D.R. NO. 78-18

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

In the Matter of

BOROUGH OF SOUTH PLAINFIELD,

Petitioner,

-and- Docket No. CU-76-30

SOUTH PLAINFIELD P.B.A. LOCAL 100,

Employee Representative.

SYNOPSIS

The Director of Representation, in agreement with the findings and conclusions of a Hearing Officer, determines that a conflict of interest exists between superior officers and rank and file patrolmen to warrant the removal of captains, lieutenants and sergeants from an all-inclusive police negotiations unit. The Director, relying upon the rationale previously expressed by the Commission in In re City of Union City, P.E.R.C. No. 70, finds that the quasi-military organization of the police department and the authorities exercised by superior officers produce an inherent conflict of interest between these personnel and patrolmen, which conflict is not mitigated by the existance of exceptional circumstances. Contrary to the assertions of the employee representative, the Director, in agreement with the Hearing Officer, finds that the relationship of the employee representative with the employer prior to 1968 did not amount to an established practice of collective negotiations.

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SOUTH PLAINFIELD P.B.A. LOCAL 100,

Employee Representative.

Appearances:

For the Petitioner, Abrams, Dalto, Gran,
Hendricks & Reina, Esqs.
(Angelo H. Dalto, of Counsel)

For the Employee Representative,
Renato R. Biribin, Esq.

DECISION

Pursuant to a Notice of Hearing to resolve a question concerning the composition of a negotiations unit represented by the South Plainfield P.B.A. Local 100 (the "P.B.A."), a hearing was held before Charles A. Tadduni on June 3, 11, 30, July 21 and August 24, 1976, in Newark. All parties were given an opportunity to examine witnesses, present evidence, and argue orally. Briefs were filed by October 1, 1976, and the Hearing Officer issued his Report and Recommendations on July 1, 1977. A copy is annexed hereto and made a part hereof. Exceptions were filed by the P.B.A. on July 28, 1977, to which the Borough of South Plainfield (the "Borough") has not responded.

The undersigned has considered the entire record including the Hearing Officer's Report, the transcript and the exceptions, and on the basis thereof finds as follows:

1. The Borough of South Plainfield is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., as amended (the "Act"), and is subject to its provisions.

2. South Plainfield P.B.A. Local 100 is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Public Employer having sought clarification of a unit of its employees for which the PBA is the exclusive representative, a question concerning the composition of a unit of public employees exists and the matter is appropriately before the undersigned for determination.

4. The PBA unit has included all police other than the Chief. The Borough seeks the exclusion of all superior officers - captains, lieutenants and sergeants from the PBA unit.

The Hearing Officer found that the superior officers were supervisors within the meaning of the Act, and further that a conflict of interest exists between patrolmen and superior officers warranting severance of the superiors from the unit. He also found that no established practice existed which might overrule the above considerations and allow the superior officers to remain in the unit. Consequently, he recommended that the superior officers be severed from the PBA unit. The PBA's exceptions take issue with the Hearing Officer's findings and conclusions, generally claiming that the weight of evidence is contrary to his findings.

There is now a long line of Commission decisions on the question of whether superior officers may be included in negotiations units with patrolmen. The standards utilized by the Commission in reaching these determinations are presented in 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). Generally, these decisions provide that, except in

very small departments where any conflict of interest between superior officers and rank and file personnel is de minimis in nature, the quasi-military structure of police departments virtually compels that superior officers and patrolmen be placed in separate units. This is so inasmuch as the exercise of significant authority in a chain of command operation produces an inherent conflict of interest within the New Jersey Supreme Court's definition of that concept in Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971). The existence of an inherent conflict of interest in these circumstances must lead to a determination that separates superior officers from rank and file notwithstanding a previous history of collective negotiations in a combined unit. Moreover, the finding of such conflict is not contingent upon a finding that the superior officers are supervisors within the meaning of N.J.S.A. 34:13A-5.3.

In the Union City matter, supra, the Commission stated the above most cogently:

> "It is readily observable that the military-like approach to organization and administration and the nature of the service provided (which presumably accounts for that approach) set municipal police and fire departments apart from other governmental services. Normally there exist traditions of discipline regimentation and ritual, and conspicuous reliance on a chain of command all of which tend to accentuate and reinforce the presence of superior-subordinate relationships to a degree not expected to be found in other governmental units and which exist quite apart from the exercise of specific, formal authorities vested at various levels of the organization. When the Commission is asked to draw the boundaries of common interest in this class of cases, it cannot ignore this background as it examines for evidence of whether or not a superior exercises any significant authority over a rank and file subordinate which would or could create a conflict of interest between the two. In our view, where these considerations are real rather than merely apparent, it would be difficult indeed to conclude, in contested cases, that a community of interest exists between the lowest ranking subordinate and his superior, absent exceptional circumstances. We do not intend that this observation extend to those cases where

> the points of division are so few and so insignificant as to be termed de minimis, such as might not unreasonably be expected to exist in a small police or fire department. We are persuaded, however, after almost four years experience with this statute that unless a de minimis situation is clearly established, the distinction between superior officers and the rank and file should be recognized in unit determination by not including the two groups in the same unit."

The Union City rationale was relied upon, and its facts analogized, in a subsequent decision, In re Borough of Sayreville, E.D. No. 76-27, 2 NJPER 85 (1976), rev. denied, P.E.R.C. No. 76-35, 2 NJPER 174 (197), aff'd., App. Div. Docket No. A-3325-75 (4/1/77), Pet. for Certif. denied, __ N.J. ___ 7/20/71). The Appellate Division stated:

> "In reviewing a determination of an administrative agency in a matter such as this, the courts ordinarily give deference to the expertise of the agency entrusted with the duty of developing and applying an expertise in the area delegated to it. See Close v. Kordulak Bros., 44 N.J. 589, 599 (1965). Allowing for such deference to the presumed expertise in the developing field under the jurisdiction of PERC, we conclude that there is sufficient evidence in the record to support its determination and affirm essentially for the reasons expressed in its written decision.

In view of the Appellate Division's affirmance of the Sayreville decision, the standards utilized by the Commission in this decision are now the standards by which all such cases will be determined. Accordingly, in cases involving police department units, superior officers will normally be severed from rank and file personnel unless it is shown that there is an exceptional circumstance dictating a different result. Examples of such are the following: (1) A department in which there is a very small force, where superior officers perform virtually the same duties as patrolmen, and where any community of interest is de minimis in nature; 1/ (2) Where it is determined that superior officers are supervisors, the existence of established practice, prior agreement or special circumstances dictate the continued inclusion of superior officers in a unit of rank and

1/ In re Borough of Rockaway, E.D. No. 43 (1972); In re Twp. of Hanover, E.D. No. 41 (1971).

file personnel.[2/]

5. An examination of the facts in this matter reveals that the police department consists of 50 policemen organized by divisions with captains in command and the lieutenants and sergeants having command responsibilities. A chain of command exists and the Chief must rely on his superior officers in order for the Department to function. Accordingly, having reviewed the record, the undersigned adopts the findings of fact and recommendations of the Hearing Officer and further finds that under these circumstances and in the context of the standards enumerated above there is an inherent conflict of interest between the superior officers and patrolmen which is not mitigated by exceptional circumstances.

As to the PBA's claim that an established practice exists in the Borough, an independent review of the record reveals that with one exception, the witnesses who had been on the Police Committee prior to 1968 testified that the Police Committee had no authority to enter into any binding agreements, and that its meetings with the PBA were utilized only to provide guidelines for the Mayor and Council. Accordingly, the record, while establishing a history of meetings between the Borough's police committee and the committee from the PBA, fails to meet the requirements for a finding of established practice, as described in West Paterson, footnote 2.

2/ N.J.S.A. 34:13A-5.3. In re West Paterson Board of Education, P.E.R.C. No. 77 (1973). The Commission stated that for a finding of established practice it would be necessary to find that prior to the establishment of the Act in 1968 there was:

> "An organization regularly speaking on behalf of a reasonably well-defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) with an employer who engaged in the process with an intent to reach agreement." (P. 10)

In a further consideration of the West Paterson matter, P.E.R.C. No. 79 (1973), the Commission also stated that the term prior agreement referred to an executed agreement pre-dating the 1968 Act.

Based on the above conclusions, it is unnecessary for the undersigned to make a ruling as to whether the superior officers are supervisors.

Accordingly, for the reasons stated above the undersigned hereby directs the removal of all superior officers (captains, lieutenants and sergeants) from the unit represented by the PBA. Insofar as the instant Clarification of Unit Petition was filed prior to the execution of a 1976 Agreement,[3/] the undersigned finds in accordance with the Commission's clarification procedure [4/] that the superior officers shall be removed from the unit immediately upon this determination.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Carl Kurtzman, Director
of Representation

DATED: October 26, 1977
Trenton, New Jersey

3/ Exhibit J-1. The 1976 Agreement, as well, provides that it shall not be construed as the Borough's recognition of the PBA as the representative of the titles disputed in the instant Petition.

4/ See In re Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977).

H.O. NO. 78-1

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

In the Matter of

BOROUGH OF SOUTH PLAINFIELD,

Petitioner,

-and-

Docket No. CU-76-30

SOUTH PLAINFIELD P.B.A. LOCAL 100,

Employee Organization.

SYNOPSIS

On the basis of the evidence taken at a hearing in a representation proceeding, the Hearing Officer recommends that superior officers (sergeants, lieutenants and captains) employed in the South Plainfield Police Department be excluded from the negotiations unit of rank and file police officers. The Hearing Officer finds that the superior officers possess and exercise the authority to recommend discipline and therefore are supervisors within the meaning of the Act. The Hearing Officer also found that there is a substantial actual and potential conflict of interest between the superior officers and rank and file officers which warrants the exclusion of the superiors from the unit of rank and file police officers. Finally, the Hearing officer found that no established practice existed herein sufficient to warrant the inclusion of superior officers the unit of rank and file police officers.

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

In the Matter of

BOROUGH OF SOUTH PLAINFIELD,

Petitioner,

-and- Docket No. CU-76-30

SOUTH PLAINFIELD P.B.A. LOCAL 100,

Employee Organization.

Appearances:

For the Petitioner, Abrams, Dalto, Gran, Hendricks, & Reina, Esqs.
(Mr. Angelo H. Dalto, of Counsel)

For the Employee Organization, Mr. Renato R. Biribin, Esq.

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

A Petition for Clarification of Unit was filed with the Public Employment Relations Commission (the "Commission") (Docket No. CU-76-30) on December 23, 1975, by the Borough of South Plainfield (the "Borough") seeking a clarification regarding the composition of a unit of employees represented by the South Plainfield P.B.A., Local No. 100 (the "PBA"). The Borough seeks a determination which would exclude from the negotiating unit represented by the PBA all sergeants, lieutenants and captains employed in the South Plainfield Police Department. Pursuant to a Notice of Hearing hearings were held before the undersigned Hearing Officer on June 3, 11, 30, July 21, and August 24, 1976, in Newark, at which all parties were given an opportunity to examine witnesses, to present evidence, and to argue orally. Briefs were submitted by the parties by October 1, 1976. Upon the entire record in this proceeding, the Hearing Officer finds:

1. The Borough of South Plainfield is a Public Employer within the meaning of the New Jersey Employer-Employee Relations Act, (the "Act") is subject to its provisions, and is the employer of the employees who are the subject of this proceeding.

2. The South Plainfield P.B.A., Local No. 100, is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Borough has filed a Petition for Clarification of Unit seeking exclusion of police sergeants, lieutenants and captains from the unit represented by the PBA. The PBA asserts that it represents all policemen employed by the Borough, excluding the Chief, and will not agree to the exclusion of the superior officers from its unit. Accordingly, there is a question concerning the composition of the negotiations unit and the matter is properly before the Hearing Officer for Report and Recommendations.

I BACKGROUND

In 1974, the parties began negotiating for an agreement covering calendar year 1975. On April 12, 1976, the Agreement for 1975 (Exhibit J1-a) was executed. This was the first signed, written agreement between the Borough and the PBA.[1/]

During the negotiations for the 1975 Agreement, Borough negotiators proposed that the titles of police lieutenant and captain be excluded from the negotiations unit represented by the PBA. Disagreement over the unit placement of these titles led to the filing of the instant petition. The Borough made a motion to amend its petition at the outset of the hearing in order that the title of police sergeant also be excluded from the nego-

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* Note: transcript references are made as follows: hearing date 6/3/76 = Tr. 1, 6/11/76 = Tr. 2, 6/30/76 = Tr. 3, 7/21/76 = Tr. 4, and 8/24/76 = Tr. 5.
It should also be noted that use of the term "superior officers" by the undersigned is intended in a generic sense and is used herein to refer to sergeants, lieutenants and captains, the employees who are the subject of the instant matter. Such use of the term "superior officer" should be distinguished from the meaning given to that term in the South Plainfield Police Department Rules and Regulations (Exhibit J3-b, p. 3).
The undersigned has used the term "rank and file police officer" or "patrol-level officer" to refer to the rank of patrolman or patrol officer.
Finally, the Hearing Officer has used the term "police officer" to refer to all members of the South Plainfield Police Department.

1/ Tr. 1, p. 8. The 1975 Agreement (Exhibit J1-a), taken together with Exhibits J1-b, J1-c, J1-d, J1-e, J1-f and the record herein, clearly indicates that its coverage extended to all police officers employed by the Borough. However, in view of their pending representation proceeding before the Commission the parties previously agreed that the 1975 Agreement was not to be construed as a recognition of the PBA as the negotiations representative of all police officers in the South Plainfield Police Department. No question has been raised concerning the status of the PBA as the exclusive negotiations representative of all patrol-level officer personnel.

tiations unit represented by the PBA. The motion was granted by the undersigned.[2/]

The South Plainfield Police Department is comprised of a total of 50 police officers -- one Chief, three captains, five lieutenants, six sergeants and 35 rank and file police officers.[3/] The organization of the department is along para-military lines. The department is subdivided into three divisions -- Patrol, Investigations, and Special Services -- with a captain in charge of each division. In the Patrol Division, there are three lieutenants, each in charge of one of the three shifts plus one traffic safety lieutenant. There are also three patrol sergeants, each of whom is is responsible for direct supervision of patrol officers during their shifts. There are 27 patrol officers in this Division. In the Investigations Division, there is one lieutenant, two sergeants, and five rank and file police officers. In Special Services, there is one sergeant and one rank and file officer.[4/]

The Department operates pursuant to a fairly well-defined chain of command -- command decisions, orders concerning personnel and other operations instructions are handed down through the ranks and are carried out by the appropriate personnel in the command chain. Personnel and operations reports and duty assignment requests are passed up through the ranks for the information or approval of the appropriate level of authority.[5/]

II POSITIONS OF THE PARTIES

(A) Position of the Borough of South Plainfield

The Borough asserts that sergeants, lieutenants and captains are supervisors within the meaning of the Public Employer-Employee Relations Act. The Borough further asserts that conflicts of interest are generated by having both rank and file and superior officers in the same negotiations unit. It is also contended that such a mixed unit lacks the community of interest found in smaller, functionally homogeneous, police department negotiations units.

The Borough also advances the counter argument that the past relationship between the Borough and the PBA was not an established practice. While the Borough acknowledges that there have been limited contacts between the parties in prior years concerning compensation paid to police officers, it insists the relationship was informal and was not give and take in nature. The Borough also notes that even if an established practice is found to exist, the presence of other factors -- such as conflict of interest -- may operate to counterbalance the effects of established practice.

2/ Tr. 1, p. 11.
3/ Tr. 1, pgs. 24, 26, 27, 31, 71.
4/ Tr. 1, pgs. 24, 26, 27, Exhibit J3-b, Exhibit P-1.
5/ Tr. 1, pgs. 31-38, Exhibit J3-b.

Relying upon the foregoing claims and citing N.J.S.A. 34:13A-5,3 and West Orange Board of Education v. Wilton, 57 N.J. 404 (1971), the Borough contends that a negotiations unit inclusive of both superior officers and rank and file police officers would be an inappropriate unit under the policy and purposes of the Act.

Therefore it is argued that the sergeants, lieutenants and captains should be excluded from a negotiations unit containing rank and file police officers.

(B) Position of the PBA

The PBA contends that sergeants, lieutenants, and captains are not supervisors within the meaning of the Act as they neither hire, discharge, discipline, nor effectively recommend the same. The PBA notes that the record herein indicates that almost none of the disciplinary measures recommended by the superior officers in question had been followed by the chief. It is also contended that no actual or potential substantial conflict of interest exists between superior and rank anf file officers.

The PBA notes that none of the superior officers desire to be excluded from the unit of rank and file officers. It was further asserted that a substantial community of interest accrues between these two groups through the similarity of benefits provided them by the Borough and through the similarity of their duties and working conditions.

The PBA further asserts that the past relationship of the parties herein amounts to an established practice. Therefore, because the parties have demonstrated an ability to work successfully within a negotiations unit containing both rank and file and superior officers, the above-indicated mixed unit should not be altered by the exclusion of superior officer ranks.

III ISSUES

(1) Whether the sergeants, lieutenants, and captains are supervisors within the meaning of the Act?

(2) Whether such actual or potential substantial conflicts of interest are generated by inclusion of the sergeants, lieutenants and captains in the same negotiations unit with rank and file police officers that it becomes necessary to exclude superiors from the unit of rank and file personnel?

(3) Assuming arguendo that the titles sought to be excluded -- sergeants, lieutenants and captains -- are supervisors within the meaning of the Act and/or that the inclusion of such titles in the same unit with rank and file officers creates actual or potential substantial conflicts of interest, is there an established practice that would dictate the continued existence of either a mixed unit of supervisors and non-supervisors or a negotiations unit whose composition gives rise to conflicts of interest?

IV DISCUSSION AND ANALYSIS OF LAW AND FACTS

(A) Supervisors

N.J.S.A. 34:13A-5.3 provides in part that "...nor except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline or effectively recommend the same have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership."

N.J.S.A. 34:13A-6(d) states that "...except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and non-supervisors..."

The Commission has determined that the Act, in effect, defines supervisor as one having the authority to hire, discharge, discipline, or to effectively recommend any of the foregoing.[6/]

After careful consideration of the entire record herein, the undersigned concludes that superior officers are supervisors within the meaning of the Act.

A careful examination of the record reveals that superior officers have but a small role in the hiring process. Hiring is accomplished through Civil Service ranking after administration of an examination, a background investigation of each applicant that is conducted by a superior officer, applicant interview by the Chief and possibly the Captain, and the Chief's recommendation to the Mayor and Council. The Mayor and Council make the ultimate hiring decision.[7/]

The involvement of superior officers in the discipline and discharge processes is both more extensive and more intricate. Under the Rules and Regulations of the South Plainfield Police Department, superior officers are responsible for the direction and control of employees in their charge to insure proper performance and good conduct, for maintenance of discipline, and for enforcement of departmental Rules and Regulations.[8/]

6/ In re Cherry Hill Department of Public Works, PERC No. 30, p. 4 (1970). See also In re Township of Teaneck, E.D. No. 23, p.5 (1971).

7/ Tr. 1, p. 41, 53, 75.

8/ Exhibit J3-b, Rules and Regulations of the South Plainfield Police Department, sec. 2.02-2.20. Tr. 1, p. 24-28, 36-42.

While the Rules and Regulations designate the Chief of Police as the final departmental authority on disciplinary matters, superior officers are not without authority to act in this area. Minor infractions are usually initially handled informally with the superior officer merely speaking to the offending subordinate privately. Repetitions of minor infractions or matters of somewhat greater consequence may draw oral reprimands from superior officers. In matters concerning serious infractions of rules or actual criminal conduct, a superior officer may suspend a rank and file officer on an emergency basis.[9/] Superior officers may also seek to have a formal written reprimand placed in the personnel jacket of a rank and file officer where the infraction warrants. However, this latter procedure requires the Chief's approval.[10/] Additionally, superior officers have the responsibility and authority to file factual reports with recommendations for discipline concerning misconduct of police officers which are passed up through the chain of command for ultimate resolution by the Chief.[11/]

Superior officers have given oral reprimands to rank and file police officers[12/] and have suspended rank and file officers on an emergent basis.[13/] The record also shows that superior officers have initiated disciplinary proceedings by their submission of written reports, via the chain of command, to the Chief.[14/]

9/ Exhibit J3-b, sec. 10.01-10.46.
Tr. 1, p. 38-41, 61-63. Tr. 3, p. 116, 123, 131. Tr. 4, p. 31, 36-40, 69.
Where emergency suspension authority is invoked, the suspending superior officer must prepare a report concerning the incident and appear before the Chief along with the suspended individual at 9:00 A.M. on the next business day following the incident. Thus, once any imminent danger from an incident requiring disciplinary action is past, normal disciplinary procedures are utilized.

10/ Exhibit J3-b, sec. 10.01-10.46.
Tr. 1, p. 38-41, 61-63. Tr. 3, p. 116, 123, 131. Tr. 4, p. 31, 36-40, 69.
It is also noted that the initial disciplinary report filed by a superior officer is placed in the personnel jacket of the officer charged with the misconduct, along with other pertinent documents concerning the incident regardless of the ultimate determination made by the Chief.

11/ Exhibit J3-b, sec. 10.29. Tr. 1, p. 39-41.
While the testimony indicates that rank and file police officers are free to report misconduct of police personnel, there is no indication in the record that such action was ever taken by a rank and file police officer, including those instances wherein a rank and file officer has functioned as the Officer-in-Charge.
See Tr. 4, p. 57, 118.
See also Exhibit J3-b, sec. 2.15.

12/ Tr. 3, p. 128. Tr. 4, p. 47.

13/ Tr. 4, p. 96-97.

14/ Tr. 4, p. 38-47, 79-102.

While the Chief may exercise discretion in determining whether or nor to formally prosecute a charge, the record shows that the Chief usually goes along with the recommendations of the charging superior officers.[15/] In processing a charge, either the Chief or an assigned superior officer will investigate and prepare a report and recommendations concerning the charge. Thereafter, a hearing is convened before the Chief, and is normally attended by the charging superior officer, the investigating superior officer, the individual charged and any necessary witnesses. The Chief decides guilt or innocence based upon the evidence presented at the hearing and metes out penalties where appropriate.

There is no indication in the record of any formal disciplinary proceedings in which superior officers were involved and which resulted in the discharge of a police officer.[16/]

The record shows that in almost every incident reported or recommended for discipline by a superior officer, some action was taken ultimately which was consonant with the recommendations of the superior officer.[17/]

In some instances the recommended penalty was altered by the Chief, and action was taken by the Chief only after some independent evaluation of the charges was made by him.

While the disciplinary recommendations of a superior officer are not simply rubber stamped by the Chief, close examination of the record reveals that after considering the record in a disciplinary matter, the Chief has almost without exception affirmed the accusations of misconduct brought by various of his superior officers. Further, the investigation and preparation of reports and recommendations concerning disciplinary incidents is most often done not by the Chief but by another superior officer.

15/ Tr. 1, p. 62-3
Further, the record shows that once put into written form by a superior officer, unless voluntarily withdrawn by that superior officer, the charges must proceed through the chain of command for disposition by the Chief. Tr. 4, p. 35-40. Tr. 2, p. 54.

16/ However, there has been some significant informal involvement by superior officers in discharge matters, e.g. Captain Cobb's testimony which indicates that upon being confronted by then - Sergeant Cobb and the Chief with allegations of misconduct, a police officer "voluntarily resigned" from employment with the Borough. Tr. 3, p. 124. See also n. 17d, infra.

17a/ Tr. 3, p. 127-8, 131. Tr. 4, p. 45-6, 99-100.

It appears from the record that most accusations of serious misconduct by superior officers have been accompanied by somewhat open-ended recommendations for discipline. Where specific disciplinary recommendations were made, there were no significant alterations of the recommended discipline.

Captain Cobb testified that he was assigned to investigate and prepare recommendations concerning two separate disciplinary incidents.[17b] Consistent with Captain Cobb's findings, one of the matters was simply withdrawn after his investigation. In the second matter, while his specific recommendations were not adhered to — possible early retirement based upon (further) consideration of the matter — it is clear that the corrective disciplinary action which was taken by the Borough was based upon and consistent with Captain Cobb's recommendations (the man was given psychological treatment but was not forced to retire).

Sergeant Cvetko's testimony reveals that his penalty recommendations were quite open-ended; he recommended a suspension pending psychological testing, and if warranted, termination of employment.[17c] The Chief, in accordance with Exhibit J-3b, sec. 10.28, gave the individual charged a three-day suspension.

The record also shows that two of Lt. Mueller's disciplinary recommendations were very general ("serious discipline called for"). The testimony indicates that these matters were dropped rather abruptly and that the only action taken by the Chief was to transfer the charged officer to another assignment. In the third matter, after suspending an intoxicated officer from duty on a Saturday evening, Lt. Mueller recommended psychological treatment and a 5 day suspension for the offender. The Chief gave the offender a 5-day suspension.[17d]

17b/ Tr. 3, p. 128-32.
17c/ Tr. 4, p. 38-50.
17d/ Tr. 4, p. 81-105.
It is also significant that on the morning following his emergency suspension of the intoxicated officer (a Sunday), it was not then possible to bring the matter before the Chief.

While speaking to the suspended officer on that following morning, Lt. Mueller "suggested" he take Sunday as a sick day. The officer took the Lieutenant's advice and called in sick later that day.

Based upon the entire record, it is abundantly clear to the undersigned that an individual charged with misconduct by a superior officer almost unquestionably can depend upon receipt of an appropriate penalty, notwithstanding the intervening step involving the Chief. Thus the undersigned concludes that superior officers have the authority to and do in fact effectively recommend discipline. Accordingly, based upon the entire record herein, the Hearing Officer finds superior officers to be supervisors within the meaning of the Act.

B. Conflict of Interest

Even assuming arguendo that the superior officers are not found to be supervisors within the meaning of the Act, there exists a conflict of interest herein sufficient to warrant the exclusion of superior officers from the negotiations unit of rank and file police officers.

In Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971), the Supreme Court examined at length the factors attendant upon the establishment of negotiations units consistent with the purposes of the Act, i.e. to foster fair and harmonious public employer-employee relations.

Specifically, the Wilton court considered:

> To what extent does the reasonable and good faith performance of the obligations a supervisor owes to his employer have capacity, actual or potential, to create a conflict of interest with other supervisors whose work he is obliged to oversee and evaluate for his employer.[18]

The court concluded that where performance of the obligations or the powers delegated by an 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 the inclusion of such supervisor is not present.

In applying the principles enunciated by the Wilton court, the Commission has determined that just as the court observed that a community of interest does not exist merely because all the employees involved are found to be supervisors, so it follows that merely finding all the employees in a proposed unit which encompasses several hierarchical levels of the employer are non-supervisors, does not necessarily mean that all such non-supervisory

18/ Board of Education of West Orange v. Wilton, 57 N.J. 404, (1971).

employees enjoy a community of interest sufficient to permit their inclusion in one unit.[19] Thus, even though not a supervisor, one may have responsibility and authorities over other employees which disqualifies the former from inclusion in the unit because the responsibility and authority exercised precludes the requisite community of interest with other unit employees.

The Commission has had considerable experience in applying conflict of interest considerations to police and fire departments across the State. It may be observed that these governmental entities are almost without exception structured and administered in para-military fashion. In treating the appropriate unit issue in these settings, the Commission has developed a standard for use in conflict of interest determinations, i.e., unless a conflict situation is clearly established as deminimus, such as might not unreasonably be expected to exist in a small police or fire departments, the superior-subordinate distinction should be recognized in unit determinations by not including the two groups in the same unit.[20]

Based upon the foregoing considerations, the Hearing Officer concludes that actual and potential substantial conflicts of interest are generated by the inclusion of sergeants, lieutenants and captains in the same negotiations unit with rank and file police officers.

All superiory officers are responsible for the maintenance of good order of the personnel in their command. All are responsible for maintenance or inspection of equipment and for assisting subordinates when necessary. All may be assigned to investigate charges against rank and file police officers, and may be called upon to testify against those subordinates in hearings before the Chief.

Superiory officers are all actively involved in the day-to-day supervision of the activities of their rank and file subordinates. They supervise field activities, give on-the-job training and act to insure the efficient performance of their subordinates.[21] This latter function

19/ In re City of Camden, PERC No. 52, p. 4 (1971).
20/ In re City of Union City, PERC No. 70, p.4 (1972).
21/ Exhibit J3-b, sec. 2.03-2.22 Tr. 1, p. 32, 34, 35, 35, 37, 38.

-- described in the record as a "leadership function"-- may occur in varying forms: (1) positive behavior reinforcement to encourage good performance (2) private talks to bolster deficient performance (3) oral reprimands (4) request that a higher superior officer speak to a deficient performer; or (5) submission of a written report recommending discipline and/or training.[22/]

While it is the Chief who ultimately disposes of requests for duty or schedule changes, supervisory officers have a material input into the disposition of such requests.[23/]

Superior officers have a significant role in the disciplinary process. Their role in the process is instrumental to its success in maintaining proper job performance and discipline in the department.

The record demonstrates that in almost every instance wherein a superior officer filed a written disciplinary report and/or recommendation, some disciplinary action resulted therefrom.[24/] In making a disciplinary determination, the Chief relies to a significant degree on [illegible] from superior officers -- i.e. a disciplinary report initiating the procedure, an investigative report with recommendations for disposition, and testimony given at the Chief's hearing. The proper functioning of superior officers in the disciplinary sphere puts them at odds with the subjects of the supervision and/or discipline. Having these superior officers in the same negotiations unit with their subordinates precipitates actual and substantial conflicts of interest and creates a substantial potential for future conflicts.

22/ Tr. 4, p. 47-57, 105-110.
23/ Tr. 4, p. 53, 110-15.
24/ Tr. 3, p. 131-2, 38-50, 79-102.
Sec. 10.28 of Exhibit J3-b sets forth the penalties which may flow from departmental disciplinary proceedings.

C. Established Practice

N.J.S.A. 34:13A-5.3 provides that except where dictated by established practice, prior agreement or special circumstances, a mixed unit of supervisors and non-supervisors is inappropriate. The Commission has determined that these statutory exceptions may be applied to a negotiations unit comprised of non-statutory supervisory employees and their subordinates whose joint presence in one unit gives rise to a conflict of interest.25/

The Commission has determined that the mere existence of one of the exceptions is not sufficient for the maintenance of a mixed unit. Rather, the Commission has found that "the sense of it (§5.3 of the Act) is that an appraisal and judgement is to be made to determine whether exceptional circumstances warrant, indeed require, a deviation from the norm."26/

In past decisions, the Commission has indicated the type and extent of relationship between parties (public employers and employee organizations) necessary to support a claim of established practice.27/ The measure of such a relationship as enunciated by the Commission requires

> an organization regularly speaking on behalf of a reasonably well-defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) with an employer who engaged in the process with an intent to reach agreement. 28/

The Commission has further determined that the statutory exceptions were meant to apply only to pre-Chapter 303 circumstances.29/ Without exception, the Commission has given a narrow interpretation to these terms.30/

25/ In re City of Camden, PERC No. 52, p.5 (1971); In re City of Union City, PERC No. 70, p.5 (1972).
26/ In re West Paterson Board of Education, PERC No. 77, p. 14-15, 9-10 (1973).
27/ In re West Paterson Board of Education, PERC No. 79 (1973); In re West Paterson Board of Education, PERC No. 77 (1973); In re City of Camden, PERC No. 53 (1971); In re City of Camden, PERC No. 52, (1971); In re Middlesex County College Board of Trustees, PERC No. 29 (1969); In re Township of Teaneck, E.D. No. 23 (1971); In re Hillside Board of Education, E.D. No. 2 (1970).
28/ In re West Paterson, PERC No. 77, p. 10 (1973).
29/ In re West Paterson, PERC. No.79, p.4 (1973).
30/ In re West Paterson, PERC No. 77, p. 9-10 (1973).

To substantiate a claim of established practice, there must be clear and convincing evidence in the record which shows that such a negotiations relationship had timely existed.[31] The mere labeling of an event as negotiations or calling a document a demand or proposal will not suffice to demonstrate the substantive nature of the offered item.[32] It must be demonstrated in the record that there exists a consistent and exclusive bilateral negotiations relationship between the parties such as is evidenced by an exchange of negotiations proposals on substantive term and conditions of employment such as salary, method of payment, and various other economic and non-economic fringe items. Further, it must be shown that both parties entered the give-and-take relationship with an intent to consummate a mutually acceptable agreement.

Such a bilateral relationship -- a sort of "economic equilibrium" between the parties -- may be contrasted with circumstances wherein terms and conditions of employment are unilaterally determined by the public employer after consultations with public employees or their representatives. In the latter situation, a bilateral exchange or flow of ideas and proposals between the arties is lacking; it is essentially a static system.

Based upon careful consideration of the entire record in this matter, the Hearing Officer concludes that the claim of an established practice sufficient to warrant the inclusion of superior officers in the unit of rank and file of police officers has not been substantiated. While the undersigned recognizes that the relationship described herein did amount to something more than hat-in-hand consultations, it is also clear that this relationship did not rise to the level of an established practice.

The record reveals a long relationship between these parties, extending back as far as 1950. However, meetings which took place between the parties in the years prior to 1968--and for several years after 1968--were infrequent[33] and often not formally structured.[34] There was no indication in the record that the parties exchanged written proposals during these years. Rather, there were requests for increased benefits submitted to the Police Committee from several sources.[35] Some requests for increased

31/ In re Teaneck, E.D. No. 23, p. 7-8 (1971).
32/ Id., p. 8.
33/ Tr. 2, p. 120. Tr. 4, p. 5, 10.
34/ Tr. 2, p. 32 Tr. 3, p. 33, 89. See n. 13 infra.
35/ Tr. 2, p. 24, 30, 32, 37, 50; 101, 144-50.

benefits for department members were submitted by the Police Chief along with his requests for equipment and supplies.[36/]

A very limited number of topics were discussed at these meetings; discussions generally focused on salary increases. There is no indication in the record that the parties ever discussed a grievance procedure or a timetable for future discussions. There is also no indication in the record that the PBA was ever extended formal recognition by the Borough, either orally or in writing, as the exclusive negotiating representive of the mixed unit of rank and file police officers and superior officers which it is seeking herein.

In years prior to 1975, the essential nature of the parties' meetings was described, alternately, as informal by the Borough's witnesses and as "give and take" by some of the PBA's witnesses. In its presentations, the PBA attempted to establish the existence of an established practice by demonstrating that the PBA had met with Borough representatives year after year to discuss police officers' compensation and benefits, that police often were the first employees of the Borough to receive a new benefit, and that benefits were received by police officers after a give-and-take exchange between the parties.

The undersigned recognizes that the Borough did more than pay mere lip service to the PBA. Captain Cobb's testimony on the normal course of the talks between the parties typified the testimony of several PBA witnesses[37/] --- the PBA Raise Committee started high, the Borough Police Committee started low, and eventually they settled somewhere between; while such testimony reflects the essence of a negotiations relationship, it is too general in substance for the undersigned to base a finding of established practice thereon. The undersigned also considered several examples in the record of specific circumstances approximating a give and take exchange between the parties.[38/] While these instances may be indicative of a negotiations relationship, they are, in short, too little too late.

36/ Tr. 2, p. 5. Exhibits P- 2, P-3. Tr. 2, p. 37.
Tr. 3, p. 84.

37/ Tr. 3, p. 87-88.

38/ Tr. 3 at 146 (differential pay for superior officers, 1971).
Tr. 4 at 6-7, 20-21 (clothing allowance/ partial insurance payments, 1973).

In addition to their occurring subsequent to 1968, they are virtually isolated examples in a long relationship and are either not consistent with or contrary to the overwhelming balance of the record herein. Other testimony offered in support of the PBA's claim of established practice is either largely conclusionary, equivocal, or is stated in terms so general as to be of minimal value.[39/]

Further, there are several examples in the record of actions taken by the Borough which were either accepted or acquiesced in by the PBA and which actions were simply not consistent with a collective negotiations relationship. The record shows that the Borough's Police Committee was not authorized to bind the Borough to any "agreements" reached in discussion with the PBA Raise Committee.[40/] Rather, the Police Committee would report the results of their talks to the Mayor and Council and make recommendations for the succeeding year's budget in which would be reflected both equipment and personnel-benefit increases. The Mayor and Council often changed these recommendations (including the personnel benefit recommendations) subsequent to the meetings with the Raise Committee.[41/] Some benefits were advanced to police officers before the completion of discussions or before any agreements had been reached;[42/] at other times the Borough has granted more of certain benefits than were asked for by the Raise Committee;[43/] and the record shows that the Borough has provided police officers with certain benefits that were never requested by the Raise Committee at all.[44/]

On no occasion was it shown that the PBA processed grievances on behalf of any of its members. In fact, there is no indication in the

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39/ Tr. 2, p. 23; also p. 21, 23; p. 33, 37. Tr. 3, p. 24; 33-35, 51-53, 54; 30, 75-77. Tr. 4, p. 5-6.

40/ Tr. 2, p. 48, 102. Tr. 3, p. 29, 49, 50, 61. Tr. 4, p. 19-22. It would appear that in contrast to pre-1975 discussions, the Borough Negotiating Committee formed in 1975 (including the Mayor, Borough Counsel and several councilmen) had the authority to bind the Borough. Cf. In re East Brunswick Board of Education, PERC No. 76-6, 2 NJPER 279, motion for reconsideration denied, PERC No. 76-26, __ NJPER ___, appeal pending, App. Div. Doc. No. A-2366-75.

41/ Id. Tr. 2, p. 56-7. Tr. 4, p. 18.

42/ Tr. 2, p. 121. Tr. 3, p. 84.

43/ Tr. 2, p. 107, 123.

44/ Tr. 2, p. 102.

record that a grievance procedure was ever negotiated by the parties, up to and inclusive of its written agreement with the Borough covering 1975.[45/]

Further, testimony of the Borough's witnesses and some of the PBA's own witnesses belie the claim of a give and take relationship. The testimony of witnesses called by the Borough indicates that the talks with the Raise Committee were informal,[46/] and that they were conducted to gain information about employee requests and departmental needs so that the Mayor and Council could structure an accurate and workable budget for the succeeding year.[47/] It is also claimed by witnesses for the Borough that the Police Committee-Raise Committee talks did not themselves lead to improvement in police benefits;[48/] rather, the Borough contends that the talks preceded budgetary deliberations, subsequent to which and based upon which improved benefits were disseminated to all Borough employees.

The Borough has regarded all the talks with the PBA as informal and informational in nature, except perhaps those which occurred since 1974. Prior to that time, it had not authorized its Police Committee to make binding committments and at times changed the understandings reached by that committee. The Borough acted in a unilateral manner concerning other aspects of the employment relation between the Parties herein. Clearly, in all but the most recent years, the Mayor and Council reserved to themselves the ultimate decision on police officers' terms and conditions of employment.

The Borough's attitude in these talks was clearly not that contemplated by the Commission in its view of established practice. The Commission found that in attempting to affect terms and conditions of employment, an employee representative had to have engaged in "a dialogue with an employer who engaged in the process with an intent to reach agreement."[49/] Councilman Flakne, a PBA witness, testified that the purpose of the talks was to "explore and report" PBA requests to the Borough Council.[50/] Patrolman Tersky's testimony captures the essence of the Borough's position on the established practice issue -- "... the ultimatum was they made their final offer after the second meeting or so and we just couldn't get any more from it and that's why it was more or less accepted."[51/]

45/ Exhibit J1-a through J1-f.
46/ Tr. 2, p. 8, 20, 32, 48, 67, 114.
47/ Tr. 2, p. 29, 31, 42, 48-50. Tr. 3, p. 29, 61.
48/ Tr. 2, p. 91, 93, 149. Tr. 4, p. 22, 23.
49/ In re West Paterson, PERC No. 77, p. 10 (1973).
50/ Tr. 3, p. 61. Tr. 4, p. 18.
51 Tr. 4, p. 12.

In view of the foregoing, the undersigned concludes that the PBA has failed to demonstrate by clear and convincing evidence that an established practice exists herein.

The undersigned further concludes that even assuming arguendo that an established practice does exist herein, the nature of the conflict present between superior andrank and file officers is such that the exclusion of superior officers from the mixed unit would be dictated thereby. In this regard, the undersigned notes that the department itself has evidenced a clear pattern of slow but steady growth.[52/] This circumstance is likely to produce increasingly greater opportunities for both the frequency and intensity of conflicts of interst. Taken in conjunction with the operational requirements of the department's para-military structure, these factors would warrant the exclusion of superior officers from the negotiations unit even in the event that an established practice is found.

RECOMMENDATION

Based upon the entire record and the findings derived therefrom, the undersigned Hearing Officer recommends that sergeants, lieutenants, and captains employed in the South Plainfield Police Department be excluded from the negotiations unit of rank and file police officers because (a) superior officers are supervisors within the meaning of the Act, and (b) actual and potential substantial conflicts of interest are created by the inclusion of both superior and rank and file officers in one unit.

Respectfully submitted,

Charles A. Tadduni

Charles A. Tadduni
Hearing Officer

DATED: Trenton, New Jersey
July 1, 1977

52/ Exhibit J3-b, p. 7a, b, c, d, e, (charts).
Tr. 1, p. 70
The undersigned would further note that the complexity of the negotiations relationship between the parties has grown steadily during recent years. Although instances of give and take exchanges have become increasingly frequent and the parties in 1974 sat down to negotiate a formal written agreement, the recent origin of this level of negotiations interaction will not suffice for a finding of established practice.