

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

In the Matter of

NEW JERSEY STATE  
(DIVISION OF STATE POLICE),

Public Employer,

-and-

Docket No. RO-2006-087

STATE TROOPERS CAPTAINS ASSOCIATION,

Petitioner.

SYNOPSIS

The New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A -1 was amended in January 2010. The amendment changed the definition of "managerial executives" in the Executive Branch of State government. Pursuant to an Appellate Division order to conduct a supplemental hearing, and after reconsidering the facts developed at an earlier hearing, a Hearing Officer recommends that the Commission find that certain captains employed in the Division of State Police are entitled to be represented for collective negotiations. The Hearing Officer recommends that their responsibilities, role in policy formulation and positions below the level of the Division's equivalent to assistant commissioner establish that these captains are not managerial executives within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-3(f).

The Hearing Officer finds that several other captains are ineligible for representation in the proposed unit. They formulate management policies and practices and are at or above the level of assistant commissioner and are managerial executives within the meaning of the Act.

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.

H.O. NO. 2011-2

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Appearances:

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

For the Charging Party,  
Loccke, Correia, Linsky & Bukosky, attorneys  
(Marcia J. Tapia, of counsel)

**HEARING OFFICER'S REPORT AND RECOMMENDED  
DECISION ON SUPPLEMENTARY HEARING**

This matter is before me pursuant to an order by the Appellate Division of Superior Court to conduct a supplementary hearing necessitated by the January 2010 amendment to the definition of "managerial executive" in the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The Act excludes managerial executives from the definition of covered public employees and does not entitle them to representation for purposes of collective negotiations over terms and conditions of employment with their employers. In State of New Jersey (Div. of

State Police), H.O. No. 2009-002, 34 NJPER 389 (¶127 2008), applying the previous statutory definition, I recommended that certain captains employed in the Division of State Police (State or Division) were not managerial executives, and were entitled to negotiate collectively with their employer. The Public Employment Relations Commission (Commission) adopted many of my recommendations in State of New Jersey (State Police) and NJ State Troopers Captains Association, P.E.R.C. No. 2010-13, 35 NJPER 335 (¶114 2009), app. pending. I have conducted a supplemental hearing. The new statutory definition narrows the managerial executive category and expands the category of those eligible to be represented for purposes of collective negotiations. Accordingly, I recommend that most, but not all, captains in the Division are not managerial executives within the meaning of the new definition.

#### Procedural History

On June 7, 2006, the New Jersey State Troopers Captains Association (Captains Association or Association) filed a card check representation petition<sup>1/</sup> seeking to represent a unit of approximately 45 captains employed by the Division. The captains are unrepresented. The State opposes the petition asserting that

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<sup>1/</sup> N.J.S.A. 34:13A-5.3 permits public employee organizations to be granted exclusive majority representative status by submitting authorization cards demonstrating that they have majority support among the employees in an appropriate negotiations unit. N.J.A.C. 19:11-2.6 (c).

captains are managerial executives or confidential employees within the meaning of the Act, and ineligible for inclusion in any negotiations unit. On October 30, 2008, after 13 days of hearing, I issued a report and recommendation, H.O. No. 2009-2, 34 NJPER 389. I concluded that most captains employed by the Division are eligible for representation and inclusion in an appropriate unit which includes: the captains in the Identification and Information Technology Section (Administration Branch); Intelligence Services Section (Investigations Branch); Investigations Section (Investigations Branch); Field Operations Section- Troops A, B, C, D and E; and Homeland Security Branch. I recommended the exclusion of: captains serving as section executive officers, and captains in the Offices of State Police Affairs, Regional Operations and Intelligence Center Task Force; Office of Strategic Initiatives; Office of Public Information; Office of Recruiting and EEO; Internal Affairs Investigations Bureau; Internal Affairs Intake and Adjudication Bureau (Office of Professional Standards) (OPS); Fiscal Control Bureau; Budget Operations Bureau; Grants Administration Bureau; Human Resources Management Bureau; Employee Services Bureau; and Office of Operation Cease Fire.

On September 24, 2009, the Commission adopted, with modifications, my recommendations and remanded the petition to the Director of Representation to determine whether a majority of

the captains wished to be represented by the Association. The Commission found that the captains serving as executive officers were eligible to be included the unit with other captains. 35 NJPER 335. On October 22 and 24, 2009, the State filed appeals.

On October 22, 2009, the State filed a Notice of Appeal from the Commission's interlocutory decision remanding the case to its Director of Representation. On November 4, 2009, the Commission's Chairman denied the State's request for a stay pending appeal. On November 16, 2009, the Appellate Division denied the State's application for leave to file an emergent motion for a stay.

On January 20, 2010, an amendment to the Act changed the definition of managerial executives for State employees. L. 2009, c. 314.

On January 21, 2010, the State filed its brief with the Appellate Division. On January 22, 2010, the Director of Representation issued a decision certifying the Association as the exclusive majority representative of certain State Police captains.

On April 19, 2010, the State filed a request for Commission review of the Director's decision certifying the Association as the exclusive representative, and asked that, in light of the statutory changes, the Commission stay the obligation to negotiate and order a new evidentiary hearing. That request was

pending before the Commission when, on May 3, 2010, the State filed a motion with the Appellate Division to direct the Commission to supplement the record by conducting an evidentiary hearing; to stay the obligation to negotiate; and to dismiss the appeal of the Commission's decision and the Director's certification of the unit as moot. The Commission opposed an order to supplement the record, arguing that no order was necessary since the State could petition for a decision about the impact of the statutory changes by filing an appropriate motion or petition with the Commission. On May 25, 2010, the Appellate Division ordered a new hearing.

On July 7, 2010, July 27, 2010, July 30, 2010, August 4, 2010 and August 9, 2010, I conducted supplementary hearings at which the State and Association examined witnesses and placed documents into the record.<sup>2/</sup> Both parties filed post-hearing briefs.

Based upon the entire record I make the following:<sup>3/</sup>

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2/ The transcripts from the hearings are referred to as "1T" through "5T" respectively. Commission exhibits are referred to as "C", and the State's exhibits are referred to as "RS".

3/ I take administrative notice of and incorporate the facts developed at the earlier stage of this case in New Jersey (State Police), H.O. No. 2009-2, 34 NJPER 389 (¶127 2008), affirmed w/ modif. State of NJ (State Police) and NJ State Troopers Captains Association, P.E.R.C. No. 2010-13, 35 NJPER 335 (¶114 2009), app. pending.

**Findings of Fact**

1. The executive branch of state government is comprised of the 15 principal departments and numerous independent agencies, boards and commissions (1T7). The highest or first level in departments is a commissioner or secretary. The second level, reporting directly to a commissioner, is a chief of staff or a deputy commissioner. Assistant commissioners form the third level, typically reporting to a chief of staff or deputy commissioner (RS-1). These hierarchical relationships are depicted in organization charts (1T8-1T10; RS-1). Not all departments utilize assistant commissioners (1T10; RS-1).

2. At the highest or first level of the Division's organizational structure is the Superintendent/Colonel of the State Police, Superintendent Joseph R. Fuentes (Superintendent or Colonel), a cabinet-level official, who reports to the Attorney General and the Governor (1T7, 1T14-15, 34 NJPER at 389).

3. Reporting to Fuentes is chief of staff Lieutenant Colonel Thomas R. Gilbert who is the second-in-command. Organizationally, he is at the second level of the Division (Findings no. 3 and 4, 34 NJPER 389, 390). Reporting to Fuentes and Gilbert are two lieutenant colonels and three deputy superintendents. They serve at the third level in the Division (34 NJPER at 389). Reporting to the lieutenant colonels and deputy superintendents are approximately 14 majors who form the

fourth organizational level of the Division. Reporting to the majors are approximately 45 captains. Most Captains form the fifth level of the Division's hierarchy. (34 NJPER at 389).

4. Over the past decade, the Division has become more complex, as evidenced by increases in the number of lieutenant colonels and majors. In 1998, there were two lieutenant colonels and eight majors (34 NJPER at 389). In 2008, there were five lieutenant colonels/deputy superintendents and 14 majors (34 NJPER at 390).

5. The Division is organized into four branches: administration, investigations, field operations and homeland security. The office of the chief of staff is equivalent to a fifth branch. Each branch is headed by a lieutenant colonel or deputy superintendent. Branches are further subdivided into sections, supervised by majors, and sections are subdivided into bureaus or offices, supervised by captains (34 NJPER 390).

The captains in the offices of the superintendent, office of the attorney general, office of professional standards, office of operation cease fire and office of the chief of staff report directly to a lieutenant colonel, deputy superintendent or to the superintendent (34 NJPER 411, 412, 413).

6. The Colonel's management philosophy recognizes that innovation can come from all ranks and he promotes the initiation of ideas from any rank, teamwork and consensus in problem-solving



within the Division's paramilitary structure. Nevertheless, the Division is characterized by adherence to the chain of command typical of paramilitary police organizations (34 NJPER at 390).

Captains' roles in the division's strategic planning process does not constitute "formulating policy" and their recommendations for policies are scrutinized by their own branch management and, often, by other specialized units' review. (35 NJPER 336-338). The existence of a large number of standard operating procedures and operating instructions also limits captains' input into policy formulation in the Division (35 NJPER 338).

Captains only occasionally participate in the Division's management accountability conferences and rarely confer with the executive level staff - colonel, chief of staff, lieutenant colonels and deputy superintendents (34 NJPER 392).

7. Generally, assistant commissioners are appointed by their commissioners, deputy commissioners or the governor (2T65, 3T15, 4T35). RS-2 is a Civil Service Commission-generated job specification for assistant commissioners that provides that assistant commissioners report to deputy commissioners or commissioners. Thus, according to RS-2, in their organizations, assistant commissioners are at the third level of the hierarchy. Assistant commissioners supervise others by effectively recommending the hiring, firing and disciplining of their

subordinates and they evaluate others' performance (2T23-2T25, 2T49-2T50, 2T62, 2T67, 3T11-3T12, 3T33-3T35, 4T21-4T24, 4T29, 4T63, 5T31, 5T40-5T41).

Assistant commissioners advise commissioners on policies, respond to legislation, develop goals and oversee program evaluation systems, formulate plans and participate on boards, commissions and special purpose committees or teams (1T10-1T11; RS-2). Individual assistant commissioners' roles and job duties vary widely (1T11, RS-2).

#### Department of Human Services

8. The Department of Human Services provides services to adult developmentally-disabled clients, medicaid clients, blind and deaf clients, disadvantaged families and children, and operates five mental health hospitals (2T53). The department employs 15,000 employees, the majority of whom work in the Division of Developmental Disabilities (2T52-2T53). The next largest division is the Division of Mental Health Services (2T53).

9. Commissioner Jennifer Velez is at the highest or first organizational level; reporting directly to her on the second level are a chief of staff, two deputy commissioners, two assistant commissioners and a director (RS-1). The department has five (5) assistant commissioners on the third organizational level (2T74-2T77; RS-1).

10. Human Services' executive level staff uses a team approach to solving problems. The team consists of the commissioner, special assistant to the commissioner, chief of staff, director of family development, deputy commissioners, assistant commissioners and several directors (2T52). Every two weeks, the executive team meets with Velez, where many issues are discussed. The team members meet one-on-one with Velez to follow through on specific items (2T79).

11. Assistant Commissioner Rudene Vaught is in charge of human resources in the department (2T48). Vaught reports to the chief of staff or to the Commissioner (2T50-2T51, 2T70; RS-1). She oversees the creation, implementation and enforcement of all human resources policies (2T58-2T59). Vaught oversees all personnel functions, hiring, discipline, terminations, promotions, training and employee relations (2T49-2T50). Vaught is consulted on reorganizations within the department (2T49-2T50). There are four other assistant commissioners on Vaught's level - the third level in the departmental hierarchy - the assistant commissioners of budget and finance; legal regulatory and guardianship services; developmental disability services and mental health services (2T75; RS-1). The assistant commissioner for public affairs and the director of family development are at the second level in the department; they report directly to Commissioner Velez (2T55, 2T75-2T77; RS-1). All other assistant

commissioners have approximately the same level of authority as Vaught and all have direct access to the commissioner, as needed (2T77-2T78).

12. Vaught participated in the decision to close one of the department's mental health hospitals (Hagedorn), as part of the executive management team that recommended closure and, in particular, as the primary resource/expert on the human resources implications of closure (2T54-2T56). Once the decision was made with the approval of the Governor's office, the executive team members, including Vaught, developed the plans to implement the closure (2T55-2T56).

13. Some departmental policies emanate from legislation, for example, the requirement for drug testing of direct care staff in the developmental centers (2T59-2T60). Vaught created a policy and procedure for the drug testing, submitted it to the executive management team for input, and then to Commissioner Velez for approval (2T59-2T60).

14. Vaught supervises a few hundred employees and has an indirect or "dotted-line" supervisory relationship with human resource managers who report directly to division directors in family development, medicaid assistance, commission for the blind and mental health services (2T61).

15. With respect to hiring and promotions, there are different levels of approval - - Vaught approves most hiring

before the final approval by the Civil Service Commission (2T62-2T63). Human resource managers in facilities can hire into positions for which there is high turnover (2T62). The Chief of Staff or Commissioner approve hiring of higher level positions i.e., Directors (2T72).

Vaught was appointed by Commissioner Velez (2T65). The directors who report to Vaught are higher level supervisors or managers (2T66).

16. In her division, Vaught is authorized to hire and promote all employees, subject to civil service rules, except for those in salary range 30 or above (2T67). The department has internal personnel policies that define how civil service rules are implemented. These policies do not generally require review and approval by the Commissioner or anyone higher than Vaught (2T71-2T72). For hiring or promoting above range 30, the department must supply more detailed justifications to civil service and these also require Commissioner Velez' approval (2T73-2T74).

#### Department of Corrections

17. The Department of Corrections is responsible for operating 13 State prison facilities, insuring that inmates are kept in a safe manner and preparing inmates for transition back into the community (3T5).

18. Commissioner Gary Lanigan is at the highest or first organizational level in the department; reporting directly to him at the second level are a confidential assistant, chief of staff, assistant commissioner, deputy commissioner, and two division directors (equal employment division and office of specialized programs) (RS-1). The Chief of staff and deputy commissioner are on the second organizational level (3T15). At the third organizational level are three assistant commissioners who report to the deputy commissioner or directly to the commissioner (2T74-2T77; RS-1).

19. Grace Rogers is the assistant commissioner for the Division of (Custody) Operations (3T3-3T4). Rogers reports to the Deputy Commissioner who reports directly to the Commissioner (3T9; RS-1). Also on the third level in the department's hierarchy, are the assistant commissioner for administration - fiscal, human resources, employee relations, and the assistant commissioner for the division of community programs - education for reentry, victim programs and community release programs.

20. Rogers oversees the operation of the 13 prison facilities (3T6). Three directors and a managing physician/psychiatrist report to her (3T6). The directors have jurisdiction over 3 or 4 institutions, managed by administrators (formerly, wardens) and directors of custody operations (also referred to as chiefs) report to the administrators (3T8).

Chiefs are responsible for all security operations within the prisons; reporting to chiefs are captains, lieutenants, sergeants and corrections officers (3T8, 3T19-3T20).

21. Directors manage and oversee capital construction projects, physical plant issues and maintenance (3T6). Rogers oversees security audits, Governor's referrals, correspondence and administrative remedies - complaints that inmates cannot get resolved (3T6-3T7). Policy decisions, such as the opening of a new facility would be initiated above Rogers but she and her directors would help establish the new physical plant (3T9-3T10).

22. Rogers approves those policies created in the policy and planning unit that pertain to custody operations (3T10). That unit reports directly to the Chief of Staff (3T11).

23. With respect to hiring or promoting employees, Rogers participates in group interviews, and, along with the deputy commissioner, reviews and recommends candidates (3T11-3T12). Rogers evaluates the directors who report to her (3T12-3T13). Rogers was appointed by a previous commissioner (3T15).

24. On occasion, Lanigan assigns projects directly to Rogers (i.e., inmate population management)<sup>4/</sup>, and for these she reports directly to Lanigan; normally, she reports to Deputy Commissioner Mark Farsi (3T15-3T16).

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<sup>4/</sup> Inmate population management is a project to depopulate county jails of state-sentenced inmates and move them into state prisons (3T16-3T17).

25. In the Chief of Staff's chain of command, the policy and planning office drafts, develops, reviews and maintains all departmental policies (3T35). Rogers reviews, responds and approves only those policies that concern her operations (3T17-3T18).

26. Rogers speaks with the commissioner frequently and attends 3 briefings per week with Lanigan and his executive staff - the public information officer, chief of staff, deputy commissioner, assistant commissioners of administration, operations and community programs, special legal advisor and chief of the special investigations division (internal affairs) (3T30-3T32).

27. The commissioner and deputy commissioner do not sign off on all disciplines (3T33). Rogers does not sign off on minor disciplines or any discipline below the level of administrator (3T33-3T34). She is informed about disciplines of lieutenants and above, and where internal affairs has become involved (3T34). These are infrequent (3T35).

28. The other two assistant commissioners also have frequent contact and interaction with the commissioner (3T36-3T370).

#### Department of Labor and Workforce Development

29. The Department of Labor and Workforce Development houses the divisions of unemployment insurance, temporary



disability insurance, employer accounts and disability determinations, workforce development, labor planning and analysis, labor standards and safety enforcement, and workers compensation (RS-1).

30. Commissioner Harold Wirths is at the highest or first organizational level of the department; reporting directly to him at the second level of the department are a deputy commissioner and chief of staff (4T4; RS-1). The director of internal audits and the director and chief judge of workers compensation also report directly to the commissioner on the second level.

There are five assistant commissioners on the third level of the department; all report to either the deputy commissioner or the chief of staff (RS-1; 4T4). The deputy commissioner is in charge of operational areas - income security, workforce development and labor planning and analysis (4T39). The chief of staff's responsibilities are support rather than operational - budget and finance, labor standards/safety, communications and marketing, legal services, human resources (4T45). There is moderate attention to the chain of command; assistant commissioners may work directly with Commissioner Wirths on important legislative proposals (4T47).

31. Assistant Commissioner Ronald Marino is the Assistant Commission for Income Security, including the divisions of unemployment insurance, temporary disability insurance, employer

accounts and disability determinations (4T3-4T5). Marino was appointed by the Governor (4T35). Marino reports to the deputy commissioner (4T4; RS-1). Marino meets with the deputy commissioner once a week to go over issues, activities, problems and ideas (4T39). The commissioner meets with all of the assistant commissioners and his executive staff every 3 to 4 weeks (4T44).

32. The divisions of unemployment and temporary disability insurance process and adjudicate claims for those benefits; employer accounts maintain the accounts for the 235,000 registered employers who pay unemployment and disability taxes, and disability determinations division determines and evaluates the eligibility of applicants for federal disability payments under the social security act (4T6-4T10).

33. When the new Governor took office in 2009, a request was made of the department to study and recommend actions to address the unemployment trust fund deficit (4T36-4T37). The deficit began in March 2009 after a lengthy period of rising unemployment that was not predicted (4T40-4T41). The federal government authorized various extensions of the program, and the State extended benefits automatically when the unemployment rate went above 6.5 percent, and these further burdened the trust fund (4T41-4T42). Marino initiated the study by enlisting help from labor planning and analysis and information technology to collect

data and he presented proposals to the deputy commissioner and commissioner (4T36-4T38). Marino had to ensure that his proposals would conform with U.S. Department of Labor statutes, ensuring that the fund's federal support would not be jeopardized (4T38). Marino proposed modifications of the unemployment statutes that would restrict eligibility and reduce the fund's deficit (4T14-4T17). Some of Marino's proposals were incorporated into the Governor's proposal to the legislature, and Marino, as an assistant commissioner, appeared before legislative committees to defend and explain the proposed legislation (4T18). Marino regularly facilitates higher-level managerial decisions, streamlines operations, reviews programs, monitors funding issues, and proposes cost-saving measures (4T19-4T21).

34. Marino oversees 1800 employees (4T21). Marino evaluates and determines staffing needs (4T22). He becomes involved in discipline of employees of only the most severe degree (4T24). In such cases, he consults with the department's human resources division (4T29). Marino recommends the appointments of the four division directors that report to him (4T26-4T27).

35. Marino reports directly to the Commissioner occasionally, and worked closely with him during recent changes to the unemployment statute (4T35).

36. The organization chart accurately depicts the hierarchical relationships between the Department of Labor's Commissioner, Deputy Commissioner, Chief of Staff and assistant commissioners (4T48-4T49; RS-1).

Department of Transportation

37. The Department of Transportation is comprised of the capital improvement, operations, planning and development and financial divisions. There are also numerous support divisions - community relations, legislative and regulatory services, human resources, information technology, investment, and traffic operations. Commissioner James Simpson also serves as an ex-officio member of many transportation authorities, including as chairman of the board of New Jersey Transit Corporation (RS-1).

38. The commissioner is at the highest or first level in the department. A deputy commissioner is on the second level. Four assistant commissioners, the executive director of capital investment, executive director traffic operations, legal services officer, and the chief financial officer are on the third level in the department (5T25, RS-1). A fifth assistant commissioner - government and community relations - reports directly to the commissioner and is located on the second level in the department's hierarchy.

39. Senior leadership in the department includes the commissioner, deputy commissioner, assistant commissioner and

chief financial officer (5T39-5T40). There is no chief of staff (5T40; RS-1).

40. Richard Hammer is the Assistant Commissioner for Capital Program Management (5T23-5T25). Hammer reports directly to the deputy commissioner and also meets with or is in contact with the commissioner a few times per week (5T27, 5T34). Hammer manages all engineering and construction of the construction projects on interstate and state highways; he has authority over 1100 employees (5T25, 5T43).

41. Five division directors report to Hammer (5T25, 5T37). Hammer approves policies within his areas related to engineering practices, business practices, and construction contract requirements (5T39). The division of construction and materials is where all hands-on construction work and materials testing associated with construction occurs (5T25). The division of right of way and access management acquires properties necessary for the construction of capital projects and any other departmental need, such as the access areas adjacent to highways that provide egress and ingress to the highway system (5T25-5T26). The division of project management manages design and construction contracts (5T26). The division of design services manages most departmental engineering activities (5T26). The division of capital program supports and manages contract

bidding, policies and procedures, utilities management, permits and environmental documentation (5T26-5T27).

42. The mission of capital program management is to promote and maintain "a state of good repair" in the highway system (5T28). Written guidelines and federal standards define "the state of good repair" (5T32). A regular inspection program is required to continue to receive federal funds (5T31-5T34). Hammer decides which projects have priority and ensures that adequate funding is available to maintain high-priority projects, coordinating with the budget preparation team (5T29-5T31).

43. Hammer personally monitors the progress of projects and the performance of the units under him, though his directors are responsible for day-to-day supervision of them (5T31).

44. The deputy commissioner holds a bi-weekly senior leadership meeting to discuss shared issues and convey the administration's vision for departmental goals and projects (5T34-5T35).

45. Hammer approves most projects in the capital program management without the deputy commissioner's or commissioner's review (5T45). The value of the construction Hammer currently oversees is around \$2.5 billion dollars in 125 construction projects (5T45-5T46). He manages all projects that are being prepared for construction - there are four program years of work in planning/design phases worth \$2 billion dollars (5T46).

Department of Banking and Insurance

46. The Commissioner of the Department of Banking and Insurance has broad authority to regulate, license and oversees the banking, insurance and real estate industries (4T55, 4T65). The department may impose penalties and disciplinary orders to companies that are found to have violated statutes or regulations, and issues advisories when changes in legislation or regulations occur (4T65-4T66).

The department is headed by a commissioner on the first organizational level; on the second organizational level is a chief of staff; and on the third organizational level are the directors of banking, legislation and regulation, insurance and the assistant commissioner for administration. The director of legislation and regulation also holds the title assistant commissioner (4T52-4T53, 4T68). Four assistant commissioners form the fourth organizational level (RS-1).

47. Mary Beaumont is the Director/Assistant Commissioner of the Division of Legislation and Regulation (4T52-4T53, 4T68). Beaumont reports directly to the Commissioner (4T53, 4T62-4T63; RS-1). The division oversees and handles all legislative initiatives that affect the department and creates and maintains the department's regulations (4T52-4T54). Reporting to Beaumont are a manager, legislative liaison, six regulatory officers and four support/clerical staff (4T54).

48. Beaumont involves the chief of staff in the review of proposed legislation and regulation (4T53, 4T62-4T63; RS-1). The chief and commissioner have, at times, suggested modifications to proposed regulations (4T62). Beaumont meets regularly with the commissioner, who is very accessible to directors and assistant commissioners and thus, there is only moderate attention to the chain of command (4T64).

49. The legislative liaison, who reports to Beaumont, tracks all proposed legislation and interacts with legislative staff members, legislators, assistant commissioners and experts in the department (4T55, 4T57). They troubleshoot and discuss legislation with the Governor's counsel and policy chiefs to assess the impact of legislation on the regulated industries and the department's operations (4T57-4T58).

50. As legislation affecting the department's programs advances, Beaumont's division decides whether new or amended regulations are needed and prepares them for approval by the attorney general's office, departmental chief of staff and commissioner (4T59-4T60). Once approved in-house, regulations are submitted to the Office of Administrative Law, for a public comment period and to be published (4T60). Comments are received and incorporated (4T60). Beaumont rejects proposed regulations that do not conform to the department's policies and thus, she plays a role in the formulation of management policies (4T61).



Beaumont's division prepares orders and advisories for review and approval by the chief of staff and commissioner (4T66-4T67).

51. Beaumont effectively recommends the hiring of her subordinates, except that the Commissioner hires the legislative liaison (4T63-4T65).

52. William Reder is the Assistant Commissioner of the Property and Casualty office in the Division of Insurance (2T4). There are three other assistant commissioners in the Division (2T23; RS-1). Reder's office regulates the property and casualty insurance industry, reviewing and approving various filings by insurance companies to ensure they comply with regulations (2T4, 2T8).

53. Reder reports to a director who reports to the Commissioner of the Department (2T4, 2T22). Thus, Reder is on the third level in the department (RS-1). Once a filing has been analyzed and reviewed by Reder it is presented to the director as a recommendation for approval and these are very rarely returned for further study (2T26).

54. All of the other assistant commissioners in the division of insurance are also on the third level in the department (2T23). The assistant commissioner for administration reports directly to the commissioner and is on the second hierarchical level (RS-1). In this department directors are at higher organizational levels than assistant commissioners (2T29).

Directors are appointed and must be approved by the legislature (2T29). At times Reder deals directly with the chief of staff, other assistant commissioners and other officials in the department (2T37-2T39).

55. Reder and the other assistant commissioners effectively recommend hiring to the director (2T23). Reder effectively recommends discipline of employees to the assistant commissioner for administration (2T23-2T24; RS-1). Reder supervises approximately 19 employees (2T5). In the division of insurance, the other assistant commissioners in charge of solvency regulation, consumer protection services, and life and health insurance policies have the same level of authority as Reder (2T34).

56. Reder participates in monthly senior staff meetings with the Commissioner but does not attend the weekly executive staff meetings attended by the commissioner, directors, chief of staff and others (2T5-2T7). Reder cannot independently implement policy changes without approval by the commissioner and/or director (2T28-2T29). Reder directs his subordinates to implement the commissioner's and director's policies (2T7).

57. Reder requests approvals for hiring and promotions to the director of administration (2T36). Reder's provides information to the chief financial officer for his presentation of the department's budget to the legislature (2T41-2T45).

Salary

58. The annual salaries of all 35 assistant commissioners vary from \$114,558.00 to \$130,168.00 (+/- \$15,600.00 annually), whereas captains' salaries are either \$123,810.02 or \$127,154.73 annually (5T3, RS-3, RS-4). Captains promoted after mid-2007 receive more than captains promoted earlier because their salaries advanced higher as lieutenants than the captains' salaries advanced between 2006 and 2011. After this petition was filed in June 2006, the Division did not increase any captain's salary.

59. A majority (58.3 percent) of assistant commissioners earn more than all captains' average annual salary.

**ANALYSIS**

N.J.S.A. 34:13A-3(f) provides:

Managerial executives of a public employer in the case of the State of New Jersey, means persons who formulate management policies and practices, but shall not mean persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that, in the case of the Executive Branch of the State of New Jersey, "managerial executives" shall include only personnel at or above the level of assistant commissioner.

The State asserts that captains are managerial executives within the meaning of the Act and, therefore, not entitled to representation. The State argues that the Legislature "evinced

an intent that requires a comparative analysis of the employee group seeking recognition to determine if it is the functional equivalent of an assistant commissioner" and that "captains are the functional equivalent of assistant commissioners" (State's Post-hearing brief at pg. 1). The State argues that an equivalency test should be adopted consisting of three prongs: (1) identification of the basic minimal characteristics of employment shared by assistant commissioners, (2) identification of the basic minimal characteristics of employment of captains as a group, and, (3) a comparative analysis to determine their similarity (State's Post-hearing brief at pg. 14). Finally, the State argues that the new definition eliminates the element of "formulating management policies and practices" for managerial executive employees in the Executive Branch (State's post-hearing reply brief at pg. 7). Thus, it asserts that under the new definition, the sole issue is whether captains are at or above the level of assistant commissioners and proposes the use of its three-pronged functional analysis.

The Captains Association argues that the new definition requires both that managerial executives formulate management policies and practices and are at or above the level of assistant commissioner. The Captains Association argues that most captains are not managerial executives and are entitled to form a unit and be represented for collective negotiations. The Captains

Association further asserts that those captains assigned to the administration branch who were previously excluded should now be included in the negotiations unit because they are not at the level of assistant commissioners.

Applying the facts here and in H.O. 2009-002 to the new statutory definition, I reiterate my recommendation that the Commission find that certain captains are not managerial executives and, therefore, may be included in the petitioned-for negotiations unit. I disagree that the Legislature intended to eliminate the requirement of formulating management policies and practices for State employees in the Executive Branch.

The Applicable Standard

A fundamental policy embodied in the Act is that public employees have the right to form, join and assist employee organizations and to have their chosen representatives negotiate for them over their terms and conditions of employment. N.J.S.A. 34:13A-5.3; Lullo v. IAFF, 55 N.J. 409 (1970). The Act permits supervisors to organize. N.J.S.A. 34:13A-5.3; N.J.S.A. 34:13A-6(d). By permitting supervisors to organize, the Legislature accepted the view that employees can negotiate over their own wages and working conditions without being disloyal in carrying out their supervisory responsibilities.<sup>5/</sup> The

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5/ Supervisors are defined as employees "having the power to hire, discharge, discipline or to effectively recommend the (continued...)

Legislature also determined that the employer's interests in ensuring oversight responsibilities are effectuated without the risk of divided loyalties in decision-making justified requiring that supervisors be placed in negotiations units apart from the employees they supervise. It also excluded some employees from the Act's protections altogether, among those are managerial executives. The Act thus accommodates the interests of employees in negotiating over terms and conditions of employment and the interests of governmental employers in having policy-making deliberations uncompromised by divided loyalties.

N.J.S.A. 34:13A-3(d) defines public employees as ". . . any person holding a position, by appointment or contract, or employment in the service of a public employer. . ." The only exclusions from this definition are "elected officials, members of boards and commissions, managerial executives and confidential employees."

From 1968 to 1996, the Commission decided numerous disputed cases about whether particular employees were managerial executives, and under a previous definition, developed interpretive guidelines. In 1996, our Supreme Court examined the guidelines in New Jersey Turnpike Auth. and AFSCME Council 73, 150 N.J. 331 (1997) (Turnpike Authority). That case partially

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5/ (...continued)  
same." N.J.S.A. 34:13A-5.3.

modified, but otherwise approved the long-standing standards set forth in Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1981) (Montvale).

The Montvale standards provided:

A person formulates policies when he develops a particular set of objectives designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. [Turnpike Authority at 337] [Emphasis added].

The Supreme Court concluded that the underlined requirement was unduly restrictive, especially as applied to large organizations in which some managers might not possess "organization-wide power" yet still have "significant power, discretion and influence within their own departments." Excising that requirement, the Supreme Court approved these revised standards:

A person formulates policies when he develops a particular set of objectives designed to further the mission of a segment of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises.  
[Turnpike Authority at 356]

While holding that a managerial executive need not possess organization-wide power, the Supreme Court also rejected the lower court's opinion that would have expanded the managerial executive definition to exclude all employees above first-line supervisors and to adopt the private sector exclusion of all managerial employees who effectuate managerial policies. The Supreme Court reasoned that the problem of divided loyalties is of less concern in the public sector than in the private sector because public employees do not have a right to strike; public employees have a much narrower scope of negotiations; public employers are not seeking to maximize profits; and public employers and public employees share a stronger common interest in the mission of the organization. The Court emphasized that the Legislature had rejected a managerial executive definition,



proposed by Governor Cahill, that would have excluded persons "effectuating and making operative" management policies and practices and had instead confined that part of the exclusion to persons "directing the effectuation" of such policies and practices."<sup>6/</sup> The Court concluded that "directing the effectuation" connotes a higher level of authority than does "effectuating and making operative." Id. at 355.

The Court's decision in Turnpike Authority effectively expanded the managerial executive category, and narrowed the category of public employees eligible for collective negotiations rights.

Applying the Turnpike Authority standards to a dispute over State section chiefs in the New Jersey Department of Environmental Protection (DEP), the Commission observed in NJ State (DEP-Section Chiefs), P.E.R.C. No. 99-59, 25 NJPER 48 (¶30021 1998), recon. den. P.E.R.C. No. 2000-34, 25 NJPER 461 (¶30200 1999) (NJDEP):

An employee need not be at the top of an organization to be a managerial executive. But the higher an employee is in the

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<sup>6/</sup> The Legislature simultaneously rejected several other proposals of Governor Cahill that would have contracted organizational rights to match the private sector model he favored. Those proposals included denying representation to supervisors; deleting the limitation of the managerial executive exclusion in the school board context to superintendent-level employees; and continuing to automatically deny representation to all heads and deputy heads of departments and agencies.

hierarchy and the fewer levels of decisional review, the more likely it is that the employee has authority to formulate or direct the effectuation of management policies and practices. In examining the hierarchy, we will also consider the number and positions of employees reporting to an employee asserted to be a managerial executive; the more employees who report to a person and the higher and broader range of positions they hold, the more likely it is that the person has managerial executive status.

And we will consider the extent to which an employee regularly participates in management-level committees convened to discuss and adopt managerial policies and strategies. Compare County of Rensselaer (Hudson Valley Community College), 18 N.Y. PERB 3001 (¶3001 1985) (Director of Learning Resources who participated in weekly meetings of college deans and served in president's cabinet formulated policy).

We finally repeat that the Legislature contemplated the possibility that some employees holding managerial titles would be eligible for representation when it limited the managerial executive exclusion in the school board context to superintendent-level employees and when it limited that exclusion in other contexts to employees who formulate policies and practices or direct their effectuation. Thus, merely holding a managerial title in the employer's hierarchy does not make one a managerial executive. [Id. at 52]

In January 2010, the Legislature, presumably aware of the state of the law regarding managerial executive, enacted a new definition, eliminating the requirement that managerial executives are ". . . persons who are charged with the responsibility of directing the effectuation of such management

policies and practices . . .", and adding "in the case of the Executive Branch of the State of New Jersey, 'managerial executives' shall include only personnel at or above the level of assistant commissioner."

The Senate Labor Committee's statement accompanying the Senate version of the bill noted:

By this change in definition, any manager employed by the Executive Branch of State Government at a level below the level of assistant commissioner, and any manager employed by the State who is not involved with formulating management policies and practices, may join employee organizations and through these organizations collectively negotiate salaries and benefits with public employers.

By using the underlined phrase, the Legislature appears to have intended that both prongs of the definition apply. I disagree with the State that the Legislature eliminated the requirement that managerial executives formulate management policies and practices. These changes simplify the definition and narrow the category of those who will be found to be managerial executives, since assistant commissioners are subordinate generally only to commissioners, and to deputy commissioners or chiefs of staff.

Formulate management policies and practices

In an earlier hearing between these parties, I recommended that most captains do not formulate management policy and practices. 34 NJPER 389. The Commission adopted this finding.

35 NJPER 335. The Commission added the executive officer captains to those eligible to be represented, finding no conflict of interest existed between them and the other captains.

At or above the level of assistant commissioner

Assistant commissioners in the principal state departments are on the third level in the organizational hierarchy. With a few exceptions, captains are on the fourth or fifth organizational level in the Division. The lieutenant colonel who serves as chief of staff forms the second level of the Division. Several captains report directly to him and formulate management policies, and I recommend that they are managerial executives under the new definition. These captains include the captains in the Office of State Police Affairs, Regional Operations and Intelligence Center Task Force, Office of Strategic Initiatives, Office of Public Information, Office of Recruiting and EEO, Internal Affairs Investigations Bureau and Internal Affairs Intake and Adjudication Bureau and Office of Operation Cease Fire.

By leaving intact the requirement of formulating management policies and practices, the Legislature left intact the Montvale, Turnpike Authority and NJDEP analyses. It limited the analysis concerning an employee's relative position in his/her employer's hierarchy to "at or above the level of assistant commissioner." Montvale, Turnpike Authority, N.J.S.A. 34:13A-5(f). Thus, it is

unnecessary to create a new model, or borrow from analogous statutes, as the State recommends in its brief advocating the adoption of a three-pronged functional equivalence test.

Regular and frequent contact with a commissioner is generally only afforded to those persons at relatively high levels of a department, and it establishes greater influence over policy formulation. Assistant commissioners attend weekly or monthly executive staff meetings with commissioners and their executive staffs, including chiefs of staff, deputy commissioners, legal/legislative advisors, public information officers, chief financial officers and executive assistants. Assistant commissioners participate in policy formulation by proposing and reacting to proposed policies and participating in these discussions. Assistant commissioners generally have regular and frequent contact with commissioners - weekly or more often. They do not always go through the second level in their departments, the chiefs of staff or deputy commissioners, to contact the commissioner, and commissioners give assignments and projects directly to assistant commissioners without going through the intermediate level.

Because captains work in a paramilitary environment, except for the captains in the superintendent's office, captains only occasionally attend meetings with the Colonel. Captains' policy suggestions must go through the chain of command. Captains

consistently forward projects, ideas and reports to majors, and then majors file them with lieutenant colonels or deputy superintendents and then to the chief of staff and then to the colonel. Assistant commissioners evaluate proposed legislation. Captains do not respond to legislation for the Colonel, and for most captains, their participation in the development of policies is circumscribed by standard operating procedures, operations instructions, policies and orders (35 NJPER at 336-341).

#### Salary levels

The State argues that captains' salaries are at the same level as assistant commissioners' salaries. While their "average" salaries are comparable, there is no basis to conclude that the Legislature meant to include salary level in fashioning the new managerial executive definition. There are significant differences between captains' and assistant commissioners' salaries. Captains' base salaries are enhanced by a \$12,300 maintenance allowance, which is not salary. The annual salaries of assistant commissioners vary from \$114,558.00 to \$130,168.00 (+/- \$15,600.00 annually), whereas captains' salaries are fixed at either \$123,810.02 or \$127,154.73 (inclusive of the maintenance allowance). Captains' salaries, until recently, were pushed upward by lieutenants' salaries, which are collectively negotiated. There is no basis in this record to know how assistant commissioners' salaries are determined.

While salary level may correspond to one's level in an organizational hierarchy, salary alone is not determinative of managerial executive status. The mere fact that their "average" salaries are comparable does not make captains "at or above the level of" assistant commissioners.

#### Administration Branch Captains

Having reviewed the facts concerning the administrative branch captains (34 NJPER 398-402), I find that they formulate policies but are not at the level of assistant commissioners. Accordingly, the captains in the bureaus of fiscal control, budget operations, grants administration and logistics and their executive officer are now included in the unit (34 NJPER 393, 398-401, 412-413).

#### RECOMMENDATION

I recommend the Commission find that the New Jersey State Troopers Captains Association has petitioned for an appropriate higher level supervisory unit, but that several individual captains positions should be excluded from the unit because they are either managerial executives or confidential employees.<sup>2/</sup> Accordingly, I recommend that the Commission order that the petition continue to be processed and that the Director's

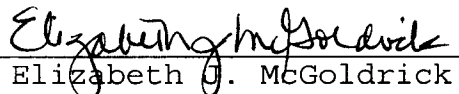
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<sup>2/</sup> In the earlier phases of this case, the captains in charge of the Human Resources Management Bureau and Employee Services Bureau were found to be confidential. This case does not alter that finding (35 NJPER at 344).

certification dated January 2010 be affirmed. The appropriate unit is:

Included: All captains employed by the Division of State Police, including but not limited to the captains in the Identification and Information Technology Section (Administration Branch), Intelligence Services Section (Investigations Branch), Investigations Section (Investigations Branch), Field Operations Section, Troops A, B, C, D and E, Homeland Security Branch, and executive officers in the Identification and Information Technology Section, Intelligence Section, Special Investigations Section, Field Operations Section, Emergency Management Section, Special Operations Section, and captains in the Bureaus of Fiscal Control, Budget Operations, Grants Administration and Logistics.

Excluded: Managerial executives, confidential employees, non-supervisory employees, non-police civilian employees, captains in the following offices and bureaus: Office of State Police Affairs, Regional Operations and Intelligence Center Task Force, Office of Strategic Initiatives, Office of Public Information, Office of Recruiting and EEO, Internal Affairs Investigation Bureau (OPS), Internal Affairs Intake and Adjudication Bureau (OPS), Human Resources Management Bureau, Employee Services Bureau, Office of Operation Cease Fire, employees represented in other negotiations units, lieutenants, sergeants first class, sergeants, detectives, and all troopers.

  
Elizabeth J. McGoldrick  
Hearing Officer

DATED: May 25, 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 June 6, 2011.