

P.E.R.C. NO. 2019-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BURLINGTON,

Public Employer,

-and-

Docket No. RO-2018-038

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL 3091,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission denies the County's request for review of a Director of Representation decision certifying the IAFF as the exclusive representative of a unit comprised of the County's Fire Marshal and Assistant Fire Marshal. The Commission finds no compelling reason warranting review of the Director's determination that the duties performed by the titles do not involve the level of independent discretion or scope of authority over the formulation and implementation of employer policies necessary to be managerial executives.

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. 2019-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BURLINGTON,

Public Employer,

-and-

Docket No. RO-2018-038

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL 3091,

Petitioner.

Appearances:

For the Respondent, Capehart Scatchard, attorneys
(Primitivo J. Cruz, of counsel)

For the Petitioner, Spear Wilderman, PC, attorneys
(James Katz, of counsel)

DECISION

On November 28, 2018, the County of Burlington (County) filed a request for review of D.R. No. 2019-8. In that decision, the Director of Representation certified a unit comprised of the County's Fire Marshal and Assistant Fire Marshal to be represented by the International Association of Fire Fighters, Local 3091 (IAFF). The Director concluded that the titles are not managerial executives within the meaning of N.J.S.A. 34:13A-3(f) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The Director determined that the County did not submit facts sufficient to demonstrate that the duties performed

by the Fire Marshal or Assistant Fire Marshal involve the independent discretion or scope of authority demanded of employees asserted to be managerial executives.

The County asserts that the Director misinterpreted or misapplied the Act's managerial executive test as set forth in New Jersey Turnpike Authority v. AFSCME Council 73, 150 N.J. 331 356 (1997) by implying that final decision-making authority is required. It argues that the Director disregarded the County's documentary evidence and certifications as supporting evidence to establish managerial executive status. The County asserts that the Director's statement regarding whether the duties of the titles under the Uniform Fire Safety Act, N.J.S.A. 40A:14-1, et seq., rise to the level of managerial executive raises a question of law concerning N.J.S.A. 40A:14-2, which establishes that county fire marshals act in an "advisory capacity." It argues that the Director factually erred by finding that the County created the Fire Marshal titles via the December 8, 2010 Resolution designating the Fire Marshal as the chief enforcement officer for the County, and thereby implied that the titles are mere code enforcers. The County also asserts that the Director erred by not conducting a hearing per N.J.A.C. 19:11-2.6(f) because substantial disputes of material fact still remain.

On December 4, 2018, the IAFF filed a response opposing review. It argues that the County fails to point to any evidence

supporting its claim that the Fire Marshal and Assistant Fire Marshal are managerial executives excluded from coverage under the Act because they exercise independent decision-making authority over the formulation and implementation of employer policies. The IAFF asserts that the County's submission fails to raise a substantial question of law concerning interpretation or administration of the Act, fails to show that the decision is clearly factually erroneous, fails to show prejudicial harm, and fails to show a credible reason to hold a hearing. It argues that the Director's recognition of the statutory duties of the titles did not result in a finding that they are mere code enforcers. The IAFF asserts that the Director carefully reviewed the County's documentary and evidence and certifications and concluded that none of it rose to the level of demonstrating the discretion and authority required of a managerial executive.

N.J.A.C. 19:11-8.2(a) states that a request for review will be granted only for one or more of these compelling reasons:

1. A substantial question of law is raised concerning the interpretation or administration of the Act or these rules;
2. The Director of Representation's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the party seeking review;
3. The conduct of the hearing or any ruling made in connection with the proceeding may have resulted in prejudicial error; and/or

4. An important Commission rule or policy should be reconsidered.

We deny the County's request for review as it has not advanced any compelling reasons to review the Director's findings or conclusions.^{1/}

The Director properly applied the New Jersey Supreme Court's Turnpike Authority managerial executive test in rejecting the County's assertions that the petitioned-for titles are managerial executives excluded from the Act under N.J.S.A. 34:13A-3(f). The Director applied relevant Commission precedent finding that managerial executive status will only be found where the employees formulate management policies or direct the effectuation of such policies. See, e.g., City of Newark, P.E.R.C. No. 2000-100, 26 NJPER 289 (¶31116 2000), aff'd, 346 N.J. Super. 460 (App. Div. 2002); Teaneck Tp., P.E.R.C. No. 2009-25, 34 NJPER 379 (¶122 2008). Contrary to the County's assertion that the Director held that an employee must have final approval authority over policy proposals to be considered a managerial executive, the Director applied the appropriate standard that an employee who does not have independent decision-making authority over the formulation and implementation of employer policies is not a managerial executive. Hopewell Tp., D.R. No. 2011-14, 38

^{1/} We also note that the County's request for review was untimely because it was filed at 5:39 p.m. on the due date of November 27, 2018. N.J.A.C. 19:10-2.1(d) (requiring filings to be made by 5:00 p.m.).

NJPER 165 (¶48 2011); State of New Jersey, P.E.R.C. No. 99-59, 25 NJPER 48 (¶30021 1998). The Director also cited pertinent precedent for the proposition that an employee's mere capacity to recommend management policies is not part of the statutory definition of a managerial executive. City of Camden Housing Authority, D.R. No. 2014-7, 40 NJPER 219 (¶84 2013).

The County relies on Township of Pemberton, D.R. No. 2015-1, 41 NJPER 135 (¶46 2014), req. for rev. den., P.E.R.C. No. 2016-32, 42 NJPER 259 (¶73 2015), which we find distinguishable from the instant case. The managerial executive in Pemberton was a department head, appointed by the mayor with the advice and consent of the Township Council. She prepared annual budgets for her department and had the authority to make purchases within the adopted budget. She also had the sole authority to implement and evaluate programs in her department and amend or discontinue them based on her independent assessment of their value and cost. Although the employee's policy proposals were submitted to the business administrator and mayor for final approval, the Director found that her level of independence in identifying the need for policy changes in her department and her responsibility for initiating the policy proposals were indicative of managerial executive status.

In contrast, the Fire Marshal position at issue here is not a department head but reports to the Director of Public Safety,

who in turn reports to the County Freeholders and Administrator. Here, the Director of Public Safety, not the Fire Marshal, must authorize and approve all policies concerning the Office of the Fire Marshal, is alone empowered to communicate and make recommendations directly to the County Freeholders and Administrator, and has sole authority regarding the Office of the Fire Marshal's budget and funding. Although the Director of Public Safety may rely upon the particularized knowledge of the Office of the Fire Marshal when creating policies, it is the Director of Public Safety who directs the Fire Marshal to prepare policy recommendations regarding fire code compliance. The level of independent responsibility for formulation and effectuation of policy necessary for a finding of managerial executive status that was apparent in Pemberton is not present here.

There is also no support for the County's contention that the Director disregarded the County's documentary and certification evidence. The Director relied upon and recited the County's evidence in establishing the facts of his decision (D.R. No. 2019-8 at 3-7) and further addressed and considered the County's certifications in light of the County's legal arguments in the decision's analysis section (D.R. No. 2019-8 at 10-13). The Director specifically considered the County's arguments that cited examples of alleged formulation and direction of management policy, finding that those scenarios did not illustrate

managerial executive status. D.R. No. 2019-8 at 12-13. The Director noted that the evidence does not show that the Fire Marshal or Assistant Fire Marshal have authority to create and implement County policies, and that policy determinations regarding the Office of the Fire Marshal are approved and implemented by the Director of Public Safety.

We also find no basis for review based on the Director's reference to the Fire Marshal's duties under the Uniform Fire Safety Act, as the Director never referred to the titles as mere code enforcers. The Director did not limit his investigation and analysis of the job duties and responsibilities of the Fire Marshal to those listed in N.J.S.A. 40A:14-1, et seq., but considered all of the facts presented concerning their job duties. We also reject the County's argument that the language of N.J.S.A. 40A:14-2 that Fire Marshals shall "act in an advisory capacity to all of the fire companies in the county" automatically makes them managerial executives under the Act.

As for the Director's finding that the County created the petitioned-for titles on December 8, 2010, based on the County Resolution of that date submitted by the County and referenced by the County's Drinkard certification, we find no harm in this misstatement of fact concerning the resolution that designated the Fire Marshal's office as the County Enforcing Agency (CEA) responsible for enforcement of the New Jersey Regulations for

Fire Code Enforcement. The Director also noted that the Office of the Fire Marshal was created in 1927 and merged into the County's Department of Public Safety Services in 2002, indicating that the Director was aware that the Fire Marshal position existed in some form prior to the December 8, 2010 Resolution designating it as the CEA. Regardless, the factual misstatement about when the titles were created does not concern a material factual issue because it had no bearing on the Director's analysis of the duties and responsibilities of the titles. We find no support for the County's claim that the Director relied only on the code enforcement functions contained in that Resolution for a description of the Fire Marshal job duties, as the Director's decision shows he considered the documentary and certification evidence submitted by both the County and IAFF about the title's job duties.

Finally, the County argues that it was entitled to a fact-finding hearing under N.J.A.C. 19:11-2.6. N.J.A.C. 19:11-2.6(f) provides that a hearing shall be conducted if it appears to the Director, in the exercise of reasonable discretion, that substantial and material factual issues exist which may more appropriately be resolved after a hearing, or the particular circumstances of the case are such that a hearing will best serve the interests of administrative convenience and efficiency. The Commission has a consistent policy of resolving representation

questions through administrative investigations unless substantial and material facts are in dispute warranting an evidentiary hearing. See Somerset Cty., P.E.R.C. No. 2014-88, 41 NJPER 55 (¶15 2014); Teaneck Tp., supra; and Camden Cty. Library Commission, P.E.R.C. No. 2008-35, 33 NJPER 319 (¶121 2007).

The Director conducted an administrative investigation which included a conference with the parties, and the parties' submission of documents, certifications, position statements, and replies. The County asserts that a hearing is necessary "based on the disputed rulings" made by the Director. The County's assertion indicates that its objection is to the Director's application of the law to the facts, rather than any specific material factual issue that was not resolved in its favor. The Director considered all of the facts submitted by the County, but determined that they did not support a conclusion that the titles are managerial executives under the Act. Based on the record before us, there are no substantial and material facts that need to be resolved at an evidentiary hearing.

For all of the foregoing reasons, the County has not established any of the reasons for granting a request for review and we accordingly deny its request.

ORDER

The County of Burlington's request for review is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau, Jones and Papero voted in favor of this decision. None opposed. Commissioner Voos was not present.

ISSUED: January 17, 2019

Trenton, New Jersey