

P.E.R.C. NO. 2000-100

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Public Employer,

-and-

Docket No. RO-2000-19

ASSOCIATION OF GOVERNMENT
ATTORNEYS,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission denies the City of Newark's request for review of D.R. No. 2000-11. In that decision, the Director of Representation ordered an election among attorneys employed by the City. In rejecting the City's arguments concerning the Rules of Professional Conduct, the Commission concludes that there is no inherent or obvious tension between collective negotiations over terms and conditions of employment and the delivery of professional services. The Commission further concludes that the New Jersey Constitution guarantees all public employees the right to organize and elect representatives and that the New Jersey Employer-Employee Relations Act covers professional employees, including attorneys, not otherwise covered by a specific statutory exclusion. The Commission finds that the City has not presented any case law which suggests that the Rules of Professional Conduct prohibit collective representation for its attorneys. The Commission also finds that the City has not presented any extraordinary circumstances warranting review of the Director's determination on the showing of interest or any showing that the Director made substantial factual errors in his determination that the attorneys are not 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.

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Appearances:

For the Public Employer, Genova, Burns & Vernoia,
attorneys (Angelo J. Genova, of counsel)

For the Petitioner, Supino & Jacobs, attorneys (Robert J.
Rudy, III, of counsel)

DECISION

On May 2, 2000, the City of Newark requested review of
D.R. No. 2000-11, 26 NJPER ____ (1 ____ 2000). In that decision,
the Director of Representation ordered an election among attorneys
employed by the City, including assistant corporation counsels in
the law department, public defenders and zoning attorneys.
Excluded are the first assistant corporation counsel, section
chiefs in the law department, and assistant corporation counsel
assigned to the labor section and development department.

The City also requested a stay of the election which the
Chair denied. On May 17, the Association of Government Attorneys
("AGA") was selected to be the majority representative by a

majority of the eligible employees voting in the election.

The City argues that the Rules of Professional Conduct ("RPC") governing attorneys preclude the City's attorneys from being represented for purposes of collective negotiations. Specifically, the City contends that permitting the City's attorneys to organize would create an appearance of impropriety and divided loyalties and limit its right to be zealously represented by its own attorneys.

In requesting review, the City argues that the cases cited by the Director do not focus on an attorney's ethical and professional responsibilities to his or her employer/client. Accordingly, it argues that we must review the Director's decision and direction of election. The City also argues that representation will create an impermissible conflict of interest similar to the conflict that municipal attorneys have in representing clients in the same municipality. The City then states that we do not have the authority to resolve the conflict. It argues that the Judiciary possesses the exclusive authority to adopt rules governing attorney activity. It contends that we must grant review and "should rule on the issue to preserve the City's ability, if necessary, to appeal the Commission's decision."

The City also argues that the AGA abused our representation process by filing a defective showing of interest and misleading the employees who signed the petition in support of

the showing of interest. It contends that the Director erred in declining to investigate the allegations and choosing to conduct an election.

The City also contends that the unit has been reduced since the filing of the petition and that there is a question as to whether the showing of interest is deficient.

Finally, the City argues that the City's attorneys are managerial executives.

The City requests oral argument and/or a hearing. We deny those requests.

On May 10, 2000, the AGA filed a response opposing review. It argues that the Legislature did not intend to exclude attorneys from the collective negotiations process and that the hypothetical conflicts offered by the City are pure speculation. It notes that the City has not requested an advisory ethics opinion. As for the alleged defects in the showing of interest, the AGA asserts that they can best be answered by the election.

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. [N.J.A.C. 19:11-8.2]

The City first raises the RPC. No rule prohibits an attorney from being a member of a negotiations unit. While the Judiciary must be the ultimate judge of the RPC requirements, we see no inherent or obvious tension between collective negotiations over employee terms and conditions of employment and the delivery of professional services. We note in this regard that all employees, represented or unrepresented, have some element of self-interest in their relationship with their employer; that element does not mean that an employee will render his or her services less competently or ethically. We also note that the New Jersey Constitution guarantees all public employees the right to organize and select representatives of their own choosing and that the New Jersey Employer-Employee Relations Act covers professional employees, including attorneys, not otherwise covered by a specific statutory exclusion. N.J. Const. art. I, ¶19 (1947); N.J.S.A. 34:13A-6(d); N.J.A.C. 19:10-1.1.

No New Jersey case addresses this issue. The Supreme Courts of California and Florida, however, have rejected similar arguments. Santa Clara Cty. Counsel Attorneys Ass'n v. Woodside, 7 Cal.4th 525, 869 P.2d 1142 (1994); Chiles v. State Employees Attorneys Guild, 734 So.2d 1030 (Fla. 1999). So has the Commonwealth Court of Pennsylvania. City of Philadelphia v. PLRB, 163 Pa. Commw. 628, 641 A.2d 709 (1994). The City has not

presented any contrary case law that suggests that the RPC, per se, prohibit collective representation for its attorney employees.

As for the City's arguments regarding the showing of interest, the Director exercised his exclusive authority in this area and there are no extraordinary circumstances warranting review of his determinations.


Finally, the City argues that we should review the Director's determination that the attorneys are not managerial executives even though it elected not to present evidence supporting that position. Reliance on an attorney's professional advice regarding a legal matter does not necessarily render an attorney a managerial executive. Cf. Newark Housing Auth., P.E.R.C. No. 93-10, 18 NJPER 432 (123195 1992). Absent a showing that the Director made substantial factual errors, we cannot second-guess his determination.

Under all these circumstances, we deny the City's request for review.

ORDER

The City of Newark's request for review of D.R. No. 2000-11 is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner McGlynn abstained from consideration. None opposed.

DATED: May 25, 2000
Trenton, New Jersey
ISSUED: May 26, 2000