing was held on April 11, 1988. Both parties submitted post-hearing briefs by June 7, 1988, and both parties submitted reply briefs by July 8, 1988.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. Background

The PBA represents a unit of three weights and measures employees including Floyd Van Syckle, County Superintendent of Weights and Measures; Edward Paulik, Deputy County Superintendent; and John W. Davis, Assistant County Superintendent. The PBA became the majority representative of that unit in late spring 1986.

Prior to April 1986, the three above titles were included in a broad-based, county-wide unit including supervisors and non-supervisors represented by a non-police union. Prior to December 1985, the broad-based unit was represented by Warren Council No. 17 ("Council 17"). On September 18, 1984, the American Federation of State County and Municipal Employees ("AFSCME") filed a petition (Docket No. RO-85-37) seeking to represent the broad-based unit excluding the supervisory employees. The County and Council 17 opposed the Petition and sought to continue the supervisors' inclusion in the unit. The issue proceeded to a hearing and on December 13, 1985, a hearing officer in County of

Warren, H.O. No. 86-2, 12 NJPER 73 (¶17029 1985), concluded that supervisors should remain in the unit under the established practice exception provided for in subsection 5.3 of the Act. The hearing officer concluded that Council 17 had represented the broad-based unit which included supervisory and non-supervisory titles, since prior to 1968. That decision resulted in the withdrawal of that petition and the filing of a new petition (Docket No. RO-86-98) by AFSCME seeking to represent the broad-based unit including supervisory and non-supervisory titles. The County, Council 17 and AFSCME all agreed to exclude the County Superintendent title (as well as certain other titles) from the unit for that election because they agreed, for purposes of that petition, that the Superintendent was a managerial employee within the meaning of the Act (Exhibit P-3). An election was held and AFSCME was certified as the majority representative of that unit on February 26, 1986.

During the pendency of the AFSCME petitions, the PBA filed a petition (Docket No. RO-88-101) seeking to represent the weights and measures titles (County Superintendent, Assistant County Superintendent, etc.). The PBA alleged that those titles were police employees within the meaning of the Act and should be placed in a separate (police) negotiations unit. On April 21, 1986, the Commission in County of Warren, P.E.R.C. No. 86-111, 12 NJPER 357 (¶17134 1986), concluded that the weights and measures employees were police within the meaning of the Act. On June 18, 1986, the County recognized the PBA as the majority representative of the weights and measures employees including the Superintendent.

2. Hiring Process

Van Syckle has been Superintendent since February 1984. Since becoming Superintendent he interviewed and recommended the hiring of John Davis, and his recommendation was followed (T29-T31, T57-T58, T70-T77, T94-T95, T121).^{1/} Van Syckle had been given a list of eligible people to interview. He sent letters to the eligible people, including Exhibit P-6 which was sent to Davis, informing them they could apply for a position and appear for an interview. Van Syckle interviewed Davis and recommended that he be hired (T121). All such recommendations by department heads are reviewed by the County Administrator/Freeholder Clerk, who is the civil service appointing authority, and then either accepted or rejected. Van Syckle's recommendation to hire Davis was accepted (T10, T28, T74, T77).

Van Syckle testified that he recommended Davis for hiring because he (Davis) was first on the list and he (Van Syckle) believed that he had to select the first on the list (T124). I do not credit that testimony to show that Van Syckle did not effectively recommend that Davis be hired.^{2/} Dorothy Gill, Deputy Freeholder Clerk since 1984, testified that all department heads including Van Syckle, interview potential employees and make

^{1/} "T" refers to the transcript dated April 11, 1988.

^{2/} It is not inconceivable that an employee could be unaware of his supervisory status and still have the degree of authority and responsibility to render him a supervisor within the meaning of the Act.

recommendations, and that even though Davis was first on the list, Van Syckle was not required to recommend he be hired. Van Syckle had the authority to go to number two or three on the list (T29-T31, T72, T74-T77). Gill testified that if Van Syckle did not want to hire Davis, the County could by-pass him (T77). I credit Gill's testimony to show that Van Syckle had greater latitude in his authority to make hiring recommendations than his own testimony would suggest.

3. Discipline Process

By memorandum dated July 26, 1985, from Van Syckle to the Clerk of the County Freeholders (Exhibit P-4), Van Syckle recommended that Davis be disciplined (a one day suspension) for improper conduct on the job. Although P-4 was signed by both Van Syckle and Ed Paulik, the memo was written by Van Syckle in the first person and was his recommendation, Paulik only signed P-4 as a witness (T128). As a result of P-4, Gill signed a notice of Minor Disciplinary Action (Exhibit P-5) accepting Van Syckle's recommendation and suspending Davis for one day (T35-T40, T8, T154-T155).

Van Syckle and other department heads have the authority to recommend suspensions and discharges (T34-T35, T87, T154). Although Van Syckle's recommendation to discipline Davis had to be reviewed, Gill testified that Van Syckle's recommendation was followed and that she would not have attempted to have Van Syckle change that recommendation because he was the one who knew what occurred

(T81-T83). I credit Gill's testimony to show that the department head (in this case Van Syckle) exercises his (or her) own judgment in determining the level of discipline. (T82).

4. Evaluation Process

Van Syckle and other department heads have authority to evaluate employees in their department and make recommendations as a result of those evaluations (T33-T34, T106, T125-T26). Van Syckle has evaluated the two employees in his department, and although those evaluations do not vary much, he gives particular thought to them (T151-T152).

5. Promotion Process

Van Syckle has the authority to promote his employees and has in fact recommended promotions in two instances (T52-T53, T155-T156). Pursuant to N.J.S.A. 51:1-45, the County has authorized the Superintendent to appoint his assistants, and Van Syckle recommended that Paulik be promoted to Deputy Superintendent, and that Davis be promoted from a trainee to an Assistant Superintendent (T52-T53, T166, T172). Both recommendations were followed (T52, (T155)).^{3/}

^{3/} On cross examination Van Syckle had testified that he made recommendations for two promotions and that they were followed (T155). On redirect examination, however, Van Syckle contradicted his earlier testimony and said he could not recall all the circumstances regarding Davis' promotion but believed the County directed him to do it because Davis had been employed for one year (T166, T171-T174). I do not credit

6. Budget Process

All department heads, including Van Syckle, are responsible for preparing or recommending a budget for their respective departments (T44-T47, T157). The department head is responsible for implementing the budget with respect to his department (T46); and, has the authority to sign requisitions to spend money that is budgeted for the department. (T156).

ANALYSIS

Although Van Syckle is not a managerial executive within the meaning of the Act, he is a supervisor within the meaning of the Act. Moreover, he should be removed from the PBA's unit because of both the existence of and the potential for substantial conflict of interest. Bd. of Ed. of W. Orange v. Wilton, 57 N.J. 404 (1971); Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1987); City of Asbury Park, D.R. No. 85-26, 11 NJPER 475 (¶16171 1985).

Managerial Issue

The evidence failed to establish that Van Syckle was a managerial employee. Managerial executives are defined in the Act as follows:

3/ Footnote Continued From Previous Page

Van Syckle's redirect testimony that the County required him to promote Davis. Van Syckle identified a document showing his written recommendation that Davis be promoted (T172) and could not offer any document or recall who may have contacted him to tell him to promote Davis (T174). I credit Van Syckle's cross examination to show that he did, in fact, make two recommendations for promotion and that they were followed.

"Managerial executives" of a public employer means persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

In Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980), the Commission determined that an employee is a managerial executive when he/she formulates policy or directs its effectuation. The Commission established certain factors to consider in determining whether an employee possessed the proper level of authority.

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 the discretion he exercises. [6 NJPER at 509.]

The evidence did not establish that Van Syckle formulates policy; selects a course of action from among alternatives; or, develops the methods or means of reaching a policy objective. Thus, I reject the County's assertion that he is a managerial executive.

The agreement between the County, Council 17 and AFSCME in Docket No. RO-86-98 to exclude Van Syckle from the unit because he allegedly was a "manager" (P-3), is not dispositive here of whether he is a managerial executive. The parties to that petition had the right to agree to exclude him on that basis if they wished, but here, Van Syckle's managerial authority in terms of his responsibilities and duties can be the only determinant of his managerial status. The facts do not support a finding that he exercises the degree of authority outlined in Montvale, supra.

Supervisory Issue.

A supervisor is defined in subsection 5.3 of the Act as someone "having the power to hire, discharge, discipline, or to effectively recommend the same...." That same subsection prohibits the inclusion of supervisory and non-supervisory employees in the same negotiations unit. Van Syckle recommended that Davis be hired and disciplined, and both recommendations were effective. On that basis he must be excluded from the PBA's unit.

Wilton Conflict

In addition to finding that Van Syckle's authority to recommend hiring and discipline falls squarely within the Act's definition, his actual discipline of a unit member is evidence of an inherent conflict of interest that was found inappropriate by the Supreme Court in Wilton, supra. Even if Van Syckle were otherwise entitled to be in the unit based upon the established practice exception provided for in the Act, under these facts he should still

be removed because his continued inclusion would result in a substantial conflict of interest with his subordinates. Wilton, supra. See also, Town of West New York, supra.

CONCLUSION AND RECOMMENDATION

Accordingly, based upon the above factual findings and legal analysis the County Superintendent should be removed from the PBA's unit.

I recommend that the PBA's unit be clarified to exclude the County Superintendent.^{4/}

^{4/} In addition to arguing that Van Syckle was not a supervisor within the meaning of the Act, the PBA, in its post-hearing brief, argued that the Petition should be dismissed because the County raised no objection to Van Syckle's inclusion in the unit when it recognized the PBA as the majority representative, and because there has been no change in circumstances. The P.B.A. also argued that the County's filing of the Petition to remove Van Syckle was improperly motivated because it was filed just after the PBA filed for interest arbitration, and because Van Syckle has been active in negotiations on the unit's behalf. These arguments have little merit.

First, there are no specific timeliness provisions in the Commission's rules (N.J.A.C. 19:11-1.5 or 19:11-2.8) concerning the filing of CU petitions. They may be filed at any time. Furthermore, it is the Act and the case law, and not the County, that prohibits the inclusion of supervisors in units with non-supervisors; and, the County is entitled to raise that issue before the Commission for consideration. The County's earlier recognition of the unit including Van Syckle, does not result in a waiver of its right to file a CU petition to ask the Commission to determine whether a title should be removed from the unit.

Second, the County's motivation for filing the CU petition is not at issue here. If the PBA believed the County acted in violation of the Act, it should have raised that issue in an unfair practice proceeding.

H.O. NO. 89-1

11.

A handwritten signature in cursive script, reading "Marc Stuart". The signature is written in black ink and is positioned above a horizontal line.

Marc F. Stuart, Hearing Officer

Dated: August 2, 1988

Trenton, New Jersey