

P.E.R.C. NO. 98-120

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEAN COUNTY UTILITIES AUTHORITY,

Public Employer,

-and-

Docket No. CU-C-94-38

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 14, AFL-CIO,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission dismisses a clarification of unit petition filed by the Office and Professional Employees International Union, Local 14, AFL-CIO. The petition seeks to add the new title of regulatory compliance officer to either OPEIU's negotiations unit of white collar employees of the Ocean County Utilities Authority or its negotiations unit of the Authority's supervisors. The Commission concludes that the regulatory compliance officer exercises Authority-wide decisional powers and is a managerial executive under N.J.S.A. 34:13A-3(f).

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Petitioner.

Appearances:

For the Public Employer, Haines & Thompson, attorneys
(Richard S. Haines, of counsel)

For the Petitioner, Schneider, Goldberger, Cohen, Finn,
Solomon, Leder & Montalbano, attorneys (James M. Mets, of
counsel)

DECISION

Office and Professional Employees International Union, Local 14, AFL-CIO, filed a petition for clarification of unit. Local 14 desires to add the new title of regulatory compliance officer to either its negotiations unit of white collar employees of the Ocean County Utilities Authority or its negotiations unit of the Authority's supervisors. The Authority responds that the regulatory compliance officer is a managerial executive under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., and is thus ineligible for representation.

Hearing Officer Elizabeth J. McGoldrick conducted a hearing lasting five days. The parties examined witnesses, introduced exhibits, and filed briefs.

The Hearing Officer recommended that the petition be dismissed. H.O. 97-1, 22 NJPER 442 (¶27231 1996). She concluded that Michael Matuskiewicz, the regulatory compliance officer, was a managerial executive.

Local 14 filed exceptions contesting the Hearing Officer's findings of fact and her conclusion of law. The Authority urges us to accept the Hearing Officer's findings and conclusion.

We have reviewed the record. We adopt the Hearing Officer's findings of fact (H.O. at 2-5) with these modifications and additions.

We add to finding 1 that the Authority has about 300 positions in its table of organization (R-6).

We correct finding 6 to state that the systems engineer is not in a negotiations unit (5T25-5T26). The parties do not disagree that some positions immediately beneath each division director are deemed managerial and excluded from any unit while other such positions are included (R-6; 2T7-2T8).

We add to finding 7 that after Matuskiewicz was hired, other employees continued to review regulations pertinent to their areas of responsibility (3T92-3T93; 5T72-5T73). Matuskiewicz, however, differs from these employees because he alone has Authority-wide responsibility for ensuring compliance with environmental regulations (2T84). He formulates policies to meet those requirements and determines the necessary staffing and structure (1T44).

We add to finding 12 that Matuskiewicz was hired at a salary of \$35,000. Directors earned, on average, \$30,000 per year more than he did (5T68). We correct an error at 5T68-5T69. Given the questions and answers, that line should state "Is it above \$35,000?" rather than "Is it about \$35,000?"

We add to finding 14 that Matuskiewicz seeks input from non-managerial employees in drafting policies and his policies may be subject to formal approval by a director or, in some cases, directly by the Executive Director (2T163). When Matuskiewicz develops a plan to meet a regulatory requirement, his director, Richard Kunze, does not have to approve that plan and Matuskiewicz has the final say in implementing the policy (1T80-1T81). But if a mandate can be met in more than one way, Kunze may approve or disapprove a recommended option (5T71). The Southern Division director testified that when a regulation leaves room for decision-making, he looks to Matuskiewicz for direction (5T105-5T108).

We modify finding 15 to state that the policies implemented by Matuskiewicz govern the way directors run their operations (2T169).

We clarify and supplement finding 17 to reflect that non-managerial employees had input into the Stormwater Prevention Plan (SPP) (2T161). The SPP's cover page lists Matuskiewicz and other employees as "preparers" (J-11).

We modify finding 18 to state that the stormwater plan Matuskiewicz developed for the Northern Division was "basically copied" by Auermuller for the Central Division (2T162-2T163).

We clarify findings 30 to 33 to state that Matuskiewicz revised the Emergency Response Plan (J-9B). Auermuller had authority to approve revisions and a draft revision stated that "Fred is completely overhauling section 9.0" on hypochlorite (J-9B). But Auermuller did not make any major changes (2T73-2T74).

We add to finding 54 that, according to the Southern Division director, the development of environmental compliance programs and the procedures to be implemented are "basically totally at Matuskiewicz's discretion" (5T121).

We add to finding 57 that directors take their direction from Matuskiewicz on issues of environmental compliance and safety (3T34-3T35; 5T44-5T45; 5T121).

Article I, ¶19 of the New Jersey Constitution guarantees public employees the right to organize and to choose a representative to present their proposals and grievances. The Act implements this guarantee. Lullo v. IAFF, 55 N.J. 409 (1970).

N.J.S.A. 34:13A-6(d) defines public employees to "include any public employee, i.e. any person holding a position, by appointment or contract, or employment in the service of a public employer...." The only exclusions from this definition are elected officials, members of boards and commissions, managerial executives and confidential employees." The Act specifically permits

supervisors and professional employees to organize, unless an exclusion applies. N.J.S.A. 34:13A-5.3; N.J.S.A. 34:13A-6(d).

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

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.

Our Supreme Court examined this exclusion in New Jersey Turnpike Auth. and AFSCME Council 73, 150 N.J. 331 (1997). That case partially modified but otherwise approved standards set forth in Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1981).

The definition of managerial executive is in the disjunctive. An employee will be found to be a managerial executive if he or she either formulates managerial policies and practices or is charged with the responsibility of directing the effectuation of such management policies and practices.

Under Turnpike Auth., an employee "formulates" policies and practices when he or she develops a set of objectives to further the mission of a segment of the governmental unit and when he or she selects a course of action from among available alternatives. Id. at 356. A managerial executive need not have final responsibility for signing off on policies if his or her recommendations effectively determine what policies will be adopted. See Union Cty., P.E.R.C. No. 48, NJPER Supp. 166 (¶48 1970) (assistant treasurer was managerial executive because he effectively determined

policies). Compare N.J.S.A. 34:13A-5.3 (supervisor effectively recommends hiring, firing, or discipline). See also NLRB v. Yeshiva Univ., 444 U.S. 672, 683 (1980).

Under Turnpike Auth., an employee directs the effectuation of policies and practices if:

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. Whether or not an employee possesses this level of authority may generally be determined by focussing on the interplay of three factors: (1) the relative position of that employee in employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. [Id. at 356]

An employee need not possess organization-wide or extra-departmental power to be a managerial executive. Id. at 356 (in large organizations, managers may have significant power, discretion, and influence within their departments). Accord Gloucester Cty., P.E.R.C. No. 90-36, 15 NJPER 624 (¶20261 1989) (employee who determined welfare reform policies a managerial executive even though she lacked extra-departmental power).

Turnpike Auth. rejected the private sector standards for excluding managerial employees from coverage under the National Labor Relations Act, 29 U.S.C. §141 et seq. Id. at 353-354. Canvassing the differences between the private and public sectors and stressing that the Legislature had rejected a private sector test based on "effectuating and making operative" management policies, the Court concluded that the phrase "directing the

effectuation" required a higher level of authority before representational rights would be denied. Id. at 355. The Court also rejected a test that would have excluded all employees above first-level supervisors as managerial executives. Id. at 354. Given these differences, an employee who would not be a managerial employee under private sector precedents will not likely be found to be a managerial executive under the Act. In this regard, private sector precedents establish that professional employees and technical experts may exercise substantial authority within their areas of expertise and responsibility, yet still be entitled to seek representation if they do not possess managerial authority. See Yeshiva at 690 n.30; Flinkote Co., 217 NLRB No. 85, 89 LRRM 1295 (1975); General Dynamics Corp., 213 NLRB No. 124, 87 LRRM 1705 (1974); see also Rabban, Distinguishing Excluded Managers from Covered Professionals under the NLRA, 89 Columbia L. Rev. 495 (1989).

In sum, the line between managerial executives and lower-level employees (including supervisors and professional employees) will have to be located case-by-case. Our analysis in each instance will focus on the interplay of multiple factors such as the employee's responsibilities, position in the hierarchy, breadth of authority, and extent of discretion and our goal will be to determine whether the employee has the authority of a managerial executive to formulate or direct the effectuation of management policies and practices.

The Authority's mission is to receive, treat, clean and discharge residential and industrial wastewater. The responsibilities of the regulatory compliance officer are critical to accomplishing this mission. Absent compliance with the maze of federal and state environmental regulations; citizens and employees may be hurt; the environment may be damaged; and heavy fines may be incurred. Unlike other Authority employees who work with regulations, the power of the regulatory compliance officer extends throughout the Authority and includes such powers as effectively selecting consultants, imposing penalties, and ordering the cessation of dangerous operations.

The interpretation of federal and state regulations is not a cut-and-dried process and requires judgment as to what they mean and what must be done. In exercising that judgment, Matuskiewicz functions as a policymaker, not just a technical expert. He formulates policies and determines the necessary staff and organizational structure to satisfy regulatory mandates.

The Authority employs over 300 employees. The regulatory compliance officer is situated on the organizational chart beneath the commissioners, the executive director, and the directors. However, the commissioners do not review regulatory policies and actions (unless a cost will be incurred); the executive director gives only the most general direction on such matters; and the directors' approval is not needed when Matuskiewicz develops a plan to meet a requirement. Directors take direction from him on

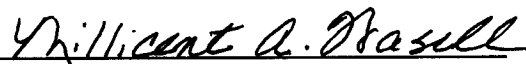
issues of environmental compliance and safety and he has almost total discretion over the development of environmental compliance programs and procedures. When more than one option is available to meet a regulatory requirement, a director may reject a recommendation but even then recommendations from Matuskiewicz receive deference because of his expertise. The policies discussed and implemented by Matuskiewicz shape the way directors run their operations. The record shows several such instances: the Stormwater Pollution Prevention Plan, the Laboratory Chemical Hygiene Plan, the revised Emergency Response Plan, and the Spill Prevention Control and Countermeasures Plan.

Given these circumstances and based on our review of the entire record, we conclude that this regulatory compliance officer, who exercises Authority-wide decisional powers, is a managerial executive under N.J.S.A. 34:13A-3(f). We therefore dismiss the petition.

ORDER

The petition for clarification of unit is dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed.

DATED: March 26, 1998
Trenton, New Jersey
ISSUED: March 27, 1998

H.O. NO. 97-1

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

In the Matter of

OCEAN COUNTY UTILITIES AUTHORITY,

Public Employer,

-and-

Docket No. CU-H-94-38

OPEIU LOCAL 14, AFL-CIO,

Petitioner.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that the Commission dismiss a clarification petition which seeks to include the Regulatory Compliance Officer employed by the Ocean County Utilities Authority in an existing unit of professionals represented by OPEIU Local 14. The Hearing Officer finds that the regulatory officer possesses Authority-wide authority, exercises independent judgment in determining policies and practices which will effectuate regulatory compliance and possesses sufficient authority to direct regulatory practices. Accordingly, under these facts, she concludes that the regulatory compliance officer is a managerial executive within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-3(f), and is inappropriate for membership in any negotiations 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 exceptions 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 Petitioner
Schneider, Goldberger, Cohen, Finn, Solomon, Leder
& Montalbano, attorneys
(James M. Mets, of counsel)

HEARING OFFICER'S REPORT
AND RECOMMENDED DECISION

On February 3, 1994, Local 14, Office and Professional Employees International Union, AFL-CIO, ("OPEIU") filed a Petition for Clarification of Unit with the Public Employment Relations Commission, seeking to add the newly created regulatory compliance officer ("RCO") employed by the Ocean County Utilities Authority ("OCUA" or "Authority") to its white collar professional or supervisory unit. The Authority opposes the petition and asserts that the RCO is inappropriate for inclusion in the unit because it is either a managerial executive within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

("Act"), or because an inherent impermissible conflict of interest exists between the petitioned-for title and other members of Local 14's unit.

The Director of Representation determined that substantial and material disputed factual issues warranted an evidentiary hearing. On January 25 and 30, March 6 and 7, and April 6, 1995, I conducted a hearing at which the parties examined witnesses and introduced exhibits.^{1/} Post-hearing briefs were received by July 28, 1995. Based upon the entire record I make the following:

FINDINGS OF FACT

1. The Authority is a public employer within the meaning of the Act and employs the regulatory compliance officer which is the subject of this petition. Local 14, a public employee organization within the meaning of the Act, represents a professional white collar negotiations unit and a supervisory unit at the Authority. The petition seeks to add the RCO to either the professional or supervisory unit. Local 14 and the Authority have collective negotiations agreements covering both units, effective from January 1, 1993 through December 31, 1997 (J-1).^{2/}

^{1/} The transcript citations 1T- through 5T- refer to the transcripts developed on the above dates in order, respectively. Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "P" and "R" refer to the Petitioner's and Respondent's exhibits, respectively. Those exhibits marked "J" refer to joint exhibits.

^{2/} There is also a non-supervisory blue collar employees unit represented by the Oil, Chemical and Atomic Workers Union.

2. The Authority's mission is to receive, treat, clean, and discharge residential and industrial wastewater (5T53). A board of ten commissioners, appointed by the Ocean County Board of Freeholders, heads the Authority. Commissioners oversee and control the organization's financial management, approve the creation of additional or new positions and approve the hiring, discipline, promotion or termination of employees. A subcommittee recommends personnel actions, and the board votes to approve these actions (2T52-2T53). Commissioners meet monthly (2T40-2T42).

3. Commissioners do not approve regulatory policies generated at the Authority (2T54). They become involved in these issues only when costs are involved (2T42-2T44).

4. The Authority is organized into nine divisions: the southern, central and northern divisions, the central maintenance division, the fertilizer maintenance division, the administrative and finance division, engineering and construction division, metering division and technical services division (R-6, 2T5-2T7). The first three divisions process residential wastewater from local municipalities.

5. Executive Director Robert Holland is responsible for the management of the Authority. Reporting directly to Holland are eight division directors and the metering supervisor (R-6). Holland is a professional engineer whose signature is necessary on those documents which, by law, require a licensed professional engineer's signature (1T87).

6. The regulatory compliance officer is located in the technical services division and reports to Director Richard Kunze (1T51-1T52). Kunze reports to Holland, and in addition to directing the division, performs research, responds to calls, represents the Authority on committees and interacts with various personnel at the New Jersey Department of Environmental Protection ("NJDEP") on matters concerning the Authority (5T24-5T25). The division's mission is to provide technical support of the Authority's water treatment and certification processes (1T18). Its major programs are the Industrial Pretreatment Program ("IPP"), where permits are issued to industries which discharge processed wastewater into the Authority's collection systems; the laboratory and the regulatory compliance program (4T7). A systems engineer oversees the Authority's computer systems (2T134-2T135, 5T22, R-6). In addition to the RCO, the laboratory manager, industrial discharge coordinator and the systems engineer also report to Kunze (5T22, R-6). All of these positions except the director are included in an OPEIU unit.

7. The RCO position was created to coordinate all of the Authority's regulatory compliance programs, policies and procedures; to address deficiencies in the IPP; and to act as one of the Authority's spokespersons with the NJDEP and federal regulatory agencies (1T19-1T21, 1T23, 2T64, 5T26). Other OCUA employees, including Kunze, performed aspects of this function before the RCO was created (5T29). Division directors and the director of engineering also reviewed regulations (5T30-5T31). The purpose of

creating an RCO was to consolidate the review of those regulations and avoid duplication (5T31).

8. In its 1992 and 1993 audits, the NJDEP found that the Authority had committed insufficient staff to the IPP program (4T20, P-2). On September 30, 1992, and October 6, 1993, NJDEP's Principal Environmental Engineer Valentin Kouame sent letters to Holland, the first of which states, in relevant part:

As indicated above, OCUA failed to review and notify some industrial users (IUS) of their violations Note that the previous audit also found OCUA to be deficient in its responsibilities to serve notice of non-compliance situations. Based upon our review, the NJDEP has concluded that staff resources are insufficient for current pretreatment program implementation.
(P-2)

In 1993, Kouame again found that staff resources were insufficient for the IPP (P-4, 4T26-4T27, 1T19-1T21). The creation of the RCO in March 1993 was the OCUA's response to the DEP's repeated comments finding staff resources in the IPP inadequate (4T27).

9. The Authority began developing the regulatory compliance officer title between fall 1992 and April 1993. David Ertle, then the acting director of human resources, Kunze and other directors developed a job description (1T23, P-5, 4T29, 5T26).^{3/}

10. In addition to the problems in the IPP, the directors felt that they needed an employee with expertise in environmental

^{3/} Kunze also asked Chris Haines, IPP coordinator, for comments (4T29-4T30).

and safety regulations to create and implement policies and procedures which bring the Authority into regulatory compliance (1T23). Of major concern to the Authority's directors was the increasing number of complex regulations and the threat of liability for non-compliance (1T23). The consequences of non-compliance are heavy fines, harm to employees or the public and damage to the environment (1T24-1T25). The statutes and regulations do not specify how to comply; it is up to the OCUA to decide what policies and practices will achieve compliance.

11. In April 1993, the commissioners reviewed the proposed job description and approved the creation of the regulatory compliance officer position (1T25, 5T26-5T27). On September 8, 1993, the Authority posted a job vacancy notice (R-1, 1T26). Kunze prepared a newspaper advertisement and interviewed candidates. He and Holland evaluated the candidates and recommended Michael Matuskiewicz be hired, which was approved by the OCUA's board (5T27-5T28).

12. Michael Matuskiewicz was hired on about November 29, 1993, as the RCO. When he was hired, there was no comprehensive compliance program (2T64-2T65). As coordinator of the Authority's regulatory compliance program, Matuskiewicz is expected to identify and create sets of policies and practices that will place in the Authority in compliance with federal and state environmental and safety regulations (J-3).

13. His duties include: reviewing regulations and determining which apply to the Authority, formulating policies and procedures and identifying operational practices which will ensure regulatory compliance (1T44, J-3). He is also responsible for filing reports with regulatory agencies, completing and filing permit applications, and issuing notices of violations, fines and noncompliance reports to the Authority's customers (1T60).

14. Regulations alone do not establish policies or procedures (1T80). Matuskiewicz determines whether a policy meets the regulatory requirement and which regulations are not addressed by existing policies (1T80-1T81). Matuskiewicz' job is to identify regulations that apply to the OCUA, and determine those options available and feasible for OCUA's compliance (5T28, 5T41-5T42, 5T47, 5T90).

Matuskiewicz has authority to meet with division directors and instruct them to cease operations which are out of compliance with regulations (1T74). Matuskiewicz became aware that one of the divisions was removing paint by sandblasting which is prohibited when the paint is lead-based (1T75). Matuskiewicz directed that division to cease sandblasting until a determination was made about whether the paint was lead-based (1T75).

15. Matuskiewicz decides which other employees to involve in designing policies and procedures to comply with regulations (1T82-1T83). Kunze does not direct Matuskiewicz as to how to satisfy the regulations; he gives Matuskiewicz authority to decide

what regulations need to be translated into procedures (1T81, 5T31-5T32). Matuskiewicz does not give final Authority approval to plans which require Holland's signature; Holland is not involved in drafting plans, nor was any evidence presented that he gives Kunze or Matuskiewicz anything but the most general direction, in the creation of these plans (1T81). Matuskiewicz does not directly supervise directors, but the policies he implements affect the way they run their operations (2T169-2T170). The policies and procedures developed by Matuskiewicz are followed by OCUA's managers.

16. One format used to implement the regulatory program is the creation of documents called "Plans," containing policies and procedures pertaining to one program or statute. Matuskiewicz has prepared plans and coordinated their preparation (1T45). He also monitors the Authority's performance and revises plans, as needed (2T169, 2T108). In most cases, Matuskiewicz alone has final say as to whether a plan satisfies the statutory or regulatory requirements (1T82).

Stormwater Pollution Prevention Plan

17. Matuskiewicz developed the Stormwater Pollution Prevention Plan ("SPPP"), necessary for a a New Jersey Discharge Elimination Pollution System ("NJPDES") permit (2T73-2T74, 5T38). The plan is a statement of procedures designed to avoid contaminating stormwater discharges with chemicals or solids (2T74-2T75). Implementing the plan required each division to modify or set up procedures to insure that pollutants do not enter the

stormwater drainage system at the treatment plants (5T38-5T40, 5T110).

18. J-11 is the stormwater plan for the Northern Division which Matuskiewicz developed (2T75, 2T161). All divisions have a similar version of the plan (5T110-5T114). Fred Auermuller, the central division director rewrote J-11 to fit the central and southern divisions (2T162-2T163). The policies contained therein specify how chemicals are stored and handled and contains corrective actions. For example, the Authority had to cease the practice of flushing its fire hydrants into the stormwater sewer (2T75-2T76). Also needed were procedures for the delivery of fuel to the Authority, procedures for on-site contractors, and, a training plan in stormwater pollution procedures (2T76).

19. Matuskiewicz creates monitoring procedures; he and others periodically inspect various sites, and he coordinates and audits the results (2T77, 2T108). Matt Dillon, for example, will inspect the northern division facility for conformance with the SPPP (2T108-2T109).

20. No one at the Authority can unilaterally countermand the procedures developed by Matuskiewicz in the stormwater prevention plan (2T78-2T79).

21. Under the SPPP, the division directors will "provide direction and technical guidance in all stages of SPPP development and implementation, request and allocate resources as needed, keep all records and insure reports are submitted." (2T164-2T165, J-11,

p. 15, 5T168-5T170). Matuskiewicz advised and explained the new SPPP to Robert Holland and obtained Holland's signature, as required by law (2T162-2T163).

Laboratory Chemical Hygiene Plan

22. The Occupational Safety and Health Act ("OSHA") requires a laboratory chemical hygiene plan, which is a set of guidelines and procedures to be followed in a laboratory environment (2T80-2T81). The OCUA's laboratory monitors daily industrial users and the OCUA'S plants' performance in order to maintain the discharge permits, and performs many analytical procedures to control wastewater treatment and insure the process is working properly (5T33). The lab gives information to the OCUA divisions' plant operators so that they can effectively control the wastewater treatment process (5T33-5T34).

23. A plan was due by March 1994. Matuskiewicz, Kunze, Laboratory Manager Robert Grant, and Safety Officer Gus Crist met to discuss the plan (2T81). It was decided that Matuskiewicz would develop the plan and procedures (2T81). Matuskiewicz prepared the initial version of the Authority's laboratory chemical hygiene plan (1T81-2T83, J-5).^{4/} He submitted the draft to others for their suggestions (J-5, 1T81, 2T183-2T185). Carol Conklin, a laboratory supervisor and OPEIU unit member, and Grant, also an OPEIU unit

^{4/} Matuskiewicz had a model plan on which to structure the Authority's plan which he obtained while working for private companies (2T182). He modified the model plan to fit the Authority's needs (2T183-2T185).

member, also had input into the development of this plan (1T82). J-5 and J-6 are the drafts (2T81).

24. Most of the laboratory hygiene plan was developed by Matuskiewicz, but prior to the final draft, Grant and Conklin added specifics on lab operations, a subject on which Matuskiewicz does not have specific knowledge (3T6). Once the plan was complete, Matuskiewicz, Grant, Kunze, Crist jointly approved the plan and agreed to its implementation (2T83). Matuskiewicz approved it for regulatory compliance (3T6). Neither Grant nor Conklin have authority to change the plan without Matuskiewicz' "okay" (1T115). Conklin is identified as the chemical hygiene officer responsible for day-to-day coordination of the procedures (2T82). Matuskiewicz is accountable to the Public Employer Occupational Safety and Health Administration ("PEOSHA") and to his supervisor, Director Rich Kunze, for the plan's implementation (2T101).

25. The development of the chemical hygiene plan (J-5) was on the Authority's agenda prior to hiring Matuskiewicz (3T20-3T22).

26. As lab manager, Grant has overall responsibility for the chemical hygiene plan in the laboratory, insuring that employees know and follow the plan, that protective equipment is available, and that appropriate training has been provided (1T94-1T97). Conklin and Matuskiewicz share responsibility for understanding the current legal requirements concerning regulated substances in the lab, and updating the plan based on changes which occur in the laboratory (1T95, 2T185-2T186).

27. Matuskiewicz monitors the lab to insure that the procedures are followed by conducting on-site inspections (2T83). Once a year the plan is audited and changed, if necessary (2T84).

28. On June 8, 1994, at a safety committee meeting, Gus Crist, safety coordinator for the plant, was asked the status of the chemical hygiene plan (1T62). Crist in turn called Matuskiewicz for the status (1T62, 1T119). On June 10, 1994, Matuskiewicz sent a memo suggesting an agenda for a meeting to discuss the plan (1T63-1T64, R-4).

29. R-4 included as an agenda item: "Disciplinary action to be taken in the event of non-compliance by laboratory technicians." (R-4). On June 14, 1994, Grant responded to R-4 by issuing R-5, stating the laboratory supervisor (Conklin) would attend the meeting and further stating that he thought discussion of disciplinary action as a way to enforce chemical hygiene procedures was premature and would be one of his duties (R-5, 1T117-1T121).

Emergency Response Plan

30. Matuskiewicz is not on the Authority's emergency response team, but has coordinated the updating of the Authority's emergency response plan (2T157). An OSHA regulation requires an employer who is storing a hazardous substance to develop a procedure to handle that substance in the event that it is inadvertently released, spilled or leaked. Matuskiewicz is responsible for insuring that the Authority complies with the Toxic Catastrophic Prevention Act ("TCPA") which regulates certain chemicals, and only

applies to organizations who use or store those chemicals (1T88-1T89). The Authority's responsibilities under the TCPA predates the hiring of Matuskiewicz (1T133-1T134). The Authority uses chlorine for disinfection, and, under the TCPA, must have a plan containing procedures for handling chlorine in the event of a leak or spill (1T89).

31. Matuskiewicz did not draft the Authority's initial emergency response plan under the TCPA; but he is responsible for maintaining it (1T88, 2T68, 1T90). He and the directors of the northern, central and southern divisions developed procedures that will be followed if chlorine is released (2T67-2T68). The plan describes the equipment to be used, protective clothing/gear to be worn, and the type of instrument to be used to detect the presence of chlorine (2T68-2T69, 5T135-5T136). Matuskiewicz decided to switch to a new instrument and developed the procedures to be followed (2T69).

32. The Authority's goal is to discontinue using chlorine by August 1995 (1T133). Each year since the statute governing the handling of chlorine was enacted, the Authority has had to update its toxic catastrophic prevention plan to satisfy new regulations (1T133-1T134). OCUA is the process of converting from chlorine to sodium hypochlorite disinfection because it is a safer chemical with a lesser/lower regulatory burden (2T70). The decision to switch was made jointly by Matuskiewicz, the directors and the engineering department (2T70-2T71). Matuskiewicz' compared the regulations and

costs for both chemicals (2T71). J-9B is the emergency response plan Matuskiewicz developed for sodium hypochlorite (2T70-2T72, 2T158).

33. Fred Auermuller, director of the central division, assisted in the drafting of J-9B by adding specific details about the hypochlorite stations at OCUA (2T73-2T74). Matuskiewicz also asked Auermuller to evaluate the possible results of a sodium hypochlorite spill (3T10-3T11).

34. The Authority is considering whether to enter into a contract with a local emergency response team to avoid the requirement of maintaining an emergency response plan (3T12). Matuskiewicz will make the decision about whether to have an in-house or contracted-out plan, in consultation with the three division directors and the safety officer (3T13-3T14).^{5/}

35. The Authority may have responsibilities under the TCPA even if chlorine is discontinued (1T134, 4T72, 2T155). For example, it is likely that proposed new federal regulations will force the Authority to comply with TCPA propane criteria/standards (2T155).

Spill Prevention Control and Countermeasures Plan

36. Matuskiewicz is accountable for oil spill prevention at the Authority (2T176, J-10). Policies Matuskiewicz developed are in the Spill Prevention and Control Countermeasure Plan ("SPCC"),

^{5/} Matuskiewicz will likely forward this decision to his supervisor, the executive director and commissioners for approval since it will incur a cost.

which addresses spills from above-ground storage tanks (1T84, J-10, 1T73). The law requires the development of countermeasures in engineering designs to prevent spills from occurring; the countermeasures could include secondary containment, leak detection, or a contingency plan (2T79-2T80). The Authority's management appeared not to be aware that such a plan was required until Matuskiewicz initiated it (2T80).

37. In about 1992-1993, the Authority was required to register and move its underground fuel tanks. This activity is regulated by federal rules (2T79). Kunze and the industrial discharge coordinator prepared the initial documents, and Matuskiewicz has assumed these responsibilities (2T90-2T91, 4T119-4T120, 5T82-5T83, 5T30-5T31).

38. Matuskiewicz investigated a fuel spill which occurred near the southern division plant and resulted in soil contamination (5T102-5T103). The spill occurred before Matuskiewicz was hired, in June 1993, and required Southern Division Director Bradford Hazley to deal directly with the State Department of Environmental Protection (5T103). At that time, Hazley was unfamiliar with State clean up regulations and was, therefore, uncertain about the OCUA's liability (5T103-5T104).

39. Matuskiewicz advised Hazley to enter into a Memorandum of Agreement with the State concerning the spill (5T105-5T106).^{6/}

^{6/} Hazley testified he had greater confidence in entering into the agreement because of Matuskiewicz expertise (5T105-5T106).

40. Other examples of activities undertaken by Matuskiewicz are the restructuring the Authority's air pollution permits for the Clean Water Act and Clean Air Act (5T102, 2T97-2T98, 5T106-5T107).

41. In April 1993, the Northern Division was inspected by NJDEP. It found the Authority out of compliance with several aspects of the hazardous waste regulations (2T92). At that time, the Authority was classified as a large quantity generator which has different compliance requirements - programs, procedures, contingency plans, health and safety issues. The Executive Director wanted to avoid the regulatory burdens associated with "large generator" status (2T92-2T93). Matuskiewicz was directed to investigate the feasibility of small quantity generator classification (2T93-2T94). The transformation to small quantity generator status is complex (2T93-2T94). It may involve product substitution, use of satellite facilities, sub-contracts with disposal facilities (2T94).

42. The Authority has 39 pumping stations which run continuously 24 hours per day; these stations require emergency generators (2T96). At a meeting in June 1994, Matuskiewicz and three directors discussed these generators (2T95-2T96). Following the emission survey completed by the Killam Associates, Matuskiewicz worked on restructuring air pollution control permits (2T97). The issue of unpermitted emergency generators was raised.

43. The use of emergency generators which generates certain heat levels require the acquisition of an air pollution control permit (2T97). Matuskiewicz and the three service area division directors discussed the costs of obtaining the permits for their emergency generators versus the likelihood of failing an inspection (2T97). At one time, it was decided not to obtain the permits, to be out of compliance with the law. But, then, Matuskiewicz later decided to override this decision and to secure the necessary air pollution control permit (2T98). He had the authority to overrule the earlier decision (2T98).

Differences Between Haines and Matuskiewicz

44. Chris Haines is the Authority's industrial discharge coordinator (4T6). He reports to Kunze and is a member of OPEIU's professional negotiations unit. Matuskiewicz and Haines appear on the same level of the organization (2T21-2T22, R-6). Neither Haines nor Matuskiewicz supervise other employees (4T85-4T86). Haines issues discharge permits to industries and non-domestic customers who discharge any type of processed wastewater into the Authority's collection systems (4T7).

45. Like Matuskiewicz, he reviews state and federal regulations, but only those which apply to permits under the industrial discharge program; he informs Kunze and other managers who use this information (1T153, 4T7-4T8). There are 41 permitted companies in the OCUA service area (4T137).

46. Haines recommends and establishes procedures for the industrial pretreatment program; he forwards the recommendations to Kunze (4T9). Haines develops "local limits" for the Authority to use to maintain compliance with the New Jersey Pollution Discharge Elimination System permits ("NJPDES") (4T10-4T11).^{7/} Haines reviews sampling data and applications for discharge permits; reviews industries' self-monitoring reports to make sure industries are in compliance with permit requirements and with state and federal regulations (4T7, 4T49).

47. On-site inspections are part of this duty. Kunze directed Haines to familiarize Matuskiewicz with the conduct of inspections (4T109-4T110). Matuskiewicz will assume the conduct of all on-site inspections (4T130). For industries which are out of compliance, Haines forwards a recommendation to Matuskiewicz with direction to issue a notice of violation ("NOV") (4T49, 4T111-4T112). Matuskiewicz does not independently verify the basis for NOVs, but issues them under his signature (4T51-4T54, P-9, P-10, P-12, P-13). In some cases he sends penalty assessments (4T100, P-10, P-12). Haines was not permitted by the management at the Authority to impose penalty assessments (4T100). Matuskiewicz appears to have authority to impose penalties (P-12, 4T101, 4T129).

^{7/} Local limits are permissible levels of chemical concentrations in wastewater flowing into the Authority. The purpose of local limits is to insure that an industry's discharges to the Authority are not so concentrated so as to cause a violation or problem (4T11, 4T136-4T137). The EPA sets categorical limits, concentrations which differ according to flow levels, and which also must be followed (4T138).

48. The NJDEP performs annual audits of the Authority's industrial pretreatment program (2T151). As IPP coordinator, Haines responds to the DEP after an audit (4T26, 2T151-2T152). Both Matuskiewicz and Haines corrected the deficiencies identified in the 1993 DEP audit (3T17). Matuskiewicz and Haines were both present at the 1994 and 1995 DEP audits (4T130).

49. Haines recommended that some of his duties be shifted to the new RCO position (4T22-4T23).

50. Haines has worked with consultants but has never hired or recommended the hiring of consultants (4T62-4T63). Matuskiewicz has recommended and supervised the work of consultants hired by the Authority (2T90, 5T57). In 1994 Matuskiewicz recommended contracting with Killam Associates to complete an air emissions survey. Matuskiewicz also recommended the use of Hill Environmental for work on a bio-remediation project involving underground storage tanks (2T90-2T91, 2T115). On another occasion, Matuskiewicz observed that one of the consulting engineers was not observing sound procedures and he intervened to have this corrected. That engineer was reporting to a senior project manager in the Authority's construction division, but now the engineers report to Matuskiewicz as well (2T90-2T91). Final approval of the use of consulting firms rests with the comptroller and Executive Director Holland (2T195-2T196).

51. Groundwater remediation plans are required where a company has begun a clean-up of contaminated groundwater and

requests to discharge the water into the Authority's collection system (4T68). Haines reviews proposals, test data and site plans, inspects the facility and establishes standards (4T68-4T69). Matuskiewicz will perform some of these duties (4T69).

52. Matuskiewicz also reviews IPP regulations (4T77). He and Haines have discussed some of these regulations. Haines implements the changes in the IPP program (4T77). He has not developed policies or procedures for other OCUA employees (4T106-4T107).

53. Haines has never been told by Kunze or anyone that Matuskiewicz directs his work or is his supervisor (4T128).

54. Generally, Haines' role is almost entirely centered around industrial pretreatment and the issuance of permits. Matuskiewicz' responsibilities also include IPP, but cover a broader scope of regulations (5T41). Matuskiewicz is responsible for insuring that OCUA complies with regulations that other agencies impose on OCUA (5T41-5T42). He has very broad discretion. Kunze doesn't give Matuskiewicz direction as to how to comply; Matuskiewicz reads the regulations and advises Kunze or other directors or parties what is necessary to comply (5T43). Haines has not been charged with drafting policies, whereas Matuskiewicz has drafted the Authority's policy related to hazardous wastes (5T84-5T85).

55. Gus Crist, Safety Officer, is a managerial employee in the human resources division (2T8). He oversees the Authority's

compliance with safety regulations (2T8-2T9). He develops policy and drafts procedures (2T9). In February 1990, Crist directed the chief engineer to develop procedures pursuant to a notice from the New Jersey Department of Labor, Employee Safety Division concerning the administrative code for lockout/tagout procedures (R-7, R-8, 2T10-2T11, 2T14). Crist is not in any negotiations unit.

56. Matuskiewicz' monitoring of overall compliance by the Authority includes monitoring individual employees (5T76). If Matuskiewicz were to recommend corrective action of an employee for failing to adhere to regulatory policies, he would correct that employee informally. If his recommendations were not followed, he would report the situation to the individual's immediate supervisor and then to Kunze for further action (2T102). He has authority to recommend disciplinary action, but has not recommended any disciplinary actions.

57. Matuskiewicz has authority to direct others' activities concerning regulatory compliance, including directors (5T44). Matuskiewicz has authority to call meetings with directors and he does so regularly (5T45). He decides how the policies he develops should be implemented in order to maintain the Authority's regulatory programs (5T46). OCUA's directors have consulted with Matuskiewicz on regulations and follow his directions and advice (5T74).

ANALYSIS

The Authority asserts that the regulatory compliance officer is a managerial executive within the meaning of the Act.

N.J.S.A. 34:13A-1(f) defines "managerial executives" as:

(f) "...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, ...

Although the policies of the Act afford organization rights to all who desire them, managerial executives are ineligible to be members of any collective negotiations unit. In Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980), the Commission discussed its standards for determining whether an employee formulates or directs the effectuation of policy within the statutory definition. It 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[;]

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..., [and,]

...possess[es] and exercise[es] a level of authority and independent judgment sufficient to affect broadly the organization's purpose or its means of effectuation of these purposes...
6 NJPER at 508, 509.

The Commission also added that the determination should focus upon the interrelationship 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..."

6 NJPER at 509.

The Appellate Division approved the Montvale standards in Bergen Cty.-Operating Bergen Pines Cty. Hosp. and Coun. No. 5, NJCSA, D.R. No. 83-8, 8 NJPER 535 (¶13245 1982), rev. den. P.E.R.C. No. 83-76, 9 NJPER 47 (¶14022 1982), aff'd 10 NJPER 77 (¶15042 App. Div. 1983)

In Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977), where a lifeguard captain was found not to be a managerial executive, the Commission stated:

[T]he term "managerial executive" should be narrowly construed...[R]elevant National 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.

More recently, in State of New Jersey (Trenton State College), P.E.R.C. No. 91-93, 17 NJPER 246 (¶22112 1991), the Commission reiterated that "managerial executive" must be narrowly construed, consistent with Borough of Avon.

In Gloucester Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 90-36, 15 NJPER 624 (¶20261 1989) the Commission held that the REACH Program Coordinator was a "managerial executive" under the Act where she effectively made the policy choices which shaped the County's REACH program. She was responsible for formulating goals, implementing and managing the program which had components involving

private and public agencies working under her direction and where she oversaw compliance with program-funded contracts. She was primarily responsible for defining and implementing the REACH program. Further, there was no evidence of higher-level interference with her choices of how to realize the goals. In City of Newark, P.E.R.C. No. 92-116 18 NJPER 300 (¶23128 1992) deputy chiefs were found not to be managerial executives where their authority was circumscribed by limits on their scope of responsibility, comprehensive agreements, policies, rules and procedures and the extent of control exercised by director of the fire department. And, in City of Newark, P.E.R.C. No. 86-140, 12 NJPER 513 (¶17192 1986) police deputy chiefs were not managerial executive where they did not formulate management policies and practices, and where they exercised limited discretion due to the fact that the Director, with the aid of a very large supportive staff, made virtually all policy-related decisions.

Applying the above standards to the facts here, I conclude that the regulatory compliance officer at the Ocean County Utilities Authority is a managerial executive employee and, therefore, inappropriate for membership in any collective negotiations unit. The regulatory compliance officer, Michael Matuskiewicz, is only two levels below the Executive Director and has Authority-wide responsibility. Although Matuskiewicz does not supervise anyone or develop a budget, his area of responsibility -regulatory compliance- is critical to OCUA's missions. The policies which he personally

develops, coordinates and monitors affect the practices of all of the Authority's operations. The record contains many examples of the regulatory officer's recommendations of policies to be followed, modified or discontinued.

OPEIU argues that his position is on the same organizational level as other unit members, especially, the laboratory manager, industrial discharge coordinator, and systems engineer, all of whom also report to Technical Services Director Kunze. This comparison ignores the fact that each of those positions is primarily responsible for only one program. Matuskiewicz' focus is the Authority's overall compliance program, which includes all federal and state environmental and safety regulations and broadly affects the Authority's operations. He is not limited in scope to carrying out a single purpose regulatory program; his jurisdiction is Authority-wide. Further, it is not location on an organization chart alone which determines managerial executive status, but the interplay of location, functions and extent of discretion exercised.

Matuskiewicz has significant independence from his supervisor and from other executive employees in determining what the Authority's regulatory policies and program should be. His ability to determine policies without interference and to effectuate policies is similar to that of the Coordinator in Gloucester Cty, but he has significantly broader scope of authority than the REACH program Coordinator, or the above OCUA employees. Compare, City of

Newark, P.E.R.C. No. 86-140, 12 NJPER 513 (¶17192 1986) (police deputy chiefs were not managerial executive where director made all policy decisions). Directors Ertle, Kunze and Hazley stated that Matuskiewicz was hired to coordinate the regulatory compliance program because of his expertise in this area, and their consistent testimony reveals that they rely on his recommendations for policies and practices.

Most recently, in N.J. Tpk. Auth. and PERC and AFSCME, P.E.R.C. No. 94-24, 19 NJPER 461 (¶24218 1993), 22 NJPER 114 (¶27060 App. Div. 1996), App. Div. Dkt. No. A-1646-93T5 (3/20/96), rev'd and rem'd 289 N.J. Super. 23 (App. Div. 1996), pet. for certif. pending, the Appellate Division instructs that a managerial executive "need not formulate policies and practices and be responsible for directing the effectuation of policies and practices. One or the other is sufficient." The Appellate Division further noted that "...the term 'formulate' is not the equivalent of 'adopt' and would seem to encompass the responsibility for recommending policies and practices, particularly where the manager's recommendations form a key component of the ultimate determination." 22 NJPER at 117. Under these standards, Matuskiewicz is a managerial executive because he formulates policies, recommends their effectuation, and, occasionally, directs their implementation.

Matuskiewicz reviews the many regulations that apply to the OCUA, determines whether OCUA policies and practices satisfy regulatory requirements, and determines those options available and

feasible for OCUA's compliance. He decides which other employees must help design policies and procedures to comply with regulations and he has the final say about whether a plan meets the regulatory requirements. He has recommended policies in the form of the stormwater pollution prevention plan, the laboratory chemical hygiene plan, the emergency response plan and the spill control plan. He has become involved in decisions about the OCUA's use of certain chemicals, carrying out of sandblasting, testing for toxic substances in the area where employees work and the clean up of contaminated soil.

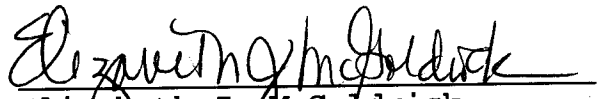
Both the Authority and OPEIU argued about whether Matuskiewicz has authority to impose discipline on other employees. Matuskiewicz has not recommended the hiring, termination or discipline of any other employees. He does not supervise other employees, and is not a supervisor within the meaning of N.J.S.A. 34:13A-5.3 A supervisor is defined as one "having the power to hire, discharge, discipline, or to effectively recommend the same." Cherry Hill Tp., P.E.R.C. No. 30, NJPER Supp 114 (130 1970). Determination of supervisory status requires more than the mere assertion that an employee has the authority to hire, discharge, discipline or effectively recommend such actions. The Commission requires evidence that the authority is regularly exercised. "The mere possession of the authority is a sterile attribute unable to sustain a claim of supervisory status." Somerset Cty. Guidance Center, D.R. No. 77-4, 2 NJPER at 360 (1976).

Relying on West Orange Bd. of Ed. and Wilton, P.E.R.C. No. 8, NJPER Supp. 23 (18 1969), aff'd App. Div., rev'd 57 N.J. 404 (1971), the Authority argues that Matuskiewicz is in a conflict of interest with other OPEIU unit members. Wilton was a supervisor whose membership was sought in a negotiations unit composed of her subordinates. In evaluating their performance, Wilton made recommendations which affected their tenure, salary and promotional opportunities. No evidence suggests that Matuskiewicz evaluates other employees. Unlike Wilton, Matuskiewicz is not a supervisor. Therefore, a Wilton-type analogy is inappropriate.

Where he does not have the role of directing new practices, the record demonstrates that Matuskiewicz' recommendations are followed. In fact, no evidence was presented that Matuskiewicz' recommendations were not followed by directors. Therefore, applying either pre-N.J. Turnpike standards or the new standards enunciated by the Appellate Division in the N.J. Turnpike decision, I conclude on the facts of this record, that Matuskiewicz is a managerial executive.

RECOMMENDATION

I recommend that the Commission find that the Regulatory Compliance Officer employed by the Ocean County Utilities Authority is a managerial executive position and inappropriate for membership in any negotiations unit. Accordingly, I recommend that the Commission dismiss the petition.


Elizabeth J. McGoldrick
Hearing Officer

DATED: October 15, 1996
Trenton, New Jersey