

D.R. NO. 99-1

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

In the Matter of

BOROUGH OF MADISON,

Petitioner,

-and-

Docket No. CU-98-21

PBA LOCAL 92, AFL-CIO,

Employee Organization.

SYNOPSIS

The Director of Representation finds that police sergeants have actual and potential conflicts of interest with patrol officers and must be removed from their negotiations unit, effective immediately. The Director rejects the PBA's argument that the Borough's earlier conduct acted as a waiver of its right to seek clarification of the unit.

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Appearances:

For the Petitioner
Stanton, Hughes, Diana, Zucker & Salsberg, attorneys
(Richard M. Salsberg, of counsel)

For the Employee Organization
Fox and Fox, attorneys
(Stacey Rosenberg, of counsel)

DECISION

On October 27, 1997, the Borough of Madison filed a Petition for Clarification of Unit seeking to remove sergeants from a unit composed of all full time patrol officers and sergeants, represented by the Madison Policemen's Benevolent Association ("PBA"), Local No. 92. The Borough asserts that as shift commanders, sergeants directly supervise and evaluate patrol officers and recommend their hire and discipline. Therefore, the Borough asserts, the New Jersey Employer-Employee Relations Act prohibits their inclusion in the same bargaining unit as patrol officers. Further, the Borough argues that there is an actual and substantial potential for conflict of interest created by their continued inclusion in the PBA unit.

The PBA denies a conflict exists by the sergeants' inclusion in the unit. The PBA argues that sergeants are not statutory supervisors but rather serve as "working foremen" who perform the same duties as patrol officers. The PBA asserts a pre-1968 relationship based upon an established practice within the negotiations unit for sergeants and patrol officers should require preservation of the present unit.

The PBA objects to the timing of the clarification of unit petition and submits that the petition should be barred on bad faith grounds.

The PBA further contends that the petition should be barred due to the protracted negotiations over the past year between the Borough and the PBA leading to an interest arbitration hearing. The PBA submits that the Borough caused the PBA to rely to its detriment on the belief that the sergeants would be covered by the pending award, constituting bad faith bargaining.

We have conducted an administrative investigation; these facts appear. See N.J.A.C. 19:11-2.2 and 2.6.

The PBA's first contract with the Borough was in 1976.^{1/} The most recent collective negotiations agreement between the Borough and the PBA expired December 31, 1996. After extensive negotiations, interest arbitration hearings were held and an award was issued on May 11, 1998, covering three years (January 1, 1997

^{1/} The PBA submitted no facts in support of its claim of a pre-1968 bargaining relationship.

through December 31, 1999). The Borough and the PBA executed a collective bargaining agreement incorporating the terms of the arbitrator's award on or about June 23, 1998.

The Borough granted voluntary recognition of the Madison Supervisory Officers Association ("SOA"), for a separate unit of lieutenants in July 1997. The PBA asserts that, as part of the recognition agreement, the Borough agreed to permit the sergeants to remain represented by the PBA, in exchange for the exclusion of the police captain from the SOA. Negotiations for the SOA are at impasse and docketed for arbitration.

The Madison Police Department is composed of 1 Chief, 1 Captain, 3 lieutenants, 7 sergeants and 24 patrol officers.

The sergeant's duties and responsibilities as set forth in the job description contained in the department's Standard Operations Procedures provide:

Under the direction of the Chief of Police, and under the supervision of officers of higher rank, the Sergeant performs the following described duties with considerable opportunity for the exercise of personal initiative, action and judgment: 1. Has responsibility for the due and proper enforcement of law, preservation of order, and the protection of persons and property within the Borough of Madison; 2. Performs any of the duties if necessary, and has all of the responsibilities of the Patrolman; 3. Assists in the training of Patrolmen as directed; 4. Handles the Headquarters Desk, Blotter, Records, Switchboard and Radio as assigned; 5. Receives and takes appropriate action on complaints received at Headquarters; 6. Issues necessary orders to Patrolmen or Special Officers; 7. Makes routine police investigations, and attends hearings, etc., as required; 8. Makes inspections of Patrolmen on duty as directed; 9. Performs

such duties as may be assigned to him by the Chief of Police or a superior officer, and during the absence or disability of a superior officer shall, upon instructions of the Chief of Police or Captain assume, perform and exercise all of the authority and functions of such superior officer; 10. Instructs and assists patrolmen in the discharge of their duties; 11. If more than one report is received of neglect of duty on the part of a Patrolman under a Sergeant's supervision, on one tour of duty, without proper action having been taken by the Sergeant, it may be deemed prima facie evidence that the Sergeant neglected to perform his duty under these Rules, Regulations and Instructions, and the Commanding Officer shall prefer charges accordingly.

Prior to 1995, lieutenants were in charge of the shifts. A reorganization of the department in 1995 resulted in sergeants being assigned to "run the shift" as shift commanders.

Departmental regulations set forth the authority and responsibilities of the shift commander as follows:

The shift commander, during his tour of duty, exercises the same authority and has the same responsibilities as his commanding officer, subject to higher authority. In the absence of the shift commander, the senior available member of the shift is in charge unless otherwise provided.

The regulations also set forth other general supervisory duties of a shift commander.

Of the seven sergeants, four act as shift commanders. The remaining sergeants are specially assigned to traffic safety, court officer/floater, and the detective bureau.

As shift commanders, sergeants are the first line of supervision. During the day shift, sergeants report to lieutenants, who report to the captain on duty. After 4:00 p.m.,

sergeants run the department as the top level of supervision on duty. They address the squad formation and conduct the briefing at shift change. Patrol officers report to the sergeant and call them when there is a problem.

Prior to 1997, evaluations were done several times a year on a sporadic basis. Sergeants now do formal periodic evaluations every fourth month. Evaluations are used for remediation, additional training, and as a basis for promotion. The chief's evaluation counts for 35% of the promotional score.

Discipline is recommended by a patrol officers or sergeant and is subject to the final authority of the chief. Sergeants are authorized to issue an Oral Adjustment Form to a patrol officer for an infraction of departmental rules. These are confidential written records of oral reprimands which are placed in the patrol officer's personnel file. The Borough presented several examples of oral adjustment forms which had been issued by sergeants to officers. The sergeant has the power to remove a patrol officer from duty until the next day when the lieutenant comes on duty.

The PBA filed an unfair practice charge (docket number CO-98-25) on July 17, 1997 alleging that the PBA's President, Frank Wulff, received less than favorable evaluations from a sergeant as a result of Wulff's protected activity. The parties ultimately settled the charge with the participation of the evaluating sergeant.

Sergeants participate in superior officer "management team" meetings which are held four to six times a year.

The Borough argues that as shift commanders, sergeants are charged with recommending hiring, directly supervising, disciplining, and evaluating the rank and file patrol officers. The Borough submits that this relationship creates an inherent conflict of interest prohibiting the sergeants' inclusion in the same unit as the patrol officers.

The PBA agrees that sergeants have the authority to discipline patrol officers, but alleges that patrol officers also have the ability to recommend discipline for other officers. Although sergeants have a role in written evaluations, the PBA asserts that their recommendations are not automatically followed by the chief, who makes the ultimate decision in all personnel actions. The PBA further alleges that final evaluations for new hires include recommendations from the training officer, who could be a patrol officer.

* * *

N.J.S.A. 34:13A-5.3 provides in pertinent part that "except where established practice, prior agreement or special circumstances dictate the contrary,...any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, [shall not] have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership...."

Further, in Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 at 425-427 (1971), the New Jersey Supreme Court held that public employees who exercise significant power and responsibilities over other personnel should not be included in the same negotiations unit as their subordinates because of the conflict of interest between these employees and their supervisors.

In Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1988), the Commission reaffirmed its long line of cases holding that we will ordinarily find a conflict of interest between superior officers and rank-and-file officers in a police department. In Union City, P.E.R.C. No. 70, NJPER Supp. 295 (¶70 1972), cited in West New York, the Commission explained:

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. [*Id.* at 350].

In West New York, the Commission also cited with approval, South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977), in which the Director of Representation found,

...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 Bd. of Ed. 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. [*Id.* at 349.]

* * *

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 conflict of interest is de minimis in nature; (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 file personnel. [emphasis added; footnotes omitted. Id. at 350.]

In West New York, the Commission removed superior officers from the rank and file unit based upon the potential for conflict of interest, even though a history of a long relationship in one combined unit existed, and notwithstanding the employer's lack of assertion of conflict. There, the Commission observed that it was removing the superiors even in the absence of direct evidence of actual conflict -- "where a superior officer was actually torn between his divided loyalties to his employer and his unit, thus damaging the public interest" -- finding that such a standard (actual conflict) is "too exacting and is inconsistent with West Paterson,^{2/} especially when public safety employees are involved." West New York at 279. In West New York, the Commission said:

Rather, we believe severance is appropriate for uniformed employees even where there has been an 'established practice' where, as here, the employees' job responsibilities place him in a substantial conflict of interest with his subordinates. [Id.]

Based on the foregoing, I find that the sergeants should be severed from the existing unit. Impermissible actual and potential conflicts of interest exist between the sergeants and other unit

^{2/} West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973).

members. The job description for sergeants clearly sets forth the supervisory authority which sergeants exercise over patrol officers. The Oral Adjustment Forms which sergeants have issued to patrol officers are evidence of an actual conflict of interest between sergeants and patrol officers. Moreover, the PBA's assertion that patrol officers are authorized to recommend discipline for other officers, which may include higher ranking officers, constitutes further evidence of conflict of interest. Finally, and significantly, the PBA's filing of an unfair practice charge concerning the evaluation of a patrol officer by a sergeant further illustrates the actual conflict presented by the membership of sergeants and patrol officers in the same negotiating unit.

The PBA argues that any order to remove the sergeants from the existing unit should not be effective until the expiration of the collective bargaining agreement recently executed by the parties which incorporates the terms of the interest arbitrator's award. The PBA advises, with the consent of the SOA, that on January 1, 2000, the sergeants would become represented by the SOA.^{3/} I reject that argument. Where, as here, the continued inclusion of sergeants would result in an impermissible conflict of interest, those employees must be removed immediately despite the existence of

^{3/} The issue of whether the sergeants, if ordered severed from the existing unit, should nevertheless receive the benefits of the arbitrator's award for the period January 1, 1997 through December 31, 1999 is not within our jurisdiction in this context.

a current collective bargaining agreement. I find that the actual, not merely potential, conflict of interest posed by the membership of patrol officers and sergeants in the same unit requires that the sergeants be removed from the unit immediately. Clearview Regional H.S. Board of Education, D.R. 78-2, 3 NJPER 248, 252 (1977) (where the clarification of unit question is raised before the Commission prior to the execution of the parties' most recent contract, the clarification of unit determination shall be effective immediately).

The PBA argues that since the recognition clause in the successor collective agreement expressly includes sergeants, the Borough's recent execution of the agreement constitutes the Borough's waiver of its objections to the sergeant's continued inclusion in the PBA unit or the Borough's effective withdrawal of its clarification of unit petition. However, since the petition for unit clarification had been filed after the commencement of interest arbitration,^{4/} it is clear that the Borough intended to proceed with this petition independently from the arbitration proceedings. The Borough's execution of the collective agreement pursuant to the issuance of the interest arbitration award was done without any express waiver or withdrawal of this petition. I find no implied waiver or withdrawal.

The PBA further argues that as part of the recognition agreement between the Borough and the SOA, the Borough agreed to

^{4/} The first meeting among the parties and the interest arbitrator was conducted on June 18, 1997.

permit sergeants to remain in the unit represented by the PBA. Thus, the PBA contends the clarification of unit petition should be barred on the basis of that agreement. The PBA asserts that since this agreement was reached under the auspices of the Commission's jurisdiction in representation matters, the Commission should now enforce that agreement by barring this petition.

I find that the Borough's recognition agreement does not bar this petition. That agreement is between the Borough and the SOA, not the PBA or the Commission. The Commission's processing of the representation petition does not make the Commission a party to such agreements and does not place the Commission in a position which requires it to enforce parties' sidebar agreements. Moreover, neither the terms of the agreement nor the SOA representation petition mentions the exclusion of sergeants from the PBA unit. A public employer can never permanently waive the right to assert that certain employees are statutorily prohibited from inclusion in a negotiations unit. See County of Warren, H.O. 89-1, 14 NJPER 552 (¶19232 1988); aff'd, P.E.R.C. 89-66, 15 NJPER 30 (¶20013 1988); cf. Gloucester Tp. Bd. of Fire Commissioners, D.R. 91-6, 16 NJPER 499 (¶21219 1990) (although an employer may waive its right to seek removal of employees based upon community of interest, it may not waive a statutory argument). The Borough, by entering into the recognition agreement with the SOA, did not waive its right to assert that the sergeants should be excluded from the existing PBA unit on the basis that they are statutory supervisors or that a

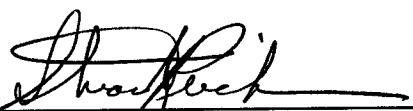
Wilton conflict exists. Therefore, even if such language had been included in the agreement between the Borough and the SOA, as a matter of law, such a provision would be unenforceable.

Having determined that the sergeants are properly excluded from the existing unit based on an impermissible conflict of interest, I need not reach the question of whether the sergeants are statutory supervisors.

ORDER

Sergeants are removed from the collective negotiations unit currently represented by Madison PBA Local No. 92, effective immediately.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Stuart Reichman, Director

DATED: July 22, 1998
Trenton, New Jersey