

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

In the Matter of

BOROUGH OF METUCHEN,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-77-47

POLICEMEN'S BENEVOLENT ASSOCIATION
FOR THE BOROUGH OF METUCHEN, LOCAL
NO. 60, INC.,

Employee Representative.

SYNOPSIS

The Director of Representation, in agreement with the Hearing Officer's Report and Recommendations in a Clarification of Unit proceeding, finds that captains employed in the Metuchen Police Department are supervisors within the meaning of the New Jersey Employer-Employee Relations Act. However, due to the established practice of including the captains in the PBA unit and the absence of examples of actual -- as opposed to potential -- conflicts of interest, the Director finds the existing mixed unit to be appropriate.

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Employee Representative.

Appearances:

For the Public Employer-Petitioner
~~Mar~~ Martin A. Spritzer, Esq.

For the Employee Representative
Robert Bradley Blackman, Esq.

DECISION

Pursuant to a Notice of Hearing to resolve a question concerning the composition of a collective negotiations unit represented by the Police-men's Benevolent Association for the Borough of Metuchen, Local No. 60, Inc., (the "PBA"), a hearing was held before James F. Schwerin, on June 30, 1977 at which time all parties were given an opportunity to examine and cross-examine witnesses, present evidence and argue orally. Both parties filed briefs, and the Hearing Officer issued his Report and Recommendations on September 14, 1977. A copy is annexed hereto and made a part hereof. No exceptions to the Hearing Officer's Report have been filed.

The undersigned, having considered the entire record including

the Hearing Officer's Report and Recommendations and the transcript, finds and determines as follows:

1. The Borough of Metuchen (the "Borough") 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"), is the employer of the employees involved herein and is subject to the Act's provisions.

2. The Policemen's Benevolent Association for the Borough of Metuchen, Local No. 60, Inc. is an employee representative within the meaning of the Act and is subject to its provisions.

3. The PBA is the exclusive representative for a negotiations unit consisting of all police employees of the Borough.

4. The Borough has filed the instant Clarification of Unit Petition seeking a determination that the Chief of Police, two Police Captains, and one Police Lieutenant are supervisory personnel, as defined in N.J.S.A. 34:13A-5.3,^{1/} and, consequently, must be excluded from the rank and file unit of patrolmen. Accordingly, a Clarification of Unit Petition having been filed and there existing a question concerning the composition of a collective negotiations unit, the matter is appropriately before the undersigned for determination.

5. Subsequent to the opening of the hearing, the Borough amended its petition by withdrawing the Police Lieutenant title from those titles sought to be excluded from the unit. The PBA withdrew its objection or opposition to the removal of the Chief of Police from the unit. Therefore, the testimonial evidence presented at the hearing was limited to the issue of whether the Captains should be excluded from the unit.

^{1/} N.J.S.A. 34:13A-5.3 defines a supervisor as one "having the power to hire, discharge, discipline or to effectively recommend the same."

6. The Hearing Officer found that the Metuchen Police Department is organized into three divisions with the Chief of Police and the two Captains each commanding a division. Further, the Hearing Officer found that the Captains take an active part, along with the Mayor, Police Commissioner and Chief of Police, in effectively recommending hiring and discharging, ~~have~~ authority to issue oral reprimands directly to the men under their command for minor disciplinary infractions, and, with regard to more serious infractions, forward reports to the Chief who consults with the Captains to reach a consensus on what action to take. The Hearing Officer concluded that, while the Captains share the recommendation function with regard to hiring, discharging and major discipline, their input in these supervisory functions is both significant and consequential. Considering this fact in conjunction with the Captains' authority to take less serious disciplinary measures on their own initiative, the Hearing Officer found that the Captains are supervisors within the meaning of the Act.

However, the Hearing Officer also found that there existed an "established practice" ^{2/} of including superior officers with rank and file patrolmen in the PBA collective negotiations unit. He also found that no actual conflicts of interest had occurred as a result of the mixed unit. He reached this finding on the basis of the Borough not having come forward with any evidence of specific examples of actual conflicts and the testimony of Chief Perrino that no conflicts arose during the time he was a Captain or since he was promoted to Chief of Police. The Hearing Officer then applied the Commission's decision in In re West

^{2/} N.J.S.A. 34:13A-6(d) provides that "except where dictated by established practice...no unit shall be appropriate which includes (1) both supervisors and nonsupervisors." The parties herein stipulated on the record that between 1959 and 1968:

"PBA Local 60 on behalf of all Police employees of the Borough of Metuchen met with designated representatives of the employer, seeking improvements of employee conditions and resolution of differences through a dialogue in which both parties attempted to reach agreement."

Paterson Board of Education, P.E.R.C. No. 77, (1973), which provides that where there is established practice, actual as opposed to potential conflicts must exist to support the removal of personnel from a unit. Accordingly, the Hearing Officer recommended that the portion of the Petition which seeks the exclusion of Captains from the unit be dismissed.

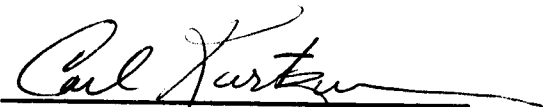
Having reviewed the entire record, the Hearing Officer's Report and Recommendations, and noting the absence of any party's exceptions to the Report, the undersigned finds that there is ample evidence in the record to support the Hearing Officer's findings. The record reveals that the Captains have direct authority to discipline minor infractions and actively participate in effectively recommending disciplinary measures in more serious matters. In addition, they are voting members of the committee which effectively recommends the hiring and discharging of policemen.

Moreover, the undersigned finds that the Hearing Officer's conclusions regarding the application of "established practice" are consistent with the Commission's decision in In re West Paterson Board of Education, supra. The record does not contain any evidence indicating that actual conflicts of interest have arisen.

Accordingly, the undersigned finds that the Captains are supervisors within the meaning of the Act. However, due to the established practice of including Captains in the PBA unit and the absence of actual conflicts -- as opposed to the potential for conflict of interest, the undersigned finds it appropriate to continue the inclusion of Captains in the existing unit. Therefore, that portion of the Borough's Petition seeking the exclusion of Captains from the unit is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

DATED: November 29, 1977
Trenton, New Jersey


Carl Kurtzman, Director
of Representation

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NO. 60, INC.,

Employee Representative.

SYNOPSIS

A Commission Hearing Officer recommends that the Chief of Police be excluded from the PBA negotiations unit, but that captains be allowed to remain.

The Hearing Officer finds that the captains are supervisors, and that there is an inherent conflict of interest such as would normally warrant exclusion. However, pursuant to a stipulation between the parties, he further finds that there is an established practice within the meaning of the Act of having the captains in the unit, and in the absence of examples of actual - as opposed to potential - conflict of interest recommends that the captains be permitted to remain.

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Appearances:

For the Public Employer-Petitioner
Martin A. Spritzer, Esq.

For the Employee Representative
Robert B. Blackman, Esq.

HEARING OFFICER'S REPORT AND RECOMMENDATION

A Petition for Clarification of Unit was filed with the Public Employment Relations Commission (the "Commission") on February 1, 1977 by the Borough of Metuchen (the "Borough") seeking a clarification of a unit of employees represented by the Policemen's Benevolent Association for the Borough of Metuchen, Local No. 60, Inc. (the "PBA"). The Borough seeks a determination which would exclude from the PBA unit the Chief of Police and all captains employed in the Metuchen Police Department.^{1/} Pursuant to a Notice of Hearing, a hearing was held before the undersigned Hearing Officer on June 30, 1977 in Newark, at which all parties were given an opportunity to examine witnesses, present evidence, and argue orally. Briefs were

^{1/} As originally filed the petition also sought exclusion of the one Lieutenant on the force, but the Borough amended its petition on the record during the hearing and no longer seeks to exclude the lieutenant.

submitted by the parties by August 3, 1977. Upon the entire record in this proceeding, the Hearing Officer finds:

1. The Borough 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 PBA 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 the Chief of Police and captains from the unit represented by the PBA, which has heretofore included all police officers. The PBA does not contest the exclusion of the Chief of Police, but will not consent to the exclusion of the captains from its unit. Accordingly, there is a question concerning the composition of the negotiations unit and it is properly before the Hearing Officer for a Report and Recommendations.

Metuchen has a 35 man force which is split into three divisions. The Uniform division has 27 men in four squads, and is under the command of Captain Howard Reeder. It is responsible for patrol services, and works on shifts with a desk sergeant and road sergeant on each shift. The Investigative division consists of a Detective Bureau and a Juvenile Aid Bureau each of which has a Detective Sergeant and a Detective Patrolman. It is commanded by Captain Charles Reeder. The Administrative Division is responsible for office work relating to purchasing, budget, etc., and is under the direct command of the Chief.

According to the Borough, the Captains are supervisors within the meaning of the Act and there is an inherent conflict of interest between

captains and lower ranking police officers. The PBA contests these allegations and further argues that even if the Captains would otherwise be excluded, the existence of an established practice of the PBA representing Captains in its unit mandates their continued inclusion in that unit.

Supervisors

N.J.S.A. 34:13A-5.3 defines a supervisor as one "having the power to hire, discharge, discipline or to effectively recommend the same."

N.J.S.A. 34:13A-6(d) provides that "except where dictated by established practice...no unit shall be appropriate which includes 1) both supervisors and nonsupervisors...."

Hiring is under Civil Service. After an examination pares the list of applicants, a committee meets to consider those remaining. This committee includes the Mayor, Police Commissioner, Chief and the Captains. Each member of the committee rates the candidates in order of preference and the consensus forms the recommendation of the committee which the Mayor and Council generally follow. ^{2/} Although the captains are not on their own effectively recommending hiring, they do participate with an equal voice in making effective recommendations.

Captains have the authority to issue oral reprimands directly to men under their command. ^{3/} In serious matters a captain will forward a report to the Chief, ^{4/} who would consult with the captains before taking action. Two major disciplinary incidents were cited. One involved a walkie-talkie being lost, and the Chief consulted with the captains to reach a consensus on what action to take, ^{5/} although the Chief did testify he might

^{2/} T: 20-21, 89.

^{3/} T: 33, 56-57, 129.

^{4/} T: 129.

^{5/} T: 35.

have overruled them if he felt it necessary.^{6/} The other incident was the denial of permanent status to a police officer at the end of his probationary period. The recommendation not to continue him was made jointly by the Chief and captains to the Mayor and Council, and the captains testified against him.^{7/}

In view of the foregoing, the undersigned concludes that the captains are supervisors within the meaning of the Act. While they share the recommendation function both as to hiring and major discipline, their input is significant and in practice has not been shown to be disregarded by higher ranking officials. Moreover, less serious disciplinary measures can be taken on their own initiative. The cumulative effect of these factors is sufficient to convince the undersigned that captains fall within the statutory definition.

Conflict of Interest

Under the New Jersey Supreme Court decision in Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971), if performance of required duties creates an actual or potential substantial conflict of interest with other employees, then the necessary community of interest for their inclusion in the same bargaining unit does not exist.

The Commission set forth its application of Wilton to police and fire departments in In re City of Union City, P.E.R.C. No. 70 (1972). As a general rule, the distinction between superior officers and rank and file should be recognized by their not being in the same negotiations unit due to the quasi-military nature of the organization. Only in exceedingly small departments where the Chief alone has any real authority will this rule not

^{6/} T: 58.

^{7/} T: 68-69.

be applied. This has received judicial sanction. In re Borough of Sayreville, E.D. No. 76-27, 2 NJPER 85 (1976), review denied P.E.R.C. No. 76-35, 2 NJPER 174, aff'd App. Div. Docket No. A-3385-75 (4/1/77), cert. denied ___ N.J. ___ (7/20/77).

In addition to the hiring and disciplinary duties discussed above, the captains are responsible for making up shift and vacation schedules,^{8/} and make recommendations as to the granting of permanent status, step increases in pay, and promotions, without which these benefits will not be received.^{9/} Clearly there is a distinct differentiation between the captains and lower ranking officers as would require their separation under the Union City standards.

Established Practice

As provided by N.J.S.A. 34:13A-5.3, supervisors and non-supervisors may be together in a unit where dictated by an established practice. The parties herein stipulated on the record that between 1959 and 1968:

"PBA Local 60 on behalf of all Police employees of the Borough of Metuchen met with designated representatives of the employer, seeking improvements of employee conditions and resolution of differences through a dialogue in which both parties attempted to reach agreement." ^{10/}

The above stipulation is in accord with the Commission's statement of the requisite factors for a finding of established practice. In re West Paterson Board of Education, P.E.R.C. No. 77 (1973).^{11/} In West Paterson the Commission went on to state that the existence of an established practice

^{8/} T: 19, 87-88, 120.

^{9/} T: 27, 90-91, 126.

^{10/} T: 8-9.

^{11/} West Paterson holds that a finding of established practice may also outweigh a conflict of interest under the Wilton standards.

does not automatically require that the existing unit be allowed to continue. Rather, an appraisal and judgment is to be made to determine whether the circumstances of each case on balance dictate continuation of the status quo. What is the key is whether the history of a unit which if sought as a new unit would be inappropriate indicates that the potential for conflict has in fact proven to be non-existent or at most de minimus. In terms of a police force, the potential for conflict between superior officers and rank and file inherent in the quasi-military structure must yield to the actual history of a mixed unit - whether any actual conflicts have arisen that would mandate a change.

An examination of the record reveals no instances of actual conflict of interest arising from inclusion of the captains in a unit with lower ranks. In fact, Chief Perrino testified on behalf of the Borough that from 1965 when he became the first captain on the force, the Chief then in office never gave any indication that his duties were not properly being carried out, and that in his tenure as Chief the captains have performed satisfactorily.^{12/} As the Borough has not come forward with any evidence of specific examples of actual conflict, the undersigned must conclude that the history of the inclusion of captains in the existing unit - given the legislative intent as interpreted in West Paterson - justifies allowing them to remain in the unit.^{13/}

RECOMMENDATION

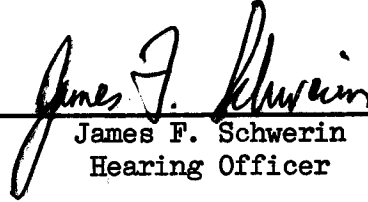
Based upon the record and the above-stated findings, the undersigned recommends that the Chief of Police be excluded from the unit repre-

^{12/} T: 76-77.

^{13/} While the current structure of three divisions has existed only since 1970, that does not affect the result herein in light of the Chief's testimony that from 1965-1970 he as a captain performed the same functions currently divided among the captains. T: 163.

sented by the PBA, but that the petition be dismissed insofar as it seeks the exclusion of captains from the unit.

RESPECTFULLY SUBMITTED,


James F. Schwerin
Hearing Officer

DATED: September 14, 1977
Trenton, New Jersey