

D.R. No. 2007-13

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

In the Matter of

TOWNSHIP OF MAPLEWOOD,

Petitioner,

-and-

Docket No. CU-2006-026

PBA LOCAL 44,

Respondent.

SYNOPSIS

The Director of Representation clarifies a unit to exclude captains, lieutenants and sergeants from the collective negotiations unit of rank-and-file officers represented by New Jersey State PBA, Maplewood Local No. 44, based upon the potential that a conflict of interest exists by the inclusions of the superior officers. The Director found no "special circumstances" existed, nor had the Township waived its right to seek removal of the superior officers based upon a previous settlement agreement.

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Appearances:

For the Respondent,
Marc D. Abramson, consultant

For the Petitioner,
Genova, Burns & Vernioia, attorneys
(Sandro Polledri, of counsel)

DECISION

On April 25, 2006, the Township of Maplewood (Township) filed a Petition for Clarification of Unit seeking to remove police captains, lieutenants and sergeants from a collective negotiations unit of about 45 patrol officers and 15 superior officers it employs. The unit is represented by New Jersey State PBA, Maplewood Local No. 44 (PBA). The Township asserts that the unit should be clarified to exclude superior officers because their inclusion with rank and file officers creates an impermissible conflict of interest. The Township also asserts that the superiors are supervisors within the meaning of the Act, noting that under N.J.S.A. 34:13A-5.3, the inclusion of

supervisory and non-supervisory employees in the same unit is prohibited unless "established practice, prior agreement or special circumstances dictate the contrary," and that no exceptions apply in this matter.

The PBA opposes the petition. It argues that the Township waived its right to seek removal of the superiors in a 2002 settlement agreement. Under that agreement, the Township permitted the inclusion of superior officers in the existing mixed unit in exchange for the PBA's acknowledgment that superior officers have an obligation to carry out their supervisory duties and impose discipline, notwithstanding the union affiliation of the officers. The PBA also contends that the Township has not asserted any specific conflict of interest that supports its petition.

The parties attended a May 19, 2006 investigatory conference and submitted position statements and supporting documents by July 28, 2006. On February 21, 2007, I wrote to the parties, advising that I was inclined to issue a decision finding a conflict of interest and ordering that the unit be clarified to exclude the superior officers. The parties were provided an opportunity to submit additional facts or arguments. On March 4, 2007, the PBA filed a letter reiterating that its prior agreement with the Township created "special circumstances" requiring the Township to show "cause" for seeking severance of superiors from

the combined unit. The PBA also urged that an evidentiary hearing should be conducted to determine the terms of the prior agreement. On March 7, 2007, the Township filed a letter, asserting that the PBA had not set forth any substantial or material factual dispute warranting an evidentiary hearing. We have conducted an administrative investigation of the petition. N.J.A.C. 19:11-2.2. The following facts appear:

FINDINGS OF FACT

1. The Township and the PBA have signed several collective negotiations agreements, the most recent of which covered the period from January 1, 2003 through December 31, 2006. The recognition clause specifies that the PBA is the majority representative of all "patrolmen, sergeants and all other superior officers" in the Township police department, excluding the chief of police and all other employees.

The Township police department is comprised of about 60 police personnel, including about 45 rank-and-file patrol officers the chief and 15 superior officers in the ranks of captain, lieutenant, and sergeant. The existing unit has been comprised of both supervisory and non-supervisory officers for more than twenty years.

2. On August 15, 2002, the Township filed a Clarification of Unit Petition (Dkt. No. CU-2003-6) which sought to exclude captains, lieutenants and sergeants from the unit, based upon an

asserted conflict of interest arising from the inclusion of supervisory officers and non-supervisory officers in the same collective negotiations unit.

On December 17, 2002, the Commission held an informal investigatory conference between the parties regarding that petition. The Township voluntarily withdrew its petition without prejudice. In return, the PBA agreed to issue a letter recognizing that superior officers have the responsibility to supervise rank-and-file officers, regardless of their shared union affiliation. On January 21, 2003, the PBA president, secretary, vice-president and state delegate issued a letter to the Township Administrator. It provides in pertinent part:

This letter has been prepared to formally express the views of the PBA concerning the responsibilities of supervisory police officers at the Township of Maplewood. The PBA understands that police supervisors are frequently called upon to exercise general supervisory responsibilities with respect to other police officers. These responsibilities include investigations, report preparation, staffing, assignments and disciplinary actions. The PBA recognizes and agrees that these supervisory responsibilities must be carried out notwithstanding the fact that both the supervisory officer and the non-supervisory officer may be members of the same collective negotiations unit. All Maplewood police officers acknowledge that superior officers have an obligation to carry out their supervisory duties and impose discipline notwithstanding the union affiliation of the officers. For purposes of this policy, the parties understand that supervisory officers

include officers who have made rank, as well as officers who are acting as supervisors.

Evidenced by the PBA officer's signature noted below, the PBA agrees that the Township's concerns on the subject are legitimate and important. Further, the PBA has communicated this letter to its membership and will work with PBA members to ensure that this policy is carried out.

3. Maplewood Township Resolution 12-97 promulgates "rules and regulations" for the police department, and specifically sets forth duties and responsibilities of supervisors. It provides:

3.2 SUPERVISORS IN THE DEPARTMENT SHALL:

- 3.2.1 Enforce department rules and insure compliance with department policies and procedures.
- 3.2.2 Exercise proper use of their command within the limits of their authority to assure efficient performance by their subordinates.
- 3.2.3 Exercise necessary control over their subordinates to accomplish the objectives of the department.
- 3.2.4 Guide and train subordinates to gain effectiveness in performing their duties.
- 3.2.5 Use department disciplinary procedures when necessary.
- 3.2.6 When using discipline, comply strictly with the provisions of the department disciplinary process.

The rules and regulations also provide that rank-and-file police officers must be accountable and responsible to their supervisors for obeying all lawful orders.

4. Step 1 of the parties' contractual grievance procedure provides that an employee with a grievance will first attempt to resolve it informally with his shift lieutenant or immediate supervisor. The shift lieutenant may then issue a decision on the grievance if it is not resolved.

5. The PBA has submitted affidavits from several lieutenants and sergeants acknowledging that they are frequently called upon to exercise supervisory responsibilities over patrol officers regarding investigations, report preparation, staffing assignments, and disciplinary actions. Each superior officer also certified, among other things:

8. I have carried out all my responsibilities including those noted above notwithstanding the fact that both supervisory and non supervisory officers are in the same bargaining unit.

9. At no time did the PBA, its officers or members attempt to interfere with my responsibilities as a superior officer.

10. The PBA, its officers and members acknowledge that superior officers have an obligation to carry out their supervisory duties and impose discipline notwithstanding my union affiliation.

11. The PBA, its officers and members understand and have accepted that supervisory officers include officers who have made rank, as well as officers who are acting as supervisors.

ANALYSIS

N.J.S.A. 34:13A-5.3 provides in pertinent part:

[E]xcept 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. . . .

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 that it will ordinarily find a conflict of interest between superior officers and rank-and-file officers in a police department. The Commission cited with approval, South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977), in which the Director of Representation found:

. . . 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 ordered that the superiors be removed, 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

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

upon a finding of the supervisory status of superiors, nor upon the presence of actual conflict among the groups.

The PBA claims that clarification is not appropriate because of "special circumstances," specifically, the 2002 agreement allowing superior officers to continue to be included in a unit with rank-and-file personnel. The PBA asserts that it has performed its promise under the agreement and that the Township's failure to show evidence of a conflict of interest requires the Township to continue to honor its promise.

The Township disputes that the 2002 agreement constitutes "special circumstances" under the Act. It also disputes that its voluntary withdrawal of its 2002 petition without prejudice precludes its current petition. Finally, it asserts that the composition of a bargaining unit is non-negotiable and that Commission regulations permit a public employer to file a petition for clarification of unit at any time.

I grant the Township's petition because the police superior officers should not be included in the same negotiations unit as rank and file officers. See West New York and South Plainfield.

Maplewood police department rules and regulations dictate that superior officers must: 1) assure the efficient performance of their subordinates; 2) exercise necessary control over their subordinates to accomplish the objectives of the department; 3) guide and train subordinates to gain effectiveness in performing

their duties and; 4) use department disciplinary procedures when necessary. Similarly, the rules and regulations hold rank-and-file officers "accountable and responsible" to their supervisors for obeying all lawful orders. Several superior officers have certified that they are required to supervise (and discipline) rank-and-file officers. Under Step 1 of the parties' grievance procedure, superior officers attempt to resolve grievances filed by rank-and-file officers and may issue a decision on the grievance. I find that these job responsibilities and circumstances create impermissible, potential conflicts of interest between superior officers and rank-and-file unit employees, which require the removal of the superiors from the unit. See Borough of Madison, D.R. No. 99-1, 24 NJPER 441 (¶29203 1998).

I disagree with the PBA that the petition should be dismissed because the Township has failed to show an actual conflict of interest in the unit. The Commission does not require evidence of an actual conflict, finding that such a standard "is too exacting and inconsistent with W. Paterson, especially when public safety employees are involved." West New York. See also Wayne Tp., D.R. No. 2005-9, 31 NJPER 16 (¶9 2005); Woodbridge Tp., D.R. No. 96-19, 22 NJPER 216 (¶27116 1996).

I also disagree that the 2002 agreement constitutes "special circumstances" warranting an exception to the general rule against mixed units. See, e.g., Springfield Tp., P.E.R.C. No. 85-88, 11 NJPER 138 (¶16061 1985). The Township's withdrawal of its 2002 clarification of unit petition, without prejudice, and its attendant agreement with the PBA do not constitute a waiver of its right to file the current petition. The Township acted in good faith and complied with that agreement for a reasonable period of time. The original petition was withdrawn in December of 2002. The Township honored the agreement for the duration of an entire contract, i.e., January 1, 2003 through December 31, 2006. The PBA asserts in its supplemental filing that an evidentiary hearing should be conducted to determine the specifics of the 2002 agreement. The agreement is not disputed. Rather, the PBA contends that the Township is barred from filing a clarification of unit petition for severance without evidence that the PBA violated the agreement. A public employer can never permanently waive the right to assert that certain employees are statutorily prohibited from inclusion in a negotiations unit. See N.J.A.C. 19:11-1.1a(4); N.J.A.C. 11-1.5; Wilton; County of Warren, P.E.R.C. No. 89-66, 15 NJPER 30 (¶20013 1988); Borough of Madison.

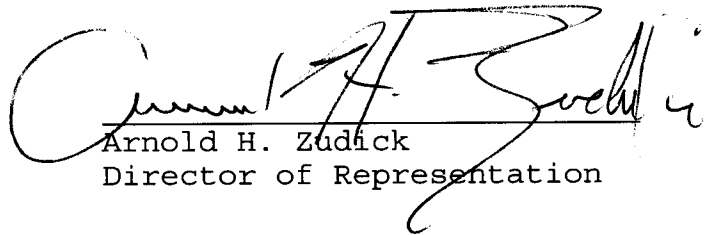
Accordingly, I grant the Township's request to clarify the mixed unit of police superior officers and patrol officers by

ordering the removal of the captains, lieutenants and sergeants. Since the collective negotiations agreement expired on December 31, 2006, I order that the severance be effective immediately.^{2/} Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977).

ORDER

Effective immediately, the Association's unit is clarified to exclude captains, lieutenants and sergeants.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Arnold H. Zudick
Director of Representation

DATED: April 12, 2007
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 April 23, 2007.

^{2/} Upon removal, the superior officers will be unrepresented unless or until a majority representative is recognized or certified.