

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

PUBLIC SECTOR MANAGERS ASSOCIATION,

Petitioner,

-and-

COMMUNICATIONS WORKERS OF AMERICA.

Petitioner.

Docket Nos. RO-2004-051
RO-2004-098
RO-2004-099
RO-2005-004

SYNOPSIS

The Public Employment Relations Commission grants the request of the State of New Jersey for special permission to appeal a Notice of Hearing issued by the Acting Director of Representation. The Commission grants special permission to appeal given the complexity, magnitude, and unusual nature of this case. However, the Commission affirms the issuance of the Notice of Hearing, finding that the Acting Director properly exercised her authority and discretion in managing this complicated case and in deciding to hold hearings rather than to continue an administrative investigation.

The Commission also approved the Acting Director's decisions to appoint a Chief Hearing Officer to coordinate the hearings, to assign several hearing officers to conduct hearings on individual titles, and to use ad hoc hearing officers as well as staff members in an effort to expedite the hearing process.

Finally, the Commission does not consider the State's request for a stay of the scheduled hearings since that schedule has lapsed, nor does it consider the parties' arguments concerning the assignments of particular staff or ad hoc hearing officers or the operational problems the employer allegedly would have encountered in complying with the previous schedule. Concerns about assignments and scheduling can be presented to and evaluated by the Chief Hearing Officer before he establishes a new schedule of hearings.

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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Appearances:

For the Respondent, State of New Jersey, Genova Burns & Vernoia, attorneys (Andrew Oddo, of counsel)

For the Petitioner, Public Sector Managers Association, Niedweske Barber, attorneys (Linda J. Niedweske, of counsel)

For the Petitioner, Communications Workers of America, Weissman & Mintz, attorneys (Steven P. Weissman, of counsel)

DECISION

The State of New Jersey has requested special permission to appeal a Notice of Hearing issued by the Acting Director of Representation. We grant that request, but affirm the issuance of the Notice of Hearing.

The Public Sector Managers Association ("PSMA") has filed a representation petition in which it seeks to represent over 2,700

State employees holding titles categorized by the State as managerial. The Communications Workers of America ("CWA") has filed representation petitions asserting that several of these titles should be placed in negotiations units already represented by it. The PSMA and CWA petitions were consolidated when the Notice of Hearing was issued.

When the PSMA petition was filed, the Acting Director of Representation investigated it to determine whether a valid question concerning the representation of employees existed in a prima facie appropriate unit. N.J.A.C. 19:11-2.2. A valid question existed so she continued to process the case.

The State did not consent to an election. It asserted that all of the petitioned-for employees were excluded from representation under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., because they were managerial executives pursuant to N.J.S.A. 34:13A-3(f)^{1/} and/or confidential employees pursuant to N.J.S.A. 34:13A-3(g)^{2/}. In the

1/ Section 3(f) provides:

"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.

2/ Section 3(g) provides:

(continued...)

alternative, the State contended that any employees who were not managerial executives or confidential employees belonged in one of the four units currently represented by CWA.

Since no agreement for a consent election had been reached, the Acting Director began a further investigation pursuant to N.J.A.C. 19:11-2.6. On April 19, 2004, she wrote a letter to the attorneys for PSMA and the State explaining how the investigation would proceed. The letter placed the burden of proving managerial executive or confidential employee status on the State since it had asserted these statutory exclusions. It stated that the administrative investigation would be conducted department by department and, if necessary, by division; and it instructed the State to provide organizational charts for each department and certain information and documents concerning each title or employee. Conferences would then be scheduled so the parties could present facts and discuss resolutions. If there were no disputed facts concerning a particular title or employee, the Acting Director would determine the inclusion or exclusion of that title or employee based upon the investigation. If there

2/ (...continued)
"Confidential employees" of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

were disputed facts, the Director would issue a Notice of Hearing. When hearings were held as to a particular department, an investigation would start as to the next department.

This process began on July 27, 2004. Over the next six weeks, the status of 52 employees in the Central Office of the Department of Human Services was investigated.^{3/} The State and PSMA were unable to agree that any employees were either excluded from representation or entitled to representation.

On September 8, 2004, an Assistant to the Director met with the parties. According to the State, she represented that the agency was inclined to find that only seven employees of the 52 so far reviewed were statutorily exempt and that if more progress could not be made in settling disputes over titles, the agency would be inclined to abandon the investigation and issue a Notice of Hearing.

On September 17, 2004, the Acting Director consolidated the PSMA and CWA petitions and issued a Notice of Hearing. She appointed Stuart Reichman as the Chief Hearing Officer and assigned five hearing officers - - three staff members and two labor relations neutrals from our ad hoc panels - - to conduct hearings concerning 20 titles. A pre-hearing conference was

^{3/} The parties also submitted legal arguments concerning the representational rights of approximately 254 employees with job titles in the Senior Executive Service. The State contends that all employees holding SES titles are by definition managerial executives.

scheduled for September 29 and hearing dates were scheduled on 24 days between October 12 and December 22, 2004.

On September 24, 2004, the State requested special permission to appeal the Notice of Hearing pursuant to N.J.A.C. 19:11-6.8(c). It also asked for a stay of the scheduled hearings. It objected to the abandonment of the investigation as violating a Commission regulation allegedly requiring that investigations be completed before hearings commence and as being an abuse of discretion allegedly designed to pressure the parties into a settlement. It also objected to the assignment of multiple hearing officers; the assignment of hearing officers who were arbitrators rather than employees; the assignment as a hearing officer of the staff member who conducted the September 8 conference; and the determination to review the petitioned-for employees title by title rather than department by department. It asserted that it has a right to present its case as it sees fit.

On September 30, 2004, CWA filed a letter joining in the State's requests and arguments.

On September 30, 2004, PSMA filed its response. As a procedural bar to entertaining the State's request, it asserted that N.J.A.C. 19:11-6.8(c) applies only to objections to rulings after a hearing has begun and thus does not apply in this case. On the merits, PSMA asserted that the Acting Director properly

and sensibly invoked her power and discretion under N.J.A.C. 19:11-2.6(d) to issue a Notice of Hearing rather than to continue an unproductive investigation. PSMA asserted that the State had not cooperated with the investigation and that at the rate the investigation was going, it would take ten years to complete it and then the parties would have to begin hearings for all titles that had not been resolved.

After these papers were filed, the State, PSMA and the Acting Director met several times in efforts to settle the case. These meetings resulted in the scheduled hearings not being held and the application for special permission to appeal being held in abeyance.

On February 17, 2005, PSMA's attorney informed us that settlement efforts had broken down and asked that new hearing dates be scheduled. We then reactivated consideration of the request for special permission to appeal.

After the matter was reactivated, the State renewed a previous request for leave to file a response to PSMA's submission; that request was granted. Its response denied that it did not cooperate with the investigation or sought to delay it and asserted that it supplied all information requested during the investigatory conferences.

PSMA then requested permission to file a response to the State's response; that request was denied because the parties'

positions had been clearly stated in the record and did not need further amplification.

ANALYSIS

As PSMA argues, N.J.S.A. 19:11-6.8 does not provide a basis for seeking special permission to appeal. That rule applies only to rulings made by a hearing officer after a hearing has already begun - - e.g., an objection to the introduction of evidence. However, N.J.A.C. 19:11-6.10 allows a party to seek special permission to appeal interlocutory rulings by a hearing officer or the Director of Representation. That rule applies to this interlocutory ruling so we will consider the State's request.

Special permission to appeal interlocutory rulings is granted only when extraordinary circumstances are present. City of Somers Point, P.E.R.C. No. 2002-45, 28 NJPER 148 (¶33049 2002). We grant special permission to appeal given the complexity, magnitude, and unusual nature of this case. However, we affirm the issuance of a Notice of Hearing because we are satisfied that the Acting Director properly exercised her authority and discretion in managing this complicated case and in deciding to hold hearings.

We are clear that the Acting Director had the power to discontinue the previous manner of investigation and to begin the hearing process. Under N.J.A.C. 19:11-2.6(d), the Director of Representation may take action based on either an administrative

investigation or a hearing. N.J.A.C. 19:11-2.6(e), in turn, grants the Director discretion to order a hearing in either of two circumstances:

1. If it appears to the Director of Representation that substantial and material factual issues exist which, in the exercise of reasonable discretion, may more appropriately be resolved after a hearing; or
2. If it appears to the Director of Representation that the particular circumstances of the case are such that, in the exercise of reasonable discretion, the Director determines that a hearing will best serve the interests of administrative convenience and efficiency.

Hearings in representation cases are considered to be investigatory rather than adversarial and are meant to develop a complete factual record as a basis for taking administrative action to effectuate the Act's purposes. N.J.A.C. 19:11-6.2 (c).

N.J.A.C. 19:11-2.6 plainly does not compel the Director to complete an administrative investigation first and then and only then determine whether a hearing should be held. Such a rigid approach would discount the premium placed on resolving representation questions as speedily as is practically possible. State of New Jersey, P.E.R.C. No. 81-127, 7 NJPER 256, 259 (¶12115 1981) (protracted litigation and unnecessary delay in certifying a representative prolongs labor unrest). Instead, the rule gives the Director the discretion to consider the

circumstances of each particular case and to choose between a continued administrative investigation or a hearing as the best means to develop the record, serve administrative efficiency, and effectuate the Act's policy of resolving representation disputes speedily.

We are also clear that the Acting Director's exercise of discretion in issuing a Notice of Hearing was a reasonable exercise of her discretion and does not warrant our intervention to overrule this interlocutory ruling. The Acting Director was in the best position in this complicated case to assess the progress and results of the investigation as it proceeded and to determine whether the benefits achieved through the investigation process then being used justified the costs of delay in resolving the representation claims of the more than 2700 employees in question. The Acting Director could reasonably conclude that administrative efficiency would not be well served by continuing the investigation for years if that process would not appreciably reduce the need for subsequent hearings to resolve disputes over the large majority of job titles.

We also believe that in managing this complex case, the Acting Director had the discretion to appoint a Chief Hearing Officer to coordinate the hearings and to assign several hearing officers to conduct hearings on individual titles. N.J.A.C. 19:11-6.1(a) does not expressly prohibit the designation of

multiple hearing officers to conduct simultaneous hearings in a complicated representation case. Reading such an inflexible prohibition into the rule would defeat the public interest in resolving representation disputes speedily because it would mean that only one hearing officer could be assigned and that all hearings thus would have to be conducted sequentially rather than simultaneously. If that were so, this case would take years longer to resolve. Assigning a Chief Hearing Officer permits desirable coordination in following uniform principles and procedures while assigning multiple hearing officers permits the hearing process to reach a speedier conclusion.

In addition, the agency has the power and discretion to decide to use ad hoc hearing officers as well as staff members in an effort to expedite the hearing process covering so many titles and employees. See N.J.S.A. 34:13A-6(f) (approving delegation of authority to "officers" of the commission) and N.J.A.C. 19:10-1.1 (defining "officer"). As evidenced by the cases reported in NJPER Supp.,^{4/} during its earliest years, the agency often used labor relations neutrals as ad hoc hearing officers in representation cases. It is a proper exercise of discretion to use ad hoc hearing officers to conduct hearings in a case of this

4/ See, e.g., State Colleges of New Jersey, P.E.R.C. No. 1, NJPER Supp. 1 (¶1 1969); Middlesex Cty. Welfare Bd., P.E.R.C. No. 10, NJPER Supp. 33 (¶10 1969); Town of Nutley, P.E.R.C. No. 12, NJPER Supp. 41 (¶12 1969).

magnitude as well. These hearing officers will serve as officers of the Commission rather than private arbitrators when conducting hearings and issuing reports and will be subject to the same standards of review and discipline in that capacity as our staff hearing officers. We therefore approve and affirm the decision to assign ad hoc hearing officers.

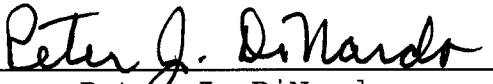
Finally, given that the original schedule of hearings has lapsed, there is no need to consider the request for stay of those hearings. Nor is it necessary or proper to consider arguments concerning the assignments of particular staff or ad hoc hearing officers or the operational problems the employer allegedly would have encountered in complying with the previous schedule. Concerns about assignments and scheduling can be presented to and evaluated by the designated Chief Hearing Officer before he establishes a new schedule of hearings. We add, however, that the scheduling of hearings is within the control and discretion of the Chief Hearing Officer rather than the preferences of the parties, N.J.A.C. 19:11-6.3, and we will not likely be inclined to substitute our judgment for that of the Chief Hearing Officer in determining how best to schedule hearings in order to resolve the representational issues as quickly as is practically possible.

ORDER

ORDER

The request for special permission to appeal is granted.
The issuance of a Notice of Hearing is affirmed.

BY ORDER OF THE COMMISSION


Peter J. DiNardo
Acting Chairman

Acting Chairman DiNardo, Commissioners Buchanan, Fuller and Watkins voted in favor of this decision. Chairman Henderson and Commissioner Mastriani abstained from consideration. Commissioner Katz was not present at the meeting but had already abstained from consideration. None opposed.

DATED: March 31, 2005
Trenton, New Jersey
ISSUED: March 31, 2005