

P.E.R.C. NO. 2012-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUNTERDON,

Respondent,

-and-

Docket Nos. RO-2009-039

RO-2009-044

AFSCME COUNCIL 73,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the County of Hunterdon's request for review of D.R. No. 2011-10 which certified AFSCME Council 73 as the majority representative of two units in the County comprised of five primary level executives and 17 secondary level executives. The County argues that the primary level executives are all managerial executives and 14 of 17 employees in the secondary unit are also managerial executives. AFSCME opposes review. The Commission remanded the petitions for further administrative processing in P.E.R.C. No. 2010-36 because, on that current record, it was unclear what information the parties were advised to submit to support their positions. On its second review, the Commission remands the case again for a hearing because the parties were not advised, in accordance with the Commission's previous Order, of the required documentation to be submitted to support their positions.

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.

P.E.R.C. NO. 2012-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUNTERDON,

Respondent,

-and-

Docket Nos. RO-2009-039

RO-2009-044

AFSCME COUNCIL 73,

Petitioner.

Appearances:

For the Respondent, Gaetano M. DeSapio, attorney, of
counsel

For the Petitioner, Pellettieri, Rabstein and Altman,
attorneys (Andrew L. Watson, of counsel)

DECISION

After an administrative investigation focused on managerial executive status, the Director of Representation certified, via card check, AFSCME Council 73 as the majority representative of two units of Hunterdon County's high level supervisory employees. D.R. No. 2010-1, 35 NJPER 303 (¶105 2009). The County then filed, and we granted, a request for review to consider the County's claim that the Director should have found that the vast majority of the petitioned-for employees were managerial executives, ineligible for representation, and that the Director's decision should have been based on an evidentiary hearing. P.E.R.C. No. 2010-36, 35 NJPER 433 (¶142 2009).

Citing Township of Teaneck, P.E.R.C. No. 2009-25, 34 NJPER 379 (¶122 2008) we commented that administrative investigations must advise the parties of the specific and pertinent information that must be submitted to substantiate a claim of an employee's managerial or confidential status and in Teaneck record that opportunity was provided.^{1/} But, we noted:

Here, the record reflects that the parties were given the opportunity to amplify their position, but there is no document in the record that makes it clear that the County was informed about the information it was required to provide to substantiate the claims made in the County Administrator's certification and chart detailing the managerial duties that it asserts the petitioned-for employees were performing. Accordingly, we remand these cases to the Director for further administrative processing in accordance with this decision. If the County was given that opportunity, the Director should so indicate. If not, the County should be given that opportunity, subject to appropriate response from AFSMCE.

[35 NJPER at 435]

Following our remand, on March 5, 2010, a letter was sent to the parties that quoted the Act's definition of "Managerial

^{1/} In Teaneck, prior to the Director of Representation's decision, a 14-page, single-spaced letter had been sent to the parties identifying each of the 11 titles in dispute, reciting pertinent sections of the Act as well as applicable court and Commission precedent, listing the positions of each party on each title, setting forth, with analysis, the Director's view of the eligibility for inclusion or exclusion from the petitioned-for unit of each disputed title and inviting the submission, within seven days, of "documentary materials, affidavits or other evidentiary materials and a letter brief in support of your position."

Executive," and an excerpt from N.J. Tpk. Auth. and P.E.R.C. and AFSCME, 150 N.J. 331, 336 (1997) providing guidance on how to determine whether an employee fits that definition.^{2/} The letter concludes:

Pursuant to the Commission's decision in P.E.R.C. No. 2010-36, please provide your position as to whether the employees who are the subject of RO 2009-39 and -44 are managerial executives within the meaning of the Act and the Turnpike Authority decision by no later than March 19, 2010. Please provide a copy of your position to AFSCME by that date. AFSCME's response, if any, shall be due by April 2, 2010.

On May 5, 2011, the Deputy Director of Representation issued a decision [D.R. No. 2011-10, 37 NJPER ____ (¶____ 2011)] based on a "supplemental administrative investigation." The decision recites, presumably referring to the March 5, 2010 letter, that

^{2/} The excerpt reads:

A person formulates policies when he develops a particular set of objectives designed to further the mission of a segment of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. 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.

during the investigation "The parties were asked to provide letters, certifications, etc., explaining whether the disputed employees in both cases are managerial executives within the meaning of the Act." The decision also notes that, except for an 11-page supplemental certification from County Administrator Cynthia Yard, both parties relied on their original submissions filed prior to the issuance of D.R. No. 2010-1, 35 NJPER 303 (¶105 2009). The Deputy Director reasoned:

The County summarizes and reiterates many of the facts about the disputed employees set forth in its previous submissions. The County in this instance has recategorized disputed employees based upon Civil Service classifications, and has enclosed generic job descriptions. It suggests that County employees have a managerial executive status equivalent to State department heads and managers. These arguments considered separately or together do not warrant a different analysis and conclusion than reached by the Director in D.R. 2010-001. Although the County contends that certification of both units will leave it bereft of managerial executive employees, several titles or classifications, including the County Administrator, the County collective negotiations team, the County's Department Head/Finance, the County's Treasurer/CFO, and other officials remain unaffected by this decision.

[D.R. 2011-10 at 7-8, 37 NJPER at ____ (¶____ 2011)]

The Deputy Director then certified AFSCME, based upon the card check, as the majority representative of the two units described in D.R. No. 2010-1, 35 NJPER 303, 310 (¶105 2009).

On May 16, 2011, the County, pursuant to N.J.A.C. 19:11-8.3 requested review of D.R. 2011-10. Briefly, the County asserts:

1. The Director's decision is contrary to the weight of the evidence;
2. The Director's decision denies the County the ability to use managerial executives in administering County government;
3. That a full administrative hearing should have been held to resolve factual issues about the roles of members of the petitioned-for units; and
4. That the employees in the proposed primary upper level supervisory unit had reached an agreement with the County to withdraw their request for representation by AFSCME.

On June 1, 2011, AFSCME responded that the County's application did not articulate or meet the standard that compelling reasons existed that warrant the granting of a request for review; that the Deputy Director's decision was appropriately based on an administrative investigation; and that only AFSCME, as the petitioning organization, can seek to withdraw a representation petition and that any withdrawal or dismissal must be approved by the Director of Representation.

Based upon the particular procedural history of this case, and the nature of the Commission's statutory obligations in representation cases, especially those involving the creation of new units for collective negotiations, we remand this case to the Director of Representation to conduct an administrative hearing. That proceeding is to determine whether the petitioned-for units

are appropriate for collective negotiations and to assess whether any of the employees proposed for inclusion, should be excluded as managerial executives within the meaning of the Act.^{3/} Given this ruling, we decline to address issues 1, 2 and 4.^{4/}

In remanding this case we note that, unlike unfair practice cases, representation cases, especially those involving the initial formation of a unit for collective negotiations are investigatory and not adversarial.

^{3/} During the course of these cases, the legislature amended the definition of managerial executives for employees of the State of New Jersey. N.J.S.A. 34:13A-3(f) now reads:

“Managerial executives” of a public employer, in the case of the State of New Jersey, means persons who formulate management policies and practices, but shall not mean persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that, in the case of the Executive Branch of the State of New Jersey, “managerial executive” shall include only personnel at or above the level of assistant commissioner.

In the case of any public employer other than the State of New Jersey, “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.

^{4/} Although a good deal of time has passed since AFSCME submitted authorization cards establishing that a majority of employees in each of the petitioned-for units desired to be represented by AFSCME for purposes of collective negotiations, we do not require that new cards be submitted.

N.J.S.A. 34:13A-6d provides, in relevant part:

The commission . . . shall decide in each instance which unit of employees is appropriate for collective negotiation. . . . Should formal hearings be required, in the opinion of [the Commission] to determine the appropriate unit, it shall have the power to issue subpoenas as described below, and shall determine the rules and regulations for the conduct of such hearing or hearings.

N.J.S.A. 19:11-6.2(c) provides:

Hearings under this section of these rules are considered investigatory and not adversarial. Their purpose is to develop a complete factual record upon which the Director of Representation or the Commission may discharge the duties under N.J.S.A. 34:13A-6.

As explained in State v. Prof. Ass'n of N.J. Dep't of Ed.,

64 N.J. 231 (1974):

[W]e have no doubt that under our act PERC was under a duty to make a determination as to the most appropriate unit. The act clearly directs that in event of a dispute the Commission shall "decide in each instance which unit of employees is appropriate for collective negotiation". N.J.S.A. 34:13A-6(d). Formal hearings may be conducted "to determine the appropriate unit". Ibid.

[64 N.J. at 257, emphasis by the Court]

As we noted in P.E.R.C. No. 2010-36, citing Township of Teaneck, P.E.R.C. No. 2009-25, 34 NJPER 379 (¶122 2008), our statutory obligation to determine the appropriate unit and/or to decide whether certain employees are managerial or confidential can be discharged through an administrative investigation. 35

NJPER at 435. But, using a more streamlined administrative process cannot dilute our statutory obligations including the agency's duty to develop a complete record needed to resolve questions concerning the representation of employees, especially where those employees were previously unrepresented and there is no pre-existing unit structure containing those titles.

Our review does not show any document in the record, even after remand, that makes it clear that the County was informed about the information it was required to provide to substantiate the claims made in the County Administrator's certification and chart detailing the managerial duties that it asserts the petitioned-for employees were performing.

That opportunity will now be afforded by means of a non-adversarial, investigatory hearing conducted in accordance with our rules.^{5/} The hearing officer must explore the issues that are relevant to reach a determination, based upon findings of fact, as to whether each disputed title is eligible for inclusion in the petitioned for units. This may consist of testimonial and documentary evidence. If either or both of the parties fails to elicit relevant testimony from a witness, the hearing officer can and should ask pertinent questions in order to develop a complete record.

^{5/} Our order does not preclude the parties from narrowing the issues by factual stipulations. See N.J.A.C. 19:11-6.7(a)

ORDER

The request for review is granted in part. The case is remanded to the Director of Representation to have an investigatory, administrative hearing conducted in order to determine which, if any, of the petitioned-for employees are managerial executives within the meaning of N.J.S.A. 34:13A-3(f).

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Krengel, Voos and Wall voted in favor of this decision. None opposed. Commissioner Jones was not present.

ISSUED: December 15, 2011

Trenton, New Jersey