

H.O. NO. 2011-1

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

In the Matter of

INTERNATIONAL BROTHERHOOD ELECTRICAL WORKERS
LOCAL 33,

Petitioner,

-and-

Docket No. CU-2011-011

STATE OF NEW JERSEY,
DEPARTMENT OF LAW AND PUBLIC SAFETY,

Respondent.

SYNOPSIS

A Public Employment Relations Commission Hearing Officer finds Assistant Section Chiefs (ASCs) are supervisors within the meaning of the Act and therefore must remain outside the certified unit represented by the IBEW.

The Hearing Officer also finds a potential substantial conflict of interest under Board of Education of West Orange v. Wilton among the Assistant Section Chiefs and Line DasG already represented by IBEW. Therefore they must remain excluded pursuant to Wilton.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommendations, any exception thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law.

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Appearances:

For the Respondent,
Archer and Greiner, attorneys
(David A. Rapuano, of counsel)

For the Petitioner,
Sherman, Dunn, Cohen, Leifer and Yellig, P.C.,
attorneys
(Lucas Aubrey and Nora H. Leyland, of counsel)

HEARING OFFICER'S REPORT
AND RECOMMENDED DECISION

On October 14, 2010, the Director of Representation for the Public Employment Relations Commission (PERC) certified the International Brotherhood of Electrical Workers, Local 33 (IBEW or Petitioner) as the majority representative for the following employees of the State of New Jersey, Department of Law and Public Safety (State or Respondent):

Included: All Deputy Attorney's General employed by the State of New Jersey in the Department of Law and Public Safety.

Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; non-professional employees, craft employees, police, casual employees, Deputy Attorney's General assigned to the Division of Criminal Justice and Gaming Enforcement, Deputy Attorney's General on leave to the Office of the Governor, Deputy Attorney's General assigned to the Office of Equal Opportunity, Section Chiefs and all other employees (C-1).^{1/}

Deputy Attorneys General (DASG) performing the functions of Assistant Section Chief (ASC), and specific employees previously designated by the State as confidential employees were excluded from the unit with the understanding that their future inclusion would be determined through a clarification of unit petition to be filed by either party (C1). On October 14, 2010, the IBEW filed the instant clarification of unit petition.

Position of the Parties

The IBEW seeks to include the ASC title in the certified unit. The IBEW contends that while ASCs supervise "the work" of Line DASG in their section, they merely serve as mentors in that role.^{2/} As such, the IBEW asserts that ASCs do not effectively

^{1/} Exhibits are designated as follows: "C" indicates Commission exhibits, "P" indicates Petitioner's exhibits, "R" indicates Respondent's exhibits. Transcript references are as follows: "1T" refers to the November 17, 2010 transcript; "2T" November 18, "3T" November 19, "4T" November 22, "5T" November 23, "6T" December 7, "7T" December 8 and "8T" January 19, 2011.

^{2/} In this report DASG holding titles other than Section Chief, ASC, Lead, or Assistant Attorneys General (AAG) shall be
(continued...)

recommend the discipline or discharge of Line DASG. Moreover, the IBEW argues that to the extent that ASCs have any responsibility which may be related to discharge or discipline, any action taken in this respect is subject to the approval of supervisors above the ASCs in the Division's hierarchy, and, therefore, does not constitute effective recommendation. Thus, the IBEW asserts that ASCs are not supervisors within the meaning of the New Jersey Employer-Employee Relations Act (Act) and should be included in the certified negotiations unit. Finally, the IBEW contends that the functions performed by ASCs create no actual or potential substantial conflict of interest which would bar their inclusion in the unit.

The State asserts that ASCs are supervisors within the meaning of the Act and/or that their inclusion in the unit would create at a minimum, a potential substantial conflict of interest vis-a-vis the Line DASG in the certified unit. In this respect, the State argues that ASCs are part of "supervisory teams" along with Section Chiefs and other supervisory titles. According to the State, the role of ASCs in drafting evaluations for Line DASG, preparation or input into Performance Improvement Plans (PIPs) and their day to day oversight and counseling of Line DASG establishes that ASCs are supervisors who effectively recommend

2/ (...continued)
referred to as "Line DASG" or "Line Deputies."

discipline and discharge. Finally, the State contends that ASCs' responsibilities impact discipline and advancement of Line DASG and as such create an actual or potential conflict of interest with unit members and with respect to their loyalty to the State as their employer. Therefore, the State asserts that Bd. of Ed of West Orange v. Wilton, 57 N.J. 404 (1971), requires that the ASC title in this case must remain outside the certified negotiations unit.

Hearings were conducted on November 17, 18, 19, 22, 23, December 7 and 8, 2010 and January 19, 2011. Both parties were given the opportunity to examine witnesses, present evidence and argue orally. Post-Hearing briefs were simultaneously submitted on March 7, 2011, and answering briefs were simultaneously submitted on March 15, 2011.^{3/}

Stipulated Facts and Independent Factual Findings:

Prior to the commencement of the State's presentation of its case the parties stipulated the following facts:

1. Assistant Section Chiefs and Section Chiefs have no power to hire or discharge DASG.

^{3/} Initially, the IBEW sought, in this petition, to add certain DASG to the unit which the State asserted should be excluded as confidential employees. At the January 19, 2011 hearing the parties voluntarily resolved their dispute regarding confidential employees. Therefore, that issue need not be further addressed. The parties' agreement is reflected in Appendix A of this report.

2. Assistant Section Chiefs and Section Chiefs have no power to promote or grant salary increases to DAsG.

3. In their role as either Assistant Section Chief or Section Chief these employees have no power to make effective recommendations for hiring DAsG.

4. There are no Civil Service job descriptions for the local titles of Assistant Section Chief, Section Chief, Lead or Practice Group Head.

5. Assistant Section Chiefs do not receive additional pension consideration, do not receive additional sick leave, vacation leave or additional health benefits by virtue of holding the local title of Assistant Section Chief.

Based upon the entire record in this proceeding I make the following additional:

Findings of Fact

1. The State of New Jersey, Department of Law and Public Safety, is a public employer within the meaning of the Act, is the employer of the employees who are the subject of this petition and is subject to the Act's provisions (1T5).

2. The International Brotherhood of Electrical Workers, IBEW Local 33 is an employee representative within the meaning of the Act and is subject to its provisions (1T5).

3. The Attorney General heads the Department of Law and Public Safety (Department). There are approximately 9,000

employees in the Department (2T165). Approximately 30 of those are Assistant Attorneys General (AAsG) who report to the Attorney General (1T22-1T23). Within the Department are several boards and offices which also report to the Attorney General.

4. In the Department there are approximately 650 to 700 employees who are designated as DASG (1T22). DASG are assigned to boards, offices and divisions within the Department (1T24-1T26).

5. There are approximately nine divisions in the Department (1T26-1T31).

6. The Division of Law (Division) is one of the divisions in the Department. DASG in the Division provide legal advice and other legal services to various State agencies, boards and other divisions. They also provide all civil legal services for executive branch agencies (1T31).

7. Peter Traum is the Chief of Staff of the Division of Law (Traum) and has held that position consistently since 2004. Traum oversees all of the administrative operations required for the Division and oversees the staffing needs of each of the sections for DASG and other staff. He also becomes involved in various personnel issues (1T20). As part of his personnel function he coordinates the hiring, promotion and evaluation process regarding DASG in the Division (1T21, 1T90, 1T95, 1T100, 1T111). Traum also oversees the Administrative Office. The

Administrative Office is responsible for oversight and administration of the Division's budget and the human resources function pertaining to attorneys and non-attorneys in the Division (1T41-1T42).

8. Robert Hanna is the Director of the Division (1T31). Two Deputy Directors report to Hanna, one in Trenton and one in Newark (1T38; R2). Traum serves as a confidential assistant to the Director (1T20).

9. There are approximately 854 employees in the Division, 470 of whom are DAsG and 22 are AAsG (1T34).

10. Within the Division there are eleven practice groups which consist of several sections providing legal services in given areas of expertise. Several of the 11 practice groups are Division-wide and have no sections reporting through them (1T39). Generally, an AAG heads each practice group and is identified as a Practice Group Head (PGH) (1T42).

11. The Division is divided into 28 sections. The assignment of DAsG to sections is based in part on the nature of the work done in the particular section and the DAsG expertise (1T35).

12. The highest ranking person in a section is the Section Chief. The 28 sections in the Division normally have one Section Chief and between zero and five ASCs (1T42-1T86; R2). There were approximately 47 ASCs in the Division at the time of this hearing

(R-2). All sections have a Section Chief title even if not all are filled at any given time (1T36). Sections with a vacant Section Chief slot generally have at least one ASC in the section or may have an ASC acting as Section Chief (R-2; 2T3-2T4, 2T38).

13. Changes made periodically to the structure of the Division have included further development of the practice group model and re-institution of the Deputy Director title. Historically, a few sections were merged or the number of sections was increased. Additional Section Chiefs and ASCs may be added if needed. However, this change in structure does not frequently occur (1T87-1T88).

14. There are no specific civil service titles for Section Chief or ASCs. Both of those titles are referred to by the Department of Law and Public Safety as "functional" or "local titles." There are no internal job descriptions for these titles (1T93-1T94, 1T102-1T103).

15. There are generic civil service descriptions for DASG titles. However, they are rarely applied in the Division (1T102). The compensation schedule for DASG ranges from DAG 1 through 5, with DAG 1 being the highest level. Requests for promotions for DAG 5 thru DAG 1 are processed through civil service and may or may not be approved. An existing freeze on promotions with regard to civil service titles has diminished the Department's ability to make promotions in several recent years.

Thus, even though DASG may be appointed to a higher local title, for example from ASC to Section Chief, there might be no additional compensation approved for that move (1T94-1T96). Currently, a freeze "waiver" is necessary for increased compensation if a DAG is appointed to a higher title (1T97-1T98).

16. The collective negotiations unit also includes the local title Lead DAG (Lead). There are no civil service or internal job descriptions for Leads (1T12, 1T69).

The responsibilities of a Lead position remain essentially the same as that of the Line Deputy except that they may be designated as someone the Line Deputies can go to for guidance concerning their cases or interaction with the Division's clients (6T60-6T63). However, Leads have occasionally performed file reviews and draft evaluations and participated in "round table" discussions of these drafts. In one case a Lead was involved in monitoring a Line Deputy's performance in a PIP (3T62-3T63, 6T11, 6T59-6T61, 6T64, 6T66, 6T79-6T80).

In approximately September and into the Fall of 2010, several former Leads were promoted or were in the process of being promoted to the ASC title (2T84-2T86, 3T39, 4T63-4T64, 4T104). One of the reason for these promotions was that the Division sought to conform the tasks actually being done by those Leads to the appropriate job title. Because the Division considered Leads who had historically performed evaluations to be

more like ACSs than Leads or Line DAsG, they were chosen for promotion to ASC. Leads who did not perform evaluations were not eligible for promotion. The parties agreed prior to this proceeding that the Lead title would be included in the negotiations unit (C-1; 3T93-3T94)^{4/}.

17. The Section Chief title is specifically excluded from the certified unit (C-1; 4T47).

18. Section Chiefs normally have their own limited case load. The authority and responsibilities of the Section Chiefs include: administrative reporting up through their respective section, maintaining contact with the section's clients, authority to approve and enter into limited monetary settlements on behalf of the section and Division, conducting oversight of the caseload and all legal work of the section and assignment of cases to ASCs and Line DAsG. They are responsible for reviewing draft evaluations prepared by ASC's, and for evaluating ASCs and Leads and in some cases Line DAsG. Section Chiefs sign the final evaluations of all DAsG in their respective section. They distribute and discuss final evaluations with Line DAsG and in some cases they include ASCs in those discussions. They have the authority to suggest, draft and participate in the implementation of PIPs for Line DAsG and to monitor the progress of those

^{4/} Line DAsG in the Lead title who essentially oversee the work of and mentor other Line DAsG in the unit are therefore not at issue here.

employees for whom a PIP has been prepared. Finally, they may recommend employees to fill vacancies within the section, including ASC positions. (1T108, 1T124-1T125, 1T142, 2T11-2T16, 4T127-4T128, 6T112-6T113, 6T122-6T123, 7T103-7T104).

Several DASG who are currently or have previously been Section Chiefs testified that they viewed their role as Section Chief as being responsible for oversight and proper functioning of their entire respective sections (6T112, 7T103-7T105).

Based on the foregoing, I find that Section Chiefs' authority and responsibilities establish them as the primary supervisor in each section.

19. Within the structural organization of the Division, ASCs are generally second in line to the Section Chief in each section and normally report directly to and are supervised by the Section Chief. Where there is a vacancy in a Section Chief position the ASCs report to an Acting Section Chief or a PGH (2T3-2T4, 2T38)^{5/}.

20. ASCs maintain their own caseload, which is normally lighter than that carried by a Line DAG. They are specifically assigned as the "direct report" to a number of Line DASG in each

^{5/} An ASC was the ranking DAG for the New Jersey Transit Section at the time of the hearing in this matter. The State's witness testified that this was a transitional situation which was "carved out." It is unclear if the Section will remain independent or be merged with another section (1T74-1T76).

section and the Line DAsG are told which ASC they will be reporting to (3T111-3T112, 4T5-4T6, 6T89).

21. Once assigned, an ASC is responsible for day-to-day contact with the Line DAsG and oversight of their work. The ASCs give advice and assistance in case processing which may include discussing legal issues, case strategy, preparation of documents and preparation of motions and discovery requests. ASCs are also responsible for reviewing Line Deputies' briefs and making sure they are prepared for their cases. ASCs conduct one-on-one case file reviews with Line Deputies on a fairly regular basis. They gather information from the Line DAsG about their work for use in their annual evaluations. The ASCs are also responsible for reporting to the Section Chief on problems a Line Deputy may be having with his or her work. ASCs have regular informal conversations and contact with their Section Chiefs with respect to the work being done by Line DAsG in the section. They prepare the first drafts of Line DAsG annual evaluations and meet to discuss those drafts either one-on-one with the Section Chief or as a group with other ASCs and the Section Chiefs. In limited instances, ASCs have participated in preparing verbal PIPs and have drafted or had input into written PIPs. Once PIPs are implemented ASCs are primarily responsible for monitoring the DAsG progress during the performance of a PIP (1T26, 3T7, 7T154, 7T156).

22. I have found no significant discrepancies in the testimony concerning the ASC's duties and responsibilities. Based upon credible testimony in the record, I find that DASG in the ASC title perform essentially the same duties and have essentially the same responsibilities in each of their respective sections within the Division.

23. DASG are at-will employees who can be reassigned or terminated without cause. In 1996, the Department promulgated Standard Operating Procedure 4-96 (SOP 4-96) to establish a procedure for the ". . . maintenance of an effective and efficient workforce through a disciplinary process that ensures fair and just treatment of all employees" (R7II).

SOP 4-96 explicitly applies to all employees in the Department. However, it also states that the procedure provided therein does ". . . not limit the Department's right to terminate, demote or reassign without cause, an employee who serves at the pleasure of or at the will of the Attorney General" (R7IIID).

There is unrebutted record testimony that the provisions of SOP 4-96 are infrequently applied to DASG, and that in any event, SOP 4-96 is not applied with respect to Line Deputies' performance problems (1T126-1T127, 2T152; R-7IIID).

Based on the foregoing, I find that the processes and provisions of SOP 4-96 do not affect the duties and

responsibilities of ASCs or Section Chiefs with respect to discipline or discharge of Line DASG which may be based upon poor performance.

File Reviews: Purpose and Process

24. ASCs, and in some instances Section Chiefs, perform file reviews. In rare instances Leads have also done file reviews. These reviews are generally one-on-one meetings between the reviewer and the Line Deputy to discuss the status of some or all of his or her assigned cases. Some of the reviewers access and update the Division's computerized case tracker system to conduct file reviews, other do not. There are several uses for the file reviews including; ensuring that the Line Deputy is prioritizing and moving cases in a timely manner, keeping track of possible problems in assigned cases and, affording a less experienced Line Deputy the opportunity to receive advice and input from a more experienced ASC to determine ways to handle his or her cases effectively. A file review also helps the reviewer determine whether the case load is appropriate for any given Line Deputy. Ideally, ASCs conduct file reviews on a quarterly basis. While all sections conduct file reviews, there is some testimony that not all sections do them as frequently (1T151-1T152, 4T37, 4T86, 5T8, 5T56, 6T11-6T12, 6T56-6T57, 6T64, 6T110-6T111, 6T160, 7T14-7T15, 7T58).

25. File reviews also provide the reviewer an opportunity to detect and discuss with a Line Deputy specific problems he or she may be experiencing with their caseload or a particular case. When a problem is detected, the ASC either calls it to the attention of the Section Chief or the ASC may choose to deal with the problem directly with the Line Deputy (6T37-6T38, 6T65).

26. If problems with a Line Deputy are detected during a file review, the Deputy may be given suggestions for improvement and/or follow-up counseling from the ASC. Additionally, if the ASC has reported the problem to the Section Chief the Chief may direct the ASC to conduct more frequent file reviews with the Line Deputy. An annual evaluation may also include a reference to problems discovered in file reviews. Finally, if a PIP is prepared for a Line Deputy, that PIP may be based in part on problems found at the file review (2T17-2T18, 3T47-48, 3T57, 3T69-3T70, 6T91-6T92, 7T25-7T26, 7T37-7T38, 7T156-7T157; R-9, R-10, R-11).

27. There are generally no formal written file review results. At most, notes are kept in a document written by the ASC or in the case tracker system used by the Division. Before the case tracker system was widely used an ASC might prepare a memo to the Line Deputy summarizing the results of their file review discussion (7T14-7T15, 7T80-7T81).

28. While problem areas for Line DAsG may be detected and addressed as a result of file reviews, I find that there are no written or oral recommendations for discipline or discharge made during the file review process. I further find that file reviews standing alone are not intended to be, nor are they discipline (6T12-6T13, 6T110-6T111, 6T161, 7T15, 7T82, 7T157).

Evaluations: Purpose and Process

29. For the most part, evaluations for DAsG in the Division are conducted on an annual basis. The evaluation process is usually initiated by the distribution of memoranda from Chief of Staff Traum, the Division Director and/or Section Chiefs. The memoranda describe the purpose and the process of evaluation. They set time frames for completion and solicit input from Line DAsG concerning the work they performed during the year. The input from the Line DAsG goes to their assigned ASC. When a Section Chief has DAsG who report directly to him or her, whether they are ASCs or Line DAsG, the Section Chief drafts the evaluations for those DAsG using the form provided by the Division. ASCs use the same form to draft evaluations for Line DAsG who report to them on a regular basis.

Section Chiefs and ASCs draft evaluations for their assigned DAsG because they normally have day to day interaction with them and therefore are believed to have the most knowledge of their work. For example, ASCs have direct knowledge of the quantity,

quality and any problems or instances of particularly good work done by their Line DAsG. The Division takes the evaluation process seriously, as do Line DAsG. The evaluation process seeks to ensure that the person most familiar with the work of the Line DAsG prepares the first evaluation draft (1T99-103, 1T110-1T111, 2T9, 2T11-2T12, 4T12-4T13, 4T21, 6T17, 6T20, 6T22, 7T20, 7T27-7T28; R-4; P-1, P-3, P-4, P-5, P-6).

30. The "performance evaluation" forms used in the Division are based upon an American Bar Association evaluation form with modifications relevant to evaluation of DAsG. The Director constructed the performance evaluation form and it has remained fairly consistent over time. The form provides scoring matrixes in eight categories and DAsG are rated in each category numerically from one to five, with one being the lowest rating. Category number 6 "Leadership," is "For Supervisors Only." It sets forth criteria which require the ability to provide constructive criticism, monitoring and training, ability to evaluate staff and to maintain an effective file review procedure. ASCs are evaluated in this category and Line DAsG are not. An overall numerical performance summary is given at category eight. The form also requires that the evaluator complete a narrative of the employee's performance using examples of work performed. The evaluations reveal that the ASC drafting the narrative includes a judgment as to the quality of the Line

Deputies' work and often their professionalism (R-5). Finally, the form provides a section for professional development goals and training needs. The only signature lines provided on the form are for the Section Chief, PGH/AAG and the evaluated attorney. The same form is used for both the draft evaluation and the final. There is no specific provision in the form for recommendations for discipline or discharge of Line DASG or any other DAG (1T103-1T106; R-4).

31. Section Chiefs and ASCs rely on their day to day observation of the Line DASG they evaluate. They also review prior evaluations and the work material the DAG has provided for consideration. They may also discuss the DASG with other Section Chiefs or ASCs for whom the Line Deputy has worked. Some ASCs maintain a file for each Line Deputy which includes examples of their work and notes on problems or success the Line Deputy may have experienced over the evaluation year. To the extent they exist, an ASC may also refer to notes of file reviews done during the year when preparing a Line Deputy evaluation draft (3T38, 6T17, 6T124, 7T57-7T59, 7T159).

32. In most cases a draft evaluation is completed by the ASC before it is forwarded to the Section Chief. In some sections a pre-draft meeting between the ASCs and the Section Chief is conducted to discuss the information for the potential drafts and after that meeting the ASCs prepare the drafts for

their assigned Line Deputies based in part on what was discussed at the pre-draft meeting (2T13, 3T15-3T16, 4T114-4T115, 5T62, 7T159).

33. Post-draft meetings are frequently held between ASC's and Section Chiefs. These meetings are referred to as "round tables" and are in part an opportunity for the ASCs and Section Chiefs to discuss the Line DASG work with all who may have had direct personal knowledge of their work in order to do the best job possible in evaluating and getting out all of the facts concerning the Line Deputies' performance (6T21, 6T22, 6T67-6T68). In those meetings the participants discuss the observations made in all draft evaluations. The consistency of numerical ratings given to Line DASG in the evaluations are frequently discussed both in pre-draft and post-draft meetings. The Section Chiefs are responsible for ensuring consistent numerical rankings in their sections. Some but not all Section Chiefs prepare grids when they review the drafts in order to determine consistency and fairness of numerical rankings. If there are inconsistencies, scores may be changed before a final version of the draft is completed. In most sections, changes to the evaluations at this stage of the evaluation process are discussed with the original drafter before they are made (2T36-2T37, 2T42-2T45, 3T66-3T67, 3T88-3T89, 4T50-4T51; R-14; P-7, P-8, P-9, P-10).

34. Along with the review of numerical scores pre or post draft, there are normally discussions concerning the evaluation narratives. In this context the goal is completeness and accuracy in describing and recording the work done by the particular Line Deputy. As a result of these discussions, ASCs or Section Chiefs with additional knowledge of the Line Deputy's work may add to or otherwise suggest changes to the draft narrative. Changes made to the drafts are described in the record as being the result of "collaboration or consultation" with the ASCs concerning the reason or the need for a proposed change. In some cases, however, Section Chiefs do not consult with the ASC about the changes they make. There is also evidence that in some cases the Section Chief and ASC may not initially agree upon the proposed change but eventually agree after further discussion. Likewise, there is evidence that the ASC may not agree to the changes even after further discussion with the Section Chief. In either situation, the Section Chief has the final word on what goes into the final draft (2T13-2T14, 2T42, 3T25-3T27, 3T65-3T68, 4T49-4T52, 4T113-4T117, 4T139-4T140, 5T63, 6T21-6T22, 6T67-6T69, 6T133-6T134, 7T60, 7T175-7T176).

35. Most Section Chiefs give due regard to the drafts done by their ASCs largely because they view the ASCs as having greater first-hand knowledge of the Line Deputy's work. The ASC may have particular expertise in the subject area that Line DASG

are assigned to. The Section Chief generally has limited, if any, day to day contact with Line DASG he or she does not directly supervise. Finally, many of the Section Chiefs have worked with their ASCs for a significant period of time and trust their judgment regarding evaluation of Line DASG (2T12, 2T15, 2T31, 2T49, 3T114-3T115, 4T24-4T25, 5T67).^{6/}

36. Once reviewed and finalized by the Section Chief, the evaluation is forwarded to the PGH for his or her respective sections. The evaluations are unsigned when submitted to the PGH.

PGHs review the numerical scores to ensure they are consistent across the entire practice group. When they believe there are inconsistencies they may discuss them with Section Chiefs. In some cases ASC's are also part of the conversation.

PGHs can and do make changes to both numerical scores and the narratives to make sure the two make sense to the overall evaluation. If the two parts of the evaluations do not coincide, the PGH may reach out to the Section Chief and the ASC to discuss the discrepancy. The discussion may result in a change to the evaluation before the PGH signs off. The PGH can also make

^{6/} One Section Chief testified that while he gave weight to ASCs' drafts, he did not give them "great weight" but he would give the ASC's opinion more weight than he would someone else. He also noted that he valued their opinions very much but would not defer to the ASCs because ultimately it was his job to supervise and make the decisions on evaluations (7T46-7T47).

comments on the evaluation form and the "Reviewer Comments" section of the form is reserved for the PGH (1T98-1T99, 2T48-2T52, 2T68-2T69, 2T98-2T99, 3T80, 4T64-4T67).

37. Since 2005, no one above the PGH level has reviewed the drafts. Chief of Staff Traum receives all evaluations once the PGH's have reviewed them. The PGH does not sign the final draft before it goes to Traum. In the past, the purpose for forwarding the final evaluation drafts to Traum was for his review, particularly with regard to consistency among the Division's practice groups. Since 2005, the major purpose for forwarding the drafts to Traum is to allow the evaluations to be entered into a data base (2T102-2T103, 3T72, 4T83-4T88).

38. In one instance of a Line Deputy who received a severely negative evaluation after the Section Chief had finalized the evaluation and forwarded it to Traum's office, the Section Chief requested that the ASC provide the documentation he had relied upon in drafting the evaluation. The Section reviewed the material and the final evaluation remained negative (7T180-7T183).

39. The final draft evaluations are returned to the PGH by Traum's office and at that point the PGH signs them and distributes them to the Section Chiefs. The Section Chiefs then sign the final evaluation and distribute them to the Line DASG.

In most cases the ASCs do not see the final evaluations after they are returned to the Section Chief or the Line DASG.^{2/}

40. ASCs do not sign the draft or final evaluation at anytime. The Line DAG signs the final evaluation to confirm receipt of the document. (3T65; R-5).

41. If a Line DAG wishes to discuss his or her evaluation, he or she generally will meet with the Section Chief. An ASC may or may not attend that meeting (2T47, 4T88-4T90, 6T26-6T27, 6T152, 7T52-7T53).

42. Neither Section Chiefs nor ASCs receive any formal training related to discipline or discharge of Line DASG (3T131-3T132, 3T144).

43. The Attorney General retains final authority to discipline or discharge Division employees (1T155).

44. Numerous witnesses on behalf of the State and the IBEW testified that the major purpose for evaluations was to evaluate performance. In this regard, the evaluations assist ASCs, Section Chiefs and Line DASG to identify problem areas, to facilitate discussions for solving the problems and to gauge overall performance within or among sections. Additionally, the annual evaluations serve to provide feedback to Line DASG, familiarize them with department goals and assist them in

^{2/} One ASC testified that she does not see the draft evaluations again after she prepares them and submits them to her Section Chief (7T60).

achieving those goals. They also provide an opportunity for the DAsG to offer input concerning the work they completed during the year. Finally, the evaluation is intended as a professional development tool to be used for future achievement by DAsG. In this respect a good evaluation may identify the Line Deputy as a future supervisor in the Division.

None of the witnesses believed that evaluations were intended as a disciplinary tool. Likewise, these witnesses testified that they did not recall ever having seen a draft or final evaluation that specifically contained a recommendation for discipline, termination, promotion or other monetary increase (1T100, 1T107-1T108, 2T8, 2T94, 2T139, 3T68-3T69, 3T113, 4T123, 4T137, 5T38, 5T44-5T45, 6T30, 6T77, 6T157-6T158).

45. In addition to the testimony above describing the purpose for evaluation there is also a significant amount of credible testimony that poor evaluations can and do lead to more intensive overview of the Line Deputy's work, additional counseling of the Line DAG by the ASC and more frequent file reviews. All of these have been described as attempts by either the Section Chiefs or ASCs to support professional growth and help the Line Deputy improve. However, there is equally credible testimony that if these attempts to assist the DAsG to improve their work do not succeed or that a problem revealed in the evaluation is particularly serious, an evaluation may contain a

notation to the effect that the Line Deputy's downward trend is a problem and a subsequent evaluation may contain a lower score or more critical narrative. As a result, an informal unwritten or a formal written PIP may be developed. Evaluations subsequent to a PIP and a problematic file review may reflect whether the Line Deputy's work has improved enough to retain him or her. If it has not, the subsequent poor performance evaluations can lead to probation and/or termination.

Conversely, good evaluations may describe a Line Deputy as "leadership material." Good evaluations, particularly those with high numerical scores, have been used to award merit increases (1T100, 1T162-1T163, 2T9, 2T13, 2T16-2T17, 2T54-2T55, 2T166, 3T47, 3T49, 3T57, 3T95, 3T100, 3T112, 3T128-3T129, 4T9, 4T54, 4T77-4T79, 4T110, 5T56-5T58, 5T74, 6T65, 7T38, 7T42, 7T71-7T72, 7T147, 7T150, 7T164).

46. In 2005, the Division completed an evaluation cycle and relied solely on the overall numerical performance scores on those evaluations to institute a reduction in force (RIF) which was implemented in 2006. While Section Chiefs and ASCs were not aware that the evaluations for 2005 would be used for the RIF, the fact remains that the sole criterion for that action was taken from the evaluations (2T58, 2T94-2T96, 3T112-3T113, 3T124-3T135, 3T128-3T129, 3T141, 7T21).

47. The State provided 46 sets of drafts and final evaluations for the 2009 evaluation period (R-5). The 46 sets covered 12 sections. My review of each of the sets is summarized as follows.^{8/}

In two of the 12 sections no changes were made to numerical scores (DYFYS North and South). Of the remaining 10 sections changes were made to numerical scores in 18 evaluations. For one evaluation no overall score was provided in the draft but did appear in the final. The changes made to the numerical scores either raised or lowered a score or scores in a particular category. Of the 10 sections where numerical changes were made, two resulted in a change in the overall score. Both of these changes were made in the same section.

With respect to the narrative portions of the evaluations, for three of the 12 sections there were no changes evident (DYFYS North, Tort Litigation and Cost Recovery). In the remaining nine sections changes involved additions or deletions to the draft.

^{8/} At the hearing, the State objected, for various reasons, to the admission into the record of Petitioner's exhibit 14. P-14 was offered as a summary of changes made between the drafts and final evaluations contained in R-5. The document is not intended to characterize the nature of the specific changes made other than identifying them as numerical or narrative changes. Nor is it intended to evidence the significance of any changes made. I have thoroughly reviewed each set of R-5 drafts and finals. To the extent I have relied on them to make factual findings or legal conclusions in this report, I have based findings and conclusions solely on my review of the documents.

These changes usually related to removing a negative comment, toning down a positive comment by removing a word or phrase used by the ASC, adding additional examples of work product and case load carried by the Line Deputy and the entire section, or adding a summary remark on the overall quality of the Line Deputy work. Finally, in several of the sets, the goals section was either added to or a goal was deleted (R5).

Given the length and thoroughness of the drafts, changes made to the final evaluations are not disproportionate. The relatively few changes made to the evaluation drafts along with the testimony from the ASCs' supervisors regarding their reliance upon the ASCs' day-to-day knowledge of the work of the Line DASG, leads me to conclude that the Section Chiefs by and large rely upon the assessments made by the ASCs in evaluating Line DASG.

Based upon my review of each of the draft/final evaluations, I find that neither the narrative changes nor the numerical changes were so significant that they negated the importance of and the Section Chiefs' reliance upon the draft evaluations completed by the ASCs.

Based upon all of the foregoing, I find that evaluations are used by the Division to evaluate performance and support professional development and do not, standing alone, normally lead to discipline or discharge of Line DASG. However, I further find that in instances of continued poor performance where all

avenues to improve the Line Deputy's performance have been exhausted and failed, evaluations combined with file reviews and PIPs are used to substantiate a decision made by the Division to retain or to terminate Line DASG.

Performance Improvement Plans: Purpose and Process

48. Performance Improvement Plans are described in this record as a tool used in the Division to address work performance problems of Line DASG. The PIPs are used to explain to the DASG specific problems an ASC or Section Chief has observed along with providing formal steps to be taken to improve and monitor the Line Deputies' work (1T127, 1T142-1T143, 3T100, 7T23-7T25, 7T64; R-9, R-10, R-13).

49. There are no explicit recommendations for termination or other discipline contained in a PIP. The record is clear however, that as a result of the process leading up to and including a PIP, Line DASG have been more intensely observed and monitored by ASCs and Line DASG have been transferred to different sections where the work is less complex and/or they have been terminated. One witness noted a Line Deputy who was experiencing work related problems was put on some type of "probation." These results are especially true if the Line DASG receive a poor evaluation subsequent to the PIP. Likewise, if a Line Deputy improves as a result of a PIP there is credible testimony that his or her ASC and/or Section Chief have noted the

improvement and the Line Deputy has been retained (2T70, 2T140-2T142, 7T65-7T66, 7T164-7T165).

50. The process which leads to the development of a PIP is usually initiated when the Line Deputy's ASC notices problems with his or her work. If the ASC views the problem as serious or ongoing, he or she first brings it to the attention of the Section Chief. A file review or evaluation can raise a red flag regarding problems the Line Deputy may be having. An ASC's or Section Chief's direct observation of a Line Deputy at work or client complaints to the Division can also lead to the identification of problems that trigger a PIP (1T141-1T142, 2T59).

51. While there is little evidence that ASCs recommend that a PIP be prepared, once the need for a PIP is determined, the ASC, Section Chief and possibly the PGH discuss what type of PIP will be developed for the individual Line Deputy. They also may include Chief of Staff Traum in their discussion. The PIP may be informal and presented to the Line Deputy verbally. However, although the institution of a PIP is infrequent, it appears that when one is called for, the plan is normally written. In one instance an ASC was directed by the Section Chief to draft a PIP. More often, however, the Section Chief drafts the PIP then asks for input from the appropriate ASC. In the example noted where the ASC drafted the PIP, the draft was reviewed by the Section

Chief. During the discussion stage of PIP preparation, the PGH, Section Chief and ASC may all have input to the Plan^{9/}. The Chief of Staff reviews all PIPs before they are implemented, (2T60-2T61, 2T121-2T123, 2T134, 4T16, 4T57, 5T168, 6T74-6T75, 6T76, 7T66, 7T164-7T166).

52. Before a PIP is implemented, the Line Deputy for whom a PIP is developed has usually been made aware of his or her performance problems by the ASC. This occurs verbally and is often done as a result of a poor evaluation. The Line Deputy may also participate in pre-PIP discussions along with the ASC, Section Chief and PGH. The directives contained in a PIP and the methods proposed to improve performance are part of a written PIP packet which normally is presented and usually explained to the Line Deputy by the ASC. In some instances, the consequences of failure to improve are also addressed with the Line DASG (2T20-2T21, 2T60-2T61, 2T140 2T162-2T163, 5T68-5T71).

53. A time frame for improvement is established for the Line Deputy in a PIP. During that period the ASC is primarily responsible for monitoring the Line Deputy's progress and assisting him or her to successfully follow the plan. Often there is more intense oversight of work quality, more frequent file reviews and increased attendance reporting requirements.

^{9/} There is some testimony that a Lead with particular knowledge of a particular Deputies' problems may provide input into the PIP process and plan (6T79-6T80).

Aside from the ASC, the Section Chief and PGH may also be involved in monitoring and follow-up. In one reported instance, a Lead DAG was also responsible for monitoring the Line Deputy inasmuch as the Lead was more experienced in the particular subject area (1T132, 1T141, 1T145, 2T136, 3T53, 6T76, 6T79-6T80, 6T100-6T101, 7T178-7T179; R-13).

54. During the process and after the PIP is completed, the ASC, Section Chief, PGH, Deputy Director, Director and Chief of Staff may all be involved in discussions of what, if any, further action will be taken with respect to the Line Deputy. If his or her performance has not improved sufficiently a determination of whether to retain the Line Deputy may be discussed among the group. The record shows that input from each of the Division's participants is solicited in this regard, however, any final decision is made by the Director. A decision to terminate may be made as a result of these discussions or after a subsequent formal evaluation is completed which references the PIP and the Line Deputy's continuing problem (1T149-1T150, 1T154-1T155, 2T140-2T141, 3T123, 4T54, 4T103, 5T67-5T68, 6T89-6T90).

It is clear from the record that a PIP is close to the last step of the process for assessing Line Deputies' performance. It follows a poor file review, poor evaluation and discussions between the Line Deputy, ASC, Section Chief and possibly the PGH.

One witness described a PIP as "informal discipline" (1T139, 1T148, 3T99-3T100).

55. The role and possible result of a PIP and the responsibility for its implementation with respect to Line DASG is evidenced in the record by several specific examples. PIP's were drafted and implemented for Line DASG Ann 1, Beth, Charles and Jack.^{10/} In each case either the ASC brought the Line Deputy's performance problems to the attention of his or her Section Chief or both were aware of the problems and discussed them together. Once a decision was made to place the Line Deputy on a PIP, either the ASC drafted the plan at the instruction of the Section Chief or the Section Chief drafted the plan with input from the ASC.

In each of these examples, before reporting to the Section Chief the ASC spoke with the Line Deputy concerning his or her performance problems. Thereafter, if a PIP was to be implemented either the ASC alone, or the ASC along with the Section Chief met with the Line Deputy. In most of these examples the ASC to whom the Line Deputy was assigned was primarily responsible for monitoring the PIP and reporting the Line Deputy's progress to the Section Chief.^{11/} In several instances the Section Chief in

^{10/} All Line DASG referred to here have been given pseudonyms.

^{11/} As noted previously, in at least one case, a Lead was also involved in drafting and monitoring the PIP. In another
(continued...)

conjunction with the ASC directly monitored the Line Deputy's progress. In one case, Traum and a PGH were also involved in reviewing the Line Deputy's progress as well as reviewing the subsequent performance evaluation which was drafted by the ASC (1T141-1T142, 1T145, 4T54, 4T57, 5T14-5T15, 5T68-5T69, 5T73, 6T36, 6T74-6T76, 6T78-6T79, 6T97, 6T131-6T132, 7T38, 7T162-7T163, 7T168).

56. In the cases of Ann 1 and Beth, their ASC monitored their progress under the PIP. When the 2006 RIF was about to occur, the Section Chief recommended to the ASC that both should be discharged/RIF'd. The ASC believed that one of the two had made sufficient progress in her PIP and should be retained. The Section Chief agreed with the ASC's recommendation and initially only one of the two was subject to the RIF (4T54, 4T57).

57. After Charles was placed on a PIP his ASC talked with him and monitored his progress and then reported back to the Section Chief. As a result, Charles was transferred to a less complex assignment. Eventually, he was terminated when the ASC and the Section Chief agreed that he had not improved and should not be retained (2T140, 2T142, 5T68, 5T73-5T74).

11/ (...continued)
case, the Line Deputy was assigned to the Section Chief, therefore the Section Chief monitored the PIP (3T53, 6T79-6T80, 7T22).

58. In approximately 2009, Line Deputy Ann was terminated after she unsuccessfully completed a PIP and subsequently received a poor performance evaluation. The evaluation was based in part on the PIP results and in part on an earlier poor performance evaluation which had triggered the initiation of the PIP. In Ann's case, the evaluation drafted by the ASC and finalized by the Section Chief recommended an overall numerical score of two. A score of two supports termination. Ann's PGH also reviewed the evaluation and lowered the overall score to one after comparing the evaluation narrative to the original score given by the ASC and Section Chief. Either of the two low scores was sufficient to support Ann's eventual termination (3T52, 3T54-3T57, 3T59, 3T102-3T103, 6T76-6T79, 6T81-6T83).

59. At the time of the hearing in this matter, Jack was subject to a PIP which had been drafted by his ASC at the direction of the Section Chief. Jack's ASC also solicited input from a previous ASC to whom Jack had reported in a different section. Jack's Section Chief approved the ASC's draft PIP. Thereafter, discussions were ongoing between the ASC and Jack concerning minor problems he was experiencing on the PIP. However, the ASC reported more serious problems to the Section Chief. On one occasion Jack reported to the Section Chief's office where the ASC and Section Chief discussed a problem he was having meeting the time frames established in the PIP. Both the

ASC and the Section Chief were continuing to monitor Jack and he was still employed at the time of this hearing (7T167-7T168).

60. Although the institution of a PIP for Line Deputies is infrequent, I find that ASCs' observations of Line Deputies' performance problems can and do trigger the development of a PIP. Thereafter, the ASCs have significant input into the application of a PIP and are regularly and directly involved in monitoring of the Line Deputy.

61. The record also provides examples of verbal performance improvement plans that were initiated as a result of an ASC's observations regarding certain Line Deputies' work. These plans were discussed and developed with the ASC, Section Chief and Line Deputy. In one example, Martin was the subject of a verbal improvement plan which required his ASC to intensely monitor his workload and work product and to conduct more frequent file reviews. Martin was also directed to report daily to the ASC and Section Chief. Throughout the implementation of the plan, several times the ASC recommended to the Section Chief, PGH, Deputy Director and Traum that Martin be retained because he believed that Martin could improve sufficiently with intensive help from the ASC. From Fall 2008 to early 2010, the ASC continued to recommend Martin's retention. His recommendation was followed and Martin was initially retained. However, during this time frame Martin also received a poor performance

evaluation. After further discussions between the ASC, Section Chief, PGH, Deputy Director, and Traum, the group could not reach consensus and took the issue to the Director. The Director made the decision to discharge Martin (1T149-1T150, 1T153-1T155, 3T116-3T117, 3T119, 4T15-4T17).

62. In other cases involving Line Deputies identified in the record as A thru N, when performance problems were identified and reported to their Section Chiefs by their ASCs, the ASCs conducted more intensive oversight. As in the previous examples, there were increased file reviews, daily reporting to the ASC and/or the Section Chief and one-on-one counseling with the ASC and the Line DASG. In some cases, requirements for stricter attendance reporting were imposed on the Line Deputies. Various results occurred. In one particular case the Line Deputy was initially recommended for termination by the ASC and Section Chief. After the PGH and Chief of Staff reviewed the recommendation, the Line Deputy was warned about the potential consequences of continued poor performance and retained for more follow-up. In another case, the Line Deputy has been warned by her ASC, Section Chief, the Director and the Chief of Staff that she must improve her performance or be terminated. In other cases ASCs are continuing to monitor the Line Deputies' work. Finally, in several other cases involving Line DASG A through N, recommendations have been made by ASCs and Section Chiefs for

continued intense monitoring and/or termination. The termination recommendations had not been acted upon at the time of this hearing (1T149-1T150, 1T153-1T154, 3T116-3T117, 3T119, 4T15-4T17, 6T120-6T123, 6T136, 6T141-6T143, 6T149-6T150, 7T147-7T149, 7T151-7T152).

63. I find that Section Chiefs' reviews of the performance of Line DASG essentially focus on the input ASCs have included in evaluations, PIP implementation, and follow-up and regular informal or formal discussions between the ASCs and Section Chiefs.

64. I find that while there are no recommendations for discipline or discharge explicitly contained in file reviews, evaluations or PIP's, nonetheless, a Line Deputies' poor performance is frequently addressed during each of these processes. I further find that ASC's have significant ongoing daily responsibility for detecting and monitoring performance problems of Line DASG. This is especially true when a PIP is implemented. I also find that poor performance evaluations combined with poor file reviews and unsuccessful performance in PIPs have led to discipline and discharge of Line DASG.

65. Final decisions regarding discipline and discharge of DASG are made above the Section Chief level of supervision in the Division. However, those decision-makers rely to a significant

extent upon the input provided to them by ASCs and Section Chiefs within the Division hierarchy.

Analysis and Recommendation

There are two issues to be addressed in this case. First is whether ASCs are statutory supervisors and therefore must remain excluded from the negotiations unit. Independent from the statutory supervisor issue is whether including ASCs in the unit would create a potential or actual substantial conflict of interest between the ASCs duty to the Respondent and their loyalty to fellow unit members.

I. Statutory Supervisor

The Act provides in relevant part:

5.3 . . . Nor, except where established practice, prior agreement or special circumstances dictate the contrary, shall any supervisor having the power to hire, discharge, discipline or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership . . .

6(d) . . . The division shall decide in each instance which unit of employees is appropriate for collective negotiation, provided 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. N.J.S.A. 34:12A-5.3 and 6(d).^{12/}

^{12/} DAsG were not eligible for representation in a collective
(continued...)

Consistent with subsection 5.3, the Commission has defined a statutory supervisor as one having the authority to hire, discharge, discipline or effectively recommend the same. Cherry Hill Twp. Dept. of Public Works, P.E.R.C. No. 30, NJPER Supp. 114 (1970). A determination of supervisory status, however, requires more than an assertion that an employee has the power to hire, discharge, discipline or effectively recommend the same. An indication that the power claimed to be possessed is exercised with some regularity is needed. "The mere possession of the authority is a sterile attribute unable to sustain a claim of supervisory status." Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358, 360 (1976); Hackensack Bd of Ed., P.E.R.C. No.

12/ (...continued)

negotiations until the Legislature's amendment of the Act in 2010. Therefore, the exceptions contained in subsection 6(d) do not apply to the instant case. In re West Paterson Bd. of Ed., P.E.R.C. No. 79 (1973).

Notwithstanding limited evidence in this record of differences in the duties of ASCs, I have found that employees holding the ASC title essentially perform the same duties and have the same responsibilities throughout the Division (Facts 21, 22). The Commission prefers that all employees holding the same title be placed in the same collective negotiations unit or conversely be excluded from the unit, based upon the functions and responsibility of the title. Atlantic County Welfare Division, D.R. No. 94-2, 19 NJPER 408, n.2 (¶24179 1993); Borough of Avalon, P.E.R.C. No. 84-108, 10 NJPER 207 (¶15102 1984), adopting Hearing Officer's recommendation, H.O. No. 84-11, 10 NJPER 149, 154 n.6 (¶15075 1984); Univ. Of Medicine and Dentistry of N.J., H.O. No. 90-5, 16 NJPER 228 (¶21095 1990). Based on the foregoing, I conclude that the duties of ASCs throughout the Division are sufficiently similar to dictate a common result in this case.

85-59, 11 NJPER 21 (¶16010 1984); City of Margate, P.E.R.C. No. 87-146, 13 NJPER 500 (¶18184 1987). All the circumstances of a case must be considered in order to determine whether an employee has and regularly exercises these statutory powers. Westfield Bd. Of Ed., P.E.R.C. No. 88-3, 13 NJPER 635 (¶18237 1987), rev'ng H.E. No. 87-57, 13 NJPER 309 (¶18129 1987); Atlantic County Prosecutor's Office, D.R. No. 2008-3, 33 NJPER 291 (¶112 2007)

Additionally, the standard developed for determining whether an alleged supervisor effectively recommends discipline or discharge provides that:

The mere rendering of an opinion which is subject to independent analysis by the hiring authority does not constitute the high order of reliance necessary to meet the test of effective recommendation. Tp. of Teaneck, E.D. No. 23, NJPER Supp. 465, 466 (¶114 1971); Borough of Manasquan, D.R. No. 90-28, 16 NJPER 353 (¶21143 1990).

In the instant case the parties have stipulated that ASCs do not have the power to hire or effectively recommend hire. Likewise, there is no dispute that they have no authority to promote, grant salary increases, discharge or discipline. The Attorney General, acting through the Division Director retains the final authority to discipline or discharge. Therefore, the determination of the statutory supervisory status of ASCs turns on whether they effectively recommend discharge or discipline.

I find particular significance in the role ASCs play in drafting annual evaluations, monitoring PIPs and providing

consistent feedback to Section Chiefs during the evaluation and PIP processes. Even though evaluations are not part of the statutory criteria to determine supervisory status, they can be a significant factor in considering whether one employee has supervisory status over other employees where the evaluations play an important role in affecting various personnel actions, such as renewal, tenure, promotion or salary.^{13/}

In this case, the Division has established a formal procedure for evaluating Line DASG. One of the first steps in the process requires ASCs to draft annual written evaluations for all Line DASG assigned to them. Once these evaluations are drafted the ASCs' obligations to the Division do not end. Frequently there are discussions of the evaluations among the ASCs, Section Chiefs and on some occasions PGHs. During these discussions ASCs provide further input for the Division's use in ensuring consistency among the evaluations within a section or among the sections within the Division. During and after these "roundtable" discussions changes may be made to the draft evaluation. Normally, either Section Chiefs or the ASCs are

^{13/} Ramapo-Indian Hills Regional Bd. of Ed., P.E.R.C. No 85-21, 10 NJPER 535 (¶15246 1984); Highland Park Bd. of Ed., D.R. No. 84-2, 9 NJPER 486 (¶14202 1983); Cliffside Park Bd. of Ed., D.R. No. 83-10, 8 NJPER 540 (¶13248 1982); State of New Jersey, D.R. No. 83-11, 8 NJPER 586 (¶13271 1982); Westfield Board of Ed.

responsible for making changes to the drafts. The evaluation is finalized by the Section Chief and/or PGH.

Numerous witnesses credibly testified that draft evaluations which require both the ASC's written narratives and an overall numerical rating of Line DASG are heavily relied upon by Section Chiefs and PGHs throughout the evaluation process.

In determining whether an evaluation supports a finding of effective recommendations, the Commission and the Director of Representation have focused on establishing who has primary evaluative responsibility and whether the evaluations played an "important" or "instrumental" role in forming the basis for personnel actions. Statutory supervisory status will not be found where evaluations merely raise concerns about an employee's performance without more. Likewise, no effective recommendation will be found on the basis of an evaluation which contains only general statements that cannot establish a nexus between those statements and a personnel action applied to the employee.^{14/} The

14/ Atlantic County Prosecutor's Office; Westfield Board of Ed.; Borough of Butler, P.E.R.C. No. 91-99, 17 NJPER 260 (¶22119 1991); Paramus Bd. of Ed., D.R. No. 82-7, 7 NJPER 556 (¶12247 1981); Borough of Avalon, adopting H.O. No. 84-11, 10 NJPER 149 (¶15075 1984). Township of Fairfield P.E.R.C. No. 92-115, 18 NJPER 299 (¶23127 1992), adopting H.O. No. 82-1, 18 NJPER 155 (¶23073 1992) (reports of subordinates conduct in evaluations without showing that evaluations were instrumental to negative personnel actions do not establish effective recommendations). In these cases, where specific recommendations for negative or positive personnel actions were part of the evaluations, effective recommendation was
(continued...)

cases are consistent with respect to determining the overall importance of evaluations in effectuating personnel action.

In the instant case, the evidence shows that poor evaluations, particularly with respect to the overall performance score have led to termination of Line DASG.^{15/} Moreover, poor evaluations coupled with poor PIP performance have led to discharge of Line Deputies. On the other hand, Line Deputies who improved their performance after a poor evaluations and PIP were retained.^{16/}

14/ (...continued)
easily established.

15/ In 2006, a RIF was based on overall performance scores taken from evaluations initially drafted by ASCs in 2005. I recognize that at that time neither ASCs nor Section Chiefs were aware that a RIF was imminent. The fact is, however, the evaluations prepared by ASCs and reviewed by Section Chiefs and a Deputy Director served as the sole basis for the RIF. Clearly, a nexus existed between the score on the evaluations and the negative personnel action.

16/ The Petitioner argues that only those evaluations containing specific recommendations for discipline or discharge can support a finding of an effective recommendation. I do not agree with this analysis. Given the Commission's consistent emphasis on determining whether an evaluation plays an important and instrumental role in effectuating personnel actions, I am not convinced that the lack of explicit language in an evaluation has been or should be the sole basis for concluding that no effective recommendation for personnel action is reflected in an overall evaluation. See Waldwick Bd of Ed., D.R. No. 82-5, 7 NJPER 498, 500 (¶12221 1981), where department chairs who prepare final evaluations which do not contain specific recommendations for retention and which are reviewed and amended by the superintendent are supervisors within the meaning of the Act.

The record here reflects that Division ASCs have formal and extensive responsibilities with respect to evaluation of DAsG and the Division's evaluation process as a whole. On the basis of the entire record and my consideration of the parties' positions I conclude that ASCs have primary responsibility for evaluating Line DAsG and that their evaluations have been instrumental in various negative and positive personnel decisions.

The record also reveals that beyond their evaluative responsibilities, ASCs often continue to be directly involved when a poor evaluation leads to the development of a PIP. Initially, they may offer recommendations for what terms should be contained in the plan. Once a PIP has been implemented for a Line Deputy, the ASC is most often primarily responsible for monitoring, evaluating and determining whether the Line Deputy's performance has improved, albeit the Section Chief and PGH may also monitor PIP performance. I agree with the Petitioner that a PIP in-and-of itself is not necessarily discipline.^{17/} However, the facts in this case clearly show that an ASC's determination of poor performance during a PIP receives significant deference in deciding whether to discharge a Line Deputy. This is even more evident where a poor evaluation by an ASC leads to a PIP,

^{17/} Township of Plainsboro, P.E.R.C. No. 2009-26, 34 NJPER 380 (¶123 2008) (Scope of Negotiations decision denying arbitrability of grievance based on a PIP alleged to be discipline.)

the ASC determines the Line Deputy has not successfully improved as a result of the PIP and, the ASC then drafts a subsequent poor evaluation which results in discharge of the Line DAG (Fact 45).

Standing alone, an evaluation or implementation of a PIP may not appear significant to a determination that an effective recommendation of discipline or discharge has been made. When considered collectively, however, I am convinced that evaluations and PIPs establish and result in effective recommendations with respect to continued employment of Line DASG.^{18/}

My analysis of effective recommendation to determine whether ASCs are statutory supervisors does not end here. The more difficult question is whether recommendations made by ASCs through evaluations and monitoring of PIPs are adopted without independent review and analysis by a higher level of authority. If I find there is independent review by Section Chiefs, PGHs, the Director or a combination of these, recommendations made by ASCs would not be "effective" and the title could be includable

18/ Watchung Hills Regional H.S. Bd of Ed.

There are also examples in the record of Line Deputies having been protected from terminations for a substantial period of time based in large part on the ASC's recommendation that the Deputy be given more time to improve. There are further examples of Line Deputies placed on PIPs or verbal improvement plans who were retained after their ASC concluded, based upon his or her own observations and follow-up with the Line Deputies, that the Line Deputies had improved.

in the negotiations unit, absent the existence of a Wilton conflict.^{19/}

The Commission and Director of Representation have considered numerous cases where independent review by a higher authority has been an issue. The parties in this case have aptly presented their analyses of many of those cases in their post-hearing and reply briefs. My review of the case law leads me to conclude that no one case, or even the body of existing case law clearly establishes the legal standard for what level of review constitutes "independent review."^{20/}

The facts in the instant case show that the structure of the Division and the ASCs' obligations to the Division afford nearly daily contact and interaction among the ASCs and Section Chiefs and ASCs and Line DASG. This interaction serves in part as a basis for ASCs drafting Line Deputies' annual evaluations. Likewise, some ASCs keep files which include examples of their Line Deputies' work in a given year. These files are also used to support draft evaluations. At the beginning of the annual evaluation process Line Deputies are requested to submit their

^{19/} See, Tp. of Teaneck, NJPER Supp. at 466; Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971).

^{20/} It is important to note here that I am convinced that the existing case law does not support Respondent's argument that independent review can be found only "where the higher level of authority engages in independent fact gathering" prior to making a decision. (Respondent's brief at 42.) This standard is too narrow.

own input to ASC's and/or Section Chiefs regarding the work they did during the year. Once again, that input is used by ASCs in constructing draft evaluations (Facts 26, 29,31). All of the information described here has been incorporated in the ASCs' drafts by the time they are forwarded to Section Chiefs.

The Division's evaluation form requires ASCs to rate their Line Deputies numerically, to complete a narrative of their performance and to develop goals for the following year based on the ASCs evaluation of the Line Deputies' skills and experience. The narratives contained in the evaluations generally show that ASCs not only report the work done for the year, but that they also form opinions and make judgments concerning the quality, quantity and professionalism of their Line Deputies.^{21/} The evaluation form used by ASCs is the same form reviewed by Section Chiefs and PGHs. Information may be added to or deleted from the draft form but no higher levels of authority use a form containing different criteria, nor do they draft their own independent evaluations for Line Deputies who report directly to ASCs.

There is testimony in the record that in some instances before ASCs draft the evaluations, they meet with other ASCs and their Section Chiefs to discuss the potential drafts. It is more common, however, that these meetings take place after the ASCs

21/ Exhibit R5.

have completed their initial drafts. In these "round table" discussions, the narratives are reviewed and deletions or additions are made based upon further input from the ASCs and/or the Section Chiefs. Numerical scores are also discussed and changes made to scores are usually the result of discrepancies between the narrative and the overall score, or because the score for an individual Line Deputy appears to be inconsistent with similarly situated Line DASG in the same section^{22/}.

The reviews of the draft evaluation described in this record do not rest on facts which have been independently gathered by the Section Chief after an ASC has prepared the draft. Rather, the Section Chiefs' reviews focus on clarifying the facts and conclusions already set forth in the ASCs' drafts.^{23/} Moreover, based upon my review of the draft and final evaluations in the record I have found as a fact that the number of changes made to

22/ There is one reference in the record describing a situation where a reviewer above the ASC may have changed a score he thought to have been "wrong" regardless of what the ASC believed. I do not find that such limited testimony outweighs the substantial evidence in the record that changes are made infrequently and are primarily based on discussions with and input from the ASCs.

23/ To the extent there is evidence in the record that some Section Chiefs may meet with ASCs before the ASCs do their draft evaluations, I find that those meetings provide Section Chiefs with the opportunity to offer input into the drafts. However, the fact that they have input does not necessarily lead to a conclusion that the Section Chiefs do not rely primarily on the ASC's input and conclusions contained in the eventual draft.

those drafts, given their length and thoroughness are not disproportionate. Likewise, I have found that the types of changes made were not so significant that they negated the Section Chiefs' (or PGHs') reliance on the drafts prepared by ASCs (Fact 47). In this respect, there is significant give and take during the discussions between ASCs and Section Chiefs throughout the evaluation process at this level. ASCs clearly play an important role as evaluators and are consistently kept in the evaluation loop.

Finally, though I recognize that at this stage of the evaluation process Section Chiefs have the authority to make the final decision with respect to changes which may result from their discussions with ASCs, I find that the infrequent changes made are so closely related to and reliant upon the ASC's initial evaluations and the give and take during post and pre-draft meetings, that those changes cannot be said to result from an independent review which dilutes or undermines the ASC's evaluations of Line Deputies. Thus, I view the discussions between the Section Chiefs and ASCs to be less a "review" by Section Chiefs than a team effort to ensure that draft evaluations are complete and fair to Line Deputies.^{24/}

^{24/} Department Heads are found to be statutory supervisors as part of a team involved in evaluations. See, Cliffside Park Bd. of Education. The indicia of Department Heads authority to make recommendations effecting unit members is more

(continued...)

The final step in the evaluation process in the instant case requires that the edited drafts are forwarded to the appropriate PGH. The record shows that the only significant additional information that PGHs have at this step of the process is the accumulated scores set forth in the evaluations across the practice group. While the ASCs and Section Chiefs did not have this bank of information when initially drafting evaluations, the record shows that PGHs use this data in large part to determine consistency in scores across their respective practice groups. Moreover, the record shows that if a PGH determines that a change should be made to the evaluation with regard to score changes, before making that change, he or she often discusses it with the Section Chief. Likewise, the ASC may be included in that discussion. Thus the initial evaluators though less involved with PGHs, remain in the process as part of the evaluating team.

Finally, evaluations are forwarded to the Chief of Staff and the information they contain is entered into a data base. No significant review of the contents of the evaluations occurs at

24/ (...continued)

substantial in Cliffside than it is in the instant case. Nonetheless, the ASCs here are required to observe, monitor and write evaluations of unit members, just as was the case in Cliffside. Likewise, in both cases the evaluators were required to forward their evaluations to a high authority who signed them and made comments on them. In both cases it is clear that the observations and recommendations made by the initial evaluators were heavily relied upon by higher levels of authority and those evaluations and conclusions were infrequently changed.

this step. Once returned to the PGHs for their signature, the evaluations go to the Section Chiefs who sign them and return them to the Line DAsG in each section.^{25/}

25/ In Brookdale Community College and State of New Jersey (New Jersey State Colleges), the Director of Representation excluded certain titles alleged to be statutory supervisors where the facts showed that employees in those titles were involved only at the initial level of hiring, discharge or discipline and were too far removed from the actual final decisions and decision-makers. Numerous higher levels of administrators reviewed and were required to approve the initial recommendations without further involvement of the titles at issue. Additionally, there were no facts to substantiate that the recommendations made at the lower level were accepted in almost all cases (Brookdale). Likewise, in State of New Jersey, recommendations for hire, discharge or discipline made by assistant directors were not effective recommendations. In that case, multiple layers of administrators along with a peer advisory committee were involved in reappointment decisions. The Director determined that those multiple layers established significant independent review and collateral recommendations which "diluted and attenuated" any recommendations made by assistant directors. Therefore he concluded that the assistant directors had no power to hire, discharge or discipline or effectively recommend such personnel actions.

The instant case can be distinguished from Brookdale and State of New Jersey in one important respect. There is ample evidence in this record which shows that ASCs are not merely "initially" involved in evaluation and monitoring of Line Deputies. They are a regular part of the Division's evaluation process as a whole. Their observations and conclusions regarding the work performance of Line Deputies, while reviewed and/or "round tabled" with higher levels of supervision, nonetheless consistently serve as a basis for personnel decisions effecting Line Deputies. Moreover, if changes to ASCs' evaluations are made by Section Chiefs or PGHs, the record shows that those changes are minimal as to their content and their effect on final recommendations. Therefore, in the instant case, it cannot be said that ASCs are so far removed from the higher level reviewers that

(continued...)

Based upon all of the foregoing and the record as a whole, I find that employees of the Division of Law who hold the title Assistant Section Chief are part of the Division's supervisory team. In this role they regularly evaluate and monitor Line DASG and the conclusions contained in their evaluations and observations of PIP performance result in effective recommendations which lead to discipline/discharge of negotiations unit employees. As a result, they are supervisors within the meaning of the Act and must remain excluded from the certified negotiations unit represented by IBEW.

Given the conclusion set forth above, I need not consider the second issue raised by the Respondent in this case. However, I have chosen to do so and have considered the parties' arguments with respect to this issue in the context of the entire record.

Conflict of Interest

The second issue here is whether assuming arguendo ASCs are not supervisors within the meaning of the Act, the inclusion of the ASC title in the certified negotiations unit would create an actual or potential substantial conflict of interest between the

25/ (...continued)
their recommendation resulting from the evaluation and PIP process are diluted so as to render them ineffective. Brookdale Community College, D.R. No. 78-10, 4 NJPER 32 (¶4018 1977); State of New Jersey (New Jersey State Colleges), D.R. No. 82-35, 8 NJPER 87 (¶13036 1982).

ASCs obligations to the State and their loyalty to fellow unit members.

A conflict of interest determination can be made separate and apart from a determination that certain employees are statutory supervisors. The Act provides that negotiations units ". . . shall be defined with due regard for the community of interest among the employees concerned." N.J.S.A. 34:13A-5.3.

The New Jersey Supreme Court established principles of conflict of interest in Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971). The Court held:

If performance of the obligations or powers delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interest of a particular supervisor and the other included employees, the community of interest required for inclusion of such supervisors is not present. 57 N.J. at 425

The Court also stated:

While a conflict of interest which is de minimis or peripheral may in certain circumstances be tolerable, any conflict of greater substances must be deemed opposed to the public interest. 57 N.J. at 425-426^{26/}

^{26/} The Commission has found that an application of Wilton principles to non-supervisor groups is appropriate where certain employees have authority over other employees which may create a real or potential conflict of interest, even though those holding the authority may not be statutory supervisors. In re City of Camden, NJPER Supp. (¶52 1971) at 196-197.

The Commission's Director of Representation has applied Wilton principles to remove employees from negotiations unit where a potential conflict of interest existed due to both evaluative and disciplinary functions. Ridgewood Bd/Ed and Ridgewood Ed/Assn., D.R. No. 80-33, 6 NJPER 209 (¶11102 1980), Bd/Ed of the Boro of Paramus and Ed/Assn. of Paramus, N.J.E.A., D.R. No. 82-7, 7 NJPER 556 (¶12247 1981).^{27/}

Likewise, in Lakeland Regional High School Bd. of Ed, D.R. No. 88-34, 14 NJPER 417, 418 (¶19169 1988), the Director found that conducting evaluations can be an indicator of a significant conflict of interest where the evaluations play an important role in other personnel actions such as employment renewal. (In Lakeland, the title at issue had not yet performed an evaluation and, therefore, was not excluded from the unit.)

In the instant case, as set forth in Section I, it is clear that ASCs play a regular and instrumental role in evaluating Line DASG. It is also clear from the record that Line DASG know that their ASC is the person to whom they are to report because they are told as much by Section Chiefs or ASCs. They also know that ASCs are responsible for their initial evaluations because they are either told this is the case or they are directed to submit

^{27/} See also, Middletown Board of Ed., H.E. 2004-017, 30 NJPER 243 (¶90 2004), payroll supervisor's input into written evaluation constitutes an effective recommendation as to personnel action which may be based in whole or in part on evaluations.

input about their work to their Section Chief and ASC for use in drafting the evaluations. They regularly meet one-on-one with their ASC to discuss their productivity and case handling. In some cases, the ASC participates along with the Section Chief and Line Deputy in discussions of the Deputy's final evaluation. Moreover, the record shows that final evaluations initially drafted by ASC have been used as partial support for other personnel actions, such as termination of Line DASG. Given the possibility that a Line Deputy may be discharged based in part on an ASC's evaluation, there is a "reasonable foreseeability"^{28/} for the existence of a potential substantial conflict for the ASC in determining what numerical score to assign to the Line Deputy and what to include in the narrative of an evaluation. A conflict may arise between the ASC's loyalty to his fellow unit member and his obligation to the State to perform an objective evaluation.^{29/}

While evaluations can indicate a significant conflict of interest, my analysis in the instant case does not rely solely on the obligations of ASCs to perform evaluations. The record here

^{28/} City of Trenton, D.R. No. 83-33, 9 NJPER 382 (¶14172 1983).

^{29/} It is appropriate to note here that an employee's integrity is not at issue in analyzing a potential or actual conflict of interest situation. The integrity of the individual in the title is irrelevant. The analysis and determination are related to the title itself. There is nothing here to suggest that ASCs would compromise their integrity in fulfilling their responsibility to the Division. Borough of Avalon, 10 NJPER 207. See, Borough of Avalon, H.O. No. 84-11, 10 NJPER 149 at 153.

clearly indicates that ASCs play a significant role in monitoring Line DAsG who have been placed on a PIP. This obligation, when combined with the evaluative obligation, is significant to a determination of whether a potential or actual substantial conflict of interest exists between ASCs and the unit DAsG as envisioned in Wilton. In this respect, once a PIP is established, the Line Deputy's ASC is normally the person required to monitor his or her performance. It is the ASC who most often speaks directly with the Line Deputy about performance problems prior to and during the implementation of the PIP. The Section Chief may also direct the ASC to have the Line Deputy to report the ASC more frequently than had been the case prior to implementation of the PIP. Finally, the ASC reports his or her observations of the Line Deputies progress to the Section Chief and perhaps to the PGH or the Director. In the event a subsequent evaluation is completed, the ASC often has significant input. Given the ASC's obligation for monitoring the Line Deputy in the context of a PIP, just as in the case of an evaluation, there clearly exists significant potential for conflict between the ASC's responsibility and loyalty to the Division and his or her loyalty to fellow unit members. I find this to be especially true because both the ASC and the Line Deputy may become aware at some point in the PIP process that insufficient improvement may lead to a decision to discharge the Line Deputy. There is ample

support in the record that failure to improve after a PIP, in combination with a poor file review and poor evaluation has in fact led to termination of Line DASG. Such a decision in significant part often rests on what the ASC reports to his or her Section Chief and PGH.

Thus, even though Line DASG, due to their professionalism, may not often need to undergo greater monitoring and may infrequently be subject to negative personnel actions, when there is such a need, it is the ASC that has the most significant daily one-on-one interaction with and responsibility for the Line Deputy involved.

Finally, in determining whether a potential or actual conflict of interest exists which would require that a title be excluded from a negotiations unit, Wilton requires a finding that the conflict is "substantial." 57 N.J. at 425-426

In the instant case the fact is that DASG have been subject to the ultimate penalty: discharge. The discharges were based upon a combination of the three processes discussed herein in which ASCs play a significant role. There is no evidence in the record that the obligations of ASCs have diminished since certification of the negotiations unit.

Given all of the above, I conclude that there is ample support in the record that a substantial potential conflict of

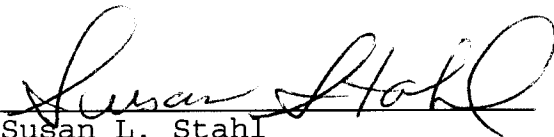
interest exists in this case which requires the exclusion of ASCs from the negotiations unit.

RECOMMENDATION

Based upon the entire record and for the above-stated reasons, the undersigned recommends that the IBEW's clarification of unit petition which seeks to include ASCs in the certified negotiations unit be denied for the following reasons:

1. ASCs effectively recommend discharge of unit employees by virtue of recommendations arising out of their direct responsibility to evaluate and monitor the performance of Line DASG. They are supervisors within the meaning of the Act and therefore must remain excluded from the certified negotiations unit.

2. The responsibilities required of ASCs vis-a-vis Line DASG create an ongoing potential for substantial conflict of interest between ASCs and unit Line DASG, thereby negating a required community of interest and compelling exclusion of ASCs from the certified negotiations unit.


Susan L. Stahl
Hearing Officer

DATED: April 29, 2011
Trenton, New Jersey

Pursuant to N.J.A.C. 19:11-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:11-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:11-7.4(c).

Any exceptions are due by May 13, 2011.

APPENDIX A

On January 19, 2011, the IBEW and the State agreed to the following in settlement of the issue concerning whether certain employees in the Division were confidential employees who are required to be excluded from the IBEW's certified negotiations unit. All of those listed below are hereby excluded from the unit as confidential employees.

1. Office of the Attorney General Legal Affairs and Employment Relation; three DASG, excluded.
2. Transportation Section; two DASG excluded
3. Labor, Personnel and Community Affairs Section, eight DASG excluded.
4. Office of Equal Employment Opportunity; five DASG excluded.
5. New Jersey Transit Section; four DASG excluded.
6. University of Medicine and Dentistry Section; three DASG excluded.

The parties further agreed as follows: Non-Waiver- The parties acknowledge that this agreement shall not constitute a waiver of any right the Union may have to negotiate regarding unit member transfer procedures nor waive any managerial prerogative with respect to employee transfers.

Exclusion of the Employment Counseling Section:

The parties acknowledge that based on the nature of the work performed by deputies assigned to the Employment Counseling Section of the Division of Law, all deputies assigned to this section shall be deemed confidential employees during the period of such assignment. The State agrees that the number of deputies assigned to the Employment Counseling Section shall be commensurate with managements good faith determination regarding the needs of the Division.

The parties agree that the State may assign confidential work to non-unit employees greater than the number of employees listed in this agreement with no change to these agreed upon numbers (8T3-8T5).