

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

CITY OF NEWARK,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-80-75

NEWARK SUPERIOR OFFICERS
ASSOCIATION,

Employee Representative.

CITY OF NEWARK,

Public Employer,

-and-

DOCKET NO. CU-81-7

NEWARK SUPERIOR OFFICERS
ASSOCIATION,

Employee Representative-
Petitioner.

SYNOPSIS

The Director of Representation adopts the recommendation of a Hearing Officer that the Chief of Police and the Deputy Chiefs of Police in the City of Newark are managerial executives within the meaning of the Act and that their inclusion in any negotiations unit would be inappropriate. The Hearing Officer found that the Chief and the Deputy Chiefs possess and exercise a level of authority and independent judgment sufficient to broadly affect the department's policies. The size of the City's workforce was also a factor in the Hearing Officer's recommendation. In reaching this conclusion, reliance was placed on the guidelines established for determining managerial status in In re Borough of Montvale, D.R. No. 80-32, 6 NJPER (¶ 11097 1980), aff'd P.E.R.C. No. 81-52, 6 NJPER (¶ 11259 1980).

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Petitioner.

Appearances:

For the Public Employer

John J. Teare, Corporation Counsel
(Brigid Bohan, Assistant Corporation Counsel)

For the Employee Representative

Whipple, Schneider & Ross, attorneys
(Lawrence A. Whipple, Jr. of counsel)

DECISION

Pursuant to a Petition for Clarification of Unit filed on April 22, 1980, with the Public Employment Relations Commission (the "Commission") by the City of Newark (the "City"), hearings were conducted before a designated Commission Hearing Officer on the claim raised by the City that the title of Deputy Chief(s) should be removed from the collective negotiations unit represented by the Newark Superior Officers Association (the "Association"). The City based its request for the exclusion of Deputy Chiefs on the claim that the deputy chiefs are managerial executives or

confidential employees within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). In the alternative, the City alleges that a conflict of interest exists between the Deputy Chiefs and the other superior officers in the Association's unit which would justify the removal of that title from the unit. Subsequently, on August 6, 1980, the Association filed its own Petition for Clarification of Unit seeking the inclusion of the Chief of Police (as well as the Deputy Chiefs) in the Association's unit.

The Association claims that the Chief of Police and the Deputy Chiefs are neither managerial executives nor confidential employees, and that no conflict of interest with other superior officers would result from their inclusion in the unit. The City argues that the Chief is specifically excluded from the recognition clause of the contract and is a managerial executive. The City further argues that a conflict of interest would result if that title were included in the unit.

Pursuant to an Order Consolidating Cases and a Notice of Hearing, hearings were held in these matters before Commission Hearing Officer Dennis J. Alessi, on September 17 and 18, 1980 and on December 16, 1980 before Hearing Officer Arnold H. Zudick, who was assigned to this matter by the undersigned, pursuant to N.J.A.C. 19:11-6.4, due to the unavailability of the original Hearing Officer. All parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. A post-hearing brief was submitted by the City on January

12, 1981; the Association did not file a post-hearing brief. The Hearing Officer thereafter issued his Report and Recommendations on May 18, 1981, a copy of which is attached hereto and made a part hereof. Neither party has filed exceptions to the Hearing Officer's Report and Recommendations. However, the Association has filed an application for a new hearing, or alternatively, other relief, and this request will be dealt with in this decision.

The undersigned has carefully considered the entire record herein, including the Hearing Officer's Report and Recommendations, the transcript, and the exhibits and finds and determines as follows.

Initially, the issues raised by the Association in its application for a new hearing will be considered.

The Association argues that it was incumbent upon the Hearing Officer to ascertain all of the facts necessary to enable him to render a Report and Recommendation and that without hearing testimony from the Police Director as well as each Deputy Chief, it was inappropriate for the Hearing Officer to issue his Report and Recommendation finding that the Police Chief and each Deputy Chief were managerial executives who formulate policy and direct its effectuation.

It is the duty of the Hearing Officer to inquire fully into the facts as they relate to the matter under consideration in order to establish a full record upon which a decision can be rendered. ^{1/} The Association asserts that it was led to believe

1/ N.J.A.C. 19:11-6.3(a)

that it would be informed as to whether additional testimony would be needed by the Hearing Officer and that it was under no obligation to file a post-hearing brief until the Hearing Officer ruled upon the necessity for further hearings. The Hearing Officer was apparently satisfied with the adequacy of the record, since he did not order further hearings prior to the issuance of his Report and Recommendations. Having reviewed the record, the undersigned confirms that the Hearing Officer reached the proper conclusion with regard to the adequacy of the record.

An examination of the record reveals that the Hearing Officer advised both parties of their opportunity to file post-hearing briefs, and the fixing of the briefing schedule was not conditioned upon the Hearing Officer's first ruling on the necessity for further hearings. Additionally, four Deputy Chiefs were present at the third hearing, but the Association chose not to call them to testify when given the opportunity by the Hearing Officer, and in fact, elected not to present any direct testimony in support of its Petition or in rebuttal to the City's Petition. ^{2/}

Moreover, a hearing will not be reopened simply because one party states that the record has not been fully established. A party requesting the reopening of a record has the duty not only to disclose who will additionally testify but also how the additional testimony will differ or further add to testimony already

^{2/} The Hearing Officer was not in a position to know whether the Police Director or other deputy chiefs would offer testimony which would supplement or contradict the testimony already on the record. It is not the Hearing Officer's obligation to seek out additional testimony where the record contains adequate testimony concerning the facts. On the other hand, the parties to a representation proceeding, may produce whatever evidence they believe will result in a more complete factual record.

on the record and why that evidence was not produced at the time the record was open. No such information was supplied by the Association in its application. Accordingly, the Association's motion is denied.

The Hearing Officer recommended that the Chief and Deputy Chiefs of Police in the City of Newark are managerial executives within the meaning of the Act ^{3/} and are not includable in any negotiations unit. In In re Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶ 11259 1980) aff'g. D.R. No. 80-32, 6 NJPER 198 (¶ 11097 1980), the Commission confirmed the guidelines set forth by the undersigned to determine when a person is a managerial executive, stating that:

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. Whether or not an employee possesses this level of authority may generally be determined by focussing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises.
[6 NJPER, at 508]

^{3/} N.J.S.A. 34:13A-3(f) states: "Managerial Executives" of a public employer means 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, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

The undersigned, in establishing the standard by which managerial executive status would be measured was guided by the National Labor Relations Board. The Board's definition of managerial executive was summarized as follows:

Managerial employees have been defined as (1) executives who formulate, determine and effectuate management policies by expressing and making operative the decisions of their employer or (2) those employees who have discretion in the performance of their job independent of their employer's established policy or (3) those employees who are so integrally related to or so closely aligned with management as to place the employee in a position of potential conflict of interest between the employer on the one hand and his fellow workers on the other. [6 NJPER, at 201]

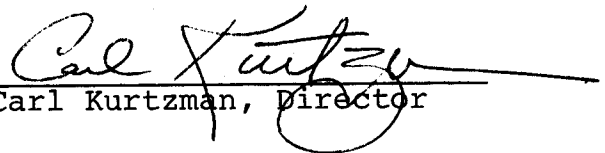
The Hearing Officer properly applied the guidelines established in Montvale in concluding that both the Chief and the Deputy Chiefs formulated policies and objectives and directed the effectuation of such throughout the department and the respective divisions. The record confirms the Hearing Officer's finding that the Newark Chief of Police is in command of over 1,400 employees, issues departmental orders, and has the authority to transfer and deploy men throughout the department; the Deputy Chiefs have the authority and discretion to deploy the men in their respective divisions, discipline subordinates, transfer men within their divisions, participate in budget formulation, purchase equipment, and assist in the development and drafting of departmental policies and orders. The Chief and the Deputy Chiefs possess and exercise a level of authority and independent judgment

sufficient to broadly affect the department's policies.

The size of City's workforce was a factor in the Hearing Officer's recommendation. The record confirms his conclusion that with a police force of 1,400 employees, a substantial degree of managerial authority is delegated through the Deputy Chief.

Accordingly, for the above reasons, the undersigned adopts the findings of fact and conclusions of law of the Hearing Officer and determines that the Chief of Police and the Deputy Chiefs of Police in the City of Newark are managerial executives and are inappropriate for inclusion in any negotiations unit. Therefore, the City's Petition is granted and the Deputy Chiefs are hereby removed from the Association's unit. Further, in regard to the Association's Petition, the undersigned determines that the Chief is not included in the Superior Officer's unit.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: November 2, 1981
Trenton, New Jersey

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

In the Matter of

CITY OF NEWARK,

Public Employer

-and-

Docket Nos. CU-80-75 & CU-81-7

NEWARK SUPERIOR OFFICERS ASSOCIATION

Public Employee Representative.

SYNOPSIS

In clarification of unit petitions filed by the City of Newark and the Newark Superior Officers Association, a Hearing Officer of the Public Employment Relations Commission recommends the removal of the Deputy Chiefs of Police from the Association's Unit and recommends that the Chief of Police not be included in the Association's Unit.

The Hearing Officer finds that both the Chief and Deputy Chiefs are managerial executives within the meaning of the Act, therefore, those positions are inappropriate for inclusion in any negotiations unit. The Hearing Officer also found that, independent of the managerial issue, a substantial actual or potential conflict of interest would exist if either title were included in the Association's unit.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The Report is submitted to the Director of Representation who reviews the Report, and 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. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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Appearances:

For the Public Employer
John J. Teare, Corporation Counsel
(Brigid Bohan, Asst. Corporation Counsel)

For the Public Employee Representative
Whipple, Schneider & Ross, Esqs.
(Lawrence A. Whipple, Jr. of Counsel)

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

On April 22, 1980, a Clarification of Unit Petition ("CU") was filed with the Public Employment Relations Commission (the "Commission") by the City of Newark (the "City") which seeks to remove the title of Deputy Chief(s) from the unit represented by the Newark Superior Officers Association (the "Association") which currently includes all superior officers except the Chief of Police. The City alleges that Deputy Chiefs are managerial executives or confidential employees within the meaning of the New Jersey Employer-Employee Relations Act; 34:13A-1 et seq., (the "Act"). In the alternative, the City argues that a conflict of interest exists between the Deputy Chiefs and the remainder of the

Association's unit which justifies the removal of that title from the unit. Subsequently, on August 6, 1980, the Association filed its own CU Petition seeking the inclusion of the Chief of Police (as well as the Deputy Chiefs) into the Association's unit.

The Association argues with respect to both petitions that the titles of Chief and Deputy Chief are neither managerial executives nor confidential employees, and that no conflict of interest resulted from their inclusion in the unit. With respect to the Association's petition, the City argues that the Chief is excluded from the recognition clause of the contract, that the Chief is a managerial executive, and that a conflict of interest would exist if that title were included in the unit.

Pursuant to an Order Consolidating Cases and a Notice of Hearing dated August 14, 1980, ^{1/} hearings were held in these matters before a Commission Hearing Officer on September 17 and 18, 1980, ^{2/} and before the undersigned Hearing Officer on December 16, 1980, at which all parties were given the opportunity to examine and cross-examine witnesses, to present evidence and argue orally. A post-hearing brief was received from the City on January 12, 1981. ^{3/}

^{1/} Subsequent to the filing of the City's Petition on April 22, 1980, the Director of Representation on June 9, 1980 issued a Notice of Hearing only with respect to that Petition. However, after the filing of the Association's Petition on August 6, 1980, the Director on August 14, 1980 consolidated the two Petitions and issued a new Notice of Hearing.

^{2/} On or about October 10, 1980, the original Hearing Officer, Dennis J. Alessi, resigned from the Commission. On October 14, 1980, pursuant to N.J.A.C., 19:11-6.4, the Director of Representation transferred the instant matters to the undersigned Hearing Officer.

^{3/} The Association did not file a post-hearing brief, nor a reply brief in these matters. (Continued).

Based upon the entire record in these proceedings, the Hearing Officer finds that:

1. The City of Newark is a public employer within the meaning of the Act, is the employer of the employees who are the subject of these Petitions, and is subject to the provisions of the Act.

2. The Newark Superior Officers Association is an employee representative within the meaning of the Act and is subject to its provisions.

3. The City seeks a clarification of the collective negotiations unit of its Superior Officers currently represented by the Association. The parties have been unable to agree upon the continued placement of the titles in question in the unit. Therefore, a question concerning the composition of a collective negotiations unit exists, and the matter is appropriately before the undersigned for Report and Recommendations.

3/ (Continued) A decision in the instant matters was deferred pending the completion of the hearing and briefing process in Docket No. CU-80-76, which will also be decided by the undersigned Hearing Officer. That case involves the same legal issues as the instant matters, but somewhat different facts, i.e., whether the fire Deputy Chiefs in the City of Newark should be removed from the remainder of that unit based upon the same reasons raised in the instant matters. Although the facts of the two separate matters are somewhat different, the same law applies. Consequently, in order to prevent influencing the outcome of CU-80-76, a decision could not be issued in these matters until the case involving the fire Deputy Chiefs was concluded. The briefs in that matter were scheduled to be received on or about May 15, 1981.

4. The parties agree that the issues herein are as follows:

- (a) Whether the titles of Chief and Deputy Chief in the Newark Police Department are managerial executives or confidential employees as those terms are defined by the Act.
- (b) If these titles are found not to be managerial executives or confidential employees, is there a sufficient conflict of interest which would preclude the inclusion of titles of Chief and Deputy Chief in the unit of superior officers represented by the Association.

FINDINGS OF FACT

I. The Chief of Police

The record reveals that the Chief of Police is in overall command of the Police Department under the Police Director, and is responsible for the operation of a police force consisting of approximately 1400 sworn, and civilian employees. The evidence shows that the Chief's title was removed from Civil Service classification and the Chief is now appointed by the Mayor. ^{4/}

^{4/} See Exhibit R-1.

The record further reveals that the Chief serves as Acting Director for as much as 30 days during the year in the Director's absence 5/, and that his recommendations are often followed by the Director. 6/ The Chief is the fourth level in the grievance procedure; he presides at formal police hearings; 7/ and he can issue discipline as a result of those hearings. 8/

The job description for police chief (Exhibit J-3) shows that it is the Chief's responsibility to formulate police rules and regulations, and the record demonstrates that the Chief actively participates in this process along with the Police Director. 9/ In fact, the record shows that both the Director and the Chief issue written orders, and they often make consensus decisions concerning the operation of the police department. 10/

The Chief also has the authority to grant overtime, and to make decisions regarding the deployment of personnel throughout the department, including assignments and transfers. 11/ The Chief is also actively involved in the preparation of the police budget 12/, and in the selection and purchasing of police equipment. 13/ Finally, the evidence demonstrates that the Chief is deeply involved with the Director in the overall operation of the department.

5/ Transcript ("T") 2 pp. 10, 78, 79.

6/ T2 p. 99.

7/ T2 pp. 76-77.

8/ T2 p. 77.

9/ T2 pp. 97-100.

10/ T1 p. 59; T2 pp. 79-100.

11/ T1 pp. 26-27; T2 pp. 48, 81-82, 154, 155.

12/ T2 pp. 41-44.

13/ T2 pp. 119-120.

II. The Deputy Chiefs

The record reveals that there are seven active deputy chiefs of permanent rank, two active inspectors serving as acting deputy chiefs, and one deputy chief of permanent rank who is on a terminal leave of absence. The active deputy chiefs hold the following positions and basic responsibilities.

1. Chief of Staff Office of the Chief of Police

The Deputy Chief who serves as chief of staff assists the Chief in managing the entire department; he is responsible for his own staff of 12 people over whom he has control; he analyzes all reports and other information sent to the Chief; and he serves as Acting Chief in the Chief's absence. ^{14/} The Chief of Staff has the authority to grant overtime ^{15/} and take certain forms of disciplinary action. ^{16/}

2. Commander of the Staff Services Division

The Deputy Chief in command of this division has authority over 105 sworn and civilian employees, he is responsible for the functioning of the cell block, security of the courts, the conduct of investigations for candidates eligible for hiring, and responsible for training in his division. This Deputy Chief prepares a budget and supply request for his division ^{17/}, is responsible for all training at the police academy, and has the authority to deploy the personnel within his own division. ^{18/} He also has some discretion in granting short leaves of absence. ^{19/}

^{14/} T1 pp. 17-18.

^{15/} T1 p. 22

^{16/} T1 p. 23.

^{17/} T1 p. 25.

^{18/} T1 p. 26

^{19/} T1 p. 31.

3. The Commander of the Detective Division

This Deputy Chief operates the division which is responsible for all criminal investigations. He has 160 people under his control, and he has the same authority as the Staff Services Deputy Chief to prepare a budget for his division and to purchase equipment.^{20/} He can deploy the man in his division and discipline the men under his command.^{21/}

4. Commander of the Youth and Community Services Division

This Deputy Chief operates the division which is responsible for investigating sex crimes and crimes involving juveniles. He has 40 people under his control, and has the same authority as the Deputy Chief of the Detective Division particularly with regard to deployment and discipline.^{22/}

5. Commander of the Records and Communications Division

This Deputy Chief is responsible for the police communications system as well as record keeping and data processing. He has a total of 178 sworn and civilian employees under his control. The Chief testified that the Deputy Chief of this division recommended and then established the current operational communications system, including the funding for the system.^{23/} In addition he has the same authority as other deputy chiefs with respect to discipline, granting overtime and scheduling vacation.^{24/}

^{20/} T1 pp. 34-35.

^{21/} T1 pp. 35-36.

^{22/} T1 p. 40.

^{23/} T1 p. 51.

^{24/} Id.

6. Commander of the Property Room

This Deputy Chief has five people under his control and is responsible for all property confiscated or evidence held by the department. The facts show that the Deputy Chief has extensive discretion in maintaining the property and cash held as evidence, and in disposing of or destroying certain property such as firearms. 25/ He has the authority to purchase certain supplies from approved vendors, 26/ and to set up procedures for inventorying and safe keeping of property. 27/

7. Chief of Staff-Office of the Police Director

This Deputy Chief coordinates the units assigned to the Director specifically the: Intelligence Unit, Legal Analyst, Crime Prevention Unit, and Internal Affairs. He has approximately 55 people under his control and has the same general authority as other Deputy Chiefs regarding scheduling overtime and vacations, making recommendations, and assisting the Director on implementing policy decisions. 28/

8. Commander of the Patrol Division

The Acting Deputy Chief of this division is responsible for providing patrol activity throughout the city twenty-four hours a day, seven days a week. The total force under his control consists of 845 people including sworn and civilian employees. Within the division, the Deputy Chief is responsible for the tactical operations of the department, Traffic Bureau, Housing Task Force, and the Safe Streets Project. It is the Deputy Chief's responsibility

25/ T1 p. 43.

26/ T1 p. 45.

27/ T1 p. 47.

28/ T1 pp. 51, 70-71, 80.
T2 pp. 85, 104.

to deploy and assign personnel within his sphere of operation, and to determine the coverage that is necessary over the twenty-four hour period. 29/ This Deputy Chief helped establish the Housing Task Force as a pilot program and he is the fund manager of the Safe Streets Project which includes the responsibility to assign people in that project in accordance with State rules. 30/ Finally, this Deputy Chief has the same basic authority as the other Deputy Chiefs concerning granting overtime and disciplining his subordinates. 31/

9. Commander of the Office of Management Improvement-
Police Department ("OMIPD")

This division is the inspectional arm of the Police Director which evaluates the various divisions of the police department. The Acting Deputy Chief of this division has approximately 10 people under his control and is responsible for designating individuals to inspect facilities and personnel, 32/ and he has been active in the planning for a new cell block. 33/ The Chief and Director have accepted recommendations made by this Deputy Chief as a result of his inspections. 34/ Finally, this Deputy Chief had the authority to establish the OMIPD operation and to determine how it was going to work. 35/

In addition to the above specific responsibilities, the Chief testified that the Deputy Chiefs shared the following general responsibilities: 36/

29/ T1 pp. 67-68.
30/ T1 pp. 68-69.
31/ T1 pp. 65-66.
32/ T1 p. 56.
33/ T1 pp. 54-55.
34/ T1 pp. 58, 59, 61-62.
35/ T1 p. 61.
36/ T1 pp. 59, 80.
 T2 pp. 85, 104.

A. Discipline

The Deputy Chiefs consider grievances at step 3 of the grievance procedure; they have the authority to evaluate and discipline their subordinates 37/; and they can reprimand employees, deny them certain privileges, or recommend formal discipline. 38/ The record shows that the Chief has relied upon such recommendations. 39/

B. Scheduling

The Deputy Chiefs have the authority to grant certain leaves of absence, decide upon vacation scheduling and approve limited compensatory time. 40/ In addition, the Deputy Chiefs have the responsibility to authorize employees to attend one day training meetings when no special cost is involved. 41/

C. Assignments & Deployment

The Deputy Chiefs have the authority to decide how to best use the men under their control and to deploy them to meet the needs of their respective divisions. 42/ In addition, the Chief testified that except in the Patrol Division, the Deputy Chiefs have the authority, without further consultation with or approval from the Chief or Police Director, to make permanent transfers of individuals within their sphere of operation. 43/

37/ T1 pp. 22, 23, 27, 28, 36-39.

38/ T1 pp. 81, 83

39/ T2 p. 108.

40/ T1 pp. 31, 84-87
T2 pp. 59-61, 86.

41/ T2 p. 62.

42/ T1 pp. 79-81, 27, 31, 36, 62, 67-68; T2 pp. 80, 85-88

43/ T2 pp. 48-50, 154-155.

The Chief indicated that since the Patrol Division is so large, the Deputy Chief of that division can authorize transfers but must do so only after consultation with the Chief.

D. Effective Recommendations on Policy Matters

The facts show that the Deputy Chiefs in general frequently make recommendations to the Chief and the Police Director concerning department operations. For example, some Deputy Chiefs have made effective recommendations concerning reductions in the police force, ^{44/} and many Deputy Chiefs make recommendations on proposed general orders which are issued by the Chief or Police Director, and in fact they often assist the Chief or Director in preparing the final general order. ^{45/} The Chief testified that he and the Police Director consider and in fact agree with Deputy Chief recommendations most of the time. ^{46/}

E. Other Responsibilities

The Chief also testified that the Deputy Chiefs prepare budget requests which are submitted to the Chief ^{47/}; they make recommendations on the type of equipment they need ^{48/}; and they are consulted on staffing needs and internal investigations. ^{49/}

^{44/} T1 p. 72.
T2 pp. 89-90.

^{45/} T2 pp. 97-99, 101-103.

^{46/} T1 pp. 37, 39.
T2 pp. 103, 108-109.

^{47/} T2 p. 38.

^{48/} T2 p. 120.

^{49/} T2 pp. 92-93.

CONCLUSIONS OF LAWI. Managerial Executives

Managerial Executives are defined in the Act as follows:

"Managerial Executives" of a public employer means 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, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district. N.J.S.A. 34:13A-3(f).

The Commission has previously examined the definition of managerial executive, In re City of Elizabeth, P.E.R.C. No. 36 (1970), and In re Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977), and applied certain standards in evaluating whether a given title would fit the definition. However, the leading and most recent case in New Jersey on managerial executives is In re Borough of Montvale, D.R. No. 80-32, 6 NJPER 198 (¶ 11097 1980), affirmed P.E.R.C. No. 81-52, 6 NJPER 507 (¶ 11259 1980), wherein the Commission established the guidelines for determining whether an employee formulates policy or directs its effectuation, thus acting as a managerial executive within the meaning of the Act. The Commission held that:

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. Whether or

not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercise. P.E.R.C. No. 81-52, at slip. op. p.7.

In Montvale, the Director of Representation and the Commission found that the chief of police in that borough was not a managerial executive because he played no role in policy formulation, and a very small role in directing the effectuation of any policies. There, the borough's mayor and commissioners exercised almost complete control over the chief and the departmental operations. The chief's recommendations on a variety of matters were not followed, and he could not assign overtime, promulgate policies, or plan duty or vacation schedules with any degree of discretion because the mayor and/or commissioners frequently performed those functions. In addition, the chief did not have control over or effective input into the deployment of personnel, disciplinary matters, or the conduct of investigations.

In reaching his conclusion in Montvale, the Director of Representation considered the policies and cases of the National Labor Relations Board with respect to managerial executives. The Director found that:

The NLRB has developed a definition of managerial employees through numerous adjudications. Managerial employees have been defined as (1) executives who formulate, determine and effectuate management policies by expressing and making operative the decisions of their employer or (2) those employees who have discretion in the performance of their job independent of their employer's established policy or (3) those employees who are so integrally

related to or so closely aligned with management as to place the employee in a position of potential conflict of interest between the employer on the one hand and his fellow workers on the other. D.R. No. 80-32, at slip. op. p.16.

The Director also considered decisions of other jurisdictions. In New York, the Public Employment Relations Board found in In re City of Elmira, 6 PERB ¶ 4016 (1973) that the chief of police was a managerial employee. The chief organized the police department, coordinated policy, issued departmental rules, was responsible for deployment, meted out discipline and prepared an estimated budget. In Pennsylvania, the Pennsylvania Labor Relations Board held in In re Borough of Wilkinsburg, 9 PPER 484 (1978), that a police chief was a managerial employee because the chief evaluated personnel, directed departmental policy matters, prepared annual budgets, and sent employees to training courses.

In addition to the above decisions, the undersigned has found that recent New York and Pennsylvania cases have continued the earlier trend in this area. In New York, PERB found in In re Town of Bethlehem, 11 PERB 3027 (¶ 3015 1978) that the police chief was managerial because he made decisions regarding deployment of personnel, authorized overtime and formulated departmental policy. In In re City of Watervliet, 11 PERB 4122 (¶ 4078 1978) (Director's decision), a fire chief was held to be a managerial employee because his duties included assignment, discipline and direction of personnel, planning and administering the department's budget, and resolving grievances. 50/

50/ In New York, PERB has issued other decisions finding that police and/or fire chiefs are managerial employees. See In re City of Binghamton, 10 PERB ¶3038 (1977) and In re City of White Plains, 7 PERB ¶4019 (1974).

However, the case which is most on point with the instant matter was recently issued in Pennsylvania. In re Upper Providence Twp. 11 PPER 161 (¶ 11087 1980). There PLRB found that the police chief and deputy chief (in a police force which is considerably smaller than Newark's) were managerial employees. The Board found that the chief and deputy chief drafted and prepared the police departments procedure manual and personnel regulations, and that they independently developed and implemented various training programs for police personnel. The chief was also responsible for initial budget preparation, for the expenditure of funds provided for in the budget, and for enforcing the discipline code. The Board also found that the deputy chief performed the chief's duties in his absence, and replaced the chief when he was ill. The duties of the Chief and Deputy Chiefs herein include, and in fact are broader than the duties set forth in Upper Providence Township. For example, Newark's Chief and Deputy Chiefs are active in the preparation of departmental and divisional procedures and regulations; they can authorize training programs; they are involved in budget preparation, and they discipline subordinates.

In another Pennsylvania case, In re Lower Allen Twp. Police Dept., 11 PPER 17 (¶ 11010 1979), the Court of Common Pleas upheld PLRB's finding that the police chief was a managerial executive because his duties included direct responsibility for the department, implementing new systems, preparing the budget and making decisions on equipment. ^{51/}

^{51/} See also In re North Middletown Twp., 11 PPER 110 (¶ 11058 1980), wherein a police chief was found to be managerial.

II. Conflict of Interest

The principles of conflict of interest have been well established in this State as set forth by the New Jersey Supreme Court in Board of Education of W. Orange v Wilton, 57 N.J. 404 (1971).

In that decision, the Court held:

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 supervisor 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 the principles set forth by the Supreme Court, the Commission has adopted a policy with respect to quasi military structures such as exists in the instant matter. The policy provides that, except in very small departments where any conflict of interest is de minimis in nature, the quasi military structure of a police department compels that patrolmen and superiors be placed in separate units. 52/

52/ See In re Borough of South Plainfield D.R. No. 78-18, 3 NJPER 349 (1977); In re City of Elizabeth, P.E.R.C. No. 71 (1972); In re City of Union City, P.E.R.C. No. 70 (1972); and In re City of Camden, P.E.R.C. No. 52 (1971).

In applying that policy in In re City of Paterson, D.R. No. 78-23, 3 NJPER 385 (1977), a case which is very much on point with the instant matter, the Director of Representation held that the chief and deputy chiefs of police should be removed from a unit which included not only rank and file policemen, but also superior officers, i.e., sergeants, lieutenants, and captains, because of a substantial actual or potential conflict of interest. The Director found that the duties of the chief and deputy chiefs included the authority to recommend hiring or discharge of police officers, the authority to discipline subordinate officers, and the authority to regulate the dress and appearance of officers. In addition, the chief was responsible for the daily overall operation of the department; he could provide oral or written reprimands; and he could suspend or fire employees. Each deputy chief was responsible for the operation of one division of the department and had the authority to issue oral reprimands, suspend employees in emergency situations and recommend other discipline. In the chief's absence, a deputy chief would assume the authority to run the department.

Florida's PERC has also removed a chief's title from a unit because of conflict of interest, In re Broward County Community College, 6 FPER 58 (¶ 11037 1980). There the Commission removed a security chief from a unit which included security guards as well as nonguard titles. The Commission found that the chief assigned work, evaluated job performance, scheduled vacations, made effective recommendations, initiated discipline, prepared a budget, and implemented policy, all of which justified his removal from the unit because of a conflict of interest.

ANALYSIS

Having reviewed all of the facts and law with respect to the issues raised herein, the undersigned finds that the Chief and Deputy Chiefs of Police in the City of Newark are managerial executives within the meaning of the Act and must not be included in any negotiations unit. The undersigned also finds that, independent of the managerial issue, sufficient evidence exists to warrant the exclusion of the Chief and Deputy Chiefs from the Association's unit because of a conflict of interest.

Although Montvale established the guidelines for determining managerial executive status, the Commission acknowledged (P.E.R.C. No. 81-52 at note 8), that the result of the decision on the merits, i.e., finding that the chief was not a managerial executive, was an unusual situation. The Commission, in the form of dicta, indicated that good policy measures generally exist for considering the chief law enforcement officer as an essential part of management. The Commission, however, did indicate that merely designating someone a chief would not automatically result in managerial status. ^{53/}

In applying the Montvale guidelines the undersigned is convinced that the Chief and Deputy Chiefs in Newark formulate management policies and objectives, and direct the effectuation

^{53/} The Commission found that a case-by-case examination into the actual role an employee plays in the formulation of policy or the direction of its effectuation must be held before determining whether a title is a managerial executive. In re Montvale, supra, at p.8.

of those policies throughout the department and the respective divisions. In sharp contrast to the relatively small Montvale police force and the chief's duties therein, the Newark Chief of Police is in command of over 1400 employees, issues departmental orders, and has the authority to transfer and deploy men throughout the department.

The Newark Deputy Chiefs have the authority and discretion to deploy the men in their respective divisions, discipline subordinates, transfer men within their divisions, participate in budget formulation, purchase equipment, and assist in the development and drafting of departmental policies and orders. Both the Chief and Deputy Chiefs possess and exercise a level of authority and independent judgment sufficient to affect broadly the department's purposes. In comparison to the cases cited from other jurisdictions, the Chief and Deputy Chief herein do similar and, in some cases, broader duties than those relied upon in those decisions.

A critical factor in determining that the instant titles are managerial executives is the size of the City of Newark and the Newark police force. It would be unreasonable to conclude, particularly in view of his duties and responsibilities, that the Chief of Police in a City of approximately 300,000 people, and a police force of 1400 employees, would not be a managerial executive. It is equally unreasonable to conclude that one person -- the Chief or even perhaps two people -- the Chief and Police Director -- could alone operate, from a management perspective, a police force of 1400 people and nine separate divisions. The size and comprehensiveness of the police force alone dictates the need for multiple levels of

of managerial control and policy effectuation. The facts show that the Deputy Chiefs perform duties and have responsibilities which are critically needed for the overall effective operation of the police department. For example, if the Deputy Chiefs were not managerial executives the Chief alone might be expected to make all of the deployment and assignment decisions of the respective divisions. In a police force of this size such a result is an unrealistic approach to management. The size of the force necessitates the need for delegation of managerial authority, and the record shows that the Deputy Chiefs have that authority.

With respect to the conflict of interest issue, it is evident from the facts, that the Chief and Deputy Chiefs possess certain obligations delegated to them by the employer, i.e., the ability to transfer and deploy, approve vacation schedules and overtime, and the ability to discipline, all of which place them in a conflict situation with unit employees. In view of the level of discretion exercised by the titles in question, it is evident that there is a substantial, rather than de minimis, potential conflict of interest between the instant titles and the other superior officers. The duties of the instant titles are very similar to their counterparts in Paterson, supra, and there is no evidence to suggest a different result.

RECOMMENDATIONS

Based upon the foregoing discussion, the undersigned recommends the following:

1) That the Chief of Police and Deputy Chiefs of Police in the City of Newark are managerial executives within the meaning of the Act and are inappropriate for inclusion in any negotiations unit.

2) That independent of the above recommendation, the record supports a finding that a substantial actual or potential conflict of interest exists with the inclusion of the above titles in the Association's unit, and therefore the Deputy Chief's title should be removed there from, and the Chief's title not be included therein.

3) That the City's Petition should be sustained and the Deputy Chiefs removed from the Association's unit.

4) That the Association's Petition be dismissed in its entirety.

Respectfully submitted


Arnold H. Zudick
Hearing Officer

DATED: May 18, 1981
Trenton, New Jersey