

P.E.R.C. NO. 87-116

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Public Employer,

-and-

Docket No. CU-85-8

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission clarifies the Communication Workers of America, AFL-CIO professional negotiations units to include the new "site manager" position in the State of New Jersey, Department of Environmental Protection. The Commission finds that the site manager is not a managerial executive.

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Appearances:

For the Public Employer, Hon. W. Cary Edwards, Attorney
General (Michael Diller, Deputy Attorney General)

For the Petitioner, Steven P. Weissman, Esq.

DECISION AND ORDER

On August 9, 1984, Communications Workers of America, AFL-CIO ("CWA") filed a Clarification of Unit Petition. CWA seeks to include the new "site manager" position in the State of New Jersey, Department of Environmental Protection ("State"), in its collective negotiations unit of professional employees. The State contends that the site managers are "managerial executives" within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., and may not be included in any negotiations unit. N.J.S.A. 34:13A-3(f); N.J.S.A. 34:13A-5.3.

On February 4, 1985, the Director of Representation issued a Notice of Hearing.

On March 21, April 12, May 10 and 16 and July 12, 1985, Hearing Officer Marc F. Stuart conducted hearings. The parties examined witnesses, introduced exhibits and argued orally. They also filed post-hearing briefs. The State's principal argument, throughout the hearing, was that the matrix management system used to clean up toxic waste demonstrated that site managers are managerial executives. In fact, its post-hearing brief was devoted to this argument and stressed that these employees are "responsible for managing the cleanup from beginning to end."

On May 12, 1986, the Hearing Officer issued a report recommending that the site managers be included in CWA's professional unit. H.O. No. 86-6, 12 NJPER 383 (¶17152 1986) (copy attached). He found that site managers were not managerial executives because "they do not formulate policy. Instead, they carry out others' directions in coordinating the clean up efforts." The Hearing Officer rejected the State's reliance on its matrix management system, concluding that "mere management and/or supervision of a particular project is not synonymous with the level of functioning, responsibility and discretion common to a managerial executive."

The State was granted several extensions to file exceptions. On November 5, 1986, it sought an additional extension until November 21, 1986 because "changes in leadership within the Department of Environmental Protection [would result in] organization changes...which would have an effect upon both the

nature of site manager authority and the nature of the actual work duties of site manager." On November 12, 1986, Chairman Mastriani granted this request. The State did not, however, file exceptions until December 19, 1986, when it also filed a motion to file exceptions out of time. That motion states the delay was caused by the need to respond to emergency appeals in the Third Circuit Court of Appeals.

The State first contends that this case is moot because of "changed circumstances" in the department's organization. It has submitted affidavits and a new organizational chart. These documents establish that site managers answer directly to their superiors on the organizational chart who make the "final decisions." The State, therefore, now concedes that this new organization makes site managers professionals or supervisors "as a result not only of the compartmentalization of their roles but also the fact that this compartmentalization placed them under superiors who viewed site managers as clearly subordinate and as performing in their new roles without the same ultimate authority with regard to operating the project as was part of the original conception of the position." Based upon these facts, the State contends the case is moot.*FN@It has, however, filed other exceptions in the event the Commission decides the merits.@

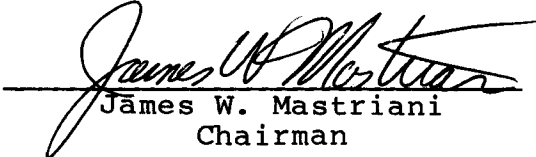
On January 8, 1987, CWA filed a reply. It contends the case is not moot because the State's Office of Employee Relations continues to classify the employees as managerial. It also contends a decision is necessary because the situation may arise in the future.

This case is not moot because there has been no final resolution whether site managers should be in CWA's professional unit and the State apparently has not voluntarily included them. Therefore, it is necessary for us to render a final determination. However, one issue is moot: whether the site managers are managerial executives under the State's prior matrix management system. That system is no longer in effect and the State properly advised us of these post-hearing changes. Cf. State of New Jersey, P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985). These changes, as the State readily concedes, establish that the site managers are professional employees, not "managerial executives." We therefore clarify CWA's professional unit to include site managers. In view of these post-hearing changes, it is unnecessary to decide whether site managers were "managerial executives" under the matrix management system.

ORDER

CWA's professional unit is clarified to include site managers.

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
March 23, 1987
ISSUED: March 24, 1987

H.O. No. 86-6

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

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Public Employer,

-and-

Docket No. CU-85-8

COMMUNICATION WORKERS OF
AMERICA, AFL-CIO,

Petitioner.

Appearances:

For the Public Employer
Michael Diller, District Attorney General

For the Petitioner
Marchetta & Weissman
(Steven P. Weissman of counsel)

HEARING OFFICER'S
REPORT AND RECOMMENDED DECISION

On August 9, 1984, the Communications Workers of America, AFL-CIO ("CWA") filed a petition for clarification of unit with the Public Employment Relations Commission. The CWA seeks to include, in its Professional Unit, the newly created title Site Manager (title code M98-03256), currently assigned to the Managerial Executive Employee Relations Grouping. The State of New Jersey, Department of Environmental Protection ("State") maintains that the title Site Manager is not properly includable within the CWA unit because the title is "managerial" within the meaning of the New

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-3(f);
N.J.S.A. 34:13A-5.3.

On February 4, 1985, the Director of Representation issued a Notice of Hearing. On March 21, April 12, May 10, May 16, and July 12, 1985, I conducted a hearing at the Commission's offices in Trenton, New Jersey. The parties were given an opportunity to examine and cross-examine witnesses, present relevant oral and documentary evidence and to argue orally. Following the granting of extensions of time in which to file briefs, the petitioner filed its brief on October 7, 1985. The State filed its brief on November 18, 1985. Thereafter, the State filed a reply brief on November 25, 1985, and the petitioner filed a corrected reply brief on December 2, 1985.

FINDINGS OF FACT

1. The State of New Jersey, Department of Environmental Protection 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 representation petition (TA 15).^{1/}

2. The Communication Workers of America, AFL-CIO is a public employee representative within the meaning of the Act and is subject to its provisions (TA 15).

^{1/} Transcript citations are as follows: 'TA' refers to the transcript dated March 21, 1985; 'TB' refers to the transcript dated April 12, 1985; 'TC' refers to the transcript dated May 10, 1985; 'TD' refers to the transcript dated May 16, 1985; 'TE' refers to the transcript dated July 12, 1985.

3. The position of Site Manager, located within the Division of Waste Management, was first created in May of 1983, partly as a result of a major reorganization within the Department of Environmental Protection (TA 44; TA 101-102; TB 37-39; J 9).^{2/} The chain of command in the Department of Environmental Protection is as follows:

1. Commissioner
2. Deputy Commissioner
3. Assistant Commissioner
4. Division Director
5. Division Deputy Director
6. Division Assistant Director
7. Division Administrator
8. Division Deputy Administrator
9. Bureau Chief
10. Division Section Chief
11. Site Manager (TD 25-26; J 4-7; TD 25-26)^{3/}

There are currently twenty (20) Site Managers (TC 88).^{4/} The

^{2/} Exhibit designations are as follows: 'P' refers to Petitioner's Exhibits; 'R' refers to Respondent's Exhibits; 'J' refers to Joint Exhibits; 'C' refers to Commission Exhibits.

^{3/} The record evidence of the chain of command above the title of Site Manager is conflicting. The parties agree to nine (9) levels above the position of Site Manager; however, the record supports the existence of ten (10) levels, as indicated above.

^{4/} The record is in conflict over whether there are fourteen (14) or twenty (20) Site Managers; however, twenty (20) appears to be the correct figure (TA 96; TC 88).

number of Site Manager positions is established by higher management personnel within the Hazardous Site Mitigation Administration (TC 91). Criteria and qualifications for hiring Site Managers and possibly certain other personnel are determined by the Bureau Chief and Section Chiefs (TC 92-93). Generally, a Site Manager is responsible for coordinating and managing the various efforts of the Site Management Team, including but not limited to technical coordinators, legal coordinators, technical representatives from other divisions, etc. (TA 49; TC 12; TD 27).

4(a) Specifically, Site Managers report to an Assistant Chief or Section Chief (TA 91). They are evaluated annually by their Section Chiefs (TA 91; TC 89). The Bureau Chief also has routine supervisory authority over Site Managers (TC 123-125; TC 153-154). Bureau Chiefs and Section Chiefs meet periodically to review general aspects of the supervision of the Site Managers' work (TC 98). Site Managers are assigned projects by their Assistant Chief (TA 91; TC 54). They are not permitted to schedule their own vacation or leave time without approval from their superiors (TA 92). They attend monthly staff meetings within their Bureau, chaired by their Bureau Chief, to discuss procedures and concerns regarding the clean-up of the various sites (TA 93). Occasionally, staffing levels are discussed at these monthly staff meetings; however, Site Managers have no real input into setting staffing levels (TA 96-97). Section Chiefs have a role in developing EPPISs for Site Managers (TA 90).

(b) Site Managers have wide responsibility and a lot of latitude with respect to the management of the various clean-up sites (TD 127). However, according to the Director of the Division of Waste Management, Site Managers do not have ultimate responsibility for the clean-up of hazardous waste sites (TD 108). It is also of some significance to note that, with regard to the recommendations and evaluations Site Managers are required to perform, many are made on a consensus basis between the Site Manager and the various members of the Site Management Team (TE 59; TE 72). All clean-up levels for given sites must be approved by the Chief of the Bureau of Environmental Evaluation and Risk Assessment, and by the Administrator of the Hazardous Site Mitigation Administration (TD 101-102).

(c) The Treasurer has responsibility to select contractors -- not the Site Manager (TD 110). However, the Commissioner has the right to approve the selection of contractors (TD 110-111). A body known as the Quality Assurance Management Team -- not the various Site Managers, evaluate data that has been collected by contractors and subcontractors who are under contract with the department, and determine the validity of such data (TC 31). Site Managers are responsible for certifying that a particular project was done according to the governing contract (TD 49-50). The Administrator of the Hazardous Site Mitigation Administration is ultimately responsible for the type of coordination necessary to clean-up the various hazardous waste sites (TC 85).

(d) Administrator also has responsibility for preparing and coordinating the preparation of the Administration's budget (TC 86). Bureau Chiefs also assist the Administrator in establishing the Bureau's budget (TC 87). Overall responsibility for formulating and preparing a budget for the Division, for projecting personnel requirements and for formulating policy with respect to various dealings between the state and federal governments, rests with the Division Director and his Assistant Directors (TD 98-100). Site Managers have no involvement in the preparation of the Bureau's budget (TA 97).

(e) The Administrator further develops various rules and regulations designed to implement applicable statutes governing the clean-up of toxic waste sites in New Jersey (TC 87). The Bureau Chiefs are generally responsible for setting goals for the Bureau and prioritizing the Bureau's work (TC 87; TC 102). Decisions to prioritize sites which demand immediate attention and where federal dollars are imminently available, are made by high-level personnel such as those at the Commissioner, Assistant Commissioner and Director levels (TC 105). In this regard, Bureau Chiefs solicit input from both Section Chiefs and Site Managers (TC 88).

(f) A committee known as the Hazardous Sites Task Force is responsible for the approval of remedial alternatives, recommendations for which are generally made by a Site Manager (TD 111-112). The Site Manager's recommendations in this regard are generally effective (TD 121). The Hazardous Sites Task Force consists of various Division Directors (TD 114).

(g) In the case of sites undergoing a great deal of activity, Site Managers report regularly to their superiors (TA 113). In situations requiring a determination of various alternatives in the selection of remedial actions, such decisions are made by committee, and not by Site Managers (TB 92-93).

(h) Normally, Site Managers have no independent authority to meet with members of the public to discuss the progress of their work, although they do answer routine inquiries from individuals (TC 72-73; TC 129-130). Site Managers frequently respond to public inquiries about the progress of various clean-up sites; however, these responses are subject to review and revision by higher-level personnel (TC 29-30).

(i) A policy and procedure manual for the Hazardous Site Mitigation Administration was created following the 1983 reorganization and later updated, but all actions and decisions with regard to this project were made by personnel at a higher level than that of Site Manager (TC 94-96).

(j) Requests for super fund money must be made by the Commissioner and not by Site Managers (TD 109). Once approval is granted, a request for proposal (RFP) is submitted by the Department of Treasury, not the Site Manager (TD 110). Although Site Managers have the initial responsibility of preparing these RFPs (TC 105-151), they ultimately must be approved by higher-level personnel (P 4; P 5). Likewise in enforcement cases, Administrative Consent

Orders (ACO) and Scope of Work Determinations are frequently prepared initially by Site Managers, but then must be approved by various higher-level personnel (TC 159; P 7).

(k) Management team meetings, in most cases, are chaired by Site Managers (TC 52). Site Managers have limited authority to approve spending in federal projects without pre-authorization from the Spill Fund (TC 76). Site Managers have authority to deal with change orders in amounts under \$10,000; although, change orders in higher amounts must be approved at higher levels (TC 133-134; TD 117). On-Scene Coordinators also have the responsibility to authorize change orders where needed (TD 51). In situations where legal action should be initiated on a given project, Site Managers have the capacity to recommend such action; however, approval has to be given by higher-level personnel (TC 139-140).

5. Site Managers have no responsibility to supervise subordinate employees (TA 98; TB 14). They do not participate in the hiring process of any Bureau employees (TA 98-99). Site Managers do not evaluate any Bureau employees (TA 99); nor, do they have authority to discipline any employees in their capacity as Site Manager (TA 99). Neither do they schedule leave time nor overtime for employees, nor do they have authority to assign work to subordinate employees (TA 99). Site Managers have no independent authority to dismiss individual members of the site management team (TC 71); however, in one instance a Site Manager effectively recommended the termination of a contractor under his purview (TD 45-46).

LEGAL ANALYSIS

The sole issue presented for determination is whether Site Managers, whose duties' have been discussed at some length, are "managerial executives" within the meaning of the Act.^{5/} If they are, the petition must be dismissed since such employees do not have the right to be included in an employee organization. N.J.S.A. 34:13A-3(f) states:

"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....

In Borough of Avalon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977), the Commission first applied this definition. There, a lifeguard captain was found not be a managerial executive. This so even though he prepared the beach operations budget, authorized and modified rules and regulations, created a disciplinary point system, authorized changes in the work week, added guards to the payroll in emergencies, participated in management meetings, influenced the Borough and the Mayor's policies, trained and scheduled all guards, managed the beach and supervised cars on a day-to-day basis. The Commission stated:

...the term "managerial executive" should be narrowly construed and ... the relevant National

^{5/} The question is appropriate for CU determination under In re Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977), as the title is a new title which came into existence following the implementation of the parties most recent collective negotiations agreements.

Labor Relations Board precedent ... indicates that a wider range of discretion than that possessed by ... [the lifeguard captain] is needed. [He] ... was clearly a supervisor and in that capacity could be said to be effectuating management policy, but the Act clearly distinguishes managerial executives -- excluded from coverage -- from supervisors -- eligible to be represented in appropriate units. [Id. at 374].

In In re Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER

507 (¶ 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 for 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 judgement sufficient to effect broadly the organization's purposes or 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 508-509].

Based on the application of the foregoing principals, I conclude that Site Managers are not managerial executives within the meaning of the Act. They are tenth in the line-of-command in the employers hierarchy. With regard to their functions and responsibilities, although they appear to have the most direct responsibility for the management of the clean-up of waste sites, they do not possess any of the other requisite responsibilities and

powers common to an individual functioning in a managerial capacity. Site Managers do not formulate policy. Instead, they carry out others' directions in coordinating the clean-up efforts. They lack ultimate responsibility in the areas of budget formulation, personnel requirements, prioritization of clean-up sites, methods of approach to effectuate the clean-up, and virtually every other function and responsibility common to a managerial executive. Site Managers do have some limited discretion with regard to clean-up procedures, minor expenditures of funds and the retention or non-retention of contractors under their control on a given site; however, the degree of discretion they maintain leaves them far below the level of authority and autonomy necessary to the status of a managerial executive.^{6/}

In support of its assertion that Site Managers are managerial executives, the State advances an argument based on the concept of matrix management which, taken at its most basic level, is a system of horizontal, rather than vertical, management. The concept involves the coordination or "management" of different disciplines working together on a common project. The State asserts that under the concept of matrix management, the Site Manager is the "manager" of his clean-up site; and, thus, a managerial executive

^{6/} Moreover Site Managers are not statutory supervisors, as they lack the capacity to hire, fire, discipline and/or evaluate subordinate employees. This does not appear to be in dispute between the parties.

within the meaning of the Act. The State is mistaken in this assertion. Regardless of the term used to characterize the Site Manager's function with regard to the clean-up of a toxic waste site, it does not rise to the level of what is understood by both statute and case law to be managerial. That is not to say that the Site Manager does not manage and/or supervise the clean-up of sites within his or her purview. However, mere management and/or supervision of a particular project is not synonymous with the level of functioning, responsibility and discretion common to a managerial executive.

In its post hearing brief, the petitioner cites a case in which the National Labor Relations Board dealt with a comparable set of circumstances. In In re General Dynamics, Convair Aerospace Division, 213 NLRB No. 124, 87 LRRM 1705 (1974), the employer claimed that Senior Engineers functioning as Proposal Managers, Proposal Team Members or Project Leaders were managerial employees. The Board stated:

The Employer's Convair operation is based upon the concept of systems engineering. It is formulated as a matrix, one axis of which is functionally or organizationally oriented, and the other project-oriented. The functional axis consists of the Employer's departments and sub-departments in which inter alia, the employees sought are located, and where they are subject to institutional or functional, supervision by supervisory payroll employees. This axis is completely bisected by the project axis, which is the operational structure through which the employer performs his various projects. [87 LRRM at 1713, footnote omitted, emphasis added].

Within the structure at General Dynamics, Convair, Proposal Managers, Proposal Team Members and Project Leaders' responsibilities are similar to those of Site Managers in this case. Both coordinate and direct the implementation of tasks toward completion of a final goal. Additionally, Proposal Managers, Proposal Team Members and Project Leaders are like Site Managers in that neither are "supervisors" within the statutory meaning of that term applicable to each.

In determining that Senior Engineers functioning as Project Leaders, Proposal Managers or Proposal Team Members are not managerial employees, the Board's analysis of the facts presented to it is particularly relevant to the facts in this matter and its conclusions are equally applicable here. It reasoned as follows:

Here, purely technical decisions which are not discretionary and which comply with limitations previously established during the systems engineering cycling process nevertheless may affect indirectly the Employer's business direction simply because the nature of the Employer's business is such that it is geared to directional change based upon the technical performance of its employees. We do not view such directional changes as policy changes.

Similarly discretionary and independent judgments routinely made on a project during the ordinary course of employment and within the systems engineering framework may affect company direction directly, but again only because of the manner in which the Employer's business is conducted. In every instance, management makes the policy decision, the effective decision whether to reject or pursue the results of those technical judgments, all of which have been routinely rendered on the basis of, and as a

result of professional and/or technical expertise and in accordance with the task assigned. Such judgments are dependent completely upon the technical discipline of the classification involved and, in view of the Employer's operation, or necessity, have the potential of indirectly affecting or creating company policy. In no event, however, are the engineers or administrative employees specifically armed with true managerial authority, nor do they pursue their work in a managerial vein or in any vein other than routinely practicing their respective disciplines in a routinely and rigidly regulated format. The fact that the employees involved may handle the entire project assigned to them undoubtedly is a tribute to their organizational skills and abilities, but has little, if any, bearing on managerial authority. Their discretions and decisions are predicated solely on a technical base, and culminate in technical reports or recommendations to managerial superiors who, in turn, determine, establish, and carry out management direction, i.e., "policy," by approving or disapproving the recommendations presented.

We cannot find, in these circumstances, that the employee sought, who perform as proposal managers . . . , proposal team members, or project leaders, formulate or effectuate management policies, or that they have the type of discretion indicative of managerial status, or, indeed, that they have discretion in their job performance independent of their Employer's established policy, since their job discretions in fact are exercised in conformity with the Employer's established policy, which is based on directional change rather than on status quo. We do not believe that the employees who exercise these job responsibilities are true representatives of management in the traditional sense, or that Congress intended that managerial status be conferred upon, or extend to, such employees. Conferring such status upon them would eviscerate the traditional distinction between labor and management. [87 LRRM at 1715-1716; footnote omitted].

Virtually, the same analysis is applicable here, and under this analysis, the same result is achieved. There is no doubt that Site Managers exercise a high level of professional judgement, coordination and supervision; however, they are not "managerial executives" within the meaning of the Act. As indicated previously, they are ten steps removed from the highest level of authority in the employer's hierarchy, and their ability to formulate and effectuate policies and exercise discretion is simply not self-established, but rather delegated by higher levels of authority. Although they may make some technical decisions and independent, discretionary judgements on various projects, and although these decisions and judgements may directly affect the course of the employer's efforts, this is so only because of the manner in which the Employer's business is conducted. In every instance, higher management personnel make the effective policy decisions to reject or pursue the results of those technical decisions and independent, discretionary judgements. This has been demonstrated through numerous examples contained in the Factual Findings section of this report. Here, as well as in General Dynamics, Convair, supra, the fact that the subject employees handle the entire project assigned to them undoubtably is a tribute to their organizational skills and abilities, but has little, if any, bearing on managerial authority.

RECOMMENDATION

I recommend a finding that Site Managers, employed by the State of New Jersey, Department of Environmental Protection, are not "managerial executives" within the meaning of the Act. I further recommend unit placement in petitioner's Professional Unit,^{7/} effective immediately. In re Clearview Regional High School Board of Education, supra.



Marc F. Stuart
Hearing Officer

DATED: May 12, 1986
Trenton, New Jersey

^{7/} The State declined a definitive position with respect to a possible unit placement in the event the title was found to be a non-managerial, and it appears to have no preference between the petitioner's Professional Unit, Higher-Level Supervisory Unit and Primary-Level Supervisory Unit. Nevertheless, it is my recommendation, based upon my finding that the Site Manager title is non-supervisory and non-managerial, that the proper unit placement is in the petitioner's Professional Unit.