

D.R. NO. 82-18

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-80-76

PROFESSIONAL FIRE OFFICERS ASSOCIATION,
LOCAL 1860, IAFF, AFL-CIO,

Employee Representative.

SYNOPSIS

The Director of Representation adopts the recommendations of a Hearing Officer that Deputy Chiefs in the Newark Fire Department are managerial executives within the meaning of the Act and that their inclusion into any negotiations unit would be inappropriate. The Hearing Officer found that the responsibilities of the deputy chiefs demonstrate that they clearly exercise a level of authority and independent judgment to warrant their classification as managerial executives. The size of the City's workforce was also a factor aiding in the Hearing Officer's determination. In reaching this conclusion, much 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 507 (¶ 11259 1980).

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Employee Representative.

Appearances:

For the Public Employer-Petitioner
John J. Teare, Corporation Counsel
(Rosalind L. Bressler, Assistant Corporation Counsel,
of Counsel)

For the Employee Representative
Brian C. Doherty, 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 Professional Fire Officers Association, Local 1860, IAFF (the "Association"), which currently includes all superior officers except the Fire Chief. The City based its request for the exclusion of the 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"). The City further alleged that a conflict of interest exists between deputy chiefs and the other superior officers in the Association's unit.

Hearings were held before Commission Hearing Officer Dennis J. Alessi on July 8, 1980 and before Commission Hearing Officer Arnold H. Zudick on February 6, 1981, ^{1/} at which time all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Post-hearing briefs were submitted by the parties, the last of which was received on June 18, 1981.

The Hearing Officer issued his Report and Recommendations on July 22, 1981, a copy of which is attached hereto and made a part hereof. He concluded that the deputy chiefs exhibit a great deal of discretion and independence with respect to policy formulation and effectuation, and thus qualify as managerial executives.

Neither party has filed exceptions to the report of the Hearing Officer. The undersigned has carefully reviewed the entire record in this matter, including the Hearing Officer's Report and Recommendations and adopts the Hearing Officer's findings of fact and conclusions of law for the reasons stated below.

The record reveals that the Newark Fire Department consists of approximately 839 uniformed employees of which approximately 748

^{1/} During the course of the hearing, the original Hearing Officer resigned from the Commission. On October 14, 1980, pursuant to N.J.A.C. 19:11-6.4, the undersigned transferred the instant matter to Hearing Officer Zudick for completion of the record and for report to the undersigned. The delay in scheduling the second hearing date is attributable to numerous requests by the parties to reschedule this matter.

are actively engaged in fire fighting. The department is controlled by a Fire Director, a Fire Chief, and 14 Deputy Fire Chiefs, 6 of whom are involved in administrative duties, and 8 of whom are operating deputy chiefs involved in the operations of firefighting functions.

The Deputy Chiefs involved in operations have total discretion in deploying their personnel throughout the divisions under their control and may utilize their manpower as they feel will best serve the department regardless of procedural guidelines. They also have full discretion to require their personnel to obtain specific forms of additional training. In addition, a deputy chief may have full command of the entire Department when acting as Chief in his absence.

The administrative deputy chiefs possess similar authority. For example, the Fire Prevention Deputy Chief has wide discretion in deploying his personnel and he has the responsibility to determine where inspections will take place, and the Community Relations Deputy Chief chooses and implements the programs he feels are necessary to accomplish his objectives.

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 examined the issue of managerial executive status in the context of the statutory definition 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 507 (¶ 11259 1980). In Montvale, guidelines were established for determining managerial status and certain factors were analyzed in determining whether an employee possessed the proper level of authority to qualify as a managerial executive.

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 purpose 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 exercises. [P.E.R.C. No. 81-52, 7 NJPER at 508-509.]

In Montvale and In re Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977) the titles of chief of police and lifeguard captain, respectively, were deemed not managerial. In Montvale, although the chief exercised a wide range of duties, the record established that the Mayor and the Commissioner exercised almost complete control over departmental operations. Likewise, in Avon where the Captain prepared the budget, authorized certain rules and regulations, changed work schedules, hired guards in emergencies and directed the guards' work

on a day-to-day basis, it was determined that his role was merely supervisory and that his responsibilities did not include the formulation or effectuation of policy.

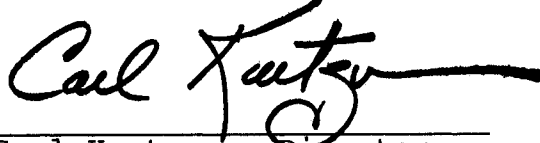
In the instant matter, there is ample evidence in the record to establish that there is a need for various levels of managerial authority due to the large size of the Newark Fire Department.

The responsibilities of the deputy chiefs, as detailed in the record, demonstrate that they clearly exercise a level of authority and independent judgment to warrant their classification as managerial executives.

On the basis of the position of the deputy chiefs in the City's managerial hierarchy and the level of authority and independent judgment which they exercise in carrying out their functions and responsibilities the undersigned finds the deputy chiefs in the Newark Fire Department function in the type of managerial capacity envisioned in the statutory definition of managerial executive.

Accordingly, for the above reasons and in the absence of exceptions the undersigned adopts the findings of fact and conclusions of law of the Hearing Officer and determines that the Deputy Chiefs of the Newark Fire Department are managerial executives within the meaning of the Act and their inclusion in any negotiations unit would be inappropriate.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

A handwritten signature in black ink, appearing to read "Carl Kurtzman", with a long horizontal flourish extending to the right. The signature is written over a horizontal line.

Carl Kurtzman, Director

DATED: October 23, 1981
Trenton, New Jersey

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

In the Matter of

CITY OF NEWARK,

Public Employer-Petitioner,

-and-

Docket No. CU-80-76

PROFESSIONAL FIRE OFFICERS ASSOCIATION,
LOCAL 1860, IAFF, AFL-CIO,

Public Employee Representative-Respondent.

SYNOPSIS

In a Clarification of Unit Petition filed by the City of Newark, a Hearing Officer of the Public Employment Relations Commission recommended the removal of the Fire Deputy Chiefs from the Association's negotiations unit.

The Hearing Officer found that the Deputy Chiefs were managerial executives within the meaning of the Act, therefore that position was 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 said title were included in the Association's unit.

A Hearing Officer's Report and Recommendation 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, 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. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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PROFESSIONAL FIRE OFFICERS ASSOCIATION,
LOCAL 1860, IAFF, AFL-CIO,

Respondent.

Appearances:

For the Public Employer

John J. Teare, Corporation Counsel
(Rosalind L. Bressler, Assistant Corporation Counsel,
of Counsel)

For the Respondent

Brian C. Doherty, Esq.

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

On April 22, 1980, a Clarification of Unit Petition was filed with the Public Employment Relation Commission (the "Commission") by the City of Newark (the "City") seeking to remove the title of Deputy Chief(s) from the unit represented by the Professional Fire Officers Association, Local 1860, IAFF, (the "Association") which currently includes all superior officers except the Fire Chief.

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"), and it further alleges that a conflict of interest exists between Deputy Chiefs and the remainder of the Association's unit, all of which justify their removal from the unit. The Association argues that the Deputy Chiefs are neither managerial executives nor confidential employees, and that no conflict of interest exists with their inclusion in the unit.

Pursuant to a Notice of Hearing dated June 9, 1980, hearings were held in this matter before a Commission Hearing Officer on July 8, 1980, and before the undersigned Hearing Officer on February 6, 1981, 1/ at which all parties were given the opportunity to examine and cross-examine witnesses, to present evidence, and argue orally. Both parties filed post-hearing briefs in this matter the last of which was received on June 18, 1981. 2/

1/ 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 matter to the undersigned Hearing Officer for completion. The delay in scheduling the second hearing date is attributable to numerous requests by the parties to reschedule this matter.

2/ The delay for the receipt of briefs in this matter is attributal to two factors. First, the transcript was late in arriving and therefore, the briefs were originally due on May 1, 1981. Second, a few days prior to May 1, the Respondent substituted attorneys herein and their new counsel had to acquire the files from the original attorney and review the entire record and write the brief. Therefore, it was necessary to provide him additional time.

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

1. The City is a public employer with the meaning of the Act, is the employer of the employees who are the subject of the Petition, and is subject to the provisions of the Act.
2. The 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 represented by the Association. The parties have been unable to agree upon the continued placement of the Deputy Chiefs 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.
4. The issues herein are as follows:
 - a) Whether the Newark Fire Deputy Chiefs are managerial executives or confidential employees as those terms are defined by the Act.
 - b) If those Deputy Chiefs are neither managerial nor confidential employees, is there a sufficient conflict of interest which would justify the removal of the Deputy Chief title from the Association's Unit?

Findings of Fact

The record reveals that the Newark Fire Department consists of approximately 839 uniformed employees of which approximately 748 people are actively engaged in fire fighting. The department is controlled by a Fire Director, a Fire Chief, and 14 Deputy Fire Chiefs, 6 of whom are involved in administrative duties, and 8 of whom are operating Deputy Chiefs involved in firefighting duties.

Administrative Deputy Chiefs

The basic duties and responsibilities of the 6 administrative Deputy Chiefs include the ability to deploy and transfer personnel in their respective divisions ^{3/}, and take certain disciplinary actions. ^{4/} Chief Kossup also testified that all Deputy Chiefs play a role in policy formulation. He stated that when a change of policy is contemplated all Deputy Chiefs are required to attend a meeting where the policy is discussed ^{5/}. The Deputy Chiefs make constant recommendations concerning possible procedural and policy changes and the Chief always considers these recommendations which sometimes result in a new policy. ^{6/}

^{3/} Transcript ("T") I pp. 75-76, 82, 86-87, 95, 106, 128.

^{4/} TI pp. 81, 107.

^{5/} TI p. 45.

^{6/} TI pp. 48-50.

The six administrative Deputy Chief positions including their specific functions are set forth below:

1. Deputy Chief-Assistant Chief for Operations

This Deputy Chief functions as the Chiefs assistant concerning all administrative matters. He works from 8:30AM - 4:30PM Monday thru Friday, and during that time he functions when necessary as Acting Chief in the Chief's absence. The Chief testified that this Deputy Chief has almost total discretion in performing his duties within the guidelines established by the Chief. ^{7/} The record also reveals that this Deputy Chief is privy to nearly all of the information the Chief receives including arson investigations. ^{8/} However, this Deputy Chief does not participate in collective negotiations, nor does he impose discipline. Nevertheless, the Chief testified that this Deputy Chief does give input concerning disciplinary matters. ^{9/} Finally, the record shows that this Deputy Chief would not serve as Acting Chief at night, or on weekends, or when the Chief was on vacation. That duty would be given to another Deputy Chief.

2. Deputy Chief-Division of Fire Prevention

The primary function of this division is fire inspection which includes the responsibility to ensure that all City fire codes and ordinances are properly followed. The division inspects buildings and building plans to determine whether they meet legal requirements.

^{7/} TII p. 37.

^{8/} TII p. 47.

^{9/} TII pp. 48-49.

The Deputy Chief of this division has the authority to assign his personnel as he believes is necessary to fulfill division responsibilities, 10/ and he can transfer personnel within the division without any other approval. 11/

The Chief testified that the Deputy Chief of this division has wide discretion in the operation of the division. The Deputy Chief controls training within the division, he can discipline employees and use transfers as a form of discipline, and he has the responsibility to determine which areas of the City will be inspected and at which times. 12/ This Deputy Chief has considerable input in policy formulation with respect to matters covered by his division, and he has been instrumental in creating a new policy with respect to compiling data. 13/

3. Deputy Chief-Division of Community Relations

This division deals with community activities such as checking fire hydrants, assisting fire victims, meeting with community groups and discussing fire prevention, and recruitment of fire personnel. The Deputy Chief of this division decides which programs to use and how to implement them, deploys and transfers his personnel as he deems necessary, selects the speakers for the educational programs, and directs the recruitment program. 14/

10/ TI pp. 75-76.

11/ TI p. 76.

12/ TI pp. 79, 81-82, 83-84.

13/ TI pp. 79-80.

14/ TI pp. 86-89.

The Deputy Chief has input with the Chief and the Director as to which programs should be utilized and his input is given great weight. 15/ This Deputy Chief can recommend his personnel for special training and these recommendations are usually followed. 16/ Finally, this Deputy Chief can shift priorities on his own to meet the needs of the Community. 17/

4. Deputy Chief-Division of Special Services

This division is responsible for providing all of the supplies and equipment that are necessary for the operation of the Fire Department. The Deputy Chief of this division has the authority to order supplies and has full discretion in ordering what he feels is necessary within the budget amounts. 18/ Neither the Chief or Director have countermanded the Deputy Chief's purchasing decisions. 19/ In addition, the Deputy Chief has the authority to deploy the men in his division without approval from the Chief or Director. 20/ The Chief testified that the Deputy Chief has almost total input in determining the special services budget and the equipment which is needed, 21/ he has final authority concerning the repair or replacement of fire equipment, 22/ and, he makes effective recommendations with regard to training. 23/

15/ TI p. 102.

16/ TI pp. 95-96.

17/ TI p. 101.

18/ TI p. 105.

19/ TI p. 106.

20/ ID.

21/ TI p. 115.

22/ TI p. 122.

23/ TI p. 108

5. Deputy Chief - Division of Training

The Deputy Chief of this Division is solely responsible for selecting the curriculum and fire activities in which fire fighters are trained, ^{24/} and he has final authority with regard to the development of the quarterly training report within which are recommended training programs which the Chief has approved. ^{25/} This Deputy Chief also initiates new training techniques such as the closed circuit training system, and initiates changes in equipment. ^{26/} In addition, this Deputy Chief functions as Chairman of the Safety Committee, and is a permanent member of the Accident Review Board, and he represents the Director and Chief in meetings with the Business Administrator. ^{27/} Finally, this Deputy Chief has the same authority as other Deputy Chiefs concerning deployment and transfers of personnel and discipline.

The Chief testified that this Deputy Chief was responsible for a change in departmental procedures when his recommendations for testing of in-service fire fighters was adopted. ^{28/}

6. Deputy Chief - Bureau of Investigations

This Deputy Chief is responsible for the investigation of fires. The Chief testified that he has the same authority as other Deputy Chiefs with respect to deployment and transfer of personnel, discipline, and input into policy formulation. ^{29/}

^{24/} TI p. 123.

^{25/} TI pp. 125-126.

^{26/} TI pp. 126-128.

^{27/} TI p. 130.

^{28/} TI pp. 134-135.

^{29/} T2 p. 36.

Finally, the record shows that the administrative Deputy Chiefs provide considerable input into the Departments budget. Those Deputy Chiefs are required to submit their budget requests to the Director. He testified that he gives these requests almost complete weight, and that the final budget adopted by City Counsel reflects the Deputy Chief recommendations. 30/

Operating Deputy Chiefs

The facts show that fire operations are organized into four tours of two deputy divisions. Each deputy division is responsible for one-half of the City, and a Deputy Chief is responsible for each division. Consequently, there are two operating Deputy Chiefs on duty at any one time. 31/ The Chief testified that there are approximately 187 firefighters on duty at any one time and therefore each operating Deputy Chief may be responsible for 94 firefighters at any one time. 32/

The record shows that these Deputy Chiefs have the following responsibilities:

A. Assignments & Deployment

The Chief testified that the operating Deputy Chiefs have total discretion and full authority during any working period to depoly their personnel as they see fit to properly cover and balance out the roll calls between the two deputy divisions. 33/

30/ T2 pp. 3-5.

31/ TI p. 22.

32/ TI p. 23.

33/ TI pp. 25, 27-28.

The purpose of this deployment responsibility exercised by the Deputy Chief is to make certain that approximately the same number of men are assigned to each company in both deputy divisions. The Chief stated that when the Deputy Chiefs come on duty they will attempt to balance the personnel they have between both deputy divisions. In exercising this responsibility the Deputy Chiefs have the authority to shift and reassign personnel to other companies and duties, and to make these assignments whenever a need arises. ^{34/} When making such a deployment decision the Deputy Chiefs are not required to obtain approval from the Chief or Director. ^{35/} In unusual circumstances, however, the Deputy Chief will contact the Chief who testified that he gives great weight to recommendations by the Deputy Chief regarding deployment. In fact, the Chief testified that he is not aware of any case where he did not accept a Deputy Chief recommendation on deployment. ^{36/}

Finally, the Chief stated that although procedural guidelines exist regarding the deployment of personnel, a Deputy Chief can utilize his manpower as he feels will best serve the Department in dealing with the changing needs that arise during the course of his tour. ^{37/} He also indicated that the Deputy Chief is

^{34/} TI pp. 28-29, 72. Examples of deployment in this area include shifting employees into aerial platform companies, or companies in more active parts of the City.

^{35/} TI p. 29.

^{36/} ID.

^{37/} TI pp. 72-73.

totally responsible in the Chiefs absence for all phases of fire activity at the scene of any fire. 38/

B. Scheduling, Transfers, and Training

The Chief testified that the Deputy Chiefs have the discretion to approve overtime and hold over firefighters and superior officers beyond their tour of duty if there is a fire in progress, and may do so without obtaining approval. 39/ He also testified that Deputy Chiefs make recommendations on transfers and these are followed in most cases. 40/

With respect to training, the Chief stated that the Deputy Chiefs have full discretion to require their personnel to obtain additional training in any phase of the firefighting operation to maintain the efficiency of the members under their command. The Deputy Chiefs can select a particular phase of the operation in which additional training is needed, they can require training any time they wish -- day or night, and they can select the training area, i.e., central Newark, abandoned structures, or the Training Academy. 41/ The Deputy Chief's do not need approval to institute training procedures. 42/

C. Discipline

The facts show that Deputy Chief's can recommend discipline against any individual under their command, and that the

38/ TI pp. 36-37.

39/ TI p. 30.

40/ ID.

41/ TI pp. 34-36.

42/ TI p. 35.

recommendations are strongly considered. 43/ The Chief testified that Deputy Chiefs can initiate internal discipline by causing individuals to work extended watches, or by transferring them to other companies within their command, all without the approval of the Chief or the Director. 44/

Director Caufield testified that the discretion exercised by a captain or battalion chief regarding discipline is less than the Deputy Chief. The lower superior officers, for example, can not institute the internal discipline outlined above. 45/ Moreover, the Director stated that in his nineteen years as Fire Director he has never countermanded a Deputy Chief recommendation that an employee he placed on charges. 46/

D. Equipment

The record shows that as a result of recommendations by Deputy Chiefs the Department purchased particular types of firefighting equipment. Specific Deputy Chief recommendations resulted in the purchase of a "squirt" system, rear mount aerial ladders, and inch and three-quarter hose. 47/ The Chief stated that all administrative and operating Deputy Chiefs have participated in recommending equipment and he gives great weight to their recommendations. 48/

43/ TI p. 32.

44/ TI p. 34.

45/ T2 p. 20.

46/ T2 p. 6.

47/ TI p. 40.

48/ TI pp. 44-45.

E. Acting Chief Duties

The Chief testified that when he is off duty or unavailable an operating Deputy Chief is appointed as Acting Chief in his place. 49/ An Acting Deputy Chief is appointed on Friday night until Monday morning; on any of the 30 vacation days, two or three convention days or holidays the Chief may be absent; and, on days the Chief is sick. 50/ The Chief indicated that an Acting Chief assumes full command of the Department and has the same responsibilities as the Chief. For example, an Acting Chief can declare emergencies and give aid to a nearby community or city other than Newark, and he can suspend employees for disciplinary reasons, and such suspensions have already occurred. 51/

In addition to the above duties the record reflects that both Administrative and Operating Deputy Chiefs have effective input into policy making.

The Deputy Chiefs are required to and do provide input in meetings called to discuss proposed changes in Department policy. For example, Deputy Chief recommendations with respect to the movement and location of 7 engine and 6 engine resulted in placing those engines where the Deputy Chiefs had recommended. 52/ The Chief indicated that he gives considerable weight to Deputy Chief recommendations concerning policy and procedures. 53/

49/ One exception to this rule is that from 8:30 A.M. - 4:30 P.M. Monday-Friday, the Deputy Chief-Assistant Chief for Operations usually serves as Acting Chief in the Chiefs absence unless the Chief is on vacation or at a conference.

50/ TI pp. 56-58.

51/ TI pp. 61, 62, 67.

52/ TI pp. 45-47.

53/ TI p. 52.

The Director testified that much of the Departments policy is determined after consultations with the Deputy Chiefs and emanates from them and is given great weight. ^{54/} He also testified that the last time Departmental policies were formulated it was done by a committee of Deputy Chiefs who made recommendations to the Chief and himself, and he relied upon those recommendations almost totally. ^{55/}

CONCLUSIONS OF LAW

In a recent decision, In re City of Newark, H.O. No. 81-13, 7 NJPER _____ (¶ _____ May 18, 1981), the undersigned Hearing Officer, in a lengthy discussion, reviewed the Commissions policy as well decisions from other jurisdictions regarding the definition of a managerial executive and the application of conflict of interest in a case that had issues identical to the instant matter. The undersigned relies upon that discussion with respect to the issues raised herein. However, it will be helpful to the parties to provide a brief review of that discussion.

A. Managerial Executives ^{56/}

In a recent decision, In re Borough of Montvale, D.R. No. 80-32, 6 NJPER 198 (¶ 11097 1980), affirmed P.F.R.C. No. 81-52 6 NJPER 507 (¶ 11259 1980), the Commission established certain

^{54/} T2 p. 7.

^{55/} T2 p. 9, 20.

^{56/} 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).

guidelines for determining managerial status. The Commission held that an employee is a managerial executive when he/she formulates policy or directs its effectuation. The Commission defined what it meant by the formulation and effectuation of policy, and established certain factors to consider in determining whether an employee possessed the proper level of authority.

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 purpose 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. 57/

57/ The undersigned believes that the Commission's decision in Montvale broadens the interpretation of the terms "formulate" and "effectuate" as compared to the Commission's initial use of those terms in In re City of Elizabeth, P.E.R.C. No. 36 (1970). As opposed to Elizabeth, Montvale does not require an employee to have the "final responsibility" to formulate or effectuate policy to be considered a managerial executive. As long as a title meets the above criteria, it is managerial.

Two other jurisdictions, New York and Pennsylvania, have issued several decisions finding chiefs or deputy chiefs (police and fire) to be managerial employees. In New York, the Public Employment Relations Board has found that police chiefs who coordinate policy, deploy personnel, prepare estimated budgets, and authorize overtime are managerial employees. ^{58/} In Pennsylvania, the Pennsylvania Labor Relations Board found that police chiefs who prepare annual budgets, send employees to training courses, and made decisions concerning equipment were managerial. ^{59/} The Pennsylvania Board also found that a police deputy chief who performed the chiefs duties in his absence, assisted the chief in drafting the departments procedures and regulations, and who developed and implemented various training programs was a managerial employee. ^{60/}

B. Conflift of Interest

Conflict of interest principles were established by the New Jersey Supreme Court in Board of Education of W. Orange v Wilton, 57 N.J. 404 (1971). In application of those principles in In re City of Paterson, D.R. No. 78-23, 3 NJPER 385 (1977), the Director of Representation removed the chief and deputy chief of police from a unit which included other superior officers because of a substantial actual or potential conflict of interest. The deputy chiefs in that

^{58/} In re City of Watervliet, 11 PERB 4122 (¶ 4078 1978); In re Town of Bethlehem, 11 PERB 3027 (¶ 3015 1978); In re City of Binghamton, 10 PERB ¶ 3038 (1977); and In re City of Elmira, 6 PERB ¶ 4016 (1973).

^{59/} In re No. Middletown Twp., 11 PPER 110 (¶ 11058 1980); In re Lower Allen Twp. Police Dept., 11 PPER 17 (¶ 11010 1979); and In re Borough of Wilkesburg, 9 PPER 484 (1978).

^{60/} In re Upper Providence Twp., 11 PPER 161 (¶ 11087 1980).

case were responsible for the operation of one division within the department, they could recommend discipline, and a deputy chief would assume the authority to operate the department in the chiefs absence.

In another matter, In re City of Elizabeth, P.E.R.C. No. 71 (1972), the Commission found, in reliance upon Wilton, that the chief and deputy chiefs of the Elizabeth police and fire departments be removed from units which included other superior officers because of a conflict of interest.

ANALYSIS

The Association maintains that the Deputy Chiefs are not managerial executives because they lack discretion and have limited authority with respect to personnel matters, discipline, policy guidelines and budget formulation. In support of its position the Association relies in-part upon In re Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977). The Commission in that case upheld a Hearing Examiners finding that a lifeguard captain was not a managerial executive, and further held that the term "managerial executive" should be narrowly construed. The Commission concluded that the lifeguard captain was a supervisor, but not a managerial employee.

The Hearing Examiner in that decision, H.E. No. 77-21, 3 NJPER _____ (1977) found that the captain prepared the budget, authorized certain rules and regulations, changed work schedules, hired guards in emergencies, and directed the guards work on a day-to-day basis. However, the Hearing Examiner concluded that the captains role was

advisory only, and that he did not formulate or effectuate policy. The Mayor in Avon often rejected the captains recommendations without consulting with him and thereafter developed his own policies. The Hearing Examiner determined that the captain's discretion and independent action was exercised within the limits of established policy and therefore, he was only a supervisor and not a managerial employee. ^{61/}

The undersigned believes, contrary to the Association, that Borough of Avon is more similar to Montvale, supra, and is in fact distinguishable from the instant matter. In Montvale, the chief exercised a wide range of duties, but the Commission found that he lacked any real role in policy formulation and effectuation because the Mayor and Commissioner's exercised almost complete control over departmental operations. That is the very same situation in Avon where the Mayor exercised control over lifeguard operations.

However, in the instant matter the Deputy Chiefs discretion and independence with respect to policy formulation and effectuation frequently go beyond basic policy standards and is greater than the discretion exercised by the captain in Avon. For example, the operating Deputy Chiefs have total discretion to deploy their personnel throughout the deputy divisions, and the Chief testified that these Deputy Chiefs can utilize their manpower as they feel will best serve the department regardless of procedural guidelines; ^{62/}

^{61/} See also Bell Aerospace Co., 219 NLRB No. 42, 89 LRRM 1664 (1975); and Flintkote Co., 217 NLRB No. 85, 89 LRRM 1295 (1975).

^{62/} See note 37.

they have full discretion to require their personnel to obtain specific forms of additional training; and, they have full command of the Department when serving as Acting Chief.

The administrative Deputy Chiefs have similar authority. For example, the Fire Prevention Deputy Chief has wide discretion in deploying his personnel and he has the responsibility to determine where inspections will take place. The Community Relations Deputy Chief chooses and implements the programs he feels are necessary to accomplish his objectives, and the Special Services Deputy Chief has the full discretion to order supplies for the Department.

All of these responsibilities demonstrate that the Deputy Chiefs exercise a level of authority and independent judgement far beyond the responsibilities of the Avon captain or the Montvale chief. The Deputy Chiefs, in making decisions concerning deployment and training, are selecting a course of action from among various alternatives to reach policy objectives, and they oversee and coordinate the implementation of their decisions by line supervisors.

Another distinguishing factor between Avon and the instant matter is that the Fire Director, unlike the Avon Mayor, relies heavily on recommendations by the Deputy Chiefs. In fact, the Director testified that the Deputy Chiefs were involved in the fomulation of policy.

A final substantial difference between Avon and Montvale, versus the instant matter is that the captain and chief in Avon and Montvale respectively, are only responsible for a relatively small complement of employees. The Newark Fire Department, however, is one of if not the largest fire department in the State, and each Deputy Chief is responsible for a major departmental function, and the

operating Deputy Chiefs have authority over several hundred firefighters of various ranks. The very size of the Department necessitates a need for various levels of managerial authority which is absent from the Avon and Montvale cases.

In further support of its position the Association cited various portions of the transcript purported to show that the functions performed by Deputy Chiefs lack managerial status. For example, the Association contended that the Director testified that the Deputy Chiefs discretion in deploying personnel must conform to the rules and regulations set by the Chief and himself. That testimony, however, is somewhat misleading. The Director was responding to a question as to whether Deputy Chiefs could exercise discretion in such a way that would violate Departmental rules and regulations. The Directors response to that question is accurate of course, because the Deputy Chiefs cannot violate the rules, but that should not be read as a limitation to the exercise of reasonable deployment discretion by the Deputy Chiefs. In fact, the Chief testified that during the course of a tour there are no guidelines as to how the Deputy Chief is going to redeploy his personnel, he does what he feels is best. 63/

The undersigned believes that the preceding phrase means that the Deputy Chief is to redeploy personnel as he feels is best to further the mission of the Employer and reach policy objectives all of which demonstrate managerial responsibilities. The Association seems to argue that the deployment of personnel is merely a minor or custodial function. The undersigned cannot agree. The purpose of balancing the role calls by the Deputy Chief is to make certain that there is sufficient manpower throughout the Department to

effectively perform the responsibilities of the Department. In performing the deployment function the Deputy Chief may redeploy a substantial number of employees, and neither the Chief nor the Director are required to approve the Deputy Chiefs actions. It is unrealistic in a Department as large as Newark's to expect the Chief or Director to perform the deployment function on a daily basis. This function by the Deputy Chief thus demonstrates the need for various levels of managerial authority.

The Association also contends that the Deputy Chiefs role in policy making is not managerial because the Director has the authority to alter recommendations and make the final decisions. Despite the fact that the Director has final authority in policy formulation, the record shows that Deputy Chiefs are involved in the development of objectives designed to further the mission of the Department and they select -- from various alternatives -- the course of action to follow. For example, the Director testified that much of the policy emanates from the Deputy Chiefs, and that for example, nearly 100 percent of the policy formulated by the Deputy Chief of the Community Relations Division is implemented. ^{64/}

Having reviewed the entire record herein the undersigned believes -- based upon the above discussion -- that the Newark Fire Deputy Chiefs are managerial employees. When viewing the duties of the instant titles, their hierarchy in the Fire Department, and the size and comprehensiveness of the Department it is apparent that the Deputy Chiefs are actively involved in the formulation and effectuation of Departmental policy.

^{64/} T2, p. 7.

With respect to the conflict of interest issue, the Association argues that the Deputy Chiefs are not engaged in labor negotiations on behalf of management and are therefore not confidential employees within the meaning of the Act. ^{65/} The Association contends that since the Deputy Chiefs are not confidential employees, no conflict of interest exists between them and the remainder of their unit. The undersigned agrees with the Association that Deputy Chiefs are not confidential employees, but this hardly justifies a finding that no conflict of interest exists. To the contrary, the instant facts show that a substantial actual and potential conflict of interest exists between Deputy Chiefs and the remainder of the Association's unit.

In comparison to the deputy chiefs in Paterson, supra, and Elizabeth, supra, (P.E.R.C. No. 71), the instant Deputy Chiefs perform equivalent or even greater functions than those deputy chiefs. In fact, the duties of the instant titles are equivalent to the deputy chiefs in Newark, supra, where the undersigned also found a conflict of interest. In view of the level of discretion exercised by the instant titles, i.e., the deployment of personnel, and transfers within divisions, the undersigned believes that independent of the managerial issue, a conflict of interest exists herein justifying the removal of the Deputy Chiefs from the Association's unit.

^{65/} N.J.S.A. 34:13A-3(g) defines confidential employees as follows: "Confidential employees" of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

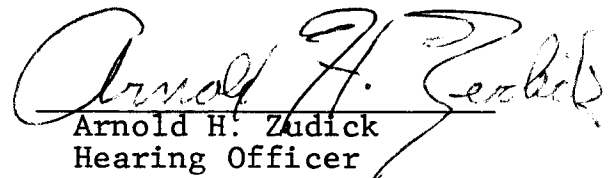
RECOMMENDATIONS

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

1. That the Fire Deputy Chiefs in the City of Newark are managerial executives within the meaning of the Act and are inappropriate for inclusion in any negotiations unit and must therefore be removed from the Association's unit.

2. That independent of the above recommendation, there is a substantial, actual or potential conflict of interest between the instant title and the remainder of the Association's unit thereby justifying the removal of the Deputy Chiefs from that unit.

Respectively Submitted


Arnold H. Zudick
Hearing Officer

DATED: July 22, 1981
Trenton, New Jersey