

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF AVALON,

Public Employer-Petitioner,

-and-

Docket No. CU-82-37

LOCAL 1983, CIVIL AND PUBLIC
EMPLOYEES OF CAPE MAY COUNTY,
NEW JERSEY, IBPAT, AFL-CIO,

Employee Representative.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, clarifies a negotiations unit of Borough of Avalon employees which Local 1983, Civil and Public Employees of Cape May County, New Jersey, IBPAT, AFL-CIO, represents to exclude the Senior Crew Chief position and Crew Chief Ritchie and to include Crew Chief Lind and the Carpenter position. The Chairman, in the absence of exceptions, adopts the Hearing Officer's recommended findings of fact and conclusions of law.

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Appearances:

For the Public Employer-Petitioner, Fineberg & Rodgers,
Esqs. (Robert A. Fineberg, of Counsel)

For the Employee Representative, Gorman & Goodkin,
Esqs. (Bruce M. Gorman, of Counsel)

DECISION AND ORDER

On December 9, 1981, the Borough of Avalon ("Borough") filed a Petition for Clarification of Unit with the Public Employment Relations Commission. The Borough seeks to have three titles excluded from a negotiations unit represented by Local 1983, Civil and Public Employees of Cape May County, New Jersey, International Brotherhood of Painters and Allied Trades, AFL-CIO ("Local 1983"): Senior Crew Chief, Crew Chief, and Carpenter.

1/ The recognition clause in the parties' collective agreement describes the unit as follows: "In accordance with the 'Certification of Representative' of the Public Employment Relations Commission dated April 25, 1972 (Docket No. RO-426) the Borough recognizes [Local 1983] as the exclusive collective negotiations agent for all employees covered in the aforementioned Certification and more specifically including all laborers, truck drivers, mechanical operators, sewer and water maintenance, equipment operators, conservation commission workers, and all other employees in the Public Works Department of the Borough
(Continued)

The Borough contends that the Senior Crew Chief and Crew Chief titles are supervisory and that the Carpenter title is a craft position excluded from the unit in the Certification of Representative the Commission issued in 1972. Local 1983 denies that the Senior Crew Chief and Crew Chief titles are supervisory and asserts that the parties have always treated Carpenters as unit members under the 1972 certification.

On May 24, 1983, the Director of Representation issued a Notice of Hearing.

On July 26, 1983, Hearing Officer Mark Rosenbaum conducted a hearing. The parties examined witnesses and presented exhibits. Both parties submitted post-hearing briefs.

On January 30, 1984, the Hearing Officer issued his report and recommended decision. H.O. No. 84-11, 10 NJPER ____ (¶ ____ 1984). He concluded that the Senior Crew Chief and one of the two Crew Chiefs were supervisors who should be excluded from the unit; that the other Crew Chief was not a supervisor and should not be removed from the unit; and that the Borough could not now object to the unit inclusion of the Carpenter title when the parties since 1972 had consistently treated that title as belonging in the unit.

The Hearing Officer served his report on the parties and informed them that exceptions, if any, were due on or before

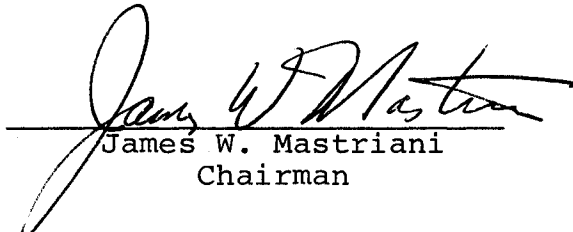
1/ (Continued) of Avalon and excluding office and clerical workers, managerial executives, police, professional and craft employees and supervisors within the meaning of the Act." The above recognition clause replicates the unit description in the Commission's Certification of Representative.

February 14, 1984. Neither party filed exceptions or requested an extension of time.

Pursuant to N.J.S.A. 34:13A-6(f), the full Commission has delegated authority to me to decide this case in the absence of exceptions. I have reviewed the record. The Hearing Officer's findings of fact (pp. 3-7) are accurate. I adopt and incorporate them here. Based on all the circumstances of this particular case and in the absence of exceptions, I adopt the Hearing Officer's recommendations concerning the appropriate unit placement of the employees in dispute.

ORDER

The negotiations unit of Borough of Avalon employees which Local 1983, Civil and Public Employees of Cape May County, New Jersey, IBPAT, AFL-CIO, represents is clarified to exclude the Senior Crew Chief position and Crew Chief Ritchie and to include Crew Chief Lind and the Carpenter position.


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
March 9, 1984

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
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LOCAL 1983, CIVIL AND PUBLIC EMPLOYEES
OF CAPE MAY COUNTY, NEW JERSEY, IBPAT,
AFL-CIO,

Employee Representative.

SYNOPSIS

In a Clarification of Unit proceeding, a Hearing Officer of the Public Employment Relations Commission makes unit placement recommendations with respect to several titles in the Division of Public Works in the Borough of Avalon. The Hearing Officer recommends findings that the Senior Crew Chief and one Crew Chief are supervisors within the meaning of the New Jersey Employer-Employee Relations Act, and that neither established practice, prior agreement nor special circumstances exist which would permit the inclusion of those positions in a negotiations unit which includes non-supervisory personnel. The Hearing Officer also recommends findings that conflicts of interest compel the exclusion of the Senior Crew Chief and one Crew Chief from the negotiations unit represented by Local 1983.

The Hearing Officer recommends a finding that the other Crew Chief employed by the Borough is not a supervisor within the meaning of the Act and should remain in the negotiations unit represented by Local 1983. In so ruling, the Hearing Officer emphasizes the glaring disparities in the responsibilities of the two Crew Chiefs. With respect to the disputed Carpenter title, the Hearing Officer recommends findings that given the lengthy history of including the title in the negotiations unit, the Borough failed to exercise due diligence in identifying this representational issue. Accordingly, in the absence of the assertion of a statutory prohibition which would preclude the inclusion of the Carpenter title in the negotiations unit represented by Local 1983, the Hearing Officer recommends that the Borough's petition should be dismissed.

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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Appearances:

For the Public Employer-Petitioner
Fineberg & Rodgers, Esqs.
(Robert A. Fineberg, Esq.)

For the Employee Representative
Gorman & Goodkin, Esqs.
(Bruce M. Gorman, Esq.)

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

On December 9, 1981, the Borough of Avalon (the "Borough") filed a Petition for Clarification of Unit with the Public Employment Relations Commission (the "Commission") seeking clarification of a negotiations unit represented by Local 1983, Civil and Public Employees of Cape May County, New Jersey, International Brotherhood of Painters and Allied Trades, AFL-CIO ("Local 1983"). The negotiations unit represented by Local 1983 consists of "...all laborers, truck drivers, mechanical operators, sewer and water maintenance, equipment operators, conservation commission workers, and all other employees in the Public Works Department of the Borough of Avalon and excluding office and clerical workers, managerial executives,

police, professional and craft employees and supervisors within the meaning of the [New Jersey Employer-Employee Relations] Act."

(Exhibit A-4, p. 1).

The parties dispute the status of the Senior Crew Chief, Crew Chief and Carpenter titles in the Borough's Division of Public Works. The Borough asserts that the Senior Crew Chief and Crew Chief are supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., (the "Act"), and thus may not be included in a unit of non-supervisory personnel. Local 1983 contends that the titles in question are not supervisory and should remain in the negotiations unit represented by Local 1983. The Borough also contends that conflicts of interest require the removal of the Senior Crew Chief and Crew Chiefs from the negotiations unit represented by Local 1983. With respect to the Carpenter title, the Borough maintains that the Carpenters are craft employees within the meaning of the Act, that craft employees are specifically excluded from the unit in the Certification of Representative issued by the Commission, and that the unit should now be clarified to exclude these employees. Local 1983 argues that, regardless of whether or not they are craft employees, the Carpenters have been and should remain in the negotiations unit represented by Local 1983.

Pursuant to a Notice of Hearing dated May 24, 1983, ^{1/} a hearing was held before the undersigned on July 26, 1983. At the hearing, the parties were given opportunities to examine and cross-examine witnesses, present evidence, and argue orally. Both parties

^{1/} At the request of the parties, the Commission held this petition in abeyance pending possible resolution of the issues in a related court matter. In February, 1983, the Borough requested that the Commission's processing of the matters be resumed.

submitted post-hearing briefs, the last of which was received on December 12, 1983.

Findings of Fact

Based on the entire record in this matter, the undersigned finds as follows:

1. The Borough of Avalon is a public employer within the meaning of the Act and is subject to its provisions.
2. Local 1983 is an employee representative within the meaning of the Act and is subject to its provisions.
3. The Borough seeks a clarification of the collective negotiations unit of its employees represented by Local 1983, namely, the removal of the Senior Crew Chief, Crew Chief and Carpenter titles from that unit. Local 1983 asserts that these positions should remain within the negotiations unit. Accordingly, there is a question concerning the composition of a collective negotiations unit, and the matter is properly before the undersigned for a Report and Recommendations.
4. The Borough of Avalon operates under a Mayor/Council form of government. The Business Administrator, who reports directly to the Mayor, also serves as the Department Head in charge of three Divisions: Public Works, Public Safety, and Revenue and Finance. The three titles in dispute are all located within the Division of Public Works.
5. David Carrick is the Division Head of Public Works and has held that position since February, 1980 (Transcript at p. 106). Carrick's immediate subordinate is the Senior Crew Chief, Joseph

Somers, who has served in that capacity ^{2/} since 1972 (T at pp. 147, 166). Next in the Division's hierarchy are the Crew Chiefs, Conrad Lind and Craig Ritchie, who have held their titles since 1979 and 1981 respectively (T at pp. 203, 150). There are three individuals who hold the disputed Carpenter title (T at p. 56). In total, there are 33 employees, with an additional 15 or so hired during the summer, in the Division of Public Works of this non-Civil Service municipality (T at pp. 17, 76).

6. Commission records indicate that Local 1983 was certified by the Commission as the majority representative of the unit in question in 1972 (Commission file No. RO-426). The recognition clause of the collective agreement between Local 1983 and the Borough, as quoted above, replicates the unit description in the Commission's Certification of Representative. Ritchie testified that the Borough asserted a challenge to the election ballot of the foreman at that time, Harry Baxter (T at p. 146). Commission records indicate that Baxter was not included on the list of eligible employees submitted by the Borough, and that the Borough asserted two challenges at the election. The challenges were not resolved because they were not sufficient in number to affect the results of the election.

7. Testimony establishes that while they share an office next to Carrick's in a trailer at the Public Works Complex, Somers, Ritchie and Lind have different day-to-day responsibilities in the

^{2/} The Senior Crew Chief and Crew Chief titles were created in 1980 as part of the collectively negotiated agreement between the parties. Previously, the positions were known as Foreman titles, and the Foreman title is still commonly used, even by the Crew Chiefs (T at p. 165, Exhibits P-1 and 2).

Division. Somers, the Senior Crew Chief, is primarily responsible for paperwork, responding to citizen complaints, deciding on work assignments, and traveling throughout the Borough to oversee problems and employees (T at pp. 142-144, 186-188). Somers' designation as "Senior Crew Chief" and his attendant responsibilities reflect his many years of meritorious service to the Borough as well as his age (T at pp. 69, 123 and 190). While Somers spends some time with the employees on job sites, and has twelve employees for whom he is directly responsible (T at p. 27), Crew Chief Ritchie has more direct contact with more employees. Ritchie informs the employees of their daily assignments, works with them and monitors their performances (T at pp. 142-144, 153-155). Lind, the other Crew Chief, has little day-to-day contact with the rest of the Division. He does not work with a specific crew of men; instead, Lind works by himself, performing courier responsibilities throughout the Borough and Cape May County, and reacting to specific complaints (T at pp. 142, 204-205).

8. The Division of Public Works employs an annual written evaluation process for its employees for use in promotion, retention and pay increase decisions (T at pp. 30-32, 36). Employees complete self-evaluation forms, followed by written evaluation by both Somers and Ritchie (Exhibits P-1 and 2). Individual employees discuss these evaluations with Somers, Ritchie and Carrick, whereafter a review is conducted between the employee, Carrick and Business Administrator Andrew Bednarek (T at pp. 30-32).

9. Discipline of Borough employees is conducted pursuant

to the Borough's Personnel Ordinance (T at pp. 48-50). Firing or suspension may only be ordered by the Business Administrator, with the approval of the Mayor (T at p. 96), while minor discipline and recommendations for suspension or firing may be effected by supervisors and the Division Heads (T at pp. 58-60, 113-118, and 155-156). Division employees who have been disciplined may grieve such discipline in accordance with the collectively negotiated agreement (T at pp. 98-100). The grievance procedure provides that the first step is to submit the grievance in writing to Local 1983's Shop Steward, who files one copy with the Borough Administrator and one copy with the employee's immediate supervisor. An attempt is then made to resolve the grievance with one's immediate supervisor. The grievance procedure provides for further appeals to the Department Head and to an arbitrator (Exhibit A-4, pp. 3-4).

10. Senior Crew Chief Somers is the Shop Steward of Local 1983, and Crew Chief Lind is Assistant Shop Steward (T at pp. 55 and 166).

11. The hiring needs of the Borough's Division of Public Works are determined through consultations between the Division Head, the Department Head and the Mayor. Interviews are conducted by some combination of those three individuals, with ultimate hiring decisions made by the Mayor (T at pp. 100-101 and 128-131). After appointment by the Mayor, a new employee in the Division of Public Works undergoes a probationary period of four months, whereafter "...the employee shall be evaluated by the Department Head to determine whether he shall be granted permanent status or dismissed." Exhibit A-4, p. 31.

12. The record also establishes that the parties have considered the Carpenter title to be in the unit since the PERC certification in 1972 (T at pp. 83-84, and 121), notwithstanding the exclusion of "craft employees" from the Certification of Representative issued by the Commission.

13. The Carpenters have their own shop in the Public Works complex; there is also a mechanic shop and welding shop (T at p. 122). The Carpenters work primarily by themselves and perform a wide range of skilled labor without supervision (T at pp. 55-57, 119-122 and 138-141). The Carpenters have also performed work unrelated to carpentry for the Borough, such as snowplowing (T at pp. 197-200).

Analysis

I. Supervisor Status (Senior Crew Chief and Crew Chief Titles)

N.J.S.A. 34:13A provides, in pertinent part:

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

6(d)...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 (1) both supervisors and nonsupervisors....

The Borough asserts that the Senior Crew Chief and Crew Chiefs are supervisors within the meaning of the Act. Noting that Local 1983 represents nonsupervisors, the Borough argues that, pursuant to the above provisions, Local 1983 may not represent the

Senior Crew Chief and Crew Chiefs for the purpose of collective negotiations. The Borough also argues that these positions should be clarified out of the negotiations unit because the predecessor Foreman position was excluded from the unit in the 1972 election. As noted above, Harry Baxter held the Foreman title in 1972, his vote was challenged at the election, and that challenge was not resolved since it was not determinative of election results. In subsequent years, employees holding the Foreman title (and either Crew Chief and Senior Crew Chief titles) were clearly considered part of the bargaining unit (see, e.g. Exhibit A-3, Appendix A, listing Crew Chief and Senior Crew Chief titles and their salary grades). Accordingly, the Borough waived its right to rely on any prior exclusion of this title when it agreed to include the title in subsequent contracts. (c.f. Bergen Pines County Hosp., D.R. No. 80-20, 6 NJPER 61 (¶11034 1980), where a majority representative was estopped from seeking to add a title to its negotiations unit when it executed two collective agreements which excluded that title.)

At the same time, it does not follow that the Senior Crew Chief and Crew Chief titles must remain in the unit based on their prior inclusion in the unit. While this result may obtain in many circumstances (see discussion of the Carpenter title, infra), it cannot occur if a statutory prohibition applies. Thus, regardless of the representational history of a title, a Clarification of Unit Petition claiming that the above-cited provisions of the Act are violated by the inclusion of a supervisor in a unit of non-

supervisors is always appropriate for Commission review. ^{3/}

It is undisputed that the negotiations unit represented by Local 1988 includes nonsupervisory employees (Exhibit A-4, p. 1). Local 1983 does not contend, nor does the record suggest, that "established practice," "prior agreement" or "special circumstances" exist which could permit a supervisor to be represented by Local 1983 pursuant to N.J.S.A. 34:13A-5.3 and 6(d). ^{4/} Thus, if the Senior Crew Chief and Crew Chiefs are supervisors within the meaning of the Act, they must be excluded from the negotiations unit represented by Local 1983.

Preliminarily, the undersigned notes that a determination of supervisory status requires far more than a job description or verbal assertion stating that an employee may have the power to hire, discharge, discipline or effectively recommend the same:

[T]he bare possession of supervisory authority without more is insufficient to sustain a claim of status as a supervisor within the meaning of the Act. In the absence of some indication in the record that the power claimed possessed is exercised with some regularity by the employees in question, the mere "possession" of the authority is a sterile attribute unable to sustain a claim of supervisory status.

Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358, 360

(1976). With this caveat in mind, the undersigned reviews the re-

^{3/} Similarly, a Clarification of Unit Petition claiming that employees are confidential or managerial executives within the meaning of the Act is always appropriate for Commission review, as would a Clarification of Unit Petition based on the Act's prohibition of including policemen in a unit with non-policemen.

^{4/} The record clearly indicates that there was no established negotiations relationship between the Borough and Public Works employees prior to the passage of the Act in 1968 which would demonstrate "established practice." T at pp. 184-186.

sponsibilities and actual job performance of the Senior Crew Chief and Crew Chiefs to determine whether or not they are supervisors within the meaning of the Act.

The record reveals that neither the Senior Crew Chief nor the Crew Chiefs have an established role in the hiring of Borough employees. As noted above, the Senior Crew Chief and Crew Chiefs do not interview candidates for employment by the Borough, and do not participate in the ultimate hiring decisions. While the Senior Crew Chief (T at p. 172) and one of the Crew Chiefs (T at pp. 159-162) testified that they each recommended a candidate who was subsequently employed by the Borough, those recommendations did not constitute formal, regular and effective participation in the hiring process. See, e.g. Township of Teaneck, E.D. No. 23 (1971) and Brookdale Community College, D.R. No. 78-10, 4 NJPER 32 (¶4018 1977).

With respect to the roles of the Senior Crew Chief and Crew Chiefs in the firing of personnel, the record reveals that the Crew Chiefs have had no involvement in that process in their capacities as Crew Chiefs (T at 156 and 204). ^{5/} Somers, the Senior Crew Chief, testified that while he has informed at least ten employees of their discharge from Borough employment, he did so only at the instructions of his supervisors (T at pp. 167-168). One of the discharged employees was a summer helper. Somers testified that the summer helper refused to perform a job assigned

^{5/} Crew Chief Ritchie was involved in discussions resulting in the discharge of one employee; however, Ritchie's contribution to those discussions was strictly based on personal knowledge about the employee gained from prior employment in a different division in the Borough (T at pp. 115-116). Similarly, Lind participated in one termination matter involving a member of his family (T at pp. 47-48 and 206).

to him by Somers. When Somers informed the Mayor of this event, the Mayor told Somers to fire the employee (T at 167-168).

The other discharged employees were fired over a two day period in January 1982 for failing to work assigned overtime. Division Director Carrick testified that he and Somers informed some of the men on January 15 that they would be fired if they refused to work the assigned overtime hours, and that Carrick alone informed additional employees of their discharge on the following day. Carrick further testified that the actual decision to fire the employees was made by the Mayor (T at pp. 132-138).

The events described above do not support a finding that the Senior Crew Chief effectively recommends the firing of personnel. While the Senior Crew Chief has carried out the orders of his supervisors and informed individuals of their termination, such actions do not evidence a statutory supervisor. Instead, the record indicates that the Senior Crew Chief has never recommended that anyone in the employ of the Borough be fired (T at pp. 182-184).

The remaining indicator of supervisory status is whether or not the employees in question discipline employees or effectively recommend the same. Actual discipline is typically manifested by prompt action at the work site. See, e.g. Borough of Metuchen, D.R. No. 78-27, 3 NJPER 395 (1977). Effective recommendation of discipline can be demonstrated by the employee who has "...primary responsibility for evaluating..." employees "...where the evaluations are instrumental..." in effectuating various personnel actions. Emerson Board of Education, D.R. No. 82-13, 7 NJPER 571 (¶12255 1981); see also State of New Jersey and Local 194, IFPTE, D.R. No. 83-11, 8 NJPER 586 (¶13271 1982).

The record reveals that Senior Crew Chief Somers has an established role in the evaluation and discipline of personnel. He completes annual evaluation forms for twelve employees in his charge (Exhibit P-1), and reviews the performance of new employees during their probationary periods (T at p. 32). The record reveals that two employees have been promoted to permanent status after four months on the recommendations of Somers (Exhibit P-4 and P-5; T at p. 35). In the case of two probationary employees, Somers recommended that their probationary periods be extended from four to five months (T at p. 179; Exhibit P-3). Thereafter, Somers and Division Director recommended that these employees be granted permanent status, which was effected by the Borough Administrator (Exhibit P-3; T at pp. 33-35). In the case of another probationary employee, Somers extended the employee's probationary employment for an extra two months "...due to the fact that he was...late a lot and anybody who is late is an enemy of mine...." (T at p. 168). Somers testified that the employee performed well during the additional probationary period, and was granted permanent status (T at p. 168). When extending the probationary periods of these three employees, Somers first checked with Division Director Carrick: "I told him what was happening. I told him what I was recommending and he said okay." (T at pp. 178-179).

Somers has also disciplined an employee for being absent without contacting his office (Exhibit P-10, T at pp. 41-42 and 181-182). Somers testified that he discussed the problem with Carrick, who instructed Somers to write up a memorandum and hand

it to the employee (T at p. 182). The record is not clear as to who decided that a two day suspension was appropriate for the described offense, but there can be no doubt that Senior Crew Chief Somers brought the problem to the attention of the Division Director, and that Somers issued the disciplinary action. The discharge of the summer helper, discussed supra, is analogous.

As noted above, Somers has less direct contact with the workers than Crew Chief Ritchie by virtue of his responsibilities for Division paperwork. Nonetheless, it is apparent that Senior Crew Chief Somers is still active in the evaluation and discipline of employees, and that, while his recommendations are subject to review, Somers' recommendations are instrumental in achieving the end result (i.e. a positive or adverse personnel action). In fact, the record does not reveal a single instance where a personnel recommendation by Somers was not followed by his superiors. Accordingly, the undersigned concludes that the Senior Crew Chief effectively recommends discipline of employees in the Division of Public Works, is a supervisor within the meaning of the Act and thus should be excluded from the negotiations unit represented by Local 1983.

The undersigned proceeds to consider the respective roles ^{6/}

^{6/} Given the disparity in the responsibilities of the two Crew Chiefs, the undersigned is compelled to review the roles of Ritchie and Lind separately. Inevitably, this approach leads to the possibility that two people who hold the same title may have different representational status. While the Commission and its agents have shown reluctance to split a title's representational status (see, e.g. City of Newark and Newark Superior Officers Assn ., D.R. No. 82-21, 7 NJPER 645 (¶12291 1981), request to reopen record den. P.E.R.C. NO. 82-97, 8 NJPER 298 (¶13131 1982), appeal dismissed App. Div. Docket No. A-4626-81T2 (1982)), nonetheless titles have been split where circumstances are particularly compelling. See,

(continued)

of the two Crew Chiefs in the discipline of personnel. Crew Chief Ritchie holds the traditional foreman role in the Division of Public Works. He informs employees of their daily work assignments and spends a substantial part of his day with the employees on various work sites (T at pp. 143 and 153-155). Ritchie testified that he has issued warnings to employees who violate safety rules and to employees who are chronically tardy (T at pp. 155-156). Like Somers, Ritchie is responsible for completing annual evaluation forms for employees in his crew (Exhibit P-2) and participates in the annual evaluation conference with each employee, Division Director Carrick and Senior Crew Chief Somers (T at pp. 30-31). Since becoming Crew Chief in 1981, Ritchie has made several recommendations for promotions which have been effected by the Borough (T at pp. 158-159).

The record clearly indicates that Ritchie has daily responsibility for monitoring the job performance of employees and facilitating efficient operations. Ritchie also has an established and regular role in the evaluation of employees and in recommending personnel actions. When compared with Senior Crew Chief Somers, Crew Chief Ritchie appears to have a lesser or subordinate role in many of these functions. However, these differences between Somers and Ritchie reflect their disparate ages and levels of experience. Crew Chief Ritchie is receiving additional training in

6/ (continued)

e.g. Bloomfield Bd/Ed, D.R. No. 82-56, 8 NJPER 383 (¶13175 1982) and State of New Jersey and N. J. State College Locals, D.R. No. 82-35, 8 NJPER 87 (¶13036 1982). Ultimately, in Clarification of Unit proceedings, the Commission and its agents must always look beyond job titles to job responsibilities, particularly where, as here, the titles are not established pursuant to Civil Service regulations.

supervision through rigorous coursework (Exhibit P-8) and by daily contact with Division Director Carrick and Crew Chief Somers (T at pp. 154-156). Based on all the above factors, and in anticipation ^{7/} of Ritchie's continuing and increasing responsibilities in the evaluation and discipline of employees, the undersigned concludes that Crew Chief Ritchie is a supervisor within the meaning of the Act and should be removed from the negotiations unit represented by Local 1983.

The undersigned proceeds to review the role of Crew Chief Lind in the discipline of employees. As noted above, Crew Chief Lind is not responsible for a specific crew of employees, and has little day-to-day contact with members of the negotiations unit. Unlike Somers and Crew Chief Ritchie, Crew Chief Lind does not complete evaluation forms, does not participate in annual evaluation conferences, and does not participate in decisions concerning the retention or promotion of employees (see footnote 5). While Lind shares an office with Somers and Ritchie, and has completed a course in time management paid for by the Borough (Exhibit P-9), the record does not reveal any relationship between these facts and any supervisory responsibilities within the meaning of the Act. Instead, the testimony of Senior Crew Chief Somers and Crew Chief Ritchie indicates that they (along with Division Director Carrick) are responsible for the supervision of employees, without daily or even periodic assistance from Crew Chief Lind (T at 153-156 and 189-190). Business Administrator Bednarek confirmed that he

^{7/} The Commission's Director of Representation has held that anticipated responsibilities is a relevant factor in Clarification of Unit proceedings. Linden Free Public Library, D.R. No. 82-32, 8 NJPER 76 (¶13031 1981).

occasionally inspects work by the Division, in the company of Carrick, Somers and/or Ritchie, but without reference to Crew Chief Lind (T at pp. 66-67). Beyond testimony of Business Administrator Bednarek and Division Director Carrick and documentary evidence ^{8/} which generally categorized Lind with Somers and Ritchie, the only specific record reference to Lind performing supervisory responsibilities came from Carrick. Describing Crew Chief Lind's responsibilities, Carrick testified:

...we use him to relay a lot of information out of the Borough Hall right now, and it's a lot of records that go to Mr. Fineberg's office or to different lawyers offices and all over the county.

When Mr. Lind isn't doing that, he'll supervise people. Generally, he doesn't have a set crew that he overlooks, but he at different times comes and tells me that that guy down the road is goofing off, you better see where Craig is or Joe is or stop himself -- he will stop it himself or tell him about the problem, whereas Mr. Ritchie and Mr. Somers -- they have specific crews that they work with...
[T at p. 142]

This testimony hardly establishes a regular and meaningful role by Crew Chief Lind in the discipline of employees. Instead, along with all the factors noted above, it confirms that Crew Chief Lind is not a supervisor within the meaning of the Act, and should remain in the negotiations unit represented by Local 1983.

II. Conflict of Interest (Senior Crew Chief and Crew Chief Titles)

The principles of conflict of interest were established by the New Jersey Supreme Court in Bd/Ed of W. Orange V. Wilton, 57 N.J. 404 (1971), where the Court held:

^{8/} Exhibit P-11 states that Lind would assist in "...supervising all employees."

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. 57 N.J. at 425.

The Court also stated:

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.

In applying these principles, the Commission's Director of Representation has removed employees from negotiations units where potential conflict of interest existed due to both evaluative ^{9/} and disciplinary^{10/} functions. As noted above, Senior Crew Chief Somers and Crew Chief Ritchie have regular and instrumental roles in the evaluation and discipline of employees. Inevitably, the supervisory roles of Somers and Ritchie in the formal evaluation of employees and the discipline of employees lead to conflicts with their fellow negotiations unit members. As Crew Chief Ritchie testified,

...I don't want to discipline as a foreman while belonging to the union...I have two obligations. I have an obligation, like I said, of -- to my Union brother, and I have an obligation to the Borough. And I can't make that distinction. [T at p. 164]

Somers, of course, is similarly situated. His conflict is intensified by the fact that he is the Shop Steward of Local 1983 and thus is involved in the filing of all grievances by negotiations

^{9/} See, e.g. Ridgewood Bd/Ed and Ridgewood Ed/Assn., D.R. No. 80-33, 6 NJPER 209 (¶11102 1980).

^{10/} See, e.g. Bd/Ed of the Boro of Paramus and Ed/Assn. of Paramus, N.J.E.A., D.R. No. 82-7, 7 NJPER 556 (¶12247 1981).

unit employees, while he may also be the "immediate supervisor" at the first step of the grievance procedure (Exhibit A-4, pp. 3 and 4). Accordingly, the undersigned concludes that a "reasonable foreseeability" ^{11/} of potential substantial conflict exists between Senior Crew Chief Somers and Crew Chief Ritchie and the rest of the negotiations unit represented by Local 1983 which compels the removal of Senior Crew Chief Somers and Crew Chief Lind from the negotiations unit.

In addition to the potential substantial conflict of interest, the record reveals that circumstances causing an actual substantial conflict of interest occurred in January, 1982. Certain members of the negotiations unit represented by Local 1983 refused to work assigned overtime (T at pp. 132-138). Division Director Carrick testified that he was advised of the pending action by Crew Chief Ritchie (T at pp. 133-134). Senior Crew Chief Somers and Crew Chief Ritchie worked through the evening, while many other unit members did not work and were terminated by the Borough (see discussion at p. 11). ^{12/}

The above facts clearly indicate that Senior Crew Chief Somers and Crew Chief Ritchie were placed in actual conflicts of interest as envisioned in Wilton: Their responsibilities to the Borough conflicted with their loyalties to their fellow unit members. When reporting the imminence of the job action to supervisors, working in the absence of their peers, and informing peers of their

^{11/} City of Trenton, D.R. No. 83-33, 9 NJPER 382 (¶14172 1983), appeal withdrawn A-5701-82T3 (December 5, 1983).

^{12/} Crew Chief Lind also stayed and worked that evening. However, since Lind is not a supervisor, and does not have a crew of employees in his charge, he does not have any special loyalty to management which could conflict with his loyalty to his fellow negotiations unit members.

discharge, Somers and Ritchie had to choose between conflicting loyalties. Their decisions were critical to the continuing operation of their department, and thus posed substantial conflicts.

The undersigned does not suggest that Crew Chief Somers and Crew Chief Ritchie did or would compromise their positions of responsibility based upon pressure from their peers. Instead, it appears that Somers and Ritchie responded to these situations as the Borough would have them react. However, conflict of interest is not a concept which turns on the integrity of the individual holding a position in question. Instead, conflict of interest relates to the position itself; if there is a substantial conflict of interest which compels the exclusion of the position from the negotiations unit, the integrity of the individual who holds the position is irrelevant. Accordingly, due to the potential and actual conflicts described above, the undersigned determines that a substantial conflict of interest exists which compels the exclusion of Senior Crew Chief Somers and Crew Chief Ritchie from the negotiations unit represented by Local 1983.

III. Carpenter Title

The Borough also seeks the removal of the Carpenter title from the negotiations unit represented by Local 1983. Noting that the Certificate of Representative signed by the Commission in 1972 specifically excluded craft employees from the Unit (Exhibit A-5), the Borough argues that the Carpenters are craft employees and that the unit should now be clarified to exclude these employees.

There can be no doubt that, notwithstanding the exclusion of craft employees from the unit in the Certificate of Representative,

the parties have previously agreed to the inclusion of the Carpenters title in the unit. For example, the collective agreement between the parties for 1980-81 contains class specifications and a salary range for the title (Exhibit A-3). Testimony confirms that the Carpenters have always been in the unit (T at pp. 83-84, 121).

There is no evidence in the record to indicate that the inclusion of the Carpenters in the unit has created instability or managerial difficulties, nor that the Borough has previously objected to their inclusion in the unit, nor any evidence of inadequate representation of the Carpenters by Local 1983. Thus, the Borough seeks to remove the Carpenter title from the negotiations unit represented by Local 1983, notwithstanding the existence of a stable negotiations history as concerns the Carpenters of over eleven years.

As noted above in the discussion concerning the other disputed titles in this matter, a Clarification of Unit petition concerning titles which are indisputably included in a negotiations unit is always timely if a statutory exclusion is asserted. However, if no statutory exclusion is claimed with respect to the unit placement of a previously existent and undisputed title, a Clarification of Unit petition is only appropriate in two circumstances:

1) where the petitioner claims a change of circumstances for a title which negates the prior community of interest with the negotiations unit. (Clearview Reg. High School Bd/Ed, D.R. No. 78-2), and

2) where the petitioner has not had sufficient time to identify appropriate unit status for the employees in question.

Bergen Pines Hospital, D.R. No. 80-20, 6 NJPER 61 (¶11034 1980). 13/

In the instant matter, the Borough does not seek the removal of the Carpenter title from the negotiations unit based on a statutory exclusion. While the Act provides that craft employees are entitled to vote on whether they wish to be included in a unit with non-craft employees, this is not a statutory exclusion which is analogous to the Act's prohibition against, for example, the inclusion of managerial executives in a collective negotiations unit. 14/

Since the instant Petition does not assert a statutory prohibition, it must meet one of the other criteria reviewed above to effect the removal of a previously existent title. However, the Borough does not assert that the Carpenter title has changed in scope so as to negate the previous community of interest with the negotiations unit represented by Local 1983. To the contrary, both Business Administrator Bednarek and Division Director Carrick testified that the functions performed by the Carpenters have always been performed by unit members with that title (T at pp. 83 and 121). Nor

13/ While Bergen Pines Hospital involved a Clarification of Unit Petition by a majority representative seeking to add a previously existent title to its negotiations unit, its holding should apply equally to public employers which file CU petitions seeking to remove previously existent titles from negotiations units for reasons other than statutory exclusions or changed circumstances: A party to a collective negotiations agreement must exercise due diligence in determining the appropriate unit status of a title, and, having neglected this responsibility, cannot cure its neglect through Clarification of Unit proceedings.

14/ Moreover, assuming arguendo that the Carpenters are craft employees as defined by the Commission's Rules (N.J.A.C. 19:10-1.1), the vote for inclusion in a unit with non-craft employees is the craft employees' option to assert, not the Borough's. The record is devoid of any evidence of efforts by the Carpenters to exercise a craft option.

can the Borough claim that the Clarification of Unit Petition is appropriate as to the Carpenter title due to an insufficient time period for the identification of the title's lack of community of interest with the rest of the negotiations unit. Instead, the lengthy history of including the Carpenter title in the negotiations unit, as well as the numerous contracts executed during that time frame, establishes a lack of due diligence by the Borough in identifying this representational issue. Bergen Pines Hospital, supra.

Accordingly, the undersigned concludes that the Borough's Petition for Clarification of Unit with respect to the Carpenter title is not an appropriate application and should be dismissed. ^{15/}

Recommendations

For the above-stated reasons, the undersigned recommends the following findings:

1. The Senior Crew Chief employed by the Borough of Avalon is a supervisor within the meaning of the Act; neither established practice, prior agreement nor special circumstances exists which would allow the inclusion of the Senior Crew Chief position

^{15/} In so ruling, the undersigned does not decide the question of whether or not the Carpenters are craft employees within the meaning of the Commission's Act and Rules. The undersigned notes the record contains ample evidence to decide that issue should the Commission deem it necessary. Assuming arguendo that the Clarification of Unit Petition with respect to the Carpenter title is appropriate, and that the Carpenters are craft employees within the meaning of the Commission's Act and Rules, the undersigned believes that private sector and Commission precedent compel the retention of the Carpenters in Local 1983's negotiations unit so as not to disturb an existing, stable negotiations relationship. See, e.g. La-Z-Boy Chair Co., 235 NLRB 77, 97 LRRM 1490 (1978); Malinckrodt Chemical Works, 62 NLRB 387, 64 LRRM 1011 (1966), Englewood Bd/Ed, P.E.R.C. No. 82-25, 7 NJPER 516 (¶12229 1981).

in Local 1983's negotiations unit, which includes non-supervisors; and the Senior Crew Chief must therefore be excluded from the negotiations unit represented by Local 1983.

2. Crew Chief Ritchie employed by the Borough of Avalon is a supervisor within the meaning of the Act; neither established practice, prior agreement nor special circumstances exists which would allow the inclusion of Crew Chief Ritchie's position in Local 1983's negotiations unit, which includes non-supervisors; and Crew Chief Ritchie must therefore be excluded from the negotiations unit represented by Local 1983.

3. Potential and actual substantial conflicts of interest exist which compel the removal of the Senior Crew Chief and Crew Chief Ritchie from the negotiations unit represented by Local 1983.

4. Crew Chief Lind is not a supervisor within the meaning of the Act, does not have potential or actual substantial conflicts of interest with members of the negotiations unit represented by Local 1983, and should remain in Local 1983's negotiations unit.

5. That portion of the Borough's Clarification of Unit Petition which seeks to remove the Carpenter title from Local 1983's negotiations unit is inappropriate and should be dismissed.

Respectfully submitted,



Mark A. Rosenbaum
Hearing Officer

DATED: January 30, 1984
Trenton, New Jersey