

D.R. No. 2005-9

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

In the Matter of

TOWNSHIP OF WAYNE,

Public Employer,

-and-

WAYNE SUPERIOR OFFICERS
FOP LODGE 181,

Docket No. RO-2005-023

Petitioner.

-and-

SUPERIOR OFFICERS ASSOCIATION,
PBA LOCAL #136-A,

Intervenor.

SYNOPSIS

The Director of Representation severs superior officers from a unit of police patrol officers and orders an election among the superiors. The Director finds the superior officers' exercise significant authority for discipline, evaluation and direction over rank and file officers which creates an inherent potential conflict of interest requiring severance.

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Appearances:

For the Public Employer,
Mark J. Semeraro, attorney

For the Petitioner,
Damico, Del Sardo & Montanari, LLC, attorneys
(Michael Montanari, of counsel)

For the Intervenor,
Loccke & Correia, attorneys
(Michael A. Bukosky, of counsel)

DECISION

On September 15 and 22, 2004, the Wayne Superior Officers FOP Lodge 181 (FOP) filed a representation petition and amended petition, respectively, seeking to represent police sergeants, lieutenants and captains employed by Wayne Township (Township). The twenty-seven (27) superior officers are currently represented

by Wayne PBA Local 136 (PBA) in a collective negotiations unit which also includes all patrol officers. The PBA intervened in this matter pursuant to its current collective negotiations agreement with the Township. N.J.A.C. 19:11-2.7.

The PBA opposes the petition and does not consent to an election. It maintains that a community of interest exists among all unit employees and that it has fairly represented the petitioned-for employees. Furthermore, the PBA asserts that the superior officers are not supervisors within the meaning of the Act because all discipline and evaluations are undertaken by the chief. The PBA also asserts that no conflict of interest exists between the superior officers and rank and file officers.

The Township also opposes the petition and does not consent to an election. The Township denies any conflict of interest among superior officers and patrol officers. The Township also cites the lengthy history of the current unit as a reason to keep the employees in one unit.

On October 21, 2004, the Wayne Township Superior Officers Association, PBA Local No. 136A (PBA/SOA) intervened in the petition, pursuant to an accompanying adequate showing of interest. N.J.A.C. 19:11-2.7. The PBA/SOA seeks to represent the petitioned for superior officers in the event that a separate unit is declared appropriate.

The parties attended an investigatory conference and later submitted position papers on October 5 and 14, November 1 and 30, and December 6, 2004. We have conducted an administrative investigation of facts regarding the petition. On January 27, 2005, we notified the parties of our tentative findings and invited responses. Neither party filed a response. N.J.A.C. 19:11-2.2 and 2.6. There being no substantial or material factual issues in dispute, the disposition of this matter is based on the following:

FINDINGS OF FACT

The Township and the PBA have signed collective negotiations agreements, the most recent of which extended from January 1, 2001 through December 31, 2004. The recognition clause of the agreement specifies that the PBA is the majority representative of all sworn, regular, full-time police officers of the Wayne Police Department, excluding the chief of police, deputy chief, special police, dispatchers, confidential employees, and all other employees of the Township. The parties acknowledge that the PBA and the Township have a negotiations relationship dating to sometime before 1968.

The Township police department consists of approximately one hundred and twenty (120) police personnel. One chief of police presides over a deputy chief, four (4) captains, six (6) lieutenants, seventeen (17) sergeants, and approximately ninety

one (91) corporals, detectives and patrol officers. The department houses three divisions; patrol, investigation and operations. A captain heads each division. The patrol division is divided into four (4) patrol shifts, a traffic bureau, a community policing unit, and a warrant section. Each of the four (4) patrol shifts is comprised of one (1) lieutenant, one (1) sergeant and thirteen (13) patrolmen. The traffic bureau is comprised of one (1) lieutenant, one (1) sergeant and nine (9) patrolmen. The community policing unit consists of two (2) patrol officers that report directly to the patrol captain. The warrant section consists of two (2) sergeants who report directly to the patrol captain.

The investigative division is divided into three sections: a detective bureau, a juvenile bureau and a narcotics bureau. A captain heads the division. The detective bureau consists of two (2) sergeants and seven (7) detectives. The juvenile bureau has one (1) sergeant, five (5) detectives and four (4) school resource officers. The narcotics bureau has one (1) sergeant and four (4) detectives.

The operations division is commanded by a captain. It consists of one (1) lieutenant, two (2) sergeants, three (3) patrol officers and approximately eighteen (18) civilian dispatchers.

The police department rules and regulations are codified in a manual of general orders. The manual was established by the business administrator in consultation with the chief of police and implemented on October 14, 1999. These rules and regulations set forth the duties, by rank, of all police personnel. Section 3:2.1A(1) of the rules and regulations provides:

The chief shall be the executive head and commanding officer of the police department. He shall be responsible to the business administrator and the mayor for the conduct, efficiency and management of the department. In the absence of the chief or in the event of his disability, his duties and responsibilities shall be carried out by the next senior ranking superior officer of the department.

Under section 3:2.1D(2), the chief or his designee is required to investigate any dereliction of duty, improper conduct or violation of the rules and regulations. Section 3:2.1E, empowers the chief to suspend any member of the police department for flagrant violation of law, ordinance, rule, regulation or order.

Section 3:2.2, entitled, "deputy chief", provides that the deputy chief, in the absence of the chief, assumes the duties of acting chief of the department. If the deputy chief becomes the acting chief, he or she exercises the same powers, performs the same duties and is subject to the same responsibilities, rules and regulations as the chief. 3:2.2B(2).

Captains in the department rank below deputy chief. 3:2.3A. In the event of the absence of the chief and deputy chief, a captain assumes the duties of acting chief. 3:2.3B.

Lieutenants rank immediately below captains. 3:2.4A. In the absence of the chief, deputy chief and any captain, the most senior ranking lieutenant on duty shall be in command of headquarters. 3:2.4C.

Sergeants rank next below lieutenants. 3:2.5. In the absence of the chief, deputy chief, any captains or lieutenants, the senior ranking sergeant shall be in command of headquarters. 3:2.5C.

The manual empowers the deputy chief, all captains, lieutenants and sergeants with "general responsibilities", including the responsibility "for the conduct, discipline, efficiency and appearance of all members under his command; for the care and proper use of all equipment and for the proper carrying out of the rules and regulations governing the department." 3:2.2C, 3:2.3C, 3:2.4B, 3:2.5B.

All sworn police personnel below the rank of sergeant are police officers. 3:2.6A. All police officers with seventeen (17) years service shall be designated as corporal. 3:2.6A. All police officers are responsible to perform all duties set forth in the rules and regulations, by ordinance, or by order. 3:2.6B.

In addition to the general duties of each rank, the specific duties of "supervisors" are set forth in section 3:3.2:

Subject to higher authority, supervisors have direct control over one or more members and/or employees. In addition to the general and individual responsibilities of all members and employees, each supervisor is responsible for:

A. Closely supervising the activities of his subordinates in a manner that assures good order, conduct, discipline and efficiency.

B. Enforcing department rules and regulations and ensuring compliance with departmental policy and procedures.

C. The inspection of personnel and equipment under their supervision and the initiation of appropriate action in the event of a failure, error, violation, misconduct or neglect of duty by a subordinate.

The Township acknowledges that superior officers are responsible for both evaluations and discipline of subordinate officers. According to the Township, discipline includes whatever is necessary to "ensure acceptable performance levels." Evaluations are also used in the same manner. Evaluations are performed on an annual basis by an officer's immediate supervisor. The evaluations are placed in an employee's personnel file and are considered during the promotional process. Evaluations are also used to determine whether a probationary employee is retained.

The police department has a written internal affairs policy and procedure. The policy prescribes that the internal affairs unit shall investigate and review all allegations of misconduct by members of the department. The unit, however, forwards complaints of differential treatment, demeanor and minor rule infractions to an accused officer's supervising officer for the purpose of investigation. The supervising officer forwards the investigation with appropriate disposition to the commanding officer. If the complaint is sustained the chief or his designee determines the appropriate disciplinary action.

Oral and written reprimands of subordinate officers may be issued by supervising or commanding officers, subject to the chief's final approval. A supervisor or commanding officer initiating disciplinary action for more serious complaints about a subordinate officer's conduct completes a "recommendation for internal affairs investigation form" and forwards it through the chain of command to the chief, with supporting documents. The chief will, in turn, direct an investigation by either the original supervisor, commanding officer or internal affairs unit. The investigating officer files a report summarizing the facts and recommending an appropriate disposition. The investigation disposition recommendation form is forwarded up through the chain of command. Officers at ascending rank may provide written recommendations and comment for consideration by the chief.

Thereafter, the chief directs the appropriate action. An officer may request a hearing on charges, and appear before the appropriate authority or its designee, who determines the penalty for the infraction.

Discipline may also be imposed for an infraction of the department's off-duty and extra-duty employment policy. Captain James Clarke is responsible for implementing the policy. On August 1 and August 4, 2003; March 10 and March 30, 2004; and April 13, 2004, Captain Clarke issued memorandum to subordinate officers wherein he determined the policy was violated, and he suspended those officers from additional work for a period of time.

Shift lieutenants and sergeants are responsible for setting patrol officer work schedules, time off and assignments. Sergeants and/or lieutenants approve patrol officers' requests for time off as they are submitted. Superiors direct the officers to complete assignments, based upon the need or call for service at the time. Captains, lieutenants and sergeants have authority to grant time off within the chain of command; a sergeant can grant time off for himself or a patrolmen. A lieutenant can grant time off for a sergeant or a patrol officer. A patrol officer always needs a superior officer's permission for time off.

Under step one (1) of the "Grievance Procedure" as set forth in the most recent contract between the Township and the PBA, an aggrieved employee, or the PBA on behalf of an aggrieved employee, shall attempt to informally resolve differences first with the immediate supervisor. The supervisor shall, thereafter, render a decision within five (5) days of receipt of the grievance.

ANALYSIS

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-supervisor personnel to membership. . . ."

In Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404, 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 those 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, 297

(¶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. [Union City 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 ordered that superior officers be removed from the unit based upon the potential for a conflict of interest with rank and file officers, despite a history of a long relationship in one combined unit, and notwithstanding that the employer did not assert that an actual conflict existed. The Commission removed 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,^{1/} especially when public safety employees are involved." West New York at 13 NJPER 279. The Commission wrote:

Rather, we believe severance is appropriate for uniformed employees even where there has been an 'established practice' where, as here, the employee's job responsibilities place him in a substantial conflict of interest with his subordinates. [West New York at 279.]

We presume that in police departments, an inherent potential conflict of interest exists between police superior officers and rank-and-file police officers. The presumption is not dependent upon a finding of the supervisory status of superiors or upon the

1/ West Paterson Bd. of Ed., P.E.R.C. No. 77, NJPER Supp. 333 (1977 1973).

presence of actual conflict among the groups. An exception may be found in small units if the duties and authority of superiors and rank-and-file are virtually identical so that any potential for conflict between the ranks is de minimis. See Town of Harrison, P.E.R.C. No. 93-104, 19 NJPER 268 (¶24134 1993), affirming H.O. No. 93-1, 19 NJPER 39 (¶24018 1992). This situation is normally found in a very small police force, where the lines of demarcation between ranks is slight. See Pine Valley Borough, D.R. No. 99-15, 25 NJPER 269 (¶30114 1999) (unit of three (3) patrolmen and one (1) sergeant appropriate where sergeant is not a statutory supervisor and performs the same duties as patrolmen); Township of Greenwich, D.R. No. 99-7, 25 NJPER 61 (¶30023 1998) (small force exception applied where all ranks of small department have interchangeable responsibilities); Borough of Audubon Park, D.R. No. 88-6, 13 NJPER 741 (¶18278 1987) (small force exception applied to unit of one (1) sergeant and two (2) patrolmen); Borough of Merchantville, D.R. No. 80-38, 6 NJPER 305 (¶11147 1980) (unit appropriate where sergeant has no greater authority than patrol officers in ten (10) member department).

In this case, I find that the superiors should be separated from the existing unit. Impermissible potential conflicts of interest exist between the superior officers and the rank and file members. The rules and regulations of the police department

specify that the deputy chief, captains, lieutenants and sergeants are responsible for the conduct, discipline, efficiency and appearance of all members under their command and for the carrying out of the rules and regulations of the police department. Rank and file officers are not similarly charged with supervisory authority, a fact underscored by the definition of "supervisor" in the department regulations. Oral and written reprimands of subordinate officers by superiors indicate a potential conflict of interest between the superiors and the other unit members. The PBA's assertion that patrol officers could likewise recommend a reprimand of a higher ranking officer does not negate this conflict of interest.

Superiors are also responsible for evaluating rank and file officers annually, and during probationary periods. These evaluations present a potential conflict of interest between superiors and patrol officers. Superiors are also responsible for issuing decisions at step one of the grievance procedure which presents a substantial potential, if not actual, conflict of interest.

The Township opposes severance, asserting that no evidence suggests a conflict of interest. Unlike the circumstances in Harrison, it appears that the superior officers in Wayne Township have the authority to discipline or effectively recommend discipline; that the duties of the superior officers and rank and

file officers are not identical; and that the superior officers' evaluations of subordinate officers create an inherent potential conflict of interest among them.

In Woodbridge Tp., D.R. No. 96-19, 22 NJPER 216 (¶27116 1996), the Director of Representation severed superior officers from a unit of police patrol officers. In doing so, the Director found that the size of the Department (approximately two hundred (200) police personnel) and the superiors' exercise of authority to discipline and direct assignments of the rank-and-file officers created an intolerable conflict of interest. This finding was made despite a twenty-six (26) year relationship between the Township and a unit that included all police officers except the chief and deputy chief, and without any evidence of an actual conflict of interest.

Similarly, the case *subjudice* does not meet the small force exception with approximately one hundred twenty (120) police personnel, the superior officers have authority to discipline and evaluate, and pursuant to the rules and regulations are responsible for and exercise supervisory authority over subordinate officers.

Given the conflict of interest created by the inclusion of superior officers with the rank and file, I find that the petitioned-for unit is the most appropriate unit for collective

negotiations of superior officers. Accordingly, I direct an election among employees in the following appropriate unit:

Included: All police superior officers employed by Wayne Township including sergeants, lieutenants and captains.

Excluded: Managerial executives, confidential employees, non-supervisory employees within the meaning of the Act; corporals, detectives and patrol officers; professional, craft and casual employees, chief, deputy chief and all other employees employed by the Township.

Superior officers will vote on whether they wish to be represented by the Wayne Superior Officers FOP Lodge 181, Superior Officers Association PBA Local #136-A, or no representative.

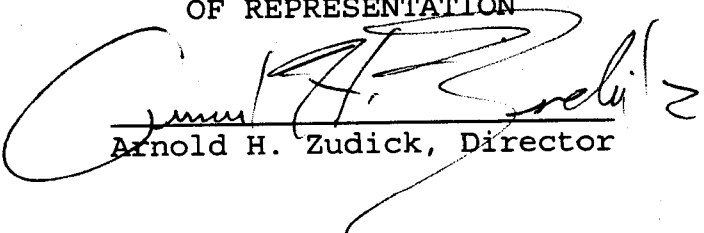
The election shall be conducted no later than thirty (30) days from the date of this decision. Those eligible to vote must have been employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, on vacation or temporarily laid off, including those in the military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Pursuant to N.J.A.C. 19:11-10.1, the public employer is directed to file with us an eligibility list consisting of an

alphabetical listing of the names of all eligible voters in the units, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by us no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously provided to the employee organization with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

The exclusive representative, if any, shall be determined by a majority of the valid votes cast in the election. The election shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Arnold H. Zudick, Director

DATED: February 10, 2005
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by February 23, 2005.