P.E.R.C. NO. 30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CHERRY HILL TOWNSHIP, DEPARTMENT OF PUBLIC WORKS

Public Employer

and

Docket No. R-92

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 1965, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Pursuant to a Notice of Hearing to resolve a question concerning the representation of certain employees of the Township of Cherry Hill, a hearing was held on August 5, 1969 before Hearing Officer Theodore A. Winard at which all parties were given the opportunity to present evidence, examine and cross-examine witnesses and argue orally. Thereafter, on November 7, 1969, the Hearing Officer issued his Report and Recommendations. Exceptions were filed by the Public Employer and by the Cherry Hill Association of Public Works Employees.[1/] The Commission has considered the record, the Hearing Officer's Report and Recommendations, the Exceptions and supporting briefs and on the facts in this case finds:

1. The Township of Cherry Hill is a Public Employer within the meaning of the Act and is subject to its provisions.

1/ This organization did not make an appearance at the hearing, but subsequent to its close, moved to intervene. The Hearing Officer recommended that the motion be denied.

2. The American Federation of State, County, and Municipal Employees Local 1965 is an employee representative within the meaning of the Act.

3. The Employer refuses to recognize Petitioner as the exclusive negotiating representative for certain of its employees; accordingly, a question concerning the representation of public employees exists and the matter is properly before the Commission for determination.

4. The Hearing Officer's findings and recommendations are hereby adopted with the following modifications:

The parties are in basic agreement and the Commission finds that an appropriate collective negotiating unit is: "All blue collar employees of the Department of Public Works of the Township of Cherry Hill, but excluding managerial executives, office clerical, professional and craft employees, policemen and supervisors within the meaning of the Act."[2/]

The Hearing Officer found the classifications of Foreman and Shade Tree Maintenance II to be non supervisory and included them in the unit. The Employer contends that this disposition is erroneous in both law and fact, claiming that the Act nowhere defines the attributes of a supervisor, and further that, even assuming the

2/ This unit description differs from that found by the Hearing Officer in that it does not exclude the employees of the Division of Engineering Services. Petitioner seeks a department-wide blue collar unit. The Division of Engineering Services is within that department, but the parties agree that no blue collar employees are presently working in that division. Consistent with a finding that an all blue collar departmental unit is appropriate, we do not exclude all Engineering Service employees inasmuch as blue collar employees may subsequently be employed within that division; if so, they would properly be a part of the unit.

accuracy of the Hearing Officer's "definition", he apparently ignored certain uncontroverted evidence clearly contrary to his findings.

It is true that section 13A-3 of the Act, entitled "Definitions", does not contain a definition of the term "supervisor". Section 13A-5.3 does provide that supervisors "having the power to hire, discharge, discipline or to effectively recommend the same..." shall not be represented by an employee organization which admits "nonsupervisory" personnel to membership, absent certain conditions not pertinent here. The Employer argues that this language is not a definition but simply a modification which indicates a class of supervisors who are subject to the prohibition. It further argues that, without a statutory definition, the Commission should broadly construe the term, and for guidance it urges consideration of the definition found in the National Labor Relations Act. The clear implication, from the above quoted portions, of the Act's disjunction between non-supervisory personnel and those having the ennumerated authorities is that those employees without such authority are not supervisors. Even if it were otherwise, the Act, by this delineation, has obviously marked out separate areas of interest and a faithful construction would seem to require the conclusion that those having some, but not these specific authorities, are, for the purposes of representation by an employee organization, more closely allied in interest with non-supervisory employees. On the other hand, were we to borrow the definition from the federal act, there could result the anamolous situation that one having the authority to assign and transfer, for example,

could not normally be included by the Commission in the same unit with nonsupervisors, by virtue of the proscription in Section 13A-6(d), but he could be represented in negotiations by an organization which admits nonsupervisory members. It is the judgment of the Commission that the Act does, in effect, define a supervisor to be one having the authority to hire, discharge, discipline or to effectively recommend the same.

The Employer's next contention is that the uncontroverted evidence establishes that precisely this authority is held by those whom it seeks to exclude as supervisors. It cites the testimony of its witness who affirmed that those in question did have one or more of the necessary powers. As the Hearing Officer's Report more fully details, the witness is without knowledge of the extent, if any, to which any of these powers is regularly exercised by those in question. It is clear from the record that the Municipal Manager has final authority and he receives effective recommendations from the Director. The "foremen" in question are at the bottom of the chain of command. While the record indicates that they have the authority claimed, it does not establish that they regularly exercise any of them. Indeed, the weight of the evidence is to the contrary, as the Hearing Officer found. In this situation, where the Municipal Manager and the Director, whose status is not in dispute, regularly exercise the authority claimed for the foremen, the foremen's mere possession of such is a sterile attribute and is not sufficient to establish them as supervisors. Accordingly, they are included in the unit, as well as the individual classified as Shade Tree Maintenance II.

The Employer finally excepts to the recommended inclusion of probationary employees on the basis, not that there exists a statutory or policy bar to their inclusion, but rather that it is inappropriate to include them. The Commission has considered this exception and the reasons therefor and finds it to be without merit. Accordingly, it adopts the Hearing Officer's recommendation and includes probationary employees in the unit.

The Commission has also considered the exceptions filed by the Cherry Hill Association of Public Works Employees to the recommended denial of its motion to intervene. That motion, filed after the close of the hearing and supported by designations which postdate the hearing, is denied as being untimely.

5. The Commission directs that a secret-ballot election shall be conducted among the employees in the unit found appropriate. The election shall be conducted as soon as possible but no later than thirty (30) days from the date set forth below.

Those eligible to vote are employees set forth in Section 4 who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or temporarily laid off, including those in military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Those eligible to vote shall vote on whether or not they desire to be represented for the purpose of collective negotiations by the American Federation of State, County, and Municipal Employees, Local 1965, AFL-CIO.

The election directed herein shall be conducted in accordance with the provisions of the Commission's Rules and Regulations and Statement of Procedure.

BY ORDER OF THE COMMISSION

WALTER F. PEASE
CHAIRMAN

DATED: January 9, 1970
Trenton, New Jersey

In the Matter of

CHERRY HILL TOWNSHIP, DEPARTMENT OF PUBLIC WORKS

Public Employer

and

Docket No. R-92

CAMDEN COUNTY, LOCAL 1965, AFSCME, AFL-CIO

Petitioner

HEARING OFFICER'S REPORT AND RECOMMENDATION

Pursuant to a Notice of Hearing issued by the Public Employment Relations Commission, a hearing was held on August 5, 1969, before the undersigned Hearing Officer of the Commission to resolve questions concerning representation of public employees. The Hearing Officer has considered the entire record and finds:

1. The Township of Cherry Hill, Department of Public Works, is a Public Employer within the meaning of the Act and is subject to the provisions of the Act.

2. The American Federation of State, County and Municipal Employees, AFL-CIO, Local 1965 is an employee representative within the meaning of the Act.

3. The Public Employer having refused to recognize the employee representative as the exclusive representative of certain employees in the Department of Public Works a question concerning the representation of employees exists and is properly before the undersigned for a Report and Recommendation to the Commission.

4. The undersigned finds as a result of a stipulation of the parties at the hearing, the appropriate unit to be:

All employees of the Department of Public Works of the Township of Cherry Hill excluding the employees of the Division of Engineering Services, managerial executives, office clericals, professionals, craft employees, policemen and supervisors within the meaning of the Act.

5. The parties are, however, in issue on the supervisory and probationary status of certain employees within the meaning of the Act. The record reveals that the Municipal Manager of the Township is the chief executive officer of the departments in the Township government. The Director is the head of the Department of Public Works. The supervisory status of certain employees has been brought into question. They are Sewer Pump Foreman, Sewer Line Maintenance Foreman, Refuse Collector Foreman, Road Maintenance Foreman, Shade Tree Maintenance II, and Parks and Grounds Foreman, respectively as designated on a sheet entitled, "Department of Public Works" showing subdivisions and departments with a listing of employees and introduced into evidence as exhibit PE-1. In support of its position that the above mentioned employees are supervisors, the Public Employer has placed in the record job descriptions and classifications prepared by McCann Associates. (A study of all positions in the Township prepared in 1968). The job descriptions reveal the employees in question may "supervise in the more routine aspects" of work and are engaged in the "general supervision of subordinates". However, the critical issue before the undersigned is whether or not the above mentioned employees have the authority to hire, discharge, discipline or effectively recommend the same within the meaning of Section 7 of the Act. The job description prepared by the McCann Associates does not expressly confer the right to hire, discharge, discipline or effectively recommend any of the above mentioned actions. The record, as a whole, reveals that in the Department of Public Works these employees have not,

been given the aforementioned authority, nor has any such authority been effectively exercised and followed. As demonstrated by the following testimony of Mr. Melchoir, Municipal Manager of the Township of Cherry Hill:

Q. Mr. Melchoir, did Mr. Vile, (Sewer Pump Foreman), ever hire anyone to your knowledge?

A. I would have to say--actually hired, no, because the Manager does the actual hiring.

Q. Is the same true with respect to firing?

A. The same would be true. I actually do the official, final action on the firing.

Q. Did he ever recommend to you any hiring, or firing?

A. Not to me, No.

Q. Do you have any knowledge, then, of his ever hiring, or firing, or effectively recommending the same?

A. I have no knowledge of it, as such-for the same reasons.

The record further indicates the Municipal Manager's judgment that a particular employee merits hiring, discharge, or disciplining is predicated on the written recommendation of the Director. The Director exercises a degree of independent discretion and judgment and makes the only written recommendation to the Municipal Manager. There is no evidence that the above mentioned employees have ever in fact made effective recommendations on hiring, discharge or discipline to the Director. In view of the foregoing, it is clear that the decision to hire, discharge or discipline an employee is based solely on the independent investigation and judgment of the Director who then makes an effective recommendation to the Municipal Manager.

The totality of the record reveals that the above-classified employees do not possess any of the attributes of a supervisor as defined by the Act.

The fact that they are called foreman, give verbal evaluations of subordinates and otherwise assign, review and check the routine aspects of daily work does not warrant a finding that they are supervisors within the meaning of this Act. Section 7 of the Act expressly provides that a supervisor is one "having the power to hire, discharge, discipline or effectively recommend the same". The review and check of the work of subordinates in terms of its compliance with certain standards of an agency; all of which may constitute attributes of supervisory authority under other statutes, does not satisfy the criteria of a "supervisor" as set forth in this Act." See: Middlesex County Welfare Board and CWA, P.E.R.C. 10, August 20, 1969.

The other major question posed before the undersigned is whether or not certain probationary employees may be included in the unit found to be appropriate. The Act does not expressly exclude a probationary employee from the right to select an exclusive representative for collective negotiation concerning the terms and conditions of employment. Section 4 of the Act provides in pertinent part: "The term "employee" shall include any employee... This term, however, shall not include any individual taking the place of an employee whose work has ceased as aforesaid, nor shall it include any individual employed by his parent or spouse, or in the domestic service of any person in the home of the employer or employed by any company owning or operating a railroad...This term shall include public employee, i.e., any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, head and deputy heads of departments and agencies..."

> "Accordingly, the Legislature has made exquisitely clear the categories of employment excepted from the broad coverage and protection afforded by the Act. To infer an additional exception in the instant case would fly in the face of the legislative purpose to provide an all inclusive definition of "public employee" within the meaning of the Act." Burlington County, Evergreen Park Mental Hospital and Dorothy Cooper, P.E.R.C. 14, Page 4.

Furthermore, probationary employees, such as those involved herein hold their employment with a contemplation of permanent employment subject only to the satisfactory completion of an initial trial period of six months. Their general conditions of work in other respects and their employment interests are identical to those of permanent employees with whom they share a "community of interest" with the minor exception of a more severe disciplinary standard and different fringe benefits. They work the same hours and in the same location under the same supervision as permanent employees. Thus, the probationary and permanent employee work together as a functionally integrated whole. Accordingly, there does not appear any cogent reason for withholding from probationary employees the right to select an exclusive employee representative for collective negotiations concerning the terms and conditions of their employment, simply because they are on probation during a specified period of time.

For these reasons, it is the recommendation of the undersigned the probationary employees be included in the above unit found to be appropriate.

It was brought to the attention of the undersigned by the Public Employer at the hearing that another employee organization had claimed to represent public employees in the Department of Public Works with regard to wages and the terms and conditions of employment. It was not made clear whether or not the employee organization had come into existence prior to the time of hearing and in any event no employee organization other than Petitioner appeared or requested intervention at the hearing.

On August 28, 1969, a motion to intervene was made to the Executive Director of the Commission by the Cherry Hill Association of Public Works Employees and on September 18, 1969, a showing of interest was submitted. The motion to intervene and "showing of interest" have been referred to the undersigned by the Executive Director for review and recommendation.

Inasmuch as the designations of showing of interest postdate the close of the hearing on August 5, 1969; it is recommended that intervention be denied. The intervening employee organization should not be accorded the same treatment as an employee organization which has timely submitted its designations of showing of interest. It is my opinion that to grant such an untimely motion to intervene would tend to frustrate orderly procedures and the ultimate termination of representation proceedings for the Certification of Public Employee representatives. Accordingly, it is my recommendation the motion to intervene should be denied.

6. A secret ballot election shall be conducted as soon as possible among the employees in the unit found appropriate.

Those eligible to vote are employees set forth in Section 4 who are employed during the payroll period immediately preceding a date to be set by the Public Employment Relations Commission, including employees who did not work during that period because they were out ill, or on vacation, or temporarily laid off, including those in the military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who quit or were discharged for good cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Those eligible to vote shall vote on whether or not they desire to be represented for the purpose of collective negotiations by the American Federation of State, County and Municipal Employees, Local 1965.

The majority representative shall be determined by a majority of the valid ballots cast in each unit.

Theodore A. Winard

Theodore A. Winard, Esq.
Hearing Officer

NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Representation Dispute between	EXCEPTIONS BY CHERRY HILL TOWNSHIP (DEPARTMENT OF PUBLIC WORKS) TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS
CHERRY HILL TOWNSHIP, DEPARTMENT OF PUBLIC WORKS	
and	
CAMDEN COUNTY, LOCAL 1965, AFSCME, AFL-CIO	
DOCKET NO. ~~R-56~~ R-92	

EXCEPTIONS

The Cherry Hill Township Department of Public Works on and in behalf of the Township of Cherry Hill, County of Camden, State of New Jersey, hereby submits its exceptions to the Report and Recommendations of the Hearing Officer, Theodore Winard, Esq., dated November 7, 1969, as submitted in his Report and Recommendations to the New Jersey Public Employment Relations Commission.

1. The Township of Cherry Hill takes exception to the finding of the Hearing Examiner as stated on page 3 of his Report that the Sewer Pump Foreman, Sewer Line Maintenance Foreman, Refuse Collector Foreman, Road Maintenance Foreman, Shadetree Maintenance II, and Parks and Grounds Foreman are not supervisors as defined in the Act. (N.J.S.A. 34:13A, et seq.)

The Township's exception to this finding by the Hearing Examiner is based on both his determination of the law to be applied to this question and to his factual determination.

2. The authority for the unit determination by the Public Employment Relations Commission is contained in N.J.S.A. 34:13A-6(d) which provides:

> " ... The division shall decide in each instance which unit of employees is appropriate for collective negotiation, 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 ..."

Nowhere in the Act is the word "supervisor" defined.

3. The Hearing Examiner made the incorrect conclusion on page 4 of his report that "Section 7 of the Act expressly provides that a supervisor is one having the power to hire, discharge, discipline or effectively recommend the same." Section 4 of the Act is entitled "Definitions". The term "Supervisor" is not there defined. Section 7 of the Act to which the Hearing Examiner referred is entitled "Public employees' organizations; authorization, membership, representation, written agreements, grievance procedures". This section is concerned with the structure of the employees' organizations and has no relevance to an appropriate unit.

4. Section 7 of the Act does state:

> " ... Nor, except where established practice, prior

> agreement or special circumstance, dictate to the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the case, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership ..." (emphasis added).

The underlined portion merely modifies "Supervisor" for the purpose of Section 7, and is not a definition. Supervisors who have the power underlined above, cannot be represented by an employee organization that admits nonsupervisory personnel. The clear implication of the wording of Section 7 is that "Supervisor" must be given a broad definition in Section 8(d) since it is not so modified.

5. Without a statutory definition of "Supervisor" the Commission should consider the body of law which has evolved under the National Labor Relations Act. Under that statute a supervisor need only have one of the following criteria:

> " ... any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Section 2 (11) National Labor Relations Act. See NLRB vs. Budd Mfg. Co., 169 F2d 571 (6th Cir. 1948).

6. Even using the definition of supervisor applied by the Hearing Examiner, the uncontroverted facts are that the employees in question have the power to "hire, discharge, discipline or to effectively recommend the same". The only testimony before the

Hearing Examiner was given by the Township Manager, Charles M. Melchior. On Page 51 of the Record Mr. Melchior was asked whether one of the employees in question, Mr. Klimhofski, had the power to effectively recommend hiring, or firing, or disciplinary action with respect to the personnel under him and answered affirmatively.

7. Mr. Melchior was asked on page 68 of the Record whether Mr. Vile had the "right to hire, and fire, or effectively recommend hiring, firing or promotions or disciplinary action." He answered again in the affirmative. Mr. Melchior then described the jobs of the remaining employees in question and was asked at page 92 of the Record whether "these men have the right to effectively recommend either the hiring, or firing, or disciplinary action, with respect to the personnel under them, or any personnel?" Mr. Melchior answered "Yes".

8. The Hearing Examiner evidently completely ignored this uncontradicted testimony. He cites on page 3 of his opinion irrelevant testimony from the Record and then states "(T)here is no evidence that the above-mentioned employees have ever in fact made effective recommendations on hiring, discharge or discipline to the Director." Even under the definition of supervisor used by the Hearing Examiner, the supervisor need merely have the "power" to so do. There is no relevance to the question of whether they have actually done so. Mr. Melchior testified that the employees in question do have this power, and this evidence is unchallenged

in the Record. Therefore, the Commission should find that the employees in question are supervisors and should not be included in the unit.

9. The Township further takes exception to the recommendation of the Hearing Examiner's (page 5 of his Report) that the probationary employees be included in the unit. The Hearing Examiner's apparent concern was whether these employees are excluded by the Act. The Township does not challenge the fact that these employees can be included. It does challenge that the Hearing Examiner properly considered whether or not it would be appropriate to include these employees in the unit.

10. The Statute (N.J.S.A. 34:13A-6(d)) states:

> "The Division shall decide in each instance which unit of employees is appropriate for collective negotiations ..." (Emphasis added).

N.J.S.A. 34:13A-5.3 states, inter alia:

> "The negotiating unit shall be defined with due regard for the community of interest among the employees concerned, ..."

11. The Commission is not directed to decide whether the proposed unit is appropriate, but which unit. The fact that the Union has petitioned for a given unit only is entirely irrelevant to the determination. And the Statute calls for the Commission to consider factors other than the "community of interest" in deciding "which unit of employees is appropriate for collective negotiations".

12. It must be recognized that the interest of the probationary employees are not the same as those of the permanent employees. The temporary employees have not yet proved themselves. They are subject to a more stringent disciplinary standard than the permanent employee (Tr. p. 105). There is an actual conflict of interest in connection with overtime assignments as priority for these assignments are given to the permanent employees.

13. While giving "due regard" for the "community of interest" the Division must also consider the effect of the proposed unit upon the Public Employer. The practice of the Township has been to keep an employee on probationary status for a six month period. If at the end of this period he has satisfactory service, his status is changed to that of a permanent employee. If during this period his service is unsatisfactory, he is discharged. The Township feels this clearly understood probationary period is necessary. The inclusion in the same bargaining unit with permanent employees would cause a merger of identity and defeat the purpose of the Township.

14. After the six month probationary period, the probationary employees would achieve permanent status and would then become part of the bargaining unit. They as permanent employees would then share a community of interest with the other permanent employees.

15. The Township of Cherry Hill therefore requests that the Public Employment Relations Commission hold that the employees in question are supervisors and are not to be included in the unit and the probationary employees are not appropriate for inclusion in the unit because of their lack of community interest and because of the hardship that their inclusion would cause the Township.

Respectfully submitted on
behalf of the Township of
Cherry Hill, Department
of Public Works

Warren C. Douglass
Township Solicitor