

P.E.R.C. NO. 85-105

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF CLARK,

Petitioner-Respondent,

-and-

Docket Nos. CU-82-72,
CU-83-24 and RO-84-44

UNION COUNCIL NO. 8, NJCSA,

Public Employer-Petitioner.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, clarifies two negotiations units represented by Union Council No. 8, N.J.C.S.A. in Clark Township. The Public Works Unit is clarified to exclude foremen. The white-collar unit is clarified to include the construction official.

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UNION COUNCIL NO. 8, NJCSA,

Public Employer-Petitioner.

Appearances:

For the Petitioner-Respondent, Fox & Fox, Esqs.
(David I. Fox, Of Counsel)

For the Public Employer-Petitioner and Respondent,
Stanley A. Fink, Esquire

DECISION AND ORDER

On April 26, 1982, Union Council No. 8, N.J.C.S.A.

("Council No. 8") filed a Clarification of Unit Petition (CU-82-72) with the Public Employment Relations Commission. The petition seeks to add the position of "construction official" to its negotiations unit consisting of "clerical and secretarial employees, plumbing inspector, sanitary inspector and building maintenance employees of the Township of Clark ("Township").

On November 15, 1982, the Township filed a Clarification of Unit Petition with the Commission. This petition seeks the removal of two foremen from a negotiations unit of public works employees represented by Council 8. The Township contends these employees are supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. and that a conflict of

interest exists between the foremen and the other unit members. Council 8 denies that these employees are "supervisors" or that a conflict of interest exists. In addition, it contends that an "established practice" exists which warrants their continued inclusion in the unit even if they are supervisors.

On September 23, 1982 and January 10, 1983, the Director of Representation issued Notices of Hearings and an order consolidating the cases. On June 22, 1983 and January 18, 1984, Hearing Officer Lawrence Henderson conducted hearings. On January 31, 1984 Hearing Officer Henderson resigned from the Commission and Hearing Officer Richard C. Gwin was assigned to the case, pursuant to N.J.A.C. 19:11-6.4. A third day of hearing was held before Hearing Officer Gwin. The parties examined witnesses, presented evidence and argued orally.

On February 19, 1985, Hearing Officer Gwin issued his report and recommended decision. H.O. No. 85-10, 11 NJPER ____ (Para ____ 1984). He found that the two foremen are supervisors within the meaning of the Act and have a conflict of interest with the other members of the public works unit. He further concluded that there was not an "established practice" sufficient to warrant the continued inclusion of the foremen in the unit. Therefore, he recommended that the unit be clarified to exclude the two foremen. With respect to the construction official, he found that Council 8 did not waive its right to represent this position. He further found that the construction official was not a supervisor or

managerial executive within the meaning of the Act and that he did not have a conflict of interest with the other unit members. Accordingly, he recommended that the unit be clarified to include the construction official position.

On February 26 and 27, 1985, both parties requested an extension of time to file exceptions. An extension was granted until March 25, 1985. The Township subsequently advised that it would not file exceptions. Council No. 8 also has not filed exceptions.


Acting under authority delegated to the Chairman by the full Commission, I have the authority to decide this case. I have reviewed the record. The Hearing Officer's findings of fact (pp. 3-14) are accurate. I adopt and incorporate them here. Based on these findings of fact and in the absence of exceptions, I agree with the Hearing Officer that, under the circumstances of this case, the public works unit should be clarified to exclude the two foremen and the white-collar unit should be clarified to include the construction official.

ORDER

The Public Works Unit is clarified to exclude foremen.

The white-collar unit is clarified to include the
construction official.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
April 22 , 1985

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

In the Matter of

TOWNSHIP OF CLARK,

Respondent,

-and-

Docket No. CU-82-72

UNION COUNCIL NO. 8, NJCSA,

Petitioner.

TOWNSHIP OF CLARK,

Public Employer-Petitioner,

-and-

Docket No. CU-83-24

UNION COUNCIL NO. 8, NJCSA,

Respondent.

SYNOPSIS

The Hearing Officer recommends clarification of two units of Clark Township ("Township") employees represented by Union Council 8.

Based on their authority to effectively recommend discipline, the Hearing Officer concludes that foremen in the Township's Department of Public Works are supervisors and should be removed from a blue-collar unit. The Hearing Officer finds that no established practice exists that would dictate the continued inclusion of foremen in the unit and that a conflict of interest exists between foremen and other unit members.

The Hearing Officer recommends that a nonsupervisory white-collar unit be clarified to include the title of construction official. He concludes that the construction official is neither a managerial executive nor a supervisory employee and that no conflict of interest exists between the construction official and other employees in the unit. The Hearing Officer also finds that Council 8 did not waive its right to seek the title by unit clarification.

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 exception 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.

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

In the Matter of :
TOWNSHIP OF CLARK, :
Respondent, :
-and- : Docket No. CU-82-72
UNION COUNCIL NO. 8, NJCSA, :
Petitioner. :

TOWNSHIP OF CLARK, :
Public Employer-Petitioner, :
-and- : Docket No. CU-83-24
UNION COUNCIL NO. 8, NJCSA, :
Respondent. :

Appearances:

For the Respondent
Fox & Fox
(David I. Fox, of Counsel)

For the Public Employer-Petitioner
Pisano & Triarsi
(Joseph J. Triarsi, of Counsel)

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

On April 26, 1982, Union Council No. 8, N.J.C.S.A. ("Council 8") filed a Clarification of Unit Petition (CU-82-72) with the Public Employment Relations Commission ("Commission") seeking to add the title of construction official to its negotiations unit of clerical and secretarial employees, plumbing inspector, sanitary inspector, and building maintenance employees ("Unit 1") employed by the Township of Clark ("Township"). On November 15, 1982, the Township filed a Clarification of Unit petition (CU-83-24) seeking the removal of two foremen from a Council 8 unit of Public Works employees ("Unit 2").

The Township asserts that the foremen should be removed from Unit 2 because they are supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), and because a conflict of interest exists between foremen and other Unit 2 members. The Township further asserts that the construction official is both a managerial executive and supervisor within the meaning of the Act and that a conflict of interest exists between the construction official and members of Unit 1. Finally, the Township raises a waiver defense to the filing of Council 8's Clarification of Unit petition (CU-82-72).

Council 8 denies that the foremen in Unit 2 are supervisors or that a conflict of interest exists between them and other unit members. Council 8 similarly denies that the construction official is a supervisor, managerial executive, or that a conflict of interest exists between him and Unit 1 members. Council 8 also denies that it waived its right to seek the construction official title by unit clarification, claiming instead that it pursued the title with due diligence.

The two matters were consolidated for hearing. Hearings were held on June 22, 1983, January 18, 1984 and February 22, 1984.^{1/} The parties were given the opportunity to examine and cross examine witnesses, present evidence and argue orally. The parties filed post hearing briefs dealing solely with the construction official title. The last of the briefs was received on September 17, 1984.

Based on the entire record I make the following:

^{1/} On September 23, 1982, the Director of Representation issued a Notice of Hearing for CU-82-72. The hearing was originally scheduled for November 3, 1982 but was postponed at the request of the parties. The Township filed CU-83-24 on November 15, 1982 and the matters were consolidated. After several requests to reschedule the hearing, Hearing Officer Lawrence Henderson conducted the first two days of hearing. Mr. Henderson resigned from the Commission on January 31, 1984 and I was assigned to complete the hearing and prepare a Report and Recommendations, pursuant to N.J.A.C. 19:11-6.4.

FINDINGS OF FACT

1. The Township is a public employer within the meaning of the Act, is subject to its provisions, and is the employer of the employees involved in this proceeding.

2. Council 8 is an employee representative within the meaning of the Act, is subject to its provisions, and represents the two units of Township employees involved in this proceeding. Unit 1 consists of the Township's clerical and secretarial employees, plumbing inspector, sanitary inspector and building maintenance employees. (Exhibit J-23). Unit 2 consists of employees of the Department of Public Works, Bureau of Roads. (Exhibit J-12).

The Foremen--CU-83-24

3. There are twelve employees working exclusively in the Township's Department of Public Works: five Public Works Repairmen, five Senior Public Works Repairmen and two Foremen. The Repairmen and Senior Repairmen are divided into two crews with a foreman in charge of each. (T1, pp. 27, 40).^{2/}

2/ Transcript cites shall be designated as follows: T1 designates the transcript of June 22, 1983; T2 designates the transcript of January 18, 1984; and T3 designates the transcript of February 22, 1984.

4. The chain of command in the Department starts with the Director of Public Works and Engineering at the top, followed by Foremen, Senior Repairmen, and Repairmen. The senior man on a job directs work at the site. He is responsible for making a daily report to his foreman. The foreman, in turn, submits a daily report to the Director. (T1, pp. 40-44, 62, 177, 178).

5. The foremen share an office in the Township's Public Works yard. Each is in charge of a crew. Their daily responsibilities include work scheduling and assignment--they arrange jobs by priority, give the men their work orders, and tell them who they will be working with. Foremen monitor the work of their crews and, when necessary, help them on the job. Because their crews are often split, the foremen travel from one job site to another checking on the work being done. Foremen check and record complaints. They keep records of supplies. They keep work records. (T1, pp. 36, 42, 113, 117-120).

6 On December 4, 1981, Council 8 was certified as the exclusive representative of Unit 2 (P.E.R.C. Docket No. R0-82-44; J-4). Council 8 is the successor to Teamsters Local 469 ("Local 469") as Unit 2's representative (J-12). The record contains copies of collective negotiations agreements between Local 469 and the Township covering the years from 1975 to 1981. (J-8, J-10, J-11). Council 8 also represented the unit prior to Local 469--as

far back as the early 1960's. (T1, pp. 71, 113). The inclusion of foremen in the unit predates 1968. (T1, p. 112).

7. Foremen have participated, to a limited degree, in hiring Public Works personnel. (T1, pp. 108, 149). One of the Department's two foremen has been asked to review job applications. The recommendations he made were followed "most of the time." (T1, p. 109). The Department's other foreman made one recommendation to hire and it was followed. (T1, P. 149). The record does not indicate, however, that foremen have interviewed job candidates or that they have a defined role in a formal hiring process.

8. Foremen have also evaluated Department personnel. There is, however, no formal evaluation procedure in the Department. One foreman has been asked to evaluate members of his crew once in the last five years. The use of an evaluation procedure has varied with Department Directors and there has been a high turnover in the position. (T1, pp. 48, 151, 156).

9. Foremen possess the authority to recommend the discipline of Unit 2 members. (T1, pp. 50, 151). They conduct disciplinary investigations, prepare reports, and submit them to the Director with recommendations. (T1, p. 63). The record contains several examples of foremen recommending discipline of unit members, ranging from small fines to dismissal. (T1, pp. 50, 51, 63-70, 120). While those recommendations have not always been followed to the letter

the record demonstrates that foremen have the authority to make effective disciplinary recommendations.

10. The parties contract does not designate foremen as a step in the grievance procedure. Foremen, however, have been involved in grievances filed by Unit 2 members. The record contains several examples of grievances filed by the unit in response to disciplinary action taken as the result of a foreman's recommendations. (T1, pp. 60, 65-67, 121-124)^{3/}

11. Council 8 has taken action against two of its members who were temporarily assigned to acting non-unit positions. In 1967 Council 8 expelled Thomas Smith, now one of the Department's two foremen, for reporting a unit member for improperly issuing building permits. At the time Smith was temporarily serving as Superintendent of Public Works, a position that no longer exists in the Township. While the action taken against Smith is remote in time, the expulsion order is still effective. (T1, p 113). In the Spring of 1983, Council 8 wrote Kevin Bamburak--a Council 8 member who was serving as Acting Director--and asked him to resign from Council 8 under threat of expulsion. Bamburak was reprimanded by

3/ The foreman job description requires that he "[counsel] employees, [adjust] informal complaints and grievances through discussion with employees and union representatives, and [initiate] disciplinary action as needed.

Council 8 for what it considered improper and unfair action against fellow union members. He had disciplined two Department employees while serving as acting Director. (E-1, E-2, E-3).

Construction Official--CU-82-72

12. Article 10 of the Revised General Ordinances of Clark establishes a Township Department of Public Works and Engineering, consisting of three Divisions: Engineering, Building, and Code Enforcement. (J-14) Leland S. Stires, the Director of Public Works and Engineering, is the administrative head of the entire Department. The Division of Code Enforcement is headed by John Pabst, the Construction Official, who is vested with the statutory authority to enforce the State Uniform Construction Code Act, N.J.A.C. 52:27D-119 et seq. ("Code"). Within the Division of Code Enforcement are four subcode officials: building, a title also held by Mr. Pabst; plumbing, a part-time position held by a licensed plumber; fire protection, also a part-time position; and electrical, held by a firm under contract with the Township. Olga Sachenski, a principal clerk/typist and permit clerk^{4/} also does work for the

^{4/} The title was also referred to as "control person" in the record (T3 168-170)

Division of Code Enforcement. (T2, p131, T3, pp32-36, 168-170, J-14)

13. Although the Division of Code Enforcement is within the administrative umbrella of the Township's Department of Public Works and Engineering, it is an autonomous entity. The construction official is the final authority in code enforcement subject only to an appeal process which does not directly involve the Township. The Legislature granted local municipalities the authority to appoint a construction official and any necessary subcode officials but it also granted code enforcing entities with independence from their appointing bodies. The Township of Clark is no exception: the Director neither directs nor reviews the work of the construction official. (T3, PP. 8,9, 159, 160; N.J.A.C. 52:27D-119 et seq)

14. Subcode officials review plans, make recommendations relative to permit issuance and perform inspections. It is their responsibility to ensure that State-approved materials are used in construction and alteration projects and that the execution of approved plans conforms with the Code. As the chief administrator of the Division, the construction official coordinates the activities of the subcode officials. He develops a work program for the subcode officials to ensure timely compliance with the Code. The construction official cannot, however, countermand a subcode official's decision unless the construction official is licensed in the subcode official's area. Permits are issued in the construction

official's name, after all the subcode officials have submitted their reports finding an applicant's plans in conformity with the Code. The construction official also issues certificates of occupancy. He also has the power to issue violation notices and impose fines of up to \$500.00 for noncompliance. While subcode officials have the authority to issue stop work orders, they lack the authority to impose fines. (T3, pp. 147, 151, 158, 164; N.J.A.C. 52:27D-126)

The construction official also participates in developing a Division budget. Code enforcement is self-funded, relying exclusively on permit fees. The Division budget is prepared by Mr. Pabst and the Director. Mr. Pabst tells the Director what he feels he needs for the Division. They then discuss the validity of those needs. A proposed budget is submitted by the Director to Mayor and Council. Permit fees are adjusted to meet budget requirements. Both the construction official and certain of the subcode officials review and adjust permit fees. Fees are reviewed every two years. (T3, pp. 153, 154).

15. Under the Code, the construction official and subcode officials are appointed positions. The Code now requires that the construction official and subcode officials be licensed and have specified work experience. The only involvement that the Township's construction official has had in hiring Division employees occurred

when the previous plumbing subcode official retired. The Council asked Mr. Pabst if he had any recommendation to make for a candidate who had occasionally filled in for the retired plumbing subcode official. Mr. Pabst indicated that he "didn't see there was anything wrong with the man." The candidate was appointed by the Council in February, 1984. (T3, pp. 205, 206, 230).

16. Mr. Pabst was instructed to evaluate Olga Sachenski, the principal clerk/typist and permit clerk. The evaluation was performed after the filing of CU-82-72 and resulted in a grievance challenging the appropriateness of the evaluation. Council 8's grievance protested a lack of performance evaluation standards, a lack of any indication of what term the evaluation covered, and the fact that the construction official, rather than the Director, performed the evaluation. The parties resolved the matter by removing the evaluation from Sachenski's file. (T2, pp.82-84, 160, 164; T3, 185; U-1)

17. Olga Sachenski is the President of Council 8. The fact that she holds office in the Union, together with the actions taken by Council 8 against certain members serving in acting positions, (See finding No. 11) forms the basis of the Township's conflict of interest claim.

Sachenski performs a variety of functions for the Township. She does secretarial work for the construction official,

the Director, and, in certain areas, for the Fire Department. She does searches for the clerk's office and transmits materials to the Planning Board and Board of Adjustment. She records employee absenteeism. She also accepts plans for the construction official and checks applications for completeness. A former Director wrote to Sachenski and told her that she was the construction official's secretary and that the construction official was her supervisor. (T2, pp. 73, 85-87; E-4)

18. N.J.A.C. 52:27D-126 (L 1975, c. 217, Sec. 8) has been amended three times since its adoption. The first amendment (Assembly, No. 3456--L 1979, c. 394, Sec. 1, eff. Feb. 6, 1980) clarified certain rights of construction and subcode officials.^{5/} Among other things, the bill defined "construction official" and "subcode official" in terms of equivalent positions existing prior to the enactment of the Code^{6/} and it specified that officials in

5/ Assembly Municipal Government Committee Statement to Assembly No. 3456

6/ This bill provided that the title of "construction official" shall be equivalent to that title which, prior to the adoption of the Code, entailed the chief administrative responsibility to enforce all construction codes, not the responsibility of an authorized private inspection agency. It described the title of "subcode official" as equivalent to the pre-Code title that entailed subordinate administrative responsibility
(Footnote continued to page 12)

civil service municipalities shall be considered in the classified service. The second amendment (Assembly No. 3171--L. 1981, c. 469, Sec. 1, eff. Jan. 11, 1982) was intended to remedy certain problems concerning the status of construction and subcode officials. This bill provided that any official hired before February 6, 1980 in a civil service municipality shall be considered a member of the classified service without examination.^{7/} The final amendment (Senate, no. 1936--L 1982, c 210, Sec 1, eff. Dec. 23, 1982) provided that any construction or subcode official who had permanent civil service status or was in the unclassified service prior to January 1, 1981, shall be included in the classified service without examination.^{8/}

19. In December, 1970 the Township recognized Council 8 as the exclusive representative of the following unit: "clerical employees, Building Inspector, Plumbing Inspector, and Senior Maintenance Repairman." (J-20). The 1974 collective negotiations agreement between the Township and this Council 8 unit contains the

(Footnote continued from page 11)

to enforce one or more of the building, plumbing, electrical or fire codes.

7/ Senate County and Municipal Government Committee Statement to Assembly, No. 3171--L 1981, c 469.

8/ Introductory Statement to Senate No. 1936--L 1982, c 210).

following recognition clause: "...clerical and secretarial employees and municipal building employees..." (J-22). The parties' agreements covering the terms of 1975-77 and 1979-81 describe the recognized unit as follows: "clerical and secretarial employees, plumbing inspector, sanitary inspector and building maintenance employees..." (J-23).

Olga Sachenski testified that Council 8 has historically represented only classified employees in Unit 1. (T2, pp. 79-80). That testimony was not disputed. Sachenski also testified that the building inspector was a member of the unit through 1974; that the title was included in "municipal building employees" as set forth in the recognition clause of J-22. The 1975-77 agreement was not signed by Council 8 until April 30, 1976 nor executed by the Township until May 24, 1976. The Code was adopted on October 7, 1975 and became effective 120 days later. Sachenski was advised by counsel that, with the adoption of the Code, the title of building inspector was no longer classified. She testified that, because the title was unclassified, it was no longer included in the unit. (T2, pp. 91-92)

On May 18, 1978 a Civil Service branch manager wrote to the Township's Business Administrator advising him that the construction official was considered to be in the unclassified service. (J-15).

In 1980 the Township published its salary ordinance for classified employees. The title of construction official was not

listed in the ordinance. (J-16).

On February 16, 1982, the Township adopted Ordinance No. 82-11, effective March 17, 1982, establishing a salary range for the construction official. (J-17)

On March 25, 1982, the Department of Civil Service again wrote the Township's business administrator, this time advising that the Department had classified John Pabst, the construction official, in the competitive service.

On April 26, 1982, Council 8 filed its Clarification of Unit petition.

ANALYSIS

Foremen

Based on their authority to make effective disciplinary recommendations, I conclude that the Township's Public Work's foremen are supervisors within the meaning of the Act and possess a conflict of interest with Unit 2 members.

The relevant subsections of the Act provide that:

Nor, except where established practice, prior agreement or special circumstances dictate to the contrary shall any supervisor having the power to hire, discharge, discipline or effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership. N.J.S.A. 34:13A-5.3

The division shall decide in each instance which unit of employees is appropriate for collective negotiations, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes both supervisors and nonsupervisors. N.J.S.A. 34:13A-6(d).

Consistent with subsection 5.3, the Commission has defined a statutory supervisor as one having the authority to hire, discharge, discipline or effectively recommend any of the same. In re Cherry Hill Twp Dept of Public Works, PERC No. 30 (1970). A finding of supervisory status, however, requires more than a job description or assertion that an employee has the power to hire, discharge, discipline or effectively recommend. An indication that the power claimed is exercised with some regularity is needed. In re Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358 (1976).

The principles of conflict of interest were explained by the New Jersey Supreme Court in Board of Education of W. Orange v. Wilton, 57 N.J. 404 (1971):

If performance of the obligations or powers delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of a particular supervisor and the other included employees, the community of interest required for inclusion of such supervisors is not present.

While a conflict of interest which is de minimis or peripheral may in certain circumstances be tolerable, any conflict of greater substance must be deemed opposed to the public interest. 57 N.J. at 425-426.

The Court posed the following question as the focal point for a finding of conflict of interest:

To what extent does the reasonable and good faith performance of the obligations a superior owes to his employer have capacity, actual or potential, to create a conflict of interest with other supervisors whose work he is obliged to oversee and evaluate[?]

The Public Works' foremen have participated, in varying degrees, in hiring, evaluating and disciplining Unit 2 members. Their role in hiring and evaluation has been irregular and undefined. The record lacks any indication of their recent participation in either area. Their possession of disciplinary authority, however, is well documented. Consistent with their job descriptions, foremen have initiated disciplinary action resulting in the imposition of fines, suspension and termination of Council 8 members. Township action taken on foremen's disciplinary recommendations has also resulted in related grievance filings.

The disciplinary authority exercised by the foremen compels a finding both that they are supervisors within the meaning of the Act and that they possess a substantial conflict of interest with Unit 2 members. In re Teaneck, E.D. No. 73 (1971); In re Ridgewood Bd/Ed and Ridgewood Ed/Assn, D.R. No. 80-33, 6 NJPER 209 (para. 11102 1980); In re Paramus B/Ed., D.R. No. 82-7, 7 NJPER 556 (para. 12247 1981).

In its closing remarks before Hearing Officer Henderson on June 22, 1983, Council 8 made reference to a history of the foremen's inclusion in Unit 2 predating the enactment of Chapter 303 (T1, pp. 191-193, 196). It is necessary, therefore, to determine whether an "established practice" exists which would dictate the continued inclusion of the foremen in Unit 2.

The prerequisites for a finding of an established practice are explained by the Commission in In re West Paterson, PERC No. 77 (1973). Generally, it must be demonstrated that prior to the passage of Chapter 303 (in 1968) an employee organization spoke on behalf of a reasonably well-defined group of employees seeking improvement of employee conditions and resolution of differences through negotiation with an employer who engaged in the process with an intent to reach agreement. The record must reveal a consistent and exclusive bilateral negotiations relationship existed, evidenced by an exchange of negotiations proposals on substantive terms and conditions of employment such as salary, method of payment, grievance machinery, and other economic and fringe items. [Cf. In re Teaneck, E.D. No. 73, slip op. at 7-8 (1971)].

The record does not support a finding of established practice. The record reveals only that the unit existed and foremen were in it. There is no evidence of discussion over terms and conditions of employment or of proposals being exchanged. There is

no evidence of what duties were performed by foremen prior to 1968 or whether those duties have changed. Finally, there is no evidence of a consistent and exclusive negotiations relationship that would dictate the continuation of the existing unit structure.

Construction Official

Waiver Defense

The Township claims that Council 8 has waived its right to seek the construction official by unit clarification. The essence of the Township's waiver argument is that the title existed in Clark since 1977 and Council 8 failed to pursue it until 1982. By sitting on its rights for some five years, asserts the Township, Council 8 has failed to exercise due diligence and has waived its right to clarify the unit.

Council 8 denies that it failed to exercise due diligence in its pursuit of the construction official. It argues that the building inspector title was in Unit 1 until the Code was adopted creating the construction official title. At that point, asserts Council 8, the titles were equivalent and unclassified. Because Council 8 represents only classified employees in Unit 1, it could represent neither the building inspector nor the construction

official. Within a month after Civil Service classified the title, Council 8 filed its Clarification of Unit petition.

The Commission's approach to the waiver issue may be described as follows: to add titles to an existing unit by clarification proceeding a majority representative must demonstrate due diligence in searching for, identifying and petitioning for the titles in question. (See e.g. Atlantic Community College, H.E. No. 85-5, 10 NJPER 585 (Para. 15272 1984), adopted by the Commission in PERC No. 85-____, 10 NJPER ____ (Para. ____ 1985).

The Director of Representation has suggested a strict standard of due diligence for majority representatives seeking to add newly created titles to an existing unit:

[I]n an accretion proceeding, where employees in newly created programs or aquired enterprises or facilities are sought to be clarified as included in a previously existing unit, the representative must search out these employees and file a petition prior to its execution of a successor collective negotiations agreement. Bergen Pines Hospital, D.R. No. 80-20, 6 NJPER 61, 65 (Para. 11034 1980).

In other cases involving waiver defenses by employers, however, the Commission and the Director have not applied a standard of strict contractual waiver but have looked at the totality of circumstances surrounding the majority representative's efforts to obtain the title. [See e.g., Wayne Board of Education, PERC No. 80-94, 6 NJPER 54 (Para. 11029 1980); Union County Regional High School District #1, D.R. No. 83-22, 9 NJPER 228 (Para. 14106 1983)].

I conclude that Council 8 has exercised due diligence in seeking to add the construction official title to Unit 1. The President of Council 8 testified that only classified employees were represented in Unit 1. That testimony was not disputed. A May 18, 1978 letter from Civil Service (J-15) and a 1980 Township Ordinance (J-16) demonstrate that at those times the title was unclassified. In March of 1982 Civil Service wrote the Township (J-18) and confirmed that Mr. Pabst had been classified in the competitive service. Council 8 filed its Clarification of Unit petition within a month and prior to the execution of a successor collective negotiations agreement. I conclude that such conduct does not constitute a waiver. (compare Atlantic Community College, supra. and Union County, supra.)

Supervisory Employee

The standard for a finding of supervisory status is set forth at pages 14 and 15, supra. I conclude that the Township's construction official is not a statutory supervisor. He does not hire, discharge or discipline Council 8 members nor does he effectively recommend any of the same. The only involvement of the construction official in a hiring decision was described in finding number 15. The construction official does not interview job

candidates and does not review job applications. His one recommendation ("didn't see there was anything wrong with the man") concerning the plumbing subcode official does not indicate the exercise of the supervisory power of recommendation in the area of hiring. Township of Teaneck, E.D. No. 23 (1971); Somerset County Guidance Center, D.R. NO. 77-4, 2 NJPER 358 (1976).

The record does not indicate that a Township construction official has ever been involved in a decision to discharge a Township employee. The remaining indicator of supervisory status is discipline.

Effective recommendation of discipline may be found where the employee has primary responsibility for evaluating and the evaluations are instrumental in various personnel actions. Borough of Avalon, PERC No. 84-108, 10 NJPER 207 (Para. 15102 1984) adopting H.O. No. 84-11, 10 NJPER 149 (Para. 15025 1984); Emerson Board of Education, D.R. No. 82-13, 7 NJPER 571 (Para. 12255 1981). Supervisory status has been found where evaluations formed the basis of decisions to withhold increments, renew contracts, or terminate employment. Paramus Board of Education, D.R. No. 82-7, 7 NJPER 556 (Para. 12247 1981); Waldwick Board of Education, D.R. No. 82-5, 7 NJPER 498 (Para. 12221 1981); Cinnaminson Board of Education, D.R. No. 81-39, 7 NJPER 274 (Para. 12122 1981).

Finding number 16 describes the one instance that a construction official has evaluated a Township employee. The

timing, effect and ultimate disposition of the evaluation are not suggestive of supervisory status. The record contains no other indication that the construction official has been involved in the discipline of Township employees.

In finding that the construction official in Clark Township is not a supervisor within the meaning of the Act, I am mindful of the fact that the authority exercised by Mr. Pabst and his predecessors is related to the size of the Township and the personnel who work in its Division of Code Enforcement. Two of the Township's subcode officials are part-time and possess the authority to make decisions, based on their subcodes, that the construction official cannot countermand. Another of the subcodes is the responsibility of an independent contractor. The final subcode --building--is administered by the construction official himself.^{9/}

Managerial Executive

^{9/} At hearing the Township expressed concern that a finding that its construction official should be included in Unit 1 would set a precedent that construction officials across the State should be included in nonsupervisory units. Such is not the case. The Commission looks beyond titles, to the actual duties of the individuals occupying them when passing on the question of what constitutes an appropriate collective negotiations unit.

Section 13A-3(f) of the Act defines "managerial executives" 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." Section 5.3 excludes managerial executives from the protection the Act affords public employees. The Commission defined "formulation" and "effectuation" of management policies and practices in Borough of Montvale, PERC No. 81-52, 6 NJPER 507 (Para. 11259 1980) affirming D.R. No. 80-32, 6 NJPER 198 (Para. 11097 1980):

A person formulates policies when he develops a particular set of objectives designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes.

In Montvale, supra., the Director explained that, "those chosen for directing the effectuation of policy must be empowered with a substantial measure of discretion in deciding how the policy should be effectuated." D.R. No. 80-32, slip op. at 22.

The Township's construction official does not possess the discretion or authority envisioned by the Commission as necessary to bring the title within the narrow construction adopted for the statutory exclusion.

The construction official does not formulate policy--the objectives of construction code enforcement were developed by the Legislature. The method and means of reaching those objectives are codified. While the construction official certainly must exercise independent judgment as head of the division, the record does not demonstrate that he exercises a level of authority that broadly affects the "organization's purposes or its means of effectuation of these purposes."

Conflict of Interest

The Township's conflict of interest argument is set forth in findings number 11 and 17, supra. The contention is that Mr. Pabst will have a precarious decision to make if the need arises to discipline his secretary (the Council 8 President). The Township points to the actions taken by Council 8 against certain union members who served in acting positions and who disciplined fellow union members. This, according to the Township, would place the construction official in a position of divided loyalty.

The Wilton standard requires an "actual or substantial potential conflict" for the exclusion of a title. I conclude that the hypothetical dilemma posed by the Township does not rise to this level. The record lacks any evidence of a conflict between a

Township construction official, acting or otherwise, and Council 8 members. The title is not a step in the parties' grievance procedure. The construction official has never disciplined a Township employee. Borrowing Wilton language, I conclude that the "potential" for conflict cited by the Township is not "substantial" and that an "actual" conflict has not been demonstrated on the record.

RECOMMENDATION

Based on the above, I find:

1. The foremen in the Township's Department of Public Works are supervisors within the meaning of the Act and that a conflict of interest exists between them and other Unit 2 members;
2. The construction official is not a supervisory employee or managerial executive within the meaning of the Act and no conflict of interest exists between him and Unit 1 members; and
3. Council 8 did not waive its right to seek the construction official title by unit clarification.

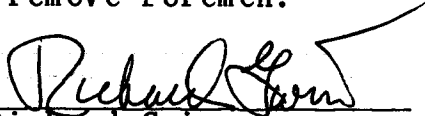
Based on the above findings, I recommend that the Commission order that:

1. Unit 1 be clarified to include the position of construction

H.O. No. 85-10

official; and

2. Unit 2 be clarified to remove foremen.


Richard Gwin
Hearing Officer

Dated: February 19, 1985
Trenton, New Jersey